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COUNSELORS AT LAW

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January 3, 2020

Mr. Brian Smith, Chair
Zoning Board of Appeals of
the Town of Glastonbury
2155 Main Street
P. O. Box 6523
Glastonbury, CT 06033-6523

Re: Appeal of John Sakon Regarding The Shoppes at Avalon

Dear Chairman Smith:

We have reviewed the appeal Mr. John Sakon filed with the Zoning Board of Appeals ("ZBA") on December 11, 2019, related to The Shoppes at Avalon, located at Griswold Street and Main Street in Glastonbury, Connecticut (the "Project"). Specifically, Mr. Sakon, the owner of the Project, alleges that, on or about October 2019, the Building Official/Zoning Enforcement Official ("ZEO") for the Town of Glastonbury, Peter Carey, spoke with Alan Levine of Levine & Associates, P.A., a forensic accountant compiling a due diligence report for Project financing sought by Mr. Sakon. Mr. Sakon alleges that Mr. Carey indicated to Mr. Levine that the special permit for the Project had expired because "substantial construction" had not begun "on a building or structure," in accordance with Glastonbury Building Zone Regulations ("Regulations") § 12.7.[1] *See* Appeal at p. 2. Mr. Carey's alleged statement to Mr. Levine, Mr. Sakon argues, is an appealable final decision of the Building Official/ZEO.

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[1] Regulations § 12.7 provides:

> If substantial construction has not begun on a building or structure, or no use established on a lot, for which a building structure or use special permit with design approval was received from the Town Plan and Zoning Commission after (effective date of these Regulations), **within one (1) year from the date of issuance of such special permit** for said building, structure or use, **such special permit shall become null and void.** (Emphasis added.)

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We have reviewed Mr. Sakon's appeal packet, the information provided to us by the Town regarding Mr. Sakon's special permit for the Project, and the Regulations themselves. We have not spoken with Mr. Levine or conducted an independent investigation of the full Project file.

As detailed further below, we recommend that the ZBA lacks jurisdiction to hear Mr. Sakon's appeal because the appeal was untimely filed, in violation of § 8-7 of the General Statutes and Regulations § 13.6. Further, even if Mr. Sakon had timely filed his appeal, we caution that the ZBA may lack jurisdiction to hear the appeal because Mr. Sakon has failed to appeal from a final decision/ruling of the Building Official/ZEO, as required by § 8-6 of the General Statutes and Regulations §13.6. Accordingly, the ZBA should dismiss Mr. Sakon's appeal.

I. Background.

By Regulation, appeals to the ZBA must be filed within 15 days after the alleged decision of the building official/ZEO.

Section 8-6(a) of the General Statutes provides, in relevant part:

> The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter....

Section 8-7 of the General Statutes provides, in relevant part:

> An appeal may be taken to the zoning board of appeals by any person aggrieved or by any officer, department, board or bureau of any municipality aggrieved and shall be taken **within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days,** by filing with the zoning commission or the officer from whom the appeal has been taken and with said board a notice of appeal specifying the grounds thereof. Such appeal period shall commence for an aggrieved person at the earliest of the following: (1) Upon receipt of the order, requirement or decision from which such person may appeal, (2) upon the publication of a notice in accordance with subsection (f) of section 8-3, or (3) upon actual or constructive notice of such order, requirement or decision.... (Emphasis added.)

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Regulations § 13.6 states:

> Any person aggrieved by a ruling of the Town Building Official respecting the interpretation, administration or enforcement of these Regulations or any officer, department, board, commission, agency, or bureau of the Town affected by a ruling of the Building Official concerning the interpretation, administration or enforcement of these Regulations may take an appeal to the Board of Appeals. **Within [*sic*] 15 days of said ruling.** (Emphasis added.)

II. The ZBA Lacks Jurisdiction To Hear Mr. Sakon's Appeal.

As detailed further below, we recommend that the ZBA lacks jurisdiction to hear Mr. Sakon's appeal because the appeal was untimely filed, in violation of § 8-7 of the General Statutes and Regulations § 13.6 and, as a result, the ZBA should dismiss Mr. Sakon's appeal. Further, even if Mr. Sakon had timely filed his appeal, we caution that the ZBA may also lack jurisdiction because the alleged statements to Mr. Levine do not rise to the level of an appealable final decision/ruling of the Building Official/ZEO, as required by § 8-6 of the General Statutes and Regulations §13.6.

A. The Appeal Was Not Timely Filed.

Mr. Sakon's appeal alleges that Mr. Carey informed Mr. Levine "[o]n or about October 2019" that the special permit for the Project had expired but he did not file the present appeal until December 11, 2019. As a result, the 15-day deadline for appeals had long passed by the time Mr. Sakon filed his appeal. Based on Mr. Sakon's October 2, 2019 email to members of the Community Development/Planning and Environmental Department (attached here as Exhibit A), Mr. Sakon had "actual or constructive notice of" Mr. Carey's alleged comments to Mr. Levine as of at least October 2, 2019. Specifically, Mr. Sakon quotes a portion of Mr. Levin's due diligence report in his October 2, 2019 as stating: "[B]oth Enforcement Officer Peter R. Carey, and City Planner John Mullen, stated that the transporting of land fill material to the site does not constitute 'Site Development' and thus [Regulations §] 12.7 does not apply…"

As noted above, § 8-7d of the General Statutes establishes that appeals to the ZBA of a decision of the Town Building Official/ZEO "shall be taken within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days." Regulations § 13.6 states that such an appeal must be taken within 15 days of the Building Official's/ZEO's ruling.

As a result, if the alleged comments complained of in the appeal constitute an appealable decision, Mr. Sakon would have had to file his appeal of Mr. Carey's alleged October 2, 2019 decision/ruling by October 17, 2019. However, Mr. Sakon did not file his appeal until December 11, 2019, 55 days after the 15-day deadline to appeal. Accordingly, the ZBA lacks jurisdiction

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to hear Mr. Sakon's appeal and we recommend that the appeal should be dismissed. *See Bosley v. Zoning Bd. of Appeals*, 30 Conn. App. 797 (1993) (finding that failure to timely appeal to ZBA deprived board of appeals of jurisdiction).

B. An Appeal To The ZBA Must Involve A Final Decision/Ruling Of The Building Official/ZEO.

As noted above, Mr. Sakon has appealed from the Building Official/ZEO's alleged response to Mr. Levine that the special permit for the Project has expired. Mr. Carey maintains that he did not make the alleged comments in his discussion with Mr. Levine regarding the validity of the special permit for the Project. Notwithstanding, even if Mr. Carey had represented to Mr. Levine that the special permit for the Project had expired, we caution that such a statement may not be an appealable decision/ruling of the Building Official/ZEO, as required by § 8-6 of the General Statutes and Regulations § 13.6. The Connecticut Supreme Court's decision in *Piquet v. Town of Chester*, 306 Conn. 173, 184 (2012) is instructive here. In that case, the plaintiff appealed to the zoning board of appeals from the zoning compliance officer's written determination that the plaintiff's interment of her deceased husband's remains on her property was in violation of the zoning regulations. In finding that the officer's letter was a "decision" from which the plaintiff could appeal, the Court stated:

> Accordingly, we hold that, when a landowner receives notice from a zoning compliance officer that the landowner's existing use of his or her property is in violation of applicable zoning ordinances or regulations, that interpretation constitutes a decision from which the landowner can appeal to the local zoning board of appeals pursuant to § 8–7 and, when applicable, pursuant to local zoning regulations. **Put differently, when a landowner obtains a clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property, the landowner properly may appeal that interpretation to the local zoning board of appeals.** Conversely, when a zoning enforcement officer provides an interpretation that is contingent on future events, that interpretation will not be appealable, and the landowner must await a subsequent, final determination following that interpretation—e.g., the issuance of a certificate of zoning compliance—in order to appeal to the local zoning board of appeals.

(Emphasis added.) *Id.*, at 185-86.

In *Reardon v. Zoning Bd. of Appeals*, 311 Conn. 356 (2014), the Supreme Court further explained:

> Even when there is a written communication from a zoning official relating to the construction or application of zoning laws, **the question of whether a "decision"**

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> **has been rendered for purposes of appeal turns on whether the communication has a legal effect or consequence.....** The obvious examples of such appealable decisions would be the granting or denying of building permits and the issuance of certificates of zoning compliance.... This interpretation is consistent with the terms used in relation to "decision" under §§ 8–6 and 8–7—"order" and "requirement"—which similarly import legal effect or consequence. *See* General Statutes §§ 8–6(a)(1) and 8–7 (addressing appeals from "order, requirement or decision").

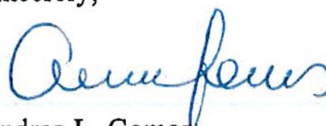
(Emphasis added.) *Id.*, at 365-66.

Here, Mr. Carey's comments to a financial consultant conducting lending due diligence are not a "clear and definite interpretation of zoning regulations applicable to the landowner's current use of his or her property." *Piquet, supra,* at 185-86. Instead, the facts presented here are more akin to those in *Holt v. Zoning Bd. of Appeals*, 114 Conn. App. 13, 29-30 (2009), where the Appellate Court concluded that a zoning enforcement officer's letter regarding whether a single-family residence could be built on the lot was not an appealable decision. Specifically, the court held that the zoning enforcement officer's letter did not have binding effect but, instead, consisted of preliminary, advisory statements. *Id.*

Mr. Carey's statements regarding the interpretation of Regulations § 12.7 generally, and the lack of building permits or building permit applications for the Project, do not have a "binding effect" on the zoning Project. Thus, we caution that the ZBA may also lack jurisdiction for this reason and recommend that Mr. Sakon's appeal should be dismissed. *See Holt, supra,* 114 Conn. App. at 29 (failing to appeal from a "decision" of the zoning enforcement officer deprived board of jurisdiction).

In summary, it appears that the ZBA lacks jurisdiction over Mr. Sakon's appeal because he failed to file his appeal within the 15-day appeal period in Regulations § 13.6. Accordingly, we recommend that the ZBA dismiss Mr. Sakon's appeal.

Sincerely,



Andrea L. Gomes

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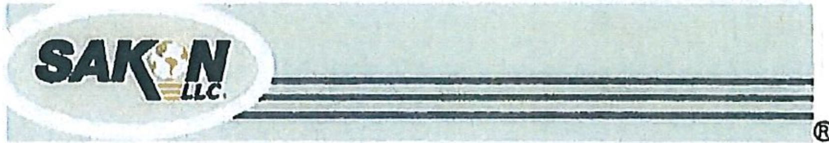
EXHIBIT A #6.5

REDACTED - ATTORNEY-CLIENT PRIVILEGED INFORMATION

From: John Sakon <johnsakon@sakon.biz>
Sent: Wednesday, October 2, 2019 10:33 PM
To: khara dodds <khara.dodds@glastonbury-ct.gov>; Thomas Mocko <thomas.mocko@glastonbury-ct.gov>; Jonathan mullen <jonathan.mullen@glastonbury-ct.gov>
Cc: Bryan Pereyo <bpereyo@salesantidote.com>; alan levine <alevine@levineassociates.com>
Subject: The Shoppes at Avalon Wetlands Permits



October 2, 2019

Dear Khara, John and Tom,

The following statement was made by Alan Levine in his due diligence report for *The Shoppes at Avalon* Refinancing:

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As to the Site Development activity stated by the Borrower and sited as cause for the automatic continuance of the "Special Permit" beyond the April 4th, 2019 expiration date, both Enforcement Officer Peter R Carey, and City Planner John Mullen, stated that the transporting of land fill material to the site does not constitute "Site Development" and thus 12.7 does not apply and was so advised to Mr. Sakon during a discussion between John Sakon and City Planner John Mullen in May/June 2019, as Mr. Mullen advised me in today's call.

LEVINE & ASSOCIATES, P.A.

LITIGATION CONSULTING
FORENSIC ACCOUNTING
FRAUD EXAMINATION

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E-mail: alevine@levineassociates.com

Let us review your regulations.

12.7 Substantial Construction Within One Year

If substantial construction has not begun on a building or structure, or no use established on a lot, for which a building structure or use special permit with design approval was received from the Town Plan and Zoning

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Commission after (effective date of these Regulations), within one (1) year from the date of issuance of such special permit for said building, structure or use, such special permit shall become null and void.

In its discretion, and for good cause, the Town Plan and Zoning Commission, upon request of the applicant, may extend for an additional one (1) year the period for the beginning of substantial construction or establishment of a use. Such extension shall be granted only once for any particular special permit.

The Town Plan and Zoning Commission may also, in its discretion and for good cause, upon request of the applicant, approve a staging time table for the start of construction or the establishment of a use, provided that such a staging time table shall include all portions of the proposed development.

I would presume that Mr. Levine's misunderstood or misquoted Mr. Mullen when he stated *"the transporting of land fill material to the site does not constitute "Site Development"!* Tens of Thousands of yards of material have been brought to the site, spread, graded and rolled in one foot lifts. Tens of thousands of dollars of invoices support this contention. And the regulations clearly state that fill can only be brought to the property under the auspices of a Special Permit. Therefore, the transporting of tens of thousands of yards of fill material certainly constitutes the commencement of substantial construction.

I am concerned that Mr. Mullen and Mr. Carey have improperly made a legal conclusion. Under the law, ***any*** of the following activities that have occurred at the site constitute the beginning of "substantial construction":

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1. Grubbing and Clearing of 14 acres of land;
2. The installation and construction of erosion, sedimentation and site controls.
3. Removal of and trucking of 20,000+ yards of topsoil off-site deemed unsuitable for foundations to parking lots and buildings;
4. The trucking of approximately three thousand yards of asphalt to the site for use as sub-base for roads and parking lots.
5. The trucking of over 25,000+ yards of gravel to the site. Spread, rolled and layered in one foot lifts. The going cost of gravel to site is approximately $11/ton. There are 1.4 tons per cubic yard. Therefore, this material represents approximately $275,000 yards of material.
6. The trucking of over 1,000 yards of septic sand to the site for underlayment of drainage structures.
7. Construction and installation of over 200 feet of 36" Cast Concrete pipe to redirect the watercourse as authorized by the Wetlands and Special Permits. Cost $50,000+.
8. The filing of the deregulated wetlands.
9. Contracts with Hartford Materials to bring approximately 40,000 yards of material to the site. This activity is ongoing from day to day.
10. The application for construction permits to build a foundation for building 800 in the building department.
11. The posting of a $50,000 construction bond with the Town of Glastonbury.

The collective value of these activities exceed $350,000. The fact that these activities have been ongoing and unchallenged by the Zoning Enforcement Officer at all times relevant lends credence to my position. I will also note, my lawyers have found no sunset provision or required completion date for a Special Permit in the statutes or in the town's Regulations once "substantial construction" has commenced. While my activity has been continuous, (Hartford Materials brings fill to my site weekly), my lawyers have found no requirement for a continuous activity once substantial construction has taken place.

I would immediately ask for a written retraction of Mr. Mullen's and Mr. Carey's remarks in regards to my Special Permits. I would also request a letter of retraction be issued from your office so that I may present it to my lender.

I believe Mr. Mullen's and Mr. Carey's casual and un-researched remarks may have devastating financial consequences. I believe the facts and law as to my special permits are clear. Therefore, I would ask for your immediate attention to this matter.

I would think the town of Glastonbury would have welcomed the news that the project was receiving its financing, construction would soon accelerate, back taxes would be paid and an increase in tax revenues would soon be had.

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However, I am not surprised the town seeks yet another impediment in the way of my project.

Sincerely,

John Sakon
SAKON LLC
82 Folly Brook Lane
Manchester, CT 06040

(860) 675-4000
(860) 793-1000 (Cell)
(860) 675-4600 (Fax)

johnsakon@sakon.biz

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