

**MEMBERS PRESENT:** Rich Carey, Howard Haberman, Fred Katen, Nanci Seltzer, Joseph Tuozzola

**ALTERNATES PRESENT:** John Collins, William Evasick, Tom Nichol

**STAFF PRESENT:** Emmeline Harrigan, Assistant City Planner, Kathy Kuchta, Zoning Enforcement Officer, Rose Elliott, Clerk

The meeting was called to order at 7:01 p.m.

**1. INTRODUCTION OF JOCELYN MATHIASSEN, DIRECTOR OF PERMITTING AND LAND USE**

**Chairman Katen** introduced and welcomed Jocelyn Mathiasen who told the Board she has worked in local government for much of her life, directly for the last ten years and as a consultant prior to that. Since her arrival here in August, she has been working with everyone in the combined departments of Planning and Zoning, Building and Inland Wetlands, now known as the Department of Permitting and Land Use, to move the department forward with several new initiatives. She felt government needed to learn how to be as cutting edge in both technology and customer service areas as businesses are, while at the same time spending the taxpayers' dollars prudently and responsibly. Renovations are underway for a new permitting center. Website information has been upgraded for online research and new software programs are being installed to allow for some types of permits to be obtained online from the comfort of your home. She invited the Board to contact her with any questions or concerns and to visit the new offices which should be completed in a couple of months.

**A. CONSIDERATION OF AGENDA ITEMS**

1. **767 East Broadway** (Zone R-5) Stephen W. Studer, attorney, for Irene Buckley and Ann Marie Mockler, owners – appeal the decision of the Zoning Enforcement Officer in her letter of October 5, 2010 alleging a violation of Section 4.1.7.3 of the Milford Zoning Regulations and ordering removal of fences waterward of principal dwelling. Map 22, Block 474E, Parcel 28.

**Stephen Studer**, attorney, 75 Broad Street, said CT General Statutes allows for the filing of both an appeal and a variance request simultaneously. If the issues of the appeal are resolved by approving it, there is no need to consider the variance request. However, if the appeal is not approved, the Board would then need to consider the variance request. He requested opening the hearing for Item #2, so they could both be heard at once. Item #2 was then read into the record.

2. **767 East Broadway** (Zone R-5) Stephen W. Studer, attorney, for Irene Buckley and Ann Marie Mockler, owners – request to vary Sec. 4.1.7.3 to permit existing 3' high, open metal fences to remain between the rear wall of the principal dwelling and Long Island Sound. CAM required. Map 22, Block 474, Parcel 28.

**Atty. Studer** continued saying the owners feel the violation order is incorrect because the fences, which predate the adoption of Sec. 4.1.7.3 of the Zoning Regulations, are legal, pre-existing, non-conforming structures. The section was amended in April of

1997, to prohibit fences, walls and shrub rows between the rear of the principal structure and along Long Island Sound. Previously, those types of structures were allowed except within 25' of the mean high water mark. In the 1950's, when these fences were first constructed, they were legal. The reason Sec. 4.1.7.3 was changed was to preserve visual access along the beach in response to a court case involving property in Milford. The present fences are low to the ground and do not interfere with visual access along the beach. He referred to information given to the Board showing pictures of the fences, originally a wood and wire structure, from as early as 1958 to the present time. He submitted a survey from 2003 by Clarke and Pearson. CAM approval for a new house was granted by the Planning and Zoning Board in February of 2004, and the fence on the easterly side of the property was shown on the plan. That fence is part of an approved site plan by the Planning and Zoning Board and he submitted that plan to the Board. The fence is well above mean high water with approximately 39' between them and does not interfere with peoples' access to or along the beach. It demarcates the private property from the public passageway to the east and as a pre-existing, non-conforming structure, is a vested right, which runs with the land and is protected by the constitution. CT General Statutes, Sec. 8.2a, states towns may not prohibit the continuation of a pre-existing, non-conforming use, building or structure. Case law tells of abandonment and non-conformity as to location of structure. The fences have never been abandoned and submitted an affidavit from the owners stating there has been a fence delineated the side property lines since the 1950's when their parents purchased the property. When a new house was built in 2004 and 2005, the fence along the westerly side of the property remained, while the easterly fence was removed to allow access for construction and replaced with an orange construction fence. After construction was complete, the fence was put back. In 2009, they replaced the historic fence with the current fence; a more studier, safer and more esthetically pleasing fence in substantially the same location. The Board received copies of three letters of support from neighbors. The fence is important as it provides privacy and security for the backyard. It prohibits people using the beach from coming through their backyard up to their house or taking short cuts from the passageway through their backyard to the shore. The fence protects the right to the reasonable use and quiet enjoyment of the property owners. He reiterated if the appeal is denied, he would then request a variance. The facts and the reasons for the variance are the same as the appeal. The hardship is the narrow lot on the beach directly adjacent to a public right of way. Some delineation of the public accessway and the private property line is needed for the protection of the property owners and to preclude trespassing. The strict application of Sec. 4.1.7.3 to a 34' wide lot next to a 10' wide public right of way is a hardship and will deprive the property owners of the enjoyment of their land. There have been fences at this property for over 53 years and do not interfere with the public use and access, do not create visual barriers and are in harmony with the regulations designed to promote the safe and reasonable use of land. There are other fences on the beach in Milford. This Board has the authority to grant a variance pursuant to Sections 6.2.4 and 9.2.2.4 of the Regulations.

**Ms. Seltzer** asked why the fence goes right to the rear corner of the house located at #763 East Broadway.

**Atty. Studer** said the owner of that property asked his clients to put it there, on the common property line.

**Mr. Haberman** asked if the new fence was the same length as the old fence to which Atty. Studer answered it is approximately the same length.

**Mr. Evasick** noted he was in receipt of a Notice of Violation from the Department of Environmental Protection stating the fence line protrudes 6' beyond the high water mark and asked if that had been addressed.

**Atty. Studer** said he was informed by Ms. Kuchta that she had spoken with the DEP and they were of that opinion but he had not seen the Notice of Violation and didn't receive a copy. Their survey shows the high tide line, as of December 10, 2010, as being approximately 14' or 15' beyond the fence. They would however, discuss it with DEP one way or the other. If the appeal is granted, they would either apply to the DEP for a permit to leave the fence or would remove the six foot section of fence. The issue before this Board needs to be addressed first.

FAVOR:

**George Hammel**, owner of 763 East Broadway since 1973, stated he hoped the Board was able to read the letter he sent to them. He has known the owners for many years and when their entire extended family is there, it is a disaster waiting to happen if they don't have a fence, particularly along the passageway. The fence creates a very safe environment. They also have a right to their privacy and that shouldn't be taken away from them. This violation was a result of the fence being looked at on the other side of the passageway. There was never any issue with this fence; it was almost like an afterthought. He didn't think it was fair to take away this family's level of privacy and their level of safety and enjoyment. He asked the Board to consider this extended family that needs the safety of the fence and deserves the privacy of the fence.

**Clay Markham**, 805 East Broadway, said there were three items to consider. First, is a regulation that was created in 1997, second is the public and third is the rights of the homeowners. The regulation was created because of the debate on views on beach property. With this regulation, the City would not become involved in a situation where views came into play every time someone owned a piece of property on the beach. He liked the regulation as he would hate to see the beach corralled with fences but added it is not perfect. As long as you meet the required setbacks, the regulations allow you to build a house closer to the water, but not a fence. The house could obstruct views, but not a fence. If you have a fence, it ensures the public knows where they can access the beach and where they cannot. Property owners adjacent to a public passageway cannot define their property from public property. The property owners should be able to delineate that line. This delineation helps to self police the area. This fence is a good solution to the not-so-perfect regulations, to the right of public access and the property owners.

**Ken Esposito**, 759 East Broadway, said he has lived there for ten years. He felt the Board should allow the fence to remain for safety reasons and because of the fact there has always been one there.

**Rob Cleveland**, 768 East Broadway, said he uses that accessway all the time and it is his view of the Sound between the houses. The fence is a huge upgrade to the one that was there and one of the nicer ones on East Broadway. If you are walking down the beach at high tide, you don't even notice this fence and he is in favor of allowing it to remain.

OPPOSITION:

**Kathleen Kuchta**, Zoning Enforcement Officer, informed the Board that use and structure have two different meanings. Use is a school, public building, accessory apartment or liquor store. A fence is not a use it is a structure. The fences depicted in the photos from Atty. Studer are the fences that were grandfathered. Sec. 4.1.7.3 of the Regulations was put into effect on April 18, 1977, not to prohibit people from privacy in their yards but because of the severity of the nor'easters experienced here. The fences could become projectiles that could create property damage. The hope of the regulation was that over time the fences would deteriorate and would someday be gone. While on inspection of a complaint of 769 East Broadway's post and rope fence, she saw a new fence at 767 East Broadway. She has to be fair and treat everyone the same. Over last summer, because of complaints of people on Bayshore Drive replacing more than 50% of their fences on the shoreline, much time was spent with the homeowners and the City Attorney's office, interpreting the fence regulations. The outcome was a file with photos of the fences and the total number of fence posts being created for each property to determine whether or not a particular fence was grandfathered. While the fence at 767 East Broadway is attractive, it isn't fair to allow them to totally replace their fence and not the other homeowners. The map submitted to the office by Atty. Studer shows the fence ending approximately 20' from the high tide line and is based on datum of 1929. Since that datum was created establishing the elevation of sea level, more accurate data has become available and most surveyors use NAVD datum of 1988, based on satellite studies and new surveys. The surveyor obtained the 1929 datum from the Engineering Dept. but was told to subtract 1.09' from the elevation, therefore making the high tide line higher than shown on the map submitted by Atty. Studer. She spoke with Kevin Zawoy of the Office of Long Island Sound and was told the fence was found to be in violation of DEP's jurisdiction of the property from the high tide line to the mean high water mark. The City regulates from the rear of the house to the high tide line. These fences were grandfathered as long as no more than 50% was replaced. Once that was done, the whole fence has to go. In answer to a question from Mr. Haberman, she said if the owners had pulled that old fence back, built their new home and replaced the old fence in the same spot, they would have been allowed to keep the old fence. The fence was abandoned when they took it out and replaced it with a new one. It became a new structure.

**Chrmn. Katen** asked if this DEP Notice of Violation was sent to the homeowners to which Ms. Kuchta answered she wasn't sure, she only received a copy of the violation in the mail. It was however, sent to the same address as her violation letter. The Regulations clearly state no fences are allowed from the rear of the home waterward unless the fence is grandfathered and there prior to 1977.

**Mr. Tuozzola** asked whether it was April of 1977 or 1997.

**Ms. Kuchta** confirmed it was April 18, 1977.

REBUTTAL:

**Atty. Studer** agreed with Ms. Kuchta the fence is a structure. He said the regulations have to comply with State Statutes. He read CT General State Statute 8-2a "Such regulations shall not prohibit the continuance of any non-conforming use, building or structure existing at the time of the adoption of such regulations." The structure that

existed at the time the regulations were adopted was the fence from 1950. It makes no sense that you can never replace, repair or upgrade a non-conforming structure. Houses can be non-conforming structures. We need to be able to repair and replace houses. He asked how you repair or replace 50% of a fence – do you replace a section a year? There is no logic or public benefit to that. Do we want to encourage blight? The regulation he was referring to came into effect in 1997 and was included in the paperwork he handed out earlier. Sec. 4.1.7.3 says the fence can go within 25' of the mean high water mark as long as it is a mesh fence. If a fence was desired to go above that, a different type of fence could be erected but would require a Special Permit. This is where the problem began with some people, who didn't get along with their neighbors, putting up 6' high stockade fences that ran along both sides of their property down to the water's edge. There was nothing in the regulations to preclude that. So in 1997, the regulation was changed to read "...which abuts Long Island Sound only, no fences/walls or shrub rows shall be permitted within the area ... between the mean high water mark and ... principal structure ..." This regulation didn't exist in 1977 - it didn't come into existence until 1997. These fences were allowed prior to 1997 and according to State Statutes, are a vested property right that runs with the land. You have the right to maintain, replace and upgrade. He added if the Board had questions regarding the legal aspect, he would be happy to have it referred to the City Attorney's office. He agreed with Ms. Kuchta there were two datums, but disagreed with her statement the high tide line was not properly shown. He submitted a letter from the surveyor, Tracy Lewis, saying his map was accurate. Mr. Lewis used the 1929 datum because that's what was given to him by the City. He could have converted it but he was working off a base map prepared by Clarke and Pearson, whose files he acquired and all their other data was based off the 1929 datum. Nothing they are here for this evening is critical to the use of the datum. It's a different number but it's the same point. He added the owners have not received a letter from DEP as of yet. There was always a fence in substantially the same location doing substantially the same function. There are no objections from the neighbors and this newer fence is more esthetic, practical and safer as it will not rust over time like the old wire one. It is a pre-existing, non-conforming structure and should be allowed to remain. There is also a hardship and a need to delineate the rights of the public and the rights of the property owners. A variance should be granted for a piece of property directly adjacent to a public passageway.

The hearing was closed.

#### DISCUSSION:

**Mr. Evasick** was concerned about the sequence of events. He wasn't comfortable with the appeal of the decision or with the variance request while the DEP Notice of Violation was open and felt that should be taken care of first. Chrmn. Katen agreed and noted there was disagreement on the two surveys making the survey itself in question. He wondered how this Board could override the DEP's Notice of Violation. Ms. Seltzer agreed the order of events was confusing but felt the decision made by the Zoning Enforcement Officer was just and she would be standing by her decision.

**Ms. Seltzer** made a motion to deny the appeal with Mr. Carey seconding. The reason for approval was the research done by the Zoning Enforcement Officer. The motion carried unanimously with Ms. Seltzer, Messrs. Carey, Haberman, Tuozzola and Katen voting.

**Chrmn. Katen** said he needed a motion for Item #2, the variance request for the fence, heard concurrently with Item #1, the appeal of the ZEO's decision.

**Ms. Seltzer** said it is a new fence and there are regulations regarding fences, but she didn't have a problem with the fence. It may need to be shortened in length but she thought keeping part of the fence might be something to consider. Chrmn. Katen said the variance request is as presented and that is the way it needs to be voted on. Mr. Haberman said if there is a question regarding the surveys, it makes it difficult to vote on the variance. Ms. Seltzer wondered if the variance should be tabled. Chrmn. Katen felt the item should be voted on tonight, after all the time that was spent on it. Ms. Kuchta informed the Board that if the variance was granted, it should be for only the rear yard as the front portion of the fence is located in the City right of way. She asked the Board to be specific in their approval if that is what the vote is. Chrmn. Katen felt there were too many unanswered questions to approve this.

**Ms. Seltzer** made a motion to deny the variance with Mr. Tuozzola seconding. The reason for denial is because the measurements are inconclusive and inconsistent and needs to be reassessed by family members. The motion carried unanimously with Ms. Seltzer, Messrs. Carey, Haberman, Tuozzola and Katen voting.

3. **122 Pumpkin Delight Road** (Zone R-10) Lisa Bull DiLullo, owner– request to vary Sec. 4.1.4 Projections to vary rear deck allowance of 4' to 8.2'. Map 20, Block 259, Parcel 27A.

**Lisa Bull DiLullo**, 122 Pumpkin Delight Road, said the 12'x24' deck was there when she purchased the home in 1991 and she was unaware the deck did not have any permits, was not built to code and was encroaching into the setback requirements. The deck now needs to be repaired or replaced. She has a small lot and is requesting a variance to rebuild a smaller deck, 12'x20', in the same location.

**Mr. Haberman** noted the house seems to sit further back on the property to which Ms. DiLullo agreed her front yard was larger than her rear yard.

There being no one to speak in favor or opposition the hearing was closed.

#### DISCUSSION:

**Mr. Haberman** said he didn't have an issue with it. The size of the deck was being reduced, the deck existed when she bought the house and the hardship is the placement of the house on the lot.

**Ms. Seltzer** made a motion to approve with Mr. Haberman seconding. The deck needs to be replaced and the hardship is the size of the lot. The motion carried unanimously with Ms. Seltzer, Messrs. Carey, Haberman, Tuozzola and Katen voting.

4. **24 Milford Point Road** (Zone R-7.5) John Wicko, appellant, for Craig Sementilli, owner – request to vary Sec. 3.1.4.1 front yard setback to 2.7' (to overhang) in lieu of 20' required to allow existing structure to remain. CAM required. Map 6, Block 88, Parcel 8.

**John Wicko**, 50 Broad Street, said the survey shows the location of the existing two story house, which sits on a 3,900 sq. ft. lot, in a flood hazard area, VE-12. In order to do substantial renovations, they are asking to keep the house in the existing location while raising it above elevation 12, to meet FEMA standards. The house has a 3.7' front yard setback with a 1' overhang. It is inline with the houses on either side and in character with the neighborhood. Because the house is being raised, they are adding a porch and stairs for access to the side of the house and will be conforming. If the house were to be pushed back on the lot, a variance would still be required. The hardships are the size of the lot and the irregular shape of the lot.

**Chrmn. Katen** confirmed the house would be raised in the same location.

**Mr. Haberman** noted that if the house was moved back, it would cause more non-conformity.

There being no one to speak in favor or opposition the hearing was closed.

#### DISCUSSION:

**Chrmn. Katen** said they are doing renovations that are more than 50% but the house would remain in the existing location.

**Ms. Seltzer** made a motion to approve with Mr. Haberman seconding. The motion carried unanimously with Ms. Seltzer, Messrs. Carey, Haberman, Tuozzola and Katen voting.

5. **37 Shell Avenue** (Zone R-7.5) Christopher B. Carveth, attorney, for J & M Champagne, LLC, owner – request to vary Sec. 3.1.4.1 side yard setback to 9.5' in lieu of 10' required for garage; to 1' in lieu of 5' and 6.2' in lieu of 10' required to allow existing dwelling to remain according to Sec. 6.2.6; vary Sec. 4.1.4 Projection into required side yard to 2' in lieu of 6.3' required. CAM received. Map 27, Block 444, Parcel 14.

#### Withdrawn.

6. **123 Milford Point Road** (Zone R-5) Stephen W. Studer, attorney, for Nancy K. Yale and Abe Yale, appellants, for Nancy K. Yale, owner – appeal the decision of the Assistant City Planner in her letter of January 13, 2011, denying zoning permit to make permitted use of top floor of existing single family home. Map 6, Block 84, Parcel 36D.

**Steve Studer**, attorney, 75 Broad Street, passed out information to the Board. Nancy and Abe Yale are appealing a letter from the Assistant City Planner denying their application for a zoning permit to renovate their home. He submitted house plans to the Board members. The owners were told by finishing the attic, they would be

creating a fourth story in violation of Sec. 3.1.4.1. When the house was built in 1997, the Regulations allowed for a building height of 3 stories, excluding the basement and a height of 35'. The definition of building height specifically excluded that portion of the structure below the regulatory flood protection elevation. In 2011, Sec. 3.1.4.1 of the Regulations allows for a building height of 3 stories, including the basement and a height of 35'. The definition of building height changed and no longer excludes the regulatory flood protection elevation. Under the regulations in effect at the time the house was built in 1997, this property was entitled to three stories above the foundation piers and the breakaway walls, which elevate the finished first floor elevation above the regulatory flood protection elevation. That is exactly how the house was built. The height of the building is no higher because of the use you make on the inside. It still meets the 35' height definition that was in effect when it was built. It is a pre-existing, non-conforming building because it no longer complies with today's definition of height. Converting the attic to living space is not going to create a fourth story; it is already a four story structure. The attic is accessed by a standard stairway and was designed to be finished as part of the living space. He submitted a letter written by Patrick & Marianne Spillane, the original property owners who built the house. The letter states they always intended to finish the third floor at a later date. A regular stairway with banister was installed, along with heating and air conditioning ducts, regular windows with screens, cable and telephone lines and a separate room built for the enclosure of the mechanicals. They decided not to finish off the attic when they found and bought a larger house right up the street. The current owners are both professionals with a need for home offices. They have three grown children and may have some grandchildren in the future who will need a place to stay when they come to visit. In speaking with the Assistant City Planner, she acknowledged the attic could have been finished if it were done before the regulation change in 2004. He told the Board those regulations apply to new structures, not pre-existing, non-conforming structures. The timing of the renovations should not be used as a determining factor in their ability to use it as living space. He passed out copies of portions of the 2009 and 2011 regulations.

**Abe Yale**, 123 Milford Point Road, purchased the home two years ago, downsizing from their home in Fairfield. He said now that their Fairfield home is finally under contract to be sold in the spring, they can concentrate on their intentions to make two bedrooms on the third floor for a total of four bedrooms and home offices. They plan on their three grown, out of state children, to visit frequently.

#### OPPOSITION:

**Emmeline Harrigan**, Assistant City Planner, passed out paperwork to the Board. She said the Zoning Regulations evolve and change over time. When a project comes into the office, they are reviewed by today's regulations. The Regulations limit construction to three stories and 35' in height. This structure already has three stories because the first floor is the garage level. This house has already reached it maximum. The attic, as defined by the current zoning regulations, is an unfinished space. To convert the attic to living space, would be to create a four story structure. Four story homes in the City of Milford require a modification from the State Building Code because single family homes are only three stories by code. She stands by the letter she sent and repeated this is already a three story house.



**Mr. Haberman** asked if any allowance for a pre-existing structure prior to a change in regulations was given. The attic area is very large and renovation wouldn't affect the outside structure itself.

**Ms. Harrigan** said she has to adhere to the regulations in place and this is already three stories. Had this space been finished prior to the change in regulations, this would be an existing, non-conforming structure. She can't expand a non-conformity which is what she would be doing if she issued a permit for it today.

#### REBUTTAL:

**Atty. Studer** agreed that regulations evolve but that is why pre-existing, non-conforming uses, structures and buildings exist. The law is clear that if you build something and it complies with the regulations in effect at the time it was built and the regulations change, you don't apply the new rules to the old structure. They are entitled to be treated under the 1997 regulations. He said the home was already a four story house, whether the attic was finished or not, it was a story. It was designed and built under the old regulations, to be a four story house. The issue of the State Building Code is a separate issue and not part of the Zoning Regulations and the appeal before the Board this evening. The impediment is the interpretation of the regulations today as they apply to this structure built under previous regulations.

**Nancy Yale** said she loves her new home and felt she was being deprived of space she already has and the previous owners have already outfitted for use as living space.

The hearing was closed.

#### DISCUSSION:

**Mr. Carey** and Chrmn. Katen asked questions of Ms. Kuchta. Ms. Seltzer said the house was built in 1997 when the regulations did allow the 35' and three stories. They are not increasing the non-conformity because the house is already there and the four levels exist. The regulations changed after this house was built. They are increasing the use, not the size. Mr. Haberman noted Atty. Studer says the owners should be allowed to go by the regulations in effect at the time the house was built while the Assistant City Planner says you have to apply today's regulations. Since he is not an attorney and does not know what the case law is, he felt he had to go along with the Asst. City Planner, unfortunate as that might be. Mr. Evasick said this is a perfect example of what the Zoning Board of Appeals is all about. This is an existing regulation that puts an economic hardship on a landowner. There is no increase in the square footage and no changes to the exterior of the structure. The owners just want to use a floor that was legally built in 1997. This is a time when the Board has a justification of existence to override a new regulation in this one particular instance. Mr. Haberman noted the application wasn't for a variance. There would be a hardship if it were a variance. The appeal is to decide which point of view is correct. Do you apply the current regulations or the regulations in effect at the time the house was built?. Mr. Evasick agreed but repeated this is an instance where the Board has the right to overturn it. There are no radical changes being made to the dwelling. Chrmn. Katen said the house is there and agreed this was the perfect example of why we have this

Board. Whether you measure three stories from the garage or three stories from below the garage, nothing else is going to change. Mr. Carey said a reasonable person would see a stairway and utilities to the attic and see it was clearly intended for living space; it just wasn't completed. There will be no increase in size and will still be four stories high. It puts an undo hardship on the owners if they can't finish the living space. Chrmn. Katen noted he realizes Ms. Harrigan is doing what she has to do according to the Zoning Regulations but noted this is not a new house.

**Mr. Carey** made a motion to approve the appeal and overturn the decision of the Assistant City Planner with Ms. Seltzer seconding. It's an undo hardship for the homeowner not to be able to finish the attic in his home. The motion carried unanimously with Ms. Seltzer, Messrs. Tuozzola, Haberman, Carey and Katen voting.

**C. TABLED ITEMS**

**D. OLD BUSINESS**

**E. NEW BUSINESS**

**F. STAFF UPDATE**

**G. ACCEPTANCE OF MINUTES FROM JANUARY 11, 2010 HEARING**

The minutes were accepted unanimously.

**G. ACCEPTANCE OF APPLICATIONS FOR MARCH 8, 2011 HEARING**

The meeting was adjourned at 9:12 p.m.

Attest:

Rose M. Elliott,  
Clerk ZBA