STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: May 24, 2013)

CCF, LLC	:	
	:	
v.	:	**C.A. No. KC-2012-0914**
	:	
WAYNE PIMENTAL, in his capacity as the Building Official for the Town of East Greenwich, Rhode Island, and MCDONALD'S CORPORATION	:	

DECISION

NUGENT, J. These cross-motions for summary judgment arise from Plaintiff CCF, LLC's (Plaintiff or CCF) request for a mandatory injunction and writ of mandamus to halt the construction and operation of a McDonald's drive-through restaurant in East Greenwich, Rhode Island. CCF challenges the validity of various permits and approvals issued to FKL New London, LLC (FKL) and Defendant McDonald's Corporation (McDonald's) in connection with the proposed McDonald's drive-through restaurant. Jurisdiction is pursuant to Super. R. Civ. P. 56.

I

Facts and Travel

On October 1, 2003, D&D Barkan, LLC (D&D) applied to the Town of East Greenwich Planning Board (planning board) for, and was granted, master plan approval for the construction of a Dunkin' Donuts at 2500 New London Turnpike in East Greenwich, Rhode Island (the subject property). On November 25, 2003, D&D applied to the Zoning Board of Review for the Town of East Greenwich (the zoning board) for a special use permit for the construction and

operation of a drive-through window for a Dunkin' Donuts on the subject property. The zoning board approved D&D's application for a special use permit with certain conditions, and subsequently a final recorded plan was granted final approval administratively.[1] It is undisputed that D&D never commenced construction of a Dunkin' Donuts restaurant on the subject property.

On December 10, 2007, the East Greenwich Town Council adopted Ordinance 786.1, which amended Zoning Ordinance: Article III Zoning Districts, Table 3-1 (the amendment). (Defs.' Exs. 9, 10, 14.) Pursuant to the amendment, all drive-through uses are a separate use and are permitted by right as designated by the letter "Y" within the commercial highway zone. (Defs.' Exs. 9, 10, 14.)[2] Prior to the amendment, drive-through uses within the commercial highway zone required a special use permit from the zoning board. (Defs.' Exs. 9, 10, 14.)

Plaintiff operates a Wendy's restaurant located at 2311 New London Turnpike in Coventry, Rhode Island, upon a parcel of land which it leases from Lehigh Realty Associates (Lehigh).[3] The Wendy's restaurant is located across the street from the subject property. FKL

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[1] Condition 3 of the zoning board's decision states:

> "A formal written agreement between the applicant and the State of Rhode Island regarding long term use of State property for access to the subject site shall be filed with the Town and shall be subject to review and approval by the Town Solicitor."

(Defs.' Ex. 8.)

[2] Footnote 8(c) imposes the following restriction on drive-through uses in the commercial highway zone:

> "Two drive-through facilities shall be permitted in a CH Zone for a shopping center having greater than 100,000 square feet of gross floor area. The drive-through use shall be limited to a financial institution (i.e., bank) only. . . ."

[3] CCF maintains that Bald Hill Foods, Inc. originally leased the property from Lehigh and then assigned its lease to CCF on June 30, 1998. McDonald's questions the validity of the assignment

acquired the subject property by foreclosure deed on May 25, 2010. (Defs.' Ex. 2.) In or around April 2011, FKL and McDonald's applied to the planning board for a revised preliminary plan approval based upon the prior D&D master plan approval for the construction and operation of a McDonald's restaurant with a drive-through window (the FKL project). (Defs.' Exs. 9, 10.) In connection with the FKL project, representatives of FKL and McDonald's met with the East Greenwich Technical Review Committee in April 2011 and November 2011. Minutes from both the April and November 2011 meetings indicate that McDonald's would be "piggybacking" on the January 21, 2004 special use permit previously granted to Dunkin' Donuts. (Defs.' Exs. 18, 19.) On December 7, 2011, the planning department issued a staff report regarding the FKL project stating, "[a]lso in 2003, the applicants at the time secured a Special Use Permit to accommodate a drive-through as is always required in the [Commercial Highway] Zone. That permit runs with the land and remains in effect for any 'fast-food restaurant' user." (Defs.' Ex. 20.)

On December 7, 2011, the planning board conducted a preliminary plan review and public hearing to address the McDonald's development on the subject property. The public notice of the December 7, 2011 planning board public hearing stated: "[t]he dine-in and take-out establishment will have related parking, access, lighting, landscaping and other amenities and will require a special use permit from the Zoning Board of Review for the drive-through use." (Defs.' Ex. 21.) It appears that at the time of the notice, neither McDonald's nor the Town realized that revised Ordinance 786.1 permitted drive-through uses as a matter of right. Regardless, the Town determined that McDonald's satisfied this requirement of a special use

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because the purported assignment document attached to CCF's motion contains only the first page of the assignment. For purposes of this Decision only, this Court will assume that CCF operates the Wendy's restaurant.

permit through the use of the 2004 special use permit that the Town determined ran with the land. (Defs.' Exs. 9, 10.)

The planning board issued a revised preliminary plan decision as a result of the December 7, 2011 hearing to which Lehigh, as the landlord for CCF, received valid notice. (Defs.' Ex. 22.) The preliminary decision was approved on December 14, 2011 and recorded on December 15, 2011. (Defs.' Ex. 23.) The preliminary plan decision was never appealed by any party, and it was granted final approval administratively. The planning board then approved the FKL project at a second public hearing held on December 14, 2011. CCF, through counsel, participated in the December 14, 2011 planning board hearing. (Defs.' Ex. 22.) As a result of the December 14, 2011 hearing, the planning board issued a final planning decision, over CCF's objections, in which the final decision was approved December 19, 2011 and recorded December 21, 2011, recognizing McDonald's ability to use the 2004 special use permit.[4] (Defs.' Exs. 9, 10, 24.) The final planning decision was granted administratively.

FKL and McDonald's then submitted an application to Mr. Pimental, the Building Official for the Town of East Greenwich, for a building permit which includes, inter alia, the right to build and operate a restaurant with a drive-through window on the subject property in reliance on the 2007 zoning amendment and the 2004 special use permit. (Defs.' Exs. 9, 10.)

[4] The final plan decision included the following proviso:

> "Condition 3: An easement between the State of Rhode Island and the applicant shall be recorded in the Town Land Evidence records and provided to the Planning Department and any other written agreements regarding construction and/or maintenance of improvements relating to access to the proposed McDonalds shall be reviewed and approved by the Town Solicitor's office prior to final plan approval."

(Defs.' Ex. 24.)

Pursuant to Article II, § 260-6 and Article XIII, § 260-75 of the East Greenwich Zoning Ordinance, the building official is the zoning enforcement officer (ZEO) designated by the town manager to interpret and enforce compliance with the Town's zoning ordinance. (Defs.' Ex. 9.) On March 29, 2012, CCF sent a letter to Mr. Pimental, in his capacity as ZEO, and requested a determination "whether the current Planning Board has correctly interpreted and complied with the provisions of the Town Zoning Ordinance." (Defs.' Ex. 25.) The Town advised CCF that, upon advice of counsel, it would not respond to its determination request letter.

On May 2, 2012, CCF sent the zoning board Chair, Joseph Russolino, a "Notice of Appeal" pursuant to Section 260-77. (Defs.' Ex. 26.) CCF acknowledged in its appeal that "section [260-77] [] does not specifically apply to our factual situation." (Defs.' Ex. 26.) However, CCF relied on the section in exercising its purported right to appeal to the zoning board.

On April 1, 2012, the State of Rhode Island, through the Rhode Island Department of Transportation (RIDOT), granted to FKL a new easement to provide long-term ingress and egress which benefits the subject property. (Defs.' Ex. 27.) On August 8, 2012, Mr. Pimental issued building permit number 12-211, which granted FKL permission to construct a foundation for the McDonald's restaurant on the subject property. (Defs.' Ex. 28.) On or about August 16, 2012, Mr. Pimental issued building permit number 12-213, which granted FKL permission to construct and operate a restaurant with a drive-through window on the subject property. (Defs.' Ex. 29.)

On August 21, 2012, CCF filed a notice of appeal with the zoning board appealing the building official's decision to issue the building permit to FKL. (Defs.' Ex. 30.) By letter dated August 23, 2012, Mr. Pimental, through his counsel, advised CCF that (i) CCF does not have the

right to appeal the issuance of the building permit to the zoning board; and (ii) the filing of the notice of appeal does not stay all proceedings in furtherance of the actions which are the subject of the August notice of appeal. (Defs.' Ex. 31.) Subsequently, FKL and McDonald's commenced construction of a restaurant with a drive-through window on the subject property in reliance upon the 2007 zoning amendment and the 2004 special use permit. (Defs.' Exs. 9, 10.)

CCF commenced suit on August 7, 2012 seeking to enjoin the use of the McDonald's drive-through by way of a mandatory injunction and writ of mandamus. Plaintiff subsequently filed an amended verified petition on September 14, 2012. CCF filed a motion for summary judgment on February 11, 2013, and McDonald's filed an objection and cross-motion for summary judgment on March 11, 2013.[5] CCF then submitted a reply memorandum on March 22, 2013. This Court heard argument on CCF's motion and McDonald's cross-motion on March 25, 2013.

In its motion for summary judgment, CCF asks this Court to rule as a matter of law that (a) the drive-through window utilized by McDonald's is not a permitted use under the amended zoning ordinance on the subject property; (b) the D&D special use permit does not provide any authorization or permission for the drive-through window utilized by McDonald's; (c) Mr. Pimental erroneously interpreted the amended zoning ordinance when he authorized the construction and use of the McDonald's drive-through window; (d) CCF is an aggrieved party with the lawful right to appeal the issuance of a building permit; (e) Mr. Pimental unlawfully thwarted CCF's attempt to pursue its administrative remedies; (f) this Court has jurisdiction to hear this matter; and (g) the portion of the building permit which authorized the construction and use of the McDonald's drive-through is erroneous, unlawful, and invalid.

[5] Defendant Wayne Pimental (Mr. Pimental), the building official for the Town of East Greenwich, joined CCF's objection and cross-motion for summary judgment on March 12, 2013.

In their objection and cross-motion, McDonald's and Mr. Pimental argue that CCF does not have standing to bring this lawsuit and that this Court lacks subject matter jurisdiction to hear this matter. They further argue that drive-through uses in a commercial highway zone are permitted by right pursuant to East Greenwich Zoning Ordinance 786.1. They contend that under the terms of the ordinance, McDonald's was never required to obtain a special use permit. Even if it were required to obtain a special use permit, Defendants assert that McDonald's obtained a new easement from RIDOT which satisfied the condition set forth in the 2004 special use permit granted to D&D.

II

Standard of Review

This Court will grant a motion for summary judgment only if, "after reviewing the admissible evidence in the light most favorable to the nonmoving party[,]" "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law." Super. R. Civ. P. 56(c); Liberty Mut. Ins. Co. v. Kaya, 947 A.2d 869, 872 (R.I. 2008) (quoting Roe v. Gelineau, 794 A.2d 476, 481 (R.I. 2002)).

In opposing a motion for summary judgment, the nonmoving party "'has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions.'" Liberty Mut., 947 A.2d at 872 (quoting D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004)). To meet this burden, "'[a]lthough an opposing party is not required to disclose in its affidavit all its evidence, he [or she] must demonstrate that he [or she] has evidence of a substantial nature, as distinguished from legal conclusions, to dispute the moving party on

material issues of fact.'" Bourg v. Bristol Boat Co., 705 A.2d 969, 971 (R.I. 1998) (quoting Gallo v. Nat'l Nursing Homes, Inc., 106 R.I. 485, 489, 261 A.2d 19, 21-22 (1970)).

III

Analysis

A

CCF's Standing

In its motion for summary judgment, CCF challenges both the December 21, 2011 East Greenwich planning board's final decision and Mr. Pimental's issuance of a building permit on August 16, 2012. McDonald's responds that CCF lacks standing to prosecute this lawsuit. This Court will first address CCF's standing with respect to the planning board decision.

Rhode Island General Laws § 45-23-67, entitled "Appeals—Process of appeal," states in pertinent part:

> (a) "An appeal to the board of appeal from a decision or action of the planning board or administrative officer may be taken by an aggrieved party to the extent provided in § 45-23-66. The appeal must be taken within twenty (20) days after the decision has been filed and posted in the office of the city or town clerk."

While "aggrieved party" is not explicitly defined, § 45-23-32, entitled "Definitions," states that "[w]here words or phrases used in this chapter are defined in the definitions section of either the Rhode Island Comprehensive Planning and Land Use Regulation Act . . . or the Rhode Island Zoning Enabling Act of 1991, . . . they have the meanings stated in those acts." The Zoning Enabling Act defines "aggrieved party" as "(i) [a]ny person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or (ii) [a]nyone requiring notice pursuant to this chapter." G.L. 1956 § 45-24-31(4).

When asked why CCF did not attend and object at the preliminary hearing of the planning board regarding the McDonald's development, CCF's counsel explained that:

> "As I indicated to you, my clients lease that assessor's plat and lot. And, as a result, we're not within the abutting area with respect to notification. The landlord gets notification. I will refrain from going any further with respect to why I believe the landlord did not give the tenant additional notice . . . [b]ut the simple answer to your question is, and it's by statute and regs, tenants aren't part of the abutting circle." (Emphasis added.)

Thus, in order to confer standing on CCF, this Court must find that CCF, as a lessee operating a Wendy's franchise in close proximity to the McDonald's drive-through restaurant, is an entity whose property was injured by the planning board's decision.

Although our Supreme Court has not examined whether a non-applicant lessee has a sufficient property interest to confer standing with respect to a planning board decision, other jurisdictions have considered the question. The courts in a number of states have agreed that both commercial and residential lessees may satisfy the aggrieved party requirement. 4 Am. Law. Zoning § 42:11 (5th ed.) Tenants may have standing not only to seek review of decisions directly affecting the leased premises, but also decisions relating to nearby properties that have an effect on the leased property. Id.; see Quimby v. Zoning Bd. of Appeals of Arlington, 19 Mass. App. Ct. 1005, 476 N.E.2d 241 (1985) (holding that there is no per se rule that disqualifies a tenant as a person aggrieved seeking review of a zoning decision relating to nearby property); Sun-Brite Car Wash, Inc. v. Board of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d 406, 515 N.Y.S.2d 418, 508 N.E.2d 130 (1987) (explaining that "[a] leaseholder may, however, have the same standing to challenge a municipal zoning action as the owner. A change in contiguous or closely proximate property obviously can as readily affect the value and enjoyment of a leasehold as the underlying ownership interest.").

In Golden v. Steam Heat, Inc., 216 A.D.2d 440, 628 N.Y.S.2d 375 (1995), tenants of a commercial building located directly across the street from an adult entertainment establishment had standing to seek a permanent injunction against the operation of the establishment where the record indicated that the presence of adult entertainment establishments in any district, whether residential or commercial, had an adverse effect upon the surrounding area. Id. 216 A.D.2d at 442, 628 N.Y.S.2d at 377. Further, courts have held that statutes permitting "aggrieved parties" to appeal should be liberally construed. 3 Rathkopf, The Law of Zoning and Planning, § 63:18 (2003); see Bettman v. Michaelis, 27 Misc. 2d 1010, 212 N.Y.S.2d 339 (Sup. 1961); Matunuck Beach Hotel v. Sheldon, 121 R.I. 386, 399 A.2d 489 (1979) (noting that the public interest exception has been liberally applied to permit an agency to challenge a decision which, right or wrong, might otherwise be completely shielded from judicial review).

CCF alleges that the construction and operation of the McDonald's drive-through restaurant will adversely impact it because the new restaurant will create "traffic problems" on New London Turnpike. Our Supreme Court has held that "[a] mere increase of traffic at the location of a proposed use unaccompanied by a resulting intensification of traffic congestion or hazard at that site is not a valid zoning criterion." Perron v. Zoning Bd. of Review of Town of Burrillville, 117 R.I. 571, 577, 369 A.2d 638, 642 (1977). However, this Court is satisfied that CCF's allegation of traffic problems is sufficiently broad to encompass the types of congestion or hazards contemplated by the Perron Court. Ultimately, for purposes of this Decision, this Court will assume without deciding that CCF is an aggrieved party with standing to appeal the December 19, 2011 planning board's decision.

However, even assuming that CCF is an aggrieved party, its arguments with respect to the planning board's final decision are moot because it failed to file an appeal within the time

period prescribed by § 45-23-67. That statute requires that "[a]n appeal from a decision or action of the planning board . . . must be taken within twenty (20) days after the decision has been filed and posted in the office of the city or town clerk." Here, the planning board's final decision was approved on December 19, 2011 and recorded on December 21, 2011. Pursuant to the statute, the appeal period expired on January 10, 2012. CCF did not file a notice of appeal with the zoning board until May 2, 2012, some three months and twenty-one days after the appeal period expired. Therefore, CCF waived any right to challenge the planning board's final decision.

Next, CCF challenges Mr. Pimental's August 16, 2012 issuance of a building permit to FKL to construct a McDonald's restaurant on the subject property. On August 21, 2012, CCF filed a notice of appeal with the zoning board appealing the building official's decision to issue the building permit to FKL. By letter dated August 23, 2012, Mr. Pimental, through his counsel, advised CCF that CCF did not have the right to appeal the issuance of the building permit to the zoning board.

East Greenwich Ordinance Chapter 34, Section 1 establishes a Building Code Board of Appeals to "hear appeals from an interpretation, order, requirement, direction, or failure to act under the State Building Code by the building official or officials charged with the administration and enforcement of the code." Id. § 34-1. Pursuant to § 34-3(C), "[t]he Building Code Board of Appeals shall have all the powers and duties which are set forth in G.L. 1956, § 23-27.3-127.0 et seq., as amended."

Rhode Island General Laws § 23-27.3-127.1(b)(1) states that an "aggrieved party" shall file an appeal with the board of appeals within "thirty (30) days of the mailing or posting of the interpretation, order, requirement, direction, or failure to act." Unlike § 45-24-31(4), which defines "aggrieved party" with respect to an appeal of a planning board decision, an "aggrieved

party" with respect to a building permit appeal is defined in pertinent part as: "(i) [a]n owner of the building or structure which is subject to any interpretation, order, direction, or failure to act by a local building official, state building commissioner, or a local board of appeal's decision or failure to act," as well as "(ii) [p]roperty owners within two hundred feet (200') of the property lines of a building or structure which is the subject of any appeal." (Emphasis added.) While the language of § 45-24-31(4) broadly refers to "[a]ny person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town," the language of § 23-27.3-127.1(b)(1) expressly limits the right of appeal to applicants who are property owners and property owners in close proximity to the building or structure which is the subject of an appeal. (Emphasis added.) Thus, CCF is not an "aggrieved party" because it does not hold an ownership interest in the Wendy's restaurant: it is merely a lessee. Accordingly, CCF does not have standing to challenge Mr. Pimental's August 16, 2012 issuance of a building permit to FKL.

Even assuming arguendo that CCF were an "aggrieved party," it failed to exhaust its administrative remedies when it brought this action in Superior Court before filing an appeal with the appropriate administrative bodies, i.e., the East Greenwich Building Code Board of Appeals or the State Board of Standards and Appeals. An appealable decision of the East Greenwich Building Official must be made within thirty (30) days to the East Greenwich Building Code Board of Appeals. See G.L. 1956 § 23-27.3-127.1(b)(1). Here, the building official issued the relevant building permit on August 16, 2012. Therefore, the appeal period expired on September 15, 2012. As CCF failed to file a timely appeal, its arguments with respect to the August 16, 2012 building permit are not properly before this Court.

B

The Amended East Greenwich Zoning Ordinance

For purposes of discussion, this Court will assume that Plaintiff's argument, that the proposed McDonald's required a special use permit, is properly before it. In its motion for summary judgment, CCF construes the amended East Greenwich zoning ordinance and its attendant footnotes to preclude the operation of a drive-through restaurant on the subject property because it is not located within a shopping center. McDonald's responds that the amended ordinance permits drive-through uses in the commercial highway zone as a matter of right, and that the only footnote that could apply to the restaurant—Footnote 8(c)—is inapposite because the subject property is not located within a shopping center exceeding 100,000 square feet.

It is well settled in Rhode Island that the rules of statutory construction apply equally to the construction of a municipal zoning ordinance. Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981). "[W]hen the language of a statute or a zoning ordinance is clear and certain, there is nothing left for interpretation and the ordinance must be interpreted literally." Id. Where statutory provisions appear unclear or ambiguous, courts '"examine the entire statute to ascertain the intent and purpose of the Legislature."' Jeff Anthony Properties v. Zoning Bd. of Review of Town of Town of N. Providence, 853 A.2d 1226, 1230 (R.I. 2004) (quoting Cummings v. Shorey, 761 A.2d 680, 684 (R.I. 2000)). "'In interpreting a statute, [courts] must determine and effectuate the Legislature's intent and [] attribute to the enactment the meaning most consistent with its policies or obvious purposes.'" Id. (quoting Keystone Elevator Co. v. Johnson & Wales University, 850 A.2d 912, 923 (R.I. 2004)) (internal quotation marks omitted). Finally, it is firmly established that courts "will not construe a statute to reach an absurd result." Id.

On December 10, 2007, the East Greenwich Town Council adopted Ordinance 786.1, which amended Zoning Ordinance: Article III Zoning Districts, Table 3-1. (Defs.' Exs. 9, 10, 14.) Pursuant to the amendment, all drive-through uses are a separate use and are permitted in the commercial highway zone by right as designated by the letter "Y" in the revised table. (Defs.' Exs. 9, 10, 14.) Prior to the amendment, drive-through uses within the commercial highway zone required a special use permit from the zoning board. However, any post-amendment application for a drive-through use is permissible by right.

It is undisputed that the proposed restaurant is located within the commercial highway zone. Given the language of the zoning amendment, which expressly permits drive-through uses as a matter of right within the commercial highway zone, McDonald's was not required to seek a special use permit for the proposed drive-through. Further, Footnote 8(c) is inapplicable because the subject property is not located within a shopping center exceeding 100,000 square feet of gross floor area. (Defs.' Exs. 16, 32.) CCF's contention that Footnote 8(a) should act as a site restriction precluding the McDonald's drive-through restaurant is without merit. This reading would place developers in the untenable position of restricting proposed drive-through uses in the commercial highway zone to shopping centers having less than 100,000 square feet of gross floor area. The East Greenwich Town Council could not have intended such a result. See Jeff Anthony Properties, 853 A.2d at 1230 (courts should not construe a statute to produce an absurd result).

Because this Court finds that McDonald's was not required to obtain a special use permit pursuant to the amended East Greenwich zoning ordinance, it need not reach CCF's remaining arguments. Therefore, this Court denies CCF's motion for summary judgment and grants McDonald's cross-motion for summary judgment that CCF failed to timely appeal the December

21, 2011 planning board decision to the East Greenwich zoning board, CCF lacks standing to challenge the August 16, 2012 building permit, and the amended East Greenwich zoning ordinance permits drive-through uses as a matter of right. CCF's requests for a mandatory injunction and a writ of mandamus are denied.

IV

Conclusion

For the foregoing reasons, this Court denies CCF's motion for summary judgment and grants McDonald's cross-motion for summary judgment. CCF's requests for a mandatory injunction and a writ of mandamus are denied. Counsel for the prevailing party shall prepare an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	CCF, LLC v. Wayne Pimental, in his capacity as the Building Official for the Town of East Greenwich, Rhode Island, and McDonald's Corporation
CASE NO:	KC-2012-0914
COURT:	Filed in Kent County Superior Court
DATE DECISION FILED:	May 24, 2013
JUSTICE/MAGISTRATE:	Nugent, J.
ATTORNEYS:	
For Plaintiff:	Robert D. Wieck, Esq.
For Defendants:	Peter Clarkin, Esq. Elizabeth McDonough Noonan, Esq. Robert I. Stolzman, Esq. Hamza Chaudary, Esq.