

TOWN OF NEWINGTON
ZONING BOARD OF APPEALS
CONFERENCE ROOM L101
NEWINGTON, CONNECTICUT 06111
NOVEMBER 3, 2016

I. MEMBERS PRESENT

Chairman Louis Califano
Commissioner Willard Bechter
Commissioner Nicole Pane
Commissioner John Richter
Commissioner Judith Igielski: Excused
Commissioner Audra Ekstrom: Excused
Commissioner Timothy Hutvagner

PRESENT:

Michael D'Amato
Zoning Enforcement Officer
and Assistant Town Planner

Also present: Town Attorney, B. Ancona, Esquire

Comm. Califano: Attorney Ancona will take over the meeting.

Atty. Ancona: Thank you, Mr. Chairman. You know, a lot of times there are situations where you guys know a lot more than I do, you live it! You have been doing this for years. I know case law and the statutory law and, sometimes it is the practicality that really counts and you will see that as part of the presentation. What you have in front of you is a Zoning Board of Appeals by UConn. I did not do this, UConn did this and my presentation is just in addition to this, it is something to take a couple of notes and take home to look at, whatever.

I want to start with - basically, it is a power point, which we will go through very quickly and if you have questions, stop me, if I have the answer, I am going to give you the answer. If I don't have the answer, I will be back because a lot of this has to do with the procedure and how the ZBA was established and where it comes from, etc. It is based because you have a zoning commissioner in the town, and the Zoning Board of Appeals. From point A. to point B. when they do something, somebody needs to appeal it for you guys to say, affirm sustained, overruled, denied, whatever it is, whatever terminology you would like to use for strict application of the law. A lot of times it is the application. The make up of the ZBA is five regular members and three alternates and the charter determines how these vacancies are filled and of course, we are subject to the minority representation rule regarding political parties. Political vacancies are all done by the Charter. One interesting thing is that no given member can choose who will sit for them, They don't choose. That is up to the Chairman..

Of course, conflicts of interest, who can appear before the ZBA, Nicole, if you've got something, if your Dad is coming in to do something, they can't listen to you, you guys know. It's all basic and remember you can participate yourself but you cannot be participating for somebody else.

Jurisdiction based on variances and of course, special exception and I am giving you a little example there, for example, in auto related uses, home businesses and then home hair salon is an absolute "no". Votes, as you know, four affirmative votes, if somebody comes here and there's only four of you are here, you are rolling the dice and it has to be unanimous by the board. The primary function of variances is use of the property which would otherwise be hindered by the zoning regulations. I am going quickly because I assume that you guys know pretty much all of this and I am preaching to the choir here. and your case may cause a judicial tribunal and Mike is sort of a police officer and prosecutor all in one to get the job done. Of course, you know that variances run with the land, they do not go with the actual applicant and if you guys allow for the variance, it's their problem. Elasticity, the ZBA has elasticity to the regulations so that somebody is not locked into the situation where there is an actual hardship. That is really the crux of what you guys do. Variances 8-6 A3 deals with variances for only exceptional difficulty or unusual hardship. That is really it. It's got to be unique to the subject's property. I know you guys want to answer the questions of the application and this must be consistent with the general purpose of the zone regulations of the town. You cannot grant a hardship - a variance - if it abuses what the zoning board regs allow for. Obviously it would be, you've got a single family zone and somebody comes in and says, I want a 2 family. You are not conforming with the rest. Variances can't alter the plan of the town and adherence to the strict application of what caused the hardship. Financial issues do play a role if they don't fit the variance in a certain situation and all marketability of the land is lost. That would be a hardship. The variance provides practical solutions within the variance restrictions and presents the constitutionality of the property, so you don't get someone in the community saying, 'this is a 5th amendment taking because you're not letting me do what I want to do with my property'. Most times that doesn't apply. There are situations where you take all actual uses away from the home owner or property owner and that would be a 5th amendment and that is why the variances are provided, you look at them and say, okay we've got this hardship but we don't let it happen and there is going to be a 5th amendment taking and of course, the condition must relate to the land and not the person, it is the land, all with the land. Of course, when you do your variance, you must state on the record why you are approving or disapproving.
in the exact same year.

Comm. Richter: I have a question. When we go out and inspect property, what are the 'dos' and 'don'ts'.

Atty. Ancona: Of course, you want to make a determination as regards to everything possible, the wetlands, etc.

Comm. Richter:...Can we legally go on a property, or do we have to make notice.

Atty. Ancona: You need permission to be on anybody's private property.

Comm. Richter: So, in other words, if no one is home there, we cannot go on it.

Atty. Ancona: No.

Comm. Bechter: You can drive by, though.

Comm. Pane: You can drive by.

ZONING BOARD OF APPEALS 3 NOVEMBER 3, 2016

Atty Ancona: Of course, the law allows ZBA members to take into consideration your knowledge, your innate knowledge of the town and its circumstances which a lot of TPZ can't do that; they have to look at the records. You guys can go outside and take into consideration the law and the statutes and no diminuous variances - questions on that...

Chairman Califano: What is that?

Atty Ancona: I looked at a case the other day, the guy gets his plans to build a house and you have to go through the Zoning Enforcement officer first to make sure you are not violating the zoning regulations in Weston. You go to the officer, the officer looks at the plaintiff and says "no" because you are exceeding the 35' height limit. He goes back to the architect and says cant do it because we are above the 35' height limit. They changed their plans, they go and built the house, they framed it, so the ZBA officer issued a cease and desist and requires a modification. He went before you guys and you guys said, you know what, it was a diminuous variance for a couple of feet. That is illegal, just because it is a couple, that is not a hardship. Okay? It does not work. So it gets appealed. You guys say 'it's okay'. The neighbor says, 'no it aint', now look at it. So they go and appeal it to the Appellate Court, the Superior Court and the Superior Court upholds the neighbor over you guys. He goes to the Appellate Court and the Appellate Court goes to the Superior Court, and they had to tear it down and actually reframe it. And that is a huge project! So, that is the power of the ZBA. You guys can call something just right on the edge of odds, it's only a couple of feet, what's the big deal. The big deal? Sometimes it is tearing down the house! That is the big deal! Those diminuous variances, pretty big deal, to me it is.

Comm. Bechter: Diminimus means like someone moved it over?

Atty Ancona: Yeah and you think - what's the big deal?

Comm. Richter: They did that in Waterbury on a deck. This happened 6 years ago. They built a deck without a permit. They went in there and tried to sell the house, went in and added that deck in there, low and behold, he had to take the deck down.

Atty.Ancona: Sadly, right and what is happening is that appraisers are picking these things up now where years ago, and, what you do in your house no one knows, now, they want a permit, they come in and see this guy and say 'hey, is this right'? - this guy looks like he's over his setback, things like that, the next thing you know you are knocking it down, so it is far more serious than it needs to be and of course, it affects the taxes, too. The ZBA can't grant variance conditions neither does the statute provide for that and even though there is no statutory authority to put conditions on, the case law provides that yes, you guys can say, well, we will give you the variance if you do A, B, and C and of course, that condition must relate to the land as well, and not the property owner and of course hardship is always required the means to modify any condition. Hardship has to be in line with the zoning application in regards to the land and the regulation itself. It is beyond the control of the applicant. In the situation I was involved in, the home owner said it was not our fault, the architect modified the plans and the architect gave the plans to the builder and the builder built it. We did not say go and do it. We had no roll in it. It is of no consequence. The report said, those were your agents, if they screw up, you screw up.. They put all burden of proof through the zoning applicant. Applicants can show that some particular characteristic of the property is an unusual hardship, if the regulations are strictly applied Just because a neighbor got a variance at one point, there is no 4th amendment equal protection that could apply.

Just because somebody got something before does not mean you guys have to do it again, if you get a 4th amendment. Loss of competitive advantage is not a basis for a variance, just because you could see more condo's and somebody else was selling 12, well and you could sell 15, it does not work that way. It doesn't apply, unless, of course, all value and marketabilit

Examples of hardship - no market of property without requested variance, you can't sell it, you can't finance it, can't refinance it, and actually the public authorities cause the problem with partial condemnation. Example: the first time I was the Town Attorney, we took a piece of property to make an apartment out of it. Well, when we did that we took some of their back property and made the property - the building was too close now to the property line, they wanted to do something and they had trouble with the regulations and so they came in and said. 'look, this is a hardship that we did not create.

Comm. Bechter: Do you have a list of these hardship examples?

Atty Ancona: No, because it is something that you have to look at each situation and say, it is almost like a gut feeling, I hate to say that, gut feeling is not in the law and the courts will tell you they depend upon your determination because they expect you that you know the town and if you look at it as a general hardship, they are going to defer it. There is a lot topography which could be an honest error by the contractor, well, that is almost true and almost not trued because you really have to look at that one, 'oops, he made a mistake' yeah, I don't know if they are examples of hardship, probably by the previous owner and not know to the current owner or a zone change application. of course, drainage, well and septic status and subdividing lots can create unconforming lots, you can't do that. If you have a question with the land and you have somebody with no setback because there is a bigger lot next door. You have to be within the setback and he could say, 'well, I don't like it', Practicalities - this is important, too. You guys look at the applications if there is an objection out there, the neighbors are going crazy. I hate to say it but the Sisters of Mercy on Cedar Street, they wanted to put a ramp in there

Comm. Richter: Last winter they never shoveled that sidewalk in front. People have to walk out on the highway.

Atty Ancona: I used to do it for them because I felt bad until I learned that the landlord paid a 43,500.00 fee a month and you know what, I stopped. But I have a real problem with Cedar Street not because my office is there but I feel that the state trucks are flying, not 10 miles an hour, not 20, they are doing 40 plus miles an hour and I have had snow hit the front of our office windows and cover, cover the side.

Comm. Richter: Let's set the records straight, it is not only the state, it is our guys that drive on a regular street, they come down Fisk Drive and they are going like a bat out of hell.

Atty. Ancona: The use of variances by the Zoning Commission when it is a brand new is not allowed and my example is the hair salon. If you cannot get it, you can't get it. It is not allowed, period. It would change the regs. My personal opinion, I think it should be allowed, but under special exception, but we do not allow it. Extent of which the uses can be varied has nothing to do with zoning. Prohibition is actually when you need protection of public health, safety and welfare.

Also, appeal from the decision of the Zoning Enforcement Officer - you are the judges, he is going to issue a Cease and Desist or give a citation for Cease and Desist.

Michael D'Amato: The first one is a Notice of Violation and then Citation.

Atty. Ancona: Okay, there you go, so they are going to come in with an appeal and say 'no, Mike's wrong, and we need you to override it. He might be wrong or, he might be right. He has to look at it and make a judgment. He is the administrative officer and he issues Cease and Desist orders and when you are acting at the decision of the permit, you interpret the zoning regulations and there is no

it

you are looking at the application and the regulations.

Comm. Pane: Basically what the zoning regulations speak for, not any hardship.

Michael D'Amato: We had one previous and I don't know if you guys were there on Cherry Hill.

Comm. Richter: Yeah, we had the one with the vehicles.

Atty Ancona: That is on my desk right now.

Michael D'Amato: You guys looked at whether or not I was improper in issuing a notice of violation based on the regs.

Atty Ancona: That is the one that is on my desk right now.

Atty. Ancona: Coming back from dinner the other night, I am coming down South Main Street, a big van pulls out in front of me from a radio station, who the hell was that, he just pulled out to the right and it is on my desk That's the guy. That is a classic example .

Comm Richter: Now to get back to that, we were right in what we did because he was out in front, he was not putting the vehicle back, because he wanted exposure.

Atty. Ancona: That is not allowed under our regulations

Chairman Califano: And he was saying the reason he puts it there is because that is where he has to park because he has 2 or 3 cars.

Atty. Ancona: The reasonable thing to do is to park it behind the line of the house.

Comm. Richter: However, in that particular case, I brought up other commercial vehicles that are out there, they have no where to go, but in the front there and there is one over by us, a contracting business has a truck out there and it is out in the front. What do you do about it. You can't do nothing about it. It is a hardship for him. He has to leave it there. But, by the new regulations, it is a new reg.

Atty Ancona: Unless it is grandfathered in. Was it there before the issue was modified?

ZONING BOARD OF APPEALS 6 NOVEMBER 3, 2016

Chairman Califano: These are the rules and regulations, right?

Atty Ancona: The time to take an appeal is by regulations if we have it in our regs, it is a reasonable wait and if we do not have it in our days, it takes 30 days. When appeals are simultaneously filed, the Cease and Desist goes first. Appealing the decision of the ZEO and if they fail to appeal it, then this board has no jurisdiction, so it has to be through the Zoning Enforcement Officer

Now for the ZEO to enforce zoning regulations is not an appealable decision. This enforcement is discretionary. It is not imposed. What I am saying is that when he drives by a property he is not compelled to issue a citation. In certain situations, they must act upon the legality.

Chairman Califano: So unless he gets a complaint...

Atty Ancona: It is still discretionary. Procedures of Zoning commissioners = the zoning application must be put before the ZBA only as required by zoning regulations, otherwise

and that is it for the presentation but I am available for questions.

Comm. Pane: So I would like to talk about what is coming up next month, an appeal and we upheld the appeal that he was correct and that is it, so they are done, they can't do anything else?

Atty Ancona: You know, this is an extremely important body, do you guys realize this? You do! This is it. This plays a major roll here, of checks and balances.

Comm. Richter: For the past two years I have seen some real winners come here and appeal. That one over on near Cashway wanted to put that garage down in there and he said his hardship was it flooded in there, remember. He just had no right to do what he was going to do.

Chairman Califano: What I think it is - is that some of the laws go back 40-50 years ago and unless these go through, then like I say, the neighbor says, his house got it, well, it happened and you kind of feel sorry for them but you go by the rules and regulations.

Atty Anacona: Then they start saying it is equal protection, you are favoring them over me.

Comm. Richter: Then they will say you are discriminatory, too, just like that one there, when they were walking out of here, they don't like Puerto Ricans, that is what they said and that is not our task to discriminate, we have to obey the law.

Atty Ancona: Thank you for having me, guys.

The Board answers: Thank you for coming.

ZONING BOARD OF APPEALS 7 NOVEMBER 3, 2016

Atty Ancona: In closing, this is a reminder that the Land Use Academy does a lot of good work

Chairman Califano: Thanks, sir.

COMMUNICATIONS AND REPORTS: None.

New business we just had, Old business, I guess is done. Just mark your calendars for the next meeting, Mike, obviously we are going to have something, right, as far as you know right now.

Mr. D'Amato: Yes, I will provide that to you once we get a little bit closer, like December 1st I think.

Chairman Califano: Motion to adjourn.

Comm. Richter: I second it.

Chairman Califano: All in favor? Aye unanimously.

ADJOURNMENT

Chairman Califano: The meeting is adjourned at 7:30 P.M.

Respectfully submitted,

Sophie Glenn
Recording Secretary