NORCOTT, J., with whom ZARELLA, J., joins, dissenting. I disagree with part I of the majority opinion, which concludes that the decision of the defendant, the planning and zoning commission (commission) of the town of North Haven (town), which determined that fifteen video preview booths are not an accessory use for an adult oriented book and video store located in town, was not supported by substantial evidence. In my view, the commission reasonably could have determined that the booths did not constitute an accessory use, as defined in § 6.1.71 of the North Haven zoning regulations,[1] to the proposed principal use of a "basic neighborhood store" pursuant to § 6.1.11 of the North Haven zoning regulations.[2] Thus, the majority's decision to affirm the judgment of the trial court sustaining the zoning appeal brought by the named plaintiff, Dennis Loring,[3] from the commission's denial of his site plan application, improperly invades the discretion accorded to the commission, whose decision in this case was supported by substantial evidence, and an even more substantial dose of common sense. Accordingly, I respectfully dissent.[4]

I begin by noting my agreement with the majority's statement of the relevant facts and procedural history of this case. I wish, however, to emphasize a few relevant details about the proposed video preview booths and the commission's evaluation of this aspect of the plaintiff's application. According to a July 15, 2005 letter from the plaintiff to Alan Fredricksen, the town's land use administrator, the plaintiff intended to provide fifteen video preview booths as an accessory use to the 1576 square foot retail book and video store. The plaintiff proposed to operate the business under administrative conditions that included posting a sign, at least six by eight inches in size and printed with a dark ink upon a light contrasting background with letters at least one-quarter inch in height, in each booth stating: " 'NOTICE: It is unlawful for this booth to be occupied by more than one person at a time or for any person to operate this device unless the door is closed and locked.' " The plaintiff also proposed to: (1) monitor all common areas in the store either by direct view or by video at least once every sixty seconds; (2) install lights indicating when a particular booth is in use; and (3) enclose all of the booths completely with doors that have a mechanism that will not permit the operation of a showing device unless the door is locked.[5]

At the commission's August 1, 2005 meeting, after they had discussed issues with respect to the lighting and landscaping of the plaza, Daniel Silver, the plaintiff's attorney, explained that he has practiced first amendment litigation for more than thirty-five years.

Silver stated that the video preview booths are necessary for marketing purposes because adult films "are different from other types of media" since "[t]here are no preview facilities or reviews that you can pick up in a newspaper. Everything which will appear on a preview will be for sale or rental in the store. *The sale of the material depends on the ability to have these preview booths*." (Emphasis added.) He described the booths as an "industry wide phenomenon which has been created over the years of great importance to the princip[al] use," which is "the sale and rental of videos, DVDs, books, magazines, clothing, related goods such as gifts, cards and other dry goods and notions which are clearly a permitted use under our regulation." Silver stated that the booths are "a natural, usual phenomenon [or] part" of the adult entertainment store, and, if such a store "is a permitted use then it is clearly an accessory use."

In response to questions from Dominic Palumbo, the commission's chairman, and James Giulietti, another member of the commission, Silver stated that the booths would be four by four feet in size, and emphasized that they "will be properly monitored" to assure compliance with the conditions that he had proposed in the July 15 letter. In response to Giulietti's question about which of the regulations authorized the booths, Silver stated that the "basic neighborhood stores" regulation permitted the principal use, namely, the plaintiff's store, and that the booths were accessory to that use because they are "customary" for stores that market adult products. Silver emphasized that the regulations did not distinguish between adult and ordinary bookstores, and likened the booths to video preview monitors present at video stores such as Blockbuster. He submitted that the commission should "look at what is customary in the market for which we are marketing our product."

Giulietti stated his disagreement with Silver's application of the regulations. In Giulietti's view, the plaintiff was attempting to "boot [strap]" his adult video business onto the regular retail regulation, and he stated that he had never seen a preview booth in a local video store such as Blockbuster. Palumbo stated that the commission intended to focus on what is "basic and normal" in the town in determining accessory uses, but Silver responded that the plaintiff's proposed store would be the first of its kind in the town. Noting that the plaintiff is "not marketing Disney," he stated that the inquiry would, therefore, need to focus on what is present in adult book and video stores in other areas, and he offered to provide testimony under oath to the effect that video preview booths are a "normal part and [an] incidental and customary use for this type of establishment" nationally.

In response to a question from Robert Nolan, another

member of the commission, Silver stated that, although the word "preview" means that someone could come to sample a video to determine whether they want to buy it, that same person also could continue to watch the entire movie in the booth by feeding the video player quarters, at the cost of twenty-five cents per minute. Silver emphasized, however, that this was not the purpose of the preview machines, which are intended to "create the sales within the store itself."[6]

Before reaching the commission's claim that the trial court improperly concluded that its determination that the booths did not constitute an "accessory use"[7] was not supported by substantial evidence, I reemphasize the standard of review, namely, that "the review of site plan applications is an administrative function of a planning and zoning commission. . . . When a commission is functioning in such an administrative capacity, a reviewing court's standard of review of the commission's action is limited to whether it was illegal, arbitrary or in abuse of [its] discretion. . . . In determining whether a zoning commission's action was illegal, arbitrary or in abuse of its discretion, a reviewing court's principal inquiry is whether the commission's action was in violation of the powers granted to it or the duties imposed upon it. . . . In addition, this court has stated that [t]here is a strong presumption of regularity in the proceedings of a public body such as a municipal planning and zoning commission . . . ." (Citations omitted; internal quotation marks omitted.) *Clifford* v. *Planning & Zoning Commission*, 280 Conn. 434, 440–41, 908 A.2d 1049 (2006).

Moreover, it is well settled, under the line of this court's decisions beginning with *Lawrence* v. *Zoning Board of Appeals*, 158 Conn. 509, 264 A.2d 552 (1969), that "[w]hether a particular use qualifies as an accessory use is ordinarily a question of fact for the zoning authority, to be determined by it with a liberal discretion." (Internal quotation marks omitted.) *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 451. The commission's decision that the video preview booths did not constitute an accessory use is, therefore, "subject to a very narrow, deferential scope of review. If a zoning commission has stated the basis for its actions, a reviewing court must determine only whether the [commission] correctly interpreted the [regulation] and applied it with reasonable discretion to the facts. . . . In applying the law to the facts of a particular case, the [commission] is endowed with . . . liberal discretion, and its action is subject to review . . . only to determine whether it was unreasonable, arbitrary or illegal. . . . Moreover, the [plaintiff] bear[s] the burden of establishing that the [commission] acted improperly. . . . Furthermore, [g]enerally, courts will defer to a local board's interpretation of the ordinance governing accessory uses unless such ordinance or the interpretation of it, has no foundation in reason. . . .

"In determining whether a zoning commission's actions were reasonable, we examine whether there was substantial evidence in the record to support the commission's determination. . . . The substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." (Citations omitted; internal quotation marks omitted.) Id., 451–52. Finally, in reviewing the commission's administrative decision, we also must be mindful of the fact that the plaintiff, as the applicant, bore the "burden of persuading the commission that it was entitled to the permits that it sought" under the town's accessory use regulation. *Upjohn Co.* v. *Planning & Zoning Commission*, 224 Conn. 82, 89, 616 A.2d 786 (1992).

The relevant zoning regulation permits properties to be used for "[a]ccessory uses *customarily incidental* to a permitted use on the same premises." (Emphasis added.) North Haven Zoning Regs., § 6.1.71. I agree with the majority that, in considering the propriety of the commission's decision, we are guided by the principles from *Lawrence* v. *Zoning Board of Appeals*, supra, 158 Conn. 509, explaining the term "customarily incidental," as recently articulated in *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 453–54, which stated "that [t]he word incidental as employed in a definition of accessory use incorporates two concepts. It means that the use must not be the primary use of the property but rather one which is subordinate and minor in significance. . . . But incidental, when used to define an accessory use, must also incorporate the concept of reasonable relationship with the primary use. It is not enough that the use be subordinate; it must also be attendant or concomitant. . . .

"We also explained the meaning of the word customarily, stating that [a]lthough it is used in this and many other ordinances as a modifier of incidental, it should be applied as a separate and distinct test. . . . Moreover, in *Lawrence*, we noted that [i]n examining the use in question, it is not enough to determine that it is incidental in the two meanings of that word as discussed [previously]. The use must be further scrutinized to determine whether it has commonly, habitually and by long practice been established as reasonably associated with the primary use. . . . As for the actual incidence of similar uses on other properties . . . the use should be more than unique or rare, although it need not necessarily be found on a majority of similarly situated properties to be considered customary. . . . We noted in *Lawrence*, that the determination of whether a use is

subordinate and customarily incidental to the principal use of the property is one that is peculiarly within the knowledge of the local board." (Citations omitted; internal quotation marks omitted.)

Moreover, "[i]n applying the test of custom, we feel that some of the factors which should be taken into consideration are the size of the lot in question, the nature of the primary use, the use made of the adjacent lots by neighbors and the economic structure of the area. As for the actual incidence of similar uses on other properties, geographical differences should be taken into account, and the use should be more than unique or rare, even though it is not necessarily found on a majority of similarly situated properties." *Lawrence* v. *Zoning Board of Appeals*, supra, 158 Conn. 513; see id., 515 (board did not act illegally or abuse its discretion in determining that raising chickens and goats for food was not accessory use for residential property located in town center); see also *Graff* v. *Zoning Board of Appeals*, 277 Conn. 645, 672, 894 A.2d 285 (2006) (zoning enforcement officer's studies of number of dogs licensed per household in town, as well as noise complaints by plaintiff's neighbors, "provide[d] a reasonable basis for [board] to have concluded that keeping more than four dogs is both unique and rare in the town, and therefore, not a permissible accessory use of the town's residential property").[8]

As the majority notes, the parties have not cited any Connecticut or sister state cases applying these principles in the context of video preview booths located in book and video stores, adult or otherwise, and the only appellate level decision that our collective independent research has located is *In re French Adult Books, Inc.*, 44 Pa. Commw. 489, 490, 404 A.2d 740 (1979), wherein the court considered an adult bookstore's appeal from the zoning board's denial of "a special exception for the erection of coin-operated motion picture projectors in individual booths ('peep shows') within its bookstore, which is located in a commercially-zoned area . . . ." The applicable zoning regulation cited and quoted in that decision permitted " 'retail stores' " in that commercial district. Id., 491. Noting the store's claim that the booths constituted an accessory use, the court stated that, "as a practical matter 'peep shows' have been considered as customarily incidental to the so-called 'adult' bookstore"; id.; but concluded that the trial court and board properly had determined that the record of the particular case was "entirely devoid of testimony which would support a conclusion that, *in this instance*, 'peep shows' are actually an accessory use." (Emphasis added.) Id., 492. In my view, that Pennsylvania decision is less than informative in the present case because it does not explain what kind of information had been presented to the zoning board therein.[9]

Thus, this case turns on the application of well settled

principles of law to a record that is, in my view, not particularly well developed[10] and reflective of the informality of proceedings before a zoning commission, which is "not bound by the strict rules of evidence. . . . It may act upon facts which are known to it even though they are not produced at the hearing. . . . The only requirement is that the conduct of the hearing shall not violate the fundamentals of natural justice. That is, there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary or to be fairly apprised of the facts upon which the board is asked to act." (Citations omitted.) *Parsons* v. *Board of Zoning Appeals*, 140 Conn. 290, 292–93, 99 A.2d 149 (1953); accord, e.g., *Blaker* v. *Planning & Zoning Commission*, 212 Conn. 471, 477–78, 562 A.2d 1093 (1989) (commission has burden of proving harmlessness of improper receipt of ex parte evidence).

In light of this informality, even the unsworn statements of counsel for a party at a zoning board hearing are considered evidence that the board is entitled "to accept . . . in lieu of sworn testimony and to give to it *such credence and weight as, in their minds, it merit*[*s*]."[11] (Emphasis added.) *Parsons* v. *Board of Zoning Appeals*, supra, 140 Conn. 293; see also *Conetta* v. *Zoning Board of Appeals*, 42 Conn. App. 133, 138, 677 A.2d 987 (1996) (board was entitled to rely on statements of attorney with respect to length of time that property had been used for operation of plumbing business); *Paige* v. *Town Planning & Zoning Commission*, 35 Conn. App. 646, 660–61, 646 A.2d 277 (1994) (relevant statements about traffic by applicant's counsel constituted "evidence" that subdivision application did not pose public safety threat), rev'd on other grounds, 235 Conn. 448, 668 A.2d 340 (1995).

It is, however, similarly well settled that zoning board members "are entitled to take into consideration whatever knowledge they acquire by personal observation . . . ." (Internal quotation marks omitted.) *Francini* v. *Zoning Board of Appeals*, 228 Conn. 785, 791, 639 A.2d 519 (1994); id. (although "only evidence that the plaintiff presented to the board concerning the unusual or unique nature of the alleged hardship was his statement that the property was the only undeveloped lot in the area [the board was entitled to reject that in light of observation by its chairperson] . . . that there were many other nonconforming lots in the area that were subject to the same zoning restrictions as the plaintiff's property"). Put differently, "[w]e have in the past permitted lay members of commissions to rely on their personal knowledge concerning matters readily within their competence . . . ."[12] *Feinson* v. *Conservation Commission*, 180 Conn. 421, 427, 429 A.2d 910 (1980).

Thus, the record in this case presents a collision

between what are in my view two minimally probative, and barely legally admissible, forms of evidence before zoning boards, namely, the advocacy of counsel and the personal knowledge of board members. In reviewing the commission's treatment of the plaintiff's site plan application, I am, however, mindful that "an accessory use is a use that is customary and incidental to a *permitted primary use* [and] is dependent on or pertains to the primary use"; (emphasis added) *Upjohn Co.* v. *Planning & Zoning Commission*, supra, 224 Conn. 89; and that the plaintiff seeks to avail himself of the town's "[b]asic neighborhood stores" ordinance; North Haven Zoning Regs., § 6.1.11; as permitting his site plan for the town's first adult oriented shop. Section 6.1.11 permits properties in CB zones to be used for "[b]asic neighborhood stores: book and stationary, cigar, drug, dry goods and notions, florist, food, including retail bakery, haberdashery, hardware." The ordinance does not, however, refer specifically to adult oriented stores, which necessarily means that the viability of the plaintiff's proposed accessory use depends on how it fits within the local understanding of the proposed principal use under the regulations, namely, a "[*b*]*asic neighborhood store*";[13] (emphasis added); particularly given the permissive nature of the town's zoning regulations, under which "those matters not specifically permitted are prohibited."[14] *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 653; see also *Klingaman* v. *Miller*, 168 App. Div. 2d 856, 857, 564 N.Y.S.2d 526 (1990) (determination of whether profession is "home occupation" that "can be carried on in an addition to a detached garage" requires reference "to all relevant provisions in the zoning ordinance, including the definitions of accessory use, accessory building, floor area and private garage, and the list of uses specified by the ordinance as permitted in the particular district"); *Avon* v. *Oliver*, 253 Wis. 2d 647, 660–62, 644 N.W.2d 260 (App.) (determination of whether sport shooting range is accessory use on agricultural property requires reference to enumerated uses permitted under ordinance governing "prime agricultural districts"), review denied, 254 Wis. 2d 263, 648 N.W.2d 478 (2002).[15] Put differently, it appears to me that the plaintiff seeks a comparative advantage over other "basic neighborhood" book and video stores in the town that would be based solely on the content of his wares. Requiring the commission to permit the plaintiff to proceed in this manner would "[evoke] a concern for the unfair surprise of a neighbor who thought she knew the full range of uses that could be established next door, only to be met with an unexpected use and then [be] told it was merely accessory to the primary use of the land."[16] T. Tondro, Connecticut Land Use Regulation (2d Ed. 1992) p. 85.

The type of uses that are accessory to the permitted principal use of "basic neighborhood" stores in the town

is not a technical matter and is readily within the personal knowledge of the commission's members, who as community residents presumably have reason to frequent such establishments on a regular basis. Cf. *Lawrence* v. *Zoning Board of Appeals*, supra, 158 Conn. 514 (whether raising chickens and goats for food is "subordinate and customarily incidental to property located in the center of town and used for residential purposes [is] a determination . . . peculiarly within the knowledge of the local board"). Put differently, that the town, and presumably the members of the commission, ostensibly lacked experience with adult oriented stores, did not operate to deprive them of their knowledge of what constitutes a "basic neighborhood" store in the town. Thus, the commission's members reasonably could have rejected Silver's statements in favor of their own personal observations, which were communicated to him at the hearing, namely, that existing local basic neighborhood stores such as Blockbuster customarily do not have such booths, but instead play video clips or movie trailers on overhead monitors, without charging prospective customers who are the targets of such advertising.[17]

The plaintiff relies on *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 455, and likens Silver's comments and assertions to those of the city's zoning enforcement officer in *Clifford*, which this court cited as a reasonable basis for the board therein to conclude that the storage of dynamite was an accessory use for a contractor's yard in an industrially zoned area. In *Clifford*, the court stated that it "would be inconsistent with [the] deferential standard of review if we were to require the commission to second-guess the judgment of the very person charged with the enforcement of the city's zoning regulations." Id. The court's statements in *Clifford* explain, however, just why the present case is distinguishable, because it "recognize[d] that, even under this very deferential standard of review, there may be circumstances under which *conclusory statements made by a single individual before a zoning commission may not constitute substantial evidence* to support a commission's determination. We emphasize that our conclusion in the present case that [the zoning enforcement officer's] conclusory assertions, alone, constituted substantial evidence to support the commission's determination, is grounded on the fact that . . . *the zoning enforcement officer of the city, was charged with the responsibility and the authority to enforce the zoning provisions of the city.* Therefore, we conclude that the commission properly accorded great weight to his statements." (Emphasis added.) Id., 455 n.12. In contrast, the commission in the present case reasonably could have elected not to rely on conclusory comments by an attorney responsible only for the zealous advocacy of his client's application, rather than the impartial enforcement of the town's zoning ordi-

nances.[18] See *Spero* v. *Zoning Board of Appeals*, 217 Conn. 435, 444, 586 A.2d 590 (1991) (rejecting claim that board improperly delegated its authority and describing town counsel as "neutral employee of the board rather than a party to the controversy" with respect to "statutory construction of a zoning regulation"); cf. Rules of Professional Conduct 3.7, commentary (Attorney-witness rule exists because "[a] witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.").

Put differently, although the commission perhaps *could* have chosen to credit Silver's statement under *Parsons* v. *Board of Zoning Appeals*, supra, 140 Conn. 293, and its progeny, it was not *required* to do so any more than it would be mandated to accept unquestioningly the proposition that a test track would be an accessory use to a proposed new automobile dealership. Cf. *Dottie's Dress Shop, Inc.* v. *Lyons*, 313 Ill. App. 3d 70, 73, 74, 729 N.E.2d 1 (store selling sexual paraphernalia and devices properly classified as "[a]dult [u]se" under ordinances, rather than "retail clothing store" because "[t]wenty pieces of lingerie . . . do not a dress shop make"), appeal denied, 191 Ill. 2d 528, 738 N.E.2d 925 (2000); *Bolivar Road News, Inc.* v. *Director of Revenue*, 13 S.W.3d 297, 302 (Mo. 2000) (rejecting argument of adult book and video store that tokens sold for its thirteen preview booths were not subject to state sales tax applicable to " 'places of amusement' " because booths existed solely for purpose of permitting customers to sample store's merchandise and "were not meant to provide customers with entertainment"). The majority, therefore, invades the commonsense discretion exercised by the commission's members, who reasonably could have rejected the proposition that the booths are used solely for marketing and preview purposes that are incidental to the plaintiff's retail operations, inasmuch as the booths: (1) have the capability of generating significant revenues;[19] (2) inexplicably require the prospective customer to pay for the experience of being advertised to; and (3) if the occupant has sufficient fistfuls of quarters, will play the full movie, rather than the trailers that typically are used to arouse audience interest in feature films. Accordingly, I would conclude that the commission's decision that the plaintiff failed to satisfy his burden of proving that the video preview booths are an accessory use was supported by substantial evidence, and the trial court, therefore, improperly sustained the plaintiff's appeal.

Because I would reverse the judgment of the trial court and remand the case with direction to dismiss the zoning appeal, I respectfully dissent.

[1] Section 6.1 of the North Haven zoning regulations provides in relevant

part: "No use shall be permitted in any Commercial or Industrial District except . . .

"6.1.71 Accessory uses customarily incidental to a permitted use on the same premises . . . ."

[2] Section 6.1.11 of the North Haven zoning regulations permits properties in CB (commercial) zones, in which the plaintiff's store is located, to be used for "[b]asic neighborhood stores: book and stationary, cigar, drug, dry goods and notions, florist, food, including retail bakery, haberdashery, hardware."

[3] See footnote 1 of the majority opinion.

[4] In my view, the commission's determination that the video preview booths did not constitute an accessory use provided a valid, independent basis for denying the plaintiff's site plan application. Accordingly, I express no opinion about the parking and remedy issues discussed in parts II and III of the majority's opinion.

[5] The plaintiff also proposed operating conditions that would apply to the store generally, which included: (1) maintaining a light level of no less than two foot candles at the floor level in every portion of the store; (2) providing at least one bathroom with soap and wash basins; (3) keeping the walls, ceilings, floors and booths in good repair and in "clean and sanitary" condition; (4) providing vermin and pest control measures; and (5) keeping all walkways and aisles free and unobstructed.

[6] In response to further questions from Vern Carlson, the commission's vice chairman, Silver stated that people would not be permitted to loiter in the store waiting for a booth to become available if all were occupied. He also offered to make enforcement of this rule a condition of approval.

[7] The commission's denial of the plaintiff's application was phrased that "video preview booths are not a *permitted* use." (Emphasis added.) Given that this case consistently has been argued and decided in prior proceedings as an "accessory use" matter, I, like the majority, will treat it accordingly. See, e.g., *Conetta* v. *Zoning Board of Appeals*, 42 Conn. App. 133, 140, 677 A.2d 987 (1996) ("It is clear from the record of both the public hearings and the executive session that it was the board's intent to find a legal nonconforming use. We will not hold lay administrative boards to the standard of legal finesse set by Justices Holmes and Cardozo.").

[8] By way of background, I note that in *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 648–49, a zoning board appealed from the judgment of the trial court sustaining the plaintiff's appeal from its decision ordering the plaintiff to reduce the number of pet dogs on her property from fourteen to four. Although the town's regulations did not allow expressly the keeping of household pets as a principal use, or name them as an enumerated accessory use, this court concluded that the accessory use portion of the regulation served "as both a mechanism for the town to permit individuals to keep dogs as pets under the town regulations, as well as to regulate what is an acceptable number of pet dogs that can be maintained at a single-family dwelling." Id., 657; see id. (noting "rich tradition in the town, and the state as a whole, of citizens keeping dogs as pets").

This court then considered the board's claim that "the trial court improperly substituted its judgment for that of the board when it rejected the board's determination that the number of pet dogs as an accessory use in the town's rural residential district should not exceed four in number." Id., 668. Applying the principles from *Lawrence* v. *Zoning Board of Appeals*, supra, 158 Conn. 509, the court concluded that there was "substantial evidence in the record to support the board's conclusion that in excess of four dogs was not a permissible accessory use to a residential property [and that] the trial court [had] ignored the deferential standard to board determinations that was required, as well as the board's liberal discretion to make such determinations, and its unique understanding of what is customary in the town." *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 670. Specifically, the court emphasized that the board reasonably could have credited studies by the town's zoning enforcement officer into the number of dogs licensed per residence in the town, which revealed that, "of all the properties in the town with more than one dog, only 2 percent of those residences maintained in excess of four dogs, and the plaintiff's property, with fourteen pet dogs, was a significant outlier." Id., 671. The board's decision also was supported by "testimony from several neighbors who were upset about the disruptive noise and intimidating behavior exhibited by the plaintiff's animals"; id.; and the plaintiff's failures to "present any evidence contesting [the officer's] findings as to the number of pet dogs typically found in the town's residential areas [or] . . . suggest an alternate methodology . . .

to discern the number of pet dogs that are 'customarily incidental' to a residential property in the town." Id., 672.

[9] I also have found a trial level decision, *Whitehall Township* v. *Gomes*, 69 Pa. D. & C.2d 514, 515–16 (1974), which is a de novo appeal to the Pennsylvania Court of Common Pleas from a summary criminal conviction arising from an adult bookstore owner's operation, in a back room of his shop, of ten coin operated video booths displaying brief pornographic films, without first obtaining a special permit from the town's zoning board required for a "commercial amusement facility . . . ." Noting that it "d[id] not intend to condone the nefarious business of peddling smut"; id., 517; the court concluded that the defendant had not committed a criminal violation of the town's zoning ordinances because "coin-operated motion picture machines located [in the defendant's store] are an accessory use and do not constitute a separate commercial amusement facility." Id. The court considered the town's argument that "there is no evidence that the showing of pornographic films is 'customarily incidental' to an adult book store" to "[misconceive] the real issue. It is not what is customarily incidental to an adult book store that is controlling, but what is customarily incidental to a retail store. The frequent presence of coin-operated machines of amusement in [the town's] retail establishment is clear beyond peradventure of a doubt." Id., 516.

In my view, *Whitehall Township* is inapposite because it involves a party defending himself in the vastly different procedural context of a criminal case, wherein the prosecuting authority bears the highest burden of proof. Moreover, the trial court in that case was not required to defer to the fact-finding of an administrative agency. Finally, although I agree with the court's focus on what is customary to retail stores generally, as compared to adult oriented stores specifically, the comparison of the booths to other "coin-operated machines of amusement"; id.; which presumably would include games like Pac Man or picture taking booths, is unpersuasive because it does not explain the degree or incidence to which such devices are found in other retail stores—i.e., whether the other retail stores maintain *banks* of such machines.

[10] Although minimally adequate for the commission to render a decision, the record in this case is, in my view, dismayingly thin. The plaintiff failed to flesh out his application at the August 1 hearing by providing relevant details such as the amount of revenue he expected from the preview booths, or specific locations of similar stores in the area around the town that contain video preview booths. As the plaintiff properly points out, however, the commission's members did not endeavor to ask these questions or dispatch its zoning enforcement officer to perform a thorough investigation, either. Thus, the record in this case pales in comparison to the exhaustive investigation and research by the zoning enforcement officer in *Graff* v. *Zoning Board of Appeals*, supra, 277 Conn. 671. See footnote 8 of this dissenting opinion.

[11] In *Parsons* v. *Board of Zoning Appeals*, supra, 140 Conn. 293, this court overruled "the dictum in *Celentano* v. *Zoning Board of Appeals*, 135 Conn. 16, 18, 60 A.2d 510 [1948], that such statements [of counsel before zoning boards] are not evidence . . . ." I note that the *Parsons* rule represents the minority view on this issue, as most states hold that an attorney's unsworn statements before a zoning commission are not evidence. See, e.g., *Heard* v. *Foxshire Associates, LLC*, 145 Md. App. 695, 706–708, 806 A.2d 348 (2002) (rules of professional conduct do not preclude counsel for party from testifying before administrative boards, but those statements must be under oath to be considered substantial evidence); *Eichenbaum* v. *Arred*, 72 App. Div. 2d 563, 564, 420 N.Y.S.2d 749 (1979) (statements of landowner's attorney are not substantial evidence in support of zoning board's decision to grant variance); *Loveall* v. *Zoning Hearing Board*, 127 Pa. Commw. 53, 57, 560 A.2d 919 (1989) (zoning board improperly granted permit to construct rifle range in reliance on "statements [by] counsel . . . made in the hearing before the board regarding [the] noise tests; such statements are not evidence"), appeal denied, 524 Pa. 634, 574 A.2d 74 (1990); *Pellini* v. *Zoning Board of Review*, 103 R.I. 484, 486, 238 A.2d 744 (1968) (concluding that "several assertions made by applicants' counsel in support of his clients' cause" with respect to land's highest and best use "cannot be considered as competent evidence upon which the board could grant relief"). Indeed, one commentator, noting that "[d]ecisions of the utmost importance, impacting on liberty, economic, and societal rights" are made in administrative adjudications, including zoning proceedings, has suggested that ethical restrictions on attorney testimony; see, e.g., Rules of Professional Conduct

3.7 (a); should apply at administrative adjudications, as well as court trials. A. Rochvarg, "The Attorney as Advocate and Witness: Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial also Apply in Administrative Adjudications?" 26 J. National Assn. Admin. L. Judges 1, 37 (2006); see also id., 38 (suggesting that attorneys not be permitted to testify in support of their clients at administrative adjudications absent showing of " 'some hardship' ").

[12] I note, however, that, "[i]f an administrative agency chooses to rely on its own judgment, it has a responsibility to reveal publicly its special knowledge and experience, to give notice of the material facts that are critical to its decision, so that a person adversely affected thereby has an opportunity for rebuttal at an appropriate stage in the administrative proceedings." *Feinson* v. *Conservation Commission*, 180 Conn. 421, 428–29, 429 A.2d 910 (1980); see also id., 429 ("a lay commission acts without substantial evidence, and arbitrarily, when it relies on its own knowledge and experience concerning technically complex issues such as pollution control, in disregard of contrary expert testimony, without affording a timely opportunity for rebuttal of its point of view").

[13] I find significant the regulation's use of the word "basic" to modify "neighborhood store." See North Haven Zoning Regs., § 6.1.11. Accordingly, even as I accept the contention that the plaintiff's store is a "neighborhood store"; cf. *In re French Adult Books, Inc.*, supra, 44 Pa. Commw. 491 (applicable zoning regulation permitted "retail stores"); I bear in mind the word "basic," which commonly is defined as "1: of, relating to, or forming the base or essence: FUNDAMENTAL 2: constituting or serving as the basis or starting point . . . ." Merriam Webster's Collegiate Dictionary (10th Ed. 2001). Indeed, the related word "fundamental" is defined in relevant part as "serving as a basis supporting existence or determining essential structure or function: BASIC . . . ." Id. Thus, I would take my cue from the regulation's use of the word "basic," and defer to the commission's understanding of the uses that are accessory to those stores that are essential to the function, or form the essence, of its town.

[14] See North Haven Zoning Regs., § 6.1 (setting forth schedule of uses and stating that "[n]o use shall be permitted in any Commercial or Industrial District except one which is indicated by a check mark in the column below applicable to the district in which such use is located"). Moreover, although § 6.1 of the regulations "does not specify that the uses listed as permitted are principal uses of property, and although the [town's] zoning ordinances do not contain a definition of principal uses, [I] note that the uses listed in [§ 6.1] are uses that fit the traditional definition of principal uses as the main, primary or dominant use of the land." *Clifford* v. *Planning & Zoning Commission*, supra, 280 Conn. 449 n.11.

[15] Although I agree with the majority that custom in the accessory use context is determined by reference to "similarly situated properties"; *Lawrence* v. *Zoning Board of Appeals*, supra, 158 Conn. 513; I disagree with the majority's criticism of my approach to determining which similarly situated properties constitute the appropriate reference point for determining the validity of the proposed accessory use. I begin by emphasizing that this court's decision in *Beit Havurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 449, 418 A.2d 82 (1979), which the majority cites, is distinguishable, notwithstanding its focus on the applicant as a "non-traditional synagogue [that] had non-traditional needs" in determining whether unrestricted overnight use of its premises constituted an accessory use under the town's zoning regulations that permitted " 'places of worship' . . . ." Id., 441. In *Beit Havurah*, the court relied on the federal and state constitutional protections for freedom of religion in rejecting the board's conclusion that unrestricted overnight use was not an accessory use, because there was no evidence that the overnight accommodations had a nonreligious purpose and "[n]on-traditional as well as traditional synagogues are protected by the provisions of the state and federal constitutions guaranteeing freedom of religion. The legitimacy of non-traditional religious practices cannot depend on what is customary among more traditional religious groups. . . . What are the particular tenets of a recognized religious group is not a matter for secular decision." (Citations omitted.) Id., 449–50.

I similarly disagree with the majority's reliance on *Sun Cruz Casinos, LLC* v. *Hollywood*, 844 So. 2d 681, 684 (Fla. App. 2003), which concluded that the "trial court had competent, substantial evidence to support its finding that the [gambling cruise]-related uses were not customarily associated with the main permitted use, a restaurant with frontage on the intracoastal" waterway because none of the other waterfront restaurants in the

area operated large ships from their premises. That case is distinguishable because, although the described permitted use was more specific than "restaurant," the accessory use determination focused on the location of the premises, rather than on the wares sold within. Id., 683. Finally, although *State* v. *P.T. & L. Construction Co.*, 77 N.J. 20, 27, 389 A.2d 448 (1978), emphasized that "the main use to which the premises are put is as the headquarters for a construction company," that case is distinguishable because, in rejecting the board's conclusion that a heliport was not a valid accessory use to a construction company headquarters, the court in that case was able to rely on actual evidence that the town, despite its residential character, already had multiple heliports, and at least eight other construction companies in the state operated heliports at their headquarters. Id., 27–28.

[16] I disagree with the majority's characterization of my analysis as one that improperly reaches an issue that was not properly raised or briefed before either the trial court or this court. See, e.g., *Sabrowski* v. *Sabrowski*, 282 Conn. 556, 560, 923 A.2d 686 (2007). My analysis does not violate this prescription because I do not raise any *issues* that the trial court or the parties did not have a chance to consider. Indeed, a review of the record in this case demonstrates that my analysis does not ambush the trial court, which was well aware that, in the commission's view, the plaintiff's store would not be treated any differently than the other video stores in town, including those that sell adult videos. In response to the court's questions, the commission discussed at length the use of listening devices in music stores in town, and disagreed with the trial court's suggestion that, in the video realm, "Blockbuster could have little preview booths cause, you know, you want to see—well, let me watch this movie for fifteen minutes and see if I like it and it doesn't have to be an adult." Indeed, in response to further questions from the trial court, the commission stated that the other video stores in town, some which do sell adult videos, play movie clips on overhead screens, rather than in preview booths, and specifically emphasized that "the *Lawrence* test allows [the commission] to consider what other businesses in North Haven that sell adult videos, the adult genre, how their business is set up and the fact that they don't include video preview booths . . . ."

[17] The reliance by the majority, the plaintiff and the trial court on the comments of Palumbo that "seem to indicate, he understood the use of video booths were an accessory use in this type of business" is misplaced. The comments of the commission's members, including Palumbo, read in context, indicate their view of the principal use of the plaintiff's property under the applicable ordinance, which permits "basic neighborhood" book or video stores, and is not a rule pertaining specifically to adult oriented businesses.

[18] The majority quotes *Builders Service Corp.* v. *Planning & Zoning Commission*, 208 Conn. 267, 294, 545 A.2d 530 (1988), for the proposition that the commission inappropriately rejected Silver's arguments because, in the "analogous context of a trial," a "trial court cannot conclude the opposite of testimony it rejects where there is no evidence to justify that opposite conclusion. Nor can it arbitrarily disregard, disbelieve or reject an expert's testimony in the first instance. . . . Where the trial court rejects the testimony of a plaintiff's expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Internal quotation marks omitted.) In my view, this proposition is inapplicable because *Builders Service Corp.* involved a court trial in a declaratory judgment action, which is an adversary, rather than administrative, proceeding.

[19] According to my arithmetic, at twenty-five cents per minute, the fifteen booths conceivably could generate up to $225 per hour of operation, and $1800 per eight hour business day if used in full. The majority considers any attempt to quantify the projected revenues from the booths to be inappropriately speculative, given the lack of specific information in the record. In my view, however, we do not have to check our common sense at the door and presume that the plaintiff plans to construct fifteen booths with the expectation that most will sit empty for the majority of the time. Thus, even if I were to assume that the booths produce income at only one half of their capacity, that amounts to $900 per day, which is still a lot of quarters, and, therefore, hardly an "incidental" sum for a small business.