

## Minutes, Public Hearing of Zoning Board of Appeals Meeting held 17 December 2020

The Special Meeting of the Zoning Board of Appeals of Milford, CT, was held remotely on Thursday, 17 December 2020, beginning at 7:00 p.m. via ZOOM®, 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** called the meeting to order at 7:03 pm. He reviewed guidelines for online public meetings. He asked **Mr. Casey** to vote for Mr. Soda and **Mr. Hirsch** to vote for Mr. Wolfe.

**MEMBERS PRESENT:** Sarah Ferrante, Christine Valiquette, Chris Wolfe (*signed in after meeting opened*), Joseph Tuozzola (Ch)

**ALTERNATES PRESENT:** Michael Casey, Gary Dubois, Etan Hirsch

**MEMBERS/ALTERNATES ABSENT:** William Soda

**STAFF PRESENT:** Stephen Harris, Zoning Enforcement Officer; Meg Greene, Clerk; Joseph Griffith, DPLU Director

### **B. CONSIDERATION OF AGENDA ITEMS**

- 1) **17 Maddox Avenue** MBP 27/451/11, R-5, Max S. Case, Esq., for Robert McCloud and Evdoxia Picarazzi, appellants; property owner is AR Housing, LLC; Appeal the Decision of Zoning Enforcement Official, zoning permit dated September 23, 2020, signed on September 23, 2020, re: construction of a new 2-family, 2-story dwelling at 17 Maddox Avenue, with zoning permit attached to application dated 10/6/2020.

**Attorney Case**, 185 Plains Road, thanked the board for the courtesy of the special hearing and verified that the session was being recorded. He asked the chair if Dr. McCloud could speak first and the chair allowed it. **Dr. Mc Cloud** also thanked the board and began a presentation of PowerPoint slides detailing his perception of how the Inland Wetlands Agency (IWA) and Planning and Zoning Board (PZB) had failed to respond to neighborhood concerns about the 17 Maddox Avenue application. He entitled his presentation "Disenfranchising a Milford Neighborhood." He said that the ZBA was the only body willing to listen to neighborhood concerns. He expressed an opinion that the IWA and PZB had not done so. He expressed his views on definitions of wetlands and soil science. He showed a photo of the houses that were previously on the lot. He said flooding would be exacerbated by lot coverage. He noted abutment by Silver Sands State park. He showed a drawing of areas that abut nearby wetlands and said the abutters were not notified of a IWA hearing. He said the soil scientist who made the determination was not a coastal biologist. **Mr. Harris** asked for permission to interrupt to state that this matter had already been decided by IWA and was not in the purview of the ZBA. **Dr. McCloud** reiterated that he felt that the neighborhood had been done a disservice. He said permanent harm was done to the wetlands. He displayed a note from previous 17 Maddox Street owner Mike Tarantino saying that the seller had told current owner Anand that he (Anand) could not expand past the existing foundations. He showed photos of heavy construction equipment on the site. **Mr. Tuozzola** reminded Dr. McCloud that previous presentations had covered much of the same materials. **Dr. McCloud** said IWA officer Palumbo had ordered the removal of construction waste left on the site, but it was not removed. He said trucks were parked on the wetlands and then on a neighbor's property who is out of town. He said wildlife had been disturbed and destroyed by the heavy equipment. **Mr. Harris** again interrupted to state that while the information might be vital in some other venue, it was not germane to the ZBA. **Dr. McCloud** then focused on the PZB, saying that on 8/18, he sent an email asking for a public hearing at the Site Plan Review being held for the property, but he was not allowed to speak. He said he believed that a public hearing was denied because the PZB did not feel the neighbors were important enough. **Mr. Harris** asked the chair for permission to interrupt the presentation a third time, stating that it was not the purview of the ZBA to review the actions of the IWA or PZB. Direct questioning of staff was interrupted by the chair as out of order and **Mr. Tuozzola** again requested a summary. **Dr. McCloud** concluded his remarks and presented letters of objection to the project and/or support of the appeal from 6 residents of Scott Street. He said every resident near 17 Maddox Avenue objects to the project.

**Attorney Case** then began his remarks. He asked that Dr. McCloud's presentation be made part of the record. Attorney Case said this was the 4<sup>th</sup> appearance before the ZBA regarding the 2-family construction project at 17 Maddox. He agreed with Dr. McCloud that the ZBA was the only board to listen to the neighborhood's concerns. He said the ZBA has the authority to overturn decisions made in error, including those of the Chief Zoning Official. He stated that the appeal was legal and timely. He said the goal was to overturn a zoning permit that was granted in error. He reviewed the ZBA meetings for May and June and asked that these minutes be made part of the record. He noted that the first application was denied without prejudice. He said the subsequent July 14 application was denied and asked that those minutes also be included in the record. He said the ZBA can hold a *de novo* hearing based on evidence presented to it and said the authority of the board to do so was affirmed in a 2/26/90 Milford case. He presented

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information about case law that he said pertained to the gradual elimination of nonconformities. He introduced the contents of departmental emails among staff members that he obtained via the Freedom of Information Act. The emails discussed the scope of variances being applied for by Mr. Anand through his attorney Kevin Curseaden. Attorney Case asked Dr. McCloud to share a screen displaying the emails and gave his interpretation of the flow of these email interactions as they relate to section 6.2.1 of the regulations. He noted an order by Director Griffith that Mr. Harris rescind an email and review an office policy that Attorney Case said requires documentation of a disagreement on interpretation. He said the zoning interpretation first offered by Mr. Harris was correct and described why he thought so. He asserted that per Milford Zoning Regulations (MZR), nonconformities cannot be enlarged without a Certificate of Zoning Compliance (CZC), however no CZC was issued. He asserted that the MZR must be amended to eliminate the need for the CZC but at present, it is in effect and should have been part of the variance application.

*NOTE: At this point in the proceedings, Board Member Valiquette lost her internet connection due to bad weather. Ms. Greene notified the chair who asked Mr. Dubois to take over her role in the meeting and vote for her.*

**Attorney Case** said the PZB reviewed a Coastal Area Management Site Plan (CAM) application for the site while unaware of the issues regarding an expansion of nonconformity. He referred to job descriptions for DPLU zoning staff, stating that none have authority to override the MZR. He reiterated that Mr. Harris's interpretation was correct and cited additional case law. He showed the Assessor's Card for 17 Maddox, with information that one house was a single-family 1894-sf structure and that a second house on the lot was a 943-sf single family home. He said the new 2-family house will be substantially larger and listed the house's increased metrics. He said upgrades to the old houses would have been permitted. He said an email does not replace a CZC and cited MZR Section 6.2.2 which states that an existing nonconforming use cannot be moved to another part of the lot. He referred to a 2010 case that he stated was relevant involving the Town of Orange called Rogers v. ZBA which found that a vertical expansion represents the increase of a nonconforming use. He asked that MZR be made part of record and the 700 emails including the ones displayed at the meeting also be made part of the record. He asked the board to support his client's appeal.

**Mr. Tuozzola** asked for public comment.

**Evdoxia Picarazzi**, 15 Maddox Avenue, said she is a direct neighbor of the site, appreciated time, but had one unanswered question: why can a 2-family-home be built in a 1 family zone? She asked the board to vote in favor of the appeal.

**Stephen and Tomasa Yetter**, 4 Scott Street, objected to the project.

**Sheryl Lynch**, 14 Maddox, said she supports the appeal and objects to a 2-family house being built.

**Muriel Leung**, 16 Scott, said she works at a law firm, called the FOIA-produced emails incomplete, and found this irregular. She favors the appeal.

**Mark Amman**, 10 Maddox Ave, said he and his wife support the appeal.

**Grace Biggs**, 11 Maddox Ave, said she supports appeal because it will affect neighborhood property values, the neighborhood is small, and the house is out of character with it.

**Ann Krings**, 4 Scott Street, said she supports the appeal.

**Martha Lerski**, no address given except NYC, Assistant Professor at Lehman College, said she has been researching climate change and stakeholder involvement. She said she supports the appeal and is concerned about lack of stakeholder involvement.

### **REBUTTAL**

**Mr. Harris** said that, speaking on behalf of DPLU, the only issue before the board is the issuance of the zoning permit. He said that if the PZB approves a site plan review, it is his ministerial duty to issue a permit for the approved project. He said the 2-family use was never abandoned by Mr. Anand and thus a legal nonconformity. He said that internal discussions on interpretations of the MZR are common and that the result is that the final decision is made by the director. He asked that the Orange case cited by Attorney Case be made part of the record. Dr. McCloud asked if he could ask questions of Mr. Harris and **Mr. Tuozzola** allowed it.

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**Dr. McCloud** asked how there is no expansion of the nonconformity when living space is being changed from approximately 1800-sf to approximately 4800-sf; **Mr. Harris** said the City of Milford does not consider it an expansion. **Dr. McCloud** asked how a 250% increase does not constitute an expansion as well as an increase in lot coverage; **Mr. Harris** said he had provided his response. **Attorney Curseaden** offered to explain but the chair asked him to wait before providing comment. **Dr. McCloud** asked how many times Mr. Griffith has ordered a recission; **Mr. Harris** appealed to the chairman to find the question out of order, which the chair did. **Attorney Case** asked Mr. Harris through the chair to cite the authority claimed by the DPLU to find no expansion of nonconformity; **Mr. Harris** again asserted that the final interpretation of MZR rests with the director. **Attorney Case** asked if Mr. Griffith had cited an authority when informing Mr. Harris of the decision that the nonconformity was not an expansion; **Mr. Harris** said that this is work product and reiterated that under the departmental position on expansion of nonconformity, the proposed structure was not considered an expansion. **Attorney Case** said that in his research of departmental emails obtained under FOIA, he had found no citation from Mr. Griffith to support his decision that Section 6.2.1 does not apply, contrary to Mr. Harris's original opinion. **Attorney Case** asked Mr. Harris if he still believes that 6.2.1 applies; **Mr. Harris** said no. The chair allowed a question from **Ms. Biggs**; she asked Mr. Harris for an example of what an expansion would be. **Mr. Harris** told the chair he would not participate in a hypothetical discussion. At this point, **Attorney Curseaden** was allowed to address some points of discussion.

**Kevin Curseaden, Esq.**, 3 Lafayette Street, representing Mr. Anand, said that he could provide an example of the expansion of a nonconformity in this instance: going from 2 units to 3 units. He said measurement of nonconformity is not about math in this case, but rather about use. He said MZR sets no maximum square footage in a single family home but requires that structures meet lot coverage regulations. He said that **Attorney Case's** question about issuance of a CZC may remain in MZR, but the City Attorney's Office instructed the zoning office to stop issuing them unless they are being issued along with a Certificate of Occupancy. He said that some municipalities issue them, and some do not. He refuted that anything improper was being done when IWA did not hold a no public hearing—rather that the agency decided a public hearing was not needed. As for the PZB, when building a single-family house, no CAM is required; if a multi-family home is being built, then a CAM is needed. He asserted this meant that a higher level of review was given to the application than would be afforded a single-family house. He said he knows neighbors asked for a public hearing but stressed that the PZB has discretion on whether to hold one or not. He refuted the idea that the PZB did not consider this neighborhood unimportant; he said PZB Chairman Quish rejected the idea because the scale of the other project given a public hearing was so much larger. He said that DPLU, whether it means Mr. Griffith or the entire department, had used the policy on nonconformity consistently. He referred to Statute 8-2 that clarifies non-abandonment of preexisting uses. He said the property at 17 Maddox is code-compliant and FEMA-compliant, as well as meeting all zoning requirements. He said case law changed since 2010 and the Town of Orange regulations in effect in 2010 should be incorporated into the record. He said he is sorry the neighborhood feels disenfranchised but noted that they have been granted 4 ZBA appearances and have a case filed in Superior Court.

**Dr. McCloud** asked the chair if he could question **Attorney Curseaden** who said he was willing to answer a couple questions as long as it did not become a cross-examination. **Dr. McCloud** asked if it is proper to submit a partial email disregarding the portion where Mr. Harris was ordered to rescind the email. **Attorney Curseaden** said the rest of the email wasn't relevant and there was nothing improper about it. **Dr. McCloud** attributed a remark to **Attorney Curseaden** about the appeal not being important enough for a public hearing; **Attorney Curseaden** denied making such a remark, saying the PZB chair had made the decision on the public hearing. **Mr. Tuozzola** said the exchange should be curtailed at that point.

**Ms. Picarazzi** again asked why a 2-family home in 1 family zone.

**Mr. Yetter** asked whether the appeal process takes the whole group into account or is made by the authority of just one individual.

**Attorney Curseaden** said the decision to issue the permit was not based on just 1 decision; it involved the IWA Officer, the City Engineer, and others.

**Attorney Case** said the comment about the board needing to take all evidence into consideration and then come to an independent decision was part of his opening presentation.

**Mr. Tuozzola** expressed concern that the ZBA was being pulled into a position of considering the work of the PZB and he wanted to bring the hearing back on track.

### REBUTTAL BY ATTORNEY CASE

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**Attorney Case** said that even if the City Attorney no longer requires CZCs to be issued, non-issuance is not supported by the MZR, so the appropriate way to change this requirement is for the PZB to amend the MZR. He said permits were issued by the IWA and PZ without awareness that Section 6.2.1 was applicable. He quoted PZB Chairman Quish as saying the request for a public hearing in this matter was “this is a slippery slope,” saying he would leave it at that. He referred to the 2017 statutory change mentioned by Attorney Curseaden regarding not abandoning a nonconforming use, but he asserted that the statute does not empower the owner to reconstruct, enlarge and alter. He said that section 8.5 of the MZR gives the Zoning Enforcement Officer the right to determine if the regulations were met before issuing a permit in contrast to a ministerial mandate to issue it.

The chair reviewed which members of the board would be voting—Casey, Dubois, Ferrante, Hirsch, and himself. He invited the board to ask questions.

**Mr. Hirsch** asked both Attorneys Case and Curseaden whether Mr. Harris was required to issue the permit; they disagreed with each other. Attorney Case said Mr. Harris had discretion and Attorney Curseaden said Mr. Harris was compelled to issue it.

**Mr. Tuozzola** closed the hearing.

The members agreed that they were ready to vote. **Mr. Hirsch** and **Mr. Casey** said they were persuaded by the argument of ministerial duty. **Ms. Ferrante** felt differently and thought some zoning regulations were observed and others ignored in determining whether the permit could be issued. She felt the nonconforming use was being expanded despite the second portion of 6.2.1. She felt an error was made by not requiring a variance. **Messrs. Casey** and Hirsch discussed **Ms. Ferrante’s** concerns with her.

**Mr. Hirsch** motioned to **deny the appeal**. **Mr. Casey** seconded. The motion carried with **Messrs. Casey, Dubois, Hirsch, and Tuozzola** voting **with the motion** and **Ms. Ferrante** voting **against the motion**.

**C. NEW BUSINESS**-None.

**D. OLD BUSINESS**-None.

**E. STAFF UPDATE**-None.

Adjournment was at 8:52 PM.

Attest:

M.E. Greene  
Clerk, ZBA