Sylvia Rutkowska

From: DOUGLAS MC AVAY <pmcavay@comcast.net>
Sent: Sunday, September 20, 2020 6:43 PM
To: mborton@snet.net
Cc: Sylvia Rutkowska
Subject: Caryl Horner Appeal

Dear Mr. Borton,

With respect to the appeal initiated by Caryl Horner on May 22, 2020, please accept this document as a statement of our position. We ask that a copy of this statement be made available to all Zoning Board of Appeals members who will be considering and voting on the appeal.

Caryl Horner's application, Schedule A, states her claim that the generator is a structure and its placement violates side lot restrictions (Chester Zoning Regulations Sec. 20, Sec 40I.1). In a later letter dated June 3, 2020, she states that the generator is loud and refers to Sec. 40K, though no explanation or support for this conclusion is presented. We are uncertain as to whether the appeal has been properly amended to include the claim of excessive noise, but we will also address the issue here.

1. The generator is an "appliance" and not a "structure; its installation is permitted as an accessory improvement.

a. Structure
With respect to Ms. Horner's first claim, 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 at other sections of the zoning regulations as well as to related building regulations. Sec. 40S, "Certain Structures," refers to tents, Quonset huts and Nielsen 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." Accepting, then, 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 defies logic.

b. Accessory Improvement
As explained by Zoning Enforcement Officer (ZEO) Brown in her April 11 and April 24, 2020 letters to the Horners, the installation of a stand-by generator is EXCLUDED from zoning regulation because it is an "Accessory Improvement," "[a]ny improvement which is attendant, subordinate or customarily incidental to the principal improvement of the same premises." The generator is exactly the accessory improvement envisioned in the Regulations - it does not exist for its own purposes apart from the purposes of the house, itself. It is in every way attendant, subordinate and incidental to the principal improvement. Sec. 121A and 121A.1 state that " . . . [t]he issuance of a zoning permit shall be required before . . . [the] installation of any improvement, other than an accessory improvement. . .". In other words, the Regulations permit accessory improvements with no prohibitions.

c. Fairness and Equity

As ZEO Brown noted in her April 11 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 authorities 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 municipalities have done. To change a practice of many years, to penalize a property owner without prior notice is prejudicial and fundamentally unfair.

2. Noise emitted by a stand-by generator is related to an emergency and exempt from regulation.

a. Noise levels

Ms. Horner's second and unsupported claim is that the generator violates Sec. 40K because its operational noise "is offensive [or] constitutes a public hazard." As a factual matter, we would note that when first installed, the generator did operate on two occasions in test mode for five minutes early in the morning. As soon as we became aware of this and as I explained to ZEO Brown at the time, we determined that this was due to a software error. In fact, the application showed that the test ran for five minutes at 10:00 a.m. We immediately had this error in the application corrected. Presently, the generator tests for five minutes every other Wednesday at 10:00 a.m.. Otherwise, the generator runs only when power is out and, in these instances, it is our practice to run it intermittently as necessary to maintain essential household power requirements.

CGS 442, Sec. 22a-69-1.1(f) exempts from noise regulation "[n]oise created as a result of, or relating to, an emergency." CGS 442, Sec. 22a-69-1.1(j) defines "emergency" as any occurrence involving actual danger to persons or damage to property which demands immediate action." In every nearby town which has enacted specific noise regulations, noise related to emergency conditions is exempted or excluded from regulation. And as ZEO Brown pointed out in her April 11 letter, "generators are typically looked at from a public health and safety standpoint." We maintain that having a generator available to provide power when Eversource is not available does protect our basic well-being and our property in times of excessive cold or heat and does provide some security that our health and home and its value will not be put at risk by the conditions attendant to such weather conditions.

b. Fairness and Equity

We maintain that when the generator runs for its five minute test every other week, the noise is far less intrusive than many sounds in our neighborhood: less noisy than a barking dog, a lawn mower, a leaf blower, a chain saw, a yard tractor or any number of hand tools that are often operated for many minutes and even hours. (See 5/27/20 R.Leighton letter re. comparable noise levels -forwarded under separate cover.) And when the generator runs in an emergency situation, it is simply one of many generators running in our immediate area. In the recent power outage, we heard some people running portable generators arguably louder than our stand-by generator. In fact, we believe that the Horners, themselves, ran a noisy generator! We expect and accept completely that in emergency situations we might be inconvenienced by additional noise. How can it be that a resident who chooses to create such noise should then expect to be taken seriously when complaining of similar noise next door?

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

a. 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 the practice that any pertinent requirement of the Zoning Regulations must be satisfied before the Building Inspector can issue such a permit. At this time, 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 explained the reasons for the installation's not requiring zoning approval. On April 11 and April 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.

b. The granting of the Electrical Permit is the actual date of the ZEO's 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 constitutes 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 that decision on April 2, 2020.

c. 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-I, 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 to be filed no later than May 2, 2020, thirty days after receiving constructive notice that the ZEO would not claim jurisdiction.

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 this 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 Court noted that to permit an appeal outside of the appeal period "would allow someone to readily circumvent appeal deadlines and create uncertainty in zoning decisions simply by complaining to a zoning official that certain facts or law had not been considered in rendering a previous decision."

4. Conclusion

We will briefly conclude by reiterating that the generator is an appliance excluded from regulation as an accessory improvement. It is not a structure. We underscore that the operation of this emergency appliance is exempted from noise regulation because of its very nature. 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 denied. Finally, we would 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.

Sylvia Rutkowska

From: DOUGLAS MC AVAY <pmcavay@comcast.net>
Sent: Monday, October 19, 2020 9:06 AM
To: mborton@snet.net
Cc: Sylvia Rutkowska
Subject: Horner appeal hearing

Dear Mr. Borton,

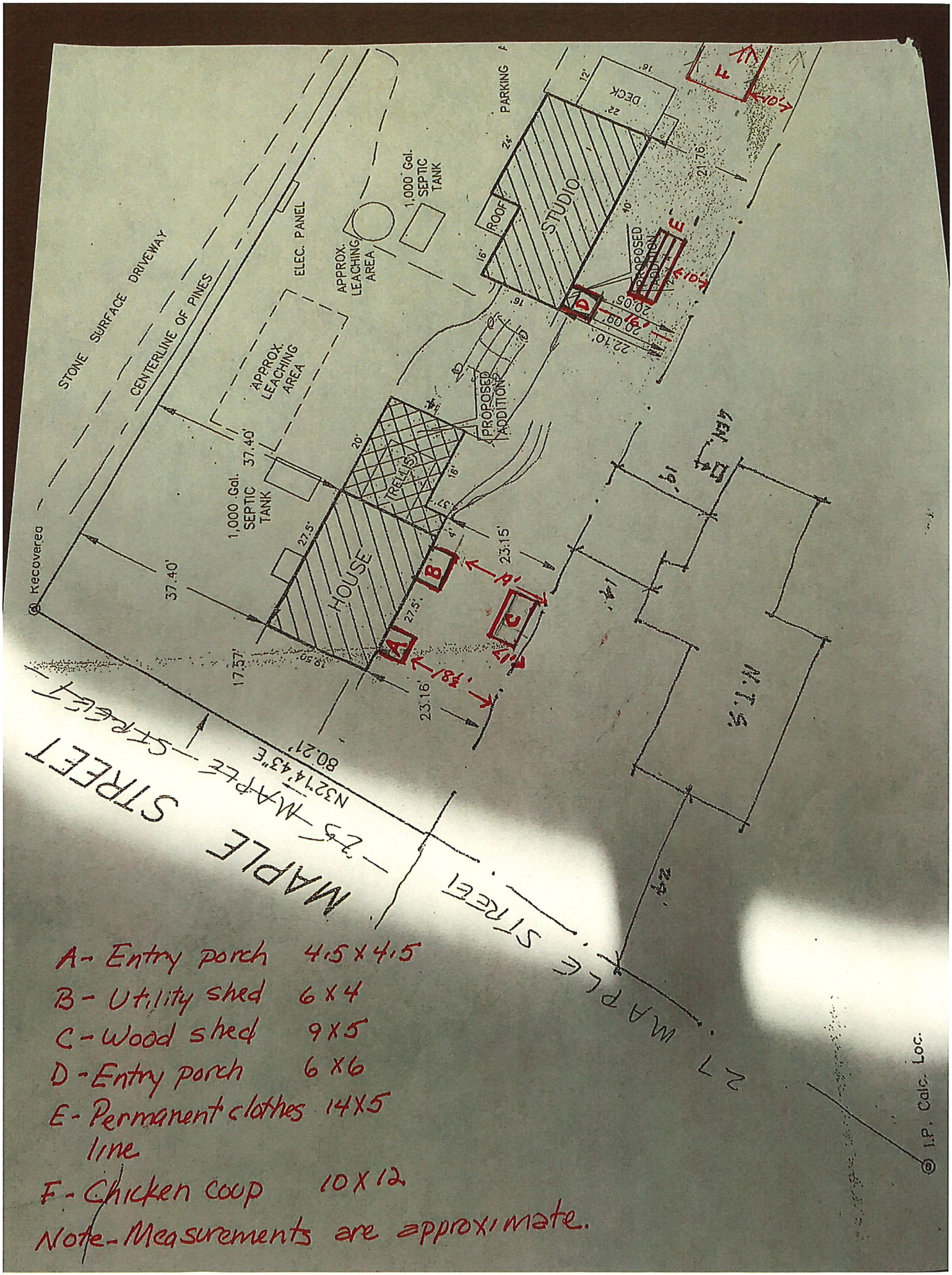
In anticipation of tonight's public hearing and in response to Atty. Cronin's Memorandum of Law, we wish to add the following comment and two photos to our statement of September 21, 2020. We ask that these documents, like the September 21, 2020 statement, be shared with Board members hearing the matter.

We add to Section 1c, "Fairness and Equity" on page 1 the following: For the information of the Board, the plot plan submitted in support of the Horners' appeal fails to show the six permanent additions/ structures/accessory improvement installed by the Horners in the twenty foot side lot of their property line (bordering our property). Please see the attached diagram.

Photos will follow under separate cover.

Thanks for your consideration.

Pam McAvay



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.