

## BERLIN ZONING BOARD OF APPEALS

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The Berlin Zoning Board of Appeals met in person on **Tuesday, October 27, 2020 at 7:00 p.m.** The public was invited to access and participate in this meeting in person, via WebEx videoconference or telephone conference call as provided below.

Join WebEx Meeting:

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Meeting Number (access Code) 132 355 5116

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### **Members Present**

Antonio Francalancia, Chairman, Corey Whiteside, Sandra Coppola, Secretary, Christine Mazzotta, Alternate, seated, Ryan Zelek, Alternate, seated

### **Members Absent**

Nelson Graca, Co-Vice Chairman, Leonard Tubbs, Co-Vice Chairman, Hunter Mathena, Alternate

### **Staff Present**

Maureen Giusti, Acting Town Planner, Adam Levitus, Temporary Zoning Enforcement Officer

### **Call to order**

Chairman Francalancia called the meeting to order at 7:00 pm.

Chairman Francalancia noted the Remand Hearing for 1005 Kensington Road may be lengthy and inquired of counsel for the parties if they had any objection to moving the hearing on the item to the end of the meeting so that the other matters on the agenda could be wrapped up before the Remand. Hearing. No objection. The Remand was moved to the end of the agenda.

### **Audience of citizens**

None

### **Public Hearings**

**ZBA #2020-11 Map 11-3 Block 132 Lot 19, 288 Beckley Road**

**aka: 286 Beckley Rd and 55 Ledge Drive**

*POSTPONED*

Carrier Enterprises, LLC is appealing the decision of the Zoning Enforcement Officer dated July 7, 2020, to deny a zoning permit for Building Permit Application for new construction of a single-family house. (postponed at request of applicant)

**ZBA #2020-12 Map 11-3 Block 132 Lot 19, 288 Beckley Road**

**aka: 286 Beckley Rd and 55 Ledge Drive**

*POSTPONED*

Carrier Enterprises, LLC is appealing the decision of the Zoning Enforcement Officer dated August 19, 2020, to deny a zoning permit for Building Permit Application for new construction of a single-family house. (postponed at request of applicant)

**ZBA #2020-15 697 Berlin Turnpike Map 10-4 Block 132 Lot 86**

Kusum Shah (owner/member - Twin Spruce Motel, LLC) is requesting a variance for a southerly side yard of 13 feet when 25 feet is required in the BT-1 Zone per Berlin Zoning Regulations §VI.J for a detached 12-foot x 24-foot accessory garage to replace a 12-foot x 20-foot garage in the same location that was damaged. Mr. Shah explained that the garage is over 30 years old (1987) and has suffered severe damage from strong storms. The garage will be used to store customer’s belongings that are left behind and air conditioning units during the winter. The existing damaged garage was too small to store everything needed. The proposed garage is 4 feet larger. Mr. Shah explained the site work has already occurred due to damage from a tree and the coronavirus.

**Comments in Favor**

None

**Comments in Opposition**

None

**Staff Comments**

Currently, the property is a motel use on an existing non-conforming lot in the BT-1 zone (lot is 1.2 Acres vs. 2-acre minimum required by current regulations). The original motel building was constructed in approximately 1959 and consists of a row of single-story motel rooms on the western portion of the property. In 1973, a Zoning Board of Appeals variance was granted for the construction of the split-level addition to the east of the 1959 building. In 1986, a Zoning Board of Appeals application for the addition of four motel units and a garage was denied due to a lack of an established hardship for expansion and the potential for public safety problems for access to the rear of the building. According to the Town Assessor’s card, the previously demolished detached garage the applicant is proposing to replace was constructed in approximately 1988. The garage was located to the south of the 1973 split-level addition and a 2003 attached garage, and per the applicant, was destroyed by a storm in approximately 2019. Based on a 1995 survey, the garage was approximately 10 feet x 20 feet and located approximately 13 feet from the southerly side property line. The proposed garage is four feet longer than the previously demolished garage and would not meet current regulations for side yard setbacks. However, it would align with the previous nonconforming setback line of the demolished garage. See the attached staff plan markup for the proposed garage and setback information. It was further noted that placement closer to the existing building would block access to the rear, existing garage and person doors. The applicant noted that the building is necessary for safe storage, particularly during the COVID-19 pandemic, of belongings left by customers, as well as motel storage.

Zoning Requirements:

§VI.J Side Yard Required: 25 ft. Previously Existing Nonconforming: 13 ft. Proposed: 13 ft.

**Chairman Francalanga moved to close the public hearing seconded by Commissioner Mazzotta. The motion carried unanimously.**

**ZBA #2020-16 65 Sbona Road Map 14-2 Block 69 Lot 85**

Vipul Patel is requesting a variance for a northerly front yard of 25 feet when 35 feet is required in the R-15 Zone per Berlin Zoning Regulations §V.A.10 for a second-story addition above an existing attached garage. The property is on a corner lot, with the requested variance along Colonial Drive. Mr. and Mrs. Patel explained they are proposing to add a second story on the existing structure. The garage would become a suite and two bedrooms would be added to the home. The family loves the neighborhood and would like to stay. They further noted that Colonial Drive was not there when the house was constructed, and therefore the side yard requirement was smaller [than for a front yard].

**Comments in Favor**

None

**Comments in Opposition**

None

**Staff Comments**

The existing ranch house with the attached garage was built in approximately 1955. The existing garage has a current setback of 25 feet (between the garage and the property line along Colonial Drive) that was established at the time of the original construction.

The applicant is proposing to construct an addition above the existing garage. The proposed addition would not meet the current regulations for front yard setbacks; however, it would align with the existing nonconforming setback line of the garage and would not decrease the existing front yard along Colonial Drive.

Zoning Requirements:

§V.A.10 Front Yard, Required: 35 ft., Existing, Nonconforming: 25 ft., Proposed: 25 ft.

**Chairman Francalanga moved to close the public hearing seconded by Commissioner Mazzotta. The motion carried unanimously.**

**ZBA #2020-17 164 New Britain Road Map 3-3 Block 24A Lot 38**

Gulbano Meghani (owner - Berlin Food Mart) is requesting a Sale of Alcoholic Beverages approval per Berlin Zoning Regulations XI.B., for an On-Premises Grocery Beer Liquor Permit for the Berlin Food Mart located at 164 New Britain Rd. The property is zoned CCD-1.

Mohin Kapadwala a consultant for the business owner explained the prior owners had a grocery beer permit. The prior owners had problems with signage and the new owners have been working with the town to take care of this problem. Mr. Kapadwala provided photos to the Board that prove the store has many shelves of groceries.

**Comments in Favor**

None

### **Comments in Opposition**

None

### **Staff Comments**

The property at 164 New Britain Road was constructed in approximately 1972 as a food store. A Zoning Board of Appeals request to sell beer was approved in 1974. More recently, the Zoning Board of Appeals granted a grocery beer liquor permit to previous business owners including the One Stop Food Store (2014), 7 Stars LLC (2018), and Berlin Mini Mart LLC (2019). The current applicant is a new business owner (Berlin Food Mart). The building owner (Aakash Properties II LLC) has not changed since the previous grocery beer permit approval in 2019. Photos of current grocery inventory have been submitted with this application. Signage will need zoning approvals with building permits and unauthorized signage will need to be removed. Conversations with the applicant's representative prior to this ZBA application have shown some progress in removing existing signage that does not comply with the zoning regulations.

The current owner of the Citgo next door had called staff voicing some opposition with no elaboration. He was advised to attend or provide comment, however, he is not present at this meeting.

Zoning Requirements:  
§XI.B. Sale of alcoholic beverages.

**Chairman Francalangia moved to close the public hearing seconded by Commissioner Mazzotta. The motion carried unanimously.**

### **Regular Meeting**

#### **ZBA #2020-11 Map 11-3 Block 132 Lot 19, 288 Beckley Road**

aka: 286 Beckley Rd and 55 Ledge Drive

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**Commissioner Mazzotta made a motion to approve the proposed application seconded by Commissioner Whiteside. The motion carried unanimously.**

**ZBA #2020-16 65 Sbona Road Map 14-2 Block 69 Lot 85**

Vipul Patel is requesting a variance for a northerly front yard of 25 feet when 35 feet is required in the R-15 Zone per Berlin Zoning Regulations §V.A.10 for a second-story addition above an existing attached garage. The property is on a corner lot, with the requested variance along Colonial Drive.

**Chairman Francalangia made a motion to approve the proposed application seconded by Commissioner Mazzotta. The motion carried unanimously.**

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**Commissioner Mazzotta made a motion to approve the proposed application seconded by Commissioner Whiteside. The motion carried unanimously.**

**Approval of Minutes**

February 25, 2020 (Francalangia, Graca, Tubbs, Whiteside, Coppola, Zelek)

Chairman Francalangia moved to approve the minutes of February 25, 2020, seconded by Commissioner Whiteside. The motion carried out unanimously.

April 28, 2020 (Francalangia, Graca, Tubbs, Whiteside, Mathena, Zelek)

Chairman Francalangia moved to approve the minutes of April 28, 2020, seconded by Commissioner Whiteside. The motion carried out unanimously.

June 23, 2020 (Francalangia, Graca, Tubbs, Whiteside, Zelek)

Chairman Francalangia moved to approve the minutes of June 23, 2020, seconded by Commissioner Graca. The motion carried out unanimously.

September 22, 2020 (Francalangia, Tubbs, Whiteside, Coppola, Zelek)

Commissioner Whiteside moved to approve the minutes of September 22, 2020, seconded by Commissioner Graca. The motion carried out unanimously.

Commissioner Coppola excused herself from the rest of the meeting at 7:43 pm.

**Public Hearing**

**1005 Kensington Road, Map 21-1/Block73/Lot 15**

Remand issued by Superior Court in the matter of Liam T. Mitchell, et al. v. Berlin Zoning Board of Appeals concerning the Board's denial of the plaintiffs' appeal of a Cease and Desist

Order issued by the Zoning Enforcement Officer for an unauthorized basement apartment in the R-43 zone per Berlin Zoning Regulations §XV.A.1.

Attorney Jennifer Coppola, Corporation Counsel introduced items being marked for the record as Exhibits #1-5. Exhibit #1: The Court's Memorandum of Decision. Exhibit #2: The packet distributed to the Board for tonight's remand hearing consisting of October 24, 2020 Correspondence from Attorney Coppola to the Board with attachments that include case law; Designated Contents of the Record list and record items #1 through #10; submissions made by applicant's counsel Attorney David Griffith on October 23, 2020 which he labeled as items #17 through #21; Connecticut General Statutes Section 8-7; and excerpts from the Berlin Zoning Regulations; Exhibit #3: Berlin Zoning Regulations - Attorney Coppola noted the marked Zoning Regulations are Designated Contents of the Record record item #11 and were the Zoning Regulations in effect at the time of appeal of the cease and desist order to the Board. Attorney Coppola also marked additional items that were being submitted by Attorney Griffith on behalf of Mr. and Mrs. Mitchell, including Exhibit #4 Revised Finding of Facts drafted by Attorney Griffith which Attorney Griffith labeled as revised item #21 and Exhibit #5 black and white printer copies of photographs which Attorney Griffith labeled as item #22.

Attorney Coppola explained some matters related to the remand hearing and the Board's procedure when acting on applications before it.

Attorney Griffith presented for the homeowners Liam and Cynthia Mitchell. He explained that a Superior Court Judge remanded the homeowners to come back to the Zoning Board for re-consideration. Attorney Griffith stated that the basement apartment pre-existed the change of the zoning laws in 1962. He noted his narrative was in evidence and some new evidence would be presented. He referred to the new information he submitted (the documents he submitted on October 23, 2020 labeled as items #17 through #21 which are part of Exhibit #2), in particular Statement of Facts from Kevin Cyr. Kevin Cyr was the son of the owners of the property from 1961-1981. In 1960, the previous owner rented out the basement as an apartment until the property was sold in 1981. Attorney Griffith noted the house main level was rebuilt after a fire around 1970. There is a door from the basement apartment that leads directly to the garage for the renter to access a vehicle. The next document in the package, item #19, is a statement of facts from Mr. Mitchell.

Attorney Griffith discussed the construction of the house which was further described by Mr. Mitchell, including, originally when the home was built the foundation was poured as if a basement apartment was going to be occupied. They described the layout including the outside door, garage and plumbing in the poured basement. Photos presented show plumbing were designed for a basement apartment including sinks and a shower. He noted there were no cuts in the concrete which would indicate installation after initial construction and the interior basement stairs are secured with a deadbolt which separate the units.

Attorney Griffith then questioned the property owner, Liam Mitchell, regarding the construction of the kitchen and cabinets. Mr. Mitchell noted the original owner was a cabinet maker according to his death certificate and that the cabinets were custom built. Other photos show custom cabinets, a cooktop and a built-in wall oven from the 1960's. Attorney Griffith noted Mr. Pautzsch's death certificate was attached. They reviewed details of additional photos.

Attorney Coppola noted for the record that she showed each of the described photos individually to the Board members.

When the current homeowner bought the property, the basement was not being rented. Evidence regarding a mailing by the 2020 census recognizes that there is an apartment on the property was presented. The Board was directed to court record item #7 in the packet, photographs, and the basement plumbing was described. Court record item #8, a series of photos of the kitchen, was described.

Mr. Mitchell explained issues with \$8,000 in permits he attempted to pull.

Mr. Mitchell was questioned on the basement heat. The basement has a wood stove and fireplace. He noted a new boiler was not used due to baseboard leaking, which he replaced. He confirmed the boiler was a single boiler for the house. The Board inquired about other utilities being separate. Mr. Mitchell confirmed there was one water meter. He compared the situation to rented rooms at his property in New Britain being divided between residents.

Chairman Francalangia asked if the apartment was rented prior to Mr. Mitchell's purchase. Mr. Mitchell stated it was. Commissioner Mazzotta asked about separate driveways, Mr. Mitchell confirmed there are two driveways. Chairman Francalangia inquired if there were 2 families in the house when he purchased it in 2015. He noted there was an ad in the paper prior to his purchase.

Chairman Francalangia noted that his (1972) house has plumbing in the house for a kitchen and bathroom, but it is a single family and cannot be a 2<sup>nd</sup> dwelling. And he was allowed to have it installed. Mr. Mitchell reiterated his belief that the apartment in his house was built prior to the single-family restriction and not abandoned. Chairman Francalangia reiterated that fixtures do not make the house able to have a two-family, but a second kitchen was allowed.

The Board questioned the proof that it was rented over the last 25 years. There was discussion regarding installed fixtures versus a two-family. Attorney Griffith stated the record shows that the apartment continued to be rented after the zoning regulation changed. Commissioner Zelek asked for an explanation of item #20 in the Attorney Griffith's October 23, 2020 submissions (part of Exhibit #2) noting that the second page indicates 1-family is checked on the tax assessor card. Attorney Griffith noted that would be the original card, but the subsequent owners, the Cyrs did rent starting in 1960. Attorney Coppola noted the Cyrs were not the original owners. She questioned if this would have been the time period when owners would come into the Assessor

to attest to the conditions at their property. Commissioner Zelek noted the card would have been the original from 1956, and the Cyr's would have been added to it when they purchased the property. Mr. Mitchell speculated that the Town would not have made a distinction of one or two family because it was the farm zone.

Commissioner Whiteside questioned the assessor cards, and the conditions and that assessment is separate from the zoning law and what they had originally considered. Commissioner Whiteside recalled the original hearing discussion with Commissioners Tubbs and Graca. However, he is understanding that the applicant has entered the assessor cards, but they do not support the two-family use. He questioned why they would enter them if it does not support the use. Attorney Griffith explained it reflect the original basement garage and Mr. Mitchell noted the finishes were there.

Commissioner Whiteside went on to propose they go back to the purpose and go through the revised proposed findings of fact submitted by Attorney Griffith and if the Board agrees, if they would find there was no abandonment. He noted that they have gone through the evidence regarding proposed findings #1, 2, 3, and 4. He suggested they move on to items #5, 6, and 7. Attorney Griffith noted affidavit from Mr. Cyr. Commissioner Whiteside noted they would now be to 1981 but asked what happened from 1981 to the present. Attorney Griffith noted the Assessor's cards may not be reflected but they know there was apartment use and there was a recognition from the Town when communication went out when the prior owners put the property on the market as a two-family with apartment in the basement, and there is not anything in record that shows it was abandoned. Commissioner Whiteside stated he did not feel the evidence for proposed finding #6 is the strongest evidence and asked to move to proposed finding #7. He stated only census for 2020 submitted, but Attorney Griffith's summary says lengthy time, and he asked how can the time period discussed be covered by the single census offered.

Chairman Francalancia noted the terms, "two-family" and "apartment" are being used interchangeably by the homeowner and his attorney. The Board discussed that these two terms are not one in the same.

Attorney Griffith returned to discuss 1981-1991 and reiterated he did not feel there was any evidence that the apartment was abandoned. He indicated there was nothing showing ingress and egress was blocked off, plumbing was not disconnected, to show abandonments. Chairman Francalancia questioned if there was evidence that the Regans rented it for the 24 years they owned the property. Attorney Griffith stated that they did not have any leases but noted the advertisement for selling the house that resulted in the Town sending a letter.

Commissioner Whiteside returned to Cumberland Farms case that Attorney Coppola distributed regarding the definition of abandonment. He referenced the past hearing where former Town Planner Marek Kozikowski indicated that the town staff came to the conclusion that upon the rebuild in 1970 after the fire, the owner had abandoned the non-conforming use. He questioned

whether Judge was saying that is not the definition of abandonment. He believes that the Board has to focus on staff's conclusion because the Board had agreed with that conclusion and that there was no evidence to overturn or reverse the order. He disagrees with the Judge that the Board did not do its job. He then stated they need to find if the original order was valid by line items in record item #3. Staff wrote out all the background. He will focus on the statement that the nonconformity would have been abandoned when the house was rebuilt as a single-family and there is conflicting evidence in the town record with multiple inspections having been conducted and not finding any fixtures down there and therefore he thinks they need to focus on whether they abandoned it or not.

Mr. Griffith noted his opinion that Mr. Cyr's statement that the basement was rented before and after the fire. Mr. Mitchell noted that he believed the basement had not been damaged and remained original.

Commissioner Mazzotta noted the Assessor's cards describe the basement finishes differently. Mr. Mitchell stated the basement square footage would not be added even when finished to the Assessor's square footage, only the first floor. Commissioner Mazzotta noted the in-law notation, and another card single-family with apartment, and another rec. room in basement. Chairman Francalanga noted that there is no evidence the finished basement was not a family space, there is no separate utilities or meter. Mr. Mitchell said the rental agreement would show how utilities are split. Mr. Mitchell compared it to New Britain 3-family.

Commissioner Whiteside stated if they stipulate it was a two-family before 1960, they have to find if it was abandoned. Attorney Coppola questioned testimony regarding Mr. Mitchell renting from the Regans. Mr. Mitchell clarified he had rented it to Mr. Kern, not from the Regans. Mr. Mitchell stated his tenant continues to rent a trailer at his place.

Attorney Coppola noted that the process should include hearing from Ms. Giusti, as she is the one that wrote the Cease and Desist Order at issue and has not had the opportunity to speak.

Maureen Giusti, Interim Town Planner, explained that after the current homeowner bought the property, he rented out the basement illegally. This was brought to the town's attention. Mr. Mitchell expressed that he pulled permits first to separate utilities and indicated that is why he received the Cease and Desist. Ms. Giusti indicated she would be giving some repetitive information and tried to summarize so as not to reiterate information they already had and would be referring to the labeling of the record done by Attorney Coppola so they would not have the same documents distributed again. She stated she would start with the 2019 staff comments with the history of the property that outline the conclusion that resulted in the Cease and Desist Order, the background investigation with the Assessor's office, the building permit records, and the rest of the enforcement file as the entire file must be included and distributed as that is required for an appeal. She referenced court record item #3 (part of Exhibit #2). She indicated she would be giving a summary of the key points followed by response to comments made during this hearing.

She stated there are layers of issues, and noted that if they disagree on one point, they may agree on another that will show why the Order should be upheld.

Ms. Giusti stated that in 2015 the real estate listing indicated the property had an apartment and a courtesy letter was sent to the realtor and the seller that stated this property was single-family and did not include an apartment (record item #3 – ROR 3B-21 and ROR3E-3). She noted that potential for income is often advertised, but someone doing due diligence would find what is allowed. She noted that the courtesy letter indicated that the records showed no Certificates of Occupancy or permits for an apartment were found with the Town. The seller made no contest that the finding was inaccurate, there was no appeal. The letter was put in both the Zoning file and the Building Permit file. She informed the Board that the Building Department and the Zoning Office spend a considerable amount of time providing due diligence information to potential buyers and lenders. The building permits pulled by Mr. Mitchell noted that it was a single-family residence. Ms. Giusti noted that when zoning determination is made, and the applicant does not agree, that is the time to appeal. No appeal that it was a single-family house was made. She pointed out that there is specified time period to make an appeal and it passed.

Ms. Giusti then went through the Building Permit history as outlined in ROR 3A-3 and 3A-4. There is a 1954 permit for 6 room house and she read data from the card. In 1956, there was a re-issuance of the initial permit and no corrections to data and therefore likely all information was found correct. Again, a single-family residence was listed. She then went over the ROR 3B-14 installation of sewage disposal system indicating one-family and indicating basement fixtures was left blank, and related 1970 certificate of occupancy indicates one-family dwelling. Therefore, she maintained that while a farm dwelling would have allowed a farm two-family, it would not have precluded the need to acknowledge and obtain permits for the same and that submitted and issued building, zoning and septic paperwork reflect a 3-BR, bath DR and single room basement. She also noted any basement garage would have a door into the main area of the basement and include stairs up to the main floor and therefore she does not understand the claims that it would support an apartment.

She then noted that the Assessor's inspections are a tax function and shows what was seen on site by an assessment official so they can be taxed if installed, and not what is allowed. Attorney Coppola noted that the originals of court record item #3 are available if any members have difficulty reading the distributed copies. Ms. Giusti referred to 1966 card that notes occupancy single, basement 1-room, rough plumbing in the basement. The 1976 card noted the R-43 zone. She reiterated Commissioner Zelek's earlier statement that the cards were created once every 10 years and updated by hand-written notation until the next card was made. She referred back to the 1976 card indicating there was a kitchen in the basement, but that in a conversation with the Assessor on 6-8-2018 that any apartment would have been also noted and value added and it was not. Chairman Francalanga asked if that would have been when Cobuzzi's owned the house and that he knew Mr. Cobuzzi to use the kitchen to make sauce.

Ms. Giusti noted that a separate kitchen in a basement is found in homes throughout town, but it does not mean that it is authorized as a separate or rentable dwelling unit. On the 1986 card, in ROR 3C-12 and ROR 3C-13, one living unit is noted with a basement bathroom, but again no extra dwelling unit. On 1996 card, living unit one and has a notation that in-law was in walkout basement. Through the current year, the property has always been listed as a single-family dwelling on the property card and on any and all permits pulled.

Maureen Giusti read an email exchange statement made by a previous homeowner, Kim Regan, that came in via email today that was marked as Exhibit #6. Attorney Griffith asked that the Board disregard this Exhibit as not shared with him. Ms. Giusti read the email with Ms. Regan. It stated that Ms. Regan's brother-in-law lived there but did not pay rent or have separate mail or utilities and that she used the kitchen and after he moved, they used the space as a playroom.

Ms. Giusti also submitted record Exhibit #7 voter registration records showing that only Regans were registered to vote at the address back to 2000, as far back as the records were available from the Registrar of Voters. Attorney Griffith reiterated his objection to the email and it not being sworn. Ms. Giusti explained that fact finding continued as they/Attorney Griffith and the Mitchells had done and that the email was received late this afternoon. She added that she is not a lawyer but was trying to find the best information.

Ms. Giusti noted that if there is a claim for a separate dwelling unit, which she does not agree to, then it was constructed illegally after certificate of occupancy and septic permits were issued and the owners not claiming it at rebuild would also indicate abandonment of any separate unit.

Ms. Giusti then addressed the claim of a second address. She stated that only the Engineering Department assigns official addresses and no address for a separate unit has been granted for this property. She noted that there is a provision for Accessory Dwelling Units in the current zoning regulations.

Ms. Giusti then addressed claims made earlier in the hearing. She noted Ms. Regan indicated the main level garage must have been added because the kitchen window looks into it. She stated that any basement may have exterior access. She added keys and locks can be changed and added, permits would not be required. Houses have interior staircases. This does not make an apartment. Ms. Giusti noted she does not know how the census finds addresses, but no address was assigned by the Town. She explained that the US Census is simply to determine how many people live where, its purpose is not to determine what kind of dwelling the property is or if it is legal. She read from the census.gov website. She reiterated her recollection that the Town denied several permits for separate utilities.

Ms. Giusti explained to the Board that previously allowed and installed amenities do not indicate a separate dwelling. The current zoning regulations are interpreted to not allow for amenities that create a separate dwelling unit, but there may have been a time that amenities were allowed to be installed for use by the one family that lived in a dwelling. Those become a violation when used

as a rental apartment. The concern is that other residents will build amenities into their property for rental purposes.

Commissioner Zelek asked if the 1970 record was for after the fire. Ms. Giusti confirmed it was. He noted it was approved for occupancy as a single-family dwelling. Ms. Giusti added this was the premise for the order that was issued. Chairman Francalancia added that the Regans did not use it as an apartment after that time for 24 years, the use by the brother does not indicate an apartment.

Attorney Coppola referenced the deed from the Regans to the Mitchells entered as an exhibit at court. She asked if the Regans let Mr. Mitchell know that they received the letter from the ZEO. She inquired why the applicants/Mitchells did not get information from the Regans for this hearing. Mr. Mitchell stated she/Mrs. Regan was dumped and there was no need.

Ms. Giusti reiterated the 1968 permits were for one-family. If fixtures and amenities were installed, they were without Town knowledge. The order was issued when the Town found out. She noted the Town does not have the right to just enter homes to find an apartment. The system is that when permit applications are made, Zoning confirms the changes are allowed. Back then the building inspector or town engineer may have done that job based on letters in files regarding enforcement. The Town had knowledge of only a single-family home. We got a report of the sales listing which prompted zoning research.

Attorney Griffith referenced back to the amenities in the basement as listed in the email exchange with Ms. Regan. He noted that they listed the house with an apartment, and this shows she did not abandon the use. He challenged the ZEO enforcement of a nonconforming use. He added that Ms. Giusti has not been transparent by providing an email exchange at the meeting.

Commissioner Whiteside asked Attorney Coppola to go back to abandonment, noting that the appellant is asking for inferences and is confusing. Attorney Coppola referenced the Cumberland Farms case, in which the appellate court evaluated the trial court's decision. She noted that part of the appellate court decision at page 3 may be instructive and read from the decision. She indicated that like the case, there are compelling arguments on both sides. She instructed that the Board has to start at the beginning and determine the use at construction and evaluate if it was in place at the time it was allowed and then make a determination if it was continuous or if it was abandoned. She reminded the Board that they are the finder of fact. She explained inferences of fact, are made by them based on the information in front of them. The supreme court, in the Cummings case, was indicating that there were no facts to make the determination.

Commissioner Whiteside asked Ms. Giusti if the Town claims that the owners' lack of intention to remedy/address the Town indications on Assessor cards and building records and in the ZEO's letter is viewed as a permanent relinquishment. ZEO Giusti responded that the records of the officials that gained access show the basement was not finished, rough plumbed, that it was not a dwelling. She referenced ROR 3B-1, 1955, one housekeeping unit; ROR 3B-14, septic

installation: families – 1. The 1970 rebuild permits refer to one dwelling. If there was a second dwelling prior to 1970, as ZEO, she would have looked at the record and said it was relinquished in 1970 when they applied for permits to rebuilt as a single-family dwelling to be built. The indication is that they were trying to stay under the Town's radar as having an apartment that they rented. At the time, the amenities or features could have been allowed, but as an apartment would have had to have been authorized. All the permits indicate one-family after the time the zone was single-family. Any claim to two-family as nonconforming should have been claimed at that time.

In response to Commissioner Mazzotta's question, Ms. Giusti noted that a remedy under the current zoning regulations would be a unit encumbered by the current accessory dwelling unit regulations and understands Mr. Mitchell is seeking unencumbered apartment use. She explained current zoning allows an accessory unit that among other things is either age or income restricted.

Mr. Mitchell claimed that there are not accurate records and that they have shown continued use.

Ms. Giusti clarified that to the best of her knowledge the Building Department records have records dating as far back as the 1940s when zoning was established and possibly older. The damaged records that Mr. Mitchell referenced were Planning and Zoning records that were put into storage and damaged due to a leak in the Town Manager's office. The State received the list of damaged records, which were primarily actions of the Planning Commission, Zoning Commission, Planning and Zoning Commission and Zoning Board of Appeals and the records were authorized to be destroyed. They would not be records that would be relevant here. The Building Department records that are being discussed are intact. The records of the residential house would not have been in those zoning records.

Commissioner Zelek inquired if Mr. Mitchell had done due diligence which should have found the zoning letter, or the certificate of occupancy having listed the house as single-family. He questioned if the 1970s owners may have rented it illegally. Mr. Mitchell said that none of the basic structure has ever been changed.

Commissioner Mazzotta asked if they have seen evidence that it was ever a two-family house because she has not seen anything that shows it was. Commissioner Whiteside stated that nobody outright claimed the nonconforming use. Chairman Francalancia commented that two family houses have two different addresses.

There was some discussion of illegal action versus nonconforming use. Attorney Coppola asked the Board to look back to the legal argument regarding lawful or actual use prior to 1970 before the Cyrs lived there. Attorney Griffith noted the farm zone allowed for up to a two-family. Initial design showed basement dwelling including entrances through foundation wall and basement garage and plumbing pre-1962, in 1960. He stated despite what permit and CO said, the two-

family use was allowed, and he noted the original owner installed the cabinetry and the second owners the Cyrs rented it for 20 years.

Ms. Giusti referred back to the certificates of occupancy at ROR 3B-5 and the 1970 certificate of occupancy. If the regulations allowed 2-family, the certificates of occupancy should have stated what it was. The Board discussed evidence they had heard.

Chairman Francalancia called for any comments from the public. Staff confirmed that it did not appear anyone, but the recording secretary, was participating remotely.

Mr. Mitchell made a closing statement that he did not think his apartment should be an issue with the Town. Ms. Giusti indicated that others would use this to think that they could stay under the radar and incorrectly believe they have rentable apartments.

Commissioner Whiteside referred back to the supplied findings of fact and noted that the Board needs to come up with its findings for the court.

Attorney Coppola referred to page 2 of her correspondence to the Board and pointed out that the Board has to consider the timing of the construction in relation to the zoning regulations as they changed over time. They/the Mitchells submitted the use was legal at a particular moment in time and the Board has to determine if the use was in use during the timeframe that they are saying the use was legal. Then they have a claim of when the use became nonconforming and that the use continued throughout. She explained that the use would have had to be actual when it was legal and would have had to have continued when it became nonconforming and could not have been abandoned. She suggested doing it by list and reminded the Board that they have to give collective reasons to support their decision.

Ms. Giusti noted that she would like to be able to enter her notes into the record, as she is not a lawyer, never having done a remand, she did not prepare proposed findings of fact as the appellant's lawyer did. She therefore wants her written notes in the record for the Board's reference and would like to distribute them to the Board. Ms. Giusti's notes were marked as Exhibit #8.

Attorney Coppola explained the Governor's Executive Order 7B, that evidence is allowed to be submitted at the meeting, and that it is then posted as required in the Executive Order.

Commissioner Whiteside requested staff try to get a sworn statement from Ms. Regan. Attorney Griffith asked that any new info be distributed to him. Attorney Coppola recommended that if the Board wanted additional information, the hearing should be kept open.

The Board discussed their availability for a special meeting and room availability. Ms. Giusti noted they would distribute any exhibits that were not distributed in advance and noted the Board

has requested a sworn statement from Ms. Regan and proposed finding of facts from the Town/Ms. Giusti and any additional information from Attorney Griffith,

Commissioner Zelek made a motion to continue the hearing to November 24th, seconded by Commissioner Mazzotta. The motion unanimously carried.

**Remand hearing continued until next meeting, Tuesday November 24, 2020.**

### **Adjournment**

Chairman Francalanga moved to adjourn the meeting, seconded by Commissioner Whiteside. The motion carried unanimously.

The time was 11:21 pm.

Respectfully submitted  
Marlo Matassa  
Recording Secretary