

**TOWN OF KENT
ZONING BOARD OF APPEALS**

41 Kent Green Boulevard
P.O. Box 678
Kent, CT 06757

NOVEMBER 13, 2018 REGULAR MEETING AGENDA

The Town of Kent Zoning Board of Appeals shall hold a regular meeting on November 13, 2018 at 7:00 p.m. in the Kent Town Hall.

- 1) Call to Order and Roll Call
- 2) Appointment of Alternates(s) to Voting Status.
- 3) Acceptance or Revision of Agenda
- 4) Reading and Approval of Regular Meeting Minutes of July 10, 2018.
- 5) Recess Meeting. Convene Hearing:
- 6) Close Hearing. Brief Recess
- 7) Reconvene Meeting. Action on Appeal(s) Heard
- 8) Old Business
- 9) New Business
 - 9.1. Approval of the 2019 Regular Meeting Schedule
- 10) Communications
 - 10.1. Monthly Financials – July through August, 2018.
 - 10.2. Connecticut Federation of Planning and Zoning Agencies Quarterly Newsletter – Summer 2018
 - 10.3. Connecticut Federation of Planning and Zoning Agencies Quarterly Newsletter – Fall 2018
- 11) Adjourn

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**TOWN OF KENT
ZONING BOARD OF APPEALS**

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P.O. Box 678

Kent, CT 06757

(4)

JULY 10, 2018 REGULAR MEETING MINUTES

The Town of Kent Zoning Board of Appeals held a regular meeting on July 10, 2018 at 7:00 p.m. in the Kent Town Hall.

- 1) Call to Order and Roll Call

Mr. DiPentima called the meeting to order at 7:00 p.m.

Board Members Present: Anthony DiPentima, Chairman; Anne Bisenius, Nick Downes, Daniel Murray, John Noneman, Patricia Oris, Michael VanValkenburg

Staff Present: Donna Hayes, Secretary/Clerk

- 2) Appointment of Alternates(s) to Voting Status.

Mr. DiPentima elevated Ms. Oris to voting status.

- 3) Acceptance or Revision of Agenda

Mr. Van Valkenburg moved to accept the agenda as presented. Mr. Noneman seconded and the motion carried unanimously.

- 4) Reading and Approval of Regular Meeting Minutes of June 12, 2018.

Mr. Murray moved to approve the Regular Meeting Minutes of June 12, 2018 as presented. Mr. Downes seconded and the motion carried unanimously.

- 5) Recess Meeting. Convene Hearing:

The hearing convened at 7:01 p.m.

- 5.1. Application #04-18, Rita Kho, 41 Johnson Road, relief from Section 5.5, Side Yard Setback, for the installation of three (3) 120 gallon above ground lp tanks, Map19 Block 15 Lot 28.

Ms. Kho explained to the Commission that during this past winter's ice jam, the house had approximately 8' of water in the basement which damaged the furnace, hot water tank and water softener. In order to make the house livable, the Building Official suggested that a new furnace, hot water tank and the electrical panel be moved to the first floor of the house. Due to the size of the first floor, there was no space to put the new furnace except in the stairway to the basement. The only size furnace that could fit in that area was a propane fired system. The only system that is remaining in the basement is the water softener.

**TOWN OF KENT ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES FOR JULY 10, 2018**

These are draft minutes and corrections may be made by the Commission at the subsequent meeting. Please refer to subsequent meeting minutes for possible corrections and approval of these minutes.

When asked if the Building Official approved the placement of the propane tanks in their current location, Ms. Kho responded that was the best location. They were placed there in order for the residents to return to the house and have heat and with the understanding that a variance would be needed for their permanent placement.

Mr. Murray asked if the tanks were placed on the highest elevation of the property as concern was expressed due to the fact that the house is located within the floodplain. Ms. Kho said that was correct. She also explained that the tanks were secured to the ground using a floodplain approved auger system.

Ms. Oris asked if the tanks were visible by the neighbors. Ms. Kho reported that they were only visible from Johnson Road as they were placed against a 6' high stockade fence.

6) Close Hearing. Brief Recess

The hearing was closed at 7:12 p.m. and no recess was held.

7) Reconvene Meeting. Action on Appeal(s) Heard

The meeting reconvened at 7:12 p.m.

Mr. Murray moved to approve Application #04-18, Rita Kho, 41 Johnson Road, relief from Section 5.5, Side Yard Setback, for the installation of three (3) 120 gallon above ground lp tanks, Map19 Block 15 Lot 28 as they are situated right now. A real hardship does exist which is evident from this past winter with all the flooding. It is a question of safety and welfare due to the fact that they have to have a means to heat the home. The tanks placement will not affect the grand plan or the character of the neighborhood. Mr. Van Valkenburg seconded.

Mr. DiPentima added that the Building Official had rendered the property unlivable but for the installation of this new heating system and the placement of the lp tanks. There is a hardship that does exist which is not self-imposed and there is no impact on the overall plan of the village and is consistent with the plan.

Mr. Van Valkenburg seconded the addition to the motion and the motion carried unanimously.

8) Old Business

No action taken.

9) New Business

No action taken.

10) Communications

10.1. Monthly Financials – July 2017 through May 2018.

No action taken.

TOWN OF KENT ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES FOR JULY 10, 2018

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- 11) Executive Session. Pending Litigation: William H. Watts and Joanne Lee Watts v Zoning Board of Appeals of the Town of Kent and Edward J. Schullery. Discussion of strategy and negotiations with legal counsel.

Mr. DiPentima moved to go into Executive Session at 7:16 p.m.

The Board came out of Executive Session at 7:19 p.m.

- 12) Open session involving discussion and possible action.

No action taken.

- 13) Adjourn

Mr. Noneman moved to adjourn at 7:20 p.m. Mr. Murray seconded and the motion carried unanimously.

Respectfully submitted,

Donna M. Hayes

Donna M. Hayes, CZEO
Secretary/Clerk

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BY *[Signature]*
TOWN CLERK

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REGULAR MEETING MINUTES FOR JULY 10, 2018

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9.1

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Phone (860) 927-4625 Fax (860) 927-4541

**2019 REGULAR MEETING SCHEDULE
2nd Tuesday of the Month**

The Town of Kent Zoning Board of Appeals will meet on the following days at 7:00 p.m. in The Kent Town Hall, 41 Kent Green Boulevard, Kent, CT 06757.

January 8, 2019	July 9, 2019
NO FEBRUARY MEETING	August 13, 2019
March 12, 2019	September 10, 2019
April 9, 2019	October 8, 2019
May 14, 2019	November 12, 2019
June 11, 2019	December 10, 2019

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09/25/18

ZBA
Actual vs. Budget
July through August 2018

	Jul - Aug 18	Budget	% of Budget
Ordinary Income/Expense			
Income			
132-420 · Commission of ZBA	0.00	500.00	0.0%
Total Income	0.00	500.00	0.0%
Gross Profit	0.00	500.00	0.0%
Expense			
A · General Government			
025-000 · ZONING BOARD OF APPEALS			
Compensation			
025-102 · Clerk	91.24	1,126.00	8.1%
025-998 · Social Security	0.00	86.00	0.0%
Total Compensation	91.24	1,212.00	7.5%
Department Operations			
025-201 · Supplies	0.00	75.00	0.0%
025-202 · Postage	0.00	175.00	0.0%
025-203 · Notices	51.04	750.00	6.8%
Total Department Operations	51.04	1,000.00	5.1%
Professional Development			
025-450 · Dues	0.00	110.00	0.0%
Total Professional Development	0.00	110.00	0.0%
Total 025-000 · ZONING BOARD OF APPEALS	142.28	2,322.00	6.1%
Total A · General Government	142.28	2,322.00	6.1%
Total Expense	142.28	2,322.00	6.1%
Net Ordinary Income	-142.28	-1,822.00	7.8%
Net Income	-142.28	-1,822.00	7.8%

CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Summer 2018

Volume XXII, Issue 3

TIME LIMIT TO RECORD SPECIAL PERMIT

An owner of a restaurant sought a certificate of zoning compliance. A prior owner of the restaurant had obtained the necessary special exception approval for the use. The current owner sought to add adult entertainment to the restaurant use. The zoning enforcement officer declined to issue the certificate because the special exception had not been recorded on the land records as required by the zoning regulations. This denial was appealed to the Zoning Board of Appeals, which affirmed the decision of the zoning enforcement officer. An appeal to court followed.

The restaurant owner asserted that the time requirement contained in the zoning regulations for recording a special exception was preempted by Connecticut General Statutes Sec. 8-3d. The zoning regulations provided a 90 day time limit in which to record the special permit, after which it would become void. Sec. 8-3d of the General Statutes, while requiring a special permit to be recorded, is silent as to when it should be recorded. The court found that the 90 day recording requirement in the regulations was not preempted by the state statute as it furthered the goal of providing timely notice to the public through recording on the land records. In addition, the expiration of the permit was viewed only as a penalty which could be overcome by applying for a new special exception. *848 LLC v. ZBA*, 62 Conn. L. Rptr. 551 (2016).

COURT ADVISES HOW TO COUNT DAYS TO TAKE APPEAL

A recent decision of the Superior Court stated that in determining when the 15 day appeal period provided by Connecticut General Statutes Sec 8-8(b) ends, the date when the notice of a decision is published is not counted. Thus, 15 'clean' days are provided by statute to serve the appeal on a land use agency.

The court believed that this would make the land use appeal period in compliance with the general rule that the day of the 'act' giving rise to appeal rights is not counted in the appeal period. This case concerned an appeal of a decision by a zoning board of appeals denying a variance application. The appeal was served 15 days after the date notice of the decision was published. The Board had argued that the date of publication must be included. *Riganese v. Zoning Board of Appeals*, 62 Conn. L. Rptr. (2016).

LOTS IN TWO ZONES

The owner of a parcel of land which lay partly in a commercial zone and partly in a residential zone filed an application to use the entire parcel for a commercial use. The zoning regulations contained a provision which allowed the commission to approve, in a lot split between two different zoning classifications, the use of the entire lot for a use permitted in the less restrictive zone classification. In this instance, this

Written and Edited by
Attorney Steven E. Byrne
790 Farmington Ave., Farmington CT 06032
Tel. (860) 677-7355 Fax. (860) 677-5262
attysbyrne@gmail.com cfpza@live.com

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zoning regulation would allow the use of the residential portion of the lot for a commercial use not permitted in the residential zone.

A review of the commission's decision to approve this application which effectively allowed a commercial use to spread into a residential zone was found to violate 3 zoning principles. First, it created a nonconforming commercial use in a residential zone, where no such use had existed previously. Second, it amended the zoning map without a proper application to amend the zoning regulations. Finally, it varied the regulations, in essence approving a use variance which is a power reserved solely for the zoning board of appeals. *Farrington-Posner v. Zoning Commission*, 62 Conn. L. Rptr. 242 (2016).

BOARD SHOULD HOLD HEARING ON LATE APPEAL

When a zoning board of appeals declined to hear an appeal of a zoning enforcement officer's decision to issue a zoning permit because the time to do so had expired, the applicant filed an action in court seeking an order of mandamus.

At a regular meeting, the ZBA had declined to hear the appeal because the issuance of the zoning permit had taken place more than 30 days before the appeal to the board had been filed. The appeal was then denied by the board. The applicant wanted to be heard to argue, in part, that he had not received notice of the zoning permit being issued

and thus the 30 day time period had not begun to run until his application was filed.

The zoning enforcement officer and the board filed a motion to dismiss the mandamus action claiming that an administrative appeal, pursuant to Connecticut General Statutes Sec. 8-8, was the only available course of action. The court disagreed. Since no public hearing was held, there was no right to appeal under Sec. 8-8. The court found it irrelevant that the board had made a decision. In its view, it was the public hearing, and not the decision, that would trigger the appeals process under Sec. 8-8. *Steroco Inc. v. Szymanski*, 55 Conn. L. Rptr. 865 (2013).

OWNER'S SIGNATURE NOT ALWAYS NEEDED

A tenant who operated an earth excavation business on a parcel of property filed an application for a certificate of zoning compliance. The zoning enforcement officer denied the application in part because the owner of the property had not signed the application. In fact, the owner had sent a letter requesting that the application not be granted. The ZEO then issued a cease and desist order. The tenant appealed both of the ZEO's decisions to the zoning board of appeals, which affirmed the decisions.

On appeal to court, the board filed a motion to dismiss claiming that the tenant did not have standing to challenge the ZEO's decisions. The

Written and Edited by

Attorney Steven E. Byrne

790 Farmington Ave., Farmington CT 06032

Tel. (860) 677-7355 Fax. (860) 677-5262

attysbyrne@gmail.com cfpza@live.com

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court disagreed. While the application form included a place where the owner of the property was required to sign, the zoning regulations themselves contained no such requirement. Without this requirement in the zoning regulations, the failure to provide the signature of the property was not needed. Instead, the tenant need only show that he had an interest in the property to satisfy traditional standing requirements, which he did because the decisions of the ZEO and board would effectively shut down his business – a substantial personal injury. *Spezzano v. Zoning Board of Appeals*, 62 Conn. L. Rptr. 630 (2016).

LOT DIVISION NOT A SUBDIVISION IF NO SALE

In deciding whether dividing an existing lot into 3 parts constituted a subdivision of land, the court referred to the definition of subdivision contained in Connecticut General Statutes Sec. 8-18. The statutory definition requires, in addition to a lot being divided into three or more parts, that such division must be for the purposes of development or sale. Thus, an existing lot which was divided into 3 parts for the purpose of providing abutting parcels with beach access, was not a subdivision as the lot division was not for the purpose of sale or development.

A question was also raised in regard to whether one of the lots had the required lot frontage. While the lot had the required frontage on a town road, the side of the lot providing the actual

driveway access was less than that required by the zoning regulations. Since the zoning regulations did not require that the required frontage of a lot also provide access, the lot could have access from another of its property sides. *Rooney v. Zoning Board of Appeals*, 64 Conn. L. Rptr. 390 (2017).

ANNOUNCEMENTS

Membership Dues

Notices for this year's annual membership dues were mailed March 1, 2018. The Federation is a nonprofit organization which operates solely on the funds provided by its members. So that we can continue to offer the services you enjoy, please pay promptly.

Workshops

If your land use agency recently had an influx of new members or could use a refresher course in land use law, contact us to arrange for a workshop to be held at your next meeting. At the price of \$180.00 per session for each agency attending, it is an affordable way for your commission or board to keep informed. The price for these workshops includes a booklet for each agency member.

ABOUT THE EDITOR

Steven Byrne is an attorney with an office in Farmington, Connecticut. A principle in the firm of Byrne & Byrne LLC, he maintains a strong focus in the area of land use law and is available for consultation and representation in all land use matters both at the administrative and court levels.

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2B Farmington Commons
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A WETLAND BUFFER IS NOT A SETBACK

The owners of a parcel of property filed an application with the wetlands agency for a permit to allow them to construct a single family home and a swimming pool. While none of the proposed activities would take place within a wetland area, the pool as well as a portion of the home would be located within the 100' upland review area. When the application was denied, an appeal was taken to court. In its decision sustaining the appeal, the court outlined the authority of an inland wetlands agency in regard to activities taking place in an upland review area.

First, when an inland wetland agency is reviewing an activity that will take place solely within an upland review area, it is charged with evaluating the impact of the proposed activity on the wetland area, not the buffer area. Second, impacts to the buffer area by the proposed activity are insufficient to deny a permit without a finding that the proposed activity will likely have an impact on the wetlands.

In this case, the court found error in the commission's decision to deny the permit because it focused solely on the impact to the buffer area, with no evidence in the record that an analysis had been made as to the effect the proposed home and pool would have on the wetlands. The commission's treatment of the upland review area as a setback, where no activity should take place, was found by the court to be

beyond the commission's authority and outside the statutory scheme for inland wetlands regulation in this state. See *Farmer v. Conservation Commission*, 66 Conn. L. Rptr. 179 (2018).

NONCONFORMING NURSING HOME CAN BE USED TO CARE FOR PAROLED PRISONERS

When a town discovered that an existing nursing home had entered into a contract with the State of Connecticut to provide care to paroled prisoners, a court action was brought to stop what the town saw as the opening of a prison within its borders. The nursing home was located within a residential district. Since it was established before zoning was adopted, it was a nonconforming use. The issue for the court to decide was whether caring for paroled prisoners changed the use to such a degree that it was no longer a nursing home and thus a change from one nonconforming use to another, more intrusive nonconforming use.

At trial, testimony was provided by former and current nursing home staff regarding the care provided as well as the persons residing at the facility. Other than a change in residents, the type of care provided was the same. A change from patients coming from the general population to patients coming from paroled prisoners was not enough for the court to find a change in use.

It should be noted that while the burden of proof to show the existence of a nonconforming use resides on the property owner, the burden of proving

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790 Farmington Ave., Farmington CT 06032
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attysbyrne@gmail.com cfpza@live.com

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that the current use is different from the original nonconforming use rests on the zoning authority. See Town of Rocky Hill v. Securecare Realty LLC, 66 Conn. L. Rptr. 437 (2018).

REDUCTION IN NONCONFORMITY ELIMINATES NEED TO SHOW UNUSUAL HARDSHIP

A variance request can be approved where it will result in the reduction in a nonconformity. Such was the ruling from two courts in reviewing decisions by zoning boards of appeal to approve variances. In both cases, property owners sought to replace existing beach cottages. The new cottages, if approved, would reduce existing nonconformities on the property. In upholding the approval of the variance requests, the courts ruled that the reduction in the nonconforming nature of the properties is a long approved independent ground for the granting of a variance and that no hardship need be found. See Nejdl v. Zoning Board of Appeals, 63 Conn. L. Rptr. 762 (2017) and Bastarache v. Zoning Board of Appeals, 63 Conn. L. Rptr. 234 (2017).

INVERSE CONDEMNATION NOT FOUND WHERE PROPERTY HAS REASONABLE USE

The successful bidder at a tax auction purchased a vacant parcel of land in a residential neighborhood. His plan was to construct a single family

dwelling on the lot. The advertising for the auction identified the land as not being a building lot due to noncompliance with the zoning regulations. When the purchaser's variance applications were denied, he appealed, alleging in part that his land had been illegally taken by the town so that it could remain as open space.

Known as inverse condemnation, this legal principle applies where government regulation renders a parcel of land practically worthless. In this case, evidence showed that if the purchaser altered his building plans for the dwelling, he could eliminate many of the nonconforming issues. Since he could not show that all reasonable use for the property had been eliminated, his claim was dismissed by the court.

This decision is useful in that the same analysis regarding whether all reasonable use of a parcel of property has been eliminated applies equally to the unnecessary hardship test which a zoning board of appeals must find before approving a variance request. See Santos v. Zoning Board of Appeals, 174 Conn. App. 531 (2017).

AUTOMATIC APPROVAL REGULATION FOUND INVALID

A zoning regulation provided that if a special permit application was not decided within 90 days after receipt by the planning and zoning commission it would be automatically approved. A developer whose application was not decided within this time period sought to

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Attorney Steven E. Byrne

790 Farmington Ave., Farmington CT 06032

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attysbyrne@gmail.com cfpza@live.com

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take advantage of this automatic approval regulation. The commission, in processing the applicant's special permit application, had followed the time periods set forth in Connecticut General Statutes Sec. 8-7d.

When the matter was appealed to court, the ruling was that the local zoning regulation was in conflict with the state statute. The legal doctrine of preemption dictated that the state statute prevail over the local regulation. Thus, the statutory time limits controlled and not the 90 day time limit imposed by the zoning regulation. The court also noted that the zoning regulation's automatic approval provision went against long standing law in this state that there is no such remedy for a special permit application. See *Alanz v. Planning & Zoning Commission*, 64 Conn. L. Rptr. 336 (2017).

ANNOUNCEMENTS

Membership Dues

The second invoice for members' annual dues have been sent out. While many of you have paid, some have not. The Federation is a nonprofit organization which operates solely on the funds provided by its membership. In order for us to continue to offer the following services you enjoy, please pay as soon as you can.

By being a member, you get:

- This newsletter 4 times each year

- Discounts on our publications *Planning and Zoning in Connecticut* and *Connecticut Zoning Boards of Appeal*.
- Discounted Workshops for land use agencies
- Length of Service Awards for qualifying individuals serving in member agencies.

It should be noted that a membership cannot be shared among land use agencies in the same municipality.

Workshops

If your land use agency recently had an influx of new members or could use a refresher course in land use law, contact us to arrange for a workshop to be held at your next meeting. At the price of \$180.00 per session for each agency attending, it is an affordable way for your commission or board to keep informed. The price for these workshops includes a booklet for each agency member.

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Town Hall
41 Kent Green Blvd.
P.O. Box 678
Kent, CT 06757-0678

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