

1. Call to Order and Seating of Members

The Killingworth Zoning Board of Appeals held its regular meeting on Monday, July 25, 2016, at the Killingworth Town Office Building, 323 Route 81, Killingworth, Connecticut. In attendance and seated were Bruce Dodson, Charles Martens, Les Riblet, Brian Young, Matt Young. Attending but not seated were John Himmelman and Cindy Adametz. Chairman Dodson called the meeting to order at 7:05 PM.

It is noted for the record others present were Cathie Jefferson (ZEO), Attorney Mark Branse (representing ZEO), Attorney Mike Wells (representing ZBA), Susan Jameson (applicant), Attorney Casey Jameson (daughter of applicant), Attorney Kimberly McGee (attorney for applicant), Jerry Russ (Killingworth Building Official), Robert Anderson (neighbor of applicant) and Judith Brown, Recording Secretary.

2. Public Hearing and Consideration of Application -

Fredric & Susan Jameson (owners) and Kim Carlson McGee (applicant) appealing a Decision of the Zoning Enforcement Officer and seeking a variance of Killingworth Zoning Regulations Sections 500-43D(5) and 500-44D(5) for solar installation, having to do with property located at 228 River Road, Killingworth, Connecticut (Map 39, Parcel 19).

Secretary Martens read the Legal Notice of Public Hearing into the record, said notice having been published on July 12 and 19, 2016 in the Hartford Courant.

Chairman Dodson explained procedures for the public hearing and meeting.

Attorney McGee introduced herself and thanked everyone for hearing the application this evening. She noted Exhibit A was the Cease & Desist Order which was included with the application. Exhibit B was the Certified Mail receipts and list submitted as part of this hearing. The following exhibits were also submitted by Attorney McGee – Exhibit C plan submitted by home owner and received by Building Dept. May 26, 2015, Exhibit D plan submitted by BeFree and received by Building Dept. May 27, 2015, Exhibit E Building Permit Application Permit #F14-360 received by Building Dept. May 27, 2015, Exhibit F Administrative Zoning Permit Application #15-21 received by Building Dept. May 27, 2015, Exhibit G Zoning Permit #15-21 dated 6/2/15, Exhibit H Department Review Approval Sheet with permit reissued 9/03/15, Exhibit I General Location Survey Solar Panel Array dated November 19, 2015, Exhibit J GIS Map, Exhibit K Affidavit in Support of Petition and Appeal before the Killingworth ZBA for 228 River Road signed by Kapil Luthra on July 22, 2016, Exhibit L Map 712 (submitted at some point during the hearing).

Attorney McGee noted to the extent there has been any indication in the materials that her client is trying to file something frivolous or being difficult, that can't be further from the truth.

They are asking for an appeal of the Cease & Desist Order and, if necessary, an application for variance. Susan Jameson has asked the Board approach this with an open mind and clear slate. The ZBA's role is administrative in nature which is different from Planning & Zoning which is legislative.

Attorney McGee noted first thing is the Cease & Desist Order (CDO). The application was emailed to the ZEO and another staff person May 16<sup>th</sup>. Copies or the application fee were not provided until later in the week. We prefer to do email rather than drive to Killingworth and then charge the applicant. McGee noted she would ask the Board not to exalt form over substance by refusing to hear the appeal for the lack of the fee and copies until later. She further noted the purpose behind the 30 days is to provide finality so issues can't be raised 2 or 3 years later. She urged the Board to hear the appeal before the variance.

Attorney McGee stated if the Board decided not to hear the appeal on procedural reasons, then she would point out the CDO cites the wrong section of the regulations. It cites 500-43D5 and should have cited 500-44D5. Charlie Martens noted then that if the Board denies hearing the appeal because of the date and payment, the Attorney McGee would state the typo is a problem also. Attorney McGee replied yes.

Attorney McGee noted the first argument is that the Zoning Regulations don't talk about ground mounted solar panels. They are not buildings. McGee read the the building definition into the record which had an exclusion of utility, transmission towers, etc. She indicated the solar panel at its highest point is 15 feet off the ground. She suggested solar panels be included in the exceptio9n to buildings as with utility, telephone, telegraph poles, etc. If the Board agreed, then the setback of 30 feet would not apply.

Charlie Martens referenced Exhibit F the application which indicated accessory building. He noted if Attorney McGee was saying it is not a building, then one can't circle "accessory building." McGee noted this was filed more than a year ago on May 27, 2015 by BeFree. Mr. Martens noted if BeFree filed an application indicating accessory building, then they must feel it is a building. Attorney McGee noted a building is defined as with a roof and sides. Martens noted he agreed with that, but it doesn't look like a light pole either. McGee stated this reinforces the fact the regs don't address solar panels. Chairman Dodson noted the regulations are permissive and if its not in the regs, then its not permitted. Martens noted if there was any doubt if it was anything other than a building, there a section for "other."

Attorney McGee noted there is a campaign in town to use BeFree and to do solar panels. The application stipulates 32 ground mounted solar panels.

Chairman Dodson noted if you follow that logic, one could put a big billboard on a property line which would seem extreme. Attorney McGee noted the ZBA is doing its job, but it is good

for Planning & Zoning to consider the Zoning Regs for this.

Exhibit I specifies how far away from the property line, the farthest is 28.3 feet and closest is 17.4 feet. Attorney McGee referenced the map recorded in conjunction with the applicant's purchase of the property March 4, 1977 which indicates Barbara McDonnell December 3, 1976. The boundary line between her and the neighbors becomes straight. Mr. Anderson lives to the north.

Attorney Wells asked Attorney McGee for her take on the fact the application for zoning permit stamped received by Building Department shows different locations (Exhibits C and D). How did a zoning permit get approved with the setbacks not shown on the map. What did the zoning permit permit the applicant to do – 100 feet or 175 feet? Is the 175 feet from the house?

Brian Young noted the definition of building did not exclude solar arrays so it should be included. Attorney McGee noted it is more akin to a transmission line, utility, transmission towers, etc. Mr. Young asked Attorney McGee if she has talked with the CT Siting Council.

Attorney McGee noted the passing of an Ordinance by Planning & Zoning is a town function appropriate for Planning & Zoning. Mr. Martens agreed.

There was discussion as to which plan was used for the permit. Attorney Wells asked which plan was submitted and used for the granting of the permit.

Cathie Jefferson, ZEO, noted both maps were turned in to her, one from BeFree and one from the home owner. ZEO Jefferson called the home owner and asked for permission to go forward because the application wasn't signed and also asked which plan should be used. The home owner said to use her plan. ZEO Jefferson noted she used the GIS mapping measuring out the 175 feet and clearly there was another 80 feet to the property line. Attorney Branse noted one indicates 200 feet as opposed to 175 feet. If it had been 25 feet less then what it is, it would comply with the regulation. The survey gives from the property line not the house.

ZEO Jefferson noted she looked at the ground mount array as an accessory use that had to comply with the setback lines. She further noted in Killingworth solar panels have become customary and incidental as an accessory use.

Attorney Wells noted if it wasn't built where it was supposed to be, then isn't that a problem. Attorney McGee noted 8-3(f) requires the ZEO to issue a permit prior to the Building Dept issuing their permit. Her client is not a zoning expert. If there is a standard, then perhaps it should be stated in the application they are subject to accessory use. Attorney Wells noted if one submits a plan saying 175 feet from the house and its not, then it was not built in conformance with the application. Attorney McGee agreed it was problematic.

Attorney McGee referenced Exhibits C and D (plans). Mr. Martens noted the ZEO called the home owner and was told to use her plan. Chairman Dodson noted BeFree didn't follow their own drawing at all. Mr. Martens referenced Exhibit K where the solar panels are installed at an angle to the nearest property line to maximize sun exposure. There was no consideration to setback regulations.

Attorney McGee noted the Affidavit was to help the Board understand solar exposure and explain the difference between the May 26<sup>th</sup> and May 27<sup>th</sup> maps. The arrays were supposed to be in a different place originally behind the barn. BeFree did an analysis and said they couldn't go there in view of the tree garden. They indicated the place it needed to go was in the vicinity of where it is now.

Attorney McGee noted those are the reasons for the appeal. Messrs. Martens and Dodson noted they were not going to worry about whether the fee was paid on time.

Attorney McGee noted solar panels don't fit into the regulations the way they exist. Maybe there should also be something in the application about solar panels. She further noted 8-3(f) states that if a ZEO issues a zoning permit, then that tells the Building Official its appropriate to issue a building permit. She also noted they had hoped for a little more initiative with the Land Use officials to help the applicant comply with the town's rules. Her client is a lay person and relied on Killingworth staff and BeFree to take her through the process. Mr. Martens noted if they had followed the map of 175 feet, we wouldn't be in the position we are now.

Matt Young noted the contractor did the layout and installed the solar panels where they are. Attorney McGee replied yes, that is true. Messrs. Dodson and Martens explained there are two things here – an appeal of the CDO and a variance request. Matt Young further noted if BeFree has installed so many panels around town, they should know that measurements have some merit and they should have come to the town and submitted another map. Attorney McGee noted the 175 feet was submitted by the home owner. Matt Young replied but BeFree didn't follow it. McGee noted she couldn't speak for BeFree.

Chairman Dodson noted whether this is being dealt with as a building or improvement or an accessory use, it still needs to meet the requirement for setbacks. Problems with the application aren't with the ZEO, its the contractor who didn't follow what was approved.

Attorney Wells suggested the Board move on to the variance. Mr. Martens asked if that didn't depend on the vote. Attorney Wells noted before the Board moves on, Attorney Branse and/or ZEO Jefferson might like to comment.

Attorney Branse noted there were some arguments made in the written materials not addressed

by Attorney McGee. When ZBA hears an appeal, there is no deference to the ZEO. Branse noted he was the attorney for the ZEO and Planning and Zoning, not the ZBA.

Attorney Branse next addressed the jurisdictional issue. He did not object to the email filing, but couldn't waive the jurisdictional defect. The fact is the CDO was signed for on April 16<sup>th</sup>, the appeal was received by email on May 16<sup>th</sup> which is 31 days. It was filed with the ZEO, not this Board and not the Town Clerk. May 15<sup>th</sup> would be 30 days. He also noted the written materials indicate a claim of estoppel. ZBA can't consider estoppel, only the Court. The claim that because the Town of Killingworth endorsed BeFree as its designated installer that was binding on the ZEO. That is not the law. Section 8-3(f) states before a building permit is issued a zoning permit is required.

Attorney Branse noted the plan submitted to the Health Dept. shows is 99 feet from the house so we now have 3 different plans. He indicated when Jerry Russ went out there, the trench had already been dug and backfilled. The contractor was installing before he got approvals from anybody. The fact remains if the panels had been installed with the plan, we would not be here today. As Attorney McGee said the typographical error in the CDO is not fatal, nor is the payment or the filing, etc.

Attorney Branse noted the regs don't address solar panels. Section 500-43C.4 specifically allows for alternative energy sources as an accessory use. It could have said in the definition of building or alternative energy sources. It is listed expressly as an alternative energy source.

Attorney Branse noted the big issue is the height of the panels. If they were under 8 feet, it would be a different situation. Matt Young noted the problem is it wasn't installed according to the plan submitted. Mr. Martens noted the problem is its in the setback area.

ZEO Jefferson noted this went through the process the way things always do. She was the first person to get confused with the maps and then it moved on from there.

Building Official Russ noted the ground mount solar arrays are considered a permanent structure according to Building Code. There were a lot of pre-construction meetings with BeFree so they were aware of what was required. They had to do soil testing after the trenching, etc. Soil testing was done in May to identify a reserve system are but they already had the trench done two months before they came in with the application.

ZEO Jefferson noted B100's are only required for permanent structures and health considered it a permanent structure. Pretty much all of us look at these as requiring to meet the setback lines.

Attorney Wells noted no Certificate of Zoning Compliance has been issued yet. ZEO Jefferson

replied that is correct. It was noted the trench had been dug and backfilled before Mr. Russ had got there. Brian Young asked if holes were dug before the maps were submitted.

It was noted there was an email on July 7, 2015 from the Building Dept. to BeFree canceling an inspection. Attorney Wells pointed out the zoning permit was dated June 2<sup>nd</sup> but the Health Dept. hadn't approved it yet.

There was nothing further on the CDO.

Attorney McGee noted the Building Dept. did inspect several times and operated on the assumption the array was going to be 175 feet away. Attorney Branse noted they didn't have a permit and shouldn't have been installing anything. Attorney Jameson noted at no point during inspections did any official raise the issue of setbacks. It has not been established yet how far the solar panels are from the house.

Attorney Wells noted wouldn't it be incumbent upon the applicant to provide information they were in compliance with the regs. Attorney Jameson noted they didn't know which map was being used. As a home owner in this community, they have the right to expect approval of a project. The ZEO does this and the Building Official does this, that is not the applicant's job.

Attorney Wells asked Attorney Jameson if it was her contention if a property owner disregards the regs and the ZEO fails to catch it, then the property owner can keep it. Attorney Jameson replied no. He also asked if Jameson believed it was the role of the Building Official to determine location of the solar array. Attorney Jameson noted she believed the Building Official should have raised the issue of the setbacks as he was aware this was being considered.

Attorney Wells noted the role of the Building Official is to inspect concrete, etc. If the applicant cannot tell this Board if this was installed in conformance with the application within 175 feet from the house, how is this Board supposed to know.

Attorney Wells noted it was unfortunate your client did not have proper representation, etc. Attorney Jameson noted the town vetted BeFree and said this contractor was good. That is why they were chosen. That is the beginning of this process.

Charlie Martens noted the attorney started off by telling this Board was its role was and what the role of P&Z was. The Board's role is to apply the regulations of the Town. What was pointed out was there was a map of 175 feet and if that had been followed this wouldn't exist. If it was, it would have been out of the setback area. Attorney Jameson noted until now they didn't know setbacks were an issue.

Chairman Dodson noted there is a fence line north of the property line. He could see anyone

looking at that fence and thinking that would be okay. Jerry Russ noted the fence goes through the ravine. We all thought the fence was the delineation of the property line at the top of the ravine.

Matt Young noted the Board can't discount the contractor's responsibility. That is his problem, he put it in the wrong spot. Attorney Jameson noted the town said it wants people to use them and therefore its the town's responsibility.

Jerry Russ noted the project was awarded to the lowest bidder who had a history of success in the past. In his opinion it was the responsibility of the contractor. After zoning approves it, health says there is no impact, the BO says it was built in conformance and ow its coming out. He noted he would throw it back to the contractor.

Attorney Jameson asked the ZEO if she went back to BeFree and asked if they were using the home owner's plan. ZEO Jefferson noted BeFree had been in the office many times and were aware of what plan was being used. Attorney Branse noted they put it in the general area, just 80 feet closer.

Jerry Russ noted they take every application and study the paperwork. They honestly do not go back through land records and maps to verify structures are exactly as proposed. With the GIS now, everything is pretty well scaled out.

There was discussion regarding Exhibit L, Map 712. Attorney Branse referenced 208.85 feet extending past the house, then to a point from that point to the 220.42 foot property line. If it had been 175 feet, it would have been well more than 30 feet from the property line. 175 feet would have had to been more than enough.

Attorney Jameson noted she had never been alerted there were setback requirements applied and no one raised that issue until the project was signed off on and up and running. It seems unfair at this point to hand her mother the bag.

Attorney Branse noted Mr. Russ indicated that based on the location of the fence there were no clues that alerted him to the fact there was a problem. It was noted they didn't know there was an issue until the neighbor called and asked what the setbacks were.

The Board took a 5 minute recess and reconvened at 8:35 PM.

Attorney McGee noted Attorney Branse mentioned this might be a different issue if the solar array was lower to the ground. She indicated it starts at about 5 feet because the farm has goats which like to chew on things. Her client had asked for them to be raised to preclude the goats from climbing up on very expensive equipment.

Attorney McGee noted moving to the variance application that the Board was quite well versed on hardship definition. She noted this is a working farm with 12 goats, vegetable garden, chickens that produce eggs. Her client wanted the Board to know this is her retirement business with the profits from the farm to go towards her retirement income. She has put a significant amount of planning and thought into the business model she has created. The property is about 6 acres with the portion of the actual farm (not forest land) is about 2 acres. The sustainable farm model says one should use the land being farmed to the greatest extent possible and leave the rest of the land natural.

Attorney McGee noted the colored map handed out shows the white structure at the bottom is the house, moving along the 175 foot line is the vegetable garden and moving farther there is the barn. The goats are penned now around the terminus of the 175 feet. The solar array is in the goats pasture right now. Another thing to note is that animals like goats have to be rotated in pastures every 2 to 3 months or they become infected and die. McGee noted she points that out because this property has 2 places before moving into the forested area where these 12 goats can be. If they were to cut off the solar array from the goats (and there is an Affidavit from BeFree suggesting that would be necessary), the goats pasture would be cut by 1/3 if not more. That is a problem for the 12 goats that currently exist. She noted her client can make more money with more goats as there is a demand for goat milk. Goats milk is also used to create soap and dog breeders use it to feed puppies when the dog's mom is unable to do so. She wants to respond to those needs and make as much money as possible. The goats will not stay in that area between River Road and the barn where the pasture exists. They will move but will eventually come back to that area. That area is now limited given the fact the solar array shouldn't be accessible to goats.

Attorney McGee noted the solar array is 5 feet off the ground. The wires from the panel go into the ground and energy is supplied to the house. If animals chew the wires, that renders the array inoperable. This is a working farm which is a permissible use in a residential district. It would be problematic if the arrays were moved limiting the operation of the farm.

Charlie Martens asked where the goats are rotated to. Attorney McGee noted the rotation would be to the second paddock in back of the barn moving towards the Anderson property line. Mr. Martens then noted the goats would move back and forth.

Attorney McGee noted they need to create a fence that is not there now between the goats and the solar array. The solar array is angled in such a way as to maximize exposure to the sun. The contractor had said that way it would provide all the energy needs to this farm. Even if it were moved 30 feet away it would still have to maintain that angle to the property. They don't want to put any more fence posts in the area around the solar array.



Chairman Dodson asked Jerry Russ (Building Official) if the wires from the panel to the ground were in a conduit. Mr. Russ replied yes, they are in a conduit to the required depth of 24" of cover. An as built is a final requirement of the Certificate of Occupancy. Russ further noted, with no disrespect to the home owner, they required the panels be moved up and maybe the home owner asked them to be moved further away not knowing the property line was an issue.

Attorney Casey Jameson noted the stone wall poses a barrier to moving the panels closer, as well as the chicken coop and duck enclosure occupying part of the goat area. If moved forward, it would obstruct the goats area considerably more than where it is now. It would create a large obstacle moving from the front to the back. The access to the goat area would also be obstructed.

Attorney Branse asked if the home owner could answer the question posed by Jerry Russ as to moving the solar panels closer to the property line.

Susan Jameson noted the day the installation began a crew arrived and began digging holes in an area nobody had suggested which was in your colored drawing about 3 feet from the stone wall. Attorney Branse noted Mrs. Jameson was indicating an area west of the shed and north of the stone wall. Mrs. Jameson stated at that point no one was there except the crew and she told them that wasn't the place that was agreed upon, it was further back. Attorney Branse asked Mrs. Jameson if she told them how far back. Mrs. Jameson replied no, I assumed they had a plan. She also noted she did stipulate it needed to be no lower than 5 feet from the ground.

Attorney McGee noted one more consideration is were we to move the array 30 feet away from the property line, Mr. Anderson's view does not change. Mr. Anderson noted he had no desire to see Mrs. Jameson move the array. It is there, not very pleasant to look at, but he would like to see some giant arborvitae planted around it. Moving it another 12 feet wouldn't make any difference to him. He also noted a suggestion to Mrs. Jameson in terms of the goats is that in the ravine where the stream goes through, they could run a fence up to his garage and back to the dam for more food. Of course there are legal issues with that in that if one uses another's property for 15 years it becomes yours so that would have to figured out. Mr. Anderson noted the whole ravine is loaded with greens which would be more food for the goats. Anderson reiterated he would like to see some giant arborvitae.

Attorney Mike Wells noted as he understands it, their hardship is essentially there is no other optimal place for the solar array on the property and the use of the lot as a working farm limits the location of the array making it worthwhile having one. Attorney McGee replied yes. Mrs. Jameson noted BeFree identified an area the array could not go in. Jerry Russ also noted that was an area identified for septic reserve and it couldn't go there.

Brian Young asked if there was anything topographical from preventing the array from being moved. Is there ledge? Is there a slope? Mrs. Jameson replied no. Attorney Jameson noted it is limited to the goats enclosure because all the other areas of direct sun are taken up by the vegetable garden and rotating crops.

Charlie Martens asked if there were plans to expand the far area on the 6 acres. Attorney Jameson noted her mother expands when she can get someone to dig. Mrs. Jameson noted there are bogs and ledges in the wooded area. The trouble with moving the array is that if you are working land, intensively broken land is less useful than open land. Fencing it as a straight line is a more useful way of demarcating space.

Chairman Dodson noted the Zoning Board of Appeals do not grant variances for problems created by the home owner. Mr. Martens agreed noting this would be a self imposed hardship.

Attorney McGee noted she would suggest this is a very special use that is in compliance with the Zoning Regulations. Given the nature of the small sustainable farming, you can't really say her choice to be a farmer is a self-imposed hardship. The uniqueness doesn't come from ledge or something very traditional, but it comes from the fact this is a working farm.

Charlie Martens noted there are 2 aspects. Self-imposed being the solar panels put in by BeFree and its a unique piece of land and how its used. The variance goes with the land. Martens noted Mr. Anderson stated it didn't make any difference if moved 12 feet but he would like a stipulation of arborvitaes.

Attorney McGee noted Mrs. Jameson wants to be a good neighbor and has already planted 6 trees, Yoshino Cryptomeria, hoping it would be a pleasing barrier. She would like Mr. Anderson and his wife to be happy.

Mr. Anderson noted his issue would be with BeFree Solar and they didn't do what they needed to do. If they had approached him, he would have told them before they started they should be sure of the location because he felt it was too close to the property line. Mr. Anderson noted his issue is he has to look at it. Can he live with it? Yes. Would he like to see some of it covered up? Absolutely.

Attorney Jameson noted in consultation with the nursery, they said the trees would grow to large heights. Mr. Martens asked how long it would for full maturity. Mrs. Jameson noted the nursery said the trees get really tall in full sun exposure. She was urged to buy younger trees because they had a better chance of settling in to their environment. The trees she chose get to be 60 feet high. Mrs. Jameson noted the trees were 8 feet when planted at the end of March, early April. They are a little taller now.

Mr. Anderson noted another concern is that some day he will sell the property.

Charlie Martens asked Mrs. Jameson if she felt she could get together with the neighbor and pick out a type of vegetation. Mrs. Jameson noted large trees could be planted on his side of the property (on Mr. Anderson's side of the pond) where there is full access.

Chairman Dodson noted the copy of the building approval sheet shows a permit issued July 21<sup>st</sup> last year, then retracted August 12<sup>th</sup> and reissued September 3<sup>rd</sup>. Mr. Russ explained the contractor changed electricians, therefore, they had to get new information and resubmit the package. Mr. Russ noted he had them unfill the trench, expose the piping and then backfill it properly. At one point they had to dig deeper as it was too shallow.

Attorney Wells noted it seemed there were two options. One option is to close the hearing and make a decision. Another option, if the Board is inclined to allow neighbors to come up with a proposal it could consider as a stipulation, is to continue this hearing another month and allow them to come back with a proposal. Attorney Wells noted he wasn't suggesting anything, just pointing out what options might be available.

Mr. Anderson noted it sounds like a reasonable option, but he wasn't sure where the Cease & Desist stands. He didn't want to create more issues for Mrs. Jameson.

Chairman Dodson asked Attorney Wells if there was a concern about setting a precedent. Attorney Wells replied no decision made by ZBA creates a precedent for the future. The Board still has to find a hardship and do its job, but there may be some grounds on which the Board might be able to find hardship in that with other stipulations it might be less of an impact on the neighbors. If you wanted to consider that, the Board could continue this hearing. Wells also noted the Board can uphold the Order and continue the variance for another month. He reiterated he wasn't advocating anything, just pointing out the alternatives.

Attorney Branse noted earlier he was speaking on behalf of the Zoning Enforcement Officer. He stated he was asked by the Planning & Zoning Chairman to express P&Z's opposition to the variance as it was not in harmony with the spirit of the zoning regulations. Also, the setbacks do not include structures of this height and size and the hardship appears to be financial in the sense it is a working farm, etc.

Attorney McGee noted there is an important distinction between the role of ZBA and P&Z. 1958 Tyler vs. ZBA Town of Woodbridge, 145CONN655 says the P&ZC is overreaching. P&Z's job is not to appear before ZBA and opine to their position. If P&Z were allowed to tell the ZBA what to do, there might be a chilling effect on the Board's independence. The Board has a role in the Town Charter as well as the regulations.

Charlie Martens noted he respectfully disagreed. P&Z are forced to send things to ZBA because they can't change the regulations. Sometimes they see things that would work really well if the regulations let them, but they don't oppose it. It comes to ZBA and they hope it gets a favorable decision. Other times they are just dead against things. P&Z will let them know where they stand on this. Martens noted he didn't see anything wrong with that. The Board listens to the P&Z opinion and maybe it doesn't agree with it.

Attorney McGee noted this matter did not start out with P&Z. P&Z did not make a decision. She noted there is a book she referred to written by Robert Fuller. She referenced a Superior Court case City of Shelton Planning & Zoning vs. Shelton Board of Zoning Board of Appeals. Charlie Martens noted these are independent commissions.

Attorney Branse noted the Supreme Court didn't say anything about expressing an opinion. The Tyler case had to do with standing to appeal. Branse also noted he has not received any instructions to appeal anything.

There were no further questions or comments from the Board members, the applicant or the audience.

**Motion by Martens, second by Brian Young, to close the public hearing at 9:25 PM. Unanimously Approved.**

Chairman Dodson noted the Board will take the matter of the appeal up first. He stated he didn't have a problem with the 30 or 31 days or the application and payment showing up late. He asked Attorney Wells if there was an issue with any Statute. Attorney Wells noted the Board could uphold the ZEO decision on the basis of jurisdiction saying it was late or that her decision was correct in that the array was in the setback area. He noted estoppel can only be applied by a court of equity.

Charlie Martens noted the role of ZBA is not to decide if a decision is fair or unfair or who is at fault. As the attorney pointed out, it is to apply the regulations and this improvement is within the setbacks. He noted in his opinion the decision of the ZEO should be confirmed.

**Motion by Martens, second by Brian Young, to deny the appeal of the ZEO Cease & Desist Order because the structure is within the setback area.** Brief discussion followed. Chairman Dodson noted the decision was based on the fact this is an improvement in the setback area and is a large structure. Attorney Wells noted the Board is then taking the position that the solar array is an improvement in accordance with the Zoning Regulations of the Town of Killingworth and thus in the setback area and is not in conformity with the regulations. Brian Young noted based on what was submitted, Cathie Jefferson did her job. Charlie Martens noted if the Order was denied, the Board would be saying it is not an improvement and not in

the setback area. All Board members feel it is an improvement and in the setback area. Chairman Dodson noted Cathie Jefferson decision was correct in his mind. **Unanimously Approved.**

With regard to the variance application, Chairman Dodson noted he was uncomfortable approving a self-imposed problem but at the same time he felt the person most harmed by this was the neighbor because of the view and any possible detraction of property value. Dodson also noted if the neighbor is comfortable with it and they (neighbor and Susan) can work it out, then maybe its the least ugly way to go forward.

Charlie Martens noted P&Z would never agree to put anything in the setback. Even if the variance is denied, they would still have to get together or get BeFree to foot expenses to move it, but it would only move 12 feet and still be there. Les Riblet noted that might free up an additional 12 feet to plant additional trees.

Brian Young noted it's self-imposed and entirely in the setback. We're talking about a land use issue, not a hardship on the parcel or we can't put it elsewhere. He noted he felt for the home owner, but the vendor did the home owner wrong. This Board has denied others that are just a few feet in the setback. Mr. Martens noted there is a case to be made that goes to the land. Mr. Young reiterated its how the land is being used, not a parcel use.

Matt Young noted it was said this does not set a precedent. What's the point of these setbacks if we aren't going to follow them. The neighbor's happy with it now, but may not live there forever. The home owner may not live there forever. What is the point of setbacks in general?

Chairman Dodson noted the whole array isn't really within the setback. There is a corner outside the setback. Brian Young agreed to correct his statement that the majority of it is in the setback. He reiterated he felt bad for the homeowner and the vendor did not do the home owner justice.

Matt Young asked why the contractor was not present for this meeting although it wasn't really any of the Board's business.

Chairman Dodson noted if this was continued we could find out about the 175 feet. Attorney Wells replied no, the hearing was closed. Charlie Martens noted no further information can be received.

Brian Young noted the Board has always interpreted this as topographical and this is not topographical.

Chairman Dodson noted this may not be a farm 50 or 100 years from now.

Brian Young asked if the Board allows the variance and they want a shed, do they have to come back to this Board. Attorney Wells noted the variance would be as the Board writes it. Charlie Martens noted one can't enlarge a nonconforming use.

Matt Young noted he was leaning towards the hardship aspect of the farm and neighbor is in favor of it, but everything else tells him then why do we exist.

Les Riblet noted he wish the Board had control over who would pay for the relocation. The home owner didn't cause this.

Chairman Dodson noted the array is clearly movable. Its too bad we didn't ask how much it would cost to move it. Matt Young noted as a contractor he would guess probably somewhere between \$5000 and \$8000.

Chairman Dodson noted if this was continued and they come back the Board still struggles with a hardship. We would have granted a variance that was self-imposed. Attorney Wells noted the Board can't ask the applicant and neighbor to go work something out now because the Board closed the hearing. He further noted if the boundary line were moved, there would be no issue. The Board can't make a decision contingent on a 3<sup>rd</sup> party.

Chairman Dodson noted as he sees it there are 3 issues -

- 1) allowing a structure or improvement in a side setback,
- 2) definition of hardship, in the way the land is being used is a stretch, and
- 3) 3<sup>rd</sup> party created the problem (contractor).

Chairman Dodson read the following from the OLR Research Report State of Connecticut - "...financial losses generally do not constitute a legal hardship to warrant a variance, moreover the hardship must be imposed by conditions outside the property owners control."

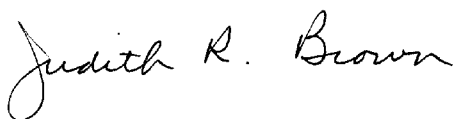
**Motion by Martens, second by B. Young, to deny the variance in as much as it is a self-imposed hardship and lack of a hardship. Unanimously Approved.**

3. Any Other Business – none.

4. Adjournment

There being no further business, the meeting adjourned at 9:50 PM.

Respectfully submitted,



Killingworth Zoning Board of Appeals  
Regular Meeting, July 25, 2016  
Page 15 of 15

Judith R. Brown, Recording Secretary