

**New Fairfield Zoning Board of Appeals  
New Fairfield Connecticut 06812  
Special Meeting  
MINUTES  
June 17, 2009**

The New Fairfield Zoning Board of Appeals held a special public hearing followed by a business session at 7:00pm on Wednesday June 17, 2009 in the New Fairfield Free Public Library. Secretary Laurie Busse took the minutes.

ZBA members in attendance: John Day, Chair, Maureen Walker, Vice Chair, (7:16pm) John Apple, (7:15pm) Michelle Rhyce, and Bob Jano

ZBA members absent: Jack Michinko and Joe DePaul

Town Officials in attendance: Maria Horowitz, CZEO

Chair John Day called the meeting to order at 7:15pm introduced the Board members and explained the meeting process and voting procedures.

Secretary, Laurie Busse, read the Call of the Meeting.

**Continued Appeal # 12-09:** Thomas and Janet Gibbons, 5 Glen Way to appeal a Verification of Non-Compliance issued by the Zoning Enforcement Officer.

John Apple made a motion to bring Continued Appeal # 12-09 to the floor, duly 2nd, approved 5-0.

Tom and Janet Gibbons and Attorney Neil Marcus approached the Board. John Day read the April 16 Minutes noting that Attorney Smith had requested any information received from Town Counsel be made part of the public record so that he would be able to respond in the public session. Chairman Day stated he emailed both Attorney Marcus and Attorney Smith a letter from Town Counsel Jack Keating dated May 15, 2009.

Attorney Marcus agreed this is where they left off on April 16, and the following events happened since then. On May 29 Judge Shaban ruled on the Writ of Mandamus filed against Maria Horowitz, CZEO noting the Verification of Noncompliance is a denial of the issuance of a zoning permit. The next event was on June 2 when the Zoning Commission amended zoning regulation 2.4.3. Attorney Marcus feels this indicates that Doyen v. Norwalk does apply in this matter.

The applicants are exhausting their administrative remedies as required by the court. Chairman Day clarified the Board is voting on whether the denial of the zoning permit was proper or not, not whether to grant a variance. Neil Marcus agreed the denial of the zoning permit is what the Board should vote on. Discussion followed that if the Board is voting on whether or not a zoning permit should have been issued, the Board does not have the authority to modify the plans and whether the applicants would actually be subject to the plans as submitted to the Board.

Neil Marcus further suggested the Board was discriminating against his clients within the meaning of Section 1983, providing a cause of action against the Board and its individual members for violation of his clients' civil rights and for tortious interference with a property right. Attorney Marcus stated he feels this way because the Zoning Commission apparently received one legal interpretation from their attorney Gail McTaggart indicating Doyen does apply in this case, while the ZBA has received a different opinion from their attorney Jack Keating.

Janet Gibbons read and submitted a prepared statement into the record outlining the history of the matter including letters of support from her neighbors, and pictures of her ceiling to show where the roof is leaking.

Attorney Marcus discussed Attorney Keating's letter dated May 15, 2009. A thumb drive with the video of the Zoning Commission's June 2, 2009 public hearing was submitted into the record, but only for the limited purpose of substantiating the content of Mrs. Gibbons' statement. Attorney Marcus indicated the Board should continue the matter to the next regularly scheduled meeting. Discussion followed on time limits.

The Board discussed there is a prior application, hearing and grant of Variance #10-99 for a vertical expansion on this property which increased the height of the home by 6' 4". Zoning regulations 2.4.3a&b were read into the meeting. Attorney Marcus reiterated that due to the removal of overhangs and porches, certain setbacks will be made more conforming as follows: The height of the home has increased to 34.8'.

<b>Setback</b>	<b>Existing</b>	<b>Proposed</b>
Side Yard	19.3'	21.3'
Front Yard	23.7'	25.49'
Rear Yard	19.7	20.46'
Height Appeal # 12-09	26' 4"	34' 8 ½"
Height Application # 01-08	26' 4"	29' 11"

Attorney Marcus stated the Board does not have to act tonight and suggested the Board tell the Gibbons to go back to the variance application # 01-08 which the ZBA denied as that case is still pending before the Superior Court and we can instruct Town counsel to open up negotiations to see if that matter can be settled with a stipulation; which can be done with an 8-8N Hearing.

Discussion focused on Attorney Keating's letter of May 15, 2009 to the effect that the Board's long standing interpretation of the standards for vertical variances applied in this matter is correct. Attorney Marcus disagrees with this letter and again discussed the Board's exposure to a claim of tortious interference and discrimination against the Gibbons, asserting this could be a serious problem and will not be resolved unless the Board finds that Maria Horowitz's decision to deny a zoning permit was wrong. Discussion followed in which Maria Horowitz explained she denied the zoning permit not based on an assessment of the proposed plans, but because of the Town's consistent past practice which is that if a building project did not meet zoning regulations in effect at the time, the applicant would have to go to the ZBA to request a variance

John Day asked for any further public comment—as follows:

Donna Rondono, Bob and Jennifer Rondono of 8 Glenway and their attorney Richard Smith approached the Board.

Attorney Smith: Discussed Judge Shaban dismissing the Writ of Mandamus against Maria Horowitz because the Verification of Noncompliance is correct. Attorney Smith further asserted that Doyen v Norwalk does not apply in this case. The Branford zoning regulations are very similar to New Fairfield's and after the ruling on the Doyen case, Justice DuPont ruled in the appellate court case of Monroe v. Branford ZBA, that the zoning regulations required a Variance for a vertical expansion. The Branford zoning regulations were read into the meeting for the purposes of comparing them to New Fairfield's zoning regulations. Attorney Smith also discussed there is no direct evidence of any legal opinion by Attorney Gail McTaggart issued the Zoning Commission in the record, just a reference to one by the Zoning Commission Chair.

Bob Rondono, 8 Glenway: Discussed the Gibbons' original plan in February of 2008 proposed a building height of less than 30'. This new proposal is 34' 8 ½ ", which is an 8 ½' increase to the existing house. Pictures of the existing house were submitted showing where the proposed addition would be. Mr. Rondono further explained that although the Gibbons are changing the direction of their roofline from left to right to back to front, he didn't mention the dormers on the roof would stick out from left to right so really, the entire width of the house will be covered with a 2<sup>nd</sup> story and the proposal will block his view even more than the previous proposal because of the increased height.

The letters of support Mrs. Gibbons submitted should not be taken into consideration because the Fitzgeralds do not live on the same road and should not be considered neighbors. The Lynches are to the side of the Gibbons so the 2<sup>nd</sup> story addition will not affect them and the Piesco's are in the process of applying for variance.

Jennifer Rondono, 8 Glenway: Discussed they tried to speak to the Gibbons regarding this matter, but instead were invited to the public hearing. The proposed 2<sup>nd</sup> story addition will add a full attic with windows and a full size ceiling; this is not just repairing their roof as the applicants claim. She does not believe that there is anything precluding them from repairing a leaky roof. The use of the home has also changed. In 1996 this was a one story seasonal summer cottage. It is now a 2 story year round home.

Donna Rondono, 8 Glenway: Discussed the existing views of Candlewood Lake are limited to over the top of the house; if this view was removed it would be devastating. Discussion followed that Variance # 10-99 issued on March 30, 1999 already increased the height of the original home by 6' 4" and that height increase dramatically blocked their views of the Lake and if this vertical addition of an additional 8' is passed their Lake views will completely vanish.

The Board discussed that although the applicants changed the direction of the roofline, the height of the home has increased by about 5' since their proposal in 2008.

Attorney Smith: Discussed there is a major increase to the bulk mass of the home and this does not decrease nonconformity but rather has a tremendous increase in nonconformity again referring to Monroe v. Branford ZBA.

The Gibbons confirmed the plans the Rondono's looked at were the correct plans. The reason for the increased height from last year's proposal is because they changed the direction of the roofline they had to redo the supports. Further discussion focused the Board doesn't have the authority to modify the plans in this proceeding, they either have to sustain the ZEO's decision to deny a zoning permit or not and the plans they use to make this decision are with the higher roof height.

Neil Marcus discussed postponing the hearing so Michelle Rhyce can listen to the tapes of the April meeting or if Jack Machinko would be able to listen to the tapes of this meeting. This delay would also buy them time for to go back and look at the old Application #01-08 for a variance to see if we can settle that matter and condition that settlement to something that is agreeable to both parties subject to the 8-8N process.

John Day asked for any further public comment—none heard

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

In the Business Session the Board discussed the advantages and disadvantages of continuing the Business Session to the next regularly scheduled meeting. In light of the Gibbons' attorney's suggestion, Michelle Rhyce was asked if she would prefer a continuation to permit her to listen to the tapes, but indicated she had visited the property, carefully reviewed the relevant documents and felt that with the presentations tonight a continuation was not needed for her sake. The unanimous consensus of the Board is they are prepared to vote tonight. The Board discussed their reluctance to contact Town Counsel a second time on this matter because his opinion would not be part of the public record and the Rondono's attorney has requested, consistent with the ZBA's prior practice that all legal opinions be part of the public record so that participating attorneys could consider and respond to them. There was further discussion that it was the Gibbons' attorney who requested the Board seek legal counsel in April, and although he does not like the opinion the ZBA received, the opinion of counsel still stands. The correspondence dated May 15, 2009 from ZBA's Counsel Jack Keating was discussed.

There was further discussion that the Board is not voting on a variance but rather whether to overturn the ZEO's decision for not granting a permit. If the Board was to overturn Maria Horowitz's decision, it would be inconsistent with the Town's practice for the last 25 to 30 years. The property received a variance in 1999 to raise the roof more than 6'. The ZBA would not have the authority to modify the plans in this proceeding anyway and nothing would preclude the applicants from raising the overall height of the roof to 35', noting they already raised the roof height since their variance application in February 2008. If the Board believes a variance is required for a vertical expansion on a nonconforming building then they should sustain the ZEO's decision. If the Board believes a variance is not required for vertical expansions on such nonconforming buildings then they should overturn the ZEO's decision.

John Day made a motion that for reasons articulated in the record to overturn the ZEO's decision that a zoning permit be denied, duly 2nd, vote 0-5. The ZEO's decision is sustained.

**Minutes:** John Day made a motion to adopt the Minutes to the May 21, 2009 meeting as amended, duly 2nd, approved 5-0.

**Continued Application # 14-09:** Richard and Joyce Dardia, 56 Lavelle Avenue, for variances to zoning regulations for the purpose of legalizing and enclosing a deck.

Maureen Walker made a motion to bring Continued Application # 14-09 to the floor, duly 2nd, approved 5-0.

Richard Dardia approached the Board and recapped on last month's meeting and what he needed to do. He has a letter from his surveyor stating the existing lot coverage is 14.9% and with the deck expansion he will be at 19.3%, so lot coverage is no longer an issue. When he built the deck 20 years ago he was told by the Land Use Dept. that if his project was under \$500 a permit was not required, but he must let the tax assessor's office know when the project was completed, which he did and submitted the tax assessor's record into the meeting. He has been paying taxes on his deck for 19 years. The Board discussed structures are never grandfathered. However, there was further discussion that the deck does not come any closer to the setback than the existing concrete stairs. The other existing (northwest) side setback is 8'7" and the requested setback is 7'9" which creates an 8" increase in nonconformity.

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 the decks were built after the zoning regulations were adopted by the Town so they cannot be grandfathered, but the concrete steps which are not part of the deck set the line of existing legal nonconformity. The applicant has submitted documentation that shows the lot coverage issues go away and there is no increase in nonconformity in the front and on one side of the property. There is a *de minimis* increase in nonconformity on the northwest side of the property.

John Day made a motion to grant the Variance for a northwest side setback to 8' 7" and the other side setback to 15' subject to the plans as submitted, the hardship is the irregular shape and size of the lot, noting except for a *de minimis* amount on a single boundary there is no increase in nonconformity duly 2nd, approved 5-0.

**Continued Application # 15-09:** Joseph Reilly, 8 Muller Street, for variances to zoning regulations for the purpose of revising a previously approved Variance to construct a single family home.

Maureen Walker made a motion to bring Continued Application # 15-09 to the floor, duly 2nd, approved 5-0.

Tom Biglin an employee of Joseph Reilly Construction approached the Board. The advertising issues of last month have been satisfied. Mr. Biglin explained he purchased the property with an existing Variance #19-06, which was to build a 2 bedroom colonial style house. He is proposing to keep the setbacks in that Variance but would like to change the style of the house to a 3-bedroom raised ranch. The house is a rectangle the dimensions will be 28' x 47' and the other side will be 36' x 47'. Maria Horowitz stated she does not have any issues with this application.

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

Bob Jano made a motion to enter the Business Session, July 2nd, approved 5-0.

In the Business Session the Board discussed the Board found hardship with this property as a prior Variance was granted. There is no evidence of any additional impact on the neighborhood and there is no increase in nonconformity from the previous variance.

John Day made a motion to grant the variance with a front setback to 14' and a side setback to 15' subject to the plans as submitted and incorporating by reference the hardship found in the Variance # 19-06, July 2nd, approved 5-0.

**Continued Application # 17-09:** Grace Scalera, 1 Glen Holly Road for Variances to zoning regulations for the purpose of constructing a 2<sup>nd</sup> story addition and expanding and partially covering the existing deck and constructing a landing.

Maureen Walker made a motion to bring Continued Application # 17-09 to the floor, July 2nd, approved 5-0.

Tammy Zinick, agent for the applicant approached the Board and recapped on last month's discussion, noting last month she received a variance for the vertical expansion portion of the project. The stairs and landing to the deck on the survey submitted with the application were incorrect and a revised survey was submitted. The existing deck is 10' x 12' the proposal is to cover and increase the deck size to 14' x 12' which increases nonconformity on the Oak Drive rear setback by 2.4'. The applicant has revised the plans and changed the stairs to a handicapped ramp. The ramp will have several landings and be on an incline. Discussion followed, a handicapped ramp does not have to meet setback requirements, but there are very specific ADA requirements. The Board was not sure if the slope of the ramp would meet ADA requirements and if not, the applicant would be right back in front of the ZBA. The Board further discussed their position on increasing nonconformity. The applicant stated she would be willing to decrease the size of the proposed deck to 12' x 12' which will keep the existing 42.4' Oak Drive rear setback. Discussion followed, the deck may have to be a little smaller than 12' x 12' to meet the existing setback. Maria Horowitz stated she does not have any issues if there is no increase in nonconformity and they can make the ramp ADA compliant.

John Day asked for any further public comment—none heard

Maureen Walker made a motion to enter the Business Session for the deck expansion portion of the application, July 2nd, approved 5-0.

In the Business Session the Board discussed the ledge outcrop and the applicant's willingness to reduce the size of the deck so as not to increase nonconformity.

John Day made a motion to grant a variance subject to the plans as revised and the deck remains 12' wide and as deep as it can be without encroaching on the existing 42.4' Oak Drive rear setback. The hardship is the 2 rear setbacks and the extensive slope and ledge on the property, July 2nd, approved 5-0.

**Application # 19-09:** Gail DeFeo as Trustee, 19 Cestway, for variances to zoning regulations for the purpose of constructing a single family home.

Maureen Walker made a motion to bring Application # 19-09 to the floor, duly 2nd, approved 5-0.

Bill and Gail DeFeo approached the Board and explained their plans. The home will be a 2 bedroom 2,000sqft colonial type house with a garage. It will be 2 stories in the rear and 1 ½ stories in the front. The lot is 90' x 120'. Due to the terrain on the lot and the proximity of their well and their neighbors' well, the septic is in the only possible location which is dictating the location of the home. A letter has been received from Rich Jackson; Town Sanitarian indicating the septic is in the only possible location. The Board discussed their position on constructing new homes on small nonconforming lots. The garage will help to eliminate off the street parking which is an issue in this area.

John Day asked for any further public comment—none heard

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

In the Business Session the Board discussed the home is consistent with other homes in the neighborhood and the garage will eliminate off the street parking. There is no evidence of any adverse impact on the community. Further discussion focused on the size and shape of the lot.

John Day made a motion to grant the variance for a front setback of 28'; and a rear setback to 39' subject to the plans as submitted. The hardship being the irregular size and shape of the lot, duly 2nd approved 5-0.

**Application # 20-09:** Kathi Ellison, 33 Knollcrest Road, for variances to zoning regulations for the purpose of revising a previously approved Variance.

Maureen Walker made a motion to bring Application # 20-09 to the floor, duly 2nd, approved 5-0.

Kathi Ellison and her architect Dan Lamb approached the Board. They explained the original Variance # 52-06 was for a 1<sup>st</sup> and 2<sup>nd</sup> story addition with a garage. Due to some issues with this project they would like to change the design plans as follows. A balcony has been added, the first floor coverage has been reduced, and the height of the home increases by 2', but a height Variance is not required. There are no changes to the previously varied setbacks. Discussion followed.

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

In the Business Session the Board discussed they previously found a hardship with this lot, there are no changes to the previously varied setbacks and although the height increases by 2' there is no evidence of any adverse impact on the community, and a height Variance is not required.

John Day made a motion to grant the Variance incorporating by reference the hardship basis for Variance # 52-06, subject to the plans as submitted, duly 2nd, approved 5-0.

**Application # 21-09:** Town of New Fairfield, 31 and 33 Route 37, for Variances to zoning regulations for the purpose of constructing a free standing sign.

Maureen Walker made a motion to bring Application # 21-09 to the floor, duly 2nd, approved 5-0.

Kathy Hull, Senior Center Director approached the Board. Mrs. Hull submitted pictures of the free standing sign she would like to construct in front of the new Senior Center. The sign is exactly like the one in front of Town Hall except it says Senior Center. Discussion followed the new Senior Center is located in a residential zone by a special permit and the zoning regulations allow for a 2' x 2' sign. The Board discussed that although this is a residential area, it has the appearance of a business district and the sign would fit into the area as well as the scope of the Senior Center project. The sign will have the proper setbacks and will be on Town property and not State property. Further discussion followed on the highly irregular shape of the lot and the previous variances on this property.

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

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

In the Business Session the Board discussed the odd shaped lot and the sign is consistent with the building's use and it fits into the neighborhood.

John Day made a motion to grant the Variance for a free standing sign subject to the plans as submitted the hardship is incorporated by reference of the previous variances, duly 2nd, approved 5-0.

Maureen Walker made a motion to adjourn the meeting at 11:00pm duly 2<sup>nd</sup> approved unanimously.