

NORWICH DEVELOPMENT REVIEW BOARD
HEARING MINUTES
April 10, 2014
Tracy Hall Meeting Room

Public Hearing:

#5APP14 – An appeal by Ann and Dean Seibert, et al, of the decision of the Norwich Zoning Administrator to issue Zoning Permit #4BAD14 to Norah Geraghty, Landowner, for an addition on Lot 20-132.000, at 383 Main Street and a Response Memorandum of Zoning Administrator (continuation from April 3, 2014).

Members Participating: John Lawe (chair), Nancy Dean, Stanley Teeter, Ernie Ciccotelli, Folger Tuggle, Arline Rotman, John Carroll

Alternates: Don McCabe

Substitute Clerk: Preston Bristow, Zoning Administrator for Barnard, Braintree, Chelsea and Pomfret, Vermont (substituting for Phil Dechert)

Appellants: Ann Seibert (spokesperson), Colleen Barr, Paul Bozuwa, Terry Appleby, Mary Ryan, Christopher Weinmann, Jennifer Roby, Gwendolyn Thompson, Robert Manby of C. Robert Manby, Jr., P.C.

Landowners: Norah Geraghty, Ciaran Geraghty, Nathan Stearns of Hershenson, Carter, Scott and McGee, P.C., and Andrew Garthwaite of Haynes & Garthwaite Architects

Appellee: Town of Norwich represented by Zoning Administrator Phil Dechert

Others: Tom Porter, Nancy Hoggson, Peter Brink, Rachael Nagel, Nancy Osgood, Deborah Williams, Andy Williams, Lizann Peyton, Robert Parker, Anne Alford, Jim Baird, Elizabeth Perry, Misty Blanchette Porter

Chairman Lawe reopened the hearing at 7:30 PM. It was noted that Attorney Robert Manby will be representing Appellants for this evening in place of Attorney Jack Candon. A site visit was held today between 4:00 PM and 4:20 PM at the Partridge House at 383 Main Street, Norwich, Vermont. Present were members Lawe, Dean, Teeter, Ciccotelli, Tuggle, Rotman, Carroll and alternate McCabe. Also present were Appellants: Ann Seibert, Colleen Barr, Christopher Weinmann; Landowners: Norah Geraghty, Ciaran Geraghty, Nathan Stearns, Andrew Garthwaite; Others: Tom Porter, Jim Baird, Andy Williams, Deborah Williams, Robert Parker, Todd Thompson; and Substitute Clerk: Preston Bristow

The following additional documents were provided at the outset of the reconvened hearing:

Submitted by Appealing Abutters (Appellants)

APL-5 Memorandum In Re: Appeal #5APP14-Geraghty by Appellants through attorney John C. Candon, 4/8/14.

Submitted by Norah Geraghty (Landowner)

APP-2a&b Cover letter (APP-2a) and Response to DRB's Request for Information by Norah Geraghty through her attorney Nathan Stearns (APP-2b), 4/8/14.

Submitted by Development Review Board:

DRB-1 Email from John Lawe entitled "Questions for APP & APL, 4/4/14.

Attorney Nathan Stearns was asked to briefly summarize Landowners' *Response to Development Review Board's Request for Information* of 4/8/14 (exhibit APP-2b). Attorney Stearns' summary was that: (1) the statutes through 24 V.S.A. §4440(c) are clear that payment of a fee is a precondition of the validity of the appeal, (2) a curb cut permit is issued under the purview of the Selectboard and cannot be appealed to the DRB, and (3) while appeals are governed by 24 V.S.A. §4440(c) which contains the word "shall," applications are governed by 24 V.S.A. §4440(b) which only uses the word "may" and therefore the payment of application fees does not affect the validity of permits that are issued. Attorney Stearns added that the DRB could instruct the Zoning Administrator to collect the balance of the fee.

Attorney Robert Manby was asked to briefly summarize Appellants' *Memorandum In Re: Appeal #5APP14-Geraghty* of 4/8/14 (exhibit APL-5). Attorney Manby's summary was that Landowners' narrow reading of 24 V.S.A. §4440(c) does not do justice to the plain language of statute or to the spirit of the law because subsection (c) refers to "appeals *and for other acts* ... the payment of which shall be a condition of the validity of the filing or act" and that the filing of a permit application is an *act*. Therefore, it is Appellants' position that should the appeal fail, the permit is not perfected either. Attorney Manby suggested that if the DRB finds the permit was not perfected, then the Landowners could reapply and the 15-day appeal period would start anew.

Chairman Lawe stated that the DRB had previously decided not to rule on Landowners' Motion to Dismiss Appeal at this time but to proceed with the substance of the appeal. Attorney Manby asked on behalf of the Appellants that their exception be taken for the record.

Attorney Manby, over Attorney Stearns' objection, was permitted to read language from the Access Permit issued on 11/7/12 (exhibit ZA-5) that "The issuance of this permit does not release the applicant from any requirements of the statutes, ordinances, rules and regulations administered by other governmental agencies." Attorney Manby noted that "regulations administered by other agencies" includes the DRB, and continued reading, "The permit will be effective upon compliance with such of these regulations as are applicable." He made the point that the curb cut is a conditional permit effective upon compliance with other regulations.

Attorney Manby, over Attorney Stearns' objection, stated that it was an anomaly that a two-unit dwelling with two home occupations could be allowed at a residential location on Main Street and the Zoning Administrator would not require a site plan and the DRB apparently can find no mechanism to review a parking plan. He stated that site plan review is at the heart of this appeal.

Attorney Manby, over Attorney Stearns' objection, stated that under section 5.01(A) of the Norwich Zoning Regulations all uses excluding home occupations within a one-unit dwelling shall be subject to site plan review. He stated that the Zoning Administrator was in error not to require site plan review because Landowners have converted the property from a one-unit dwelling to a two-unit dwelling and the exclusion no longer applies.

Attorney Manby concluded that the question of site plan review is relevant to this appeal because the issuance of permit #4BAD14 allows the expansion of a home occupation and provides a trigger for appeal and opens the door to reconsider whether a site plan is needed. It is the position of the Appellants that the act of the Zoning Administrator in issuing a permit was void when it was done in October of 2012 because of a failure to abide by the requirement in the regulations that there must be site plan review.

DRB member Carroll asked if Appellants' position wasn't trying to un-ring a bell, since the Landowners had proceeded in good faith on a permit that was issued 18 months ago.

Attorney Stearns responded with the following three points:

1. Case law is very well settled that even if a permit is issued mistakenly, if it is not appealed within 15 days, the permit is final. Courts generally hold that zoning is a derogation of common law property rights and zoning regulations are to be strictly interpreted in favor of the landowner.
2. Table 2.4(B) of the zoning regulations has an asterisk besides certain uses that would require site plan review. Table 2.2(B) for the Village Residential I District has no such asterisks suggesting that Home Business (which includes Home Occupation) and Bed and Breakfast (1 to 3 Guest Bedrooms) require no site plan review. Section 5.01(A) states site plan review "shall apply to all permitted uses *as designated* in Article II" and since table 2.2(B) is located in Article II it should be controlling and site plan review is not required of any of the permits that were issued.
3. Home Business (which includes Home Occupation) and Bed and Breakfast (1 to 3 Guest Bedrooms) are two distinct uses within the district. The current permit being appealed for the sunroom and second floor addition are only to be used in conjunction with the Bed and Breakfast and are not to be used in conjunction with catering.

Attorney Manby responded that Attorney Stearns' extractions from Article II are not convincing. Article II simply lists permitted and conditional uses within the various districts and if there is a tension between tables and asterisks the DRB can reconcile those. The language of section 501(A) is clear that site plan review is required.

DRB member Carroll offered that the Zoning Administrator made a sensible judgment rather than an error that a site plan was not necessary, and asked why we are hearing this matter today rather than 18 months ago. Attorney Manby referred to Callighan & Son v. Cooley in 1966, when the Vermont Supreme Court overturned a permit issued for a billboard that the Court determined the Town of Bennington did not have the authority to issue.

In response to an inquiry from DRB alternate McCabe, Ann Siebert for the Appellants indicated that the town manager had approached them about mediation and the Appellants were willing to do so but the Landowners were not. Mr. Geraghty for the Landowners stated that they did not rule out mediation, only that they needed time to discuss it among themselves and that they were now willing to enter into mediation. Attorney Stearns cautioned that an invitation to mediate did not mean that the DRB should not proceed with making a decision. DRB member Dean stated there was merit in going ahead and that the DRB had a charge and an obligation to make a decision.

DRB member Rotman asked whose handwriting crossed out “change of use of Bed & Breakfast” and added “and 2nd Floor addition” to application #4BAD14 (exhibit ZA-6). Architect Andrew Garthwaite stated that it was his handwriting, and that he made the changes in Phil Dechert’s office when he realized that the change of use had already been approved but that the second floor addition had neglected to be included.

DRB member Tuggle stated he believed site plan review should have been required and he would like an independent legal opinion as to whether the clock is still running for an appeal of that question.

DRB member Dean asked architect Andrew Garthwaite why, as an experienced architect familiar with the Norwich rules, he proceeded with these improvements without the required permits. Architect Garthwaite responded that he was under the impression that the work was covered in an earlier permit and was mistaken.

Chairman Lawe asked Zoning Administrator Dechert at what stage he determined that not all work was being performed according to the permit. Administrator Dechert responded that he issued the initial two permits in 2012 and that he was not aware of the sunroom or second floor additions until he heard of them in a conversation with an abutter. He called architect Andrew Garthwaite and discovered that there had been a mix-up regarding permitting between the architect and the owner. Permit #4BAD14 was issued the day after his conversation with the abutter.

DRB member Rotman suggested that each side be asked to provide a legal memorandum on the issues discussed at tonight’s hearing. Substitute Clerk Bristow suggested that each side could be asked to provide their proposed Findings of Fact and Conclusions of Law.

Attorney Manby noted that application #4BAD14 included an entry that there would be three parking spaces. Attorney Stearns responded that absent site plan review there is no requirement in the zoning regulations for a permit for parking.

Chairman Lawe asked Zoning Administrator Dechert to define catering. Administrator Dechert responded that catering falls under the category of a home business, and that it must have no more than 2 non-resident employees, must occupy less than 50 percent of the area of the house, must have no retail sales, and does not change the character of the neighborhood.

DRB member Rotman asked what constitutes an “off-site” catering business, and Mr. Geraghty responded that food would be prepared at the property but transported by van or SUV to another destination where it would be served. They are only licensed by the state for food preparation at the property and not for food service.

DRB member Teeter asked if there would be any limit to the hours of operation. Mr. Geraghty responded that there would not, but that the only vehicle returning after a catering event would be a van or an SUV.

Attorney Manby raised the question that the Landowners applied to the state of Vermont for a restaurant with up to 25 seats. Mr. Geraghty replied that they applied to the state for a lodging permit for the B&B and that the lowest category on the form was 0-25 seats.

There was discussion about the DRB's role in any mediation between the parties, and it was decided that it was up to the parties to decide whether to mediate and that it was not the role of the DRB to ask or direct that the parties mediate.

After discussion, the motion was made and seconded that the hearing be recessed until April 24, 2014 at 7:30 PM.

Attorney Stearns asked if that meant that the DRB was continuing to set aside Landowner's Motion to Dismiss Appeal. Chairman Lawe indicated that it does.

The DRB voted unanimously to recess the hearing at 9:30 PM and to reconvene the hearing on Thursday, April 24, 2014 at 7:30 PM at Tracy Hall at 300 Main Street, Norwich, Vermont.

Preston Bristow, Substitute Clerk

APPROVED 5/15/14