

Effingham Zoning Board of Adjustment Meeting Minutes December 14, 2016

- 5 Present: Jory Augenti, Tim White, Mike Cahalane, Tom Hart, David Strauss,
Tim Murphy (alternate)
Minutes prepared by Barbara Thompson

The hearing was called to order at 7:00 pm.

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7:00 Public Hearing continued from December 7th:
Cynthia Folsom
Variance Application re: Section 402
Map 105, Lot 6
15 **Case #085**

Present: Rebecca Boyden (CEO), Cynthia and Kylie Folsom (applicant)

Presentation (cont'd)

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David started the discussion by asking if the gazebo could be placed between the boulder and the cottage. Ms. Folsom explained the representation on the plan was off and the boulder is closer to the cottage than shown. There is no room to place the gazebo there. If the gazebo could go there it would block the windows in the cottage. The only place to put the gazebo is in the setback in order to keep it from affecting the Esterbrook property.

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The option of eliminating the gazebo and building a porch was discussed.

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Jory's main point is that the gazebo is an illegal structure and, therefore, cannot be grandfathered. It is illegal and not a pre-existing non-conforming structure. Further complicating this issue was the original location was straddling the property line which is also illegal.

Tim W. said that zoning speaks to the property and legitimacy in any context, not the existence of a structure.

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Mike surmised that all the discussion on the legitimacy of the structure may not be as important as the variance. The structure has been there for 10 years without notice from the Town. The variance is the issue now.

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Reasonable use was discussed. Mike brought up the fact that the allowable use of the lot is very small (50'x50') and is hampered by the location of the cottage on the lot and topographical issues. He felt the use of the lot with the gazebo was reasonable as only 11% of the lot is being used, but he still had trouble with 19' of relief. Jory countered there is no denying the Folsoms reasonable use of their property by eliminating the gazebo as they have the cottage.

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Kylie Folsom spoke to the specialness of the gazebo to her and her family.

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Hardship was discussed. Brought up was the size of the workable area, lot size relative to neighbors, gazebo placement relative to the adjacent lot and available alternatives to the gazebo. Also discussed was the unreasonable financial burden that would be placed on the Folsoms to remove and/or replace the gazebo.

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The spirit of the ordinance and public interest were discussed together. Tim W. asked what the gain would be to the public to deny the variance. The opposite side of the coin is the right of the property owner to use their property in a reasonable manner. The crux of the issue is the excessive relief of the setback.

Motion

Jory moved and Tim W. seconded to close public comment with the right to ask questions for clarification and to go into deliberation. The motion passed. Public comment closed at 8:15pm.

Deliberation

Criteria #1 Granting the variance would not be contrary to the public interest.

Tim W. felt that there would not be a great deal of improvement by taking out the gazebo and that the ZBA would not be obligated to grant something similar on the adjacent lot once it is sold to someone else as the ZBA does not set precedent. There will be no risk to the safety or welfare of the public.

Criteria #2 The proposed use is not contrary to the spirit of the ordinance.

Jory felt the setback relief was too much and against the spirit of the ordinance. Mike's position was that the gazebo has existed for 10 years straddling the property line so that the violation was much worse. Moving the gazebo off the property line doesn't make anything worse.

Criteria #3 Granting the variance would do substantial justice.

Tim W. said it depends on your point of view. Justice for the applicant is to be able to continue to use a gazebo they have had for 10 years. The strict Constructionist view would be to take it down because it is illegal. Which interest is being served? What public good would result from denying the variance? Jory's position is that the townspeople voted in the Zoning Ordinance because they wanted the town to be compliant and conforming. However Jory did say that if the other four criteria are met then this criteria is a given for the applicant.

Criteria #4 The value of the surround properties is not diminished.

Jory's problem with this is how it will affect the sale of the adjacent property. He asked how the ZBA could not allow the same situation there with new owners. How would this be answered? Mike felt that since this is an existing structure and the Folsoms have paid taxes on the gazebo for 10 years that this is easier to work through than if this were a new structure coming in. Mike didn't feel the placement of the gazebo would diminish surround property values.

Criteria #5 Hardship

Elements of hardship are: extra restrictions of the lot such as the boulder and trees, the State shoreland setback, lot size and position of the cottage and proximity of abutters. Tim W. felt that granting the variance is less of a burden on the applicant than removing the gazebo. Mike felt there was uniqueness to the lot and granting the variance would bring things better into compliance than what was before. Jory said if the setback relief was reduced the hardship would still be an issue but the spirit of the ordinance would be better met.

Motion

Jory moved and Tom seconded to take a straw poll. The motion passed.

Criteria #1 Four yes votes with Jory voting no.

Criteria #2 Four yes votes with Jory voting no.

Criteria #3 Four yes votes with Jory voting no.

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Approved 1/4/17
Approved with changes _____
Unapproved _____

Criteria #4 Five yes votes.

Criteria #5 Three yes votes with Jory and David voting no.

105 Results: A majority of members voted yes on each criteria.

Motion

Tom moved and Tim W. seconded to accept the straw vote as the official vote of the board. The motion passed.

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Motion

Mike moved to approve the application request for variance from Section 402 of the Zoning Ordinance to permit the relocation of a single gazebo structure one foot from the easterly sideline of the of the land shown on Tax Map 105, Lot 6, when 20' is required, in accordance with a plan entitle 27 Oak Ave. as drawn by Ms. Folsom dated November 1st, 2016 and submitted by the applicant as part of this hearing. Tim W. seconded. The motion passed and the variance was granted.

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Motion

120 Jory moved and David seconded to add the condition to have the gazebo moved on or before May 22, 2017. The motion passed.

Tim moved and David seconded to adjourn the hearing. The motion passed and the hearing was adjourned at 9:30pm.

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Merry Christmas and Happy New Years to all!

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