

DRAFT MINUTES

ZONING BOARD OF ADJUSTMENT

SEPTEMBER 14, 2011

(Please note: These are draft minutes prepared by staff from notes taken at the meeting. They have not been reviewed by the Board for accuracy, and should not be relied upon for accuracy. Reviewed, corrected, and approved minutes will be available at Town Hall and on the Town's website following the next scheduled Board meeting.)

Chairperson Larry Prelli called the meeting to order at 7:04 PM.

Roll Call: Larry Prelli (Chair), Wendy Anderson, Mike Hoffman (Vice-Chair), Dave Shagoury (Alternate), Helen Wellman, Joan Swenson

Others Present: Amy Manzelli, Charles & Doris Healey, David Nelson, John Sevee, Mike Clarke, Arthur Capello, Cathy Orlowicz, Mary McHale, Rebecca Wagner.

Chair Prelli introduced members of the Board. He asked the parties if anyone had any concerns about potential conflicts of interest on the part of any board member. There were none. He described the procedure for hearing the parties to the case and set time limits on each stage. He noted that Attorney Manzelli had submitted a letter asking for a continuance of the Public Hearing until next month and asked her to explain her rationale for the request.

Ms. Manzelli noted that not all the materials requested by the Healeys or the Town had been delivered and said that additional time was needed for that purpose. She added that she did not want to waste the time of those who were present and that she would be comfortable going forward with the public hearing if she could be assured that the board would not make its decision at this meeting, and additional information could be introduced at the next meeting.

Following brief discussion, Mike Hoffman moved to deny the request for a continuance on the basis that

- this meeting on 9/14 had been continued from the meeting of 8/12 which was properly noticed;
- considerable information had been submitted by all parties;
- there would not be 5 board members available to participate at the scheduled October 12 board meeting; and
- If the board did not make a decision at this meeting, there would be future opportunities to introduce additional information.

Helen Wellman seconded. Approved unanimously.

Chair Prelli asked Ms. Manzelli to present the Healey's case for overruling the Code Enforcement Officer and the Road Agent.

Ms. Manzelli said that her client believed that there was no legal driveway in the gravel area between Mr. Nelson's house and the Healey-Nelson property line. She said there were two major reasons for this.

The first reason is that the Healeys' did not ask for a driveway in this location when they asked the ZBA for 3 variances in 1990 in order to build out the lot in a manner that would meet their needs. She said that case law makes clear that the only buildings, structures, or other features of a lot that are protected from future changes in ordinance or regulation are those which are specifically requested and approved by a ZBA variance. The Nelson variance request in 1990 did not request a variance for the driveway in question, nor was a variance granted for that purpose. Therefore the driveway between the Nelson house and the property line was not grandfathered at the time the Town adopted its Shore Front Conservation Area Ordinance in March, 1990 which limited impervious surface to 20% of the square footage of the lot in that zone.

Secondly, Ms. Manzelli went on to point out that the Nelsons had not applied for a driveway permit at any time since that ZBA decision, and therefore no legal driveway exists.

Ms. Manzelli outlined the timeline of events as the Healeys understand it:

- October, 1990: Nelsons paved driveway with asphalt
- 1992: Town Code Enforcement Officer issues cease and desist re asphalt pavement and orders it removed
- 1992-1996: appeals and counter appeals by both the Healeys and Nelsons to the ZBA, Superior Court, and Supreme Court regarding the asphalt pavement.
- 1996: ZBA orders Nelsons to remove asphalt pavement.

Ms. Manzelli emphasized that the Healeys are not requesting the removal of the gravel area. They are only challenging the placement of Belgard Subterra pavers on the area. She argued that the court order means the Nelsons have no right to any impervious cover. Pavers, she noted can be more impervious than gravel. She then introduced John Sevee, licensed engineer, to provide additional information about so called pervious pavers.

Mr. Sevee said that pervious pavers can work on very flat surfaces if they are carefully installed and maintained. Even if maintained they eventually become clogged with silt and debris and lose their permeability. The reason they can work to some extent on flat surfaces is because the water does not run off immediately, allowing time for it to permeate to the surface below. He said he had used an inclinometer prior to the meeting and measured a 20% grade on the steepest part of the Nelson's driveway. On a slope that steep the water will run off before it

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has a chance to permeate the pavers. Mr. Sevee also noted that the manufacturer's information about the Belgard Subterra pavers says it must be designed by a licensed engineer to ensure proper functioning. He said that because the plans do not show the grading of the driveway it is not possible to know if the system will work or not.

Chair Prelli called on Mr. David Nelson to present his case. Mr. Nelson said many of the contentions made by Ms. Manzelli were not factual. Mr. Nelson said the Assistant Building Inspector had inspected the lot in 1998 and found that all terms of the correction plan established by the ZBA at the behest of the Superior Court had been met. This information was shared with the lawyers for all parties involved, and there was no objection from the Healeys.

At this point in 1998 the driveway was exactly the same configuration as it is now. Mr. Nelson said that if the Healeys had considered the gravel driveway to be illegal in 1998 they would certainly have challenged it along with all the other challenges they were making. He went on to say that it would be absurd to think that all parties involved (Healeys, their attorneys, ZBA, Town officials, etc.) had overlooked an illegal driveway that was present since the early 1990s.

Mr. Nelson said that Mr. Sevee was missing a major point in regard to the Belgard Subterra pavers. While it was true, as Mr. Sevee pointed out, that the pavers could lose a significant amount of their permeability over time, when they are newly installed they have the capacity to let 163 inches of rain pass through in a 24 hour period. Mr. Nelson calculated that even if they lost 90% of their effectiveness they would still allow more than 8 inches of rain to permeate in a 24 hour period which is more than enough to deal with the most significant New Durham storms.

Mr. Nelson said his family's interest in installing the Belgard Subterra pavers was quite simple: both his parents are quite ill, and the permeable pavers will facilitate access to the house by wheelchair.

Mr. Prelli called on town staff who were involved in the case to describe their involvement. Mr. David Allen said he had reviewed the plans prepared by the Nelsons' contractor (Mr. Sean O'Toole) and, after consulting the Town's steep slope map, had determined there was not enough steep slope disturbance to require a conditional use permit from the Planning Board. He told Mr. O'Toole that a driveway permit would be required and he should speak with the Code Enforcement Officer and the Road Agent.

Mr. Arthur Capello, Building Inspector and Code Enforcement Officer, said that he had reviewed the previous court cases very carefully and that from his reading there was no place in the court or ZBA decisions that instructs the Nelsons to remove the driveway. The town had closed the case so he believed that these cases had no bearing at all on the current application. The application went to New Hampshire DES; they considered it pervious with the note that the preparation of the ground base was the key to making it work.

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Mike Clark, the road agent, said that this was not a request for a permit to create a new driveway but was a request to resurface an existing driveway. During the court proceedings both parties referred to the gravel as a driveway. Mr. Clark has been a member of the new Durham highway department for about 20 years and he remembers the driveway being there from the beginning of his service with the road department.

Chair Prelli said that it was now time for board members to have an opportunity to ask questions of the parties. Joan Swenson asked if any surface remains completely pervious over time. Isn't it true that any surface pounded down by continued use will become more impervious? If the gravel stones were left as is would they become more impervious over time? John Sevee responded that she was correct that the surface will become more impervious from the effects of parking vehicles on it. This would also be true of other materials brought in to place on the driveway and it would certainly be true with the proposed pavers.

Mr. Sevee noted that the advantage of gravel is that on a 20% slope it will slow down the runoff more than the pavers will and would therefore provide more opportunity for water to permeate to the soil below. Over the long term the results would be about the same for both gravel and the permeable pavers.

Mike Hoffman asked Mr. Nelson how the disputed area had been used. Mr. Nelson said that it had been used for parking campers, used as a driveway, and used as a ramp for getting boats to the Lake.

Mr. Hoffman asked Ms. Manzelli if the area had been used as a driveway why had the Healeys never made a request to the town to remove the driveway.

Ms. Manzelli said that the Healeys were here at this time to contest the current decisions of the road agent and the code enforcement officer. She added that after the court battles of the 1990s the parties were quite fatigued. In addition, the Healeys had no reason to understand the implications of having gravel on the driveway, and in particular had no reason to understand that gravel would become compacted and impermeable surface. The fact that they did not challenge the gravel driveway does not affect the validity of their challenge to the current proposed permit.

Mr. Hoffman asked Mr. Capello why he had not requested a more in-depth study or more detailed plans prepared by an engineer, given that the manufacturer's instructions emphasize the need for an engineer to be involved. Mr. Capello responded that it was not the town's practice to involve engineers in the planning of the driveway.

Larry Prelli noted that approximately 33% of the lot is currently impervious. Given this fact, he asked why it did not occur to anyone that a variance might be needed in order to install additional impervious surface in the form of this driveway. Mr. Capello responded that he did think about the potential need for a variance. However in his opinion the permeable pavers will be an improvement over the existing gravel driveway. They will make the situation better

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and therefore reduce the amount of impervious surface on the entire lot. For this reason he did not think a variance would be needed

Wendy Anderson asked if the proposed permeable pavers would be more or less permeable than the existing driveway. She also asked if there were specific types of maintenance that would be required to keep the pavers functioning as a permeable surface. Mr. Capello noted that the Zoning Board had the authority to place conditions on its decision, so if it believed it should uphold the decision of the code enforcement officer and the road agent to approve the driveway permit, the ZBA could add conditions related to installation and maintenance.

Joan Swenson noted that a variance requires some sort of hardship and she asked if there was a hardship in this situation that made the pavers more appropriate than the existing gravel.

Chair Prelli then opened the issue for members of the public to comment or ask questions. Doris Healey said that the reason they had not challenged the gravel driveway was that in fact it was very rarely use and so they did not see it as a problem. Chair Prelli said this was a time for comments and questions from members of the public not the parties to the case.

Mr. Prelli invited Amy Manzelli to make her closing arguments and comments. Ms. Manzelli started by pointing out that they Healeys have a continuing right to know request in place and she believes that the town has not supplied the Healeys with all of the materials that they have made available to the Zoning Board. She mentioned the e-mails from Appledore engineering as an example. David Allen stated that he had sent a copy of the Appledore e-mails to Ms. Manzelli.

Ms. Manzelli he noted that there had been considerable comments about gravel being defined at one point as a permeable surface and more recently the definition changed to define it as an impermeable surface. She said that in fact it never was defined as permeable and it's only in the last few years that it has been defined as impermeable.

Ms. Manzelli asked Mr. Sevee to go into additional detail about his experience with this type of civil engineering and specifically his experience with permeable pavers. Mr. Sevee said that he had been working with permeable pavers for 35 years and that he had experience designing them into projects throughout the country. He added that he had also worked on many projects in which permeable pavers were not appropriate.

Ms. Manzelli returned to the issue of whether the existing gravel area was grandfathered as a driveway. She referred to RSA 674:39:1 which states that grandfathering is not allowed when the regulation is for the purposes of public safety or health protection and gives the example of water quality protection as a public health issue.

Ms. Manzelli asked Mr. Sevee how frequently the Belgard pavers failed to work. Mr. Sevee responded that 90% of the time they eventually do not work. Ms. Manzelli also said that the lot plan introduced by Mr. Nelson which shows a plan for a paved driveway between the Nelson

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house and the property line is very suspect. it is dated 1988 but the first time the Healeys saw this plan was on October 20, 1992 when it was introduced to the ZBA and time stamped by the town.

Arthur Capello summarized his perspective on the case. He pointed again to the fact that the Superior Court in its decision had referred to the gravel area as a driveway and that in his mind that meant that it was an existing driveway already present. Because it was existing it would not need a variance unless the requested modification or repaving would make it more impermeable. Based on his research he sees the Belgard Subterra pavers as a very different product from the Turfstone that the court had ordered removed many years ago

Chairman Prelli said that it was now time for the Zoning Board to deliberate on the issue. He asked board members if they were ready to make a decision or if they felt the need for input from town counsel before making a decision. Mike Hoffman said that he personally would very much like to have the input of the town's attorney.

Mr. Prelli said that he personally would have some problem with looking at this application for a variance because there is already a significant amount of impervious surface on the lot and because he understands from the Healeys' engineer that the slope of the lot will make the Belgrade pavers less pervious

Other board members agreed that it would be important to have an opportunity to discuss the legal questions involved with the town's attorney. Wendy Anderson added that she would also like to have the opportunity to discuss the technical issues with the town's engineer.

The board decided to schedule a site walk at the Nelson property at 6 PM on Monday, October 3. They also scheduled the next meeting of the board for Wednesday, October 19, a week later than their standard schedule. This change in schedule will make it possible to have a five-member board for the final discussion and the decision.

Helen Wellman moved to adjourn at 10:09 PM. Wendy Anderson second. Approved unanimously.

Respectfully submitted,

David Allen
Land Use Administrative Assistant

The meeting was adjourned at 9:55 PM.

Respectfully submitted,

David Allen
Land Use Administrative Assistant

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