

OFFICE OF THE CITY
ATTORNEY

MEMO

TO: Geen Thazhampallath, Mayor's Administrative Assistant

DA: May 1, 2008

RE: Legal Opinion Request – Special Exception Requests

I am writing to memorialize advice given verbally to the Planning Director concerning the above-referenced legal opinion request.

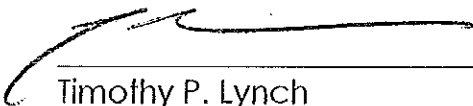
A local land use agency may only deny an application for a special exception when it does not meet the criteria set out within the Zoning Code authorizing the special exception. *Irwin v. Planning & Zoning Commission*, 244 Conn. 619, 711 A.2d 675 (1998). Therefore, if the Zoning Code does not address air pollution in the criteria to be considered for the granting of a special exception, the application cannot be denied based upon the general public health and safety language of C.G.S. § 8-2. Fuller, *Land Use Law and Practice*, Conn. Practice Series Vol. 9, at § 5.4 ("Limits on Agency Action on Special Permits") (West 1999).

Now the question has arisen whether the Commission may make regulations concerning air pollution. The general rule is that state statutes governing an area preempt that field of legislation from local regulation. See, e.g., *Berlin Batting Cages, Inc. v. Planning & Zoning Commission*, 76 Conn. App. 199, 821 A.2d 269 (2003) (noise pollution).

The General Assembly has acted to regulate air pollution. C.G.S. Ch. 446c, § 22a-170 through § 22a-201c, as amended. Section 22a-185 provides that "[a]ny municipality . . . may adopt ordinances or regulations for the control of air pollution within its territorial limits. Such ordinances or regulations may embody the regulations promulgated hereunder, in whole or in part, or may

consist of other ordinances or regulations in conformity with the regulations promulgated hereunder. No such ordinance or regulation shall be effective until fifteen days after approval by the [DEP] commissioner. . . . Subject to the approval of the commissioner, nothing contained in this section shall prohibit a municipal ordinance or regulation from imposing stricter controls than the regulations promulgated hereunder." C.G.S. § 22a-185, as amended (clarification re: commissioner added). Accordingly, it appears that local regulation in this area is permitted, subject to the terms of the statute.

Please do not hesitate to contact me should you wish to discuss this matter further, or need anything else in this regard. Thank you.



Timothy P. Lynch
Deputy City Attorney

cc: Trina A. Solecki, City Attorney

William Warner, Planning, Conservation & Development Director

MEMORANDUM
PLANNING, CONSERVATION AND DEVELOPMENT
DEPARTMENT

TO: Mayor Sebastian Giuliano and Tim Lynch, Deputy City Attorney

FROM: William Warner, AICP, Director of Planning

DATE: March 27, 2008

RE: Request for legal opinion

The Planning and Zoning Commission derives its authority to create zoning regulations from Section 8-2 of the general statutes. The Commission has recently approved three applications for drive through banks and pharmacies. Conservation Commission members have focused there public opposition on air quality from idling cars at the drive throughs.

Question

Does Sec. 8-2 authorize the local land use agency to deny an application for special exception based on non point source air pollution concerns?

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