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VIA EMAIL

Thomas G. Leahy, Esq.
Monaghan Leahy, LLP
95 Exchange Street
P.O. Box 7046
Portland, ME 04112-7046

Re: Appeal of Driveway Entrance Permit No. 2010-12

Dear Tom:

I am writing to request that you accept and provide to the Cape Elizabeth Town Council the enclosed reply brief, which responds to the brief filed on behalf of the Director of Public Works. Although your letter of December 15, 2010 did not specify a reply, it is customary, of course, to give the party with the burden of proof the opportunity to respond to an opponent's arguments. It is this courtesy that I request, in fairness to myself and my neighbors.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "R. Stier, Jr.", written over a horizontal line.

Robert H. Stier, Jr.

cc: Mr. Michael McGovern
Patricia M. Dunn, Esq.

TOWN COUNCIL
CAPE ELIZABETH, MAINE

Appeal by Robert H. Stier, Jr.)
Driveway Permit No. 2010-12) Reply Brief by Appellant
_____)

Introduction

Appellant Robert Stier respectfully submits this short reply to arguments raised for the first time in the opposition brief by the appellee, Public Works Director Malley.

Before addressing the issues that are in contention, however, it may be useful to summarize that matters that are not in dispute.

- There is no dispute that the term “shall” in the Town ordinances expresses a mandatory requirement;
- There is no dispute that the relevant section of Section 17-2-4, addressing the conditions for an entrance permit, states that

The location, design and construction of any entrance permitted shall be in accordance with all local regulations and with the following requirements: ...

- There is no dispute that the Director of Public Works made no effort to determine whether the application for entrance permit 2010-12 was in accordance with Chapter 16 of the Town’s ordinances pertaining to subdivisions.
- There is no dispute that the Stonegate Road right of way was conveyed to the Town subject to the Declaration of Covenants, Conditions and Restrictions that is attached as Exhibit B to the appeal brief;
- There is no dispute that Article III of the Declaration makes the Stonegate Homeowners Association “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; and
- There is no dispute that for over 20 years, the Stonegate Homeowners Association has, in fact, maintained the stonewalls and landscaping in that substantial portion of the right of way that is not used as the travelled road.

The Issues In Dispute

- 1. The appeal should be granted because Section 17-2-4 required the Director of Public Works to determine that entrance permit 2010-12 was in accordance with all local regulations, which in this instance, required consideration of the subdivision regulations.**

In his brief, the Director argues that he was not required to consider the subdivision ordinance because, if it is a “local regulation,” it applies only to *proposed* subdivisions.

First, it should be clear that Chapter 16, which is entitled Subdivision Regulation, constitutes a “local regulation.” Section 16-1-2 states:

These *regulations* shall apply to all land within the limits of the Town of Cape Elizabeth, Cumberland County, Maine. They shall be administered by the Planning Board of the Town of Cape Elizabeth, hereinafter called “the Board,” and the Town’s code enforcement staff, and the registered professional engineer employed or retained by the Town who shall be its lawful agents. (Emphasis supplied.)

Thus, the provisions of Chapter 16 are expressly referred to as “regulations.”

Second, it is a fundamental principle of statutory construction that all words of a statute must be given effect. *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me.1979) (“[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible”). If the ordinance had intended that the Director’s review of entrance permits be limited only to the items specified in Section 17-2-4 (a) through (f), as the brief for the Director appears to suggest, it would have omitted the reference to “all local regulations.” But since the ordinance did not do that and instead requires that the location, design and construction of any entrance permitted be “in accordance *with all local regulations and* with [subsections (a) through (f)],” the reference to all local regulations must be given legal effect. (Emphasis supplied.)

Third, the Director argues from Section 16-1-1 that the purpose of the subdivision ordinance is only to evaluate any *proposed* subdivision of land within the Town. But that is not what Section 16-1-1 states. It reads:

This ordinance is designed to promote the health, safety, convenience and general welfare of the Inhabitants of the Town of Cape Elizabeth by encouraging and ensuring sound planning, the use of the environment under healthful conditions, the imaginative and orderly use of land, compliance with the goals and objectives of the Comprehensive Plan, and development that fits harmoniously into the existing natural environment and rural

character. To this end, in evaluating any proposed subdivision of land within the Town of Cape Elizabeth, the Planning Board shall determine whether such subdivision will meet the standards set forth in this Chapter and: [conditions (a) through (n)].

Thus, the purpose of the subdivision ordinance is much broader than the reading urged by the Director, and the reference to “proposed subdivisions” is actually a description of what the Planning Board must consider “in evaluating” such proposals. But the ordinance is not limited to Planning Board evaluations. Instead, as noted above, the ordinance expressly states that the regulations “shall apply to all land” within the Town, which plainly includes existing subdivisions. Indeed, if Chapter 16 did not apply to existing subdivisions, the provisions in Section 16-2-5 regarding amendments to previously approved subdivision plans would make no sense and there would be little reason to provide for administration of the regulations by the Code Enforcement Staff, as Section 16-1-2 provides.

In summary, the brief for the Director takes an unduly narrow view of the Director’s obligations when determining whether to issue an entrance permit. In situations such as this, where a proposed driveway entrance would cross over a subdivision boundary to a right of way entirely within a subdivision, the Director is required to consider the subdivision regulations. That is hardly a radical proposition; instead, it is consistent with one of the stated purposes of those regulations: to ensure “the orderly use of land.” Section 16-3-1(c) of the subdivision regulations expressly requires the preservation of vegetative cover to buffer and separate the subdivision from abutting properties. The Director never considered that section, and because he granted a driveway entrance permit that is unquestionably inconsistent with that provision, the Council should grant the appeal and revoke the permit.

2. The appeal should also be granted because the Director failed to consider the impact of the permitted driveway on the rights reserved by Stonegate Homeowners Association to maintain stone walls and landscaping within the non-travelled portion of the right of way.

The facts surrounding the grant of Stonegate Road to the Town only reinforce the view that the Director of Public Works must consider issues relating to a subdivision when they are implicated by an application for an entrance permit.

The facts are not in dispute. Stonegate Road was granted to the Town in two separate conveyances, the first portion in 1987 and the second portion in 1989. The two conveyances should be read and interpreted together as they both concern the same road. The conveyance in 1987 expressly reserved 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.” Both the 1987 deed and

the 1989 deed reference the Declaration, which contains the obligation for the Association to maintain the stone walls and landscaping on the non-travelled portion of the public way.

The brief for the Director argues that the conveyance to the Town is not subject to any restriction because the property conveyed to the Town was a road and the Declaration recital provides that

the property described above, *excepting Lot No. 52, that area shown as "Common Open Space" on the Plan, and those areas shown as roads on the Plan* shall be held, sold and conveyed subject to the following easements, restrictions, covenants, and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property and be binding on all parties having the right, title or interest in the described property or any part thereof, ... (Emphasis supplied.)

If this argument were correct, the Declaration would be internally inconsistent: it could not both exclude the entire road right of way from the restrictions and covenants in the Declaration and still provide that the landscaping within the road rights of way is the responsibility of the Association. The provisions in the Declaration can be reconciled, however, because the Declaration uses the terms "road" and "road right of way" differently (otherwise, the phrase "right of way" in the second usage would be superfluous). Thus, the phrase "areas shown as roads on the Plan" in the recitals should be interpreted to refer to the travelled portions of the right of way as indicated by the Plan, while the reference in Article III to "stonewalls and landscaping within the road rights of way" should be interpreted to refer to the entire right of way, i.e., both the travelled and untraveled portion of the right of way. This also makes historical sense: in 1987 when the Declaration was drafted, the travelled portion of the right of way at the south entrance was still undefined.

Thus, if one gives meaning to the Declaration, the Association reserved a right to maintain stone walls and landscaping in that portion of the right of way not maintained by the Town, i.e., the untraveled portion of the road right of way. That Association accepted that obligation and exercised those rights consistently over a period of more than 20 years. It still has that obligation. Permitting driveway access to Stonegate Road would thus create an anomalous situation: the Association would have the continuing right and obligation to maintain stone walls and landscaping between the lot under construction and Stonegate Road – on land that Early Bird has treated as if it were the front yard of the lot under construction.

In summary, the Director of Public Works should also have denied the entrance permit because it puts a driveway over land that the Association has both the right and the obligation to maintain. This is another reason why such a decision should not have been made without considering the impact on the Stonegate subdivision. If the driveway permit is not revoked, the Town will have put the Association and the abutting landowner in a position that invites continual conflict. That

would be both unwise and unnecessary. The rights reserved to the Association under the deed conveying Stonegate Road to the Town were ignored to the detriment of all concerned.

Conclusion

For the reasons set forth above, the Town Council should grant the appeal and revoke driveway entrance permit No. 2010-12.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert H. Stier, Jr.", written in a cursive style.

Robert H. Stier, Jr.
Appellant

cc: Patricia M. Dunn, Esq.
Thomas Leahy, Esq.