

**ZONING BOARD OF APPEALS
WINDHAM, CT.
MINUTES**

October 4, 2012

The Zoning Board of Appeals held its meeting on October 4, 2012 in the Auditorium in Town Hall. Acting Chair Al Beaulieu called the meeting to order at 7:00 P.M. Members present were Robert Wolf, Al Beaulieu, Roger Morin, Jose Cruz and Maryann Daley. Also present were Town Planner James Finger and Code Enforcement Officer Matthew Vertefeuille.

1) Continuation of a Public Hearing for the Connecticut Department of Transportation, for property at 147-159 Windham Center Road, Windham – seeking a variance on lot requirements for existing non-conforming lots at subject property below current minimum of two acres with 200 feet of frontage for each lot.

Acting Chair Al Beaulieu said this is a continuation of the public hearing of September 6, 2012. That meeting was continued to allow time for town staff to get the Town Attorney’s opinion as to whether the application was properly filed (without the property owner’s signature on the application).

In his staff report dated August 30, 2012 Planner Finger explained that in consultation with the State DOT, it was learned that the property line actually extends into the street a few feet. Evidently the DOT had to cut into the private property with paving. Now, in order to correct the situation, the state is seeking to take a portion of the property and move the trees back another twenty feet to improve the sight line along the curve. The small taking of the property will reduce the size of the lot for any building purposes, but it would still be useful added to the owner’s existing house lot.

The secretary read into the record a letter from Town Attorney Richard Cody reviewing Section 48-24 of the Connecticut General Statutes which provides as follows: “A condemning authority, if acquiring less than the total amount of a single unit of contiguous property, shall, if the remaining portion of such property does not conform to the area requirements of existing zoning regulations, obtain a zoning variance for such remaining portion of property from the local Zoning Board of Appeals before condemning any portion of such property. If such variance is not obtained prior to the taking by the condemning authority, the owner or owners of such single unit of contiguous property shall be reimbursed for the total amount of such unit and the condemning authority shall take title in fee simple to the entire unit of contiguous property.”

The Town Attorney explained in his memo that this statute gives the state condemning authority standing to pursue the variance without consent of the property owner. He said it is our understanding that a highway was constructed or expanded prior to an actual condemnation. At this point, the state has begun to move to condemn the land under the

eminent domain statutes. Because the condemnation has not yet occurred, the condemning authority, in this case the state, is complying with the statute that requires that it “shall” obtain a variance.

He goes on to say that if there are disputes between the property owner and the condemning authority as to matters outside the scope of the ZBA’s authority, the ZBA should decline an invitation to resolve them. The only issue before the ZBA is the legal question of whether or not there will be, after the taking, exceptional difficulty or unusual hardship in the application of the zoning regulations to the property.

Acting Chair Beaulieu said the state’s request is for a reduction of the lot size. He said if anyone in the audience has new information to present to please come forward so that the information can be recorded.

Audience comments: 1) Anita Sebastyn of 146 Windham Road said the signs put up by the state to slow down traffic to 25 miles per hour are not working.

Chair Al Beaulieu confirmed this, saying that he visited the site earlier in the day and observed that out of approximately 30 vehicles only 2 vehicles were abiding by 25 MPH or less. He said the signs are large and are flashing, but the vehicles are not abiding by them.

2) Don Aubrey said his clients have been bothered by two things; a) because of the statutory changes there has never been an offer by the state to purchase their property. There has never been a deal to consider, and that has been a problem from the beginning. b) He said when the property owners purchased the property they purchased it as two lots out of the existing subdivision. So, their technical question is, is this an action against one of the lots, or is this an action against the two lots combined, and if it is, the record should be clear. He said whether you vote favorably or unfavorably, the record should be clear as to what the findings are and to have a clear record of what the variance is. They will not meet the 80,000 square foot requirement. Are we talking about a variance on lot one and whether the lot is buildable, or are we acting on the lots as a whole. He said it is important that the record show exactly what the variance is. There are two lots; one is 40,000 square foot and the other is 42,000 square foot. He said the zoning regulations require 80,000 square feet. Is the variance affecting one lot, or is it affecting two lots, he asked.

Chair Beaulieu said he would try to get an answer to Mr. Aubrey’s question. Even though the property was bought as one piece there are still two lots there. Mr. Steven Degan, spokesman for CT DOT said the variance is just for one lot. Chair Beaulieu added that the variance is for lot 29D.

Robert W. Ike, spokesman for CT DOT said we are here because we have pavement on his property. If the pavement was not on their property we wouldn’t be here. He added that we cannot make an offer to the property owner until we are granted a variance.

Board member Maryanne Daley said if we do grant the variance this evening, you will be compensating these folks not only for the land that you are taking, but also the land that is remaining. Mr. Ike said they will be compensated for the street alignment and they will be compensated for the easement. Board member Daley said it is very clear that there are traffic issues in this area. Is there anything else besides the signs that the DOT can do to change the traffic pattern. Mr. Ike said we are only trying to clean up the encroachment on their property. If we had known about this earlier, we would have taken care of it a long time ago, said Ike.

4) Murphy Sewall said it appears that they are asking to reduce the square footage from 40,000 square feet to 39,000 square feet. If the lot size is reduced, the value of the property would be affected, he said.

As there were no other comments the public hearing was closed.

Board member Robert Wolf said it appears that there are two issues. One is that if the State is condemning that piece of property where the pavement now exists, they need to go into negotiations with the property owners to compensate them for the property that was lost. The second issue is whether a zoning variance can be granted given that the property is 40,000 feet, and they are asking that it be reduced to 39,000 feet. The third issue is for motor safety for the area. The only issue that the Zoning Board of Appeals has any jurisdiction is the granting of the variance. What happens between the negotiations between the property owner and the state is out of our hands. And, what happens to the safety of that section of the road is also out of our hands.

Chair Beaulieu said our concern is that they are going to take a lot that is non-conforming now, and they are going to make it more non-conforming. A discussion ensued.

Board member Robert Wolf made a motion to grant a variance for property located at 159 Windham Center Road (lot 29D) located in Volume 106.7. Maryanne Daley seconded the motion. The Chairman asked if there was discussion on the motion.

Maryanne Daley asked if they don't get the variance this evening, will the state seize the property by eminent domain in order to get rights to that property and to the tree line. Planner Finger said the state has condemning authority regardless of whether you grant the variance or not. If you don't grant the variance, they will have to condemn the entire lot.

Voting in favor of the motion to grant the variance were Maryanne Daley, Robert Wolf and Jose Cruz. Voting against the motion were Al Beaulieu and Roger Morin. The motion failed to secure the four concurring votes required by State Law.

Discussion continued.

Robert Wolf then made a motion to reopen the public hearing and Maryanne Daley seconded the motion. The motion carried unanimously.

Robert Ike, spokesman for CT DOT said the state has the option to proceed with a highway easement across the property, or buy the entire piece and bring the existing encroachment into the state system. He said if the variance is not granted the DOT could work with the property owner to acquire an easement across the property in order to address the sight lines, but there are no plans to fix the geometry of the road in order to correct the existing traffic conditions other than to move the trees back 8-10 feet. He said we are here before you in accordance with Conn. General Statute 48-24. We are only here because of that statute, he said.

Maryanne Daley said if the ZBA does not approve the variance, the state will take the steps to acquire an easement for highway purposes.

Chair Beaulieu said the Town Attorney has recommended that the ZBA decline the invitation to resolve the problem between the State of CT and the property owner. The only issue between the Zoning Board of Appeals is the legal question as to whether or not there will be, after the taking, exceptional difficulty or unusual hardship in the application of the zoning regulations to the property. Mr. Beaulieu said the rest of his land will no longer be saleable as a building lot. Chair Beaulieu said he does not feel that the ZBA should settle the argument between the State of CT and the property owner. That is not what we are here for, he said. Maryanne Daley said if we don't grant the variance the property owner will not be able to build on the lot and that decreases the value of his property.

Board member Roger Morin referred to the remaining property (after the state's acquisition). Would the property owner have to come back to the ZBA for approval if he wanted to build on that lot?

Planner James Finger said the property value would be affected. It is a legal lot of record created in 1972, but the buildable area may not be sufficient for what they want to do and they must meet all building requirements. He said if you grant the variance, the state just takes a little bit of the property, but if you don't grant the variance, they could take the entire lot.

5) Mayor Ernest Eldridge said another factor to consider is that the lot is non-conforming and if a portion of the property is taken by the state this will make the lot more non-conforming. The property owner will not be able to come back to the ZBA if they accept state money as reimbursement for the land, he added.

Chair Al Beaulieu said if the property owner decided to move his trees 8-10 feet back would the state come in and correct the fact that their road is on his property. Mr. Ike agreed that the state will come in and clean it up one way or the other.

6) Judy Senkbeil said if the state takes the whole lot, if they have to pay for the entire lot, would that then open it up to public access. Chair Beaulieu said they have already made the statement that they are not out to buy the whole lot. They just want to buy that 10 feet.

7) Murphy Sewall asked if this wouldn't then become a self created hardship.

Code Enforcement Officer Matt Vertefeuille cautioned the board, before you make your decision consider whether or not the taking will cause exceptional hardship or difficulty.

After some further discussion Robert Wolf made a motion to close the public hearing and Maryanne Daley seconded the motion. The motion carried unanimously.

Maryanne Daley made a motion to grant the variance on lot 29D located at 159 Windham Road and Jose Cruz seconded the motion. Voting in favor of the motion were Maryanne Daley, Jose Cruz and Robert Wolf. Voting in opposition were Roger Morin and Al Beaulieu. The motion failed and the variance was not granted.

2) Approval of Minutes

The minutes of September 6, 2012 were approved. The motion was made by Robert Wolf and seconded by Maryanne Daley. The motion carried unanimously.

The meeting was adjourned at 8:20 P.M. on motion by Robert Wolf and seconded by Roger Morin. The motion carried.

Respectfully submitted,

Lillian Murray, Clerk