

MINUTES
BOARD OF APPEALS
TOWN OF DAMARISCOTTA
September 26, 2017
(continuation of 04/24/17)
1:00 PM

MEMBERS PRESENT: Wallace Schling, Fred Sewall, Bruce Rockwood, George Betke, and Jim Cosgrove. Alternate Lucy Harrington was also present.

STAFF PRESENT: Stan Waltz, Code Enforcement Officer; Anthony Dater, Town Planner; Matt Lutkus, Town Manager; Jennifer Villeneuve, Town Attorney

PUBLIC PRESENT: Maia Zewert, Lincoln County News; Gabe Shadis, appellant & neighbor to Stepping Stone Housing property; Pat Shadis, neighbor to Stepping Stone Housing property; Amy Lalime, neighbor to Stepping Stone Housing property; Paul Sherman, neighbor to Stepping Stone Housing property; Cindy Sherman, neighbor to Stepping Stone Housing property; Jessica Sirois, neighbor to Stepping Stone Housing property; Catherine Blount, concerned citizen; Shari Sage, Planning Board Member, Jenny Begin, neighbor to Stepping Stone Housing Property;

CALL TO ORDER: The meeting was called to order at 1:03 pm by the Chairman.

MINUTES:

04/24/17: On motion Rockwood / Sewall to accept the minutes as submitted.

VOTE: 3-0 IN FAVOR

CONTINUATION - PUBLIC HEARING – ADMINISTRATIVE APPEAL BY GABE SHADIS ET AL OF THE PLANNING BOARD’S DECISION OF SEPTEMBER 6, 2016 – TO ACCEPT THE CODE ENFORCEMENT OFFICER’S DETERMINATION OF GRANDFATHERING 7 RESIDENTIAL UNITS FOR STEPPING STONE HOUSING, INC ON PROPERTY LOCATED ON TAX MAP 007 LOT 41 & 41-001 AT THE INTERSECTION OF PLEASANT & HODGDON STREETS.

Chairman Schling stated that this is a continuation of a previous hearing on 04/24/2017. This Board is only taking up the grandfathering issue – any additional issues will require a separate application for appeal specifically outlining those issues.

Schling stated that the Board of Appeals’ (BOA) job here is to determine whether the Planning Board went through the proper process and addressed issues.

Rockwood told the group that the hearing was continued from 04/24/17 because it came up at that hearing that the written notice of decision from the Planning Board might not have been seen by the appellant and the BOA wanted them to have a chance to review the actual document.

Gabe Shadis told the Board that the Planning Board decision was not unanimous – it was a 3-2 vote in favor of the grandfathering of 7 units, which they do not believe is a valid decision. The information available does not support the grandfathering of 7 units. He told the Board that an abandonment issue does exist and that is why they don’t feel there were 7 units that could be considered for grandfathering. He cited abandonment case law.

Gabe told the Board that they believe the burden of proof belongs to the applicant. He went on to say that the Planning Board did not require Stepping Stone Housing, Inc. to provide evidence

to show use of the dwellings and that they had not be abandoned under Damariscotta ordinances. They feel that by not doing that, the Planning Board failed to execute their duties in accordance with the ordinances. The Planning Board ignored the Site Plan Review Standards and they believe that the BOA should return the topic to the Planning Board for proper review because the grandfathering decision is in direct conflict of the Town ordinances. The appellants believe that the Planning Board became tired of dealing with the application given that it was a 4+ year long process.

Gabe explained that they included the history of each dwelling in their application for appeal.

Rockwood stated that the BOA can't second guess the Planning Board evidence – the grandfathering decision was based on CEO and Town Attorney input as well.

Gabe argued that there was no evidence

Sewall told the Board that he had some concerns with the grandfathering interpretation – he went to the State of Maine website to do some research and in his opinion, grandfathering does not mean wipe everything out and start fresh with new buildings etc. He went on to say that in the Planning Board's defense, there is zero definition of grandfathering in the Town ordinances. He didn't see any evidence on the history of buildings being put into service or abandoned.

Rockwood asked if this was brought to the Planning Board's attention.

Gabe told him that they tried but public hearings were cut short after 20 minutes. They were continually vocal about the abandonment issues.

Rockwood stated that the application was submitted in accordance with the Town ordinances.

Gabe disagreed.

Rockwood told him that they cannot hear new evidence at this point in the process.

Sewall agreed, this may just have to play out in the courts.

Rockwood agreed and stated that it seems to him that it will only prolong the agony if it's sent back to the Planning Board, because they have the same evidence – it may be an argument for the courts.

Gabe stated that the Planning Board only has to ask for proof of non-abandonment.

Rockwood stated that they can't ask the Planning Board – Gabe could ask the Planning Board to get evidence.

Gabe asked what BOA does then.

Rockwood explained that the BOA has to review the record and determine if the Planning Board followed the ordinances. It is his opinion that they did, based on the information given.

Pat Shadis stated that the Planning Board is supposed to know the ordinances. Don't they have some responsibility to instruct the applicant on ordinance requirements?

Rockwood stated that the Planning Board's decisions are based on information given to them.

Gabe stated that it is supposed to be the burden of the applicant to prove it's case, not the burden of the concerned citizens of the neighborhood. He asked the BOA to please ask the Planning Board to provide evidence to prove that the grandfathered units were not abandoned.

At this point Town Attorney, Jennifer Villeneuve reviewed the options aloud:

- Is the Planning Board decision clearly contrary to the Town ordinances?
- Is there sufficient findings of facts for a review?

If the Planning Board decision is consistent with Town ordinances then the BOA can vote to uphold their decision.

If the Planning Board decision is clearly contrary to the Town ordinances or is not supported by substantial evidence, then the BOA can vote to remand the matter to the Planning Board to further review the evidence.

She went on to say that in the BOA, the appellant has the burden of proof to prove their claim. In Planning Board, the applicant has the burden of proof. The BOA relies on the Planning Board record – the entire record which is everything put before the Planning Board as part of the application.

Rockwood stated that the BOA is entitled to accept the Planning Board record.

Villeneuve agreed, and stated that if the BOA finds the Planning Board record “thin” they could remand it back to the Planning Board.

Rockwood asked her if new members could vote on the matter.

Villeneuve told him that if they felt that they were fully informed on the record and able to make a statement of that fact, then yes, they could vote.

Shadis asked the BOA if they were looking at the specific record on abandonment or lack thereof.

Rockwood stated that the argument on abandonment was presented to the Planning Board – this group was heard by that Board.

Shadis repeated their opinion that the applicant has the burden of proof to non-abandonment.

Sirois told the Board that the CEO said that at the time of the grandfathering decision, he didn't look into whether or not the units were abandoned so they are asking him now.

CEO told the Board he did not say that.

Rockwood told the group that that question is out of order – this Board can not entertain new evidence of any kind.

Sirois told the Board that the minutes in the record do not accurately reflect what went on at those meetings.

Sewall stated that the timing of the buildings and ordinances is a factor. It is his opinion that the Planning Board accepted the information presented by the CEO, Ordinances, and Town Attorney opinion.

Gabe stated that there was no evidence presented – no rent receipts, sworn statements, etc.

Shadis told the Board that it seems that the BOA is making an effort to excuse the Planning Board from their duties. The root of the issue is whether the applicant can get grandfathered status and the Planning Board failed to require Stepping Stone Housing to provide that proof as stated in the ordinance, to show the number of buildings not abandoned.

Town Planner Dater stated that the Planning Board relied on the judgement of the CEO, the information provided to them in the Town Attorney's letter on grandfathering, and information from Great Salt Bay Sanitary District on the number of users onsite. It is true that they did not ask for proof of rent, he doesn't believe they have to, if they are satisfied with the information before them.

Rockwood agreed, there was evidence presented, perhaps the appellants feel it was not sufficient, but they are asking this Board to second guess the Planning Board file.

Gabe told them that the Great Salt Bay Sanitary District's evidence was misleading because it was just 1 meter with several off shoots – no way to prove actual users.

Rockwood explained it is the interpretation of the evidence – this Board cannot second guess another Board's interpretation.

Gabe stated that the abandonment issue was the point that the audience brought up repeatedly over the 4 years this was before the Planning Board.

Shadis asked if the Planning Board required evidence on abandonment as required by Town ordinances?

Sewall stated there are court hearings on the State website, but court decisions alone are not enough to prove abandonment. He is unsure if the Planning Board went far enough in requiring evidence on abandoned property.

Audience member Catherine Blount told the Board that from the definition of grandfathering... "if a non-conforming or grandfathered building is destroyed that grandfathered determination is lost." The Planning Board is woefully misinformed and lazy. There is no evidence that any Board in town, including the Selectmen know their jobs.

CEO stated that the applicant originally received approval for 7 grandfathered units, but amended their application to 6 units.

Chairman Schling called for a vote.

On motion Rockwood/Sewall to remand the grandfathering matter to Planning Board for further findings of fact that the grandfathered lots were not abandoned.

Jim Cosgrove stated that he has read the record and he would not support that motion.

George Betke stated that he is sympathetic to those present. He too has reviewed the record and finds it somewhat confusing. They started at 7 units, then 6 units, then 5. He asked if construction was still going on.

The room answered yes.

CEO stated that they have a building permit that allows them to build 3 units at this time.

Betke stated that the abandonment issue is unclear to him as well. A 3-2 vote is not unanimous and in light of the abandonment issue he would support the motion.

Gabe stated that the abandonment they are referring to long precedes Stepping Stone ownership of the property.

Schling questioned the quality of evidence. Was evidence preserved?

Villeneuve reminded the Board that they are restricted to evidence already in record.

Schling questioned whether the Planning Board fulfilled the requirements of the ordinance by hearing from the Great Salt Bay Sanitary District.

VOTE: 4-1 (Cosgrove) IN FAVOR OF THE MOTION

Cosgrove stated that in his opinion the Planning Board went through this application voluminously and it is clear to him that there were 6 occupied units there.

On motion Rockwood/Schling to reject the appeal that the CEO and Planning Board did not consider change in use when approving the Stepping Stone Housing application. The Planning Board met it's burden of proof in the matter of change of use.

VOTE: 3-2 IN FAVOR

On motion Rockwood/Sewall to reject the claim that the Planning Board failed to require Stepping Stone Housing to demonstrate financial capacity to complete the project. The record is clear that evidence of financial capacity was provided to the Board and said evidence meets the ordinance requirements.

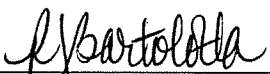
VOTE: 4-1 IN FAVOR

A. ADJOURNMENT

On motion Rockwood / Sewall to adjourn this meeting.

VOTE: 5-0 IN FAVOR

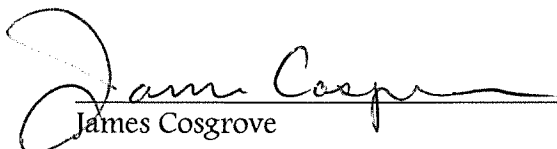
Respectfully submitted by:


Rebecca J. Bartolotta, Deputy Clerk

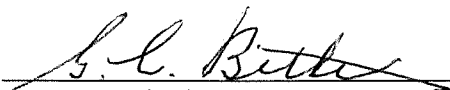
We, the undersigned, do hereby approve the minutes of the September 26, 2017 Board of Appeals Hearing & Meeting.

Wallace Schling, Chairman


Fred Sewall


James Cosgrove


Bruce Rockwood


George Betke

Dated: 02/05/18