

**BOARD OF ZONING APPEALS
TUESDAY FEBRUARY 23, 2010**

These minutes are not verbatim

MEMBERS PRESENT: Fred Jay Meyer, (Chair), Dennis Keeler, Jonathan Berry (Associate), Willie Audet, Stan Given, Don Russell (Associate)

Members absent: Jim Thibodeau. Mr. Keeler arrived late and recused himself for the Norway application.

Both associates are voting members.
October minutes approved.
November minutes are tabled.

Applications all appear to be complete.

Administrative item:

Judi & Paul Clancy- Are requesting Conditional Use under Section 6.2 for an addition at 12 Just A Mere Rd, Parcel U01-146, zoned, "RA".

Greg Yost is representing the owners as designer and contractor. Mr. Farris verifies Mr. Yost is the contractor for them.

Mr. Yost presents the plans.

Mr. Given motions to approve the application.

Mr. Audet seconds the motion.

All in favor. Vote is unanimous.

1) Norway Savings Bank-Is Appealing a Decision of the CEO and seeking a 8.4 Variance for the front setback at 266 U.S. RT1 , Parcel U58-010-A1, zoned, "BP".

Mr. Audet states Jensen Baird is one of the partners for Michael Quinlin, a registered agent for one of his LLC's and also serves as a corporate attorney for a company Mr. Audet owns with his wife for full disclosure.

Mr. Morrill discloses he and Mr. Audet are on opposite sides of a current real-estate transaction.

The board and Alliance are ok with this and have no problem with this.

Amy Tchao is here for Bill Plouffe, she also discloses their firm has represented Norway Savings Bank for on call basis for general council and they are not working with the bank on this matter.

No one has concerns regarding this.

Mr. Nick Morrill reviews applications from a month ago. He said the board had a concern about Mr. Farris made a sufficient decision that could be appealed to the Zoning Board. Also whether or not Norway Savings bank could rely on the existing variance to construct its proposed improvements. In the interim, Mr. Clifford and myself have reviewed the ordinance and have suggested two alternatives to what we've previously

presented. The board has this copy. This will clarify our alternative to our appeal. Showing what the 80' setback would be if you measured it from the exclusive easement area and also shows a 25' setback if you considered this a backlot.

Mr. Farris said a copy of this was distributed dated Feb 18th .

Mr. Morrill said they submitted two lines of reasoning that they feel the board can reverse Mr. Farris' decision.

Mr. Meyer asked to be walked through the application.

Mr. Morrill answered option one, could they construct their proposed improvements in reliance on the variance. Mr. Morrill quotes Maine Case Law. In this case the canopy is a structure and the bank is a structure, the existing canopy can be defined a structure, he notes the variance application from 1990 as exhibit C. The purpose of the canopy was for protection from the weather. We are replacing one structure for another structure or one building for another building. Are they similar? We argue yes. The purpose is the same. The type is different. It is shelter to house the patrons of the bank.

The second argument is measuring the setback from the exclusive area may not be done.

The ordinance would allow this. Lot area, Section 2.96, describes an area of land excluding a R.O.W. of streets as defined. The street does not include a piece of land like the exclusive easement area. The town's ordinance compliments the exclusive easement like ours would be included in lot area by lease hold interest. Our exclusive easement area affords us more rights than a lease hold owner would have. We have our easement and it is not going away. We have it for all purposes. We can do what we'd like.

Section 2.100 in the ordinance describes the front lot line as the line that separates the lot from the street. The only line that meets that definition is the line that divides US RT 1 from the exclusive easement area. Otherwise we don't have a front lot line.

The 3rd argument is that if we don't have a front lot line, then this is a backlot with 4 side lines.

Mr. Morrill references a Maine Case Law that defines back lots, Falmouth's ordinance doesn't describe back lots. This lot is situated behind other lots and has no street frontage.

This describes our lot.

We have 3 practical and legal arguments to get us where we want and that is having a front setback that is 30' or less ideally 25' or less. The board may want to look at which argument sets the less precedence.

Mr. Meyer asked Mr. Farris what the town thinks of this?

Mr. Farris said that Amy Tchao is representing the town.

Mr. Meyer asked if the town has made a decision on this?

Mr. Farris said he made that determination it was in the email that was addressed at the last hearing. He said even though he recognized the canopy was a structure and a building is also a structure, both provide shelter. I would not issue a building permit to build four walls under that canopy pursuant to our ordinance.

Even though he said he believes that he could. He thought it was a canopy pursuant to the variance. It was a variance for a setback so is it a setback for the canopy or setback for the front lot line. He made a decision and wouldn't issue a building permit to build a building under that canopy.

Ms Amy Tchao states the first argument is can the applicant rely on the existing variance. The variance granted in 1990 was to erect a canopy. The argument is, are the structures

similar. What was this variance intended to look at? A canopy from a land use prospective functions differently than a building. When the variance was granted did the board intend to grant it for any structure including a building? It doesn't appear to be what the purpose of this variance was. A bank building is clearly different from a canopy. Land use, it functions differently.

The second argument, Ms. Tchao reviews the plan. The area in blue is the deeded lot lines of this lot and you want to say the setback should run from the exclusive easement area giving you 80'. Ms. Tchao reads the definition of lot. There is a deed that delineated the lot. What is also clear is the exclusive easement areas in separate fee ownership. The area we are looking at is not in one ownership or one lease hold. Then, the question of lot area. She reads the definition of lot area, its exempting area within R.O.W. of streets.

This leads you to conclude the exclusive easement area is the area from which you should measure your setback. Ms. Tchao thinks this is an open interpretation for more questions.

The fact that certain things are explicit it excluded from the lot area for purposes of figuring out your coverage for what can be developed and how much can be developed. You have to exempt these things. I am sure that issue speaks to what your front line is.

The issue of the question of what your front lot line is. Ms. Tchao reads the definitions of front lot line, section 2.100. She doesn't think there is any question of where the lot is. The front lot line is the line separating the lot from a street. It doesn't say that it is the line abutting the edge of the lot or the line that separates the lot and abuts the street. It's the line that provides a clear demarcation between the edge of the lot and the street. It doesn't mean adjacent to. The blue line on the plan, which is the front of this lot by the deed description, does separate this lot from the street. Even though it abuts an exclusive easement area that is 50' wide.

The 3rd argument is that this is a back lot, and then all of the lot sides should be considered side lot lines.

You don't have a definition of a back lot. There are ordinances that describe back lot providing they have adequate emergency access. You don't have this in the ordinance.

A better view of this would be it does have a front, rear and two side lot lines. There is an area between the street that is an exclusive easement area. I think the exclusive easement area could be a problem if the landowner could negotiate an easement from neighbors to get around setback requirements. I am assuming this easement area is for egress or access.

Mr. Meyer opens comment to the public.

Mr. Clifford said the issue is what you will measure the setback from. The ordinance defines the front line as the line separating the lot from the street. If there is a front lot it would be the line on the east side of the easement. The ordinance doesn't define back lot but the State Supreme Court has defined a back lot.

The ordinance excludes lands within the R.O.W. as defined. The definition of street in the ordinance is complex but it is not the exclusive easement. Mr. Clifford likes that this is a back lot because it fits everything the Supreme Court says about back lots.

Mr. Berry asked if we treat this as a back lot the variance request will be muted? Meaning canopies will be considered structures and anyone can build four walls under them.

Mr. Farris answered this is a concern that is a canopy a building. He said he was conflicted by saying no he couldn't issue a building permit to put four walls under this

canopy. That it appears to him that the variance was a setback variance and it was only for the canopy. Does it mean it was for the canopy or setback variance. In his mind it was a setback variance and this runs with the property. So probably he could have issued a building permit.

Mr. Berry said we don't need to go here if we decide it is a back lot. Then he asked about the timing of the emails from Mr. Farris and Mr. Plouffe. He feels the back lot is an appropriate way for the board to do this.

Mr. Audet is persuaded it is a back lot.

Mr. Given says it seems to be an easy out and it makes him leery, and thinks it could be a back lot.

Mr. Russell said he thinks this is a good point but it skirts the issue. It's a run down property and to use this arcane argument that it's a back lot may get it by legally. He said it is shirting the real issue of the run down property and to improve it is being a good neighbor. But, we want the bank there to replace the gas station and using a back lot is ducking the issue, but if that's what you have to do, he is for it.

Mr. Audet motions to grant the appeal of the decision of CEO determining the lot will be considered a back lot.

Ms. Tchao said you are going to grant the administrative appeal. You are going to overturn the CEO decision on the grounds that this is a back lot meaning you are going to apply the side setbacks lines to all 4 corners of the lot.

Mr. Audet said to let the record show Attorney Clifford talked about the Supreme Court.

Mr. Clifford said it is also in the Feb. 18th letter.

Mr. Audet included in the motion he referenced the letter from Attorney Clifford dated Feb. 18th 2010.

Mr. Meyer referenced 2 waivers to the town of Kennebunk: The Board of Zoning Appeals granted the appeal of the decision of CEO, by determining that due to the unique configuration of the lot with respect to the unusual easement over abutting property between the lot and Route 1, and the lot's location relative to adjacent streets, the lot is to be considered a "backlot" as described Twigg v. Town of Kennebunk, 662 A.2d 914, 918 (Me. 1995) (citing Bishop v. Town of Elliott 529A.2d 798 (Me. 1987)), and it is not possible to identify a front lot line as defined at Section 2.100 of the Town of Falmouth's Zoning and Site Plan Review Ordinance. Accordingly, setbacks applicable to side lot lines (i.e., side setbacks, which are 25' in this lots zoning district) are applicable to all of the lot lines.

Mr. Russell seconds the motion.

Appeal is granted. Vote is unanimous.