

**MEL SEIFERT'S ANALYSIS AND CONCLUSIONS WITH REGARD TO THE
APPLICATION TO AMEND CONDITION #14 FOR THE SPECIAL EXCEPTION
OF 56 MIDDLESEX AVENUE LLC.**

The subject property is within a residential district. This Commission granted to the petitioner a Special Exception Application number 11-10 for offices and storage on the second floor and a single retail market use on the first floor subject to a number of conditions as the permitted use is consistent with prior non-conforming uses. One of the conditions was #14 which provides that "No seating, tables, or other facilities for consumption of food on the site, either in the building, the parking lot, or elsewhere on the property."

Petitioner seeks to remove condition #14 and replace it with a new condition reading,

"No service of food to patrons at tables, either in the building or in the parking lot or elsewhere on the property."

The Connecticut Supreme Court stated in *Hyatt v Zoning Board of Appeals* 163 Conn. 379, 383-384 (1972), "it is a general principle in zoning that nonconforming uses should be abolished or reduced to conformity as quickly as possible as the fair interest of the parties will permit. IN NO CASE SHOULD THEY BE ALLOWED TO INCREASE," However, the court also recognized in *Petruzzi v ZBA* 176 Conn. 479, 483 (1979) that "where a nonconformity exists, it is a vested right which adheres to the land itself."

The Chester zoning regulations follow these legal principles set out by the CT Supreme Court.

Read Section 10 B, 50A, 50C, 50 D.

The questions this commission must decide is whether the proposed new condition 14 is

- (1) An illegal expansion, enlargement or extension of the non-conforming use; or
- (2) A use consistent with the prior non-conforming use and therefore lawful; or
- (3) A new proposed use that is equally appropriate or more appropriate to the residential zoning district and therefore lawful.

It is my opinion that the proposed elimination of current condition 14 and the creation of a new condition 14 is an illegal expansion and enlargement of the non-conforming use as was admitted by the petitioner during the hearing on the original petition.

Going back to the newly proposed condition 14, this would allow the service of food over a counter like a deli, Starbucks, Dunkin, McDonalds, Wendys, and basically most fast food outlets you can think of and the placement of tables and chairs for the customers purchasing the food to sit and consume it. The only activity that would not be allowed would be for the food to be delivered to the tables. Fast food businesses do not deliver to the tables.

During the hearing last month, petitioner stated that he wanted to facilitate the on site consumption of food by placing benches for people to sit and have a pastry and coffee. This is an unlawful expansion of the non-conforming use.

During the hearings on the petition, petitioner proved that there was a prior non-conforming use of retail sales. Petitioner never presented any evidence of food service as a prior non-conforming use and it was petitioner's burden to prove the non-conforming uses.

As reflected at page 3 of the minutes of the hearing of July 7, 2012, petitioner admitted that there was no prior food service use and admitted further that any such use would be illegal.

"Cronan stated the applicant would like to retain the office space use and retain retail sales but the product to be sold would be prepared foods, groceries and dry goods. They believe they can demonstrate that is compatible to what was there.

Attorney Cronan further noted there is nothing in this application that speaks to, asks for or in any way expects an approval for on site consumption of food. This is not a restaurant. There is no evidence whatsoever this particular property was ever used in that manner. He reiterated there is nothing in the application that asks for it and they will not be asking for it unless there is a change to the regulations which makes on site consumption of food permissible. No one can come back to request it, it simply is not allowed."

During the August 4, 2011 hearing, petitioner reiterated that a petition seeking the right for on site food service would be illegal. As noted at page 6 of the minutes of 8-4-12., "Attorney Cronan reiterated the applicant is not looking for any on site consumption of food. They did not apply for that and it is not part of the application. It would be illegal if it was done."

The special exception was granted for the operation of a retail market, because petitioner proved that there were prior retail businesses on the property. The proposed change to condition 14 permits a radical and unlawful expansion of the non-conforming use to a fast food restaurant or deli.

As notes by the CT Supreme Court, "where a nonconformity exists, it is a vested right which adheres to the land itself." If this petition is granted, petitioner could then sell the business to Dunkin, Starbuck, McDonalds, or similar businesses and they would be in a position to prove that food service of the nature of their businesses became a prior non-conforming use starting today, April 11, 2013. If we grant this petition we create a new non-conforming use, which others in the future could use to continue this proposed illegal expansion.

Lastly, if petitioner is currently selling food for on site consumption, he is in violation of the special exemption and I would request the zoning compliance officer to determine if true and reasonable steps be undertaken to assure that the uses on the property currently conform to the special exception and its conditions.