Minutes, Public Hearing of Zoning Board of Appeals Meeting held November 13, 2012

The Regular Meeting of the Zoning Board of Appeals of Milford, CT, was held on Tuesday, November 13, 2012, beginning at 7:00 p.m. in CITY HALL AUDITORIUM, 110 RIVER STREET, Milford, CT, to hear all parties concerning the following applications, some of which required Coastal Area Site Plan Reviews or exemptions.

A. PLEDGE OF ALLEGIANCE

B. ROLL CALL

MEMBERS PRESENT: Joseph Tuozzola (Chmn.) Howard Haberman (Sec.), William Evasick, Richard Carey, John Vaccino
ALTERNATES PRESENT: John Collins, Gary Dubois
MEMBERS/ALTERNATES ABSENT: Robert Thomas
STAFF PRESENT: Stephen Harris, Zoning Enforcement Officer; Meg Greene, Clerk

C. CONSIDERATION OF AGENDA ITEMS

1. **60 James Street** (R-5) Attorney Kevin J. Curseaden for Dennis Warren and Tracy Warren, appellants/owners; Appeal the Cease and Desist Order of the Assistant City Planner in a letter dated 9/13/2012 regarding garage alterations in accordance with Sec. 9.2.1. Map 27, Block 456, Parcel 20

Mr. Tuozzola announced that this item had been **POSTPONED** (2nd postponement) until 12/11/12 meeting.

2. **30 Wildwood Avenue** (R-5) Attorney Kevin J. Curseaden for Kenneth and Lisa Lesinsky, appellants/owners; Appeal the Decision of the Zoning Enforcement Officer on previous 6.4.2 lot merger; in accordance with Sec. 9.2.1. Map 12, Block 123, Parcel 10

Attorney Kevin Curseaden, of Carroll, Curseaden and Moore, PC, 26 Cherry Street, Milford, addressed the board. **Attorney Curseaden** handed out a packet of materials to the board members. He noted that the appeal had been presented prior to his involvement. He said Attorney Thomas Lynch, who presented the same appeal in February of 2012, was uncertain whether the appeal's denial at that hearing was based on the merits of the appeal or based on the timeliness of the appeal.

Attorney Curseaden then reviewed contents of the packet he had handed out, which included material on the 6.4.2 decisions of the two previous ZEOs: Linda Stock and Kathleen Kuchta. Attorney Curseaden said he had provided the same packet of information to current ZEO Harris with the appeal application and that Mr. Harris also denied the application because it had been settled previously.

Attorney Curseaden stated that upon reviewing the information and evidence presented in the past, he'd identified some unintentional misinformation and missing information filed about the property. He said the package he gave Mr. Harris included two sections. The second section had a standard 6.4.2 application. The first had history and relevant law. He noted that Ms. Stock and Ms. Kuchta had determined that the lots had been merged. Attorney Curseaden said he couldn't find evidence in the file for Ms. Stock's decision about a pool that caused the merger, but that he wasn't disputing the existence of the pool she saw when she drove by. However he said the pool was a temporary inflatable one put up in 2006 by tenants on the property. He said it's important to note that the pool was put up by tenants because under Connecticut law, merger happens two ways: either by the owner's intent (common law) or if local regulations merge properties by operation of law. He noted a precedent case in 2001: Laurel Beach v. Milford ZBA. This case referenced former Assistant City Planner Peter Crabtree's understanding of the 6.4.2 regulation. Attorney

Curseaden said he recently spoke with Mr. Crabtree about the intent of the Milford regulation, who confirmed that the intent was to clarify 6.4.2 applications, make them easier to understand, and to prevent property owners from "double dipping" by adding a permanent structure on an adjacent empty lot and then at a later date use the same parcel as a building lot. He referred to the details of 6.4.2. He noted that from the time the subdivision that created the lots was approved in 1910, the lot had been vacant until 2006. Attorney Curseaden stated that in his view the critical point of the regulation was to codify the intent of the owner. If so, when tenants inflated a pool on the lot in 2006, it did not reflect Mr. Lesinsky's intent. Attorney Curseadan noted that Mr. Lesinski had instructed the tenants on use of lot, but had moved to Oxford and wasn't able to monitor the lot constantly. When Mr. Lesinski became aware of a pool on the property, he made the tenants take it down.

Attorney Curseaden noted misinformation he had detected. He referred to 2007 photographs marked by ZEO Kuchta with a red arrow indicating a pool. Attorney Curseaden said that the photo did not show a pool, but rather a trampoline with a net around it. He reintroduced copies of the simple set pool instructions and noted that such pools cost between 50-200 dollars. He said that this was not a permanent structure, didn't require permits, and therefore would not trigger a merger. Attorney Curseaden stated that Mr. Lesinski is self-employed and that his intention was always to use the lot as a retirement investment. Attorney Curseaden stated that there are 3 reasons to approve the appeal. First, non-owners can't merge the lot because all case law talks about owners' intentions, not tenants. Second, there were new facts for consideration. Third, a new decision can be made if board feels an error occurred in the original decision, and there hasn't been a judgment on the issue in court. He asked for questions.

Mr. Tuozzola noted that this is the 3rd time the issue had been heard. He did not recall previous mention of a tenant. He noted that a trampoline had now been identified on the lot, not a pool. He agreed that this was new information. **Mr. Haberman** recalled having made the motion on this item last time and that his motion to deny was based on the timeliness of the application. He noted that the original hearing was in September 2011, at which time input was requested from the City Attorney and that there had been questions on the merits. He said there had never been a question as to whether the structure was anything other than a pool. **Attorney Curseaden** said he located the best aerial pictures he could find on Google Earth, and all photos since 2006 show nothing on the property. He stated that Mr. Lesinski's intentions must outweigh what anything tenants did. **Mr. Evasick** asked for confirmation that there was a simple set pool on the property, then a trampoline. He asked Mr. Harris if permits are needed for a pool or a trampoline, but **Mr. Harris** declined to provide an answer since his order was the subject of the appeal. **Attorney Curseaden** reiterated that structures were temporary and placed on the lot by tenants.

Mr. Tuozzola invited **Mr. Kenneth Lesinski** to speak. Mr. Lesinski stated that he lives on 96 Good Hill Road in Oxford. He clarified that the trampoline wasn't on the lot in question. He described a timeline starting with the assembly of the pool to its removal on his orders. He said ZEO Stock saw the pool at 11am on a Tuesday and it was removed by 6 pm Tuesday night. **Attorney Curseaden** noted the correction about the trampoline.

Mr. Tuozzola if anyone else wanted to speak in favor of the appeal, then invited Mr. Harris to speak.

OPPOSITION

Mr. Harris reviewed the history of the appeal. He noted that the first 6.4.2 request, made on July 10, 2006, was denied, but that an appeal wasn't taken to the ZBA. In March of 2011, another 6.4.2 request was made including an affidavit about the tenants installing a blow-up pool. On April ZEO Kuchta denied the request, which was also not appealed. In June 2011, Attorney Lynch asked for reconsideration with specifications for a blow-up pool and said a non-response would trigger an appeal, which he brought in July 2011. The ZBA

tabled the item in September 2011, then it was withdrawn in October 2011. There was a concurrent new 6.4.2 request in September 2011. ZEO Kuchta responded with a denial on Jan 13, 2012. On January 24, an appeal of the ZEO's letter was submitted with the affidavit and pool brochure for the February 14th hearing. During the hearing, ZEO Kutcha submitted an aerial photo as part of the defense of the denial. The Board and applicant had the opportunity to examine the photo and comment. But the opportunity to do that was not taken. No extension was requested. At that hearing the Board upheld the ZEO. No appeal was taken to court. Therefore the arguments to overturn the ZEOs' decisions which are now being made by Attorney Curseaden, whether or worthy not, should have been made in February of 1012. If the decision was not overturned then, there's no reason to overturn it now. He invited questions.

Mr. Haberman and **Mr. Harris** discussed confusion about the nature of the motion made in February, but Mr. Harris said that the published notice of actions taken by the ZBA showed that the ZEO's decision had been upheld. They also discussed the timeliness of the February appeal, which Mr. Harris indicated was timely, as was the current appeal. Mr. Harris stated that if stronger arguments could have been made, they should have been made in February of 2012. **Mr. Vaccino** noted that the evidence presented wasn't new, but that the attorney was making a better argument.

Mr. Carey agreed with **Mr. Haberman** that the denial was based on timeliness. **Mr. Collins** said that this might mean that a new decision could be made on the merits, since the last decision was not made on the merits. **Mr. Tuozzola**, **Mr. Collins**, and **Mr. Vaccino** discussed the possibility of new information being presented, whether the new information was valid, and how it might affect a vote. **Mr. Carey** noted that the ZEO said that all the facts had been brought before board and that **Attorney Curseaden's** arguments should have been made in February 2012.

Mr. Tuozzola asked if **Attorney Curseadan** if he wished to rebut.

REBUTTAL

Attorney Curseadan said that Mr. Lesinski didn't get the photo with the arrow until after the hearing and therefore didn't get the opportunity to state that the supposed pool was actually a trampoline, and that the trampoline was not on the lot. He noted that though the same facts of the affidavit were presented before, there were no references to Connecticut merger law and its basis on intent, and that the Milford regulations were an attempt to codify this common law and that this was new information for the board to consider. He said that in reviewing the minutes from February 14, the appeal was denied for being untimely because Mr. Lynch just sent a letter asking ZEO Kuchta to reconsider, so he didn't make new legal arguments. Attorney Curseaden noted that he had done a lot of research to introduce new information and didn't wish to waste the board's time on a matter that had been considered before. He noted difficulty in conducting the research as he couldn't find the original denial letter from ZEO Stock in the file or photos of the pool. He said this makes it a confusing case, but that Mr. Lesinski shouldn't suffer because of confusing file materials. He said that Mr. Haberman's motion to deny the appeal seemed to have been based not on Mr. Lynch's letter to ZEO Kuchta, but the ZEO Kuchta's refusal to reconsider as instructed in the letter. He asked that this letter and the previous files be made part of record, including the affidavit from the previous tenants. He said ZEO's letter cited an indentation in the ground and a fence around the property, which constituted new evidence presented by Ms. Kuchta, even though Mr. Lynch was not allowed to present new evidence. He said he'd done many 6.4.2s in Milford, and that fencing and indentations were not necessarily indicators of a pool. He also noted that if the ZBA approved the appeal, it still had to be posted, allowing the neighbors to contest whether the pool was there. He emphasized that Mr. Lesinski's statement about taking the pool down promptly showed diligence in protecting his interests.

Mr. Tuozzola closed the hearing.

DISCUSSION

Mr. Evasick noted that merging lots is often misunderstood by homeowners and couldn't believe an owner would jeopardize future use. He questioned whether the city should educate owners with adjacent lots on the risk of creating mergers. He said that ZEO Stock made a decision that lot was merged with pool, but he was always troubled that a 52-hour use of a blow-up pool would result in the loss of someone's retirement investment. **Mr. Collins** agreed with Mr. Evasick, saying that the speed with which Mr. Lesinsky got rid of the pool showed that he did not want it there, for whatever reason. **Mr. Tuozzola** said he recalled discussion of the indentation in the ground, which indicated that the pool wasn't just there for a matter of hours, but for a long period of time. He reviewed the potentially new evidence presented. **Mr. Haberman** reaffirmed his recollection that the appeal was denied based on it being outside the appeal period, and if so, the time to appeal has come and gone. If it's timely, he posited that the board could reconsider. **Mr. Carey** agreed with Mr. Haberman that the motion was based on timeliness that therefore the board wasn't given the opportunity to vote on merits.

Mr. Tuozzola asked for further comments, hearing none, he asked for a motion.

Mr. Carey motioned to uphold the appeal of the applicant. **Mr. Evasick** seconded. **Mr. Carey** supported his motion by reason of ZEO Harris' statement that timeliness wasn't an issue in last appeal, so the board's decision was in error.

Mr. Tuozzola asked for a vote. The motion failed with **Messrs. Carey** and **Evasick** voting **with the motion** and **Messrs. Vaccino, Haberman, and Tuozzola** voting **against the motion**.

3. **49 Wilbar Avenue cor. Walker Street** (R-5) Valerie White, architect for Maya Prabhu, owner; Vary Sec. 3.1.4.1 side-yard setback to 1.5' where 4' is required, and rear-yard setback to 1.5' where 5' is required; for expansion and renovation of existing garage. Map 45, Block 513, Parcel 4

Valerie White, architect, 230 Hattertown Road, Monroe, addressed the board on behalf of Maya Prahbu, owner. **Ms. White** stated that the variance was straightforward; that the owner wished to make the garage a standard size. The hardship was that the lot is the minimum size for an R-5 zone and is a corner lot creating a need to meet 2 front-yard setbacks. She noted this also affected the positioning of the garage. She said that a magnolia tree is growing 4 feet from garage and that, while the owner wants to save tree, she needs to be able to get in and out of the garage. Ms. White stated that Ms. Prahbu had gotten prior ZBA permission to repair the garage as it is, but now that work is being done, she thought it made more sense to expand it. Ms. White provided a list of neighbors who favor request and provided photos of the corner and garage. She described the area as a manicured neighborhood which supports preserving the tree.

Mr. Tuozzola asked if this variance application effectively extends the prior variance and whether the tree was too big to be transplanted. **Ms. White** said that to position the garage in the setback also diminishes the rear yard and that the owner really didn't want to touch the tree. **Mr. Vaccino** asked about an error on the application indicating that no prior appeal had been filed. **Mr. Harris** explained that there is no defect in an application if an inconsequential error is made.

Mr. Tuozzola asked if anyone wished to speak in favor of or opposition to the appeal. Hearing none, he closed the hearing. After a short discussion, there were no issues in dispute, so he asked for a motion.

Mr. Haberman motioned in favor of appeal. **Mr. Carey** seconded. **Mr. Haberman** supported his motion by reason of the hardship of the corner lot. The motion carried with **Messrs. Carey, Evasick, Haberman, Vaccino** and **Tuozzola** voting **with the motion**.

4. **199 Honeycomb Lane** (R-A) Martin Malin and Crystal Malin, owners; Vary Sec. 3.1.4.1 front-yard setback to 40' where 50' is required, for construction of garage. Map 118, Block 909, Parcel 7A

Mr. Martin Malin, 199 Honeycomb Lane, addressed the board. **Mr. Malin** noted that his wife and children were also present. He reviewed the application requests and stated that the hardship consisted of a constrained lot due to underground utilities to the west of the house, the septic system to the east of it, the wetlands and reserve septic area to the south of the house. He noted that he had tried to keep the proposed garage away from his only adjacent neighbor and to position it as a buffer to Merritt Parkway. He shared a plan he drew that was color coded to show how the site is encumbered. He described the garage to also contain garbage cans, bicycles, sporting equipment, an area for a workshop. He noted that it will connect to the house with a breezeway. He shared sketches he drew for the garage, showing how it will continue the craftsman style of the house. He reviewed details, including future area to accommodate solar panels. He noted that most other houses in the area have garages and that his family will better be able to keep the yard neat.

Mr. Tuozzola discussed the possibility of building the garage by right, but **Mr. Malin** noted the need for the reserved septic area. Mr. Malin said when they purchased the house, they were told sewers would be provided soon, but time has passed and it now seems unlikely, therefore a reserve septic area must be maintained.

Mr. Tuozzola asked if anyone wished to speak in favor of or opposition to the appeal. Hearing none, he closed the hearing. After a short discussion, there were no issues in dispute, so he asked for a motion.

Mr. Vaccino motioned in favor of appeal. **Mr. Carey** seconded. **Mr. Vaccino** supported his motion by reason of the stated constraints of the lot. The motion carried with **Messrs. Carey, Evasick, Haberman, Vaccino** and **Tuozzola** voting **with the motion**.

During the making of the motion, **Mr. Harris** noted that it's good practice to make the motions as specific as possible due to potential legal challenges.

C. OLD BUSINESS

There was none.

D. NEW BUSINESS

Mr. Evasick told the board that he is resigning effective December 31. He said he had submitted a letter to the chairman and wanted to thank the board members. He said other responsibilities will constrain his participation and that he would inform city hall. **Mr. Tuozzola** thanked Mr. Evasick for his service, input, and decisions, and wished him luck.

Mr. Carey asked Mr. Harris to inspect a shed at 36 Hawley Avenue to see if it encroaches on the front yard setback.

E. STAFF UPDATE

F. ACCEPTANCE OF MINUTES FROM OCTOBER 9, 2012 HEARING

Mr. Carey moved they be accepted as amended with **Mr. Vaccino's** correction.

The meeting was adjourned at 8:15 p.m.

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:

Meg Greene
Clerk, ZBA