

Minutes, Public Hearing of Zoning Board of Appeals Meeting held 12 July 2022

The Regular Meeting of the Zoning Board of Appeals of Milford, CT, was held on Tuesday 12 July 2022, beginning at 7:00 p.m., to hear all parties concerning the following applications, some of which require Coastal Area Site Plan Reviews or exemptions.

A. PLEDGE OF ALLEGIANCE / ROLL CALL

Mr. Tuozzola advised that Mr. Wolfe and Ms. Ferrante were excused. He asked **Ms. Hirsch** to act as Board Secretary in Ms. Ferrante's place and asked **Mr. Smith** to provide the 5th vote for the evening.

He also advised that the agenda would be reordered to allow the first 2 items regarding 201 Kings Highway to be heard last.

MEMBERS PRESENT: Gary Montano, William Soda, Joseph Tuozzola (Ch)

ALTERNATES PRESENT: Gary Dubois, Carmina K. Hirsch, Mike Smith

MEMBERS/ALTERNATES ABSENT: Sarah Ferrante, Chris Wolfe

STAFF PRESENT: Stephen Harris, Zoning Enforcement Officer; Meg Greene, Clerk

CONSIDERATION OF AGENDA ITEMS

1. **819 East Broadway** MBP 27/474/50-A; R-7.5; Kevin Curseaden, Esq., for Jason Garelick, owner; vary Section 3.1.4 northeasterly side-yard setback to 5.89' where 10' required.

Atty. Kevin Curseaden, Curseaden & Moore, LLC, 3 Lafayette Street, Milford, addressed the board. He described the creation of the lot and the house. The lot was created in 1911 by subdivision map B74, recorded before subdivision regulations in 1929. Home is a small bungalow built in 1920. He described the variance requested on the easterly side of the house. He said the lot was nearly 29 feet narrower than current zoning regulations allow. He said the addition requested was similar to those of other houses on the street. The legal hardship specific to this property is the width of the lot being almost half the required size; applicant is requesting to go over the footprint of the existing deck on the beachward side and to add a second story. He said the house is also in a flood zone and the lot is oddly shaped, featuring a trolley easement. He noted a late submittal of an email from **Dawn Nelson Hart**, 827 East Broadway, and a letter from **Robert Pacelli**, 833 East Broadway, in support of the variance.

BOARD DISCUSSION

Mr. Tuozzola asked for public comment in favor.

Gloria Lanna, 823 E Broadway, said the applicant is a wonderful neighbor and they support the proposal.

Mr. Tuozzola asked for any other public comment. Being none, **Mr. Tuozzola** closed the hearing.

Mr. Montano moved, and **Mr. Soda** seconded to accept the application as based on submitted materials.

The motion carried with **Ms. Hirsch**, **Mr. Montano**, **Mr. Soda**, **Mr. Smith**, and **Mr. Tuozzola** voting **with the motion**.

2. **307 Anderson Avenue** MBP 81/706/A2; R-10; Daniel Rodriguez, owner; vary Section 3.1.4.1 easterly side-yard setback to 4' where 10' required to build a garage.

Mr. Rodriguez addressed the board. He said his wife, **Christine**, was also in attendance. He described the house as being in his wife's family for 60 years. He said they wished to add an attached garage, but the property line tapers in strongly on the side. He said the proposed addition with attached 1 car garage would be approximately 4' off the property line. He said the proposed plan fits with the aesthetics of the neighborhood and allows for a back yard. He described reaching out to his 18 neighbors, as required, and has not received any negative response.

Mr. Tuozzola verified details of the garage with **Mr. Rodriguez**.

BOARD DISCUSSION

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Mr. Tuozzola asked if anyone wished to speak in favor of or in opposition to the application; hearing none, closed the hearing and asked for a motion.

Mr. Soda motioned to **approve** based on the submitted materials and hardship of a property line on a diagonal. **Mr. Montano** seconded. The motion carried with **Ms. Hirsch, Mr. Montano, Mr. Smith, Mr. Soda,** and **Mr. Tuozzola** voting with the motion.

3. **201 Kings Highway** MBP 59/737/15; R-7.5; Keith Ainsworth, Esq., for Steven Berglass, trustee of the Steven Berglass Revocable Living Trust, owner; appeal the decision of Building Official and Zoning Enforcement Officer in accordance with the provisions of Sec. 9.2.1 regarding decision to allow construction to commence without a building permit and failure to certify that the construction on a 65'x15' inground pool within the VE zone meets all requirements of the State Building Code at subject site.

Attorney Keith Ainsworth, 51 Elm Street, New Haven, addressed the board. He has been practicing for 32 years; chairs the Council of Environmental Quality in the State of Connecticut; former chair of the Environmental Law Section of the Connecticut Bar. He represents Steven Berglass at 203 Kings Highway, also known as Seneca Place. He referenced the neighborhood, site plan and orientation of the 2 houses. He said he was presenting two appeals. Appeal 1 is regarding the decision of the ZEO and building official to allow construction to commence on March 25, 2022, without a building permit. He said the zoning permit was issued without meeting all building and zoning codes. He said zoning code requires that an in-ground pool in the coastal zone be certified flood-resistant. He said under the building code, it needs to be anchored to the substrate. He said the point where the home is located is a large ledge with some fill/soil on top; that the pool was excavated out of rock, at least partially, and should have been anchored to that rock. He said one complaint is this represents an unsafe condition. He said both properties flooded extensively during storms Sandy and Irene; last year they both experienced significant splash-over from the seawall. He said the most serious failure during the permitting process was that the ZEO failed to certify the plans meet all the zoning regulations. He said the ZEO decision not to take an action is appealable. He said another failure in the plans is they show the wrong flood elevations. The plans show the pool being in Zone AE; however, he said the pool is in the VE Zone. The difference between the two zones was described. He said the VE zone is very active, and massive amounts of water can move heavy things. He said he had two experts, **Dr. Jennifer O'Donnell**, coastal engineering specialist, and **Patrick Pinnell**, architect, who can explain how the pool can act as a boat. He said the pool could become a battering ram in a storm. He said the site plan is defective as submitted to the Zoning Commission. He said this appeal was made because the ZEO did nothing after being made aware of the erroneous information.

He spoke on the CAM act and questioned why this pool was exempted from those flood and erosion controls by the ZEO. He said the pool is only partially in ground with about 2' above grade and required a CAM application. He said anything that acts as a flood and erosion control structure is not exempt. He stated the reasons for non-exemption are that the pool is a large, concrete raised structure facing the ocean which interferes with wave energy and redirects it toward his client's property. He said the design of the pool makes it a flood and erosion control structure. He said the appeal includes public health and safety impacts.

He appealed to the Board that he would like them to declare this a situation which the ZEO should enforce.

The second issue is that the applicant was not abiding by the site plan. He said it is the ZEO's job to enforce that, along with the building inspector. He said it is the responsibility of the ZEO to take any appropriate action to stop a violation of the zoning code. He said the site plan did not indicate filling would be used, and that grading/filling cannot be done in a coastal zone. He said he had photographs of dump trucks supplying fill. He said sedimentation and erosion controls were not placed until excavation was underway. He said these controls also came down during a rainstorm and were never reinstalled. He has photographs showing the erosion controls down. He said this violation was not enforced. He said there seems to be a refusal to take the regulations seriously. He is asking for a CAM review and proper site plans because current plans show erroneous information. He stated a shed which was to be removed per the site plan has been improperly moved and placed in the front yard, and a privacy fence was also placed in the front yard, which is prohibited. He said the fence acts as a flood and erosion control structure and is not indicated on the site plan. He said in the VE zone, it would be more appropriate to avoid solid fences although he said a chain link fence there was destroyed by Storm Irene.

Jennifer O'Donnell, PhD, spoke. She stated she is co-founder and CEO of Coastal Ocean Analytics; Associate Professor of Research at UCONN Marine Sciences Department and affiliated member of CT Institute of Resilience and Climate Adaptation. She stated she is also a former member of CT Task force for Climate Adaptation and Shoreline Preservation. She said she has a Bachelor of Science

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degree in Civil Engineering from Duke University, a master's degree from University of Delaware specializing in Coastal Engineering, and a PhD in Engineering from University of Cambridge in England. She stressed she is here as a coastal engineer.

Mr. Soda interjected that he would like **Dr. O'Donnell** to limit her remarks to address the specific topic of the appeal.

Mr. Harris was asked if the 2 hearings should be heard as one. He said **Mr. Ainsworth** may state that on the record.

Dr. O'Donnell said she was asked to write a report analyzing the site plans and the construction of the pool. She offered copies of that report and a summary letter to the Board.

Mr. Harris asked that **Mr. Ainsworth** state on the record that he is rolling both appeals into one presentation.

Atty. David Schaefer, Brenner, Saltzman & Wallman, 271 Whitney Avenue, New Haven, asked for copies of all presentation materials. He believes the appellant is going far afield of the appeals filed and asked that each appeal be kept separate.

Atty. Ainsworth continued. He indicated the appeals refer to letters accompanying them which describe the conditions being complained of. He indicates the initial complaint did include the failure to require a CAM. He can separate the 2 appeals into 2 separate hearings and reincorporate some material, or the Board can make a determination on all testimony as related to each appeal.

Mr. Soda advised the Board has no jurisdiction over building code.

Mr. Tuozzola requested the 2 items remain separate, as they are separate complaints on the agenda.

Atty. Ainsworth assured the Board he is providing relevant testimony.

Mr. Harris indicated during this phase, the board is taking in information related to the charges, and not passing comment yet. The Board will have ample time to deliberate later.

Dr. O'Donnell spoke. She is concerned the submitted plans are inaccurate; thus, the permit awarded was based on inaccurate information which is vitally important in the coastal zone. She stated the AE and VE zone are both special flood hazards; a VE Zone is susceptible to wave heights of 3' and higher, requiring special codes. She stated sea level is rising and Connecticut has guidelines to consider a 20" sea level rise by 2050. She has documented what has happened at 201 and 203 Kings Highway during storm Irene, a Category 1 storm downgraded to a tropical storm. She said the pool as constructed is a shoreline flood and erosion control structure which must be permitted by DEEP. She said when the flood waters come over the seawall and hit the side of the pool it will exacerbate problems that already exist, including erosion, and increased flooding directed toward 203 Kings Highway. She said while there is currently fill in front of the exposed portion of the pool, it will be too steep to fill when erosion worsens. She asserted elevation information was not included in the pool design, meaning it could not be known ahead of time that the pool would be a shoreline flood and erosion control structure. She reinforced that the fence around the pool is not included in the plans and is also a flood and erosion control structure which can fail. There has been no coastal site plan review or consideration of what can happen over the lifetime of the pool. Information on how the pool is anchored into the bedrock is not provided. She thanked the Board.

Mr. Soda asked for pictures of the solid fence. **Dr. O'Donnell** indicated there are at least 2 pictures of the side yard fence in her report. She explained that when waves hit 201 Kings Highway, they are transported to 203 Kings Highway. She said a fence is required around the pool, but she cannot tell where the fence will be upon completion of the project.

Patrick Pinnell, Architect, spoke. He stated he has a master's degree from Yale School of Architecture; taught structural Engineering at University of Maryland; contributed to textbook, *Elementary Structures for Architects and Builders*. He said he assisted in founding the Congress for the New Urbanism in 1990 and was a member of the CNU emergency replanning team assisting on the Mississippi coastline after Hurricane Katrina. He has been an architect since 1978; Chair of Yale Environmental Design Program; Fellow of A.I.A.; speaker on climate change and storms. He said the 3 danger aspects of major storm events are high winds, low barometric pressure, and heavy rainfall. He spoke of Hurricane Katrina's effects on the Mississippi coast. He said Long Island Sound is a large basin of water which would be dumped on the CT coastline by a hurricane such as Katrina. He listed many hurricanes and tropical storms which have passed through CT. He emphasized the pool's drawings are inconsistent and inadequate, the survey is

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inaccurate, and the pool and its supporting structures are being built in ways significantly different from the drawings. He said the pool is an inherent hazard, ever increasing in the medium and long term. He stated the A2 improvement survey is dated 7/11/2000; revised 4/21/2021. He stated the plans showed the 15x65 in ground pool, and the zone is incorrect. He said the plan shows nothing about pool water supply or drainage connection. He referenced a 4x8 pool equipment pad noted adjacent to the house which contradicts Signature Pools plans received by Planning and Zoning on 9/13/21. He advised equipment there is located much closer to the water than on the survey. He said the pool coping is 2- 2.5' out of existing grade exposing at least a third of its depth to wave action. He said Signature Pool drawings note no pin connections; bedrock below was fractured by the jackhammering to install the pool. He believes the pool is in truth loose on its site as an unanchored "boat." He said in areas where ledge is known to be common, steel rebar is generally hammered in to the depth of refusal; that way the structure can be shifted based on piping and drainage. He said the 5/5/2021 Signature Pools plan indicates the pool company had done a layout without being aware of the subsurface rock. He presented an overlay of permitted location vs. actual location to show significant differences. He said the pool, if empty, would float. If floating, it would be 56% out of the water. He said the pool is oriented broadside to the Sound and has not been designed to minimize deflection of wave energy toward surrounding structures nor to reduce impacts to shoreline lateral sediment transport, both required in the VE zone. He reiterated the increase and frequency of storms and the potential of dangerous consequences.

Ms. Hirsch questioned **Atty. Ainsworth** about pg. 15 of 33; discussion ensued over the sections of the submission.

Mr. Soda questioned whether the weight of the rebar was included in **Mr. Pinnell's** calculations. He indicated construction and anchoring is determined by the building department.

Atty. Ainsworth offered an excavation photo to attempt to prove fracture. He stated they do not have proof that the pool structure is built or anchored so that it will not move and withstand flood as it should have been in the VE Zone; therefore, the ZEO could not have issued the permit because he did not have sufficient information to do so. He requests the City of Milford enforce regulations.

Atty. Ainsworth showed **Mr. Pinnell** an aerial photograph and asked him to explain. **Mr. Pinnell** explained that, using Adobe Photoshop, he took the permit plan and overlaid it on a drone aerial photograph. The photograph shows the pool location does not match the location shown on the plans. The photograph was shared with the Board.

Atty. Ainsworth believes testimony shows violation of numerous zoning regulations. He described a private covenant and boundary agreement between the two parties. He reiterated a CAM review should have been required. He requested an order for the project to go back for a CAM review.

Mr. Tuozzola asked for questions.

Atty. Schaefer, Brenner, Saltzman & Wallman LLP, 271 Whitney Avenue New Haven, who represents the **Dworkins**, property owner of 201 Kings Highway, spoke. He stated there is a statute that deals with coastal zone management review, passed by the CT legislature, which defines when such a review is to be done. A municipality may exempt swimming pools. Milford adopted that exemption. He said the pool went through every regulatory requirement. He said the ZEO did his job and the ZBA is not authorized or empowered to do the work of any other office. He said there was a building permit authorized within days of the initiation of construction, and the pool is completed. He advised the installer is here to answer questions. He said the pool is constructed like a home with concrete and rebar, and the fence is required for a swimming pool. He informed the Board his clients say the property has never flooded in the 20 years they have lived there. He summarized the qualified ZEO did exactly what he was supposed to do as did every other agency who reviewed the project. He asked to be allowed to rebut the expert testimony if need be.

Mr. Tuozzola asked **Atty. Schaefer** if, from the beginning, permits were issued, and inspectors have been coming to the property; **Atty. Schaefer** confirmed that was the case.

Mr. Harris spoke, referencing his memorandum on the 201 Kings Highway application appeal and the PZ Board approved survey for Special Permit for the pool. The application for Special Permit, 10/15/21, was filed because the pool was within 25' of mean high water. He said it was exempt from CAM because it was a pool. A zoning plan review was performed, at which the application was found zoning compliant. The Special Permit application was heard by the Planning and Zoning Board and Special Permit granted. If any aggrieved party took issue with that approval their pathway would have been to file suit in superior court. That was not done. March 1, 2022, the zoning permit was issued; 4/5/22 the building permit was issued. **Mr. Harris** responded to the appellant's grounds for appeal charge of failure to obtain a building permit; the ZEO is not charged with ensuring building permits are obtained

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by an applicant. The ZBA has no authority regarding review or issuance of building permits. To the charge, failure to certify plans of construction meet the requirements of the state building code for SHFA; ZEO is not charged with enforcing the state building code, and the ZBA has no authority to enforce the state building code. Planning and Zoning Board approved plans show the pool is in the AE 12 zone per note #7, dated 7/8/2013. This is the plan of record. To the charge of failure to require coastal site plan for shoreline flood and erosion control structure; the inground pool is an accessory use to a residential use and is specifically exempt from Coastal Site plan review per Section 5.12.2 (par. 3) of the Zoning Regulations. He stressed the appellant's entire argument is an attack on the issuance of the Special Permit. The appellant failed to make these arguments at the public hearing for the Special Permit. They cannot circle back and use the ZBA to overturn PZ Board approval.

Mr. Tuozzola asked when the Special Permit was approved by the board. **Mr. Harris** said the approval was granted 10/19/2021 and went into effect on 3/1/2022 when the applicant recorded the Special Permit.

Atty. Ainsworth asked if it was **Mr. Harris'** belief and testimony that the plan of record accurately depicts the flood elevations and flood zones that exist on the property, which is the essence of the appeal. **Mr. Harris** redirected the question to the chair. **Mr. Harris** answered that the plan was the plan of record. The time to take issue was at the time of the Special Permit public hearing. Failing that, action would be a filing in superior court, challenging the Special Permit. **Atty. Ainsworth** asked the members of the Board if they believed the plan is correct. **Mr. Soda** explained the board members are not licensed surveyors. He said the onus is on the licensed Surveyor who stamped the plan to back it up. The Board takes a surveyor's word for their survey. **Atty. Ainsworth** said there is a process for challenging the Zoning Officer's failure to enforce the zoning regulations, which is to come before the ZBA. **Mr. Soda** felt the issue may be between the appellant and the surveyor. He further stated a permit requires a survey with flood zones, which the Board was furnished with.

Ms. Hirsch made motion to close hearing. **Mr. Tuozzola** asked for comment. Being none, the hearing was closed.

Mr. Soda made a motion to uphold **Mr. Harris'** decision, **Ms. Hirsch** seconded. The motion carried with **Ms. Hirsch, Mr. Montano, Mr. Smith, Mr. Soda,** and **Mr. Tuozzola** voting with the motion.

4. **201 Kings Highway** MBP 59/737/15; R-7.5; Keith Ainsworth, Esq., for Steven Berglass, Trustee of the Steven Berglass Revocable Living Trust; failure to act on violation of Site Plan for Special Permit – failure to remove shed designated as “to be removed” on the Site Plan. Shed placed within front yard setback (w/o variance) and E&S controls were not in place (fallen down) for weeks.

Atty. Ainsworth asked to incorporate previous testimony into this proceeding. He indicated his letter indicated shed is on site plan, on a foundation of gravel. Violation of site plan. fence on site plan is a hazard, violation of zoning. Asked for enforcement on these issues which has not occurred. He referred to **Mr. Harris'** notes, indicating the shed could be moved, approved plan of record states shed to be removed, yet it is still on the property. Shed is in violation as it sits.

Atty. Shafer responded that on site plan where the shed had been the location for the new utilities for the pool. They did not say there would never be a shed. Said the shed was in a side yard, not a front yard. Nature of fence, installed a 4' fence required for a pool by code. Questioned whether a 4' fence is a flood control measure. They believe Zoning Enforcement has done the right thing.

Mr. Tuozzola questioned **Mr. Harris** whether the shed required a variance. **Mr. Harris** responded by reading portions of his memorandum. This is an open permit and he said that just because the plan said shed is “to be removed” does not mean that they are not allowed to ever have a shed. The final location of the shed has not been determined. There will be no certificates of zoning or building compliance unless the project is zoning and building compliant. The homeowner is free to move the shed to another location while construction is being done. That is not a violation. The shed will end up being zoning complaint or they will not get a certificate of zoning compliance. Nothing in the application speaking of a fence. Any fence around a pool is a building code issue. The homeowner is working on a landscaping plan. This site will be zoning compliant before a certificate of zoning compliance is issued. It is an ongoing permit.

Mr. Tuozzola closed the hearing.

Mr. Soda motioned to uphold the decision of the Zoning Enforcement Officer. **Mr. Smith** seconded.

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Mr. Soda looked at all the pictures; he has 45 years of experience in construction and found the site to be clean, and said the pool looks well-constructed. He said moving a shed during construction is customary and expects shed will be moved before CO is issued. He said silt fences fall; however, he sees no evidence of silt running down the seawall.

The motion carried with **Ms. Hirsch, Mr. Montano, Mr. Smith, Mr. Soda,** and **Mr. Tuozzola** voting with the motion.

NEW BUSINESS: Mr. Harris advised there are 3 applications submitted to be heard at the next meeting. He asked if the Board would consider taking a vacation in August. Next meeting would be September.

Mr. Soda made a motion to suspend the August meeting. **Mr. Montano** Seconded. All in favor.

A. OLD BUSINESS – none

B. STAFF UPDATE – none

C. ACCEPTANCE OF MINUTES FROM JUNE 14 MEETING

Mr. Soda motioned to approve the minutes. All in favor.

D. ACCEPTANCE OF APPLICATIONS FOR 9 AUGUST 2022 HEARING

Mr. Soda motioned to adjourn. Adjournment was at 9:07 pm.

Any other business not on the agenda to be considered upon two-third's vote of those present and voting. **ANY INDIVIDUAL WITH A DISABILITY WHO NEEDS SPECIAL ASSISTANCE TO PARTICIPATE IN THE MEETING SHOULD CONTACT THE DIRECTOR OF COMMUNITY DEVELOPMENT, 203-783-3230, PRIOR TO THE MEETING IF POSSIBLE.**

Attest:

M.E. Greene, ZBA Clerk

S.R. LaFond, DPLU Administrative Assistant