

Town of Lincoln
Zoning Board of Review
100 Old River Road, Lincoln, RI
Minutes of January 4th, 2021 Meeting

Present: David DeAngelis- Chairman, Kazem Farhoumand, Lori Lyle- Vice Chairperson, John Mancini, Stephen Kearns, Charles Ruggerio, Frank Spezzano, Attorney DeSisto

Minutes: December minutes approved

Discussion of application process and requirements, discussion of standard clarification for Dimensional Variance, and clarification of Zoning Board member nomenclature.

Attorney DeSisto: Zoning has been a part of American Law since the late 1920's. The Supreme Court Euclid v. Cleveland said Zoning was something that could be done, and not violate someone's property, appropriate usage without being a nuisance. Zoning Law is based on The Law of Nuisance. Rhode Island is governed by the Zoning Enabling Act of 1991, prior to that there were statutes on Zoning. State delegates to cities and towns the ability to have Zoning Ordinances subject to The Enabling Act. Notices are always an issue with Zoning and it's not something that The Board does. Notices sent out for each application, published in the paper, and also abutters get a notice by mail (within 200ft of the property) and that's a predicate to an application going forward. If there's a problem with notice typically what would happen would be Zoning Official Hervieux would bring it to our attention, if there are problems with notice the matter would be continued and corrected. Minor problems with notice there is Case Law stating it would not impair the notice as long as people have a good idea about what is going on. Secondly, someone would show up at the meeting saying they did not receive a notice, wanting to stop and continue another month- there is case law, there was constructive notice because the individual showed up. There are cases of the Equal Access to Justice Act- everyone has equal access to justice, it started in connection to Civil Rights Case, Human Rights Commission Cases. There are four cases that apply to Zoning Boards and what the Zoning Board has done. If the plaintiff can make a case that they were denied equal access to justice and they were treated differently than other applicants, they get their costs reimbursed (legal fees, and preparing fees). The Barbera Case- The Zoning Board is a Quasi-Judicial Body, everybody is entitled to a fair hearing. *refers to a case in Johnston- applicant comes in, Zoning Board doesn't want to hear applicant, Zoning Board all voted without hearing- all denied applicant. Appealed to court. Everybody has a right to a hearing, anybody can file, entitled to a hearing no matter. Asks The Board if they would like to continue or ask questions.

Chairman: First thing on the memo is a Dimensional Variance. The most common application that we hear. We've talked about what would be the appropriate form of establishing calculations for the relief that somebody might need. We always come back to the most reliable way, which is to require somebody to get a survey. Sometimes, applicants withdraw their applications because the cost of them to continue with the required survey costs more than the job they are looking to complete.

Attorney DeSisto: Looked at other Zoning Ordinances around the state and it is not always required. Typically what you want to see is a Class I Survey, the top survey you can get. Cumberland has language for a Class III Survey- Conversation with Member Farhoumand and not something you can rely on so much.

Member Farhoumand: The language that we have asks for dimensions, not something most people can measure on their own. Most people don't know where their property line ends, think they own all the way to the pavement which is not true. Different classes of surveys Class I to Class IV, doesn't mean that Class I is better, just depends on what you are looking for. Class I is usually the Class you would want to use to know exactly where something is on a piece of property, and how far it is from the property line. Class III would be land slope.

Vice Chairperson Lyle: What would topography come under?

Member Farhoumand: Usually Class III. Foster Survey RI has good descriptions online. The language we don't tell them what we accept and what we don't, people don't know coming in. Most Dimensional Variances we should ask for a survey, but since it's not in the language we cannot ask for it.

Member Mancini: Reading the application instructions that he gave to us a year ago; number three: copy of proposed site plan drawn to scale, it is strongly recommended that a registered land surveyor or engineer draws up the site plan. I don't particularly like the "strongly recommended". Can we replace it with required?

Member Farhoumand: For dimensional purposes an engineer cannot do that either.

Zoning Official Hervieux: Applicants get a plethora of information thrown at them, before they get here. I advise every custom that comes to my desk that they need a survey. Here is why I am strong that this should be required to come before this board, it is required for a building permit, it is on the Rhode Island State Law and the Rhode Island Building Code you have to provide a site plan when you are doing a building. It says in The State Law it has to be acceptable by the Building Official. All buildings and decks (because they have footings that go into the ground) will need a survey, there is no reason not to require a permit here, if they are coming here they are already too close to the property line, a survey should be required.

Member Kearns: Is there a different language between site plan and survey?

Zoning Official Hervieux: No. If you look at the definition in The Building Code, a site plan can only be drawn by a surveyor. No one can put dimensions to a property line. If I were to change language I wouldn't say the class I would just say a survey is going to be required. Technically, to find dimensions from building to property would be Class I.

Member Kearns: Some surveys come through, with good definitions of boundaries and setbacks. Some are done very well, and others are hard to figure out.

Zoning Official Hervieux: It's the ones that are drawn by others that a surveyor would be difficult.

Vice Chairperson Lyle: The duty is on the applicant because they get that info upfront?

Zoning Official Hervieux: They always get the info. I also tell them if they are approved, they will have to get a survey to get a permit. The argument from them is always what if The Board denies it. That's why historically we let people come before The Board without a survey.

Member Kearns: Applicant comes in without a survey, and we continue next month. Generally we feel favorably upon a person who comes back with a survey.

Zoning Official Hervieux: Survey is good, that is reasonably aged. It could be 5-10 years old but if it's stamped by a surveyor it is still good.

Chairman: No other acceptable means to come to this Board with reliable measurements.

Attorney DeSisto: Under 45-24-58, the application procedures are supposed to be under the Zoning Ordinance. Makes a suggestion: Request the Town Council to amend the application procedure to include the survey. Suggests telling the Council this is causing issues for The Board, we'd like it changed from "strongly recommended" to "required". Warwick has surveys required, only the town with "required". Can't take any votes tonight because it is not posted, but can make suggestions. Amend application instructions from strongly recommended to required. When Zoning Ordinances are amended first they have to go to The Planning Board, for recommendation, it complies with the Comprehensive Plan, then Town Council with Public Hearing and notice and vote on it.

Vice Chairperson Lyle: Questions when they do the survey, that it is known that it is not guaranteed to pass.

Attorney DeSisto: Correct.

Chairman: Focus on what makes people come back, and fix why people have to come back. More accurate calculations come up repeatedly for people to have to come back.

Member Kearns: I would drop engineer and keep registered land surveyor.

Attorney DeSisto: For the February meeting, I would have a line on the agenda saying a proposal for the amendment of the Zoning Ordinance and table for language and take a vote so when it goes to the Council, it shows The Zoning Board voted on it. Distinction I do not recommend amending the sustenance part of Zoning Ordinance- would seem biased, this is a procedural process.

Member Ruggiero: Currently qualified under the ordinance, application process.

Attorney DeSisto: It is actually the Enabling Act. Basically says procedures are part of the Zoning Ordinance, and can only be amended by the Town Council.

Member Ruggiero: Just in terms of our request, for The Council to amend that, what would we do to make a motion for a resolution?

Attorney DeSisto: Yes. A resolution asking that the Town Council amend the application procedures.

Zoning Official Hervieux: Looking at the rules and policies, not under the ordinance page two. Number one, "a certificate from The Zoning Official does not mean that the application provides all the information necessary for The Board to make a decision". Does that make sense? Can we have enough information in the application to make a decision?

Attorney DeSisto: It is an accurate statement.

Zoning Official Hervieux: What it is saying is, I cannot deny someone from coming in front of The Board because they are sending in an application that doesn't look great.

Member Mancini: Before an application comes before The Board should there be enough information for this Board to make a decision?

Attorney DeSisto: In The Planning Board what happens is an application is certified as either complete or incomplete. If it's incomplete there has to be reasons why, but if it's

complete then it would go forward. The Planning Board has a checklist, for all three stages and comply. There is really no statutory checklist for Zoning application as there is in Planning. The Zoning Official forwards it and The Zoning Board.

Member Kearns: Asks **Zoning Official Hervieux** if he has a certificate.

Zoning Official Hervieux: Yes but that basically means that as long as the items are in the packet then it has to go forward, the documents are there but it doesn't mean the documents are good, what is gathered in the documents might not be good. Just means the documents are there.

Attorney DeSisto: If the application is certified as complete the clock starts ticking and that's the application you have to go with.

Chairman: Can an abutter file an appeal?

Attorney DeSisto: yes.

Chairman: Standard 4 the relief that is being granted is the least relief necessary. If a neighbor is opposed to a development, and The Board deemed the relief is the least relief necessary. How to distinguish "least relief". Should it be stated "reasonable" rather than something that can be calculated? It is not measurable.

Member Mancini: in certain cases there are measurements that are required- like for a garage, but not for an addition, some cases a little ambiguous.

Attorney DeSisto: Other boards also struggle with this. Least relief necessary to accomplish the goals of the applicant. *Refers to the Zobota Case in Barrington* The standard requires circumstances and common sense.

Chairman: Motion reflecting the standards? Articulate how it is the least relief necessary, since it's not a measurable standard. Would have to get into reasonableness. When we present a motion, and discuss the standard we need to make sure to articulate how the proceedings relate to the standard.

Attorney DeSisto: Lincoln has a low appeal rate. Articulate the basis of what you're doing according to standard. Contrary view of living in that area, can count as excerpt testimony. If you articulate why it is, that's what The Board role of function is.

Member Ruggerio: Does it need to accompany the motion? Or discussion during dialogue?

Attorney DeSisto: In the motion.

Member Ruggerio: Our general knowledge on the standard can be within the motion?

Attorney DeSisto: Correct. My advice is to say this "this isn't the least relief necessary and this is why..."

Member Farhoumand: We are using the same language as everyone else "least relief" or do they say something different?

Attorney DeSisto: That's the language in the statute in The Ordinance.

Chairman: Special Use Permit. Easy standards. We would just have to understand what The Comprehensive Plan is - a document indicating what The Town looks like now and scale it for the future for what it will look like with a balanced amount of different types of zoning.

Vice Chairperson Lyle: Sometimes it's not as easy.

Attorney DeSisto: Most other ones have different languages, "health, safety, and morals of the town".

Member Kearns: What would be the procedure to get that language in ours?

Attorney DeSisto: Same resolution on that too.

Zoning Official Hervieux: It is nice that it gives The Town the ability to regulate prior to building.

Member Mancini: Comprehensive Plan, trying to proceed to what The Town will look like in the future. Some applications might not agree with the comprehensive plan but might not be so bad. Accessory Use?

Zoning Official Hervieux: Accessory Use, there's a definition in the Rhode Island State Law and The Building Code. It is not adding rooms to your house, it is adding an "apartment". An apartment has a definition, it has to meet certain criteria, and once it meets that's when it comes into accessory use. It's when you add a kitchen, a bathroom, separate living room- it has to meet a certain definition.

Attorney DeSisto: The Comprehensive Plan, only becomes an issue with this Board if it doesn't match The Zoning Ordinance.

Chairman: Use Variance.

Attorney DeSisto: Standard is without granting the permit no beneficial use other than granting the Use Variance- next to impossible to get. Does not apply to cell towers.

Chairman: they are federal.

Attorney DeSisto: No discretion unless the cell tower isn't needed.

Chairman: The cell tower company has an obligation to provide reliable service to their customers. So all they have to do is show up here with a map with the dead zones, for the location of where the tower needs to go.

Attorney DeSisto: Another one too, The Freedom of Religion and Zoning Act. A house of worship may not be permitted in a specific area, that Federal Statute overrides it.

Chairman: A no vote. If somebody votes no should they substantiate the standard that didn't get met in their opinion?

Attorney DeSisto: If it is a four to one vote, it doesn't make a difference. But if it's a tree to two vote it makes a big difference. What you have to say is "I am voting no, and these are the findings and facts that I am relying on for my no vote". If you're going to approve an application, it has to be yes on all the standards. For a no vote, it only has to be a no on one of the standards. If it is an appeal only three to two.

Member Farhoumand: Do we have a checklist that we use?

Zoning Official Hervieux: Don't have an actual checklist. It is in The Ordinance.

Vice Chairperson Lyle: Can we go back to the no vote. One reason for the no, can you explain then ok with other standards.

Attorney DeSisto: Yes it is just that one. Application to pass as a no, only has to be one standard. Have to say how you know and your bases of findings and facts. If anyone has any questions about The Zoning Board, The Board is covered by the Attorney/ Member agreement, can't talk among each other.

Member Mancini: Standard number two, "primarily" gain finance gain.

Attorney DeSisto: "Primarily" is important, everything is a finance gain but asking what the purpose is, is important.

Member Kearns: Negative motion- seeking denial

Attorney DeSisto: Typically don't recommend negative first. If you make a motion you have to go through all standards. Motion would be to deny.

Chairman: If I second, I am seconding the denial, aye would agree, no disagree.

Attorney DeSisto: No vote fails have to have now a yes vote motion. If there's no second someone else has to make a motion. Motion has to be seconded.

Member Ruggiero: Once there's an application that is denied by The Board is there any preclusion for them coming forward with new application

Attorney DeSisto: Can't come back for a year, unless there are substantial differences in application. Other Boards- if someone is denied, if they don't want to wait, first have to vote that the plan was substantially changed and then put on next month to vote.

Member Mancini: Denied, no second. Chair asks for another motion?

Attorney DeSisto: yes.

Member Kearns: If someone abstains, the alternate comes in?

Attorney DeSisto: Yes.

Vice Chairperson Lyle: Agrees with bringing resolutions to The Council.

Member Farhoumand: Should attorneys be shorn in?

Attorney DeSisto: No cause they are offices of the court. Have the applicant/ representative of the applicant up with them though to answer questions. Advise against qualifying witnesses as experts.

Zoning Official Hervieux: Term limits. Two alternates are one year terms, **Member Farhoumand** and **Member Spezzano** are up in July. A month or two before that reach out to your Town Councilman if you want to remain on The Board.

Chairman: Two continuance for February

Motion to adjourn: Member Mancini Second by Member Ruggiero.
All in favor.