

Town of Montville Zoning Board of Appeals
Special Meeting Minutes for Wednesday, December 11, 2013
7:00 p.m. – Town Council Chambers – Town Hall

1. Call to Order

Chairman MacNeil opened the Special Meeting of the Zoning Board of Appeals at 7:05 p.m.

2. Roll Call

Present were Board Members Adams, Aquitante, alternate Freeman, Lakowsky, MacNeil. Board Member/alternate Wittkofske was absent. Also present were Town Attorney Michael Carey and Assistant Town Planner/Zoning Enforcement Officer Tom Sanders.

3. New Business

a. Election of Officers

Motion made by Board Member MacNeil, seconded by Board Member Aquitante, to keep the same slate as the previous year. Discussion: Board Member Lakowsky commented that she was very satisfied with the slate. Voice vote, 5-0, all in favor. Motion carried.

Chairman MacNeil welcomed new Board Member Joe Aquitante to the Zoning Board of Appeals.

4. Public Hearings:

- a. **Paul E. Chase 213-ZBA-2:** An application for an appeal of the decision of the Zoning Enforcement Officer for the issuance of a Zoning Permit to Green Falls Associates, LLC for a three-bedroom home on the property located at 310 Cherry Lane, (Oakdale) Montville, CT. As shown on Assessor's Map 53 Lot 3.

Chairman MacNeil opened the Public Hearing. He stated that, because the issue concerns the action of the Zoning Enforcement Officer, Mr. Sanders will not be participating in the meeting and Town Counsel Mike Carey will be assisting the Board.

Assistant Town Planner/Zoning Enforcement Officer Sanders distributed a packet containing the applications for the property in question.

Town Attorney Carey had no comments or questions at this time regarding the application.

Atty. Jon Chase introduced his client, Appellant Paul Chase, welcomed Mr. Aquitante to the Board, and clarified the matter regarding Chairman MacNeil's previous recusal from the case. Chairman MacNeil stated that he no longer has a personal financial interest in the property and, while he is not planning to recuse himself, offered to do so should Atty. Chase view his involvement as a conflict of interest. Atty. Chase was satisfied and agreeable to proceeding with the case at hand without the recusal of Chairman MacNeil.

Atty. Chase established that the Appellant has met the burden of aggrievement regarding the property in question by asking the Appellant to verify the submitted uncertified copies of the Deed, the location of the property, and an Affidavit. He also produced a copy of the Town's Vision assessment card for the property in question.

The issue of the timeliness of the appeal from the date of issuance of the zoning permit was addressed by Atty. Chase. While many permits or approvals require the publication of a Notice of Issuance, this particular permit is not required to do so. In accordance to the State Statute, an individual has 30 (thirty) days to appeal any decision, order, or action of the Zoning Enforcement Officer from the date of the Notice of Issuance. He cited the case of Cockerham vs. Town of Montville Zoning Board of Appeals in which Judge Purtill established a law regarding what, specifically, would constitute the Notice of Issuance when a public or personal notice has not been issued. He determined that an event(s) that could have a variety of meanings, e.g., clearance of property, surveyor's stakes, would not constitute a Notice of Issuance. As outlined on Mr. Chase's affidavit, his application of appeal was submitted when he witnessed the clearing of the property, prior to any Notice of Issuance as outlined by Judge Purtill and well within the 30-day timeframe. He also sent a certified letter notifying the Green Falls Associates, LLC, Manager Peter Gardner of the appeal. Nevertheless, activity on the property continued, resulting in the eventual construction of the home.

Atty. Chase provided an outline of the court decisions regarding the use of the property in which the variance application by Green Falls Associates, LLC, was denied by the Zoning Board of Appeals, a decision which was subsequently upheld by both the New London Superior Court and Appellate Court. Prior to the final decision by the Appellate Court, the Planning & Zoning Commission held a Special Meeting on November 29, 2011. One of the items on the agenda concerned revisions to Section 4.13.6 of the Town's Zoning Regulations regarding lot widths. A discussion ensued about the handling of pre-existing non-conforming lots, which have very little frontage, but plenty of area ensued between Town Planner Marcia Vlaun, Atty. Harry Heller, and the Commission. The revision, which was unanimously passed by the Commission, affected this particular property and became effective December 15, 2011, reads as follows: "4.13.6 Delete the word Frontage and Add the words Lot Width, Revise lot width and Add new lot widths 76 to 85 ft. and 86 to 95 ft."

The Commission took a short break at 8:13 p.m., and the meeting resumed at 8:20 p.m.

Atty. Chase questioned the use, definition, and interpretation of the word "or" as used in Regulation 4.13.6 which states that non-conforming lots with "a total area less than the minimum required in the district *or* a lot width which is less than the minimum lot frontage required in the district may be used for the single family detached residences provided such lots shall conform to use regulations and all other applicable setback requirements of the district or the Table . . ." Atty. Chase stipulated that the property in question is a non-conforming lot, having less than the required area and frontage and, as such, the regulation has

been applied to this property. He continued to discuss the interpretation of the word “or”, citing Supreme Court Case decisions regarding the proper interpretation of legislative language and determined that the legislative intent of the word “or” in this case is defined as meaning “or”, not “and”, or “and/or”. As such, the properties discussed in the regulation apply to lots with either characteristic, not both.

He further noted that the applicant, Green Falls Associates, LLC, with the representation of Atty. Heller, applied for the zoning permit with full knowledge and awareness of the zoning rules and regulations. He noted Atty. Heller’s statement during the November Planning & Zoning Commission Special Meeting that the revision to Regulation 4.13.6 was necessary in order to allow the development of non-conforming lots. He reiterated the decision by the New London Superior Court and the Appellate Court to uphold the decision by the Zoning Board of Appeals to deny the variance application by Green Falls Associates, LLC, for the property. He reminded the Commission that the issue at hand is an appeal of the Zoning Permit issued by the Zoning Enforcement Officer, who, he noted, has also been legally represented by Atty. Heller in a variety of other legal matters. While he is not suggesting that Atty. Heller recuse himself from the case nor suggesting that anything improper is occurring, Atty. Chase felt that an underlying reason may deem his continued involvement in the case as biased.

Referring to Zoning Regulation, Section 4.5, which states that all zoning permits for site plans not included in Section 18 of the Zoning Regulations “shall expire one (1) year after the date of approval if all permitted work has not been completed”, Atty. Chase noted that the Zoning Permit was issued on February 6, 2012 and the clearing of the property, i.e., notification of the issuance of a zoning permit, was witnessed by the appellant in August 2013, well past the expiration date of the permit. He contrasted the situation with that of the Cockerham case in which construction began, but was not completed, within the one-year period. The Regulation does not mention any policies relating to the renewal or extension of a permit nor is there any adequate evidence that a renewal or extension of this permit was issued. As such, he felt that the matter should be referred to the Zoning Enforcement Officer for further action.

The Commission took a short break at 9:02 p.m., and the meeting resumed at 9:07 p.m.

A short discussion ensued regarding the remaining length and possible continuation of the meeting due to Board Member Aquitante’s possible need for departure to tend to his daughter’s needs who was in attendance. It was decided that the meeting will continue and, should Board Member Aquitante need to depart, he will listen to the audio recording of the remainder of the meeting, the hearing will be kept open, and a decision will be made at the next meeting.

Chairman MacNeil asked if there was anyone present who would like to speak in favor of the appeal.

Assistant Planner/Zoning Enforcement Officer Mr. Sanders submitted the Zoning Permit package as issued for the property.

Addressing Atty. Chase's arguments, Atty. Harry Heller, 736 Route 32, Uncasville, representing the property owner Green Falls Associates, LLC, argued that the appeal, as filed, is fatally deficient because it does not indicate the reason for the appeal making it difficult for the Zoning Enforcement Officer, property owner, or public to intelligently prepare a presentation for this hearing. He also noted that, while notices of the hearing sent to Paul and Johann Chase and Helge Butler were introduced into the record, notice was not provided to the property owner of the same as required by due process. Lastly, Atty. Heller felt that the Board lacked the subject matter jurisdiction to hear this appeal. In relation to Atty. Chase's argument regarding the issue of timeliness, the proceedings of the Cockerham case, and the publication of notice, he stated that CT Jurisprudence makes a distinction between constructive notice, which is subject matter jurisdictional, and actual notice, which is not. Referring to Section 8-3, Sub-section (f) regarding the issuance, notification, and appeal of a permit and Section 8-7 regarding the filing period and specification of the grounds for appeal, Atty. Heller stated that, in accordance to the Statutes, a Notice of Issuance of the Zoning Permit was published on March 8, 2012 in *The Montville Times*, a weekly publication with a substantial circulation, as well as in *The Day* newspaper on March 2, 2012 for the Zoning Permit, which was issued on February 6, 2012. As such, the appeal period had expired well before the appeal was made in August 2013 and the Board does not have the subject matter jurisdiction to entertain the appeal.

Atty. Heller addressed the issue of the language of Section 4.13.6 of the Zoning Regulations. While the regulation was amended, it remains, substantially, in its same form. Two (2) changes were made in the amendment: (1) the concept of lot width rather than lot frontage as a determining factor for relief from the side yard setback requirements and (2) the addition of two (2) categories in the table specifying lot width instead of lot frontage and the correlating minimum side yard width requirement. The language cited by Atty. Chase regarding the use of the word "or" was not changed and was in the original regulation dating back to 1986 and, possibly, 1970, when the Zoning Regulations were originally adopted in the Town of Montville. The language has been consistently interpreted and the Planning & Zoning Commission and the Zoning Enforcement Officer have issued a countless number of permits based on the regulation.

Referring to the Zoning Permit, Atty. Heller called attention to the Construction Permit Approval indicating the signature of Zoning Enforcement Officer and dated January 10, 2013. And, although this is outside the scope of the appeal, he noted that the Permit had been renewed as are many other permits for single-family residence within the Town of Montville that have not been completed within the one-year period.

Chairman MacNeil asked if there was anyone present who would like to speak regarding the appeal.

Atty. Chase addressed the issues introduced by Atty. Heller. He questioned the validity of the so-called permit renewal and felt that the interpretation of the simple stapling of a signed and dated form to the permit to constitute a renewal was fallacious. He reiterated that there are no regulations regarding the renewal process of a Zoning Permit and noted that, in the Cockerham case, the Zoning Enforcement Officer issued a new permit when the previous permit had expired. Regarding the language of Section 4.13.6, Atty. Chase stated that he did not claim that the language had been revised, but that the amendment extended the provisions of that language to include two additional zones and did so without any clarification as to the legislative intent of the term. Regarding the fatal deficiency of the completed appeal application form, he pointed out that the reason for appeal has been clearly checked on the form in the area provided and that the form does not indicate the need for any additional explanation. In addition, he does not concede that there exists a subject matter jurisdictional defect as the period of the appeal would apply only to the permit as issued in February 2012. Atty. Chase was not aware of the publication of the Notice of Issuance as submitted by Atty. Heller. Nevertheless, he finds the argument that the publication of the notice provided adequate notice flawed since the February 2012 permit had already expired under the terms of the Regulations. Furthermore, he finds that what Atty. Heller claims to be an indication of renewal to be questionable as there is nothing on the document indicating that the permit has been renewed. And, because he was not previously aware of this document's existence, Atty. Chase requested clarification. As discussion regarding the document ensued, Chairman MacNeil questioned whom to go to regarding the validity of the renewal. Atty. Chase provided some guidance noting that, in the Cockerham proceedings, a signed and dated note was added to the bottom of the original form, below the expiration date, clearly indicating that Zoning Enforcement Officer renewed the application. Chairman MacNeil noted the location of the signature and date under the section that reads "Permit Issuance Approval" and would deduce that the intent of the form/signature is the re-issuance of the permit. Board Member Adams also added that the required parties have signed off on the form prior to the issuance of the initial permit and that they are not required to do so for the second and/or renewed permit and that, should overdue taxes or some other impediment have arisen during the interim, the Zoning Enforcement Officer would determine the next step. Atty. Carey clarified that, because the appeal is in reference to Permit 212-006 issued February 2011, this issue may not be relevant to the case at hand.

Atty. Chase requested the hearing be kept open so that he may submit a certified copy of the deed should that be an impediment to their finding aggrievement. In an effort to keep the record clean, it was agreed to keep the hearing open for the submission/receipt of the certified copy of the Deed. In addition, Atty. Carey will be providing some assistance in the drafting of the motion. The next ZBA meeting will be held on January 8, 2014, within the required 35-day timeline for the completion of the hearing.

Chairman MacNeil asked if there was anyone present who would like to speak regarding the appeal.

Motion made by Board Member MacNeil, seconded by Board Member Freeman, to continue 213-ZBZ-2 until January 8, 2004, 7:00 p.m. Discussion: None. Voice vote, 5-0, all in favor. Motion carried.

5. Old Business — none.

6. Minutes

- a. Acceptance of the minutes from the Regular meeting of June 5, 2013.

Motion made by Board Member MacNeil, seconded by Board Member Freeman. Discussion: None. Voice vote, 5-0, all in favor. Motion carried.

7. Communications — none.

8. Other Business and Applications to come before the Zoning Board of Appeals:

- a. Approval of 2014 Meeting Calendar

Motion made by Board Member MacNeil, seconded by Board Member Adams. Discussion: None. Voice vote, 5-0, all in favor. Motion carried.

9. Adjournment

Motion made by Board Member Freeman, seconded by Board Member Aquitante, to adjourn the meeting at 10:02 p.m. Discussion: None. Voice vote, 5-0, all in favor. Meeting adjourned.

Respectfully Submitted by:

Agnes Miyuki, Recording Secretary for the Town of Montville

AN AUDIO RECORD OF THE MEETING IS ON FILE IN THE MONTVILLE TOWN CLERK'S OFFICE