

Minutes, Public Hearing of Zoning Board of Appeals Meeting held 12 December 2023

The Regular Meeting of the Zoning Board of Appeals of Milford, CT, was held on Tuesday, 12 December 2023, 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 welcomed new board member Andrew King. He asked **Ms. Hirsch** to provide the 5th vote in Mr. Wolfe's absence.

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

ALTERNATES PRESENT: Carmina K. Hirsch, Andrew King

MEMBERS/ALTERNATES ABSENT: Gary Dubois, Chris Wolfe

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

CONSIDERATION OF AGENDA ITEMS

72 Westport Place MBP 85/924/1H; R-30; Thomas Lynch, Esq. for James Cottrell, owner; Vary 3.1.4.1: south setback from to 7' where 15' req. for addition. East setback to 5' where 10' req. for Accessory Structure. 4.1.1.1: Front-yard setback to 25' where 40' req. for pool. 4.1.4: Front-porch projection to 5.8' where 4' permitted. 4.1.4: Rear deck projection to 6.3' where 4' permitted. 4.1.5: Terrace projection to 8.9' where 15' permitted in front yard. Survey, Codespoti & Associates, 7/25/23, revised 9/20/23.

Attorney Lynch, 63 Cherry Street, addressed the board. He introduced his client and said the several variance requests on the application were minor and necessary due to the unusual shape of the lot and resulting setbacks. He reviewed the history of the property and described the applicant's renovation plans. He noted that the rear of the lot borders a designated Open Space area in Lexington Green. He described the concept of a cluster development where smaller lots than zoned are allowed based on a provision for open space. He said that because of this, the R-18 zone applies, not the R-30. He said the current garage would be demolished and replaced by a new garage and pool. He said an addition consisting of 1000sf will be used as living space for Mr. Cottrell's parents. He noted that the agenda item had been postponed for several months due to dialog with the Cottrell's neighbors on Beth Ann Circle, which resulted in an amended plan with a setback increase from 7' to 12' corresponding to a reduction in the addition. He referred to a letter from Ms. Pacelli requesting several stipulations, which, if satisfied, earned her approval of the plan. He read the stipulations into the record, noting that his client accepted them. **Mr. Tuozzola** asked if the measurements appeared on the plan and was assured that they did. **Mr. Soda** noted the connector between the house and the addition and the *porte cochere* between the garage and house. **Mr. Montano** noted the reduced setback request from 7' to 12'.

BOARD DISCUSSION

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.

Ms. Hirsch moved to approve with the following modifications the petition of Thomas Lynch, Esq. for James Cottrell, owner, to Vary section 3.1.4.1: south setback to 12' where 15' req. for addition, East setback to 5' where 10' req. for Accessory Structure. Vary section 4.1.1.1: Front-yard setback to 25' where 40' req. for pool. Vary section 4.1.4: Front-porch projection to 5.8' where 4' permitted. Vary section 4.1.4: Rear deck projection to 6.3' where 4' permitted. Vary section 4.1.5: Terrace projection to 8.9' where 15' permitted in front yard in accordance with the survey by Codespoti & Associates, 7/25/23, revised 9/20/23.

Conditions:

- **There will be no greater than a 3' variance for the proposed 560 sf structure on the southwestern side of the subject property closest to 7 Beth Ann Circle.**
- **The proposed structure is limited to one (1) story.**
- **The applicant will plant evergreen trees known as "Green Giants" at least six feet in height on the border of 72 Westport Place and 7 Beth Ann Circle to screen the new construction from view.**

Attorney Lynch asked for permission to speak despite the hearing being closed and suggested **revising the motion to incorporate use of the plans dated 12/10/23**. **Ms. Hirsch** accepted this revision.

Mr. Soda seconded.

Discussion: **Mr. Soda** said he was satisfied the negotiations for the current request were productive and agreed that the lot shape was a hardship.

The motion carried with Mss. Ferrante and Hirsch and Messrs. Montano, Soda and Tuozzola voting with the motion.

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15 Bonsilene Street MBP 71/778/5, R-5; Kevin Curseaden, Esq., owner; Appeal the decision of the Zoning Enforcement Officer in accordance with the provisions of section 9.2.1 regarding issuance of zoning permit that allows increase in nonconforming structure and nonconforming building area as % of lot without required variances; structure exceeds approved variance; variance expired.

Attorney Curseaden, 3 Lafayette Street, addressed the board. He shared a screen showing the approved 1983 variance and elevations featuring a single story 1 car garage. He said his objection was that the width of the garage was exceeded. He shared a photograph of the addition. He said the permit was issued without a survey. He said he reached out to the designer James McElroy requesting that a survey be done. He said he located elevations despite not finding them previously in the file. He said he discussed the variance with Joseph Griffith and Stephen Harris. He said a survey was then required and the permit was revoked pending the creation of the survey. He said the completed survey showed that there was a 5' area between the garage and lot line rather than the 3' lot line indicated on a 1983 hand-drawn plot plan, making the garage zoning-compliant for that setback. He said after the survey was submitted; he filed an adverse possession application for the property that had formerly been fenced off. He said the survey also showed an increase in the lot coverage of 1.7%, which he said was dismissed as a concern by Mr. Harris. He said that he had represented other clients who were compelled to reduce lot coverage to receive a permit. He said the nonconforming structure was being expanded, and although the approved plans don't show lighting in front of the structure, his light meter measurement detected footcandles exceeding the regulations. He said he was aware that Mr. Harris does not need to review light trespass unless the application requires a Site Plan Review, but referred to a regulation that governs light trespass. He said he agreed with some conclusions in Mr. Harris's memorandum but disagreed with others. He said variances do run with the land, but there is no prohibition on expiration in the statute. He said Milford once had a regulation where variances expired after one year. He said that even if they don't expire, many things can change over 40 years and the argument that this variance expired was valid. He compared the expiration to a condition of approval. He said that since the original request was for 3' variance, it was also required for the second story. He said he wasn't asking the board to go back in time to consider more variances, but if the board were to honor the past approval, it should also be based on the previous property line. He said if the adverse possession was deemed correct, there will be a nonconformity. He said the adverse possession decision should be made prior to the decision on issuing the permit. He said he tried to negotiate with Mr. McElroy but couldn't. He said he was asking that the variance be enforced and that any additional required variances be applied for. He said the light trespass is now on the record as a complaint. He said the second story wasn't approved and that it was constructed as living space. He said the specific issue addressed by state statute 8-6 was to prevent variances terminating upon property transfer, but the language doesn't preclude expiration.

Mr. Soda reviewed the setback information. **Attorney Curseaden** stressed that the adverse possession question must be decided first. Discussed ... get from video. **Mr. King** asked about how the setback was determined whether using only the footprint versus the roof overhang.

Mr. Harris read his memorandum into the record, as follows:

SUMMARY OF FACTS & PROCEDURAL HISTORY:

1. *On June 24, 1983, a variance was recorded to reduce the side yard setback to 3' and to build a garage 13'-1/2' x 23' attached to the house. The attached garage was a one-story building.*
2. *On 9/30/22 a zoning permit was issued, based upon the site plan submitted to the ZBA in 1983, to construct an attached garage.*
3. *On 7/25/23 the zoning permit was revoked because the scope of work exceeded what the ZBA approved in 1983. The garage had a full second floor, which was not shown on the approved plans.*
4. *On 11/2/23 the zoning permit was re-issued based upon a recent survey that showed the garage in a zoning compliant location. Since it was in a compliant location and attached to the house a second story was permissible. The building footprint remained the same size as the ZBA approval.*
5. *On 11/13/23 an appeal was taken for the re-issuance of the zoning permit based upon:*
 1. *Sec. 3.1.4: Building coverage exceeded the allowable limit (41.7% where 40% permitted)*
 2. *Sec. 6.3: expansion of nonconforming structure.*
 3. *Sec. 5.2: Light trespass.*
 4. *Expiration of variance.*

CITY'S POSITION:

1. *Sec. 3.1.4 and 6.3: The granting of the variance in 1983 was based upon the submitted materials. Scaled elevations were submitted but a survey, including a zoning table, was not submitted. When a variance is granted and recorded, the materials*

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that comprise the record cannot be amended after the fact, or the variance revisited to see if further variances for the project are required.

If, in 1983, the ZBA wanted a survey and zoning table it would have asked for one prior to making its decision.

Furthermore, as a matter of equity, this Board is required to honor the past approval. The property owner relied in good faith on the approved variance. The City cannot now, after 40 years, decide further variances are required and force the property owner to file an application in order to build the same garage that has already been approved.

2. *Sec. 5.2: The City is unaware of a complaint about light trespass.*
3. *Expiration of Variance: Variances run with the land. They are not time-limited. Once recorded a variance is activated and never expires.*

CONCLUSION:

1. *A variance was recorded to build a garage. The property owner relied in good faith on that approval to construct the garage, which was built to the same size as shown on the approved variance of 1983.*
2. *The ZBA has no authority to re-examine a recorded variance to see if additional variances are required.*
3. *As a matter of equity, the ZBA is required to honor the approved and recorded variance.*

For these reasons I ask the Board to uphold the decision to re-issue the zoning permit.

Mr. Harris added that the legal action on adverse possession was not germane to the appeal, rather it was a matter for the court, not the ZBA. He stated that the ZBA has no authority to arbitrate the accuracy of surveys and beyond that, the only survey in the record when permit was reissued was the Codespoti survey. He said that CGS 8-6 does not provide a mechanism for variances to expire, that it is silent on the matter. He shared a screen displaying the original variance and plans. He showed that the 2-story structure constructed at the location is zoning compliant because the lot line is 5' away from it. He noted that if it were 3' away, only 1 story would have to been allowed, based on the original 1983 variance approval. **Mr. Soda** confirmed with Mr. Harris that based on the survey, no variance is needed, and that at some point in the past, the Milford Zoning Regulations assigned expiration dates to variances. **Ms. Ferrante** confirmed that expiration dates were not valid for variances. **Mr. King** asked for more clarification on how setbacks are measured.

Chairman Tuozzola asked if anyone in the public wished to be heard.

Charles Willinger, Esq. Willinger, Willinger, & Bucci, P.C., 1000 Bridgeport Avenue, Shelton, representing Susan Simone at 15 Bonsilene Street, addressed the board. He said she was present with Mr. McElroy, her architect, and that he (Attorney Willinger) represents her in the adverse position case. He said that the adverse possession suit is likely to fail because adverse possession requires at least 15 years of possession and Attorney Curseaden has only lived next door for about 6 years. He said the adverse possession case can't rely on an allegation; it must be based on an A2 survey. He shared a paper copy of the survey with the board and said that the previous resident to the applicant was wheelchair-bound. He said that resident asked that the fence be allowed to encroach on the 15 Bonsilene property to allow him more access when getting in and out of his car. He asserted that the fence was moved at the request of the neighbor, thus the prior owner knew it wasn't his property but requested the use of it. He noted that no survey existed in 1983 but that there is one now. He referred to another case before appellate and supreme courts where discussion of the expiration of various permits had occurred. He said that in that case, Special Permits were affirmed to be finite, lasting about 15 years, but in the case, both courts cited several other cases that demonstrated that variances cannot expire. He said the approved plan includes provision of the lot coverage. He showed photos of the existing house and the garage. He added that if the applicant is correct, municipal estoppel still prevails, explaining that to revoke the permit is contrary to the city's past conduct and makes the city liable for the issuance of the permit. He asked the board to overturn the appeal and uphold the decision of the zoning enforcement officer.

Rebuttal

Attorney Curseaden said both the ZEO's and Attorney Willinger's analyses were flawed with respect to lot coverage approval because lot coverage was not part of the original approval, and because a decision made in 1983 could be subject to the changes occurring over 40 years, such as the addition of other structures. He disputed that silence in CGS 8-6 over expiration precludes it being added to local regulations. He said with regard to the location of the fence on 15 Bonsilene, in his research the fence predated the prior owner and the same property line was reflected in the original ZBA 1983 application. He said the original application was

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for more than granted was by the variance, so it was not made in good faith. He stressed that exceeding the lot coverage regulation is still subject to a variance.

Mr. Soda asked if the 41.7% lot coverage exceeding the permitted 40% required a variance now. **Mr. Harris** said that in 1983, the then-ZBA could have asked for a survey or zoning table but for whatever reason, they didn't. He said the homeowner relied on that 1983 variance to build that garage, and that it is not up to today's board to demand something more than the board's historical decision because in opening one aspect of the plan, the original approval can be denied altogether. **Ms. Ferrante** said she felt Attorney Curseaden had a point about the possibility of interim changes being made. **Mr. Harris** said the notion of the house having been changed was speculation. He said that if this was a fresh application, received now, a lot coverage variance would be added to the request, but it was approved 40 years ago. **Attorney Curseaden** asserted that this was indeed a fresh zoning permit application, and the old variance approval was for a side-yard setback only. **Ms. Ferrante** said she also thought the variance was for a side-yard setback rather than a specific-sized garage. **Mr. Harris** said the scope of the variance is predicated on what is presented to the board at that time of the application—on the submitted materials, including the footprint of the garage—and that, in his opinion, it is unwise to speculate today on the board's thinking on what was granted back then. **Ms. Ferrante** asked if the fact that the structure was never built calls the approval into question. **Mr. Harris** said that one can get a variance and never use it; he and Ms. Ferrante discussed why that might be so, but he stressed that variances do not expire. **Mr. Soda** said he didn't see how it follows that no variance is now needed for the garage side-yard due to the new survey, but that it isn't needed for lot coverage. **Mr. Harris** said the approval for the structure had already been decided in 1983 and if you bring the owner in for a new variance, it can be denied, which would negate the prior approval, which could also negate something they already have approval for. **Mr. King** asked whether lot coverage should have been an issue when the new permit was granted in November of 2023. **Mr. Harris** said the lot coverage should have been an issue in 1983 but the board approved it without the survey and recorded the variance, so it can't be reopened without calling the whole approval into question. They discussed the second floor of the garage with Mr. Harris noting that a second floor was never part of the original approval and according to the survey, the second floor could be built today as of right and that the owner could still have used the 3' setback variance for a one-story garage but chose not to. They also discussed the revocation of the permit.

Attorney Curseaden agreed with Ms. Ferrante and said the applicant has to conform to the lot coverage regulation.

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

Ms. Hirsch moved to ***uphold the decision of the Zoning Enforcement Officer*** in reissuing the zoning permit.

Mr. Soda seconded.

Discussion: None.

The motion carried with Ms. Hirsch and Mr. Soda voting with the motion and Ms. Ferrante and Messrs. Montano and Tuozzola voting against the motion.

- A. NEW BUSINESS**—The 2024 ZBA Calendar was approved unanimously.
- B. OLD BUSINESS**—None
- C. STAFF UPDATE**—On behalf of staff, **Ms. Greene** thanked Mike Smith, who attended as part of the audience, and welcomed Mr. King to the board. She also expressed heartfelt gratitude for retiring Chairman Tuozzola's long and faithful service to the ZBA.
- D. ACCEPTANCE OF MINUTES FROM 14 NOVEMBER 2023 HEARING:** Approved.
- E. ACCEPTANCE OF APPLICATIONS FOR 8 JANUARY 2024 HEARING**

Adjournment was at **8:32PM**.

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, Clerk, ZBA