

ZBA MEETING MINUTES

TOWN OF TROY

Tuesday, August 24, 2021

Members of the Board Present: Justin Jones, Acting Chair, Tyler Bagster, Kyle Smith, Lexi Hopkins, Selectman Curtis Hopkins, Steve Obert and Wayne Cullen

Audience members present: Daniel Lang, applicant, Daniel Fougere, Owner/Builder, Attorney Michael Atkins, representing Mr. Fougere. Also present: Town Counsel, Joseph Hoppock.

Acting Chairman Justin Jones called the meeting to order at 6:30 p.m.

This meeting is a continuation of the Tuesday August 17, 2021, meeting for the same application of appeal. Daniel Lang, et al submitted application to appeal a decision of the Board of Selectmen to issue Building Permits to Daniel Fougere for two lots on Tolman Road. Map 23, Lot 1 and Map 24, Lot 5.

The Board reviewed the points of the appeal and prior meetings' discussions:

The first issue to resolve is that of the timeliness of Lang's Appeal. According to Section V. B. of the Bylaws of the ZBA, "A Petition to the Board on any decision or requirement [such as an appeal from an Administrative Decision of the Board of Selectmen] shall be taken within thirty days of the date of such decision or request." This provision was met by Lang, his Appeal of the June 14th decision of the Board of Selectmen was made by letter dated July 12, 2021. It was, therefore, timely.

Mr. Fougere claims Lang should have appealed within a time measured from the date the Building Permits were approved. This argument has no merit. Unlike an application for a variance or other application which requires a public hearing notice to abutters, a building permit application requires no public hearing and no notice to abutters. Lang did make reasonable efforts to apprise himself of the status of the two Tolman Road lots.

No New Hampshire municipality, to the Board's knowledge, requires formal abutter notice with respect to Building Permit Applications, unlike applications for a variance or special exception or the like. Further, Lang articulates an issue squarely within the ZBA's statutory jurisdiction: The interpretation of the Zoning Ordinance. He claims that the granting of the permits adversely affects his property interests (although he offered no evidence to support his opinion this his property would be adversely affected, except perhaps that he will not like the view). Last, due to constitutional considerations such as due process, Lang is entitled to reasonable notice and an opportunity to be heard if fundamental property interests are at stake. Therefore, the Bylaws require a degree of play in the joints, which the Board of Selectmen recognized when it took up Lang's request to rescind the Building Permits.

For these reasons the Board rejects the untimeliness argument raised by Mr. Fougere.

The second issue, raised by Mr. Lang's appeal:

Neither lot conforms to the Zoning Ordinance. Lot 24/05 has insufficient frontage (188' where 200' is required) and 23/01 has insufficient acreage (47,196 square feet where two acres is required).

It is beyond dispute that the Zoning Ordinance was adopted in June 1974 and that both lots were conforming lots prior to the enactment of Zoning in the Town. Therefore, they are legal, non-conforming lots in this rural district. Permitted uses in the Rural District include Single Family Houses. Zoning Ordinance Art. VII.A.1. Both lots are legally non-conforming, as both lots were lawful lots of record on the date the Zoning Ordinance took effect.

The evidence/argument of Lang (uncontested by the Owner) is that Lot 23/01 has an old garage, barn or shed type structure located on it. There was no evidence whatsoever that this old structure is or was used by anyone at any time. It may be inferred it is a vacant use. Specific comments about the barn are that it appeared abandoned and no one knew how long it has been there.

The operative provisions of the zoning Ordinance are Art. XIII.C.1 and XXI (definitions).³³ Art. XIII, in its preamble, states that: "Any lawful use of land or buildings or parts thereof at the time of the adoption of this ordinance may be continued indefinitely, although such does not conform to the provisions of this ordinance, subject to the conditions listed below.

One of the listed conditions in Art. XIII concerns Non-Conforming Lots of Record; Art XII.C1 provides:

1. In any district, a vacant *lot* that was a lawful lot of record as of the effective date of this ordinance may be developed for the uses permitted in that district, even though the lot does not conform to the area or frontage requirements of this ordinance. The applicable district requirements for yard setbacks and state septic system requirements shall still apply. [emphasis applied].

A "Lot of Record" is defined at Art. XXI.³³, as follows:

33. Lot of Record - Land designated as a separate and distinct parcel in a legally recorded deed and plan filed in the records of Cheshire County Registry of Deeds in Keene, New Hampshire.

Both lots were "designated as "separate and distinct" lots with legally recorded deeds before 1974. 24/05 is described in a deed dated August 21, 1969, and recorded at Volume 800, Page 323 of the Cheshire County Registry of Deeds. 23/01 is dated August 27, 1969 and recorded at Volume 800, Page 578. As mentioned, these were lawful lots in June 1974 when the Zoning Ordinance was adopted. So, the second requirement of the definition of "lot of record" (which requires a legally recorded Plan) presents a constitutional problem. Not only are there no Plans with respect to these lots, but

none were required when the lots were completely lawful. Here the ordinance imposes a requirement on the land that did not exist before Zoning and should not be enforced, for reasons explained below.

There was no evidence of a structure of any kind on 23/01. Therefore, the Board may conclude that it is a "vacant lot."

The Merriam-Webster on-line dictionary defines "vacant" as follows:

- 1: not occupied by an incumbent, possessor, or officer, i.e., a vacant office or vacant throne
- 2: being without content or occupant a *vacant* seat on a bus or a vacant room
- 3: free from activity or work; disengaged vacant hours
- 4: devoid of thought, reflection, or expression; a *vacant* smile
- 5: not lived; in vacant houses
- 6a: *not put to use; vacant land*
- 6b: having no heir or claimant; abandoned a vacant estate

The Board had previously heard argument that undefined language in a Zoning Ordinance is to be given its common and ordinary meaning. This is a correct statement of the law concerning interpretation of a Zoning Ordinance. *Feins v. Town of Wilmot*, 154 NH 715 (2007) (the courts use traditional rules of statutory construction when interpreting zoning ordinance; thus the words used in a Zoning Ordinance will be given their ordinary meaning unless it appears from their context that a different meaning was intended). A specifically defined term of art, such as "lot of record," is an example of a different meaning intended for those specific words, since it is specifically defined in the ordinance.

Based on the facts heard, there are two issues to resolve involving the meaning and application of "vacant lot" and "lot of record."

With respect to 24/05, it is undisputed that this is a "vacant lot." No evidence was presented of any nature that indicates any structure is or was located on this parcel.

With respect to 23/01, where there is an old barn, garage/shed situated on this lot without any use attributable to it, the conclusion is that it is unused and, therefore, "vacant." By applying the plain, ordinary, and common meaning of the word "vacant," as provided by Merriam-Webster, 23/01 as "not lived in" and "not put to use" (as in "vacant land").

Therefore, both parcels satisfy the common/ordinary definition of "vacant lot."

The next issue to resolve is the legally recorded Plan requirement in the "lot of record" definition. Recall this is a requirement that imposed in 1974, a lawfully existing lot with an additional regulatory burden.

A non-conforming lot is one that was lawfully established before the passage of the provision that prohibits the use sought in the place sought. Non-conforming uses enjoy constitutional protections under the New Hampshire Constitution. Under our State Bill of Rights (Part 1), Article 2 provides that:

"All men have certain natural, essential, and inherent rights, among which are ... acquiring, possessing, and protecting property ... "

Part 1, Article 12 provides that, in part, that:

"Every member of the community has a right to be protected by it, in the enjoyment *to* his life, liberty, and property ... But no part of a man's property shall be taken from him or applied to public uses, without his own consent, or that of a representative body of the people."

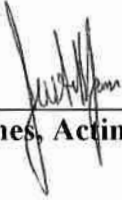
Constitutional protections apply to Zoning Ordinances. The ZBA will consider those protections in its interpretive function. Therefore, in construing the ordinances, the Board finds that both lots are lots of record under the ordinance, notwithstanding the absence of a recorded Plan describing the lots (applying the "plan" requirement to 23/01 is unconstitutional). Both lots are "vacant lots" under the ordinary meaning of that phrase.

Therefore, under the terms of the Zoning Ordinance, both lots "may be developed for the uses permitted in that district even though the lot does not conform to the area or frontage requirements of this ordinance." Art. XIII.C.1.

MOTION to deny the appeal of the decision of the Board of Selectmen, Kyle Smith, SECOND by Steve Obert. All members of the Zoning Board of Adjustment voted in favor of the motion.

MOTION to adjourn, Kyle Smith, SECOND by Wayne Cullen. All members of the ZBA voted in favor of the motion. The meeting was adjourned at 6:45 p.m.

TROY ZONING BOARD OF ADJUSTMENT



Justin Jones, Acting Chair
