

ENFIELD ZONING BOARD OF APPEALS
VIRTUAL WORKSHOP/SPECIAL MEETING
MINUTES
MONDAY, FEBRUARY 8, 2021 7:00 PM
Virtual Meeting

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2021 MAR 10 PM 4:02

Call to Order

Chairman Maurice LaRosa called the meeting to order at 7:13 p.m.

Roll Call

Commissioner Turner took the roll and present were Commissioners Maurice LaRosa, Kelly Davis, Mary Ann Turner, Charles Mastroberti and Alternate Commissioners Robert Kwasnicki and Richard Stroiney. Absent were Commissioners Catherine Plopper and Andrew Urbanowicz.

Also present were Laurie Whitten, Director of Development Services; Jennifer Pacacha, Assistant Town Planner; Ricardo Rachele, Zoning Enforcement Officer; James Tallberg, Town Attorney; Maria Elsdon from the Town Attorney's Office and Elizabeth Bouley, Recording Secretary.

Town Attorney Opinions, Policy & Procedures

Chairman LaRosa requested that they go through the legal decisions one at a time, starting with the December one about variances and what the Commission has been doing versus what they are now being told to do.

Mr. Tallberg introduced Attorney Kim Bosse, who he stated is an attorney in his firm in Rocky Hill and helps with land use items. Mr. Tallberg provided an overview on the three legal opinions, stating that the variance one was not as sensitive as the other two. He described the timing of the opinions and the work that went into getting them done in conjunction with other land use issues throughout the holidays and beyond.

Mr. Tallberg stated that the two opinions regarding nonconforming use and abandonment rest on three prior opinions from former Town Attorneys as well as his own independent research. He stated that he had discovered Public Act 17-39 entitled Grandfather Rights, which he stated clarifies the continuation on nonconforming uses.

Chairman LaRosa stated that they were told nonconforming use stays with the property forever just like a variance. He stated that they have been taught in their classes that this is not true. Chairman LaRosa stated that a lot of properties in town are legal nonconforming because the town has changed. He stated that once a property conforms to the new regulation, it cannot come out of conformity without a variance. Mr. Tallberg read a portion of the nonconforming use opinion which states that the demolition or deconstruction of a nonconforming use, building or structure shall not by itself be evidence of such property owners' intent to re-establish such use, building or structure. Chairman LaRosa provided an example, to which Mr. Tallberg replied that Town Attorney legal opinions cannot answer hypotheticals and must keep it limited to facts and be in writing.

Mr. Tallberg stated that he does not know what the Commission quarrels with on the legal opinion dated December 28, 2020 about setback modifications. Commissioner Turner stated that the Commission has always given variances from street to pin and three months ago found out that they can be specific to a spot.

Commissioner Turner asked if the rules still apply that require the ZBA to look at whether it is a financial hardship, a self-imposed hardship or the property is causing the problem. Mr. Tallberg stated that he would defer to Staff and the Commission should be satisfied with Staff opinion and should not have to escalate to Town Attorney opinion. Commissioner Turner stated that this is something they would have been doing wrong for fourteen years and no one ever mentioned it.

Ms. Whitten stated that she has been in Land Use for 37 years and in all of this time, this is how she has dealt with ZBA variances.

Ms. Elsdén stated that the Legal Department does not monitor what the Boards and Commissions are doing, and that they interact when requested to offer a legal opinion. She stated that the 2002 opinion was limited to the ZBA's role in automotive approvals and did not discuss variances in terms of this type of issue.

Mr. Tallberg described why it is not a good idea to have the Town Attorney at all of the land use meetings. He stated that they generally only respond when there are questions. He stated that there will be a workshop of Land Use Commission Chairs on Wednesday, February 10, 2021.

Commissioner Turner asked about all of the ones the Commission has supposedly done wrong, to which Mr. Tallberg replied that he cannot address that here and now.

Commissioner Turner asked what he can share with the Commission regarding variances, to which Mr. Tallberg replied that he stands by the opinion of December 28, 2020. Ms. Whitten stated that they have the right to be very specific in their variance, which allows them to minimize the variance as much as possible. She concluded that the Commission has not necessarily done it wrong in the past, they are just able to do it more specific.

Chairman LaRosa stated that the Commission has attended classes and they still walked out of the classes without a clear idea of what they are supposed to be doing. He stated that there must be more than just telling an applicant if they are too close to a school, playground or church, as someone in an office could just tell them that.

Chairman LaRosa stated that if the Commission issues a K7 for one use, the applicant can open a different use once they have the K7. He stated that applicants should go before the PZC first, as it is a problem that if an applicant goes before the ZBA first they do not have to go before the PZC.

Commissioner Turner stated that the Commission is aware of what they need to look at according to Ms. Elsdén's instructions. She asked for clarification on the exact distance that is considered to be close to schools, churches and theaters. Commissioner Turner explained that there is a quandary if the ZBA approves an applicant and PZC denies them, and vice versa. Mr. Tallberg stated that a nonconforming use is a vested constitutional right.

Commissioner Turner stated that as an agent of the state the ZBA must stick to the things Ms. Elsdén told them, including churches, theaters, intersecting streets, width of highway and effect on public travel. She stated that if an applicant comes to the ZBA and gets approved, they do not have to go to PZC for review. Mr. Tallberg stated that this is right in statute 14-54.

Chairman LaRosa cited the instance where the automotive shop turned into an autobody shop, which he stated had been approved by PZC and ZBA. He stated that it was supposed to be an online auction and is now a new autobody shop because they had a K7, despite the fact that there are no town approvals on file. Chairman LaRosa stated that everything should go before the PZC, but this project came before both PZC and ZBA and is still open for business despite the fact they are not meeting requirements. He stated that he does not understand how this happened and no one can explain it. He stated that once an applicant has a K7 in their hand, they do not need the town's approval for anything.

Mr. Tallberg stated that he does not want to get specific and would rather keep it generic, but there are circumstances where applicants just go to the ZBA for the certificate and do not have to go before PZC. Ms. Elsdon stated that if there are outstanding violations with the autobody shop, there are avenues that can be pursued and went on to describe those procedures.

Commissioner Turner read an excerpt from an April 2, 2018 Connecticut Association of Zoning Enforcement Officials (CAZEO) document. She stated that businesses should go through the PZC first so the ZBA can assume the PZC has already looked at public safety and health.

Mr. Tallberg stated that the exact proximity to schools, churches and theaters is not clear. He stated that the Supreme Court recently issued a decision and they will have to examine that. Mr. Tallberg stated that a new business coming in will go before PZC first. Commissioner Turner stated that if a business goes before PZC first, they can help the business to be a better neighbor.

Commissioner Stroiney asked if there is anything that could be done to ensure these applicants go before PZC first, to which Mr. Tallberg replied that it would be a policy decision.

Chairman LaRosa stated that the town was looking to move all automotive stuff out of certain areas, and asked why they are putting them into those areas if the town is trying to move them out. Mr. Tallberg stated that if there is a valid nonconforming use, the property owners have a constitutional protection. He stated that there must be a balance between smart economic development and a person's constitutional right to a nonconforming use.

Mr. Stroiney asked if the town has the ability to put that process in place, based on statute. Mr. Tallberg replied that the automotive licenses have to go to ZBA, to which Commissioner Turner replied that no one is disagreeing with that. She went on to question whether the business should go to PZC for review first. Ms. Whitten stated that they only need to go to PZC if they do not have a nonconformity.

Chairman LaRosa stated that the only way for the town to know the plan of a new business is by sending the applicant to PZC. He stated that if someone gives up the use of a garage and sells the property, 50 years later the new owner should go through the process again and does not get to open a garage and say it is legal nonconforming because it was a garage once. Mr. Tallberg stated that transfer of ownership is not considered abandonment, and the legislature in 2017 grandfathered and further solidified the nonconforming use as a vested right.

Commissioner Turner stated that she has an issue with saying a use was not abandoned when a property changes hands many times over decades and that use is never employed. Mr. Tallberg stated that there are many examples where there was change in ownership and lack of the use, but there was no finding of abandonment because there was never a specific intent to abandon declared. Commissioner Turner stated that this has nothing to do with ZBA.

Commissioner Turner stated that the ZBA is not allowed to enforce any conditions other than what is already on the books. Mr. Tallberg stated that if there are zoning violations the ZEO can look into them, to which Chairman LaRosa replied that they cannot send a ZEO out for enforcement as it may end up before them.

Ms. Elsdén stated that the ZEO would not be acting under the ZBA's direction and is sent out by PZC. Commissioner Turner stated that they are acting as an agent for the state and their only job is to issue or not issue the K7. Ms. Elsdén stated that if there are violation issues the PZC and Planning Staff can address them. Commissioner Turner stated that once a K7 is issued by the ZBA, the applicant does not have to go back before PZC to have their project reviewed. Mr. Tallberg stated that neighbor complaints about zoning violations would be addressed through the normal process, to which Commissioner Turner replied that there is no zoning violation if the applicant did not go before PZC because there was no conditions placed by the PZC. Mr. Rachele provided some examples of violations and the procedures being followed to correct them.

Commissioner Turner stated that the Fire and Building Departments are supposed to be part of the K7 process, and asked why ZBA is not receiving their reports prior to issuing a K7. Mr. Rachele stated that it depends upon whether the Fire Marshal goes out to the property and files a report. Commissioner Turner asked if it should be a contingency that the ZBA receive these reports prior to voting on the K7. Mr. Tallberg stated that he would like to look at this in writing rather than answer orally.

Ms. Pacacha stated that K7 applications go out to the Building and Fire Departments for sign-off after the ZBA signs off and before it goes to the DMV.

Commissioner Turner asked for more information on churches, schools, theaters and what that is all supposed to mean. Mr. Tallberg stated that he would like to provide an update on a Supreme Court decision that just came down as it may shed some light.

Commissioner Turner asked if K7s are supposed to have Public Hearings. Ms. Elsdén stated that this has recently been reviewed by the Supreme Court and they need to wait for a clearer analysis of this.

Commissioner Stroikey asked if there is a clear definition for abandonment, to which Mr. Tallberg replied that he cannot offer more clarity.

Discussion took place regarding the voluntary abandonment of a use with Ms. Elsdén providing an example of a restaurant that had not been used as a restaurant in 30 years. She stated that ownership does not matter and cannot be included as a requirement in the regulations.

Commissioner Turner asked what exactly a person does to claim abandonment, to which Mr. Tallberg replied that it is all over the map.

Mr. Tallberg stated that the three legal opinions the Commission has received are solid and based on applicable law. He stated that they will provide an update on the Supreme Court decision and also obtain an example of actual abandonment.

Commissioner Turner stated that if there is something they are doing wrong, she prefers not to be surprised on TV. She went on to state that the Land Use Boards need to be able to come together and talk as they work much better together.

Commissioner Turner asked how they are supposed to handle the K7 on Wednesday, to which Mr. Tallberg replied that the Supreme Court decision will not impact that.

Commissioner Turner asked for clarification on what is considered proximity to schools, churches and theaters. Ms. Whitten stated that they are just looking for whether there has been substantial change of any of these elements since the original approval. Commissioner Turner asked if a church that was not there before constitutes an automatic loss of a K7, to which Mr. Tallberg replied that it depends on whether it is a nonconforming protected use.

Chairman LaRosa stated that he understands the objective with the K7 better today than he did in the past. He stated that the Commission is only looking at whether a parcel of land can house an automotive location. Ms. Whitten stated that if it is a new use it has to go to PZC, but if it is an ongoing nonconforming use that is different. Chairman LaRosa stated that he feels everything should go to PZC.

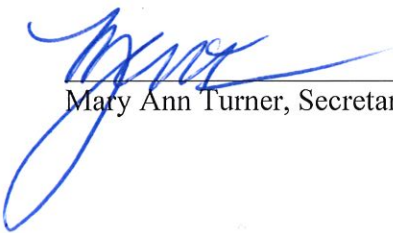
Commissioner Turner asked Ms. Pacacha to let her know what the six conditions are for the Wednesday meeting.

Discussion took place regarding whether the Wednesday meeting will work for Chairman LaRosa.

The meeting was adjourned at 8:37.

Prepared by: Elizabeth Bouley, Recording Secretary

Respectfully Submitted,



Mary Ann Turner, Secretary