

Zoning Board of Adjustment
Aug. 21, 2018
7:30pm

Members Present: Chris Stafford, Jason Holder, Curt Springer, Walter Baird

Others Present: Shawn O'Neil, Scott Borucki, Ken Baker, Chris Dowling

Chris made and Walter seconded a **motion to approve the May 1, 2018 minutes as written.** The motion **passed** unanimously.

2018-3: Special Exception request from Chris Dowling of 74 Caleb Drive, Tax Map and Lot 1-66-42, for an accessory dwelling unit

The fact that there were only four voting members present was explained to Mr. Dowling. He said he was fine proceeding with a short board. Jason was designated a voting member.

The floor plan and two renderings for the accessory dwelling unit (ADU) were presented. Mr. Dowling said the in-law space will be approximately 600 square feet. This will be next to the garage, with a living room area above. The main unit and the ADU will be divided by a laundry room and bath room. This is designed to be a shared space.

The design has been discussed with the building inspector. The addition complies with all setbacks. The unit is designed for Mr. Dowling's mother and the ADU will be built to accommodate a wheelchair. The entry off to the side will help the home appear to be a single family unit. The format will blend with other homes in the neighborhood. A new septic system has been designed and approved by state and local inspectors.

The Tuckertown Road trail is on the other side of the home. The addition is being put on the far side, away from the trail. Curt asked if a bathroom is a convenient access from one unit to the other. It was agreed that's a personal choice.

Ken Baker of 72 Caleb Drive said he is in support of the proposal. There were no more questions and the public hearing was closed.

The nine criteria were reviewed. It was agreed that the proposal meets all of the criteria outlined in the zoning ordinance. The parking area was explained briefly. No trees will be removed. The existing yard will have some leveling of the contours, the existing driveway will be widened. This does not violate the cluster ordinance requirements.

Curt made and Jason seconded a **motion to approve the application with the condition that the building inspector signs the plan stating he is in approval.** The motion **passed** unanimously.

Other Business:

Curt said, due to personal reasons, he will resign from the ZBA effective at the end of this meeting. He was thanked for his years on the Board.

Curt nominated Chris as chairman. Chris abstained from voting and all others present voted in the affirmative. Chris nominated Walter as vice chair. All voting members voted in the affirmative.

There was a short discussion about House Bill 1215 and Senate Bill 339 regarding voting on variances and voting by the ZBA. SB 339 amends RSA 674:33, III to requires a concurring vote of at least three members for any action to pass. It was agreed this Board has been using that approach already. HB 1215 amends RSA 674:33, I requiring a single, consistent voting method for all variances. This is already incorporated into the Rules of Procedure.

Curt's proposed amendment to the Rules of Procedure (RofP) was discussed. It was agreed to insert the following in section II: "In the event that neither the chair or the vice chair can serve, the members and alternates shall elect someone to the chair pro tem and that person shall carry the full power including arranging for legal counsel to the conclusion of the case, including any continuation."

There was a discussion about the Board being able to waive the Rules of Procedure. Advice regarding this from Matt Serge was reviewed by Peter Loughlin who said it was reasonable and common, although it wouldn't have made a difference in the Old Meeting House case. It was agreed the ZBA can't change when the clock starts when another entity, the Building Inspector for example, makes a decision.

Curt made and Jason seconded a **motion to release Peter Loughlin's feedback regarding this**. The motion **passed** unanimously.

The following was agreed to be added as section 7, and to make "Amendments" section 9, and to make a new section 8 as a Code of Conduct policy. The portion to be added will be: "Any portion of these rules of procedure under the jurisdiction of the ZBA, may be waived in such cases where, in the opinion of the Board, strict conformity would pose a practical difficulty to the applicant and waiver would not be contrary to the spirit and intent of the rules. The Board may, upon motion made by any Board Member, and by majority vote unless otherwise prohibited, waive compliance with any provisions of these Rules."

A code of conduct was discussed briefly. The nature of the ZBA can create conflict since the Board deals with problems that can't be solved in other ways. The following was proposed as a code of conduct policy, to be section 8: "While ZBA members and alternates are appointed volunteers and not employees of the town, their conduct and communication to other boards, town employees, town citizens, applicants and applicant representatives should be consistent

with the Town of Danville Code of Conduct and harassment policies.” It was agreed that the RofP will be put on the website with a link to the cited policies.

There was a short discussion about legal counsel and the costs. The Selectmen will be asked their opinion of the proposed addition to the RofP.

Shawn O’Neil asked to address the Board. He explained a question was posed to an on-line forum about the role of the clerk if they are involved with more than one town board. He said the question reflected negatively on the clerk and the town. The Selectmen forwarded this to the town attorney who offered an opinion. Shawn read the entirety of the response:

“Hi, Patty and Janet. I have reviewed this issue and have a few thoughts. First, a land use board is statutorily authorized to have staff (clerk) to assist with administrative functions of the body. That clerk is treated just like any other municipal employee. RSA 673:16. By virtue of the position, a clerk is necessarily going to have access to attorney-client communications of the particular land use board since written correspondence is often filtered through a clerk, and the clerk is also generally at the board’s meetings/hearings. Although the clerk is not a member of the land use board, he or she is still part of that body and generally any communications with legal counsel remain privileged. Of course, that means that the clerk, just like any other board member, is bound to protect the privileged information. Thus, the fact that a clerk serves the ZBA and the PB does not mean he or she should be removed from performing his or her functions out of concern that privileged information will be leaked.

“Indeed, because the clerk is a town employee, a land use board’s action in preventing the person from working (or restricting the position in some way) could be seen as a form of constructive termination designed to force the person to quit. The clerk is not a decision-maker, and therefore there is no conflict of interest issue simply because the employee works for multiple boards (which itself is not uncommon in many towns).”

Shawn said he is particularly disturbed by the “constructive termination” reference. He said that a board runs smoothly when the clerk is included in the correspondence.

Curt said that he never suggested that the clerk divulged confidential information and has always had the highest regard for the clerk. He said there is an issue if a document is released to someone other than the client, making the document no longer subject to attorney-client privilege. This then makes the document subject to a 91a request. He explained that during the Old Meeting House discussions, he was advised by Bernie Pelech to not include the clerk in the distribution of any legal correspondence. He said he never had any concern about the clerk’s conduct. The advice to not share legal correspondence was continued with the recent case regarding the property on Sweet Street. Advice from Peter Loughlin was shared with the clerk after the Board voted to disclose it.

Chris said that everyone on the Board has to be aware of what is restricted information. It is also important to keep in mind that the Board members are volunteers and the clerk needs to be kept in the loop. He said he's always been pleased with the work the clerk does.

Scott Borucki explained he's the ex-officio to the Planning Board and is aware that the clerk is included on privileged information for the Selectmen and Planning Board, and says the clerk does an excellent job for both of those boards; there's never been a hint of divulged information going to someone who should not have it. Curt agreed.

Walter said that small towns often employ one person to help with multiple boards and he's not sure why any attorney would say the clerk should not be part of the distribution of information. Jason said that breakdowns begin with the loss of communication. Shawn said that communication is a complete loop.

At 9:09pm Walter made and Jason seconded a **motion to adjourn**. The motion **passed** unanimously.

Respectfully submitted,
Janet S. Denison