

**ZONING BOARD OF APPEALS  
REGULAR MEETING  
November 19, 2014 – 7:00 PM  
NEW HARTFORD TOWN HALL- 530 MAIN STREET  
MINUTES**

**PRESENT:** Chairman Mary Lou Rayno, Paul Griffin, Scott Goff, Bert Brander, Lew Chappel; Alternates John Wilhelm and Keith Schaufler; Zoning Enforcement Officer Steve Sadlowski, Land Use Attorney(s) Mark Branse and Eliza Heinz.

**ABSENT:** John Rouleau.

**ALSO PRESENT:** Planning and Zoning Commission Member(s) Bob Moore and Martin Post, Inland Wetlands Commission Member Troy LaMere.

Chairman Mary Lou Rayno called the meeting to order at 7:00PM. The entire proceedings were recorded digitally and are available in the Town Hall.

**1. PUBLIC HEARINGS:**

None.

**2. PENDING APPLICATIONS:**

**A. Bruce Aldrich/Applicant, Cheryl L. Leppert/Owner – 114 Camp Workcoeman Road – Special Exception – Increase FAR to 14% as per Section 7.1.C.2.**

This application has been withdrawn.

**3. NEW APPLICATIONS:**

None.

**4. APPROVAL OF MINUTES:**

**SEPTEMBER 30, 2014 (SPECIAL MEETING) AND OCTOBER 15, 2014.**

**MOTION** Mr. Scott Goff, Mr. Lew Chappel second, **to approve the September 30, 2014 Special Meeting Minutes and the October 15, 2014 Regular Meeting Minutes; unanimously approved.**

**5. OTHER BUSINESS TO COME BEFORE THE COMMISSION:**

**A. Training Session**

Ms. Rayno reminded commission members that in 2012, the Zoning Board of Appeals was charged with reviewing applications for Special Exceptions in New Hartford. With it being a relatively new responsibility of the board, Ms. Rayno explained that they have pursued a training session with Attorney Mark Branse in order to ensure that a fair process is provided to the applicants and the neighbors.

Mr. Goff sought guidance from Attorney Branse on the do's and don'ts of reviewing special exception applications.

Attorney Branse explained that the questions are typical ones in that zoning boards of appeals are used to doing variances and are familiar with what "hardship" is. Attorney Branse distributed to commission members a copy of the section, *Zoning Boards of Appeal – Powers and Duties*, from the Connecticut Bar Association. According to Attorney Branse, state law permits, not requires, zoning commissions to delegate special exceptions to a planning commission or to a zoning board of appeal. Attorney Branse explained that during the revision of the zoning regulations, he had asked New Hartford's Planning and Zoning Commission if there were items that they might delegate to the Zoning Board. He recalled that the reason the Planning and Zoning Commission delegated this FAR Special Exception to the Zoning Board of Appeals is because the nature of these type of applications is very unique and must be closely considered on a case by case basis, similar to the nature of variances. Attorney Branse further explained that the Zoning Board of Appeals is accustomed to looking at very specific details of a site in granting a variance which is similar to what needs to be done when deciding a Special Exception application.

When the commission initially adopted FAR, according to Attorney Branse, it was fixed per zone. However, he said this originally caused a lot of problems because for example in the R4 zone, a four acre lot may be there or a 10,000 square foot lot may be there. The FAR that is easy to achieve on the four acre lot would be impossible to achieve on the second smaller lot. The reason that so many FAR requests are coming from West Hill Lake, not surprisingly, is because those lots are non-conforming, according to Attorney Branse. He explained that this is why the Zoning Board of Appeals is the right board to hear the application as they are very similar to a variance request in that the two examples he provided could be very different from each other. Attorney Branse stressed there are two components to ponder when considering variances: first, whether there is a hardship and second, whether the granting of the variance is in the spirit and harmony of the regulations. Attorney Branse used his own residence as an example to illustrate his point. As an owner of a home in a lake community, his minimum front yard setback is 75 feet and his rear yard setback is 75 feet. Yet, his lot is only 100 feet deep. He described the time that he wanted to put in a bay window and needed a variance for that.

Attorney Branse described another example of hardship as a case of an application for a 5,000 square foot house on a 15,000 square foot lot, with a full three stories and variances for two feet off the property line. Attorney Branse explained that the board could acknowledge hardship but deny based on the second component or other factor in that it does not keep with the spirit and harmony of the neighborhood. Attorney Branse mentioned that case law allows zoning boards to limit the number of stories of a building that requires a variance. He provided an example of a case that went to appeal after a zoning board allowed an application for a variance for a setback requirement but denied the number of stories for the proposed structure as it would then be looking

down on the neighbor's property. In that case, the board was trying to balance the interests. He continued that the FAR applications are very much in this vein.

Attorney Branse then explained what FAR is and what it is supposed to do. By imposing existing setbacks and height requirements, a result is sometimes an "envelope of development" or what he described as a shoe box. Development is likely to occur with a flat top and walls with vertical sides, where the building goes up and out to the maximum allowed space on small lots, resulting in "squareification". Attorney Branse explained that a commission member from Stonington some years back coined the term "squareified" where a building might have formerly had a little porch or a little indentation, was then being pushed out to its maximum part of the envelope in order to pack in the volume of square footage. FAR is a way of putting a check on that, Attorney Branse explained, by preventing construction of a plain box by encouraging a pitch roof or an indentation somewhere. FAR is a tool used at beach properties and lake communities alike, he reported. Large numbers of very small lots that used to have very small cottages are now being converted to year round homes and people want to maximize that envelope, according to Attorney Branse. One of the problems commissions have with the one-size-fix-all FAR is that it didn't work when it is applied to small lots. Large lots could potentially have 20,000 square foot houses and small lots would be allowed nothing so the commission adopted a standard of 10% FAR, with a provision that it could be as much as 20% through a Special Exception application. Through the use of evaluating the criterion as set forth on page 147 of the zoning regulations, the zoning board is allowed flexibility and discretion in their review, according to Attorney Branse.

Mr. Paul Griffin inquired as to where the burden of proof lays in these applications. Attorney Branse responded that it is always the burden of the applicant. He qualified his statement though saying that unlike wetlands, there are few instances where an expert can say much. He explained that an architect can tell you that the building design that is the subject of the application is in harmony with the character of the neighborhood but the board is not bound by that testimony. Attorney Branse explained that architectural design is too subjective. He also told the board that most of the applications under FAR that the board is going to see are what ordinary people can present without experts and ordinary people on the board can evaluate.

A question arose about whether ordinary people can testify about property values. Mr. Griffin explained that abutters will often describe the effect of granting or denying a special exception application can have on their property. Attorney Branse recalled a case from Litchfield County which resulted in a decision saying that ordinary people can testify about property value, not just an appraiser. The decision allowed for a person to say that in his/her opinion, the granting of his neighbor's application will lower his property values. However, that testimony does not mean that the zoning board has to deny the application, according to Attorney Branse. It very well may affect property values but the zoning board of appeals in their consideration of special exception applications may still absolutely accept it.

Attorney Branse stressed that the board has a very high level of discretion, especially something like a FAR consideration because there are so many factors that they could consider: What's the size of the lot? What's the design of the building? Is it architecturally appropriate? Is it in scale with the buildings around it? Is it disproportionately larger?

Mr. Goff clarified whether the board can deny applications based on those factors. Attorney Branse confirmed that the board definitely could deny based on those factors and reiterated that the board has a very high level of discretion. Attorney Branse provided additional factors the zoning board could use in their consideration: What's around them? How close they are to the lake? Does it have a walk-out basement? What's the topography like? Attorney Branse quoted from Section E (Special Exception Criteria), Item #2a (Appropriate Development), "...The design elements of the proposed Development will be attractive and suitable in relation to the site characteristics, the style of other Buildings in the immediate area, and the existing and probable future character of the neighborhood in which the Use is located."

Attorney Branse then explained that considering precedent in variance and special exception applications is essentially impossible because you won't ever likely have the identical situation on two identical properties. When considering applications regarding West Hill Lake area, the health code determines how much reserve area a home needs but a board may take a more practical approach in factors that they use in their consideration: Is the area they've shown for a reserve septic area somewhere that you can actually reach? If the applicant is expanding the house in such a way that they cut off any access to the leaching field, the board may decide that's not a good idea and not something they're willing to approve, according to Attorney Branse. He added that another factor the board may want to consider is emergency fire access.

Mr. Goff inquired as to how much detail the board can go into when it comes to environmental concerns at the lake. He referenced a situation that involved a septic tank and pump chamber which was located twelve (12) feet off the edge of the lake. Mr. Goff remarked that the tank was a standard concrete tank that is not impervious and he tended to be of the opinion such a tank would leak. He asked Attorney Branse whether this type of thing could be used as a basis in the decision. Inquiry was made as to whether Farmington Valley Health District had approved the system at the time that the board was reviewing the application. Attorney Branse commented that even if they had in fact already approved it, Section 8.5.E.5 of the zoning regulations, Environmental Protection and Conservation is a criterion that would allow the board the discretion to decide as they deem fit.

In response to a question regarding jurisdiction of the lake by Mr. Schaufler, Attorney Branse explained that regardless of who owns into the water, only land is counted for FAR calculations. When further asked about building a dock in the water, Attorney Branse explained that the Inland Wetlands Commission has authority over docks, bulk heads, filling in near or adjacent to the water. He continued stating that the Inland Wetlands Commission reviews environmental concerns from a very technical standpoint

and that the Zoning Board of Appeals looks at environmental issues from a much more broad policy standard such as the visual impact, whether it's too much of a change or too close to the lake.

Mr. Sadlowski questioned Attorney Branse regarding technical testimony, specifically if the health department says a septic system meets the code, etc., whether the zoning board could say it does not. Attorney Branse explained that the zoning board would not be saying it doesn't meet the health code, but instead that in review of the application in totality, i.e. the size of the building, the amount of grass left, and the location of the septic system, the location of the parking area, the driveway as it all relates to the total site, it doesn't work. Attorney Branse added that the applications are supposed to go before the Inland Wetlands Commission first.

Attorney Branse explained that in the motions for approval, it is highly desirable to detail and reference that approval is granted based on the plans submitted, spelled out with dates of the plan, including all revision information.

Attorney Branse explained that all the approvals granted run with the land for all the heirs, successors, and assigns. Mr. Goff asked whether it was okay to require an engineered site plan for applications. Attorney Branse confirmed especially in an area such as West Hill Lake where lots are very small and a 10% error in the plan could translate into a big difference in what the board has approved. However, conversely, if the application is regarding a ten (10) acre lot, the board may not be as concerned with an A2 survey of the perimeter for a barn, according to Attorney Branse.

Attorney Branse advised the board that they may always continue the hearing if they determine that they need more information in their review and can inform the applicant that they don't have enough specificity of what it is the applicant is proposing. Mr. Goff explained that there are times that applicants appear before the zoning board with an A2 survey wherein they have penciled in what they want to do. Attorney Branse explained that no one is supposed to alter a surveyor's drawing. Ms. Rayno inquired as to whether the board can suggest to the applicant that they can either withdraw or continue and that the board wants a site plan. Attorney Branse confirmed, indicating that there is no automatic approval for variances or special exceptions. He continued that if the board misses their timelines, there is nothing anyone can effectively do about it and that the board is not exposed to any risk by it. On the other hand, Attorney Branse explained that if an applicant with a twenty-five foot (25') side yard presents with an A2 survey that shows they're at twenty-eight (28) feet, and they're asking for an extra five (5') feet, the board can do the math, and accept a hand drawn sketch. In the approval, conditions could be included requiring the applicant to return with an A2 As-Built once the work is completed, according to Attorney Branse. In a situation such as this, the board would be perfectly justified in waiting until the work is done.

Mr. Goff then relayed a recent application that had come before the zoning board wherein a homeowner was seeking to replace a deck that had been denied. The applicant had indicated that he would get around the denial by replacing board by board

the same nonconforming deck, which would then be considered a repair and not a replacement. Attorney Branse indicated that he did not think the homeowner could circumvent the decision at this point and that it would now become an enforcement issue. Attorney Branse opined that repair versus reconstruction is a judgment call.

Mr. Troy LaMere, member of the Inland Wetlands Commission, stated that he would like to see the various land use commissions and boards meet occasionally to discuss local land use issues. Attorney Branse indicated that the town of Old Saybrook has quarterly meetings of their commissions to discuss what problems each commission is seeing. For instance, one issue that might occur is a zoning board receiving several variance applications for one area. They may request the Planning and Zoning commission to review to see if the regulations are too strict or not well written. Attorney Branse mentioned that occasionally the groups host a guest speaker on various topics. This is perfectly acceptable practice so long as there is no discussion of specific cases, according to Attorney Branse.

Ms. Rayno returned to the issue of special exception applications concerning FAR. She inquired as to an application coming in from 10% FAR to 15% FAR, and if the board considered that too much, would it be acceptable to deny it but grant them a smaller increase, such as 14% FAR. Attorney Branse said that the problem with that is approval would be granted for something the board hasn't seen. He suggested that it should be denied if the board considers it to be excessive.

Mr. Goff inquired about what could be done to prevent seasonal cottages changing to year round. He explained that they receive applications reflecting the cottage as seasonal but suspects that they will be used year round. Attorney Branse explained that while some towns regulate seasonal dwelling differently, New Harford does not. Attorney Branse said the only hurdle from seasonal dwelling to year round dwelling is the health code. He concluded by advising the board that if an applicant indicates a home is a cottage, the board should still assume it is a year round home.

Consensus was that it is a good idea for land use boards to meet as a group and discuss various items and issues. Mr. Sadlowski indicated he would coordinate this.

#### **B. Approval of 2015 Meeting Schedule**

**MOTION:** Mr. Chappel, Mr. Goff second, **to approve the following schedule for the Zoning Board of Appeals 2015 Regular Meetings:**

**January 21, 2015**  
**February 18, 2015**  
**March 18, 2015**  
**April 15, 2015**  
**May 20, 2015**  
**June 17, 2015**  
**July 15, 2015**  
**August 19, 2015**  
**September 16, 2015**

**October 21, 2015  
November 18, 2015**

**No regular meeting was scheduled for December, 2015 as it was decided that if one is deemed necessary, a special meeting will be scheduled; unanimously approved.**

**MOTION:** Mr. Chappel, Mr. Wilhelm second, **to adjourn the meeting at 8:11PM; unanimously approved.**

**Respectfully submitted,**

**Pam Colombie  
Recording Clerk**

**DRAFT**