

Trianovich, Amanda

Subject: FW: 233 Hillspoint Rd.
Attachments: Bigger Blue House.docx

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AUG 28 2020
WESTPORT Z.B.A.

From: don bergmann <donlbergmann@sbcglobal.net>
Sent: Friday, August 28, 2020 11:50 AM
To: Zoning Board of Appeals <ZBA@westportct.gov>
Cc: Tyminski, Cindy <ctyminski@westportct.gov>; Perillie, Michelle <mperillie@westportct.gov>
Subject: 233 Hillspoint Rd.

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Attached is my memorandum of today, August 28th, in response to the recent Staff Report for the above. It also comments upon several issues I believe important.

Thank you, Don Bergmann 32 Sherwood Dr. Westport

To: Westport Zoning Board of Appeals
From: Don Bergmann 32 Sherwood Dr. Westport CT
Re: 233 Hillspoint Rd. Appeal of Cease and Desist Order (# 7773) and Variance Application (#20-00305)

August 28, 2020

CAM SITE APPROVAL

I hope that hearing will address the question of whether or not this new proposal should be submitted to the Planning & Zoning Commission for confirmation of compliance with the CAM Site requirements.

CEASE AND DESIST ORDER – MUNICIPAL ESTOPPEL

The cease and desist order was properly imposed and the Applicant has provided no sound legal reason why the order should be voided. In CT, municipal estoppel is upheld only with great caution and certainly not when the applicable Town employee involved does not have the authority to approve that which the Applicant seeks to enforce based upon equitable estoppel. If the Applicant elected to appeal the action of the ZBA, it is likely, especially with the facts present, that a CT Court would defer to the analysis and judgment of the ZBA.

NEW APPLICATION

Background -

In response to the cease and desist order, the Applicant decided to submit a variance application to the ZBA which would allow the Applicant to construct a house that it liked, even though significantly different from the house sought by the Applicant in variance application #7629. P&Z Staff correctly assigned a new variance number, #20-00305, for this new application.

The proper response of the Applicant to the cease and desist order should have been to acknowledge to P&Z Staff that mistakes had been made, those mistakes would be corrected and the house, as approved, would be constructed.

Instead, the Applicant decided to apply for new variances for a different house. In addition, the Applicant appealed the cease and desist order.

The Applicant decided that it had a chance to build what it wanted, not what was approved. The Applicant submitted a new, full variance application, new designs and drawings, all other additional documents required for a new variance and provided notice to neighbors as required by law. (Note three neighbors have written that they did not receive those notices.) The Applicant asked the ZBA to approve a new house with this new variance application. In essence, this 2020 new variance application superceded the prior 2018 variance application.

Then, after realizing that the new house proposed was unlikely to be allowed by the ZBA, the Applicant changed course again. This time, it modified its variance request #20-00305 for the house it preferred and replaced the filing with plans and submissions for a house that the Applicant hopes will be seen and accepted by the ZBA as sufficiently similar to the 2018 house submission to permit construction.

The Applicant is bouncing around in many directions. First, the Applicant tried to obtain approvals to which it was not entitled by appealing the cease and desist order. Next, the Applicant determined again not to build the approved house but, rather, to try to get the ZBA to approve a different house. Now, the Applicant seeks to get the ZBA to approve a variance for a house similar to the house approved in the 2018 variance. The ZBA need not, and should not tolerate such behavior.

Action-

The ZBA should take the following action:

Deny variance application #20-00305 and advise the Applicant it has every right to submit a new variance application for whatever house it would like.

Benefits of Action –

This action is legally justified and fair.

1. It eliminates the tortuous effort of comparing the house and land design approved in 2018 with the house now, newly proposed in 2020. The recent Staff Report of Cindy Tyminski highlights several issues. My guess is the ZBA will find more. It would be helpful to all if a definitive conclusion was reached and stated as to all deviations from the design and plans for the 2018 house versus the latest 2020 house.
2. It allows all, the Applicant, the ZBA, P&Z Staff and possibly as important as all on that list, the public, to focus on one clean application, one understandable house with whatever non-structural aspects the Applicant would like.
3. It allows the Westport cupola rule to be properly applied.
4. It allows the ZBA to address coverage and setbacks, coverage being a particularly troubling aspect to many of the 2018 variance, including the one ZBA member who opposed the 2018 variance and those now on the ZBA who appear to have a concern with the coverage.

Of great import to this coverage point is the fact that in 2018, the ZBA granted a coverage variance for hardship based upon lot size and lot shape. It is worth reminding the ZBA that this site failed to conform to the desired minimum lot size for a B zone lot by only 243 sq. ft., 5,757 sq. ft. versus the 6,000 sq. ft. for a B zone. In addition, the ZBA did not appear to base its coverage variance decision upon a weighing of the benefits and detriments of the use of the very large coverage variance enjoyed by the grandfathered restaurant use.

The restaurant use was abandoned by the Applicant effective as of **January 1, 2015**. This fact appears not to have been discussed during the May 6, 2018 presentation to the ZBA for the 2018 variance. The Applicant's then attorney, Atty. Fallon, did not bring this up even though a quite important fact. A restaurant can never again exist on the site. While abandonment of a grandfathered use does not result in the abandonment of a grandfathered coverage, the use abandonment is not irrelevant to the coverage issue.

In general, when a grandfathered use is abandoned, that fact becomes relevant in the statutory basis that sustains the grant of all variances. It is part of the twostep obligatory analysis, namely, first, the variance cannot affect substantially the comprehensive zoning plan of Westport and, second, a determination that strict adherence to the zoning regulations would generate a hardship.

Those standards obligate the ZBA to analyze the grandfathered coverage, the setbacks as well, but not as something that simply exists and can be used to make the case for a reduction in coverage. Rather, the obligation is to take a look at that coverage in the context of its no longer being available for a restaurant and how that reality impacts the basic variance decision. That look should cause the ZBA to make findings in any variance determination respecting why or why not an extremely large coverage variance for a use no longer permissible should be extended in some, indeed, in any manner to benefit an Applicant who wants a large house. (Note also, that the coverage variances granted in 2018 exceeded the maximum coverage that would have been permitted had the lot been 6,000 sq. ft.)

The denial of variance application #20-0035 will allow the ZBA to make a coverage decision that is on more solid footing than that made in 2018. I am confident the neighborhood and many others will welcome such an outcome. The ZBA will balance the possible outcomes and will include in its findings in support of any coverage variance granted, the elements comprising a part of that balancing effort and

how those elements relate to or justify a coverage variance for a lot that is barely undersized for a B zone lot.

In summation, the existence of a grandfathered coverage non-conformity should never be translated automatically into a newly granted coverage variance when the grandfathered use has been abandoned. It is one thing for the ZBA to use coverage reductions in granting a new residence in a residential zone. It is very different when the ZBA is asked to apply that same concept to a use, a restaurant, which can no longer exist.

ASPECTS OF THE HOUSE THE SUBJECT OF THIS LATEST NEW VARIANCE – STAFF REPORT

Cindy Tyminski's Staff Report of August , 2020 addresses several items, with the underlying issue being if the house and land usage now sought by the Applicant is identical or at least substantially identical to that pertinent to the 2018 variance.

Cupola – Ms. Tyminski has raised a number of important issues that need to be addressed and, most likely will result in significant changes to the cupola.

Height- The cupola raises a height issue. In addition, there is a question as to how the mid point of the new roof can satisfy the height requirements of the zoning regulations, while the peak of the roof is about seven inches higher than that approved in the 2018 variance. Possibly it ties into the roof extension as to which Ms. Tyminski inquires. The midpoint could have been lowered by an increase in the lowest line of the roof while the peak of the roof could simultaneously increase by seven inches. My guess is all this may relate to the foundation height increase. I believe the foundation height increase was a violation of the 2018 variance approval. All this needs to be addressed, including in particular, the foundation height change.

Windows – It appears that the windows are not being changed to conform to the 2018 variance requirements. Windows are crucial in general and particularly in this matter. If the windows are all not substantially the same as the 2018 variance approval, as to number, location, size and design, this variance should be denied for that reason alone.

Chimney – I ask the ZBA to study this very carefully, possibly requesting independent architectural guidance. The chimney and what should be in that portion of the house is again very important to the design and appearance.

Landscaping – Ms. Tyminski again raises issues in this category. For me, I remain confused as to what the ZBA required or expected, e.g. a wall, the type of sidewalk, plantings, vegetative barriers and other site changes. It seems to me the ZBA needs to make its requirements and expectations clearly known so that the Applicant can either fully comply or seek some kind of relief.

Mechanicals – Ms. Tyminski comments on these, particularly inquiring as to why they are not in the area of the cellar. This is the kind of obvious matter that the Applicant should have made clear in its listing of changes. Possibly I missed it but if not, it reflects to me a possible indifference of the Applicant to clarity and transparency.

Of course, an analysis of this list of changes and issues, probably some others as well, would go away if the ZBA determined that a new, comprehensive and complete variance application is required.

Thank you,
Don Bergmann