

TOWN COUNCIL
CAPE ELIZABETH, MAINE

Appeal by Robert H. Stier, Jr. re:)
Driveway Permit No. 2010-12)
_____)

Introduction

Section 17-2-1, 1981 Revised Official Code, Town of Cape Elizabeth, Maine (“the Code”), provides that decisions by the Director of Public Works concerning entrance permits are appealable to the Town Council. This appeal was filed from the issuance of Permit No. 2010-12, allowing a driveway onto Stonegate Road from a subdivided portion of property formerly owned by Peter Wovkonish at 370 Mitchell Road.

Statement of Facts

1. As the Town Council determined at its hearing on December 9, 2010, Stonegate Road is a public way which was conveyed to Cape Elizabeth to Stonegate Associates in accordance with a warranty deed dated December 5, 1989, which deed is recorded in the Cumberland County Registry of Deeds at Book 9015, page 16.
2. The conveyance to the Town was expressly made “subject to a Declaration of Covenants, Conditions and Restrictions [as recorded and amended]; subject to all notes conditions and easements shown on said Plan; and is subject to easements granted ... for the purpose of installing utilities serving the subdivision.” (Ex. A.) The Declaration of Covenants, Conditions and Restrictions (“Declaration”) is dated October 14, 1987. (Ex. B.)
3. The Declaration specifies that it exists “for the purpose of protecting the value and desirability of, and which shall run with, the real property ... and shall inure to the benefit of each Owner thereof.”

4. Article III of the Declaration provides:

The Association shall be responsible for maintaining, repairing and replacing ... stonewalls and landscaping within the road rights of way where such maintenance is not the responsibility of the Town of Cape Elizabeth.

5. Article V of the Declaration provides that “the provisions of Article III shall not be amended without the approval of the Cape Elizabeth Planning Board.”

6. The actual traveled way is approximately 30 feet wide at the southern entrance to the Stonegate subdivision, whereas the landed deeded to the Town is approximately 135 feet wide. On that substantial portion of the deeded land that is not the actual roadway, the Association has consistently maintained landscaping on both sides of Stonegate Road.
7. Section 16-3-1 of the Code, setting forth the General Standards of Subdivision Design, provides in subsection c:

Plants or other types of vegetative cover shall be preserved or placed throughout and around the perimeter of any proposed subdivision to provide for an adequate buffer, reduction of noise and lights, separation between the subdivision abutting properties, and enhancement of its appearance.

8. According to Section 16-3-2 concerning Road Design and Construction Standards, the subdivision road standards are intended “to promote a sense of community,” among other goals involving safety and cost of maintenance. “Proposed roads shall be laid out in an attractive manner, in order to enhance the livability and amenity of the subdivision.” Code Sec. 16-3-1 (e).
9. At the time the Stonegate subdivision was approved, the abutting property at 370 Mitchell Road was owned and occupied by Wovkonish. (Ex. C.) On or about August 7, 2009, Mr. Peter Wovkonish and his wife Wongthong purchased a house at 4605 Hamlets Grove Drive in Sarasota, Florida. (Ex. D.) In September 2009, Mr. Wovkonish provided evidence to the Town Assessor that he was a resident of Florida, as a result of which the Town removed his Maine Homestead Exemption effective September 24, 2009. (Ex. E.)
10. On May 20, 2010, 370 Mitchell Road was listed as being for sale.
11. On September 10, 2010, Wovkonish subdivided his property at 370 Mitchell Road into three separate lots. (Ex. F.) He apparently neither sought nor obtained approval from the Planning Board for the subdivision, which approval was required before building. 30-A M.R.S.A. §4406(1).
12. On September 15, 2010, Wovkonish conveyed his property, including the newly subdivided lot at Map # U31, Lot # 9D, to Early Bird Group LLC. (Ex. G.)
13. On October 28, 2010, the Director of Public Works issued driveway entrance Permit 2010-12, permitting access to Stonegate Road from the lot at U31/9D.

Legal Issues

In Mr. Leahy's letter of December 15, 2010, he identified the following two questions for which the Town Council seeks answers:

1. Does the phrase "shall be in accordance with all local regulations" appearing in Section 17-2-4, "Conditions of Permit," mean the Public Works Director must review and find that the driveway entrance permit complies with the General Standards of approval of subdivisions by the Planning Board, specifically, Subdivision Ordinance Section 16-3-1(c)? If so, does that subdivision ordinance provision in regards to plants and vegetative cover being preserved throughout and around the perimeter of a proposed subdivision apply to the strip of land conveyed to and accepted by the Town as a public way in this case? If it does apply, does such provision prevent the Public Works Director from issuing the subject driveway entrance permit?
2. Were there any conditions or restrictions imposed by the developer of the Stonegate Subdivision, or imposed by the Planning Board in its written approval or upon plans, that prohibit or restrict the Public Works Director from issuing the subject driveway entrance permit?

The first set of questions might be paraphrased as: "What do the Town ordinances, read together, require?"

The second question focuses not on the ordinances, but on the conveyances to the Town.

Finally, although not specifically requested, this brief will also address one other question presented during the Town Council meeting, namely, whether the final clause in Section 17-2-3 ("if required by the Director of Public Works") gave the Director of Public Works discretion to issue an entrance permit even though the application lacked a plan or sketch showing the setback of the building in relation to the center line of the traveled way?

Question 1: What do the Town ordinances, read together, require?

First, and most fundamentally, the Town ordinances must be read together. Section 1-1-2 of the Code expressly provides that "The word 'shall' is mandatory." This is a common statutory construction; the Maine state statutes contain a similar definition. 1 M.R.S.A. § 9-A ("Shall" and "must" are terms of equal weight that indicate a mandatory duty, action or requirement.)

Thus, according to the plain language of the Code Section 17-2-4, the "location, design and construction of any entrance permitted" was required to be in accordance with all local

regulations. There is no ambiguity in the ordinance. Moreover, determining that a proposed entrance complies with all local regulations should not be unduly burdensome because only some of the local regulations will be relevant for any given permit application.

Thus, if an applicant wants to extend a driveway to a public road that is entirely within a subdivision, as is the case here, the Public Works Director must assure that the location, design and construction of any entrance to that road is in accordance with the Town regulations pertaining to subdivisions. Those regulations expressly include 16-3-1(c), which is another mandatory provision:

Plants or other types of vegetative cover shall be preserved or placed throughout and around the perimeter of any proposed subdivision to provide for an adequate buffer, reduction of noise and lights, separation between the subdivision abutting properties, and enhancement of its appearance. (Emphasis supplied.)

The goals of this provision are important: the enjoyment of the subdivision by its residents is promoted by providing plants and vegetation that establish an adequate buffer, reduce noise and light, separate the subdivision physically from abutting properties and make it attractive.

This provision of the Code ensures that once the Town has finally approved a subdivision, the integrity of that subdivision as a distinct entity will be respected. The intent is clear: a subdivision is to be treated as one unified set of properties, kept separate and distinct from abutting properties by “an adequate buffer.” Maintaining that distinctness by means of a physical buffer honors both the expectations of the residents within the subdivision and the efforts of those who planned, designed and approved the subdivision.

With regard to Stonegate, the subdivision was in compliance with this requirement of the Code. In particular, a natural vegetative buffer separated the subdivision from the abutting lots along Mitchell Road. The boundaries of that strip of land near the southern entrance that was deeded to the Town in December 1989 constituted part of the perimeter of the subdivision as approved. But it was more than just a perimeter: it was also an entrance to the subdivision, complete with stone walls and landscaping to make a positive initial impression. Mindful of the significance of the entrance to the value of the subdivision as a whole, the Association undertook the responsibility to maintain those walls and landscaping, as its Declaration indicated. When the subdivision conveyed the first portion of Stonegate Road to the Town in November 1987, the warranty deed contained this express reservation:

Reserving to the Stonegate Homeowners Association the right to enter upon that area of Stonegate Road which contains stone walls and landscaping, said area being at or near the intersection of said Stonegate Road with the said Mitchell Road. Reference is hereby

made to the Stonegate Declaration ... for the Stonegate Homeowners Association's obligation to maintain said stone walls and landscaping located within the roadways conveyed to the said Town of Cape Elizabeth. (Ex. H.)

When the time came to convey the second half of Stonegate Road to the Town in 1989, the deed was shorter, but it contained the same reference to the Declaration, which contained the same obligation and responsibility to maintain the stone walls and landscaping. Thus, the land conveyed to the Town clearly included landscaping at the perimeter of the subdivision that accomplished the goals set forth in Section 16-3-1(c). Because an entrance to Stonegate Road that destroyed the vegetative buffer was not in accordance with the subdivision regulations, the driveway permit should never have issued and it should now be rescinded.

In short, the principle that follows from the Town ordinances read together is this: in those few cases where permission is sought to enter a public road that is entirely within the boundaries of an approved subdivision, the Director of Public Works may not lawfully approve a driveway entrance without considering relevant subdivision regulations. Moreover, when a proposed entrance would disturb a vegetative buffer separating the subdivision from abutting properties, and thereby compromise the integrity of the approved subdivision, the permit must be denied.

Interpreting the Town ordinances in this way is required by the clear language of the ordinances and it does not impose a serious impediment to development in the Town. There will be few instances where a public road is entirely within the boundaries of a subdivision, but in those few instances, it is important that the plan for the subdivision be respected.

Question 2: What does the deed of Stonegate Road to the Town require?

Wholly apart from the protections provided by the Town regulations, the deed of Stonegate Road from the Association to the Town reserved rights that should have prevented the issuance of an entrance permit onto Stonegate Road from the abutting property.

There is no question that the right of way deeded to the Town was substantially greater than the area needed for travel over Stonegate Road. There is also no question that on that portion of the property on either side of the traveled way, the Association reserved a right to enter onto the land to maintain the landscaping and stone walls. In so doing, the Association was ensuring that it kept control over the buffer that separated the subdivision from abutting properties.

The Association's property rights can be described as an easement and a restrictive covenant regarding that portion of the right of way that was not maintained by the Town, i.e., the non-traveled portion of the right of way. On the north side of Stonegate Road, a natural buffer approximately 80 feet deep separated the traveled roadway from the abutting property. On the

south side, a somewhat narrower buffer existed. The Association exercised its rights under the easement by planting shrubs and trees on both sides of the road and removing some of the vegetation from the buffer south of the road.

The right and obligation to continue to maintain the landscaping within the right of way was more than just an easement to come onto the property, however. Implicitly, the reservation in the deed also required that there be stone walls and landscaping left to maintain. In fact, that was the case for more than 20 years until the vegetative buffer on the north side of Stonegate Road was largely destroyed in November 2010.

Just as any other transferee, the Town was required to respect the easement and restrictive covenant that accompanied the deed of the Stonegate Road right of way. *See, e.g.*, E. McQuillin, 11A THE LAW OF MUNICIPAL CORPORATIONS, 3d Ed. §33:11 at 469-474 (2009).

Question 3: Did the Director of Public Works have discretion to ignore deficiencies in the application?

At the meeting of the Town Council on December 13, the Director of Public Works took the position that Section 17-2-3 gave him discretion to determine what information must be submitted with an application for an entrance permit. The section reads:

Application. Application shall be made by filing with the Director of Public Works together with an inspection fee established by the Town Council. The applicant shall furnish a copy of plans or sketches showing the proposed entrance locations, width and arrangement; distance between entrances; setback of building, gasoline pumps, etc., in relation to the center line of the traveled way; length, size and location of existing pipes, culverts, catch basins or manholes, curbing, curb and gutter, and/or sidewalks, and the proposed location of new pipes, culverts, catch basins or manholes, curbing, etc., if required by the Director of Public Works. [Amended Eff. 1/07/09]

The clause that the Director relied on for his interpretation, “if required by the Director of Public Works,” appears to refer only to the enumerated pipes, culverts, catch basins, manholes, curbing, gutters and sidewalks in that same clause—which items may or may not be required by the Director of Public Works. It would not appear to affect the duty of the applicant, who “shall furnish a copy of plans or sketches showing the ... setback of building ... in relation to the center line of the traveled way.” (Emphasis supplied.) Again, the ordinance uses the mandatory construction.

Construed in this manner, the ordinance required information from the applicant that was admittedly not provided. Under the circumstances, the Director of Public Works should not have approved the deficient application.

Conclusion

For the reasons set forth above, the appellant respectfully requests that the Town Council reverse the decision by the Director of Public Works and rescind Driveway Permit 2010-12.

Date: December 22, 2010

/s/ Robert H. Stier, Jr.
Robert H. Stier, Jr.
Appellant

cc: Tom Leahy, Esq.
David Lourie, Esq.