

CIVIC ASSOCIATION OF SHORT BEACH

ZONING BOARD OF APPEALS

P.O. BOX 2012

SHORT BEACH, CONNECTICUT 06405

MINUTES FROM THE MAY 1, 2023 MEETING

The CASB ZBA regular meeting was held in person at Orchard House, 421 Shore Drive, Branford. It was called to order at 7:30 by Acting Chair Andi Hallier. Also present was regular member Carleen Davis. The Chair sat alternate members Martin Hallier Senior and David Steinman in order to complete a quorum. Chair designated Mr. Steinman as acting secretary. Absent were regular members Walter Kaweck and Tom Perretta.

Old Business:

Accepted Application #03-2023 by applicant Gerald Mastroangelo at 269 Shore Drive - appeal a ZEO cease and desist order concerning the status of a built addition and it being a second dwelling unit. Attorney Timothy Lee and Mr. Mastroangelo were present. Applicants were requested to provide the property deed as part of the application prior to the next regular meeting and public hearing. A motion to accept was made and seconded. The Chair discussed advertising for this hearing in *The Sound* on May 25th and June 1, 2023, and advised the applicants to provide notice to abutting Formatted: Font: Italic landowners at least 20 days prior to the hearing and provide the board with proof of notice.

Public Hearing on Applications 01-2023 and 02-2023 Continued

After polling the board for conflicts of interest, and hearing none, the public hearing continued with presentation and statements on Application #01-2023 (14 Rockland Park) Stuart P. & Rebecca K. Rosenberg Appeal of Zoning Enforcement Officer's July 12, 2022 Cease and Desist Order in conjunction with Application #02-2023 appeal (14 Rockland Park) Stuart P. & Rebecca K. Rosenberg Appeal of the Civic Association of Short Beach's denial of building permit to construct a stone patio and retaining walls on the premises, and for related variances at 14 Rockland Park. CASB denial was decided at the December 12, 2022 meeting of the Civic Association of Short Beach (CASB).

Stuart and Rebeca Rosenberg, attorneys Christopher Eddy and John Casey, architect David Provencher, and engineer Tim DeBartolomeo were present as was CASB ZEO David Perkins.

Presentation, Statements and Questions

Mr. Casey, representing the applicants, started by confirming additional letters were submitted to the application record including one from Robinson and Cole dated April 28, 2023 one from Mr. Provencher, also dated April 28, 2023 and a letter from Tim DeBartolomeo, Engineer from Sound Engineering Associates, dated April 28, 2023 regarding the retaining walls and a new proposed concept plan.

Mr. Bartolomeo discussed that Regulation 8.5.5 (4) regarding terrace walls being 10 feet apart and 3 foot horizontal distance is a prescriptive code. He discussed that the applicant's retaining wall that abuts the retaining wall at 18 Rockland Park does not violate 8.5.5(4) because the two walls are independent walls and are self-supporting. They don't apply pressure on each other. And he did not see any other conflicts in the Zoning Regulations on the matter.

Next, David Provencher, project architect from Shore Design, presented using visual aids. This is a continuation of his presentation from the May 1, 2023, public hearing. He cited his letter submitted to the board dated April 28th, 2023. He discussed defining the difference between „terrace? and „patio? and introducing a concept plan to resolve the encroachment at 18 Rockland Park.

Mr. Provencher discussed that licensed design professionals largely look to existing regulations in project planning, and specifically to the 2022 Connecticut Building Code for definitions of ‘terrace’ and ‘patio’.

Discussion was held regarding any possible changes in the 2022 code versus the 2020 code since that is when primary construction occurred. Mr. Provencher discussed there were no changes in the code, and that the code incorporates the 2015 International Building Code’s definitions, which are identical to that of the 2022 Connecticut Building Code. Discussion was held regarding building permits being necessary from both Town of Branford and the Civic Association of Short Beach.

Mr. Provencher discussed code defining a terrace as a relatively level step constructed in the face of a graded slope for drainage and maintenance purposes. Citing Architecture: Forms, Space and Order, a terrace is a raised level of a vertical or sloping front or sides faced with masonry or such. Regarding patio, he discussed that though often used, it wasn’t defined in building codes or professional architectural references. He discussed that the Connecticut

Building Code refers to patios as being on-grade or on-ground. He compared before and after photos of construction and discussed the process of building a terrace being done by excavating a foundation trench, building a wall in that trench, and then moving soil to create the terrace platform, which is how the structure was built.

Mr. Provencher went on to discuss the proposed concept plan to address encroachment onto 18 Rockland Park simply by removing all the material that is between the 18 and 14 Rockland walls and extending the current southern wall to wrap around the eastern property line.

Discussion was held and confirmed board member questions that construction would not fall into setback conformity, and that the proposed wall extension would create over a five-foot drop at the deepest point.

Mr. Provencher confirmed that the wall extension on the east be exempt from setbacks by ‘terrace’ definition. He also confirmed that there would be a gap between the two walls. He acknowledged that this would create a safety hazard and require safety rails.

Discussion was held about the applicants’ building permit, which sought permission to construct a request for “patio.” Mr. Casey explained discussed that the issue of „patio? versus „terrace? on the application was not brought to their attention. Mr. Casey discussed that the ZEO gave guidance to follow regulations in section 8.5 pertaining to earth moving and filling, that this is a joint application situation (with the Lewis’s) and that the applicants didn’t realize the significance in using the term ‘patio’ instead of ‘terrace’ at the time they applied for a building permit.

A board question was raised regarding the plot plan showing wall height exceeding 6 feet per regulation 7.4.3. and there was discussion that since they were applying for an unroofed terrace, then there was no need to comply with setbacks, that terraces are comprised of different parts and do not involve fences or walls as described in 7.4.3.

Further, Mr. Casey discussed that they complied with ZEO letter from February 2023 requiring approval of proposal which they received from the Lewis’ at 22 Rockland Park. Also, that 8.5 was no longer relevant since what is proposed was not earth moving but instead was the construction of a structure as determined by the zoning board – the structure is an unroofed terrace and does not have to comply with Short Beach zoning regulations.

In summarizing, Mr. Casey emphasized that since the term ‘terrace’ carried such importance, that expert testimony was necessary to show that the structure is a terrace; that since the two retaining walls were built side by side at 14 and 18 Rockland Park, and not on top of one another, the required 10 foot minimum distance need not apply; that

the Rosenberg's structure elevation aligns with the existing wall at 18 Rockland Park, and the applicants assumed this was permitted based on the neighbor's preexisting structure; and that since the decades- old structure at 18 Rockland Park is similar, this new structure would be in keeping with the type of development in the area.

There was discussion that the ZBA has an obligation to preserve the health, welfare, and safety in Short Beach and that removing the eastern wall and extending the southern wall would create a known safety issue. Mr. Casey pointed out that the Shubiks at 18 Rockland Park never complained about encroachment and the applicants would be ready to make a deal to remedy the encroachment.

There was discussion about how if the ZBA were to approve the proposal, wording would need to be such that the work at 18 Rockland is deemed a terrace, setbacks wouldn't apply, and would be conditional on being within limits of the Rosenberg parcel. Mr. Casey emphasized that the homeowners, at 22 Rockland Park have no objection to the encroachment on the western property line.

Next, David Lewis, homeowner at 22 Rockland Park spoke. He described, based on photos from the 1850s, how the properties used to have a gentle slope to the south, but were heavily filled over the years thus creating the currently steep slopes and a hazard. He discussed that the timbers holding back the fill along the western property line would regularly rot and fail and stated that he is in favor of the current wall, that it is beautiful and that drainage issues are fixed. Mr. Lewis said he is not concerned about the encroachment being a disputable issue in the future. He hoped that a reasonable solution could be found on this issue.

A point of order was raised by ZEO Perkins, and then discussion was held clarifying that the variances requested are in case the appeal were to be denied and that all three issues – appeal of the cease and desist, the application for appeal of the applicants for a building permit, and the variance requests – are all currently pending and that three findings were possible, and that this is how the applicants requested to present the appeal.

There was discussion about hardship. The Chair discussed photos shown at the May 1, 2023 public hearing showing the south yard in the same condition in 2020 as in 2005 when the Rosenbergs purchased the parcel with its slope and preexisting back deck. Mr. Casey discussed that this (southern slope) is a topographic hardship that impedes the ability to make reasonable use of the property.

There was discussion about having four ZBA members hear the appeal and that four ZBA members present still made a quorum.

Mr. Casey spoke of Mr. Cretella's letter citing legal cases that supported the position that this is a self-created hardship. Mr. Casey said that these cases were situations where the applicants themselves created that hardship. Further, he discussed that the Rosenbergs did not create their hardship and that the hardship is the result of peculiar topography making their property unsuitable for use as permitted by ordinance in this zone.

The Chair asked if Mr. Casey was suggesting that the topography makes this property unsuitable for residential use. He said yes, that the Rosenbergs basically had no use of their backyard because of the steep slope.

Mr. Hallier questioned how they could have no use of the backyard since there was a preexisting deck. Discussion was held about the deck dimensions being approximately eight by eight feet.

Mr. Steinman put forth for discussion that many parcels in Short Beach have clear safety hazards including ledge and sheer cliff, and that topographically, safety hazards on parcels are not unique to this district.

Discussion was held regarding whether it was feasible to create a usable terrace that conforms to setbacks. Mr. Casey agreed that it is feasible, but that CASB regulations don't require compliance and that a terrace that conforms to setbacks would not allow the applicants full use of their property compared to the property at 18 Rockland Park. Further discussion focused on the dimensions of the current sections of the structure being approximately 8x8, 8x14, 11x11, and 10x5. The previous deck dimensions were estimated to be between 64 and

100 square feet and in its place is the 400 sq ft. terrace level. There was discussion about the hardship and that the variances requested were including built-in planters. It was also asked if there was an alternative option if the terrace exemption were to be denied.

Summarizing, Mr. Casey discussed that there is substantial evidence on record that the structure is a terrace, that a rational reading of the CASB zoning regulations exempts terraces from setback requirements and that the zoning board made an error saying it was not an unroofed terrace, and that the ZBA should overturn the zoning board's decision and grant permission for the applicant's terrace, and that permitting would be conditional on removing the encroachment.

There was discussion and concern about the legal timeliness of the appeal related to the ZEO issuance of the cease and desist of July 22, 2022 calling into question subject matter jurisdiction and the expiration of the right to appeal it within 60 days. There was further discussion that the applicant's appeal to the zoning board was made and denied at their Sept 11, 2022 meeting. The ZBA granted a stay on the ZBA appeal application at its October, 2022 meeting, and stated then, that it did not waive the 60-day requirement because the ZBA does not have subject matter jurisdiction over expired cease and desist matters.

Mr. Casey discussed that a valid, not appealed cease-and-desist would be moot if the ZBA granted the applicant's appeal for a building permit. The Chair questioned that if the ZBA did not have subject matter jurisdiction to overrule the cease and desist, then would it still be valid and moot the other two appeals. Mr. Casey discussed in response how the cease-and-desist order is based on the idea that there is no permit for a terrace. If a permit for a terrace were granted, then the cease and desist would go away.

Mr. Casey discussed that the appeal application was made on time and that Attorney Eddy was present at all of the virtual meetings, that the initial application was not accepted because it was incomplete and that it could be submitted again without prejudice, and that there is case law showing that an incomplete application can be accepted if completed during the hearing process.

Mr. Eddy described how the application to the ZBA was made on time at the first meeting (Sept 6, 2022) and was denied as being incomplete and could be resubmitted without prejudice within 60 days. Also, there was board discussion on whether the ZBA could grant a stay. Further, that the application was then resubmitted on time and in conversations with Chairman Kawecky, Mr. Eddy was told that effectively there was a stay in place because the application was incomplete. Mr. Eddy said that since the second application was accepted, the case has stayed on schedule.

There was further discussion about the application timeline. At the October 3, 2022, ZBA meeting, the applicants were denied without prejudice due to incompleteness. At that time, they were reminded of the 60-day time limit to appeal the cease-and-desist order. At the November 7, 2022 ZBA meeting the application was again denied without prejudice due to being incomplete. Applications for appeal of the cease and desist and building permit were accepted at the February 6th, 2023 ZBA meeting. The applicants asked for a stay on the March 6, 2023 public hearing so that the ZBA could consolidate three applications, including the variances, into one hearing and that the ZBA has been accommodating and that the applicant has been on notice regarding the cease-and-desist since July 22, 2022 thus the concern that the ZBA does not have subject matter jurisdiction.

Mr. Casey discussed concern about his clients' rights being prejudiced. He discussed that the ZBA could have accepted the incomplete application in Oct 2022 and waited 65 days to open hearings during which time the ZBA could have requested any missing application material. The Chair discussed that when the applicants came back in November 2022, the application was still incomplete and again denied without prejudice to which Mr. Casey said that no one at the ZBA ever informed them that it was incomplete before that meeting. Mr. Eddy confirmed he was not informed about it either. Further discussion resulted with Mr. Casey submitting a handwritten request granting the ZBA permission to continue this public hearing at the next ZBA regular meeting allowing time to resolve the subject matter jurisdiction issue.

Discussion circled back to the application's denial based on incompleteness in October and November of 2022, reapplying without prejudice, the timeliness of this application, the requested stays, the validity of the cease and desist order and the applicants being reminded of the cease and desist 60-day limit, along with the rebuttal that the

applicants have met every deadline along the way, that they didn't want to open a hearing because they thought they would get through the CASB zoning board appeal (December 1, 2022 meeting) in time and may not need to apply to ZBA and that permits are regularly granted after the fact of a cease and desist order.

Discussion was held that the denial (due to incomplete material in application) was based on procedure and not substance and that the issue of subject matter jurisdiction could be brought up at any time during any proceeding as now.

Further discussion was held regarding the absence of Chairman Kaweck; him being the initial contact from the ZBA and that the acting Chair was present at all meetings along the way.

Discussion was held with ZEO Perkins regarding the cease-and-desist order date and wording, that it stated no building permit was applied for or received and that it ordered removal of improvements and a return of the premises to its previous condition. There was further discussion about the question of whether the cease-and-desist need be upheld in that the applicants were now appealing the CASB's denial of their application for a building permit. Subject matter jurisdiction was again questioned as a concern since the cease-and-desist order may or may not have been timely appealed.

Next, Attorney Michael Cretella presented on behalf of Claire Shubik, owner of 18 Rockland Park. He discussed reasons that the project doesn't comply to zoning regulations as outlined in submitted letter.

First, that retaining walls were built within 15 feet of side or rear property lines and that the new retaining wall is within 10 feet of another existing retaining wall. He pointed out the wall on 30 Rockland Park is particularly vulnerable. He mentioned that the Shubik patio was built before specified regulations were adopted.

He mentioned being open to discussion with Mr. Casey regarding any deal towards remedy.

Mr. Cretella discussed there is no unusual hardship particular to the parcel at 14 Rockland Park, noting that the homeowners have used the property in a residential manner for 18 years, and asserting that a slope on a small portion of the parcel doesn't justify a variance.

Citing case law, he discussed that should a previous owner be denied variance due to voluntary acts, then the successor is barred as well given the same circumstances, making it a self-created hardship.

Lastly, he mentioned jurisdictional requirements are strict and the board can't necessarily change that by public hearing comments.

Next, David Peterson, 72 Riverview Avenue, spoke about terrace versus patio and that building code requires patios over 30 inches have a building permit. Also found was that patios are cut into the ground and terraces are raised. He said the 30 inches was a determining factor for railing. He mentioned that this was in the building code and not zoning code.

Mr. Casey was given the floor for rebuttal. He discussed the retaining walls and the zoning board citing 18 and 14 Rockland Park as the basis and not the sea wall on 30 Rockland Park. He asked Mr. DeBartolomeo to help explain.

Mr. DeBartolomeo discussed that the 10-foot rule is usually just a prescriptive code. He used visual aids to explain that while the current retaining wall is less than 10 feet away from the 30 Rockland Park sea wall, it was structurally sound because it is resting on bedrock and therefore not applying pressure.

Mr. Casey continued the rebuttal discussing that when regulations appear in favor of property owner, that they be liberally construed in their favor. He discussed that the rules for terraces be applied.

It was also discussed that this was the first-time the applicants sought permitting for this project and that there are no known right of way arrangements with any neighbors. There was also discussion about why the applicants didn't just apply for all 8.5 guidelines and that this is a joint application with the Lewis's at 22 Rockland Park.

The Chair discussed receiving Mr. Casey's written approval for a 35-day public hearing extension and entertained a motion to adjourn the hearing, which was made and seconded.

New Applications

After a five-minute break, regular business resumed. There were no new applications.

Minutes

Minutes from the April 3rd, 2023, regular meeting and public hearing were accepted unanimously and so moved and seconded.

Old Business

Moved to top of meeting per request of application 3-2023.

Bills & Correspondence

The Chair discussed correspondence submitted for record for the 14 Rockland Park applications.

New Business

None

Adjournment

A motion was made and seconded for adjournment at 9:50pm.

Respectfully submitted,

David Steinman, Acting Secretary
Short Beach Zoning Board of Appeals