Town of East Kingston, New Hampshire
Zoning Board of Adjustment Meeting Minutes

April 23, 2015
7:00 pm

Case # 15-02 Maplevale Builders, LLC with respect to property located at Woldridge Lane, East Kingston, (Tax Map 3, Block 2, Lot 3).

The Applicant appeals an administrative decision of the Building Inspector denying its proposed sewage disposal system plan. The Building Inspector found that the property failed to satisfy the conditions of RSA 674:41 and thus was not a buildable lot.

Members Attending: Chairman John Daly**,** Vice Chairman Catherine Belcher, Dave Ciardelli, Paul Falman, and Tim Allen.

Also present: Mr. David Story owner of Maplevale Builders and Mr. Story's representative Attorney Thomas MacMillan; East Kingston Building Inspector John Moreau; Ms. Julie LaBranche, Senior Planner for the Rockingham County Planning Commission; East Kingston residents Daniel O'Neill, 7 Woldridge Lane and David Hobson, 3 Woldridge Lane.

Mr. Daly opened the meeting of the East Kingston Zoning Board of Adjustment (ZBA) at 41 Depot Road (Pound School) on April 23, 2015 at 7:17 pm.

Attorney MacMillan introduced himself and explained to the Board they were appealing the Building Inspector's denial of a sewage disposal system at the applicant's property on MBL 03-02-03. He then distributed a memorandum packet in support of the applicant's appeal of the administrative decision to the Board members.

He explained the applicant had purchased the property which consists of 15.26 acres of land off of Woldridge Lane in 2012. The initial application to the Planning Board was to extend the cul-de-sac through an existing 50' right of way to create frontage and develop a 4-lot subdivision; that application was then reduced to a 3-lot subdivision application which was denied by the Planning Board in 2013. This denial was affirmed by the Superior Court and the New Hampshire Supreme Court. Mr. Story now seeks to build one single-family dwelling on the 15.26 acres and use the same right of way for access. The packet includes a copy of the subdivision plan and a copy of the applicants sewage disposal system plan which shows the access by the 50' buffer.

Mr. MacMillan explained the Building Inspector had issued a denial for the applicant's sewage disposal on March 20 (Exhibit #2) delineating 4 different measures why the approval was being denied:

1. The Woldridge Lane subdivision plan established Parcel A, a 50-foot wide right-of-way (unpaved) off the easterly end of the Woldridge Lane cul-de-sac. Note 10 says that Parcel A will be deeded to the Town.
2. The Designation of right-of-way established an access easement on the 50' ROW easement (Parcel A) to George M. Bakie.
3. A warranty deed dated April 16, 2003 conveys the ownership of Parcel A from LaNoria Development Corporation to the Town of East Kingston and established Parcel A as a public way.
4. RSA 674:41 stating "no building can be erected on any lot nor a building permit issued unless the street giving access to the lot meets the criteria for streets as defined".

The final summary statement of the Building Inspector's denial reads that "because the only access to MBL 03-02-03 currently is via a private easement or right-of-way, that access does not appear to satisfy the criteria of RSA 674:41 and thus would not be considered a buildable lot under 674:41 at this time".

The appeal was filed on March 30 and is based not only on the denial under 674:41 but is also based on 676:5 which gives the Zoning Board the authority to hear appeals of a decision by an administrator.

Mr. MacMillan reviewed from his Appeal, paragraph I, *Applicable Zoning Ordinances and State Statutes*. East Kingston Zoning Ordinance, Article IX,F provides that any non-conforming lot of record is buildable, provided it passes State standards for soil conditions, and meets current Town setbacks for structures. Furthermore, the Ordinance provides that the property is a non-conforming lot because it does not have 200 feet of contiguous frontage (Ord. Art. XI, A.1). He also directed the Board's attention to 674:41, II which grants the Zoning Board of Adjustment authority to hear the appeal.

Appeal, paragraph II, *The Administrative Decision Should be reversed and the Sewage Disposal Plan should be Approved.* A. The Applicant's access to the subject lot meets the criteria of 674:41 and B. the proposed Lot meets all Town Standards and is a Buildable Lot.

674:41, I prohibits construction of a building on a lot that does not have "access" to a class V or better highway. The NH Supreme Court has ruled that the term access is not synonymous with frontage. In the case *Belluscio v. Town of Westmoreland* the court held that access is defined as a landowner's legal right to pass from his land to a highway and return without being obstructed. In this case the court held that the plaintiff's 1100 deeded ROW provided access under the statute and reversed the ZBA's decision denying the building permit. Mr. Story believes the same situation holds in his case; his lot does have access via the ROW and satisfies the criteria of 674:41.

Mr. Story's position is this lot is a pre-existing, non-conforming lot of record and does comply with the provisions of 674:41, I. He is not looking for an exception but a reversal of the Building Inspector's determination that his lot does not comply with 674:41.

Mr. Daly asked if Mr. MacMillan could compare the language of the cited case with 641:3 which states: *"the street giving access to the lot" means a street or a way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraphs I (a), (b), (c), (d), or (e).*

Mr. MacMillan opined it all goes back to the definition of what constitutes an access and said it stated as much in the court case cited. He was not sure why the Building Inspector took the position that the 50' easement was not a public way. In Mr. MacMillan's opinion it is a public way, although it may not be maintained. The Warranty Deed from April 16, 2003 specifies Parcel A as a public way.

Mr. Story noted a parcel of property cannot be landlocked without a way to get to it. Mr. Daly stated they had heard anecdotally that the ROW was created to allow access for the landowner to his wood lot. It was never intended to be a public way or access for another reason. Mr. Story asked if that was public record.

Mrs. Belcher reviewed that the first portion of the Warranty Deed dated April 16, 2003 is a description of the front land and the last paragraph reads *"Meaning and intending to convey the premises depicted in the aforesaid plan as "Woldridge Lane" (50' ROW) and "Parcel A" with all improvements. This conveyance is made pursuant to the acceptance of the said Woldridge and by the grantee as a public way pursuant to the terms of the sub-division approval given to the grantor by the grantee's Planning Board dated May 20, 1999 and the vote of the grantee's Town Meeting on March 11, 2003. These premises are a portion of the premises conveyed to the grantor by deed of Richard L. Charlesworth et al dated July 29, 1999 and recorded in said registry at Book 3424, Page 1360."*

Mrs. Belcher asked if they had information for the subdivision approval in 1999. Mr. Falman asked if they had Plan D-27353 dated 7/15/1999. Mr. Daly noted although they did not have those documents, the Building Inspector was in attendance. He asked Mr. Moreau if the 50 ROW was accepted as a public right of way? Mr. Falman asked what he saw to come to that conclusion in #1 in his letter of denial to Maplevale Builders.

Mr. Moreau indicated he would need to review his notes. He had reviewed all the minutes for the original subdivision. Mrs. Belcher asked if there was conversation regarding the ROW in those minutes. Ms. LaBranche noted that in conversation with the Building Inspector, the wording for #1 had come from the warranty deed. Mrs. Belcher asked what the requirement for road width is in the regulations. It was noted that requirement is 50'. She had some question as to why the ROW was required to be 50' wide.

Mr. Daly reviewed that the applicant's argument was that this was a public way so therefore qualified as a buildable lot. Mr. MacMillan noted it was stated that it was a public way. Mrs. Belcher read from the definitions in the subdivision ordinances - *STREET means and includes street, avenue, boulevard, road or highway and does not mean driveway or right-of-ways*. She opined this might help understand the intent of the Town and that a right-of-way is NOT included in the definition of street.

Mr. MacMillan reviewed there was a right of access to get to a highway that dates back to 1859 for this property. When the Planning Board approved the Woldridge Lane subdivision, they did what they needed to do to make sure the right-of-way was still accessible to the landowner. Mr. MacMillan reiterated it was a pre-existing, non-conforming lot with deeded rights. His contention was the important issue is the access.

Mr. Daly opined there needed to be more than just access; it would need to fit under 674:41, a-d.

Mr. MacMillan noted Appeal, Paragraph B. - *The Proposed Lot Meets all Town Standards and is a Buildable Lot.* Article IX, F from the ordinances states - *Any non-conforming lot of record is buildable, provided it passes State standards for soil conditions, and meets current Town setbacks for structures.* This lot is a non-conforming lot of record because it does not have 200 feet of contiguous frontage and existed prior to the subdivision of the Woldridge lots in 1999. The property is comprised of 15.26 acres and the only known access is through the 50' wide ROW shown on both recorded plans D-27353 and D-24298.

Mr. MacMillan reiterated the original ROW was stated to be the "right to pass and repass from the highway over said land…" It became a public way with the second deed. The designed disposal system denied by the Building Inspector meets all the state and local siting requirements and should be approved as their contention is Mr. Story's property is a buildable lot.

Mr. Daly restated Mr. MacMillan's position was that the right of way gives Mr. Story access to the highway and therefore should qualify his property as a buildable lot. Mr. MacMillan stated the original easement stated that. The second deed calls it a public way.

Mr. Daly was still not sure the applicant had satisfied 674:41. III : *"the street giving access to the lot" means a street or a way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraphs I (a), (b), (c), (d), or (e).* Mr. Daly asked if Mr. MacMillan's position was it was a public way and not a private easement; Mr. MacMillan answered in the affirmative, but noted more importantly it was a non-conforming, pre-existing lot. Mr. Daly opined the statute would trump that.

Ms. LaBranche noted there was an error in #3 of the Building Inspector's letter. The April 16, 2003 Warranty Deed deeds over two items - the Woldridge Lane 50' ROW in its entirety and Parcel A with all improvements. It state that Woldridge Lane is the public way not the ROW.

Ms. LaBranche also noted Section VII - *General Requirements for the Subdivision of Land*, Paragraph B of the subdivision requirements states: *"The arrangement of streets in the subdivision shall provide for the continuation of the principle streets in adjoining subdivisions or for their proper projection when adjoining property is not subdivided, and shall be of a width at least as great as that of such existing connecting streets."* and Paragraph C states *"no street or highway right-of-way shall be less than 50 feet in width…"* This property was limited by the length of the cul-de-sac.

Mrs. Belcher asked if there could ever be a through road; Mrs. LaBranche noted there was a golf course on the property adjacent to Mr. Story's property and there was also a lot of wetlands, so most likely not.

Ms. LaBranche noted that originally the Town had an 800 ft. limit to cul-de-sacs and then it was changed to 1,000 ft. This applicant had originally wanted the Planning Board t to extend it further so he could fit in 3 or 4 houses from what would be a newly created extension of the cul-de-sac length and the Planning Board denied the waiver for the extension. That was why the applicant had been to the Superior Court and then the Supreme Court.

Mr. MacMillan stated that the limiting language of 674:41, III limits it to private rights-of-way. His opinion is that that is not the case here; it is a public way. He stated it cannot be dealt with it without taking into consideration that by allowing the Woldridge subdivision, where Mr. Bakie was allowed to cross over the land that became Woldridge Lane, essentially it still gave him access to his land via the right-of-way.

It is still a non-conforming lot which cannot be created as an unusable property. Mr. MacMillan opines because of the status of a non-conforming lot and the previously stated case, Mr. Story still qualifies under 676:41, I and the septic disposal system should have been allowed. If Mr. Story is not allowed to use his non-conforming, pre-existing lot, it is essentially a taking of the land. His proposed use to build one house is reasonable.

Mr. Daly stated Mr. Story had bought the property the way it was. Mr. Story answered it was a lot of record and it is not landlocked; it has access through the ROW so he feels it's a house lot.

Mr. Daly restated that the applicants' position was that it was a pre-existing, non-conforming use and therefore that makes it a buildable lot without regard to 674:41? Mr. MacMillan agreed that was Position #1.

Position #2 is that Mr. Story has access it the land based on the existing rights of way before the Woldridge subdivision was set up and after 1999, the date of approval (for the subdivision) , then by virtue of the ways shown on plans D-27353 and D-24298. Mr. Story did comply with the requirements of the statute.

Position #3 is that to not allow Mr. Story to develop this property would constitute a taking. *See Dugas v. Conway, 125 N.H. 175, 181 (1984)*. A governmental regulation can be a taking, even if the land is not physically taken, it is an arbitrary or unreasonable restriction which substantially deprives the owner of the economically viable use of his land (i.e. not allowing him to use it for a single family home).

The notation from the Supreme Court found that there was no evidence to suggest that in this case the property could not be developed as one lot thus it can make reasonable use of its land.

Mr. MacMillan noted that Mr. Story was not a farmer and had never planned on using the property to harvest wood or use it for farming. Mr. Ciardelli asked if there were ever any restrictions against developing that piece of property. Mr. MacMillan stated not that he had found. Mr. Falman asked if most of the lot was buildable; Mr. Story answered that perhaps 6 acres was wetlands. There is enough upland to satisfy the ordinances for 4 house lots.

Ms. LaBranche noted she did not understand the reasoning for deeding the ROW to the Town and not to the land owner; she opined it might have been with future development of that parcel in mind but did not know for sure.

Mr. Daly noted there were members of the public in attendance and asked if they would care to speak.
Mr. Daniel O'Neill, 7 Woldridge Lane wondered how Mr. Story could build a house on that property without the 200' of frontage the other residents had been required to have. Mr. Daly answered that was the issue before them and why they were having this public hearing. Mrs. Belcher noted Mr. Story's lot was a pre-existing, non-conforming lot and could qualify for some special exceptions. When the Woldridge Lane subdivision went in, all the lots were created to meet the ordinance standards for frontage and acreage.

David Hobson, 3 Woldridge Lane stated he would be happy with no houses on that lot, but one house would be acceptable. He would also not like to see the cul-de-sac disrupted so as the rural character would not be changed and stressed the fact it is also the emergency helo-pad for the Town.

Mrs. Belcher asked since Mr. MacMillan stated the ROW was public way, would the Town be responsible for maintaining it? Mr. Daly stated that was one of the issues the Board would need to consider.

There was discussion on the differences between the ROW deed language on the various versions and whether or not they indicated the same thing.

Mr. MacMillan noted it was not unusual for planning boards to make such a ROW available for future use in the case the property was to be developed.

Mr. Daly read a statement from one of the original minutes from 1999: *"Mr. Gage stated that the plan also reflects a road connector to abutting land owned by the Bakie estate. He expounded that an easement agreement by the fathers of the late John Bakie and the Charlesworths would need to be honored in this proposal. He stated that although the actual easement was running straight through the wetlands, a new easement would be designed to prohibited landlocking the Bakie land thus upholding the spirit of the easement agreement. He stated that the ROW would need to be released, rewritten and recorded".*

Mr. Daly opined the Board needed to fully understand the rationale by which the ROW was created. He proposed a continuance to review the cited case and allow the ZBA Board members access to all the information available on the subdivision at their disposal. Mr. MacMillan and Mr. Story agreed to a continuance. A May 14 date was agreed upon and Mrs. White will ensure the room is available and contact all parties. She will also get all the Woldridge information together for distribution to the Board.

The meeting was adjourned at 8:45 PM.

Respectfully submitted,

Barbara White

Barbara White
Recording Secretary

John Daly
Chairman