MEMO TO: Chester Zoning Board of Appeals
FROM: Douglas and Pamela McAvay
RE: Horner ZBA Appeal
DATE: November 10, 2020

We are the owners of property at 27 Maple Street, the subject of ZEO Brown's decision to permit the installation of a stand-by generator and the subsequent appeal by adjacent property owner, Caryl Horner. Please accept this document as a statement of our position with respect to the Horner appeal. We have also attached both a copy of the plot plan submitted by the Horners, with notations to provide a more complete record and a photo of a portion of the annotated area. We ask that a copy of this statement and the two attachments be made available to all Zoning Board of Appeal members who will be considering and voting on the appeal.

A. The placement of the stand-by generator violates no Zoning regulation.

1. Regulations

Sec. 40D of the Zoning Regulations requires that "[n]o improvement shall be made except in conformity with these regulations. In Sec. 20, "Improvement" is defined as "any structural addition to, or other change in the condition of the land, ..." "Accessory Improvement" is defined as "[a]ny improvement which is attendant, subordinate or customarily incidental to the principal improvement of the same premises." Sec. 121A and 121A.1 state that . . . [t]he issuance of a zoning permit shall be required before . . . [the] placement, relocation or installation of any improvement, other than an accessory improvement . . .."

2. The generator is not a structure.

Sec. 20 defines a structure as '[a]nything constructed or which is located on, above or beneath the ground, ..." Because this definition is so broad and could include anything from a bird feeder to a wood shed, it is necessary to look to other sections of the regulations, as well as to other building regulations for guidance. Sec. 40S, "Certain Structures," refers to tents, Quonset huts and Neilsen huts. There are two considerations here: first, Sec. 40S does give us an idea as to what a structure might look like and second, that the regulations do name building-like structures when there is a specific prohibition.

Looking at the 2018 Connecticut State Building Code which controls building decisions in Chester, a stand-by generator is classified as an "appliance," "a device or apparatus that is manufactured and designed to utilize energy." If we accept that a Quonset hut is a structure and that a generator is an appliance, the difference is clear and to construe an appliance as a structure is not reasonable. Because the generator is not a structure, it is consequently not an improvement subject to regulation.

3. Should the Board of Appeals determine that a stand-by generator is a "structure", the generator is EXCLUDED from zoning requirements because it is an "Accessory Improvement."

An "Accessory Improvement" is defined as "[a]ny improvement which is attendant, subordinate or customarily incidental to the principal improvement . . .." A generator can be viewed as the accessory improvement envisioned by the regulations – it has no purpose of its own except as it is supplemental to the house, itself.

Mr. Cronin concedes that the generator is "probably an accessory improvement", however his subsequent argument fails to distinguish between "Improvement" and "Accessory Improvement." These terms are not interchangeable in meaning or legal consequence. As an "Accessory Improvement", "the placement, relocation and installation" of the generator are not subject to the same prohibitions as an "Improvement" might be. WHERE the generator, an accessory improvement, is placed is specifically EXLUDED from Zoning requirements.

Mr. Cronin's use of the swimming pool as an example of the interchangeability of the two terms is without merit. While a pool may be an Accessory Improvement, Sec.40P specifically addresses the location issue: "no swimming pool shall be located closer than 35 feet to any boundary of the lot." A pool has a location requirement because it is not subject to the same exclusion as other accessory improvements enjoy.

Finally, and more generally, Atty. Cronin maintains that no thing can be placed in a set back area unless expressly permitted by the regulations. Is Atty. Cronin suggesting that no AC or heating unit, that no gas grill, that no propane tank can be situated along the side of a home but within a set back area? Is he suggesting that the Zoning authority require permits and oversight for all of these "structures"? This is contrary to the reality that all manner of objects, additions and what he might call structures are situated in the set back areas of many homes. (For example, please refer to the attached photo of the Horner set back area.) We think that the important issue is to determine what is a reasonable, predictable standard. ZEO Brown did this in her reliance on the Accessory Improvement regulation and many years of the Commission's past practice.

4. The placement of the generator, an accessory improvement, conforms with the regulations.

As an "Accessory Improvement" and pursuant to Sec. 121A and 121A.1, the generator's placement is excluded from zoning regulation and its location is not subject to restriction. The installation fully conforms to the regulations, as required by Sec. 40D.

5. Fairness and Equity

As ZEO Brown noted in her April 11, 2020 letter to Errol Horner, the location and installation of generators have never required review by the zoning authority. Within the last several years, numerous Chester property owners have legally installed stand-by generators without the requirement of review for compliance with side lot restrictions. And, in fact, some of these generators have been installed in side lot areas. If town officials now wish to regulate such installations, it is incumbent on the Planning and Zoning Commission to propose, conduct a hearing on, enact and give notice as is statutorily required and as other communities have done. To arbitrarily change a practice of many years and thereby penalize a property owner without prior notice is prejudicial and fundamentally unfair.

B. The Horner appeal is untimely and should be dismissed.

1. Facts

An electrical permit for the installation of the generator was issued on March 10, 2020 by Building Inspector Richard Leighton. In Chester, it is required that any pertinent requirement of the Zoning Regulations must be satisfied before the Building Inspector can issue such a permit. On March 10, the ZEO's action to not require a permit took legal effect (otherwise, the electrical permit could not have been issued). On April 2, 2020, Mr. Horner received constructive notice that the generator project would not be regulated by the zoning department. A letter dated April 3, 2020 from Mr. Leighton to Mr. Horner confirmed this constructive notice and offered reasons for the installation's not requiring zoning approval. On April 11 and 24, 2020, ZEO Brown sent letters to Mr. Horner further explaining the reasons that the activity was not regulated. On May 22, 2020 the generator's installation was completed. On the same day, Ms. Horner's appeal was filed.

2. The granting of the Electrical Permit is the actual date of the ZEO's regulatory determination.

In the Connecticut Supreme Court Case, *Reardon v. Town of Darien* (311 Conn. 356, 2014), the court noted that only decisions of the ZEO can be appealed and that [e]ven when there is a written communication from a zoning official relating to the construction or application of zoning laws, the question of whether a 'decision' has been rendered for purposes of appeal turns on whether communication has a legal effect or consequence." In the *Reardon* case, the court found that the "decision" of the zoning official to not invoke regulatory jurisdiction arose at the time pertinent permits were issued, and not at a later date when the official articulated his reasoning. Similarly, in the present situation, ZEO Brown's "decision" to not claim regulatory authority arose at the time that the installation permit was issued by Mr. Leighton. There was no need for her to issue a written decision. Ms. Brown's letter of April 11 merely explained her earlier conclusion and her April 24 letter, though stating that it constituted a formal decision, simply restates her April 11 explanation. The binding, legal effect of any "decision" made by ZEO Brown was prior to the March 10 permit to install. Again, the Horners had constructive notice of this decision on April 2, 2020.

3. The Horner appeal was filed after the permissible appeal period.

The second issue addressed by the *Reardon* court related to the timeliness of the appeal. The court noted that an appeal of any decision may be taken "only by strict compliance" with regulatory provisions, "including time periods prescribed in which to appeal." CGS 124 Sec. 8-7 requires that any appeal be filed within thirty days of constructive or actual notice of the ZEO's decision, in this case by May 2, 2020.

Please note that the thirty-day appeal period has not been tolled or extended by any Executive Order of Gov. Lamont related to Covid 19. In fact, the March 21, 2020 Executive Order 7-1, Sec. 19(i) states that the procedure for commencement of an appeal of a decision by a ZEO may (now) be filed electronically but that the "time period to commence appeal shall remain unchanged."

Based on the Supreme Court holding in *Reardon*, any appeal by Caryl Horner would have had to be filed no later than May 2, 2020, thirty days after receiving notice that the ZEO would not claim jurisdiction. The appeal, filed on May 24, was untimely and should be dismissed.

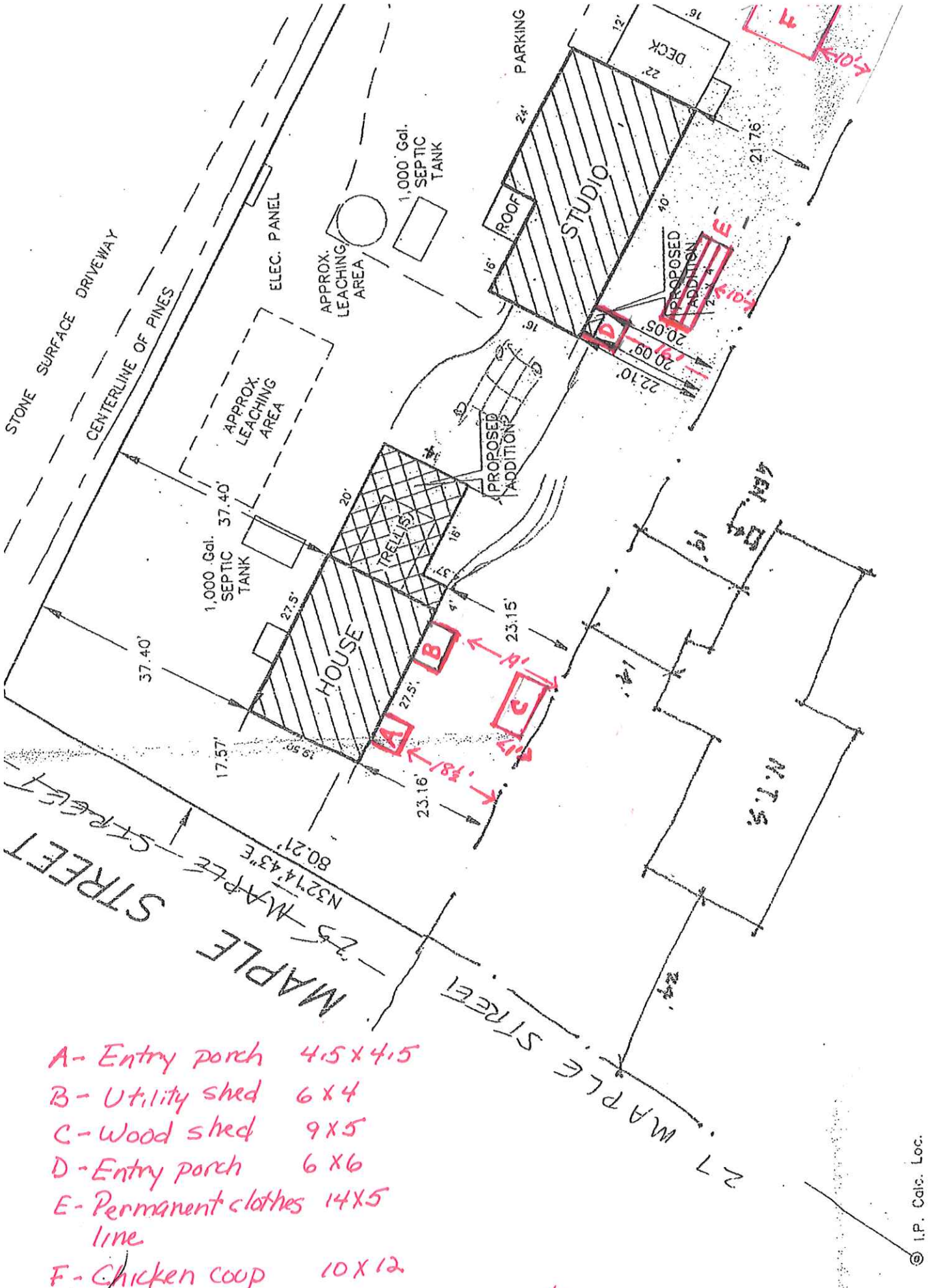
D. Fairness and Equity

While the above discussion centers on an issue of administrative procedure and may seem insubstantial to some, in fact, it goes directly to the issue of whether any action to grant the Horners' appeal would be fair. The generator was put in place on May 5, 2020 and the electrical and gas hook-ups were completed on May 22. At the time, we had assurances from both the zoning and building departments that the installation was permitted. The Zoning Commission had always permitted it in the past. No appeal had been filed. Had we had notice of appeal, we could have paused in the work schedule in order to avoid the complications and expense of possibly relocating the generator. In the *Reardon* case, Connecticut's Supreme Case noted that to permit an appeal outside of the appeal period "would allow someone to readily circumvent appeal deadlines and create uncertainty in zoning decision simply by complaining to a zoning official that certain facts or law had not been considered in rendering a previous decision."

C. Conclusion

We will briefly conclude by reiterating that the generator is either an appliance, not a structure, and therefore not subject to Zoning oversight or it is an Accessory Improvement whose placement is excluded from the usual restrictions. And we rest on the holding of *Reardon* that any decision to permit the installation was made by the time the electrical permit was issued and this appeal is consequently late and must be dismissed. Finally, we express our hope that the Board will act on the Horner appeal on the basis of the town's historical practice, the Zoning Regulations, and the law.

Thank you for your patient consideration.



A- Entry porch 4.5 x 4.5
B- Utility shed 6 x 4
C- Wood shed 9 x 5
D- Entry porch 6 x 6
E- Permanent clothes line 14 x 5
F- Chicken coop 10 x 12

Note- Measurements are approximate.

Side lot - 25 Maple St.

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