

February 20, 2003

MEMBERS PRESENT: Mrs. Friedman, Mr. Fitzherbert, Mr. Martin, Mr. Owen

MEMBER ABSENT: Ms. Page

ALTERNATES PRESENT: Mr. Abella, Mr. Brinton, Mr. Shapiro

STAFF PRESENT: Mrs. Hill, Mr. Solley

ALSO PRESENT: Atty. Kelly, Atty. Fairbairn, Mr. Sears, Mr. Rudin, Atty. Bloom, Mr. Talbot, Mr. Cannavaro, Mr. O'Donnell, Mr. Shannon, Ms. Simone, Residents, Press

Mr. Martin called the Special Meeting to order at 7:30 p.m. and seated Members Friedman, Fitzherbert, Martin, and Owen and Alternate Abella for Ms. Page.

Washington Community Housing Trust/16 Church Street/Special Permit: Section 13.15/Affordable Housing

Mr. Martin explained the WCHT had submitted a request to the Zoning Commission for approval of modifications to its approved site plan for affordable housing units at 16 Church Street. Originally this request was not submitted under the Affordable Housing Land Use Appeals Act and thus, could be considered at tonight's Special Meeting. Mr. Martin said, however, the WCHT had recently decided that its request would be under Section 8-30h of the State Affordable Housing Land Use Appeals Act. Therefore, a public hearing would be required to consider the request for modifications. The public hearing was scheduled for Monday, March 24, 2003 at 7:30 p.m. in the Land Use Meeting Room.

Herrmann, Trustee/328 Nettleton Hollow Road/Application for Second Story Addition Within the Setback Area/Advice to the ZEO

Mr. Martin said he would not make a motion for the Commission to go into executive session. Letters from the Town attorneys to the Commission pertaining to pending litigation of this matter had been released to the applicant and so an executive session was no longer necessary. He noted that the decision to release these letters would enable the Commission to focus on the substantive aspects of this matter as opposed to procedural aspects.

Mr. Martin noted all Commissioners had received detailed information packets several days prior to the meeting. Additionally, the Commissioners had reviewed the additional documents received since the mailing, which were passed out this evening. (A list of both categories of documents is attached.)

Mrs. Hill, ZEO, noted normally she would have acted on her own to deny this type of application, but because the applicant had said he would appeal if her decision was a denial, she had decided to consult with both the Town Attorney and the Commission. Mr. Martin asked the Commissioners to make recommendations on the basis of what they thought was right and not to advise Mrs. Hill based on any concerns about a possible appeal.

The issue to be decided was whether a second story addition within the setback area should be considered an increase in the nonconformity

of the building. While the addition would not increase the existing footprint, it would increase the volume of the building within the setback area.

Mr. Shapiro asked what the rationale for denying the application would be. Mrs. Hill said she had been trained and it had been her consistent practice that an increase in the volume of a nonconforming building required a variance and it had been done this way for as long as she knew (having been employed by the Town for 14 years). Since other parts of Section 17 stated the volume of the nonconformity could not be increased, she had thought it was a common sense approach that this would apply throughout the entire section. Mr. Martin agreed variances for an increase in the volume of a nonconforming building had been historically and consistently required by both the ZEO and the ZBA. He pointed out that the percentage of the building within the setback area would increase even though the footprint would not. Mr. Owen said this was a logical interpretation of the Regulations and that this had been the procedure when he had served on the Zoning Board of Appeals. Mrs. Friedman asked if the ZBA had been consistent in its interpretation and Mr. Owen said it had. Mr. Martin noted both the ZBA and the ZEO had consistently interpreted the Regulations this way.

Mr. Shapiro asked if it had been thought an increase in volume of a nonconforming structure would make it more nonconforming, and if so, where was this written? Mr. Martin said this was the way it had historically been done. Mr. Owen stated the proposed second story would increase the encroachment on the setback. Mr. Shapiro felt the nonconformity was the setback and that a second story would not increase the encroachment into the setback area. Mr. Owen stated the justification for this regulation was to keep building mass out of the setback and it was logical that a two story building would be more intrusive than one story would be. He also said this had been the way it had always been done and he did not think it would make sense to make an abrupt change. Mr. Brinton and Mr. Abella agreed.

Mrs. Hill asked whether the Commissioners thought it made a difference that volume was referred to in one section but not the other. Mr. Martin pointed out there are inconsistencies throughout the Regulations and said over time the Commission has worked to eliminate them. However, he said in this case because it is known how the regulation has been interpreted over time and knowing how imperfect the Regulations are, he did not think there was sufficient reason to change this interpretation.

Mr. Owen pointed out Washington's Regulations are written to state that if something is not explicitly permitted, it is prohibited. (Section 2.3.2) He said, therefore, an interpretation could not be made that such a second story addition is permitted.

Mr. Martin noted both the Town Attorney and the applicant's attorney had referred to the 2002 Doyen decision and asked if there were any questions about how to apply this case. Mr. Shapiro said it had struck him that Essex had more restrictive regulations than Washington, and yet the court held that a vertical expansion need not be viewed as an increase of a nonconforming characteristic. Mr. Martin agreed but also noted the court accorded significant weight to being consistent with the procedure historically followed.

Atty. Bloom asked if the public could comment. Mr. Martin noted this was a Special Meeting and privilege of the floor was not on the agenda. He reminded Atty. Bloom that the Commission was thoroughly briefed on the points of view in the matter. He referred to all the legal opinions received from the applicant's attorney and the Commission's attorneys. (See attached list.)

Mr. Martin informally polled the Commissioners for their opinions, noting these were not to be considered a formal vote at this point in the discussion. Mr. Fitzherbert said the Commission knew how this issue had been handled previously and should act consistently with past

procedures. Mrs. Friedman agreed, but added the regulation should be further clarified so this issue would not come up again. Mr. Martin agreed, but cautioned that if the Commission decided to clarify this section it would not necessarily mean the existing language is deficient. Mr. Abella stated that per the existing language of 17.4.a, building upward does constitute an increase in the nonconformity of a nonconforming structure. Mr. Shapiro thought the practice that has been followed did not comport with the language of the Regulations and so said if he had been seated, he would have voted to recommend approval of the application.

Mr. Martin said the issue to be decided was whether the Commission thought the historical interpretation by the ZEO and the ZBA carried the most weight or whether any ambiguity of the Regulations was the more important factor to consider. Mr. Owen thought the wording was, indeed, ambiguous, but did not agree that it contradicted the historical interpretation. He said there should be more reason than just ambiguous wording to force a change in the historical procedure. Mr. Shapiro said the language was not only ambiguous, but compelled a practice other than that which the ZEO and ZBA have followed. Several Commissioners disagreed with this view.

An informal poll was taken. Of the Commissioners present, 6 supported the historical interpretation and 1 thought the ambiguous wording should carry more weight. Of the Commissioners seated, all 5 thought the historical interpretation was the more important factor.

A motion to advise the ZEO was considered and the following wording agreed upon:

MOTION: The Washington Zoning Commission recommends that the ZEO continue to apply the historical interpretation by the ZEO and the Zoning Board of Appeals of Section 17.4.a of the Washington Zoning Regulations and, therefore, not issue a zoning permit in the case of a proposed second story addition for Herrmann, Trustee, 328 Nettleton Hollow. By Mr. Owen, seconded by Mr. Fitzherbert, and passed 5-0.

MOTION: To adjourn the meeting. By Mr. Fitzherbert.

Mr. Martin adjourned the meeting at 8:25 p.m.

FILED SUBJECT TO APPROVAL

Respectfully submitted,

Janet M. Hill, ZEO