

Zoning Board of Appeals Meeting Minutes  
Wednesday, April 6, 2011 – 7:00 p.m.  
Montville Town Hall – Town Council Chambers

1. Call to Order

Chairman MacNeil called the meeting to order at 7:05 p.m. and announced that Commissioner Loiler has resigned and in his place Ms. Mari Jurczyk has been appointed until the end of Mr. Loiler's term in November of 2011. He welcomed Ms. Jurczyk to the Commission and indicated she is a full voting member of the Board.

2. Roll Call

Present were Commissioners Adams, Bassetti, Lakowsky (7:10 p.m.), Jurczyk, Longton and MacNeil. Absent was Commissioner Freeman. Also present was Zoning Enforcement Officer, Thomas Sanders.

Chairman MacNeil seated Commissioner Longton in the absence of Commissioner Lakowsky.

3. New Business – none.

4. Public Hearings

a. Garhard C. Leitkowski, Jr.; a request for a variance of Section 9.4 minimum lot size in R-20 not served by public sewer to allow for a two family home on the property located at 36 Bergman Drive, Montville, CT as shown on Assessor's Map 17, lot 24.

Chairman MacNeil inquired if all of the appropriate mailing receipts are in place. Mr. Sanders indicated all the receipts have been submitted and are in the file.

Mr. Sanders indicated the request was originally intended to create a two family house on the property on Bergman Drive. The property is located in an R-20 Zone and it is not hooked up to sewers and therefore needs to have a total of forty thousand square feet of land and the property owners are asking for relief of Section 9.4 of the Zoning Regulations to do so. The property is pre-existing non-conforming due to a private road and the lot size without the sewer. The original dwelling was constructed in 1956 before both subdivision and zoning regulations were in place. The expansion of the existing garage has a finished area above. The homeowner was allowed to construct under Section 4.13.7 of the Regulations and that is in the report and outlined in detail. The applicant would like the finished area above the garage converted over to a dwelling unit and this requires special permit approval by the Planning and Zoning Commission but they require the variance on the lots size before they can apply to Planning & Zoning. The property is located in a generally residential neighborhood with a mixture of single multifamily duplexes and there are industrial areas to the east. The questions that need to

be addressed are as follows; will the activity have an adverse affect on the public health and safety, will the proposal blend in with the character of the neighborhood and the applicant is requesting a waiver of the site plan because the site plan that was presented has not been brought up to date because the surveyor has passed away since the site plan was submitted to the Planning & Zoning office, there is an A-2 survey on file and the Planning & Zoning Commission has agreed to waive their requirements regarding the update to the A-2 survey.

Commissioner Lakowski arrived at the meeting at 7:10 p.m. and was seated as a full voting member for the purpose of discussions and Commissioner Longton became an alternate with no voting privileges.

Commissioner Longton inquired regarding Section 4.13.7 that states for residential structures, expansion, modification or alteration is permitted provided that no new non-conformity or increased encroachments into required setbacks or height limitations results, or no non conforming use is expanded. He asked if it was the opinion of staff that the applicant qualifies under this use. Mr. Sanders stated the interpretation of the regulations is to ensure that homeowners are not punished because their lots are non conforming. Non-conforming properties are allowed to be upgraded to meet the normal needs of the current conditions. This particular case is a request for an upgrade to a garage expansion for a living unit. The house is pre-existing and the addition to the garage does not create a non-conforming use because it is a typical residential dwelling. There is a change of use from a single family home to a two family dwelling but will not change the footprint of the dwelling.

Chairman MacNeil invited the applicant up to address the Commission and state their case.

Attorney Garon Camassar, 181 Broad Street, New London, CT representing the applicant, pointed out that the proposal is to change what is set up as a "hobby room" to a unit whereby someone could stay in the unit for a couple of days and cook meals while they are staying there. The request under the regulations is for a two family, the proposal is for an area in which a guest may stay occasionally, there is no proposal in the plan that this space will be a rental unit or available for any use in this regard. The homeowner anticipates the room be used for relatives who visit on occasion to be able to stay independently of the main house if they choose to do so. Except for the issue of the kitchen the present use of the present plan on file would be permitted under the regulations. The total area they are looking to incorporate into the loft area of the garage is three hundred and seventy two square feet and is not suitable for any long term or permanent occupancy. Mr. Leitkowski, Jr. purchased the property from his grandmother in 2006 and prior to this the property was inhabited by the same person since 1956. The original configuration of the house has not changed at all until Mr. Leitkowski, Jr. purchased the property and being 56 years old the house required renovations and updating. The garage is permitted in this zone under the regulations, and externally this proposal will not create a different appearance and there will be no changes to the outside

of the garage at all. Mr. Leitkowski, Jr. would not be before the Commission if there were public utilities available on Bergman Drive. Bergman Drive is a private road and is not an accepted town street and is not on the accepted street list for the town. The sewer line is available on Maple Avenue and he does not know of any proposal to extend the sewer line to Bergman Drive and the applicants' residence is at least one thousand feet off of Maple Avenue. He stated his client's hardship is that except for the issue of the utilities the property meets the requirements of the purview of the Zoning Regulations. The regulations require if there is no public water and sewer available that the lot size be a minimum of forty thousand square feet. The footage of the lot is approximately twenty five thousand seven hundred square feet and is more than the minimum required by Zoning. The Uncas Health District has inspected the property and has determined it is satisfactory for the kind of purpose proposed. The hardship is the public utilities are not there and they are not going to be there. Mr. Leitkowski, Jr. acquired the property with this knowledge but nonetheless he is entitled to make full use of the premises within the purview of the Zoning Regulations and if a variance is granted he will be able to do just that. There would be no adverse impact on public health or safety and the use of this property as a permanent residence would not have any impact at all, it could be used by people occupying the room as a common room or as a separate dwelling would be just as functional. There is no question the proposal blends in with the character of the neighborhood and the reconstruction of the property makes the neighborhood look better than it did prior. He asked the Commission to consider the request and act favorably to this request.

Chairman MacNeil inquired if the egress and fire safety issues have been addressed.

Attorney Camassar stated the reason the applicants are before the Commission is because they want to include a kitchenette above the garage and this requires that the structure come within the purview of the two family dwelling because in theory it is a dwelling unit. If the Commission grants this application the property would be considered a two family dwelling. He stated Mr. Leitkowski, Jr. does not anticipate construction of a rental unit, they want to comply with the letter of the law and the kitchenette changes the complexion of the structure, and without the kitchenette the applicants would not be here. There is an existing bathroom above the garage.

Mr. Sanders stated when the property was under construction the Building Official asked if the unit would be occupied and indicated it has to meet the fire code if it is going to meet occupancy requirements. It does meet the requirements for occupancy at this time.

Chairman MacNeil inquired if there was anyone else would like to speak in favor of this application.

Mr. Dennis McNulty, 150 Maple Avenue was present to speak in favor of the application. He indicated he shares a common border with the applicants and stated he has attended school for architectural design and believes the egress is more than adequate and does not

foresee a problem with parking. He discussed the gas line as a hindrance to obtaining sewer and water to this area.

Chairman MacNeil inquired three times if there was anyone who would like to speak in favor of the application.

Chairman MacNeil inquired if there was anyone who would like to speak in opposition to the application.

Attorney Harry Heller, 736 Rt. 32, Uncasville, representing Mr. Gary Pike who resides at 38 Bergman Drive, one of the abutting property owners. He stated his client is opposed to the application. The land use in municipalities that have land use are required to comply with the requirements of the zoning regulations. The Zoning Board of Appeals is statutorily provided in order to provide flexibility in the application of the zoning regulations wherein specific circumstances which the courts have consistently said could be construed, particular circumstances may arise that meet the legal requirements for granting a variance and the legal requirements established in Section 8-6 of the Connecticut General Statutes authorize the Board to grant the variance if the Board makes a determination there is an unusual hardship or exceptional difficulty that is unique to the property and this does not apply generally to the properties in the district and secondly that the variance if granted, would be consistent with the comprehensive plan which is embodied in the Zoning Regulations and on the Zoning map and the history of zoning as it has developed in town. He stated the application does not comply with either of the two requirements for a variance and it must be denied by the Board. Proof of hardship is a prerequisite to the Boards exercise of jurisdiction in granting a variance and the burden of proving there is and exceptional hardship or unusual difficulty is on the applicant and that hardship must be unique to the property and can not arise out of the voluntary act of the applicant or the predecessors entitled to the applicant. The testimony indicated the lot in question contains twenty five thousand seven hundred square feet and there was testimony that it complies to zoning and it does not, even though the property is in an R-20 zone district, the Zoning Regulations specifically provide that if the property is not served by municipal sewers even though it is in an R-20 district it has a minimum lot area of forty thousand square feet. This property is not served by sewers and the minimum bulk requirement for this property based upon the explicit language of the regulations is a forty thousand square foot lot area. The lot does not conform to zoning in that it does not meet the frontage requirements in the R-20 zoning district which the regulations require one hundred feet of frontage on a town road. This property is not located on a town road; Bergman Drive is a private drive that was created before the adoption of subdivision or zoning regulations in the Town of Montville. This is a situation that would not exist today because the Zoning Regulations do not authorize private roads, and it creates issues in compliance with the comprehensive plan and compliance with the health, safety and welfare of the municipality that do not exist on public roads. This is the reason the zoning regulations require a frontage requirement on a public road, to alleviate public health and safety issues that can arise with respect to the width of the driveway and the grade of the road. This application is asking for a variance

that will allow the applicant to apply to the Planning & Zoning Commission for a two family dwelling house on this property. The traffic burden will double on the private road and it is not in compliance with the zoning authority in town and its legislative capacity enacted for specific reasons. If a lot is to be improved to a single family residence in any area that does not have municipal sewers it should have a minimum of forty thousand square feet. The lot is currently non-conforming in this regard; it is a single family residence with a twenty five thousand seven hundred square foot area. The variance request is to double the degree of non conformity by allowing two residences on the property that does not comply with the requirement for a single family residence. The hardship does not exist at all, because the applicant was constructed in 1956 and the property is currently utilized as a validly existing non-conforming single family residence. The property owner has full and complete use of the property for a use authorized by right in the zoning district. There is nothing in the law that allows for or authorizes or entitles a property owner to the ultimate or maximum use of the property, the property owner is entitled to the use of the property that is governed by the regulation and in this case, currently as things exist today, the property owner has the use which complies with the use requirements for the R-20 zone district. The hardship must be something that is unique to the property in question and does not exist generally throughout the district. He introduced into evidence as **Exhibit A**, an excerpt from the geographic information system maintained by the Southeastern Connecticut Council of Governments which has the applicant's property highlighted. The purpose of the exhibit is to demonstrate that in the Maple Avenue/Roselund Hill Road/Bergman Drive area, there is nothing unique about the applicants property, there are many lots in this area which are under forty thousand square feet in size. This property does not pass the uniqueness test. A person is not entitled to a variance with a hardship claim if it is not different from the generally affected properties in the same zoning district and it is not unique, this quote comes from Chapman vs. Zoning Board of Appeals of Old Lyme, 23 Connecticut Appellate 441 and he introduced this case into the record as **Exhibit B** with the applicable language highlighted. This is not a case where the application of the zoning regulations for a particular piece of property is so harsh in its applications that it amounts to a practical confiscation or taken of the property. This property is currently improved and its utilized for a single family residence, a use permitted by right and the applicant is seeking relief from the Board in order to then apply to the Planning & Zoning Commission for a special permit to double the impact of the use and it is not permitted by right, but a use permitted only by special permit. This hardship is self created, and the Board can not grant a variance for this reason. He stated the application does not satisfy either the hardship test or compliance with the comprehensive plan and the Board does not have the authority to grant the variance. The applicant is currently making use of the property for a use that is allowed by right in the district and that is what he is entitled to under the zoning regulations. Once the variance is granted the applicant then has the authority to obtain a special permit from the Planning & Zoning Commission for a use which he is not entitled to at law. The zoning regulations make no distinction for guest houses in the R-20 zone district. Two family dwellings are allowed by special permit and once the variance is granted the Board authorizes the utilization of this property for a two family on a full time basis, with all of the resulting impacts from that use on a lot that

does not comply with the bulk requirements for a single family residence. There is a request for a waiver of the site plan requirement. The survey that has been submitted with this survey does not meet the site plan requirements of the regulations. He cautioned the Board in granting any waiver, there are particular reasons why the Planning & Zoning Commission in enacting zoning regulations in town require certain components to be included in a site plan in order to demonstrate compliance with the regulations. The survey submitted with this application does not demonstrate the location of any parking spaces. Language of section 19.3.1 of the zoning regulations sets forth the parking requirements for one and two family dwellings, it requires two spaces for each family unit, which means this dwelling will require four spaces for a two family home. Driveways may be included as a required space in a single family dwelling, but does not make that provision for a two family dwelling. In order to comply with the parking requirements of the regulations the site plan must demonstrate an ability to accommodate four parking spaces on the property without the use of the driveway. This plan has no topography, no delineation of wetlands, shows no parking spaces, there is no way for the Board to make a determination as to whether or not this property does or can comply regulations and without this information the Board does not have the ability to make a determination as to whether or not the legal requirements for the comprehensive plan has been satisfied. He stated the application does not meet the legal requirements and the waiver should not be granted and the variance application should be denied.

Chairman MacNeil asked Attorney Heller if the lot is a non-conforming lot and he answered the lot is a validly existing non conforming lot for a single family residence. Chairman MacNeil and the Board Members asked Attorney Heller questions regarding the application and his testimony regarding the applications. Attorney Heller answered all of the questions asked by the Board.

Chairman MacNeil inquired three times if there was anyone who would like to speak in opposition of this application.

Chairman MacNeil inquired if there was anyone who would like to speak in favor of the application or address any issues that have been raised or make any general comments.

Attorney Camassar, for the applicant, stated the proposal will not functionally change the use of the property at all. If this application was approved the applicant would be amendable to a series of conditions for the use of the property. He stated the traffic is not an issue. The hardship under the regulation is there are no public water and no public sewer, if there was, there would be no need for a variance for the proposed use. If the variance is granted and the applicants go forward with a special permit application a new site plan will have to be submitted to the Planning & Zoning Commission. The present garage is large enough to house two vehicles and the driveway to the house is forty feet in length with enough room to accommodate the vehicles that would be anticipated in a two family use if that came to be. The law is clear and the hardship requirements are clear and hardship determinations have been made in the past due to lack of public utilities.

Commissioner Longton inquired if it were not for the inclusion of the kitchen the applicant would not require a variance, and Attorney Camassar stated this is correct, but if the property had utilities the applicant would meet the bulk requirements and would not require a variance. Commissioner Longton stated the hardship is a direct result of an action taken by the homeowner and is therefore a self-imposed hardship. Attorney Camassar stated this is correct.

Chairman MacNeil made a motion to close the Public Hearing for application ZBA-2011-001. Commissioner Adams seconded the motion, discussion, none, voice vote, 5-0, all in favor, motion carried.

#### 5. Old Business

Motion made by Chairman MacNeil, seconded by Commissioner Adams to open discussion for application ZBA 2011-001 Gerhard C. Leitkowski, Jr.; a request for a variance of Section 9.4 minimum lot size in an R-20 zone not served by public sewer to allow for a two family home on the property located at 36 Bergman Drive, Montville, Connecticut as shown of Assessor's Map 17, Lot 24. Discussion, the Commission members discussed the validity of the application request, the hardships discussed, and the requirements needed and conditions considered for granting the variance. The applicant has stated the hardship is self created and the Board discussed this in length and stated they do not have a choice but to deny the application.

Motion made by Chairman MacNeil, seconded by Commissioner Adams to deny the application # ZBA 2011-001 Gerhard C. Leitkowski, Jr.; a request for a variance of Section 9.4 minimum lot size in an R-20 zone not served by public sewer to allow for a two family home on the property located at 36 Bergman Drive, Montville, Connecticut as shown of Assessor's Map 17, Lot 24. The unique conditions and circumstances associated with the request are the result of actions taken subsequent to the adoption of the zoning regulations.

Roll call vote, 5-0, voting in favor of denying the application request were Commissioners Adams, Bassetti, Lakowsky, Jurczyk, and MacNeil. Motion carried, application denied.

6. Motion made by Chairman MacNeil, seconded by Commissioner Adams, to accept the meeting minutes of the December 1, 2010 regular meeting as submitted. Discussion, none, voice vote, 5-0, all in favor, motion carried. Meeting minutes approved.

#### 7. Communications

The only communication submitted to the Board was the appointment of Ms. Mari Jurczyk to the Zoning Board of Appeals.

8. Other business and applications to come before the Zoning Board of Appeals – none.

9. Adjournment

Motion made by Chairman MacNeil, seconded by Commissioner Adams to adjourn the meeting at 8:40 p.m. Discussion, none, voice vote, 5-0, all in favor, motion carried. Meeting adjourned.

Respectfully Submitted by:

Audrey Ulmer, Recording Secretary for the Town of Montville.