

NORWICH DEVELOPMENT REVIEW BOARD

MINUTES

April 4, 2019
Tracy Hall Meeting Room

Members present: Dean, Lawe, Teeter, Carroll, Rotman

Members not present: Stucker

Alternates not present: McCabe, Pitiger

Clerk/Staff: Rod Francis (John Carroll??)

Appellant: John Eller

Public: Nate Stearns Esq. (for Glenn Gurman Appeal of John Eller), Glenn Gurman (Appeal of John Eller), Antoinette Jacobson and Noah Jacobson (Other/Deliberation #36BSUB17; Left early)

The meeting was called to order by Chair Dean at 6:30 PM

1. Call to Order, Roll Call

2. Agenda – Approved with Reorder:

- a. Start with 5. Public Hearing at 6:30 and
- b. Move 3. and 4. to end of Meeting

3. Public Hearing: 6:30 PM

- a. Continued from March 21, 2019 - Appeal of Zoning Administrator Decision; concerning alleged zoning violations (height of fence[s] and side setback), by John Eller, Appellant and Landowner at 194 Kendall Station Road, Lot #06-072.000. Application to be reviewed under the Norwich Zoning Regulations.

The record in this appeal includes the following documents:

Submitted by Appellant:

- A-1 Appeal Letters from Appellant to DRB with Enclosures
- a. Appeal of ZA Memorandum (1-15-19) Letter from Applicant to Norwich Development Review Board (“DRB”), dated 2-5-19 (received 2-6-19)
 - b. Ortho Map (Applicant added handwritten property line markings on 186 and 194 Kendall Station Road) originally done by the Norwich Planning Office dated 1/18, submitted 2-6-19
 - c. Appeal Letter, dated 2-5-19
 - d. Letter to Norwich Zoning Office, dated 11-18-15
 - e. Letter to Norwich Design Review Board, 10-23-17
 - f. Letter to Norwich Zoning Office, dated 5-11-16
 - g. Letter to Norwich Zoning Office, dated 10-25-17
 - h. Complaints to Norwich Zoning Administrator, 1-31-18
 - j. Letter to Norwich Development Review Board, 2-2-18
- A-2 Request for Action to Correct Zoning Violation Letter to Norwich Zoning Office from John Eller
- a. Request for Action Letter, dated 11-28-18
 - b. Letter to Norwich Zoning Office, dated 11-18-15
 - c. Letter to Norwich Zoning Office, dated 5-11-16
 - d. Letter to Norwich Selectboard, dated 5-16-16
 - e. Letter to Norwich Development Review Board, dated 10-23-17

- f. Letter to Norwich Zoning Office, dated 10-25-17
- g. Memo Subject: Unanswered Complaints to Norwich Zoning Administrator, dated 1-31-18.
- h. Letter to Norwich Development Review Board, dated 2-2-18

Submitted by Zoning Administrator

- ZA-1 ZA Response Memorandum to John Eller Violation Letter dated 11-28-18 re: Site Visit 186 and 194 Kendall Station Roads on 12-19-18, dated 1-15-19
- ZA-2 Environmental Court Decision to Vacate Appeal, Docket #66-6-18 Vtec, signed by Thomas G. Walsh, Judge, dated 10-31-18
- ZA-3 Appellant's Motion to Vacate, Docket #66-6-18 Vtec, submitted by Nate Stearns, Esq., of Hershenson, Carter, Scott and McGee, P.C., Attorney for Glenn Gurman, dated 10-15-18

Submitted by Interested Person

- IP-1 Letter re: Motion to Dismiss and/or Deny Mr. Eller's Appeal, submitted by Nate Stearns, Esq., of Hershenson, Carter, Scott and McGee, P.C., Attorney for Glenn Gurman, abutter at 186 Kendall Station Road, dated 3/26/19

Present Members: Nancy Dean (Chair); John Lawe (Vice-Chair); John Carroll (acting Clerk); Arline Rotman; Stan Teeter

Present Alternates: (none)

Clerk: Staff: Rod Francis

Appellant: John Eller

Interested Parties: Glenn Gurman, Nate Stearns, Esq., Attorney for Glenn Gurman

Site Visit Report: There was no site visit

At approximately 6:25 pm, Mr. Eller furnished to the Administrator a submittal, dated 7 March 2019, entitled "Response to Zoning Office findings and written Appeal re. March 7, 2019 hearing for action to correct zoning violations on Lot 71 Kendall Station Road" (A-3a). Mr. Eller then left meeting-room; he soon returned and gave to the Administrator a revised version of A-3-a, which was denoted A-3-b. Mr. Eller then left the meeting.

The Chair opened the Public Hearing at 6:40 pm.

It was noted that Mr. Eller was not present in the room. After extended discussion among members of the Board, it was agreed that the Board would hear and consider Mr. Gurman's motion for dismissal.

At 6:50 pm Mr. Gurman (abutter) and Mr. Stearns (attorney for abutter) were sworn in.

Stearns: The Board should dismiss Mr. Eller's appeal on the grounds that Mr. Eller has not demonstrated that he has standing in the matters at issue. Mr. Stearns reviewed and reiterated many of the elements of his 26 March 2019 motion to dismiss (IP-1).

At approximately 6:55 pm Mr. Eller returned to the meeting-room and furnished to the Administrator a revised version of submittal A-3-a, which was designated A-3-c.

At 6:57 pm Mr. Eller (appellant) was sworn in.

Eller: "I have standing...I live right next door to the Gurman property....The board has previously ruled that I have standing...."

Gurman: (on question of Carroll about any modifications to the structures at issue during the period between the date of the DRB's site visit (4 May 2018) and the ZA's site visit (19 or 20 December 2018): "... *The four-foot fence (along the Eller/Gurman boundary) was altered to make sure that it was only four feet (in height)*", and it was moved back "an inch in one spot". ... "Other than that, there has been no other change to any of the other structures".

Eller: (on question of Carroll): I am no longer concerned about the 'four-foot fence' along the Eller/Gurman boundary: this appeal does not embrace the 'four-foot fence'.

Eller: (on question of Rotman as to his standing as an interested party): I am an abutter (along the northly boundary of the Gurman property) and I am an "interested party" with regard to the 'carport' (which is situated on the southerly boundary of the Gurman property).

Stearns: (on question of Carroll): "... *With respect to the 7-foot fence...I am not arguing that Mr. Eller does not have standing.*" Carroll: "You concur that Mr. Eller does have standing with regard to the 7-foot fence?" Stearns: "I do." Carroll: "I take it that you are not making a motion to dismiss with regard to the 7-foot fence." Stearns: "That's correct."

Stearns: "Mr. Eller cannot challenge the zoning permit for the fence, because we are beyond the 15-day appeal period.... *The only challenge can be, that's valid at this point, that can be entertained, to that 7-foot fence, is that somehow that (it) does not comply with the zoning permit that was issued to build it.*"

Eller (on question of Dean): "... *a day or two after he (the contractor) started to build the berm....I called Phil (the then Zoning Administrator) and I went down to the office...by the time Phil came out, the fence was complete, and Phil made the remark, I think it looks like 'blank', and he said 'What if you took a chain-saw and cut two feet off the top'...*"

Eller: "...How was I to know what was going to be built before it was built? And object to it? If I saw a 7-foot fence, I wouldn't object to a 7-foot fence...On the application he said '7-foot fence': he didn't say '7-foot fence with two foot fill, with a final elevation of nine feet'...I believe that the permit misrepresented what he was going to do. When the contractor was going to build a 9-foot fence?"

At 7:35 pm, Rotman offered a motion to "Suspend the hearing in order to enter deliberate session to discuss the merits of the motion to dismiss." The motion was seconded by Teeter. The motion was approved unanimously by voice-vote.

The Board entered Deliberative Session at 7:40 pm.

The Board concluded its Deliberative Session at 7:55 pm.

The Chair reconvened the public hearing at 7:58 pm. The Chair announced that the Board concurs with Mr. Gurman's motion-to-dismiss with regard to the carport and the privacy fence. With regard to the 7-foot fence along the Eller/Gurman property line, the Board determines that Mr. Eller has standing as an interested party.

Eller: (on question of Rotman to explain why he believes the findings (with regard to the 7-foot fence) of the present Zoning Administrator are not accurate): "When the Zoning Administrator came out, there was 14 inches of snow, or more, and he asked where the berm was, that I claimed, and I said you can't see it because of the snow....The previous site inspection, by the Board, there was no snow...they measured the berm....they got down with a tape measure, measured the berm, measured the fence, and determined it was a violation. That's in the record..."

At 7:45 pm, Mr. Francis (Zoning Administrator) was sworn in.

Francis: *May we have clarification of which of the three documents provided this evening is the one we are to be working with?*

After some discussion, it was explained that the last document provided (at 6:55 pm) by Mr. Eller is the document to be working with. (denoted as A-3-c)

Francis: *“My task is to interpret in a literal sense the zoning regulations. ... From long-standing practice and experience, and some training ... where the regulations are silent you should read that as an absence of clear direction to the Zoning Administrator to implement. In other words, it’s hard to interpret silence. ... There is no definition of a ‘berm’ in the zoning regulations. In this instance, the absence of the term ‘berm’ in the regulations is an absence that I couldn’t overlook. ... There was snow on the ground....a bright sunny day, the snow was in light relief, so in fact it accentuated the shape of the ground rather than disguised it. I had also visited the site twice before and had a good recall as to exactly where the grade changed and why it did.*

“... It’s clear that grade under no circumstances could be described as pre-existing or natural on either side of the fence. It’s obviously been manipulated by long-standing activity on both sides of the fence and it would be impossible to establish what is natural or pre-existing grade on either side. ... There’s no denial that there had been fill used on the Gurman side of the property. ... The permit shows clearly the linear distance where the fill would be added and why.

“... So in the absence of a definition of ‘berm’, and in the absence of any kind of concern in terms of quantity, quality, or volume of fill added, I could not deduce that there was an excessive amount of fill or that the amount of fill that was added was in contradiction to the permit that was issued. The fence at no point exceeds 7-feet high from the ground underneath it. ... The conclusions that I reached was: I can’t establish what the pre-existing conditions were, pre-existing conditions are outside my purview because the zoning regulations do not explicitly identify preexisting grade or natural grade relative to the proposed or subsequent grade, so I literally interpreted what was before me. The permit stands. ... The fence corresponds closely with the sketch-plan that was provided with the permit. So therefore, my conclusion as the Zoning Administrator is that the permit was issued reasonably and that the permit was adhered to reasonably.”

Francis (on question of Carroll): *“With all due respect... there’s no way, under the zoning regulations, that the question of fill has anything to do with the consideration of the height of the fence. The question of whether the fill is present or not is, in some ways, beside the point.”* Carroll: *“So, can I put in a five foot row of fill adjacent to my neighbor’s property... Can I do five? Can I do ten? With seven feet on top of that?”* Francis: *“Yes, yes you can.”* Carroll: *“Do you think that would be within the intent of the framers of our by-law?”* Francis: *“If you ask me for a comment on the quality of the by-laws, I’ll give it to you in frank terms: it’s poor. Do I think that was their intent to have that happen? Obviously the conclusion is no. Do they write language clearly enough to prevent it? No.”*

Stearns: *“The permit itself is no longer is subject to appeal. ... When interpreting the regulation, you must look at the plain language.”*

Gurman: *“... The fill was delivered in a front-end bucket loader – not a truck, and just to clarify that, a truck carries about twelve yards of material. A bucket loader carries two yards. So we had two bucket-loaders that came and delivered fill in that area. So we’re talking about four yards of material, not twelve trucks as we’ve heard before. The two bucket-loaders which added fill in the relevant sections – which is not the entire length of the fence. It was simply to level and fill a divot between two sections of fence...”*

Stearns (on question of Carroll): “... Hypothetically, speaking, if a permit were issued today, and a neighbor, somebody with standing, chose to appeal the issuance of that permit to this board, this board could review that and could, if it found that the permit was improperly issued, overturn the issuance of that permit. ...”

Rotman made motion to accept all of the exhibits in the hearing documents listed above, the document A-3-c furnished by the Appellant, notes from the site visit and other documents in the previous proceeding. The motion was seconded by Carroll. The motion was approved unanimously by voice-vote.

Rotman made motion to close the hearing. Lawe seconded. The motion was approved unanimously by voice-vote.

At 9:10 pm the Chair declared the hearing closed.

3. **Public Comments & Announcements –None**
4. **Administrative Issues -**
 - b. Don McCabe, Alternate, applying for vacant DRB position due to Resignation of Ernie Ciccotelli – **Will be discussed at future meeting**
4. **Minutes:** 3-21-19 Draft Minutes were discussed.
There not being a quorum of members who were at the 21 March meeting, no action was taken.
5. **Deliberative Session: Continued to 4-18-19 DRB MEETING**
 - a. **#36BSUB17:** Preliminary/Final Plan Review of a Subdivision Application by Antoinette Jacobson, Applicant and Geraldine Jacobson, Landowner, to divide Lot 10-012.500 into 2 lots of approximately 3 acres and 23 acres at 519 Bragg Hill Road. Application to be reviewed under the Norwich Subdivision Regulations.
 - b. **#47BSUB17:** Final Plan Review of a Subdivision Application by Glyn Jones Elwyn, Applicant and Landowner, to divide Lot 11-126.000 into 4 lots of approximately 3.9 acres, 2.2 acres, 2.0 acres and 98.2 acres at 720 Union Village Road. Application to be reviewed under the Norwich Subdivision Regulations.
6. **Deliberative Session: Scheduled for 4-18-19 DRB MEETING**
Appeal of Zoning Administrator Decision; concerning alleged zoning violations (height of fence[s] and side setback), by John Eller, Appellant and Landowner at 194 Kendall Station Road, Lot #06-072.000. Application to be reviewed under the Norwich Zoning Regulations.
7. **Other Business:** (none)
8. **Adjournment:** The meeting adjourned at 9:22 pm.

Respectfully submitted,

APPROVED 4-18-19

John Carroll

Future DRB Meeting: April 18, 2019 at 6:30PM

Development Review Board Agendas & Minutes are available at: <http://norwich.vt.us/development-review-board/>