

Unapproved

**SALEM ZONING BOARD OF APPEALS
Special Meeting
June 4, 2009**

Present: Balavender, G., Alt. - left at 10:39 pm
Bellandese, K.
Cole-Chu, L.
Kozlowski, S., Alt.
Mullin, M.
Nortz, R.

Absent: Diamond, S.
Vacancy, Alt.

Guests: see attached.

CALL TO ORDER:

L. Cole-Chu, chairman, called the meeting to order at 7:32 pm.

SEATING OF ALTERNATE(S):

M/S/C (Bellandese/Mullin) to seat S. Kozlowski for S. Diamond. Vote: approved unanimously.

PUBLIC HEARING(S):

- 1) #09-3 D. Wright, 59 Rattlesnake Ledge Road, Salem CT 06420
Request for a variance of Section 4.4 (MINIMUM SETBACKS)
for porch construction twenty-two (22) feet from the property
boundary [fifty (50) feet required] for property at 59
Rattlesnake Ledge Road.
Assessor's Map #20; Lot #20 59 Rattlesnake Ledge Road

Legal Notice read.

All Certificates of Mail received as per the Regulations.

D. Wright, applicant, appeared:

The house was built in 1950.

Subsequently, Rattlesnake Ledge Road was reconfigured and
the road became closer to the house.

He has lived in the house for eleven (11) years.

The measurement between the front of the house and the
stonewall is presently twenty-eight (28) feet.

His hardship is that he wants to make an improvement to his home
and for safety (snow/ice).

Submitted:

[Exhibit #1] - Letter of 5/26/09 from Lisa R. Humble, State Building Inspector, in regard to her approval of the proposed 168 square foot porch addition.

The Board explained to Mr. Wright the meaning of hardship as it applies to a ZBA variance; the hardship must be unique to the land and it has nothing to do with the personal circumstances of the landowner.

Public Comments:

There were no public comments.

M/S/C (Mullin/Kozlowski) to close the public hearing on application:

#09-3 D. Wright, 59 Rattlesnake Ledge Road, Salem CT 06420

Request for a variance of Section 4.4 (MINIMUM SETBACKS) for porch construction twenty-two (22) feet from the property boundary [fifty (50) feet required] for property at 59 Rattlesnake Ledge Road.

Assessor's Map #20; Lot #20 59 Rattlesnake Ledge Road

Vote: approved unanimously.

M/S/D (Mullin/Nortz) to approve application:

#09-3 D. Wright, 59 Rattlesnake Ledge Road, Salem CT 06420

Request for a variance of Section 4.4 (MINIMUM SETBACKS) for porch construction twenty-two (22) feet from the property boundary [fifty (50) feet required] for property at 59 Rattlesnake Ledge Road.

Assessor's Map #20; Lot #20 59 Rattlesnake Ledge Road

based on it being the right thing to do.

Vote: For approval - no one. For denial - Bellandese, Cole-Chu, Diamond, Mullin, and Nortz. Abstentions - none.

MOTION DENIED.

M. Mullin offered the following reasons for denial:

- Variances have to be unique to the property.
- Financial reasons are not a hardship.
- The ZBA must be consistent about what they have done in the past.

After Board discussion in regard to the reason for denial of the Wright application, the following action was taken:

M/S/C (Nortz/Bellandese) to approve the following reason for denial of application #09-3 of D. Wright:

The applicant has failed to show a hardship, as required, to justify the approval of a variance.

Vote: approved unanimously.

2) #09-2 (CONTINUED TO 6/04/09)

Attorney H. Heller, Authorized Agent for:

J. Civitello, 5 Ruta Drive, Northford CT 06472

E. Pucillo, 215 Bear Hill Road, Bethany CT 06524

Appeal from the decision of the Zoning Enforcement Officer that the determination that the dwelling constructed on the subject real property at 9 Gardner Lake Heights is a seasonal dwelling. Assessor's Map #22; Lot #38 9 Gardner Lake Heights

The Legal Notice had been read when the public hearing was opened on 5/28/09.

All Certificates of Mail had been received as per the Regulations.

Attorney H. Heller, Authorized Agent for the applicants, appeared:

This application is solely for an appeal from the decision of the Zoning Enforcement Officer. His clients are not requesting a variance.

The property has been owned by the Civitello family for 55 years and through those years it was used year-round.

Submitted the following:

[Exhibit #1] - Copy of Section 8-2 of the CT General Statutes, the enabling legislation for zoning. (3 pages)

[Exhibit #2] - Copy of Perry Taylor et al, v. Zoning Board of Appeals of the Town of Wallingford et al. (12 pages)

[Exhibit #3] - Copy of James Caserta v. Zoning Board of Appeals of the City of Milford et al. (7 pages)

[Exhibit #4] - Copy of Cummings v. Tripp. (1 page)

[Exhibit #5] - Copy of John V. Magnano et al v. Zoning Board of Appeals of the Town of Westbrook et al. (8 pages)

[Exhibit #6] - Cumberland Farms, Inc. v. Zoning Board of Appeals of the Town of Westbrook. (12 pages)

[Exhibit #7] - Copy of Kement Family Limited Partnership et al v. East Windsor Zoning Board of Appeals. (9 pages)

In order for abandonment to take place, there must be a discontinuance of the use over a period of time and a demonstrated intent to permanently abandon the use by the owner.

The Zoning Enforcement Officer (ZEO) maintained a map of the lake area properties that was delineated showing those properties that had seasonal use and those properties that had year-round use.

This map became lost or disappeared prior to 2006.

The PZC received two (2) legal opinions, one from the law firm of Byrne & Byrne and another from the firm of Robinson & Cole. The two firms were not in agreement as to how the PZC should proceed.

The PZC chose to use the Robinson & Cole decision and in 2008 began the process of adopting proposed regulations, which would set parameters to reverse a seasonal use decision to year-round.

Section 5A.4, effective 1/01/09, was the result.

It provides some homeowners a "safe harbor," but the conditions of the regulation cannot be satisfied by other homeowners.

Submitted:

[Exhibit #8] - Copy of 9/26/06 letter from Attorney T. Bates of Robinson & Cole, LLP, concerning *Opinion Regarding Seasonal v. Year-Round Occupancy of Lots in the Kendall Knolls Subdivision, Salem, Connecticut*. (15 double-sided pages)

[Exhibit #9] - a title search, CERTIFICATE OF NON-CONTIGUITY, signed by Harry B. Heller, Attorney at Law (1 page)

J. Civitello, applicant:

His father bought the property in 1955 and they built the house together during 1956 - 1958. His father and mother lived in the house year-round until 1961 and it has been rented, though not continually, for year-round use after that.

Atty. Heller:

Though the house was not in continual use, they did not abandon their year-round use.

[Exhibit #10] - Copy of Assessor's 1981 Street Card for 9 Gardner Lake Heights. (1 double-sided page)

The card is signed by Sylvester Civitello and in the *COMMENTS* section *seasonal* is written.

J. Civitello stated that his father did not sign the card; he wouldn't have because he was renting the house out for year-round.

[Exhibit #11] - Copies of three (3) Assessor's Street cards for 9 Gardner Lake Heights: 2007 (double-sided), 2001 (double-sided), and 1990 (single-sided).

The cards span seventeen (17) years and there is no Assessor notation of seasonal.

[Exhibit #12] - Handwritten letter of 5/18/09 signed by Phyllis Civitello (signature guaranteed), former owner of the property along with her husband, Sylvester Civitello,

attesting to the year-round use of the property. (1 double-sided page)

[Exhibit #13] - Sworn affidavit (5/12/09) of Timothy Allard, former tenant, stating his year-round residency of 9 Gardner Lake Heights from October 1967 to June 1968. (1 page)

[Exhibit #14] - Sworn affidavit (5/09/09) of David Anderson, former tenant, stating his year-round residency of 9 Gardner Lake Heights from November 1982 to April 1983. (1 page)

[Exhibit #15] - Sworn affidavit (5/13/09) of Richard Civitello, former tenant, stating year-round residency of 9 Gardner Lake Heights from April 1981 to April 1982. (1 page)

J. Civitello, applicant, stated that they tried to get statements from all the tenants, as the house is heated and they all resided at the property on a year-round basis, but some they could not locate and one has passed away.

[Exhibit #16] - Notarized statement (5/06/09) of Lorraine Darcy. (1 page)

[Exhibit #17] - Notarized statement (5/15/09) of Joanne Evans. (1 page)

[Exhibit #18] - Statement (5/12/09) of Monica Lostritto (signature guaranteed). (1 page)

[Exhibit #19] - Copy of a Town of Salem Application for Basic Building Permit (approved 9/05/71) issued to Sylvester Civitello for alteration of a frame building on Gardner Lake Heights. (1 page)

[Exhibit #20] - Report (letter of 4/03/09) from D. Dell'Oro of General Paving & Heating stating that after inspection it has been determined that the furnace in the home located at 9 Gardner Lake Heights is of the 1950's era. (1 page)

Attorney Heller stated that the home was fully winterized when constructed in 1958.

[Exhibit #21] - Copy of the cover of the SBC/SNET Telephone book revised through March 2004 and page 263 from the book showing the telephone number (859-1019) of Sylvester Civitello residing at 9 Gardner Lake Heights (2 pages)

[Exhibit #22] - Letter (5/13/09) from Thomas Desrosiers, 8 Gardner Lake Heights, in support of the appeal. (1 page)

Atty. Heller continued:

By the evidence submitted, proof has been shown that the intent of the owners, since the home on the property known as 9 Gardner Lake Heights was built, was to utilize it as year-round. It has been used

that way for over fifty (50) years, though not continually, but the year-round use has been established.

This property satisfies Connecticut law. The year-round use was established before zoning came into effect in Salem and there has never been in the past, nor is there now, an intent to abandon the year-round use.

Public Comment:

- M. Vlaun, 19 Gardner Lake Heights: very upset with the way the seasonal/year-round matter has been handled. Being a Town Planner, when she bought her home in 1988 she did her "due diligence" and made sure the house was year-round, but she also received a determination letter in January stating that her property was seasonal. She has been able to prove her year-round status, but she wants the Commission to know that this matter has put a lot of hardship on a lot of people unnecessarily. Feels that the determinations were made in an arbitrary manner. She hopes that the seasonal year-round issues in the lake area are over for good this time.

M. Mullin stated:

The town has made the Zoning Regulations "muddy" by creating the Seasonal/Residential Zone and its requirements in 1995. The lake area, as defined prior to 1995, was simplistic and easy to understand. Two (2) years was too long for the town to make these determinations and spend as much money as was spent on research and legal opinions.

Attorney J. Casey, Robinson & Cole, representing M. Chinatti, Zoning Enforcement Officer for the Town of Salem:

Served as a Special Counsel to the Salem Planning and Zoning Commission for Seasonal/Year-Round Uses.

He had worked with Attorney T. Bates on the 9/26/06 letter (see [Exhibit # 8] submitted by Attorney H. Heller this evening) to the Salem PZC in regard to *Opinion Regarding Seasonal v. Tear-Round Occupancy of Lots in the Kendall Knolls Subdivision, Salem, Connecticut.*

Reviewed the contents of this letter with the Board.

Submitted:

[Exhibit #23] - Excerpt (pages 225 - 229) from Fuller Land Use Law and Practice in regard to 52.5 *Abandonment, discontinuance, non-use and cessation of nonconforming uses.*

Reviewed this document with the Board.

M. Chinatti, Town Planner/ZEO/WEO for the Town of Salem, appeared:

On 1/05/09, letters went out to all residents of the SR Zones as to her determination of seasonal or year-round for the use of their properties. A copy of Section 5A.4 of the Zoning Regulations (requirements for proof of year-round use) was included. The letter also stated the reason for her determination and instructions for the property owner if they disagreed with the determination.

In her review of the documentation on file in the Town Office Building for the properties, the only documentation she could legally use, it was not within her purview to make abandonment decisions; that decision is to be made by the Zoning Board of Appeals.

The reason for her decision in this case was because she was not presented with documentation as per Section 5A.4 of the Zoning Regulations.

Attorney H. Heller:

Submitted:

[Exhibit #24] - A copy of the Assessor's Field Card for the property of Sylvester & Phyllis Civitello for the years 1956 through 1960. (1 double-sided page)

The reverse side of the card shows that the dwelling was 50% complete in 1957.

Stated that the ZEO said that his clients did not comply with the requirements of Section 5A.4.

It was not because they did not comply; they were not able to comply.

M/S/C (Mullin/Kozlowski) to close the public hearing on application:

#09-2 (CONTINUED TO 6/04/09)

Attorney H. Heller, Authorized Agent for:

J. Civitello, 5 Ruta Drive, Northford CT 06472

E. Pucillo, 215 Bear Hill Road, Bethany CT 06524

Appeal from the decision of the Zoning Enforcement Officer that the determination that the dwelling constructed on the subject real property at 9 Gardner Lake Heights is a seasonal dwelling.

Assessor's Map #22; Lot #38 9 Gardner Lake Heights

Vote: approved unanimously.

M/S/ (Nortz/Bellandese) to uphold the applicant in their appeal from the determination of the Zoning Enforcement Officer of application:

#09-2 Attorney H. Heller, Authorized Agent for:

J. Civitello, 5 Ruta Drive, Northford CT 06472
E. Pucillo, 215 Bear Hill Road, Bethany CT 06524

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After a brief discussion, it was the Board's decision to take no action on the motion and to take a ten (10) minute recess in order to review exhibits.

G. Balavender left the meeting at 10:39 pm.

The Board reconvened at 10:44 pm.

After discussion, the following amended motion was made:

M/S/C (Nortz/Bellandese) the appeal of application:

#09-2 Attorney H. Heller, Authorized Agent for:

J. Civitello, 5 Ruta Drive, Northford CT 06472
E. Pucillo, 215 Bear Hill Road, Bethany CT 06524

Appeal from the decision of the Zoning Enforcement Officer that the determination that the dwelling constructed on the subject real property at 9 Gardner Lake Heights is a seasonal dwelling.
Assessor's Map #22; Lot #38 9 Gardner Lake Heights

is sustained based on the Zoning Board of Appeals finding that the Zoning Enforcement Officer's "determination of seasonal use" of 9 Gardner Lake Heights is erroneous. The Board finds from the evidence that the subject home was used as a year-round home before Salem adopted Zoning Regulations on April 14, 1960, and, notwithstanding periods of irregular occupancy, there has never been any intent by the owners to abandon the year-round use.

Vote: approved unanimously.

RECEIPT OF APPLICATION(S) TO SET PUBLIC HEARING DATE(S): N/A

APPROVAL OF MINUTES OF PREVIOUS MEETING(S): N/A

OLD BUSINESS:

- 1) **Such other Old Business as may be proper**

There was no other *OLD BUSINESS* this evening.

NEW BUSINESS:

- 1) **Such other New Business as may be proper**

There was no other *NEW BUSINESS* this evening.

CORRESPONDENCE/ANNOUNCEMENTS:

There was no *CORRESPONDENCE/ANNOUNCEMENTS* this evening.

ADJOURNMENT:

M/S/C (Nortz/Kozlowski) to adjourn the meeting at 10:45 pm. Vote: approved unanimously.

D. McTigue, Administrative Assistant/Recording Secretary

L. Cole-Chu, chairman