

Danville Zoning Board of Adjustment
Sept. 22, 2015
7:30 pm

Members present: Chris Stafford-chairman, Tara Burkhart, Jason Holder, Joe Luna, Curt Springer, Janet Denison-clerk

Others Present: Sheila Johannesen-Selectmen's rep, David LaPlume, Christina LaPlume, Sheryl LaPlume, Dottie Billbrough, Kim Farah, John Cronin, Charles Cote, Wanda Cote, Natasha Cormier

Minutes

Chris made and Joe seconded a **motion to accept the August 18, 2015 minutes as amended**. The motion **passed** unanimously.

Joe made and Curt seconded a **motion to accept the June 30, 2015 minutes as amended**. Tara abstained. The motion **passed**.

Joe made and Curt seconded a **motion to accept the December 16, 2014 minutes as amended**. Tara abstained. The motion **passed**.

Continued Hearing for an appeal from an Administrative Decision for Charles and Wanda Cote of 6 Cote Drive, known as Tax Map and Lot 4-2. They are appealing a decision by the Danville Board of Selectmen referenced in a letter dated April 3, 2015 from the Selectmen to the Cotes

- *91A Request*

Chris mentioned that there were two concerns from the previous meeting that he wanted to ensure were managed to the applicant's satisfaction. The first one involved a 91A request. John Cronin, counsel for the Cotes, said there is an issue with the emails that were provided. He mentioned RSA 91.A.

Mr. Cronin said there is a subsection to RSA 91-A regarding emails. He explained that any emails regarding the Cotes fall under the framework of their request to see those emails. Mr. Cronin said he is not sure if individual members of the Board had communications between themselves but he felt there were emails that were not provided per this request. He mentioned these were communications to the state veterinarian. He said that, speaking of the tenure of the communications, he's not sure the Cote's would get a fair hearing from this Board. He said the quasi-judicial nature of a zoning board is similar to a jury in Brentwood, and based on the emails, he felt none of the present Board members would be able to sit on this hearing.

Chris asked if the emails in question are from private emails and if that includes anything other than to or from the clerk. Mr. Cronin offered as an example an email from the clerk to the Board, dated July 16. He said if there were emails related to that from Joe to Roger, for example, he would be entitled to a copy of that email.

Chris said he provided any correspondence with Cote in the subject. The clerk did the same. Chris said due diligence was done to fulfill the request, but it may be possible that something

was missed. He said he can't speak for other boards in town. Curt stated he never sent any emails regarding this that did not include either the chairman or the clerk. Therefore any emails to or from him would have been provided already. Joe and Tara agreed they also include the chairman and the clerk on all emails regarding this Board.

Chris said he can't speak to any correspondence regarding the state veterinarian. He said again that due diligence was done to satisfy the request and that asking the entire Board to step down is unreasonable. He explained this is a small town, one member already stepped down at their request, there is only one alternate and there is no one else on the Board. He asked if there's an alternative that would allow the hearing to proceed.

Mr. Cronin suggested polling the members to see if all the emails were provided. Joe explained that he hasn't seen what was provided but affirmed that all of his emails regarding ZBA matters include the clerk. Tara said that she also included the clerk on all of her emails. Joe mentioned that he authored an email policy while a member of another Board, which prohibits discussion via email, and he has adhered to that in his service as a member of many town boards, including the Board of Selectmen. The clerk stated she provided all the emails that were possible to be provided.

Mr. Cronin said the law doesn't require disclosure of emails that are sent from private emails to other private emails. He asked the clerk if any emails were sent to private email addresses. It was explained that only the clerk has a town email account; all the members use personal or work email addresses.

Chris concluded that all emails were provided that had Cote in the subject. The Board members confirmed that all correspondence was sent through the clerk. Mr. Cronin said this doesn't explain how the state vet has seven emails on the subject that were generated yet not provided per this request. It was explained that those were not provided to or generated through this Board, so this Board can't speak to that subject. Joe asked if the Board should review that correspondence, Tara said she never saw any emails from the state vet. Curt said the ZBA issues are a subset of other town issues. While the ZBA deals with zoning issues, the Selectmen deal with other issues and there could be emails not from this Board that have nothing to do with this case.

Mr. Cronin told the Board he does not take this personally. He said he suspects there are emails from a selectman that are not produced here. Curt asked him why that would be something for the ZBA to answer.

- *Alternate Board Member*

Chris said he would like to proceed with the hearing and talk about the issues, discuss the appeal, and move forward. He said that perhaps this issue is something that can be discussed further but it shouldn't prevent the Board from hearing any testimony tonight. He said he will speak with town counsel about the issue.

Chris mentioned the second request of the Cotes. He explained one of the Board members chose to step down from this case and the alternate, Jason, is attending the hearings. Without the alternate having been at the first meeting for this rehearing, Chris asked if it's acceptable that

Jason sit on this case. Mr. Cronin said that nothing substantive was discussed at the previous hearing and had no objections to Jason at this point.

- *Zoning Allowances*

Mr. Cronin explained that they are here tonight to challenge the findings relative to a violation. He said the Cotes' home is in the Residential/Agricultural zone (RA) and that the Zoning Ordinance (ZO) has a laundry list of acceptable uses, including farm and farm uses, customary farm occupations except for commercial piggeries and mink farms. He said this means someone could go to 6 Cote Drive and start a farm.

Mr. Cronin offered a brief history of zoning, stating a case in Illinois (Euclid v. Ambler) went to the US Supreme Court; this was the advent of zoning regulations. He stated this case established that a landowner can do as they see fit with their property subject to narrowly tailored zoning regulations that are designed to protect the health, safety and welfare of the community. He explained that legislature has put measures in place to protect farms and to see them advance and progress. He pointed out what he called a particularly important presumption in state law, RSA 674:32-a, that if agricultural pursuits are not explicitly disallowed in zoning, then they are allowed using best practices. He said it is important to note that the RA zone only excludes piggeries and mink farms; there is no restriction relative to dogs.

- *Fur-Bearing Animals*

Mr. Cronin said it strains common sense to think someone can go out and raise a number of badgers or other dangerous animals per agriculture but not raise dogs. He said farms have been in place many years and dogs are kept at farms as an ancillary part of that farm. He said there is sufficient support in the federal statutes that dogs are fur-bearing animals. He cited Part 301, Rules and Regulations under Fur Products Labeling Act and Title 7-Agriculture, chapter 17-miscellaneous matters, subsection 433.a, stating dogs are listed in federal statute, not so much in state statute, as fur-bearing animals.

Chris said that NH Fish & Game defines fur-bearing animals under RSA 207:1, VIII and dogs are not listed. He said there may be federal rules but the Board found something specifically pertinent to New Hampshire. Mr. Cronin said RSA 21:34-a, II(a)(9) outlines that domesticated strains of fur-bearing animals are part of farming. He said he is unaware of skunks being domesticated, for example. He purported that raising dogs, which are domesticated and fur-bearing animals, is a farm use.

- *Farm Operation*

Chris said the Board needs a clearer description of what is happening at the property, especially in light of the prior concern that it is a customary farm operation. The Board had been told that some animals are bred in a different state, imported to Danville, and sold here. Some puppies may be born in Danville, but it seemed a large number were bred elsewhere. He said that doesn't sound like a customary farm operation. Mr. Cronin said that isn't relevant because the ZO talks about farm and farm uses. He said that a blacksmith or selling milk is a customary farm occupation; dog breeding is a use and is not tied to anything customary. He explained the Cotes have had dogs and sold dogs from their property for 50 years.

Mr. Cronin said there was some confusion about health certificates and that the Board seems to think each certificate represents one animal. He said a health certificate has a limited life span and one dog may have multiple certificates.

Mr. Cronin said there is a complaint to the state vet of which they can't locate the source. The complaint is that the Cotes have a "puppy mill" operation. He said this language is slanderous and emphasized they have owned dogs there for a number of years.

Mr. Cronin said Wanda has a relative in Kentucky who keeps some of Wanda's dogs. Those dogs have puppies and are then sold. Many of those dogs never come to New Hampshire.

- *Non-Conforming use/Commercial Operation*

Chris asked for clarification regarding a document provided by Mr. Cote during the June 9th meeting. He presented a list of the number of dogs sold each year from 2006 to 2015. Mr. Cote said that list was for copies of health certificates. Joe said that is not what Mr. Cote said at the June 9 meeting. Curt and Tara concurred that he told the Board the numbers represented the number of dogs sold. Chris said the question at the time was regarding how many dogs were sold and if the Cotes could provide supporting documentation. It was the Board's impression that the numbers represented a lot of dogs and thus made this a commercial operation. He further explained that the board has tried to determine if the Cotes have a commercial operation, not whether it is a farm. In previous meetings, the Board suggested a threshold of 50 dogs differentiated between someone has dogs and sells the puppies that are born and someone who has a commercial operation. That's why the question was asked and this was what was provided, thus the assumption that this represented the sale of dogs.

Mr. Cronin said the number is irrelevant because dogs are a domesticated strain of fur-bearing animals, therefore are not bound by zoning requirements, although there may be some licensing issues. He said a comment had been made that just because there are other breeders in town, that doesn't excuse the Cotes' behavior. He said that other breeders in town represent an administrative loss based on the penalty levied against the Cotes, especially seeing that no action has been taken against the others. Chris said that we're not here to talk about the others in town or enforcement issues. This meeting is to discuss one appeal.

Chris asked for clarification of something from the March 13 letter from Stephan Crawford. The letter point out that the number of certificates of veterinary inspections (CVI) indicated 123 puppies and 31 kittens were delivered between April 2014 and February 2015. Chris asked Mr. Cote if that were true, to which Mr. Cote said he couldn't confirm that without looking at the record. Chris said this letter from Dr. Crawford is what is referenced in the letter from the Board of Selectmen and is what this Board is focused on. The volume of animals indicated a commercial operation.

Mr. Cronin said that, commercial operation or not, this is a farm therefore this activity is allowed. The town ZO doesn't provide a definition or distinction of dog breeding or operation. He said there is some reference to this in the commercial zone, but that it is irrelevant due to those parcels being inaccessible. Chris said that is not necessarily true.

Joe said he remembered a resident applying for a kennel license in the commercial zone. Chris said that zoning was amended in 2008 to allow breeding kennels in the Village District, which

indicates the town recognized the need for some control or regulation over kennels. In 2003 an amendment was made to allow boarding kennels in the commercial zone. Curt said a good question is whether something is a farm use or an accessory use to a farm. He said that there can be primary uses and accessory uses. Once the accessory use becomes the primary use, it no longer stands as a right.

Mr. Cronin said it all falls under the definition of agriculture and it is splitting hairs to say its an accessory use. He said there is evidence already presented that show this activity has been going on with the Cotes prior to 2008.

Chris said a non-conforming use implies that some level of activity has been occurring continuously for a significant period of time. He asked if there's data or documentation to this effect. Mr. Cote said that he has had dogs, horses, and goats all along and the documentation from the state vet is at least from 2006, showing that he's been breeding and selling dogs. When asked if he can produce those records, Mr. Cote said that the state requires records to be kept for five years.

Mr. Cote further explained that the court proceedings from the case in 2007 or 2008, which were given to the Board at the May 26th meeting, indicate the activity has been there for years.

Chris said the letter from the Selectmen referenced permitted uses in a residential zone and that if it's a commercial operation, it is not allowed in the residential zone. The commercial zone was established in the ZO in 1982. The Cotes are appealing a decision by the Selectmen who have stated the Cotes are running a commercial operation. If the Cotes are claiming a nonconforming status, they need to prove that commercial operation has been continuous since prior to 1982.

Mr. Cronin asked if it is the opinion of the Board that every farm that sells products needs to have commercial approval. Chris said, speaking for himself, that if the breeding takes place in another state, and those puppies are imported and sold out of state, it is not really raising animals therefore it is not a customary farm operation.

Mr. Cronin said he read Peter Loughlin's letter and knows where Chris is going with his last statement, but the thrust of his argument is that this is a farm use and therefore allowed. He knows from the emails that the Selectmen disagree and a lot of effort has been put into finding documents to support the Selectmen's decision. Joe said he disagrees with that assertion. Joe said there was a question of the definition of "fur-bearing" animals and, if his emails were reviewed, it will be discovered that he was looking for the definition. He did not find a definition that described a dog as a fur-bearing animal. Joe said the problem is also the quantity of dogs that are imported and then sold. He said this is not raising animals on a farm. This is no different than having a corner at the mall in which to sell a product. Tara agreed with this opinion.

- *Research*

Mr. Cronin said he is not making this personal. He stated that individual members doing independent research outside these meetings should not occur. That is like a jury going home at night and researching the evidence. He said the ZBA is supposed to make a decision based on the record established by the Selectmen. The Board members can bring their own background

and knowledge into making a decision. He said there is case-law regarding this that he can produce for the Board.

- *Review*

Chris said he'd like to make sure the Board reviews each point of the appeal. He asked if the argument is that this is a customary farm operation, not a non-conforming use, and asked to have it clarified that they are not offering any documentation of sales exceeding 50 puppies per year dating prior to 2006. Mr. Cote said his proof dates back to 2006. Chris asked if the records corroborate this form of operation started prior to 2005. Mr. Cote said he is not sure and that records are supposed to be kept three to five years. He asked why someone would have to keep old records. Chris asked if he has any records of dog sales prior to 2006. Mr. Cote said he is not sure because he didn't go back that far.

Chris asked if the Board members had any other questions. Joe said he is still confused regarding the statement presented that the Cotes are importing and exporting dogs and that can be considered a farm. Mr. Cronin said it doesn't matter because of the way the ZO is written and the state statute. There is no language in the ZO that breeding is not allowed in that zone.

Joe asked if all of the dogs imported belong to them. Mrs. Cote said she was tired of the town and transferred all of her dogs to Kentucky. Mr. Cote said that their males and females are sometimes sent out of state for breeding. Chris said it sounds like they are breeding dogs in New Hampshire and Kentucky and all we know is the breakdown they provided which doesn't distinguish how many were bred here and those that were bred elsewhere.

Curt asked if there are any farm activities on that property. Mr. Cote said they have horses, goats, and chickens. They've sold horses, dogs, imported goats, sold horses, have miniature horses. Mrs. Cote said that they let people take the manure. They said they also have eggs and milk the goats. The goats are also sent elsewhere to clear fields.

- *Public Discussion*

Chris opened the discussion to the public.

Sheryl LaPlume of 24 Hawke Lane stated there are contradictions in the Cotes comments. They stated their records don't go back further than 2008 yet they produced a number going back to 2006. She pointed out that Mr. Cote said records are to be kept for five years, then stated they are to be kept three to five years. She said tax records are supposed to be kept for seven years. Mr. Cote said the health certificates go back to 2006, all of his other records have been purged. He didn't think to look at tax records.

Dorothy Billbrough of 9 Cote Drive said she's lived on that street since 1973. She said the goats they have are all male and belong to their daughter. The horses they have also belong to their daughter as pets. They have only had goats for a couple of years.

Dave Laplume of 24 Hawke Lane said he owns the property between the Cote's properties. He said he spends a lot of time getting the Cotes' animals off of his property which is not something a normal farmer allows to occur. He spoke of the manure, saying he had to involve the state to have the manure removed from the wetland buffer. He said he's never heard of raising dogs as a farm activity and their dogs are dying of viruses.

Natasha Cormier of Barrington, New Hampshire said she worked for the Cotes for three weeks in 2013. During that time she observed inhumane conditions. The males and females were separated. She was present when Mrs. Cote went to Ohio to received 10-12 puppies and brought them back to Danville. She was present when a veterinarian, now deceased, wrote health certificates for animals without examining them. She said this is not slander because she personally witnessed these activities.

Chris asked Ms. Cormier how many dogs or puppies she observed during her employment there. Ms. Cormier said she knew of 50-55 puppies of various designer breeds such as yorkipoos and Chihuahuas. She was instructed to give a wormer for cows to the eight week old puppies when they were taken from their mother. She said many of the puppies were sick and there were unhealthy conditions. She was also instructed to give the puppies syrup if they seemed lethargic and someone was scheduled to look at them for possible purchase. She said she has serious concerns about what she witnessed to be a commercial business. She said Mr. Cronin mentioned best practices and this is not what she witnessed at the Cotes.

Chris asked if Ms. Cormier could corroborate that all of the puppies were bred in Danville. She said that they were imported from out of state, and bred from a stud that did not belong to the Cotes. She said Mrs. Cote drove to Ohio and returned to Danville to sell the puppies, some of which were already sold and waiting for pick-up. She said she also dealt with the state Department of Labor, and she has documents in which the Cotes are deemed a business and not a farm, that their business is not considered under the statute of agriculture. She is able to provide these documents to the Board.

Mr. Cronin asked Ms. Cormier if she had filed a workers' comp claim while employed at the Cotes and that claim was denied. She said that is inaccurate. Mr. Cronin asked if that finding in that particular claim was that the accident she claimed happened at the Cote farm actually happened elsewhere. Mr. Cormier said that is not the finding. She was asked by Mr. Cronin if she received any workers' comp benefits. Ms. Cormier said she was awarded an amount and never sought to receive it through the courts. Mr. Cronin asked if she can provide those documents to prove what she's said. She said she could.

Mr. Cronin asked Ms. Cormier if she went to Ohio to get the dogs. Ms. Cormier said she did not.

- *Review of Motion for Rehearing*

Chris briefly reviewed each point in the motion for rehearing as stated in paragraph 6 of the document dated July 3, 2015.

- a. Time to present the case and regard of state statute.

Chris said there has been a lot of discussion about state statutes.

- b. Neglect to consider state statute

Chris said there has been a lot of discussion regarding this. The Board may disagree, but there has been a discussion.

- c. Error in administrative decision

The number has been clarified in a subsequent letter.

d. Interpretation of customary farm operation and agriculture and farming
Chris said this has been discussed at length.

e. Permitted uses
This has been discussed and no records have been presented to corroborate this prior to 2006.

f. Special exception
Chris said this has not been discussed at length. He said a special exception is needed if this is going to be a customary home occupation. Curt said he recalled reviewing the permitted uses in the RA zone and that he pointed out that without an application for same, it can't be applied here. Chris said this Board is not here to talk about whether this is a special exception or a variance.

g. Not allowing a continuance
Chris said this has certainly occurred.

h. Procedural error
Chris said this has been clarified. There may be a disagreement, but the hearing was granted.

- *Continued Review*
Chris asked if there were any other questions. Curt asked when the ambulance service closed and was it the main use of the property. He was told that was in 1994 and that they've always had animals at the property. The subdivision occurred in 1987.

Joe asked about the list provided at the June 9th meeting. He reviewed his notes and said the list was presented with the statement that it represented the number of puppies sold. Further in that discussion it was stated those numbers represented some puppies that were direct shipped. He asked Mr. Cote to clarify if those numbers mean anything or if he is retracting his earlier testimony. Mr. Cote said those numbers represent health certificates which they are required to keep. He said they are not required to keep contracts. He said it may have gone into the minutes as the number sold but he does not recall saying that. He said he counted the health certificates about 30 minutes before the meeting began.

Mr. Cote was asked if he has any records that would indicate the quantity of puppies raised or birthed on his property versus the number of puppies imported, whether those imported belong to them or otherwise. Mr. Cote said there would be federal records, called a CVI, or a certificate of veterinary inspection. Joe asked if those records will establish the quantity of raised puppies versus the quantity of imported and sold puppies. Mr. Cote said he does not have those records tonight.

Mr. Cote further explained a CVI is a federal health certificate and is different than a state health certificate. Joe said he is asking because, based on what he heard tonight, he has to find out the answers for himself at the meeting.

Mr. Cronin said this is an appellate proceeding and independent research shouldn't be going on outside the meeting, and Board members have the right to ask questions.

Jason asked for clarification. He said that research doesn't mean checking a definition that applies to the hearing. Mr. Cronin said that is a valid point, but looking at the level of things going back and forth between the Board members in the emails, he submits that someone may say they shouldn't be doing that. It would be different if this were a variance or special exception as interrogatories are appropriate.

Jason said he has not heard a clear definition of what a farm animal is, and hasn't heard it clarified whether or not dogs are fur-bearing animals, neither has it been established whether or not this is a commercial operation. He said he is hearing different things regarding some dogs being bred here, some are bred elsewhere and some are only sold from here.

Joe said Mr. Cronin has stated dogs can be considered fur-bearing animals and that this constitutes a farm use. He doesn't necessarily agree or disagree, but it was the statement made. He would also like to know, is it established that they have a dog farm and that they are importing dogs from elsewhere, which in his mind is different than a farm which raises dogs.

Chris said this hearing is about a letter from the Board of Selectmen which references a letter from the state vet. The letter from the state mentions CVIs. Chris read in part the letter: "The department has obtained a number of interstate certificates of veterinary inspections, (CVIs) that document Wanda Cote, 6 Cote Drive, Danville, NH as the recipient (copies enclosed) of numerous imported animals. CVIs are legal documents that indicate that animals were delivered to a particular entity and address. Between April 2014 and February 2015, CVIs indicate that you imported 123 puppies and 31 kittens."

Curt said that the law has recently changed making the certificated prima facie evidence of a transaction. Chris quoted the letter further: "...The department has obtained health certificates for 43 dogs written for the approximately three months between April 21 and July 14, 2014. RSA 437:10, I states in part, 'If an official health certificate is produced, it shall be prima facie evidence of transfer.'"

Chris pointed out the two time spans mentioned and two separate activities. The challenge for the ZBA is that no data has been provided for what has happened. He said it will make it clearer what the operation is. It would be clearer to the Board and hopefully clarify the conflicting information.

Mr. Cronin offered to the Board some documents for consideration. He explained the different packets as containing documents produced in response to the 91A request, an article that talks about fur and dogs, the federal statute and regulation referring to dogs, some website printouts for various people in Danville in the RA zone that to his knowledge do not have special exceptions or variances for their purported dog businesses. He also said that public comments should be germane to the discussion and there may be some credibility issues with the former employee of the Cotes who offered some testimony. Mr. Cronin said this should be stricken from the record and not considered during deliberations. The documents were given to Chris.

Curt asked, regarding the others mentioned in websites, if that is up to the discretion of the Board of Selectmen whether or not to pursue action. Mr. Cronin said he's introducing this in the event the subject of administrative gloss comes up. He is not asking for a ruling on it, but entering it

into the record. Joe asked if those residents also received letters from the state vet. Mr. Cronin said he is not sure.

Mr. Cronin said he had nothing more to add. Chris said the Board will not deliberate at this time. The concerns brought up at the beginning, regarding the entire Board stepping down from the case, will be discussed with Town Counsel. Mr. Cronin said he left a request for findings which he hopes will be incorporated into the deliberation and decision.

Mr. Cronin and the Cotes were told they will be informed when the next meeting will be held. They left the meeting.

- *Adjournment*

The Board agreed to meet on October 20th at 7:30pm. Jason was unsure of his schedule and said he will make every effort to attend. Chris asked the Board members to not research anything at this point. Jason asked if that included the documents provided tonight by Mr. Cronin. It was agreed to give them to Town Counsel for his opinion before they are given to anyone to read.

Joe expressed his concern for what was said regarding the emails and that Mr. Cronin seemed to have concern for one letter. He said that since this Board was not presented with this information, it is not germane to this Board. Curt said he believes Mr. Cronin is concerned that whatever was in the email will cause this Board to be impartial. It was agreed that this Board has not seen this particular email.

At 9:15pm Chris made and Curt seconded a **motion to adjourn**. The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison-clerk