

ZONING BOARD OF APPEALS
TOLLAND, CONNECTICUT
REGULAR MEETING MINUTES OF JANUARY 28, 2010

MEMBERS PRESENT: Peggy Boyajian, Chair
Vin Avino, Vice Chair
Warren McDermott, Secretary
Robert Green
Stephen Caron
Kuhrt Bidorini, Alternate

OTHERS PRESENT: Steve Lowrey, Zoning Enforcement Officer & Wetlands Agent
Applicants and their representatives

CALL TO ORDER

Ms. Boyajian called the meeting to order at 7:32 p.m. in Council chambers. She explained the two part process of their meetings. Election of new officers will take place at the February meeting. Ms. Boyajian introduced new members Stephen Caron and Robert Green, explaining that Mr. Green has opted to only observe the meeting as this is the first meeting he has attended. She seated Kuhrt Bidorini for Robert Green.

MOTION: Warren McDermott/Kuhrt Bidorini motion to open the Public Hearing. Motion was unanimously approved. Ms. Boyajian confirmed that all members had visited the sites of the two applications. Ms. Boyajian also reversed the order of the applications to hear ZBA #10-1 first.

PUBLIC HEARING

1. ZBA #10-1 – Town of Tolland: 15 Old Post Road. Variance from Sec. 170-43. D to allow a new lot to be created so that an existing house will be 11.7' from the side property line where 15' are required; and a variance from Sec. 170-43.E. to allow the same existing house to be 11.7' from the streetline at such time as a planned road is constructed, the required setback is 40'.

Linda Farmer, Director of Planning and Community Development for the town said this is a fairly complicated situation. The Town has an earmark from HUD for \$190,000 for the purchase of 7.2 acres of a 19-acre parcel from Steve Tompkins. The intended use is to build senior housing. This is near the town center and fits in with the vision of a walkable community in this area. There is just one house on the 19-acre parcel. She showed a proposed concept plan for the Village Center Area, which shows mixed use development in the town center. Ms. Farmer said town staff has had several discussions and site walks with Steve Tompkins, and they felt there was room to meet the required setbacks. The town hired a land surveyor, however, and found that they will require a 3.3' variance because the lot line being drawn is 11.7' from the house, 3.3' short of the minimum 15' setback required in the Village Center Zone. The town is trying to mimic the historic lots in the area. The plan initially is for a driveway but in time to be converted to a public road in what will be a higher density than

currently exists in the area. Ms. Farmer said that in order for the town to proceed with the purchase of the land, they will require this variance.

Mr. McDermott asked why, if the town is exempt from zoning, do they need to consider granting a variance? Ms. Farmer said this is because Steve Tompkin's house and his property are not exempt and this driveway would be his access to the property as well. Ms. Boyajian asked if the Tompkins family was amenable with a main road being 11.7 feet from their home. Ms. Farmer said they were and that they endorsed the application. Mr. McDermott noted that the town had provided proof of notification to neighbors. Mr. Lowrey noted that a neighbor had sent a letter, which includes some comments.

Mr. Avino said he noted that the driveway grade is steep where it enters the road. He asked if this is a two-phase proposal, the first being senior housing with a driveway, and later turning it into a road. He said the sight lines could be improved and that there is a substantial embankment near the road that would hinder sight-line from the intersection. He asked if this would be graded. Ms. Farmer said she cannot provide specifics as the road has not yet been designed, and their Town Engineer's last day is next Thursday; however, it will be constructed to Town's standard, and all sight lines will be met. Mr. Avino also asked if the Town had given any thought to contacting the owner of the adjoining property to get the 50' setback required. Ms. Farmer said this is a possibility, but as the HUD paperwork needs to be submitted shortly, they felt it best to focus on the one property.

Mr. Avino suggested that if the town is going with a 40' minimum dimension, if they buy the adjacent property they could put the centerline of the driveway set 25' off the property line closest to the house. This would give them a 3' area on the other side to make it easier to grade the road. Mr. Avino said this adjustment would make it easier to grade the road and meet minimum sight lines. He asked if they grant a variance if they could put in some restrictions like this to help meet sight lines. Ms. Farmer said she would expect they could, but they would need to be careful about conditioning any variance on a third property.

Mr. McDermott read the January 25th letter to the ZBA from Indrik Linask of 5 Old Post Road, which said he felt the requested variance would adversely affect the character of the town green and is a huge deviation from the regulations. He wrote that an added intersection in this area would be a major safety concern and should be looked at by a traffic expert.

Mr. Avino asked if there would be any problem if they granted only the initial variance for the house first and then looked at granting a variance of a certain number of feet from a future road when the time gets closer. Ms. Farmer said she is not certain as this driveway/road would be the other property owner's access to their property also. She said part of the purchase agreement is an easement for them over this driveway, so she is not sure if not granting both variances would complicate the purchase and sale agreement.

Mr. McDermott read the legal notice for the applications.

2. ZBA #09-1 – Lloyd and Jayne Bahler: 97 Cook Road. Appeal from the Zoning Officer's Order to 1) remove an Outdoor Wood-burning Furnace pursuant to Sec. 170-84 B., and 2) to remove an accessory building erected without a permit, pursuant to Sec. 170-85 B. and 170-124. The Bahlers are also seeking variances from Sec. 170-84 B. & 170-85 B.2 should the appeal fail.

Lloyd Bahler of 97 Cook Road attended accompanied by his attorney, Bruce Fader. Attorney Fader submitted proof of mailings to neighbors. Mr. Lowrey noted that because this application was originally scheduled to be heard on December 10, he notified the nine abutters/neighbors by regular mail and posted a new sign.

Mr. McDermott and Mr. Avino read several items into the record

- November 19, 2009 letter from Steve Lowrey to the Zoning Board of Appeals
- July 1, 2008 letter from Steve Lowrey to Lloyd Bahler
- September 30, 2008 letter from Steve Lowrey to Lloyd Bahler
- November 26, 2009 letter from Greg Lanz of Greg Lanz Plumbing & Heating to Lloyd Bahler
- July 31, 2008 letter to “Whom It May Concern” from Lloyd Bahler, which includes the names and addresses of seven neighbors expressing that they had no objections to the outdoor woodburning furnace
- August 10, 2009 letter to the Tolland Fire Marshall from “Concerned Citizen” expressing his/her objection to the off-season burning of the OWF.
- September 16, 2009 Cease and Desist order to Lloyd Bahler from Steve Lowrey
- Receipt from Mainline Electric bill to Lloyd Bahler
- A copy of CGS 22a -174K was included into the record

Attorney Fader explained that this appeal has three parts, two of which are inter-related. The OWF is a separate third component. He said his client has eighteen acres of property, has talked to the assessor and plans to submit an application to the assessor to designate a portion of his land as a farm classification. If a portion of the land is reclassified for farming, then the building may be allowed to stay and be used for farming purposes. The structure has a roof but no sides and is presently being used to keep heavy equipment under a roof. He asked that the ZBA delay making a decision on this to give his client reasonable time to reclassify the land. Attorney Fader said he understands that because fourteen acres of his client’s land is presently classified under Open Space 490, his client will need to first go before the Planning and Zoning Commission, which hears these items only once a year in June, to have a portion of the land removed from this classification.

Mr. Lowrey said the PZC meets and discusses Open Space 490 during their first meeting in June. Mr. McDermott asked if Mr. Bahler would need to specify what kind of agriculture the property would be used for. Mr. Fader said he believes so, that the State has five classifications based on tillability. Mr. McDermott asked if there is a certain minimum amount of land that needs to be classified for agriculture and whether or not it needs to be a business. Mr. Fader said he believes it has to be the person’s primary occupation, and that because Mr. Bahler owns and operates a business in South Windsor, this occupation would be primarily his wife’s business. Ms. Boyajian noted that there is also a wetlands restriction on this property. Mr. Lowrey said there is a small amount of wetlands on this property, but it is, unfortunately, right next to the existing building. However, agriculture is allowed as an “as of right use” due to the Wetlands Act.

Attorney Fader asked then that because this building poses no risk to public, health and safety, is set off from the road and is not occupied, but simply used for storage, would the ZBA postpone acting on this for one year to allow his client to meet the agricultural requirement. He explained that the land has been in Open Space since 1995 and if they wish to take some of the land out of the Open Space designation for farming, his client must go before the PZC to remove that Open Space designation. Then he must provide an application

to the assessor and the operation must be in effect for one year in order for the property tax to go into effect.

Ms. Boyajian asked if they can rule on portions of the Cease and Desist order separately. Mr. Lowrey said he believes so, that they can split the order and rule on its individual portions. Mr. Fader suggested they could put in a decision that his client must come back before the ZBA by a specified date in order to avoid being in violation of the Cease and Desist order.

Mr. Avino asked when the building was erected. Attorney Fader said he understands the ZBA would wish to have compliance to zoning regulations before the fact and understands his client should have first gotten a permit to put it up. This is why when the issue first came up he suggested that his client go for a permit. However, the permit request was denied. His next step was to figure out what his client could do to be in compliance.

Mr. Avino asked again when the building was put up. Mr. Bahler said it was in 2004 or 2005. Ms. Boyajian said that if this building is to be used for agriculture, he cannot be storing paving equipment in it. Mr. Bahler said this is not a standard practice. He occasionally stores it there if he is finishing up on a job in the area and does not want to have to bring it all the way back to his business in South Windsor. Mr. Bidorini asked what kind of agriculture business his client plans to have. Mr. Bahler said they would be raising either Christmas trees or apple trees. He said this takes some time to develop. Attorney Fader said he understands that as long as the applicant is actively pursuing the crop, then it is acceptable.

Ms. Boyajian asked that if they postpone making a decision for a year, can non-agricultural equipment still be stored in the structure. Mr. Lowrey said that if they choose to give the applicant time to change his designation, they cannot simply postpone or table making a decision. They would need to uphold the Cease and Desist but suspend enforcement on it with a note on the record that the PA 490 agricultural designation must be established on the tax rolls by a certain specified date.

Mr. Bidorini asked Mr. Bahler what his original intent was for the structure. Mr. Bahler said he intended it for an agricultural use. He said he had worked on the farm where this structure was located for many years when he was younger, and that when the farm was sold to build houses, he had the opportunity to get a part of the truss and roof. Ms. Boyajian asked if there is a customary time frame to establish an agricultural use. Mr. Lowrey suggested that if they want to go this route, they allow Mr. Bahler until October 1, 2011, to have the assessor designate the acreage in PA490 agriculture. Attorney Fader asked that it be until October 30, 2011 and the ZBA was amenable to this. Attorney Fader also asked that if that date arrives and his client was not able to get this designation due to something beyond his control, but can prove he is doing due diligence to get to that point, would they grant a grace period. Mr. McDermott said it would be acceptable to him as long as it were reasonable. Attorney Fader agreed that if the Bahlers are not pursuing the farm classification, then he would be in violation of the Cease and Desist order and would be subject to legal ramifications.

The ZBA moved the discussion to Item 3 of the Cease and Desist order regarding Section 170-84.B.1, Installing and operating an Outdoor Wood-burning Furnace. Attorney Fader said the ZBA is supposed to act as an independent body and asked that they take a fresh look at this issue. He said he wishes that whoever made the complaint to the ZEO had come to Mr. Bahler first to resolve the issue, and that he does not know if the aggrieved party lives within 100' of the Bahler residence.

Attorney Fader said he is asking the ZBA to overturn the portion of the Cease and Desist order that relates to the OWF. He said the OWF was in existence on the Bahler's property prior to July 8, 2005 and that Tolland did not adopt a prohibition on these furnaces until July 1, 2006.

Attorney Fader said this is an environmental regulation, not a zoning regulation, which the town has decided to enforce through its zoning. He said zoning statutes fall under Chapter 8 and zoning must enforce land use activities under Chapter 8-2. However, nowhere in Section 8-2 is there listed the right to regulate outdoor woodburning furnaces. Therefore, he said, the ZBA must determine if the Bahlers complied with the environmental statute only.

Attorney Fader said the stove is exempt because it was installed before July 8, 2005. He said he contacted Mainline Electric and they stated that the stove complies with manufacturing specifications. He referred to their invoice which shows the unit was picked up in April of 2005. Mr. McDermott asked if because the OWF requires electrical and plumbing connections be done, that there would have needed to be appropriate permits taken out in order for it to be legal. Attorney Fader said that there is nothing in the environmental statute that states a building permit is required. He said this is because OWFs are not related to zoning. He said he understands this is counterintuitive to how a ZBA thinks.

Ms. Boyajian asked if the ZBA does not have jurisdiction over any structure on a property and confirmed that the OWF is constructed in a sort-of lean-to structure. She also said that while Attorney Fader has provided proof of when the OWF was purchased and picked up, he and his client have not provided proof of the actual date of installation. She said it would be good to have a cancelled check from the plumber or other evidence from Lanz Plumbing and Heating when he was paid for the work—for example a copy of the bill. Attorney Fader asked if it would be sufficient if he got a letter from Greg Lanz stating it was installed before July 8, 2005. Ms. Boyajian said they would need a copy of the bill or cancelled check, and that Mr. Lanz's letter in the record only says he believes it was installed before the cold weather, which could be construed just as easily as November of 2005. Mr. Bidorini confirmed with Attorney Fader that Mr. Bahler did not in fact employ Greg Lanz, but rather he provided assistance in hooking up the OWF as a friend, so there was no invoice issued or check written.

Mr. Avino said an OWF is attached to a home's heating system, which would require a heating or plumbing permit. Permits are required for installations and it does not appear that Mr. Bahler or Mr. Lanz obtained them.

Mr. Lowrey said the town prohibited the installation and use of OWF's based on their requirement to protect the health, safety, and welfare of the town. He said State statute does not exempt OWF's from the Town of Tolland's prohibition. He said if the OWF was installed after the 2006 prohibition date, then it would be prohibited. He said the 2005 date does not have anything to do with zoning, and as he sees it, the applicant would need to demonstrate that the OWF was installed legally before July 1, 2006. Mr. Lowrey went on to say that the definition of grandfathering is any use that lawfully existed prior to zoning. Therefore, the question is whether Mr. Bahler's OWF was legally installed prior to July 1, 2006. He said he found no evidence that the required permits were taken out. He also said the PZC has the right to regulate the health, safety, and welfare of the town's residents. He noted that the Town has already taken another resident to court regarding an OWF and the resident had to take down the OWF. However, he said, this is a decision of the ZBA.

Ms. Boyajian asked if the chimney for the OWF is in compliance with regulations. Mr. Lowrey said chimneys need to be higher than the house, but this is only 6' to 8' above the ground. Attorney Fader reiterated that there are several ways for an OWF to be exempt from zoning, and one is if the OWF was installed prior to July 8, 2005, which he is trying to establish. Mr. Lowrey said the only thing predicated on State statute is the definition of OWFs. Attorney Fader disagreed saying a town can only do what State statute gives them authority to do.

Mr. Avino said he again needs to go back to the fact that no permits were taken out and so it was not legally constructed. Because of this, he said when the OWF was installed is immaterial. He told Mr. Bahler that as a contractor he should know this. Attorney Fader said he does not think the requirement may be necessary if you look at the State statute and that the direct focus is whether or not the town has the legal right to enforce an environmental statute vis-à-vis the local zoning authority. He said he is willing to get a letter from Greg Lanz clarifying the date of the installation. Ms. Boyajian said it would not be necessary at this time.

Mr. McDermott read a letter from Scott at Main Line Electric dated November 30, 2009, which indicates the installation of the OWF was inspected from pictures. The letter stated that the OWF complies with manufacturer's specifications and the internal hookups have been done correctly. The letter stated that Scott suggested to the furnace owner not to burn in summer months and recommended increasing the chimney height. Ms. Boyajian asked how Scott would know all of the electrical and plumbing work was done correctly simply from looking at pictures. Attorney Fader said he asked the same thing, and he said Scott had told him he is very knowledgeable about these installations and so can see it from the pictures. He said that Mr. Bahler is willing to not burn from June 15 to September 15, which should hopefully satisfy the concerned citizen.

Mr. Bidorini asked if Attorney Fader is telling them a permit was not necessary to take out in the first place. Attorney Fader said he is not saying that, but only that for the purposes of satisfying the exemption requirements, it is not necessary to prove a permit was taken out. Mr. Lowrey said the Building Official has the required permits from other residents in town who had their OWFs legally installed. He said he believes there are about five or six residents who have done this.

Attorney Fader said that if it is just the issue of permit, Greg Lanz is a licensed plumber. Ms. Boyajian said then that he should have known better to take out a permit. Attorney Fader said that Mr. Lanz had said that many towns don't require permits and while he does not want to put Mr. Lanz's credibility or license on the line, he helped Mr. Bahler as a friend by providing the technical help.

The Public Hearing was opened to public comment. Ed Patapas of 123 Cook Road said he has lived in town for forty years and shares a common boundary with the Bahlers. He said they keep their windows open in the summer and did not know the Bahler's even had an OWF until this issue arose. He said they don't experience any odors or smoke issues. He estimated that their home is about 400' from the OWF.

Damen Polance of 107 Cook Road said he has no problems with the Bahlers using their OWF. He said they have never had a problem and they were not even aware of the issue until they got the notification letter.

Phil Bahler of 112 Cook Road said he has no problem with the OWF. He likes the smell of wood and it has not been an issue.

Attorney Fader concluded by saying that they have made a solid effort to establish why they feel the OWF should be exempt and that it was not his intent to alienate anyone. He said however, because of the way the statutes are worded, he does not feel that permits are necessary.

MOTION: Warren McDermott/Vin Avino to close the Public Hearing. Motion was unanimously approved.

BUSINESS MEETING

1. ZBA #10-1 – Town of Tolland: 15 Old Post Road. Variance from Sec. 170-43.D to allow a new lot to be created so that an existing house will be 11.7' from the side property line where 15' are required; and a variance from Sec. 170-43.E. to allow the same existing house to be 11.7' from the streetline at such time as a planned road is constructed, the required setback is 40'.

Mr. Bidorini asked Mr. Avino to go over once more his concerns about grading. Mr. Avino said he feels the grading is acceptable for when this entryway is a driveway but if it becomes a public road, it will need to have a flatter grade. When this is done, they will have to slope up to the house. He suggested that when they put in the driveway, that the 40' Right Of Way be skewed westerly away from the house to give them more room to taper in the road. Mr. Lowrey said that in other words they might put the center of the travelled way 25' from the property line.

Mr. Avino said that Ms. Farmer said that for purposes of starting the project and buying the property, they only need the house variance to allow it to be 11.7' from the new property line as opposed to 15'. He said he doesn't feel quite comfortable talking about the other variance requested until they have established zoning regulations.

MOTION: Vin Avino/Warren McDermott to approve a variance from Sec. 170-43.D to allow a new lot to be created so that an existing house will be 11.7' from the side property line where 15' are required, and that when the Town establishes the centerline of the new road or driveway, it establishes it 25' to the west of the new property line. Motion was unanimously approved.

MOTION: Vin Avino/Warren McDermott motion to deny a variance request from Sec. 170-43.E. to allow the same existing house to be 11.7' from the streetline until such time as new zoning regulations are established for the area. Motion was unanimously approved.

2. ZBA #09-1 – Lloyd and Jayne Bahler: 97 Cook Road. Appeal from the Zoning Officer's Order to: 1) remove an Outdoor Wood-burning Furnace pursuant to Sec. 170-84 B., and 2) to remove an accessory building erected without a permit, pursuant to Sec. 170-85 B. and 170-124. The Bahlers are also seeking variances from Sec. 170-84 B. & 170-85 B.2 should the appeal fail.

MOTION: Kuhrt Bidorini/Steve Caron to suspend enforcement of the portions of the Cease and Desist Order that violate Sec. 170-124 and Sec. 170-85.B.2 of the Zoning Regulations

until October 30, 2011 to allow the appellate sufficient time to pursue a PA 490 Open Space farming designation on the tax assessor's rolls on his property. Additionally, if this designation had not been acquired by the October 30, 2011 due date, but the appellate has demonstrated due diligence in his efforts to meet this goal, then the ZBA may grant an additional grace period. Motion was unanimously approved.

The ZBA discussed the third item in the Cease and Desist order, regarding Section 170-84.B.1 installing and operating an Outdoor Wood-burning Furnace. Mr. McDermott said he would like Mr. Lowrey to get the town attorney's opinion with regard to the permit issue. Mr. Bidorini agreed, asking Mr. Lowrey to find out if the applicant required a permit regardless of when it was installed. Mr. Lowrey said he can also get something in writing from the Building Official.

Ms. Boyajian asked if they decide to allow continued use of the OWF but to not be operational during the summer, do they need to address the chimney height. Mr. Lowrey said that if they wish to overturn his Cease and Desist order, he believes they can make modifications.

Mr. Avino said he understands that if the applicant applies for a permit after the fact and it is granted, the date the permit is granted becomes the effective date of the installation and so it would be after the July 1, 2006 ban. Mr. McDermott asked if the applicant can continue to use the OWF while they are waiting for an opinion from the town attorney. Mr. Lowrey said that once the Cease and Desist order was appealed, it any enforcement action is stayed. Attorney Fader asked that if they are getting a legal opinion, can the Public Hearing be reopened for him to comment on it. Mr. Lowrey said this can be done and suggested they reopen the Public Hearing at this time.

MOTION: Stephen Caron/Kuhrt Bidorini to reopen the Public Hearing on ZBA #09-1. Motion was unanimously approved.

MOTION: Vin Avino/Stephen Caron to table the Public Hearing until the February 25, 2010 meeting. Motion was unanimously approved.

Mr. Lowrey noted that the February meeting will be held in the 1st Level Community Room.

ACCEPTANCE OF MINUTES

MOTION: Kuhrt Bidorini/Vin Avino to accept the minutes of the September 24, 2009 meeting. Mr. Bidorini, Mr. Avino, and Ms. Boyajian voted to approve. Mr. McDermott and Mr. Caron abstained. Motion passed.

MOTION: Warren McDermott/Vin Avino to accept the minutes of the October 22, 2009 meeting. Mr. McDermott, Mr. Avino, and Ms. Boyajian voted to approve. Mr. Bidorini and Mr. Caron abstained. Motion passed.

ADJOURNMENT

MOTION: Warren McDermott/Vin Avino to adjourn the meeting and pay the clerk at 10:00p.m. Motion was unanimously approved.

Respectfully submitted,

Annie Gentile
Clerk