

Danville Zoning Board of Adjustment
June 9, 2015
7:30 pm

Members present: Chris Stafford, Tara Burkhart, Roger Denison, Jason Holder, Joe Luna, Curt Springer, Sheila Johannesen-Selectmen's Rep., Janet Denison-clerk

Other's present: Roger Whitehouse-Planning Board Rep., Wayne Brown, Doug MacGuire, Wally Fries, Andrea Lindenmayer, Robert Loree, Carsten Springer, Ron Peverly, Robert Allen.

Arriving at 8:30pm: Kim Farah, David LaPlume, Natasha Cormier, Christina LaPlume, Sheryl LaPlume, Dorothy Billbrough, Thomas Billbrough, Chuck Cote

The voting members from the previous hearings on May 26, 2015 were present and were voting members for this hearing.

Case #2015-3 -- This is for L.E.R. Realty Company for property located along Long Pond Road, known as Tax Map and Lot 4-46. They are requesting a variance from the following Zoning Ordinance Article: IV.A.2.e.4.a. This is in order to allow the existing utility easement area on-site to be used as part of the density calculation for the proposed open space subdivision.

Chris asked follow-up questions from the previous meeting about specific lots. The Conservation Commission was asked to review the plans. Chris had attended their meeting and said there was a question about some information regarding the flow of water from the site toward Long Pond. The Conservation Commission was not able to provide feedback to this Board for the following reasons: possible data inaccuracy concerning direction of water flow; concerns about drainage pertaining to lots 14-16 and flow direction; and a look at a 26 lot layout wasn't available. This third item wasn't a specific request of the ZBA but came from the Conservation Commission. Carsten, Jason and Doug did walk the site, noting the direction of water flow compared to what is represented on the plan.

Roger Whitehouse explained the Planning Board reviews drainage during site plan and subdivision review and ensures that drainage will not be increased with new development. He said this meeting is regarding yield and since the developer has to follow the town regulations which require the runoff isn't any greater after development, this Board is putting the cart before the horse. He handed out the excerpt from the Subdivision Regulations Section V.C regarding this. Chris said drainage encompasses part of the spirit of the ordinance and this is part of the variance request review.

Carsten said the runoff they're concerned is with where the existing drainage goes. There was one point on the plan in which the direction of flow was questioned.

Jason explained that he and Doug walked the property and specifically looked at the lots that would be near 182 and 194 Long Pond Road. Jason said the water flows under the road straight to Long Pond, traveling about 125-150'. He also pointed out a flat area on the proposed site saying the flow is in both directions from that point. He said lot 31 has a lot of wet area behind it and wondered about consolidating lots 15 and 16, stating those three lots will have the greatest impact on the pond.

Mr. MacGuire explained that the question they are trying to figure out is: is the drainage shown on the drainage overflow plan, dated 2/5/2015, accurate? He explained there is a low point at the center of the subject property. Flow will come through there, through a proposed culvert in the road, then through several different types of wetland. Although the site is close to Long Pond, runoff will drain through 4200 linear feet of forested wetland and marsh before reaching the pond.

Regarding the direction of flow behind 182 Long Pond Road, Mr. MacGuire said there is a low area there but there is a defined break line behind this property. Mr. MacGuire offered his professional opinion that the majority of the flow will still travel northward through 4200' of marsh and forested wetlands as indicated on the 2/5/2015 overflow plan. He said there is runoff from Meadowlark Lane and the surrounding properties draining to that low area, then traveling north. During a large storm event there may be runoff in both directions, but most of the water will still remain on-site in the low area. He did additional elevation spot shots and there is a difference of a few inches, which isn't significant, but he contends the flow as shown on the plan is correct.

Mr. MacGuire said he is prepared to talk specifically about drainage behind lots 14-17. They propose building a 3' deep, 4' wide stone trench behind lots 14-17. The roof runoff and yard runoff will be intercepted. He explained this will contain a 25-year storm event fully. They are required to mitigate the peak flows and comply with all state required Alteration of Terrain specifications which are more stringent than local zoning requirements.

He said there was some discussion with the Conservation Commission about a compromise and asked if this Board had any comments. He reminded the Board that they are only asking for 31 units when the other two yield calculations allow them to build 34 units. He said they want to have a project with which everyone is comfortable.

Chris spoke about the effect the proposal will have on the health and welfare of the residents. He asked if the Board had any questions thus far. Roger asked about the stone trench and if it will redirect the flow. The infiltration trench is designed for 100% containment which isn't even occurring in current conditions. It is in a low impervious area. When asked about maintenance he explained these mostly will falter due to proximity to the road in which it will collect runoff from the winter salt and sanding. This trench will not be sited on private property and runoff will be filtered across lawns and other vegetated areas, offering further mitigation, before reaching the trench. The rock will be wrapped in marafi fabric to further keep the stones clear of sediment. An easement can be put in place to further protect the trenches.

Curt asked about the trade-off between public versus private benefits. He's not interested in the development costs, but asked about the benefit to the town to allow or not allowing additional lots. Mr. MacGuire said this is a different interpretation than his understanding of this variance criterion. He said he didn't believe the criterion means there has to be a specific benefit to the town. He stated this is a unique property with a large encumbrance and the Planning Board said they wanted a full road connection. The addition of five lots will be a low impact use from a drainage point of view. He explained that a developed area with flattened slopes, such that will be created with lawns and landscaped areas, will limit concentration of runoff and create sheet flow that allows greater filtering of runoff. Over 30 test pits have been witnessed, plus exploratory test pits, and all show the soil is very well drained. All these areas will accept water as it is loose, sandy gravel. A subdivision will have very good recharge on this site and Mr. MacGuire said he doesn't see this as a detriment to the town. He said there has to be a level of comfort from this Board that goes all the way through the Planning Board process. Treatment and peak runoff will be reviewed separately by the town engineer and the state inspectors. There should be no concern that runoff is being disregarded per this proposal.

Wally Fries explained that what flows northward eventually flows into the pond. He said the language of the zoning and subdivision regulations are clear and one has to look at the total situation. The trench proposed here will require a great deal of maintenance; he said foliage is important for absorption. He said the pond is dying due to phosphates and other things draining into the water. He also said the road is curved and will be dangerous with increased traffic.

There was a short discussion of traffic on Long Pond Road. Mr. MacGuire said that the general rule is one home generates 10 trips per day. This development equals 310 trips per day and AASHTO criteria considers anything under 400 trips per day a low volume use. It was noted this is in addition to the traffic already on Long Pond Road. Mr. MacGuire said they can look into the number of houses already there and the Planning Board may want a traffic report but he doesn't think it's necessary considering the size of this proposal. Their request equals 50 trips per day which will have a negligible impact on the total area. In a 12 hour period this is 2.5 trips per hour, compared to Route 111A which has 20,000 vehicles on it per day. The 310 trips per this proposal are all day long, not peak hours.

Mr. MacGuire said a soil scientist and licensed wetland scientist delineated all wetlands by hand, soils have been evaluated, a site specific soil map has been done which mapped the topography with slope categories and test pits. This information hasn't been reviewed by Conservation Commission yet. Jason suggested a list of questions can be made by the Conservation Commission for Mr. MacGuire.

The typical house is shown to be 2200-3000 square feet, in the low \$200,000 range. These are in-kind or slightly larger than the surrounding properties. It is in the best interest of the surrounding properties to develop in-kind houses.

Curt showed pictures of the right-of-way near his home on Sandown Road, showing the powerline by his house. He said the idea here is to ask why the powerline corridor is not included in an open space calculation. He said the majority of the powerline corridor through Danville is on private property. Carsten said the utility company has typically been very good about notifying landowners of maintenance to be taken care of on the lines. Mr. MacGuire said the majority of the land under the lines is usable space for recreation. During the recent walk with Carsten and Jason, they were bombarded by mosquitos until they went under the lines where the walking trails are. When construction is complete and the area naturalizes, it will be very useful for this development.

It was pointed out that some of this ordinance was based on the negative reaction to the Colby Pond development which is partially under the powerlines. That area is used in the open space calculations.

Mr. MacGuire said in a standard subdivision there is nothing stopping the lot lines from being in the utility easement. That area would be used to calculate upland soils and used in calculations for buildable lots. The area would be used for yards around the homes. He pointed out the discrepancy that this area can be used this way for a standard home but not for a single home in an open space subdivision.

Jason asked about making the development 28 lots and if they would have control over the drainage in the open space. Mr. MacGuire said the drainage trench can be put in the wetland setback, and that may be an ideal location for it. Trees are intentionally shown between the homes and the powerlines and no lots are shown in the utility easement. They are intentionally not using that land.

Carsten said it is clear there should be construction under the powerlines and purchasers should be aware of those constraints when purchasing property. He said the habitat under the powerlines is one of the better transitional habitats. The Conservation Commission wants the best result for the town and postulated the town may get a lower quality product if the developer can't make money off of this project.

Roger Whitehouse was asked to explain why the Planning Board asked for one continuous road rather than two cul-de-sacs. He thought this was partly due to emergency vehicles and winter plowing. Chris said he will contact Barry about this.

It was agreed that the Conservation Commission will discuss this at their next meeting. This Board agreed to meet again on the 30th.

Curt made and Tara seconded a **motion to continue the public hearing to June 30th**. The motion **passed** unanimously.

Case #2015-6 – This is for Charles and Wanda Cote of 6 Cote Drive, known as Tax Map and Lot 4-2, an appeal from an administrative decision made in a letter from the Selectmen dated 4/3/2015 regarding Zoning Ordinance Article IV.A and X.C.

Mr. Cote said he received the corrected Selectmen's letter yesterday. The certified receipt showed delivery confirmation of the Selectmen's letter and the ZBA meeting notice on June 3rd.

A letter from Peter Loughlin dated June 8, 2015 was discussed. A copy was given to Charles Cote. Chris said this letter explains with a little more clarity some definitions pertinent to this hearing.

Chris pointed out there are three relevant issues to be determined.

1. What is a customary farm operation and does Mr. Cote's operation fit under this definition
2. Is a customary home occupation applicable here
3. Is this an existing non-conforming use or can it be grandfathered?

Curt said that perhaps #2 doesn't have to be discussed because there's been no application brought to the Board.

Chris said that there are some discrepancies regarding how many puppies have been sold from this property. Mr. Cote has contended he's sold more than 50 puppies per year for many years.

Chris read from Mr. Loughlin's letter:

Based on the information that you provided to me and being somewhat familiar with the Danville Zoning Ordinances over the last 30+ years, I don't think it is likely that the type of puppy import/sale operation being run by the Cotes has ever been permitted by the Ordinance. I don't recall that the list of permitted uses was ever broad enough that it would have allowed the import and sale of puppies at the scale that has apparently been occurring at the Cote property in the last several years.

In order to establish a valid nonconforming use, the Cotes should demonstrate that there has been a sale of a significant numbers of puppies continuously from the time that it was permitted under some earlier ordinance to the present. To support a claim, they should cite a regulation which showed that it was legal when it started and demonstrate that it has continued. If indeed, they have been in the business of selling puppies, one would assume that they would have numerous records of sales and tax returns showing an income from the "business" over an extended period of time.

Mr. Cote said his physical records go to 2006 and the other records are gone. Curt pointed that during the April 21, 2008 Board of Selectmen meeting Mr. Cote stated he is not selling more than ten litters per year and not more than 50 individual puppies.

Mr. Cote said that not more than 1% of the puppies are sold in Danville; most are transferred elsewhere. They target Boston and New York. Curt produced a copy of their website which lists dogs for sale. Mr.

Cote said those dogs are all here in Danville. It showed 16 puppies yet to be sold; 16 have already been sold. Mr. Cote said they transport a lot, some are direct shipped, and rarely is a litter brought here.

Chris said to prove the operation is grandfathered they would have to show the operation predates zoning. Mr. Cote said this was put into the Zoning Ordinance in 2008. Copies of prior Zoning Ordinances show it was put into place in 1982. Breeding kennels were first added to the Zoning Ordinance in 2008 and noted as allowed in the Danville Village District and the HCLI zone.

Mr. Cote asked for a continuance in two weeks so he could respond to Mr. Loughlin's letter. He was told the letter was just issued to the board members at 5pm this evening and the meeting would continue this night.

Chris reminded the Board of the three key points: is it existing non-conforming, is it a customary farm operation or is it a customary home occupation. Mr. Cote said the state does not require numbers for licensing. Curt said this Board is not concerned about licensing but is concerned whether or not the Cotes are selling dogs. Mr. Cote said that is agriculture. He was told selling puppies is not an agricultural use.

Chris asked if Mr. Cote is breeding dogs on his property as well as importing them. Mr. Cote said they are. Curt said that if this is a home occupation then it is illegal because there is no evidence they have ever spoken to the Board of Selectmen about it or have obtained a special exception. This Board also cannot render a judgement about this being a home occupation because the Board has not been asked to consider a special exception for such.

Mr. Cote provided a list of the number of puppies sold per year since 2006. The breakdown is as follows:

2006	64
2007	82
2008	84
2009	57
2010	132
2011	226
2012	171
2013	178
2014	95
2015	73 so far

Chris said again we're not talking about licensing. To have a home occupation in Danville you either need to see the BOS or have a special exception and this property doesn't have either one. The letter from the BOS was read. It states they need to obtain local zoning approval by seeing the BOS.

Chris said this Board needs to decide if an error was made by the BOS in their determination. The State says more than 50 puppies sold per year constitutes a commercial operation and that threshold will be used as the definition here.

Curt asked about where the dogs are housed. He said according to the website, the dogs are in a kennel. Chuck said he has seven dogs left that are not housed in a kennel. The puppies are in a kennel.

Mr. Cote said the numbers represent the number sold, and some are direct ship. Mr. Cote asked the Board to review RSA 437:7 which refers to licensing. He said if you are a farm and raising animals, you don't need a license.

Curt said this meeting is to determine if the BOS was correct in their determination that the Cotes are violating local zoning. Each item of Zoning Ordinance Article IV was reviewed. It was agreed that each one is not applicable to this situation. A customary home occupation has been part of the Zoning Ordinance since 1982; a resident needed a special exception for same since 1990. Not any use allowed in RA zone applies to this hearing. Curt proposes the BOS were correct. Roger said unless he can prove he's been doing this since prior to 1982, the current use at that property is not grandfathered.

Board agreed this is not a customary farm occupation. He can still come to the ZBA for a customary home occupation.

Curt made and Roger seconded a **motion to deny the appeal because the Zoning Board agrees with the Board of Selectmen that the current use is not a valid use in that zone and is also not a grandfathered use.** The motion **passed** unanimously.

It was noted to the public, in answer to their questions, that the Selectmen are the enforcers of the Zoning Ordinance. It was noted the Cotes can apply for a special exception. The public was told to continue "knocking on the Selectmen's door" if they have an issue that isn't being addressed.

Selectman Farah explained the law has changed as to what can be considered evidence of transfer of animals and the onus is now on the kennel and not Selectmen to prove they are or are not a kennel.

It was noted by an abutter the Cotes may have a difficult time proving this is a grandfathered use as the files will show they were a daycare and an ambulance service.

The minutes of May 26, 2015 were reviewed. Curt made and Jason seconded a **motion to approve the May 26, 2015 minutes as amended.** Joe abstained. The motion **passed.**

At 9:55pm Jason made and Roger seconded a **motion to adjourn.** The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison
Land Use/Assessing Clerk