

MEMBERS PRESENT: Rich Carey, Howard Haberman, Fred Katen, Nanci Seltzer (7:05), Joseph Tuozzola

ALTERNATES PRESENT: Bill Evasick, Tom Nichol

STAFF PRESENT: Emmeline Harrigan, Assistant City Planner; Rose Elliott, Clerk

The meeting was called to order at 7:04 p.m.

A. CONSIDERATION OF AGENDA ITEMS

1. **354 North Street** (Zone R-18) Stephen W. Studer, attorney, for Northpointe Associates, LLC, owner – appeal the decision of the City Planner's letter dated February 25, 2010, stating the legal, pre-existing non-conforming use of the property was abandoned. Map 87, Block 907, Parcels 6 & 8.

Stephen W. Studer, attorney, 75 Broad Street, informed the Board the possibility of continuing this item to next month was discussed as the City Planner would be out of town for tonight's meeting. However, he and his clients felt that City business should not be put on hold because one of its staff members was unavailable. He said they are interested in going forward if the Board is ready to hear the application and make a decision on it.

Chrmn. Katen stated he would like Atty. Studer to continue with his presentation of the item.

Atty. Studer passed out paperwork to the Board. He told the members this property consists of four parcels totaling approximately 9.29 acres with a 58,900 sq. ft. industrial/commercial building constructed in 1922. The industrial use predates the Zoning Regulations which were enacted in 1930. Two zoning maps, one in 1942 and the other in 1972, show this property being zoned for industrial uses. When it was re-zoned to R-18 around 1973, the industrial/commercial use became a non-conforming use. Several different companies have used this property since 1973 and he passed out a list of the companies to the Board. He pointed out that after Remington Electric Shaver vacated the property in 1974, Packaging Plus took over in 1982. After his clients, Northpointe Assoc., acquired the property in 1972, there have been a series of industrial/commercial tenants including Bob's Landscaping, Kirkham English Garden Landscaping, Northeast Construction Co., and Earth Materials, LLC. Home Response Company has been there since 2005. Since 2002, there have either been no, or some short periods of vacancy. The property has been substantially occupied to the present time. CT General Statutes, Sec. 8-2a states that towns may not prohibit the continuation of legal, pre-existing, non-conforming uses and they may not provide for the termination of that use simply as a result of the nonuse or vacancy without the intent of the property owner being taken into consideration. He then passed out copies of said statute. The question tonight is whether the non-conforming use was abandoned. The only way a non-conforming use can be lost is through abandonment and abandonment requires intent. A third party sought and obtained, through a judgement by the Superior Court, approval to build multiple family housing under 8-30g on the property, but this use was never begun. The applicant was a party who was interested in buying the property and changing the use. This applicant never

purchased the property and the use was never changed. The property itself has not substantially changed as the same building and parking lot are still there after 90 years. In 2005, during meetings regarding the multiple family housing request of S Squared, Mr. Marqese, as the manager of Northpointe, filed an affidavit with the Planning and Zoning Board, making it clear the industrial/commercial use of the property had not ceased and he had no intention of voluntarily relinquishing that use. Mr. Marqese is being taxed on, not vacant single family residential land, but on industrial land with an industrial building. They have paid over \$200,000 in taxes on the building alone since 2002, on top of the \$200,000 he paid in delinquent taxes when he purchased the property. If he intended to stop using the property for industrial/commercial uses, he would not still be leasing it and trying to sell it as an industrial/commercial property. Northpointe's conduct is not consistent with the intent to permanently abandon the use. No action has ever been taken by the City to stop the industrial/commercial use of the land as a result of Mr. Marqese's 2005 affidavit. In the later part of 2009, there were people who were interested in purchasing the property and when they went to the Planning and Zoning office, were advised by Mr. Sulkis that the property could not be used for industrial/commercial uses. They contend there are no credible facts to support Mr. Sulkis' determination of abandonment. His letter implies that the change from Packaging Plus to other industrial/commercial users, together with the cessation of personal property tax, is evidence of abandonment. Personal property taxes are irrelevant. The issue is the use of real property, not personal property. The identity of the user is irrelevant. Planning and Zoning covers the use, not the user. Case law makes it clear that a non-conforming use does not stop because the identity of the property owner or the tenant changes. Packaging Plus was the latest in a series of commercial tenants between 1973 and 2002. There were other tenants before and since. The applications made to the Board for the change in use to multi-family were not made by Northpointe, as stated in Mr. Sulkis' letter, but by a third party, S Squared, who was a contract purchaser.

Steve Wilson, owner/operator of Home Response, LLC, stated he has been a tenant of the building since 2005 and stores trucks and materials there. He needs to be able to continue to work there and does not want to move.

Peter W. Crabtree, 64 Stanley Street, New Haven, stated in today's economy, when you have a specialized piece of real estate, it is difficult to find a tenant. Eighteen months is a relatively short amount of time to find an industrial user. He agreed with Atty. Studer that the position taken by Mr. Sulkis is incorrect and inconsistent with the very basics of zoning. The tenants using this space have been low profile, low key and never attempted to change the non-conforming use into something that is objectionable to the town. Everything that has been done at the property since Packaging Plus left, has been done inside the building. There has never been a complaint regarding any tenant there in his tenure.

Anthony Marqese, 450 Center Street, Southport, said he has owned the property since 2002 and reiterated his affidavit, signed in 2005, states Northpointe never had any intentions of relinquishing the ongoing industrial/commercial use of the premises. He has continued to pay over \$30,000 each year in taxes as an industrial use. He could have saved about 80% of those taxes had he said he will no longer be using it for

industrial purposes. There have been tenants in the building on and off for as long as he has owned it. Since the use became non-conforming, there was a six-year gap where there was no one in the building and then Packaging Plus moved in. They were considered a pre-existing, non-conforming use. He doesn't understand how the position the property has been abandoned is being taken now. We have kept the building in the same exact manner as it has always been in the past. As the property owner, he is devastated that Mr. Sulkis continues to tell everyone that is interested in the building that it is no longer possible to use it as an industrial/commercial building. He reminded the Board that abandonment is a legal term, not just a word. There has to be intentional, voluntary abandonment by the owner. He is the owner and he can certify that he never even thought about abandoning the use of the building as an industrial/commercial building.

Mr. Tuozzola confirmed that the taxes being paid each year is proof the property had been used all along to which Atty. Studer said that was correct.

Ms. Seltzer asked whether Sec. 6.2.7.2 of the Zoning Regulations has occurred?

Atty. Studer said Mr. Marqese's affidavit references four tenants that have been on the property since he acquired title. There are some gaps in the time periods, but Mr. Wilson has been there since 2005. He didn't see there being six months or 18 months over a three year period of vacancy. Even if there was, it doesn't comply with the General Statutes, which states you can't find abandonment without evidence of intent.

Mr. Haberman confirmed there was intent to sell the property to someone to use it for residential use.

Atty. Studer said that was correct but added the intent to sell the property is not the intent to abandon its use.

Ms. Seltzer asked Ms. Harrigan whether she knew of six months of vacancy to which Ms. Harrigan answered the current use is determined by whether or not there has been a recent permit or Certificate of Zoning Compliance (CZC) for that activity. Even if this was an industrially zoned piece of property and the last use permitted on the site was Packaging Plus, if a new zoning permit is not issued for that new use or new CZC for a comparable use issued to move in, they don't have the right to just move in. The last CZC issued by Mr. Crabtree, is specifically for interior manufacturing and mail sorting services as Packaging Plus. Nothing has been issued since that time. Has that use been abandoned which was last issued a CZC for - yes it has.

Ms. Seltzer asked where in the Regulations, does it state that a tenant has to come in to Planning and Zoning office to rent space.

Ms. Harrigan said they come in to get a CZC to ensure the use is the same. It is in Section 8.8 of the Regulations.

Mr. Tuozzola asked about S Squared Development, who was interested in purchasing the property for residential housing.

Atty. Studer explained the property was originally zoned for industrial use. In 1973, it was rezoned for residential use but the industrial use was already established, so it became a pre-existing, non-conforming use that was allowed to continue. In 2003 or 2004, S Squared Development applied to the Planning and Zoning Board for a zone change from R-18 to RMF-9 to allow for a multi-family development. They were denied. They came back and applied for an affordable housing project under 8-30g. It was the exact same plan, but without the zone change because it wasn't needed under 8-30g. It was again denied. It was taken to Court and the judge overturned the

Planning and Zoning Board and said this use was allowed. Three years or more went by, the economy changed and S Squared was no longer in position to buy the property so they walked away. Mr. Marqese was very clear to the Planning and Zoning Board when he said if he couldn't sell the property to this company who wanted to convert the use then he was going to continue to use it for the purposes for which it was permitted.

Chrmn. Katen confirmed with Ms. Harrigan that the property was light industrial, then changed to allow affordable housing, which didn't occur. He asked if that changed the use?

Ms. Harrigan answered what changed the use of the property was the use of the property. The only CZC on the property is for Packaging Plus. If there are uses on site now, those uses were not permitted by the Planning and Zoning office. They are not the same as what was given that last CZC. They have abandoned the use stated on that last Certificate of Zoning Compliance.

Mr. Tuozzola asked if the tenants there did not apply for a permit to use the property to which Ms. Harrigan answered in the affirmative.

Atty. Studer stated he didn't think a tenant had to apply for a CZC to use a piece of property. He thought you could ask for one but didn't think you had to ask for one. He added the Planning and Zoning office had known about this use since 2005 and no one said anything about it. Even if the tenant didn't get a CZC, it doesn't mean the tenant is not there or the use was abandoned. It means they failed to obtain a CZC. It has nothing to do with the concept of abandonment.

Chrmn. Katen questioned why a tenant moving into a building needs a CZC.

Ms. Harrigan explained that if this were an industrially zoned site with multiple tenants in multiple buildings, each of those tenants would obtain a CZC if a site plan were not required, to ensure that the use is compatible with the original approval granted. In this case, there is an existing non-conforming use that's on that site. The tenant in 1994, requested a CZC to ensure that their use was still compliant with the non-conformity on site. They have abandoned what was previously approved as a non-conformity for that site. The last use was light manufacturing. What is there now, is warehousing. The office doesn't know if they have subdivided the space because they have never approached the office. If they did subdivide the space, it is unclear if that affects the parking requirements. There hasn't been an application to the City for continued use of the property.

Mr. Crabtree said the question has come up as to whether the tenants have zoning approval and clearly they do not. It is an oversight and it should have been done, but everyone in business today isn't as cognizant of the Zoning Regulations as you or I. If you were going into a warehouse with a warehouse storage business, you probably wouldn't think twice about it.

Chrmn. Katen wondered if it would be oversimplifying to say that nothing has changed on the property only the paperwork has been neglected.

Ms. Harrigan said the zoning has changed. Atty. Studer is correct in saying this once was an industrially zoned piece of land but it is not industrially zoned presently. It is still a residentially zoned property. This is why the issue of non-conformity comes into play.

Mr. Tuozzola asked what year the industrial zone was changed to residential to which Atty. Studer said he believed it was a citywide rezoning done in 1973.

Mr. Haberman confirmed there were signed, dated leases that show no break in usage to which Mr. Marqese said that was correct and added that he is in the finance

business and he finances, among other things, heavy equipment. So even when the building wasn't tenanted, it was being used by himself for storing equipment. There was never a day when that building wasn't being used. We haven't heard a word from the City since 2005 that we were doing something wrong. We have lost three buyers as a result of Mr. Sulkis saying they couldn't use the property for light industrial use.

The hearing was closed.

DISCUSSION:

Mr. Carey said this piece of property was zoned light industrial and then the City rezoned it while the use was still light industrial, making it legal, non-conforming. The applicant has shown proof that they have been using it as light industrial and paying taxes to do so. It would be unfair to not allow it to continue. Ms. Seltzer said she remembers how the neighbors spoke out in opposition in 2005, when it was proposed to become a residential area. Mr. Tuozzola added it appears that from 1982 to the present it has always been tenanted. He didn't see any better use than what is currently there. Mr. Haberman added if there hasn't been any break in the non-conforming use, he didn't see a problem with it continuing as it is.

Mr. Carey made a motion to approve the appeal and overturn the decision of the City Planner with Ms. Seltzer seconding. Approval is for all the reasons discussed. The motion carried unanimously with Ms. Seltzer, Messrs. Tuozzola, Carey, Haberman and Katen voting.

2. **23 Hillside Avenue** (Zone R-5) Michael Mastriano, owner – request to vary Sec. 3.1.4.1 for 0.3' rear yard setback in lieu of 20' required. CAM required. Map 49, Block 716, Parcel 3.

Michael Mastriano, 23 Hillside Avenue, said he would like to add some additional living space to his home and would not be changing the footprint. They would like to add a second story to the one story area of the existing home. There was an addition added to the house in 1987 that was built within that 20' setback requirement. Between the house and the water there is an abandoned piece of property. His attorney is working on obtaining that abandoned piece for him, which will give him an additional 10 feet of land and reduce his variance request.

Ms. Harrigan explained that when Mr. Mastriano purchased the property, he thought he had bought to the seawall. He knew he was going to have to go the Planning and Zoning Board because he was within 25' of mean high water but he didn't realize until he obtained a survey that the property line was right at the back of the house. This is an odd, non-conforming piece of property because this used to be a street on the waterside, which was abandoned by the City. Even at that time, it was probably non-conforming.

Mr. Mastriano passed out pictures to the Board and explained the property is fenced in by a chain link fence that has been there for twenty five or twenty seven years. Old records from the City Hall showed the property was 50' x 100' to the seawall. The house was built in 1915. This land has been part of this house for the past twenty-seven years. It is technically an abandoned piece of land that belongs to no one.

Legally they are entitled to half of the property and his attorney, Atty. Lynch, is working on finalizing the paperwork, which should be completed within the next couple of weeks.

Mr. Tuozzola asked if they have purchased this property?

Mr. Mastriano answered the 10' section would be titled to them for one dollar.

Mr. Haberman confirmed they would be going straight up and not changing the footprint to which Mr. Mastriano said that was correct.

Ms. Harrigan explained that if he were going over an existing first story that was not a porch, he would not have to go for a variance. The fact that it is a porch means he is going over a projection, and now needs to go before the Board for approval.

Ms. Seltzer asked how long the porch was there to which Mr. Mastriano answered he thought it was there prior to the addition in 1987.

Chrmn. Katen confirmed the porch was there when he purchased the house.

Mr. Mastriano said yes.

OPPOSITION:

Brian Stone, attorney, 1026 East Broadway, for Alexa Ferrucci, the next door neighbor at 19 Hillside Avenue, stated Sec. 9.2.2 of the regulations explains what is needed to apply for a variance. This lot is 50'x100' and is not irregular, narrow or shallow. He never heard of a hardship existing because there is an expansion of a piece of property. This street was abandoned in 1971 and this property is similar to all the other properties nearby. All the houses along this stretch have the same setbacks and have the same size lots. There is no hardship here. He is looking to build almost two more stories with a cupola that will create a wall, which would block the views of the water in both directions.

Judy Brennan, 13 Hillside Avenue, said she has lived there for 11 years and if this structure is approved, she would lose her views and the value of her home would diminish extensively.

Darryl Arnette, 67 Hillside Avenue, has lived there for four years and from a safety standpoint, this application should not be approved. The debris that would be torn from the house from a storm with 6'-8' high waves crashing into the proposed addition, would be thrown into other areas. There would also be a land rush for all the neighbors to build piers and pylons to build out because they would all be pushed back behind Mr. Mastriano's house.

Rachel O'Sullivan, 7 Farview Avenue, moved to this property last summer and said this proposal would limit some of her views and these properties are not inexpensive.

B.J. Brennan, 13 Hillside Avenue, said from an esthetic, panoramic viewpoint, this is something that cannot be allowed to happen. It is a line of site issue. All the houses are lined up and he feels this is how the City of Milford intended the houses to be kept. He submitted a petition of 25 people in opposition of the application. He asked that the Board maintain the Milford shoreline.

Anthony Samuelian, 10 Hillside Avenue, has lived there for thirty-eight years, and asked the applicant to check out 9 Hillside Avenue, where the owners are keeping within the footprint and not looking for variances. They are holding true to the feeling and attitude of Hillside Avenue.

REBUTTAL:

Mr. Mastriano showed a revised copy of elevations that show the addition as being much shorter. With the original plan, they tried to build as much as they could afford. Then they realized they didn't need a loft, which is where much of the extra height is located. This variance request is for the footprint of the house not the height. He has six children and he needs more space. If he cannot build on the existing footprint, he will go up on the regular house and he will go up to the 35' height allotment.

Chrmn. Katen asked him to restate his hardship to which Mr. Mastriano stated they need more space. The home has one and one half bathrooms. They need to have another bathroom. They cannot build behind the home because there is an easement for a sewer that runs behind the house. The hardship is the existing footprint of the house is already within the rear yard setback. They just want to build on top of that.

Ms. Harrigan clarified the easement is a hardship because this is the only area where they could potentially build, within the setbacks. You cannot build over an easement.

Mr. Mastriano stated that his plans have changed and whatever is house will stay house.

Chrmn. Katen stated that if you are changing the plans, maybe a variance is no longer required.

Mr. Mastriano then showed Ms. Harrigan the plans and she informed the Board that he may not require a variance after all.

Chrmn. Katen felt the Board should table the application until the office could take a look at the plans and decide whether a variance is needed or not.

The hearing was closed.

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

3. **171-173 Kings Highway** (Zone R-7.5) George W. Adams, attorney, for Gregory W. & Deborah Field, owners – request to vary Sec. 4.1.1.3 to allow height of 19' in lieu of 15' to the midpoint for an accessory structure. CAM received. Map 60, Block 795, Parcel 3A.

Attorney George Adams, 300 Bic Drive, passed out photos to the Board. The variance is for a one car, detached garage with a height of 19' where 15' is allowed, to allow a room upstairs for use by the family or caretakers, without cooking facilities. The property is 50'x247' and is narrower than the required 60' width. The hardship is the width of the lot. The property as presently used is non-conforming with three separate living units. Two units in what is referred to as the beach cottage facing the water and one unit facing the road. The owners will demolish all the buildings on the property and construct one, single family dwelling which they use as their home. The proposed garage will be more conforming than what is there now and will meet all side yard requirements as will the new single family dwelling. All they need is the height variance for the garage. He submitted a map of neighbors in favor of the application.

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

DISCUSSION:

Mr. Tuozzola made a motion to approve with Mr. Carey seconding. The reason for approval is the proposed single family dwelling will be an improvement to what is currently there and will be more conforming. The garage will be no higher than the structure existing now. Mr. Carey added the applicant will be taking away multiple non-conformities and is only asking for one small non-conformity. The motion carried unanimously with Ms. Seltzer, Messrs. Tuozzola, Carey, Haberman and Katen voting.

B. TABLED ITEMS

C. OLD BUSINESS

D. NEW BUSINESS

E. STAFF UPDATE

Ms. Harrigan informed the Board that the Zoning Enforcement Officer's position is frozen until July 1st, 2010. She didn't believe there had been any interviews for the position yet.

F. ACCEPTANCE OF MINUTES FROM MARCH 9, 2010 MEETING.

The minutes were approved unanimously.

G. ACCEPTANCE OF APPLICATIONS FOR MAY 11, 2010 MEETING.

The meeting was adjourned at 8:51 p.m.

Attest:

Rose M. Elliott
Clerk - ZBA