**ZONING BOARD OF APPEALS**

MINUTES

Public Hearing – Regular Meeting

**August 17, 2017**

7:30 P.M. Main Level Meeting Room

**MEMBERS PRESENT:** Mr. Bowman, Mr. Wyant, Mr. Horan

**MEMBERS ABSENT:** Mr. Catlin, Mr. Peterson

**ALTERNATES PRESENT:** Mr. Wildman, Mr. Gunnip

**ALTERNATES ABSENT:** Ms. Kaplan

**STAFF PRESENT:** Mr. Ajello, Ms. Pennell

**OTHERS PRESENT:** Atty. Kelly, Atty. Pires, Mr. Szymanski, Mr. Janson, Mr. Schwartz, Sean Hayden

**PUBLIC HEARING(S):**

Mr. Bowman called the meeting to order at 7:30 p.m.

**Seated**: Mr. Bowman, Mr. Horan, Mr. Wyant, Mr. Gunnip, Alt. Mr. Wildman, Alt.

**ZBA-1040: Request of Keith Angell/47 West Shore Road/For Variance from Section 11.6.1C Front and Rear Setback:**

Mr. Bowman read the letter dated August 17, 2017, from Atty. James G. Kelly addressed to the Zoning Board of Appeals, regarding Keith Angell, 47 West Shore Road, Application for Variance ZBA-1040, requesting that the public hearing regarding this matter be continued to the next regularly scheduled meeting, September 21, 2017.

**MOTION:** To continue ZBA-1040/Request of Keith Angell/47 West Shore Road/For Variance from Section 11.6.1C Front and Rear Setback. By Mr. Bowman, seconded by Mr. Wyant, passed 5-0 vote.

**ZBA-1041: Request of Erben Partners, LLC/169 West Shore Road/For Variance from Section 11.6.1.C, Minimum Setback and Yard Dimensions, and Section 12.1.1, Wetlands and Watercourse Setback:**

Mr. Paul Szymanski, P.E. of Arthur Howland and Associates stated that their client had withdrawn this application.

**ZBA-1042: Request of Erben Partners, LLC/169 West Shore Road/For Variance from Section, 11.6.1.C, Minimum Setback and Yard Dimensions, and Section 12.1.1, Wetlands and Watercourse Setback.**

**Seated**: Mr. Bowman, Mr. Horan, Mr. Wyant, Mr. Wildman, Alt. Mr. Gunnip

Atty. Fisher introduced himself and stated that he was present on behalf of the property owners, Erben Partners, LLC. He stated that Mr. Schwartz a co-manager and member of the LLC, Mr. Janson of Janson Goldstein, LLP Architects, and Mr. Szymanski, P.E. of Arthur H. Howland and Associates, P.C, were also present on behalf of this application.

Mr. Szymanski noted that since the last time the applicant has reduced the variances that were requested for this property by 50%. He reminded the commissioners that the other withdrawn application was for the accessory building and, based on the commission’s comments they reconfigured the plan so that it would not need any variances.

Mr. Szymanski explained that they were present to speak to the variances that would be needed for the existing main structure and introduced Mr. Janson, Architect.

Mr. Janson distributed a revised set of reduced size plans to the commissioners. The full size revised plans were presented to the commission. He stated that the second page was the site plan with floor plan depicting the existing conditions, the third page depicts the proposed site plan with proposed floor plan (titled Site Plan – Proposed Renovation). At this point, he noted that the proposed plan does maintain the footprint and is identical to the cubic volume of the existing structure.

Mr. Janson presented the fourth page that depicts both the existing and proposed North, South, East and West elevations (sheet titled Existing and Proposed Elevations – Single Family Dwelling), the fifth page depicting the existing and proposed view from the road level elevation of 712’ (titled, Existing and Proposed Road Level @ West Shore Road, Single Family Residence), and the sixth page presenting a photograph of the view of Lake Waramaug with existing structure from West Shore Road, as well as a rendering of the proposed structure and the view of Lake Waramaug (titled, Existing and Proposed View From West Shore Road). He stated that they have achieved lowering about 55% of the structure on the west side, and redistributing the cubic volume; the existing volume above the road is 755 SF and the proposed volume is 638 SF. As a result, the proposed view from West Shore Road is improved.

Mr. Janson presented samples of the exterior materials that they are proposing to use on the proposed structure which was selected to absorb light as opposed to reflect light.

Mr. Szymanski stated that in the last two months there was a change in the executive directorship of the Lake Waramaug Task Force. He stated that they had met Sean Hayden, Executive Director of the Lake Waramaug Task Force on site to discuss the existing stormwater quality issues. He noted that the existing Connecticut drainage system on West Shore Rd discharges directly into the structure. They are proposing to relocate the discharge pipe so it would no longer be aimed at the main structure and stormwater runoff would be redirected into a row of infiltrators. He stated that based on Mr. Hayden’s commentary they are proposing additional design features such as infiltrating the roof runoff from the main structure, remove two concrete retaining walls that extend out approximately + 30 ft. into the lake (which was possibly originally used to minimize the collection of sediment in the boat storage area) and now that the property owners are no longer proposing to store a boat in the structure these walls are no longer needed. He noted that removing the concrete walls would have the added benefit to the lake by not reflecting the wave action, which could increase the erosion potential on the opposite side of the lake. Mr. Szymanski stated that they are proposing standard riprap in front of the home along the lake edge so that when the wave action does come towards the structure it’s absorbed as opposed to reflected.

Mr. Szymanski stated that they have addressed all of the LWTF’s comments and concerns and the proposed structure is no more nonconforming than what exists. He noted that the existing structure has a partial fieldstone foundation that was parged with concrete and has failed over time. He stated that the existing structure does meet the definition of a single family dwelling with a garage, in essence, that has the ability to pull a boat into the east side of the structure. He reiterated that they are proposing to remove the boat storage aspect that currently exists.

Mr. Szymanski noted that the site plan does not show the setback lines because they overlap and the entire property is nonconforming.

Mr. Bowman asked what the existing living square footage.

It was estimated that the existing living square footage was approximately 550 SF.

Mr. Szymanski noted that the revisions to the proposed site plan bring the structure into compliance with regards to Zoning Regulation Section 11.8.1 – Minimum Ground Floor Area. He stated that the existing structure is not in compliance with Sec. 11.8.1.

Mr. Bowman asked for the applicant to speak to the hardship for this variance.

Mr. Szymanski answered that the hardship is with respect to the Connecticut State Drainage System directly discharges into the existing structure and that there is no other property around the lake that has a drainage system that drains into the house itself.

Mr. Bowman asked why correcting the drainage system would compel the property owner to renovate the whole building.

Mr. Schwartz, property owner, answered that when they met with Atty. Ann Block, Co-President of the Lake Waramaug Association, she agreed that the existing structure was uninhabitable. Mr. Schwartz noted that the structure isn’t safe and is mold infested.

Mr. Bowman agrees that the drainage pipe is the cause of the hardship but it seems that this has been addressed by relocating the pipe away from the house. He feels that it does not justify, basically, the demolition and replacing it with an entirely different nonconforming structure.

Mr. Szymanski stated that if the drainage pipe was not positioned to continuously drain directly into and under the existing structure the demolition would not be needed.

Mr. Bowman stated that he agrees that the drainage pipe needs to be relocated but he does not think it justifies a whole new structure. He asked why not relocate the drainage pipe and simply fix the existing structure.

Mr. Stewart stated that all the architects and builders that he spoke with told him that the foundation needs to be totally replaced. Mr. Jansen added that the foundation has been completely compromised.

Atty. Fisher stated that historically, the ZBA had to find the uniqueness of property and also a hardship to grant a variance. He said that in 2007 the Connecticut Supreme Court expanded the ability of the ZBA to grant a variance if the reduction of an existing nonconforming use or location on the property or the change in one nonconforming use to another has less impact on the neighborhood, may constitute the grounds for granting a variance. Mr. Fisher distributed a copy of pg. 263 from Fuller’s Land Use and Law Practice regarding Variances § 9:3 and noted the reference to Vine v. Zoning Board of Appeals of Town of North Branford and supporting materials regarding Vine v. ZBA (on file in the Land Use Office).

Atty. Fisher explained that the logic of the Supreme Court was that reducing an existing nonconformity is an improvement to the neighborhood. He stated that many cases have followed with this reasoning applied. Atty. Fisher reiterated Mr. Szymanski’s statement that the entire property is nonconforming and that the main other nonconformity that affects other properties on Lake Waramaug is the proximity of the structure to the lake, and by moving this existing structure slightly, it does reduce the nonconformity. He stated that the architectural improvements are obvious and improve the view from West Shore Drive. He concluded that the traditional high bar for finding hardship is no longer the only way to justify the granting of the variance. He asked if there were any questions from the commissioners.

Mr. Bowman stated that he did not have any questions but remains unconvinced of the hardship. He clarified that what he is understanding is that the applicant is taking an existing cottage with an attached boathouse and expanding its use to a single family house. He noted that the existing structure does not comply with the ZBA requirements for living area and he believes that it does not comply with the State of Connecticut building code requirements for minimum house size. He stated that the use is being increased because he believes the proposed plan is taking a part-time cottage and making it a full-time house.

Atty. Fisher stated that he does not believe that the building code requires a minimum square footage.

Mr. Bowman stated that it is 750 sq.ft.

Mr. Szymanski stated that the proposed plan would be in compliance with the minimum square footage.

Mr. Bowman stated that he is trying to establish the fact that, as the structure exists at this time, it is not a single family residence.

Mr. Szymanski respectfully disagreed and that Zoning Regulation Section 21.1.21 – Dwelling, Single Family. He read the definition and noted that instead of a garage for a car this house has an attached garage for a boat. He stated that it does not distinguish between a boat or a car. He continued to explain that a boathouse is different than what exists on this property because Section 21.1.11 defines a boathouse as not for habitation, no well or plumbing fixtures, toilets, or effluent discharge. He stated that this “garage” has finished square footage, plumbing, toilets, etc. so it does not meet the definition of a boathouse.

Mr. Bowman stated that he does not agree that the existing structure has a garage.

Mr. Szymanski stated that per the definition in the Town of Washington Zoning Regulations specifically prevents Mr. Bowman from making that conclusion and read the definition of a single family dwelling.

Mr. Wildman asked for confirmation that the proposed plan is to eliminate the boat parking area attached to the structure.

Mr. Szymanski confirmed that the proposed plan is eliminating the garage for the boat and making it all livable space. He explained that the proposed plan is to take the small area where the boat is parked and the walking areas on both sides and finishing that space.

Mr. Schwartz stated that they are also removing the boathouse section from the structure to decrease erosion and improve the water quality of the lake.

Mr. Horan asked the applicant to confirm that because the flow of the drainage system has been directed at the house for many years, it has caused the current dilapidated state and there is no other remedy short of tearing it down

Mr. Szymanski confirmed that this was the case and that the foundation has been compromised.

Mr. Horan continued to ask for confirmation that redirecting the drainage away from the house into an infiltration system before exiting into the lake would be an improvement.

Mr. Szymanski confirmed that, from a stormwater quality perspective, it currently discharges to the house, flows under the house directly to the lake. He then explained the proposed infiltration system. He noted that 95% of all storm events are an inch or less of water and those carry the pollutants.

Mr. Szymanski confirmed that the volume of the proposed structure is exactly the same as the existing volume but it has been adjusted.

Mr. Janson explained the proposed adjustment in volume using the submitted renderings and how it improves the view of Lake Waramaug from West Shore Rd.

There was a brief conversation explaining the proposed site plan improvements and changes.

There was a brief discussion regarding how the lake water is under a portion of the existing structure and the proposed foundation will be closed off. Mr. Janson confirmed that the structure would be closed off and behind the mean water line. Mr. Szymanski confirmed that the structure would be in compliance with respect to height.

Atty. Fisher stated that the proposed structure is more compliant, not because of cubic volume but because it will be shifted slightly away from the lake.

Mr. Szymanski stated that they are willing to modify the proposed plans to shift the structure more to be even more compliant than what has already been presented. He referred to the information that Atty. Fisher forwarded to him regarding another case in which extreme hardship has not been established, the reduction of a nonconforming use to a less offensive prohibited use may constitute an independent ground for granting a variance.

Atty. Fisher referred to the Vine v. Town of Branford ZBA case. He stated that this case did not refer to use at all but the two subsequent cases referred to use. However, the same concept was applied because the court did not specify that the reduction in nonconformity had to be a specific amount or percentage, it just had to be a reduction in nonconformity and an improvement to the neighborhood for the ZBA to grant a variance.

Mr. Bowman stated that he believes that the proposed plan is increasing the intensity of the use.

Atty. Fisher stated that the proposed plan is for a residence in a residential zone. Mr. Schwartz stated that the building has always been used all year. He noted that there is a fireplace, kitchen facilities, showers, toilets and people have slept in there.

Mr. Bowman stated that the intensity of use is increasing because it has always been used as a boathouse with someone occasionally living in it and what is being proposed is a full-time residence.

Mr. Schwartz informed the commission that this structure will be used as a boathouse, during the day, to spend time around the water and is not intended to be a residence. He talked about all of the improvements that they have made on their properties to improve the quality of the lake.

Mr. Bowman stated that he appreciates the effort to improve the quality of the lake but one of the goals of the Zoning Code is to eliminate nonconforming structures and this is clearly a nonconforming building that has lived past its useful life. He noted that the property owners have every right to maintain, repair and correct the building that is there and does not agree that the property owners have the right to replace it.

Mr. Schwartz listed the reasons as to why they wanted to replace the existing structure. And stated that some of his neighbors had sent letters of support to the Land Use Office.

Mr. Bowman read support letters from Kevin Hayden, Hugh Frater, David Shapiro and Abigail Pogrebin into the record (on file in the Land Use Office).

Mr. Schwartz explained why his family bought the property. He stated that one of the reasons was to prevent overdevelopment on the lake. He noted that the existing building is an eyesore, unsafe, and in disrepair.

Mr. Horan stated that it is not appropriate for the commission to question the property owner’s motives. He feels that this is a modest improvement, the applicant has proven hardship and that they propose to correct the drainage issue that has caused most of the damage. He does not think the proposed plan is a radical change.

It was noted that the chimney would be removed and a propane furnace would be installed.

Atty. Fisher stated that he was concerned with Mr. Bowman’s use of the expression of increasing intensity. He stated that the proposed plan is a single family residence and if any future owners wanted to expand that they would have to come before the ZBA and it could be denied because a hardship would not exist to build a bigger house.

Mr. Bowman stated that he does not feel that the existing use is a single family residence but a cottage for occasional use.

Atty. Fisher stated that a definition of “cottage” does not exist the Town of Washington Zoning Regulations.

Mr. Bowman asked why the applicant cannot just rebuild what is there.

Mr. Schwartz stated that all of the contractors that came to inspect the property told him it was unsafe, the foundation is deteriorating and the structure would have to be “gutted.” They decided that if the structure needed to be gutted they wanted to use materials that are more native to the area, like stone and wood and improve the view for people along West Shore Rd.

There was a brief discussion regarding boathouses that have been rebuilt on Lake Waramaug. Mr. Bowman pointed out that those most likely did not have to come to ZBA because they were conforming.

Mr. Gallup stated that he sees this proposed plan as a complete change.

Mr. Bowman stated that the plan proposes a new foundation wall in the water.

Mr. Schwartz explained that their goal with this proposed plan was to reduce the erosion and runoff into the lake.

Mr. Bowman responded that he is not disagreeing with the fact that this would be beneficial for the lake but he is not convinced that they have proven hardship. He noted that the removal of a nonconforming building does not give the property owner to replace it with another nonconforming building.

Mr. Horan stated that he does not agree with Mr. Bowman and feels that this is a renovation of an existing structure.

Mr. Bowman asked how much of the existing structure will remain.

Mr. Szymanski explained how the existing area used for storing the boat was under the structure and it was manually excavated. He stated that this feature would be removed along with the existing retaining walls that are in the lake. He confirmed that the shoreline was altered when this structure was built.

Mr. Bowman explained to the applicant that there were only five members present and seated and that they would need a vote in favor of 4-1 to be granted a variance.

Mr. Bowman asked if there were members of the public that would like to speak.

Mr. Sean Hayden introduced himself as the new Executive Director of the Lake Waramaug Task Force. He informed the commissioners that he is a soil scientist and a water quality expert. He then discussed the process that he follows when determining whether a proposed plan meets the requirements that will benefit the quality of water in Lake Waramaug and he feels that this project meets the requirements.

Atty. Pires was present to represent the Lake Waramaug Association in opposition to this application. He stated that Mr. Bowman has spoken of the major issues regarding this application but he would like to emphasize a couple other points. He noted that in Section 17 of the Town of Washington Zoning Regulations it does not state that one nonconforming building may be replaced with another nonconforming building. The intent is to allow the nonconforming buildings until they are removed. Atty. Pires stated that this is also the law in Connecticut. He cited a case from the town of Westport that approved a variance for an applicant that rebuilt in the area of a nonconforming structure and it was overturned by the Superior Court. Atty. Pires explained that this application is less conforming that what exists. What exists includes boathouse/boat storage which is permitted within 50 feet of Lake Waramaug per Section 12 of the zoning regulations. He noted that a single family house is not allowed as it would expand the use per Section 17. Atty. Pires stated that whether the proposed plan is beneficial to the lake is not part of the hardship analysis. He said that the zoning regulations that are in place are designed to prevent structures so close to the lake.

Atty. Pires asked to see what Atty. Fisher had submitted. He stated that the information regarding the case was not updated and that since then there have been cases similar to this applicant that had overlapping setbacks and the court declared that even though it would be difficult to build something on the lot it did not mean that they would be granted a variance.

Mr. Wildman asked what this structure is categorized as in the assessor’s information. Mr. Szymanski answered that he did not have the assessor’s card with him.

Mr. Szymanski read the definition of “boathouse” from the zoning regulations.

There was a brief discussion regarding the definition and use of a “boathouse” versus “single family dwelling.”

Atty. Fisher pointed out that contrary to Atty. Pires’ suggestion that the North Branford case is out of date, it was cited in favor of two appellate court cases. He proceeded to give examples.

Atty. Pires rebutted by noting that the particular case that Atty. Fisher was using as an example was not relevant because the applicant, in that case, failed to prove hardship.

Atty. Fisher stated that he had no further testimony or evidence and agreed to close the public hearing.

**MOTION**: To close the public hearing for ZBA-1042/Request of Erben Partners, LLC/169 West Shore Road/For Variance from Section, 11.6.1.C, Minimum Setback and Yard Dimensions, and Section 12.1.1, Wetlands and Watercourse Setback. By Mr. Bowman, seconded by Mr. Wyant, passed by 5-0 vote.

**MEETING:**

Mr. Wyant stated that safety, function ability issues were addressed as well as relocating the drainage pipe. He said that he was leaning in favor of this application.

Mr. Wildman feels that since the cubic footage is not changing at all, the applicant has made an effort to rectify issues along the lake, proposed fixing the drainage, will not be modifying the accessory building and will be getting rid of the concrete structures in the water, he is in favor of this application. He said that he feels this is a modest change even though it will look different from the existing structure.

Mr. Horan stated that he is in favor of granting a variance for this proposed plan. He noted that there are some issues but to deny this application would be an overly restrictive interpretation of our zoning regulations. He stated that he feels that the overall plan is consistent with the zoning regulations even though some inconsistencies exist. Regarding hardship, he said, it is unique and clearly a hardship to have a drain pouring into the house creating a mess as a result. He stated that he would agree that it is a residence and that he is in favor of granting a variance for this application.

Mr. Gallup stated that he does not see it the same way as Mr. Horan. He said that he did not see the hardship but sees a plan to demolish the existing building and rebuild an entirely different building. He informed the commission that he is not in favor of this application.

Mr. Bowman stated that he fails to make the connection between the impact of the drainage pipe and the need to rebuild the entire building. He continued to explain that he feels the applicants proposed correction of the storm drainage and repairing the existing building would be appropriate. He does not believe that hardship has been established and he is not in favor of this application.

**MOTION:**  To deny application ZBA-1042, Request of Erben Partners, LLC at 169 West Shore Road for Variance from Section, 11.6.1.C, Minimum Setback and Yard Dimensions, and Section 12.1.1, Wetlands and Watercourse Setback by a 3-2 vote.

**CONSIDERATION OF THE MINUTES:**

**Correction(s)**

pg. 5, 4th paragraph **should read:**

Mr. Bowman asked Mr. Ajello if, **in the case of the public way bisecting a large lot, the setback requirement between a structure and a public way, has been enforced.** Mr. Ajello **confirmed this has been the case.** Atty. Kelly **said** this setback would only apply if the property was a lot.

**MOTION**: To accept the minutes of the July 20, 2017, meeting minutes as corrected. By Mr. Bowman, seconded by Mr. Wyant, passed 5-0 vote.

**ADJOURNMENT**

**MOTION**: To adjourn the meeting at 8:43 p.m. By Mr. Wyant, seconded by Mr. Wildman, passed 5-0 vote.

**Filed Subject To Approval**

**Submitted by:** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Shelley White, Land Use Clerk

August 24, 2017