

## **ZONING BOARD OF APPEALS SPECIAL MEETING MINUTES**

The Brooklyn Zoning Board of Appeals held a public hearing and special meeting on Monday, July 22, 2019 at 6:30 p.m. at the Clifford B. Green Meeting Center, 69 South Main Street, Brooklyn, CT on the following:

**Present:** Dan Ross, Bruce Parsons, Bill Macnamara, Stephen Mylly and Lucien Brodeur.

**Absent:** None.

**Staff Present:** Margaret Washburn, ZEO, Rick Ives, First Selectman, Attorney Peter Alter, Audrey Cross-Lussier, Recording Secretary.

**Also Present:** Attorney Harry Heller, Aaron Kerouac, Tina Kerouac, John Valente.

**Call to Order:** The meeting was called to order at 6:34 p.m.

**Seating of Alternates:** None.

### **Public Hearing**

**Reading of Legal Notice:** Read into record by Chairman Ross.

**1. ZBA19-003 Aaron-James Puzzo Kerouac, 282 Windham Road, Map 7, Lot 22, RA Zone; Requesting variance of the Zoning Regulations, Section 3.7.1 to allow up to 5 lots to be served by a private driveway.**

Attorney Harry Heller represents the applicant. A free split was discussed by Attorney Heller. Attorney Heller entered into the record two exhibits. The first is a property survey prepared to Class A-2 Standards of the Kerouac property on Windham Road. The survey demonstrates three parcels of land. The first is 20.128-acre parcel which is a standard lot, part of an approved subdivision with 150 feet of frontage on Windham Road. The second is the 54.167-acre parcel lying adjacent westerly to the first parcel, also part of an approved subdivision. The third tract is the 14.234-acre parcel which is located remote from Windham Road and has no frontage on any Town road; this is a validly pre-existing non-conforming lot.

The second exhibit entered into the record is a plan showing the wetlands boundaries flagged by a soil scientist. There is a proposed driveway laid out by Normand Thibeault consulting engineer. The proposed driveway is 18-feet wide. It currently provides ingress and egress to two approved lots. One is the 54-acre lot owned by the Kerouac's currently accommodating two dwellings. The second lot is the Jackson property located to the west of the 54-acre lot. A variance is being

requested of the provisions of Section 3.7.1 in order to allow up to five dwelling houses on the common driveway. In order for the Commission to grant a variance two findings need to be made. The first is that the variance as requested arises out of unusual hardship or exceptional difficulty that does not pertain generally to other properties in the district. The second is that the granting of the variance is consistent with the comprehensive plan with the Town of Brooklyn and is not injurious to public health, safety or welfare. With respect to the hardship issue, Mr. Heller calls attention to the fact that the 14-acre parcel which is a legally existing, non-conforming lot, is entitled to access. Because of the proliferation of wetlands on this property, there is necessarily going to be some amount of wetlands disturbance required in order to access this lot. However, in order to minimize wetlands disturbance, it is most practical to utilize a common driveway for purposes of accessing this property and future development. The driveway that is shown on this plan as indicated in staff report from the ZEO, has been presented to and received approval from the municipal IWWC. It has not been constructed to the standards approved by the IWWC yet. Mr. Heller comments that if the Commission sees fit to grant the variance, it should be conditioned upon bringing that common driveway up to the standards by the IWWC because of public health, safety and welfare issues involved with five properties on a common driveway.

You need to have sufficient width for two vehicles to pass comfortably and for emergency vehicles to access the property. We would submit to you that an 18-foot driveway width easily accommodates this. There is a memo that is part of the record from the Fire Marshal indicating that you should ensure the driveway is of sufficient design in order to allow emergency vehicle access. Mr. Heller comments that an 18-foot width is sufficient to accommodate a car passing a fire engine with some margin of safety. There are no site line issues at the intersection of the driveway with Windham Road. There is more than adequate site line in both directions. The disturbance that is required in order to install the common driveway is consistent with the approval that was granted by municipal IWWC. Attorney Heller submits a conceptual plan. The wetlands were depicted on this plan for purposes of the construction of the common driveway. This plan better depicts the limits of the wetlands system in the vicinity of the frontage along Windham Road. You can see the wetlands system is more extensive to the east on this plan, encumbering a good portion of the frontage along Windham Road.

The hardship that is claimed by the applicant is the fact that we have a legally non-conforming lot of record the applicant is entitled to access to. This situation is not commonly occurring in the district and is unique. If the applicant is not granted some relief in order to access that lot, there is an issue of whether or not a regulatory taking has occurred. There are other situations in the Town of Brooklyn where you have allowed more than three properties on a common driveway. In looking at regulations in other municipalities, it is not uncommon that five or six houses are allowed on a common driveway which is consistent with the variance being requested from the Commission. If the driveway is improved to the specifications consistent with the wetlands application, we submit to you #1 it has been prepared by a professional engineer who has deemed the design safe and #2 that it will not present any health, welfare or safety problems. Mr. Heller believes the variance request complies with the requirements of the law and would request that the Commission vary the regulation to allow up to 5 lots to be served by this common driveway.

Mr. Parsons asked for clarification 5 houses or 5 lots. Attorney Heller commented 5 lots and demonstrates on the site plan. Attorney Heller stated there are 4 lots on the Kerouac driveway because the Jackson property is one of the current users of the road. Chairman Ross commented that 4 would be Kerouac and Jackson would be the 5<sup>th</sup>. Attorney Heller commented that is correct.

Attorney Alter asked Attorney Heller to label the lots on the plan. The site map supplied as part of the record was reviewed. The applicant is entitled to a free split of the 14-acre lot. Discussion ensued.

Chairman Ross commented that the back lot has a lot of wetlands, will IWWC allow access to that property? Attorney Heller commented they will have to submit an application to IWWC; there is no approval yet.

Mr. Macnamara questions Attorney Alter if he reads this being confiscatory if there is no access to this parcel of property, would the value of the land change and would this create the hardship?

Attorney Alter commented that there is case law that says not being able to utilize a piece of property to its maximum value is not the same as a confiscatory action by a municipality. If a lot cannot be developed for a house or houses, that does not necessarily mean that it has been taken by the municipality. It can be used for other purposes. It can be used for agriculture, grow Christmas trees, used for any number of permitted uses. It is up to the Commission to decide whether the applicant and Attorney Heller have indicated that there is no other reasonable use of that property unless you permit the variance for the driveway.

Attorney Heller comments on two case laws Horowitz and Chevron Oil. What they say is if the effect of the regulation is so pervasive as to practically destroy the value of the property, that in and of itself is sufficient to constitute hardship. Determination of hardship does not have to be confiscatory. Confiscation is a subset and if you have confiscation in and of itself you meet the hardship requirement. The hardship test itself is whether or not the effect of the regulation on the property results in exceptional difficulty or unusual hardship that does not apply in general to property in the district. Confiscation is one category of that test, it is not the only test to satisfy that requirement. With respect to confiscation the case law cited Horowitz and Chevron Oil, it is a matter of degree, and Attorney Alter is correct that is a question of fact it has to be determined by the Commission. Just based on the examples given, Mr. Heller would submit that a parcel of land, 14 acres, has a certain value if it can be developed for one to two residences. Its value as a wood lot or for hunting or some other recreational purpose is vastly different from its value as two building lots. Attorney Heller would think that on a factual basis, that does meet the requirement.

Mr. Macnamara commented does enforcement of the regulations as they are help create the hardship. Attorney Heller commented that is correct.

Chairman Ross asked when was the property purchased? Attorney Heller stated it was not all purchased at the same time. Attorney Heller believes the 54-acre parcel was purchased in the

80's and then the other two parcels were purchased in 2002. Chairman Ross stated they were all purchased after 1972. Attorney Heller stated yes, that's correct.

Mr. Parsons asks if Lot 22 (14 acres) is a building lot or a parcel. Attorney Heller reviewed the plan with Mr. Parsons and stated that these two lots were part of an approved subdivision done by Steven Burlingame. This is a long pre-existing non-conforming lot that existed long before zoning. Chairman Ross asked if this was purchased later on. Attorney Heller stated that is correct. Chairman Ross asked if the Town taxes it as a building lot. Attorney Heller commented he does not know how the Town taxes it. Attorney Heller stated it is all in PA 490 which is all open space.

Mr. Brodeur states that the site plan drawing dated 5/9/2018 does not show any wetlands and the site plan dated 7/22/19 shows the wetlands. Why do they not correspond to each other? Attorney Heller stated they were done for different purposes. Attorney Heller stated that the plan was prepared in conjunction with the driveway improvement plan (7/22/19) so all they were concerned about was the wetlands that were impacted with the construction of the driveway.

Mr. Macnamara reviewed the approval letter from IWWC which states "construction only during the driest months of the year." Attorney Heller stated he does not know what the conditions of the approval were. IWWC Approval letter was supplied in the Commission packets for review. Discussion ensued.

Mr. Parsons has a concern with the number of lots and vehicles traveling over the driveway. Who is going to maintain the road? There is no enforcement if it is private property. Attorney Heller commented that the wetlands approval is for a paved driveway; this is not what exists now. Attorney Heller's opinion is if there are 5 users on the road it should be 18 feet wide and paved. Ms. Washburn questions whether it is a paved driveway. Attorney Heller commented that it is stated on the plan that it is paved. Discussion ensued. Attorney Heller enters a map into the record.

Attorney Heller comments there will be a maintenance agreement for the driveway. This grants the rights, provides how maintenance decisions are made. It is generally done on a percentage of use basis. If someone is only using 100-ft they shouldn't have to pay for somebody who is using 1,000 feet of the common driveway. There is a provision for making decisions which is done on a majority vote basis, not by individuals, but by percentage of the common driveway. Discussion ensued.

Mr. Parsons commented on turn-offs on the driveway. Attorney Heller stated they are not existing. Mr. Heller's opinion is that an 18-foot wide paved driveway is sufficient to accommodate 2-way traffic. There is really no need for a turn off. Discussion ensued.

Ms. Washburn, ZEO, reads the hardship stated on the application, and questions if a different application is necessary because it seems what was presented by Attorney Heller is not exactly the same as what is on the application. Attorney Heller stated that the application is just that it is an application. It forms the basis for what is presented to the Commission in the public hearing process. Mr. Heller believes the application was prepared by the Kerouac without the assistance

of counsel. Essentially what the application says and what Attorney Heller says in more legal terms is the same thing.

Chairman Ross asks Attorney Heller if there is a second alternative access available without disturbing wetlands. Attorney Heller stated no. Chairman Ross asked if this is the most reasonable access. Attorney Heller stated yes. Mr. Macnamara commented that it is the only access. Attorney Heller stated he would not say it is the only access, it is the only access that could realistically be permitted in the current regulatory scheme. Chairman Ross asked if access could be gained through the Jackson property. Attorney Heller stated no; Jackson has an easement over the property but it is not reciprocal.

Mr. Brodeur asked why the driveway could not be put along the edge of the property line without disturbing the wetlands. Attorney Heller stated there is ledge with steep contours. Discussion ensued.

Ms. Washburn commented that Attorney Heller stated there is deeded access to the land-locked parcel which Ms. Washburn has not come across. Attorney Heller did not say there was a deeded access; he said that they are entitled to access. Chairman Ross commented that they are looking for access to a lot that does not have a deeded access.

Ms. Washburn asked if additional information is to be submitted, would it be possible that it be submitted in 10 business days before the next continued public hearing so that staff and the public would have the opportunity to review it.

Chairman Ross polls the Commission if they wish to do a site walk. Discussion ensued.

Mr. Brodeur asks where the Jackson property is located on the map. Attorney Heller demonstrates and discusses with Mr. Brodeur. The physical driveway comes off onto the common driveway.

A motion was made by Lucien Brodeur to schedule a site walk. Bruce Parsons seconds the motion. In favor of site walk Dan Ross, Bruce Parsons, Lucien Brodeur. Not in favor of site walk Bill Macnamara and Stephen Mylly. Date of the site walk will be Monday July 29<sup>th</sup> at 1:00 p.m. Members available to attend are to meet at the site.

Attorney Alter commented that 35 days from today will conclude the public hearing unless the applicant agrees to an extension. He also reminded the Commission members while on the site walk no discussion or testimony is to be held. Someone can be the tour guide, but any questions or comments come back to the public hearing.

Attorney Alter asked Attorney Heller if the IWWC approved driveway is marked with stakes. Attorney Heller commented that it is just a widening of the existing driveway, it is not staked out. The driveway there currently is approximately 10 to 12 feet wide.

Attorney Alter commented that if there are any questions or if the Commission would like more information from Attorney's Alter, Heller, the project engineer for the application, now is the time to make them aware of this.

Mr. Parsons asked who is going to verify the maintenance agreement. Attorney Alter commented that often times the applicant is asked by the Commission to provide a draft and it is submitted as part of the record and this could be a condition of approval by the Town Attorney/Staff and then executed in as part of the recording and be recorded on the land records.

Attorney Heller commented that the maintenance agreement can cover all of the Kerouac lots, however, he cannot require Jackson to sign it. They may do this voluntarily, it is in their best interest, they have a covenant in their deed. Discussion ensued.

Ms. Washburn would like to have the maintenance agreement before the next scheduled meeting. Attorney Heller stated he could have a draft maintenance agreement ready by next week.

A motion was made by Bill Macnamara to continue the public hearing and reconvene on Monday, August 26, 2019 at 6:30 p.m. in the Clifford B. Green Meeting Room. Bruce Parsons seconds this motion. No discussion held. All in favor. The motion passes unanimously.

Certificate of mailings to abutting property owners were submitted by Aaron Kerouac.

**Approval of Meeting Minutes:** Special Meeting Minutes April 23, 2019.

A motion was made by Bill Macnamara to approve the special meeting minutes of April 23, 2019 as written. Stephen Mylly seconds this motion. No discussion held. All in favor. The motion passes unanimously.

**Other Business:** None.

**Adjourn:** A motion was made by Bruce Parsons to adjourn the meeting at 7:50 p.m. Stephen Mylly seconds this motion. No discussion held. All in favor. The motion passes unanimously.

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Audrey Cross-Lussier  
Recording Secretary