

Danville Zoning Board of Adjustment
Dec. 6, 2016
7:30 pm

Members present: Chris Stafford-chairman, Curt Springer, Tara Burkhart, Roger Denison, Joe Luna, John Russo, Michelle Cooper; Roger Whitehouse arrived at 9:20

Excused members: Sheila Johannesen, Jason Holder

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

Others present: Cynthia Boisvert, Walter Baird, Don Mathieu, Judy Mathieu, George Nelson, Kevin Hatch, Phil Roth, Jan Danisevich, Ken Danisevich, Aldeh Sanborn, Dotty Sanborn Emilio, David Cogswell, Judi Cogswell; Shawn O'Neil arrived at 9:20

Chris recused himself and sat with the audience. Voting members continued as the following: Curt, Tara, 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.*

Curt, as acting chairman for this application, said that he has obtained more legal advice from Bernie Pelech. The Board has also received two letters from the Heritage Commission, one regarding the recusal of the acting chairman and the other regarding procedural matters for conducting the meeting. Curt said he did not speak to Mr. Pelech regarding the recusal, but he had obtained advice regarding how to conduct the meeting. He said the Board will first discuss whether or not they have jurisdiction over the appeal. If it is voted by the Board that they do have jurisdiction, they will then discuss the recusal request.

Curt said he was told that he should not have allowed any public input on this case until the decision was made whether or not they have jurisdiction. Carol called for a point of order, and asked why the Board does not follow its own rules of procedure. Curt said he will follow the legal advice he obtained from the attorney. Carol said the Heritage Commission has a right to be heard before the ZBA.

Chris Stafford asked if the hearing is open. Curt said it is not and that he should not have allowed anyone to speak yet. He said they will discuss whether they have jurisdiction over the case and then allow testimony. Carol asked about the RSAs or case law upon which that is based. Curt said this is the legal advice he was given and the Board can decide whether or not to disregard that advice.

Chris said there has been no vote to open the meeting but there have been two meetings so far in which testimony has been heard from the developer, Planning Board, and the Heritage Commission. He said the actions of the Board imply that the process of a public hearing has begun. He said that in a quasi-judicial hearing such as this, he's found it's always best to get all of the information on record for any future decisions. He said that many people put a lot of effort into getting a lot of information and it may

behoove the Board to have that information presented. The Board can decide later what to do with that information and discuss the merits of the appeal.

Curt said again that the question for the Board is whether or not they have jurisdiction over this case. If it's decided they have jurisdiction, they will hear the appeal. He said that Mr. Pelech told him about a court case, *Atwater v. Plainsfield*, that states the operative date for the time of the appeal is the date the conditional approval was granted. He said this gives them two prongs that denote they don't have jurisdiction.

Joe said that if the appeal was filed late, the applicant should have been told at the time of filing and not at the beginning of a third meeting, so that should be taken off the table.

Joe also said that last week he summarized what Curt was saying regarding whether or not this Board has a right to discuss this appeal. He said that as a result of adopting an official zoning map, it required our Planning Board (PB) to determine what the boundaries are. He said that whether they intended to or not, it doesn't seem to him that the PB determined the location of the zoning boundaries, knowing that it was in question at the time of the subdivision approval process. No one has asked the PB to determine the location of the boundary due to this subdivision application.

Curt said that when the PB approved the subdivision, they were not determining the boundaries of the district. Joe said that, not knowing what was presented to the PB, and having seen limited drawings here, he's unclear whether this boundary dispute involves just town property or the subdivided property as well. He asked, if it doesn't involve the subdivided property, could all of this been assuaged by deleting property lines that had nothing to do with the subdivision approval. Joe said he's unsure what we're talking about. Curt said the task before the PB was to decide on a subdivision of land that had not previously been surveyed. He does not believe the PB made any decisions about zoning district boundaries.

Curt said the historic district is an overlay on the residential/agricultural zone. It was said that if some part of the subject property were part of the historic district, it would require additional approval from the Heritage Commission. He said this has nothing to do with the PB process of approving the septic and well placements, etc. Joe said that if the boundary is in dispute and part of the property is in the historic district, the PB can approve the application only if the applicant has seen the other board. Curt said that isn't true; the Heritage Commission is consulted if someone is going to put up a structure in the Historic District.

Curt said that the PB also does not send applicants to other committees, such as the Conservation Commission. The PB may ask for input from these boards during an approval process, but it isn't required to get any sign-off from other boards.

Joe said another concern he has is a comment made by Chris that the meeting in October went further than it should. There was no official motion to open the public hearing but the chair said he will hear testimony to determine what questions to pose to the attorney. Michelle said that part of the discrepancy is that she town feels the boundary is further than what is on the approved plan, meaning the Historic District covers further than what is shown. She thinks that at some point someone should say that if the subdivision was erroneously approved, it should be reviewed. Curt said that he's not arguing that there may be a dispute, but he believes this belongs in the courts and not with the ZBA. He said it's up to the town to do a survey and if there is a dispute, it should be taken to court to resolve the boundary issue. Michelle said she believes that where there's an issue and the ZBA has been asked about it, the ZBA should respond. She said it's like telling one person they can go ahead with their plans and the town

board is told they have to go and figure out the problem for themselves. Curt said the subdivision does not approve the perimeter boundary.

Curt asked about the two letters received from Bernie Pelech. Curt made and Tara seconded a **motion to release the town letters from Bernie Pelech marked “attorney-client privileged”, dated Nov. 11, 2016 and Dec. 5, 2016.** Joe said he’d like to re-read them before the vote. Walter asked if the questions will be released that were asked of the attorney. Curt said he will not release them. Walter asked what good the questions were and Curt answered that the letter is self-explanatory. The motion **passed** unanimously. The two letters had previously only been given to Joe, Tara, John, and Michelle. Copies of the letters were then given to Carol Baird, Chris Stafford, Judi Cogswell, Kevin Hatch, and Janet Denison.

Joe noted that in the May 26th PB meeting, the developer was told that he had some homework to do relative to this discrepancy. He said the PB was aware of a potential border dispute but he does not find a record that this particular issue was resolved and he does not know why. Curt said that the PB had to make their decision on the application within so many days of receiving it. It was mentioned that the PB has 65 days to make a decision after receiving an application. Joe said there are other options, including denying the application.

Joe said that he has been a member of several town boards, including the Heritage Commission and the Planning Board, and is wrestling with his desire to know the details of this case. He said however, that he’s not sure it’s his place to go against legal advice. There was a discussion about the possibility of appealing this Board’s decision if it is denied. Curt said this appeal “stays” development on the project. Joe said that this Board may find that they are for or against the appeal, but he can’t tell now. John said he is in favor of hearing other testimony regarding this case because they’ve been given an application and he believes it should be reviewed by the Board. Curt said that this Board can only hear cases that deal with zoning. Joe said he’s not sure if the appeal was filed in the most appropriate way considering what they are being asked to decide. He said the wording of the appeal may not have been appropriate.

Walter asked if the Board is talking about whether or not to accept the appeal. Joe asked for clarification regarding accepting the appeal and if that means they sit as if they are members of the Planning Board and decide if the Planning Board application should have been approved. Curt said that is correct and that could get messy. Joe said he’s not afraid to discuss whatever comes before the Board and is wondering if there is new information regarding this case of which they are currently unaware. But he said that going against town council has not typically been the appropriate path.

John said he is in favor of hearing the case because this Board has received an application. Curt reiterated that this Board can only hear cases that deal with zoning issues. Joe said that this Board should not consider whether or not this can become a legal issue; that should not be the basis of our decision. Curt said this issue should be resolved by the two parties speaking to each other to try to resolve it.

Jim Castine asked if the purpose of a ZBA hearing can be explained. He said that based on the explanation just given, these hearings are irrelevant all the time. Curt said this Board is not going to debate that issue.

Michelle said it seems the Heritage Commission isn’t asking this Board to make any decisions regarding boundaries except for a question of the Historic District boundary. She asked if the Historic District is noted on the subdivision plan. She was answered that it is not. Curt said the Board has been asked to overturn the subdivision approval and have a new perimeter drawn.

Joe clarified that if this Board decides to hear the case, it would be deciding if the PB redefined the boundary, not having the boundary redrawn. If that is determined, it would require the applicant to go back to the PB with a new application. They believe that by approving the plan, the PB accepted disputed boundaries and because it was reviewed under the Subdivision Regulations, and although zoning is part of that review, their decision didn't involve applying the Zoning Ordinance to the subdivision.

Carol asked if the report from Arago Consulting was given to the Board members. Curt said it was sent via email and he glanced at it.

After further discussion, Joe made and Tara seconded a motion that the ZBA not accept the appeal based upon the attorney recommendation that the subdivision regulation approval by the Planning Board did not apply zoning. The Board discussed this and Joe amended his **motion**, seconded by Tara, that **the Board not accept the application of administrative appeal because the application for appeal would not involve the interpretation of or the application of the Zoning Ordinance.**

The idea of an appeal was mentioned. The correct information will need to be given in any appeal, including the fact that the Selectmen are the only ones who can appeal on behalf of the town. Carol stated the process, if it goes to court, is a paper review so the paper documents need to be reviewed and established for the record.

The motion was read again.

Michelle said that she will play the part of the devil's advocate and ask that this Board hear the reasoning for why they want this meeting. She asked what if there's something there and this Board is not letting that information come forth. She said we're presuming that they're presenting something that has nothing to do with zoning, yet we haven't heard the case yet. She said that in the two hours that this meeting has been going on tonight, the information could have been presented. Curt said they presented in their application what the legal basis was, and Curt said the appeal is heard based on what is in the appeal. Michelle said we're still unaware if there is other information that should be heard and she is not sure what the harm is of hearing what they have to say, even if the outcome is that we cannot act on this case. Curt reminded the Board that a citizen has gone through the approval process through the Planning Board, begun months ago, and with this appeal, any action he would like to take involving this property is stayed. Joe said that has nothing to do with the motion on the table.

Curt asked for a vote on the motion. Joe and Curt were in favor; Tara and John were against; Michelle said she is undecided. The motion was read again. Joe said this Board is the interpreter of zoning. He said he didn't think acting on this appeal is going to resolve any boundary issue, if that is the problem. Curt said that if the lot line has moved, it doesn't change the boundary of the district. Michelle said that after hearing testimony, that determination may be made. Curt read portions of the November 11 letter. Joe reiterated that it could mean part of the Historic District is in the parcel that was approved for a subdivision. Joe said the line established in 2008 when the zoning map was accepted remains unchanged.

Chris Stafford said he hopes the documentation submitted by the Heritage Commission, not new information, is being correctly understood. Curt said again that the zone follows the map, regardless of how individual parcel boundaries change. He said it could be possible that part of the Historic District is in the subject parcel that has been subdivided. Michelle asked that, if that is the case, would they need approval from the Heritage Commission prior to development. Curt said the answer was they might, but that still has no bearing on this case. Michelle read from the Zoning Ordinance that a certificate is required from the Heritage Commission before any work is done on a lot in the Historic District. She also asked if that is supposed to be noted on the approved plans that in order to get a building permit on that

lot, a certificate from the Heritage Commission is required. She said that would seem to be an important note to have on approved plans.

Curt said that may be true, but the subdivision plans do not include zoning boundaries. If it does, it will say "Residential/Agricultural." He said that is not the issue at hand, because the zoning boundaries have not moved. He said the attorney addressed this by saying the PB did not determine the boundary of the zoning districts. Carol asked if the attorney had the surveyor's report that stated the historic district overlaps the property that was subdivided. She was answered that he did not have it. Curt said that the district boundary will remain where it was in 2008. Joe said that could mean some of this parcel is part of the subdivision. The subdivision was approved which did not change the boundaries of the districts. If the subdivision line is correct, the Historic District line hasn't moved.

Joe asked for the vote to be completed. Michelle asked to see the letter from Attorney Pelech again. Michelle read the letter, then voted against the motion. The motion and the vote were read again: **motion that the Board not accept the application of administrative appeal because the application for appeal would not involve the interpretation of or the application of the Zoning Ordinance.** Joe and Curt voted in favor; Tara, Michelle, and John voted against. Joe stated the **motion failed**.

John made and Tara seconded a **motion to accept the application.** Curt and Joe voted no; Tara and John voted yes. Michelle abstained. The motion **failed**.

Michelle said that in reading the letter from Mr. Pelech, the opinion was focused on the property boundaries and not so much on the use and he felt the boundary line would still be the boundary regardless, and the one lot would be affected. Curt said the PB didn't make a decision about zoning district lines thus there is no reason for the ZBA to be involved. Curt said that it doesn't matter if the plan is correct or not, it isn't a zoning issue.

Michelle asked if the attorney had any opinions on hearing testimony. Curt said this was addressed in the letter stating there is no contradictory information or survey in the Planning Board record; only lay people reviewed the one survey for the subject parcel.

Curt asked if a continuance is in order. Chris stated it is the purview of the chair and the members to take public input to clarify the application or the process to decide whether or not to have a hearing. Curt said we have information about the process in the form of legal advice. Michelle made and John seconded a **motion to hear public input.** Curt said that there has already been legal advice and public input at the prior meetings. Michelle clarified that the motion is not to accept the application. Curt read from Mr. Pelech's letter stating that public input should not be taken until the Board decides on jurisdiction. Tara, John, and Michelle voted yes; Curt and Joe voted no. The motion **passed**.

Cynthia Boisvert, from Arago Land Consultants, explained the zoning district line did not move. It goes through the first lot that is in contention. The overlay district has different requirements than the residential district, and these zones were not shown on the plan. She said that contrary to the town regulations, the septic and well radius are within the Historic District which is a zoning issue. She read a portion of the ZO which states that any activity cannot be done within the Historic District. She noted the hearse house foundation is on the subject property yet not noted on the plans. If they want to do anything, they have to get permission from the Heritage Commission. This is a non-buildable, non-conforming lot that has been approved by the PB and this is a zoning issue. She said the Historic District is a zoning matter and is the purview of the ZBA.

Curt asked Cynthia if a buildable area has been identified in the Historic District. Joe asked what that matters if it is non-buildable. Kevin Hatch showed a copy of his drawn plan and Cynthia pointed out that

the zones are not shown on it. Cynthia showed on the plan she drew that the Historic District is part of the approved subdivision. She pointed out the septic box and well radius are within the Historic District.

Joe said that whether that zoning line is the stone wall or two feet one way or another, the approved plan shows a typical siting, not where the structure will actually go. Cynthia said that is correct, except the well is where it will be and the radius encroaches the Historic District. Joe said the property owner determines if and where a structure can be fit on a lot. It is also the prerogative of the owner to not build on the lot if he doesn't want to speak with the Heritage Commission and get a certificate to build on the lot. He said the PB did not change the zoning.

Cynthia mentioned the Kingston case in which the Kingston Heritage Commission said they cannot develop that land. Curt said that was a shopping center which is different than what is happening here. Cynthia said the appeal application did not say the PB moved the boundary. Joe read the appeal application. Carol said that at the time the appeal was filed, the only documents available were the plans from Mr. Hatch which put the meetinghouse land north of the meetinghouse and onto Chris Stafford's property. Once the town hired a surveyor to do the research, it was noted there was a problem south of the meetinghouse. The PB approved a subdivision that is now overlapping the Historic District and the PB has no authority to do that. Curt said a home can be built in the Historic District.

Cynthia noted that Mr. Pelech has said the zoning boundaries have not moved. However, the town regulations, including the Zoning Ordinance, state that zoning boundaries must be shown on the plans, and they were not. Joe said the ZBA has to work off of what was submitted with the application. He said the appeal is alleging that if this is the Historic District boundary, the appeal says the boundary has moved. Carol said the appeal was filed based on the only information available at the time, which was Mr. Hatch's plan. She said the appeal states the PB accepted Mr. Hatch's opinion on where the boundaries are, when further research indicates there are issues with the area south of the meetinghouse.

Joe said the metes and bounds were accepted and they were conforming lots. Carol said it no longer has conforming lots. Cynthia said a conforming lot is not only what is in town regulations but state approvals are required also. She said the Selectmen hired her to find out what the town owns. She said the subdivision approval created a lot that didn't go through the proper approvals. Joe said that if the PB created a lot that is non-conforming, but is non-conforming in ways other than amount of acreage and frontage, then part of the lot is going to be claimed as town-owned property. That is not necessarily a zoning issue based on how this appeal was filed. The town can file a differently worded application, but this application doesn't pull the ZBA into play.

Curt asked why Cynthia thinks this is non-conforming. She said that it is due to the septic building box and well radius. It's not allowable to have those easement areas in the Historic District. Joe said that has nothing to do with this application as it's submitted. If the northern lot belongs to someone else and not the town, and Mr. Hatch's client decided to steal it, it has nothing to do with zoning. Cynthia disagreed, saying the purpose of the PB is to create conforming lots and this plan created a non-conforming lot.

Joe said that Mr. Hatch may or may not have made an error, but the ZBA has to review and accept the application as presented. If it isn't accepted, the town can appeal that decision. Chris asked if Joe is saying that a different wording of the application may be approved. Joe said yes.

There was a short discussion of the establishment of the Zoning Map in 2008 and that it hasn't changed since then. Joe said that the PB recently discussed hiring someone to update the map. The tax map may change due to this subdivision. Unless the PB or a citizen puts forth a citizen's petition to have the tax map changed, it is however it was in 2008.

The motion for a rehearing was clarified. The Selectmen can appeal any denial on behalf of the town. If that is denied further, it can go to court. Carol said that it has to be understood that if this goes to court, it is a review of paper, and the only paper evidence that has been presented so far is from Mr. Hatch and this is not fair to the town. This is why they've been trying so hard to be heard by the ZBA.

Joe said that his interpretation of the appeal is that the PB moved the zoning boundaries. There was a short discussion about the beginning of this appeal application process. Carol stated that the ZBA members can accept the case de novo and hear the new evidence even if the appeal is denied, and that allows a paper record to be created.

Cynthia asked if a case regarding the Historic District is under the purview of the ZBA. Curt said it is if they bring us a case. Cynthia then said part of the Historic District ordinance states coordination between the Boards needs to happen and a discussion with the Heritage Commission is mandated by the Zoning Ordinance when lots in that district are being considered for improvements.

Curt said the ZBA takes specific cases dealing with zoning. Carol said the PB accepted the opinion of a surveyor regarding where the Historic District is located. She said that surveyor put part of the Historic District onto someone else's property, essentially forcing a citizen to comply with the Historic District ordinance.

There was a lengthy discussion about what was filed in the appeal and what types of applications can be accepted by the ZBA. Mr. Hatch said his plan is correct.

Joe said that if there is a problem with the lot and the developer can make that lot conform to zoning and not encroach within the HD, it would be in his rights to do so.

Carol said that the zones were never put on the plan and the developer said he does not have to conform to the requirements in the Historic District. Mr. Hatch said that it is absurd to say that Mr. Delorey will not conform to zoning. Chris said that this hearing is to decide whether there is an appeal that the ZBA can rule on. Chris asked if this is a case of clarifying the application. Joe said that is what he has suggested: there is some input that there may be a question of zoning but this was not originally submitted in this appeal. If the appeal is denied, there is recourse for an appeal.

Chris said the appeal could be denied or the Heritage Commission could withdraw the appeal. Joe said that if the appeal were denied and the appellant submitted an motion for a rehearing, there's an opportunity to clarify the zoning issues so this Board can vote on an appeal directly related to the hearing. It would have to be information not known at the time of the decision. Joe made and Tara seconded a **motion that the ZBA not accept the application for appeal because the application for appeal would not involve the interpretation of or the application of the Zoning Ordinance.** The motion **passed** unanimously.

At 11:00pm Joe made and John seconded a **motion to adjourn.** The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison