

Danville Zoning Board of Adjustment
Oct. 25, 2016
7:30 pm

Members present: Chris Stafford-chairman, Curt Springer, Tara Burkhart, Joe Luna, Roger Whitehouse, Jason Holder, Sheila Johannesen, John Russo, Michelle Cooper

Excused members: Roger Denison

Others present: Peter Gorton, Walter Baird, Carol Baird, Chip Current, John Mathieu, Judy Mathieu, Sharon Woodside, Barry Hantman, Jim Castine, Ed Delorey, Linda Roth, George Nelson, Judi Cogswell, David Cogswell, Kevin Hatch, Ken Danisevitch, Jan Danisevitch

Minutes: Chris made and Joe seconded a **motion to approve the October 4, 2016 minutes as amended.** The motion **passed** unanimously.

Part 1

Voting members for the following case were decided as follows: Chris, Joe, Tara, Roger, and Sheila. Curt excused himself from the table to sit with the audience.

2016-5: Peter Gorton of 78 Walker Road is requesting a variance of the Danville Zoning Ordinance article VI.A, regarding lots with less than 200' of frontage for a proposed subdivision. The lot is known as Tax Map and Lot 3-21-15

The variance granted in 2003 was briefly reviewed. Feedback from the fire chief included that he is concerned about the length of the driveway and the hairpin turn, including whether or not his trucks would be able to navigate it. He also expressed concern that the width of the driveway and construction will not be navigable for the fire trucks.

Peter Gorton was asked about the use of the homes today. He stated that both are two-family homes. His plan is to sell one of the homes to one of his children and keep the new lot for himself. Chris stated this is information that was unknown to the Board during the first hearing. It has now become a discussion of a driveway to access not just three dwelling units but five and possibly six.

Chris asked if the fire chiefs concerns impact the criteria for the variance, or should restrictions be included in the decision and addressed with restrictions.

There was a short discussion about acreage. Joe pointed out that the lot is currently 5.5 acres. There is already a zoning violation with the creation of one two-family home. The creation of another lot for another dwelling unit would be contrary to the minimum lot size. The applicant has not asked for a variance for lot size. It was agreed that it is unknown if the applicant can reconfigure the existing lots to meet lot sizes required in zoning without another variance. Mr. Gorton was told he may either submit a new application for the additional variance or he try to reconfigure the lots in a way that he does not have to request a variance for lot size.

Mr. Gorton said he will consider his options. Joe made and Chris seconded a **motion to continue the hearing on November 15th at 7:30pm.** The motion **passed** unanimously.

Part 2

2016-6: appeal from an administrative decision. The appeal is made by the Danville Heritage Commission regarding a subdivision approval made by the Danville Planning Board on September 8, 2016 for Tax Map 2 Lot 75, owned by Delridge Realty, which is adjacent to the Meeting House land (Tax Map 2, Lot 73) and cemetery (Tax Map 2, Lot 74), which are lots in the Historic District. The meeting notification included the following: *The nature of this application may result in a quorum of other town committees being present for the hearing.*

Curt was designated the chairman for this hearing. Chris and Roger excused themselves from the table to sit with the audience. Jason and Sheila left the meeting. Voting members for this hearing were designated as follows: Curt, Joe, Tara, John, and Michelle.

Curt explained the nature of the hearing being that of the Heritage Commission (HC) appealing a decision made by the Planning Board (PB). That decision was granting final approval for a subdivision of land south of the Old Meetinghouse on Main Street. Peter Loughlin had informed Curt that he would not be able to offer advice on this hearing as he had already acted as a reviewing agent during the Planning Board proceedings. Curt has retained the help of Bernie Pelech, an attorney in Portsmouth, for advice on this case. Curt explained that there have been neither discussions nor exchanges of emails between Board members regarding this hearing. He said he would like to limit testimony and evidence to whether or not there is a case to discuss. He also said he will ask the Board members about releasing to the public any correspondence that may be declared attorney/client privilege.

Curt read the application as submitted by the HC. He said this Board needs to decide if the PB decision determined the boundary of the Historic District (HD) or if they approved a subdivision of the land as presented and did not take a position on the boundary. He further said that it should be considered that if the PB determined the district boundary, what sort of information should have been considered in that determination. There's also a question of standing, and Curt said tonight would be the time to determine this.

The Board will first take testimony from the applicant, then the PB, then the abutters or other interested parties. There are several town properties that abut the subject parcel and there are several town boards that have an interest in the parcel, including the Board of Selectmen, the Cemetery Trustees, and the Forestry Committee. He said the Zoning Board (ZBA) accepts all testimony usually, but this case is looking at a very narrow topic and Curt will cut off any irrelevant testimony in the interest of time and to avoid being influenced by unrelated testimony.

Barry Hantman, chairman of the PB, told Curt that perhaps the ZBA should determine whether or not they should look at evidence that wasn't available to the PB at the time of the PB hearings. There were no questions or comments from the other Board members at this time.

Carol Baird, chairman of the HC, asked if the ZBA members have had time to review the documents relative to this case. Curt said the PB minutes have been sent to the members. Joe suggested pointing out specific documents as they are referred to and if this has not been previously reviewed, it can be given to the Board members.

Carol explained that the PB subdivision approval changes the boundaries for the Meetinghouse lot as shown on the official town map. She handed out to the Board members a sketch from the surveyor for two of the parcels that make up part of the meetinghouse lots. This was presented to the PB that a portion of one parcel extends to the abutters property to the north. This puts a piece of the HD into the abutters lot. When the plan is recorded, it will be incorporated into the tax maps.

It was pointed out that the meetinghouse and cemetery land has never been professionally surveyed. Many questions were raised during the PB hearings about the town's lands in that area but were never resolved. The HC has determined that these questions cannot be resolved without a professional survey of the land. This survey is not information that was available to the PB during their hearings.

After the subdivision approval, the HC voted to have the properties surveyed. On October 10th, Carol met with the Board of Selectmen regarding a surveyor and the cost of preparing a report. The surveyor, Cynthia Boisvert, has never worked in this town and has not dealt with the surveyor who presented the subdivision plan. She is a separate party to all others involved. Ms. Boisvert has already begun work but requires a little more time, therefore Carol prepared a written request for continuance. It is Carol's hope that the survey will provide new information and will answer the question of where the boundaries are.

Curt said the property owner could have filed a perimeter plan at the Registry of Deeds. The town is then notified of the plan. Curt asked Carol how that process is different than going through the subdivision approval process with the PB. Carol said that this may be asked of legal counsel, but she is not sure if the recording of a plan that has not been reviewed by the PB has the same effect on the town's official maps. Curt asked if the PB action actually change to district or does it simply allow a claim to be filed regarding the public record, disputing what was recorded. Carol said the PB was aware at the time of approval that this abuts the HD.

Joe said this is a potentially disputed boundary, and it was approved knowing that this is a disputed boundary. Joe pointed out that previously this Board has granted a continuance without hearing other testimony. Curt said he believed this Board should hear from the PB, and as a courtesy to hear from other parties, before considering a continuance. Curt said we should consider the property owner who went through the process of PB approval and we should be careful about delaying anything.

Barry said that regarding the continuance, the PB recommended that the land be surveyed. Any new information obtained by a new survey was not available to the PB at the time of its approval and was not part of its decision. Carol asked about the standard of review for an appeal is either an error of judgement or new information. Curt said that is for a reconsideration of a decision. Curt suggested making a list of questions for legal counsel. Carol said she believed she read in the ZBA handbook that an error of judgement and the finding of new information are grounds for an appeal.

Curt said the perimeter plan could have been filed without interaction on the part of the PB, therefore he is seeing no compelling reason for the appeal to the ZBA. Carol said that no one wants to hold up this process any longer than, but perhaps it would be prudent to continue after having the ZBA questions answered by legal counsel. That would possibly allow the surveyor to finish her work also.

Barry introduced himself as the chairman of the PB. He said that some may have the erroneous idea that this is Heritage Commission vs. Planning Board. He said that he and Carol are good friends and he has the highest regard for Carol and her work with the HC. He feels that both boards are doing what they should in their respective capacities, which includes the overall interests of the Town of Danville. Barry pointed out that not every vote of the PB is unanimous and that while he speaks on behalf of the Board, it is on behalf of the majority of the Board and not to any one member's views.

Barry said the portion of zoning mentioned in this appeal is about moving district boundaries, and he feels the PB decision did not move any district boundaries. The PB decision was two-fold: the approval of the subdivision and the location of boundaries. The HD is specifically listed in the zoning ordinance by lot number. The decision by the PB did not remove or add any lots from the HD. Barry said that at the time of subdivision approval, there was not sufficient evidence provided to deny the application. During the

discussions, there had been questions about the northern lot line which abuts the cemetery. A licensed land surveyor presented to the PB a plan which was questioned by the PB, the public, and the HC. Deed research was given to the PB and it was questioned if the subject parcel infringed on town land, which would be part of the HD. At that time, the PB suggested having those lots surveyed. That survey did not happen in a timeframe necessary for PB approval therefore the subdivision approval was not delayed. During the approval process, a site walk was conducted by the PB. Town counsel conducted a site walk of the meetinghouse and cemetery lots. All of the deed research, which was confusing and referenced trees that are no longer extant, was given to town counsel and a meeting was held with him, the surveyor for the subdivision, and Carol Baird. Town counsel sent a letter to the PB which said that the frontage claimed by the developer was incorrect and that the developer was claiming more frontage than he actually owned. The PB made the developer move the lot lines. Town counsel didn't find sufficient evidence to deny the subdivision. The PB did not approve the location of the other lots to the north although some deed research for those lots was provided to the PB. The PB made it clear that nothing they were doing absolved anyone from filing a claim to some of that property. The applicant was reminded that getting title insurance is a very good idea.

John said that he has a high regard for Peter Loughlin, but recognizes that Mr. Loughlin is not a land surveyor. Barry mentioned a letter from Mr. Loughlin to the PB was marked, "attorney-client privileged," but based on a discussion he had with Mr. Loughlin, the letter was given to the applicant.

Curt asked if the PB has had cases in which the boundaries were disputed. Barry said they are rare and usually the parties came to an agreement of where the lot lines are. Barry said that in the case of this subdivision, it was pointed out during the hearings that there are other unrelated pieces that may turn out to not belong to the developer or the town.

Kevin Hatch introduced himself as the surveyor who worked on the subdivision plan. He explained that the deed research given to the Board tonight by Carol was nothing that the PB had to approve or disapprove. It was his own deed research and a sketch of what the properties may look like. He pointed out that the stamped plan is the official survey and that the lines match the outline of the town tax map for this parcel.

Curt asked Mr. Hatch to clarify that anything could have been recorded at the Registry which would have then made its way to the mappers, thus changing the tax map. Mr. Hatch concurred.

Mr. Hatch was asked about the total acreage for the property, noting that the total noted in the deeds has increased over the years. Mr. Hatch said his survey indicates 24+ acres but it has nothing to do with changing property lines by the cemetery and the Stafford property; it has everything to do with finding the markers on the ground, cross referencing the evidence in the deeds, and calculating the area. He pointed out that the bold lines on the plan approved by the PB matches the tax maps.

Barry clarified that the tax assessment is based on 20 acres and he's not sure if the tax map actually says 20 acres. Carol clarified that the triangle of land on which the Meetinghouse stands has to be somewhere. It is town land and if it isn't where it's shown on the plan, it has to be somewhere.

Chris Stafford introduced himself as the abutter to the north. He said he has title insurance, owner insurance, and bank title insurance, but nothing can be done until the survey of the Meetinghouse is completed and there are definitive answers about the property lines. He pointed out that the Planning Board deliberated well and used the information that was provided to them at the time. He said each town committee tries to do its best at interpreting the information that is available. He then stated there is one piece that should be discussed, based on an opinion given by Peter Loughlin. The deeds reference trees that are over 200 years old. One tree in particular is a white oak that stands between his property and the

Meetinghouse land. He's had two surveys of his property, in 1993 and 2009, and each define his southern boundary, which is the northern boundary of the Meetinghouse land. There are triangle pieces being referred to, one of which is shown to run 220' north, which would be about one third of the way in front of his house. Chris expressed his concern that if conclusions are drawn from this survey, there are questions about his property that need to be addressed and that a survey of the Meetinghouse land is necessary. He expressed his support of the request to continue.

Curt asked Chris if he thought the PB should consider deed research when approving a subdivision. Chris answered that if there are questions of the boundary, those should be answered. He knew the PB was told to not hold up the approval based on the boundary issues. He said there's a recognition that the northern boundary is questionable, but each board has to make its own decision during the hearings whether that's sufficient grounds for delaying things. After the survey, it can be decided if there really is a dispute.

Barry clarified that the PB didn't make a determination that the triangle was in the Stafford property. The PB determined that there is insufficient evidence that the triangle was in the land being proposed for development. Chris said that if the triangle is where Peter says it is, there are significant implications to the historic district, frontage issues, etc.

Curt said he never saw anything about prescription, stating that even if the deed says the boundary is in one place, but it's been agreed or assumed that a stone wall some feet away is the boundary, the wall becomes the boundary. He asked if anyone had any opinions about that. Mr. Hatch said there is no once claiming prescriptive rights which is similar to taking something that is not yours. He said this property is entirely surrounded by physical evidence which matches his deed and title.

Jim Castine asked if the Board has a copy of the current deed. The Board did not; Mr. Castine read the metes and bounds as described in the deed. He pointed out there is no turn mentioned in the northern line and that it contains 20 acres. Curt asked him why he voted no during the PB approval. He didn't think there was sufficient evidence to support what Mr. Hatch drew as the boundary.

Walter Baird pointed out that Mr. Hatch's survey changed during the PB proceedings after new information was presented. He talked about the 293' that is one length of the triangle in front of the Stafford property. He pointed out that there are too many questions left unanswered.

Curt stated the Board is in no position to decide anything tonight and he would like to get legal advice. He said that the need for legal advice is the reason to continue the hearing.

Barry asked what legal advice is being sought.

There was a short discussion about voting to continue and why. Curt said that he thought continuing the hearing based solely on the Heritage Commission getting a survey was insufficient. He also said he's leery of continuing based on needing deed research.

Barry asked if the ZBA has a specific timeframe to make a decision on an application. It was explained that the only timeframe is that the first hearing needs to take place within 30 days of receiving the application. Chris said that the Board also considers working reasonably with the applicant, to be expeditious as we can and to schedule meetings within reasonable limits. Curt said everyone needs to consider that the property owner has rights that are important.

Carol asked about the land owner rights of the abutters and, if the survey reveals that a portion of town land is in the development, does that carry as much importance as the landowners rights to develop. Curt said that is not relevant to this proceeding. He said this Board needs to decide what to decide and on what

evidence. He explained there are other venues with which to appeal a PB decision; the ZBA has a very limited scope of power.

Questions to legal counsel may include the following:

- When the PB approved the subdivision, did they actually make a determination of the boundary?
- Is this an appeal that we should consider?
- Did approving the subdivision move the boundary of the historic district?

Carol asked that counsel be told that there was an awareness of and a lot of discussion of the boundaries during the PB deliberations. Curt said he can. He also said a follow-up question is:

- If the PB made a determination of the external boundaries, then what should they have taken into consideration in making their determination? Perhaps deed research should have been considered.

Barry said the PB did consider deed research. Barry suggested that the ZBA could ask the following:

- If information was not provided or available to the PB during their hearings, and is not available at the time of this appeal, can this be used as a basis for the appeal?

Chris reminded the Board that there was a question raised about the standing of the Heritage Commission. He said he believes they do, but this may be a question to ask legal counsel. Barry said he believes they have standing. Curt said he believes they do also, but feels this may be a good question to ask legal counsel.

Jim asked if either Board has the authority to look into current deed and ensure that the land they're planning is actually their land.

Mr. Hatch asked if correspondence between this Board and legal counsel can be copied to him so he can share it with his client. Curt said that will have to be discussed with the Board. He is personally in favor of that. It was agreed this has to be discussed with legal counsel, and if something is marked "privileged and confidential," why is it marked as such and can it be shared with others.

Barry cautioned the Board that this has a high potential of ending up in court. He said that some correspondence may mention things that the Board would not want to share with someone who may be in court as an adversary.

Joe made and Sheila seconded a **motion to continue the hearing**. It was agreed to meet on the November 15th following the Gorton hearing. The motion **passed** unanimously. It is assumed the hearing will continue around 8:00pm.

Zoning Ordinance warrant articles:

Chris returned to the table and passed out copies of the proposed warrant articles. He asked that the Board members review these for a discussion on the 1st. Curt asked about why the ZBA should continue to review the accessory dwelling units to grant special exceptions.

At 9:50pm Curt made and Tara seconded a **motion to adjourn**. The motion **passed** unanimously.

Respectfully submitted,

Janet S. Denison