



Halifax Zoning Board of Appeals

Meeting Minutes

Thursday, February 20, 2020

The Halifax Zoning Board of Appeals held a public hearing on Thursday, February 20, 2020 in the Selectmen's Meeting Room of the Halifax Town Hall with five (5) Board members in attendance: Chairman Robert Gaynor, Vice Chairman Kozhaya Nessralla, Member Gerald Joy, Member Robert Durgin and Alternate Member Daniel Borsari. Clerk Peter Parcellin is absent.

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

7:00pm – Petition #915 – The Party Trust – Amanda's Estates, Modification to Special Permit (continued)

Land Use Counsel Attorney Amy Kwezell, The Party Trust (Amanda Monti and Ed Johnson) and their Attorney Adam Brodsky; Abutter Gordon C. Andrews and his Attorney Ginny Kremer are present. Chairman Gaynor reads Public Hearing Notice into record. Brodsky presents Petition and reminds Board why the Party Trust is here by giving background on petition. The revised plan has the same number of units: 12. Lots 1 and 3 have two existing units on each of these lots. Lot 2 will have four units and Lot 4 will have four units. The density is the same, the distance between buildings meets dimensional requirements for multifamily development, septic remains the same. The modification to the special permit is to adopt the new, revised, Planning Board-approved plan. The unexpected roadblock is that it was suggested that this modification was subject to the repetitive petition requirements of Ch 40A Sec 16 where one cannot come back to the Zoning Board to request relief after denial without the Planning Board's determination of whether this is a substantial change. Brodsky disagrees with this as he believes the Party Trust's valid special permit was not denied, they are simply requesting modification to it. Brodsky presents Chapter 40A Sections 14 and 16 and Zoning Bylaw Section 167-22 handouts to Board. Brodsky has researched and found no case law that stands for the proposition that a request for a valid, existing special permit are subject to the repetitive petition requirements. Brodsky doesn't believe Kwezell's three case examples are on point with this case as they had to do with clerical errors. Brodsky points out differences in other cases compared to this. Brodsky states that if the Zoning Board decides to send the Party Trust back to the Planning Board for determination of substantial change it's fair to say that they would be unable to get unanimous consent, which is required for a determination of this kind.

Kwezell believes Brodsky has a good argument as there is very little case law on Section 16 and zero case law on Section 14. However, she feels Brodsky is misconstruing the cases she sent him which stood for the proposition that the Zoning Board can correct insubstantial, inadvertent or clerical changes without going through the Ch 40A Sec 11 process. She attributes Sec 14 that states the ZBA powers allow to modify any order or decision. This is a modification, not an inadvertent mistake or clerical error and therefore, in her opinion, Sec 16 and Bylaw would be applicable. Brodsky disagrees that the Board can only consider a modification if there is a clerical error and believes the Board has broader powers. Joe Webby presents plan approved by Planning Board on December 2, 2019 in comparison with plan presented to the Zoning Board in November 2019 to reflect changes from six lots down to four with 150 feet of frontage and 40,000 square feet of area. Brodsky states that these changes were made to conform to bylaw as member Peter Parcellin felt the frontage was necessary.

Attorney Ginny Kremer, representing abutter Gordon C. Andrews, speaks to this Petition. She states that the original plan had six lots depicted on it but there was never any intention to create any lots. She adds that Webby keeps referring to four lots, but the Party Trust has been clear that they aren't going to create any lots. She states that the word lot they're using doesn't exist. She adds that in respect to "Amanda's Way," a "Way" cannot be approved in special permit proceedings under the ZBA as a "Way" gives access to housing which can only be approved under the Selectmen (Ch 82) or Planning Board under subdivision control under Mass law. Gaynor responds that this "Way" has already been approved several times by the Planning Board and that the Board is not here now to debate on whether this is a legal way, private way or street. Kremer responds that the Zoning Bylaw requires a public way or private way, not a driveway. Kremer presents two handouts: Amanda Monti's Affidavit and the provisions of the Subdivision Control Law. Kremer states that bylaw requires each building to be constructed on an individual lot with adequate frontage on a public or private way and adds that Halifax would be the only town she's heard of that doesn't adhere to the recorded plans. Kremer states that for whatever reason, the Party Trust is refusing to undergo subdivision so that lots would be lots and the Way would be a "Way." Kwezell responds that the Planning Board already voted and none of what Kremer discussed is in front of the Zoning Board at this time.

Nessralla asks why, after all of the decisions, they are going to go backwards. Durgin asks if they can legally hear this Petition. Kwezell responds that the Board can agree with Brodsky that the repetitive petition statute Ch 40A Sec 16 and Bylaw Section 22 does not apply to modification of special permit and go forward or Board could determine they do apply to amendment or modification to special

permit and cannot go forward, the applicant will have to go back to the Planning Board which will require a unanimous vote from the Planning Board. Durgin asks why there is a new Petition number and they aren't using the same number. Kwesell responds that there is no provision in Chapter 40A or Bylaws regarding modification to special permit. Kwesell states that the Board does have the power to modify a special permit however there is ample case law that the ZBA can modify a special permit provided it's a clerical error or inadvertent mistake without going through Section 11. In Kwesell's opinion, this is a change made by the applicant, not a clerical error or mistake. There is no case law that references ZBA powers under Sec 14 or a connection between 14 and 16. Brodsky clarifies that the Town is the one who administered a new Petition number, it was not requested by The Party Trust.

Brodsky states, in response to Kremer's statements, that the Party Trust was not required to subdivide the lots by the Court. Brodsky states that you can create pursuant to a multifamily development. In response to Gaynor's question of the judge's deadlines, Brodsky states that the judge issued a final judgment with permits by March 13, 2020. Andrews filed a Notice of Appeal of the judge's final decision. Brodsky and the Party Trust filed a notice of appeal since Andrews' appeal and Brodsky recently filed a motion to extend the March deadline with a status conference with judge on February 27, 2020. Borsari confirms with Kwesell that there is no case law that says there has to be a clerical error to make a modification to a special permit; whether Sec 16 applies or not. Borsari believes that you can make revisions not just based on clerical errors but on other things as there is no case law. Kwesell states that usually a modification of special permit does not restart the clock, but if the ZBA determines there is a substantial change that would be restarting the clock.

Borsari asks abutter Andrews what he'd like to see on these plans. Andrews would like to see the Party Trust go through subdivision control process and a 30-foot buffer around the entire project as that is what the bylaw requires. Andrews and Borsari argue over the the definition of a multifamily development and what it requires in the bylaw. Andrews brings up the decision of the ZBA with respect to the Country Club and feels it set a precedent - each building on a separate lot and required creation of a subdivision. Borsari states that the bylaw says minimum lot size of 10 acres. Borsari asks, if the Party Trust succeeds in getting the four lots, will Andrews return and ask them to get the 10 acres and is Andrews picking and choosing the bylaws he wants to use? Andrews answers no and references 167-11 of the bylaw. Borsari argues that the bylaw is poorly written and is confusing. Andrews states he had no way to appeal this until the building permits were issued because that's when he had to appeal the site plan because the lots weren't there but the Party Trust could have created the lots through subdivision control.

Durgin feels this is a substantial change and would like to hear the petition - it's a modification, not a new special permit or new variance. Joy wants to call it a clarification and doesn't see a difference. Nessralla agrees. **M/Nessralla, S/Joy that under Sec 14 the Board has the power to allow them to accept the modification to the special permit under Petition #915 with a Unanimous Voice Vote of "Yes" from all five (5) members present: Nessralla, Gaynor, Durgin, Joy and Borsari.**

This vote will open up a 20-day appeal period, in Kwesell's opinion, once the decision is written and filed with the Town Clerk.

Durgin confirms with Kwesell that Amanda's Way is not a legal road, rather it is an internal drive which is not in the town's bylaws. There is further discussion of ways and roads in a subdivision. Kwesell states that the definition of Multifamily Development does not match 167-11 at all and, in her opinion, conflicts with 11. Kwesell confirms that to create a private or public way it would need to go to the Selectmen. Brodsky reminds the Board that both the Planning and Zoning Boards approved the private way and the special permit also references "private way." He doesn't feel the ZBA can go back and argue whether this is a private way as it's not an issue before the Board. Gaynor and Borsari agree that this is not in front of the Board and Borsari feels this shouldn't even be talked about. Brodsky states that the buffer zone was an issue discussed in 2014 and 2015 and the decisions were made with the buffer zones as shown on the original plan, which Andrews was aware of and states he had the ability to appeal either the special permit or site plan approval. Kremer responds that after the plans are approved the developer must take steps to conform to that plan, when the plan shows lots, the developer has to take steps to create those lots. When the plan says there is a private way, the developer must take steps to create that private way. Just because it's on the plan doesn't mean it exists. Kremer believes Brodsky has misrepresented what the judge's decision was several times. Brodsky and Kremer further argue over the interpretation of the judge's decision regarding going through subdivision control to create lots.

Durgin and Brodsky discuss 167-7 and 167-12. Brodsky states the Party Trust never proposed to create a subdivision as Amanda's Estates was never intended to be a subdivision. Andrews states that Kwesell said in the November meeting that if this is going to be on one lot, it requires 150 feet of frontage and this doesn't, it has 74 feet. Kwesell doesn't remember what she said in November. Kwesell states that she finds Judge's decision very confusing. She reads a portion of his decision. Kwesell does not read his decision as meaning Amanda's Estates requires subdivision control law, however usually subdivision does usually mean that, the decision does not say that which is why she was only reading it. Kremer states that Judge did not take 167-7 off the table. She reads from his decision regarding continuous frontage. Brodsky reminds the Board that the Planning Board has already approved the site plan twice when presented with these same issues. Andrews states that a site plan does not create a subdivision. Brodsky responds that he agrees, but they made these same arguments to the Planning Board who made the decision to approve the site plan. **M/Joy, S/Nessralla to**

accept/approve Petition #915 on the Party Trust's request that the Zoning Board of Appeals modify the 2015 special permit by deleting reference to prior plan set and adopt the 11/6/2019 Webby Plans under 167-7D2(a) with a Voice Vote of four (4) "Yes" from members Borsari, Joy, Gaynor and Nessralla and one "No" from member Durgin.

The Decision passes 4-1-0 and the Decision Form is signed by the Board.

Discussion

The Country Club Estates 40B Project for a Comprehensive Permit

Attorney Kwesell, Building Inspector Robert Piccirilli and Town Admin Charlie Seelig are present. Although there is no application in front of the Board at this time, there is anticipation of the receipt of this application soon. Kwesell explains that the Zoning Board will step into the shoes of every other permitting agency in the town so a comprehensive permit will come to the ZBA for all approvals - Conservation Commission, Board of Health, Planning Board and Zoning Board. Waivers can be sought through all Boards by the applicant. Kwesell explains that there is a tight schedule and goes over deadlines in reference to Comprehensive Permits. Kwesell goes over the process beginning with the receipt of application. Peer reviews are necessary and discussed. The hearing must be opened within 30 days of application receipt. All applications must be accepted whether complete or not for advertisement reasons. Kwesell states that often there are arguments made of 40Bs burdening the schools which is never something the Zoning Board can consider with a 40B project. Kwesell discusses examples of other 40B projects. Dates are discussed for first special meeting. **M/Borsari S/Joy for a Special Meeting in the Selectmen's Meeting Room on Wednesday, March 18, 2020 at 7:00pm to review application for Comprehensive Permit with all in favor.**

Kwesell will try to get a proposal for a peer review from Amory Engineering before the meeting.

Adjourn:

M/Joy, S/Nessralla to adjourn the meeting at 8:35pm with all in favor.

Documents:

1. Agenda – 2/20/2020
2. Public Hearing Notice – Petition #915
3. Application Packet – Petition #915
4. Chapter 40A Section 14, 16 handouts
5. Zoning Bylaw Section 167-22 handout
6. Amanda Monti's Affidavit
7. Provisions of the Subdivision Control Law
8. Decision Form – Petition #915
9. Comprehensive Permit Information Packet
- 10.

Respectfully submitted,


Robert Gaynor, Chairman
Zoning Board of Appeals

Date: 3-9-20


