

BERLIN ZONING BOARD OF APPEALS

April 27, 2021 7:00 p.m.

The Berlin Zoning Board of Appeals will meet remotely via Webex video conference* on Tuesday, April 27, 2021 at 7:00 p.m. The Town of Berlin invites you to access and participate in this meeting via Webex video conference* or telephone conference call as provided below.

**The WebEx call to participate in this meeting is a toll call and you may incur additional charges for placing the call by your phone service provider. The Town does not reimburse participants for any toll charges. Please check with your phone service provider before making the call.*

Click the link below to join the meeting by Webex:

<https://townofberlin.my.webex.com/townofberlin.my/j.php?MTID=md4e86504c59b37a03513ed657dc748fe>

Or join by phone:

+1-408-418-9388 United States Toll

Meeting number (access code): 132 068 3402

Meeting password: ZBATu700 (92288700 from phones and video systems)

This agenda and all meeting materials related to the agenda items which have been distributed to the Board will be posted on the town's website at: www.town.berlin.ct.us and will be available for viewing twenty-four (24) hours prior, during and after the meeting. Members of the public are encouraged to submit materials relevant to the applications no later than 12:00 p.m. on Friday, April 23, 2021 for posting prior to, during and after the meeting.

A video recording of the meeting is scheduled to be posted to YouTube after the meeting.

Berlin Zoning Board of Appeals Agenda

I. Call to Order

II. Public Hearings:

ZBA #2021-03 0 Berlin Turnpike Map 10-2 Block 83 Lots 12-7333, 12-7334, 13A, 13C-7509, 13C-7510

a.k.a. 404 Berlin Turnpike

BT 2008 LLC (Peter D'Addeo, Managing Member of D'Addeo Family Limited Liability Company, Member of BT 2008 LLC) is requesting a motor vehicle use location approval for a gasoline filling station per Berlin Zoning Regulation XI.R. The properties are owned by BT 2008 LLC and the gasoline filling station is being proposed as a component of a proposed mixed-use development. (Continued from 1/26/21, 2/23/21, 3/23/21)

2021 APR 23 AM 11:10

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ZBA #2021-07 38 Eastbrook Terrace Map 15-2 Block 91 Lot 70-C

Kyle and Tracy Cooney (property owners) are requesting a variance for southernly front yard of 10 feet when 30 feet is required in an Open Space Subdivision in the R-21 Zone per Berlin Zoning Regulations V.A.8.f for a detached 10 foot x 12 foot accessory shed.

III. Regular Meeting:

ZBA #2021-03 0 Berlin Turnpike Map 10-2 Block 83 Lots 12-7333, 12-7334, 13A, 13C-7509, 13C-7510

a.k.a. 404 Berlin Turnpike

BT 2008 LLC (Peter D'Addeo, Managing Member of D'Addeo Family Limited Liability Company, Member of BT 2008 LLC) is requesting a motor vehicle use location approval for a gasoline filling station per Berlin Zoning Regulation XI.R. The properties are owned by BT 2008 LLC and the gasoline filling station is being proposed as a component of a proposed mixed-use development. *(Continued from 1/26/21, 2/23/21, 3/23/21)*

ZBA #2021-07 38 Eastbrook Terrace Map 15-2 Block 91 Lot 70-C

Kyle and Tracy Cooney (property owners) are requesting a variance for southernly front yard of 10 feet when 30 feet is required in an Open Space Subdivision in the R-21 Zone per Berlin Zoning Regulations V.A.8.f for a detached 10 foot x 12 foot accessory shed.

IV. Approval of Minutes:

November 24, 2020 (Francalangia, Whiteside, Mazzotta, Zelek, Coppola, Graca, Tubbs) – 1005 Kensington Remand Underlined

March 23, 2021 (Francalangia, Tubbs, Whiteside, Coppola, Zelek)

V. Adjournment

Berlin Zoning Board of Appeals
Regular Meeting Minutes – November 24, 2020

The Zoning Board of Appeals held its regular meeting on November 24, 2020 at 7:00 p.m. in person and by remote Webex conference at the Berlin Board of Education Conference Room at 240 Kensington Road, Berlin, CT.

Members in Attendance:

Tony Francalangia, Chairman
Nelson Graca, Vice-Chairman
Sandra Coppola, Secretary
Ryan Zelek, alternate

Lenny Tubbs, Vice-Chairman
Corey Whiteside
Christine Mazzotta, alternate

Members Absent:

Hunter Mathena, alternate

Staff Present:

Maureen Giusti, Acting Town Planner/ZEO
Adam Levitus, Zoning Enforcement Officer
Jennifer Coppola, Corporation Counsel
Kristen Grabowski, Recording Secretary

I. Call to Order

Chairman Francalangia called the meeting to order at 7:08 p.m.

It was noted that a letter from Chris Edge, Economic Development Director was submitted for the record requesting a discussion. Ms. Giusti noted that in the letter, Mr. Edge requests that the 1500 ft. buffer between motor vehicles uses or gasoline stations be brought to the Planning and Zoning Commission. It was noted that because the Zoning Board of Appeals administers that regulation, they should have the opportunity to comment on any changes made. She noted that it may be discussed in January.

Ms. Giusti noted that the proposed meeting schedule for the next calendar year should be voted on.

Chairman Francalangia conducted a roll call.

The agenda items were considered in the following order:

V. ZBA 2021 Meeting Calendar

Chairman Francalangia discussed the proposed meeting schedule for the 2021 calendar year. Commissioner Zelek moved to approve the calendar, seconded by Commissioner Graca. The motion carried unanimously.

II. Public Hearings:

**ZBA #2020-11 Map 11-3 Block 132 Lot 19, 288 Beckley Road
aka: 286 Beckley Rd and 55 Ledge Drive**

Carrier Enterprises, LLC is appealing the decision of the Zoning Enforcement Officer dated July 7, 2020, to deny a zoning permit for Building Permit Application for new construction of a single-family house.

(postponed at request of applicant)

**ZBA #2020-12 Map 11-3 Block 132 Lot 19, 288 Beckley Road
aka: 286 Beckley Rd and 55 Ledge Drive**

Carrier Enterprises, LLC is appealing the decision of the Zoning Enforcement Officer dated August 19, 2020, to deny a zoning permit for Building Permit Application for new construction of a single-family house.

(postponed at request of applicant)

ZBA #2020-18 Map 17-4 Block 147 Lot 3, 1163 Mill Street – East Berlin

Saleem Khan (owner/principal – Maple Avenue Repair Service LLC) is requesting a Location of Motor Vehicle Uses approval for a Dealer and Repairers License per Berlin Zoning Regulations VI.F.3.b and XI.R at 1163 Mill Street, East Berlin. The property is zoned GC and is owned by 1173 Associates LLC (owner/principal – Fred Campanella).

Mr. Saleem Khan was in attendance to present the application to the Board. Mr. Khan noted that this would be the seventh license with DMV, explaining that the use of the current business would not be changing, but the facility would be getting a face lift. He noted that all licenses are in good standing, and he has been an upstanding AAA provider. He reiterated that the use would not change. He explained that the ZBA must sign off on the location approval prior to moving forward with the proper licensing. It was also noted that there are approximately 50 people employed throughout all locations, which include two in Meriden, two in North Haven, one location in Plainville, and one location in Southington. Mr. Khan noted that he does low-key private towing.

Commissioner Whiteside inquired about the smaller building, closer to the road. He addressed the property owner, Fred Campanella, asking if the smaller building would remain an office. Mr. Khan elaborated, noting that the building would be cleaned up, and new signage would hung.

Commissioner Whiteside inquired about the towing machinery, as the property would be used for a car sales operation. Mr. Khan noted that car towing would be part of the business, noting that they may do some towing for the Berlin Police Department. It was explained that most towing, unless an accident, would not be coming back to the property. He explained that customers would more than likely choose an auto body shop to have the vehicle towed to.

Commissioner Tubbs inquired about the primary use of the business, asking if towing would be the majority of the business. Mr. Khan reiterated that there would be some repairs, but it would be a private towing operation. He explained that there is a small garage on the property. Mr. Levitus noted that the previously-approved 2012 survey was submitted with this application. Mr. Khan confirmed that the layout from 2012 will be maintained under the new operation.

Fred Campanella, property owner, noted that he holds the current license on the property. He explained that there are two operations on the property; one is Accurate Automotive, which is housed in the larger building. He noted that Mill Street is in the smaller building. He explained that there will not be many changes in the operation. He explained that there is storage for 38 cars, which has been previously approved. Mr. Campanella noted that the application before the Board served as a name change.

Mr. Khan provided pictures of the most recent property in Plainville. He noted that family members work at the locations, and all operations are clean and neat.

Commissioner Mazzotta noted that she has visited the locations in North Haven, and echoed that the properties are clean.

Mr. Khan thanked the Board for the opportunity to speak, and he noted that he is excited to be part of the community.

Commissioner Tubbs moved to close the public hearing. Commissioner Mazzotta seconded the motion, which carried unanimously.

Commissioner Tubbs moved to amend the agenda, moving 1005 Kensington Road remand to after the Regular Meeting portion of the meeting. Commissioner Coppola seconded the motion, which carried unanimously.

III. Regular Meeting:

ZBA #2020-18 Map 17-4 Block 147 Lot 3, 1163 Mill Street – East Berlin

Saleem Khan (owner/principal – Maple Avenue Repair Service LLC) is requesting a Location of Motor Vehicle Uses approval for a Dealer and Repairers License per Berlin Zoning Regulations VI.F.3.b and XI.R at 1163 Mill Street, East Berlin. The property is zoned GC and is owned by 1173 Associates LLC (owner/principal – Fred Campanella).

Chairman Francalanga moved to approve the application, which was seconded by Commissioner Tubbs. The motion carried unanimously.

II Public Hearing:

(The public hearing for this item commenced at the October 27, 2020 meeting and was continued to this meeting.)

Commissioners Graca, Coppola, and Tubbs excused themselves from the meeting. Commissioners Francalanga, Mazzotta, Whiteside, and Zelek were seated for the remainder of the meeting.

1005 Kensington Road, Map 21-1/Block73/Lot 15

Remand issued by Superior Court in the matter of Liam T. Mitchell, et al. v. Berlin Zoning Board of Appeals concerning the Board's denial of the plaintiffs' appeal of a Cease and Desist Order issued by the Zoning Enforcement Officer for an unauthorized basement apartment in the R-43 zone per Berlin Zoning Regulations §XV.A.1. (Continued from 10/27/2020)

Attorney Jennifer Coppola addressed the Board, laying ground rules, and reviewing the terms of the remand order. She reviewed the exhibits:

1. Court's Memorandum of Decision
2. Packet distributed by Attorney Coppola to the Board, which included October 24th correspondence, with attachments that included case law, the designated contents of the record. She also noted that part of exhibit two included record items number one through 10 submissions that had been made by the applicant's counsel, Attorney Griffith, on October 23rd for the October ZBA remand hearing. She explained that Attorney Griffith had labeled those items as items number 17 through 21. She noted that excerpts from the Berlin Zoning Regulations were attached, as well as Connecticut General Statutes Section 8-7.
3. Berlin Zoning Regulations that were filed with the Court as designated contents of the record item number 11. She noted that they were certified as the Zoning Regulations that were in effect at the time of the appeal of the cease and desist order to the Board.
4. Attorney Coppola noted that exhibit four included revised findings of fact that had been drafted by Attorney Griffith, which is subsequently labeled as revised item number 21.
5. Exhibit number five was black and white copies of photographs, which Attorney Griffith had labeled as item number 22.

Attorney Coppola explained that Ms. Giusti submitted additional exhibits, continuing with exhibit 6.

6. Included in exhibit six, was email correspondence with the previous property owner, Kim Regan, submitted by Ms. Giusti.
7. Voter registration cards obtained from the Registrar of Voters were included as exhibit number seven, submitted by Ms. Giusti.
8. It was noted that exhibit number eight included notes from Ms. Giusti to the Board, consisting of typed and hand-written notes.

Attorney Coppola noted that four additional documents had been taken in since the last meeting. She noted that they had been marked, and picked up with exhibit number nine.

9. Notarized letter dated November 19th (stamped received November 20th) from former property owner Kim Regan.
10. Proposed findings of fact were marked as item number ten.
11. The Memorandum of Staff Comments, updated 11/20/2020 were marked as exhibit number 11, which also had an attachment of the zoning ordinance in 1954.

12. Attorney Coppola noted that the last marked item was an additional affidavit from the applicant, Liam Mitchell, which was received through email from Attorney Griffith. It was noted that Attorney Griffith marked it as item number 23, and it also had a one-page attachment. The attachment was a court record item (#3), ROR3F1.

Attorney Coppola reviewed the remand language, referring to her October 24th correspondence to the Board (exhibit #2), noting that the Board is the finder of fact for the remand hearing. She also referred to Statue 8-7, noting that the order could be sustained or reversed wholly or partly and the reasons for the Board's decision need to be stated on the record.

Attorney Coppola stated that proposed findings of fact had been received by the Board, referring to exhibit number four, the revised findings of fact which were provided by Attorney Griffith at the October 27th meeting, and the proposed findings of fact that were received for the current meeting from Ms. Giusti which were marked as exhibit number 10. She noted that the proposed findings could be used as a starting point and that the Board is the fact finder for the remand hearing.

Attorney David Griffith addressed the Board, summarizing the evidence presented to the Board. He referred to the affidavit submitted by Mr. Mitchell, noting that the basement apartment had been rented out. The affidavit also addressed the state of the basement apartment when he acquired the property, indicating that it was in the same condition as when the previous property owner (Regan) purchased the home in 1991. He explained the property was also listed as a two-family property.

Attorney Griffith summarized the basis for the claim of the vested right of a legal nonconforming use, pointing out to the Board that a nonconforming use is an existing use, which upon adoption of the zoning regulation would no longer be permitted. He continued, noting that the basement was rented from 1960-1981. He explained that a person who lived in the house provided a sworn statement, and it was noted that the zoning ordinance changed in 1962.

Attorney Griffith discussed the submitted proposed findings of fact (exhibit four). He noted that when the home was built, there was plumbing in the basement for a bathroom and kitchen sink, including fixtures. There were door openings carved out of the foundation for the basement garage and exterior. He noted that in addition to photos, the Town of Berlin building official also confirmed the plumbing. It was explained that the plumbing was hooked up in the basement dwelling starting in 1960, and continued forward from that time.

Attorney Griffith referred to an affidavit of Mr. Cyr, attesting to the fact that the apartment had been rented out for 21 years after his parents purchased the home in 1960.

Attorney Griffith noted that the basement had all the attributes of a walk-out apartment and that this was confirmed by the sworn statement from Mrs. Regan, who stated that when she purchased the property in 1991, she observed that. Additionally, it was noted that Mrs. Regan shared that the apartment was inhabited by her brother-in-law and presumably an adult child during the time that she owned the home.

Attorney Griffith continued, referring to Mr. Mitchell's affidavit, which was submitted earlier in the meeting. The affidavit notes that the Mitchells have continued the apartment use.

Attorney Griffith noted that in 1962, the use of the apartment became vested in all owners going forward.

Attorney Griffith noted that the applicant was requesting that the Board make the findings of fact as proposed and therefore overturn the Cease and Desist Order because of the existing legal nonconforming use in the basement as a dwelling.

Chairman Francalanga inquired about the history of building permits for the property, asking when the last permit was issued and what it was for. Ms. Giusti noted that the permit for the reconstruction of the dwelling was issued in 1969 for rebuilding the home, referring to permit #3363. She explained that the number of housekeeping units was left blank, but that the soil test done at the same time was for three bedrooms. She referred to her report (Item 1B), which made references to this permit. The permit referenced three bedrooms, one bath, one shower, and one lavatory. The line next to basement fixtures was blank. It was also noted that there was a private sewage disposal system.

Chairman Francalanga inquired about the tax base records, asking how long the property had been treated as a single-family dwelling. Ms. Giusti noted that the oldest card was from 1966. Chairman Francalanga noted that if it was never treated as a two-family home, the use was abandoned back when the permit was issued, noting that there was never two electrical, telephone, or gas or heating bills. He noted that there was never an indication that there were two separate families living in the dwelling. The only piece of evidence discussed to support a two-family residence was voter registration cards. However, Chairman Francalanga noted that voter registration cards would not indicate that the property was necessarily a two-family dwelling. He continued, noting that the property has been taxed as a single-family property. He reiterated that if there was a two-family residence at one point in time, it was abandoned in the 60s. He continued, explaining that while people may have lived in the basement over the years, that would not make the property two-family. Discussion continued about when the two-family use was abandoned, and Chairman Francalanga noted that it was abandoned once the building permit was issued.

Commissioner Zelek referred to the Certificate of Occupancy, which was issued in April 1970. He noted that the certificate referenced the occupancy approval as single family dwelling.

Attorney Griffith addressed the Board to discuss the abandonment. He noted that the affidavit provided by Mr. Cyr stated that the use was not abandoned. He also discussed the submitted Staff comments, noting that they state that if the use was nonconforming at the time when it was rebuilt, that it should be allowed to continue. The applicant is in agreement that it was in existence, and there was not an abandonment. He stated that there was no evidence of abandonment.

Chairman Francalanga explained that a relative or someone living downstairs would not make the property a two-family dwelling. He noted that taxes have been paid for 30-40 years as a single-

family dwelling. He noted that the person living in the basement was not paying rent. The person could have been helping with the household expenses, but that would not make it a two-family property. Attorney Griffith reiterated that the property has operated as a legal nonconforming use for years, which has been supported by the evidence presented. Mr. Mitchell noted that the meters were not changed until recently. He explained that meters changed in the industrial park prior to changing in the residential sector sometime in the 90s. Mr. Mitchell said that everything in the basement is original to the home, and the use has not been abandoned.

Ms. Giusti referred to her Staff report, noting a correction, specifically in the Memorandum of Staff Comments (1A-2-1). She noted that the report states that the data for the building permit was attached, but because the Board was already in receipt of the documents, they were not attached again. She also noted that at the previous meeting, it was discussed that a tenant was utilizing a trailer on the property. She continued, stating that if that was indeed the case, it would be a new violation. She noted that the applicant stated at the last meeting that the tenant was no longer living in the apartment and living in a trailer on the property. She noted that the trailer on the property would not be a permitted use at the present time. Mr. Mitchell noted that the tenant is living in a motel on the Berlin Turnpike.

Ms. Giusti discussed the abandonment of the two-family use. She noted that specific finishes in the basement, including kitchen cabinets, bathrooms, facilities, a den or family room, and an entertainment space do not make up an apartment. She noted that it becomes a violation when it is rented. The Town no longer allows those fixtures to be put in because it could potentially become a problem. Ms. Giusti discussed the various permits that were obtained by previous property owners through the years, noting that all refer to one housekeeping unit. She noted that sometimes houses have two kitchens, but that does not make it a rentable unit. She noted that multi-generational situations may constitute a separate kitchen, and that it is now referred to as an accessory dwelling unit. It is not a rental unit. Ms. Giusti noted that if the unit was rented, it was done without the Town's knowledge or approval. She explained that the opposing counsel presented evidence to support a walk-out basement and separate entrance. Ms. Giusti noted that the walk-out basement does not constitute an apartment dwelling. Many houses have a door to the garage or to outside.

Chairman Francalangia referred to the Memorandum of Staff Comments, items two and three, discussing the number of housekeeping units as one. He also referred to the Certificate of Occupancy issued on October 13, 1954, which also stated the occupancy as one. Mr. Francalangia noted that it has been taxed as a one-family unit. He explained that no matter how many families live on the property, it has been taxed as a one-family dwelling, and it must remain that way. Mr. Francalangia provided an example, using his own property as a guide. He noted that his basement currently has another kitchen and bathroom, with additional refrigerators and freezers. He noted despite having all of the features on the property, it has been taxed as a single-family, and he cannot rent it out.

Attorney Griffith noted that the Certificate of Occupancy that has been referred to was issued in error, and the building permit expired and became void. He noted that the Memo and record show that the permit expired, and the CO was issued in error in 1955. Commissioner Zelek inquired about

the permit issued in 1970. Attorney Griffith noted that the vested right had already kicked in in 1962. Mr. Mitchell interjected, discussing the taxes. He noted that immediately following the last ruling, he obtained a letter from Town Assessor, Joe Ferraro, stating that once the ruling found that the property was single-family, the assessment increased.

Ms. Giusti noted that the Zoning Office determined that the house was single-family in 2015. She noted that what led to the violation would be irrelevant because Mr. Mitchell rented the unit after the Town determined that the property was single-family. She noted that because it is part of the violation, it cannot be included in the history of the property. Ms. Giusti noted that the previous owner received the letter from the Town and understood that there was no record of a second unit in the home, and they had the opportunity to appeal. She noted that the previous owners did not have the unit rented, so it was not being used as a two-family. The house was then sold and there were notices in the building permit record and zoning file. Therefore things that occurred with Mr. Mitchell after the sale of the property were known violations. It could have been appealed at that time.

Attorney Griffith noted that the evidence presented supports that the use was in effect for 50 years, including before the time that the zoning ordinance was changed. Mr. Mitchell referred to a Zillow listing, noting that it was listed as a rental in 2014. Ms. Giusti noted that as soon as it was brought to the Town's attention, it was dealt with as a violation. She noted that any two-family conversion was done without Town approval, under the Town's radar, and was not done legally. She explained that septic systems are put in based on housekeeping units.

Attorney Coppola discussed the departmental file, court record item #3, ROR3-B-1, which is one of the Certificates of Occupancy dating back to 1954. Attorney Griffith noted that that permit expired. Attorney Coppola discussed that the permit was signed by the owner and the architect at the time, and the permit indicates that the number occupancy units as one. Despite the fact that the permit expired, it was still signed by the property owner and officials at the time. She asked for clarification as to why the permits should be discredited, especially because all parties signed them. She noted her perception, indicating that the Board, and the Chairman specifically, could not understand why the content of the permit would be discredited. She noted the importance of Attorney Griffith explaining to the Board why the permit should not be considered.

Attorney Griffith explained that the permit became void, and the Certificate of Occupancy was issued in error. He explained that there was a subsequent application, with notations on it, that the property was being taken as is. He noted that the doorways carved out, and notations were made on the permit. The Certificate of Occupancy was issued in error, and Ms. Giusti noted that he was referring to permit #A2178. She explained that there were handwritten notations made at the top of the permit indicating that it was issued in error on September 29, 1955. It should have been the renewal of permit #A1436. The notations also state that this application takes the situation as it exists. Ms. Giusti noted that from a zoning standpoint, this would indicate that the permit expired, and the process would have to start over as a reissuance.

Attorney Griffith discussed ROR3-B-6, which includes a notation indication “needs removal of permit.” The Certificate of Occupancy was issued in error, and it indicates in the notation “couldn’t understand woman(foreigner).” He noted that it does not say renewal, it says removal.

Mr. Mitchell noted that the Fire Marshal would not allow the hatchway to be used a fire escape.

Attorney Coppola addressed exhibit #3, submitted as a paper filing to the court, and she said it looks like ROR 3-B-6 states “removal of permit” and ROR 3-B-7 looks like “renewal of permit.” She stated that it appears as though two different terms were used. Ms. Giusti noted that Attorney Coppola had a lesser generation copy in front of her. Commissioner Mazzotta also noted that the copy said “see date” when referring to the permit. She noted that it was canceled, not changed. She asked if there was any evidence to support that the occupancy was changed from one to two-family. Mr. Mitchell said it was allowed at that time.

Commissioner Zelek inquired about the 1969 permit, asking why that couldn’t be used. Mr. Mitchell noted that the owner had use before the fire and after the fire, and it was rented, used for the same purpose. . Commissioner Zelek asked why the permit did not specify a two-family dwelling. Mr. Mitchell noted that the building permits never specified the zoning, and only asked for the address. He continued, noting that he has been a builder in Town for many years, and zoning has not been part of the application, that only since Ms. Giusti they run them through zoning. Commissioner Zelek noted that building inspectors typically go to the house to do a walk-through prior to issuing a certificate of occupancy. Chairman Francalancia and Mr. Mitchell discussed the issuance of Certificate of Occupancy in terms of single and two-family units. Ms. Giusti clarified, noting that the application at the time asked for the number of families, which was written in by the applicant as one. Chairman Francalancia noted that he could not go against what was provided at the time and it is a legal document.

Mr. Mitchell noted that he had a signed affidavit, and Chairman Francalancia noted that the permit application superseded the affidavit. He noted that as an agent for the Town, he could not go against the evidence provided by the Town Building Department. Mr. Mitchell maintained his viewpoint, indicating that the use had been grandfathered in, and should be allowed to continue. Chairman Francalancia noted that the property has been rented illegally, and he cannot go against the Town in this case. He noted that the Town records show the property as a single-family in 1970, and if it was ever a multi-family, it was abandoned. He noted that the permit from 1969 shows abandonment. Mr. Mitchell noted that property owners fill out the paperwork. In order to abandon the use, it would have to be more than just the paperwork. He noted that the grandfather clause states that the use must be abandoned. Chairman Francalancia noted that in 1970, the property owner would have put in utilities for a second family, but they did not. Mr. Mitchell disagreed, stating that utilities were not changed to multi-family until more recently. Chairman Francalancia noted that he could not dispute the fact that the permit was issued as a single-family dwelling.

Ms. Giusti circled back to the use. She noted that from her research, she did not find anything to support that it was a two-family dwelling. She referred to the cabinet maker, noting that perhaps the property owner did trade work and put in the cabinets himself. She noted that if that happened,

the Town did not authorize a two-family. She also referred to the septic system calculations, noting that a second system is very dependent upon the number of families.

Chairman Francalangia noted that based on the evidence, he did not have any more questions.

Attorney Coppola noted that she sent copies of ROR 3-B-6 and ROR 3-B-7 with the “renewal” and “removal” language by email to Attorney Griffith, Ms. Giusti, and Mr. Levitus so that the Board could review if needed. Both documents were presented for review. Attorney Coppola noted that it was difficult to tell. Chairman Francalangia noted that it looked like “renewal” and Mr. Mitchell indicated that it looked like “needs renewal” written on the permit.

Commissioner Whiteside asked a point for clarification, inquiring about item ROR 3-B-7. He asked if that ended up being the 1970 Certificate of Occupancy. Attorney Coppola pointed the Board to exhibit #2, record item #3. She noted that it would be in that packet, indicating that it was September 21, 1956. Commissioner Whiteside noted that he was looking for something to show the intent of the owner that applied for the Certificate of Occupancy in 1970. If the application, which was signed by the owner, applies for a single-family, that makes a difference in reference to intent.

Attorney Coppola noted that the Board has paperwork signed by the original property owners. She noted that there was nothing in the record signed by the property owners in 1970. Commissioner Whiteside noted that there were no signatures on paperwork in 1970 referring to ROR 3-B-14. Attorney Coppola noted that the only other paperwork with property owner signatures were signed by Cabuzzi on ROR 3-B-19. She noted that ROR 3-B-12 was a request for the placement of a trailer in 1968, which was also signed. It was noted that that was not relevant to the number of dwelling units. Commissioner Whiteside reiterated he was looking to find the intent of the property owner.

Chairman Francalangia noted another application for an electrical upgrade in the garage in 1988. Mr. Mitchell confirmed the garage as a separate building.

Chairman Francalangia called for additional comments. Commissioner Whiteside moved to close the public hearing.

Attorney Coppola reminded the Board of the protocol prior to moving into deliberations. She noted that individual Board member comments would not be considered collective reasoning for action. She explained the importance of deliberations and individual respective thoughts, but the reason for action must be a collective statement.

Attorney Griffith circled back to the voided building permit, as well as the application, and he noted that it was not clear if the permit had the signature of Mr. Pouch. He stated that it was unclear as to whether the other documents were signed by the property owners.

Commissioner Mazzotta inquired about a possible timeline for the two garages and driveways. Ms. Giusti referred to ROR-3-B-10, the plot plan for a 2-car garage and breezeway for Dorteia and Richard A. Pouch, signed by Theodore Miller, Civil Engineer and Land Surveyor, dated April 26, 1958.

She noted that it showed the proposed garage 20x28 on the west side of the house. Mr. Mitchell noted that garage is part of the house, as the upper garage, which is why the tenant looks out of the kitchen window into a garage. Ms. Giusti noted that in the email exchange between herself and Ms. Regan, that Ms. Regan was confident that the garage was an add-on because of the proximity of the garage to her kitchen window. Ms. Giusti noted that the 1958 garage was not part of the original build. Mr. Mitchell reiterated that the garage had no importance to the downstairs unit.

Ms. Giusti discussed the 1970 permit, noting that it was a permit for a longer footprint than the 1958 plot plan shows. She explained that the house is now 52-feet long according to ROR 3-B-16 (plot plan from 1969). Mr. Mitchell confirmed that the 52-feet includes the apartment. Ms. Giusti referred to a 1954 plot plan, and Attorney Coppola confirmed it as ROR 3-B-6. Ms. Giusti noted that it was 40x36, and in 1970, it was 52-feet. Mr. Mitchell noted that it showed the basement.

Chairman Francalangia asked for additional comments and then a motion to close the public hearing.

Attorney Coppola noted the importance of calling for public comments. Chairman Francalangia asked if there were any members of the public who wished to comment and hearing none noted that there were no public comments. He asked the Board members, Attorney Griffith, and Attorney Coppola if they had any comments and the Attorneys each indicated they had none.

Chairman Francalangia moved to close the public hearing, seconded by Commissioner Zelek. The motion carried unanimously.

Chairman Francalangia noted his opinion, that he felt they needed to sustain the decision of the Zoning Enforcement Officer.

Commissioner Mazzotta noted that with all the documentation provided that it was a single-family, she was having a hard time seeing that the property was ever a legal two-family dwelling.

Commissioner Whiteside noted his agreement with the appellant, specifically that the use at the time of the ordinance change was germane. He stated that even if the Certificate of Occupancy, which was issued in 1954, said single-family, there was more weight for him that the property was used as a two-family from 1960, and at the date of the ordinance change in 1962, he noted agreement with the appellant that it is a vested grandfathered right there. The main issue after that was whether there was enough evidence to show intent for abandonment. Commissioner Whiteside discussed the direction from the judge, specifically looking at whether there was abandonment of the use. He referred to case law, stating that intent of the property owner must be to relinquish permanently. He stated that he did not see enough evidence to show a permanent abandonment of the use at the rebuild in 1969. The Certificate of Occupancy at the time states single-family, but it is possible that the property owners at the time did not know that they were nonconforming. He noted that the bar for abandonment is higher, and he stated that he could not get over the bar.

Commissioner Zelek noted that after the review of the records, he sees the property as a one-family.

Attorney Coppola addressed the Board to provide direction during the deliberation. She noted the importance of focusing the discussion on what the court has asked the Board to address. She urged the Board to review the language from the court, specifically referring to page two of the October 24th correspondence from Attorney Coppola to the Board. She noted the importance of being responsive to the court and encouraged the Board to read the language over. She noted that with a nonconforming use, it is important to look at the period of time when the use came into existence and then when the regulations changed to make it nonconforming. She noted that it is clear from the judge's language that 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. She noted that the judge states that 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. Attorney Coppola urged the Board to discuss the first piece, specifically when the structure came into existence, and whether it was a permitted legal structure, whether the use was actual, then talk about the use over time and whether it was abandoned.

Attorney Coppola noted that the proposed findings of fact were exhibit #4 (offered by Attorney Griffith) and exhibit #10 (offered by Ms. Giusti).

Chairman Francalangia and Commissioner Mazzotta both discussed the intent of construction, noting that there was no evidence to support the legal construction of a two-family dwelling. It was noted that the unit was possibly constructed for extended family members. Chairman Francalangia noted an overwhelming amount of evidence to support a single-family use. He noted that it would not be in the best interest of the Board to go against Town records, as it could potentially lead to other litigation going against the Town's records.

Attorney Coppola offered guidance. She noted the importance of deciding based on the facts presented, rather than what could potentially be brought forth in future matters. Zoning matters are very fact dependent and record dependent, so there really is no precedent. She reiterated the importance of determining whether the use was legal, actual and in existence and then the regulations changed, did the use continue throughout..

Chairman Francalangia asked for clarification on when it would be appropriate to vote. Attorney Coppola noted that the Board should have more discussion based on the two proposed findings of fact and asked that the Board look at the proposed findings.

Attorney Coppola discussed the proposed findings of fact submitted by Attorney Griffith. She summarized, noting that he proposed that the basement was originally constructed and designed to be used as a second dwelling. She referred to paragraphs two and three. She also discussed paragraph four, which addressed the cabinetry and his offering of related exhibits.

Attorney Coppola discussed the proposed findings of fact submitted by Ms. Giusti, noting that they focus on the Town records and permits not supporting a two-family dwelling, referring to paragraph two. It was also noted that there was no indication of a prior owner trying to rectify inaccuracies with the Town.

Attorney Coppola noted that there were two opposing arguments, and noted there were four members sitting and referenced statutory requirement of agreement of members (to reverse the order)

Commissioner Mazzotta discussed the history of the property, noting that there were no leases on file. She explained that family members living at the property do not constitute a legal rental, even if they were supplementing the income.

Chairman Francalanga reiterated the statement made by Commissioner Mazzotta. He noted that the Town has provided many points of evidence to support that the property has always be a single-family dwelling. He noted that the zoning ordinance adopted in 1948, and then revised in 1954, would have been in effect at the time of construction. Records have always supported a single housekeeping unit.

The Board discussed the tax records. Chairman Francalanga noted that the property has never been taxed as a two-family dwelling. Commissioner Whiteside noted that the taxation history should not be relevant, but Commissioners Mazzotta and Francalanga disagreed. Commissioner Whiteside discussed the legal definition, stating that the taxation is a separate process that is incidental to the legal permitted use. He noted that the Certificate of Occupancy and applications should have more weight than the taxation of the property. The process could result in an unpermitted use, but in this case, the assessment process did not. Commissioner Whiteside also noted that the footprint of the foundation should be relevant, as it shows the intended use, noting that the separate entrance to the basement could have been intended for an apartment. Commissioners Mazzotta and Francalanga disagreed. Chairman Francalanga noted that there are many properties in Town with walk-out basements, but that does not mean that they are all apartment entrances.

Chairman Francalanga discussed the plumbing, tax records, and building permit applications, and they have all said single-family. Chairman Francalanga noted that the Board represents the Town, and it must support Town records.

Commissioner Whiteside noted that the majority of the Board would not support that the property was initially constructed as a permitted legal two-family structure. Commissioner Mazzotta noted that the Board was being expected to interpret intentions, which could not be considered facts. Commissioner Whiteside noted that intentions should be relevant to consideration. He noted that the Board is allowed to bridge the gaps and make reasonable inferences.

Chairman Francalanga discussed the proposed findings of facts, stating that the first page of facts is Town records, the second page is half Town records, half hearsay, and the third page is all hearsay. Attorney Coppola asked for clarification on item numbers. He clarified, noting that there were three

pages of records items following a cover page. It was noted that he was referring to the Memorandum of Staff Comments dated 11/20/20. Commissioners noted that it was exhibit #11. Attorney Coppola noted that the proposed findings of fact submitted by Ms. Giusti was exhibit #10. He noted that the first page of exhibit #11 all has Town supported records, rather than conjecture on other pages. Commissioner Whiteside noted that in listening to the Chair's rationale, it appeared that the Board should be most concerned with exhibit #10, item #1. He noted that the Board should make that statement as a finding of fact because it relates back to the language communicated by the judge. He noted that the judge has stated that if the Board determines that the basement apartment was initially constructed as a permitted legal structure and use, then the discussion could continue to the next step. He noted that based on the discussion, exhibit #10, item #1 is the statement of fact pertaining to the Board's ruling. He noted that the Board has not determined that the basement apartment was initially constructed as a permitted legal structure and multi-family use.

Chairman Francalanga asked if the Board members were in agreement. The Board was in agreement with Commissioner Whiteside's summary. Chairman Francalanga asked Attorney Coppola if the Board needed to continue discussion. Attorney Coppola addressed the Board, asking for clarification on the question. She summarized Commissioner Whiteside's statements in that the Board was using the language submitted by Ms. Giusti (Attorney Coppola read the language) that a claim of an existing nonconformity for use as a two-family would not be supported by the record as the basis for the determination. She then asked for the Board to articulate the question. Chairman Francalanga asked if the discussion needed to continue.

Attorney Coppola noted that the Board should also review the proposed findings of fact submitted by Attorney Griffith. She noted that in paragraph #1 submitted by Attorney Griffith, he notes that the property was initially designed and constructed as a two-family, specifically that the basement was to be used by a party other than the family that utilized the main house. She noted that the Board spoke briefly about intent, and that it was difficult to determine the intent of the initial property owners in designing and constructing the structure. She explained that the intent could be part of the collective reasoning as well.

She reviewed the judge's language again, and it was noted that the Board could comment on the actual use. She noted that there is a difference between the design and construction of the structure versus intent versus actual use. She noted that it would be responsive to the court's direction, as the judge has asked the Board to consider how the property has been used over time.

Chairman Francalanga reread the court's direction, and he noted that none of the evidence presented points to the property being a legal nonconforming structure.

Attorney Coppola noted that the court's direction asks the Board to review the structure and use and the judge wants the Board to weigh in on the structure and use.

Chairman Francalanga noted that there were two items up for discussion. Attorney Coppola clarified, noting that the Board seemed to be leaning toward paragraph #1 in Ms. Giusti's proposed

findings of fact. She noted that the second sentence may not be completely responsive to the judge's remand order. She noted that the judge may be looking for more detail than that.

Chairman Francalangia noted that they have discussed two items. The first item discussed was about the legal nonconforming structure and use. The second item was the timeline of the basement apartment, specifically that it was never legally constructed. He asked whether the judge was looking for Town records.

Attorney Coppola explained that it would be helpful for the court to know which documents the Board was using to make a determination. Chairman Francalangia noted that exhibit #11 clearly shows that the records show that the property is a single-family property. He noted that based on the evidence, the basement apartment was not a legal nonconforming use, as there were no records of leases. Commissioner Whiteside noted that the original Certificate of Occupancy shows that the property is a single-family dwelling, and therefore, the property is not a legal multi-family or two-family dwelling. He noted that statement pertains to the structure. Commissioner Whiteside discussed the use, noting that it was not a separate housekeeping unit or separate use by a whole family. The Board discussed the affidavit from Mr. Cyr (exhibit #2), which was submitted by Attorney Griffith.

Chairman Francalangia noted three items, with the first showing that all construction records point to a single-family dwelling. The next point was that the last permit obtained showed the intent to abandon the use. He also noted that the basement apartment is not a legal nonconforming use. Commissioner Whiteside noted that even if it was a multi-family property at one point, the use was abandoned with the 1970 certificate of occupancy.

Commissioner Zelek noted agreement with all statement made.

Attorney Coppola noted that importance of clearly articulating reasoning behind the motion.

Chairman Francalangia reiterated the Board's determination. He noted that all construction records show the property as single-family, including the permits and Certificates of Occupancy. He noted that no records have ever shown the property as anything other than a single-family property. He explained that when the house burned, and another permit was granted as a single-family, which inferred that the property owners were abandoning any use of the property as a multi-family, if it had ever been used in that capacity. He continued, noting that there has been no evidence presented to support that the basement apartment is a legal nonconforming use.

Attorney Coppola noted that if the Board were to find that there was no legal nonconforming use, then they would not have to discuss abandonment. She noted the importance of being clear when discussing intent. She explained that based on the previous transcripts, the court determined that the Board needed to clearly articulate the reasons for upholding the order, encouraging the Board to make reference to item numbers as part of the motion. Attorney Coppola noted that in her role, she could not guide the discussion, but she could guide the Board around the language.

Commissioner Mazzotta noted that the basement had to have been impacted when the fire took place on the first floor.

Chairman Francalangia reiterated again the basis for the Board's decision. He noted that all building and construction records have indicated a single-family dwelling. He noted that there was never evidence of a legal two-family structure.

Chairman Francalangia moved to uphold the decision of the Zoning Enforcement Officer's Cease and Desist Order for 1005 Kensington Road based on:

1. All the construction records that are shown for this property show it as a single-family, both permits and certificates of occupancy. Also, at the time of a fire in 1969-1970, it was shown as a single-family.
2. Nothing ever existed to show that this was a legal conforming structure and a legal conforming use. Based on the 1969 fire, when it was said to be a single-family use, there was the intent to forget about any other use. There was no intent at that time to continue to make it multi-family if in fact it was multi-family, which it was not based upon the 1954 and 1955 records, which records show it was not multi-family.

Commissioner Mazzotta seconded the motion.

The motion carried unanimously.

IV. Approval of Minutes:
October 27, 2020 (Francalangia, Mazzotta, Whiteside, Coppola, Zelek)

Chairman Francalangia moved to table the minutes to the next meeting, which was seconded by Commissioner Zelek. The motion carried unanimously.

V. Review of ZBA 2021 Schedule
(Discussed earlier in the meeting)

VI. Adjournment

Commissioner Zelek moved to adjourn the meeting, seconded by Commissioner Whiteside. The motion carried unanimously. The time was 10:00 p.m.

Respectfully submitted,

Kristen M. Grabowski
Recording Secretary

BERLIN ZONING BOARD OF APPEALS

March 23, 2021 7:00 p.m.

The Berlin Zoning Board of Appeals will meet remotely via Webex video conference* on Tuesday, March 23, 2021 at 7:00 p.m. The Town of Berlin invites you to access and participate in this meeting via Webex video conference* or telephone conference call as provided below.

**The WebEx call to participate in this meeting is a toll call and you may incur additional charges for placing the call by your phone service provider. The Town does not reimburse participants for any toll charges. Please check with your phone service provider before making the call.*

Click the link below to join the meeting by Webex:

<https://townofberlin.my.webex.com/townofberlin.my/j.php?MTID=m669b5454075e63fd98fdcc48def53d42>

Or join by phone:

+1-408-418-9388 United States Toll

Meeting number (access code): 132 994 6433

Meeting password: ZBATu700 (92288700 from phones and video systems)

Members Present:

Antonio Francalangia, Chairman, Leonard Tubbs, Co-Vice Chairman, Sandra Coppola, Secretary, Corey Whiteside, Ryan Zelek, Alternate, seated

Members Absent:

Nelson Graca, Co-Vice Chairman, Hunter Mathena, Alternate, Christine Mazzotta, Alternate

Staff Present:

Maureen Giusti, Acting Town Planner, Adam Levitus, Zoning Enforcement Officer, Kristen Grabowski, Recording Secretary

Call to Order

Zoning Enforcement Officer Levitus took a roll call. Chairman Francalangia called the meeting to order at 7:02 p.m.

Public Hearings:

ZBA #2021-03

0 Berlin Turnpike

**Map 10-2 Block 83 Lots 12-7333, 12-7334, 13A,
13C-7509, 13C-7510**

a.k.a. 404 Berlin Turnpike

BT 2008 LLC (Peter D'Addeo, Managing Member of D'Addeo Family Limited Liability Company, Member of BT 2008 LLC) is requesting a motor vehicle use location approval for a gasoline filling station per Berlin Zoning Regulation XI.R. The properties are owned by BT 2008 LLC and the gasoline filling station is being proposed as a component of a proposed mixed-use development. *(Continued from 1/26/21)*

Mr. Levitus noted that a proposed application is currently being heard before the Planning and Zoning Commission. It was noted that the public hearing is still open. It was noted that the applicant has requested that the Zoning Board of Appeals public hearing be postponed until the next meeting.

Chairman Francalanga moved to postpone the agenda item to the next meeting (April), seconded by Commissioner Tubbs. The motion carried unanimously. (Francalanga, Tubbs, Coppola, Whiteside, Zelek)

ZBA #2021-05 379 Main Street – East Berlin Map 23-2 Block 152 Lot 6

Ryan Haley (property owner) is requesting a variance for northerly side yard of 2 feet, 8 inches when 30 feet is required and a westerly front yard of 37 feet, 4 inches when 50 feet is required in the R-43 Zone per Berlin Zoning Regulations V.A.10 for a new 1-car attached garage and small addition. The proposed new garage and addition would be located in the same general area as an existing detached garage and an existing lean-to attached to the house (existing garage and lean-to to be removed).

NOTE: The public hearing was not opened at the 2/23/21 ZBA meeting and was postponed at the request of the applicant. The dimensions for the requested yard variances for ZBA #2021-05 have been updated by the applicant since the 2/23/21 ZBA meeting. The applicant is now requesting a 2-foot, 8-inch northerly side yard and a 37-foot, 4-inch westerly front yard instead of a 1-foot northerly side yard and 37.5-foot westerly front yard. The overall project of a new 1-car attached garage and addition to replace an existing detached garage and lean-to has not changed.

Ryan and Shelley Haley were on the call to present the application to the Board. Commissioner Whiteside recused himself, noting for the record that he would not be offering comments or feedback on the application as a commissioner or member of the public.

Mr. Haley began the presentation, noting that he and his wife purchased the property in 2010, and they have been working to update and improve the house since then. He explained that the time has come to make significant improvements to the exterior of the property. It was noted that they have two small children, and they have reached a good point to renovate and redo the exterior of the property.

He summarized the request for the variance, noting that the scope of the project includes the removal of a detached one-car garage and attached lean to, and the construction of a new attached one-car attached garage and addition to the existing 1770 colonial. He explained that the proposed new construction will be in the same general area of the property, and would total approximately 865 sq. ft. It was noted that the project would also include updating the efficiency of the home, along with replacing the siding. He noted that the home was built around 1770, and the existing detached garage was built around 1930. It was noted that all structures on the property predated zoning, and all of the

pre-existing structures are located within the front and side yard setbacks. He explained that the at the closest point, the existing structure is 2 ft. 6 in. from the property line, and the new proposed garage is 2 ft. 8 in. at the closest point, as it will be slightly shifted and pivoted. The new proposed plans are 122 sq. ft. smaller than the original proposals, which had the garage about 1 ft. from the property line. The size of the proposed garage is a result of the standard overhead of a garage door, along with space to accommodate a family vehicle and room for proper egress/circulation around the vehicle. The garage includes limited space along the east side for storage of the lawn tractor. Due to the size and proportions of the existing garage, it is not adequate for a modern vehicle.

Mr. Haley spoke about the desire to preserve the existing backyard, which is what initially drew him to the historic property.

Mr. Haley spoke about the hardship, reiterating the need for a variance for the front and side yard setbacks. He noted that coupled with the unique design of the property, along with the desire to continue to use the backyard as is, a variance would be necessary. It was also noted that the plans allow the applicant to maintain the existing driveway as the main entry to the property. He reiterated that the existing structures predated zoning, as the home was built 250 years ago. He noted that the existing structures are located tight within the north and west boundaries, and make it impossible to apply the strict zoning regulations, while also maintaining the use of the backyard as desired. Due to the location of the house within the setback area, there are not opportunities for adding onto the house without impacting a portion of the front or side yard areas. The issues described were in effect long before the Haleys became the property owners, and it was noted that they are beyond their control. Mr. Haley noted that similar conditions do not appear to be anywhere else within the adjacent properties, with the exception of the neighbor to the south, where the house appears to encroach on the 30-ft setback.

Mr. Haley discussed other potential locations for the addition on his property. He discussed the possibility of locating the proposed garage addition on the east and south sides of the property, but when drafted on plans, the structure would have taken up much of the backyard. It was also noted that there would have been significant modifications to the topography, as well as the removal of two mature maple trees. Additionally, the destruction of the hand-dug well would have been necessary. Relocating the addition to the rear of the property would have significantly impacted the backyard space, which Mr. Healy noted brings much value to the property.

Mr. Haley further discussed the design option locating the proposed garage off the southeast corner of the house, which was considered prior to submitting the current plans. It was noted that the garage would consume a significant portion of the main area of the backyard, which the property owners wish to preserve. The option would have also required a new access driveway, routed through the middle of the backyard.

Mr. Haley discussed another less-impactful option as well. He noted that they explored constructing the garage on the north side of the house (in the backyard), which would have allowed the property owners to maintain use of the existing driveway by extending it east along the property line to the new garage behind the house. With this design, the garage doors would face north, but this location would not allow for a proper turning radius to maneuver the car into the garage. In order to achieve the

turning radius, the garage would have to be pushed to the south side of the existing house, which would have consumed the majority of the outdoor space. As previously discussed in the first option, the Haleys wish to preserve the backyard outdoor space, so that option was not feasible. Additionally, that option would eliminate the existing vegetable garden, significantly reduce natural light into the eastern side of the house, relocation of the existing sanitary sewers, jeopardize the existing maple trees, and required removal of existing trees along the northern property line, which would have negatively impacted the neighbors to the north. This option would have also compromised sightlines to the backyard, which would pose a safety risk to the wellbeing of the Haleys' young children.

Mr. Haley summarized the presentation, noting that the current proposal is least impactful, and achieves the design goals of the garage and addition, which preserving the existing use and historic character of the property. While the proposed garage is larger, it allows for more space between the garage and the north property line. The northwest corner would be 5-ft. 3-in. from the property line, and it is currently 2-ft. 6-in. The northeast corner would be 2-ft 8-in, and it currently 3-ft. 1-in. The resulting side yard proposed adjacent to the garage would provide sufficient space for maintenance and upkeep of the garage. The remaining side yard would not be used to access the backyard, as there is an existing fence that would remain and prevent access around the back of the garage. The backyard would be access through the garage or the house, or through an existing gate near the southeast corner of the house.

Commissioner Coppola inquired about the proposed location of the garage, asking if it could be located on the same footing. Mr. Haley noted that the existing garage appears to be sitting on a wood framed floor, and it would not be suitable. It was also noted that the garage was shifted slightly to align with the house for the addition.

Chairman Francalangia discussed the proposed garage, noting that from a variance perspective, the proposed garage location was better than the existing garage location, concerning the west side of the property. Mr. Haley noted that the side in question was the north side. Mr. Haley confirmed that the size of the garage has increased, but it has been shifted away from the property line. Chairman Francalangia confirmed the proposed distance from the property line as 2-ft. 8-in. in the back, and 5-ft 3-in. in the front of the structure.

Chairman Francalangia noted concerns about the location of the garage in reference to the northern property line. Mr. Haley discussed the previously submitted design with the original application had the garage 1-ft from the property line. He noted that the plans were tweaked to reflect an overall reduction in size. The distance went from 1-ft to 2-ft 8-in. from the property line.

Commissioner Tubbs revisited Commissioner Coppola's questions, asking why the same footprint could not be used. Mr. Haley noted that the current structure is not aligned with the house, and the proposed layout accomplishes two objectives. The first is moving the new garage away from the property line, and the second is aligning the garage with the house, which would keep the character of the house and make it more aesthetically pleasing.

Attorney Tom Vincent, attorney for Dorothy Warren (abutter to the north) asked to address the Board.

Atty. Vincent noted that a letter was emailed to Mr. Levitus, and he expressed the desire to read it into the record. Chairman Francalangia invited Atty. Vincent to read the letter. Mr. Levitus noted that he received the letter, and he projected it on the screen for audience members to review.

Atty. Vincent read the letter of opposition into the record. In the letter, Atty. Vincent noted that he represents an abutting property owner. Atty. Vincent noted that proposed garage addition is in close proximity (less than 3-ft) to the property, and the overall footprint is increasing from the current structure. He also noted that with the lot size being over 1-acre, with room in the rear of the house for the construction of a garage addition, there is an overall lack of hardship with the proposed variance request.

Atty. Vincent and Mr. Haley discussed the proposed garage addition, including overall square footage, property topography, and the proposed location.

Mr. Levitus addressed the Board, clarifying points that were made. It was noted that Staff does not have an opinion where the delineations are or are not for the garage versus other areas of the addition; rather, the key criteria for the Board's focus would be in regard to the setbacks themselves, and the encroachment on the setbacks. It was noted that the proportion of the garage itself, whether increasing or decreasing, would be less relevant than the nature of the structure increasing into the setbacks and the variances required as a result. It was noted that the variance is required because the structure is encroaching on the setbacks (front yard and side yard to the north), not because of the general size of the structure.

Comments in Favor

Ewa Whiteside, 386 Main Street, East Berlin

Ms. Whiteside addressed the Board, and noted support of the proposed variance. She noted that the applicants have explored many options, and they have appropriately resubmitted plans based on the feedback from neighbors. She noted that the proposed addition will add significant value to the neighborhood, including Mrs. Warren's property. She noted that the Town should be encouraging young couples to stay in Town.

Comments in Opposition

(See previous comments shared by Atty. Vincent.)

Staff Comments

Mr. Levitus noted that overall the topic was fairly comprehensively discussed by the applicant and members of the public. He noted that the focus for discussion would be the variances being requested. He noted that although the severity of the side yard setback is being reduced, overall, it will be a nonconforming structure. He noted that the variances must still follow the rule of hardship, so identifying whether or not there is sufficient proof of hardship would be key element to discuss for both the front and side yard setbacks. He noted that there may be confusion because of a reduction in one area, but an increase in another portion of the building.

Commission Coppola noted that the property is not an odd sized lot or a corner lot. She continued,

noting that the applicant spoke to the desire not to lose the backyard or to cut down trees, which is understandable. Ms. Coppola directed her comments to the application, stating that there would be potential for the garage to be located in other places on the property. She asked the applicant if convenience and aesthetics would make the current plan the best option.

Mr. Haley noted that it was not just the convenience or aesthetics driving the design and location. He noted that the objective was to have an attached garage to the property that allows the family to use the property as they desire, while also using the existing driveway and maintaining use of the existing backyard. He continued, stating that what was being proposed would be very minimal impact to his property, as well as the neighboring property. He noted that the plans shift the garage slightly, and expands it a bit away from the property line. Mr. Haley noted that the site plan (displayed on the screen) does not reflect the unusable portion of the yard. He explained that about 50% of the area in the backyard is heavily wooded and swamped on the east side of the property. He explained that the grade slopes significantly in the back. He explained that the usable portion of the property ends at the eastern most side of the existing shed. He explained that the primary use of the existing backyard is directly behind the house, and the applicants are trying to preserve that portion of the yard.

Atty. Vincent addressed the Applicant, asking why the existing driveway could not be used. Mr. Haley noted that two other options were explored to include garage behind the house, but the turning radius would not have been sufficient unless that garage were pushed the southern most extreme side of the house. That would have impacted the existing sanitary piping, trees, and daylight into the back of the house.

Chairman Francalanga refocused the discussion, noting the purpose of the discussion had to be focused on the nature of the variance.

Chairman Francalanga moved to close the public hearing, which was seconded by Commissioner Tubbs. The motion carried unanimously. (Francalanga, Tubbs, Coppola, Zelek)
Commissioner Whiteside previously recused himself from the application.

Commissioner Whiteside rejoined the meeting for the next application.

ZBA #2021-06 276 Chamberlain Hwy Map 8-3 Block 12F Lot 5B

Tim Sullivan (property owner) is requesting a variance for a 6-foot-tall fence in a residential front yard when up to 3 feet tall is permitted in a residential front yard per Berlin Zoning Regulations §IV.B.7. The property is on a corner lot, with the requested variance along West Lane.

Tim and Melissa Sullivan were present on the call to present the application to the Board. Mr. Sullivan explained the nature of the variance, noting that the property is a corner lot, and while the location of the needed variance is considered a “front” yard, it is located in the back yard of the property. Because of the regulations, the property line is considered a second front yard. Mr. Sullivan noted that the closest corner of the proposed fence would be 243-ft to the stop bar at the intersection of West Lane and Chamberlain Highway. He noted that the fence would not impact any sight lines. The corner of the

property is 93-ft from corner to the stop bar.

Mr. Sullivan noted that nature of the hardship, citing the need for privacy from the neighbor to the south, but more importantly for the safety and security of his family. He noted that he has three young children, and West Lane has become quite busy with foot traffic, distracted driving, and speeding. The police have been notified, and it was reported that they have attempted to assist with traffic concerns.

Mr. Sullivan also noted that the existing shed falls near to the property line, and it would be outside of the 40-ft required setback. He explained that in addition to the safety and security of his family, he is looking to secure the shed due to many break-ins in the area. He noted that in the immediate area, there have been two recent car break ins, shed break ins, and children's toys have been stolen right out of the yard more than once, which were located by the shed.

Mr. Sullivan discussed alternatives, noting that a 3-ft. fence would be permitted without the variance. He explained that a 3-ft. fence would not provide the security needed. He explained that moving the fence to the 40-ft. mark would leave the shed in a vulnerable spot, and it would reduce the usable yard space by 32%. He noted that plantings could provide a border, but they would not provide security.

Mr. Sullivan noted that a previous ZBA meeting, a similar request was made, and blight was brought up as an issue. He assured the Board that the fence would be well maintained.

Mr. Sullivan noted that as a result of the required mailing, he heard from five neighbors, who were all in support of the project. He explained that the purpose of the request was for the safety and security of his family.

Chairman Francalangia noted that variances have been granted in the past, specifically referring to a one recent application that was a split vote. He explained that no precedent has been set, as all applications are looked at individually based on circumstances. He noted that there have been previous approvals, which have turned into a nightmare, and others have turned out well. He spoke about a recent variance approval, which revolved around a power structure concern. In that case, the power company would not allow for any evergreens to be planted in the location, which would have been an alternative. Mr. Sullivan confirmed that he was referring to that application. Chairman Francalangia noted that evergreens would be an alternative to the fence, noting that wholesale nurseries could be an option. Mr. Sullivan noted that arborvitaes were considered, and the plan is to eventually put them in along the Chamberlain Highway frontage. He noted that that concern is safety and security, and trees do not provide the security needed. He noted that the trees would take years to mature enough to provide a visual barrier.

Commissioner Whiteside inquired about the hardship, asking if any reports of criminal activity were included in the application, especially because part of the hardship speaks to recent thefts in the area. Mr. Sullivan noted that he's had recent communications with neighbors impacted. He noted that he doesn't have any police reports, but the security cameras show quite a bit of activity. Mrs. Sullivan noted that within the last two weeks, there were people going into sheds on West Lane. She noted that there have been many times when people have pulled over to ask her children directions, and the kids have been terrified. She noted the desire to have her children feel safe. She noted that she contacted

the police department, asking for a sign to be installed. The Department was able to set up a “warning” speed sign for a few weeks, but that did not help much. She noted that her children have made “slow down” signs in an effort to get cars to slow on West Lane. She explained that it would be peace of mind to know that their yard would be secure with the children playing in the backyard. It was also noted that that area of the backyard is a blind spot, and it cannot be seen from inside the house, as there is not clear sightline.

Commissioner Coppola inquired about the possibility of moving the fence to the 40-ft line. Mr. Sullivan noted that moving the fence to the 40-ft. line would not include the shed in the fenced area. It would also reduce the reasonable use of the backyard.

Mrs. Sullivan noted that the front yard is not safe for the children to play, as it is quite busy. She noted that there is a daily clean up of trash in the front yard. She explained that the fence would provide security, and it would prevent the children from running into the street. It was also noted that arborvitae would not do the same, as the kids could simply walk between the trees.

Staff Comments

Mr. Levitus noted that the main Staff comment would be to focus the discussion on the hardship versus the Applicants’ requested fence configuration. It was also noted that the regulations allow for a 3-ft. fence, but because the request is for a 6-ft. fence, a variance would be needed.

Comments in Favor

There were none.

Comments in Opposition

There were none.

Commissioner Coppola moved to close the public hearing. Commissioner Whiteside seconded the motion, which carried unanimously. (Francalanga, Tubbs, Coppola, Whiteside, Zelek)

Regular Meeting:

ZBA #2021-03	0 Berlin Turnpike	Map 10-2 Block 83 Lots 12-7333, 12-7334, 13A, 13C-7509, 13C-7510
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a.k.a. 404 Berlin Turnpike

BT 2008 LLC (Peter D’Addeo, Managing Member of D’Addeo Family Limited Liability Company, Member of BT 2008 LLC) is requesting a motor vehicle use location approval for a gasoline filling station per Berlin Zoning Regulation XI.R. The properties are owned by BT 2008 LLC and the gasoline filling station is being proposed as a component of a proposed mixed-use development. *(Continued from 1/26/21)*

Continued to the April 27th meeting.

ZBA #2021-05 379 Main Street – East Berlin Map 23-2 Block 152 Lot 6

Ryan Haley (property owner) is requesting a variance for northerly side yard of 2 feet, 8 inches when 30 feet is required and a westerly front yard of 37 feet, 4 inches when 50 feet is required in the R-43 Zone per Berlin Zoning Regulations V.A.10 for a new 1-car attached garage and small addition. The proposed new garage and addition would be located in the same general area as an existing detached garage and an existing lean-to attached to the house (existing garage and lean-to to be removed).

NOTE: The public hearing was not opened at the 2/23/21 ZBA meeting and was postponed at the request of the applicant. The dimensions for the requested yard variances for ZBA #2021-05 have been updated by the applicant since the 2/23/21 ZBA meeting. The applicant is now requesting a 2-foot, 8-inch northerly side yard and a 37-foot, 4-inch westerly front yard instead of a 1-foot northerly side yard and 37.5-foot westerly front yard. The overall project of a new 1-car attached garage and addition to replace an existing detached garage and lean-to has not changed.

Commissioner Tubbs moved to approve application for discussion only. Commissioner Zelek seconded the motion.

Commissioner Coppola noted concern about the stated hardship. She noted that there were other places on the property to put the garage addition. While the other locations may not be as convenient or cost effective, there were other locations to consider. She noted that the homeowners' line of site may be impacted, but that does not fall into the definition of hardship.

Commissioner Tubbs agreed with Ms. Coppola's statement about hardship. He noted that there is over one-acre of land, which would allow the Applicant to put the garage in the rear of the property. He noted that there would be room on the opposite side of the house.

Commissioner Zelek noted that if the garage was located on the other side of the house, it would still be within the 50-ft. front setback. He noted that the whole house was within the setbacks. Chairman Francalangia confirmed, noting that if the garage was located on the other side of the house, a variance would not be needed. Commissioner Zelek noted that no matter how the garage was attached to the house, a variance would be needed. Commissioner Coppola noted that if it was attached in the back, a variance would not be needed. Commissioner Zelek noted that a variance would still be needed, even if the garage was located in the back of the property. Commissioner Zelek referred to the first site plan (F-1). Commissioner Tubbs noted that even if a variance was needed, it would be less invasive. Chairman Francalangia noted that if the garage were located in the back of the property, a variance would be needed there, but it would not be as invasive as the side yard. Commissioner Tubbs noted that the setbacks are 30-ft. and 50-ft., so the variance would be needed. It wouldn't be a 2-ft. 8-in. variance, and it would be greater. Commissioner Tubbs also noted that the current pre-existing structure is nonconforming. Chairman Francalangia noted that if the proposed garage were built using the same footprint, the building would be skewed, which would not be ideal. Chairman Francalangia and Commissioner Tubbs asked for Staff clarification on whether a variance would be needed if the

Applicant used the existing footprint to construct the garage.

Mr. Levitus spoke to the regulations (separate from the application). He noted that an existing nonconforming structure shall not be increased by any means without a variance, as part of regulations. It can be reduced, as part of the regulations, and it would be permissible without a hardship-based variance. He noted that there are provisions within the regulations that speak to repair of existing residential structures, up to 100%. He noted that they would have to dive into exactly what would be done, but there is potential to approve without a variance. It comes down to a project by project basis, but if it were to come to the exact same spot, there are potential avenues for constructing that without a variance.

Commissioner Zelek noted that the existing garage would not accommodate modern car, which was further discussed by Chairman Francalangia. He noted that the applicant reported that the existing garage would fit a modern car, further noting that if a car fits, but doors cannot open, it would not serve the purpose. He noted that a 270 sq. ft. garage does not allow for much, as most cars are about 120 sq. ft.

Commissioner Zelek moved to close the discussion, which was seconded by Chairman Francalangia. The motion carried unanimously. (Francalangia, Tubbs, Coppola, Zelek)
Commissioner Whiteside recused himself.

Commissioner Zelek approve application as submitted, and the motion was seconded by Chairman Francalangia. The motion was unanimously defeated. (Francalangia, Tubbs, Coppola, Zelek)
Commissioner Whiteside recused himself.

ZBA #2021-06 276 Chamberlain Hwy Map 8-3 Block 12F Lot 5B

Tim Sullivan (property owner) is requesting a variance for a 6-foot-tall fence in a residential front yard when up to 3 feet tall is permitted in a residential front yard per Berlin Zoning Regulations §IV.B.7. The property is on a corner lot, with the requested variance along West Lane.

Commissioner Tubbs moved to approve the application, and it was seconded by Commissioner Zelek. The motion was defeated with a vote of 3-2-0. Voting in favor: Tubbs, Coppola, Zelek. Voting in opposition: Francalangia, Whiteside.

Approval of Minutes:

October 27, 2020 (Francalangia, Whiteside, Mazzotta, Zelek, Coppola) – 1005 Kensington Remand Underlined

Commissioner Whiteside moved to approve the minutes of October 27, 2020. The motion was seconded by Commissioner Zelek. The motioned carried unanimously. (Francalangia, Coppola, Whiteside, Zelek). It was noted that Ms. Coppola was not part of the remand, and she voted for the non-remand potions of

the meeting.

February 23, 2021 (Francalangia, Tubbs, Graca, Coppola, Zelek)

Commissioner Coppola moved to approve the minutes of February 23, 2021. The motion carried unanimously (Francalangia, Tubbs, Coppola, Zelek). Commissioner Whiteside was not in attendance at the February meeting, and did not vote.

Housekeeping

Mr. Levitus discussed an item for housekeeping purposes. It was noted that at the present time there is an item before the Planning and Zoning Commission for a text amendment to change the regulations for gas stations, effecting the 1500-ft. rule. He noted that there are additional provisions that would impact the size of the attached retail store. He noted that the verbiage would be emailed out to the Board just so the board was aware, as motor vehicle approvals are part of the ZBA purview.

Commissioner Zelek noted that it would be helpful for future applicants to submit photos with the application package. He asked Mr. Levitus to encourage applicants to do so moving forward. Mr. Levitus noted that he would suggest that to future applicants.

Adjournment

Commissioner Tubbs moved to adjourn the meeting, which was seconded by Commissioner Coppola. The time was 8:36 p.m.

Respectfully submitted,

Kristen Deliman Grabowski

CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Spring 2021

Volume XXV, Issue 2

IMPOSSIBILITY TO COMPLY RAISED AS DEFENSE TO ZONING ENFORCEMENT

A judgment of \$125,000 in daily fines plus \$51,674.00 in attorney fees awarded by a trial was reversed by the State Appellate Court. The case concerned the use of a residentially zoned property as a junkyard and processing center for over a period of 5 years. The homeowner used her home in connection with her business, which was to clean out foreclosed properties. She would, under contract with the foreclosing lender, empty a foreclosed home of its contents and then sell or junk these items. Much of this material ended up at her home, where it was first stored indoors and then overflowed into the front and side yards of her property. The award was made under C.G.S. Sec. 8-12, which provides for daily fines as well as an award of attorney fees where the violation is deemed to be willful.

At trial, the homeowner raised the defense that it was impossible for her to comply with the zoning regulations because shortly after the issuance of the operative cease and desist order, her home was destroyed by fire. Due to an investigation regarding the cause of the fire, she was ordered by the police as well as her insurance carrier to not remove anything from the property. The court agreed that these orders did prevent her from complying with the cease and desist order and reversed the

court's decision as to its award of fines and attorney fees on this basis. A new trial was ordered solely on the issue of making a determination as to these issues. In issuing its remand order, the Appellate Court instructed that daily fines in a civil action are limited to a maximum amount of \$100.00 per day. The \$250.00 maximum amount is limited to a criminal conviction for a zoning violation. See *South Windsor v. Lanata*, 203 Conn. App. 89 (2021).

ENFORCEMENT OFFICER CAN MODIFY APPROVED PERMIT

A wetlands permit that was approved by the Commission was later modified by the wetlands enforcement officer. The permit as approved allowed for the construction of a single-family dwelling and an accessory structure as well as the creation of a yard adjacent to some wetlands.

[CONT. ON NEXT PAGE]

CONFERENCE WEBINAR

Please join us on April 21, 2021 at 3:30 pm for a webinar. The topic of discussion will focus on the many pending bills before the state legislature which negatively affect local zoning authority. An invitation to this webinar will be emailed to all members on our email list. A notice will also be posted on the Federation's website www.cfpza. We will also take time to recognize those members who received length of service awards and lifetime achievement awards.

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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Spring 2021

Volume XXV, Issue 2

When the applicant wanted to add additional fill so as to create a more level yard, the WEO approved the change. An abutting neighbor appealed this decision to the Commission, which affirmed the decision. An appeal to court followed.

The court found that the WEO acted properly as Connecticut General Statute Sec. 22a-42a(c)(2) provides the Commission with the authority to delegate a decision to approve or extend an activity not within a wetland or watercourse to its duly authorized agent.

The Commission's regulations contained a provision delegating the authority and there was evidence in the record that the WEO possessed the necessary training as required by the state statute. *See Zahid v. Inland Wetlands and Watercourses Agency*, 70 Conn. L. Rptr. 245 (2020).

TIME LIMIT CAN BE PLACED ON SPECIAL PERMITS

While it is well established that a special permit, once it is recorded on the land records, 'runs with the land', can zoning regulations place a time limit on the duration of the permit? The State Appellate Court says yes.

In this case, the commission approved a special permit to construct a retail center. A condition of the approval was that the proposed use must be completed within two years of the approval. The regulations also provided

for renewal of the special permit to allow additional time for completion. When the Commission approved such a renewal application, an abutting property owner appealed claiming that the approval had expired.

The State Appellate Court's review focused on the defense raised by the special permit holder that the permit ran with the land and thus could not expire. In reaching its decision that the permit could expire, the court focused on Connecticut General Statute Sec. 8-2 which provides the Commission with the authority to attach conditions to a special permit "necessary to protect the public health, safety, convenience and property values." The Court found that this statutory language empowers a zoning authority to impose a temporal condition on a special permit such as by requiring the completion of a development attendant to the permitted use within a set time frame. *See International Investors v. Town Plan & Zoning Commission*, 202 Conn. App. 582 (2021).

FAILURE OF A COMMISSION TO ACT IS NOT APPEALABLE TO COURT

When a planning & zoning commission refused to accept a site plan application, an appeal of this action by the commission was appealed to court. The applicant argued that since the commission had failed to render a

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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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decision on his site plan application within the time period stated in Connecticut General Statutes Sec. 8-3(g)(1) and 8-7d, the court should find its application automatically approved. Instead, the court dismissed the appeal, stating that only a decision could be appealed and that the commission's refusal to accept the application was not a decision.

Instead, the applicant should have filed a mandamus action with the court. This action would request an order from the court that the commission approve the site plan application as required by Connecticut General Statute Sec. 8-3(g)(1) and 8-7d because it failed to make a decision within 65 days of the filing of its application. The court did add that such an order would not be awarded as a matter of right as the court has discretion to deny a request for mandamus. *See B. Metcalf Asphalt Paving Inc. v. Planning & Zoning Commission, 69 Conn. L. Rptr. 24 (2019).*

ZONING LEGISLATION CONTINUES TO ADVANCE

Numerous bills have been submitted to the State legislature which seek to drastically amend our zoning laws by reducing local control and creating State mandates. For example, S.B. 1024 – An Act Concerning Zoning Authority, Certain Design Guidelines, Qualifications of Certain Land Use

Officials and Certain Sewage Disposal Systems, would require that multi-family and single-family housing be treated the same. It would also eliminate a commission's authority to consider the character of the town and replace it with a set of state-imposed guidelines. This bill, as well as many others, will soon emerge from various committees and face a vote before the State Legislature. The Federation asks that you visit our website and also www.ct169strong.org for more information and how to take action to preserve local control over zoning.

ANNOUNCEMENTS

Workshops

At the price of \$180.00 per session for each agency attending, our workshops are an affordable way for your board to 'stay legal'. Each workshop attendee will receive a booklet which sets forth the 'basics' as well as a booklet on good governance which covers conflict of interest and how to run a meeting and a public hearing.

ABOUT THE EDITOR

Steven Byrne is a practicing attorney with an office in Farmington, Connecticut. A principle in the law 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.

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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