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OF COUNSEL

October 24, 2020

VIA HAND-DELIVERY

Mr. Antonio Francalangia, Chairman
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Mr. Corey S. Whiteside
386 Main Street
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Christine S. Mazzotta
405 Alling Street
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Ryan T. Zelek
107 Crystal Falls Way
Berlin, CT 06037

Re: Remand Hearing in Liam T. Mitchell and Cynthia M. Mitchell v. Berlin Zoning Board of Appeals (Docket No. HHB-CV19-6051459) Concerning 1005 Kensington Road

Dear Zoning Board of Appeals Members:

Included in the meeting agenda for the October 27, 2020 regular meeting of the Board is the remand issued by the Superior Court in the above-referenced matter concerning the Board's denial of Liam T. Mitchell and Cynthia M. Mitchell's ("Mitchells") appeal of the December 10, 2018 Cease and Desist Order issued by the Zoning Enforcement Officer Maureen Giusti ("ZEO") for an unauthorized basement apartment in the R-43 zone per Berlin Zoning Regulations § XV.A.1.

You are four (4) members of the Board who participated in the February 26, 2019 public hearing on the Mitchells' appeal ("2019 Hearing") who are scheduled to attend this Tuesday's regular meeting, with Messrs. Francalangia, Whiteside, and Zelek having voted on same along with Nelson Graca and Leonard Tubbs. Messrs. Graca and Tubbs are unable to attend Tuesday's meeting.

As you are aware, the Court (Cordani, J.) directed the following in the Memorandum of Decision regarding the hearing on remand ("remand hearing"):

This court finds that the Board has not properly considered the plaintiffs' assertion and evidence of a preexisting legal non-conforming structure and use concerning the Basement Apartment. As such, the court remands this matter to the Board for further consideration. Upon remand, the Board should consider the evidence presented by the plaintiffs concerning the timing of the construction of the Basement Apartment in relation to the applicability of the zoning regulations as they changed over time. [Footnote 5 appears here which states: The current record contains evidence to support a finding that the structure of the Basement Apartment was legally constructed in the 1950's and has remained so over time. Concerning the use of the structure, reasonable inferences may be made, and consideration should be given to the regulatory definition of dwelling at the time that the Basement Apartment was originally permitted and constructed. However, the Board is the finder of fact here and may make any reasonable findings of fact that find substantial support in the evidence. In this regard, the Board is reminded of its statutory obligation as provided for in General Statute § 8-7(3).] The parties may present new evidence at the remand hearing. If the Board determines that the Basement Apartment was initially constructed as a permitted legal structure and use, then the Board should further consider whether the Basement Apartment has remained so constructed and used over time. The Board should make reasonable inferences from the evidence presented. In considering the evidence presented, the Board should consider the word 'dwelling' at the time of the initial construction of this house provided for up to two families. Based upon the Board's factual findings after further consideration at the remand hearing, using the evidence presented and reasonable inferences therefrom, the Board should then conclude whether the Basement Apartment is a preexisting legal non-conforming structure and use, or not. Only after determining and considering all of the foregoing, can the Board determine whether or not to uphold the Cease and Desist Order.

Enclosed herewith are copies of the following documents for your review concerning the remand:

- (1) Designated Contents Of The Record Per Practice Book Section 14-7B(c) and related Notice of Paper Filing: As you review the record items, please note that there is an initial list which describes each record item. Within that list, there were four (4) record items [Record Item Nos. 2 (drawings), 3, 8, and 11] that had to be paper filed with the Court because they could not be properly reproduced and/or electronically filed. Copies of Record Item Nos. 3 and 8 are enclosed for your review but portions are difficult to read. The originals of those record items, and Record Item Nos. 2 and 11, are being obtained from the Court and will be available for your review at the remand hearing. In sum, the subject Cease and Desist Order is at

Record Item No. 1; the Mitchells' appeal application with supporting documents at Record Item No. 2; the ZEO's January 16, 2019 Memorandum of Staff Comments on Application and departmental file at Record Item No. 3; the minutes and transcript of the Board's 2019 Hearing and deliberation at Record Item Nos. 4 and 5; and additional exhibits/supporting documents submitted by the Mitchells' counsel, Attorney David Griffith ("Attorney Griffith") at the 2019 Hearing at Record Item Nos. 6, 7, and 8; and the published notice of decision and letter of decision at Record Item Nos. 9 and 10. Please note that Attorney Griffith requested via email on October 23, 2020 that undersigned counsel submit all of the record items included in the Designated Contents Of The Record to the Board to be part of the record of the remand hearing. Thus, a complete copy thereof will be submitted into the record at the remand hearing. Please note that regarding Record Item No. 11, the Zoning Regulations, a complete copy is not enclosed in this packet (only those excerpts noted at #4 below) but will be entered into the record.

- (2) Documents Submitted by Attorney Griffith on October 23, 2020: Attorney Griffith has submitted new documents for Tuesday's remand hearing. A copy of said documents is included herewith. He has marked these Items as #17 through #21.
- (3) Connecticut General Statute Section 8-7.
- (4) Zoning Regulations Sections II (Page 17 only), IV.C., XI.T., and XV.

To guide you as you review the enclosures and conduct the remand hearing, I have included instructive case law.

In Wing v. Zoning Board of Appeals of Town of Cromwell, 61 Conn.App. 639, 644-645 (2001), *cert. denied* 256 Conn. 908 (2001), the Appellate Court noted the following with respect to the necessary analysis of a claimed nonconforming use:

'A nonconforming use is merely an "existing use" the continuance of which is authorized by the zoning regulations.' *Melody v. Zoning Board of Appeals*, 158 Conn. 516, 519, 264 A. 2d 572 (1969). 'To be a nonconforming use the use must be actual. It is not enough that it be a contemplated use nor that the property was bought for the particular use. The property must be so utilized as to be irrevocably committed to that use.' (Internal quotation marks omitted.) *Lebanon v. Woods*, 153 Conn. 182, 197, 215 A.2d 112 (1965). '[T]o be irrevocably committed to a particular use, there must have been a significant

amount of preliminary or preparatory work done on the property prior to the enactment of the zoning regulations which unequivocally indicates that the property was going to be used for that particular purpose.’ *Karls v. Alexandra Realty Corp.*, 179 Conn. 390, 399, 426 A.2d 784 (1980).

Shortly thereafter, in the matter of Cumberland Farms, Inc. v. Zoning Board of Appeals of Town of Westbrook, 74 Conn.App. 622, 627-632 (2003), *cert. denied* 263 Conn. 901, the Appellant Court reviewed and reversed a trial court decision sustaining an appeal of a decision by the Westbrook ZBA to uphold a cease and desist order issued by the Westbrook ZEO concerning an alleged preexisting nonconforming use of a gasoline station. Therein, the Appellate Court (Lavery, C.J.) wrote:

General Statutes § 8-2(a) provides in relevant part that zoning regulations ‘shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use....’ A nonconformity has been defined as ‘a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the regulations [were] adopted.’ *Adolphson v. Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988). ‘For a use to be considered nonconforming ... that use must possess two characteristics. First, it must be lawful and second, it must be in existence at the time that the zoning regulation making the use nonconforming was enacted.’ (Emphasis in original; internal quotation marks omitted.) *Cummings v. Tripp*, 204 Conn. 67, 91–92, 527 A.2d 230 (1987). ‘The party claiming the benefit of a nonconforming use bears the burden of proving that the nonconforming use is valid.’ *Connecticut Resources Recovery Authority v. Planning & Zoning Commission*, 225 Conn. 731, 744, 626 A.2d 705 (1993).

.....

‘ “Abandonment” is a question of fact which implies a voluntary and intentional renunciation. Nevertheless, the intent to abandon may be inferred as a fact from the circumstances.... The mere discontinuance of a use where there is no intent to abandon is not enough.... To establish abandonment, the intention on the part of the owner [must be] to relinquish permanently the nonconforming use.... Because the conclusion as to the intention of the landowner is an inference of fact, it is not reviewable unless it was one which the trier could not reasonably make.’ (Citations omitted; emphasis in original; internal quotation marks omitted.) *Cummings v. Tripp*, *supra*, 204 Conn. at 93, 527 A.2d 230.

Zoning Board of Appeals
October 24, 2020
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Again, a copy of the Appellate Court's decisions in Wing and Cumberland Farms is enclosed as an attachment to this correspondence.

I will attend your meeting on Tuesday to address any questions that you have regarding the remand. Thank you.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Jennifer N. Coppola", is written over the printed name. The signature is stylized with large, sweeping loops.

Jennifer N. Coppola

Enclosures

61 Conn.App. 639
Appellate Court of Connecticut.

Ronald WING et al.
v.
ZONING BOARD OF APPEALS OF The TOWN
OF CROMWELL.

No. 19435.
|
Argued Oct. 31, 2000.
|
Decided Feb. 6, 2001.

Synopsis

Landowners sought review of town zoning board of appeals' decision requiring landowners to remove horses from their residential property. The Superior Court, Judicial District of Middlesex, Munro, J., dismissed. Landowners appealed. The Appellate Court, Stoughton, J., held that evidence did not establish a legal nonconforming use of horse or pony on property.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****133 *640** Joel M. Ellis, Hartford, for the appellants (plaintiffs).

Mark K. Branse, Glastonbury, for the appellee (defendant).

Before SCHALLER, MIHALAKOS and STOUGHTON, Js.

Opinion

STOUGHTON, J.

The plaintiffs, Ronald Wing and Candice Wing, appeal from the judgment of the trial court dismissing their appeal from the decision of the defendant, the zoning board of appeals of the town of Cromwell (board). The defendant seeks review of the court's denial of its motion for sanctions against the plaintiffs for having filed a frivolous appeal.¹ We affirm the judgment of the trial court.

***641** On September 9, 1997, Fred Curtin, the development compliance officer of the town of Cromwell, ordered the plaintiffs to remove all of the horses from their property, citing §§ III, paragraph 3.1.37, and XI, paragraph 11.10, of the Cromwell zoning regulations. The plaintiffs appealed from the cease and desist order to the board. The appeal was heard and denied on February 3, 1998. Thereafter, the plaintiffs appealed to the court. The court dismissed the appeal and upheld the decision of the board. This appeal followed.

The plaintiffs claim that (1) the court improperly approved the invalidation of a legally nonconforming use because it was inconsistent with later zoning regulations, (2) the court illegally applied the current regulations to invalidate an existing nonconforming use, (3) the court approved the board's restriction on the nonconforming use when the restriction was inconsistent with prior ordinances, (4) that the actions of the board and the court were arbitrary, capricious and unreasonable, and (5) if the actions of the board and the court were arbitrary, those actions were sufficiently outrageous to violate substantive due process. Those five claims depend on the plaintiffs' assertion that they had established a legal nonconforming use. We are not persuaded.

The following facts and procedural history are necessary for our resolution of this appeal. The plaintiffs have owned the property at 95 South Street in Cromwell since 1994. The property consists of 2.3 ****134** acres in a residential zone.² Prior to August 19, 1997, the zoning regulations ***642** did not have any provisions that concerned the keeping of horses or other large animals on residential property. The town did, however, have municipal ordinances that defined large animal pets and permitted residential property owners to keep them on their premises under certain conditions. The size and number of large animal pets permitted was determined by a land area to animal weight ratio.³ Those municipal ordinances were repealed on June 12, 1997.

On August 19, 1997, §§ III, paragraph 3.1.37,⁴ and XI, paragraph 11.10,⁵ of the zoning regulations took effect. Section III, paragraph 3.1.37, defines large domestic animal pets to include horses, goats and sheep used for personal pleasure only. Section XI, paragraph 11.10, requires that property owners in a residential zone obtain a use permit to keep large domestic animal pets, ***643** and requires that the property consist of no fewer than three acres of nonwetlands soil for the first large domestic animal pet maintained on the property and another one-half acre for each additional large domestic animal

pet. The plaintiffs' property does not meet those standards because it lacks the acreage required for even one large domestic animal pet. In addition, the plaintiffs conceded that they never obtained a use permit.

In their appeal to the board, the plaintiffs claimed the right to maintain, on their property, two horses that they had owned for many years, one pony that they had owned for almost three years and one sheep. They also asserted that they had kept various other large domestic animals on their property since 1994. The plaintiffs now claim that because they kept a pony and a horse on their property prior to the date the new zoning regulations took effect, the keeping of the pony and the horse are legal nonconforming uses. Moreover, they argue that because they used their property to maintain certain large domestic animals prior to the new zoning regulations, keeping *any* large domestic animal that meets the land area to animal weight ratio required by the repealed municipal ordinances constitutes a legal nonconforming use. We disagree.

In reviewing the actions of a zoning board of appeals, we note that the board is endowed with liberal discretion and that its actions are subject to review ****135** by the courts only to determine whether they are unreasonable, arbitrary or illegal. *Pleasant View Farms Development, Inc. v. Zoning Board of Appeals*, 218 Conn. 265, 269, 588 A.2d 1372 (1991). "The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision." (Internal quotation marks omitted.) *Id.*, at 269–70, 588 A.2d 1372. "[A] zoning board of appeals hears and decides an 'appeal' de novo." *Conetta v. Zoning Board of Appeals*, 42 Conn.App. 133, 137, 677 A.2d 987 (1996). "It is the board's ***644** responsibility, pursuant to the statutorily required hearing, to find the facts and to apply the pertinent zoning regulations to those facts. *Toffolon v. Zoning Board of Appeals*, 155 Conn. 558, 560–61, 236 A.2d 96 (1967); *Connecticut Sand & Stone Corporation v. Zoning Board of Appeals*, 150 Conn. 439, 442, 190 A.2d 594 (1963). In doing so, the board 'is endowed with a liberal discretion....' *Id.* Indeed, under appropriate circumstances, the board 'may act upon facts which are known to it even though they are not produced at the hearing.' *Parsons v. Board of Zoning Appeals*, 140 Conn. 290, [292,] 99 A.2d 149 (1953)." *Caserta v. Zoning Board of Appeals*, 226 Conn. 80, 90, 626 A.2d 744 (1993). Upon an appeal from the board, the court must focus on the decision of the board and the record before it. *Id.*, at 90–91, 626 A.2d 744.

It is well settled that the courts should not substitute their own judgment for that of the board and that the decisions

of the boards will not be disturbed as long as an honest judgment has been reasonably and fairly made after a full hearing. *Conetta v. Zoning Board of Appeals*, supra, 42 Conn.App. at 137–38, 677 A.2d 987. "The court's function is to determine on the basis of the record whether substantial evidence has been presented to the board to support its findings." *Id.*, at 138. Upon an appeal from the judgment of the trial court, we review the record to see if there is factual support for the board's decision, not for the contentions of the applicant; *Pleasant View Farms Development, Inc. v. Zoning Board of Appeals*, supra, 218 Conn. at 270, 588 A.2d 1372; to determine whether the judgment was clearly erroneous or contrary to law. *Fuller v. Planning & Zoning Commission*, 21 Conn.App. 340, 344, 573 A.2d 1222 (1990).

"A nonconforming use is merely an 'existing use' the continuance of which is authorized by the zoning regulations." *Melody v. Zoning Board of Appeals*, 158 Conn. 516, 519, 264 A.2d 572 (1969). "To be a nonconforming use the use must be actual. It is not enough ***645** that it be a contemplated use nor that the property was bought for the particular use. The property must be so utilized as to be irrevocably committed to that use." (Internal quotation marks omitted.) *Lebanon v. Woods*, 153 Conn. 182, 197, 215 A.2d 112 (1965). "[T]o be irrevocably committed to a particular use, there must have been a significant amount of preliminary or preparatory work done on the property prior to the enactment of the zoning regulations which unequivocally indicates that the property was going to be used for that particular purpose." *Karls v. Alexandra Realty Corp.*, 179 Conn. 390, 399, 426 A.2d 784 (1980).

In this case, the record reveals that the plaintiffs kept a variety of animal pets on their property after they moved to 95 South Street in 1994. Candice Wing herself, however, stated on the record that her horse, Glider, was boarded at another farm and that she "dragged [it] home" on or about August 12, 1997, before the new zoning regulations took effect, "to make sure that something was standing on the property." There is no indication in the record that horses were ever kept on the plaintiffs' property prior to that date. Rather, that horse was specifically brought onto the property in an attempt to create a nonconforming use. See *Wallingford v. Roberts*, 145 Conn. 682, 684, 146 A.2d 588 (1958).

****136** The record also reveals that no preliminary or preparatory work was done to the plaintiffs' property for the upkeep of a horse prior to the enactment of the new zoning regulations. The plaintiffs' property has not been irrevocably committed to keeping horses thereon and, therefore, keeping the horse on the property had not been

established as an actual and existing use on August 19, 1997. Thus, there was sufficient evidence in the record for the board to find that there was no legal existing nonconforming use of the horse on the plaintiffs' property prior to and on the day the new zoning *646 regulations took effect, and we conclude that the court's judgment was not clearly erroneous or contrary to law.

With respect to the pony, the record indicates that the plaintiffs' pony had been kept on the property prior to August 19, 1997, the effective date of the new zoning regulations. The record also indicates, however, that the pony had been at "Amy's Udder Joy" petting zoo, which also is in Cromwell, since before April 15, 1997, and was *not* actually on the plaintiffs' property on August 19, 1997. The owner of the petting zoo used the pony to attract individuals to the zoo and to give pony rides to children who patronized the zoo. Although the plaintiffs were not actually paid for the use of their pony, the record reveals that the petting zoo boarded and fed the pony at no charge to the plaintiffs. Furthermore, the petting zoo charged visitors a small fee to ride on the pony.

We conclude that there was sufficient evidence in the record from which the board could have found that use of the property for keeping the pony had been abandoned and that the use was neither existing nor actual on August 19, 1997, the date the new zoning regulations took effect. We conclude that there was sufficient evidence in the record for the board to find that there was no legal nonconforming use of the pony on the plaintiffs' property on August 19, 1997, and that the court's judgment was not clearly erroneous or contrary to law.

The plaintiffs, nevertheless, argue that because they were permitted to keep a certain number of large domestic animal pets on their property⁶ under the *647 repealed municipal ordinances, and because there was a sheep and a pygmy goat on the property on August 19, 1997, they had established a legal nonconforming use of the premises for *any* large domestic animal pet pursuant to the repealed

municipal ordinances. The board does not contest the right of the plaintiffs to keep those animals on the premises for which a nonconforming use had been established on August 19, 1997. The plaintiffs assert, however, a right to keep *any* large domestic animal pet on the premises so long as they do not exceed the former land area to animal weight ratio. We disagree.

The plaintiffs are not merely seeking an intensification of a legal nonconforming use, but a change in the character of the use. "A change in the character of a use ... constitute[s] an unlawful extension of the prior use." *Helicopter Associates, Inc. v. Stamford*, 201 Conn. 700, 716, 519 A.2d 49 (1986). In this case, the animals that were deemed legal nonconforming uses can be kept on the plaintiffs' 95 South Street property. The addition of other kinds of large animals, including the horses, constitutes an unlawful extension of the prior use.

Moreover, the zoning regulations provide in § IX, paragraph 9.1,⁷ that a use **137 *lawfully* existing when zoning regulations take effect may be continued. In this case, when the new zoning regulations took effect, the municipal *648 large animal pet ordinance already had been repealed and the use no longer was lawful. Thus, the plaintiffs do not have a right to keep their horses or pony on their 95 South Street property. Finally, in light of our decision, the defendant's renewed motion to strike the plaintiffs' appendix will not be reconsidered.

The judgment is affirmed.

In this opinion the other judges concurred.

All Citations

61 Conn.App. 639, 767 A.2d 131

Footnotes

¹ We need not consider this claim because the defendant failed to raise it in a cross appeal pursuant to Practice Book § 61–8. See *Futterleib v. Mr. Happy's, Inc.*, 16 Conn.App. 497, 499, 548 A.2d 728 (1988); see also *Blue Cross/Blue Shield of Connecticut, Inc. v. Gurski*, 47 Conn.App. 478, 480–81, 705 A.2d 566 (1998) (although prevailing party at trial generally not aggrieved within meaning of Practice Book § 4005, now § 61–8, aggravation can be found where relief awarded falls short of relief sought). We note that even if we were to consider the defendant's claim, it would not succeed because the plaintiffs' arguments on appeal to the trial court were not wholly without merit.

² The plaintiffs' property is 2.3 acres, inclusive of wetlands. The nonwetlands classified portion of the plaintiffs' property is approximately 4500 square feet, or 0.1 acres.

- ³ Cromwell Code, art. II, § 82–5, provides in relevant part: “LARGE ANIMAL PETS—Animals usually kept outside the house which are primarily for pleasure rather than for profit....”
Cromwell Code, art. II, § 82–7, provides in relevant part: “A. A large animal pet may be kept if there exists a contiguous area behind the building line and ten (10) feet within the common property lines, equivalent to ten (10) times the standard adult weight of the animal (as set forth in breed standards) expressed in square feet....”
- ⁴ Section III, paragraph 3.1.37, of the zoning regulations provides in relevant part: “Large Domestic Animal Pet: Large domestic animal pet shall include, but not be limited to, horse, cow, calf, goat, sheep, and llama, for personal pleasure only....”
- ⁵ Section XI, paragraph 11.10, of the zoning regulations provides: “The keeping of a Large Domestic Animal Pet shall be permitted as an accessory use for single family dwellings in residential zones only upon the issuance of a Use Permit. The Large Domestic Animal Pet must be owned by the resident occupant and there shall be a minimum area of three (3) acres devoted to the first Large Domestic Animal Pet and ½ acre for each additional Large Domestic Animal Pet. Watercourses, as defined in section 22a–38 of the Connecticut General Statutes, shall not be included in the calculation of area. The grazing area of Large Domestic Animal Pets shall be restricted to no closer than ten (10) feet from the property boundary and prohibited entirely from the Front Yard. Manure piles and buildings housing Large Domestic Animal Pets shall be a minimum of one hundred (100) feet from adjacent property lines.”
- ⁶ Since 1994, the plaintiffs have kept a number of different animals on their property. A December, 1995 report disclosed that a potbellied pig, a large goat, a pygmy goat, several chickens, a rooster, turkeys and three dogs existed on the plaintiffs’ property. An April 4, 1997 report disclosed that a pony, a sheep, two goats, two rabbits and two chickens existed on the plaintiffs’ property.
- ⁷ Section IX, paragraph 9.1, of the zoning regulations provides in relevant part:
- “a. Any building or use *lawfully* existing ... may be continued subject to compliance with the following conditions:”
- “1. Any use of land or buildings which does not conform to the requirements specified by these regulations shall not be:”
- “a. Changed to another non-conforming use without a Special Permit from the Board of Appeals, and then only to one equally, or more nearly in conformity.”
- “b. Re-established for any reason after non-use longer than one year.” (Emphasis added.)

Wing v. Zoning Bd. of Appeals of Town of Cromwell, 61 Conn.App. 639 (2001)

767 A.2d 131

74 Conn.App. 622
Appellate Court of Connecticut.

CUMBERLAND FARMS, INC.
v.
ZONING BOARD OF APPEALS OF the TOWN OF
WESTBROOK.

No. 21047.
|
Argued Oct. 28, 2002.
|
Decided Jan. 28, 2003.

Synopsis

Convenience store operator appealed decision of town zoning board of appeals that upheld zoning enforcement officer's denial of application for permit to reopen gasoline station. The Superior Court, Judicial District of Middlesex, Higgins, J., entered judgment in favor of operator. Board appealed. The Appellate Court, Lavery, C.J., held that: (1) substantial evidence supported board's determination that use of property as gasoline station was not a preexisting nonconforming use, and (2) substantial evidence existed to support board's determination that prior owner had abandoned use of property as gasoline station.

Reversed and remanded with direction.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****397 *623** Ralph W. Johnson III, Hartford, with whom, on the brief, were John B. Farley, Duncan J. Forsyth and Erik J. Ness, Hartford, for the appellant (defendant).

David M. Royston, Old Saybrook, for the appellee (plaintiff).

***622** LAVERY, C.J., and DRANGINIS and FLYNN, Js.

Opinion

LAVERY, C.J.

The defendant zoning board of appeals of the town of Westbrook (board) appeals from the judgment of the trial court sustaining the appeal of the plaintiff, Cumberland

Farms, Inc., from the decision of ***624** the board to uphold the decision of the zoning enforcement officer denying the ****398** plaintiff's application to reopen a gasoline station. On appeal, the board argues that the court improperly substituted its judgment for that of the board. We agree with the board, and, accordingly, reverse the judgment of the trial court.

The following facts, as recited in the court's memorandum of decision, are relevant to the board's appeal. The Bongiorni family formerly owned the subject property located at 1223 Boston Post Road in Westbrook. In 1941, the Bongiornis opened a gasoline station on the property and from 1975 through 1981 leased the station to David S. Anderson. The property thereafter was conveyed to the estate of John Bongiorni and was leased to Thomas H. Matus doing business as Tom's Super Saver Gasoline station.

In December, 1988, it was discovered that underground gasoline storage tanks on the property had leaked and contaminated the subject property as well as abutting property located at 1211 Boston Post Road, which was owned by the plaintiff. Between January 4 and January 11, 1989, the department of environmental protection (department) ordered the removal of the gasoline storage tanks from the property. On January 14, 1989, the department commenced remediation of the property. As of November 15, 1993, the department had incurred expenses of \$348,228.44 in remediating the property and on February 14, 1994, filed a lien against the property.

On March 2, 1989, the plaintiff brought an action against John Bongiorni, trustee of the Bongiorni estate, and Matus for the damages it had sustained as a result of the contamination of its abutting property and obtained an attachment of the property. The department intervened in that action to recover its costs from remediating the property. On May 13, 1994, the plaintiff, ***625** the department, the Bongiorni estate and Matus filed a stipulation for judgment. Pursuant to the judgment, the Bongiorni estate transferred the property to the plaintiff, which released its claims against the Bongiorni estate, and Matus agreed to vacate the property. The department released its lien, and the plaintiff entered into a consent order with the department to continue the remediation of the property. The Bongiorni estate conveyed the property to the plaintiff on August 25, 1994.

While the litigation and remediation were taking place, the zoning commission of the town of Westbrook revised its regulations, effective June 21, 1991. Section 4.55.01 of the revised regulations prohibits the use of a fuel storage

facility in the commercial town center district (district) within which the property lies.

In September, 1996, the plaintiff filed a site plan application, proposing to demolish the existing gasoline station on the property and to build a new gasoline station on a site consisting of that property merged with its abutting property. That application was denied on the ground that a gasoline station was a prohibited use in the district. On July 1, 1997, the plaintiff filed a zoning compliance and health permit application with the zoning enforcement officer to reopen the former gasoline station on the property. On July 23, 1997, the zoning enforcement officer denied the application, concluding that (1) the use was not permitted in the district, (2) the use was not a preexisting, nonconforming use and (3) the use was abandoned.

The plaintiff appealed to the board from the zoning enforcement officer's decision. Following a public hearing, the board upheld the decision of the zoning enforcement officer. The plaintiff then appealed to the trial court, which reversed the decision of the board and sustained the appeal on the ground that the evidence *626 in the **399 record was insufficient to support the board's determinations.¹ We granted the board's petition for certification to appeal and now conclude that the court improperly sustained the plaintiff's appeal.

I

The board first argues that the court improperly substituted its judgment for that of the board, which had determined that a gasoline station was not a valid nonconforming use because it had been discontinued prior to the enactment of zoning regulations prohibiting such a use. The plaintiff counters that the court properly concluded that the evidence in the record did not support the board's determination that the gasoline station was not a valid nonconforming use of the property. We agree with the board.

The standard of review in zoning matters is well settled. "In reviewing the actions of a zoning board of appeals, we note that the board is endowed with liberal discretion and that its actions are subject to review by the courts only to determine whether they are unreasonable, arbitrary or illegal.... The burden of proof to demonstrate that the board acted improperly is upon the party seeking to overturn the board's decision." (Citation omitted; internal

quotation marks omitted.) *Wing v. Zoning Board of Appeals*, 61 Conn.App. 639, 643, 767 A.2d 131, cert. denied, 256 Conn. 908, 772 A.2d 602 (2001).

"The settled standard of review of questions of fact determined by a zoning authority is that a court may not substitute its judgment for that of the zoning authority *627 as long as it reflects an honest judgment reasonably exercised.... The court's review is based on the record, which includes the knowledge of the board members gained through personal observation of the site ... or through their personal knowledge of the area involved." (Internal quotation marks omitted.) *Children's School, Inc. v. Zoning Board of Appeals*, 66 Conn.App. 615, 627, 785 A.2d 607, cert. denied, 259 Conn. 903, 789 A.2d 990 (2001). "The trial court's function is to determine on the basis of the record whether substantial evidence has been presented to the board to support [the board's] findings.... [E]vidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred." (Internal quotation marks omitted.) *Stancuna v. Zoning Board of Appeals*, 66 Conn.App. 565, 568, 785 A.2d 601 (2001).

In denying the plaintiff's request to overturn the decision of the zoning enforcement officer, the board indicated that the reopening of the gasoline station was not permitted as a preexisting, nonconforming use. The court, however, reversed the board's decision as erroneous. In so holding, the court rejected the board's argument that the use of the property as a gasoline station ceased in 1989 and was not in existence at the time of the adoption of the new regulations in 1991.

General Statutes § 8-2(a) provides in relevant part that zoning regulations "shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any **400 nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use...." A nonconformity has been defined as "a use or structure [that is] prohibited by the zoning regulations but is permitted because of its existence at the time that the *628 regulations [were] adopted." *Adolphson v. Zoning Board of Appeals*, 205 Conn. 703, 710, 535 A.2d 799 (1988). "For a use to be considered nonconforming ... that use must possess two characteristics. First, it must be *lawful* and second, it must be *in existence* at the time that the zoning regulation making the use nonconforming was enacted." (Emphasis in original; internal quotation marks omitted.) *Cummings v. Tripp*, 204 Conn. 67, 91-92, 527 A.2d 230 (1987). "The party claiming the benefit of a

nonconforming use bears the burden of proving that the nonconforming use is valid.” *Connecticut Resources Recovery Authority v. Planning & Zoning Commission*, 225 Conn. 731, 744, 626 A.2d 705 (1993).

It is undisputed that in the present case, the premises were used as a gasoline station from 1941 until the removal of the gasoline storage tanks in January, 1989. On June 21, 1991, the zoning regulations were revised to prohibit the use of a fuel storage facility in the district.² On that date, the property, which was owned by the estate of John Bongiorni, was not being used as a gasoline station.

At the public hearing before the board, the counsel for the plaintiff repeatedly was questioned regarding the intent of the owner of the property. Vice Chairman Stephen Doerrer even suggested that the board recess the hearing to enable it to hear testimony from John Bongiorni, the former trustee of the Bongiorni estate, on that issue.³ Counsel for the plaintiff, however, did *629 not request a continuance to present evidence regarding the intent of Bongiorni or attorney Maura K. Finan, the successor trustee of the Bongiorni estate. The plaintiff relied, rather, on the testimony and affidavits of its employees and attorneys on the issue of the owner’s intent. Included in the record before the board, however, was a letter dated September 19, 1997, from Finan indicating that she had been appointed trustee of the Bongiorni estate on May 28, 1990, and that as trustee, she “did not have any intention of reviving the gasoline station business or installing new fuel storage tanks.”⁴ The **401 plaintiff did not submit any evidence to the board challenging Finan’s authority with regard to the letter,⁵ *630 nor did it seek to strike the letter from the record. Rather, counsel for the plaintiff argued that through the letter, Finan was not evincing an intent to abandon a property right.⁶

We conclude, contrary to the trial court, that the evidence before the board supports its determination that the use of the property as a gasoline station was not a preexisting, nonconforming use. The substantial evidence in the record, primarily Finan’s letter, supports the board’s conclusion that the owner of the property at the time of the change in the regulations did not intend to revive the gasoline station business. We therefore conclude that the board properly exercised its discretion in upholding the decision of the zoning enforcement officer and concluding that the plaintiff had not satisfied its burden of establishing the validity of the proposed gasoline station use as a preexisting, nonconforming use. The court, therefore, improperly substituted its judgment for that of the board and *631 improperly reversed the decision of the board on that ground.⁷

II

The board next argues that the court improperly substituted its judgment for that of the board, which had determined that any claimed nonconforming use had been abandoned. The plaintiff argues in response that the evidence in the record did not support the board’s determination that the gasoline station use on the property **402 was abandoned. We agree with the board.⁸

“ ‘Abandonment’ is a question of fact which implies a voluntary and intentional renunciation. Nevertheless, the intent to abandon may be inferred as a fact from the circumstances.... The mere discontinuance of a use where there is no intent to abandon is not enough.... To establish abandonment, the intention on the part of the owner [must be] to relinquish *permanently* the nonconforming use.... Because the conclusion as to the intention of the landowner is an inference of fact, it is not reviewable unless it was one which the trier could not reasonably make.” (Citations omitted; emphasis in original; internal quotation marks omitted.) *Cummings v. Tripp*, supra, 204 Conn. at 93, 527 A.2d 230.

In addition to holding that the use was not a preexisting, nonconforming use, the board alternatively held that the use was abandoned. The court held, however, that there was substantial evidence in the record that the use of the property as a gasoline station was suspended *632 for reasons beyond the owners’ control for a reasonable period of time. Accordingly, the court held that the board’s finding that the use had been abandoned was illegal, arbitrary and an abuse of discretion. Although we do not disagree with the court’s reasonable interpretation of the evidence, we nonetheless conclude that substantial evidence existed in the record from which the board reasonably could have found that the Bongiorni estate had abandoned the gasoline station use.

It is undisputed that the gasoline storage tanks were removed from the property in January, 1989. At the time that the tanks were removed, the property was owned by the Bongiorni estate. The estate sold the property to the plaintiff in August, 1994. At no time between the removal of the tanks in January, 1989, and the sale of the property in August, 1994, did the estate take any action to restore or to revive the property as a gasoline station. The board, however, was presented with the letter from Finan, referred to previously, in which she stated that “[a]s trustee [of the estate], I did not have any intention of

reviving the gasoline station business or installing new fuel storage tanks.” With regard to the letter, the court stated: “Given the pendency of the litigation and remediation, it was reasonable for Finan to state that she had no intention of reviving the gasoline station during her tenure as trustee of the Bongiorni estate. The fact that she had no intention to reopen the gasoline station during her position as trustee, however, does not warrant a finding that she intended to permanently relinquish the use of the property as a gasoline station. Considering the circumstances, it would not have been economically prudent for the Bongiorni estate to reopen the gasoline station during the period between ... when the contamination was discovered and ... when the property was conveyed to [the plaintiff].” Although that is a reasonable *633 interpretation of the evidence, the board reached a contrary conclusion based on the Finan letter, which was equally reasonable. The court, therefore,

improperly substituted its judgment for that of the board with regard to the intent of the Bongiorni estate to abandon the use **403 of the property as a gasoline station.⁹

The judgment is reversed and the case is remanded with direction to render judgment dismissing the plaintiff’s appeal.¹⁰

In this opinion the other judges concurred.

All Citations

74 Conn.App. 622, 814 A.2d 396

Footnotes

¹ The court held that the board’s determinations that (1) the use of the gasoline station on the property had been abandoned and (2) the use of the property as a gasoline station was not a preexisting, nonconforming use were erroneous. The court held that the board’s determination that the use of the property as a gasoline station was not permitted in the district was not erroneous. That holding has not been challenged on appeal.

² Section 4.55.01 of the revised Westbrook zoning regulations provides: “The following are prohibited uses in the CTC District.
“(a) Repair garage, auto dealership, truck terminal, fuel storage facility, car wash.
“(b) The following shall be prohibited uses in the CTC District unless connected to a municipal sewer treatment facility: Laundromat, dry cleaner, and beauty salon.”

³ The transcript reveals the following:
“Doerrer: That’s my point. I’m trying to get the intent of Bongiorni. He had no intent either.
“Ronald Grabarek [plaintiff’s vice president for real estate]: He did have intent. He didn’t have incentive to do it.
“Doerrer: I’d like to ask him that question, see what his [intentions] were.
“[Plaintiff’s Counsel]: This would be the only way to settle that litigation because it ended up—
“Doerrer: “Can we take a ten minute recess? Maybe we can get a hold of Mr. Bongiorni and have him come down to find out what his [intentions] were.
“[Board chairman] John L. Hall III: Steve, I think we need to let the applicant finish presenting his case.
“Doerrer: Okay.”

⁴ The letter, addressed to board chairman John L. Hall III, states: “On May 28, 1990, I was appointed trustee of the Estate of John F. Bongiorni which owned a parcel of land located at 1223 Boston Post Road, Westbrook, Connecticut. This parcel was used as a gasoline service station until approximately 1989 when the Connecticut Department of Environmental Protection began to remediate certain contamination caused by the release of petroleum from the underground fuel storage tanks on the property. The underground storage tank system was removed as part of the remediation effort. As trustee, I did not have any intention of reviving the gasoline station business or installing new fuel storage tanks.

“On August 24, 1994, I executed a trustee’s deed conveying the property to Cumberland Farms,

Inc. This deed is recorded at Volume 166, Page 82 of the Westbrook Land Records.”

- 5 On September 13, 2002, this court ordered the parties to file supplemental briefs addressing “what authority Maura K. Finan, trustee for the estate of John Bongiorno, had with regard to the subject property; see *LaFlamme v. Dallessio*, 261 Conn. 247, 259 [802 A.2d 63] (2002); *Claydon v. Finizie*, 7 Conn.App. 522 [508 A.2d 845] (1986); and to state what other evidence was before the board regarding whether the use was a preexisting, nonconforming use and whether the use was abandoned.” The parties have complied with that order.
- 6 At the public hearing, the plaintiff’s counsel argued: “[W]ith respect to the letter from Maura K. Finan. I just ask you to look at it in the context of what we have been saying. The critical question, I think, is the last sentence of the first paragraph. I think it’s very carefully written. It says, ‘As trustee, I did not have any intention of reviving the gasoline station business or installing new fuel storage tanks.’ And I think, as we have indicated here previously when the question was asked, when did they go in and put tanks in there? Wouldn’t there be that evidence of some continuation of the business. And what we indicated is, because of the litigation and because of the cost that the state had incurred and was incurring in their lien on the property, there would be no incentive for the trustee to put in tanks. There would be no incentive for them to put in tanks. I submit to you that to say to you that ‘I, as trustee, did not intend to reinstall,’ is not the same thing as saying, ‘I, as trustee, intended to give up a property right relating to the property.’ Because a trustee could not do that. A trustee has a fiduciary responsibility to maintain the value of that property. So, there is a big difference between what the trustee said and abandoning a property right.”
- 7 In light of that conclusion, it is unnecessary for us to consider the board’s additional and related claim that the court impermissibly established a new standard for determining whether a permitted use has been discontinued prior to a change in zoning regulations.
- 8 We address that issue because the trial court addressed it and it was brief by the parties. We are mindful, however, that the board’s action must be sustained if even one of the stated reasons for the board’s decision is sufficient to support that decision. See *Bloom v. Zoning Board of Appeals*, 233 Conn. 198, 208, 658 A.2d 559 (1995).
- 9 Although the court addressed whether the plaintiff had abandoned the gasoline station use, it is the intent of the prior owner, not the current owner, that is controlling on that issue. *Caserta v. Zoning Board of Appeals*, 41 Conn.App. 77, 674 A.2d 855 (1996); R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (2d Ed.1999) § 52.5, p. 566 (“[w]here a prior owner discontinued the use, the question then is whether that owner, not the current owner, intended to resume the use”). We have concluded that the court improperly substituted its judgment for that of the board with regard to the intent of the Bongiorno estate to abandon the use of the property as a gasoline station. It is unnecessary for us to consider the intent of the plaintiff on that issue.
- 10 Our conclusions in this case, that there was sufficient evidence before the board to support its determinations that the gasoline station use was not a preexisting, nonconforming use and, alternatively, that the use had been abandoned, are based solely on the evidence submitted before the board. We do not hold that the removal of gasoline storage tanks pursuant to an environmental remediation order constitutes evidence of the abandonment of a preexisting, nonconforming use.

Cumberland Farms, Inc. v. Zoning Bd. of Appeals of..., 74 Conn.App. 622 (2003)
814 A.2d 396

DOCKET NO. HHB-CV19-6051459-S

LIAM T. MITCHELL AND CYNTHIA M. MITCHELL	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN
BERLIN ZONING BOARD OF APPEALS	:	SEPTEMBER 13, 2019

DESIGNATED CONTENTS OF THE RECORD
PER PRACTICE BOOK SECTION 14-7B(c)

The parties to the above-referenced administrative appeal hereby designate the following papers which are attached hereto, as the Record in said appeal and undersigned counsel hereby certifies that true and accurate copies of the Record items are attached hereto except as noted:

1. Notice of Violation – Cease and Desist Order issued by ZEO Giusti dated December 10, 2018 (“Cease and Desist Order”).
2. Application to ZBA appealing Cease and Desist Order submitted December 27, 2018 (“Application”) consisting of application form, narrative entitled “Description of Appeal”, letter of authorization, Exhibits A through E, drawing entitled “Plot Plan Showing Proposed House Addition & Wall and ZBA Variance Request Property of Liam T. Mitchell, et al #1005 Kensington Road Berlin, Connecticut Scale 1”=20’ July 23, 2018” revised through 12-27-18 prepared by Flynn & Cyr Land Surveying, LLC, and sketch drawings of front elevation, floor plan, basement plan, and wall section.¹

¹ All referenced drawings at Designated Record Item No. 2 will be submitted to the Court in paper format, and a notice of submission of same electronically filed, as said drawings cannot be reproduced and properly reviewed electronically.

3. Memorandum of Staff Comments on Application prepared by ZEO Giusti dated January 16, 2019 and documents contained in the departmental file as referenced therein and distributed therewith.²

4. Minutes from the February 26, 2019 ZBA meeting.

5. Transcript from the February 26, 2019 ZBA public hearing on Application.

6. Exhibit 1 submitted by David L. Griffith, Esquire (“Attorney Griffith”) at the February 26, 2019 ZBA public hearing consisting of excerpts from the Zoning Ordinance of the Town of Berlin, Conn. dated August 6, 1948.

7. Exhibit 2 submitted by Attorney Griffith at the February 26, 2019 ZBA public hearing consisting of three (3) written narratives entitled “Design and Construction of the Existing Use as a Basement Dwelling (October 13, 1954 to September, 1962)”, “Continued Use of the Basement Dwelling (September, 1962 – February 26, 2019)”, and “The ZBA Should Reverse the Cease and Desist Order”, respectively, and color photocopies of nine (9) photographs.

8. Exhibit 3 submitted by Attorney Griffith at the February 26, 2019 ZBA public hearing consisting of a four (4) page print-out of an article from retrorenovation.com entitled “Wood kitchen cabinets in the 1950s and 1960s – ‘unitized’ vs. ‘modular’ construction”, color photocopies of ten (10) photographs, and two (2) pages containing email exchanges.³

² Designated Record Item No. 3 will be submitted to the Court in paper format, and a notice of submission of same electronically filed, as the content of the Record Item cannot be reproduced and properly reviewed electronically, due to the quality of some of the documents included.

³ Designated Record Item No. 8 will be submitted to the Court in paper format, and a notice of submission of same electronically filed, as the content of the Record Item cannot be reproduced and properly reviewed electronically, due to the quality of some of the documents included.

9. Notice of Decisions from the February 26, 2019 ZBA meeting with the published notice.
10. Letter of decision issued to Attorney Griffith dated February 28, 2019 with certified mail receipt.
11. Town of Berlin Zoning Regulations.⁴

THE DEFENDANT –
BERLIN ZONING BOARD OF APPEALS

By 

Jennifer N. Coppola
JCoppola@CD-LLP.com
Ciulla & Donofrio, LLP
127 Washington Avenue
P.O. Box 219
North Haven, CT 06473
Tel. (203) 239-9828
Fax (203) 234-0379
Firm Juris No. 412770

⁴ The certified copy of the Zoning Regulations will be submitted to the Court in paper format, and a notice of submission of same filed electronically, as due to their length/size the Regulations cannot be uploaded to the Judicial Branch website as a single document and properly reviewed electronically.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via electronic mail on this 13th day of September 2019 on all counsel of record as follows:

David L Griffith, Esquire
Griffith & Kelly, LLC
66 Cedar Street, Suite 608
Newington, CT 06111-2655
d.griffith@newingtonlaw.com


Jennifer N. Coppola

RECORD ITEM #1



December 10, 2018

Town of Berlin

Planning and Zoning Department

240 Kensington Road
Berlin, Connecticut 06037
www.town.berlin.ct.us

Planning and Zoning Commission
Zoning Board of Appeals
Conservation Commission
Historic District Commission

1005 Kensington

CERTIFIED MAIL # 7012 1010 0002 6991 2708
AND REGULAR MAIL

Liam T. Mitchell
1005 Kensington Road
Berlin, CT 06037

NOTICE OF ZONING VIOLATION - CEASE AND DESIST ORDER

Pursuant to the authority vested in me by the Zoning Regulations of the Town of Berlin, Connecticut, this letter serves as official notice that you are hereby ordered and directed to discontinue and remedy the violations at the property identified as **1005 Kensington Road, Map21-1 Block 73, Lot 15** within fifteen (15) days.

As previously discussed, and acknowledged by you subsequent to the courtesy letter dated 3-20-2018, this office has found the following violation for the purpose of determining compliance with the Berlin Zoning Regulations (BZR):

- Unauthorized use and unpermitted work resulting in a **basement apartment in the R-43 single family zone**.

This is a violation of BZR §V.A. Residential Zones. Single family residential (R-86, R-43, R-21, R-15)

You must:

- Restore the property to single family use.

While you have verbally claimed that the use is nonconforming, this office has found no indication that a 2-family dwelling was approved or allowed. Note that no zoning or building permits have been found that authorized conversion of the basement space into a second dwelling unit since the Certificate of Occupancy for the single-family dwelling was issued on April 14, 1970.

Failure to comply with this order by January 2, 2019 will result in immediate enforcement action, including citation fines as provided by Berlin Ordinance No.5/96 – Berlin Municipal Code Chapter XIX. §19-22 and Connecticut General Statutes §8-12.

Thank you in advance, for your anticipated cooperation in resolving this matter. I have attached a summary statement of our conversations, explaining the type of evidence that can be gathered to support your nonconforming claim.

The zoning regulations are available online or in Berlin Town Hall, room 7. Please contact this office ASAP to discuss your compliance plan.

Maureen K. Giusti

Assistant Town Planner & Zoning Enforcement Officer

YOU HAVE THE RIGHT TO APPEAL THIS ORDER TO THE ZONING BOARD OF APPEALS WITHIN 15 DAYS OF RECEIPT PER CGS §124 AND BZR §XIV.

Attachment: Memo to file dated 8/17/2018 updated 11/9/2018

Cc: Jack Healy, Town Manager *(via email)*

Marek Kozikowski, AICP, Town Planner. 860-828-7060. mkozikowski@town.berlin.ct.us

Maureen Giusti, Assistant Town Planner/ZEO. 860-828-7008. mgiusti@town.berlin.ct.us

Frances Semnoski, Land Use Administrator. 860-828-7066. fsemnoski@town.berlin.ct.us

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)
 For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	
Certified Fee	\$	
Return Receipt Fee (Endorsement Required)	\$	
Restricted Delivery Fee (Endorsement Required)	\$	
Total Postage & Fees	\$	

Sent To: **Liam T. Mitchell**
 Street, Apt. or PO Box: **1005 Kensington Road**
 City, State, ZIP+4: **Berlin, CT 06037**

CERTIFIED MAILTM



7012 1010 0002 6991 2708

Town of Berlin

Department of Development Services
 240 Kensington Road
 Berlin, CT 06037

Liam T. Mitchell
 1005 Kensington Road
 Berlin, CT 06037
Received

JAN 14 2019

Planning & Zoning Department
 Berlin, Connecticut

ANKK1: 9327000098

NIXIE 061 DE 1 0001/08/19
 RETURN TO SENDER
 UNCLAIMED
 UNABLE TO FORWARD

BC: 05057265599 *0344-01433-12-44

05037265599

RECORD ITEM #2



Town of Berlin

Planning and Zoning Department

240 Kensington Road
Berlin, Connecticut 06037
www.town.berlin.ct.us

ZBA # _____

Town of Berlin
Received

DEC 27 2018

Planning & Zoning Department
Berlin, Connecticut

ZONING BOARD OF APPEALS APPLICATION

- ☐ Special Permit ☐ Variance ☒ Appeal of ZEO
☐ Motor Vehicle Location ☐ Alcohol Uses Location ☐ Other / Determination

Property Owner(s): Liam T. Mitchell and Cynthia A. Mitchell

Project Address*: 1005 Kensington Road

Map: 21-1 Block: 73 Lot: 15 Zone(s): R-43 Lot Area: _____

Please select all relevant items below:

- ☐ Supplemental Information Is Required For:
ZBA Special Permit / Sale of Alcoholic Beverages Location / Motor Vehicle Uses Location
☐ Inland Wetlands and Water Course Commission review needed
☐ Planning and Zoning Commission review needed
☐ Property is within 500 feet of a Municipal Boundary of _____
☐ Previous Zoning Board of Appeals actions on this property:

Date(s) & Purpose(s): _____

Applicant Information

Name: Attorney David L. Griffith* Firm Name: Griffith & Kelly, LLC
Street Address: 66 Cedar Street City: Newington ST: CT Zip: 06111
Email: d.griffith@newingtonlaw.com Phone: 860-667-0855
Signature: [Signature] Date: December 27, 2018
*representing the property owners

Property Owner(s) Information (If Not the Applicant)

Name: Liam T. Mitchell & Cynthia A. Mitchell Principal: _____
Street Address: 1005 Kensington Road City: Berlin ST: CT Zip: 06037
Email: _____ Phone: 860-818-5540

*Letter of Authorization Required

ZBA action is requested pursuant to Berlin Zoning Regulations Section(s): IV C1 & 3; XVA1

*Any town official and/or employee who the town deems necessary may enter the property to verify information submitted with this application.

Town of Berlin
Received

DEC 27 2018

Brief description of the proposal: See attached Description of Appeal
Janning & Zoning Department
Berlin, Connecticut

VARIANCE APPLICATIONS: For relief of: _____ requirement.
Requested requirement: _____
Reason/Description of Hardship (REQUIRED): _____

MOTOR VEHICLE USE LOCATION¹:

The first page of the State DMV application is required to be submitted with this application

<input type="checkbox"/> New Car Dealer	<u>Number of Service Bays</u>	<u>Parking Required</u>	<u>Parking Provided</u>
<input type="checkbox"/> Used Car Dealer	_____	_____	_____
<input type="checkbox"/> General Repairer	_____	_____	_____
<input type="checkbox"/> Limited Repairer	_____	_____	_____
<input type="checkbox"/> Gasoline Station	_____	_____	_____

SALE OF ALCOHOLIC BEVERAGES LOCATION¹

The first page of the State Liquor Permit application is required to be submitted with this application

Type of State Liquor Permit:

☐ On -Premises Permit: Type _____
☐ Off-Premises: Type _____
☐ Other: Explain _____

To be completed by P&Z staff only:

Fee Paid \$ 210.- (Refer to current Fee Schedule)

ZBA # _____ - _____ - _____

Received by: fms

Scheduled on ZBA Agenda of: _____

ZONING BOARD OF APPEALS DECISION:

Plan Title & Date: _____

DEC 27 2018

Description of AppealPlanning & Zoning Department
Desist Order dated:

This is an appeal for the Notice of Zoning Violation – Cease and Desist Order dated December 10, 2018, stating the following violation:

- “• Unauthorized use and unpermitted work resulting in a **basement apartment in the R-43 single family zone.**

This is a violation of BZR §V.A. Residential Zones. Single family residential (R-86, R-43, R-21 R-15)

You must:

- Restore the property to single family use.”

THE USE OF THE BASEMENT IS NONCONFORMING AS IT WAS USED AS A TWO-FAMILY DWELLING SINCE THE HOUSE WAS BUILT AND OCCUPIED COMMENCING SEPTEMBER 29, 1955 PRIOR TO THE ADOPTION OF THE REVISED BERLIN ZONING ORDINANCE IN SEPTEMBER, 1962.

The initial Certificate of Occupancy was issued on September 29, 1955 when the house was located in the Farm Zone. (See Exhibit A). The original plumbing from 1955 was and is located beneath the basement floor, (see photos to be submitted), and the plumbing was installed and located so that a bathroom and kitchen sink could be hooked up in the basement. At that time, the house, as a “farm dwelling”, was permitted in a Farm Zone (Section V – Zoning Ordinance Revised July, 1954). A “dwelling” was defined in the ordinance as “a building arranged or designed to be occupied by not more than two families.” (Section XXIIq of the Zoning Ordinance Revised July, 1954). The original plumbing shows the arrangement and design for a two-family dwelling.

After a fire, the house was rebuilt from the existing foundation and with the original basement floor and plumbing under the basement floor. The Certificate of Occupancy was issued on April 14, 1970. The design/construction plans for the basement, when it was rebuilt, left the same configuration of plumbing as existed in 1955. The basement continued to be arranged or designed to be occupied by two families as previously in a Farm Zone. The Basement Plan reflects the original 3” basement floor and existing foundation (P. 3 – design/construction plans)

The 1966 Assessor’s card shows a finished basement. (Exhibit B). The Berlin Assessor’s card, based on an inspection by the Town on July 22, 1975, reflects a finished basement of 4 rooms, including shower, toilet and sink. (Exhibit C). Subsequent Assessor’s cards reflect the continued use of the basement as an apartment. (Exhibit D & Exhibit E).

The use as a two-family dwelling existed at the effective date of the zoning ordinance revision in September, 1962. The building was originally adapted for that use and has continued to the present.

Town of Berlin
Received

DEC 27 2018

Letter of Authorization

Planning & Zoning Department
Berlin, Connecticut

Property Owner: Liam T. Mitchell/Cynthia A. Mitchell

Principal: _____

Subject Address: 1005 Kensington Road

Applicant: Attorney David L. Griffith, Griffith & Kelly, LLC

We, Liam T. Mitchell & Cynthia A. Mitchell hereby give consent to Attorney David L. Griffith/
(Current Owner or Principal) Griffith & Kelly, LLC, to
(Applicant)

apply to all relevant Town of Berlin land use Boards and Commissions for a

ZBA appeal at the property located at 1005 Kensington Road,
(Purpose of Application) (Address &/or Map Lot Block)

Berlin Connecticut.

In addition, we consent to allow any town official and/or employee that the town deems necessary
the ability to enter said property to verify any information submitted with corresponding
application.

Sincerely,

Liam T. Mitchell
Liam T. Mitchell

12/27/2018
Date

Cynthia A. Mitchell
Cynthia A. Mitchell

12/27/2018
Date

Form 3 A

ZONING COMMISSIONS COPY

1005 Irving - N 7th Street

CERTIFICATE OF OCCUPANCY

— Office of —

The Zoning Commission

Berlin, Conn., September 29, 1955

THIS IS TO CERTIFY, that the Building at No. 124 Preston Road Street, has been inspected and found to conform with the zoning ordinance and permit No. A-1436 issued from this office to Dr. H. H. Richard A. Puffer Date of Permit 05-15-1954

By E. J. Jones, Jr. Vice Mayor Zoning Commission
For The Zoning Commission

Buildings to be used for Training

No. of Families

No. of Stories

No. of Garages

Receipt A 1173

Town of Berlin
Received

DEC 27 2018

Planning & Zoning Department
Berlin, Connecticut

1746 C.H.K.

[illegible]

[illegible][illegible]

L 26

TOWN OF BERLIN, CT

1005 KENSINGTON RD
ACCOUNT NUMBER: 015330 MAP/BLOCK/LOT# 21-1 0073 000015 CLASS: R STATE CLASS: 101 CARD #: 1 OF 1

VOLUME:

PAGE: 00914
DEED DATE: 910327
DEED PRICE: 160000
DISTRICT: 7
LAND DATA:

CT 06037

REGAN, PETER, F,
REGAN, KIM E,
1005 KENSINGTON RD
KENSINGTON

NHBD: 101
LIVING UNITS: 4002
CENSUS:

- ASSESSMENT INFORMATION -

CODE	UNITS	APPRAISAL	ASSESSMENT
1-3	1.000	\$119,870	\$83,910
1-4	1.000	\$6,400	\$4,480
1-1	1.000	\$60,780	\$42,550

LAND VALUE

[illegible]

9103	2	\$160,000	0	TOTALS:	\$187,050
9104	2	\$160,000	0		\$130,940

TOTAL ACRES:	1.130	TOTAL LAND VALUE:	60,780	PRIOR ASSESSMENT:	103,400
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ADDITION DATA:

	Lower Level	First Floor	Second Floor	Third Floor	Area	Value
NEW RE&SIDNG						
13207	\$0					
8901	0					
0	\$0					
0	\$0					

	E	F	G	H
RANCH	99,480			
Year Built:	1969			
Plumbing	6,720			
Story Ht:	1.00			
ALUM/VINYL	0			
HEATING/AIR COND	0			
BASE PRICE				
Opn Frm Prch				
100				
34,800				
53,400				
\$0				
\$0				
\$0				
\$0				

[illegible]

FULL	5,640
BASEMENT:	
FIREPLACE	
FULL	
ATTIC:	
ATTIC:	
NONE	
EXTENSION	
EXTENSION	

RECREATION ROOM (1)	8,320
RECREATION ROOM (2)	
RECREATION ROOM (3)	
RECREATION ROOM (4)	
RECREATION ROOM (5)	
RECREATION ROOM (6)	
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RECREATION ROOM (92)	
RECREATION ROOM (93)	
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RECREATION ROOM (97)	
RECREATION ROOM (98)	
RECREATION ROOM (99)	
RECREATION ROOM (100)	

2. Fixture Bath:	0
3. Fixture:	12
Total Estimate:	12
BASEMENT GAR.	3,320
ADDITIONAL	

Heating System:	HOT WATER
Heating Type:	ADJ. BASE
Heating Unit:	22,100
Heating Unit:	146,180

SUT ROOM (1) = 104.0
 SUT ROOM (2) = 0
 GRADE FACTOR C & D = 0
 FACTOR = 0

	18	21	14	14
ALN RESIDENCE				
PERCENT GOOD				
replace Total:	146	6	82	

MARKET	ADJ %
0	1

	16	FU	16
Unitin. Area:	6440	970	
Unitin. Grade:	BONI D	PESIDENCE	

	AV	AV	AV	AV
DU/COND.	1642	1642	1642	1642
Total living Area.	1642	1642	1642	1642

31 FIG

OUTBUILDING DATA	REMARKS
1. BUILDING NO.	100
2. BUILDING NAME	100
3. BUILDING TYPE	100
4. BUILDING AREA	100
5. BUILDING VOLUME	100
6. BUILDING HEIGHT	100
7. BUILDING DISTANCE	100
8. BUILDING DIRECTION	100
9. BUILDING COLOR	100
10. BUILDING MATERIAL	100
11. BUILDING FOUNDATION	100
12. BUILDING ROOF	100
13. BUILDING FLOOR	100
14. BUILDING WALL	100
15. BUILDING DOOR	100
16. BUILDING WINDOW	100
17. BUILDING STAIR	100
18. BUILDING ELEVATOR	100
19. BUILDING HALL	100
20. BUILDING CORRIDOR	100
21. BUILDING ENTRANCE	100
22. BUILDING EXIT	100
23. BUILDING ENTRANCE	100
24. BUILDING EXIT	100
25. BUILDING ENTRANCE	100
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98. BUILDING EXIT	100
99. BUILDING ENTRANCE	100
100. BUILDING EXIT	100

Year	Grd	Cond	Value
2006	2	0	0

1	69	18	26	C	A	\$6,400
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100	100

OUTBUILDING TOTAL	64.00	
		6

NOTE: IN-LAW APT IN WAI K-OUIT RSWT

Q1E: GAINED
N-SG: GAINED

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Berlin, Connecticut

OUTBUILDING DATA

Type	qty	Yr	Size1	Size2	Grd	Cond	Value
RG1	1	69	18	26	C	A	\$6,400

OUTBUILDING TOTAL 6400

OUTBUILDING TOTAL

NOTE: IN-LAW APT IN WALK-OUT BSMT

NOTE:
EN. SG. GAINED

[illegible]

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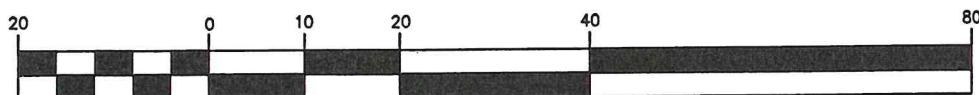
DEC 27 2018

Planning & Zoning Department
Berlin, Connecticut

*PLOT PLAN SHOWING
PROPOSED HOUSE ADDITION & WALL
and ZBA VARIANCE REQUEST
PROPERTY OF
LIAM T. MITCHELL, et al
#1005 KENSINGTON ROAD
BERLIN CONNECTICUT
SCALE 1"=20' JULY 23, 2018*

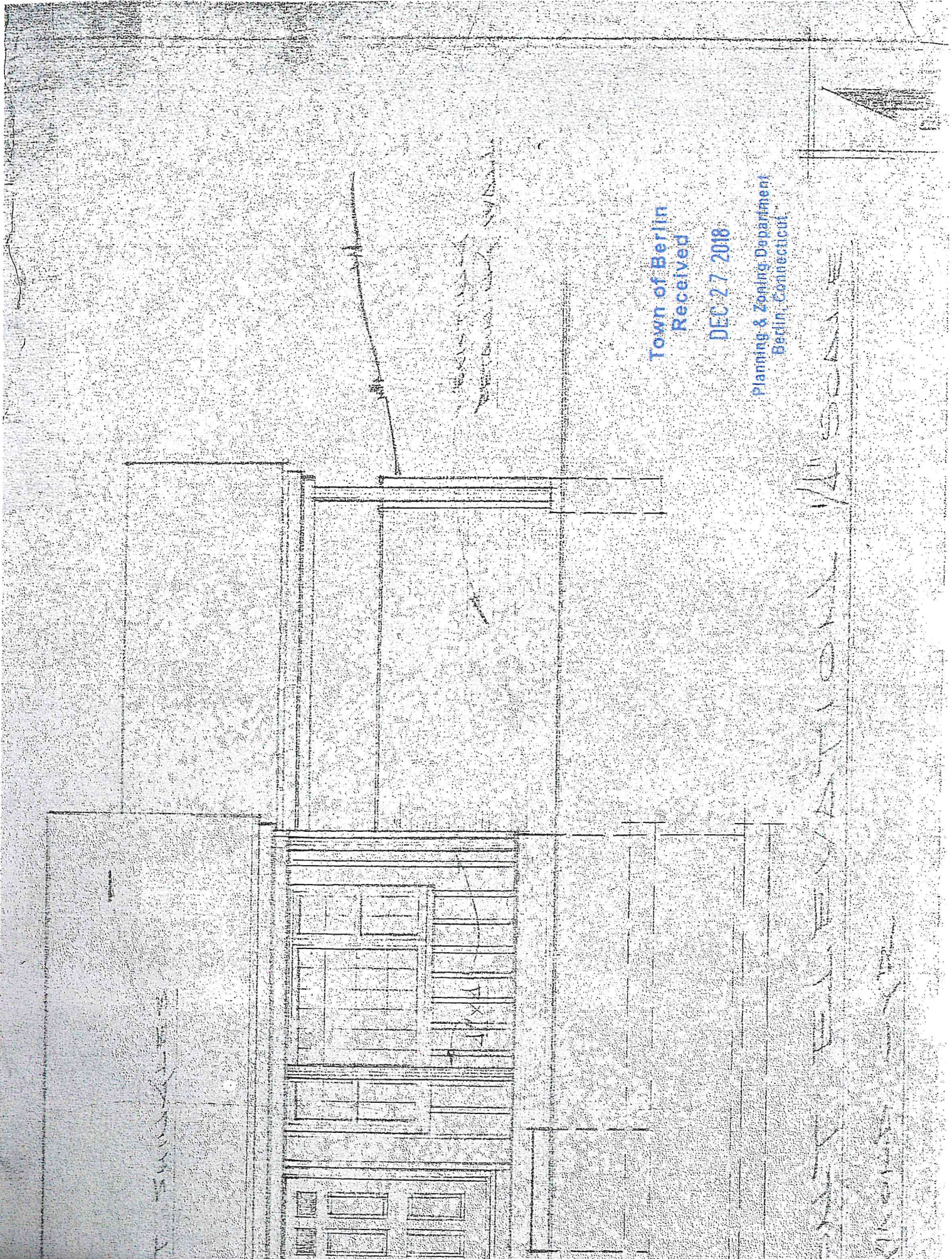
REVISED: 12-27-18

GRAPHIC SCALE



(IN FEET)

1 inch = 20 ft.



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1/4 SECTION

216 east

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Berlin, Connecticut

$\frac{1}{2} \times \frac{1}{2} = \frac{1}{4}$

245

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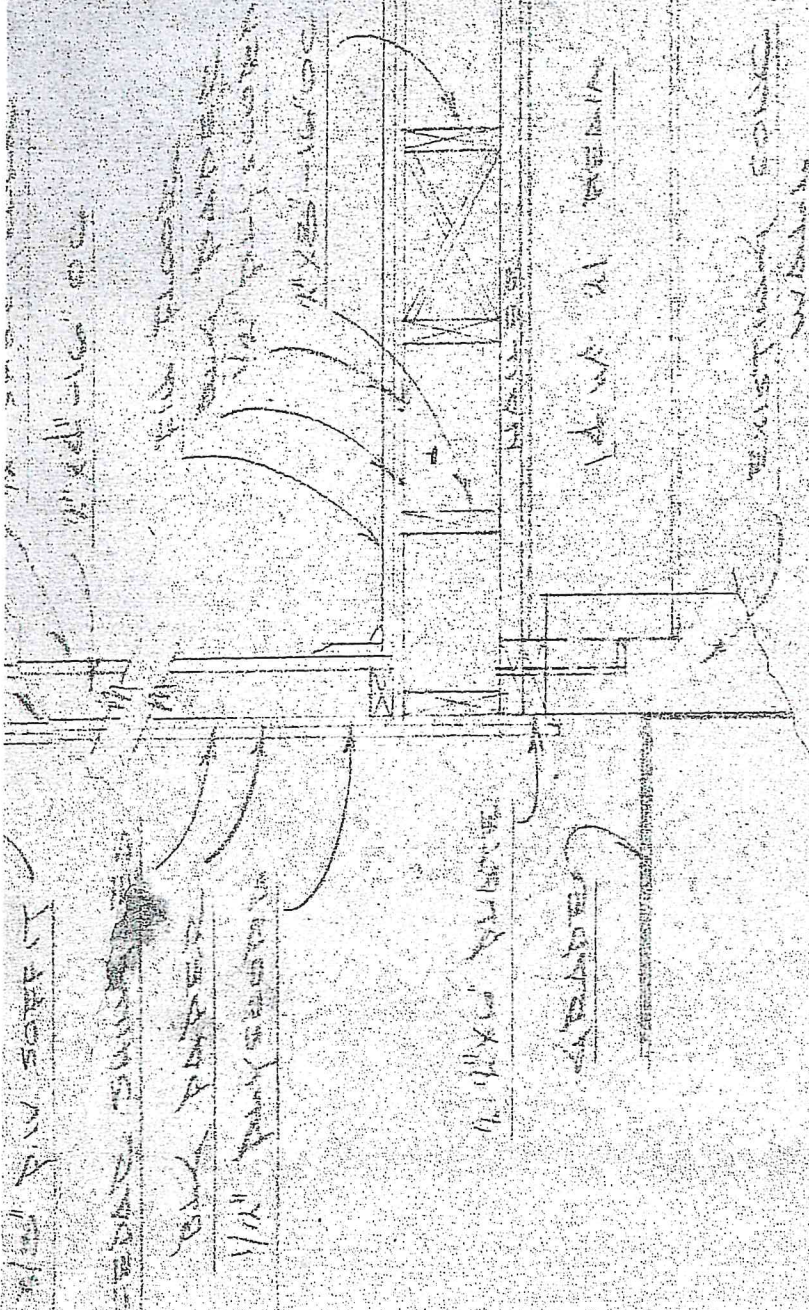
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WINDING ROAD

1/2" x 1/2" in corner of wall

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