

BOROUGH OF NEWTOWN ZONING BOARD OF APPEALS NEWTOWN, CONNECTICUT

THESE MINUTES ARE SUBJECT TO APPROVAL BY THE BOROUGH OF NEWTOWN ZONING BOARD OF APPEALS

Minutes of the meeting of the Borough of Newtown Zoning Board of Appeals on August 30, 2017 at Borough Office, Edmond Town Hall, 45 Main Street, Newtown. Chairman Madzula called the meeting to order at 7:00 p.m.

Present: John Madzula, Kathy Geckle, Mary Thomas, Jane Maher, Patricia Antal and John Fletcher.
Staff Present: Maureen Crick Owen, Clerk.
Also Present: 9 Public.

Note: John Fletcher was sworn in as an alternate member by James Gaston prior to the start of the meeting.

Docket B17-02: Application of Paul Tanski for a variance to Section 5.01 of the Borough zoning regulations so as to permit a 0.5± setback on the northerly side of the construction of a two car 1.5 story garage. The property is located at 13 Main Street in a R-1 Zone in the Borough of Newtown.

Mr. Madzula opened the public hearing at 7:00 p.m. He stated sitting on the application was himself, Kathy Geckle, Mary Thomas, Jane Maher and Patricia Antal. He welcomed John Fletcher to the commission. Mrs. Maher read the legal notice.

Paul Tanski, applicant and owner of 13 Main Street, was present to present his application to the commission. He spoke about the variance that was granted in 2005 regarding the addition to the back of his house. This application is demolish the existing one car garage and replace it with a two car garage. The current garage is starting to fail and is very old. He said he has the smallest lot of his immediate neighbors with only 60' frontage. He said he plan is to demolish the garage and the new garage will be built on the same footprint but will be a little longer but it will not come any closer to the side yard than the existing garage.

Discussion took place that the application should reference Section 5.04 rather than 5.01.

William Hintzen, 15 Main Street, spoke in favor of the application.

Jim Gaston, 18 Main Street, resides within 500' of the subject property and supported the application. Mr. Gaston submitted to the commission a document which addressed the three issues as to frameworks to which the ZBA members must address. He

summarized the document and said that the vertical extension of a structure within the footprint of a non-conforming use complies with height and space regulations does not require a variance pursuant to the zoning regulations. He addressed that the applicant's application is consistent with the POCD. Mr. Gaston further went on to state that the applicant's application presents several undue hardships. He stated they are: (1) configuration of applicant's lot; (2) the property is in the Borough Historic District and a hardship may be created by the historical nature of a structure; and (3) the proposed structure would promote safety to the applicant as he would be able to more easily avoid backing out of the driveway onto Main Street (Route 25) which is a road well-traveled. Mr. Gaston also stated that Mr. Tanski has approval from the Borough Historic District for his proposed two car garage.

The document Mr. Gaston submitted to the commission is attached as Attachment A. He also submitted case law to support his written document which is also a part of the file.

Mrs. Maher read into the record the letter dated August 23, 2017 from William K. Hintzen and Lisa M. Hintzen, both of 15 Main Street, in support of Mr. Tanski's application.

The public hearing was closed at 7:35 p.m.

Docket B17-03: Application of William and Barbara Snyder for a variance to Section 5.04 of the Borough zoning regulations so as to permit a 20' setback on the northeasterly side for the construction of a two car garage. The property is located at 29 West Street in a R-1 Zone in the Borough of Newtown.

Mr. Madzula opened the public hearing at 7:36 p.m. He stated sitting on the application was himself, Kathy Geckle, Mary Thomas, Jane Maher and Patricia Antal. Mrs. Maher read the legal notice.

Attorney Fran Pennarola, attorney for the William and Barbara Snyder, presented the application to the commission. Attorney Pennarola stated that they are requesting a modest variance and that approximately 65-70 square feet of the proposed garage will go into the setback. The hardship presented is the shape of the lot and it does not substantially impact the POCD. Without the variance, the access to the rear yard would be restricted, impacting light and air, and would prove a hardship to both the applicants as they age in place and their disabled son.

Attorney Pennarola submitted a letter dated august 30, 2017 at the hearing, which is made a part of the file.

Mrs. Maher read into the record the following letters:

1. Letter from Kim Damico, 27 West Street, supporting the application.

2. Letter from Leonard Patti dated 07.15.17, 31 West Street, supporting the application.
3. Letter from Mario Zigerlig, 2 Topside Lane, supporting the application.

Discussion took place about the breezeway and that one does not exist now. Mrs. Snyder stated that they reduced the size of the garage to not create such a big variance.

There was no one to speak in favor or against the application. The public hearing was closed at 7:50 p.m.

Old Business:

1. Docket B17-02 - 13 Main Street – Discussion took place whether a variance is actually necessary. Mrs. Geckle made a motion that Docket B17-02 does not require a variance for the height of the proposed two car garage as it complies with the height requirements of the zoning regulations and if a variance were to be required the applicant's hardships would be: (1) contour of property; (2) consistent with the POCD in order to preserve the historic nature of the property; and (3) safety in that it will allow the applicant to come out of the driveway face first. The motion was seconded by Mrs. Maher and unanimously approved.

2. Docket B17-03 – 29 West Street – Discussion took place regarding the application. It was agreed that it was a positive change from the variance requested in April 2017 (which was denied for lack of hardship). Mrs. Maher made a motion to approve the application of William and Barbara Snyder for a variance to Section 5.04 of the Borough zoning regulations so as to permit a 20' setback on the northeasterly side for the construction of a two car garage, as presented, on property located at 29 West Street. The motion was seconded by Mrs. Geckle and unanimously approved.

There being no further business to come before the meeting, the meeting was adjourned at 8:45 p.m.

Respectfully submitted,

Maureen Crick Owen
Clerk

Attachment A

Rec'd 8.30.17
PLANNING DEPARTMENT

1) **FIRST STEP – CT GENERAL STATUTES SECTION 8-6 – Powers and Duties**

of board of appeals

Sec. 8-6. Powers and duties of board of appeals. (a) The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter; (2) to hear and decide all matters including special exceptions and special exemptions under section 8-2g upon which it is required to pass by the specific terms of the zoning bylaw, ordinance or regulation; and (3) to determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated, a literal enforcement of such bylaws, ordinances or regulations would result in exceptional difficulty or unusual hardship so that substantial justice will be done and the public safety and welfare secured, provided that the zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise allowed. No such board shall be required to hear any application for the same variance or substantially the same variance for a period of six months after a decision by the board or by a court on an earlier such application.

(b) Any variance granted by a zoning board of appeals shall run with the land and shall not be personal in nature to the person who applied for and received the variance. A variance shall not be extinguished solely because of the transfer of title to the property or the invalidity of any condition attached to the variance that would affect the transfer of the property from the person who initially applied for and received the variance.

In short, there are three issues as to frameworks to which Zoning Board of Appeals members must address. First, whether the issue requires a variance at all, or otherwise falls within the zoning regulations. Second, whether the variance falls within the confines of conservation and development. Third, whether the requested variance conforms to a substantial hardship related to the land and not created by the applicant. The hardship shall determine and vary the application of the zoning bylaws, ordinances or regulations in harmony with their general purpose and intent and with due consideration for conserving the public health, safety, convenience, welfare and property values solely with respect to a parcel of land where, owing to conditions especially affecting such parcel but not affecting generally the district in which it is situated.

1] The Vertical Extension of a Structure Within the Footprint of a Non-Conforming Use that Complies with Height and Space Regulations Does Not Require a Variance Pursuant to the Zoning Regulations

A determination as to whether an alteration, extension, reconstruction, or repair of a nonconforming structure ... is permissible is dependent on, or is affected by the particular provisions of the applicable zoning ordinance. *Munro v. ZBA*, 75 Conn. App. 805-806. See also 101A C.J.S. supra. Section 181, p. 264 (the right to alter or extend a nonconforming structure depends primarily on the terms of the applicable zoning ordinance.)

Courts allow zoning authorities discretion in determining the public need and the means of meeting it, because the local authority lives close to the circumstances and conditions which create the problem and shape the solution. *Burnham v. Planning and Zoning Commission*, 189 Conn 261, 266. There is a strong presumption of regularity in the proceedings of an agency such as a board. *Frito-Lay v. Planning & Zoning Commission*, 206 Conn 254, 573-74 ((1988)). The board "is in the most advantageous position to interpret its own regulations and apply them to the situations before it." *Doyen v. ZBA*, 67 Conn App. 597, 603 (2002). "It is therefore entrusted with the function in interpreting and applying [its] own zoning regulations." *Borden Planning & Zoning*, 58 Conn App. 399, 411 (2000). "Generally, it is the function of a zoning board...to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether in a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. *Wood v. ZBA*, 258 Conn. 691, 697 (2001). "Courts should accord great deference to the construction give [a] statute by the agency charged with its enforcement." *Cimochowski v. Hartford Public School*, 261 Conn. 287, 296 (2002). Moreover, it should be noted that "the possibility of drawing two inconsistent conclusions

from the evidence does not prevent an administrative agency from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 588.

In interpreting a zoning ordinance the question is the intention of the legislative body as found from the words employed in the ordinance...The words [employed are to be interpreted according to their usual and natural meaning..."*Munro*, supra. p.804. Our courts have affirmed the right of the zoning board of appeals to make a determination based in part, on its past practices. *Fedorich v. Zoning Board of Appeals*, 178 Conn. 610 (1979).

Interestingly, there is caselaw on this vary issue. In *Doyen v. Zoning Board of Appeals of Essex*, 67 Conn. App. 597 (2002) the zoning board of appeals upheld the zoning enforcement's granting of a permit to the property owners to allow them to build an addition above the part of an existing, legally nonconforming deck on their property. The trial court sustained the neighbor's appeal and the Appellate Court reversed the trial court, remanding with instructions to render judgment affirming the decision of the Board. The Appellate Court took particular notice of the zoning language "no improvement having a

nonconforming characteristics, shall be enlarged, extended or expanded *except in conformity with these Regulations...*" The Appellate Court also noted other language in the zoning regulation that "sharply" contrasted – "[n]o nonconforming...characteristic of any...improvement shall be enlarged, extended or expanded." The Appellate Court opined "A fair interpretation of Section 50D thus expressly anticipates the permissive expansion of an improvement having a nonconforming characteristic as long as the nonconforming is not expanded and the extension is otherwise in conformity with the regulations. The Appellate Court concluded that the zoning board's finding that the vertical expansion over the nonconforming characteristic was correct.

In *Ross v. ZBA of New Fairfield*, superior court, j.d. of Danbury at Danbury, CV 08-4009837S (12/7/2009)(Maronich, J.) the court likewise interpreted the zoning regulations "do not prohibit the vertical expansion over the footprint [previously] established." (The court dismissed the case on a technical issue where a proper appeal on the issue was not preserved.) (Two other cases, *Moon v. ZBA* 291 Conn 16 (2009) and *Munro v. ZBA of Branford*, 75 Conn. App. 796 (2003) also addressed the issue. *Ross* distinguished both these cases as the language in the zoning regulations was markedly different including that

"nonconformities should be reduced to conformities with all speed." No such language is contained in Borough Zoning Regulations, and in fact such language would fly in the face of the 2014 Town/Borough Plan of Conservation and Development p. 132-136 (The Borough forms a very powerful visual image that adds to the perception of Newtown's community character.) It should be noted that the vast majority of Main Street is zoned 1 acre residential and but a handful of the properties possess 1 acre of land. Many of these properties are likewise in the Borough Historic District and included in the National Register of Historic Places. The Borough Zoning regulations have also included a Village Concept for purposes of historic preservation. The instant property is in the Historic District and Registry. Clearly, the intent is to preserve the Historic appearance and properties of Main Street, not to reduce the vast majority of residential properties to conforming uses that would result in the loss of such historic structures. The Borough of Newtown Historic District approved the requested build. If the interpretation of the Borough ZBA was other than that found in *Ross* and *Doyen* every resident alteration with less than 1 acre, even if the structure satisfied all height, setbacks and area zoning requirements would require a variance as the residential structure is a nonconforming

use. Such was clearly not the intention of the zoning regulation, nor has been the long previous practice since the inception of Borough zoning in approximately 1963. One recent example is 16 Main Street where no variance was required for vertical garage expansion within the footprint setback line. Numerous other examples exist, as well.

Codification Borough Zoning Regulations B70-8.05F reads analogously to those cited in *Ross and Doyen* "Any building in which a conforming use is conducted and which has been made nonconforming as to front, side or rear yard dimensions, height or minimum size of dwelling by virtue of the Regulations or the amendments thereto *may be enlarged*, altered or maintained notwithstanding any such nonconformity, *provided that the enlargement or alteration of said building shall not increase the degree of such nonconformity*. Clearly, the intention was that vertical alterations or enlargements are ^{NOT} intended as increases in the degree of nonconformity. If such were not the case there would be no purpose for the clause *provided that the enlargement or alteration of said building shall not increase the degree of such nonconformity* since every enlargement must be an increase in the degree of nonconformity. Adding the language *provided that the enlargement or alteration of said building shall not increase the degree of*

such nonconformity tells us that NOT every enlargement is an increase in the degree of nonconformity, including vertical enlargements or alterations contained within the same footprint. Again, this has been the long interpretation and practice of zoning enforcement in the Borough.

Summarily, it is submitted no Variance is required and the Zoning Enforcement Officer should be directed to provide a Permit.

2] The Applicant's Proposal is Consistent with the Comprehensive Plan

Even if the ZBA should find that a Variance is required, the Applicant should be granted the Variance as the proposal is Consistent with the Comprehensive Plan, and there are numerous unusual hardships, not created by the Applicant and consistent with the carrying out of the purpose of the zoning plan.

As presented above, the Applicant's proposal is consistent with the overall purpose of the zoning regulations and historic preservation intentions.

2014 Town/Borough Plan of Conservation and Development p. 132-136 (The Borough forms a very powerful visual image that adds to the perception of Newtown's community character.) It should be noted

that the vast majority of Main Street is zoned 1 acre residential and but a handful of the properties possess 1 acre of land. Many of these properties are likewise in the Borough Historic District and included in the National Register of Historic Places. The Borough Zoning regulations have also included a Village Concept for purposes of historic preservation. The instant property is in the Historic District and Registry. Clearly, the intent is to preserve the Historic appearance and properties of Main Street, not to reduce the vast majority of residential properties to conforming uses that would result in the loss of such historic structures. The Borough of Newtown Historic District approved the requested structure.

3] The Applicant Presents Several Undue Hardships

The Applicant presents several undue hardships, only one which is necessary to satisfy the granting of a variance.

Courts have long held that the term undue hardship requires a showing that due to some peculiar characteristic of the property, the strict application of the zoning regulation will result in an unusual hardship versus the general impact the regulation has on other properties. The hardship must originate in the zoning ordinance and

arise from the application of the zoning ordinance to conditions not within the control of the applicant. *Kaeser v. Zoning Board of Appeals*, 218 Conn. 438, 445 (1991). The following hardships satisfy such showings.

A. The Configuration of an Applicant's Lot and Other Structures is Sufficient to Create an Undue Hardship Not Personal to the Applicant and Existing No Matter Who Owns the Property.

The case of *Stilman v. ZBA*, 25 Conn. App. 631 (1991) is particularly on point. In *Stilman*, a homeowner proposed to construct an addition to her house. Because an existing well and septic system the addition could be located only on the easterly side of the property for which the local regulations required a 40 foot side yard setback. The local zoning board of appeals approved the variance but the decision was reversed by the trial court. On appeal, the Appellate Court reversed the trial court, concluding that the well, septic system and side yard setback requirements constituted the type of hardship required for variance. In the instant application we have a small lot with a historic home and bordering wetlands. There appears no other location that the garage can be built, including the fact that it is highly unlikely the Historic District would approve an unattached structure that would be inconsistent with its historic district regulation which include

preservation of the house and sweeping frontal views consistent with the New York Times description of “pristine early-American elegance.” See also *Merlo v. ZBA of Wethersfield*, superior court, j.d. of Hartford, CV 95-0552145S, 3/18/1996)(Holzberg, J.); *Sgnella v. Wallingford Planning and Zoning*, superior court, j.d. of Hartford (7/23/2008)(Zoarski, J.)(A review of the record reveals that there is substantial evidence to support the ZBA’s action...The area of the property where a structure could be erected consist of the small area in which the proposed garage is located. It was logical for the ZBA to conclude that these conditions constituted a hardship or practical difficulty justifying the placement of the three-car garage); *Lowenstein v ZBA of Branford*, superior court, j.d. at Hartford, 013102 CTSUP (1/28/2002) (Abery-Wetstone, J.)(There is substantial evidence contained in the record that supports the ZBA’s approval of the variance. It is simple matter of common sense to see that the location of the narrow street setback without a variance would require a narrow alley between the main house and any addition. The narrow alley is created by the fact that the house was built before the enactment of the zoning regulations and is not the creation of the owners of the property). Note the 13 Main Street house was build prior to the 1963, enactment of the zoning regulations.

It should also be noted that our case law consistently holds that undue hardships may be created by the historical nature of a structure. *Engen v. ZBA of New Canaan*, superior court, j.d. at Stamford cv 02-0192283 (3/10/2004)(Ryan, J.) (The minutes of the board's business meeting provides that the hardship is the historic nature of the house and the architectural nature of the property.) The court also cited other cases in which the court upheld the board's granting of a variance for unusual hardship in circumstances where an applicant demonstrates that that the structure constitutes an architectural hardship. *Bozzi v. East Hampton*, superior court, j.d. at Middlesex, docket no. cv 98-0085712 7/7/1999)(Robaina, J.); *Pirone v. New Canaan, ZBA*, superior court, j.d. of Fairfield at Bpt. Docket No. CV 97-0159631 (May 26, 1998)(Karazin, J.). Other cases also support such undue hardship issues relating to historic structures. *Weber v. ZBA*, superior court, j.d. at Danbury, cv 03-0349892(6/10/2014)(Nadeau, J.); *Cody v. New Canaan ZBA*, superior court, j.d. at Stamford, cv 04-4001956S (3/29/2006)(Karazin, J.)

Finally, safety concerns are pertinent to and can be determinative of an application for a variance. *Wynne v. ZBA of Waterbury*, sup. ct. j.d. at Waterbury, cv 08-4015058S (8/13/2009)(Brunetti, J.) Included in the purpose of zoning regulations is the concern for the public

safety and welfare. Of concern is the fact that the Police Commission reviewed motor vehicle collision locations for 2012, 2013 and 2014. Within 300 feet of Main Street and Glover Avenue for that period of time there were counted 37 motor vehicle collisions. On the northern side of the intersection (Main Street) from 3 to 11 Main Street there were 17 crashes. The structure proposed and approved by the Historic District would promote safety as applicant would be able to more easily avoid backing out of the driveway away which common sense dictates is far more dangerous than pulling out front first onto Main Street that sees an average of 17,000 cars per day. When there is an ability to support further safety and not intrude on the objectives of zoning, said opportunity should be welcomed. The lives saved may include not only the applicants, but others in the Borough and Town.

Thank you.

Jim Gaston

18 Main Street

INVENTORY OF BUILDINGS WITHIN THE PROPOSED HISTORIC DISTRICT

Buildings are listed by street numbers; owners names are given in parentheses.

Main Street

- 3-5 Town Hall South (Town of Newtown)
One-story flat-roofed building, texturized siding, substructure behind, c. 1945; formerly a farm equipment supply shop; reconstructed for town offices 1980.
- 9 Residence (Christopher W. and Jane H. Luongo)
Wood frame Cape, 1949-50; 1½ stories, gable roof.
- 11 Residence (Thomas W. Johnson)
Colonial Revival, 1931. Wood frame, clapboarded, gable roof, two stories. Remodeled by present owner 1967.
- 13 Residence (Paul A. Tanski)
Remodeled colonial, 18th century and 20th. Post and beam construction, clapboarded, two stories. This was Newtown's first schoolhouse, built 1718 on corner of Main Street and Church Hill Road; moved 1733 to present site to become Middle District School; converted to dwelling house by Mary E. Hawley 1921; additions made by Mr. and Mrs. Paul S. Smith who occupied it 1932-51.
- 14 Residence (Kate E. and James F. Rogers)
Colonial revival, early 1900's. Wood frame 2½ stories, modified gable roof.
- 16 Residence (Lee W., Sr. and Patricia A. Glover)
Colonial revival, 1930. Wood frame, 1½ stories. William W. Sunderland, architect. Won honorable mention in "Better Homes in America" competition 1932.
- 18 Residence (Stephanie A. Gaston)
Victorian/colonial revival. Built c. 1870, this house had three full stories and a mansard roof; was an inn known as the Holcomb Tavern until 1938. Thereafter, the top story was replaced by an attic with gable roof; and Federal decorative details were added to the house. Attached garage, north side.
- 19-21 Hawley Manor Inn (Lowell Hodgkins & Associates, Inc.)
Built before 1850, possibly as early as 1820's, as a simple two-chimney house. Enlarged and given Victorian details, probably in the 1850's. Further enlarged and much altered since c. 1930 when it became an inn. Victorian carriage house and stable with clock tower were converted to an attached motel section, late 1940's. This was the home of Newtown's benefactress, Mary Elizabeth Hawley (1857-1930); of her parents, Sarah Booth and Marcus