

**DUNBARTON ZONING BOARD OF ADJUSTMENT****Monday, August 14, 2023 ~ 7:00 p.m. ~ Town Office****MINUTES OF MEETING**

Chair John Trottier called the meeting to order at 7:00 p.m. He confirmed that notices have been posted in two public places and on the Town's website.

Attendance: Matthew Delude, Vice Chair Jim Soucy, Dan Dal Pra, Chair John Trottier, Secretary Alison Vallieres, and Alternate Derrick Labranche

Approval of previous meeting minutes: **Dan Dal Pra made a motion to approve the minutes of July 10, 2023 as written; Alison Vallieres seconded the motion. Majority in favor; John Trottier & Derrick Labranche abstained as they were not in attendance.**

Application #2023-ZBA-002, Michael J Guiney – Appeal of Administrative Decision of the Dunbarton Building Inspector for the issuance of a building permit to David A Nault for Lot B6-01-09. Attorney Pat Panciocco represented the applicant, who was also in attendance.

Ms. Panciocco said they have two bases for the appeal: 1) The property owner no longer has a variance to build on the lot; and 2) The property owner has not complied with RSA 674:41 which states one cannot build a single-family home on an unapproved street. Ms. Panciocco said nothing has been shown that this lot has a reasonably safe access, noting they are also required to meet the state fire code. She handed out copies of a plan used in the Town's complaint against her client, showing the access to the lot in question. Ms. Panciocco pointed out the 14.5' wide cart road that extends to the west, leading to a 50' wide ROW that goes to Lot B6-01-07. She said the access was technically only to benefit Lot 7, but Mr. Guiney had agreed it could be used to access Lot 8 and 9 as long as they went through Lot 7. Ms. Panciocco said RSA 674:41 requires input from the Planning Board to determine if access is adequate. She said she believes the Town only allows two houses on a common driveway, referring to what she found in the subdivision regulations. She said, in 2006, Mr. Nault was granted a variance for all three lots, as none had frontage on a Class V road, and RSA 674:41 has not been touched at all. Two of the three lots have been previously built upon, leaving this one undeveloped until now.

Attorney Panciocco said RSA 674:43 was revised in 2013, requiring variances to expire within two years. She said this was the year after the Town adopted Article 12D of the Zoning Ordinance which states they would automatically expire two years after the date of approval if conditions were not met. Ms. Panciocco said there are limited documents available about the adoption of the change, and she is not sure what it means in regard to the 2013 State amendment. She said the Zoning Board is supposed to interpret the Zoning Ordinance.

John Trottier said the Board was given information that the building department contacted NHMA about the validity of the 2006 variance granted to Mr. Nault. He read the response: "*The statute that caused zoning variances to expire within two years of being granted if not exercised only*

*applies to variances granted on or after August 19, 2013. Thus, a variance granted in 2006 would run with the land and would still be valid.*" Attorney Panciocco said the Town's ordinance was adopted a year before the RSA was amended which is confusing. She read from public hearing minutes on proposed zoning changes of January 18, 2012: *"Item C. Asked why the change was made from twelve to twenty four consecutive months in the event that the nonconforming use ceases for any reason, etc. The Planning Board noted that this was done partly because of the downturn in the economy and the longer period of time it might take to settle insurance claims in the event of fire, or sale of property, etc. This would also involve the abandonment of a business, etc. In the event, they cannot meet the 24 month period, they can re-establish by applying to the Zoning Board of Adjustment for a Variance or Special Exception."* Donna White said this change would be to Section 4, addressing non-conforming uses, in the event a property was damaged, or a use delayed or discontinued, not relative to the amendment on the expiration of variances. She said, based on the response from NHMA, any variance granted prior to the date of adoption would stay with the land. Ms. Panciocco asked if Donna explained to NHMA that the town adopted the change in 2012, prior to the RSA revision. She said she is not sure what that means, why it was changed the year before a change to the RSA. Donna stated that NHMA was given the details of the variance and question at hand. Ms. Panciocco said she would agree with the 2013 amendment but is not sure of the 2012 amendment under the Zoning Ordinance. She said the Board has to make a decision on that.

Ms. Panciocco said there is a process to be followed and they have to look at RSA 674:41. She asked how much a new fire truck would be if damaged on a 14 ½' wide cart road in a snowstorm. John Trottier read from a letter dated October 2, 2006 that was submitted to the ZBA by Fire Chief Jon Wiggin and included in the applicant's packet for this appeal: *"The proposed driveway widths of 18' & 14' by David Nault at the end of Kelsea Road on lots B6 1-7, 1-8 & 1-9 would be acceptable to the Dunbarton Fire Department. These widths are consistent with other shared driveways in town which allow safe passage for our apparatus as long as the grades are within reason."* Mr. Trottier said it is the chief's call. Ms. Panciocco said fire code requires 20' so two cars can pass each other and protects the Town and its equipment. She said at that time only two houses were allowed on a single driveway, yet there are three houses on this driveway. She read from an email sent to the building inspector by the fire chief: *"This will be the first property in town that will have three residential structures on one shared driveway."* Ms. Panciocco said that reinforces what she said about the two-house limit. Mike Guiney said the width was to be from the end of Kelsea Road, which no longer ends at his barn. He noted there will be four houses on a 14.5' driveway and said he is not sure how many towns around here would allow that. Ms. Panciocco said she understands the limit of two houses on a shared driveway is why the third house was not built, but this is in the Board's hands.

Jim Soucy noted that the attorney has said there is no longer a variance, has spoken about the ordinance and amendment, about variances timing out, yet he has not heard any indication that the statute or amendment to the Zoning Ordinance is intended to be applied retrospectively. Ms. Panciocco said she did not argue that point. Ms. Panciocco said a municipality has the right to amortize non-conforming uses but cannot create new ones. She said the board has to make an interpretation as she is not sure what was intended by the amendment. Mr. Soucy noted that what the attorney read from the minutes of 2012 referred to non-conforming, not variances, and does not seem to apply to what is before the Board right now. Ms. Panciocco said she cannot speak to what is in the

minutes. Jim Soucy said the key phrase was non-conforming versus the term variance. Donna White said the amendment mentioned by the attorney was referring to non-conforming uses or structures that may have been discontinued. Ms. Panciocco said a variance in effect creates a non-conformity.

Matt Delude read Article 1.D Applicability of the Zoning Ordinance, noting that each section states 'after the effective date of this Ordinance'. He stated that the 2012 amendment to Article 12D would apply from that point forward. Ms. Panciocco said it does not say it was effective as of 2012. Mr. Delude said it cannot go back in time, people have already received legal rights. John Trottier said this goes back to the 2006 approval. Mr. Delude pointed out that the ordinance would be prospective, not retrospective, in keeping with the law everywhere.

Dave Nault noted that Pat Panciocco thought his third lot was not built on due to a limit of two houses on a shared driveway. He said that was incorrect, explaining that the first house was built in 2007 for his son Josh, then his own house was built in 2010. Mr. Nault said they are now building a house for his daughter, and he has one more lot on Kelsea Road that will eventually be built upon for his other son. He said he knew when the variance was issued in 2006 that it stayed with the land. Mr. Nault said the change was only for new approvals and forward, as you cannot take away someone's rights from previous approvals. He said he was on the Board for 18 years and is very familiar with the process.

Dave Nault said previous discussions had the access at 18' in width on the corners and 14' in width in the straight area. Mike Guiney said it was to be an 18' in width common driveway, per the Gildersleeve agreement. He went over the drawing for the board. John Trottier said the variance was granted on information provided at the time, and there seems to have been some discovery since then that the access is not part of Kelsea Road. Mike Guiney spoke about the history of the road and court cases; John Trottier stated that they are here to discuss the appeal, not the history.

Pat Panciocco said another part of the appeal is if there is reasonably safe and practical access to the lot. She said her client recently went through the subdivision process for his property, and it was made very clear that Kelsea Road needs work done. She said during those hearings, they were talking about a 14.5' wide cart road leading in to four homes. She said the Town has neglected maintenance of Kelsea Road since before her client bought his property, and now Mr. Guiney has to pick up a good share of those improvements despite the Town's neglect. Ms. Panciocco referred to minutes of a public hearing on December 15, 2021: *"Dave Nault said this is part of the Planning Board's jurisdiction. He said having the proper width, particularly for fire department purposes, needs to be considered. He said it needs to be a 50' right-of-way, noting that his daughter plans to build on the third lot in the spring and he wants proper access."* Ms. Panciocco pointed out that the cart road is 4' narrower than Kelsea Road, and Mr. Nault admits the access is unsafe for fire protection. John Trottier asked what upgrades are planned. Ms. Panciocco said Jeff Crosby would have that information, but she does know that it involves removing ledge and trees and relocating poles to allow for widening. She said the point being that Kelsea Road is presently inadequate yet a 14' wide access here is adequate. Mr. Trottier said it goes back to what was approved at the time of the variance. Ms. Panciocco said RSA 674:41 was not done at the time other permits were issued, which is a separate process from a variance.

Matt Delude asked if the court decided the street was not a street in 2020. Dave Nault said the court did not decide the location of Kelsea Road, the Town has not determined the location of Kelsea Road, and the applicant's interpretation of where the road is remains different than his. He said the

location is undetermined at this time.

Jim Soucy said a variance was granted in 2006, and he asked Ms. Panciocco what she is referring to in 674:41, I-a. Ms. Panciocco said that does not mean that the access to those lots was reasonably safe and practical as required by 674:41. She said the property owner needs relief from the statute as well as the Zoning Ordinance.

Matt Delude asked Mr. Guiney if he owned his property at the time the variance was granted. Mr. Guiney said he did. Mr. Delude asked if he had appealed the variance in 2006. Pat Panciocco said they appealed the access but were denied. Dave Nault said they appealed, then dropped the appeal. Mr. Delude asked if they appealed to the court. Ms. Panciocco said no. She said she could not recall exactly what the appeal was for, but 674:41 requires approval from the Planning Board for a building permit. She said someone needs to read the statute and call the Town's attorney. Mr. Delude said since the variance was granted in 2006, 2006 would have been the time to argue that point. Ms. Panciocco said that was on the variance, but she feels this is a separate approval Mr. Nault needs. She said a variance is not the statute.

Jim Soucy asked Ms. Panciocco to explain what she is referring to in 674:41. Attorney Panciocco said she is referencing the erection of buildings on streets; appeals, and she read from the statute. Mr. Soucy asked if 674:41, I-a was what she has been referring to. Ms. Panciocco said the statute also gives a test to apply and continued to read through the RSA. She read about private roads and existing streets. Mr. Soucy asked what sub-section she is referring to when she has repeatedly stated and made reference to 674:41. Ms. Panciocco said because Mr. Nault has no legal frontage, he still has to comply with the statute. Jim Soucy and Matt Delude agreed that it is the applicant's burden to explain how this applies.

Attorney Panciocco said the lots are not on a street or a Class VI road. She said Mr. Nault has to figure out how to make this happen, again suggesting that someone call and ask the municipal attorney. Dave Nault stated that the department has already called NHMA. He said the cart road is a driveway, and Kelsea Road is the access. Ms. Panciocco said the variance is not enough to make it a safe access, noting that you cannot build on a Class VI road unless you prove it is adequate to accommodate emergency equipment.

Jim Soucy asked Ms. Panciocco what subsection that wording is found. She read I-a again, adding that Mr. Nault does not have Class V highway in front of his property. Dave Nault said that is why he got a variance. Mr. Soucy said the attorney keeps saying safety and adequacy, but he wants to know where that is in statute 674:41. He asked her to pinpoint the section, saying he has repeatedly asked Ms. Panciocco for the precise section. Ms. Panciocco said Mr. Nault does not have Class V frontage. She went on to read I-b which addresses an official street map, I-c which addresses Class VI roads, and I-d which addresses private roads. Ms. Panciocco said this is not a private road, it is a 14.5' easement. Matt Delude asked if she is saying a cart road is not a private road. Ms. Panciocco said it is an access easement. Jim Soucy asked what supports her characterization. Ms. Panciocco referred to I-d (1) which reads: *"The local governing body, after review and comment by the planning board, has voted to authorize the issuance of building permits for the erection of buildings on said private road or portion thereof."* Mr. Soucy said the Planning Board has voted to authorize the issuance of building permits, adding that it is a one-time review and grant to delegate the authority to the local governing board, not something that is done on each application. He asked again where what Ms. Panciocco is saying can be found, requiring some Planning Board review, just

one pinpoint citation. Ms. Panciocco said they have to have safe access to get a building permit, a basic requirement for emergency vehicles. She then went on to read I-e which addresses existing streets, noting this is not an existing street either.

Ms. Panciocco continued by reading 674:41, II. Jim Soucy said again that he is asking for her argument. Ms. Panciocco said there needs to be safe, practical, and adequate access for the fire department to go out with a truck and come back without damage. She said they need to be able to safely reach a home. Jim Soucy asked where safe and adequate are found in this statute. Ms. Panciocco said they are not in the statute; it is in the fire code and local regulations. She said the fire code says 20', noting that the local official has the power to waive that, but she is not sure about 14' widths. Ms. Panciocco said they can ask the fire marshal about that.

The chair asked Chief Wiggin if he would like to speak to the matter. The chief said the Town does not have a driveway ordinance. He has asked for an 18' width on shared driveways, but there is nothing standing to reference. He said the fire code does not address shared driveways, and what was referred to by Ms. Panciocco earlier was for fire lanes and access road width. He also said the fire marshal does not address driveway widths. Chief Wiggin said at the time of the variance approval and his letter, it was felt that Kelsea Road ended at Mr. Guiney's barn. He spoke about the court decision that the Nault access had to go through its own property rather than a path by Mr. Guiney's barn, thus putting the driveway where it is now. He said there was an issue with a wetland where relief was given and there was an existing 16' culvert. The chief said all agreed that the initial access could not be used. He said it is 14.5' on private property, and he is not sure how the town could force the widening. Pat Panciocco said they tried working with Mr. Nault so he could buy additional width to improve the situation. Mr. Guiney said Mr. Nault has not approached him to buy additional land.

Brian Arsenault, Building Inspector/Code Enforcement Officer, said the building permit application came in and the department had all of the past records. He said they reached out to NHMA and found that the variance is still in effect. He said the fire chief is the same one who previously weighed in on the access. There were no appeals at the time of the initial variance. As part of the permit process, the department asked Jon Wiggin to look at the access, which he did, and he stated that it is adequate. Mr. Arsenault said he met with Mr. Guiney a couple of times, and he thought those discussions went well. He said the department's outline of the process of granting the building permit was shared with the applicant and board members prior to this hearing, and there have been no secrets.

Jim Soucy asked Ms. Panciocco to fit the plan that was handed out earlier in the meeting into the tax map for clearer reference. Dave Nault noted that all maps relied upon were done by the former owner of the Guiney property, depicting the cart road. Donna asked if the text of 674:41 had changed since the permits were issued for Lots 7 and 8. Ms. Panciocco said 674:41 was created in 1983. It was noted that the question was not raised when the other two house permits were issued.

Hearing no further discussion, the chair closed the public hearing at 8:08p.m., bringing it back to the board. Jim Soucy said they have heard soundly that the variance is still good and is not to be applied retrospectively. He said the Board has reviewed the fire department and applicant's materials, along with comments from the police department. The access has been addressed by Chief Wiggin, noting that the fire code cited by the applicant's agent is inapplicable. Mr. Soucy said the chief has been to the site in connection with this building permit and deemed it safe and adequate. Dan Dal Pra said he agrees with Jim Soucy. He said it was confirmed by NHMA that there is a valid

variance, the fire chief said he could live with the width, it is an unusual site with the number of houses, yet he does not see an overwhelming case for an appeal. Alison Vallieres said the ZBA made their decision in 2006 in good faith, and it should not be changed. John Trottier said the 2006 decision was made based on evidence at that time, and even though new information has been discovered, he does not feel they can go back. Matt Delude said looking at an ordinance retrospectively is not logical and is always disfavored by the courts. He said RSA 674:41 does not apply as there is no street that does not give access. Mr. Delude said the applicant would need to argue the point in 2006 and the board should not be undoing it.

**Jim Soucy made a motion to deny Application #2023-ZBA-002, Michael J Guiney – Appeal of Administrative Decision of the Dunbarton Building Inspector for the issuance of a building permit to David A Nault for Lot B6-01-09. The motion was seconded by Matthew Delude. All were in favor.**

Adjournment: Having no further business, **Matthew Delude made a motion to adjourn the meeting at 8:18 p.m. Jim Soucy seconded the motion. All were in favor.**

Respectfully submitted,  
Donna White, Office Administrator