

CORNWALL DEVELOPMENT REVIEW BOARD (DRB)
MINUTES • May 3, 2023 • 7:00–9:53 pm
Meeting • In-Person (Town Hall) and Virtual via ZOOM

**MEMBERS PRESENT: Barbara Greenwood, Shari Johnson, Douglas Black, Molly Daly,
Kymberly Breckenridge**

ALTERNATES PRESENT: Joan Lynch

**GUESTS PRESENT: Randy & Mary Martin (Appellants); Benj Putnam (Appellants' Attorney);
Jim Duclos (Assistant ZA), Jim Carroll (ZA Attorney); Marge Drexler;
Brian Gill; Paul Seiler; Adam Eckhardt; Conor Stinson**

- 1. CALL TO ORDER: at 7:00pm by Barbara Greenwood, DRB Chair**
- 2. ESTABLISHMENT OF QUORUM**—Established. Barbara noted that Board Member Kymberly Breckenridge would be recusing herself from the Hearing, being an abutter to the property at issue. Joan Lynch was appointed to fill the vacancy.
- 3. APPROVAL OF AGENDA**— Shari MOVED, Kymberly SECONDED, to approve the Agenda as amended. *Motion passed.*
- 4. APPROVAL OF MINUTES**
 - *April 5, 2023*—Douglas MOVED, Kymberly SECONDED, to approve the **April 5 Minutes** as amended. *Motion passed.*
 - *April 19, 2023*—Joan MOVED, Shari SECONDED, to approve the **April 19 Minutes** as presented. *Motion passed.*
- 5. HEARING SIGN-INS**—Barbara explained what an Interested Person was and why the designation is important. Attendees' were reminded to sign the hearing sign-in sheet. Douglas then administered the oath. The recording of the meeting was begun.

6. HEARING: Appeal of Zoning Administrator's Decision

A. Introduction—Barbara gave a short review of the process proposed to be used for this Hearing: after some housekeeping matters, the Martins (Appellants) and Benj Putnam (Putnam & Menard, PLC, Appellants' Attorney), present their Appeal from the Zoning Administrator's Decision, dated March 8, 2023; Appellants' presentation followed by Jim Carroll's (Carroll, Boe, Pell & Kite, PC, ZA's Attorney) presentation, an opportunity for Putnam to respond, then Board questions, followed by Appellants' and ZA's opportunities to respond. Public comment would follow, then additional Appellant and ZA responses, and a final opportunity for additional Board questions. The two attorneys approved the proposed order of procedure.

Barbara noted that the meeting would be conducted in an orderly manner and in accordance with the Board's rules of procedure.

Barbara explained that this is an appeal pursuant to §360 of the *Cornwall Zoning Regulations* of 2008, from a decision by the ZA that he was unable to confirm that the Martin property "exists as two lawfully subdivided parcels pursuant to the May 3, 1989 subdivision approval, and that the two parcels can be conveyed separately without the need for further subdivision proceedings." The property at issue is a 329.4±-acre parcel at 1967 Route 74, Cornwall (Parcel ID 08-03-47). The parcel is owned by the Randy Martin and Mary Martin Joint Trust, represented by Trustees Randy and Mary Martin, and their Attorney, Benj Putnam, Esq..

This hearing was warned and posted as required.

B. Housekeeping—Before opening Hearing, the following housekeeping issues were dealt with:

- **Conflicts of Interest, ex parte communications, or visits** to the property
 - Shari noted that Randy is her insurance agent, but did not feel there would be any issue of bias in her ability to hear the issue before the Board.
 - Kimberly recused herself as she is an abutter to the Martin property.
- **Exhibits**—The following documents have been jointly filed by the Appellants and ZA and subsequently marked as *Exhibits 1–18* pursuant to the jointly signed **Stipulation** filed April 28, 2023:

Stipulation

Exhibit 1— Notice of Appeal dated March 22, 2023

Exhibit 2— Martin Application for Appeal, submitted March 22, 2023

Exhibit 3— Zoning Administrator’s March 8, 2023 Determination re Martin Certification Request

Exhibit 4—List of Abutters with attached portions of tax mapping

Exhibit 5—Warranty Deed from Prior to Candido dated May 31, 1967

Exhibit 6—Copy of Cornwall Zoning Regulations of 1972, as revised June, 1974

Exhibit 7—Copy of Cornwall Zoning Regulations Adopted March 3, 1987

Exhibit 8—Candido Application for Subdivision, dated December 5, 1988 with cover letter dated February 23, 1989, and attached property drawings

Exhibit 9—Copy of Cornwall Subdivision Regulations, dated March 7, 1989

Exhibit 10—Joint Selectmen and Planning Commission Meeting Minutes, dated March 15, 1989

Exhibit 11—Warranty Deed from Candido to Martin, dated March 28, 1989, conveying 165 acre parcel

Exhibit 12—Planning Commission Meeting Minutes, dated April 19, 1989

Exhibit 13—DRAFT Cornwall Planning Commission correspondence to Candido, dated April 20, 1989

Exhibit 14—Handwritten notes addressed to Cornwall Planning Commission Secretary, Sheila Foote, with revisions to draft letter

Exhibit 15—Cornwall Planning Commission correspondence to Candido, dated May 3, 1989

Exhibit 16—Warranty Deed from Candido to Martin, dated March 31, 1992 conveying remaining lands

Exhibit 17—Warranty Deed, conveying “Parcels One” and “Two,” from Martin to Randy and Mary Martin, Trustees of the Randy Martin and Marty Martin Joint Trust u/t/a dated April 20, 2017

Exhibit 18—Cornwall Planning Commission Meeting Minutes, dated October 18, 1989

The following documents were marked as *Exhibits* at the Hearing:

Exhibit 19—Warning (posted in a timely fashion at the Town Hall and Town Garage, on the Town website, and on the property)

Exhibit 20—Copy of warning as published in the Addison Independent April 16, 2023

Exhibit 21—List of abutters and mail certifications received from Benj Putnam, April 3

[**Exhibit x**—Copy of page 2 which had been inadvertently omitted from the Candido subdivision application (*Exhibit 8*) submitted with the *Stipulation*. The page was added to *Exhibit 8*.]

C. Hearing Testimonies:

1. Appellants' Presentation—Benj Putnam representing Randy and Mary Martin, Appellants on behalf of the Randy Martin and Mary Martin Joint Trust.

a. Background.

- i.* Candido subdivided the property in 1989 and sold the lots to the Martins, as separate parcels, in 1989 and 1992.
- ii.* Early in 2023, the Martins applied to the ZA requesting that he certify the two parcels as legally subdivided and conveyable as separate parcels.
- iii.* It was noted that any purchaser needs to be assured of clear title, hence the Martins' request for confirmation of the parcels' separability.
- iv.* The DRB, as successor to the original authorizing entity, the Planning Commission, has the necessary authority to make a determining decision.
- v.* The hope is that all abutters who care to do so will take the opportunity to make known any thoughts or challenges that have not been heard.
- vi.* Candido submitted his subdivision application on February 23, 1989, prior to the Martins' purchase of Parcel A. The map he submitted shows the parcel with the proposed two lots, the application requested a subdivision approval for two lots of about 165 acres each. The PC approved the application May 3, 1989, approximately 2 months after the Martins purchased the lot referred to as Parcel A.
- vii.* The Warranty Deed for Parcel A, dated March 28, 1989, from Candido to Martin is *Exhibit 11*; *Exhibit 16* is the Warranty Deed from Candido to Martin for Parcel B, March 31, 1992.
- viii.* The Martins paid property taxes on their initial purchase of Parcel A and Candido paid the taxes on the Parcel B acreage until it was purchased by the Martins in 1992. The Martins never merged the two parcels they purchased as separate lots. After the purchase of Parcel B, the two parcels were taxed as one, but no actual parcel merger was ever effected. The Martins kept the two properties separate when putting them into their Joint Trust, noting in the Deed "...by including two parcels of land in a single Deed neither the Grantors nor Grantees intend to create merger of lots. Rather, Grantors and Grantees intend for the parcels to retain their separate and distinct status as separate lots of land. ..."
- ix.* In 2017, the Martins transferred both parcels, identified in the Warranty Deed as Parcel One and Parcel Two, to their Joint Trust.
- x.* The current tax map shows the property split by a dotted line representing the boundary between Parcels A and B.
- xi.* In 2020, the town declined to throw up the class 4 section of Audet Road fearing that it could possibly lead to the creation of a land-locked parcel of that southern section of the Martin property

b. Grounds for the Appeal.

- i.* As stated above, the Planning Commission approved the proposed subdivision of the Candido property into two lots on May 3, 1989.
- ii.* At their March, 1989 meeting the PC determined that they wanted a survey, but at the April meeting after hearing Candido's concerns the Commission appears to have rescinded their request and asked only for a sketch. This, in effect, waived both the survey requirement and the need for it to be recorded.
- iii.* The first lot was conveyed to the Martins by a deed dated March 28, 1989, and the second lot was conveyed to them three years later, by a separate deed dated March 31,

1992. The Martins have continued to own both lots since that time, conveying them to their Joint Trust in 2017 by a deed that described the lots as two separate parcels.

- iv.* As the original subdivision approval in 1989 was not appealed and there were no challenges to the conveyances of the two lots by separate deeds in 1989 and 1992, the subdivision became final and cannot be undone or reversed and the two parcels remain two separate parcels unless specific action had been taken to merge the two lots back into a single lot as they were prior to the 1989 subdivision approval. The Martins are not aware of any such action being taken; therefore, the two lots continue to exist as lawfully subdivided lots that can be separately conveyed.
- v.* There is a well-known rule of construction regarding land-use regulations that when a by-law is ambiguous, it is resolved in favor of the land owner because of the restrictions regulations put on the land-owner's rights.
- vi.* The Martins respectfully request that the DRB confirm this status in a written decision so that they will be free to convey the lots independently in the future.

2. ZA Testimony—Jim Carroll, representing the town and ZA Gary Barnett, presented the letter Barnett sent to the Martins in which he explained his reasons for deciding he was unable to comply with their request to confirm that their property was comprised of two separate parcels.

- a. Per Statute, the ZA's job is ministerial: to interpret the by-laws literally.** The ZA has no discretionary authority regarding the interpretation.
 - i.* When the ZA's research results in ambiguity, s/he is unable to make a decision, having no authority to decide between two or more reasonable interpretations. If a decision were made, in this instance to certify the property as being two separate parcels, the town could be subjected to problems later if a different reasonable interpretation were focused on.
 - ii.* The DRB is under no such restriction as there is no Statutory requirement that they interpret bylaws literally. They have discretionary authority.
- b. The 1972 Zoning Regulations,** having no subdivision provisions, required only a land-use permit to divide a parcel.
 - i.* The hand-drawn maps in the zoning folder are not dated, there is no indication of when they appeared in the folder or with what document they are associated.
 - ii.* The town's first *Subdivision Regulations* were officially adopted March 7, 1989. March 7 was the date of the 1989 Town Meeting. The regulations were required to be adopted at a regular or special town meeting (§190).
- c. The 1989 Subdivision Regulations** identifies documents/materials that are required for submission with a subdivision application. They also have a provision giving the PC authority to waive certain regulation. Surveys (“...*complete survey of the boundaries of the subdivision parcel by a Vermont licensed surveyor with date, true north point, and scale...*”) are identified as being required (§320[d]). They are also required to be signed by two members of the PC (the authorizing entity at that time) and recorded within 90 days of approval (§240.1). This leads to several issues.
 - i.* §150 addresses the PC authority to waive or vary the regulations. No request for a waiving of the survey requirement was found
 - ii.* Nothing in the regulations or Statute relieves the PC of signing a survey so it can be recorded.
 - iii.* The Minutes record what happens at a meeting, but it is the plat that officially delineates the decision.

- iv.* §240.1 of the '89 Subdivision Regulations says that all subdivisions must be recorded by submitting a plat to the Town Clerk within 90 days of the final plan approval date or the approval expires. The plat must be signed by two PC members. There is no recording of this subdivision found.
- d.** Given the ambiguities engendered by the lack of recorded subdivision survey, lack of identity of the author of the note (*Exhibit 14*) and the questions raised by these ambiguities, the ZA was correct in his decision that he was unable to comply with the Martins' request.

4. Attorney Statements

a. Putnam.

- i.* *Exhibit 12* states the PC approved the subdivision.
- ii.* By accepting a sketch in lieu of a survey, the PC effectively waived the survey requirement.
- iii.* The Candido application was for a subdivision, page 2 shows this clearly as being a two lot subdivision.
- iv.* A person who disagrees with the Board's decision is limited to an appeal of the decision to the Environmental Court, then the Vermont Supreme Court.
- v.* The PC's comments and thought processes as far as can be determined from the Minutes and memos, cannot be the basis for a legal decision.
- vi.* Were the properties merged? The only municipal or statutory provision relating to an automatic merger of adjacent lots which come under common ownership is the small lot provision, but that does not apply to this property. It is neither a small lot nor an unconforming lot.
- vii.* The DRB's job is to determine the validity of the issued permits/decisions, not to determine the PC's intentions.
- viii.* With no challenge to the PC approval or the Martins' purchases, and the expiration of the 15-year statute of limitation, the subdivision stands.

b. Carroll.

- i.* This is a subdivision question, not a merger question.
- ii.* DRB has authority to determine if there is or is not a subdivision.
- iii.* The plat is the determinant of a subdivision decision. Its recording is of great importance and the lack thereof a significant omission.
- iv.* PC Minutes indicate what happened at the meeting. It is the letter issued by the PC that is the actual issued decision.
- v.* The DRB's authority comes, in part, from adherence to due process. By noticing the warning to the abutting property owners, publishing it in the newspaper, and otherwise following the procedures laid out in *24 VSA 117* for hearings, anyone wishing to object to or comment on this proceeding was given the chance to appear and testify on the issue at hand.

5. Board Questions.

- *Please clarify about the class 4 road. **Putnam:*** The class 4 road refers to the south portion of Audet Road which runs south from Route 74, west of the property, to the town line between Shoreham and Cornwall.

- *How could property taxes be paid on half of an un-owned parcel?* **Carroll:** It was never challenged.
- *Would not a title search have brought up any questions about a clear title?* **Carroll:** It probably just never came up as the transfer by the Martins was to themselves.
- *Could a sketch from an earlier submission be signed and submitted?* **Carroll:** Possibly, but would need to be supported in the decision and would be subject to appeal. **Putnam:** That, as a Condition, would help the Martins avoid the time and expense of going through the subdivision process.
- *In the May 3 PC letter where the approval is given could it not be that the approval was for a 2-step sale not a subdivision?* **Putnam:** Possibly, but doubtful as the application was for a subdivision not a land sale and the subdivision parameters were listed on page 2 (acreages, number of lots, etc).

6. Public's Questions.

- **Gill:** was on the PC several years after the Candido application, but not in 1989. Recalled it was a topic of discussion for quite some time, said the intent was a 2-lot subdivision. To his knowledge no sketch was ever received or reviewed.
- **Breckenridge:** The PC made an error and if the Martins have to go through the subdivision process it would cause hardship similar to the hardship the PC was attempting to avoid for the Candidos by, essentially, waiving the survey and recording requirements. There is simple way to correct this and rectify an issue that was not recognized as an issue.

7. Additional Comments from Appellants or ZA—None

- 8. Wrap Up**—Board agreed they had sufficient information to embark on their deliberations. The hearing was closed at 8:59. Recording ended.

Business meeting Agenda resumed at 9:15.

7. CANDIDATE DISCUSSION

- **Adam Eckhardt**—He found the hearing to be very interesting and feels he is up to the challenge. His wife was born and raised in Cornwall and his son is just entering school. They are currently looking for a house or land to buy, several options have fallen through. He would be pleased to be on the Board, as an Alternate would be fine.
- The Board advised they would recommend the Selectboard appoint him as an Alternate.

8. OTHER BUSINESS

- **New**
 - **Open Meeting Law**—Recap of the VLCT's OML Zoom presentation, particularly the provisions covering emails and ex parte communications on issues in front of the Board.
 - **Potential for PC collaboration**—Conor Stinson, PC Chair, has expressed an interest in working with the DRB for input on the updating of the town's zoning and subdivision regulations. There may be a joint PC/DRB meeting in the summer.
- **Old**
 - **Cornwall Salt Shed Decision**—Decisions mailed , some hand delivered.

9. AVAILABILITY FOR NEXT MEETINGS

- **June 7, 2023**—All available. Nothing currently scheduled
- **July 5, 2023**—Douglas and Molly not available, the July 4 holiday may be an issue.

10. DELIBERATIONS

- **Martin Appeal from ZA Decision**

ADJOURNMENT—At 9:53^{PM}, Douglas **MOVED**, Joan **SECONDED**, to adjourn the meeting. ***Motion passed.***

Respectfully Submitted,

Robin Conway, DRB Secretary