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

May 14, 2015
7:00 pm

Continuation of 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.

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 7:00 pm.

This public hearing was continued to allow the ZBA Board members access to all the information available on the subdivision at their disposal and to review the cited case.

Mr. Daly invited Attorney MacMillan to continue his presentation from last month. Mr. MacMillan stated he had reviewed the copies of the original minutes of the subdivision and noted he did not see any smoking gun. He directed the Board's attention to page 3, paragraph 4 of the minutes of October 15, 1998. He read the content to the Board. *"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 made by the fathers of the late John Bakie and the Charlesworth's 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 prohibit land-locking the Bakie land, thus upholding the spirit of the easement agreement. He state that the right-of-way would need to be released, rewritten and recorded."*

The subdivision plan at that time was going to relocate the existing easement which went back to the late 1800's and take into account that there were wetlands as well as interference with the setup they wanted for the subdivision.

Mr. MacMillan stated that the next time there was any meaningful reference in the minutes was the February 18, 1999 minutes. He directed the Board's attention to Page 3, Paragraph 7 addressing the ROW. *"Discussion then focused on the existing ROW easement leading to the Bakie property. Mr. Gage informed the Board of this ROW's history and stated that he intends for the Charlesworth heirs to designate a new ROW along the proposed road, past the cul-de-sac and into the Bakie property."* Also in the punchlist of items to be addressed by the applicant, Number 11 reads *"have Town Counsel review the easement language for the ROW."*

As best as Mr. MacMillan could tell, something was submitted in the form of a proposal with respect for the language for the relocation of the ROW. He referred the minutes of April 15, 1999 page 6 of 10, paragraph 3

which states: *"…He noted that Town Counsel has approved the fire pond easement language, but the right-of-way easement language has been changed. He stated that he has decided to deed the tag of right-of-way at the end of the cul-de-sac to the Town because not doing so might cause real estate problems in the future (see Note #10). He stated that this tag would not be paved. He went on the say that before the mylar is approved and recorded, the Charlesworth's would assign the designation of the easement to the proposed easement. Both the proposed road and right-of-way would be deeded to the Town."* Mr. MacMillan stated that Note #10 refers to a notation on the subdivision plan. Mr. MacMillan also noted that several different references had been made to the ROW, which is Parcel A shown on the plan.

Mr. MacMillan directed the Board's attention to Exhibit #5 - Designation of Right-of-Way dated June 7, 1999 from his application which is the relocation of the easement. Language from the deed of January 10, 1921 was stated and the new right-of-way now states: *"NOW THEREFORE we, as the heirs of, and / or successors in interest to, the said Harry P. Charlesworth, grantee under the Bakie deed, hereby designate and forever fix the right to pass and repass set forth in the Bakie deed as running over that portion of the aforesaid tract depicted as "Woldridge Lane" on the Woldridge Meadow Plan and that portion of Lot 3-2-10 depicted on the Woldridge Meadow plan as "50' Wide R.O.W. Easement."*

Directing the Board's attention to plan D-27353, Mr. MacMillan pointed out where the Parcel A 50' wide R.O.W. Easement was shown and Note #10 which states *"Parcel A - 50' right of way / easement to be deeded to the Town as part of roadway, but not paved."*

Mr. MacMillan stated that this points out Parcel A is part of a public roadway. He also noted that in the Warranty Deed dated April 16, 2003 the language states*: "Meaning and intending to convey the premises depicted on the aforesaid plan as "Woldridge Lane (50' R.O.W.)" and "Parcel A" with all improvements, this conveyance is made pursuant to the acceptance of the said Woldridge Lane by the grantee as a public way pursuant to the terms of the subdivision 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 the said registry at Book 3411, page 1263."*

Mr. MacMillan pointed out that was the access (to the property). Although there had been discussion if it was a public or private way, the deed states it is a public way and the recorded plan refers to it as part of the roadway. The applicant has access under the statute, as it is a public way and not a private way, part of a roadway albeit not paved.

Mr. Daly asked where does it say the Town accepts that as part of the roadway? Mr. MacMillan stated it was Condition #10 (on the plan). Referring to the minutes of the subdivision hearings, it appears that the Town Counsel at that time did not like the language of the newly-drafted right-of-way, something new was drafted and that resulted in the language for the ROW on the April 16, 2003 Warranty Deed.

The easement, whether for the benefit of the subdivider of the property or at the insistence of the Town, is part of the approved subdivision. It stated on the plan it is part of the roadway (Note #10) and is signed off by the Planning Board. Taken in conjunction with the Deed from LaNoria, he does not know how else you could see it (but as part of the roadway).

Mr. Daly does not see any indication that the Town ever acknowledged that after the fact, took dominion over it or did anything in any way to indicate that was a public way. Mr. MacMillan opined the Town did not need to do any of those things; the fact they signed off on the plan in July 15, 1999 was explicit acceptance of that - *"to be deeded to Town as part of roadway"*. And the subsequent deed to the Town of East Kingston, taken together, constitutes that that is a roadway.

It is a pre-existing parcel with only 2 owners since 1879. Refer to the Town Assessment Card, Notes Section, which states *"…logging necessary for DEV (development?), appears easy to DEV (develop?) …"* Mr. MacMillan

noted even from the tax assessor's standpoint, they took the position that this was a developable, buildable piece of property.

Also, Town Ordinances state, under Article IX - Lot Area and Yard Requirements - Paragraph f. - *"Any non-conforming lot of record is buildable, provided it passes State standards for soils conditions, and meets current Town setbacks for structures."* The (septic) engineer has introduced information that it does meet those requirements. Mr. MacMillan reviewed the applicant has a pre-existing, non-conforming lot and has access to an approved road under the statute.

Raised last month under 674:41, section III, there was an issue regarding how to get around section 3 which states: *"This section shall supersede any less stringent local ordinance, code or regulation, and no existing lot or tract of land shall be exempted from the provisions of this section except in accordance with the procedures expressly set forth in this section. For the purposes of paragraph I, "the street giving access to the lot " means a street or 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)."* In Mr. MacMillan's opinion, his applicant meets that.

They are not relying on the access for a private right-of-way; it is a public right-of-way as it has been deeded to the Town of East Kingston. Mr. MacMillan maintains it is a roadway because of the language contained in the deed and accepted by the Town. It is a street on a subdivision plan, and the applicant has direct access to that street from the lot. Therefore he does not find that 674:41, section III is applicable.

Mrs. Belcher endeavored to equate this instance to another road with a similar right-of-way (Fish Road) for a better understanding. Mr. MacMillan noted without seeing the language of that right of way, it could not be known how it would compare. Mr. MacMillan emphasized it stated clearly on the (Woldridge) plan it was a roadway, not paved. Mr. Daily interpreted Mr. MacMillan's statement to mean that the language makes it (the right-of-way) part of Woldridge Lane.

Mrs. Belcher clarified for her understanding that Mr. MacMillan was stating Parcel A was not an "extension" of Woldridge Lane and has no impact on the length of the cul-de-sac. It was approved by the Planning Board, the record was signed off, and it was recorded. Mr. MacMillan stated he did not know for sure that it wasn't an extension of Woldridge Lane. All he can go by is what the plan refers to which is part of the roadway, not paved.

Mr. Daly asked if the notes on the plan appeared anywhere in the minutes. Mr. MacMillan referred to the April 15, 1999 minutes which stated: *"...He noted that Town Counsel has approved the fire pond easement language, but the right-of-way easement language has been changed. He stated that he has decided to deed the tag of right-of-way at the end of the cul-de-sac to the Town because not doing so might cause real estate problems in the future (see Note #10)." He stated that this tag would not be paved. He went on the say that before the mylar is approved and recorded, the Charlesworth's would assign the designation of the easement to the proposed easement. Both the proposed road and right-of-way would be deeded to the Town."*

Mr. Allen asked what the requirements for a public right-of-way were. Can there be a public right-of-way to a private piece of property? The land is clearly public land as it is deeded to the Town. Mr. Daly questioned if there is anything beside the note on the plan and the ambiguous language that would show acceptance by the Town. Mrs. Belcher asked about the handwritten note on the plan copy which asked when the road was accepted by the Town and the date March 2003. Did Mrs. White know where that note came from; she did not.

Mr. MacMillan reiterated from the Warranty Deed dated April 16, 2003, page 2 - *"Meaning and intending to convey the premises depicted on the aforesaid plan as "Woldridge Land (50' R.O.W.)" and "Parcel A" with all improvements. This conveyance is made pursuant to the acceptance of the said Woldridge Lane by the grantee as a public way pursuant to the terms of the subdivision 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. " He emphasized they were not just speaking to the parcel but the entire roadway. Mr. Daly questioned what went before the voters?

Mr. Falman stated he had reviewed all the Planning Board minutes for the subdivision hearings and opined they deliberately acknowledged there was a right-of-way and so there wouldn't be any problems in the future (for access).

Mr. MacMillan reviewed from the Supreme Court Order, page 3 which reads: *"The Superior Court found that there was no evidence to suggest that in this case the petitioner's property could not be developed as one lot, thus he can make reasonable use of its land."* Mrs. Belcher opined that statement was in relation to the original development of seven lots then 4 lots; they (the Court) was not giving permission to build one house. She opined that did not apply for this appeal. Mr. MacMillan disagreed. Mr. Daly noted the Superior Court made that decision and the Supreme Court only quoted what they said. Mr. Daly agreed that addresses the issue of hardship.

Mr. MacMillan argued that one house on the property was reasonable use of the property. It not only meets the dimensional requirements for a non-conforming lot except for frontage, but it passes State standards for soil conditions, and meets current Town setbacks. It meets the standards stated in the ordinance.

Mrs. Belcher asked for clarification. Was it Mr. MacMillan's contention that the right-of-way is a public right-of-way and as such is the access to the lot that would satisfy 674:41? Mr. MacMillan stated Parcel A, according to the notation on the plan is a roadway, not paved; it's a public roadway.

Mr. Daly asked if it was plowed? Mr. Moreau answered no; it was wooded in. There are boundary markers but it is not a class 6 road. Mr. Daly remarked that there was no action taken by the Town to show they felt it was a continuation of the roadway. Mr. Ciardelli opined there was no action as there is nothing to go to at this time; there was no reason to plow. Mr. Allen stated that there was the assumption that if a house is built, then this (Parcel A) will become part of the road and the Town would plow it.

Mr. Moreau remarked that Woldridge Lane is 990' long and the limit is 1,000 feet. The Town may have accepted it as a road, but you cannot extend beyond the 1,000 ft cul-de-sac. Ms. LaBranche noted that the original developer wanted more than the 1,000 feet, but settled on the 990' length. Also, Subdivision Regulation, Section VII, Paragraph H. states: *"Where the Planning Board judges necessary, the applicant shall provide a 50' right-of-way to adjacent parcels to provide accessory for possible future connections."* When the Planning Board reviewed the original subdivision plan, the road construction and design was only for the actual paved portion of Woldridge Lane. The Planning Board honored the existing access easement that existed from the state highway to the Bakie property, as well as providing the right-of-way as per the regulations. It was never meant to be "part of the road". They used the ROW to lay an easement across the property. The Town has no responsibility to maintain the ROW (Parcel A) since there is no road there.

Mrs. Belcher opined the Town cannot create a situation whereby they would intentionally land-lock a parcel of land; that was why the ROW easement was clarified. Mr. Ciardelli noted that all through the subdivision minutes, there was intent of making sure there was access to that piece of property. Mr. Daly stated the Board should not confuse the access issue with frontage. Mr. Allen noted the access to the property has not changed since 1921.

Mrs. Belcher reasoned that the property still does not meet the frontage requirements, which to her mind would need a variance. Mr. Story remarked there was access to the property so it should be buildable as it was a non-conforming lot of record.

Ms. LaBranche quoted 641:41, III 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).* Also 674:41, I which states*:" ...(a) shall have been accepted or opened*

as, or shall otherwise have received the legal status of , a class V or better highway … or (b) corresponds in its location and lines with: (1) street shown on the official map; or (2) a street on a subdivision plat …(3) a street on a plat adopted by the Planning Board ; (4) a street located and accepted by the local legislative body…" It was never designed as a street; only platted as a right-of-way. Ms. LaBranche argued it was a right-of-way and not a road. Mr. MacMillan noted it was a street and referenced Note 10 on the plan which calls it a roadway. Based on the acceptance of that plan and the language in Note 10, his contention is that it is a road.

Mr. Allen opined to make that assumption, in order to access a house, that 50' parcel would need to be brought up to a class V road; Ms. LaBranche answered in the affirmative. Mr. MacMillan offered as an alternative, Parcel A could be deeded to Mr. Story and it would then be considered part of his 15 acre property.

Ms. LaBranche opined it was an error for it to be labeled as roadway on the plan. It is labeled on the plat as a right-of-way. If the Board had accepted it as a street, they would have gone beyond the 1,000 feet, which they did not grant a waiver for. It has no name and is not part of Woldridge Lane.

Mr. MacMillan stated it was a part of the road. The accessor even states on the property card *"…logging necessary for DEV (development?), appears easy to DEV (develop?) …"*

Mr. Daly asked if Mr. Cacciatore, Planning Board Chairman, if he had any comment. Mr. Cacciatore stated that the Planning Board considered that Parcel A was right-of-way to get into the backland for cutting wood, not for development as the road stops at 990'.

There was a question as to what the Town would need to do if this Board accepted that Parcel A was part of the roadway. Mr. MacMillan stated that should have no bearing on this appeal; Mr. Daly countered it was relevant as the Board might need to place conditions on the approval.

Mr. Daly asked again how it met 674:41. Mr. MacMillan reiterated it was a pre-existing, non-conforming lot. It is a roadway shown on a subdivision plat and described in the deed as being part of the roadway; therefore 674:41 does not apply. He said either way Mr. Story met the requirements as the property abuts a Town road that's been approved and is part of a subdivision plan.

Mr. Daly noted 674:41, I prohibits *…"construction of a building on any lot …nor shall a building permit be issued for the erection of a building that does not have "access" to a class V or better highway*". Mr. MacMillan stated that since Parcel A is part of Woldridge Lane, it meets the requirements.

Mr. MacMillan stated that the basis of this appeal is to get the septic design approved. Mr. Story will then most likely go back to the Planning Board to resolve the 50' right-of-way access to his property.

Mr. MacMillan stated that Mr. Story has a right to make a reasonable use of his property. The Supreme Court has opined there is nothing they saw that would not allow Mr. Story make use of the property as a single family residential house lot.

Mr. Daly asked for Board comments. Mr. Falman noted nothing he read made him think anything but that they (the Planning Board) were trying to make sure there would be continued access to this piece of property.

Mr. Moreau asked when the 200' frontage requirement was adopted. Mr. MacMillan said that had no bearing. The Town has accepted it as a roadway. Mr. Allen stated he still did not see how the property met 674 as it is very clear as to what could provide access.

Ms. LaBranche noted that from the minutes of the original subdivision, it was very clear that the Planning Board was adamant about staying under the allowable 1,000 feet; the Planning Board would not unknowingly extend the

length beyond the 1,000 feet. She opined the ROW was never intended to be an extension of the road. On the deed the 50' ROW and Parcel A are two separate items each within parentheses.

Mr. Daly would like specifics of what to accept to get to the requested relief in the form of written findings of fact from Mr. MacMillan. Mr. Allen would like a clearer definition of Woldridge Lane as to where the "road" ends and wondered if it might be in the construction drawings.

Mr. MacMillan asked for 5 minute recess; Mr. Daly agreed. When the hearing reconvened, Mr. MacMillan declined the finding of fact.

Mr. Daly closed the public hearing for Board deliberation.

Mr. Allen asked if he did not think the applicant met 674:41, should he even vote? Mr. Daly stated that first they would need to find if the applicant met 674:41.

The issue to conclude is: Did the Town intend and did they accept that ROW as part of the roadway.

Mrs. Belcher concluded that whether or not it was the intention of the Planning Board make an extension of Woldridge Lane or not, the evidence shows based on the map and based on the deed that was, in fact, what they did. Mr. Falman agreed and found in the meeting minutes specific discussion on the ROW and not causing real estate problems in the future, and reference to the note 10 that was added to the plan (April 15, 1999).

Finding of fact - the applicant has satisfied the Board of Adjustment that the Planning Board did accept that 50' right-of-way as part of Woldridge Lane and it is part of that roadway, duly accepted.

Mr. Daly asked for a **MOTION**:

> Mr. Falman **MOVED** that based upon reviewing the Planning Board minutes of the Woldridge Lane development deliberation in 1998 and 1999, and on the recorded warranty deed and on the recorded subdivision plan for Woldridge Meadow and the notes as stated on the approved plan, the access to Mr. Story's land meets the access from a public roadway, and by virtue of that evidence, the Board is convinced that the applicant has satisfied that the Planning Board did in fact accept the 50' right-of-way called Parcel A as an extension of Woldridge Lane, undeveloped. Mr. Ciardelli seconded.
>
> Mr. Daly - yes; Mrs. Belcher - yes; Mr. Ciardelli - yes; Mr. Falman - yes; Mr. Allen - no.
> Motion passed voted 4:1

Mr. Daly noted, having determined that, the next step is to find it is a buildable lot since in his denial the Building Inspector found it was not a buildable lot as it did not comply with 674:41 and did not have frontage.

Mr. Daly asked for a **MOTION**:

> Mrs. Belcher **MOVED** based on the board's determination that the lot in question is a pre-existing, non-conforming lot, by that virtue it meets the eligibility for development. Mr. Falman seconded.
> 5:0 / unanimous.

Mr. Daly asked for a **MOTION**:

> Mrs. Belcher **MOVED** to grant the appeal from the administrative decision on Case 15-02 to reverse the decision of the Building Inspector to approve a sewage disposal system because it is the ZBA's position the applicant has satisfied the conditions of 674:41. Mr. Ciardelli seconded. 5:0 / unanimous.

Mrs. Belcher had a question of the authority of how the ROW gets developed and who is going to do it. She opined the ZBA is not authorized to do anything about that aspect of it.

Mr. Daly offered an amendment to the **MOTION** that the appeal is granted and the applicant would need to go the Planning Board to get further clarification of the status of that roadway. Mrs. Belcher seconded. 5:0 / unanimous.

Mr. Daly closed this hearing.

Mr. MacMillan and Mr. Story thanked the Board.

The meeting was adjourned at 9:15 PM.

Respectfully submitted,

Barbara White

Barbara White
Recording Secretary

John Daly
Chairman