



HALIFAX ZONING BOARD OF APPEALS

Meeting Minutes

Monday, July 10, 2017

The Halifax Zoning Board of Appeals held a public hearing on Monday, July 10, 2017 in Meeting Room #1 of the Town Hall with the following Board members in attendance:

Robert Gaynor, Kozhaya Nessralla, Gerald Joy, Robert Durgin and Daniel Borsari are in attendance. Peter Parcellin is absent. (Daniel Borsari will be voting in Peter Parcellin's place.)

Chairman Gaynor calls the meeting to order at 7:00pm and reprised the audience that this public hearing/meeting is being audio taped. He also explained the procedure and the protocol at the public hearings.

Bills:

W.B. Mason, HP Express (Advertisements and 1-year subscription)

Correspondence/mail/notices:

Chairman Gaynor read the Planning Board re-organization memo into record.

Meeting Minutes:

Motion to accept Meeting Minutes for Monday, July 8, 2015:

MOTION: Kozhaya Nessralla
SECOND: Gerald Joy AIF
Passes: 4-0-0

Motion to accept Meeting Minutes for Monday, June 12, 2017:

MOTION: Gerald Joy
SECOND: Kozhaya Nessralla AIF
Passes: 4-0-0

Amendments made to Meeting Minutes for Monday, December 8, 2014 (requested by Gordon Andrews, Jr. concerning Petition #823, The Party Trust): Postponed for Board to review.

Appointments:

7:15 – Petition #868 Appeal of Building Permits – G. Andrews, Amanda's Estates, Halifax

Present: Gordon Andrews, Jr.; Attorney Gary Brackett (representing Mr. Andrews), Worcester; Town Counsel Richard Hucksam; Attorney Adam Brodsky (representing The Party Trust), Hingham; Amanda Monti, Ed Johnson; Joe Webby of Webby Engineering (project engineer).

Chairman Gaynor reads the Public Hearing Notice into record.

Mr. Gaynor greets Mr. Andrews who passes things over to his attorney Mr. Gary Brackett. Mr. Brackett gives his background – he's been a public attorney for more than 40 years serving at the city and town level. He's been working with the Zoning statute since it was adopted in 1975. He's explaining this because when Mr. Andrews first contacted him, Mr. Brackett evaluated the statute and after careful review he concluded that there were several issues that related to the status of this project. Mr. Andrews had already filed a request for

zoning enforcement to the building inspector. Mr. Brackett and Mr. Andrews are aware that the building permits were issued for four of the units consisting of two buildings on two separate lots. Mr. Brackett explained to Mr. Andrews that he has a right (under both general law and Zoning by-law) to take an appeal from the denial of zoning enforcement to the Zoning Board and he also has a right to appeal the building inspector's decision on the building permits to the Zoning Board, each within 30 days. They took those appeals and set forth the information contained in their statements and support of each of the appeals. Mr. Brackett asks for the Board's permission to address both appeals (Petition #868 and #869) as they are interjoined. The same reason they're asking for Zoning enforcement is the same reason they're asking for an appeal of the issuance of the building permits. They are looking for relief through a cease and desist order; having the Board overturn the building inspector, or the building inspector on his own put a hold on the building permits to allow the applicant to go back and address the underlying issues that they believe caused there to be a serious defect in the status of this project.

Mr. Gaynor would like to begin with the application for the issuance of the four building permits, #2, #4, #9 and #11. Mr. Brackett passes out copies of a factual chronology to the Board members, Mr. Hucksam and Mr. Brodsky. Mr. Brackett goes over a timeline of events. He goes on to make several references for support:

First, On September 20, 2012, there was a withdrawal of the application for definitive subdivision approval of this property. It originally displayed eight lots on the property. As early as November 8, 2010, Mr. Kotowski of Webby Engineering was advised by the Planning Board that the plan submitted was incomplete as it didn't meet the subdivision requirements. On September 20, 2012 the applicant for the property, Cory Merritt, formerly withdrew the request for definitive approval before the Planning Board. The reason for this chronology is to show that the application for definitive subdivision approval was presented and withdrawn. Between 9/20/12 and now, there has never been an application for definitive subdivision approval of the six lots (A-F) or the 7th lot (G) being developed on the plan. The plans presented to the Planning and Zoning Boards show seven lots which have never been formerly subdivided by the Planning Board under subdivision approval.

Second, on September 23, 2014, the Planning Board granted site plan approval. During the Planning Board hearings on site plans, the applicant acknowledged that definitive approval did not go through. On the application for site plan it states that the road will be a private way, it won't be accepted by the town. This is a problem because under the Zoning Board's subdivision regulations there is a requirement that says private streets are prohibited but existing private streets will be approved only if they meet standards. The applicant is saying it's going to be a private street but the applicant hasn't gotten subdivision approval with a waiver of Section 235 Subsec B7. Without a waiver seven lots do not exist legally on that property today as they've never been subdivided. What has been proposed for site plan and special permit is a private driveway. The prohibition against private driveways has never been waived. On August 7, 2014, the applicant requested a continuance from the Planning Board. The Board members had a discussion on multi-family requirements and site plan. There was a review of the requirement for each building in a multi-family development regarding whether it should be located on an individual lot with frontage, which is part of the Zoning by-law. 167-72 requires minimum sizeable lot with continuous frontage. The lot size is 40,000 sq. feet, the frontage is 150 feet. The Planning Board is responsible for site plan but the notation is made on April 7, 2014 "approved with...variances...variances will be necessary." The site plan shows insufficient frontage. On September 22, 2014 the Planning Board's decision states "subject to all orders of conditions, approval, special permits, variances of requirements are met from all town departments." The last sentence states "please be advised that all variances and special permits shall comply with all the rules and regulations and codes of the Town of Halifax." The Board reviews the site plan which shows seven lots, A-F and parcel G. Lot G is an unbuildable lot. The proposal shows each of the dwellings on a separate lot having two units for a total of 12 units as part of a

multi-family proposal. They're shown on separate lots at the time of this site plan decision which had not been approved under subdivision control. Mr. Andrews, as an abutter to the entrance drive, is a party of interest and a party aggrieved of the issues being presented.

Mr. Brackett continues to reference Planning Board minutes leading up to the site plan approval. At the continued hearing in August 2014, in the Planning Board's opinion, the applicant was told that they will need variances. At the continued hearing on September 18, 2014, Mr. Webby (Webby Engineering) was quoted as saying "the Board asked me last time to make sure every building, six buildings, be put in its own 40,000 sq. foot lot...they would all require variances by the Zoning Board..." Mr. Brackett feels that you cannot create more than two lots if they're not on a public way or an established subdivision road under Ch 41 Sec 81-L (definition of a subdivision). You can only create lots by creation of a subdivision road approved as part of a definitive subdivision. As of three years ago, there has been no definitive subdivision approval.

Continuing with the chronology, Mr. Brackett makes more references. He points out that the special permit was granted by the Zoning Board on January 20, 2015. He reads the official motion of the Zoning Board stating that the applicant must adhere to the Zoning By-law regarding multi-family development. A special permit was granted to the applicant and the Zoning Board paragraph three was read out loud regarding stipulations. Any changes must be brought back before the Zoning Board. All variances and special permits shall comply with all the rules, regulations and code of the Town of Halifax. Mr. Brackett explains that the last two pages of the reference package of assessor's plans 15 and 16 showing the three lots that make up the subject property are not lots for the purposes of subdivision control or for complying to the Zoning by-laws. Mr. Brackett moves on to November 16, 2016 when the applications for the building permits were filed. Mr. Brackett references January 20, 2017 – under Mass General Laws, the special permit expires within two years from the date of issuance unless construction has begun. Mr. Brackett raises this issue because there may have been some roadwork done but the applications for the permits weren't filed until two months before the expiration of the two-year period. The building permits weren't issued until May 16, 2017, approximately six months after the applications were made. Included amongst the list of legal issues is whether the special permit expired for lack of commencement of construction before the building permits were issued. Mr. Brackett feels this is a question as to evidence that must be presented to determine whether that satisfies the standards under Mass General Law and the Case Law of the Commonwealth. The building permits were issued on May 16th, Mr. Andrews filed a request for zoning enforcement six days later, on May 22nd. Two days later the Building Inspector issued a denial of that request. Mr. Andrews raised the issues that the lots don't have proper frontage, it's never been approved by a subdivision plan, therefore the building permits should not have been issued. Mr. Brackett questions that there were six months between the time of application and the time of issuance. Mr. Brackett's understanding of the state building code is that, normally, the Building Inspector must act within 30 days of an application for a building permit. This is a six-month period. Within those six months, the two-year expiration from the 1/20/15 special permit expired. When you add to the list of issues the fact that it never had subdivision approval creating the six residential lots and also the expiration of the two-year special permit period, it raises the question of the Building Inspector's denial. Mr. Brackett makes a reference to a mortgage and conditional assignment of rents and leases recorded at Plymouth County's Registry of Deeds of only two lots: A and D of this supposed six lot development. He questioned the Halifax Town Counsel, Mr. Mayo, as to why it was incomplete. Mr. Mayo mentioned that he had not been consulted on this matter.

The last two items Mr. Brackett discusses are Mr. Andrews' appeal for Zoning enforcement and his appeal from the issuance of the building permits. Mr. Brackett discusses the legal issues involved:

First, the Subdivision Control Law, Chapter 41 Sec 81. Anytime you're dividing land into two or more lots, you need definitive subdivision approval. If those lots don't already have frontage on a public way or an existing subdivision road, then you need to submit a subdivision. You must show the road, the infrastructure, the lots fronting on the road, meet all the dimensional requirements of the Zoning by-law. Chapter 41 Section 81-U is a section of controls, approval, modification, etc. by the Planning Board. This procedure was started, withdrawn and never finished. That is the foundation for the grant of zoning. If you're going to be building a multi-lot development where each residential structure of two units in each structure is on each of six lots, the starting point is that you need subdivision control for the lots. Once that is granted, with or without waivers or conditions, you move on to the next phase of special permit which is site plan approval. Chapter 48 Section 9, Special Permits. This (Amanda's Way) is a special permit for new construction. The statute says that if you don't commence construction within two years the permit expires. Mr. Andrews has explained to Mr. Brackett that he's been aware of work that has been done on the roadway but no building permits for the buildings themselves. Mr. Brackett went to Amanda's Way and observed that there is one building where the first floor is framed and a foundation for another building, but that has only taken place since the building permits were issued on May 16th, there's a question about that two-year period.

Second, Mr. Brackett makes reference to the Zoning By-laws, Paragraph 8. He notes that with expression of general terms vs. specific terms, specific terms usually control, as is the Zoning By-law language. Where two or more requirements apply to the same space, that which controls the greatest restriction on the placement of the building will control. A dwelling should not be located on a lot having less than the minimum requirements and no more than one dwelling should be built on any single lot except as in hereafter provided. Access to all lots shall only be through or across it's legal frontage, no common driveways are allowed unless otherwise provided for in this chapter. Mr. Brackett explains that the only way to vary that is to file a petition for dimensional variance in the terms of Zoning by-law of dimensional compliance to use a common driveway or allow access from other than the legal frontage. Mr. Brackett further discusses Sec 167-11 of the Zoning By-law (40,000 square foot lot needs 150 feet of frontage) and 167-12 (Density regulations for multi-family development). He explains that there is nothing in those density regulations that allows for any change in the 150-foot frontage requirement or the requirement of each dwelling beyond the individual lot. Mr. Brackett goes over one of the issues that the Building Inspector raised in his denial of enforcement which is, in his opinion, that the grant of the special permit overrides the underlying requirements that Mr. Brackett is raising. Mr. Brackett feels that the Zoning Board's special permit decision recognizes the requirements to meet all of the other requirements of the town by-laws and would also include the subdivision regulations of the Planning Board. The grant of the special permit does not wipe the slate clean as far as the issues that Mr. Brackett raised that should've taken place beforehand.

Mr. Brackett wraps up with discussion of the condominium Master Deed. He refers to when Mr. Andrews reviewed the files, Mr. Mayo raised a question on April 12th when the building permits were pending for five months. Mr. Mayo said only Lot A and Lot D are being declared as part of the condo and built upon right now. In Master Deed Paragraph A, it is suggested that Lots A through F on the site plan are being conveyed into the condominium, but that didn't happen. Lots A and D combined a total of only about two acres. The Zoning Board decision contemplates that all 12.52 acres would be conveyed into the condominium right away. In order to build under the special permit and meet the Zoning by-Law requirements, all of the acreage parcels A through F and Lot G must be used to create the condominium described in Exhibit A. Mr. Brackett sums up by explaining that Mr. Mayo had issues regarding the condo Master Deed. Mr. Brackett raised issues regarding the mortgage and conditional assignments only relating to Lots A and D and feels that there are multiple issues with how this project is being administered. Mr. Brackett respectfully requests that the Zoning Board vote to grant Mr. Andrew's appeal of the Building Inspector's denial of enforcement and grant his appeal on the issuance of the building permits by directing the Building Inspector to issue a cease and desist order for

work on the project and have him direct the property owner to go back to square one – apply for and secure a subdivision approval. If the frontage on the lots is less than the required 150 feet, the Planning Board is going to be faced with the same issue from 2012 which is that the lots didn't have the required frontage. There is no grandfather protection and no compliance in this project.

Adam Brodsky introduces himself, Amanda Monti, Ed Johnson and Joe Webby and explains that he has just been retained and therefore has not had the time to delve deeply into this with the long history. Mr. Gaynor asks Mr. Brodsky if there is a subdivision approval currently. Mr. Brodsky answers "not required" but goes on to correct some things. The special permit (decision) was dated January 20, 2015. The certificate issued by the Town Clerk's office, which would make the decision effective, was not issued until March 25, 2015. The site plan approval was originally issued on September 22, 2014 but was amended on May 7, 2015. He believes 40A Sec 9, which formally provided a two-year period for the exercise with special permit, was amended effective August 10, 2016 to three years. There's no question that the work and the permit has been exercised. There's a procedural issue here and the Board doesn't even need to reach this history as he feels one cannot, two years after the grant of a special permit and even longer than that for site plan approval, breathe life into a Zoning issue that was addressed previously by this Board. Mr. Brodsky states that this is procedurally deficient. His clients' special permit was not appealed. Mr. Brodsky believes that Mr. Andrews participated in the public hearings and all of these issues were addressed at that time and states that Mr. Andrews cannot come back now, two years and several hundreds of thousands of dollars in construction costs later, and appeal through an enforcement request and building permit request.

Mr. Brodsky discusses related cases. He begins with Bonfatti vs. Holliston Zoning Board of Appeals, 1999. Copies of case documents are submitted to the Board and Building Inspector. Mr. Brodsky reviews the case. The property owner retained a special permit for a cluster development. There were questions regarding frontage raised at the public hearings. The property owner was limited to only developing two lots. A year later he submitted a permit application to construct a third lot to the Building Inspector. He was trying to circumvent the conditions of the special permit by going around the Zoning Board, which was denied. He took an appeal to the Zoning Board which was denied and taken to Superior Court. Superior Court reversed the Building Inspector's decision, however, on an appeal to Appeals Court, he was given a no as the procedure was inappropriate and the case was dismissed. This attempt was labeled as an appeal to circumvent the issues and avoid the 20-day appeal period of the special permit and was dismissed. Mr. Brodsky feels this is a variation of this case, regarding Amanda's Estates.

Mr. Brodsky goes on to discuss the second related case, Sutula vs. ZBA, which he feels will show a pattern. Property owner, through deceit, was granted a variance for an addition to his property. He lied to his neighbor, who had a problem with his proposed addition. He told his neighbor that he was going to remove elements of the project and asked his neighbor to sign a consent letter. The neighbor signed the letter, the variance was granted and the property owner built the project that he wanted without removing any elements or telling the neighbor. An abutter saw the construction, found out about the issues with the permit and asked the Building Inspector to issue a cease and desist order which the Building Inspector denied. There was an appeal and the Zoning Board supported the Building Inspector. It was appealed to the Superior Court which was dismissed one year after the variance was granted. Even under circumstances where the property owner lied to his neighbor, the neighbor was barred from using the enforcement mechanisms to appeal a variance through this process. Mr. Brodsky feels that is what is happening here. Mr. Andrews had his opportunity to appeal the issuance of the special permit, he participated in those proceedings and chose not to appeal. Two years later, after Mr. Brodsky's clients have spent significant time and money, Mr. Andrews is trying to appeal the issuance of the special permit which is categorically not allowed by Black Leather Law in Mass. Mr. Brodsky feels that Mr. Brackett has omitted the relevant section of the by-law (Sec 167-7D2), which

allows the Zoning Board to grant a special permit allowing multi-family development in the ARP and C districts and goes into the requirements for doing that including that a multi-family development complex shall locate each building on an individual lot which shall have continuous frontage on a public or private way. The Halifax Zoning Board Multi-Family by-law expands and replaces many of the general provisions that are found elsewhere in the by-law. To his understanding, Mr. Brodsky explains that two years ago, the Halifax Zoning Board grappled with the interpretation of these provisions and felt the applicant had met their burden. The applicant showed they had sufficient frontage on a private way that allowed this development to go forward. With respect to the word “lot,” Mr. Brodsky believes Mr. Brackett is interpreting the word “lot” for purposes of subdivision control. Mr. Brodsky believes the Board is interpreting “lot” to mean something different in the context of this Zoning by-law. This is a condominium, common areas are owned by the condominium association. The units are owned by the individual unit owner. To show that there was sufficient area for the condos, the applicants were told to show the phasing of the condominium. Mr. Brodsky has seen plans that refer to those lots as “phases” and that refer to those lots as “lots.” Two years ago, the Board and the Building Inspector at the time interpreted the plans and accepted them per their interpretation.

Chairman Gaynor speaks, after hearing from both attorneys, about his main concerns and asks Town Counsel Richard Hucksam a couple of questions. He’d like to know what is acceptable as far as the legality of the private road itself – does the private way have to be registered under subdivision control in order to establish the frontage? Does the private way meet the requirements of frontage in the dates/times discussed?

Mr. Hucksam introduces himself as Town Counsel and shares his opinion. He feels there are two fundamental problems based on his review. First, the 150-foot frontage requirement in the AR’s district. The facts indicate, as he understands them, that this requirement is not met. The issue of subdivision approval is a peripheral issue. If you look at this situation as lacking the requisite frontage, the most logical way to get that frontage is to have a subdivision plan approved with a subdivision roadway which would create the requisite frontage. That is the way frontage is usually created, other than having an approval, where the lots shown on the plan already have the requisite amount of frontage on a public way or another acceptable kind of way. The project development parcel only has about 74 feet of frontage on Elm Street that does not meet the 150-foot frontage requirement. The discussion about subdivision control compliance on waivers is logical but it’s jumping ahead. In terms of some of the other issues, Mr. Hucksam’s opinion is that the special permit did not grant any waiver or relief from the frontage requirement. The special permit granting authority can only grant relief where a Zoning by-law specifically grants that authority. Not only does the Halifax Zoning by-law not grant it, but it specifically says that the grant of a special permit is only permission for the use. It does not give any dispensation regarding other requirements of the Zoning by-law. In Mr. Hucksam’s opinion, the special permit did not waive the requirement that the development comply with the 150-foot frontage requirement. Mr. Hucksam goes on to say that the issue of the special permit lapse was not raised in the appeal and we do not have the facts to decide on this. There has been an amendment to the state statute that increased it from two to three years.

The second fundamental problem with this proposed development, in Mr. Hucksam’s opinion, is the one-building-per-lot issue. This is clearly stated in the Zoning by-law. As he understands the facts, this project is one big lot and has not been divided into separate lots. Again, the logical way to create individual lots is through the approval of a subdivision plan, which, according to the facts, has not occurred.

Mr. Gaynor asks Mr. Hucksam about the appeal of the building permits. He asks if that would be covered under the fact that it was not appealed under the original 20-days for the special permit? Mr. Hucksam answers that since that issue was not issued in the appeal that was filed, he would like the opportunity to look further into the lapse issue before expressing his opinion.

Mr. Gaynor asks the other Board members if they have any other questions. Mr. Gaynor asks Mr. Piccirilli if he has any questions or opinions to state. Mr. Piccirilli answers that he has nothing to say, he's made his decision and would like to just let the attorneys to discuss their sides and let the Board make a determination based on what they feel fit.

Mr. Gaynor states that he'd like to give Mr. Hucksam the opportunity to review the issues Mr. Gaynor asked and would also like to hear a reply from each attorney to the areas that Mr. Hucksam brought forward to explain their feelings on whether they can waiver from the requirements of the by-laws, if they feel the special permit can do that.

Mr. Brackett responds to Mr. Gaynor. Regarding the issue of the two years, he refers to the statute in front of him. The 14th paragraph was effective until August 10, 2016. The special permit was granted on January 20, 2015. That provides the two-year. It was amended on August 10, 2016 effective, prospectively to increase it to three years. The time the special permit was granted, there was a two-year limitation. There's nothing in the three-year amendment that makes it retroactive. Mr. Brackett would like to counter the issue that the two-year issue was wiped out by the three-year amendment. He also clarifies the two cases that were cited by Mr. Brodsky. Mr. Brackett does not feel that this is a backdoor attempt to appeal the site plan approval of the special permit. This is the issue that goes to the core question – the requirement for frontage, the requirement for individual lots – that Mr. Hucksam has already addressed. Mr. Brackett has already acknowledged that the Planning Board cannot deny site plan approval. If Mr. Andrews came to him to appeal site plan approval, he would answer that the appeals of site plan approval are very limited in scope. He would have explained that Mr. Andrews would have to prove that the Board didn't have a complete application when they made their decision. However, they are not appealing site plan approval, this is not a disguised attempt to appeal the grant of the special permit by this Board. Mr. Brackett explains that they're trying to correct this process so if the development goes forward as allowed under the Zoning bylaws, it's done correctly with the proper foundation, which is subdivision approval. They certainly understand and are willing to let Mr. Brodsky and Mr. Hucksam have time to review. They are willing to give the Board time to receive the input from Land Use Counsel and any further input from Mr. Brodsky.

Mr. Brackett would like to renew his request that the Building Inspector voluntarily ask the builder to stop work on the site until the Board can address this matter. Mr. Gaynor asks the Building Inspector if there is work going on now at the site to which Mr. Piccirilli answers yes. Mr. Brackett understands that the developers have construction contracts, as he's had much experience negotiating these contracts, and he's aware of the language involved regarding interruptions and work. But the question is, during the period of time that it's going to take the Board to review it, should the work continue putting up the buildings if there's going to be any revision so the configuration of those lots meet frontage or they get a dimensional variance from the Board on a frontage requirement? In Mr. Brackett's opinion, it would make sense to halt this work before any more foundations go in.

Mr. Brodsky comments. He explains that his client presently has a valid and effective special permit which they are exercising and have the legal right to do. One of the additional amendments to 40A Sec 9 is even in the event that the special permit is granted and an appeal taken, the developer is still allowed to proceed with development at his or her own risk because the legislature and governor recognize that too many special permits were being appealed by abutters for insubstantial reasons so the statute was changed. It's a business decision if his client wants to stop work. Mr. Brodsky can't speak for the building inspector to give up his authority. Mr. Hucksam agrees with Mr. Brodsky in terms of the Mass Zoning Act that was amended a few

years ago to allow special permit holders to go forward in the face of an appeal at their own risk. But in terms of any work that requires the building permits, those are under appeal.

Mr. Gaynor asks if the work is going forward while the building permit is under appeal. Mr. Piccirilli answers yes, only a certain number, not all of them. For the buildings that have been issued, the foundations are in the ground. Mr. Piccirilli states that if they are going to be in jeopardy, they are already in jeopardy. Mr. Piccirilli confirms that “we” are not increasing the problem at this point.

Mr. Hucksam responds that in his opinion, any work under these permits that have been appealed should not continue because they’re subject to appeal. Mr. Brodsky responds “only if the appeal is decided against the applicant.” Mr. Hucksam responds that the appeal is currently pending, so in his opinion they are not effective building permits at this point. Mr. Gaynor clarifies “if they are under appeal.” Mr. Gaynor asks the Board their feelings.

Mr. Joy questions that if the building permits are under appeal, should they not be doing work? Mr. Hucksam answers no they should not, with the building permits under appeal. Mr. Nessralla asks Mr. Hucksam if the Board has the authority to cease and desist? Mr. Brodsky responds that if the Board is going to decide that there is validity to these arguments and grants their request for relief, then their building permits are ineffective and they can’t do anything further. He can’t speak to the Case Law on the effectiveness on a building permit under appeal, which he’d like to look at, but he can speak about the effectiveness of a Zoning permit under appeal as that is governed by statute. This Board hasn’t rendered a decision one way or another but Mr. Brodsky and his clients feel that this appeal is deficient and shouldn’t even be entertained.

Mr. Brackett understands the Board hasn’t rendered a decision and doesn’t have the authority to suspend. He feels that this responsibility lies with the Building Inspector. He supervises building permits. Mr. Brackett is aware that if builders get a building permit, if they are concerned by any neighborhood concerns they wait 30 days. If there is no appeal, they begin construction. Mr. Brackett agrees that with a special permit a party can proceed at risk if the special permit is under appeal. They don’t have an appeal with the special permit. They do have an appeal within the 30 days of the building permit. He doesn’t understand Mr. Brodsky’s question about the procedural irregularities of their appeal. They were filed within a timely fashion: 30 days within the building permits, 30 days within the denial of enforcement request. Mr. Brackett believes the building inspector has the authority. Mr. Brackett doesn’t believe the Board can order the building inspector because they haven’t reached a decision. When the Board does render a decision and grants their appeal, overturn the building inspector’s denial of enforcement, overturn the issuance of building permits because there are no separate lots and no proper frontage than yes, the Board could reverse the issuance of the building permits and the building would have to come to a halt. Mr. Brackett makes a final point. He thinks the discretion is with the building inspector to render a decision on the status of the building permits and if building is at risk under the permits, that is not protected under the special permit statute.

Mr. Gaynor asks if there are any questions or comments. He thinks it boils down to the Board deciding on allowing the proper time for all parties/representatives to do the research necessary and to decide, as a Board, if they have the authority and the right to issue a cease and desist or to allow the builder to continue at their own risk knowing that the appeal is in effect which could nullify the building permit. Mr. Hucksam responds that on the special permit, there is no question about proceeding at your own risk but the special permit has not been appealed. As for the building permits, in his opinion, the validity of the building permits is the issue now. Mr. Hucksam doesn’t think they have the authority to go forward under the building permits now because they are subject to appeal. He doesn’t know of a provision that says that you can proceed under your own risk under a building permit that is under appeal until a decision has been made by this Board. The

permits subject to this appeal are A and D. Mr. Brodsky comments that his understanding is that the town does things a little differently. The town issues a foundation permit to allow a foundation to be put in while the building permits continue to be processed. Mr. Piccirilli states that he has the ability to issue a foundation permit, it's not through the town, it's through a state code, which was done.

Mr. Gaynor asks Mr. Johnson what phase of construction they are in and what would he be proceeding with next. Mr. Johnson answers that the first building has first and second floors framed, the foundation is in, the septic is installed, the concrete floors and garages have been floored for Lot A. The foundation has been poured as well as the as-builts and he was given the building permits. It has been backfilled, the septic tanks have been installed and the leaching field is under construction. Mr. Gaynor confirms that May 16, 2017 was when the building permit was issued. Mr. Joy asks, if the building permit is under appeal, is there a law to go by for the Board to cease building? Mr. Hucksam answers that, in his opinion, the permit is not valid as it is subject to this appeal. Mr. Nessralla comments that this is a big undertaking for the owner of this property. It's been five years and in those years he questions that nobody caught this mistake. The owner has already been issued the building permits and has spent a lot of money on this project. To stop it and tell him he can't continue...maybe it's a technicality. Mr. Nessralla would not put a cease and desist on it.

Mr. Brodsky comments that he can understand if his clients were building something different from the approved plans, he could see the Board and Building Inspector acting to stop the development. However, they're building exactly what has been permitted. The abutter is questioning the underlying permits. The issue of frontage has been discussed two to four years ago, it's not a new issue. That's the whole problem of this process to use enforcement and appeals mechanisms to get at these underlying issues that were resolved years ago. That's why he's suggesting it's not appropriate to have his clients stop building.

Mr. Brackett speaks in response to Mr. Brodsky. Mr. Andrews has raised these issues in the past. The question of variance relief and frontage was addressed before the Planning Board at the time of site plan review but the Planning Board was limited in terms of its scope. The Planning Board told the applicant to have each drawing on a separate lot, the lots must have the required frontage. In response to Mr. Brodsky's statement that his clients are building according to the plan approved, Mr. Brackett states that the plan approved doesn't have legal frontage under the Zoning by-law and they're not on individual lots, which Land Counsel has advised on this issue. There's one lot making up the three lots shown on the assessor's plan. This is an illusory attempt on the part of the property owner's attorney who is suggesting that these appeals are frivolous. If they were, Mr. Brackett tells the Board he wouldn't be here representing Mr. Andrews now. Instead, he would have told him up front that he had no basis for these issues and saved him the time. However, Mr. Brackett feels these appeals are not frivolous as they are based on the record, which he has reviewed. Mr. Brackett feels that these past meeting records/minutes do not reflect Mr. Brodsky's statement that these issues have been addressed and resolved.

Mr. Gaynor feels there are two issues that the Board should address at this time. First, he entertains a motion to continue the hearing until August 14, 2017. At this time, all three representatives can submit their opinions and proposals to resolve the situation. Second, Mr. Gaynor feels that the Board needs to make a decision, and he would accept a motion, whether or not to suspend any further construction on the site or allow the building permits issued and the work that is acceptable under the permits to continue on the property until the Board's decision at the next meeting.

Once again, there is a short discussion on whether the Board can allow the owner to continue construction at their own risk or they need to put a cease and desist. Mr. Hucksam states that the building permits are under appeal. In his opinion, he feels the building permits are not valid to proceed construction.

Motion to continue this hearing for Petitions #868 and #869 until August 14, 2017 at 7:15p.m:

MOTION: Kozhaya Nessralla

SECOND: Robert Durgin

Passes: 5-0-0

Mr. Borsari asks if there are any plans to subdivide these lots. Mr. Brodsky responds that they need to reevaluate what's been said at this hearing. He doesn't feel they are in any position to comment on what should be done in the future. Mr. Borsari explains that his problem is that with everything Mr. Brodsky's clients were given permission for, they weren't under the condition of compliance with zoning bylaws. He would feel better about moving forward if the Board had an answer of subdivision control approval. Mr. Brodsky responds that there were no conditions in the special permit and therefore his clients have not violated any conditions. Mr. Brodsky cannot answer the question of subdivision approval being necessary as he needs to digest all of this information and speak with Town Counsel to get a better understanding of his reasoning. Mr. Hucksam responds with his observation. The approved plan, as he understands it, and the plan that he looked at on the registry website both show what looks like a subdivision roadway with a name and "Lot." There has been no subdivision approval, which, in his experience, is unusual. Mr. Brodsky responds that there is also a plan recorded that shows the property divided into phases, which correspond with the lots. Mr. Brodsky agrees that there is confusion with the plans of record and would be happy to show the Board. Mr. Borsari asks about the phases. Mr. Brodsky answers this is going to be one condominium, owned by a condominium association which represented the land owned as common area and individual units. It was phased, he believes, for purposes of bank financing for construction, which is typical and is why it's seen in the title "Master Deed," as this will be how it's structured for ownership purposes. Mr. Borsari asks why it shows as individual lots. Mr. Brodsky answers that at one point there was a request made to Webby Engineering to label the plan to show lots to make sure there is sufficient area for each of the buildings. Mr. Gaynor confirms with Mr. Piccirilli that the building permits were specific to lots A and D as indicated on the site plan.

Mr. Gaynor asks, and the Board agrees, that all attorneys submit to the Board their views and opinions on compliance prior to August's hearing.

Motion to allow building permits to remain in effect with construction to the site of Lots A and D at the builder's risk:

MOTION: Kozhaya Nessralla

SECOND: Robert Durgin

VOICE: Yes - Kozhaya Nessralla, Robert Durgin, Gerald Joy, Daniel Borsari;

No - Robert Gaynor.

Passes: 4-1-0

Regular meeting resumes.

Discussion

Petition #744 – Jennifer Choate – 7 Plymouth Street, Halifax

Present: Richard Hucksam, Town Counsel; Kimberly Roy, Selectman

Mr. Gaynor reads into record an email from Ms. Choate to the Zoning Board requesting a continuation as her property is up for sale and she is in litigation. The Zoning Board secretary explains that there is a question on whether Ms. Choate's special permit is in effect. Mr. Hucksam advises the Board to take no action before consulting with Attorney Salant, who is handling the pending litigation regarding the special permit. She may

want to meet in executive session since its pending litigation. Something the Board does could have effect on litigation.

Motion to continue discussion on Petition #744 until litigation has been resolved:

MOTION: Gerald Joy
SECOND: Daniel Borsari AIF
Passes: 5-0-0

Ms. Roy respectfully requests to be notified of any meeting with Attorney Salant. The Selectman's office received another complaint of excessive dog barking from abutter Scott Clawson. Ms. Roy visited and verified the barking early in the morning with another neighbor. Mr. Gaynor asks about the Animal Control Officer, Noreen, having problems getting onto the property for an inspection. Ms. Roy explains that an appointment is not necessary to do an inspection as it is a spot inspection. However, Ms. Roy informs the Board that the gate has been locked when Noreen, on several occasions, attempted to visit the property. Noreen also hasn't been able to reach Ms. Choate as her voicemail has been full. Ms. Roy informs the Board that there will be a Selectman hearing in two weeks regarding this issue. Mr. Nessralla asks Ms. Roy about Ms. Choate's property being on the market and being sold. No one is certain of the property's sale. Ms. Roy explains that the Town needs to proceed as if the property has not been sold. Mr. Gaynor asks Mr. Hucksam if the Board can ask Ms. Choate the status of the sale. Mr. Hucksam answers that the Board can, and notes that the litigation does not affect the licensing, they are separate. The appeal does not relate to the licensing at all. Mr. Nessralla asks if Ms. Choate has 25 dogs or more to which Ms. Roy can't answer, as she can't get on to the property. However, from what she can hear from the driveway, she is assuming there aren't as many dogs as last year.

Mr. Gaynor and the Board decide to send a letter to applicant Ms. Choate (in response to her May 31, 2017 email) to advise, per her request, that her hearing will be continued until litigation is resolved with the Town and other parties. Until this time, the Board requests that Ms. Choate inform the Board regarding the final sale and disposition of the property.

Adjourn:

Motion to adjourn meeting.

MOTION: Robert Durgin
SECOND: Gerald Joy AIF

It was unanimously voted to adjourn the meeting at 8:54 p.m.

Respectfully submitted,

Robert Gaynor
Chairman, Zoning Board of Appeals