

ONEIDA COUNTY BOARD OF ADJUSTMENT
PUBLIC HEARING SUMMARY
JULY 27, 2020

Chairman Harland Lee called the meeting to order at 1:07 PM in accordance with the Wisconsin Open Meeting Law.

Roll call of Board members present: Harland Lee, “here”; Guy Hansen, “here”; Phil Albert, “here”; Norris Ross, “here”; and Mike Pazdernik, “here”.

Members absent: None.

County staff members present: Karl Jennrich, Zoning Director; Brian Desmond, Corporation Counsel (via ZOOM); and Julie Petraitis, Program Assistant

Other individuals present: See Sign in Sheet.

Chairman Harland Lee stated that the meeting will be held in accordance with Wisconsin open meeting law and will be tape-recorded and sworn testimony will be transcribed. The Board of Adjustment asks that only one person speak at a time because of the difficulty in transcribing when several people are talking at once. The Board of Adjustment is made up of five regular members and two alternates. At this time there are no alternates.

Chairman Harland Lee stated that the County and Attorney Melms, who is representing Ms. Bostrom, and have indicated to Chair Lee that they wanted to have the Board consider a dismissal of the case. Chair Lee stated he informed Attorney Wiesneski, representing the Appellant’s, of that request. At this time, Chair Lee stated that he will make a motion to dismiss, with prejudice, simply to discuss the issue. If it is decided, after both sides have presented their arguments for or against dismissal the Board will then consider the issue and make a decision.

Motion by Harland Lee, second by Guy Hansen to dismiss the case.

Brian Desmond began his testimony by stating, for the record, that the morning meeting continued without the public being present by the audio/visual means that the agenda called for. This may be an open meetings violation.

The County has made a motion to dismiss the case. He stated that the issue the County has with this appeal is that this appeal is not timely. The Board of Adjustment requires an appeal regarding a CUP or ARP be made within thirty (30) days of its issuance. We are long past that date and time. The appellants have known about the Dance School for at least 15 years, since they have lived across the street from it. He feels it should also be dismissed as untimely for failing to state a claim. They are attacking the Conditional Use

Permit conditions and that is an issue that should have been sorted out long ago, when the Conditional Use was issued.

Their second issue was regarding an ARP and allowing for the expansion of an existing parcel by creation of a new structure. Again, this is untimely and the facts in this case do not bear this out as an issue that truly exists. They say that the appeal is not to attack the issuance of the permits but the thrust of the arguments seem to do that. Their third argument about the transfer of the CUP from one parcel to another is, again, an argument that has no basis in the facts. The only thing that changed was the parcel was subdivided. The CUP stayed with the building that was built when the CUP was originally issued. This was never a Home Occupation. It has never been operated in Ms. Bostrom's home. Therefore, they should be allowed to continue this. There was not a transfer of the CUP from one location to another. It never transferred buildings. It has always been operated out of the Dance School that was applied for in 2000.

The last issue is a direct attack on the Conditional Use Permit that was issued in 2000. It asked if the Dance Studio is a School. If there is going to be an argument as to whether this is a Dance Studio or School, that argument definitely should have been addressed back when the permit was issued. There is no doubt that this issue is untimely. Again, their arguments suggest that they want to attack the underlying permits, not they are seeking some sort of enforcement. It should be noted that in some of their arguments they talk about the subdivision on the property that they feel there should have been some conditions put on that by the County. Mr. Desmond would just note that the Board of Adjustment does not have the authority to regulate subdivisions. That is beyond the scope of their authority of the ordinances and it is State Law.

On Friday, the issue was raised that the Zoning Director told them they could appeal his decision. In that regard, there is Law that states that municipalities, such as the County, cannot be bound to representations made by department employees. This would cause endless litigation over the words of the employees and would delay and confuse resolutions of these issues. Again, Mr. Jennrich may have said they could appeal this, however he does not have the authority to circumvent on behalf of the appellants in language in Chapter 17, which lays out the timeliness needed for an appeal to the Board of Adjustment.

In closing, the Dance School was permitted almost 20 years ago, it has been in the same location since the building was constructed. The Dance School was never a home occupation. The only change that occurred with the issuance of CUP 687-00 is the subdivision of the property. The violations alleged by the appellants are just an attack on the issuance of those permits, despite their assertions otherwise.

Attorney Timothy Melms stated that he and Corporation Counsel filed a joint brief. They share the same position.

Attorney Wiesneske began his testimony by stating that the purpose of the appeal today is not to challenge the issuance of the Conditional Use Permit or the issuance of the ARP; their sole purpose is to challenge the Zoning Administrator's refusal to enforce the conditions that were stated in those two permits. He thinks the joint brief filed by the respondents has kind of misdirected the Board. The next thing he wants to explain is that when he filed his original statement he was under a mistaken belief as to what the facts

were. His arguments got a little off base on some of the issues raised. His belief at the time was that there were three separate tax parcels. He thought MI 2312-5 is where the Dance Studio was. In fact, the permit that was issued refers to that tax parcel number. Attorney Wiesneske stated that he looked at the early correspondence and the statements that were made on the Conditional Use Permit Application and what he believed from that was that the proposal was that the owner was going to operate a guest house in the summer months and operate a dance studio in the fall, after the tourist season was done. There was a sketch attached where her house was. It also stated in her application that it was going to be a home occupation. All of these got him confused. He thought that the original, what is now Lot 3, was the location of the original Dance Studio and that the expansion was onto Lot 2. That is where he got off base. He apologizes for his mistake. He stated that when he wrote to Zoning Director, Karl Jennrich, in the spring and he was not corrected on his mistake. He spoke on the phone with Mr. Desmond and Mr. Melms in June and they did not correct his facts. Anyway, that did not eliminate the expansion of the dance studio. Attorney Wiesneske stated he needed to pause a minute. He informed the Board that his clients live across the street from the Dance Studio and they were waiting for the onsite inspection at 10 a.m. They did not see anybody appear. He assumes there was an onsite inspection and they just did not see anyone show up.

Chair Lee stated that all five members of the Board and Mr. Jennrich were there. They were in five separate cars.

Attorney Wiesneske continued that after Ms. Bostrom got the permit for the entire parcel, which at the time, unknown to him, was MI 2312-5 and that is the way the CUP was issued. In 2005 the owner had the first Certified Survey Map which split the parcel into three lots, which, unbeknown to him, is the fact that the Studio was built on Lot 2. That must have been some time after the 2000 CUP was issued and some time before the 2005 survey was done. In 2014 the owner then applies for an ARP for an expansion. Under the Code, he believes Chapter 35, an expansion is allowed for an existing building. The square footage, you can expand it, the square footage of an existing building. Again, his misinterpretation of the facts he thought the original building was on lot 3 and that they were expanding it onto lot 2. They expanded the building that was on lot 2. At the time of the expansion the construction or that permit was issued the building and the expansion were both located on lot 2 and he agrees with those corrected facts that were brought to his attention. He pointed out to the Board that in 2019, just last year, the owner caused the second, a resurvey of a Certified Survey and it changed the lot line. It moved the lot line so that now lot 1, which is the northern most lot, that lot now includes the expansion building and lot 2 has the original studio. Here is another point to point out; the ARP, the sketch that is attached to it, represented to the Zoning Office that those two buildings were going to be connected by some kind of hallway or something. He said that he is sure when the Board went out there and inspected they did not see those two buildings connected. What they have now is a building that is not really an expansion to the north; what is now lot 1, they have a separate building out there. Not only that, but the 2019 second Certified Survey shows a proposed addition on that second building. They don't know what the owner's got in mind there. It's got to be a plan at some point to sell one of those lots and have a bigger, commercial type building on it

because neither one is a residence. So, he thinks the issue they have about the expansion being on a different lot, the same argument applies although the circumstances have changed. There is a change of circumstances here and when they complained about this to Karl Jennrich, Attorney Wiesneski doesn't think he did any investigating to find out where the lot line was or where the building was or if the two were connected. Mr. Jennrich just wrote a letter in February reciting the nine different conditions that were stated in his letter of approval back in 2000 but he ignored all the conditions that were in the actual Conditional Use Permit. That brings us back to the other violations that they have alleged and Attorney Wiesneski agrees with the County that maybe the owner did not need to get a Home Occupation permit because she got the CUP instead. But her conditions stated on her application said it was going to be a home occupation. Even if the location of the studio is not in her home and never was, it also says on there as a condition 'no employees'. They have evidence that shows there are lots of employees out there and that is a further violation of the original conditions. Then we come to the ARP where they explain that they are going to- one of the concerns for a Conditional Use Permit in a residential district is traffic. They represented that they were not going to have classes back-to-back so that there would be ample time for people dropping off their students and those picking them up so there wouldn't be an overlap to create a big traffic problem out there. His clients will testify that there is a big traffic problem out there caused because they are violating that condition. They do conduct their classes back-to-back. Attorney Wiesneske does think there are some issues for the Board to consider. He does not think their appeal is frivolous although their facts are slightly different than what he explained, he thinks some of the issues are still the same.

Chair Lee stated that there will not be any more testimony, temporarily. The Board discussed the motion to dismiss, based on the arguments presented.

There was discussion about the timeliness of the appeal and if there is a violation of conditions of a permit there really is not a time limit. Mr. Jennrich stated that a CUP or ARP or any permit with the conditions goes with the parcel into perpetuity.

Discussion was held on the procedure is if there is a violation of a condition of a permit. Mr. Jennrich stated that it is the Zoning Administrators responsibility to look at the letter that was issued, what the conditions were or the conditions the Administrative Review Permit and take appropriate action. Meaning sending a letter to the owner to try to bring them into compliance. If they don't, he has the ability to issue citations and also the committee has enforcement jurisdiction which they can amend/suspend or revoke a Conditional Use Permit when it comes to CUP's. He does not have the ability to revoke permits, only the committee does.

Mr. Ross asked if this situation had gone to the committee. Mr. Jennrich stated that it hadn't.

Mr. Albert asked whether a violation opens the door to an appeal by lack of enforcement. Mr. Desmond stated that he did not recall the appeal stating any problems with traffic. He said in looking at what the appeal alleged it did not appear to be anything but a direct

attack on the CUP. They were asking what conditions were approved as part of the CUP. They were asking about an expansion of an Administrative Review Permit or a building based on an Administrative Review Permit. Their other issue is can you transfer the CUP from on parcel to another and the fourth issue is the Dance Studio a School. Mr. Desmond stated he does not see anywhere in the appeal that they argued there were violations of the CUP. They argued other issues but that hadn't come up to his attention.

Mr. Albert asked if a violation of a CUP condition, whatever it may be, opens the door to an appeal, which is the appeal that is before the Board. There was a question about lack of enforcement. Mr. Albert stated his understanding of lack of enforcement does not open up the opportunity of an appeal of the CUP.

Mr. Desmond stated he does not think the non-action by the Zoning Department gives rise to an action before the Board of Adjustment. If they are not enforcing anything he does not know what the enforcement action the appeal route would be. He does not see how the appellant has been aggrieved.

Mr. Hansen stated that Mr. Jennrich did respond by way of a letter. Mr. Jennrich read the April 24, 2020 letter he sent to Mr. Wiesneske into the record.

Mr. Albert asked if there is a violation of a CUP does that open the door to the possibility of an appeal of that lack of enforcement.

Attorney Melms does not believe it does. He believes that is a way to collaterally attack what was issued in the CUP twenty years ago. He stated the Zoning Administrator has limited amount of discretion to enforce or not enforce a CUP. When Karl doesn't enforce something within a CUP it does not rise to give somebody the right to come to the Board of Adjustment. If they wanted to challenge a condition that Karl should enforce, that has to be done when the CUP is issued, timely under your rules. He has discretion whether to enforce those or not but that doesn't give rise to somebody coming in stating that he did not enforce and go to the Board of Adjustment. In his opinion, this is the wrong route to go. More importantly, the appeal did not raise this issue. They set out four items within their appeal to you and this was not raised. Again, more importantly this is twenty years later. Even the second ARP is going on six years. He and the County do not feel it is timely and don't think they can appeal the Zoning Director not enforcing something.

Mr. Hansen stated that he would think the first step would be to go to the Zoning Committee if they are unhappy with what the Director is doing.

Mr. Lee stated that was his question in the beginning. Why are they coming to the Board of Adjustment?

Attorney Wiesneske stated that the summary that he submitted by email is not the appeal.

Mr. Lee said he understood that.

Attorney Wiesneske stated the appeal is based on the three letters that were attached going back and forth between himself and Karl and there were violations that were

alleged in those letters. So they were complaining about the violations, not the permits. Even though, peripherally, some of the issues because the application for the Appeal asks do you want the Board to interpret certain provisions of the code. I think that the appeal of the violation involves interpretations of the code to find out if there is a violation and to find out if Karl is doing anything to enforce those violations. The question becomes and the question that is being asked that you are deliberating right now is does the Board of Adjustment have the jurisdiction. That is the question. Does the Board of Adjustment have the jurisdiction to hear this Appeal? If it doesn't, then they were misdirected by Karl Jennrich in his letter.

Chair Lee explained that the Board of Adjustment does not have the authority to enforce the violations of a permit.

Mr. Wiesneske asked if the Board dismissed the case today if they had thirty days to appeal to the Planning and Zoning Committee.

Mr. Jennrich said he believes they can take their concerns to the Planning and Zoning Committee at any time.

Mr. Desmond responded that the Planning and Zoning Committee has the authority to amend/suspend or revoke a permit. It is also important to note that zoning in the State of Wisconsin, the law is that zoning enforcement is a discretionary act which means it is not required by the zoning department. Two, Mr. Jennrich does not have the singular authority to take action on a Conditional Use Permit and if he made an error in telling them to come to the Board of Adjustment you can't override the Legislative intent of the County Board when they enacted the Ordinances that are pertinent here and delegated the time frame and legal authority to the Board of Adjustment. It is the possibility that this can be remanded to the Zoning Committee for their action.

Chair Lee asked the Board how they want to handle this appeal. Discussion was held. Chair Lee called the question on the motion made prior to hearing the testimony: On roll call vote: Mr. Pazdernik, "aye"; Mr. Ross, "aye"; Mr. Hansen, "aye"; Mr. Lee, "aye"; Mr. Albert, "aye". The motion carried to dismiss the appeal.

The decision is to be written by August 7, 2020.

1:50 pm - The meeting was adjourned by Chair Lee.

Harland Lee, Chairman

Phil Albert, Secretary