I. CALL TO ORDER
The meeting was called to order at 7:32 p.m. by Mr. Bartoli.

II. ROLL CALL
The roll was called.

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. ACCEPTANCE OF MINUTES
   OCTOBER 6, 2009 and DECEMBER 7, 2009

MOTION by Mr. Lentini; seconded by Mr. Wilson.

MOVED to accept the minutes of October 6, 2009 subject to corrections, deletions, additions.

Corrections: October 6, 2009 – page 8 - change “Mr. Wilson” to “Mr. Wilkinson”; page 9, vote on 405 Maple Avenue application should read “Grudzias” not “Wilson”.

VOTE The motion passed unanimously by those present.

MOTION by Mr. Wilson; seconded by Mr. Devine.

MOVED to accept the minutes of December 7, 2009 subject to corrections, additions, deletions.

VOTE The motion passed unanimously by those present.

Attorney Olson was introduced to the Board by Ms. Augur.
VI. BUSINESS

Review of Procedures.

Attorney Olson submitted to the Board members an informational document on the powers of the ZBA, Zoning Enforcement Appeals, and CGS Section VIII which governs the ZBA. In her comments, Attorney Olson stated that the powers of the ZBA are stated in CGS Sections 8-5 to 8-7. Cases before the ZBA are strictly construed by the courts in determination of the Board’s accuracy in its decisions. The criteria for decisions by the ZBA applies to every town in the State of Connecticut, and towns can create ordinances in order to act on variance matters. The rules and regulations are not the same in all towns, and the flood plan management regulations are unique to Cheshire.

The power of the Board is to hear and decide variance applications under specific conditions; to hear and decide all matters including special exceptions and exemptions under Section 8-2g; and to determine and vary the application of the zoning laws in harmony with their general purpose and intent with consideration for the public health, safety, convenience, welfare and property values.

Under Section 44 A.3.1, Cheshire’s Affordable Housing regulations, a variance with respect to affordable housing should not be entertained by the Board.

Under CGS Section 8, the Board has the authority for location of and approval of motor vehicle repairs, dealers, and junk yards. Ms. Augur noted that in Cheshire this comes under the Planning and Zoning Commission. Attorney Olson noted that regarding junk yards and motor vehicle repairs/dealers the approval depends upon the population of the municipality.

Flood Plain Management regulations permits ZBA decisions on appeals for construction within a flood plain area (Section 46).

At the end of the document submitted to the Board, Attorney Olson noted that there is a section on the regulations which apply to the ZBA.

The power which a Board faces the most is a request for variances, and the courts will strictly construe statutes on variances. A variance is a license to violate existing regulations and should be sparingly granted. In general, Zoning Board of Appeals grant variances frequently, and sometimes under circumstances where the variance should not be granted. For a small variance without neighborhood complaints or concerns, the ZBA can grant a variance. Without strict adherence to the criteria for a variance, a Board could be overturned on appeal. The Board would have a very hard burden to meet if the variance granted did not meet the terms of the statutes.
With a variance approval an abutting property owner can bring a lawsuit against the ZBA with a complaint and grievement proven within the proper time frame. Attorney Olson cited an example whereby a Board failed to find a hardship for the variance and approved it anyway.

A variance cannot affect the Comprehensive Plan of Development and Conservation ("Plan") of the Town. Variances must adhere to the strict zoning regulations, what causes the unusual hardship, and the effect on the Plan.

Variances run with the land and when a variance is granted it belongs with the subject property, not the owner of the property. When the property is transferred, the variance goes with the property. When the Board approves a variance it cannot be personal and conditions cannot be personal. In 2003 the law was revised to state the variance runs with the land and when conditions are imposed which are illegal or adversely affect the ability to transfer the property, this does not invalidate the variance.

Attorney Olson informed the Board that Murtha Cullina has represented other Zoning Boards on appeals, and the best decisions are not subject to challenge.

In the past the Cheshire ZBA has imposed conditions on variance approvals, and Attorney Olson advised that if the condition is not considered void, then a new property owner would be required to comply with it. The Board can look at public safety as a condition for a variance.

Hardship Requirements were discussed by Attorney Olson who reaffirmed the fact that the “hardship must run with the land”. She informed the Board that there cannot be “accommodations” made for handicapped situations which apply only to the current resident of the property. Nothing in the law provides this, and to place a personal condition on a variance is not allowed. It is possible zoning regulations need to be revised to accommodate building structures related to handicapped issues. Ms. Olson recommended that the PZC take up this issue, but the question is whether the Town wants to restructure all properties to accommodate handicapped access. The ZBA is constrained by what it can do and would be subject to a challenge under these types of circumstances.

Attorney Olson commented on the difficulty of looking at personal aspects along with land aspects of an application. With a larger variance, the Board should consider an alternate for a softer variance. Attorney Olson briefly cited some of the cases in the information document (Garibaldi v. ZBA, Bloom v. ZBA, Grillo v. ZBA, Stillman v. ZBA, Bloomberg vs. ZBA) and read excerpts from Supreme Court rulings in some of the cases.

The issue of nonconformity was raised for a house built before zoning regulations were in place, and the owner wants to put an addition on the house, making the
nonconformity worse. In that regard, Attorney Olson said that the law permits a degree of nonconformity. She cited land in a commercial zone with a residential use, and the property owner wants to change it to commercial use needing a garage to store trucks, and going one foot into the setback. The law recognizes the residential use is nonconforming, and granting this variance would be better than continuance of the nonconforming use. Variances should not increase a nonconformity.

The Board was informed that every application is fact specific, and the Board must look at every application individually. Under Cheshire regulations it states there are areas where a variance would be permitted. Attorney Olson read an excerpt from the Superior Court on the Garabaldi case. She stated that there cannot be a financial hardship for an application which is not directly related to the property itself. Ms. Olson stated it has been made clear that the courts, not the ZBA, makes decisions with claims of municipal estoppels or waivers.

With regard to hardships for an application, Attorney Olson advised that the Board must look at the property, or the challenge to a cease and desist order. Under the cease and desist order the Board makes a determination on whether the order is appropriate. The ZBA is not given the authority to make findings on municipal estoppels.

Under Section 8-13A, nonconforming buildings which are modified without variance approval, must be caught within 3 years or left alone.

In the Bloomberg case, Ms. Olson said that the variance could not be granted based on financial or economic situations. The only time this is permitted is when, without the variance, the property could not be used and is rendered useless. This is an extreme example. The Board must look at each application and the regulations individually.

In some cases the Board can grant a variance, make the encroachment as simple as possible, and use discretion in sculpting the variance to minimize the impact. Most boards take the stance that without complaints or negative responses from neighbors the variance can be granted. Boards must be aware that it is harder to defend a variance approval than a denial of a variance. The hardship definition is limited to the property and there should not be any self-created conditions.

For self-created hardships, Ms. Olson cited a case where a hotel had 5 acres, sold off 1 acre, and wanted a variance for the 4 acres because it could not do what it wanted without a variance. This is a self-created hardship by the hotel selling off 1 acre. Sometimes people subdivide property and want a variance because they cannot build anything, and such a variance should not be granted. Having a large family is also a self-created personal hardship, and is not related to the land, when the property owner wants to add a 3-car garage.
Attorney Olson commented on times changing and regulations needing to evolve with these times. She said that hardship is so hard to define that courts are not even consistent in most cases when a variance is challenged. Regulations are becoming stricter and it is harder for existing buildings to meet zoning and have expansion possibilities.

There was a brief discussion about changing the zoning regulations, when it is done and how it is done. Attorney Olson stated that the Planning and Zoning Commission decides on making changes to the zoning regulations and when this is done. It is important for the PZC and ZBA to communicate and know what people are looking for, i.e. handicapped accommodations, acreage requirements for poultry and horses, etc.

Ms. Augur explained that she, Town Planner Voelker and PZC Chairman Strollo will be meeting to review the zoning regulations and the ZBA will be kept informed of the status.

Attorney Olson noted that individuals can also make application to change the zoning laws.

Mr. Augur informed the Board that the PZC last changed the Plan in 2002 and it is up for review in 2012. With a revised/new Plan, the zoning regulation changes will naturally follow.

The Board can work through staff and present issues to the PZC and Ms. Olson said the regulations are generally changed due to problems with applications.

Board Chairman Bartoli stated that the ZBA has “seen it all” from handicapped issues, garages, porches, decks, etc.

Attorney Olson stated that the ZBA’s jurisdiction is to determine whether the regulations apply to the subject matter, and the Board is the first line of defense. The Planning Department staff is invaluable to the Board in this regard. She noted that economic/financial gain which is good for a neighborhood is not sufficient reason to grant a variance because the hardship must be strictly related to the property.

The zoning law is more likely related to setbacks and lot coverage and Mr. Wilson believes that the Cheshire Board could be challenged by neighbors in a court case.

According to Attorney Olson this happens, but it is rare since it is very difficult to overturn a denial of a variance because the hardship was hard to establish. It is easier to overturn granting of a variance.
With regard to the PZC’s perception of the ZBA, Ms. Augur stated that the PZC believes the Board is reasonable.

In the packet given to the Board, Attorney Olson included a copy of the application form for a variance, sections of the laws applicable to the ZBA, criteria to be considered in granting variances, and the flood plain regulations.

Attorney Olson stated that the Board members must be careful in what they say and what is recorded in the minutes of meetings because the minutes will be used in court proceedings. Every application is different and the Board should feel comfortable communicating with staff. Ms. Olson advised the Board that staff communicates with the Town Attorney’s office and legal staff is always available for advice.

The Board was informed that applications for a variance should never be discussed privately with an applicant. If a Board member has communication with an applicant, the ZBA must be informed, and the member should be recused from hearing or acting on that application.

For a Zoning Enforcement Officer decision, the Board needs 4 out of 5 members to overturn the ZEO decision.

Site visits to properties – Attorney Olson advised that Board members can make individual visits to properties but can never visit with a quorum as this would technically constitute a “meeting”, would require public notice and minutes to be taken. Board members should not talk to the property owner or go onto the private property, but can drive by a subject property. If the applicant/property owner attempts to talk to the Board member, it should be curtailed, and the ZBA informed about this at the public hearing.

Mr. Wilson informed the Board members that he visits “Google Earth” to get a more detailed viewing of a property for which an application has been filed.

For a cease and desist order there is a time frame set in which an appeal can be made.

There was a brief discussion about a “blight” law in Cheshire, and Ms. Augur explained that this issue would probably be referred to the Building Department. Typical complaints are about too many unlicensed motor vehicles, debris, compost piles, etc. These could also be health issues, but at this time Cheshire does not have a blight law in effect.

Attorney Olson advised that Glastonbury, Avon, Milford are looking at implementation of a blight law.
Chairman Bartoli thanked Attorney Olson for her informative presentation to the Board.

4. ADJOURNMENT

MOTION by Ms. White; seconded by Mr. Devine.

MOVED to adjourn at 9:22 p.m.

VOTE The motion passed unanimously by those present.

Attest:

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Marilyn W. Milton, Clerk