

Zoning Board of Adjustment
June 23, 2020

Members present: Chris Stafford, Roger Whitehouse, Michele Cooper, Walter Baird, John Russo, Jason Holder

Others present: Gail Turilli, Carol Baird, Brenda Whitehouse, Matt Serge, Sumner Kalman, Kevin Hatch, Ed Delorey

Remote attendee: Janet Denison

Chris explained he's an abutter to the case so he will not be participating as a member nor will he vote. He is running the remote access and will remain at the table. Walter was nominated as vice-chair during a previous meeting and will lead the proceedings.

Case #2020-

This is an appeal from an administrative decision regarding map and lot 2-75-1. A rollcall was taken. Michelle was designated a voting member for this discussion. All questions and comments regarding this hearing should be directed to Walter. Each party addressing the Board was asked to state their name and whether they are an agent or abutter.

This case was explained as an appeal to a decision by the building inspector to deny a building permit. A letter dated February 24, 2020 was provided to the Board, along with other information from the applicant's attorney and information from the attorney hired by the Board of Selectmen to represent them. All abutter's were notified via certified mail of the meeting.

Sumner Kalman introduced himself, stating he represents Delridge Realty. He said the approved subdivision plan was recorded on October 14, 2016. The letter from the building inspector was read. It states the permit was denied due to a lack of sufficient frontage. Mr. Kalman said the Planning Board calculated the frontage when the subdivision application was first approved on September 8, 2016. Any questions about the frontage should have been addressed within 30 days of that approval. He stated that the appeal period has expired, but he is not relying solely on that to make his case.

Mr. Kalman explained that the town records indicated this lot is a single-family house lot. Per the zoning ordinance, two acres and 200' of frontage are required as a minimum. Route 111A, or Main Street, is a state road. He explained a letter obtained by the NHDOT dated February 18, 2020 is the most confusing piece of the puzzle. This was included in the packet given to the Board members a few days prior and read to the Board members.

Mr. Kalman explained briefly there was a court decision in which the judge ruled on the town's petition to quiet title. He further explained the DOT couldn't find a highway layout, therefore it's presumed to be a prescriptive easement of variable width. This width would be defined by the use that created it, most commonly the presence of stonewalls and other boundary markers.

Mr. Kalman then indicated on Tab L of the packet that the frontage for the lot as referenced in the DOT letter, is indicated by a pink line. This appears to be the frontage indicated on the subdivision plan.

48 He indicated frontage is necessary along a class 5 road and that frontage is defined by DOT in its letter.
49 The deed and sketch were pointed out in the packet previously provided. The court order was also
50 included in the packet. He said the title to 75-1 should have been done to the satisfaction of everyone.
51 He said the frontage is necessary for a class 5 road. He said since the denial letter, he has not received
52 any information regarding the basis of the denial. He does not know what issue could possibly indicate a
53 problem with frontage. He concluded that this has been litigated twice, saying it is time this is over and
54 it's time to issue a building permit.

56 Mr. Kalman added an additional letter from DOT which speaks to the recent no-parking signs placed
57 along the road. The letter stated in part, that the signs are not in compliance with the manual regarding
58 uniform traffic control. While there is no regulation forbidding traffic here, there is no designated
59 parking allowed in a state right-of-way. The signs will be removed and be delivered to the town garage.
60 He says the DOT has gone out of their way to prove where their right-of-way is and it conforms to the
61 approved subdivision and the state will limit what the town's use of this land is. He further stated the
62 state does not have the deed to the land the road is on. He said this road was probably there when the
63 Indians were there and over the years this became a traveled way. He said this goes a long way back
64 with these cemeteries and the rest of it, therefore the state determines where the road is by way of the
65 elements that are spelled out in the first letter from DOT. He said the DOT concluded the frontage along
66 75-1 corresponds with the frontage created by the prescribed easement based on the research they
67 did. The letter from DOT regarding the signs was added to the file.

69 Mr. Kalman said the decision of the building inspector was in error and the frontage is there
70 unequivocally.

72 Roger asked about a note in the court order stating the town met its burden of proof and quiet title is
73 granted and pointed out a different plan. Mr. Kalman directed the Board to the map on tab L that was
74 provided to the court. He stated the town has title to the area in which people are buried.

76 Walter stated a package has been received from Attorney Serge. It included the same information
77 provided by Mr. Kalman.

79 Roger made and John seconded a **motion to open the public hearing**. The motion **passed** unanimously.

81 Matt Serge introduced himself as the attorney representing the Board of Selectmen. He explained the
82 frontage at the time of the subdivision approval was not challenged. The circumstances changed with
83 the issuance of the court order. The court decreed it owned a piece of land configured in a way the
84 town had not previously thought, and this is why there was no immediate appeal after the subdivision
85 approval.

87 Mr. Serge offered the definition of frontage as the distance along a lot line dividing it from a public
88 highway. He also said "lot line, front" according to the town zoning ordinance is defined as separating
89 the lot from the street right-of-way from which legal access may be obtained. The question is whether
90 lot 75-1 has enough frontage to legally access the highway. He said the triangular shape of the lots
91 prevents legal access to that portion of 75-1 since there is no road frontage there.

93 He referenced the original order and the discussion of the shape of two parcels. There were a number
94 of lots discussed in court, but lots A and B comprise the oldest transfer, and were positioned by the
95 town to be rectangular. There was no dispute about the acreage or size, but the court decreed they are

96 triangular. After that decision, the town had a surveyor, Arago, prepare a boundary plan per the court
97 decision. Mr. Serge said the lot must go somewhere per the court decision with the stone wall on the
98 east side being used as a reference. He said this lot was received by the town in the 1700s. The triangle
99 shaped lot goes almost all the way in front of lot 75-1 according to the judge's decision. The traveled
100 way of the road is beyond the limits of the parcel. The Board of Selectmen's position is that the building
101 permit should be denied because of the intervening parcel that is between the road and lot 75-1 and it
102 does not meet the definition of frontage.

103
104 Mr. Serge referenced the DOT letter, stating its importance and that it says no layout is available. He
105 said the prescriptive easement theory has been discussed in many cases in NH. He quoted the case in
106 1999 of Sanford v. Town of Wolfeboro that to achieve prescriptive easement, the plaintiff must prove
107 adverse continuous uninterrupted flow of use of the land for 20 years in such a manner to give notice to
108 the record owner of such use. The use must be such that it is obvious to the owner that it was being
109 used without permission.

110
111 Mr. Serge stated that to make a claim of prescriptive easement, there must be a definite, continuous,
112 and active use and easements are not defined by looking at bounds and monuments. Referring to the
113 boundary plan prepared for the town, the area between two stone walls, and the area the town claims
114 is the hearse house, has been traditionally used for parking cars and for the cemetery's use. It has not
115 been used for vehicular traffic and is not part of the viatic use of the highway. Per the court's decision
116 there is an area that the town has been using that the town owns fee and simple. Legal access does not
117 exist for lot 75-1. The town has the right to use its property as long as it does not interfere with
118 vehicular traffic. The town did put up signs which were removed, and this is being dealt with internally
119 and is not part of this hearing.

120
121 Mr. Serge briefly discussed RSA 236:32 which states the DOT can remove any stone, lumber, etc that is
122 encumbering the highway. He concluded that the town owns the land, and it does not lose rights to
123 property, and it also cannot be used to gain frontage for the other lot.

124
125 Mr. Serge stated that the applicants said this is a surprise to them and they do not know why they are
126 here. Mr. Serge said that during the trial it was pointed out that if it is determined the lots are triangles,
127 there will be a problem with frontage. Peter Loughlin raised this same issue when this was initially
128 discussed with him, saying a triangular town lot will cut off access to the applicant's lot.

129
130 Mr. Serge said that some site work was done on lot 75-1 which resulted in the removal of a portion of
131 stone wall. A letter was sent to Mr. Kalman on November 12, 2019, which included a copy of the town's
132 boundary plan. The plan shows the stone wall is within the town's triangular lot, but the stone wall can
133 at least serve as a boundary between the two lots. The town requested that the wall be repaired, and it
134 was. He says this is a recognition of a boundary line.

135
136 He said it's always been the town's position that a variance would be needed due to the lack of
137 frontage. Looking at the results of the court order, holding to the position that the lot is a triangle, and
138 the recognition that the town owns lot B, lot 75-1 does not have sufficient frontage

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140 The amount of frontage as shown on the town's boundary plan was discussed. According to the
141 subdivision plan, the lot has 268.11'.
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The Board members seemed to have difficulty determining the exact numbers due to the maps provided being small. Roger thought it was about 60' of frontage and Jason said it looked like 68'. Walter asked Mr. Kalman how much frontage is left on lot 75-1 after the town's lot is considered. Mr. Kalman said no one will answer that because it is irrelevant. Mr. Hatch said that according to the Arago plan which ignores the language of the deed, there are 79' +/- . Roger said the Board is discussing the court decision. Mr. Serge clarified that the Arago plan was drawn to illustrate the court decision.

Walter asked if there were any other questions, comments, or any rebuttal to Mr. Serge. Mr. Kalman said that according to the court decision, Ms. Boisvert, the Arago the surveyor, did not adequately explain how she reached her conclusion of the boundaries for lots A and B and the court maintained the opinion that the lots are triangular. Mr. Kalman also said its interesting that the town thinks everyone is wrong. He said the road has been there for hundreds of years and that DOT looked at the physical evidence on the ground to make their conclusions, yet this Board is basing its denial of a building permit because they believe that the DOT is wrong, and adheres to Ms. Boisvert's findings which the court states are wrong. He said at some point the town must acknowledge someone other than itself. He said it's good for himself as the lawyer that this be continued, but he's not sure it's good for whoever pays the legal bills for the town of Danville. He said that maybe the town needs to face the music and realize the legal bills are too costly. He said he's happy to take this to superior court and tell that court that the town believes DOT is wrong. He said the decision to deny a building permit is untenable and unreasonable. He said they've paid taxes on this lot since 2016, and all appeal periods have expired. He said he thinks this is absurd, and the town should put politics aside.

Michelle asked about the location of lot B on the subdivision plan. Mr. Kalman said they are not shown on the subdivision plan because how they related to the subdivision was not an issue during that time. Those were discussed when the town petitioned to quiet title after exhaustive research was done. That was before the court decided the town owns lot B. Michelle pointed out it is not clear on the subdivision where plan B is, but Tuckertown Road, on the other side of the street, is shown on the plan.

Walter asked Mr. Kalman if he disagrees that the town owns the land on which the meetinghouse stands. Mr. Kalman explained that if someone has a prescriptive easement over your fee you could have the fee but its not the fee simple absolute because it's subject to the prescriptive easement. He said you may own the land under the easement, but the state has the right to use the land. He further stated that by the town's definition, you must have 200' of frontage on a class 5 road, and DOT is saying you should rely on the 268' as the frontage. That is what was used during the petition to quiet title. He said if you do not have 100% use of a parcel of land in which you have a fee, you don't have fee simple absolute. If there were fee simple absolute, there would be no easement. He explained that if someone has in their deed that they own frontage along a state road, they own the fee to the center of the road. It is subject to the prescriptive easement the state has for the highway.

Roger said he is confused because it seems Mr. Kalman is disagreeing with the judge who said the town owns this triangular lot which has frontage in front of the subject lot. He said it seems to come down to who the attorney is and how the RSA is interpreted. Mr. Serge said regarding the triangle lot, there may be some of it that is within a prescriptive easement, but there is a limit to how far that easement goes. He suggested that the Board hire its own council.

Jason asked about the southern line of the plan Hatch drew, stating that it stops at the corner of the cemetery. He said it looks obvious where the lot corners are, and the meetinghouse lot continues beyond that. Michelle pointed out the meetinghouse lot boundaries are on one plan but not on others.

The Board members consulted the different maps provided. It was mentioned that the recorded subdivision plan does not show all the rock walls.

Michelle asked if there is a reason the plan submitted does not have the second stone wall on the subdivision plans. Mr. Hatch said it was on other sheets but not on the sheet that was recorded. He stated that this information is from the 1820s when the town received land for a cemetery. Reference is made to a road, and Mr. Hatch said this is some prescriptive use. He said the road mentioned is Route 111A. In 1827, the town received a piece of property which eventually became the Delridge property, and that deed calls for the Route 111A frontage to go all the way to the cemetery wall.

Roger said the right-of-way is different widths all along Route 111A. Mr. Hatch concurred, saying it is a variable width highway.

Walter asked, and Mr. Hatch concurred, that the court determined the town-owned piece is 1/3 acre in size and is a triangle. Walter asked where the north/south boundary would be on the plan. Mr. Hatch said he did not record a sketch with this lot on it. Walter said that according to the court decision, the triangle must be a certain size, 1/3 acre, which makes the triangle to be 14,529 square feet. He said this must be somewhere. Mr. Hatch said, according to the deed to the meetinghouse, it starts at the cemetery stone wall and is 99' along the stone wall. If it is a triangle, it extends out under Main Street.

Walter asked what information was provided to DOT. Mr. Hatch said the DOT official was simply asked to look at the right-of-way in the area. He had spoken with Cynthia at Arago.

Walter asked if there were any more comments. Carol Baird pointed out the legend in the corner of the Arago plan which references the court findings. This plan was based on those findings. Walter stated, where the northwest bound corner of the lot on which the meetinghouse stands is 1/3 of an acre by deed. The Judge did not alter that.

Mr. Hatch was asked if he prepared a plan based on the court decision. Mr. Kalman said they do not need it. He said they own 75-1 and the most important document this Board has is the letter from DOT. He said that to say DOT is wrong is absurd and he's never met any DOT bureaucrat who ever admitted to being wrong. He said if the deeds are reviewed, the Board will find that Mr. Hatch is correct, and it will be tough to convince a judge that DOT got it wrong. He said it's important to understand what a prescriptive easement means.

Mr. Serge suggested consulting another attorney. Carol Baird gave an example of personal experience based on her own property. She said she owns to the center of the road as does her neighbor across from her and the town has a right-of-way on both sides of the pavement. She said a neighbor wanted to operate an unregistered dirt bike within the town's right-of-way. The police were contacted, and he was informed he is not allowed to travel there due to it being trespassing.

There were no more comments from anyone at this time.

Walter summarized that Delridge maintains that they have sufficient frontage. He said the town believes the right-of-way does not go in as far as the stone wall. The Board was asked if anyone knows when the stone walls were constructed. It is believed the stone wall along the road was built in the late 1800s. Carol said it is not known when any were built, but that in late 1890s a state law was enacted

that required cemeteries to be enclosed with fences. Stone walls served as fences. The wall between the meetinghouse and the road was one of the projects during the depression.

Roger made and John seconded a **motion to close the public hearing**. The motion **passed** unanimously.

Deliberation:

Jason said he does not feel like he has enough information. He is a little perplexed by the lines drawn. He said one map does not give any strong indication that this lot belongs to anyone except the Old Meetinghouse. Jason made and Roger seconded a **motion to consult with an attorney**. The motion **passed** unanimously.

Michelle said we need clarification on the plan regarding where the meetinghouse sits, and clarification of what Mr. Kalman said about easements and access. A determination needs to be made whether they have at least 200' of frontage on the lot. Roger said we need clarification on the judgment, it will determine what the boundary and the frontage are. We need to know where the triangle starts and stops. Michelle pointed out those are legal lots.

Walter said that per the decision the lot is 1/3 of an acre and it can only fit one way. He said the DOT admits there is no definitive right-of-way and that they are unable to locate the layout. Michelle said we need to know if they have the right to cross over this piece. She said since we have nothing else to go by, the boundary plan was drawn per court judgement and we do not know if they can cross over it with a driveway. Jason also asked if the right to cross over alters the frontage requirement.

The questions for the attorney were reviewed. The attorney will be asked to review the documents, and if the town land can be crossed to access the lot. The other question is regarding the triangular shaped lots and are the bounds legally binding.

Roger stated that is the Arago plan is recorded and indicates where the town land is. Mr. Hatch interjected that the Arago plan is not part of the court record; it was produced after the court hearings. He said the court did not review that plan. Mr. Serge said it was prepared by a surveyor and it isn't the Board's job to determine if it's accurate or not. Mr. Serge said the important thing is what is the significance of the lot, viz. frontage and DOT's position. His position is that the town lots cuts off frontage because it is between the road and the lot; their position is that it does not.

Mr. Kalman said the letter from DOT is the most important piece here and what the effect is per the letter.

Chris explained that another council has already been obtained in advance of this meeting. Per the Rules of Procedure and since Walter is chairing this proceeding, he'll be the one to contact the attorney.

Schedules were discussed. Mr. Serge clarified that the next meeting will only be deliberation since the public hearing is closed. It was agreed to meet on July 14th at 7:30. If this date does not work, abutter's would need to be re-notified.

Walter asked for a copy of the court case that Mr. Serge referenced. He will provide a copy.

285 Chris resumed chairing the meeting. Roger made and John seconded a **motion to accept the June 16,**
286 **2020 minutes as written.** The motion **passed** unanimously.

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288 It was noted the Conservation Commission is meeting on July 2. Regarding ongoing application reviews,
289 Ms. Anzalone is coming to that meeting to discuss the placement of a garage within the wetland
290 setback. Gail was asked to speak with the road agent about the culvert being made when the driveway
291 was installed, and if the culvert was put in after the fact, would it have driven a request for a wetland
292 permit. The Conservation Commission may discuss this as well. Jason said there were some dimension
293 issues that need to be clarified.

294
295 The upcoming schedule was reviewed. A site walk is scheduled for tomorrow. The Conservation
296 Commission was reminded earlier today. Next week, June 30th, is a special exception application public
297 hearing and a variance. Tonight's discussion will continue July 7th.

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299 At 9:15, Roger made and Jason seconded a **motion to adjourn.** The motion **passed** unanimously.

300
301 Respectfully submitted,
302 Janet S. Denison