

MINUTES
NEW DURHAM ZONING BOARD OF ADJUSTMENT
10 APRIL 2013

Chairperson Larry Prelli called the meeting to order at 7:05 pm.

Roll Call: Larry Prelli (Chair), Wendy Anderson (Vice-Chair), Joan Swenson, Mike Hoffman, Cecil Williams (alternate); recording secretary Amy Smith.

Others Present: Atty. Arthur Hoover, Paul & Lynn Straight, Paul Perry, Brad Hunter, Town Administrator Jeremy Bourgeois, Town Attorney Justin Richardson, Zoning Board alternate Dave Shagoury, David Bickford (arrived at 8:00 pm).

PUBLIC HEARING : CASE 2013-1 – The application for Appeals to an Administrative Decision submitted by Atty. Arthur Hoover on behalf of Paul & Lynn Straight for property at 9 Country Lane (Map 238 Lot 30). Chair Prelli read the public hearing notice and explained the public hearing process to the audience. Atty. Hoover requested that the Board take up **Case 2013-3**, the request for two variances, before they hear **Case 2013-1**. **Chair Prelli made a motion to reverse the order on the agenda and hear Case 2013-3 before 2013-1. Mr. Hoffman seconded the motion. The motion was unanimously approved.**

PUBLIC HEARING : CASE 2013-3 – The application for variances from Article IV Section B-6-1 and Article IV Section B-8 submitted by Atty. Arthur Hoover on behalf of Paul & Lynn Straight for property at 9 Country Lane (Map 238 Lot 30). Chair Prelli read the public hearing notice. Atty. Hoover stated he would not review the facts 4 times for the 4 different issues before the Board but only once. Atty. Hoover stated Country Lane is a Class V Road ending in a cul-de-sac in the residential/recreational/agricultural zone. The Straights access their property via a right of way that is 50 feet wide and 50 feet – 100 feet long that crosses over Mr. Perry's property. Atty. Hoover gave the Board a history of the lot stating it was created by the George Miller subdivision, as shown on the plan dated June 1981, prepared by Donald Poppema and approved by the Planning Board on December 19, 1983. Atty. Hoover stated that on this plan there is a note in the left hand corner stating the lot in question is designated as a woodlot. Atty. Hoover stated he would agree with Atty. Richardson's opinion that actual notice was given as the note is on this plan and this plan is referred to in the Straight's deed. Atty. Hoover continued to state that Mr. Miller subdivided his land again in June 1984 and this plan does not show the Straight's lot as being a woodlot. The property was subdivided again in 1984. The plan prepared by Robert Colbath dated October 30, 1984 and approved by the Planning Board on December 3, 1984 shows Lot 3 clearly marked as a woodlot but does not show that the Straight's lot is a woodlot. The property was subdivided once again in 1985. The plan prepared by Robert Colbath dated

June 14, 1985 and approved by the Planning Board on July 1, 1985 shows a 'Parcel A' clearly marked as a woodlot but again does not show the woodlot designation on the Straight's lot though the original plan creating it is referenced.

Atty. Hoover informed the Board that he went into the Town Offices and asked for a list of woodlots. Atty. Hoover stated he was given a document that had 39 properties listed on it and the Straight's property is not on the woodlot list. Atty. Hoover stated he randomly picked 3 lots on the list and looked at their corresponding plans and found all 3 to be clearly marked as woodlots on the plans. Atty. Hoover also noted that the Town has treated the lot as a buildable lot for tax purposes and not as a woodlot. Atty. Hoover then referred to the Straight's deed from Norman & Maria Sarette and the deed from George Miller to the Sarettes which stated 'only single family dwellings' could be erected on the lots.

Atty. Hoover informed the Board that the Straights needed a Shoreland Protection Permit and contracted Norway Plains to prepare it. Atty. Hoover showed copies of certified mail receipts showing the Town and all abutters were noticed of the project. Also the Straights received a State septic approval which the Town was also notified of and at no point did anyone from the Town or did any of the abutters inform the Straights of the woodlot designation. Atty. Hoover stated the Straights applied for and received a building permit in August 2012, paying a building permit fee of \$2,515.00 and an Impact Fee of \$7,265.82. Atty. Hoover noted the Straights have invested close to \$460,000.00 in this project and when the project was 1/3 to 1/2 complete they were told to stop construction. Atty. Hoover stated the Code Enforcement Office visited the site on 5 occasions and never indicated to the Straights that there was a problem. Atty. Hoover also stated that the Code Enforcement Office was contacted by Mr. Perry in September or October but took no action until December. Atty. Hoover stated he feels that his clients did their due diligence. Atty. Hoover pointed out that the lot was advertised as a buildable lot, the sales disclosure did not mention anything about a woodlot designation, the title insurance company, buyer's broker, deeds, and the Town's assessment all indicated that the Straight's lot was a buildable lot.

Atty. Hoover wanted to state for the record that he was grateful that Mr. Perry acknowledged that the Straights themselves did nothing wrong.

Atty. Hoover reviewed the letter dated 5 April 2013, drafted by Atty. Richardson, which consisted of questions and responses from the Code Enforcement Officer as he could not be at tonight's meeting. Atty. Hoover next reviewed the 5 criteria necessary in granting a variance and went over his responses on the applications explaining how he felt his clients have met the criteria. Atty. Hoover pointed out that the woodlot ordinance is an ordinance and the ZBA has the power to grant a variance to it. Atty. Hoover stated the Straights are willing to stipulate that the property cannot be further divided and will always remain as one house lot as a condition of variance approval.

Atty. Hoover next discussed the Administrative Appeal application **2013-1**. Atty. Hoover stated that he is not contesting that the lot in question is a woodlot just that the designation was hard to find and the Town did not treat the lot as a woodlot. Atty. Hoover reviewed RSA 674:41 and stated the house is related to a right of way which is essentially a driveway from the Town Road. Atty. Hoover noted emergency vehicles could access the property. Atty. Hoover also stated that

he does not believe the Peters vs. Town of Nottingham case which Mr. Perry cited in his packet of information applies to this case.

Chair Prelli asked how Atty. Hoover received the woodlots listing. Atty. Hoover stated he got it from Laura Zuzgo, Clerk, in the Town Office. Mr. Hoffman questioned the access to the property. Atty. Hoover stated the deed shows the 50' wide right-of-way and noted this runs with the land and cannot be taken away. Ms. Swenson asked for clarification on the woodlot designations on the various subdivision plans. Atty. Hoover stated 5 lots were created as a result of 4 different subdivisions. Three of the lots were woodlots. Two of the three are clearly marked as woodlots with the designation stamped right on the lot itself. The Straight's lot only indicates that it is a woodlot from a side note on the left hand side of the first subdivision plan. The woodlot designation is not stamped on the lot itself nor is the lot referred to as a woodlot on any of the subsequent plans. Atty. Hoover reviewed a list of missed opportunities where the Straight's woodlot designation could have been caught but wasn't.

Atty. Richardson asked about a seller's disclosure statement, a title report, and title insurance. Mr. Straight stated he did have title insurance but was told that covered the title itself and not use of the property. Mr. Straight stated he did not remember seeing any type of report only an insurance policy. Atty. Richardson asked Mr. Straight if he would provide the closing package information. Mr. Straight stated he would. Atty. Richardson asked when he was notified of the woodlot designation. Mr. Straight stated 3 days before Christmas, he received a letter from the New Durham Code Enforcement Officer. Atty. Richardson asked how long the right of way is. Mr. Perry stated about 75' long.

Mr. Perry stepped forward and asked the Board if they had copies of the materials he submitted. Board members stated they did. Mr. Perry gave the Board a history of the property and reviewed a property tax timeline from before the Straights bought the property. Based on the property tax timeline, Mr. Perry stated he believes the property was being taxed as a woodlot and then for some reason the property tax doubled and the value of the property quadrupled. Mr. Perry noted around this time is when the property went up for sale. Mr. Perry stated to the best of his knowledge Mr. & Mrs. Straight have done nothing wrong but as Atty. Hoover pointed out a multitude of mistakes had been made. Mr. Perry stated the Code Enforcement Officer could have done a better job but before it even got to him many people made mistakes along the way. Mr. Perry stated he believes these people need to be held accountable and thinks the Straights should be able to recover their money. Mr. Perry stated he has 3 main points, the Straights did nothing wrong, the Town could have done a better job, and the people who didn't do their job properly should be held accountable. Mr. Perry stated he also is concerned that a precedent would be set if the variance is granted. Mr. Perry stated he would like to see the parties that did not do their job properly pay the price and the Straights should be reimbursed.

Atty. Richardson stated the Board has heard Atty. Hoover's presentation and questioned how the failure to recognize the lot as a woodlot is different than any other owner who does something because they say they didn't know of a regulation. Atty. Hoover stated variances are heard on a case by case basis. Mr. Hoffman stated he agreed with Atty. Hoover and stated every case is unique and does not set a precedent.

Mr. Perry stated the Straights hired professionals and would expect them to do their job. Mr. Perry did point out that even if there was no knowledge of the woodlot designation it would have been known that the property had no road frontage. Mr. Perry stated that whoever signs the building permit application is acknowledging that the property is in compliance with the Town's regulations. Ms. Swenson asked Mr. Perry why, if he received the Shoreland Permit notification in April did he not file a complaint with the Code Enforcement Officer until October. Mr. Perry stated at first he thought the permit was for a boat dock because he knew the lot was not a buildable lot. Chair Prelli asked how Mr. Perry knew the lot was not buildable. Mr. Perry stated he knew because he was told by George Miller. Chair Prelli asked when. Mr. Perry stated sometime in the 1980's. Mr. Perry stated once he realized it was a house that was being built it took him a little bit of time to figure out how to do the research to show the woodlot designation. Mr. Perry noted that once he knew the procedure of how to go about getting the information, he was able to find the woodlot designation pretty quickly.

Mr. Hoffman stated that since Mr. Perry has stated several times that he believes the Straights have done nothing wrong and that he is interested in the rule of law. Mr. Hoffman asked Mr. Perry if he believed substantial justice would be done if the ZBA denies the variances for Mr. & Mrs. Straight. Mr. Perry stated there are two paths the Board could go down, one would be to hold the people who didn't do their jobs accountable, including the people who sold the Straights the property, or the second path would be to grant the variance as proposed. Mr. Hoffman asked Mr. Perry again if he believed substantial justice would be done if the ZBA denies the variances for Mr. & Mrs. Straight. Mr. Perry stated he needed a minute to think about it. Mr. Perry then stated he really believes the people who did not do their jobs should be held accountable, however, he would not be opposed to the ZBA's judgment if they decide to grant the variances.

Chair Prelli asked if there were any other abutters who wished to speak. There were none. Chair Prelli asked if there were any public officials who wished to speak. There were none. Chair Prelli asked if there were any members of the public who wished to speak. David Bickford stepped forward and stated in his opinion the lot is either a woodlot or it is not a woodlot. Mr. Bickford also noted that he owns a woodlot. Atty. Hoover stated he acknowledges that the lot is a woodlot and is seeking relief from the woodlot designation.

At 8:45 pm Chair Prelli closed the public hearing portion of the meeting.

Chair Prelli made a motion to grant a variance to Article IV B 6 1 to allow the building of a single family residence on 9 Country Lane (Map 238 Lot 30), a lot that has 50 feet of frontage on a right-of-way and not the required 400 feet of frontage on a Town road. Mr. Williams seconded the motion.

Chair Prelli stated that Mr. Perry framed the issue very well. The lot is a woodlot but for a substantial amount of time it was not treated as a woodlot. The Straights turned to experts and though they paid the fees the experts they hired failed them. Chair Prelli stated that he believed a case with this series of errors is pretty rare. Mr. Hoffman pointed out that even if an applicant is aware of the requirements, they can still apply to the ZBA for relief from the ordinance through a variance. Mr. Hoffman reviewed the Preamble of the Zoning Ordinance and believes by agreeing to allow only one house on the property the Straights would meet the criteria of the Preamble and therefore be in compliance with the spirit of the ordinance.

Chair Prelli asked about any plans for further development. Mr. Straight stated he has no plans for any further development at this time, however, he does have 3 adult children and doesn't want to completely rule the possibility to build out. Mr. Straight also stated that he had spoken with Keith Fletcher of Moose Mountain Regional Greenways regarding conservation about a year ago. Mr. Straight stated due to the real estate market and tax implications he decided not do anything with conservation at that time but it is something he is still interested in. Mr. Hoffman read the Preamble of the Zoning Ordinance and stated if the Straights do not agree to the restriction of only one house then in his opinion the request would no longer meet the spirit of the ordinance. Board members agreed that the building of one house would not diminish the surrounding property values. Board members also agreed that the series of errors that occurred with this property did cause a hardship.

Chair Prelli asked Ms. Smith to repeat the motion that was made.

Chair Prelli made a motion to grant a variance to Article IV B 6 1 to allow the building of a single family residence on 9 Country Lane (Map 238 Lot 30), a lot that has 50 feet of frontage on a right-of-way and not the required 400 feet of frontage on a Town road. Mr. Williams seconded the motion. The motion was unanimously approved.

The Board next discussed the variance from Article IV Section B-8, the woodlot designation. Mr. Hoffman stated the same trail of errors and missteps apply for the woodlot designation. Mr. Hoffman stated a reasonable person would not expect so many professionals to miss this designation. Mr. Williams noted that the Straights went through the procedure for the Shoreland Permit, septic approval and building permit and no one picked up on the woodlot designation. Mr. Williams stated it was understandable that the Straights had no reason to believe that the lot was not considered buildable. Mr. Williams stated it would be an injustice to the Straights if the variance is not granted.

Ms. Swenson stated that she agrees there was a series of missteps and mistakes that were made regarding this property. Ms. Swenson further stated she felt that it is important to note that the other lots designated as woodlots in this subdivision were very clearly marked. Ms. Swenson noted that each case is heard on its own merits and reviewed individually and felt this particular case is unique.

Ms. Anderson stated a woodlot is a woodlot and no one is contesting that. Ms. Anderson stated that she would like to see the original intent of the woodlot designation complied with as much as possible and added that it was good to know about Mr. Straight's conversations with Moose Mountain Regional Greenways. Ms. Anderson also stated that it is understandable that the Straights were unaware of the woodlot designation considering how many professionals missed it. Ms. Anderson stated she felt it would be unjust to deny the variance considering the amount of money the Straights have invested in this; and she would consider this a financial hardship.

Atty. Richardson stated he did not believe the missed opportunities on the part of the Code Enforcement Officer or on the tax records are legally significant. Atty. Richardson stated the Code Enforcement Officer can certainly help people but he is under no legal obligation to do research of the property to confirm or verify a woodlot designation.

Mr. Hoffman made a motion to approve the variance from Article IV Section B 8 of the Zoning Ordinance for property owned by Paul & Lynn Straight, 9 Country Lane (Map 238 Lot 30), to allow the building of a single-family residence by giving relief from the woodlot designation contingent upon the following: 1) No further subdivision of the property. 2) Only one single-family dwelling to be built upon the property. 3) The six conditions stipulated in the deed from the Sarettes to the Straights, dated 30 July 2010 and recorded in the Strafford County Registry of Deeds Book 3851, Page 0443 must be complied with. Ms. Swenson seconded the motion. The motion was unanimously approved.

The Board next reviewed the two Appeals from an Administrative Decision. Atty. Hoover stated the first appeal no longer applies. Board members reviewed RSA 674:41.

Chair Prelli made a motion that the circumstances of this case do not require enforcement of RSA 674:41 due to practical difficulty and unnecessary hardship and the circumstances of the case do not require the building, structure or part thereof to be related to an existing or proposed street. The property in question is on a deeded right of way for a relatively short distance and no further subdivision will be allowed. Mr. Williams seconded the motion. The motion was unanimously approved.

Mr. Hoffman made a motion to authorize the Chair to prepare a written decision, in consultation with legal counsel, on the case in accordance with the Board's decision. The Board's decision will become effective on the issuance of the written decision. Ms. Swenson seconded the motion. The motion was unanimously approved.

Atty. Hoover and the Straights thanked the Board.

Board members reviewed the minutes of 13 February 2013. **Ms. Swenson made a motion to approve the minutes of 13 February 2013 as printed. Mr. Williams seconded the motion. The motion was unanimously approved. (Mr. Hoffman abstained from voting as he was not present at that meeting.)** Chair Prelli asked Ms. Smith if the letter from the Planning Board regarding the Barwells was submitted. Ms. Smith stated it was and she put it in the Barwell's file. Chair Prelli asked if she ever received the written statement from Mr. Varney stating the 'new septic system is safer'. (Page 2, first paragraph, 6th line down). Ms. Smith stated she did not. Chair Prelli asked Ms. Smith to contact Mr. Varney to obtain the statement for the file.

Board members reviewed the mail.

Election of Officers

Mr. Hoffman made a motion to retain the current Chair (Mr. Prelli) and Vice-Chair (Ms. Anderson). Mr. Williams seconded the motion. The motion was unanimously approved.

Ms. Smith noted she passed out the information packet for the next hearing scheduled for May 8, 2013.

Mr. Shagoury stated both Ms. Smith and the videographer would prefer to have the meetings located at the Town Hall if possible as it is more convenient for Ms. Smith to have access to all the files and for the videographer to not have to move all his equipment back and forth across the street. Mr. Shagoury also suggested moving the meetings back to Tuesday nights. Board members decided to discuss this at their next meeting.

Ms. Swenson questioned Ms. Smith about the e-mail she sent regarding the proposed gravel pit. Ms. Smith stated she received a phone call from a gentleman who was considering putting a gravel pit on Kings Highway. The gentleman wanted to know if he needed to go to the ZBA for a Special Exception or Variance to allow a commercial operation in a residential area prior to going to the Planning Board for the Excavation Permit. Also did he need to provide detailed drawings for the ZBA considering if he was approved he would need to provide them to the Planning Board and if the ZBA was not going to allow the commercial operation in a residential zone in the first place he didn't want to go through the expense. Board members stated that he would definitely need detailed plans and whether he went to the ZBA before or after the Planning Board was up to him. Most Board members felt it would make more sense to go before the Planning Board first to see if anything else may be required from the ZBA other than the Special Exception to allow the commercial operation in a residential zone.

At 10:30 pm Ms. Swenson made a motion to adjourn. Mr. Hoffman seconded the motion. The motion was unanimously approved.

Respectfully submitted,

Amy Smith

Recording Secretary