



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
JANUARY 19, 2017
CANCELLATION NOTICE**

The January 19, 2017 Regular Meeting of the Zoning Board of Appeals has been cancelled.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



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ROXBURY ZONING BOARD OF APPEALS SPECIAL MEETING FEBRUARY 2, 2017

SITE WALK

Present: Members Nanette Falkenberg, Judith Kelly, Bill Davies, Karen Kopta, and Nancy Schoenholtz; Applicants Charles Haver and Stewart Skolnick; and a member of the public Peggy Richards.

The Roxbury Zoning Board of Appeals met for a field inspection on Thursday, February 2, 2017 at 4:00 p.m. for the application of:

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.
Case file 2016-0076, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space.

Those present viewed:

- The current retail 1st floor space used as a retail antique shop
- The 2nd floor space currently approved for antique shop; proposed to be professional office space to be rented out
- The house currently used as antique space and proposed to eliminate this use
- The proposed separate entrance to the 2nd floor proposed as professional office space
- The approximately six parking space area on Southbury Rd side of property.
- The circular driveway between barn and house, with additional parking spaces;
- The property on which the barn and house reside

Respectfully submitted,

Tai Kern

Tai Kern, Secretary

SECOR, CASSIDY & McPARTLAND, P.C.

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Of Counsel
DONALD McPARTLAND
JOHN DEL BUONO

To: Zoning Board of Appeals, Attention: Chairman, Nanette Falkenberg
From: Gail E McTaggart, Secor Cassidy & McPartland, PC, Town Attorney
Dated February 16, 2017



Re: Haver and Skolnick Variance/Variance amendment application to allow second floor professional offices by nonresident at property at 3 Southbury Road

You have asked us to review the Variance application of Charles Haver and Stewart Skolnick regarding their property at 3 Southbury Road to obtain or modify a variance to: “eliminate retail sales entirely from the future use of the house; 2) maintain retail sales in the form of an Antique Shop in the barn on the 1st floor as is currently authorized; and 3) eliminate retail sales entirely from the 2nd floor of the barn by reducing the use of the 2nd floor of the barn to professional office space only (type of tenant to include Attorney, Accountant, Architect, Designer, Engineer or Psychiatrist).”¹

According to the application letter by Attorney Robert Shaver, the professional tenant and its employees would specifically not be required to be residents of the Property. The professional office space would require the professional to schedule clients by appointment only and limit the employees to 3 with typical working hours of 9 am to 6 pm, with one 4 SF sign on east face of the barn. The owners propose to provide for 11 parking spaces (6 in front of barn near the road and 5 in adjoining driveway).²

¹ The application and Attorney Shaver’s support letter refer to the existing commercial use as “retail sales” but the variances for the relevant spaces are granted expressly for “Antique Shop” use which is described when approved as primarily by appointment only requiring one or two parking space or the same as a prior antique shop use which was similarly described. By repeating the word “retail” as used by Attorney Shaver, we are not agreeing that the approval of the Antique Shop should be deemed to approve any “retail use.” In determining if a use is the same or a different use, the Board would need to look at how it is known in the neighborhood, for example the degree of external evidence of commercialism. A hardware store is retail and certainly different in type and intensity of use from a by appointment antique shop. It should be noted that if this were a home enterprise use rather than the 1973 and earlier variances, Section 8.5.5 requires that “no Home enterprise use shall be primarily devoted to retail sales on the premises.” This is evidence of the what is required to maintain residential character.

² If this were a home enterprise, the parking would be required to be screened from the street and not less than 25’ from the highway line.

This application letter describes the current buildings as a 2800 SF house and 3360 SF barn (1st floor 1905 SF and second floor 1455 SF) and the current use as Antique Shop retail sales “throughout the Property including both home and barn” comprising “6,160 sq., ft. of retail space.” The proposal is stated to reduce what Attorney Shaver calls “retail” space to 1905 SF but substitute non-resident professional space for again what he calls “retail” space for the 1455 SF second floor of the barn (and eliminate commercial use of home).

Attorney Shaver notes that arguments exist for accomplishing the changes through ZEO review (reduce/eliminate nonconformities) but that his clients preferred to have a recordable modification of the variance to extinguish the prior approval of antique shop (characterized by applicant broadly as “retail sales”) in the house and modify the second floor barn use from antique shop (again termed “retail”) to professional offices.³ In light of this, you have asked for our recommendation on the following, each to be discussed briefly and then in more detail below:

1. For the best way to proceed with this application- particularly given that it is requesting a change of use.

Response: The zoning enforcement officer and the zoning commission have no authority to grant any type of variance or modification of existing variance to allow a new use not permitted in the district; this professional office is not a permitted home enterprise as it must be conducted by a resident and must meet the percentage of dwelling floor area requirements of the Home Enterprise Regulations. Further variance authority lies solely with the ZBA. This is not simply a reduction in the area used for a legally pre-existing non-conforming use. Here there is a new non-resident use added to the existing Antique Shop use permitted that is requested for approval by variance. In this case, the ZBA has no authority to grant such a use variance for a non-resident operated professional office—as this use is not permitted within Residence A district and the Zoning Regulations at Section 17.1.1 d prohibit such a use variance.

2. Whether this raises concerns as to whether the proposed change of use does in fact decrease the non-conformity given the attributes of the new use (i.e. external commercialism based on frequency of commercial traffic in and out of the site, two uses where there was one, additional parking use).

Response: In our opinion set out below, the ZBA has no authority to grant such a use variance because of the regulatory prohibition; even absent such a prohibition, the ZBA should consider whether in fact the new additional non-resident commercial use for professional office in the second floor of the barn instead of possible antique shop use⁴ is less offensive than the antique shop use by a resident in the residential zone.

³ It is unclear which “section” of the barn was approved for the antique shop, but it is obviously less than all. See 1973 permit in the attached chronology.

⁴ The antique shop use in the barn was for a “section” of the barn which may or may not include the second floor that has more recently been slated for an accessory apartment.

3) If this can be done without a variance on the theory that the applicants are reducing the non-conformity?

No. The Zoning Officer cannot approve a new commercial non-resident use not permitted in the zone. A home enterprise under Section 8 of the Regulations must be operated by the owner or resident of the dwelling on the property so the use cannot qualify for administrative review even if there is a reduction in nonconformity where the use will be by a non-resident. This is a determination for the ZBA, but only to the extent it has jurisdiction to grant a use variance (which in our opinion it does not).⁵

In responding to these questions, we have requested and received the zoning history for this property which involves prior reviews by this firm with respect to the ancient permit approvals/variances and nonconforming use as well as prior regulations. See attached summary. We were provided substantially more information (i.e. full copy of 1948 regulations) than our prior 1992 review of this property and there are new statutes and case law that apply; thus we request that the ZBA treat this review as updated and superseding any prior chronology, opinions and related information previously provided.

In addition, we are well-familiar with and have reviewed the cases cited by Attorney Robert Shaver on behalf of the applicant; these cases support a limited exception to the hardship standard by allowing a ZBA to grant a variance for a change of a nonconforming use to a less offensive use, even if that new use is not permitted by the Zoning Regulations. However, for the reasons stated below, it is my opinion that these cases do not apply here where there is a Zoning Regulation which limits the power of the ZBA to grant a use variance for a use not permitted in the zone and the facts in those cases are easily distinguished from the specific facts relating to the use of the subject property.

Discussion:

1. What is approved for this property?

See the attached chronology for 3 Southbury Road based on information provided by Roxbury Land Use Staff. Much of the regulatory history for this property is a bit of a puzzle and somewhat confusing, because:

⁵ For home enterprises under Section 8 of the Zoning Regulations, the dedicated commercial use area must not be more than 2000 SF of floor area or 90% of the dwelling space whichever is less. Thus here even an allowed commercial home enterprise use under this Regulation would be limited to 90% of the 2800 SF dwelling floor area but not over 2000 SF. The 90% is 2520 SF so the 2000 SF limit would apply to the barn space. According to the applicants, a combination of the two commercial uses (one new and not meeting the home enterprise residence tests) will result in 3360 SF (1st floor 1905 SF and second floor 1455 SF); This means that if approved the commercial space will continue to far exceed that of the residence—even though the dual commercial and residential use of the residence is eliminated.

- The age of the permits (earliest use information goes back to 1850's and permits are first issued in the 1932);
- The title and nature of the "permits" based on earliest available zoning regulations (the 1948 regulations state that the ZBA may vary the regulations to grant a temporary non-conforming use for a period not to exceed 5 years);
- In the past, the term "Appeal" was used to describe any application to the ZBA: Variance, Zoning commission/ZEO decision appeal; special exception applications or temporary non-conforming use permits;
- The ZBA did not apply a hardship standard but treats the review of the permits more like a special exception authority evaluating the suitability in the neighborhood;
- The record includes an appeal of ZEO/Zoning Commission enforcement decisions denying that the rights run with the land and limiting the term of the use;
- Permits issued were time restricted and personal to the owner until variances that run with the land and are not time limited;
- The approvals are for uses not permitted in the zone;
- There is evidence that the antique shop use did not occur until after the first Zoning Regulations were adopted;
- An Amendment in the statutes in 1993 regarding variances made clear that they run with the land and are not time limited, and
- Court decisions apply the statutory changes retroactively so as to sever the time limitations and non-transferability, but leaving the remainder of the permit valid.

After much consideration given and the additional information provided regarding the history, we have come to the conclusion that the ZBA may view the early permits issued by ZBA for "temporary nonconforming use of any building or premises for a period not to exceed five years" as a type of variance allowed by the regulations as early as 1948 and probably earlier with respect to the antique shop in the home and as issued in 1973 as to the right to open an antique shop in the barn. The approvals were not appealed even though it appears a special permit type suitability test rather than a hardship standard was applied. Further, today both variances and special permits (terms "special permit" and "special exception" are interchangeable) run with the land and are not time limited; thus the distinction of the end result is without difference. Note that the 1973 approval to open an antique shop in the barn was characterized as "a special exception by way of variance."

Therefore it is my recommendation that the ZBA approvals set out in the attached chronology (1948 and renewals for the house and 1973 for the barn) should be given the status of variances that are limited by both the specific conditions placed on them by the ZBA but also interpreted based on the record before the ZBA at the time of approvals. In *Anatra v. Zoning Bd. of Appeals of Town of Madison*, 307 Conn. 728 (2013) our Connecticut Supreme court states:

In light of this substantial body of law, we agree with the board that it makes more sense to treat a certificate of variance, which refers to conditions having been attached, as a notice to all those searching the land records that further

investigation should be undertaken by reviewing the administrative file. Accordingly, we conclude that the Appellate Court improperly determined that the conditions attached to the granting of a variance must be explicitly stated in the certificate of variance. Rather, consistent with our precedent, such conditions should be construed not only by examining the language contained in the certificate of variance, but by considering the entire public record, including the variance application, the accompanying plans and exhibits, the minutes or hearing transcript, and the record of decision.

As to the antique shop in the home: The 1949 approval notice to Mrs. Adams for a **“temporary nonconforming permit was for a “gift shop at her premises”** for a period of 5 years. However by the first renewal, the use is described as antique shop use in one room of the house which was later described as “antique shop operation in her home.” In 1960 with the sale to Atwood, both the Zoning Commission and the ZBA jointly and properly ruled that the “further action for reissue of the permit was not required because the shop had been in continuous operation” and thus was allowed to continue as it had over the years. If a variance, which we now conclude is the best interpretation, the continuous operation would not be an issue, unlike continuance of nonconforming uses such as the ones that predate zoning. All of these approvals in the home required the antique operator to be the resident of the home. This was true of Mrs. Adams, Mrs. Atwood and eventually DeCortin. After DeCortin purchased the property in 1972, there was an attempt to find abandonment of the use and non-transferability, but after legal review and an appeal to the ZBA in October 26, 197, the ZBA granted the permit for 2 years, limiting it to the same use as previously, mainly by appointment and run by the person who resides on the property.

As to the antique shop in the section of the barn: The record shows that in 1973, the ZBA granted DeCortin the right to open an **“antique shop in section of the barn”** located on premises and related small sign on the barn. **We don’t know which section this is.** This permit was limited to 2 years. The use was to be the **same use as previous antique shop** (in home) in this location based on representation that it will be run in same manner as prior owner. **The prior owner, Atwood, had agreed that the use was very low intensity, mainly by appointment needing only one or two spaces.** At that time and before, an expansion of a nonconforming use was not permitted under the zoning regulations and thus the barn antique shop use would have had to be allowed by a use variance to allow a non-conforming use under the authority of the ZBA at the time. The term “non-conforming” in this context does not mean a use legally created and pre-existing the adoption regulations, but rather a use not permitted by the regulations.

The current zoning regulation restricting use variances was not yet adopted until 2006 so there was no such regulatory limit on the ZBA authority in 1973 or before. Today the variances for the resident-operated antique shop in the home and barn are permitted by variance to continue in the same way as approved, but cannot expand. These variances were originally time limited and made personal to the applicant owner so that they originally were deemed to not apply to a new property owner; however, as noted, the statutes do not now allow such restrictions and our Supreme court has held that this statute regarding transferability to new owners and prohibition

on time limitations is retroactive so as to sever these limitation but leave the remainder of the permit in place.

2. The owners' current request is for a use variance or modification of a variance which they state will reduce or eliminate a non-conformity.

A. Current status of uses. As discussed above, the current status of the uses is not a legally pre-existing nonconforming use, but uses allowed by variance that are limited to the four corners of the variance-i.e. run by the resident of the property in the areas approved. There should be some record of the "section" of the barn approved for the antique shop, but to date we have not found such a record. The Board may want to investigate this further. We understand that the early zoning regulations used the term "non-conformity" or "non-conforming" use to apply to a use that is not permitted by the regulations (i.e. vary the regulations by approving a "temporary non-conforming use permit"), but the term also applied and now applies to uses that were legally created under zoning but later were no longer allowed or created prior to zoning and continue to today (these are the non-conforming uses to which vested rights attach if the owner can prove they were legally created at the time—legally created may be legally created by variance). See Regulations Section 3.10.1.

B. May the ZBA grant a use variance? Specifically the request is for the creation of a non-resident professional office use in the second floor of the barn with the elimination of the resident operated antique shop in the home; the resident operated antique shop use would continue on the first floor of the barn per the prior variance approval. The property is located in Zone A where no professional office use is permitted except as a customary home enterprise operated by the resident for a use meeting the requirement of Section 8 regarding home enterprises. The application is thus asking for a use not permitted in Zone A—that is a use variance. (Also today a customary home enterprise cannot be a retail use, thus even the antique shop business could not be a home enterprise today although the variance from 1973 protects that use).

In my opinion the ZBA is not authorized to approve such a use variance or modification of variance. The reason for my opinion is that Conn. Gen. Stat. Section 8-6 provides that the "zoning regulations may specify the extent to which uses shall not be permitted by variance in districts in which such uses are not otherwise permitted." The Roxbury Zoning Regulations, consistent with this statutory authority, provide at Section 17.1.1 d as follows:

The Zoning Board of Appeals shall not grant a variance for a use of land that is not listed as permitted use for the district in which the land is located.

Section 4 of the Zoning Regulations neither lists professional offices as a permitted use in Zone A, nor does Zoning Regulations Section 8 permit a home enterprise unless run by the person residing in the residence. See definition of Home Enterprise at Section 20.39 (must be conducted "by the residents of the dwelling unit"). Because the Roxbury Zoning Regulations are permissive, all uses not expressly permitted are prohibited. See section 4.1

Thus, no variance is permitted under the Roxbury Zoning Regulations to allow by variance a new use for non-resident professional offices on the second floor of the barn. Robert Fuller in *Land Use Law and Practice* Section 22:8 instructs that the granting of a variance to authorize a use not permitted under the Zoning Regulations “ would usurp the legislative function of the zoning commission.” The amendment to section 8-6 of the General Statutes in 1977 reflects this concept. See P.A. 77-509. This statute reflected court cases finding that the grant of a use variance by the ZBA usurps the power of the zoning commission under Conn. Gen. Stat. Section 8-2 which authorizes only a zoning commission to zone for the uses permitted in districts. There are very few court decisions interpreting this ability for a zoning commission to limit the grant of uses variances ; however, there is one decision upholding a nearly identical prohibition for uses variances as that in Roxbury. *Heyman v. Darien Zoning Bd of Appeals*, upheld a restriction on use variances where the regulations provides that a variance may not be granted for a not permitted use anywhere in the zone. Superior Court of Connecticut, April 3, 1996 WL 278287, 13 Conn. L. Rptr. 634. We have have provided a copy of that case. Superior Court of Connecticut, April 3, 1996 WL 278287, 13 Conn. L. Rptr. 634.⁶

If the non-resident professional office use proposed was granted, there would be the creation by variance of an additional commercial use that is not permitted in the zone—a use variance. Further unlike the antique shop that is limited to a resident of the dwelling, the professional office use would not be so restricted. In my opinion the ZBA lacks authority based on Regulation Section 17.1.1d as authorized by Section 8-6 of the General Statutes to approve or modify a variance to allow a new non-resident professional office commercial use not permitted in Zone A.

C. Can a variance be approved based on reduction in nonconformity.

Attorney Shaver on behalf of the applicants urges the ZBA to consider the rulings in *Stancuna v. Zoning Board of Appeals*, 66 Conn. App. 565, *Vine v. Zoning Board of Appeals*, 281 Conn. 553(2007) and *Adolphson v. ZBA of Fairfield*, 205 Conn. 703 (1988) as authority for granting a variance for the non-resident professional office use based on reduction/elimination in a nonconformity (elimination of antique shop use in house). We have reviewed each of these cases as follows and in our opinion, they are not controlling as the court in those cases did not deal with zoning regulations that adopted a restriction on use variances. Further, even if there were no restrictions on the grant of use variances in the Roxbury Regulations, these cases are not controlling for the fact pattern presented here.

The *Adolphson* appeal involved an industrial building previously used for aluminum casting and proposed for an automobile repair shop, a use prohibited by the regulations in an industrial district 1 where the property is located. The court upheld the granting of the variance to provide

⁷ *Heymen* is easily distinguished from a prior appellate decision of *Wallingford Zoning Board of Appeals v. Wallingford Planning and Zoning Commission*, where the adoption of a prohibition of use variances was tested upon passage and struck down. 27 Conn.App. 297 (1992). In the Wallingford case, the regulation limited use variances to those where there is an unconstitutional taking and the only rationale for adoption given was that unconstitutional takings are hard to prove so that would chill the ability to obtain such variances. The court found that this was not an acceptable rational basis zoning purpose for granting the regulation.

for a “less offensive” industrial nonconforming use. The court considers if this amounted to a change of use permitted in the zone and thus usurps the legislative power of the P & Z. The Supreme Court distinguishes this case from one where a legal accessory use was expanded to become a nonconforming use- thus creating a nonconformity. In *Adolphson* the court reasoned that “[h]ere, the board granted a variance . . . for a single parcel of land which is a lot consisting of fifty by one hundred feet, occupied by a building of forty by eighty feet. In granting a variance . . . for this particular lot, the board has not, in our view, used its variance power to establish or change the general zoning regulations of Fairfield.” This variance to allow a “less offensive” nonconforming use has become known as the “Adolphson Exception” to the hardship standard for granting a variance.

In the present application, the antique shop use is permitted by variance but is limited to operation by someone who resides on the property. It is not being replaced by another use but rather an additional use is being added but this time instead by a resident in a residential zone, by a non-resident who will operate a business on the property. This non-resident use does not comport with the home enterprise uses which must be operated by a resident; without that this is simply opening the residential zone to pure commercial uses. In the case of *Adolphson*, both uses are industrial type uses, although the repair shop was not permitted in the regulations. Further here the propose use is by non-resident conducted commercial professional office—it is not a home enterprise-type use and thus creates a second use not permitted by the regulations, rather than replacing that use with another use that is required to be less offensive.

This is a judgment call by the ZBA, but the *Adolphson* case is easily distinguished from the facts here. Also the antique shop uses for the barn were to be similar to the prior variances approved, which reflect a use that was low intensity, mainly by appointment and for which only one or two parking spaces would be required for the business. This means that the house would require two spaces, the business two spaces for a total of four spaces; allowing the Antique shop in the rear did not mean there are two antiques businesses as both are conducted by the resident and thus reasonably one customer may visit both spaces. Here the parking required is for 3 employees plus the professional of the non-resident business as well as clients, plus parking for the separate antique business operated by the resident, in addition to the standard residential parking. Thus the application is for 11 parking spaces many of which are in plain view of the neighborhood, rather than behind the house as set out by the owners when the variances were granted. Thus even if it were within the ZBA’s power to consider a variance to allow a prohibited use, on the facts presented, the ZBA may find that the proposed change of use/ addition of non-resident use does not necessarily present a less offensive situation and unlike *Adolphson* here there is a zoning regulation prohibiting the ZBA from granting such a use variance for a second commercial use not permitted in this residential zone A.

In *Stancuna* the property at issue contained a nonconforming use—a single-family residence in a commercial zone. Id.66 Conn App. at 571 (2001). The applicant there sought a variance of certain side yard setback requirements to permit the construction of a new commercial building, which the Zoning Board of Appeals granted. See *Verrillo* 155 Conn. 727-728 citing 66 Conn. at 567. The elimination of nonconforming residential use in a commercial zone” and allowance of a “commercial use in a commercial zone,” constituted the basis for sustaining the grant of a

side yard variance; but the variance was for a setback not a use. the appellate court affirmed that decision, citing to *Adolphson* and stating, that a variance which eliminates “a nonconforming use [setback allows a commercial building and thus eliminates a residence in a commercial zone] constitutes independent grounds for sustaining the granting of a variance.” *Verrillo Case*, 155 Conn App. 657, 727-728 (2015) citing 66 Conn App. at 571. As in *Adolphson*, the court in *Stancuna* went to great lengths to emphasize that the variance did not result in an increase of the existing nonconformity: “In this case, the court did not conclude that the variance was an expansion of a nonconformity. Rather, it concluded that the board had properly granted the variance. The board did not allow for a continuance and expansion of the nonconforming use, rather, it granted [the] application for a variance under the applicable regulations. *Stancuna v. Zoning Board of Appeals*, supra, 66 Conn.App. at 573.

The Haver/Skolnick situation in Roxbury is unlike *Stancuna*; here the property has a valid variance for the home enterprise antique store use for the barn in a residential zone (where home enterprises are permitted, but not retail sales type home enterprises) and a new prohibited professional office commercial use by a non-resident is proposed to add to the continuing approved antique shop use in the barn. In fact the upper floor of the barn previously proposed for residential use as an accessory apartment would now become a stand-alone non-resident commercial office—a second commercial use. Even if the ZBA were to determine that it has jurisdiction to grant a use variance, the Board should determine whether this addition of a non-resident professional office business increases or reduces the nonconformity. The applicant asks to Board to find that the elimination the resident run antique store in the dwelling in favor of the non-resident professional office and remaining antique shop business in the barn is a sufficient reduction in nonconformity to support the granting a use variance or modifying the variance(s) for the property to allow the non-resident professional office. However, the Board should consider that in the end there remains an antique shop use, a retail use that is prohibited as a home enterprise in Roxbury and the addition of second commercial use that is also not a home enterprise use when conducted by a non-resident of the dwelling. The Commission should compare this situation to *Stancuna* which ended up with a commercial use in commercial zone and where the actual variance approved is for a setback to allow the commercial use to the proposal for the subject property, where there is actually a request for variance to create a prohibited commercial use in a residence zone. In addition, as with *Adolphson*, the *Stancuna* case did not involve a local zoning regulation prohibiting the ZBA from granting use variances as is the case in Roxbury. This is an important distinction.

Vine v. Zoning Board of Appeals, 281 Conn. 553 (2007) also acknowledges the limited exception articulated in *Adolphson* -- the court notes that “[i]n cases in which an 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.” Id.155 Conn. 727-728. In *Vine* the applicant owns property consisting of three contiguous lots in an R40 residential zone. In 1981, the Connecticut Light and Power Company (utility) acquired an easement by condemnation for purposes of installing electrical transmission lines. The easement was eighty feet wide and crossed two of the lots. The zoning regulations require a minimum 150 foot square of land on each building lot located in an R-40 zone; and provide that land subject to an easement for above ground utility transmission lines cannot be included in determining

compliance with minimum lot area and shape requirements. The applicant first prepared a site plan proposal seeking to convert the three approved subdivision lots into two lots by variance application because the utility easement precluded compliance with the 150 foot square requirement on one lot. The board denied that application. The applicant then submitted a second application for a variance requesting essentially the same relief but setting out the hardship as “[t]he existing [lot located at 66 Notch Hill Road] and a portion of [the lot located at 72 Notch Hill Road] are encumbered by an [eighty foot] wide above ground [utility] easement. The utility easement impairs [the] 150 [foot] square ... requirement and there is no ability to place an unencumbered 150 [foot] square anywhere on the proposed Lot A without being compromised by the location of the utility easement.... The current property owner cannot utilize the proposed Lot A as an approved building lot unless a variance of the 150 [foot] square ... requirement is granted.” In reliance upon *Stancuna* and *Adolphson*, the *Vine* court ultimately affirmed that the zoning board’s “decision to grant the variance from the minimum square requirement was proper because it reduced the preexisting nonconforming use of the property to a less offensive use.” 281 Conn. at 563. The facts of the subject application do not present an involuntary situation preventing all use as occurred with the condemnation in *Vine* and *Vine* does not present a situation where a new use of the property not allowed in the zone (i.e. commercial use in residential zone) is being approved by variance- the lots remained residential building lots just did not meet the lot square requirement. The *Vine* case also did not involve a local zoning regulation prohibiting the ZBA from granting use variances as it the case here.

In the more recent *Verillo v Zoning Board of Appeals* decision, the Appellate Court imposed a very strict interpretation of the hardship standard distinguishing *Vine v. Zoning Board of Appeals*, 93 Conn.App. 1, 9 n. 14 (2006), rev’d, 281 Conn. 553, aff’d after remand, 102 Conn.App. 863, (2007), by concluding that “it is not proper to grant a variance on the basis of the denial of reasonable use of the property.” 155 Conn App. 657 (2015). However, commenting on *Vine v. Zoning Board of Appeals*, supra, 281 Conn. 553, the court noted that “[i]n cases in which an 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.” Id., at 562. In *Vine*, the lot square requirement is similar in nature to the setback varied in *Stancuna*, so that the actual end use of the lot is not what is varied. The Board may find that the kind of nonconformity varied in those cases (setback or lot square), is far less of a disparity from standard zoning requirements than adding by variance a prohibited commercial use in a residential zone. As noted above, for the subject application, there is not merely a reduction of a legally pre-existing nonconforming use in the house- but rather there is the creation of a second stand-alone commercial use not permitted in a residential zone.⁷ In our opinion, the present application does not appear to easily qualify under the *Adolphson* “less offensive use” exception to the hardship requirement. However, it is for the Board to determine if the proposed creation of a use not permitted in the zone results is a reduction in nonconformity that is less offensive

⁷ The variance for the barn provided for the antique shop in a “section” of the barn. We are uncertain where that portion is located although the antique shop occurs downstairs and prior permits were for an accessory apartment upstairs for which permits were previously issued and thus is evidently now being abandoned. This apartment would have been a conforming residential use that was possible in the upstairs and is now proposed to be supplanted by a use that is not permitted in the zone.

where it replaces a resident-run low intensity (typically by appointment) antique business in the second floor of the barn (to the extent that replacement is in a section of the barn approved for antique shop use) and the low-intensity in-home mainly by appointment antique business which serves the same customers as the antique shop use in the barn.

As our Supreme Court explained in *Helbig v. Zoning Commission*, 185 Conn. 294, 306 (1981), “the indisputable goal of zoning [is] to reduce nonconforming to conforming **uses** with all the speed justice will tolerate.... Nevertheless, the rule concerning the continuance of a nonconforming use protects the right of a user to continue *the same use of the property as it existed before the date of the adoption of the zoning regulations.*” (Citations omitted; emphasis added; internal quotation marks omitted.) Here the owners already have a use that no one else in Roxbury may now achieve and they are asking for a second prohibited commercial use by variance. The courts have consistently held that ZBAs should use their power to grant variances sparingly (see, for example, *Horace, Jaser, and Buccante v. Zoning Board of Appeals of City of Bridgeport*, 153 Conn. 44 (1965)). If the Board determines that it has jurisdiction in spite of the prohibition on use variances, it is for the Board to weigh the facts presented at the hearing and determine if there in fact is shown to be a reduction of nonconformity that is less offensive within the meaning of *Adolphson, Stancuna* and *Vine* cited by the applicants; the Board may consider the differences in the facts of those cases from that presented here as well as the lack of a use variance prohibition at issue in those cases.

D. Conclusion. In summary, we urge the Board to comply with the zoning regulations and statute authorizing same and find that it does not have authority to grant the use variance proposed or to modify the variance to allow a use variance to create the non-resident professional office use even if there is a reduction in the antique shop use in the house; further we recommend that the ZBA also make a decision on the merits in the event that it is later found to have had jurisdiction; to do this, the Board should consider if the proposal in fact provides a less offensive and more conforming use than exists today based on the elimination of the antique shop use in the home and the addition of a second commercial use run by a nonresident; in making this decision the Board may consider all the facts and evidence presented including any expected impact on the residentially zoned neighborhood including evidence of external commerciality from the conduct of the two businesses with employees and client/customers and the related commercial parking at or near the street-front.

Chronology of Use and Regulatory History of Property at 3 Southbury Road, located in Residential Zone A

- Notes in the zoning file reference photos of the property showing building with notations for “Preston General Store 1850 to 1930” and “The Homestead. See May 2, 1999 letter below regarding size of signage.
- On or about May 5, 1932 the Town adopted zoning and formed a zoning commission (The town journal recites that “the ordinary function of Building commission and building Inspector shall be carried on by the zoning Commission.”) On May 5, 1932 according the minutes of the zoning commission, a public hearing was held regarding the new regulations for the center section of Town (the chairman “read the regulations of zoning law” and members of the public were heard (for example Joseph Hartwell -owner of property formerly of Harvey Thomas, raised objections to regulations limiting chickens/chicken houses and tourist auto parking. It was suggested that Mr. Hartwell submit an application noting where he wished to place chicken houses on his property). The earliest regulations the Town has been able to locate are from 1948.
- On May 9, 1932 at the zoning commission meeting, members of the ZBA were appointed and thus were available for appeals and possibly variances.
- On May 16, 1932 a zoning commission public hearing was held on the application of Joseph Hartwell for building and certificate of occupancy permits and decided as follows:
 - 1st granted one year permit for use of the present family house as two- family house with practically no change outside and only minor inside changes
 - 2nd granted one year permit for temporary use of occupancy of woodshed as dwelling house
 - 3rd Granted a permit dated to June 1, 1933 to alter the south east part of the barn on inside, location opposite Ward Brown to house 4 to 500 chickens
 - 4th denied the right to erect on any property, a 20 X 40 brooder house
 - 5th granted to June 1, 1933 with right to renew, a permit for tea room or tourist room in any house located opposite Preston property- allowed auto storage; denied the right to transfer these permits in the event of sale.

These are examples of ancient so-called “non-transferable permits”

- May 17, 1932: According to prior zoning chairman, notes in zoning file reference to zoning decision to **Joseph Hartwell in list of non-transferable permits.**
- June 25, 1932: Town Meeting called to consider zoning the section of Roxbury not zoned in the Center section.

- January 16, 1933 zoning commission meeting minutes reflect consideration and adoption of change in zoning regulations. “Reg. on file.”
- January 30, 1933. Minutes show Zoning Commission meeting considered and approved the permit “application of Irene M. Hartwell for permit to use part of her house for a gift shop and women’s exchange also to consider her application regarding other activities; to act on the **application of Alice Adams for changes use of building formerly used as probate office to residence.** A bath will be installed in the above building.” Both permits were granted. It is unclear if both of these houses were on the subject property and if so, which of the current houses is the gift shop and which was turned into a residence from a probate office, but see below that by 1945 Alice Adams had requested use of one room of her house for “antique shop”- see below.
- Jan 2, 1945: Notes on file re: Permit to Alice Adams to **allow “antique shop in one room of house”** (reference to this permit but no copy of this permit provided.).
- June 17, 1948: Revision to Zoning Regulations. Section 7 permits “**any nonconforming use existing at the time of adoption of these Regulations” to be continued in any existing building, structure or premises,** and may be reconstructed structurally altered and the nonconforming use therein changed, **subject of the Approval of the Zoning Commission.**” In this case the ZBA treated the uses not as continuations of nonconforming uses but consistent with **Section 11 of the Regulations that states that the ZBA “may in specific cases, after public notice and hearing determine and vary the application of these regulations in harmony with their general purpose and intent as follows” “Allow a temporary non-conforming use of any building or premises for a period not to exceed five years.”** The board could require a bond before granting such a permit to assure relinquishment of the use at the end of the period. Interestingly, this section also authorizes the ZBA by variance to permit a “tea-room, accommodations for tourists, boarding and rooming house, under such conditions as to size, location, area of lot, character of buildings, signs displayed . . . as said board may determine.” This is in the nature of a use allowed by special permit although the 1948 regulations do not use that term here. This section also states that the ZBA may vary the regulations to “allow a nonconforming use of any building or premises approved by the Zoning Commission after due notice and hearing.” The regulations set out no hardship standard. As a matter of interest, these 1948 regulations also permit in residential zones an “office of member of recognized profession “**residing on the premises** and providing there is no display or advertising except for small professional name plate.” This is the only home enterprise provision; signs may be not over 4 feet referring to premises or tract of land and in Residential Zone A ; there can be only one chicken house as an accessory building.
- Feb 7, 1949: ZBA approval of January 28, 1949 application for “**renewal of a temporary nonconforming use permit for a period not exceeding five years from expiration of old permit of Alice Adams for a gift shop at her premises on Highway 67, Town of Roxbury.**” (*Comment, under today’s law and in 1949, no variance or*

permit is required for legally pre-existing nonconforming uses, which unless abandoned, are permitted as of right to continue in the same form as they existed prior to the regulations or as allowed under prior regulations. However, this application was treated as a "temporary nonconforming use permit" which is consistent with the ZBA authority under Sections 11 of the 1948 Regulations to vary the regulations to "allow a temporary nonconforming use of any building or premises for a period not to exceed five years.")

- July 26, 1956: Appeal #14. ZBA granted approval and renewal of "temporary nonconforming use permit" for Alice Adams **"to continue her antique shop operation in her home for a period of 5 years from expiration of old permit.** (This confirms that the prior approval was for the "home" not the barn); see notice of decision dated July 27, 1956 notice that the ZBA voted that Miss Alice Adams be given a permit to continue her antiques shop operation at her home on Route 67 from January 29, 1954 to January 29, 1959; there is no evidence that this was appealed.
- August 1, 1956: Appeal #18. ZBA approval of permit to Alice Adams **"to continue the antique shop operation at her home on Route #67** from January 29, 1954 to January 29, 1959 (See above comment. Note that this is limited to her home, not barn.)
- Nov. 12, 1959: Appeal #26: ZBA approval for "renewal of Permit" for Alice Adams "Antique Shop at Route #67" for a period of 5 years from "date last permit expired." (See above comment. Note that this **renews the prior permit for the antique shop in the home**). Both minutes and notice of approval reflect this permit approval.
- August 11, 1960: Adopted Zoning Regulations effective Nov. 28, 1969. In addition to variances and appeals of zoning enforcement decisions, these Regulations broadly authorize the ZBA to grant "in a specific case, special exceptions to the Regulations herein established" where public convenience and welfare will be substantially served and the appropriate use of neighboring property will not be substantially or permanently injured." The excerpts provided in the past for the 1960 and 1963 regulations do not use the term "variance" in the powers of the ZBA although the General Statutes at that time provided that the ZBA shall have this "variance" function along with the power to decide appeals of zoning commission or ZEO denials of zoning permits. It is possible that the regulations meant to provide both variance and special permit authority; the review provided by the ZBA was more in the nature of a special permit rather than a hardship analysis.
- Nov. 8, 1960: Mary Atwood, successor owner, filed a "Notice of Appeal" to the ZBA of the Zoning Commission ruling that permit does not apply to new owner's continuation of Antique Shop use. Ms. Atwood's notice of intention to appeal sets out the use as follows: "I carry only 17th and 18th and 19th century furniture and accessories . . . largely of the best collectors and accessorers in the country so . . . work is by appointment, thus present no parking problems. I feel a shop of my type would be an asset to the community."

Obviously the zoning commission or zoning officer had denied the continuation of the use by or transfer of the permit to the new owner. This may not be consistent with the law today but is consistent with the early classification of the use as “nontransferable” and the requirement of a continuation permit that is issued for not more than 5 years.

- Nov. 29, 1960: Appeal #31. The ZBA minutes reflect the Application for **Appeal of Zoning Commission** decision to deny the permit of Adams to be used by new owner **Mary Atwood** for operation of Antique Business and for use of her Williamsburg sign. Minutes provide representation by Ms. Atwood that there would be no outside display “in front of her house which would mar the appearance of the center,” **that “nearly all her business is done by appointment and therefore there would rarely be more than one or two cars parked here at a time, and that parking facilities would be in rear of house.”** She also stated that the house would be restored to its original state. **After the hearing the ZBA voted to approve the permit** “to operate antique shop on Route #67 in Roxbury center for five years from the date of issue.” This is similar to the prior variance for “temporary nonconforming use permit” issued for the prior owner. The application is not characterized as a “variance” but rather a request to approve the same type of permit previously issued to Ms. Adams which was arguably a type of variance.
- September 13, 1964: Letter issued by Zoning Commission chair to Mr. and Mrs. Lester Atwood that it appeared from the Commission’s records that the permit for the operation of their antique shop expired, and suggesting that reissuance be applied for (Described in Sept. 21, 1964 Zoning minutes).
- September 16, 1964: Letter from Attorney Curtis McGann, counsel to Zoning Commission and ZBA to Ms. Atwood, opining that **“as long as . . . antique operation remains substantially unchanged it is not necessary to obtain approval from the Zoning Commission”** but that “any structural alteration or modification or extension of the business would create new set of circumstances requiring zoning action.” (Letter is also described in Sept. 21, 1964 zoning commission minutes). This ruling is consistent with the a prior grant of a variance.
- September 21, 1964: Zoning commission meeting minutes outline the September 13 and September 16, 1964 letters and reflect “it was a consensus of the meeting that a letter of apology be sent to the Atwoods.”
- September 16, 1965: Reference in records to Permit #248 to Mary Atwood and Lester Atwood to move accessory building (No copy of permit).
- May 2, 1966: Reference in records to Permit #268 to Mary Atwood and Lester Atwood to move accessory building (No copy of permit).
- August 25, 1966: Permit #281 Jerome Blum, Antique Shop permit denied.

- September 21, 1966: Zoning Commission Minutes reflect letter from Zoning Chairman to Mr. and Mrs. Atwood noticing that permit expired and the decision that a new permit (variance) is required **is superseded by joint action of ZBA and Zoning Commission on advice of counsel that “further action for reissue of the permit was not required because the shop had been in continuous operation.”** (Comment: This apparently responds to September 16, 1964 letter from Attorney Curtis McGann to Ms. Atwood, and copy to Zoning Commission opining that “as long as . . . antique operation remains substantially unchanged it is not necessary to obtaining approval from the Zoning Commission” but that any structural alteration or modification or extension of the business would create new set of circumstances requiring zoning action. This letter does not mention a variance, but the result for a variance would be the same and would allow continuation of use of home for antique shop use.
- March 17, 1967: Permit # 306. Mary Atwood to “divide house lot” – fee refunded. We have received no indication that this was ever approved, approvable or carried out.
- 1968 Zoning Regulations Section 8 clearly delineates the ZBA powers to include special exceptions where specified in the regulations, grants of variances using a hardship standard and appeals of ZEO//ZC decisions. The regulations set out the procedure for these applications.
- October 2, 1972: Transfer of property to Susanne DeCortin.
- September 11, 1973: Trade name certificate filed with town clerk for “Roxbury Village Antique Shoppe, “ Route 67.
- September 12, 1973: Letter from Zoning Commission to Susanne DeCortin that the business was discontinued for almost a year since the transfer of the property and because of that the previous permit issued to Mary Atwood is void. This letter states that Mrs. DeCortin may apply for a variance to open an antique business at the property. This letter characterizes as a variance the November 29, 1960 permit issued for the previous business by Mary Atwood for period of five years but states that on Sept. 17, 1964 Mrs. Atwood was informed that the business “could continue as it had been in continuous operation.”
- September 19, 1973: Zoning Commission Minutes reference the Susanne DeCortin request for permit to **“open” an antique business in her barn similar to business Atwood business operated on the premises.** Reference is made to 5–year variance granted Nov. 29, 1960 to Mrs. Atwood being originally ruled to be nontransferable to a new owner. **The minutes reference a letter from Linc Cornell, Town Attorney that Ms. Atwood must apply for variance to operate the antique business.** However, the minutes also reflect a joint ruling of ZBA and Zoning Commission for the use to “continue beyond the 5 years (treated as valid nonconforming use). The term “variance” is used to refer to prior permit approvals which were “temporary non-conforming use

permits” as referenced in the 1948 regulations. **At this meeting, Mrs. DeCortin described her use as “very low key similar to Mrs. Atwood’s.”**

- September 21, 1973: Letter from Zoning Commission to ZBA regarding purchase by DeCortin of former Atwood property, noting that Mrs. Susanne DeCortin “was denied a permit by the Zoning Commission to operate an antique business because her property is not in the business zone.” The Zoning Commission provides to the ZBA a copy of the minutes of its proceedings and also the decision on a prior 1971 unrelated variance application that was approved for Plungis (and his family only) based on “hardship,” for a temporary use variance from Customary Home Enterprise regulations to allow artist to sell original oil paintings purchased from artists not residing on premises; can apply for renewal of same. (Expiration Aug. 31, 1973-permit terminates upon sale or transfer to new location). The Plungis temporary approval limited to the current owner is a use variance and precedes the statute allowing the zoning commission to limit the ZBA’s grant of use variances and the current zoning regulation prohibition of granting of use variances. It must be considered on its own facts. Evidently it was not appealed.
- September 21, 1973: Letter from Zoning Commission to DeCortin realtor, Jean Nasturwich indicating that Mrs. DeCortin had been incorrectly told that she could operate an antique business at the former Atwood property in the same fashion as the former owner.” The letter indicates that Mrs. DeCortin will need a variance from the ZBA to do so.
- October 1, 1973: Letter from DeCortin to ZBA enclosing Sept. 28, 1973 DeCortin appeal of denial action of zoning commission and request for **special exception by way of variance** to permit antique shop in section of the barn located on premises. This letter reviews history of reliance on Zoning Regulation that provided “ No non-conforming building or use which shall have been discontinued for a period of one year, shall be resumed or replaced by any other nonconformity” and her understanding that the one year had not expired. This letter confuses variances and nonconformities; it outlines the process Ms. DeCortin had gone through including: A conversation with a zoning administrator who stated that the operation of the antique shop is not a “nonconforming” use since the antique shop was not in existence when the zoning laws were adopted; that an application to the Zoning Commission had been denied; and that the current “appeal” is for **a small antiques shop in barn with Williamsburg sign, most customers by appointment.**
- October 26, 1973: ZBA voted temporary approval (2 years) on DeCortin **to allow the same use “as previous shop in this location” because “not objectionable and appellant has stated that her shop will be run in same manner.”** The approval states: **“If the operation proves objectionable it can be terminated at the end of the 2 year permission.”** This appears to be for the house as the later variance issued **within a month is limited to the barn. Although no evidence of application of a hardship standard, this appears to be another variance for a “temporary non-**

conforming use not to exceed 5 years” with the term “non-conforming” meaning not permitted by the regulations rather than legally pre-existing nonconforming use.

- November 5, 1973: **Notice of appeal decision with permission granted** (requested “special exception by way of variance”) **to operate an antique store in the barn** subject to the following limitations: 1. Williamsburg type sign meeting Zoning Regulations as to size may be displayed in vicinity of barn; 2. **Permission expires Nov. 1, 1975, subject to renewal**; 3. Permission is granted to Susanne DeCortin and her spouse only and applies only to the premises at the corner of Church and Southbury Road, with immediate termination if property sold, rented, transferred or appellant moves to new location. The minutes do not reflect a hardship evaluation but rather the review of impact on the neighborhood. The 2 year time limitation is consistent with the regulations allowing a variance for “temporary non-conforming use not to exceed 5 years.”
- Oct. 19, 1992: Minutes Re: “POSSIBLE ANTIQUE SHOP VARIANCE:” State that “There was a variance to run an antique shop in 1960. Since variances cannot be time limited and that encumbrance is on the property and not the people, it may be possible to open a shop. Referral of question to town attorney.”
- November and December 1992- information gathered setting out permit history;
- Dec. 2, 1992: Letter from Attorney Pellegrini asking for clarification for a series of “variances” that were granted for DeCortin Property noting that they were improperly time-limited and that they run with the land not the owner.
- Dec. 21, 1992: **Zoning Commission Minutes: Gustave DeCortin, Church St. “PERMIT TO OPERATE AN ANTIQUE SHOP.”** Minutes provide: “Attorney McTaggart has gone over a long list of zoning permits and activities concerning the property and its antique shop from 1948 through 1973, from Alice Adams, Mrs. Mary Atwood and Susanne DeCortin. Since language in the Zoning Regulations and ZBA regulations has changed over the years, Ms. McTaggart found it difficult to know if there has really been a “variance” issued which would “go” with the land and still be active . . . while it appears it may still be possible to run an antique shop there, it has to be run by the owner, not someone renting the shop, she said.” The Commission gave Attorney McTaggart authorization to talk this over with Attorney Pellegrini (client Gus DeCortin) to discuss appropriate action.” A preliminary, unsigned and unissued letter dated December 21, 1992 by Attorney McTaggart is found in the record; it points out the confusion as to type of application approved over the years and requests more information as to regulations in effect over the years. (See above the historic power to vary the regulations for “temporary nonconforming use of any building or premises for a period not to exceed five years” and bonding to assure relinquishment of use. The preliminary McTaggart letter concludes at minimum that antique shop may be allowed to continue. As a result of this review, Mr. DeCortin was able to continue the Antique business in the barn and house as previously approved; at this time in 1992, the State

Statutes had not yet been amended to provide that variances must run with the land and not be time limited and the appellate and supreme court had not yet ruled that such restrictions were to be severed from variances so that they remain valid and run with the land.

- Public Act 93–385 amended General Statutes § 8–6 by adding subsection (b), which provides: “Any **variance** granted by a zoning board of appeals shall run with the land and shall not be personal in nature to the person who applied for and received the **variance**. A **variance** shall not be extinguished solely because of the transfer of title to the property or the invalidity of any condition attached to the **variance** that would affect the transfer of the property from the person who initially applied for and received the **variance**.”
- Nov. 22, 1994: Letter from ZEO, Thomas Oloskey, to Attorney David Griffen for then Owner, OOPS, that “**Antique Sale/home enterprise, activity is permitted providing the dealer resides on the premises**” and noting that “**Carriage House Apartment**” is “**presently in a state of disrepair; however could be reconstructed to its present size.**” (Apparently, the carriage house is the barn as there are only two buildings on the property; the barn is variously described over the years as garage/apt, carriage house).
- January 1996: The Connecticut Supreme Court *Reid v. Zoning Bd. of Appeals of Town of Lebanon*, 235 Conn. 850, (1996) ruled that the Public Act 93-385 was to be applied retroactively and that any prospective challenges to variances subject to otherwise invalid, integral conditions must result in the severance of the condition and the survival of the otherwise valid variance. This meant that any variances were valid but stripped of restrictions on transfer to predecessor in title and of any time limitations.
- April 15, 1997: Zoning permit application “denied” by ZEO for apartment/garage (1 bedroom 1 ½ bath, 600 SF on 2nd floor, 1284 SF first floor.”
- April 18, 1997: ZBA Application #216 for variance to rebuild the existing foundation with a new foundation, not changing the footprint of the existing foundation for use as “GARAGE/APPT.” The application reflects the ZEO denial was failure to meet setbacks. Hardship claimed is that existing building is nonconforming with less than a 50’ setback. The application states: “**THE PROPER WAY TO REBUILT [SIC]THE STRUCTURE IS WITH A FOUNDATION THAT MEETS CURRENT BUILDING CODES.**”
- April 21, 1997: Notice of public hearing on variance to rebuild the existing foundation with a new foundation, not changing the footprint of the existing foundation with use for garage/apartment.at 3 Southbury Road. (We have not found the decision on this but apparently the barn was rebuilt to essentially what is there today; the commission could confirm this with the owner).

- April 29, 1997: Zoning Permit #2263 signed by Dan Yonker, Zoning Chair and Thomas Oloskey, ZEO and issued to Charles Haver and Stewart Skolnick for "Apt. retail." This permit circles and initials "Apt " and "7/21/98 Do NOT INTENT TO BUILT OUT [SIC] APT AT THIS TIME." The ZEO/Zoning chair condition the approval as follows: "Framing cannot start until 'as built' of the foundation location is submitted to the Zoning Commission."
- June 24, 1998: Application (received June 28, 1998) for Certificate of Appropriateness from Historic District Commission) for Accessory building (including sign on Barn, elevations attached). No signature of approval is evident.
- July 21, 1998: Zoning Permit issued to current owners for detached accessory apartment with new foundation. (HDC approval for sign on barn and "Accessory Building") There is no indication that the apartment was ever built (no building permit or c/o) but that second floor area of the barn is the area now proposed for non-resident professional office.
- May 2, 1999: Letter to Dan Jonker, zoning chairman, from Charles Haver regarding research with aid of Roxbury Historical Society of history of subject property as to signage; this letter encloses copies of photos showing signage from two previous businesses run at the property. The first photo copy is from Preston's (sign is estimated to be 1' X 2', states "Please Ring Bell"- mounted at doorbell), the second photo copy is for Atwoods "COL ASHE BRADLEY ANTIQUES MARY R. ATWOOD" (noted as mounted on house- at southwestern corner of the house with the back door leading into the kitchen), the third picture is from the *Newtown Bee* showing an estimated "2' X 4' sign for "Atwood Antique shop 1960-1977" erected on post at barn. There is also a copy of a photo referencing a sign and bears added notations for "The Homestead" and "Preston General Store 1850-1930" -- this was apparently provided by the Roxbury Historical Society. The letter references a certificate of appropriateness from the Historic District Commission which we do not have to review. The request to the zoning chairman was to increase the sign from 4 SF to 9 SF based on the history. (The record received by us does not include an approval of a larger sign).

There is no indication that any of the above referenced permits were appealed in whole or in part as to conditions.



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

ROXBURY ZONING BOARD OF APPEALS PUBLIC HEARING / REGULAR MEETING FEBRUARY 16, 2017

MINUTES

PUBLIC HEARING

CALL TO ORDER

Nanette Falkenberg, Chair, called the meeting to order at 7:30 p.m.

IDENTIFICATION OF MEMBERS

Members Present: Nanette Falkenberg, Judith Kelly, Margaret Miner and Karen Kopta.

Alternates Present: Nancy Schoenholtz, and Doug Lewis

Alternate Nancy Schoenholtz was seated as a Regular Member.

Others Present: James Conway, John Cody, Attorney Gail McTaggart, Attorney Rob Shaver, Charles Haver, Stewart Skolnick, Brendan Kolnick, and Mary Schinke

BUSINESS

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2016-0076, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space

- Confirmation of certified mailings

Chair Falkenberg read the legal notice of this public hearing for the record. Attorney Shaver submitted the notices of this public hearing to abutters for the record.

The minutes of the February 2, 2017 Site Walk were read for the record.

Motion to approve the minutes of the 2/2/17 Special Meeting/Site Walk. Motion by Nancy Schoenholtz, seconded by Judith Kelly and carried unanimously.

- Applicant presentation

Attorney Shaver came forward to represent Mr. Haver and Mr. Skolnick and reviewed an 1867 map of Roxbury and research regarding the Phineas Smith House & Office 1796c. He explained that when his client purchased this house it was dilapidated and they have restored it. He states that they are very Roxbury orientated members of the community.

Attorney Shaver describes the house as currently having 2800 square feet of "retail" space and the barn has 360 square feet of "retail" space. Both of these uses were granted approvals for a resident owned antique shop. The applicants would like to forgo the right to conduct "retail" sales in the home with this application and the second floor of the barn. The first floor would remain as is which is a retail antique shop. In place of the antique shop use on the second floor of the barn they are requesting to lease professional office space to a nonresident. This office would be run by appointment only. They would also be requesting a sign in compliance with the Roxbury Zoning Regulations on the east side of the building. The building has been brought up to commercial grade as per the building code as part of their application in 1994/1995. There is adequate septic and separate entrances. Attorney Shaver states that this would be a reduction of a pre existing use to a less offensive use.

Nanette Falkenberg asked for the definition of "offensive use" as it may be a matter of opinion. Attorney Shaver asked that the Board look at the totality of the application and written support. A letter dated 11/21/16 from seven members of the public in favor of this application was read aloud.

A letter dated 11/25/16 from the Historic District Commission was read aloud in favor of elimination of antique shop from the house. Chair Falkenberg noted that the Historic District Commission did not comment regarding the barn. Charles Haver clarified that the Historic District Commission already saw the barn as a commercial building and this was not of concern to them; whereas, the house is an important aspect of the historic district. Attorney Shaver explained that this variance saves a historic house, retains "retail" use in the lower level of barn, and allows for professional office space in the upper level of the barn.

It was confirmed for Karen Kopta that the applicant is requesting that the lower level barn always be an antique shop. Attorney McTaggart advised that this must be a resident owned antique shop per the current variance.

Doug Lewis questioned whether there is a hardship for this variance request or if this is a modification of variance. Attorney Shaver noted that case law shows that there is independent grounds for granting a variance. He characterizes the proposal as good for the town, good for the neighbors and is more consistent with what is intended for the area. He states that the town should consider the neighbors, owners, and the future owner of this property when making this decision.

Attorney Shaver clarified for Chair Falkenberg that this is an all or nothing request. The applicants are not willing to negotiate their request. Attorney Shaver explained that alternately the position could be that over the years the applications have become so muddled that the argument can be made that this has been already approved. This is not a direction that the applicants have chosen to take at this time.

Mr. Haver came forward and noted that he hopes that this is a proposal that will benefit both them and the town and will clarify what can be done in the future.

Town Attorney McTaggart came forward and reported that she has done a great deal of research back to 1932 regarding this property. She submitted a package with a letter dated 2/16/17 entitled Haver and Scholnick Variance/Variance amendment at property at 3 Southbury Rd. (see attached) along with documents of supporting evidence and reviewed this with the Board.

Attorney McTaggart believes there is a variance for house and barn or a section of the barn. She clarified that although the word "retail" is being used in the application it is an antique shop that was approved. In 2006 Roxbury adopted a Use Variance Provision stating that the ZBA has no authority to grant a use variance for a use not permitted in the particular zoning district in which it is located; however, the Zoning Commission can grant a change of use. In this case, the ZBA has no authority to grant such a use variance for a non resident operated professional office as this use is not permitted within Residence A district and the Zoning Regulations Section 17.1.1 d prohibit such a use variance.

Attorney McTaggart advised that the Board should think about what they would decide if it had the jurisdiction and then consider whether it does have jurisdiction. She reviewed case law and what would be considered should a decision be contested (included in attached letter dated 2/16/17). She suggested that the Board examine the external commercially to determine if this added us is less offensive.

Attorney McTaggart explained that there are two standards for variances; hardship and the exception under the Adolphson case for less offensive uses and reduction in nonconformities. The applicants are not applying for a hardship. In this case the application does not meet the case law that applies. If the Zoning Commission would like to make a change to allow for this then that is where the relief may be. This town has one of the most lenient home enterprise regulations; however, the requirement for it being resident owned is always present. This request would have to go back to the Zoning Commission as a petition to revise the regulations.

- Questions from the Board

It was clarified for Margaret Miner that use variances should never be granted by the ZBA per the adoption of the Use Variance Provision in 2006. However, a resident of a primary dwelling could have such a use under home enterprise.

Attorney Shaver explained that he disagrees with Attorney McTaggart's interpretation of the case law. The language in this matter is almost the same as the Heyman case. He states that The ZBA is designed to make

exception to a use that is not permitted. He urged the Board to try to negotiate through this to do the fiduciary job of the ZBA. He states that this is an opportunity to extinguish retail use on one of the most historic homes in Roxbury and that the applicants are giving up a lot and it is in the benefit of Roxbury. Judith Kelly questioned whether the house and barn can be sold separately. It was confirmed that this 2 acre lot cannot be split. The commonality of "by appointment only" of a professional office was discussed.

Gail McTaggart and Doug Lewis discussed the modification of the variance should this be approved so that the current variances will no longer run with the property.

- Public comment

Mary Schinke came forward as a prospective tenant in support of this request

Brendan Kolnick came forward and noted that he is in favor of this request.

- Additional Questions from the Board - N/A
- Close or continue public hearing

Motion to close to the public hearing of Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd. Case file 2016-0076, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space

Motion by Nancy Schoenholtz, seconded by Judith Kelly and carried unanimously.

REGULAR MEETING

CALL TO ORDER

Nanette Falkenberg, Chair, called the meeting to order at 10:00 p.m. The same members remained seated as in the public hearing.

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2016-0076, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space

The members agreed that there is a lot of material entered as part of the record to digest and would prefer to table this matter.

APPROVAL OF MINUTES

November 17, 2016 Regular Meeting and Public Hearings

Tabled

OTHER BUSINESS

N/A

ADJOURNMENT

A motion was made to adjourn at 10:05 p.m. Motion by Judith Kelly, seconded by Margaret Miner and carried unanimously.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary

These minutes are not considered official until approved at the next Meeting of the Roxbury Zoning Board of Appeals.



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

ROXBURY ZONING BOARD OF APPEALS PUBLIC HEARING / REGULAR MEETING MARCH 16, 2017

MINUTES

PUBLIC HEARING

CALL TO ORDER

Nanette Falkenberg, Chair, called the meeting to order at 7:30 p.m.
Members Present: Nanette Falkenberg, Margaret Miner, Bill Davies and Karen Kopta.
Alternate Present: Doug Lewis
Alternate Doug Lewis was seated as a Regular Member.
Others Present: James Conway, Brendan Kolnick, and Jeff Mose

BUSINESS

Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd.
Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses and accommodate an expanded bedroom configuration.

- Read legal notice into the record

Chair Falkenberg read the legal notice of this public hearing for the record.

- Confirmation of certified mailings

Jeff Mose came forward and submitted the certified mailings receipts to abutters for the record.

- Applicant presentation

Jeff Mose, agent and architect for Kolnick, submitted the Zoning Location Survey revised March 1, 2017 for the record and reviewed it with the Board. The history and updates of the property were discussed. Mr. Mose noted that there were two separate houses at one time and then, at some point, the two houses were connected on the first level. Plans and photos of the site were reviewed.

Mr. Mose further explained that the applicants would like to create a viable living configuration. They would like to maintain the footprint of the two connected houses. It is a safety issue for a modern family to have bedrooms located in two different houses; therefore, they would like to lift the linking roofline up by 7 feet. The proposal also includes an expansion of the roofline on the backside of one of the houses creating a shed dormer to allow for a more practical bathroom. He noted that the house also presents structural deficiencies with regard to the bathroom roofline and the existing gable roof in the front corner that is unusable space.

Mr. Mose presented both computer and sketched renderings of the proposal. The concept is to have the entire body of the house to feel like an original home. The goal is to have 3 bedrooms in main house, which will connect to the back house where the master bedroom will be located.

It was explained that the alternative layouts that would not encroach in the setback would not be as subtle as what is being presented. Mr. Mose stated the hardship as these houses predate zoning and any work done on this property regardless of ownership chain would be nonconforming. Additionally, the configuration of the house does not make it livable for any kind of family. The existing architecture and uniqueness of the house begs for a better connection between the 2nd floors. It is odd to have one bedroom in each house connected merely by a first floor.

Engen vs. New Canaan ZBA and Bozzi vs The Town of East Hampton were cited as case law that would apply to this application. These cases had architectural rationale and the character of the house as basis for a hardship.

- Questions from the Board

Margaret Miner questioned when the connecting 1st floor was built. Mr. Mose reported that there is no record of this addition or a variance for it.

Bill Davies noted that of the hardships stated by Mr. Mose the architectural hardship is only one that can be considered an actual hardship. Mr. Mose explained that they would be bringing this house more in line with the spirit of the master plan of development.

Karen Kopta asked if geographically it is possible for there to be other options that would not further increase the non-conformity. Mr. Mose explained that the challenge is maintain the historic significance of the house. The alternate would not expand the nonconformance, but creates a staccato. He reminded the Board that the current plan is not expanding the footprint. Bill Davies asked for clarification regarding expanding the footprint outside the setback. Mr. Mose noted that the area in question is just a pergola. Margaret Miner reminded that the group that they were instructed that the fact that a nonconformity is de minimis should not affect the Board's decision.

Mr. Mose noted the location of the new septic on the map for Doug Lewis.

Nanette Falkenberg asked whether if the applicant has concerns that children and parents would be separated, then could existing space in one of the houses be converted to bedrooms? Ms. Falkenberg asked about bedrooms on the first floor to create a sleeping house and a living house. Mr. Mose stated that this could be done. She noted that the question is; "Is there a different way to do this?". Mr. Mose explained that the uniqueness of this house presents some challenges. He noted that the case law cited suggests that the uniqueness of the architecture is a sufficient hardship. To create a new layout, he would then have to reconfigure how you would enter the house so it would not be through the bedrooms.

Mr. Mose advised for Mr. Davies that the front building is 600 square feet on the 1st floor.

The Board asked for the copies of the case law being referred to by the applicant; Engen vs. New Canaan ZBA and Bozzi vs The Town of East Hampton. Mr. Mose submitted the caselaw for the record.

Karen Kopta asked for the square footage of the existing livable space and the square footage of the proposed livable space. Mr. Mose advised that the farmhouse is currently 4268 square feet and will be 4800 square feet when complete.

A member of the public, James Conway, came forward to better view the presentation. The Board asked that for the record it be noted that James Conway is also the Chairman of the Zoning Commission.

Mr. Mose explained that this house presents an undue burden of how one would live today. It does not function to today's standards. Margaret Miner noted that the house functioned fine for many years. She asked about the part of the Plan of Conservation and Development that he is referring to in previous comments. Mr. Mose noted that he is referring to the spirit of the village area that this should be a single house instead of two houses. He confirmed that there is not a specific part of the PoCD that states this.

Mr. Mose reviewed the current layout of the house for the Board as one bedroom in the front house and the back house has 1 bedroom with the 1st floor as a kitchen. Once complete there will be a total of 4 bedrooms; 3 bedrooms in one house and the upper link to other house for 1 master bedroom.

- Public comment

James Conway came forward as a member of the public and asked for the square footage of the existing footprint. Mr. Mose stated the existing footprint is 3000 to 3200 square feet. The addition will be about 600 square feet all within the existing footprint. Mr. Mose explained that they are trying not to increase the level of nonconformity.

- Additional Questions from the Board

Margaret Miner and Bill Davies asked for confirmation that the pergola will go outside the footprint. Mr. Mose noted that they could easily avoid that problem. He explained that this design is as sensitive as it can be to the street scape. The plan is to maintain a line of continuity of all the buildings.

Brendan Kolnick came forward and explained that he and his wife are making a long-term investment in this town. They have a 3 year old in the Reach Program and his wife is on the BOE. They were drawn to the house and town because of its historical value. They don't want to knock it down and create something within the setback that is usable. He believes Jeff Mose has made modest additions to make the house more usable.

Doug Lewis explained that the Regulation is clear not to reconstruct unless it is to reduce the nonconformity. Mr. Lewis questioned whether there are options to reduce the nonconformity of the house. Mr. Mose explained that this is not a big house and all of the square footage is sacred. He reviewed the layout and noted that they can remove the bay window area if necessary. Mr. Mose confirmed that the answer is that there is a way to decrease nonconformity. Brendan Kolnick noted that he feels this is a prominently sited property in the town and would like to minimize the disturbances. They are trying to keep it as is to preserve the history of the house.

- Close or continue public hearing

Motion to close to the public hearing of Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd. Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses and accommodate an expanded bedroom configuration.

Motion by Bill Davies, seconded by Karen Kopta and carried unanimously.

REGULAR MEETING

CALL TO ORDER

Nanette Falkenberg, Chair, called the meeting to order at 8:44 p.m. The same members remained seated as in the public hearing.

Motion to revise the agenda to move to the top the application of Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd. Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses an accommodate and expanded bedroom configuration. Motion by Bill Davies, seconded by Karen Kopta and carried unanimously.

Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd.

Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses and accommodate an expanded bedroom configuration.

Nanette Falkenberg noted that she is torn regarding this proposal. She feels it would be a nice addition to the town; however, with the constraints outlined by the Town Attorney she cannot see how a variance can be granted. A major issue she finds is that a hardship cannot be personal in nature. She views this as a personal request.

Bill Davies explained that he is also torn, but sees the hardship as two separated bedrooms. The request would be expanding footprint by less than 5 feet as most of the addition is vertical. The applicant is making an attempt to continue the two-house connection. Yet still, Mr. Davies noted that he sees some issues with the hardship. The plan should not be encroaching further into setback and should be keeping a semi historical feel. However, the owner can tear down and rebuild in this prominent part of town.

Margaret Miner explained that she is interested in the details of an architectural hardship case. Multifamily dwellings were built in many ways. The details of Engen vs. New Canaan ZBA were reviewed. Mr. Lewis noted that it states; "the homeowner's hardship arises from the unique historic nature of the home"; however, the next sentence notes; "like Stillman". He explained that the Court's decision rested on Stillman and that Stillman has since been overturned.

Requirements for finding a hardship supplied in the ZBA training by Town Attorney were reviewed. It was noted that these are the same criteria involved in the overturning of Stillman. The group discussed the "uniqueness" rationale.

Margaret Miner questioned whether the architecture is almost inherent to the property. Bill Davies does not see this request personal in nature due to the layout of bedrooms in two different houses. Mr. Davies commented that this is about living in this era and trying to preserve historical homes. Karen Kopta added that it does not matter if

it is a bedroom or study, but the issue is making the two sections of the house work together. She does not see it as a personal request. The request is for a usable space.

Margaret Miner reminded the group that many people in Roxbury have a study or office separate from their home on their property or a place where kids that are home from college can stay. Many people might consider the layout an inconvenience, but not all people.

Nanette Falkenberg discussed that this layout was known before the house was purchased. Bill Davies cautioned that this is heading to a complete inability to improve a home if it is in the setback.

Doug Lewis noted that he would have liked to have seen an attempt to reduce the nonconformity and with some reconfiguration the nonconformity can be reduced. He would then find this request much more acceptable. Margaret Miner questioned if the nonconformity was reduced, would the application need to come to the ZBA. The Board noted that they must act on the application before them at this time.

The Board was polled regarding this application and it was determined that the Board was in favor of consulting the Town Attorney and holding over the application until the April meeting.

A motion was made to consult with the Town Attorney regarding the application of Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd. Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses and accommodate an expanded bedroom configuration because of the nature of this request and argument presented. Motion by Bill Davies, seconded by Doug Lewis and carried unanimously.

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2016-0076, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space.

The group reviewed the letter from Attorney Shaver withdrawing this application with intention to resubmitting. The Town Attorney has recommended that the record of the prior application be included in the record of any subsequent application.

APPROVAL OF MINUTES

November 17, 2016 and February 16, 2017 meetings

A motion was made to approve the minutes of the November 17, 2016 meeting. Motion by Nanette Falkenberg, seconded by Bill Davies and carried unanimously.

A motion was made to approve the minutes of the February 16, 2017 meeting. Motion by Karen Kopta, seconded by Doug Lewis and carried unanimously.

OTHER BUSINESS

N/A

ADJOURNMENT

A motion was made to adjourn at 9:50 p.m. Motion by Margaret Miner, seconded by Bill Davies and carried unanimously.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary

These minutes are not considered official until approved at the next Meeting of the Roxbury Zoning Board of Appeals



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

ROXBURY ZONING BOARD OF APPEALS REGULAR MEETING APRIL 20, 2017 MINUTES

CALL TO ORDER

Nanette Falkenberg, Chair, called the meeting to order at 7:36 p.m.

IDENTIFICATION OF MEMBERS

Members Present: Nanette Falkenberg, Margaret Miner, Bill Davies, Judith Kelly and Karen Kopta.

Alternates Present: Doug Lewis, and Nancy Schoenholtz

Others Present: James Conway, Brendan Kolnick, Attorney Shaver, and Suzanne Scott

Alternate Doug Lewis was seated as a Regular Member and Judith Kelly stepped down for the approval of the minutes and case file 2017-077.

APPROVAL OF MINUTES

Regular Meeting - March 16, 2017 meeting

A motion was made to approve the minutes of the March 16, 2017 meeting. Motion by Bill Davies, seconded by Margaret Miner and carried unanimously.

BUSINESS

Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd.

Case file 2017-0077, for an application for a variance of Section 3.10.4 to add second floor link to join existing 2 story farmhouses and accommodate an expanded bedroom configuration.

Chair Falkenberg noted that the public hearing for this matter was closed at the March 16, 2017 meeting. A memo from Gail McTaggart, Town Attorney, dated April 19, 2017 was distributed and reviewed (see attached). Chair Falkenberg explained that Gail McTaggart pointed out that while the application is for a variance to Section 3.10.4 of the Zoning Regulations, the request includes a vertical expansion, which is addressed in Section 3.10.12 of the Zoning Regulations. The legal notice was found to make the intent of the application clear, but Ms. Falkenberg asked that both regulations be included in the deliberations and decision.

Chair Falkenberg asked for discussion by ZBA members.

Doug Lewis stated that a more traditional hardship would be required for an approval and the Stillman case no longer applies.

Karen Kopta noted that the application did not couple the uniqueness and historic value of the property with other factors to describe the hardship. The caselaw presented last month is overruled by recent decisions. The hardship requested is personal in nature which does not represent grounds for a hardship.

Bill Davies noted that this is one of the most unique properties that has come before the ZBA. The properties do not link and they predate Zoning. The encroachment is merely 5 feet into the setback area. Nanette Falkenberg clarified that the vertical expansion represents further encroachment. Mr. Davies stated that this request is a reasonable use for the property and the hardship is within the property itself. The Board needs to use common sense regarding these matters or it is not doing justice to the Town.

Margaret Miner reminded the Board that for some time the ZBA has found value in small houses. Caselaw that considered reasonable use or other houses in the neighborhoods because the court found that the definition of

hardship was being over extended. A "reasonable use" standard is being requested, but the ZBA is no longer permitted to rely on this standard.

Nanette Falkenberg concurred with much of what had been said. She also noted that there has not been any attempt to decrease the nonconformity and that there was an acknowledgment at public hearing by the applicant's architect that there are other options to the current plan. The ZBA must look to the spirit and intent of the Zoning Regulations as its primary reference, not the PoCD.

She noted that the Zoning Commission currently has in front of it an amendment to the Zoning Regulations that may allow for the addition that has been proposed. Bill Davies expressed concern that if the purview over such decisions is put in front of the Zoning Commission, it may not be the best for Roxbury. ZBA views such matters case by case but a Zoning change would grant blanket approval. He agrees that in this case the attempt at maintaining historical character of the property is a miss; however, it is still a reasonable request. This is a unique property and if this was approved it would apply to this property only.

Margaret Miner noted that it is not that unique to have two smaller living spaces separated and often it is even desired.

Nanette Falkenberg clarified that the current connector serves as a living space, this is already one house. The applicants could have done a better job to maintain the historic look of the house and to reduce the nonconformity.

Doug Lewis discussed Section 3.10.9 which almost imposes a duty of an owner of a nonconforming property to reduce the nonconformity. The applicants did not take steps to make the structure more conforming.

A motion was made to deny the application of Brendan & Stephanie Kolnick, Assessors Map 18 Lot 90, located at 3 Hemlock Rd. Case file 2017-0077, for an application for a variance of Section 3.10.4 and 3.10.12 to add second floor link to join existing two-story farmhouses and accommodate an expanded bedroom configuration, for the following reasons:

- The duty of Section 3.10.9 which requires a positive effort on behalf of the applicant to reduce the nonconformity was not met;
- The argument for reasonable use cannot be applied under current court decisions.
- Alternative options that would reduce the nonconformity were acknowledged but had not been fully explored

Motion by Margaret Miner, seconded by Doug Lewis.

Discussion:

Bill Davies reiterated that he was disappointed that this plan did not maintain the historic character of the house and the applicants should have reduced nonconformity, but believes that the uniqueness of the property does exist.

Vote in favor of denial 4-0-1. Bill Davies abstained

Regular Member Judith Kelly was seated and Doug Lewis stepped down.

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2017-0078, for an application for a variance and/or modification to existing variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space.

Chair Falkenberg reminded the group that there was an application regarding this matter that was heard by this Board, but it was withdrawn prior to a decision.

A motion was made to accept the application of Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd. Case file 2017-0078, for an application for a variance and/or modification to existing

variance to change/modify use from Antique Shop to Antique Shop and Professional Office Space and to set a public hearing for May 18, 2017. Motion by Margaret Miner, seconded by Doug Lewis and carried 5-0 in favor.

OTHER BUSINESS

The group discussed applications that are submitted just before the deadlines and agreed that Chair Falkenberg will review and determine whether an application should go immediately for notice and public hearing that month or be brought to the ZBA for review.

Margaret Miner requested information on whether the CT Bar Association is discussing responses to the impact of the recent court decisions restricting the ZBA's ability to grant variances and, on another matter, whether it is permissible for a ZBA member to testify before a Zoning Commission public hearing concerning proposed changes to current zoning regulations.

Nanette Falkenberg introduced Sue Scott, who is considering volunteering to become an alternate ZBA member.

ADJOURNMENT

A motion was made to adjourn at 9:25 p.m. Motion by Margaret Miner, seconded by Bill Davies and carried unanimously.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary

These minutes are not considered official until approved at the next Meeting of the Roxbury Zoning Board of Appeals

To: Roxbury ZBA

From: Gail E. McTaggart. Town Attorney

Dated: April 19, 2017

RE: 3 Hemlock Road in Roxbury- Variance Application

The Roxbury Zoning Board of Appeals (ZBA) has requested an a technical legal review of a variance application on property of Brendan Kolnick at 3 Hemlock Road in Roxbury. This review and response includes the applicable zoning regulations, applicable variance decisions including court cases, *Engen* and *Bozzi* cited to the ZBA by the applicant's agent, Architect Jeff Mose and provided as part of the public hearing record. Specifically you have asked for a technical review of whether the *Verillo* decision known to the ZBA applies to this application, if there must be a reduction in nonconformity in order to grant a variance, whether architecture/historic factors may be a legal basis for finding a hardship, how to consider that the expansion is vertical and if the separation of the bedrooms constitutes a hardship base on the safety issue for families with small children.

A. The application and facts presented:

The application requests a variance of Section 3.10.4 which limits expansions (except if result is reducing nonconformity) of nonconforming additions to a house including this one which is both within the required 50 foot front setback from Weller's Bridge Road and Hemlock Road.

The proposal is to expand vertically by raising the roof 7' to link the upper level of what is described by the applicant as two houses (one or both built around 1867 per assessor's real property card included in record) which are now connected only on the first floor by a central living area. This vertical expansion is over a nonconforming portion of the house. Plans include photos of the existing main (front) entry from Wellers Bridge Road and another entry from Hemlock Road. The first floor connecting area appears to be unchanged in floor area (there will be raised roof providing for open area over great room, second floor balcony walkway and walk- in closet), and will continue to be living area as it is now (used for a great room with fireplace and dining room). The plans show that the existing first floor area comprising the "connection" is approximately 40' X 40' or 1600 SF. According to the architect, the existing footprint of house (first floor only) is 3000SF to 3200 SF and the existing "livable space" is 4268 SF which will be increased by 600 SF to 4800 SF if the variance is granted.¹ When asked

¹ The Assessor's real property field card for the property shows that there is currently 4.65 acres improved with 4003 SF of living area (2,637 first floor, 1198 upper story finished and 168 half story finished) and 5688 SF of gross area with 4302 SF of effective area divided into 9 rooms including 3 bedrooms and 4 full baths. The property was purchased by Brendan and Stephanie Kolnick in December 2015 for \$800,000.

if there are options to reduce the nonconformity of the house, the architect responded that “this is not a big house and all the square footage is sacred.” He did respond that the bay window area could be moved if necessary (the bay window extends into the setback); he also confirmed that there is a way to decrease the nonconformity. The owner mentioned that the property is prominently sited and that he wants to preserve the history of the house. The record does not appear to provide much in the way of history of the house(s) and the property.

There is no evidence in the record of when or with what approvals the existing connection between the two houses was built—there are no variances found that relate to that connection area; thus it is unknown if the addition of the connection was legally accomplished or not.² However any building that violates a setback and that has been existing in such violation for over 3 years without zoning enforcement, is considered legally nonconforming under Conn. Gen. Stat. Section 8-13a.

The minutes provide that Mr. Mose states that:

the goal is to have 3 bedrooms in main house which will connect to the back house where the master bedroom will be located . . . The existing architecture and uniqueness of the house begs for a better connection between the 2nd floors. It is odd to have one bedroom in each house connected by merely a first floor.

The minutes also that Mr. Mose explains that “it is a safety issue for a modern family to have bedrooms located in two different houses” and that “the house presents an undue burden on how one would live today.” It was brought up that the house functioned for many years and the assessor’s field card shows 3 bedrooms and 4 full bathrooms currently exist. The ZBA may find that this is description of the proposal is at odds with the above statement that there is one bedroom in each house. The ZBA may have more information on this. See footnote 1.

In addition to the vertical expansion and the square feet associated with that, it appears from the record that that in addition to the vertical expansion, the proposal results a small expansion of nonconformity, that is, less than a 5’ expansion of the footprint into the setback. The pergola extends into the setback. In addition to the second floor addition over the first floor connection area, there is also some vertical expansion of the existing flat roofed first floor area shown on the photograph views from the street corner , the east, and he southeast as reflected in the South Elevation- Sheet A-201.

When asked about alternatives, the architect says there are alternatives which would create a “staccato” (I assume this mean a choppy appearance) and that he would have to reconfigure “how you enter the house so it would not be through the bedrooms.” See Minutes. The architect

² The minutes show that Mr. Mose stated that there is no record of when the first floor connection addition was built or of a variance for it. See minutes of public hearing.

responded positively to the question as to whether existing space in one of the houses could be converted to bedrooms—or if there could be a sleeping house and living house.

B. The Regulations involved:

The applicant states that all of the expansion except a pergola is within the existing footprint but the variance application does not reference Section 3.10.12 of the Zoning Regulations which prohibits vertical expansions of such nonconforming buildings even if within the existing footprint (vertical expansions within the setback).

Zoning Regulations 17.2.1 requires the applicant for a variance to set out the specific provision of the Regulations involved. In this case it is clear that a vertical variance is being requested although the applicable provision is not set out in the application. I understand that the newspaper notice makes clear that the request is for a vertical variance. The ZBA should confirm this.

The additional applicable Regulations is Section 3.10.9 which provides “it is the intent of these Regulations that nonconformities shall not be expanded, and that they shall be changed to conformity as quickly as the fair interests of the owner’s permit, and that the nonconformity shall not in itself be considered the grounds for the issuance of a variance.” This is a stated and overriding goal of the Roxbury zoning scheme.

C. The Hardship grounds claimed by applicant:

The stated basis for the hardship is that the historical house predates zoning and is within the setback of two streets, plus the unusual architecture features caused by the connecting of two separate historic houses with one bedroom in each of the old houses making the bedrooms for children and parents connected to each other only through an existing first story living space. See footnote 1 with conflicting bedroom count. Thus the hardship claimed is based on the historical and architectural aspects of the property that make it “unique.” To support this basis for a variance/hardship, the applicant’s architect, Mr. Jeff Mose provided the ZBA with the following two superior cases upon which the applicant relies: Engen v. ZBA of New Canaan, superior court JD Stamford-Norwalk at Stamford, Docket No. CV 02 0192283 (March 10, 2004, Ryan, J.T.R.), and Bozzi v. Town of East Hampton ZBA Superior court Docket No. CV 02 9885712S (July 6, 1999). We have been asked to advise on both of these cases and applicable law as it affects this application.

D. The Standard for granting a variance.

Conn. Gen. Stat. 8-6(a) (3) provides that a zoning board of appeals may grant a variance provided that their decision conforms to the following conditions:

1.) because of circumstances unique to the property adherence to the strict letter of the zoning regulations would cause exceptional difficulty and unusual hardship as opposed to the general impact which the regulation has on other properties in the zone and

2.) the variance is not substantially inconsistent with and shall not affect the town's comprehensive zoning plan. “[T]he comprehensive plan is to be found in the zoning regulations themselves and the zoning map, which are primarily concerned with the use of property.” *Dutko v. Planning & Zoning Board*, 110 Conn. App. 228, 241 (2008), quoting, *Konigsberg v. Board of Aldermen*, 283 Conn. 553, 585 (2007)

“The hardship must be different in kind from that generally affecting properties in the same zoning district, and must arise from circumstances or conditions beyond the control of the property owner .” *Durkin Village Plainville, LLC v. Zoning Board of Appeals*, 107 Conn.App. 861, 870, 946 A.2d 916 (2008). It cannot be self-created for personal.

Finally the ZBA is reminded that the burden is on the applicant to prove a legally cognizable hardship, not the ZBA.

E. Court Decisions:

Stillman: To understand the two cases cited by applicants architect, the ZBA needs to know about the case on which these two cases rely, impliedly or expressly: *Stillman v. Zoning Board of Appeals*, 25 Conn. App. 631,, cert. denied, 220 Conn. 923 (1991). In *Stillman*, the applicant sought to construct a first floor addition to her house due to “her advancing age; the hardship that supported the granting of a variance arose “from the configuration of [the applicant's very small] lot and the location of the well and the septic system which left the side setback area as the only area in which an addition was possible.” In *Stillman* the court upheld a ZBA grant of a variance from setback requirements on such a basis. This gave rise to the so-called “reasonable use” basis for a variance. ³

Engen. In *Engen v. ZBA of New Canaan*, the lower court in 2004 reviewed a variance to allow more than the permitted coverage to add a garage to an historic property, Superior court JD Stamford-Norwalk at Stamford, Docket No. CV 02 0192283 (March 10, 2004, Ryan, J.T.R.); the court overturned the zoning board of appeals decision denying this variance in part finding that “[t]he hardship [was] the historic nature of the house ...[built in 1903 and historic architecture of eaves and overhangs caused house to exceed coverage allowed].” In so doing, the

³ As you will see below, *Stillman* and the reasonable use basis for hardship is no longer good precedent on which to base a variance. The *E & F* court discussed below found that a peculiar characteristic of a property **that makes compliance with zoning regulations difficult** is insufficient to justify the granting of a variance when the property would have economic value even if the zoning regulations were strictly enforced.

court cites *Stillman* and *Bozzi v. Town of East Hampton_ZBA_* as authority for the decision. Superior court_Docket No. CV 02 9885712S (July 6, 1999) *In Engen*, the record shows that the property in issue is listed in the New Canaan Historical Society Annual. The court found that by granting the variances on a historical basis, the ZBA is choosing to preserve the historic premises, which is within its purview and interest. under New Canaan Regs., c. 60 § 1.2C. The court noted that the New Canaan zoning regulations also state that an objective of the regulations is to protect historic structures. The court states “**In addition, decisions have held that the historic nature of a structure, combined with other hardship factors, is a sufficient basis for granting a variance.**” The court *Engen* court also relied on the superior court case in *Weber v. Zoning Board of Appeals*, Superior Court, Docket No. 03 0349892 approving of a variance based upon historic factors where a variance for a garage had been granted 20 years before.

The court in *Engen* noted that “the [defendants'] hardship arises from the unique, historic nature of their home and the configuration and location of integral, architectural features of the home” The court states that “(L)ike *Stillman*, these unique conditions arise from the size and configuration of the [defendants'] historic home.” This certainly constitutes reliance on *Stillman* for the configuration issue and also the reasonable use criteria. Further, the hardship was found to be “not personal to the [defendants]” as “such unique conditions would affect any owner of the property.” The *Engen* applicants had argued that they could construct a garage without a variance but it would destroy the architectural character of the historic house—the owner would have to tear down back porch “an exquisite aspect of the building” to comply with zoning. The *Engen* court rules that “there is sufficient evidence in the record to show that the premises are historic and that this, along with the unique topography and change in regulations, is a valid basis for the hardship that justifies granting a variance.”

Bozzi. In *Bozzi*, the zoning board of appeals granted a variance to allow the construction of a covered deck, stairs and ramp to allow visiting by applicant’s son (a paraplegic) and use by mother (confined to wheel chair) to access the house on the mother’s nonconforming property (variance needed for both lot coverage and setback). Superior court_Docket No. CV 02 9885712S (July 6, 1999) The deck/stairs would block the lake view of the neighbor who appealed. The *Bozzi* 1999 decision upheld the grant of variance and finding of hardship based on the size of the pre-existing nonconforming lot (6400 SF where 20,000 SF required in the zone) and unique architectural features of the historic house built before zoning regulations (narrow doorways, narrow hallway impedes access to deck by disabled members of applicant’s family who use wheelchairs and the fireplace just requires wider deck to accomplish this). Acknowledging that a hardship cannot be personal, the *Bozzi* court relies on *Stillman* that existing structures or impediments may create an unusual hardship unique to the property with the showing of a “small” and “tight” lot. *Bozzi* cites *Stillman* for the “exceptionally burdensome test,” that is, that the configuration of structures or impediments (size of lot and location of septic system) made regulations exceptionally burdensome.” In the *Bozzi* appeal, the court also noted that Section 32.3 of the East Hampton Zoning Regulations allowed the ZBA to grant variances for “exceptional irregular, narrow, shallow or steep lots or other exceptional conditions, whereby such strict applicant would result in hardship and deprive the owner of the “reasonable use of the land or building involved.”” *Bozzi* is based on the *Stillman* reasonable use approach. The court states that it did not base its decision on the wheelchair access issue but rather that a useable deck in a lakefront property is a reasonable use and the existing house and

lot configuration provided “no other feasible alternative” as to location. This is a *Stillman* approach.

***Stillman* is overruled by *E & F* in December 2015.** Thus, both *Engen* and *Bozzi* rely on the *Stillman* concept of reasonable use. However, the minutes from the Roxbury ZBA hearing on the subject application, indicate that Board Member Doug Lewis stated on the record that the *Stillman* case has been overruled. Mr. Mose did not rebut this. Indeed, in *E and F Associates, LLC V. Zoning Board of Appeals of The Town of Fairfield*, 320 Conn. 9 (December 2015) the Connecticut Supreme Court expressly overruled *Stillman* holding that peculiar characteristics of property that made it difficult to construct a second story on building that would comply with zoning setback requirements did not justify granting a variance.

E and F v. ZBA In *E and F* the trial court, relying on the Appellate Court’s decision in *Stillman* concluded that the configuration of the nonconforming property (pre-zoning building within the setback from two streets) and the building itself precluded the applicant from expanding the building vertically without running afoul of the setback regulations, the regulations produced a hardship justifying the approval of the variance application to allow a second floor addition. See *id.*, 636–37. However the Supreme Court reversed that ruling finding that the property had several uses over the years, and that the variances were improperly granted when the applicant had failed to demonstrate that the property would have no economic value without the variances. The *E & F* court cites:

Krejpcio v. Zoning Board of Appeals, 152 Conn. 657, 662, 211 A.2d 687 (1965)
 (“[d]isappointment in the use of property does not constitute exceptional difficulty or unusual hardship”).

The Supreme Court in *E & F* held that the fact that the other lots in the commercial zone had second floors and this was a corner lot with two front setbacks did not constitute a unique hardship: “the fact that the peculiar characteristics of the applicant's property made it difficult to construct a second story on the building that would comply with setback requirements did not justify the granting of the variance when the evidence established that the property would have economic value if the variance were denied.” 320 Conn. at 18. The Kolnick property is also a corner lot with two setback nonconformities making it difficult to construct a second story addition meeting setback requirements.

Test is if there economic value if variance denied? So the question in the present application under *E & F* and *Verillo v. ZBA of Town of Branford* becomes not about reasonable use but whether the property would have economic value if the variance were denied. 55 Conn App. 657 (2015). The present owners purchased it in December 2015 for \$800,000 based on the record of the assessor’s field card; that card shows an appraised value by the Town of \$1,076,020. The field card shows the existing house as containing 4003 square feet of living space; it appears to have been used for many years without the addition proposed. The configuration may not be convenient for the owners with small children, but the question becomes if that can be a basis for finding a hardship after *Verillo* and *E & F*.

Verillo. In *Verillo v. ZBA*, the Appellate Court rules that **personal hardships, regardless of how compelling or how far beyond the control of the individual applicant, do not provide sufficient grounds for the granting of a variance**; for that reason, the situation of any particular owner is irrelevant to the determination of whether a hardship exists. On the one hand the historic factors may not be of the owner's making, however the connection of the two houses complained about was obviously caused by a prior owner --perhaps making the house single family as more conforming in the zone. Even if historic factors alone could be grounds for a variance, the ZBA should review and decide if the renovations planned provide protection of historic factors; further is there a hardship where the architect indicates that other alternatives are possible that would cause less expansion of the nonconformity. Many nonconforming buildings are historic—as they by definition pre-date zoning, being a nonconformity is not an automatic basis for finding a hardship.

One of the basis proffered by Kolnicks' architect is the need to “modernize” the house to better work for the young family. The *Verillo* Court rejected the applicant's desire to expand and modernize an existing, nonconforming residence as a hardship to support a variance. In *Verillo* the applicant and lower court had relied principally on the appellate court's decision in *Stillman*. However the *Verillo* court both found the situation in *Verillo* was distinguishable from that in *Stillman* and severely criticized *Stillman* questioning the “continued endorsement of the *Stillman* case as precedent for finding hardships.” The *Verillo* court explained that:

“by contrast, [the applicant's situation] is not one in which the buildable area on the property is constrained by the presence of what *Stillman* referred to as “improvements” such as a well or septic system. *Id.* Moreover, unlike *Stillman*, the applicants' proposal involves adding a third story to the existing nonconforming structure . . . which causes “a substantial increase in the nonconformity.” *Munroe v. Zoning Board of Appeals*, supra, 75 Conn.App. at 811. . . .” The *Verillo* court warned that “we also disagree with the . . . assertion that *Stillman* modified the hardship standard when it allegedly “rejected” a “strict interpretation of the hardship test” for instances in which an applicant already possessed “a reasonable use of their land. It is axiomatic that this court “is not free to depart from or modify the precedent of our Supreme Court.” *Three Levels Corp. v. Conservation Commission*, 148 Conn.App. 91, 113, 89 A.3d 3 (2014). . . . our Supreme Court consistently has held that the personal preferences of property owners in terms of the use of their property is not a proper basis for a finding of hardship, nor is disappointment in the use of their property. With respect to the expansion of existing nonconformities, that court has held that “nonconforming uses should be abolished or reduced to conformity as quickly as the fair interest of the parties will permit—[i]n no case should they be allowed to increase.” (Internal quotation marks omitted.) *Adolphson v. Zoning Board of Appeals*, supra, 205 Conn. at 710, 535 A.2d 799; see also (“a nonconforming structure cannot be increased in size in violation of zoning ordinances, i.e., nonconforming additions may not be made to the nonconforming structure”)

The *Verillo* court cited “the Supreme Court's decision in *Bloom v. Zoning Board of Appeals*, supra, 233 Conn. at 199, . . . which also involved applicants who “expanded and

altered” a nonconforming structure “within the nonconforming areas”; *id.*; and then relied on *Stillman* in support of their claim of hardship. *Id.*, at 210 n. 13, After distinguishing that precedent, our Supreme Court declared: “Furthermore, the fact that an owner is prohibited from adding new structures to the property does not constitute a legally cognizable hardship.” *Id.*, at 210–11 n. 13. The court opined that “[i]f it is a hardship to not be able to use one's property as one wishes, then most setback variance applications would have to be granted.” (Internal quotation marks omitted.) *Id.*, at 211 n. 13, 658 A.2d 559. The *Verillo* Court concluded its discussion of *Stillman* with the following admonition:

Although we distinguish *Stillman* from this case, we do not necessarily endorse its holding.” *Id.* In the nearly quarter-century since *Stillman* was decided, the Supreme Court not once has relied on that precedent in any manner, and the Supreme Court has since stated that the inability to add “new structures to the property does not constitute a legally cognizable hardship”; *id.*, at 210–11 n. 13, 658 A.2d 559; that personal “inconvenience ... does not rise to the level of hardship necessary for the approval of a variance”; *Moon v. Zoning Board of Appeals*, *supra*, 291 Conn. at 26 n. 9, 966 A.2d 722; and that an applicant cannot demonstrate unusual hardship when it “failed to prove that it could not continue to use the property as it had been used for many years....” *Rural Water Co. v. Zoning Board of Appeals*, *supra*, 287 Conn. at 297, . In light of the great weight of authority of our Supreme Court, and *Bloom's* treatment of *Stillman* in particular, we thus view *Stillman* as best confined to its essential facts. . . .

The *Verillo* court considered other leading cases and authorities to back its position—these are instructive here:

- The court said “The defendants' position appears to be animated by a faulty premise—namely, that the applicants possess a right to expand their nonconforming structure. That presumption finds no support in our law.
- See also *Bauer v. Waste Management of Connecticut, Inc.*, *supra*, 234 Conn. at 243, 662 A.2d 1179 (“a nonconforming structure cannot be increased in size in violation of zoning ordinances, i.e., nonconforming additions may not be made to the nonconforming structure”).
- Property owners that enjoy the advantages of a nonconforming lot or structure, therefore, must recognize that the existence of such nonconformities does not confer the “right to build an addition.” T. Tondro, *supra*, at 77 (Cum.Supp.2000); see also 2 P. Salkin, *American Law of Zoning* (5th Ed.2011) § 12:19, p. 12–121. (“[t]he right to continue a nonconforming use does not include a right to expand or enlarge it”);
- On the basis of *Vine v. Zoning Board of Appeals*, the *Verillo* court explicitly rejected the claim that “a variance may be granted on the basis of the denial of reasonable use of the property.” *See*, 93 Conn.App. at 9 n. 14,
- “the fact that a particular variance request appears de minimis in scope is not a valid basis for granting a variance. . . .This court expressly has declined 'to recognize a 'de minimis' deviation exception that would obviate the need for [applicants] to prove hardship.' ...'Connecticut does not recognize an exception to the hardship rule allowing de minimus variances'.” 155 Conn. at 695 (citations omitted). See generally Fuller § 9.3.

The *Verillo* court also instructs:

- “[t]he basic zoning principle that zoning regulations must directly affect land, not the owners of land ... limits the ability of zoning boards to act for personal rather than principled reasons, particularly in the context of variances.” ...
- “As this court has recognized, an applicant's “disappointment in the use of the subject property, namely, the inability to build a larger structure,” is personal in nature and not a proper basis for a finding of hardship ...”
- “Nor does an applicant's desire “to modernize” an existing nonconformity “constitute a cognizable legal hardship that would warrant a variance.” ...
- “Improving the utility or the appearance of a building, “even if beneficial, [does not] constitute a cognizable legal hardship” ...
- As our Supreme Court observed in rejecting a claim of “unusual hardship from the fact that the internal layout of the [existing nonconforming structure] was poorly designed to meet the needs of modern living,” that “inconvenience ... does not rise to the level of hardship necessary for the approval of a variance.”

155 Conn.App. at 691-94 (citations omitted).

Application of *Stillman*, *E & F* and *Verillo* to Kolnick property. Based on the facts presented with the Kolnick application and the law set out above, the ZBA must determine if any of the above factors are at play here and whether the court rulings cited by applicant are a valid basis for a finding of hardship based on historic value and architectural configuration in light of overruling of *Stillman*, the holding of *E & F* (eliminating the reasonable use of property test) and the *Verillo* decision setting out the requirement for a strict test for finding a hardship/eliminating the reasonable use test. So the question becomes after *E & F* and *Verillo*, may a variance be legally granted based on the unique architecture caused by the linking of the two historic houses at some time in the past (making then one single family house which is more conforming in the zone) and based on the dated inconvenience/safety issues raised by the architect (master bedroom in separate wing from children’s bedrooms) together with goal of preserving the historic house(s) and streetscape.

None of the cases I have found rely solely on the historic factors for a finding of hardship and all the historic factors cases are from the lower court; even before *E & F* and *Verillo*, it was only when the historic nature of a structure is coupled with other hardship factors, that historic factors may be considered in determining whether hardship exists to justify the granting of a variance. See *Weber v. Zoning Board of Appeals, supra*, Superior Court, Docket No. 03 0349892⁴; Thus,

⁴ *Weber* has unusual facts: The granting of variances for a garage and additions to a house with historic significance was upheld where the owners purchased the property believing that they could build a garage based upon a variance granted 20 years earlier which ran with the land, and

there must be sufficient evidence in the record to not only show that the premises is historic but also that there are other “hardship factors” such as unique topography and change in regulations, for there to be a valid basis for the hardship that justifies granting a variance. Further the other facts must survive the controlling cases of *Verillo* and *E & F*. A difficult test if the property has not lost most of its value due to the hardship issues involved.

Like *Verillo*, the Kolnicks’ property has been used a long time used without a variance and like *E & F* the need for the changes must be evaluated as to whether the rationale is personal to these applicants. Under these cases the desire to expand a nonconforming structure to increase the living space and modernize the house does not constitute a legally cognizable hardship under C.G.S. § 8-6(a)(3) . They even negate the problem of setbacks from two road as being a unique hardship. Thus although the facts of those cases do not emphasize historic factors, it is difficult to see how those factors would prevail.

Under *E & F/Verillo*, the ZBA would need to determine that the connecting area that is being vertically expanded (and other proposed expansions) is required to preserve the valuable architectural character—appearance as two historic houses versus making the two historic houses look more like one large house. That part is not a legal question, but rather a factual one for the ZBA. However the hardship test under *E and F* remains: A hardship is shown if the applicant has demonstrated that the property would have no economic value without the variances. The fact that the owners purchased the property without the variances for \$800,000 seems to erode this argument (and that the Town values it for over \$1 million). The record appears devoid of any specific evidence of any reduction in value caused by zoning regulations (setbacks- vertical expansion) so as to show that the property has no economic value today.

Alternate plan Our Supreme Court upheld the denial of a variance for insufficient hardship to add a second story of living space over the zoning setback on a nonconforming building where the front yard setback would not alter or expand but the lot was not so small and narrow as to make it completely unbuildable. *Moon v. Zoning Bd. of Appeals of Town of Madison*, 291 Conn. 16, 26, 27 (2009). It appears that Kolnicks have enough acreage that they could possibly demolish the combined houses and build a new conforming house. This does not seem like the best result for either the applicant or the community. It may be that another plan could be presented that would avoid the vertical expansion or as much vertical expansion within the setback—the architect agreed on the record that there are alternatives to the plan presented which may mitigate the need the for the vertical variance requested here. Of course, the ZBA may consider this statement by Mr. Mose in deciding if there is a proven hardship.

the location of the house and driveway limited where a garage could be built; the court concluded that these limitations were not personal to the owners and would exist no matter who owned the property.

Condition to make more conforming/less nonconforming. It is noted that the architect indicated that the applicant would be willing to remove the bay windows that are not historical and which encroach into the setback; this reduction may help with Section 3.10.4 which prohibits expansions unless as a result of the change there is a reduction in nonconformity. However, that regulatory provision does not prevent the grant of a variance; reducing a non-conformity may be a basis for a variance but it is not required for the granting of every variance of a nonconforming structure. It is also not clear that these small changes in the plans (removal of Bay) would mitigate the impact of the vertical variance for what appears to be a substantial vertical expansion. Also, I understand that the applicant is willing to remove the pergola which is partially within the setback. This would reduce the variance required; however, it is hard to conjure what the hardship would be for adding a pergola within the setback. This is for the ZBA to decide.⁵ If the removal of the bays were made a condition of approval, the ZBA has the problem of what the resulting windows would look like. The ZBA would need a plan to approve – i.e. condition the approval to submit a plan for removal of bay window with substitution of window/wall that is in keeping with historic architecture and that does not further encroach into the existing nonconforming setback. The ZBA should not be designing people's buildings, so the ZBA may prefer not to enter such a condition and this could only work if a hardship were proven for the rest of the plan approved.

Is the hardship self-created and thus nonqualifying. Another issue to consider after reviewing the minutes is if a hardship is self-created (voluntary) and thus whether it is a valid basis for a variance if the owners bought the property knowing that it was nonconforming and expansions would require variances. The answer depends on the facts. If the hardship based on the strict application of the zoning regulations to the property existed for the predecessor in title, it may also exist and be a basis for a variance for the successor in title. However the opposite is also true; that is, if the predecessor voluntarily created the nonconformity making it self-created, and the board lacks the power to grant a variance on the same basis to the successor in interest. In this case it appears that the predecessor without approval from the ZBA or known building permits (we don't know the year of the connection) connected the two houses—which actually made the property more conforming with only one single house on one lot --as now required in the zone. However, the applicants have stated that configuration with the unapproved voluntary connection is the basis for claimed hardship. Without the connection, there would apparently

⁵ This is not a reduction in nonconforming use issue, the nonconformity is the building and setback not the residential single family use. Thus the exception from the hardship standard for approving a variance in some situations where there is a reduction of existing nonconforming uses or the change of one nonconforming use to another one which has less impact on the neighborhood, is not applicable here. See Fuller, Robert A., Connecticut Practice Series *Land Use Law and Practice*, 4th edition, § 9:3 (footnotes omitted).

have been two old historic houses that functioned independently. This is a factual consideration that the ZBA may want to review.

Consistency with comprehensive zoning plan. In addition to the hardship standard, the proposal must be consistent with Roxbury's comprehensive zoning plan (Not the POCD). Each of the proposed variances would enlarge the structure's existing nonconformity including an expansion of the vertical setback in contravention of the comprehensive zoning plan found in the Regulations Section 3.10.9 of the Zoning Regulations provides "it is the intent of these Regulations that nonconformities shall not be expanded, and that they shall be changed to conformity as quickly as the fair interests of the owner's permit, and that the nonconformity shall not in itself be considered the grounds for the issuance of a variance." Indeed, the Town of Roxbury has made a specific declaration that nonconforming "uses are ... incompatible with permitted uses in the districts involved." The facts show that the variances requested are in direct conflict with the Comprehensive Zoning Plan and its stated intent not to encourage the survival of nonconformities and further not to increase any existing nonconformity. The applicant has referenced the Plan of Conservation and Development without pinpointing any provision supporting this application, but the POCD is not the applicable test—that the consistency is with the existing zoning regulations and map. Accordingly, the ZBA should consider if the applicant has proven that the variance will be consistent with the stated intent of the Zoning Regulations given Section 3.10.9, as required for a grant of variance.

Failure to comply with Regulations Section 17.2.1 As noted, although the application for variance is definitely for a second floor vertical expansion, the specific provision of the regulations prohibiting vertical expansions is not listed on the application as a section to be varied. The zoning regulations at Section 17.2.1 expressly require that each provision to be varied be specifically set forth in the application. I understand the publication notice describes the vertical expansion although the applicant failed to reference the regulatory provision as required. If the notice is as stated, the public were on notice of the vertical variance request. If the notice was not clear this could present a problem if the variance is approved. However any approval must reflect a variance from Section 3.10.9 and set out precisely the extent of the variance allowed (i.e.as set forth on the plans prepared by Mr. Mose).

Conclusion. The ZBA should consider the facts presented and the above law. If it determines that the hardship is personal to the applicants it cannot be granted. If on the other hand the ZBA finds that the situation of the two historic houses and their configuration is unique, is consistent with the scheme of zoning in Roxbury and that the regulations result in an actual inability to use the property so that there is no value, then perhaps a hardship may be supported. It is for the ZBA not its counsel to make these factual decisions. In any case the ZBA should state all of its collective reasons for its decision on the record before the vote and make those findings part of the motion voted upon. There should be collective, official reasons for the ZBA decision, not just individual rationales of each member. Four votes are required to approve.



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

ROXBURY ZONING BOARD OF APPEALS PUBLIC HEARING / REGULAR MEETING MAY 18, 2017

MINUTES

PUBLIC HEARING

CALL TO ORDER

Nanette Falkenberg, Chair, called the public hearing to order at 7:37 p.m.

IDENTIFICATION OF MEMBERS

Members Present: Nanette Falkenberg, and Karen Kopta.

Alternates Present: Doug Lewis, Nancy Schoenholtz, and Suzanne Scott

Others Present: Attorney Rob Shaver, Charles Haver, Stewart Skolnick, Mary Schinke, Wendy Walker and Elaine Curley.

Alternates Doug Lewis, Nancy Schoenholtz and Suzanne Scott were seated as a Regular Members

BUSINESS

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2017-0078, application for a modification to existing variances to extinguish antique shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis.

- Read legal notice for the record

Chair Falkenberg read the legal notice of this public hearing for the record.

- Confirmation of certified mailings

Attorney Shaver came forward and submitted the certified mailings receipts for the record.

- Applicant presentation

Attorney Shaver noted that the recording of the hearing from the previously withdrawn application 2016-0076 was submitted for the record. Additionally, he asked that the contents of the previous file be made part of this file.

Attorney Shaver asked Chair Falkenberg to read the legal notice for the withdrawn case file 2016-0076 noting that the three words "primarily by appointment" had been correctly removed in the published notice but had been mistakenly read into the record. The matter was clarified.

Mr. Shaver reviewed the history of the house, which had also been reviewed under application 2016-0076. Attorney Shaver stated that a variance that exists on the entire property for retail antique and gift shop. He advised that the applicants would like to modify their existing variance in several ways. They would like to extinguish the variance for the house, making the house a residence exclusively, which would be a reduction to the nonconformity. The barn currently has a variance for retail on the first and second floor operated by a resident their proposal is to eliminate retail on the second floor and modify the variance to allow for with professional office space operated by a non-resident. He noted that when the barn was renovated it was to commercial grade standards per the Town's requirement.

Attorney Shaver submitted a three document handout including: ZBA of the City of Bridgeport v P&Z Commission of the City of Bridgeport, Zoning & Subdivision Regulations City of Bridgeport effective 1/1/10 and Kenneth Adolphson v ZBA of the Town of Fairfield. He noted that Town Attorney McTaggart suggested that the ZBA has no authority regarding this matter, but nothing can be further from the truth. He stated that Attorney McTaggart also

asked that the ZBA still make a decision regarding this request based on the merits just in case she is wrong. The Chair requested that the record reflect that the phrase "just in case she is wrong" did not accurately represent Attorney Taggart's rationale for her recommendation.

Attorney Shaver noted that Attorney McTaggart cited Roxbury Zoning Regulations 17.1.1d. He referred to the ZBA City of Bridgeport v Planning & Zoning Commission of the City of Bridgeport. He explained that this decision makes it clear that the Zoning Commission cannot tell the ZBA that they are not permitted to rule in this case. Ms. Falkenberg asked Attorney Shaver if he was aware of any similar challenge to the Roxbury Zoning Commission's adoption of 17.1.1d. He advised that he is not aware of such a case.

Attorney Shaver stated that their argument is that having office space is less nonconforming than retail space; the applicants are not making a hardship claim. Nanette Falkenberg noted that the language in the Bridgeport case requires a hardship. Attorney Shaver explained that in CT a variance can be modified through a reduction in nonconformity, citing the Vine decision which had been submitted as part of the previous file.

Mr. Shaver reviewed the "Adolphson" decision, which involved converting a variance to a less offensive nonconforming use. Nancy Schoenholtz noted that 3 Southbury Rd is in a residential area and an office is not considered residential. She does not understand how the ZBA has the authority to grant a variance for a use not permitted in this zone. Attorney Shaver advised that a variance already exists and office space is less offensive. Ms. Schoenholtz disagreed that office space is less offensive. Mr. Shaver agreed that this is a determination for the ZBA to make. He also confirmed for Karen Kopta that the retail space variance is for antiques.

Doug Lewis noted that the current use has been sanctioned by a prior variance. Mr. Lewis explained that the applicant would like to modify a variance; therefore, this is an acknowledgment that this is not a pre existing non-conforming use. It is something that is permitted by variance. Mr. Lewis noted that "Adolphson" is based on a pre-existing non-conforming use, which is very different than a case where a variance is already in place.

Stewart Skolnick came forward and distributed a booklet entitled Application for Modification of Existing Variances. He reiterated the variances that are in perpetuity with this property. Applicants are asking the ZBA to amend/modify an existing variance to extinguish retail space use in the house and the 2nd floor of the barn and to permit use of the 2nd floor for commercial office space. He explained that he is presenting written documents of this ZBA's predecessors that viewed professional office space less offensive than retail.

Mr. Skolnick explained that Roxbury's Zoning Dept., Building Dept., and Planning Commission have referred to the property variously as commercial, business, and retail sales. He reviewed what was permitted per a letter dated November 22, 1994, which does not mention restrictions regarding the location of the antiques, outdoor display, parking, or hours of operation. He reported that their business has always been open to the public and has never been by appointment only. He also discussed the review of this property by the Zoning Commission in 1992.

Mr. Skolnick clarified that the parking will be as it has always been; in front of the barns and behind the house. The parking has been screened from the town green. He noted that Maple Bank, Roxbury Market and Roxbury Garage all have their parking in a residential zone in front of their businesses.

The Zoning Permit to reconstruct the barn in 1997 required that the building be built to retail commercial standards. The Zoning Permit cites its purpose as for apartment/retail. The only thing that the property has in common with a home enterprise is the requirement for dealer to reside on the premises. Mr. Skolnick stated that the town departments cannot use words like "commercial" on town documents and then say it is not commercial. The certificate of occupancy is for Group Use B, which is commercial standard in the state of CT. Planning documents refer to this building as a commercial building. The ZBA should consider the terms used by the Building Department and Zoning Commission when making a decision regarding this request. He emphasized that words have meaning.

Mr. Skolnick stated that there are six properties in Roxbury in the residential zone that have special status. This is shown in the Planning Commission's map of development.

Charles Haver came forward and discussed the series of maps issued by the Planning Commission. He noted that in 1998 their property is shown as commercial. Additionally, they are identified as a business site not in the business zone in 1999. This map confirms that they are not a home enterprise business. The mapping clearly shows that allowing a professional office will not open the flood-gates. The only other properties that could come to the ZBA for such a request would be one of the six identified on these maps.

Mr. Haver reported that they have found that the Town has worked consistently with these six locations to allow them to continue to be viable. He reviewed each of these properties and what the town has permitted: Maple Bank Farm, Wragg Brothers, Mine Hill Distillery, Roxbury Garage, Roxbury Market and 3 Southbury Rd. In 1967 the ZBA permitted the Roxbury Market to remove the permitted apartments and replace them with professional office space; however, retail space was prohibited. Therefore, they are arguing that the ZBA found retail space to be more offensive than office space. In comparison to the Market this request is very reasonable. Additionally, there never was an attempt to make any of them more conforming. Mr. Haver stated that Zoning would not have the authority to amend the variance; therefore, it is only the ZBA that can do this.

He reviewed examples of the appearance of antique shops in other locations, noting that the definition of antiques is open to broad interpretation. There is no blight ordinance in Roxbury and there is nothing to prohibit the creation of clutter in Roxbury.

- Public comment

Wendy Walker, Chair of the Historic District in Roxbury, advised that they would like to have that house back as residential so there is control over it as a historic home. The HDC is very interested in preserving barns; therefore, keeping this barn is very important to the town. Nanette Falkenberg asked whether they support the proposal for an office in a residential zone. Ms. Walker responded that she sees that as a zoning issue; the HDC's point is that it is important to keep this barn in the historic part of town.

Elaine Curley of 4 Southbury Road came forward and noted that she lives across the street from this property and disclosed that she is a Zoning Commission member. At the request of the Chair, she confirmed that she is speaking only to the notice she received as an abutting neighbor; she is not speaking for or as a member of the Zoning Commission. Ms. Curley stated that Stewart and Charles are amazing neighbors and they have put a lot of work into their property. She then spoke to the "continuous use" required for the properties previously discussed and reminded the group that the barn was not used continuously as an antiques shop. She believes that Roxbury would not be removing a business by declining this office space as it already has a variance to operate as a business. She questioned how many offices and what type of offices are being proposed, noting the traffic on this street and at this corner with regard to safety, which she feels can be an issue. The Market might be zoned residential, but it is not as much of an impact as this proposal.

Mary Schinke came forward noting that she is interested renting this as office space and is here tonight in case anyone has questions for her.

Stewart Skolnick addressed Ms. Curley's statement regarding the barn's discontinuance of use. He explained that the variance encumbrance is on the property and not the people who own it and that is why the antique retail is allowed. 3 South Street is within 200 feet of the Roxbury Garage, which is not neat and tidy and has an unlimited amount of cars coming in and out. Charles Haver reiterated that the application is specific to the type of office that will be allowed. A doctor or dentist office will not be permitted; the request is for permission for a low intensity professional office such as a lawyer or architect.

- Questions from the board

The Board determined that due to the late hour and magnitude of information submitted at this hearing they would continue this public hearing to their next meeting scheduled for June 15, 2017.

- Close or continue public hearing

A motion was made to continue the public hearing to June 15, 2017 for the application of Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd. Case file 2017-0078, application for a modification to existing variances to extinguish antique shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space

use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis. Motion by Nancy Schoenholtz, seconded by Doug Lewis and carried 5-0 in favor.

REGULAR MEETING

Nanette Falkenberg called the Regular Meeting of the ZBA to Order at 9:55 p.m. and all members present remained seated.

A motion was made to hold over all Regular Meeting agenda items until the next regularly scheduled meeting on June 15, 2017. Motion by Doug Lewis, seconded by Nancy Schoenholtz and carried unanimously.

BUSINESS

Application - Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.
Case file 2017-0078, application for a modification to existing variances to extinguish Antique Shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis - tabled

OTHER BUSINESS

Tabled

APPROVAL OF MINUTES

April 20, 2017 – Meeting

Tabled

ADJOURNMENT

A motion was made to adjourn at 9:56 p.m. Motion by Doug Lewis, seconded by Nancy Schoenholtz and carried unanimously.

Respectfully submitted,

Jai Kern

Tai Kern, Secretary

These minutes are not considered official until approved at the next Meeting of the Roxbury Zoning Board of Appeals



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

ROXBURY ZONING BOARD OF APPEALS PUBLIC HEARING / REGULAR MEETING JUNE 15, 2017

MINUTES

PUBLIC HEARING

CALL TO ORDER

Nanette Falkenberg, Chair, called this continued public hearing to order at 7:33 p.m.

IDENTIFICATION OF MEMBERS

Members Present: Nanette Falkenberg, and Karen Kopta.

Alternates Present: Doug Lewis, and Suzanne Scott

Others Present: Attorney Rob Shaver, Charles Haver, Stewart Skolnick

Alternates Doug Lewis and Suzanne Scott were seated as a Regular Members

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2017-0078, application for a modification to existing variances to extinguish antique shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis

Chair Falkenberg reminded the group that this public hearing had been continued from the 5/18/17 meeting after the conclusion of the applicant's presentation and comment from the public. The Board has not yet had an opportunity to ask questions of the applicant. The memo dated 6/13/17 from Town Attorney Gail McTaggart was distributed to the members and the applicants.

- Questions from the board

Doug Lewis noted that the premise of the case law presented by the applicant was based upon pre-existing nonconforming use vs permitted use by variance. He asked if Attorney Shaver would agree that 3 Southbury Rd has a permitted use by variance. Attorney Shaver agreed, but did not see why this would matter and explained that the applicants could extinguish the use of the house as retail, which is the lion's share of the of the reduction.

Sue Scott clarified that what is permitted by the existing variance must be utilized by the people who reside on the property. She noted that she understands that the applicants are asking for something different involving nonresidents. On one level it is admirable to extinguish the use of the house; however, she questioned whether it would be more appropriate for the Zoning Commission to determine the allowable commercial use in the Zone. Attorney Shaver explained that the previous ZBAs have looked at professional office space as a less offensive use than retail. Nanette Falkenberg asked whether this occurred prior to the adoption of Zoning Regulation 17.2.1.d.

Karen Kopta stated that she had no questions and thanked the applicants for their thorough presentation.

Nanette Falkenberg stated that she feels that the proper way to handle this request is to petition for a zoning amendment and asked the applicants whether this was ever considered. Attorney Shaver explained that there is an existing variance for the house and the Zoning Commission cannot save this house. Only the ZBA can save the house by allowing a modification to the variance. Attorney Shaver stated that his position is that the ZBA has the authority to challenge Section 17.2.1.d of the Zoning Regulations if it concludes that The Zoning Commission overextended itself when it wrote that regulation. Nanette Falkenberg noted that this Board never challenged this regulation when it was adopted. She confirmed that the answer to her question is that the applicants rejected the

idea of going to the Zoning Commission for a special permit or to amend regulations because the ZBA can modify the existing variance. Attorney Shaver confirmed that going before the Zoning Commission is not a strategy that his clients want to pursue.

Doug Lewis asked for clarification that what Attorney Shaver is requesting is for the ZBA to essentially challenge Zoning Regulation 17.2.1.d. He noted that the difference between this request and in the case law cited is that the Zoning Commission is not involved in this matter. Attorney Shaver explained that it would be the Zoning Commission's responsibility to be the plaintiff on an appeal to the decision if the ZBA was to grant this modification. Doug Lewis explained that to accommodate this request the ZBA would have to put on the record that Section 17.2.1.d is overly broad and the ZBA will no longer follow this regulation, not having previously challenged it. There are no cases where the ZBA uses an application as a springboard to declare that they are not going to follow a Zoning Regulation. He added that what currently exists is not nonconforming. Everything there is a permitted use by variance.

Doug Lewis agreed that the applicants and attorney have done a terrific job on the presentation of this application.

Sue Scott concurred with regard to the thoroughness and volume of case law presented. She noted that the variance is quite specific about antiques. The applicant explained that at one time a gift shop was permitted. Attorney Shaver explained that the nature of an antique business is up for interpretation. It is basically retail sales of goods.

Sue Scott noted that the intention on the 2nd floor is one professional office with three employees. There are 6 parking spaces in front of the barn and room for another 5 on the side. She questioned how they would make sure this does not blossom to something else. Attorney Shaver advised that the variance can be written in a specific way to spell out what would be allowed.

Chair Falkenberg agreed that the ZBA has the ability to include restrictions on the variance. She concurred with other ZBA members that applicants did a very thorough and intensive job with regard to this application and this Board appreciates that. She thanked the ZBA members for the extra time they had to put into this application. She noted that the back and forth between the legal arguments could continue "forever". In order to limit this, she had asked Attorney McTaggart to restrict her comments in the memo to what had been said at the public hearing. The ZBA needed to decide at what point it had enough information to decide.

Close or continue public hearing

A motion was made to close the public hearing for the application of Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd. Case file 2017-0078, application for a modification to existing variances to extinguish antique shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis. Motion by Karen Kopta, seconded by Sue Scott and carried 4-0 in favor.

REGULAR MEETING

Nanette Falkenberg called the Regular Meeting of the ZBA to Order at 8:14 pm and all members present remained seated. It was explained that only four voting members are present; therefore, a decision to grant this modification must be unanimous.

BUSINESS

Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd.

Case file 2017-0078, application for a modification to existing variances to extinguish Antique Shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis.

Chair Falkenberg noted that the Board needed to decide on whether Section 17.2.1.d was applicable and then whether they also wanted to come to a decision on the merits of this application.

Doug Lewis discussed whether section 3.10.3 applies noting that this is different than a nonconforming use. The time for determining whether section 17.2.1.d was overreaching would have been when the regulation was passed. The Zoning Commission is not even present to defend its regulation. He did not feel there was a need to discuss the merits of the application.

Sue Scott agreed that it is the Zoning Commission that should grant a change of existing use that is not permitted within the Zone. However, Ms. Scott noted that she thinks that everything the applicant is requesting makes sense but that the ZBA had to consider whether it had the authority to allow it.

Karen Kopta explained that the proposal seems like a good thing for Roxbury. She noted the difficulty for non-lawyers on the ZBA to understand and decide upon the amount of case law that this Board has been presented both from the applicant and the ZBA's counsel. As a layperson, she tends to be guided by the attorney for the ZBA. She feels that the request would be properly heard by the Zoning Commission. She would deny this application on that basis.

Nanette Falkenberg agreed that it would be good for the town if the house went back to residence and that the barn could be preserved. The ZBA might be able to write a variance narrowly enough to address concerns of neighbors. However, she was never convinced that section 17.1.2.d does not apply to this matter. She agrees that the time for challenging this regulation was when it was adopted. She suggested that the applicants seek relief from the Zoning Commission.

Karen Kopta noted that if the ZBA were to decide on the merits, she is not convinced the proposal would reduce the nonconformity. This is a subjective question. Also, she agrees with the point that once a variance is granted, it is no longer a nonconforming use.

Doug Lewis reported that he read through cases presented. It was clear that those cases were dealing with pre-existing nonconforming matters and not regarding something that was permitted by variance. Also, he is not convinced that what is proposed is less offensive than what is there now.

The members determined that Section 17.2.1.d applies and that the ZBA cannot grant a variance for a use that is not a permitted in the Zone. The requested use is not permitted within Zone A.

Motion to approve the application of Charles Haver and Stewart Skolnick, Assessors Map 18 Lot 70, located at 3 Southbury Rd. Case file 2017-0078, application for a modification to existing variances to extinguish Antique Shop use in residence and to modify use of barn from Antique Shop to Antique Shop operated by resident of the property (first floor only) and Professional Office Space use (second floor only with separate entrance and signage) operated by non-resident of the property on a by-appointment basis.

Motion by Doug Lewis, seconded by Karen Kopta

Chair Falkenberg called the question:

- Karen Kopta voted to deny
- Sue Scott voted to deny
- Doug Lewis voted to deny
- Nanette Falkenberg voted to deny

Nanette Falkenberg stated that the primary reason she voted to deny is that the ZBA does not have authority to grant requested variance under section 17.1.2.d. Karen Kopta, Sue Scott, and Doug Lewis agreed. Doug Lewis stated that he declines the opportunity to use this application to challenge the zoning regulation as over broad. Motion fails. Vote 0-4

OTHER BUSINESS

Nanette Falkenberg reported that she has received several calls regarding the property on Painter Hill where there are several structures being built behind the barns. She has explained that the ZBA had no authority over anything beyond the setback.

APPROVAL OF MINUTES

April 20, 2017 & May 18, 2017 Meetings

A motion was made to approve the minutes of the 4/20/17 and 5/18/17 meetings. Motion by Karen Kopta, seconded by Doug Lewis and carried unanimously.

ADJOURNMENT

A motion was made to adjourn at 8:58 p.m. Motion by due Doug Lewis, seconded by Karen Kopta and carried unanimously.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary

These minutes are not considered official until approved at the next Meeting of the Roxbury Zoning Board of Appeals



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
JULY 20, 2017
CANCELLATION NOTICE**

The July 20, 2017 Regular Meeting of the Zoning Board of Appeals has been cancelled.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
AUGUST 17, 2017
CANCELLATION NOTICE**

The August 17, 2017 Regular Meeting of the Zoning Board of Appeals has been cancelled due to a lack of business.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
SEPTEMBER 29, 2017
CANCELLATION NOTICE**

The Regular Meeting of the Zoning Board of Appeals scheduled for September has been cancelled.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
OCTOBER 19, 2017
CANCELLATION NOTICE**

The October 19, 2017 Regular Meeting of the Zoning Board of Appeals has been cancelled due to a lack of business.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
NOVEMBER 16, 2017
CANCELLATION NOTICE**

The Regular Meeting of the Zoning Board of Appeals scheduled for November 16, 2017 has been cancelled.

Respectfully submitted,

Tai Kern

Tai Kern, Secretary



TOWN OF ROXBURY CONNECTICUT

Zoning Board of Appeals

29 North Street • P.O. Box 203 • Roxbury, CT 06783-0203

**ROXBURY ZONING BOARD OF APPEALS
REGULAR MEETING
DECEMBER 14, 2017
CANCELLATION NOTICE**

The Zoning Board of Appeals Meeting scheduled for Thursday, December 14, 2017 has been cancelled due to a lack of business.

Respectfully submitted,
Karen Eddy
Karen Eddy
Land Use Administrator