

AUG 20 2020

WESTPORT Z.B.A.

**Trianovich, Amanda**

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**Subject:** FW: 233 Hillspoint Rd. Variance Appl. #20-00305  
**Attachments:** Bluer Monster.docx

**From:** don bergmann <donlbergmann@sbcglobal.net>  
**Sent:** Thursday, August 20, 2020 12:47 PM  
**To:** Zoning Board of Appeals <ZBA@westportct.gov>  
**Cc:** Perillie, Michelle <mperillie@westportct.gov>  
**Subject:** 233 Hillspoint Rd. Variance Appl. #20-00305

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Attached for submission to the ZBA and staff is my memo respecting the above.

If there are any questions, kindly contact me.

Thank you, Don Bergmann

To: Westport Zoning Board of Appeals  
From: Don Bergmann 32 Sherwood Dr. Westport CT  
Re: 233 Hillspoint Rd. Variance Application 20-00305

August 20, 2020

The following is provided in connection with the above:

1. New Plans

The Applicant has, it appears, filed on August 16<sup>th</sup> new plans respecting the new house proposed for the above site. These plans appear to reflect much of the house and site design as approved in 2018 by the ZBA. I did not notice if this submission also went to the P&Z Commission, nor do I know if it should have. Kindly address that point.

The Staff review of the new plans will surely address the consistencies and inconsistencies between the "approved" house and that "proposed". Those need to be made clear for all. I suggest that Staff review the formal drawings against the prior drawings and note if both sets of drawings are the same, or where different. Possibly, Staff should also address the changes from the plans submitted in November 2018 which, as executed to date, resulted in the cease and desist order.

My expectation is that the latest plans reflect changes to the foundation from the original plans. If there are changes the propriety of those changes is important and needs to be addressed. Related to that may be the height of the structure since I am of the impression that the foundation approach to be maintained results in a higher structure. Height is crucial for any variance and particularly so for a house that lies between Long Island Sound and a public roadway and park.

I also ask that the cupola be addressed. My impression is it is somewhat different from that originally proposed, including as to the angling of the structure onto the roof, three sides, and the deck, one side.

As to other changes, all will await the Staff Report and the public hearing.

2. New Variance and Implications

This matter has had a long and difficult history. That has occurred by reason of the actions of the Applicant and its Architect and Builder. Had those three built the house as approved, improper construction would not have occurred, changes that may be reflected in the proposed house still may not have occurred, neighborhood disruption and annoyance may not have occurred and the time of many Town employees, including for legal expenses of Town counsel, and of the ZBA would not have been wastefully expended from these misdeeds of the Applicant. How and if that should factor into the analysis and decisions of the ZBA will await the public hearing and those decisions.

I believe that the ZBA should require now, the submission of a new all inclusive variance request that reflects all that the Applicant seeks, including all reasons for the granting of a hardship variance by the ZBA. This request makes sense due to the complicated history and complex filings and changes to those filings over the past several months. The Applicant was wrong to make changes. The cease and desist order is justified and, clearly under CT law respecting municipal estoppel, would be sustained by any Connecticut Court to which the cease and desist order might be appealed. In addition, substantive issues exist that, now legitimately, could be raised through a new application. (Those issues might also be raised if any decision in support of the Applicant was approved by the ZBA following the 9/1 Public Hearing.)

At the 2018 ZBA hearing resulting in the granting of variances, the ZBA determined that the significant non-conforming coverage variances and set back that were present as grandfathered by the Restaurant structure justified variances for the proposed house in that the proposed variance reduced the non-conforming aspects of the restaurant structure. However, the only reasons given by the ZBA for the variances granted to the Applicant pertained to lot size and lot shape. The ZBA ignored the fact that at the time of the variance request, the Applicant had formally in a legal document abandoned all rights to continue a restaurant as a non-conforming use. I believe that abandonment also had relevance to all

variance determinations. With the abandonment of a non-conforming, grandfathered use, here a restaurant in a residential zone, that abandonment obligates the ZBA to conduct a weighing test. That test, in essence, requires the ZBA to weight and assess the benefits and detriments of granting variances for coverage and setbacks that are founded, at least in part, on a reduction of the non-conformities that existed for the grandfathered use

The ZBA did not conduct such a weighing test at its 2018 meeting and decision. I believe that was wrong and an important legal error. A correction of that error at the time could well have resulted in one additional vote in opposition to the variance granted, in which case a three to two denial of the requested variances would have occurred.

By reason of the present, may I say, mess, and the present request for new variances from the Applicant, an opportunity now exists for the ZBA to address this point. I believe it should have in 2018 and it should on September 1<sup>st</sup>. That analysis should result in a confirmation from the Applicant that a de novo, new review of the entire application for variances for a house at 233 Hillspoint Rd. may occur at the September 1<sup>st</sup> or subsequent meetings or, even preferable, a new application should be submitted by the Applicant following a denial by the ZBA of the present application.

In nearly all respects, the present application was and substantially continues as, in essence, a new application. The ZBA needs to formalize that outcome by either a denial of the present request or the agreement of the Applicant that the present request will constitute a new application, at which time all relevant issues must be considered.

In addition to the coverage and setback issues above discussed, the issue of the cupola is also relevant. Due to a change in the cupola regulations, a new variance application would require a request for a variance for the cupola. As all know, the cupola is a subject of considerable concern and annoyance, especially by those on the ZBA who were not involved in the 2018 approval. A determination that a new variance request is mandated will afford the ZBA an opportunity, totally legal and justified I would assert, to subject any cupola to our existing cupola regulation. No longer could a cupola be misused to facilitate an elevator and a deck. Rather, a cupola would again become simply a source of light for the interior of a structure.

### 3. Town Counsel

My guess is that Town counsel is being consulted and will be consulted on many aspects of this application. I welcome that. I also ask that any opinion or legal analysis by Town counsel be made known to the public in advance of the September 1<sup>st</sup> meeting, hopefully by the Friday preceding the meeting. Such opinions or advice is most probably most effective if in writing. I hope that will occur.

Much of the above flows from the misdeeds of the Applicant, its Architect and Builder. However, that is not the best reason for taking the stances I have outlined. The best reason is that the ZBA will be doing what is right. The ZBA will be responding to this self-inflicted mess by airing all the issues, by giving the public an even fuller opportunity to address all the issues in this troubled project while at the same adhering, indeed better enforcing the zoning laws of CT and the current zoning regulations of Westport.

Thank You,  
Don Bergmann