

**ZONING BOARD OF APPEALS  
WINDHAM, CT**

**MINUTES**

**Nov. 4, 2010**

The Zoning Board of Appeals held its meeting on November 4, 2010 at 7:00 P.M. in the Meeting Room, Town Hall. Chairman Robert Coutu called the meeting to order at 7:00 P.M. Members present were Al Beaulieu, Robert Wolf, Andrew Gibson, Jose Cruz, Roger Morin and Robert Coutu. Also present was Town Planner James Finger. Voting members are Jose Cruz, Al Beaulieu, Robert Coutu, Andrew Gibson and Robert Wolf.

**I) Public Hearings**

**a) David and Kenyon Gardner for 25 Main Street, Willimantic** – Seeking a Special Exception/Variance to create a non-standard lot as permitted under Section 3.3.2, and to resolve parking issues for a neighboring five family property.

Planner Finger's staff report explained that the applicant is seeking a Special Exception and possibly a variance to create a non-standard lot for a single family home to be built on Lafayette Street in order to resolve parking issues for the neighboring five family property. The Board has the authority to consider this under Section 3.3.2. A few years ago, Habitat for Humanity built homes on neighboring lots of similar size on Lafayette St., and the neighborhood characteristics would support another home of the same scale. This would resolve the parking problem for the five family property in the same ownership, as tenants do not have a sufficient and dedicated area to park. After reviewing the plan, Town staff agrees that this may be a good resolution to the parking problem in the neighborhood.

Applicant David Gardner said they have a 5-family house at 35 Main Street and they would like to create parking in the adjacent lot to accommodate all the units in the 5-family house.

The hearing will be continued to later in the meeting to allow time for the property owner to attend. Board member Robert Wolf asked for clarification as to where the split is. Is it vertical or is it horizontal, he asked. Mr. Gardner pointed it out on the drawing.

**b) William Correll of 285 Walnut Street, Willimantic** – seeking a Special Exception/Variance to create a rear lot behind the subject property with a driveway off Chestnut and Washburn Streets.

Planner Finger's staff report explained that the applicant is seeking a Special Exception for a rear lot, and possibly a variance to create a rear lot with a driveway to Chestnut Street. The property description refers to a proposed extension of Chestnut Street, but a map showing this could not be found.

The applicant's surveyor has researched the matter and found reference to the proposed Chestnut Street extension. In examining the history of deeds for the property that the Town acquired from the J.S. Nasin Estate in 1966, we found that there was some mention of the Chestnut Street Extension in the Lis Pendens Notice recorded in the Town records. It reads: "... the northerly line of the proposed extension of Washburn Street...to land of John Harvey and the westerly line of Chestnut Street..." and this matches up with the westerly line of Chestnut Street; thence northeasterly by land of said Harvey and on the westerly line of proposed extension to Chestnut Street..." and this matches up with the Nasin survey. Unfortunately that language was not used in the deed and decree on which the Town and Court relied. So the current deed for the High School must have been taken from the metes and bounds of the Nasin survey – and it did not report an easement for the extension of Chestnut Street as access to the Harvey lot.

Now the concern is if the common driveway is installed, will the public have a right to use it for access to the rear of the High School property, and who will maintain it. Ideally, the Town would prefer that they use and expand the right-of-way-off of Chestnut Street where the property has its frontage, reported Finger.

Ed Pelletier, a P.E. with Datum Engineering, and representing the applicant said we are here tonight for a rear lot application for 1.2 acres of property that was created in 1927. Several parcels were deeded out over the years, and this is the remaining parcel. It does have access to Washburn Street, which is the extension of Chestnut Street. The area we are talking about is wooded and it exceeds the lot requirements for this zone. Section 78 allows this board to approve rear lots, said Pelletier. The only gray area is that the access to the right-of-way was deeded in 1927. The property that was owned by Mr. Buck was sold by his estate to Mr. Nasin, who in turn was court ordered to give it to the Town of Windham. When they did that, they did not put in the deed that the Town of Windham received the right-of-way. There was a court judgment in 1965. Fortunately for Mr. Correll his right-of-way was deeded in 1927, and I don't see how anybody can take it away, said Pelletier. We are proposing to use this right-of-way as a common driveway, but we are not going to take away any rights from the Town. There is foot traffic that goes down there now, and the Town has a liability for people traveling through there. The only difference will be that a portion of it will be paved, and the upkeep of that driveway will be the responsibility of the lot owner. We also have to extend city water, said Pelletier. The plan for the on-site septic system has been submitted to the Health Dept. for approval, he added.

A discussion ensued.

Mr. Wolf asked how much of the wooded lot would be taken by the new lot. Mr. Pelletier said there are a few trees in here, but not many. Mr. Wolf then asked about the width of the driveway. Mr. Pelletier said it was 10-12 feet. Mr. Wolf asked if it would be recorded in the deed that the owner of the lot would maintain the driveway. Pelletier said it would. As recommended by Mr. Finger, we will supply the Town with an instrument that will assure the Town that the owner of the lot will be responsible for all

maintenance and upkeep of the driveway, said Pelletier. It will be put on the Land Records, he added.

Board member Roger Morin asked if this will be entirely on the original right-of-way.

Mr. Pelletier said this would have been the extension of Chestnut Street, but there was never any length given to it although Chestnut Street was 40 feet wide, but the deed only referred to it as a right-of-way over the extension of Chestnut Street. He said all I can tell you is that Chestnut Street was typically 40 feet wide and it was for the length of the property. Mr. Wolf said he was unclear about the status of a right-of-way that is not written into the deed. The Town wrote the new deed and didn't include the right-of-way. You could interpret that the Town forgot or just failed to write it in, said Wolf.

Mr. Finger said he found the original conveyance from Mr. Harvey to the City of Willimantic. There were actually two, he added. One was from Mr. John Harvey and the other from Mrs. Evelyn Harvey. Mr. Finger read the description regarding the extension of Chestnut Street in Warranty Deed Volume 115 dated October 5, 1931. He said it appears that John Harvey is giving (for highway purposes) an easement in the north extension of Chestnut Street. The only problem is that in looking in the Board of Alderman's records in that time period he couldn't find any records where the City accepted it as a right-of-way to the extension of the street. This doesn't give any other description of where the property is, nor does it mention Washburn Street. It could be that this one was for a different extension of Chestnut Street. But in looking at the information provided it could be one and the same, he said. There was another deed, Volume 107, Page 192 that does refer to the extension of Walnut Street and the Chestnut Street Extension. He read the descriptions that appear in this volume. He said I believe it is talking about the same property. The other deed - from Evelyn Harvey dated October 5, 1931 granting to the City of Willimantic (for highway purposes) land situated on the east side of Walnut Street.

Ed Pelletier explained that the first deed, Volume 115, Pg 88 is for the easterly portion of Washburn Street. The other one that you referred to is this section of Washburn Street. Part of the problem that you have to understand is that Mr. Buck owned a lot of land in the Town of Windham. Mr. Harvey was a builder. He would buy parcels from Mr. Buck, sub-divide them, and build houses. Unfortunately, before Mr. Harvey got to build any more houses here Mr. Buck passed away. He had already acquired these properties and had built several houses on them. The Estate then sold the land to Mr. Nasin. When they sold the land to the Nasin's, that extension of Chestnut Street was mentioned in that deed, said Pelletier. When the court ordered the sale of the land (or gave the land to the town), that is when the land was taken from the Nasin's, and the extension of Chestnut Street was dropped. But, it was always in my client's title, said Pelletier.

Mr. Finger referred to Board member Wolf's question about the oversight on the Town's deed. He said he has discussed this with the Town Attorney, but Attorney Cody didn't have time to write up an opinion. In looking at the original deed, the Town said it planned to acquire Mr. Nasin's property, which includes this right-of-way. He read the

description found in Volume 209, Pg 569. It does mention the extension of Chestnut Street in the deed. That was the Lis Pendis where the Town filed suit to take it by eminent domain. He then read the decree issued by the judge on August 14, 1967. In looking at this deed, it does not include that easement (right of way) at all. Mr. Finger said he did try to find the easement to the extension of Chestnut Street, but he couldn't find it. The Town Attorney said the only thing he could determine is that the judge must have expunged the easement from the deed.

Bill Correll said his wife is the owner of the property. Her family has owned this property going back to the 1870's. Her grandfather was a lawyer in Town, as was her father. He was not a developer. He owned property, and he subdivided it very carefully to the letter of law. He made sure that every bit of his property was not landlocked. Regarding the Chestnut Street extension that was discussed in 1927 and again mentioned in the deed in 1931, it was his expectation that that would be continued, and that it would be a street all the way to the corner. There would also be a Walnut Street extension so that you could go around the corner, and it would be an alternate place for people to get around all of those lots. At some point in the 1950's and 1960's when that work was being done, it came up again. When the judgment came it was mentioned that there was an impairment in the deed that the Town had because there was no expungement without putting it in the affirmative. You have to state that something is being expunged. That would require a suit for anyone in the area that had that language in their deeds. Mr. Correll said he is not aware of something being made mute or absent by taking the rights away of a deeded property. The concern we have is; is there a right-of-way; (our deed says that there is) going all the way back to 1927. It also seems that at some point Mr. Harvey, (father-in-law) granted a deed to the Town of a right-of-way up to that property as well. It is not common sense that he would give away a right-of-way and expect not to be able to develop that land at some point in the future, or for his heirs to be able to do so. We are here tonight to discuss our options. Is this an impairment to moving forward as far as this board is concerned, or what are our options in terms of pursuing an argument that will stand up.

Mr. Finger said he found another deed from Mr. Harvey approximate to the Town taking the High School property from the Nasin property. Mr. Harvey granted the City the extension of Walnut Street to reach the back end of that property. That was in the 1960's he said. Finger said he does not disagree with Mr. Correll; it is just that the property they took from Nasin didn't mention who the easement holders were. It just said an extension of Chestnut Street. The Town Attorney did raise the issue that typically if there were any parties that were not notified, there would be no linkage back from the Nasin property to Mr. Harvey.

Mr. Correll said there wouldn't be any because they are separate titles for separate pieces of land. He said if I have a right and you don't take it from me in a court of law, how can you remove it from your deed and tell me that I no longer have mine.

Planner Finger said the Town Attorney advised the Board not to act on this application tonight because he hasn't had sufficient time to research it fully. He said it would take a

full title search to try to piece this together. As far as he could determine, in the judge's decree there was no mention of the easement, and the map did not show it. It didn't include any reference at all. Planner Finger said his concern is that we have active use by pedestrians to use that. He said he doesn't think the Town has insurance on it, but it basically is a wooded area. No one is using it, but perhaps pedestrians walk down there. Kids going to school might use it, as well as people walking their dogs and people going to the tennis courts. The concern is that if it is improved for a private driveway, the owner of the new home might get frustrated with all these people walking by their private driveway. And, if they get hurt, who is liable and who is responsible for the maintenance. We don't want to incur an additional liability, he added.

Mr. Correll said we have a unique situation, and we don't want to leave an impression on the board that what we are talking about is an easement. This is defined as access right for specific use, and is typically given to somebody who is going to maintain a utility or something of that nature. The right-of-way means without impairment. It means that you can come and go as you please. It is a right that you have. It is not something that you have to fight to get. My father-in-law wrote that up to protect that right and to make sure that it would always be there. The point that I am trying to make tonight, I agree that we won't get any action this evening, but having said that I don't want you to be left with the idea that John Harvey would write a piece of paper that could be misconstrued later on. John Harvey wrote this well. He included the right-of-way where it needed to be included. The fact that another group of people on another deed left it out of that deed... Basically what we have here is a large wooded lot that we have been paying taxes on for 32 years, and we are at the point where we would like to do something with it. We do have some neighbors who are interested in getting small parcels added to theirs so that things can be cleaned up. The overall look of the neighborhood will be maintained and kind to what we have there right now, said Correll.

Planner Finger said the issue is that a private party would be using public land as a private driveway; and they would incur frustration over the public using their private driveway. If somebody is injured on the private driveway - who is liable for that, he asked. We didn't create the driveway, the private party did. Do we incur greater liability because there is an improvement for a private driveway on a public piece of property? Town staff feels that you may have sufficient room on Walnut Street where this property has its address, and perhaps you could widen the right-of-way to gain access directly from Walnut Street. It seems that you might be able to meet the requirements to have an access drive directly to the house lot. You could re-orient the house to face Walnut Street, or whatever which way you put it, but at least it would have its access and then the board would be able to approve that. Mr. Correll said they have looked at every possible angle, but any other egress would come up through the primary property and it would take down buildings. We would have to remove either a barn or a shed that actually is a garage and both of those buildings have been with the property for 100 years. We already have a right-of-way, and the only question is whether we can make the Town comfortable with their concerns. You have said before that the lawyer needs to review all the details in order to give a full opinion, but the preliminary opinion was not to make any judgment tonight.

Planner Finger said the Town Attorney would have to be authorized do a full title search, and I don't know about the cost. Planner Finger said regardless to the topographic difficulty, it appears that you own sufficient land to make it a 25 or 20-foot right-of-way just north of the barn to get to your property. He said in terms of the process to petition the Town to accept a piece of land for highway purposes, there is no record in the Board of Alderman's records. He asked if Mr. Correll had and records regarding the City accepting it for future highway purposes. Mr. Correll said what we do have is language in the deed that precedes the deed when the Town took title. That was recorded. I don't know that there is anything, but a defacto acceptance. Mr. Correll said we have owned this land and paid taxes on it for 32 years. We would like to do something with it. We would like to do something that improves the neighborhood. We also appreciate that the Town has to take some time to satisfy their own need that a) that the right-of-way does exist, with or without it being mentioned in your deed. What we are trying to do is something that was intended for all those years, and each one of these cuts that was taken was done carefully, said Correll. We are now here before you to exercise our right, he concluded.

After further discussion, the meeting was opened to public comment. 1) Cliff Lund (25 Washburn St. an abutter of the subject property) said the proposed driveway is on the other side of his hedge. He said it is a busy area and he is concerned about traffic if this driveway is put in. He said he would like to see the Town get this piece of land and preserve it as open space. 2) Shirley Mustard said presently the path is being used by people walking their animals. 3) Letter from Peter Quercia stating that he is in favor of the plan providing certain accommodations are made prior to any approval as outlined in his letter.

Mr. Finger read the substance of letter as follow:

...Zoning Board of Appeals...

Re: Modifications proposed for construction of a Building at the rear of 281 Walnut St., (a.k.a. 285 Walnut St., Willimantic) whose property owners are listed in Town Hal as William and Janet (Harvey) Correll.

I wish to go on record as being in favor of the Correll's plan providing certain important accommodations are mad prior to any approval upon that of the Town.

- 1.) There exists a serious drainage issue in the vicinity of Washburn and Chestnut Sts. I have brought this issue to the Town's Engineering Dept. previously. The problem was never resolved. If the plan goes forward, the problem will worsen.
- 2.) I object to Correll's gift to deed approximately ¼ (.25) of an acre (about 11,500 sq. ft.) to Martin Levin of 293 Walnut St., unless the deeding allows for retention of the pedestrian right of way (a foot path that stretches about 70 yards from the beginning of the fence which runs parallel along Walnut St thru the woods to near the entrance of the Tennis Courts on the campus of Windham High School. I request further that the Correll's also do not block or otherwise prohibit or impede students and neighbors use of this – well and long established right of way.

3.) I would like to request this ¼ acre be considered for deeding to the Town of Windham with stipulation for use as a small dog park. If the property owner(s) choose to deny public access to said trail.

I have personally inspected the property at 281-285 Walnut St. today and noted serious water drainage issues from Mr. Dan Lein's property and the Correll's property. I have also reviewed the records at Town Hall and notice no proposal to mitigate these issues. (end of letter – no signature).

Mr. Correll clarified that what Mr. Quercia is referring to in the claim of a right of way through the woods, is that the kids walk along the northerly side of the Levin's property and then along a path through the woods on his property where he wants to create this house lot. There is no right of way or easement; it's just a path that people have used.

Mr. Levin of 293 Walnut spoke, and clarified that he is not getting the land from the Correll's for 'free', he is paying for it. With respect to putting a driveway along his property to the new lot, he objected. He explained that if you look at the property, it would be very close to his house and garage, and it looks like it would be in his back yard; so he is in favor of using the right of way off of Chestnut St. instead.

The public hearing will be continued to the next ZBA meeting in December.

The meeting was temporarily adjourned at 8:15 P.M.

The meeting was reconvened at 8:23 P.M. to continue the public hearing for David and Kenyon Gardner.

David Gardner said they have a 5-family house at 35 Main Street and are trying to create parking in the adjacent lot to accommodate all the units in the 5-family house. We would need 12 spaces to conform. The adjacent lot goes from Main Street to Lafayette Street. We would like to take the portion on Main Street and add it to 35 Main Street to accommodate the parking and the remaining half would be a building lot on Lafayette Street.

Chairman Bob Coutu said we do recognize there is a parking problem on Main Street. Mr. Gardner said the tenants presently park on the sidewalks on Main Street; some park on Lafayette Street. They are all over the place.

Al Beaulieu said you are proposing the 50 ft. x 50 ft. parking lot and each parking space is 9 ft. x 18 ft. and there is not enough room. How much ahead of that parking lot is there in the lawn area before you come to the edge of your retaining wall. Mr. Gardner said the lot itself is 60 ft. x 120 ft. The existing driveway is not on 35 Main Street; it is on 25 Main Street.

Al Beaulieu said you are not dealing with 60 feet; you are dealing with 50 feet. Then there is a retaining wall so you are dealing with 48 feet. Al Beaulieu asked what is the width of the entrance to parking area. When you come off the driveway and back into the parking area how wide is that? Mr. Gardner said there is a big turn-around. Mr. Beaulieu

said when you divide this and make your parking lot, what would be the width? Mr. Gardner said this would be 20-23 feet wide. We would just continue around it. The only other thing you could do - is make another one back here (pointing to the map to the rear of the five family house at 35 Main St.)

Mr. Beaulieu said he would like to see the parking on the street eliminated, but he expressed concern with putting 10 cars in there; or if you extend it, you still have only 14 feet between vehicles when you are backing out. It is going to be very tight. The other thing is that according to the Town Zoning Regulations, I believe there has to be a 5-foot buffer between property lines. So it isn't 50 feet; it is actually 45 feet and you have the retaining wall that comes up the other side.

A discussion ensued.

Planner Finger agreed that this parking plan needs to be revised. He said it looks as if the shrubs are encroaching into the driveway. He asked if it would be possible to trim back the shrubs, or remove them so that you could widen the driveway closer to the building. The owner – who sat in the audience - said the shrubs could be removed. Given the situation, Planner Finger said he couldn't recommend that the board take action on this tonight. He said we need to see a revised plan to have sufficient room for the vehicles to back out. The minimum required space is 9 ft. x 18 ft. for standard size cars and 8 ½ft. x 16ft. for compact cars. There may be some flexibility to come up with a plan that works. He said he doesn't have a problem with dividing out the lot to build a new single family home on the other side provided parking is resolved for the 5 family house on Main Street, and that the additional land be combined with the house so that any pending sale it would be clear that this land for the parking lot goes with the house. You need to have a survey to show that. I would recommend that the Board continue the public hearing and see if a revised plan works. Mr. Finger said he would be happy to work with the applicant on a revised parking plan.

The Chairman asked for any public comment and there was none.

The public hearing will be continued to allow the applicant sufficient time to revise the drawings.

## **II) Routine Business**

The minutes of September 2, 2010 were approved. Motion by Al Beaulieu, seconded by Robert Wolf. Voting in favor were Beaulieu, Wolf, Cruz, and Coutu. Andrew Gibson abstained, as he was absent from the meeting. The motion carried.

As there was no further business the meeting was adjourned at 8:45 P.M. Motion by Beaulieu and seconded by Wolf.

Respectfully submitted,

Lillian Murray, Clerk