

Danville Zoning Board of Adjustment
Nov. 15, 2016
7:30 pm

Members present: Chris Stafford-chairman, Curt Springer, Joe Luna, John Russo, Michelle Cooper; Roger Whitehouse arrived at 8:15pm and was not a voting member during tonight's meeting.

Excused members: Tara Burkhart, Roger Denison, Sheila Johannesen, Jason Holder

Heritage Commission members present: Carol Baird, Linda Roth, Marguerite Guilmette, Jim Castine

Others present: Cynthia Boisvert, Walter Baird, Don Mathieu, Judy Mathieu, Ed Delorey, George Nelson, Kevin Hatch, Phil Roth, Kim Farah

Minutes: Joe made and Chris seconded a **motion to approve part 1 of the October 25, 2016 minutes as amended**. Curt abstained. The motion **passed**. It was agreed to review the minutes of November 1, 106 when the voting members who heard the case are present.

Part 1

2016-5: Peter Gorton of 78 Walker Road is requesting a variance of the Danville Zoning Ordinance article VI.A, regarding lots with less than 200' of frontage for a proposed subdivision. The lot is known as Tax Map and Lot 3-21-15

Peter Gorton had contacted the office stating he was not ready to continue the hearing this night. It was left that there were questions about density and the possibilities of needing a second variance or a revision of his plan. He could also withdraw his application. Joe made a motion to continue the hearing to December 13, and that the Board will vote that night on the case. Joe amended and Chris seconded the **motion that the hearing be continued a second time to December 13**. Joe reiterated that this is the second continuance granted to the applicant. Curt abstained. The motion **passed**.

Don and Judy Mathieu left the meeting.

Part 2

Chris recused himself and sat with the audience. Voting members continued as the following: Curt, Joe, John, and Michelle.

2016-6: appeal from an administrative decision. The appeal is made by the Danville Heritage Commission regarding a subdivision approval made by the Danville Planning Board on September 8, 2016 for Tax Map 2 Lot 75, owned by Delridge Realty, which is adjacent to the Meeting House land (Tax Map 2, Lot 73) and cemetery (Tax Map 2, Lot 74), which are lots in the Historic District. The meeting notification included the following: *The nature of this application may result in a quorum of other town committees being present for the hearing.*

Carol asked if they are entitled to a five member board. Curt said he believed that deals with their right to appeal. Chris explained that the Board needs to inform the applicant that they can continue with a short board but they cannot appeal any decisions of the Board on the basis that it was not a full board.

Carol asked if they can present their evidence first and then wait for a full board before a vote is taken. Curt said he believes they need to deliberate first and decide what evidence they will hear. He suggested they first review the prior meeting minutes and review the letter received from their attorney.

Joe made and John seconded a **motion to accept part 2 of the October 25, 2016 minutes as written**. The motion **passed** unanimously.

The letter from Bernie Pelech, of Wholey and Pelech, dated November 10, 2016 was distributed to the Board members and to those in the audience who wanted one. Curt summarized the letter as follows: Mr. Pelech believes the Heritage Commission (HC) has standing to appeal the decision of the Planning Board (PB). The second question posed to Mr. Pelech dealt with whether the decision by the PB determined the Historic District (HD) boundary. Mr. Pelech said it did not. He said if the ZBA were to take the case, it would be de novo, meaning the ZBA could act in place of the PB and accept new evidence. Mr. Pelech said the decision of the PB was just approving a subdivision and that decision didn't redo the boundary. Therefore the PB decision doesn't involve the interpretation or application of the Zoning Ordinance (ZO). Mr. Pelech also pointed out that the Selectmen (BOS) could have appealed the PB decision directly to the Superior Court within 30 days of the decision.

Curt stated that while the HC has standing, they don't have standing to appeal the ZBA decision. This can only be appealed by the abutters, in this case it would be the BOS on behalf of the town.

Joe pointed out the map was officially accepted in 2008 by the town with the creation of the Village District.

Carol noted the attorney does not mention RSA 674:38 which speaks about recorded approved subdivision plans having an impact on the map. Curt said that is regarding the official map, which is different than the zoning map and RSA 674:38 is not relevant. Carol stated an approved recorded subdivision plan creates lots and changes where surrounding parcels lie. Curt said his understanding is that the official map is for planning and tax purposes and only changes when someone accepts those changes. He said the only entity that can determine a boundary line is the court. If there are parties that disagree with those boundaries, this must be discussed in court. Carol said her understanding is that all local remedies must be exhausted first before going to the court. Curt said that only zoning issues have to be discussed through the ZBA process before going to court and the BOS could have taken this boundary dispute directly to the court. Carol pointed out that the letter from Mr. Pelech is an opinion and that there have been many opinions rendered by several people regarding this subdivision: differing opinions with differing information. Curt said this issue can be solved in a court and Mr. Pelech was asked specific questions on behalf of the ZBA.

Carol asked whether or not the Board can discuss accepting jurisdiction of the appeal. Curt said that Mr. Pelech opined that only the BOS can appeal. Carol pointed out that Mr. Pelech's letter stated that if the Board decides it has jurisdiction, it would be de novo. She asked if the Board would entertain discussing the case. Curt said this Board has to decide whether or not to accept Mr. Pelech's recommendation.

Jim stated that he believes the PB didn't know at the time of the approval that it would change the HD boundary. He asked if it's true that the all of the HD land has to be owned by the town. Curt said that is irrelevant. Jim said that whether the PB meant to do it or not, the changes made to one parcel have changed the boundaries of surrounding parcels. Curt said the HD was laid out as certain parcels of land and there's nothing to stop the town from selling those parcels. Jim said that they will hopefully present evidence tonight to show that parts of the HD were used as part of the property approved for a subdivision. Curt said this may not be true and that the town will have to have a survey done.

Carol asked how the ZBA will proceed. She said Mr. Pelech's letter doesn't seem to indicate that the Board has an option to not accept the case. Curt said that at some point this Board will make a decision about whether this is a zoning issue or not. Carol said the appeal can be accepted as a de novo appeal. Curt said no, if the appeal is accepted as a zoning issue then the Board can discuss it. If it's accepted as a case, it would be by definition a de novo. The Board must first decide if it has jurisdiction. If the Board has no jurisdiction, there's no reason to hear evidence.

Kim Farah asked about the 30 days to appeal and the origin of that statement. Curt said there was a case in Kingston from which that arises and he will send her a link to it. He explained there are several avenues available. Appealing to the Superior Court was an option within 30 days of recording the plan but that time has expired. The BOS, acting on behalf of the town as a property owner, can have the property surveyed and negotiate with the owner to agree with the lot line or go to court.

Curt stated that Pelech recommended not hearing this case. John said he believes they should hear the case, since a survey has been done and can be discussed. Curt said the Board cannot proceed since it does not have authority. Linda Roth said the Board does have authority.

Curt said this Board needs to make a decision. This Board has a legal opinion that states we don't have authority. He said land use boards do not determine boundaries and the proper thing to do would be to have the property surveyed and go through other legal channels. The ZBA is not a proper channel. John said again that the property has been surveyed.

Joe summarized Curt's statements as follows: The HC came to the ZBA with an appeal of an administrative decision by the PB. At our last hearing, the ZBA decided to take questions to an attorney not affiliated with the applicant or the town in any way. This attorney reviewed the information and recommended that when the PB granted approval of the subdivision, they were approving it as presented. Any lot line in dispute was not approved or denied by approving the subdivision, and if there are any disputes, there are other avenues to take to remedy those.

Joe continued that the Pelech letter stated the ZBA doesn't have any jurisdiction to make a determination in a boundary dispute. A subdivision plan was presented by a registered land surveyor or civil engineer who presumably did the requisite research and presented that plan for his client's property. Joe said he wasn't involved in any of those hearings so he is not aware of anything presented there. Mr. Pelech also has recommended that since the PB has no authority to make a judgement of a border dispute, the ZBA shouldn't hear the case because the PB didn't determine the boundary.

Joe continued that the HC is appealing the PB decision, stating that by approving the plan and recording it, it created a new boundary. He said Mr. Pelech has indicated and Curt agrees the ZBA is not the place to discuss a boundary dispute. It appears everyone agrees there's a dispute, the HC appeal is because the HD boundary lines follow the lot lines. The HC believes the zoning district boundary is linked to the property lines in dispute. Correspondence received from legal counsel (Pelech) indicates the HC can appeal the case but opines that the ZBA does not have authority to hear a case regarding a boundary dispute, which this appears to be.

John asked if any new evidence would then be presented in court. Joe said he'd like to discuss the new evidence, but it seems to be a boundary issue between property owners. John said again that a survey has been done. Joe said it is wholly within the rights of the town to hire a third party to survey its own property. He said only a portion of the PB record was provided to the ZBA and he tends to agree that this Board has no place in a boundary dispute.

Carol asked if they are entitled to a full board before a vote is taken on that matter. Chris was asked to clarify and he said the applicant has the option to proceed with a full board and that continuing with a short board does not allow them to appeal on that detail. Curt asked if the Board should ask the HC if they want to continue with a full board. Joe stated it hasn't been decided if the case is going to be heard. Carol asked if the HC members could be polled to see if they want to waive their right to a full board. She said if the meeting is continued, the HC will have a chance to hire its own legal counsel.

Curt asked, if the Board decides it does not have jurisdiction, does the matter of a full versus short board still apply. Joe said that it did. The HC was asked if they want to waive their right to a five member board. They agreed they wanted a full board.

Joe made and John seconded a motion to continue the hearing. After further discussion, Joe amended the **motion to continue the hearing to December 6th at 7:30pm**. John seconded. The motion **passed** unanimously. Tara will be contacted regarding her availability that night.

At 8:45pm Curt made and John seconded a **motion to adjourn**. The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison