

**MINUTES OF THE CHESHIRE ZONING BOARD OF APPEALS SPECIAL MEETING
HELD ON WEDNESDAY, OCTOBER 19, 2016 AT 7:00 P.M. IN ROOM 207-209,
TOWN HALL, 84 SOUTH MAIN STREET, CHESHIRE CT 06410.**

Present

Ken Wilson, Chairman; Marion Nero, Secretary; Breina Schain, John Pepper, Agnes White

Absent: Alternates Jackie Cianci, Gerald Devine, Robert Formica

Staff: William Voelker, Town Planner and David Kehoss, Zoning Enforcement Officer

Guests: Town Attorney Alfred Smith and Attorney Joseph B. Schwartz

I. CALL TO ORDER.

Chairman Wilson called the meeting to order at 7:01 p.m.

II. ROLL CALL

The clerk called the roll.

III. DETERMINATION OF QUORUM

Following roll call a quorum was determined to be present.

IV. PLEDGE OF ALLEGIANCE

The group Pledged Allegiance to the Flag.

V. INFORMATIONAL MEETING WITH THE TOWN ATTORNEY

Before the start of the training and informational session, Chairman Wilson stated the importance of staying within the topics. He noted there can be no discussion of prior applications or made up scenarios, and general questions related to the topic will be addressed.

Town Attorney Alfred Smith and Attorney Joseph Schwartz from Murtha Cullina were present and conducted the training session.

Attorney Smith stated that the decisions of the Zoning Board of Appeals (the Board) are based on the facts presented. He commented on the excellent and professional staff in Cheshire who assist and guide boards and commissions with their responsibilities. In the presentation, there will be information on duties of the Board, definition of a legal hardship, process to conduct hearings, the appeals process and standard of review.

Attorney Smith and Attorney Schwartz conducted the training session through a power point presentation.

Major Criteria - the Board has 5 elected members, 3 elected alternate members per the Town Charter. A seating alternate member has all the powers and duties and rights as a regular member. Vacancies to the Board are filled by the Town Council; the chairman can appoint alternates to sit at a public hearing.

Board chairman Wilson advised that for the calendar year the alternates are scheduled for monthly meetings.

A majority of Board decisions get turned over due to process issues. The Board must specifically cite reasons why an application is approved or denied.

Attorney Schwartz pointed out that Board members cannot represent any person, entity or corporation in any matter before the Board, and cannot participate in any hearing where there is a personal or financial interest. If a Board member wants to be recused, this must be stated on the record of the meeting.

The Zoning Enforcement Officer cannot serve on the Board.

Financial Interest - this is very broad but very clear. A Board member cannot act or decide on a matter in which a close relative has a financial interest in the application. There is no threshold on the amount of financial interest, so it is better to be cautious. If a member has a concern in this regard, they should contact Town Planner Voelker or ZEO Kehoss.

Personal Interest - is when a Board member enjoys a relationship with an applicant that could impede his/her judgment...this could be on the basis of affection or hostility. It is better to err on the side of caution, step aside.

The public should have confidence in the Board decisions which are based on fact and law. It is easy to appeal a Board decision that is based on bias. The Town Attorney will fight for good legal reasons and to support the regulations.

If there is a reason to believe a Board member may have a personal interest in an application, it is reasonable for another Board member to approach this person and cite the concerns of possible conflict of interest. Knowing someone in a small town is no reason to recuse yourself from an application. If there is a question about this, state it at the opening of the public hearing...this gives the applicant the benefit of the question and the answer.

Mr. Voelker commented on the fact that staff has a duty to voice a concern with a possible Board member's conflict of interest, personal or financial. He encouraged Board members to contact staff for assistance, e-mail questions, and there will be responses on any matters of concern.

Appeals and Variances - the Board has the authority to decide on an appeal of an order of the ZEO, i.e. about the applicability of zoning regulations in a particular situation. The complaint goes to the ZEO; a preliminary determination is made; and the impacted party has the right to appeal the decision before the ZBA.

Variance Requests - a person feels a strict application of the letter of the law and zoning regulations creates an unfair, undue hardship and requests a variance from the regulations.

Zoning Enforcement Actions - these include Cease & Desist Orders, Notices of Violation, Certificate of Zoning Compliance issued with a building permit. Deciding an appeal to these actions involves interpretation of zoning regulations. The Board can only act on cases brought to the Board, and cannot give advisory opinions; it cannot determine title or ownership issues; members must keep an open mind with no pre-conceived decisions; and can only act on an appeal of the ZEO decision.

With regard to titles and ownership issues and appeals of zoning compliance, these could be issues about property lines, easements, ownership, and the Board has no jurisdiction to decide on these issues.

The issue of hardship only comes into play with a variance...it does not come into play with a zoning compliance issue or cease and desist order. As part of the cease and desist order a person may file an application. The Board decides whether the appeal is within the zoning regulations, and it cannot always be assumed that the ZEO is right. Keep an open mind. The Board can hear appeals of instances of violations, appeals of cease and desist orders, and appeals of certificates of zoning compliance.

The ZEO issues a cease and desist order to the property owner within a certain time period for response. The property owner can appeal to the Board, which hears what the owner's use is, and decide whether it complies with the zoning regulations or is a violation.

Certificates of Zoning Compliance and Cease and Desist Orders - are issued by the ZEO. When a building permit is issued it goes together with a Certificate of Zoning Compliance signed by the ZEO. There can be times when an abutter states the house being built does not conform with zoning, and files an appeal to the Certificate to the ZBA. The Board hears the appeal and makes its decision.

Variations - are applications submitted to the Board...it is someone applying to do something on their property which is in violation of the setback, use, coverage; thinks this is unfair; and wants there to be a variance of the zoning regulation just for their property. In order to do that there must be two findings...that the variance does not affect the Comprehensive Zoning Plan (the Plan), and a hardship must be proven.

Comprehensive Zoning Plan - is the regulations as a whole, the policies behind them. A variance cannot be granted if there is a violation of the Plan, i.e. industrial use in a residential neighborhood is not consistent with the Plan. Moving a setback one foot would be within the Plan.

Legal Hardship - the legal definition of a hardship was shown to the Board. The hardship must be unique to the specific property; it cannot be something everyone in

the neighborhood suffers from; a variance cannot be granted for a pecuniary issue for a small house to be expanded and thus increasing the property value. There would be no reason for the variance and no hardship proven.

The hardship can be due to the topography of the land that is unique to a specific lot...sloping, soil, drainage, septic system issues, location and size of the lot, and a decision must be done on a case by case basis.

A hardship cannot be self-created, i.e. a large 5 acre lot to be subdivided into two larger lots (2 acres each) and one lot of one acre size on which a house cannot be built. This is a self-created hardship.

There is a rule called the "purchase with knowledge rule"...this means someone buys a non-buildable lot for \$10,000. The buyer cannot buy this lot and then come to the Board asking for a variance to make it a buildable lot he can sell for \$200,000. If this were to come before the Board, it should be reviewed with Town Planner Voelker, and the Town Attorney may have to write an opinion on the matter.

Variations are personal in nature; they run with the land forever; once granted it stays with the property forever; variations must be unique to the property; once approved the variance must be filed on the land records of the Town.

The Board is not required to hear the same variance applications, month after month, on the same property. If a variance is denied the application cannot be resubmitted for six (6) months. Should a variance be granted with one invalid condition, it does not mean the entire variance is distinguished...it means only that one condition. Variations should be granted sparingly; courts often overturn variations.

Governing a Meeting - the outline of a schedule of business was shown to the Board. There should be compliance with the Freedom of Action Act (FOI) and Roberts Rules of Order. There must be proper notice of meetings, agenda available, and minutes available for public review shortly after completion of the meeting.

Chairman Wilson noted the ZBA has by-laws under which it operates. He commented on the importance of members being aware of what they say as it is on the record of the meeting.

Certificate of Zoning Compliance - when an appeal is in process the person can continue to build in the interim. For an appeal of the ZEO's order, the Board must hear the ZEO first. Anyone appealing a Board decision must be an "aggrieved" person, statutory or classical. Statutory is anyone abutting or within 100 feet of the subject property who has standing to appeal the decision in court. Classical is someone broadly aggrieved by the decision, can appeal, but may not be effective.

Public Hearing Format - the format for the public hearing was reviewed. The applicant goes first; sometimes the ZEO or town official goes first to outline the application; there

is public comment which can have a time limit set (i.e. 2 minutes per person); with time given to the due process. The public hearing is closed; the Board deliberates; all information on the subject application must be submitted prior to closing the public hearing; once the hearing is closed there can be no additional documents or statements into the record, including no legal opinion.

Four (4) affirmative votes are required to approve a variance application.

Independent research requires bringing all information to the public hearing, disclosure of the information, and it can only be discussed during the public hearing. The applicant has the right to examine and respond to the information submitted. The applicant can request an extension of the public hearing to the next meeting of the Board.

A-2 Survey - ZEO Kehoss and Chairman Wilson commented on this issue.

Mr. Kehoss pointed out that the applicants submit drawings and maps, and request waiver of the survey, or they need more time.

Mr. Wilson noted that the A-2 survey issue is handled before start of the public hearing, with a decision made to grant the waiver or not.

Attorney Schwartz commented on the survey being necessary for a complete application. The Board can suggest the applicant withdraw the application and resubmit a new application so time lines start up again. All documents must stay with the record.

Mr. Voelker noted that all exhibits (photos, drawings etc.) should be submitted to the Board as part of the applicant's record. A complete record is required for the Board's decision.

The public hearing is closed by a motion and the Board starts its deliberation session. The deliberation portion can be continued to the next meeting pending the late hour or more Board review of the applicant. There cannot be any discussion by Board members amongst themselves, with other people, and no independent research can be undertaken. At the next meeting there is discussion on the record and vote on the application. Four affirmative votes are required for approval of the variance. The Board can grant an appeal of a compliance issue or cease and desist order; it can modify the approval; and all reasons for granting or denial must be cited for the record.

During decision making session of the Cheshire ZBA, Mr. Wilson reported each member voices their reasons for approval or denial of the variance request.

Decision - there must be a motion made and seconded on the variance request, followed by a vote of the Board, with each member identified voting "yes" or "no".

In the variance approval, Mr. Kehoss said there can be a modification of a setback from 10 feet to 8 feet and this is cited as a stipulation of approval.

The timeline for decisions was reviewed by Attorney Schwartz. The appeal of the Board's decision must be within 30 days; the Board reviews it at the next meeting or within 35 days, whichever is sooner; 65 days after receiving the application the public hearing takes place; 35 days after the public hearing has commenced the hearing must be completed; 65 days after the public hearing is closed a decision must be made. This timeline gives the Board a fair amount of time to make a formal decision on the record.

For a decision the Board must state the reasons for the record; the decision must be published; notice sent to the applicant; and this must be filed on the land records of the town.

Two reasons for denial of a variance are hardship and non-compliance with the Plan. The burden to prove a hardship is on the applicant.

Court Appeal - 15 days after publication of the Board decision there can be an appeal to Superior Court. Proof that the Board acted improperly is the burden of the plaintiff. The Court decides whether the Board decision was arbitrary based on the information in the record. It is the town's responsibility to take the record, file it with the Court. The Board should be succinct when approving or denying a variance application as the Court has the power to go back into the record and review the material.

Attorney Schwartz revisited the "hardship" issue, and said it is fact specific. The Board can consider requirement of a site plan based on the plans submitted. There can be consideration of limiting the scope of the variance as a condition of approval. The Board must always be mindful of the record.

Walking or Viewing a Property - If Board members want to walk or view a subject property it must be done with permission of the homeowner. This can be coordinated through town staff with the property owner. Group tours cannot be undertaken as this constitutes a meeting, must be noticed, agenda posted and minutes taken.

Mr. Kehoss commented on the Board members having the responsibility to have knowledge before voting on an application and it is reasonable to see the property.

Attorney Schwartz explained that if the applicant is on site, the member can identify themselves to the owner and state why they are there, and ask permission. There cannot be any conversation or discussion of the application between the Board member and property owner.

Attorney Smith recommended using staff to make the subject property accessible to the Board members for a visit or walk around. It is important to identify yourself as a ZBA member, but no conversation can commence with the property owner. Should a Board member encounter the property owner wanting to converse, this should be stated for the record at the public hearing, noting there was no discussion.

After a public hearing is closed, Attorney Schwartz stated there can be no further inspection of the property. This must be done before the property/variance application is before the Board.

For the appeals process and time line, Attorney Schwartz advised the time begins when the notice is received by the person by certified mail. There must be some receipt of the notice. There can be e-mail notice with response of receipt. If the ZEO issues a notice of violation or cease and desist order and the owner appeals the order, the applicant does not have to stop the action during the appeal process.

VI. ADJOURNMENT

MOTION by Mr. Wilson; seconded by Mr. Pepper.

MOVED to adjourn the special meeting at 8:30 p.m.

VOTE The motion passed unanimously by those present.

Attest:

Marilyn W. Milton, Clerk