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APPROVED Minutes of February 17, 2016 ZBA Meeting

Attendees: Jim Ferguson, Carl Slusarczyk, Donald Schubert, Jason Cormier and Howard Stenberg

Also present: Andy Marchese, Zoning Enforcement Officer/Staff Liaison
 Mark Branse and Eliza Heins, Town Attorneys representing ZEO
 Debra Sterling, Recording Secretary

The meeting was called to order at 6:30 p.m. by Jim Ferguson, Chairman, and he read the opening statement. All Members introduced themselves. Jim Ferguson introduced the new alternate member, Howard Steinberg, and explained the voting process.

Carl Slusarczyk, Board Secretary, read the agenda:

Application # ZBA-2016-001 – BOYNTON CONSTRUCTION, INC., Applicant, seeking an Appeal of the decision of the Zoning Enforcement Officer's denial of Zoning Permits to construct a two family dwelling on Lot 5 within **Woodland Place Subdivision**, with a **possible street address of 17 & 19 Jen Drive** (street address is subject to change) in the R-22 Zone. Said Zoning Permits being denied pursuant to Vernon Zoning Regulations Section 3.20 **In all zones which permit single or two family dwellings, excluding special permits issued for assisted living facilities or housing for the elderly, only one principal building or structure and any accessory building shall be permitted on a lot.**

Chairman, Jim Ferguson, requested that everyone please try and speak separately, rather than as a group, in order for the Recording Secretary to discern what was said, and stressed the importance of the record being correct. Jim Ferguson asked Andy Marchese to begin. Attorney Branse introduced himself as legal representation for Andy Marchese and informed the Board that the Applicant should go first.

The Applicant/Applicant's Attorney, was invited to come forward to present their Appeal. Attorney Joseph Capossela came forward representing the Applicant, Boynton Construction, Inc. with Jon Boynton present and Ken Boynton absent. Attorney Capossela's paralegal, Lorraine Hicks, was also present. Attorney Capossela explained Ken Boynton's absence and stated he was out of the country.

Attorney Capossela began by stating to the Board Members what he believed the powers and duties of the Zoning Board of Appeals Members to be. He further explained that both he and Attorney Branse were Members of the CBA (Connecticut Bar Association, Planning and Zoning Section) and both were on the panel as lecturers. He recommended that the Members of the Board attend the seminar, done every other year, if they planned to stay involved in Zoning; the seminar covers all topics including ZBA powers and duties. He continued by citing from his own outline each power and duty of the Board.

Attorney Capossela stated that there was no hardship required with this Appeal, that he was in disagreement with what Andy Marchese had ruled, they are seeking a reversal, and he wanted to explain why. He went on to explain to the Board that, when they are hearing an Appeal of a decision of the ZEO, they have wide and liberal discretion and are acting de novo (acting from the start/from the

beginning). Attorney Capossela interpreted that to mean that the ZEO doesn't have any particular weight, they didn't have to back him up, they were there to decide whether they thought he was right or wrong, "he's the cop on the beat and you're the Judge here to make the decision". He stated he was going to tell the Board why he thinks the ZEO is wrong.

Attorney Capossela continued by reading a prepared written statement regarding various types of housing, and changes to the types of housing now being constructed. He discussed developments from 1980, more specifically condominium construction. He further discussed the subdivision off of South Street, known as Jen Drive, which was obtained by Ken Boynton in 2014. Mr. Boynton wished to construct carefree living at this location which is what young people seek these days, and after researching, concluded two family dwellings were permitted in this R22 zone. The Boynton's felt there was a good market for modestly priced homes with carefree living. The Boynton's made a decision to construct 2 family homes, and are aware of developments in other towns (Old Lyme and South Windsor) which produced a product they believed would be attractive to the Vernon market.

Attorney Capossela discussed previous construction provided by Mr. Boynton approximately thirty (30) years ago, namely Hampshire Court, a condominium development on Dobson Road, which has multiple units (but looks like 4 or 5 buildings) on one continuous foundation. Mr. Boynton received previous approvals for the Woodland Place Subdivision from Inland/Wetlands and the Planning and Zoning Commission. He further stated that applications were made for building and zoning permits on December 9, 2015, and the ZEO, Andy Marchese, denied the applications on December 10, 2015. Attorney Capossela stated he was glad his client, Kenny Boynton, was not there. Ken stated to Attorney Capossela that he felt the Town was continuously throwing up road blocks. Attorney Capossela stated he didn't have a problem with Andy Marchese, this is his ruling and he has a job to do, and he is doing what he thinks is right based on his research. He stated again that he did not have any issue with Andy Marchese personally, but that he didn't like his decision for sure as well. He is here tonight asking that the ZEO decision be reversed.

He felt that because out of the ordinary circumstances were presented, Mr. Marchese requested a Legal Opinion, which he based his denial on. Attorney Capossela discussed the language in the Opinion Letter regarding the definition of structure. He wanted to bring to the Board's attention the language "on or below the ground". The buildings proposed will be attached to a fixed location below the ground. Attorney Capossela stated that while in discussions with Attorney Branse, he felt they were in agreement that reasonable minds could differ on this whole thing. He stated to the Board you have Attorney Branse's opinion, and I'm giving you my opinion, you want to go out and get another lawyer, you'll get another opinion, but the opinions you get are just opinions, and the final decision is yours to make, and if we don't like your opinion, the final decision is the court's to make. He stressed that his job was to convince them to agree with him.

Attorney Capossela continued to discuss what was allowed thirty (30) years ago, as well as the decisions rendered at that time, and that his client should be treated fairly and that the Board owed it to him to find it his way. He believed he should receive the same interpretation that was rendered thirty (30) years ago and that Mr. Boynton had a reasonable expectation to believe that one foundation was one structure based on previous decisions. And although not legally bound by that decision, he requested that all come to the same conclusion, that a continuous foundation is one structure. He asked the Board Members to consider a reversal of the ZEO's decision. He brought up a letter received from a resident (not yet read into the record) who was in favor of the development by Boynton Construction and felt there was no reason not to do it their way.

Attorney Capossela concluded his presentation.

Chairman Ferguson asked if there were any questions. Howard Steinberg, Board Member, questioned Attorney Capossela about the description “duplex” on the plans and permits. Mr. Steinberg gave his opinion of a traditional duplex which he felt is a structure sharing a common wall or common floor; he felt the design presented did not meet the classification of a duplex. Attorney Capossela began to answer when Chairman Ferguson asked that questions be held as Attorney Branse came forward in representation of Andy Marchese, and wished to proceed with discussion on behalf of the ZEO’s decision.

Attorney Branse began by explaining that he was in agreement with Attorney Capossela’s description of the Board’s powers and duties. He stated that his presence here was to represent Andy Marchese as the Zoning Enforcement Officer, not to represent the Board in any way. The Board would have to seek legal advice from another Town Attorney if needed. He explained that the Board was to act in a de novo, quasi-judicial capacity, to determine the applicability of zoning ordinances to particular facts, in other words, act as the Judge and Jury in this Appeal process and to make a decision to either overturn the ZEO’s decision, or deny the Appeal which would up-hold the ZEO’s decision. Attorney Branse passed out two hand-outs to all present (CBA Land Use Law for Municipal Land Use Agencies, Boards and Commissions, and C.G.S. sec. 8-6 Powers and Duties of Board of Appeals).

Attorney Branse discussed interpretation of the Zoning Regulations. He also asked to make the correction that Attorney Capossela referred to the denial as being December 10th 2015 but it was actually December 17th 2015 and that’s important because they both agree that the Appeal was filed timely, it was appealed within thirty (30) days, and is properly before the Board for which the Board has jurisdiction over.

Attorney Branse stated there is no term duplex in the Regulations, it is written as two family dwelling, and states a two family dwelling is a structure (singular). He didn’t feel there was any dispute between himself and Attorney Capossela, they both agree that a two family dwelling allowed in this zone is one structure. Attorney Branse stated to the Board, “the question is – is this plan that is before you, a structure (singular) or is it two structures?”

Attorney Branse stated when Mr. Marchese consulted him about this matter, his reaction was if there is a question of doubt, he would urge him to deny the application so that it could be appealed before the ZBA. Attorney Branse did not think a decision like this should be made in the privacy of the ZEO’s office, he thought it should go to the Board, the representative body with a public hearing, so if there is a member of the public who had an interest in this, they can be heard. If the decision were made, people would not know about it until the buildings were actually under construction, and he felt that was unwise; he felt in questions of doubt, it is better to deny the request and allow the Applicant to come before the Board.

Attorney Branse further stated Andy Marchese would abide by whatever decision the Board makes. If the Board decides this is in fact one structure, then hereafter, any number of buildings as long as there is a row of cement in the ground connecting them, will be considered one building. He thought however that is not what the Regulations say.

Attorney Branse discussed the definition of a structure as given by Attorney Capossela. Attorney Branse believes Attorney Capossela didn’t give the entire definition; the full quote is: “anything constructed, erected, on or attached to a fixed location on or below the ground to give support, provide shelter or satisfy other purposes”. A ditch dug in the ground and filled with cement does not support anything, it does not shelter anything, it does not serve any purpose. Under this interpretation, you could have 2, 3, 4 any number of buildings on one piece of property, and in between them you could

have a pool, a bomb shelter, a cement terrace, you could have any piece of cement connecting them and they would become one building. To us that is simply illogical. If that's what the Regulations ought to say, then the proper route is to go to the Planning and Zoning Commission and ask to amend them. But the ZEO cannot make them say things that they do not say.

Attorney Branse stated that Attorney Capossela during his presentation cited the development from thirty (30) years ago, Hampshire Court. He said Mr. Boynton assumed based on this 30 year old permit, that he could do the same thing. Attorney Branse requested to enter into the record of this hearing as **Exhibit 1** the cover sheet of the approval of Hampshire Court granted April 2, 1987 by the Planning and Zoning Commission, not the Zoning Enforcement Officer; it was granted for 25 multiple single family dwellings. The Zoning Regulations do have a provision for multi-family dwellings that allows more than one building on a lot, and that is what was approved at Hampshire Court. It was not approved as 12 ½ duplexes or 12 ½ two family homes, it was not approved as a subdivision with multiple dwellings on each. It was a single lot with multiple buildings. Attorney Branse presented the documentation to the Board.

Attorney Branse stated that during Attorney Capossela's presentation, he said on behalf of his client that Mr. Boynton had a reasonable reliance on a thirty year old permit because there was no way for him to know that what he had in mind would not be allowed; Attorney Branse wished to challenge that. Attorney Branse entered into the record of this hearing as **Exhibit 2** the Subdivision Plan which was brought before the Planning and Zoning Commission which shows 1 building per lot, not 2 connected by a foundation. If Boynton Construction wanted to find out if this sort of theme would be allowable, they could have shown it on their Subdivision Plan and it would have been reviewed then and there; they could have also gone to the Zoning Enforcement Officer months ago presenting their plan and inquiring if the proposed structure was a duplex, and the Zoning Officer would have told them not in his opinion. Boynton Construction could have then sought a text amendment or whatever they needed to achieve this.

Attorney Branse felt it would be the place of the Planning and Zoning Commission to determine whether or not two separate structures on 1 lot would be allowed. It is not the place of the Zoning Enforcement Officer, a Town employee, to make that determination. That would have been way outside of his authority. If you look at the full definition of structure, this piece of cement in the ground does not qualify as one of the functions of a single structure and that is why on my advice Mr. Marchese denied this application; we felt that the Planning and Zoning Commission and any member of the public who saw the Subdivision Plan, would have said there is going to be one building.

Attorney Branse discussed the different forms of ownership and stated that the Town has no jurisdiction over the form of ownership, it is totally up to the developer. Nothing about Mr. Marchese's decision precludes that. Our feeling is simply that this isn't what the Regulations say, and therefore it would have been an abuse of authority for the Zoning Enforcement Officer to approve this, and the proper route is to go to the Planning and Zoning Commission and ask to amend the Regulations.

Attorney Branse asked if Andy Marchese wanted to make any statement. Andy Marchese stated he has worked with Jon and Ken Boynton over the course of his employment here the last 4 ½ years and he wanted to assist them. He felt he did a thorough review in this matter and felt the proposed plan was showing two structures. His thoughts and concerns were with the definition of a structure. As an example, in the Merline neighborhood of single family dwellings, if someone came in with a zoning and building permit, which is given to him first for land use, proposing an 800 square foot addition to a single family home, and build it 6 – 10 feet away and connect it underground with a 4 foot frost wall, 2 feet under the grass, you are going to tell me that's still one structure so we are setting a precedence in

my opinion if we allow this. It's a problem that I feel is going to pop up down the road having single family homes with detached additions. He felt if this had gone to Planning and Zoning Commission for approval of a site plan, it would be different.

Andy Marchese stated that a letter was received by his office, and is being entered into the record of this hearing as **Exhibit 3** written by two residents who could not attend the meeting. The letter was given to Carl Slusarczyk, Board Member, and read into the record. The residents who wrote the letter, Nancy Steffens and Bob Felber, stated they were in favor of Mr. Boynton's proposed construction of two family homes.

Carl Slusarczyk began to question Attorney Capossela concerning the Model Homes as shown on the plans submitted with the Application. Jim Ferguson interrupted to discuss and explain to the Members what they are expected to do. Attorney Branse came forward to state that the Board's role consists of three options, 1) uphold the ZEO's decision (uphold the denial); 2) overrule it (say that it shall be granted - the permit should have been granted); 3) modify and approve the order. The statute states that when acting in an Appeal of this kind, you stand in the ZEO's shoes and you have all the power and discretion that he has in this instance. Attorney Branse asked Attorney Capossela if he agreed, he did. Attorney Capossela added that he felt there was no need to go to the Planning and Zoning Commission, that this meeting was taking place now and the Board has the authority to reverse the ZEO's decision. Attorney Branse and Attorney Capossela continued with some discussion and argument about what each Commission can do. Chairman Ferguson interrupted in an effort to get the meeting back on track and focus on the point. He further stated the Board was being asked to do a very simple thing; Attorney Branse interrupted by stating the Board is being asked to interpret the definition of structure; there is agreement that a two family needs to be one structure, the question for the Board is the plan that you see before you – is it one structure or two?

Jim Ferguson held some discussion regarding Zoning Regulations section 3.20 and the ZEO's denial.

Attorney Branse stated that once the public hearing is closed, no further questions can be asked of anyone.

Jim Ferguson asked if there was anyone in the audience in favor of, or opposed to, the application. No one came forward.

Jim Ferguson closed the hearing and discussion was held between the Members. Howard Steinberg commented that with the design proposed, there is the appearance of two separate structures. It is obvious to build property that way for two different owners, is a more expensive method than having a common wall. The structure is more expensive to build in this matter. He speculates the reason for this proposed design is to give the impression of a single family home and allow for an increased price for that property, but it still gives the appearance of two separate properties and in his opinion does not meet the definition for a two family home. Jason Cormier agreed with Howard's comments. Don Schubert discussed the intent of the language today, and felt the letter from the ZEO is correct, there is a lack of a common wall. Carl Slusarczyk believed the ZEO's ruling is fair. Jim Ferguson discussed and reviewed the prints/plans with the Board which were received with the Application. In his opinion, he sees two homes not a duplex; two principal structures on this lot. The proposed structure does not meet the zoning requirements of a two family dwelling under 3.20 as the ZEO indicated. No further comments or discussion between members.

Don Schubert made a Motion to Deny the Request to Appeal based on the Zoning Order dated December 17, 2015 to allow construction of a proposed duplex; no hardship is required; reason for

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denial is it does not comply with Zoning Regulations section 3.20. Carl Slusarczyk seconded the Motion. All members were in favor of the denial being upheld for a unanimous vote. (Voting members were Jim Ferguson, Carl Slusarczyk, Donald Schubert, Jason Cormier and Howard Steinberg).

Next item on the agenda, review Draft Minutes of the October 21, 2015 meeting. Carl Slusarczyk made a Motion to approve the October 21, 2015 minutes. Don Schubert seconded the Motion. All Members were in favor for a unanimous vote. (Voting members were Jim Ferguson, Carl Slusarczyk, Donald Schubert and Jason Cormier).

Next item on the agenda, other business. No other business to discuss.

Don Schubert made a Motion to adjourn the meeting. Carl Slusarczyk seconded the Motion. All Members were in favor for a unanimous vote. (Voting members were Jim Ferguson, Carl Slusarczyk, Donald Schubert, Jason Cormier and Howard Steinberg).
The meeting was adjourned at 7:30 p.m.

Submitted by: Debra Sterling

