

ZONING BOARD OF APPEALS
WINDHAM, CT

MINUTES

Nov. 5, 2009

The Zoning Board of Appeals held its regular meeting on November 5, 2009 in Town Hall. Chairman Robert Coutu called the meeting to order at 7:02 P.M. Members present were Joseph Al Beaulieu, Gerald Hart, Robert Coutu, Jose Cruz, Renee Harris, Steven Edelman and Mary Ann Daley. Voting members are Hart, Beaulieu, Cruz. Also present were Town Planner James Finger and Zoning Enforcement Officer Matthew Vertefeuille.

- 1) **Philip Costanzo/Tri-County Memorials, 366 Windham Road** –seeking a variance from the setback line of 50 feet from the State Highway as required under Section 21,4,1, and a variance from Section 3.10.2 to permit the expansion of an existing non-conforming business in the (residential) R-2 District and to allow a 20' X 22' building addition.

Planner Finger's staff report dated October 29, 2009 explained that the existing building is already closer to the street than is permitted, and the proposed building is to be built to the rear of the existing building. The new building will be farther away, and will be partially hidden by the existing building in front, with the overhead door opening to the side,

The commercial use of the property was established before zoning was adopted in June 1972, stated Finger. The property is located on a busy and noisy State roadway and neighboring properties are reasonably well screened from this use. The current use does not generate much traffic other than occasional visits from customers looking at the monuments used mostly for tombstones, and the occasional delivery of stone, which is held in storage and displayed as product. The new building will provide space to store and work on the material indoors, added Finger.

The property is in a residential district, which allows a number of Special Uses that would generate much more traffic than this use. Planner Finger identified some of the permitted uses: churches, cemeteries, places of worship and parish halls, private schools or colleges, private museums, libraries, etc.

Greg Glaude, a land surveyor with Killingly Engineering Associates, and representing the applicant, submitted the notice of mailing to abutting neighbors. He said the application is for Tri-County Memorials, located at 366 Windham Road, Willimantic, CT. They are located on .87 acres of land, and have been in business at that location prior to the adoption of the zoning regulations. Mr. Glaude submitted an aerial photo, as well as sketches showing the oddly shaped building that is currently their studio where they sell granite memorials. He said the existing building is 28 feet off the existing roadway, but that is not their property line. That is actually the traveled way

so it is actually a little closer to the property line, he said. Right now they do a lot of their etching of the monuments outside behind this building. They are looking to build a 19' X 20' building (application states 20' X 22') so they can conduct their activity inside. The proposed building will be behind the existing building, but it will still be within 50 feet of the front building setback line. That is why we are asking for a variance on the setback line. The distance will be 65' to the edge of pavement and not to the property line, he said. But, it will be behind the existing structure which is already closer to the property than the 50'. It will not be any more non-conforming than what already exists, said Glaude.

Steven Edelman asked how far it will be off the property line. Mr. Glaude said he is not sure how far it is off the property line because we haven't done a survey out there. Planner Finger said the State R-O-W sometimes varies and we have been surprised in the past to see how wide it actually is. Sometimes it is more than 50'. In any case they are asking for the variance, and it will be less than the existing conditions. Steven Edelman asked about a typical R-O-W. Mr. Glaude said sometime a State R-O-W- can be wider than a local town road.

Mr. Glaude said the other aspect of the variance that we are asking for tonight is the expansion of a non-conforming use. On the picture I submitted the proposed addition is shown in red, said Glaude. It is shown behind the building, he added. Our hardship is that the existing use has been in existence prior to the adoption of the zoning regulations in June of 1972. We are claiming that the town zoning regulations created an unusual hardship on this parcel and that is why we are asking for the variance.

Bob Coutu asked when the business began. Mr. Glaude said it was prior to 1970. The owner is not exactly sure of the date, but it was in the 1960's. Chairman Coutu said he wasn't sure about the date, but he remembers dairy bars at this location prior to this owner being there.

Planner Finger referred to the aerial map and identified the subject property. He said looking at the map it appears that the building is 10' away from the front property line, but they might have widened the roadway. He said it measures roughly 30 feet from front to back, and they are showing the variance at 4 feet.

Mr. Glaude said this use is not your typical retail high volume traffic generator. He only employs himself and another person.

He then referred to the October 29, 2009 letter from Philip Costanzo, who states the primary use for this building is to continue doing what we currently do at Tri-County Memorials, which is etching and sculpting and some storage. We will be using the building to get out of the bad weather elements and to make it easier for my workers, and myself as well. We are not like a retail business that has hundreds of customers that come in a day. We are a specialty retail business that has about 1-3 customers a day. We are basically an art studio that provides granite memorials.

He then went on to state their hours of operations. Office hours from March till Thanksgiving are Monday – Friday 9:30 A.M. to 4:30 P.M., and Saturdays from 9:00 A.M. to 1:00 P.M. All other hours are by appointment. From Thanksgiving till February our office hours are 9:30 A.M. till 4:30 P.M. and other hours by appointment. All etchings and sculpting are done between 8:30 A.M. and 5:00 P.M. Monday – Friday but rarely on a Saturday, he concluded.

Mr. Glaude said if they are allowed to build this building, it will bring everything inside. Everything that they are doing outside will be done inside so there will be a reduction in noise.

Mr. Beaulieu said the only big vehicles coming in would be the ones dropping off stone. I have seen them, and they are not tractor-trailers. It is a smaller vehicle. He said there is ample room there.

Chairman Bob Coutu asked if they are proposing changes to the existing building in the near future. Mr. Glaude said there are no plans for the existing building at this time. Al Beaulieu said according to the photo the unit that is going to be added is going to be placed on a slab. Mr. Glaude said that is correct. Mr. Beaulieu said the slab is going to be bigger than the building itself. Mr. Glaude said it should be about the same size. Mr. Beaulieu asked if it will be anchored down. Mr. Glaude said they will utilize full footings. The door that you see is going to face the back portion. It will not face the road, said Glaude. It will face away from the road. There will be one overhead door and one passenger door.

Steven Edelman asked when the building was established. Mr. Glaude said in the 1960's. Planner Finger said zoning went into effect in June of 1972 so it would be a pre-existing business. Steven Edelman asked when zoning went into effect in Willimantic. Planner Finger said the property is located in Windham. He then checked the map and discovered that the property is just inside Willimantic. Typically the R-2 District is outside of Willimantic, but evidently they changed it and moved the line into Willimantic, said Finger. Willimantic zoning went into effect in November 1943. He said the aerial photo is from 1954, which is 11 years after zoning was adopted. It looks like it was pretty well established then, said Finger.

Al Beaulieu said that site was originally Kramer's Dairy Bar. The house before it was owned by the owner of Kramer's Dairy, and he had a huge greenhouse in back of the house. He owned the dairy barn and directly across the street was the farm with all the animals. That was well established when I was a kid, said Beaulieu. Planner Finger said the aerial photo shows all of that. You can see the greenhouses, a big pond in the back, etc.

Gerald Hart referred to the dimensions of the addition. Mr. Glaude said the application states 20' X 22', but they are planning to build a 19 X 20' addition. Planner Finger said the illustration of the proposed addition given to him was a rough sketch showing a dimension of 20' X 22'. He said if the Board is favorably inclined,

he would recommend giving him the whole amount because he might need it. Planner Finger said the Board must decide if it is comfortable approving the expansion of a non-conforming use. All the other things are just inconsequential, he said. They are just numbers. The big issue is whether or not you are going to allow him to expand. It is a non-conforming business in a residential zone and is surrounded by residences. The neighbor across the street came in to see the plans, said Finger, and he said he has no objections to the proposal.

Audience comments: 1) Robert Wolf asked if the zoning ordinance is amended and an exception is made, is that permanent, or is it for the life of that particular business? If the business leaves, does the property revert back to its earlier zoning? Planner Finger said we are not changing the zone. We are only changing the application of the rules on the property. Planner Finger said if the Board is favorably inclined to grant a variance then the variance would stay with the property providing they build it within a year. If they fail to do anything with it within a year then it would expire unless they ask for an extension, said Finger.

Steven Edelman said he is not sure whether the board needs to consider this application in terms of hardship. Case law has been well established that a pre-existing, non-conforming use has the right to expand to a reasonable extent. I believe this application falls within the normal expansion of a pre-existing use. For that reason I don't think the board has to evaluate whether hardship exists or not. The second issue has to do with setback, and I think the setback seems to fall very close to the 50' setback. The applicant wants another 4 feet. Four feet seems a little narrow so maybe another 2 feet wouldn't hurt. It might prove advisable when they have to transport the stone between the buildings.

Al Beaulieu said the reason why is that he has a boom that is permanently fixed there and that boom will be able to swing the stone monument from that point right to the door of the new building. If he puts it any further the boom wouldn't reach it. Steven Edelman said whether they have a setback of 47 or 50 feet they still have a considerable way to go to the pavement. I don't see the setback as a significant issue here, said Edelman. Planner Finger added that it doesn't disturb the spirit and intent of the regulations, and I think Mr. Beaulieu raised a good point regarding practical difficulty for the variance on the setback area.

As there were no other questions or comments, the public hearing was closed. Al Beaulieu made a motion to grant Philip Costanzo/Tri-County Memorials a variance from the front setback line of 50 feet from a State highway as required under Section 21.4.1, and also a variance from Section 3.10.2 to permit the expansion of an existing non-conforming business in the R-2 District allowing the 20' X 22' building addition. Gerald Hart seconded the motion, but was told that he was not designated as a voting member as he is an alternate. Chairman Coutu yielded his seat to Hart, and then his vote was acknowledged. The motion carried unanimously.

- 2) **179 Valley Street, LLC** – appeal to overturn the Zoning Enforcement Officer’s decision on his determination that the existing apartment at subject property is illegal.

Planner Finger’s staff report stated that an electrical permit was issued for installing an electric meter and a 100-amp panel for the garage last summer. In addition, the Sewer Dept. issued a sewer permit last fall, but there was no mention of a dwelling in either of these permits.

Heather Meehan said she is a managing member of 179 Valley Street, LLC. She said she received a request for a voluntary compliance regarding the conversion of the garage into an apartment. She said she contacted the Code Enforcement Officer to see what she had to do to keep the unit as a residence. His suggestion was to request that his decision be overturned so that she could apply for a variance.

Zoning Enforcement Officer Matthew Vertefeuille explained that the applicant is seeking to overturn his ruling that she must cease and desist from the activity.

Steven Edelman said he wasn’t sure that the applicant needed to apply for a variance. Planner Finger said there are two procedures. The appeal part of this application is that the board is considering any evidence that the property owner has to refute the zoning officer’s determination that something was illegal. If you decide that the property owner’s evidence is valid then you would overturn the zoning Officer’s ruling and tell them that she is entitled to a permit. She wouldn’t need a variance. If, on the other hand, you decided that the Zoning Officer’s ruling is correct you would deny the appeal and then the applicant could apply for a variance if she can present some reasonable basis on some practical difficulty or unreasonable hardship. The hearing was advertised for an appeal to overrule and contest the zoning officer’s determination that they have an illegal occupancy of the garage as a dwelling.

Heather Meehan said she is seeking approval for an apartment that is existing. It is a loft apartment above the garage.

Planner Finger asked the applicant if she has evidence to present to the board that would weigh on her side to show that this apartment or dwelling was pre-existing, and that the zoning officer was in error in making this ruling that she doesn’t have a legal apartment or a legal right to have an apartment. Do you have anything to show or tell the board, he asked the applicant?

Steven Edelman asked the applicant if she knew the approximate age of the out building. He said judging by the architecture it looks like 1920’s. He asked if the windows are the original windows. Ms Meehan said those are the windows that were there when it was purchased. She said there is one that is original in the front and the others have been replaced. Planner Finger said he is asking if those are the original openings for the windows or were they cut in with a saw. Ms. Meehan said they look original to me.

Steven Edelman asked to what purpose has this loft area been used. Ms. Meehan said since the LLC purchased it, it has always been an apartment. Mr. Edelman asked when the LLC acquired the property. Ms. Meehan said approximately 2 years ago.

Mr. Beaulieu said originally there was no apartment in the upstairs of the garage. I remember the former owner of the property, and I don't remember an apartment in there. It was a 2-car garage with storage area. Ms. Meehan said it was purchased in 2006. She said she didn't take over managing it until it was turned into the LLC. Mr. Beaulieu said it was always a 3-family dwelling with two garages back there.

Bob Coutu asked when she applied for the electrical permit. She said it was 6/30/08. Ms. Meehan said her sister and her mother purchased the property and then it was turned over into the LLC probably a year later. But, when they first bought it they separated the electric in the main building. She said when she took over the management she separated the garage meter. There was always electricity running to the garage. I separated it because someone was living up there. I just figured that since we were going through doing all this work, why not add another meter.

Mr. Beaulieu asked if the sewer line was changed. Was there ever a sewer line going to that building prior to your taking it over, he asked. Ms. Meehan said she was not sure about that, but the permit wasn't pulled to put in a sewer line. We pulled a permit when we had a backup from the main building. We had the backup and we had to dig up the front lawn and replace that sewer line.

Chairman Bob Coutu said it appears there is a question if a permit was ever taken out to turn this into an apartment. He asked the applicant if she had any documentation to show that. She said she did not.

Steven Edelman said looking at this building from front to back it looks like a substantial structure. The permit refers to it as a garage, but I think it is really an out building of some sort with the garage on the first floor. The building looks more substantial than the building next to it. Whoever built this building in the approximate 1920's intended the building as a substantial building and apparently some residential use on the second floor. I think we have another non-conforming pre-existing use pursuant to 8-2 of the Statutes, and we have had discussions about this in the past. In such a situation the Statutes have been changed to address this kind of situation regarding abandonment of use.

In this case, unless we have some clear indication about abandonment of an apparent intended use, the use continues. Even if that apartment was never put in there the appearance of the building indicates the intention to put an apartment in there. Unless the owner of that property abandoned that use, which I don't see anything on this that would indicate abandonment of use, it continues whether or not somebody actually fixes that in place. So, in that regard I would say that the non-conforming, pre-existing use predates the zoning limiting the property to three apartments.

Planner Finger asked Mr. Edelman to elaborate on how he arrived at the determination that there was some apparent intent to create a dwelling above the garage.

Mr. Edelman said just by the appearance of the building itself. When I think of a garage I think of some place to house cars or horses or whatever they had in the carriage shed. This looks like it is more modern. He said if he were to build a garage to house cars I don't think I would make it out of brick with two floors, and make it look so substantial. By the appearance of the building, it appears to me that someone intended it. The design of the building appears intended for a use as a residence, and also as a supplemental use to put cars on the first floor. If this were intended to be just a garage it would look just like a garage. But someone went through all this expense of building the second floor, and doing some fancy brickwork, which one would not normally associate with a structure to house vehicles. Plus you have the design of the windows as well. They are large windows with nice casings.

Ms. Meehan said there are very nice hardwood floors on the second floor and there is also a built-in fireplace.

Mr. Beaulieu said those original swinging doors (shown in picture of assessor's card) almost look like something that would have been used as a carriage shed, and they would have used it to store stuff up above; probably hay for the animals back then. But, it doesn't appear to me that it was built originally as an apartment. He asked, where are the means of entering the building, and is there a second means of egress?

Ms. Meehan said there is not a second means of egress. We applied for a permit to build a deck, or a fire escape out the back, but we were denied.

Where is the door, asked Edelman? Ms. Meehan said the door is right next to the two garage doors on the right hand side. It is an entry door on the inside of the building and it goes upstairs. Edelman said that would constitute another indication of the intended use. Ms. Meehan said there are a total of nine windows. Mr. Edelman said those windows look like normal double-hung residential windows.

Code Enforcement Officer Matt Vertefeuille said when I find something like this I do a little research with the Tax Assessor. We have property cards from inspections on properties all over town. On the 1978 card this was not considered a residential structure. It was described as a garage or out building. Not to be argumentative with Mr. Edelman, but it is pure speculation that someone would build a building to be used as residential...the use may have been intended to be a home office. Maybe it was just a finished area where someone had a woodworking shop. We really don't know, said Vertefeuille. Buildings today are built to look like many different things. We really don't know what the intent on the use was at that time. In my research no one remembers it ever being a residential structure. The garage door on the bottom, the entry door actually goes into the garage common area and then up a set of stairs. It is not a door that was just intended to the second floor. It enters into the garage

area, said Vertefeuille. Most garages do have a second door. Egress may or may not be an issue because it is a second floor dwelling, and not a 3-story building. It hasn't been inspected and we don't have any records of any permits. The permits go back to 1978, but no one has come in since then to pull any permits. We show no record of a heating system being put in there.

Mr. Edelman concurred with Mr. Vertefeuille that the use does appear from speculation; however that brings us to the burden of proof. Does the applicant need to prove her case, or does the town need to prove its case. I would concur that the town needs to prove its case against the applicant. Any speculation regarding the original intent of the building, pursuant to Section 8-2 of the Statutes, I think we would have to recognize in favor of the applicant. A heating system may have been put in a long time ago. They did use a coal stove. There is a chimney, and someone built a substantial chimney like that for a purpose. According to the applicant it has oak floors, not something typically used for storage space. The burden would bear on the town to prove that it does not have the intended residential use as claimed by the applicant.

Mr. Beaulieu said a former owner used that upstairs as a studio. He owned it with his sister. I think he did some framing and other work up there, and I don't know of any wood stove up there at that time. Mr. Edelman asked if Mr. Beaulieu knew when the gentleman purchased the building. Mr. Beaulieu said in 1966 that structure was as is, and there was no apartment on the upper floor.

Mary Ann Daley asked if it was ever taxed as a residential structure. Code Enforcement Officer Vertefeuille said it was not. He said the property was reevaluated on 10/1/01. The assessor's card never classified it as a residential structure. Chairman Coutu asked if there is a report that the electrical was inspected. Vertefeuille said Mr. Schultz inspected the meters, but he didn't go inside.

Mr. Beaulieu said basically the applicant is here to overturn the Zoning Enforcement Officer's decision. We are not here to decide if this apartment was converted legally. Mr. Vertefeuille has the proof that there were no permits ever taken out for this apartment. There were no permits taken out for the heating. The only permit is the one she took out for the electrical. I feel we are going beyond what we are here for. We are here to see if the zoning officer did his job. I feel he has done his job. He found the existing apartment, and there was some question regarding establishing the apartment.

Planner Finger said your responsibility tonight is to consider whatever evidence and findings you make based on what you observe, what you find in the record or what the applicant presents to you in her appeal, and whether you find her appeal compelling enough to grant her the appeal and overturn the decision of the zoning officer, or do you feel that the zoning officer correctly determined that this was an illegally established apartment.

Ms. Meehan said her mother and sister purchased the property in 2006; and her mother did the renovation. Ms. Meehan said that she had occupied the property for a time. She took over managing the property when it was transferred into the LLC. It was rented when she moved out of town and it has been rented ever since. I have been involved with the property for about 2 years, she said. It is a residence, and there is a tenant living there now. My sister purchased the property with my mother. She lived there. She took on the renovations and she did the work to bring the apartment up to code.

Planner Finger said he was looking for some photos to illustrate what was there before the renovations. That is what I was hoping the applicant would produce.

Steven Edelman asked if the applicant had any appraisals, photos, or some document indicating the use at that time. He said if the applicant could produce those documents we could continue the public hearing.

Al Beaulieu wanted to speak again about his knowledge of the property, but Planner Finger asked him to explain how he came to know the property and in what capacity he had authority to inspect for the record.

Al Beaulieu explained that he served as Fire Captain and Deputy Fire Marshall for the City of Willimantic, and during his duties he had occasion to inspect properties. He said when this property was purchased; it was a 3-family house with the out building. If I were buying that property and it had 4 apartments, I would be looking for something in the paperwork that would indicate 4 apartments. It only states 3 apartments.

Steven Edelman asked if the public hearing could be continued to allow the applicant time to produce any paperwork to substantiate her claim. Planner Finger said we could schedule a special meeting. The applicant agreed to try to locate any documentation to support her claim that the area above the garage was intended to be used as an apartment.

After a brief discussion, all agreed that a special meeting will be held on Thursday, November 12, 2009 at 6:15 P.M. to continue the hearing.

3) Approval of Minutes

Al Beaulieu made a motion to approve the minutes of October 1, 2009; Gerald Hart seconded the motion, and the vote was unanimous to approve the minutes.

As there was no other business, the meeting was adjourned at 8:35 P.M.

Respectfully submitted,

Lillian Murray, Clerk