

**Danville Zoning Board of Adjustment**  
**May 26, 2015**  
**7:30 pm**

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

**Other's present:** Roger Whitehouse-Planning Board Rep., Daniel Calef, Wayne Brown, Doug MacGuire, Wally Fries. Arriving at 8:30pm: Chuck Cote, Wanda Cote, Kim Farah, Daniel McRea, David LaPlume, Natasha Cormier, Christina LaPlume, Sheryl LaPlume, Dorothy Billbrough, Thomas Billbrough

**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 explained the procedure for tonight's meeting. Jason will be a voting member for these hearings.

Doug MacGuire introduced himself and the application. A 31 lot subdivision is being proposed off of Long Pond Road on a 72 acre parcel. This parcel was previously reviewed for a recreational paintball site, but abutters stated they would rather see a like-kind subdivision.

There are three tests outlined in the Zoning Ordinance to calculate the density allowed in a subdivision. They meet two of the three tests and are asking for a variance for the third test. The first two tests allow 34 lots to be built, the third test allows 26.

Mr. MacGuire explained the three tests. One is a yield plan as illustrated in the plans presented to the Board. The plan as shown is for attached units, each dwelling having at least two acres each, and half of that acreage is upland soil.

The second yield test is the amount of open space, specifically a minimum of 25% of the parcel should be dedicated open space. Their plan proposes 57% open space, totaling over 40 acres of the parcel.

For the third test, the easements, roadways, or other utilities are subtracted from the total acreage, then the wetlands are subtracted. Depending on other factors, some of the wetland acreage can be added back. The remainder is then used to determine how many two acre parcels will fit. The parcel that they are planning to use has a 280' wide swath of powerline easement bisecting the land, totaling over 15 acres. When that's subtracted out, it lowers the allowed density. This is a request to use some of that easement in the calculated density.

Mr. MacGuire explained each of the criteria as outlined in the application. Each lot is drawn to meet all setbacks and buffers. They are adding additional vegetative buffers around the entire development. The Planning Board requires access to abutting parcels as shown on the plan. Paper streets are shown to lots 4-50 to the south and 4-45 to the west. They easily meet the required 100' setback even with the additional buffer they are proposing.

Chris said the spirit of the Ordinance is to allow access to the open space. Mr. MacGuire said there are some existing trails along the powerline corridor and it seems there are other trails throughout the property, but it would be difficult to maintain trails through people's property. They plan to rough cut walking trails, making them accessible along several points by the road.

It was pointed out that lots 15 and 16 are near wetlands. It does not appear someone can walk the entire perimeter without encountering wetlands. Mr. MacGuire said they can make walking bridges going through the DES permitting process.

Jason explained he lives on Long Pond Road and the Long Pond Association has some concerns about the amount of phosphorous running into the pond. Mr. MacGuire said an in-depth drainage calculation is being done for this application. Each lot has a prototypical house and each lot is graded to show drainage toward the road. They wanted to ensure a realistically sized home can be built on each lot, including septic systems. Water will collect in roadside swales and directed toward treatment areas before leaving the development. They also will have to meet state Alteration of Terrain requirements which are stricter than local zoning. This will be handled at the Planning Board level.

Mr. MacGuire said he did not believe the intention of the ordinance was to restrict an easement of this size. He said that often an easement restriction is an area that isn't usable as open space, similar to restricting wetlands from open space. This site has an easement connected to other open space, a large portion being upland, and will be used as open space. This proposal isn't too dense as it uses 2.25 times the amount of open space required per zoning.

Mr. MacGuire said this is one of the few properties encumbered by a utility easement of this size. The utility corridor also doesn't skirt a side of the parcel but cuts through it, encompassing 20% of the parcel. The density calculations requiring the subtraction of easements is because easements are typically not usable, such as drainage swales or drainage ponds. A significant portion of this easement will still be usable, and this is where Mr. MacGuire sees the disconnect between this parcel and the strict interpretation of the ordinance.

Values of surrounding properties will not be diminished; the proposal is for similar homes to be built. Mr. MacGuire has found that new construction has helped existing homes increase in value. All required buffer requirements are met. The property has access to Long Pond Road from two points: a right-of-way off Meadowlark Lane and Long Pond Road.

Mr. MacGuire said again the utility easement size is a unique characteristic. They feel they meet the first criteria of hardship per the application outline. Each house is shown as buildable within its own lots' footprint, including well and septic space. He mentioned the March 12, 2015 minutes of the Planning Board that speaks to this application. Three members of the Planning Board who were instrumental in writing that portion of the minutes agree they were not considering a utility easement of that size on one lot when drafting the Zoning Ordinance.

Curt asked Mr. MacGuire to explain more about what they are doing above and beyond the requirements to show buildable areas and well and septic locations. Mr. MacGuire said the hardship is that no fair and substantial relationship exists between the provisions of the ordinance and the actual property. The intention wasn't to restrict this much usable and viable land. They have shown large homes with garages, with each lot being able to support a well and septic, each lot is graded such that drainage flows away from wetlands. All of this is without encumbering other properties. If someone wants a lot with a smaller home or no garage, it will obviously fit.

Jason asked about lots 14-17 with the wetlands shown at the rear sidelines and near Long Pond Road. Mr. MacGuire said that the topo of these lots drain toward the new road to be built. A subdivision with townhouses would have larger parking lots, and he feels they are doing the right thing by building single family homes. They are putting in 4000' of linear road which is a lot. Drainage is addressed at the Planning Board level and eliminating units doesn't change the road length. Rooftops will create some runoff which will be directed toward treatment areas.

The meeting was opened to questions from the abutters. Dan Calef said he cannot see 31 new homes being built in that area. He said two driveways are shown across from each other near his house on Meadowlark Lane. Mr. MacGuire said they are following state law that requires a cul-de-sac reversion in which land reverts back to property owners. They plan to reshape the road, his survey crew got some spot shots to remedy some puddling that they are told exist currently. The drainage is not allowed to be increased.

Wally Fries said this proposal is contrary to legislative intent. He said wetlands are a problem in the area and this is not the only property that has a large swath of powerline easement. Groundwater drainage is one of his concerns and he is afraid this development will kill Long Pond. Kim Farah said severe fines can be imposed if it's found the town is impairing the pond.

Mr. MacGuire will calculate drainage for the lots in question and bring this information to the Board.

Jason made and Curt seconded a **motion to continue the public hearing to June 9<sup>th</sup>**. The motion **passed** unanimously. Mr. MacGuire will be able to discuss the calculations with the Conservation Commission meeting before meeting again with the ZBA.

**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 3/3/2015 regarding Zoning Ordinance Article IV.A and X.C.

It was noted the letter from the Selectmen and the public notice for this meeting cited the incorrect Zoning Ordinance article. The contents of the notices refer to the correct section of the ordinance. Mr. Cote said if they do not prevail here tonight they are going directly to superior court which will go by what was noticed. Curt said allowances are made for scriveners' errors.

Mr. Cote spoke about grandfathering and said local zoning put into place in 2009 required residents to obtain a special exception to have a home occupation. Chris said zoning has changed over the years and that a home occupation is different than commercial use.

The contents of the file were reviewed, including letters that were sent to and from the Cotes.

Mr. Cote said the state does not consider them as having a kennel and asked why the town insists they are. Curt said the state does think they are a kennel and said they are here to deal with zoning not licensing. Chris referenced RSA 676:14, stating local zoning may be more stringent than state requirements.

Mr. Cote asked if there is any doubt that selling household pets is part of agriculture. Curt said yes, there is doubt. Curt said RSA 21:34 applied not to dogs but to animals raised for their fur.

The letter from Steven Crawford dated March 13, 2015 was mentioned and discussed briefly. It states that certificates of veterinary inspections or CVIs are legal documents indicative that animals were delivered to a particular entity. The total given in this letter is 123 puppies and 31 kittens between April 2014 and February 2015.

Chuck referred to RSA 466, dealing with licenses. Chuck said a license under 466:6 means you don't need one under RSA 437:1. The different types of licenses were discussed briefly. The Cotes said they've been selling more than 50 puppies per year since 1999, and referred to a violation from the Department of Agriculture in 2007 as evidence. They said they sued the town in 2008 to get a group license and won. Curt said he recalled the Cotes saying they were not selling that many puppies. Chuck

said that is not true. He said they are audited by the FDA, the USDA, the Department of State, and there is a paper trail indicating they have sold more than 50 puppies each year for many years.

It was stated the law has changed and now a health certificate is prima facie evidence of transfer of animals, and Curt said he recalls the Cotes claiming they were not at that level of sales. Chuck disagreed and said they never fought the fact of how many animals they were selling. He stated this year has been one of the worst due to the economy.

Kim Farah said a group license is not the same as a commercial kennel license and 466:6 doesn't mean they are exempt from needing to obtain a commercial kennel license. The town has stated there is evidence they are running a commercial kennel and need to seek audience with ZBA to obtain a special exception to run a business at home.

It was explained that a group license is available to someone who owns five or more dogs. Under 466:6, someone getting a group license is not required to obtain a commercial kennel license unless they are a commercial kennel. RA 466:4 III defines a commercial kennel as an operation selling ten or more litters per year or 50+ puppies per year.

The letter dated April 6, 2015 from the state to Mrs. Cote was discussed briefly. It mentions the 2007 hearing order, saying the Cotes did not meet the exception, that "common sense and plain language of the statute are designed to except person who own farm livestock that may breed...and not a keeper of farm livestock whose business is to sell dogs."

Mr. Cote said again to think they've ever denied saying they weren't selling 50 or more dogs per year is ridiculous and would be fraud. Mr. Cote referred to portions of a letter from the state to Mr. and Mrs. Cote dated May 1, 2008 in which the state indicates they are a commercial kennel.

Selectman Farah pointed out that the March 13 letter indicates 123 puppies and 31 kittens, yet the town clerk shows only 42 dogs were licensed. She asked where the other licenses are. Mr. Cote said the town is assuming the dogs came here, and Chris pointed out the whole point of this hearing is the assumption that all these dogs are coming to Danville. Mrs. Cote said she has transferred all her puppies to Kentucky and she goes there and brings them back here. Curt pointed out their website refers to facilities here in Danville. The Cotes said they are not contesting that they have a kennel. Chris asked them to find documentation that they've had a kennel for many years.

Mr. Cote again said RSA 466 exempts a person from getting a commercial kennel license. Chris said they are not discussing licensing but are trying to assess whether or not they meet local zoning which allows commercial business in that district with a special exception. The Cotes have admitted they have a commercial operation and only three ways would this be allowed: either the business is agricultural in some manner, the business is grandfathered, or they have a special exception.

Chuck said they are a farm and read the section of RSA 21:34 (b) which defines a farm and that "any practice on the farm incident to, or in conjunction with such farming operations, including, but not necessarily restricted to...the use of dogs for herding, working, or guarding livestock." The Board agreed this does not apply here. Chris said it is clear they are selling puppies and that they have a kennel. Roger asked if their puppies guard their livestock to which Wanda said yes, their dogs do.

Natasha Cormier introduced herself, saying she is not a resident but a concerned citizen. She said she was a prior employee of the Cotes in January 2012. She expounded on her experience dealing with the NH Department of Labor for unpaid wages owed to her by the Cotes. At that time the state considered the Cotes as being a business and not farm labor. Curt stated this speaks to the threshold of what is needed to

have a home business and employing labor outside your own home does not meet the criteria for the Selectmen to grant permission for a home business, necessitating an audience with the ZBA.

Chris stated the Board has heard that the Cote's are running a business so the issue of whether or not this is grandfathered should be discussed.

Selectman Farah said that an additional issue is that the Cotes need to meet local zoning regulations in order to apply for a state commercial kennel license. Since they've never had a commercial kennel license, how can the business be grandfathered? Mr. Cote said they applied for this license in 2007 but were denied. They appealed that in 2008 and won.

Mr. Cote further said that if someone has a farm, every building and every use on that property is a farm. Chris said the town allows different uses in different zones. Curt read from the Zoning Ordinance Article IV.A which states breeding kennels are allowing in the Danville Village District with a special exception.

Mr. Cote said the only thing prohibited in local zoning is a mink farm and piggery. It was agreed that an agricultural use is permitted in the zone in which the Cote's live. Mr. Cote asked if there is any one thing that states selling dogs is not part of agriculture, since this information is from the Department of Agriculture. Curt stated the correct title is the Department of Agriculture, Markets, and Foods and the town does not base decisions on titles. Mr. Cote asked, if his business isn't agriculture, then what is it? He was answered that this is the sale of dogs. It needs to be determined if this commercial operation is grandfathered. The Zoning Ordinances will be researched to determine this.

The Board had no other questions at this time and it seemed not all the evidence was present in order to make an informed decision.

Tom Billbrough asked if someone gets a license, does that mean they automatically are allowed to have a commercial in the residential zone? The answer is no. This Board has asked about a commercial license to determine if there's evidence of a commercial operation. Chris said if there's evidence the Cotes had a commercial operation of more than 50 puppies per year, and it was a continuous operation that predates zoning, then they have grounds to be considered grandfathered. If it wasn't continuous, it's not grandfathered.

Ms. Cormier stated she had conducted her own research and it's her understanding the Cotes never acquired a license ever through state.

Curt made and Roger seconded a **motion to continue the public hearing to June 9<sup>th</sup>**. The motion **passed** unanimously.

It was agreed to hear the Cheney Forest subdivision at 7:30pm and the Cote appeal at 8:30pm.

Curt made and Jason seconded a **motion to approve the May 19, 2015 minutes as written**. Roger and Tara abstained. The motion **passed**.

At 10pm Jason made and Roger seconded a **motion to adjourn**. The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison  
Land Use/Assessing Clerk