

**New Fairfield Zoning Board of Appeals
New Fairfield Connecticut 06812
REVISED MINUTES
Meeting
December 16, 2010**

The New Fairfield Zoning Board of Appeals held a public hearing followed by a business session at 7:00 pm on Thursday, December 16, 2010, in the New Fairfield Library Community Room. Secretary Laurie Busse took the minutes.

ZBA members in attendance: John Day, Chairman, Joe DePaul, Vice Chairman, Jack Michinko, Peter Hearty, and John Apple

ZBA members absent: Vinny Mancuso

Town Officials in attendance: Maria Horowitz, Certified Zoning Enforcement Officer (CZEO)

Chairman John Day called the meeting to order at 7:08 pm introduced the Board members and explained the meeting process and voting procedures. John Day gave the definition of a recusal.

Secretary Laurie Busse read the proposed agenda. John Day made a motion to add Membership Updates to the Agenda, duly 2nd, approved unanimously. Secretary Laurie Busse read the Call of the Meeting.

Continued Appeal # 23-10: Caperton Company LLC/Hugh Bilecky 50 Route 39, to appeal a Cease & Desist Order dated June 29, 2010, regarding storage of construction equipment and vehicles as well as violations of building permits, certificates of occupancy and zoning regulations.

Jack Michinko made a motion to bring Continued Appeal # 23-10 to the floor, duly 2nd, approved 5-0.

Attorney Cassagrande and Hugh Bilecky approached the Board. John Day gave a procedural summary of where things were at, noting the public hearing must be closed tonight, although the Board does not have to vote tonight.

For the last month Attorney Cassagrande has been working on a compromise with Maria Horowitz, noting this proposal was forwarded to Town Counsel, Jack Keating. It is Attorney Cassagrande's understanding that the issue is the unlawful expanded use of the property. According to Attorney Keating's reply, the entire use of the property is illegal as per the 1955 zoning regulations. Attorney Cassagrande went on record to state that this is the first he is hearing of this and he is not prepared to respond and had he known he would have done the proper research. Discussion focused on if the Board rules on the Cease and Desist (C&D) as an unlawful expansion of a nonconforming use does that preserve the right for the Town to issue another C&D based on the underlying use? Discussion followed. The 1955 zoning regulations concerning this part of Town were read into the meeting. The Board discussed the property does not meet the required setbacks for commercial purposes. Attorney Cassagrande noted the Town was

aware of the use of this property because in 1972 they issued a building permit for Stan Gardner to construct a garage to house the equipment in and the Certificate of Occupancy was issued in 1973. The garage permit was issued under the 1967 zoning regulations which state garages are for personal use and not for commercial use. Discussion focused on the wording of the Cease & Desist and if the Town was able to issue a separate C&D for the illegal use of the property. John Day stated he would like for Attorney Cassagrande to clarify if he wants the Board to decide on the legality of the underlying use or whether he rather the board restrict its consideration to the expansion of an existing use. Discussion followed and the question will have to be answered by the end of the public session. Attorney Cassagrande read a memo he wrote dated November 18, 2010 into the meeting which outlined the 2009 zoning regulations 7.2.2A and Connecticut State Statutes 8.2.

Attorney Cassagrande stated since the C&D was issued in June his client has put the barrels and diesel fuel into the garage and read a document entitled "Order in Appeal of Caperton Co. LLC # 23-10, Exhibit A" into the meeting. This document gives a list of current vehicles/equipment stored on the property and outlines up to 2 additional vehicles/equipment to be stored on the property for a total of 10 vehicles/equipment to be stored on the property before going through the Zoning Commission and plantings to buffer the view from the road, noting the plantings will be 25' high and will not loose their leaves. This is the compromise that he submitted to the town and he is asking the Board to consider voting on this proposal. Discussion followed.

John Day asked for any public comment—as follows:

Steve Merullo: Read 2 documents into the record which he submitted last month entitled "Memo in Opposition to Appeal # 23-10" and "Affidavit" dated November 18, 2010. These documents outline the prior zoning regulations of 1955 and 1967 and the many environmental issues the property possesses. Mr. Merullo stated that he spent a lot of time and money on traffic studies, engineer's plans and many other procedures to construct a business. It doesn't seem fair that they do not have to do the same thing, especially when you consider the length of some of the construction equipment. The combined length of a dump truck and a flat bed is 72' in length and it would be pulling out onto Route 39.

Bob Ludford, Erin Drive: Stated he has owned an excavating business in town since 1973 and has had multiple pieces of commercial equipment on his property such as backhoes, trailers, a dump truck and a septic pumper. He discussed the 1973 zoning regulations. Maria Horowitz commented that he had a misinterpretation of the 1973 zoning regulations and only the Zoning Commission has jurisdiction over the zoning regulations.

Bob Jano: Stated there are lots of properties with illegal uses all over town and that this property has been used for commercial purposes for 50 years and questioned why was this property issued a C&D.

Steve Merullo: Inland/Wetlands remediation was ordered about 3 years ago and was reviewed again after the sale of the property to Bilecky for grading without a permit.

There was discussion on the box truck which is being used as a 2nd storage building.

Maria Horowitz, CZEO stated the process that led up to the C&D being issued started quite some time ago, when town hall was still open on Saturdays. She noticed equipment in the back & side of the building and asked the Inland/Wetlands Officer to look at it at which point Stan Gardner, the prior owner, had gone before the Inland/Wetlands Commission. Maria Horowitz wanted to be clear that the events that led to her issuing the C&D happened before anyone was interested in purchasing the property at 52A Route 39 and discussed complaints raised by other people about this property that date back several years.

The C&D addresses all of the vehicles including the box truck on the property and not just the ones in the garage, noting the garage can be there, but only for storage of private vehicles or boats. The argument that has been made before is that there is a difference between a commercial vehicle and a commercial use. Storing a commercial vehicle there is not a commercial use as long as it is not used for commercial purposes. It is the Town's position that the use of the garage as it is presently made constitutes a violation of the permit for a private garage. Maria Horowitz discussed the 1967 zoning regulations. Discussion followed the 1967 zoning regulations state a private garage is for the use of motor vehicles and boats only, the garage cannot be used for a business for profit. The C&D addresses all the vehicles on the property, not just the garage. The Board discussed where the burden of proof lies. If it is an unlawful expansion of a permitted use, then the burden of proof lies within the Town. If the use itself is illegal in the first place then the burden of proof is on the appellant. There was a lengthy discussion on whether or not the Board should consider only the unlawful expansion or if the conduct was unlawful from the beginning in 1957. If the Board looks at it as an unlawful expansion of a nonconforming use there will still be the issue if the use is legal or not and the Town's right to pursue another C&D. Maria Horowitz suggested the Board look at this as an unlawful expansion of a nonconforming use but reserves her right to review the legality of the use. Attorney Cassagrande agreed with the CZEO since this is the first he is hearing of the illegal use of the property and he is not prepared to make arguments in that matter. Maria Horowitz asked if the Board would like to accept a memo from Town Counsel Jack Keating into the record. Attorney Cassagrande objected to this memo being submitted into the record as he has no idea of what it says and is not prepared to respond to it.

John Day made a motion to take a 5 minute break.

Back from the break Attorney Cassagrande stated he spoke with Maria Horowitz and if the Board votes on an unlawful expansion of a nonconforming use, Maria Horowitz will not issue another C&D for at least a year and within that year he will try to request the Zoning Commission to bring that area into the commercial use district. Additionally he would like not only for the Board to vote on the C&D but to modify it to include the "Order in Appeal of Caperton Co. LLC # 23-10". He also made several arguments as to why he would be appealing our decision if he lost the case. Discussion focused on procedural issues for voting and if the Board wanted to include the settlement offer made earlier in the evening. The Board can't vote both ways, but can vote on 2 issues. A lengthy discussion followed.

John Day asked for any further public comment—none heard.

John Apple made a motion to enter the Business Session duly 2nd, approved 5-0.

In the Business Session the Board discussed if they were prepared to vote tonight and did not want to drag the matter on any further than necessary. The Board discussed if they should vote on the unlawful expansion of a nonconforming use or if the underlying use itself is illegal.

For the illegal use the Board discussed they did not allow Jack Keating's memo to be submitted into the record and all of the documents refer to the unlawful expansion. They felt they did not have a well developed record on the original use but on the other hand the Board did not want the applicants to come back in a year with another C&D for an illegal use.

As far as the unlawful expansion the Board discussed the pros and cons of the proposal. All of the "Where As" must be removed. Some Board members were not comfortable with 10 pieces of equipment and all were in agreement that there should be plantings to hide the vehicles. Discussion focused on the box truck that has not moved in 10 years and is now considered a structure.

The ZBA discussed overturning the C&D based on a verbal agreement between the ZEO and Attorney Cassagrande that the ZEO would work over the next year with the Caperton Co. to remedy the existing condition. The ZEO verbally agreed that no other C&D would be taken against the Caperton Co. for at least one year.

John Day made a motion to overturn the C&D and to substitute the text of the C&D with the proposed stipulations from the "Order in Appeal of Caperton Co LLC # 23-10" as follows: 1- all "Where As" shall be removed and start with paragraph 1. 2- Paragraph 6 will be modified as follows on the 1st line after property the words "No Vehicle Shall Be Used As A Storage Building" will be inserted. Duly 2nd, approved 5-0. Discussion followed on the availability for the appellant to come back within a year for the C&D on an illegal use based on the 1957 zoning regulations.

The Board did not vote on the underlying illegal use of the property.

Minutes: Jack Michinko made a motion to accept the Minutes to the November 18, 2010 Meeting as presented duly 2nd, approved 5-0.

Application # 33-10: Anne Cleary, 9 Rocky Hill Road, for variances to zoning regulations for the purpose of legalizing an above ground pool.

Peter Hearty made a motion to bring Application # 33-10 to the floor, duly 2nd, approved 5-0.

Anne Cleary and Caren Silva approached the Board. Pictures taken from Google Earth were shown on Ms. Silva's laptop to show the pool was not visible from the road. The Board advised these pictures need to be put onto removable media and submitted to ZBA. Prior Application # 18-10 which was denied on June 14, 2010 was discussed. There have been no changes since then. Discussion followed. Joe DePaul stated he had visited the site and took pictures and noted that the pool is visible from the road as well as clearly visible from the shared driveway which serves 4 homes. Ms. Cleary stated she also owns the property at 11 Rocky Hill Road and the other 2 neighbors swim in the pool. She reminded the Board that those neighbors had written letters of support for the pool back in June of 2010. The above ground pool is 12' X 24' and the lot is long

and skinny, 82' wide by 290' long. It is not possible to put the pool behind the home due to the extensive ledge and slope. The applicants also noted that even if the house was in front of the pool, some of the neighbors would see the pool as they drove past it on the shared driveway and another set of neighbors would still see the pool from their front yard simply due to the location of their homes. The Board inquired on the pool meeting the side setbacks as setbacks were not advertised but there is the appearance the pool may not meet the side setbacks. Maria Horowitz stated that the home is in a 2 acre zone and since they have less than 2 acres they can drop down to 1 acre zoning and they meet the 1 acre zoning requirements, noting the rear of the property slopes up almost immediately behind the home and there is also quite a bit of ledge. Discussion followed on the Board's position of the location and visibility of the pool. John Day explained how to move forward with the application.

Joe DePaul made a motion to take a 5 minute break, duly 2nd, approved 5-0.

Back from the break the applicants stated they will screen the pool to the Board's satisfaction. Discussion followed the applicants will improve screening on the north, east, and south sides of the pool, noting that plantings won't start until the spring.

John Day asked for any further public comment—none heard

Peter Hearty made a motion to enter the Business Session, duly 2nd, approved 5-0.

In the Business Session the Board discussed the steep slope and ledge in the rear of the home as well as the Board's position on legalizing structures. The applicant is willing to extend screening around the pool.

John Day made a motion to grant the Variance subject to the construction already in place with the following conditions. There will be an extension and improvements of visual screening on the north, east, and south sides of the pool. The hardship is the irregular shape and slope of the lot duly 2nd, approved 4-1. Joe DePaul voted to deny this application.

Membership Update: John Day stated that he submitted his resignation early in the evening to 1st Selectman John Hodge and Town Counsel Jack Keating, noting the many years of serving on the Board was a great experience for him. John Hodge wanted to go on record stating that the way John Day ran the meetings was the standard for all Boards and Commissions noting the professionalism that John Day showed has won many court proceedings and that he will be missed. Discussion followed that Town Counsel will be available to the new chairman of the Board.

Discussion followed on officers. Peter Hearty made a motion to nominate Joe DePaul as the new chairman, duly 2nd, approved 4-0. Joe DePaul made a motion that John Apple be nominated as vice chairman, duly 2nd, approved 3-0-1, John Apple abstained. John Day had left the meeting prior to the voting of officers.

Joe DePaul made a motion to adjourn the meeting at 12:10 am, duly 2nd, approved 4-0.