



**** DRAFT ****

Hill ZBA

Meeting/Hearing Minutes

January 12, 2023

Regularly Scheduled In-Person Meeting

Meeting was brought to order by Stephen Thomson, Chairman, at 7:00 p.m.

Attendance: Stephen Thomson, Frank Marsh, Charles Estes, Dave Park and Stephen Arruda

Public Audience – Armand Boisvert, Matthew and Natasha Rolnick, Paul and Patricia Young, John Gaudette, Jay and Sue Quimby, Maria and August Merker.

Old Business – Minutes of the previous meeting – A Motion was made to accept the minutes of the previous meeting as prepared. Motion passed. On the Agenda is a Public Hearing scheduled, as properly posted, for 7:15 p.m.

The board received an Appeal of Administrative Decision submitted by August "Red" and Maria Merker hereinafter referred to as ("The Merkers"). The Merkers appeal the denial of a building permit submitted on August 25, 2022 handled by the Selectmen's office. The applicant sought a permit to build a single family dwelling on a 169 acre lot located at Map R12 Lot 50, on Bunker Hill Road, a Class V road in Hill, NH. The application for building permit was denied Sept. 6th, 2022. A hearing was scheduled for January 12th, 2023 at 7:15 p.m. Public Notice was posted in the local newspaper. Abutters notices were sent certified mail for verification purposes. Public notices were posted at not less than two locations frequented by residents, 10 days prior to the hearing. The Secretary read aloud the public notice of the Appeal.

PUBLIC HEARING MINUTES

The Merkers were confirmed present at 7:15 p.m., Chairman Thomson declared the Public Hearing **Open**.

August Merker stepped forward to present to the board. Mr. Merker requested that all documents submitted to the Town of Hill, related to their application for a building permit, be included as part of the hearing record for consideration by the ZBA. Mr. Merker went on to explain the location of the lot, the limited impact to abutters and their disagreement with the Planning Board and Selectmen's decision that the lot is not a buildable lot.

The documents received by the Merkers included an application for a Building Permit dated 08/25/22, a hand drawn sketch of the proposed location of the dwelling, two lot plats, a page from the application for permit with a denial initialed by a Selectman on the grounds of "lack of road frontage." Also included for consideration are Planning Board minutes from May 19th, 2022 and November 17th, 2022; Selectmen's minutes from Sept 06th, 2022 and November 15th, 2022 and ZBA Minutes dated November 10th, November 22nd, (which includes a letter to the Selectmen from the ZBA) and ZBA Minutes from December 08th, 2022. Also included is an application for a Variance which was rendered moot in the process. Mr. Merker requested the board consider a 2018 decision by the ZBA referring to the matter of Kathie Higgins. (The board recalls well the matter of Higgins without additional submission.) Mr. Merker also requested the ZBA consider NH RSA 674:41 as outlined in the Merkers Appeal form. Mr. Merker concluded.

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Chairman Thomson then provided opportunity for Abutters to appear and speak.

Mr. Gaudette suggested that it would have been better for the Merkers to inform neighbors of their intentions without the need for a public hearing. Mr. Quimby stated he was unaware of the proposed dwelling or any issues with the lot until receiving the certified mailing of the abutters notice. Mr. and Mrs. Young believed lot 50 was not buildable and are concerned with the potential for “big money” developers to come in if the property was further subdivided. They also expressed concern of development of the R.O.W. Abutters questioned the location of the planned dwelling. Chairman Thomson requested that all questions and comments be directed to the board and he explained time would be provided for the Merkers to reply. Mr. Boisvert is an abutter on the Andover side of the property line. He believes it is unfair for the Town or State to deny a building permit while receiving taxes on the land. His property is the largest lot abutting the Merkers lot. He states he does not like the thought of a building on the lot but believes to say no is unfair to the owner. Consensus of Abutters is – “The last thing we want is a large subdivision.”

Chairman Thomson then provided for rebuttal to abutters. The Merkers state there will be no large subdivision of the lot as long as they own it.

Chairman Thomson declared the public hearing **CLOSED** at 7:35 p.m.

Board Deliberations / Concluded Minutes

The Members of the ZBA began deliberation. The attendees were advised they were free to listen as the board deliberated or they were free to go. However attendees were advised that if they stayed, there would be no further public input considered by the board.

The Secretary began deliberations by chronologically detailing receipt of applications, Town of Hill minutes of the various boards and detailing the process the Merkers had undergone seeking approval of a building permit.

- On May 19th 2022, the Merkers had a preliminary consultation with the planning board at which time the planning board Secretary noted in the minutes they were provided “evidence supporting an approved subdivision was created in 1983” and “Discussion amongst the board comes to the consensus the lot is buildable if in fact we can establish the claim to the approved 1983 subdivision.”
- Additional notes in the PB minutes detail the actions taken by the Secretary after the conclusion of the meeting. The Secretary communicated individually with legal counsel for the Town. Counsel apparently expressed an opinion based on facts presented to him. The Secretary then, independent of the board, communicated to Mr. Merker his interpretation of legal counsel's opinion that “the town isn't in the business of determining the potential suitability of a parcel of land.” The PB Secretary concluded the minutes stating, “Ultimately if denied by the Selectmen and the Planning Board the ZBA is the next step for appeal.

DELIBERATIONS - Members of the ZBA commented, there are many things questionable about the Planning Board's minutes. Why do minutes include actions taken by the Secretary after the conclusion of the meeting <and> Why were his discussions with Legal Counsel not taken back to the Planning Board to consider before being told to the Merkers? Setting aside those issues for another discussion, Board Members recoiled at the wording – “if in fact we can establish the claim,” Taken at face value; Members of the ZBA confirmed the Merkers submission of a Subdivision Plat approved by the Town of Hill Planning Board in 1983. Mr. Thomson pulled the town file which does in fact confirm the Subdivision Plat. Shown on the Subdivision Plat is a Right Of Way (“R.O.W.”) being .99 acres, in excess of 530 linear ft x 50 ft wide, having clearly defined boundaries that establish it as part of Lot 50. Appearing on the Plat is a signature block bearing the signature of approval by the Town of Hill Planning Board.

- The ZBA confirmed receipt from the Merkers of a building permit dated August 25, 2022.
- The ZBA confirmed receipt from the Merkers of a page stating, “Proposal denied due to lack of road frontage.” Initialed by a Town of Hill Selectman.

The ZBA then reviewed the Selectmen's meeting minutes from September 6th, 2022 wherein, under the sections **Selectmen Business;** **Building Permits:** The minutes state- *“August & Maria Merker (Bunker Hill Road Map R12 Lot 50) wanting to construct a 2-story split level home. The building permit was denied because it doesn't have the required road frontage. A notice of decision will be needed to move this forward to the Zoning Board for a variance request.”*

Members of ZBA disagree with the Selectmen's initial assertion that a notice of decision is required to move this forward for a variance request. The ZBA disagrees that a Variance request is the next form of administrative remedy and should be reserved as an absolute last resort.

The ZBA then reviewed the Planning Board's minutes from November 17th, 2022. {It is noted that the November minutes submitted for posting on 12/09 were revised and resubmitted on 12/16 after being reworded.} The ZBA questions the restatement: *“..... the next order of business was concerning the planning board's previous matter concerning a property map 12 lot 50. The owners had come before both the selectmen and the planning board hoping that lot 50 was buildable. It was determined that it was not because it had no road frontage on a Class 5. The owners mistakenly believed that it was buildable because it is connected to a class 5 road by a 350 ft long right of way (ROW). **There was never an application put before either bored and therefore no application was denied. However the non-binding opinion was put forth that it was the unanimous opinion of the board that it was / is not a buildable lot.**”* The following statement claims; *“**Prior to this meeting Frank Razzaboni had a brief consultation with attorney Courtney who reiterated his opinion that the Lot in question was not buildable and provided abundant references to back his assertion. Also discussed with Council was the caveat that should govern all land boards, “they are not in the business of offering real estate advice.”**”* Noteworthy is a ZBA member's comment that when provided the opportunity to appear at the Public Hearing and share the abundant references to back the assertion, that no one was present and no references in support were ever provided.

This final statement(s) drew several comments from the Board (ZBA) because, based on previous review of documents submitted to the Town, the statement is categorically FALSE. An initial consensus by the Planning Board in May 2022 was that the lot was buildable. But that consensus was disregarded independently by the Ex Officio Selectman performing Secretary duties. The minutes represent an overstep by the Ex Officio / Secretary who, independent of the Planning Board, contacted legal counsel, representing it was on behalf of the Town, and asserted presumably his point of view. He then relayed a view opposing the Planning Board's consensus back to the Merkers, without board approval, setting the Merkers on the current path. There was a building permit taken up by the Selectmen at their September 06th meeting. A decision is noted in the Selectmen's meeting minutes.

On November 15th, Chairman of the ZBA, Stephen Thomson attended the Selectmen's meeting. As noted in the minutes of that meeting, He inquired *“**if the Selectmen had a chance to review the RSA Merker August Special Exception. (Inaccurate note of Application by the Executive Assistant) The board of Selectmen did review however the decision reached remains the same.**”*

Clearly noted more than once, an application was submitted and a decision was reached and reasserted by the Selectmen. The ZBA, by means of an Appeal of Administrative Decision, is the proper venue and appeal opposed to variance is the proper course of action by the Merkers.

Having concluded its review of town documents and documents received by the Merkers; the ZBA then took up review of the applicable zoning ordinance and State statutes. During review of the zoning ordinance the Secretary read aloud –

New Hampshire RSA 672: 13 - Street. This is a universal citation from 2015 where in its states **“Street” means, relates to and includes street, avenue, boulevard, road, lane, alley, viaduct, highway, freeway and other ways.** And Also applicable –

2015 New Hampshire Revised Statutes
Title LXIV - PLANNING AND ZONING
Chapter 674 - LOCAL LAND USE PLANNING AND REGULATORY POWERS
Section 674:41 - Erection of Buildings on Streets; Appeals.

Universal Citation: [NH Rev Stat § 674:41 \(2015\)](#)

674:41 Erection of Buildings on Streets; Appeals. –

I. From and after the time when a planning board shall expressly have been granted the authority to approve or disapprove plats by a municipality, as described in RSA 674:35, no building shall be erected on any lot within any part of the municipality nor shall a building permit be issued for the erection of a building **unless the street giving access to the lot upon which such building is proposed to be placed:**

(a) Shall have been accepted or opened as, or shall otherwise have received the legal status of, a class V or better highway prior to that time; or

(b) Corresponds in its location and lines with:

(1) A street shown on the official map; or

(2) A street on a subdivision plat approved by the planning board; or

Discussion amongst member of the board echoed the sentiment of determination from similar situations. Chairman Thompson pointed out that very specific circumstances must apply and not all applications will meet with the same result. However in this instance, the situation with the Merkers lot very closely resembles a case that the ZBA spent a great deal of time researching. Therefore a decision was easily reached. It was pointed out that the law applicable in this instance is a pre-emptive statute the ZBA is required to follow. Charles Estes also noted that procedurally, when the ZBA takes up an Appeal, the ZBA steps into the position of authority subject of the Appeal. The ZBA is granted the authority to conclude this matter full stop.

Stephen Thomson made a motion that, the Merkers having met the burden of satisfying NH RSA 674:41 I, (b) (2), Be approved a building permit and the ZBA to provide a letter to the Merkers that Map R12 Lot 50 is designated a buildable lot subject to all the conditions and standards of the Town of Hill Zoning Ordinance and NH Laws. The motion was seconded by Dave Park.

Discussion – Frank Marsh and Steve Arruda shared their concern that multiple dwellings might be possible without restrictions or conditions of approval. Stephen Thomson said we have the authority to condition approval If we want. It was mentioned that the Zoning Ordinance restricts the number of dwellings per property. With current ordinances in place, no further restrictions are required. Charles Estes raised the issue of release of liability of the street giving access and stated the Merkers will be required to register with the county registry of deeds releasing the Town of Hill from liability and maintenance of the street or R.O.W. It was decided this will be included in the notice of decision with the proper wording for the Merkers to file. The motion passed unanimously. The Secretary will draft a notice of decision for circulation to the board before sending to the Merkers. Attendees of the public departed .

Having no other business on the Agenda, Dave Park made a motion to adjourn. Seconded by Stephen Thomson. The motion passed unanimously. The meeting closed at 8:50 p.m.

Respectfully Submitted,
Charlie Estes, Secretary ZBA