Town of Montville Zoning Board of Appeals
Regular Meeting Minutes for Wednesday, January 8, 2014
7:00 p.m. – Town Council Chambers – Town Hall

1. **Call to Order**
Chairman MacNeil called the Special Meeting of the Zoning Board of Appeals meeting to order at 7:03 p.m.

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

3. **New Business**
   a. **Joseph M. Wyspianski:** A request for a 10' rear yard setback variance of Section 10-A.6.3. for the construction of a garage addition on the property at 894-904 Norwich-New London Turnpike (Route 32), Montville, CT As shown on Assessor's Map 83 Lots 6-000 and 7-000.

      Motion made to set Public Hearing for Wednesday, February 5, 2014, 7:00 p.m. Discussion: Board Member Adams stated that he will not be present for the February meeting. Voice vote, 5-0, all in favor. Motion carried.

   b. **Joseph M. Wyspianski:** An application for An amendment to a Certificate of Location Approval for a Used Cars Dealer's and Repairer's Facility to be located on the property at 894-904 Norwich-New London Turnpike (Route 32), Montville, CT As shown on Assessor's Map 83 Lots 6-000 and 7-000.

      Motion made to set Public Hearing for Wednesday, February 5, 2014, 7:00 p.m. Discussion: None. Voice vote, 5-0, all in favor. Motion carried.

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 stating that this is a continuation of the previous month's Hearing which was left open for the submission of a drawing by the applicant and the presentation of any additional information pertinent to the appeal.

      Atty. Jon Chase, representing Appellant Paul Chase, submitted a certified copy of the Deed and asked that it be substituted for the previously submitted non-certified copy. He addressed the issues raised by Atty. Heller at the previous meeting beginning with his contention that the appeal is "fatally flawed" due to the lack of subject matter jurisdiction due to the fact that the

reason for the appeal is not stated on the form. While he previously countered that the reason is clearly checked off on the form, Atty. Chase filed an amended appeal today with the Planning Department expanding upon the reason as stated on the original form. The amended appeal was promptly faxed to Atty. Heller. Should there be any concern regarding this practice, which is not customary of any other ZBA, he introduced the 2004 decision of Michelle Bolles Vitale v. Zoning Board of Appeals, Town of Montville in which considerable discussion took place regarding the submission of an amended appeal.

Referring to the previously submitted copy of the mailed notice to the property owner, Green Falls Associates, LLC, which was sent via certified mail to their respective addresses, he corrected Atty. Heller's allegation that the property owner was not notified of the appeal. He argued that, as stated in Section 8-7 of the CT General Statutes, it is the responsibility of the Commission/Board, the ZBA in this case, to provide notice to the property owner of the abutting or adjacent properties. To this end, he referenced an e-mail sent to Judy La Rose of the Planning Department by the Town Attorney who advised her to direct a letter to the property owner regarding the public hearing notice. He also introduced the cases of Bencivenga v. Zoning Board of Appeals, City of Milford and Kobyluck v. Town of Montville in which the ZBA had also neglected to provide a public hearing notice to the affected property owner(s) leading to their failure to appear and voiding the process. In contrast, in the Superior Court case of Smith v. Zoning Board of Appeals, City of Ansonia, the opposite situation took place in that, though the affected property owner, while not notified, appeared before the court with his Attorney thus waiving the issue regarding the failure to provide the required notice.

He reviewed the issue regarding the use, definition, and interpretation of the word "or" as used in the context of the regulation and found that there is no clear indication of the intent of the drafters or legislative body that the word means anything other than "or" or its disjunctive conjunctive context, by the standard required by the Supreme Court. Atty. Heller raised the point that the members of the Commission were simply doing what their predecessors had enacted in the other districts within the Town. In reviewing all of the meeting minutes from 1969 to 1970 of the Planning & Zoning Commission who made the regulation, he discovered that the proposed zoning regulations were not discussed. Nevertheless, a public hearing was scheduled for September 1970 to discuss the proposed regulations which were subsequently enacted, effective October 14, 1970. In comparing the revised regulations with those of July 1970, he noted that the page in question remained unchanged. In reviewing the public hearing minutes, he discovered that, while the public expressed vague concerns regarding the protection of small or non-conforming lots, no specific reference to those lots with insufficient area was made nor the proper way of interpreting the definition of the word as enacted, as dictated by the Superior Court, was made.

Atty. Chase also argued that the publication of notice, which caught him by surprise at the previous hearing, is only partially compliant. Section 8-7 of the General Statutes was amended in 2003 under Public Act 03-144 following the Monroe decision and states that, "Such appeal period shall commence for an aggrieved person at the earliest of the following: (1) Upon

receipt of the order, requirement or decision from which such person may appeal, (2) upon the publication of a notice in accordance with subsection (f) of section 8-3, or (3) upon actual or constructive notice of such order, requirement or decision." Atty. Chase argued that, in reference to item (1), the appellant did not receive a copy of the "order requirement or decision" and contended that, with regards to item (3), this appeal is being introduced based upon the fact that the Appellant appealed the permit within the 30 days of notice in the form of his witnessing a hole being dug in the ground. An action consistent with Judge Purtill's findings in the Cockerham case in which an individual is informed that a zoning permit by actual notice. In the case of item (2), which must be read with Section 8-3, subsection (f) and was also amended at that time, reads, "Such official shall inform the applicant for any such certification that such applicant may provide notice of such certification by either (1) publication in a newspaper having substantial circulation in such municipality stating that the certification has been issued, or (2) any other method provided for by local ordinance. . . ." While the required notice of publication was clearly provided in accordance to the Statute and local ordinance by the property owner, he noted that, according to the language, the ". . . official", in this case the Zoning Enforcement Officer (ZEO), " shall inform the applicant . . .", which presumably did not happen in this case nor is there any written evidence that the ZEO provided the applicant with the authority to issue a notice. The reason for such a decision may be to prevent the random publication of notices as well as to ensure that the ZEO is aware of the issuance. In his research, he has not been able to find any decisional law providing a contrary interpretation to that language.

Furthermore, the publication of notice is also a mute point and leads back to the filing of the amended appeal, which now specifically addresses the issuance of the permit by Mr. Sanders on February 6, 2012. He referred to the Building Department sign-off sheet, which must be approved by the various relevant departments prior to obtaining a zoning permit. The form, which is incomplete, is signed and dated by ZEO Sanders' and has been recognized as a permit renewal. In delving into the matter further, Atty. Chase met with the Building Inspector who confirmed that the form had been completed and provided him with a certified copy of the document. The form was signed on January 10, 2013 noting the permit number as #212-006-2612, the final four numbers indicating the date of the original permit. The regulations expressly state that all permits expire with one year of issuance and, clearly, based on the evidence of the affidavit and other materials, the work was not completed within that time frame. In ensuring that there were no other documents or materials, he requested Mr. Sanders to review his files. In reviewing his files, he sent Atty. Chase a copy of the check and receipt for the renewal of the zoning permit for the amount of $10.00, dated December 16, 2013 and noted in the memo, "renewal from 2/6/13 to 2/6/14". As such, the payment for the renewal was provided and accepted ten (10) months following the actual renewal. While the Town of Montville Planning Department's Schedule of Fees does not state any provision for renewals, it does state that "Fees shall be paid at the time of application submission. . . . Failure to comply with this subsection shall be grounds for denial of any application or revocation of any permit

previously issued." The Department's receipt of the retroactive payment in this case clearly shows the property owner's failure to comply with the provision. In contrast to the 2009 Cockerham appeal in which the work was substantially completed within the year of issuance and the permit was then renewed in a manner customarily practiced by the ZEO, construction on this particular property had not begun until the year expired.

Finally, he introduced the ultimate concern of the applicant over which, admittedly, this Commission has very little jurisdiction. This pre-existing non-conforming lot of approximately 0.11 acres is located on the edge of a four-acre water resource protection zone and is separated by an intervening strip of land measuring approximately 20 feet in width from the City of Norwich's Stony Brook Reservoir. The main goal of this appeal and the appellant's long-term goal is to ensure the protection and preservation of the aquifer or water resource which is located adjacent to the property of the appellant and may, perhaps, become part of that watershed property in the future. The Town of Montville, being a growing community will need to seek additional water sources in the future making the protection of the area more valuable. A letter written by Mrs. Butler asks that you take into consideration the opinion of DiCesare-Bentley Engineers Inc. who provided their concerns and recommendations in 2007 when a different variance was presented to the Board. While the recommendations were made in 2007, the scientific recommendations remain the same. To this end, he also submitted a Verified Pleading for Intervention in Proceedings Pursuant to Connecticut General Statutes §229-19 providing a limited jurisdiction of this Commission over environmental matters signed by Johann Chase. Atty. Carey noted that the acceptance of Appellant's submission of the Verified Pleading for Intervention and the Amended Appeal does not indicate that the Board has jurisdiction over the matter, rather that these and other materials will be reviewed and recommendations will be provided to the Board.

The Commission took a short break at 8:05 p.m. The meeting resumed at 8:10 p.m.

Atty. Harry Heller, representing Green Falls Associates, LLC, introduced his sworn affidavit with copies of a draft of Section 5.21 of the Zoning Regulations which went to a sixth and final public hearing on September 16, 1970 and the Ordinance as adopted in October, 1970. In the final draft, the word "of" is corrected to incorporate the word "or". He reviewed the history of the revisions stating that, in 1970, Section 5.21, entitled "Small Lots for Single-family Detached Residences" was revised. This section proved to be an issue with the townspeople and, after 6 (six) public hearings, was finally adopted by the Planning & Zoning Commission in October 1970. In 1990, comprehensive revisions to the regulations were made to the Zoning Ordinance. While these revisions included the incorporation of the regulations in Sections 4.13.5 and 4.13.6 into the General Non-conforming Lots, Uses, and Structures, the language in question, "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 the single family detached residences . . ." has remained the same. Atty. Chase cited two court cases, one in which Section 20-324E was cited. Sub-section (a) of Section 20-324E states that "The commission shall have the right to enter an appearance, intervene in ***or*** defend any such action and may

waive the required written notice for good cause shown." The disjunctive in this instance can be construed as meaning "and" and, as such, its construction clearly appears to have been the legislative intent. In the same manner, the legislative intent of the Planning & Zoning Commission of the word "or" must be determined in view of their deliberations and comments made during the public hearings. As evidenced in the title of the provision, "Non-conforming Lots, Uses, and Structures", the ordinance aims to provide protection and grant relief for small non-conforming lots and the legislative intent of the language has been consistently implemented and interpreted by various Zoning Enforcement Officers since the zoning regulations have been in place. To this end, Atty. Heller submitted a list of zoning permits which have been issued by four (4) different Zoning Enforcement Officers in the Town of Montville dealing with the types of lots in question over the 40 (forty) years since the ordinance has been enacted.

Regarding the issuance of the zoning permit renewal, Atty. Heller cited Judge Purtill's 2009 Cockerham decision regarding Montville's Regulations. In this case, the renewal also occurred after the expiration date of the zoning permit. Judge Purtill ruled that, as stated in Section 4.2 of the Zoning Regulations, the issuance of a zoning permit is treated under the regulations as a ministerial matter under which the ZEO is authorized to issue such permits provided the property owner has met the requirements of the regulations and paid the required fees. This procedure was followed when the permit was issued and at the time of the renewal; no changes were made between the initial issuance of the permit or its respective renewal. Similarly, in this case, a permit was issued based upon a plan submitted to the ZEO and nothing had changed between the initial issuance of the permit or its respective renewal, i.e., the zoning regulations remained the same and the proposed home was identical to that which was originally submitted. The Court continued that it would have been illogical and served no purpose to have required the submission of a new, identical application. While the regulation does not specifically state or include any language authorizing renewals, the ZEO has the authority, under Section 4.2.2, to take any necessary actions. This is evidenced by the notices which have been sent to various property owners over the past several years informing them of the pending expiration of their zoning permit and the option to renew at the Planning & Zoning office. This course of conduct was made by not only Mr. Sanders, but prior ZEOs, who have customarily renewed zoning permits in such a manner. Furthermore, the fact that, in the Cockerham case, work had commenced on the property while work had not commenced within the one-year time-frame of the permit in this case is immaterial. The critical factor is not whether work had commenced, but whether the proposal and the regulations for which the original permit was issued had changed.

Speaking in reference to the amended appeal, Atty. Heller posited that both the original and amended appeal is jurisdictionally deficient in that it is not in compliance with the requirements as stated in Section 8-7 of the General Statutes by not specifically stating the specific grounds for the appeal. In addition, the original appeal cannot be corrected by an amendment to the appeal. The Statute requires the appellant to state the grounds for appeal so

that the people may intelligently respond to the case, the Board can intelligently prepare for the evidence, and the people affected by the appeal can be prepared to substantively address the issues. Furthermore, the Board has no subject matter jurisdiction to entertain the appeal due to the fact that the appeal was not made within 30-days of the publication of notice in *The Montville Times*. While Atty. Chase argues that the publication notice was insufficient due to the allegation that it was not provided or authorized by the ZEO, Atty. Heller stated that the Statute places the obligation on the property owner or applicant to publish a notice of issuance of the zoning permit in order to cut-off the appeal rights. Whether the applicant was notified by the ZEO is not germane to the proceeding, rather, what is germane is the fact that the property owner published a notice of issuance of the zoning permit in a newspaper and is, therefore, in compliance with the Statute. After the 30-day period has passed, the public has no right to appeal and the Board has no subject matter jurisdiction to entertain the appeal and the renewal of the permit as issued by the ZEO did not alter any substantive rights. Furthermore, the renewal of a permit does not revive the procedural right to appeal. The publication of notice of a public hearing works in a similar fashion as a notice of a public hearing in which the Board is required, by law, to publish a notice of the public hearing, but is not required to publish a notice for subsequent or continued hearings regarding that same application.

Atty. Heller argued that the transcript of a public hearing held in 2011 regarding a proposed change to Section 4.13.6 of the Regulations is not germane to the substantive issue being raised in this proceeding because the language in question remained the same. As such, one must, again, take into account the intent of the Planning & Zoning Commission when Section 5.21 was adopted in 1970 and how that interpretation has been uniformly applied over the years without any complaints.

Atty. Heller addressed the submission of the intervention petition. He stated the necessity of the Board to determine whether the issue is within the subject matter jurisdiction of the Board since this is not a permitting proceeding, but an appeal of a decision made by the ZEO. In response to the location of the property relative to the Stony Brook Watershed and Reservoir, which is owned by the City of Norwich, Department of Public Utilities, Atty. Heller stated that the property in question, located near the end of Cherry Lane, while in very close proximity, is not abutting the watershed and reservoir. In addition, three (3) sides of the property are surrounded by an approximately 70 (seventy)-acre tract of land, which, by regulation, may be developed at a density of one unit per 160,000 (one hundred sixty thousand) square feet. With this in mind, the overall impact of this development, which is also located within the WRP-160 resources district, will also need to be considered. He confirmed the Board's receipt of the permit issued by the Uncas Health District stating that the lot is in compliance with the CT health code and a letter from Ian T. Cole, Registered Soil Scientist/Wetlands Scientist, Ledyard, to Peter C. Gardner, L.S., Dieter & Gardner, Inc., Gales Ferry, who examined soil conditions of the lot and ensured that there are no inland wetlands or watercourses on the property or within 75 (seventy-five) feet thereof. He also reviewed the site plans and believed that the existing field conditions were accurately represented and that the proposed

development of the site would not negatively alter nor diminish any off-site wetlands or watercourses. In this respect, Atty. Heller called Mr. Peter Gardner, a licensed land surveyor as well as a member of Green Falls Associates. Mr. Gardner discussed the procedures taken with the Uncas Health Department and his visual and topographical inspection of the location of the property in relation to the reservoir system. It was determined that the property met the health code and is not located in the watershed. In conclusion, Atty. Heller summarized that the development of the site for a single family residence is in full compliance with the CT Public Health Code and that, taking into consideration the soils and setting of the lot within a WRP-160 zone with the adjoining protected land, there is no evidence that the construction of this residence will have any adverse impact on the natural resources of the State. As such, the authorization of the zoning permit by the ZEO is not reasonably likely to unreasonably pollute, impair, or destroy the natural resources of the State of CT.

The Commission took a short break at 8:58 p.m.; the meeting resumed at 9:05 p.m.

While Atty. Chase understands that the Board may defer the intervention pleading and the environmental issues to Atty. Carey, he stated that the issue has neither been adequately addressed nor resolved. To this end, he requests that the Board review the relevant documents, including the Engineer's report and the intervention pleading. He also clarified that the statements he made regarding the wetlands and watercourses were not his testimony were made on behalf of his client. He argued that there is no question as to the relevance of the 2011 Planning & Zoning Commission's proceedings and the history of the issue leading to the current proceedings. He noted that the absence of any case law regarding his continuing contention that the appeal is fatally deficient due to the failure to state the grounds for appeal as well as of any case law addressing the argument regarding the lack of compliance with Section 8-7 in accordance to subsection (f) of Section 8-3 establishing the 30-day cut-off period by publication of notice by Atty. Heller to be very telling. He added that, in his own research, he, too, was unable to locate any examples of case law regarding either issue. He further argued that Atty. Heller's analogy of the fact that the law does not require the Board to publish a notice of subsequent or continued public hearings regarding the same application is not relevant to the argument that the purported renewal permit does not re-establish the procedural right to challenge the original permit.

Furthermore, the application form for appeals, which is quite specific and, in most cases, completed and signed by a layperson, presents an impossible situation. The appearance of both Atty. Heller and his client for the public hearings as well as the presentation of his very well prepared arguments contradicts his claim that their ability to intelligently prepare and respond to the case was diminished by the alleged lack of citing specific grounds of the appeal by the Appellant. Referring to the Bencivenga and Kobyluck cases, he commented that they would have been better off not attending the public hearings based upon the claim that they were not properly notified.

He further stated that there is no specific discussion regarding the language of regulation, i.e., the specific intention of the use of the word "or", in the minutes of the 1970 Public Hearing. He questions the limits of the regulation and how much more relief might be offered to owners of even smaller pre-existing lots. Chairman MacNeil noted that, while a lot may meet the initial bulk and setback requirements, the pre-requisite for the construction of any structure, residence, or dwelling unit is that it must also meet the health requirements for the installation of a septic/sewer system. While Atty. Chase agreed with Chairman MacNeil, he argued that the existence or non-existence of a septic permit by the Uncas Health District is not dispositive of whether the regulations have been satisfied. He also argued the fact that the 0.11 (eleven-hundredths) acre lot exists on a 160,000 (one hundred sixty-thousand) square foot water resource protection zone. In addition, he cited the decision upheld by the Appellate Court of the Board's denial of a variance request from the WRP-160 setback requirements because of the existence of valid alternative uses, uses that are still available, as evidenced by the materials presented, and would meet the zoning regulations. Atty. Chase questions whether the lot in question is entitled to the relaxed setback requirements as set forth in the regulation which leads to the need to determine the specific legislative intent of its language. The past practices, customs, and decisions of the previous and present ZEOs is not relevant to this case as errors may have been made. The subsequent interpretation of the language is also not relevant to the case. What is relevant is the meaning of the regulation in accordance with the Supreme Court's directive regarding its legislative intent.

He also disagreed with Atty. Heller's version of events regarding the 1970 public hearings and the proposed and adopted 1990 regulations. He further discussed the distinction between the Cockerham case and this case. Whereas in the Cockerham case, the property owner significantly relied upon the permit as evidenced by the near-completion of the home's construction prior to the expiration of the permit, in this case, work on the property had not commenced until after the permit had expired. The regulation clearly states that permits expire within one year of issuance unless all work has been completed. And, based upon the testimony of the ZEO and Judge Purtill's decision, the renewed permit was valid. Contrary to Atty. Heller's statement, in this case and, as evidenced by the Appellant's affidavit, the home was built with a permit that not only expired under the regulations, but was also not renewed under the regulations in accordance to what Judge Purtill verified constituted a valid renewal in the Town of Montville.

In response, Atty. Heller began by correcting Atty. Chase's reference to the property being only 0.11 (eleven-hundredths) acres. Based upon the plan submitted with the zoning permit application, the property measures 13,683 square feet or approximately 0.33 (thirty-three hundredths) acres. He concurred with Chairman MacNeil's response regarding the size controls for buildable lots as stated in Section 5.21, i.e., that the health offices must provide written certification as to the adequacy and safety of the sewage disposal system and water supply. In addition, a lot smaller than the lot in question will, most likely, not be able to meet the requirements of the public health code due to its size.

While he agrees in the abstract with Atty. Chase who indicated that whether the ZEO has been wrong in the past is not relevant to the determination of the legislative intent of the Planning & Zoning Commission, he noted that the Commission interacts with the ZEO twice monthly through the submission of a report by the ZEO. As such, the Commission has full knowledge of the actions that have been taken by the ZEO. Furthermore, as previously submitted, consistent actions have been taken by not only one (1) ZEO, but four (4) different ZEOs who have issued permits for single-family residences on non-conforming lots. Should their actions have been inconsistent with the Commission's legislative intent, the Commission would have either corrected the actions of the ZEO or revised the regulation. The fact that no action had been taken is indicative of the legislative intent of the Planning & Zoning Commission in 1970.

Motion made by Chairman MacNSeil, seconded by Adams, to close the Public Hearing for Application 213-ZBA-2. Voice vote, 5-0, all in favor. Motion carried.

5. **Old Business**

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.

Motion made by Chairman MacNeil, seconded by Board Member Adams, to deny the application of appeal and uphold the issuance of the zoning permit as made by the ZEO. Discussion: Chairman MacNeil began the discussion by proposing that a decision should be made regarding the issue of whether or not the applicant submitted the application for appeal in a timely manner, i.e. within the 30-days of the publication notice, prior to considering the arguments, discussions, and materials presented during the Public Hearing. Atty. Carey, while not suggesting that the application for appeal was untimely, felt that it should not be the only basis for a denial and recommended that further explorations be conducted regarding the issues which have been raised. He felt that it would be prudent for the Board to have him review the materials and create a draft of his findings that the Board may review prior to making a decision. These findings should be entered into the record in the event that the Board erred in their denial decision based upon the timeliness of the appeal application. Further discussion ensued regarding the relevance of the materials presented if the initial appeal application was not submitted in a timely manner.

Motion made by Chairman MacNeil, seconded by Board Member Aquitante, to continue the discussion at a tentatively scheduled Special Meeting on Wednesday, January 22, 2014, 7:00 p.m. Discussion: Chairman MacNeil stated that, though the public hearing is officially closed, the public is welcome to attend. Voice vote, 5-0, all in favor. Motion carried.

6. **Minutes**

a. Acceptance of the minutes from the Special Meeting of December 11, 2013.

Motion made by Board Member Freeman, seconded by Board Member Adams, to approve the minutes from the Special Meeting of December 11, 2013. 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 — none.

9. Adjournment

Motion made by Board Member MacNeil, seconded by Board Member Aquitante, to adjourn the meeting at 9:49 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