



**Town of Marbletown  
Zoning Board of Appeals  
PO Box 217, Stone Ridge, NY 12484  
(845) 687-7500 Ext. 163  
Email: Planning@marbletown.net**

## **Zoning Board of Appeals Meeting Minutes August 25th, 2021**

Meeting Called to Order by Chairman Smiley

6:00 P.M.

Pledge of Allegiance

Announcements & Communications:

Quorum:

Present – Tom Smiley, Zach Bowman, Kathie Grambling, Egidio Tinti, Andy Nilsen

Alternate – Brendan Masterson

Town Staff – Michelle Solcberg, Tracy Kellogg

New Business:

### **2021-XX AV: Sheran & Stewart Area Variance – New Application for Side Yard Setback on Addition**

Steve Keith (Architect/Applicant) Presented the Application and Answered the Board's Inquiries

- Build a bedroom addition to an existing Single-Family Residence at corner of Ricci Road and Mary Davis Road
- Most logical placement of an addition is the side yard along Ricci Road. Front yard is very small, and Kitchen at the rear of the structure is newly remodeled and we would like to keep it intact
- Existing sunroom would be the hallway to the newly proposed addition
- The addition would be inside of the required yard setback along Ricci Road which is why we are here tonight
- Addition is proposed to be consistent with the design of the existing home
- The front of the house faces Mary Davis Road and has an existing undersized yard setback
- Property is 6 acres, and the parcel splits across Mary Davis Road
- Septic is further out in the yard behind the house, side opposite Mary Davis Road
- Solar Panels are on the property opposite side of the Mary Davis Road

Kathie Grambling: Please add the location of the Septic to the site plan so we can relate it to mitigation factors or hardship. We'll also need the distances to the closest houses on neighboring parcels. Why is this location the most logical for the addition?



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Steve Keith: Given the landscaping, the flow of the structure, and the narrow stairs leading up to the 2nd floor, it's logical to place the addition where proposed. The kitchen was recently renovated, and the access to the addition would be logical through the existing sunroom.

Tom Smiley: Parcel is a corner lot and required to have 65 feet front yard setback from centerline. House is existing with a non-conforming setback, as is the barn across Mary Davis Road. Parcel is split across Mary Davis Road.

Zach Bowman: Setback to centerline of Mary Davis is existing non-conforming for the house and the barn. Will this require a variance for both yards?

Steve Keith: We believe that we will be 65 feet off the Mary Davis centerline, and we will be able to make it. I'll have to verify that.

Zach Bowman: You won't be increasing the nonconformance so it should be ok.

***Motion to schedule a public hearing for the September 22<sup>nd</sup> ZBA meeting at 6:00 P.M. made by Zach B, second by Andy N, call of the roll unanimous. (5-0)***

Old Business:

**2021-04 AV: Norman Application for Area Variance – Accessory Apartment - Public Hearing**

Ann Norman (Applicant)

- Existing garage approximately 90 years old and it's not functional for its purpose due to its age. Garage wall is on the property line, within a couple of feet. I would like to demolish the garage and rebuild so I can park my car in the garage during the winter. I would like to stay in my home which I love into old age, and I will need someone to help care for me who lives on the property. I would like to put an accessory apartment on the 2<sup>nd</sup> floor. I'd rather have someone live on the property to care for me, but not in the house with me. My neighbor has no objection unless it's used as an air B&B, which is not my purpose

Zach Bowman (Application Point Person)

- The garage is dilapidated and not useful even as a garage. Ann recently had a new leach field installed and is planning to install a new septic behind the garage. The current footprint of the existing garage will essentially be the footprint of the new structure. Where there is a little cutout on the right-hand side front wall, that will be closed in a bit to make it big enough for a 1 car garage.
- This is essentially a side yard setback variance for an existing pre-zoning structure to allow for an accessory apartment.
- It's noted that the neighborhood has several existing non-conforming structures and additional undersized parcels. The adjacent parcel also has a garage that sits about the same distance from the property line as Ann's garage does.



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- The neighboring parcels have numerous pre-zoning structures and it's random in their placements and setbacks.
- It's a significant variance at 78%, but it's reasonable given the character of the neighborhood and the existing pre-zoning nature of the structure.
- Distance from Ann's garage to the neighboring garage is 26 feet.

Kathie Grambling: Can the garage be demolished and moved closer to the house?

Stacy Sindt: (for the Applicant) There is a new leach field, and the septic is in the spot where you're suggesting.

Zach Bowman: I believe if the garage would be moved over, it would be on top of the leach field. Ann is also going before the Planning Board for the exterior modification as a SUP is required.

Kathie Grambling: The setback needs to be 8 feet and you have 1 foot 7 inches?

Tom Smiley: It's a reduced setback because its and undersized lot.

Zach Bowman: The exterior design of the new garage will match the primary residence on the parcel. It will be same design, roof style, and will meet the design standards for the district.

Ann Norman: My neighbors have stated that they are in favor of the project, and they can't see it from their house because their garage blocks it.

***OPEN TO THE PUBLIC FOR COMMENT***

Bill Terpening:

- 1 acre is required for a detached structure to have an accessory apartment. This parcel does not meet the minimum acreage for the zone.
- The garage size on the Ulster County Parcel Viewer is 288 square feet. An accessory apartment can't be less than 350 square feet.

Zach Bowman: Those are good points; we are focusing currently on the side yard setback variance. I'll look at the Accessory Apartment law next in full detail. I did make some notes on this matter.

Tom Smiley: The parcel is indeed undersized, pre-existing non-conforming. We'll need to dig into this.

Zach Bowman: You were citing the section on lot area, number 2, correct?

Bill Terpening: Correct. It's not allowed. You're giving a variance for the setback and not the lot size. The Accessory Apartment law does not permit the apartment on an undersized lot. The Code Enforcement Officer approves the Accessory Apartment.

Zach Bowman: I'd like to take a little more time to see where these two points in the law overlap. We would be granting a variance on the side yard setback and not the lot area. The planning board is handling an SUP for this same property.



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Tom Smiley: The Board can review the Accessory Apartment Law and hold open the Public Hearing to the call of the Chair at the September 22<sup>nd</sup> ZBA meeting.

***Motion to continue the Public Hearing on September 22<sup>nd</sup>, 2021, by Zach B, second by Kathie G., vote of the board unanimous (5-0)***

**2021-05 AV: Fox Application for Area Variance – Accessory Apartment – Public Hearing**

Marcus Fox (Applicant)

- I have an existing building on my property that is pre-existing and been there forever. I would like to insert plumbing and a septic system so it can be used as an accessory apartment.
- This apartment won't be for rentals or short-term rentals, but for private family use.
- An existing barn that was used as a woodshop is on the property. It's in disrepair and we plan to renovate it. The barn is close to the property line as well, and we would like to rehabilitate it and make it habitable
- We will be using the existing slab, existing foundation, existing walls, and the existing structure. Will renovate and update it. We'll be adding a dormer window to the roof line on the 2<sup>nd</sup> floor. Structure already has electric run to it. We'll be adding a kitchenette and shower

Applicant reviewed the site plan, septic plan, and build plans with the Board

Egidio Tinti (Application Point Person)

- Conducted a site visit and verified the existing structure, setbacks, and the plans as described
- The barn is right off the driveway and close to the property line. There is a paper road, Jacobsen Lane, which is overgrown and poorly defined and you can't tell that it's a road. There is 8-foot distance between the building and the property line at the rear of the barn, and approximately 30 feet to the middle of the ROW on the paper street Jacobsen Lane.
- This project essentially would require a setback variance for the 8 feet at the rear of the structure setback, and approximately 25-foot average on the left side to the centerline for a second variance.
- No increase in footprint or height of the structure
- Non-conforming pre-existing dating back to the 1920's
- Received an email/letter from the neighbor which cited privacy concerns and the distance to the structure from their property. I do believe there is a considerable amount of distance, around 50-60 feet from the structure. I didn't measure it, but it appears to be sufficient given the character of the neighborhood.

Kathie Grambling: Was this referred to the Planning Board?

Tom Smiley: It was referred to the Ulster County Planning Board, but the referral was returned without action due to an agreement in place with the ZBA.

Andy Nilsen: There was a letter written and submitted by Susan Spivack. Are you in the audience and would you like to speak?



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Steven Bilder & Susan Spivack: We sent a letter and email to the Planning Board. <excerpts and topics from email/letter reiterated> The proposed accessory apartment is too close to our property in our opinion. Can be seen from our chairs and fire pit and will be detrimental to our privacy.

Tom Smiley: Town code does specify that the Accessory Apartment can not be used as a Short-Term Rental. If it were to be used for the STR purpose, they would lose the occupancy on the structure.

Bill Terpening: Read section from the Town Code regarding variance conditions and variance criteria

Tom Smiley: Correct. Those are all criteria that the Board considers when it makes its determination

Kathie Grambling: It seems that the neighbor that is concerned about the distance to the proposed apartment is much closer to a couple other houses than the proposed apartment.

Tom Smiley: Code Enforcement was looking into the status of the Paper Street. Has there been any additional findings?

Shawn Marks (CEO): Unable to find 3 deeds that were all in agreement as to the existence of the Paper Street. Some deeds note its existence, some deeds do not. To confirm the existence will require some additional work from the Town Attorney.

Tom Smiley: If we confirm the existence of the reserved road, it impacts the required setback. If it's established as a ROW, then the setback needs to be 65 feet. It will affect the amount of variance that is being requested. The ROW appears to run right through the middle of the Spivak's house. (SPELLING)

Zach Bowman and Applicant reviewed the layout of the driveways on the Applicants parcel in relation to Rybak Lane and Jacobsen Lane

***Motion to continue the Public Hearing at the September 22nd ZBA meeting by Andy N., second by Egidio T., call of the roll unanimous (5-0)***

**2021-01 CEOA: Duchess Farm Appeal of Code Enforcement Officer Violations**

Tom Smiley – Application Introduction and Review

- Total of 4 Notices of Violation issued in April of 2020
- Violation A: Chapter 169 Code of Marbletown Subdivision – Failure to construct Stormwater Management Systems as per specifications on the approved Site Plan – Failure to Construct Private Roadway as per specifications on the approved Site Plan
- Violation B: Chapter 169 Code of Marbletown Subdivision – A 206 Road Specification of Town Code – Failure to Construct Roadways to the specifications of Town Code as shown per specification on the Approved Site Plan. 169 – Failing to establish a Homeowners Associations per Town Code – Failure to transfer Ownership
- Violations C: 3 Separate Violations of Chapter 167 Town Code – Failure to comply with Stormwater Management Requirements – Stormwater Maintenance as shown on approved SBD plats – Stormwater – Prohibits Inspections



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- Violation D: Chapter 200-53 – 200-90-a – Failure to comply with zoning regulation of Stormwater Management and Stormwater prevention Improvements

Request for Clarification from a member of the Public – Tom Smiley noted that essentially the boiled down matter is that it's about whether there is something wrong with the roadways and the stormwater.

Tom Smiley: The 4 notices and 8 specifics as cited is what the ZBA is here to talk about. The ZBA will determine if the Code Enforcement Officer, with the information he had at that time, made the correct call in the issuance of the violations. If the Board sees that the call of the CEO is correct, the notice of violations will be affirmed. If the board feels that it was not correct, they can be overridden or modified. Our focus is from the date of inspection until today, is there evidence that the stormwater, roads, and HOA were completed per site plans and code. Once something is built to site plan, they must be maintained to that specification or standard. The discussion should be on the 8 specific matters noted in the violations.

Kyle Barnett – VanDerwater & VanDerwater – Counsel of the Applicant of Appeal – Representing Dutchess Farm Equestrian

- Recently retained, and ask that the ZBA continue the hearing until I can fully read and analyze the file associated with the Appeal

***Motion to open the public hearing by Zach B., second by Kathie G., Call of the roll unanimous (5-0)***

Kyle Barnett – First procedural objection, Board Member Nilsen did work on the project on Warren Way and was previously employed by Dutchess Farm and there is concern whether or not he may be conflicted, and we ask that he recuses himself

Chairman Smiley asked Member Andy Nilsen to Respond to consideration by Applicants Counsel

Andy Nilsen: My work on the site was 15 years ago. We're talking about violations found and issued on April 1<sup>st</sup>, 2020. That's 14 years after the time I did work for Dutchess Farms. I do not feel the need to recuse myself. My opinion is no.

Kyle Barnett: Concern is essentially that the allegations are that the project wasn't built according to the approved site plans from years ago. That's my first objection.

Tom Smiley: Our focus is from the date of violation till today. At the time of the notice, was there a condition of violation from that date until today, have they been remedied, or are they not in violation.

Tracy Kellogg: Andy, currently you have not had any negative financial dealings, correct?

Andy Nilsen: Correct

Tracy Kellogg: When you did the work, were you given specific plans to work from?



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Andy Nilsen: We were not involved in the subdivision process. We were working only on Warren Way as an access to the barns and the riding arena area. At the time I was working for Duchess Farm, I was not aware of any subdivision work or progress at the time.

Kyle Barnett: Mr. Nilsen can I ask you another question. Do you recall bidding on any other work out there in the recent past?

Andy Nilsen: Not with Duchess Farm, No. I did submit a bid to David Warren, seated behind you, me and my partner to work on a home to be built on a private parcel owned by someone else and not being build or owned by Duchess Farms.

Kyle Barnett: Apparently the other issue is that there was a criminal complaint against Board member Nilsen as well which involved questioning by the State Police. The complaint was made by members of the Warren family.

Tracy Kellogg: Was this during the time when the Town was receiving phone calls, several calls, about Town Representatives going to the property that were being questioned by the police?

Kyle Barnett: This wasn't for any official visit or reason

Andy Nilsen: I'm willing to talk openly on the record about this. I was driving by the property on State Route 213, I don't remember the date, I had recently given a bid to do work on a house site to David Warren. When I looked in from the road as I was driving by, I saw equipment on the lot, and I wondered if someone else got the job and had it commenced? I turned around at Subway Shops, corner of 209 and 213, and drove back down Route 213 and looked. I saw excavating equipment and I knew who's it was, someone who I know. Someone I have a good relationship with. This answered my curiosity, I turned around, and continued my way home. Evidently this was "criminal suspicious activity", according to someone, and I got a visit by the State Police, I gave a statement, and that was the last I heard of it.

Kyle Barnett: My concern is that this creates a potential for bias to be able to be an impartial member on the Board, even if you dispute the allegation.

Andy Nilsen: I didn't dispute, I didn't deny, I apologized to the Police Officer if anyone viewed my activity as suspicious. There's property for sale there, I don't think that its uncommon perhaps from someone to drive past, turn around, and drive past and look again. It didn't seem like any activity out of the ordinary. I never gave it a second through. It was in broad daylight, I wasn't trying to hide anything, just drove back past and saw who got the job and said fine. That was the extent of it, never gave it a second through. I'll leave it at the mercy of the board.

Tom Smiley: In the interest of eliminating any risk of the perception of conflict of interest, we'll ask Andy Nilsen to recuse himself, and ***Brendan Masterson, an alternate member, will fill in on the Board for this care.***

Kyle Barnett: Second procedural matter – There's the potential for a conflict with any testimony from Peak Engineering as Peak engineering had done work for Duchess Farms also. My client advises that



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Peak Engineering had also done work on behalf of Duchess Farm as pertains to the subject property. There's a concern that Peak Engineer would also be a conflict.

Tracy Kellogg: My recommendation is that there is no conflict with Peak Engineering. Peak worked on the Septic Design and the scope of work was very limited. What he's doing now, is reviewing, and inspecting the site plan and standards and completely separate from the minimal work he did with the septic.

Scott Davis: Peak Engineering – We did work for the last phase, phase 4, and it was only the septic design we were hired to do by Duchess Farms. We had nothing to do with the subdivision and the septic was the only work we did. Duchess Farms couldn't get anyone to do it, so Peak did it. We received one check, the plan was approved and submitted to the Ulster County Department of Health and was accepted without any issues. Unfortunately, the septic worksheet was included in the subdivision file, but it states clearly on the septic worksheet and approved plans that it has nothing to do with the subdivision and only the septic system design. We had talked to all attorneys involved in this case, and none of them said it was a conflict of interest. The developer and his attorney also, at one point in time, agreed there was no conflict. The septic sheet was incorrectly used by the applicant and the planning board in Phase 4.

Mike Warren – Applicant: I'll respond. There is also, from Warren Replansky, it's in here – Mike Warren handed out binders to the Board – there's a lot more to this.

Tracy Kellogg: I would side bar this. Currently, the Board is not going to remove Peak Engineering.

Mike Warren: there's two complete packets there.

Tracy Kellogg: We'll give them to Michelle, and they will be entered into the file. We'll let Mr. Warren's attorney respond in writing to their request to remove Peak Engineering as a conflict.

-Mike Warren continued to provide binders and documents to the ZBA to be placed into record-

Mike Warren: I also gave Michelle an electronic copy

Kyle Barnett: The other issue that I'm going to bring to your attention is, and I'll expand upon this in my follow up, the notices of violation and orders to remedy, appear to be procedurally defective. They lack specificity as to what the actual violation is to support the charges or what needs to be corrected to resolve them. Also, some of the sections that are charged are not regulations in terms of the types of chargeable regulations. Instead, what many of these charges are, are policy codes. Complaint # 04022020A; It says these are violations of chapter 169, and if you go to chapter 169, it lays out the policies of the planning board and what they follow when doing a subdivision. It's not if you don't do this you've created some sort of a violation. Chapter 169 just deals with the subdivision of land, it doesn't specify what, or nothing in this chapter that states if you don't build something pursuant to the site plan, you're subject to a violation. If the argument is that the Planning Board didn't do their job, this board doesn't sit as the arbitrator as to whether the Planning Board did its job. That's essentially in line that's what this case is about. Duchess Farm received subdivision approval. The chair of the planning





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board, to get approval, has to sign off on the plats, the inspections, the plans, the maps. That's the evidence that the project was completed to plan. Now 14 years later, we're finding out its not to plan or been approved. Well, maybe that's a problem with the planning board and not a violation for the operator. There's nothing in section 169 that outlines what he would be charged with. It states only Chapter 169, but that's a big chapter, and it lacks specifics.

Mike Warren: A point on that, look at the SBL. He didn't put every SBL in the subdivision. He put the SBL's of the ag land. And the home sites that were sold with RMA's and CPS7's, he didn't put violation on them. That's discrimination. You either do everyone or you do nothing. It has nothing to do with any of this.

Kyle Barnett: I'm not going to go through all of these, but it's a similar problem throughout. The lack of specifics and defined charges. Related to charges that its within the chapter of 169, and it doesn't specify to what extent the purported streets aren't in compliance with paragraph I, which is related to...you know, it's related to private rural road which in and of itself is an ambiguous section.

Mike Warren: There are copies of all subdivision approval in tab. Every single approval was done with no conditions. All conditions were met before the planning board chairmen signed them.

Kyle Barnett: It's not uncommon for site plan or subdivision approval to be conditioned. There are none with this subdivision. The planning Board should have taken a harder look at this or at that.

Mike Warren: Two other subdivisions around the same time both had conditions placed upon them. It's the same exact planning board that did all the subdivisions. Tab 8, the planning board at the time, they required, which no one had heard of before, required a CPS7 which no one had heard of before. The planning Board also required Road Maintenance Agreements on all the lots. We didn't know where the roads were going to end up in phase 4 or the lots. To ensure phasing had the CPS7 and Road Maintenance by the people who bought lots then. Not the lots I didn't sell. Every lot that got sold have a Road maintenance agreement. The town and the homeowners are secure in the fact of who maintains the roads.

Kyle Barnett: Violation 202B, 169-53, I believe that's what he's referencing, dealing with homeowner's associations. First, there's no deadline. The HOA is responsible for the concerning the common facilities and the maintenance of the roads. They are responsible, the property owners, and you can't hold the project sponsor responsible or obligated for the roads.

Tracy Kellogg: Up until the point they are turned over. They have not been turned over.

Tom Smiley: So, who owns the roads? Who is responsible for the roads where the parcels are not sold?

Mike Warren: Duchess Farms owns it.

Tom Smiley: So, there's 4 home sites on Morgan Lane.

Mike Warren: There's 4 sites, but only 1 home is built. All the lots are sold so they are responsible for the road.



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Tom Smiley: Is there a portion of the Road that Duchess Farms is responsible for?

Mike Warren: We don't sign onto the Road Maintenance agreement. It's done when we sell the lot.

Tom Smiley: are there any lots still owned by Duchess Farm?

Mike Warren: Yes, 6.

Tom Smiley: The roads associated with those 6 lots, who is responsible for the maintenance of the roads in relations to the lots that are owned by Duchess Farms? Let's say Duchess Farm owns 6, and there are 12 lots, so they own half, are they responsible for half of the road maintenance?

Mike Warren: until the parcels are sold, they don't become responsible for the roads

Tom Smiley: they who?

Mike Warren: The ones that we own. We've taken responsibility for them. It's a good question. If we are supposed to or not, let's just jump to the last tab is the homeowner's association. Duchess Farm does not own any road in that community.

Tom Smiley: As of what date?

Mike Warren: As of this year some time. This was because of judge mott. He advised us that it would be helpful if you did it now. Since the roads and lots have all been defined and the phases approved because we know.

Tracey Kellogg: Kyle, can I ask a question. Are you and your client now advocating that we pursue all the individual lot owners?

Kyle Barnett: Of course not, there's nothing wrong with the roads.

Mike Warren: Homeowner association is all done. We've had CPS7 from day 1. Phase 3, the road was shortened by 500 feet, and bridal path lane was also shortened about 500 feet, and we also eliminated 5 home sites. After phase 1, we eliminated a lot of the lots and combined them.

Tom Smiley: Let's refocus the conversation.

Tracy Kellogg: Let's draw attention to the RMA, section 3, (read excerpt) "to maintain the roads at the time of their inspection and approval by the town engineer and highway superintendent...maintain access by emergency vehicles...Duchess Farms Equestrian Community LLC bears the responsibility of the construction of said roads to the specifications of the Town Code of the Town of Marbletown."

Zach Bowman: When you were advised by the judge to, is there a new road maintenance agreement or is this still the RMA?

Tom Smiley: No, this just creates the transfer to the Homeowners Association. To make sure I'm reading this correctly, the date of transfer was 12/12/2020

Mike Warren: Yes, that is right around the time, I don't know exact.



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Tom Smiley: So just to be clear, Dutchess Homeowners Association is the HOA, and Dutchess Farms Equestrian Community LLC is what?

Mike Warren: Is not part of the HOA.

Tom Smiley: Ok, but they are responsible for the development and construction of the roads up to some point?

Mike Warren: Up until the approval by the planning board

Kyle Barnett: That's what we are referring to, that they were responsible up until the time the Planning Board approved it.

Tom Smiley: So as of December 11<sup>th</sup>, 2020, before the HOA took over responsibility for the roads, what parcels was Dutchess Farms LLC responsible for?

Mike Warren: There is a map – I can't remember which tab it's on; when the HOA was formed, none of the farmland is part of it, every lot that is sitting unsold is part of the HOA now. When a lot is sold, they sign onto a Road Maintenance Agreement. The lots that are not sold do not have a road maintenance agreement. Currently, all lots are under the HOA today.

Tom Smiley: I understand. So, December 10<sup>th</sup>, last year, who owned the lots that weren't owned by individual property owners? The ones that hadn't been sold, who owned them?

Mike Warren: The LLC

Tom Smiley: That would be Dutchess Farms Equestrian Community LLC?

Mike Warren: yes

Kyle Barnett: The argument being that the LLC was not responsible for the maintenance of the roads at that time because they were approved by the planning board, and to the extent that they required to be maintained, the members of the HOA are responsible for that.

Tom Smiley: So, when there was 1 house on Palomino Path, and they were the only person in the HOA, they were responsible for every bit of maintenance on Palomino Path?

Mike Warren: Up to their house, well, no, but there are 3 houses on Palomino Path, there are 4 lots, and they are all signed onto the RMA, and all of Palomino path has sold lots on it.

Tom Smiley: Right, and I'm asking when there was 1 house built on Palomino Path, and only 1 member of the HOA, who was responsible for all the road maintenance? Was it that 1 homeowner, or was it the homeowner and then...?

Side Bar – Mike and Lawyer

Mike Warren: I don't know. I'm not sure who was. We've maintained them for 16 years.



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Tom Smiley: Ok, that would tell me that Duchess Farms LLC took responsibility for the road maintenance.

Mike Warren: No, all I'm saying is we've maintained them for 16 years.

Kyle Barnett: So, what you're driving at, correct me if I'm wrong, up until the time that a particular lot is sold, who is responsible for the road that leads to it?

Tom Smiley: Yes

Kyle Barnett: The developer

Tom Smiley: That would be Duchess Farms Equestrian Community LLC?

Kyle Barnett: That is correct

Mike Warren: Until we sell the lot

Tom Smiley: Violation notice A, I have notes; primary argument is it lacks specificity, and it ties to a town code which defines the planning board process; and then B same argument for #1, violation #2 is the HOA is responsible for the maintenance, and you can't hold the project sponsor responsible for the maintenance, and the HOA has been created. Moving on to violation C, Violation # 1, Code 167 failure to comply with stormwater management regulations...

Richard Newman: I'd like to make a clarification about the HOA. The HOA was formed, Inc was formed, so the shareholders of the HOA currently is none of the homeowners. We are currently negotiating. We are not currently shareholders of the HOA. We would argue if we had to, that we were not forced to be members of that Inc.

Kyle Barnett: Again, with 167, the violation cites the entire chapter. What was the violation? Was it section 1, section 2, 3, 4, 5? It doesn't specify what, specifically, what was not complied with. It doesn't notify of much. And, again, in terms of what this chapter deals with, and you'll see as you flip through it, there's no specificity. It deals with the policy that the planning board is supposed to follow when approving stormwater controls. This purportedly must have been done because they got their approval. I defy anyone just from looking at the 4 corners of this report to tell me what the violation is?

Tom Smiley: And that applied to all 4 violations on notice C?

Kyle Barnett: Yes. In relation to not allowing town personnel to do an inspection, I don't know how to answer that? When was the inspection? Who were the town personnel? Any time there was an inspection requested during the subdivision approval process he allowed that to happen. It's the same situation, you go to 200...

Tom Smiley: 253 Stormwater Management.

Kyle Barnett: One moment. I don't have that section in front of me, but its similar situation to earlier. The allegations, another general allegation, which is identical to the ones made previously. It does not



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say where, when, or what they are talking about? By looking at this document, there's no way one can determine what the alleged violation are that it is speaking about.

Tom Smiley: <read excerpt of violation> ...By failing to construct stormwater protection and other improvements as shows on the subdivision plat approved by the planning board...

Kyle Barnett: Right, but where is it? If I don't know where it is I don't know what the problem is?

Tom Smiley: It also references 290-A, which I don't remember off the top of my head, 290 is...it's the code for violations.

ANY QUESTIONS FROM THE BAORD MEMBERS

Kathie Grambling: What was the date of the violations?

Tom Smiley: April 1<sup>st</sup>, 2020. So, the notice of violations is in reference to failure to construct stormwater, failure to maintain roadways that are in the plans, do you have any other evidence to show that this is not factual?

Kyle Barnett: The strongest piece of evidence is the approvals of the Planning Board.

Mike Warren: Full approvals for all phases without out any conditions by the planning board. On tab 6, we also have blown up maps of this, there is a licensed surveyor survey of all the roads. A licensed surveyor, all roads the widths meet the map requirements. We had a certified surveyor go out, and all roads meet or exceed the requirements. In section 6, there is a map and all the pictures. We also have a full road video which has been submitted to judge Mott's court. I'm not going to waste your time on 20 minutes...

Tom Smiley: It was 45 minutes. I've watched all of it.

Mike Warren: It gives you an idea of what the whole community looks like.

Tom Smiley: Which one is the as-built, certified signed and stamped map?

Mike Warren: (provided a document to Chairman Smiley)

Tom Smiley: I can't read the stamp. Can we get a clean copy of this which is legible? We need a copy that is legible so we can see the signature and date on the stamp.

Brenden Masterson: Mr. Warren, is that a re-date of the original signed and filed subdivision map?

Mike Warren: There was questions about the widths, 16 feet this and 18 feet that, and 11 feet for Warren Way. We hired a surveyor to come out and g.p.s. all the roads there.

Brendan Masterson: Do you understand my question? My understanding is that filed map 07126 in the clerk's office, that John Post has now stamped with a revised date on it. He's basically doing an as-built copy of the original subdivision plat. It's saying that you're in conformance with that, is that correct?



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Mike Warren: Oh, oh oh, OK, yes. The original as built that everyone was using, the as built when Jon post went out, there's copies of testimony on this, that as-built was only because back in January 2020, it was alleged that warren way was not built within that 50 foot built that it was supposed to be built in. I paid John Post to come out and say hey, put down where the 50-foot strip that warren way was supposed to be built upon, I said make sure that Warren was built within that 50 foot strip. As he measures the road, he put in his actual dimensions. You see it on the as-built. He drew in travel area because the rest of it was snow covered. He was not able to actually measure the widths of the roads.

Brendan Masterson: He provided a full-sized copy of this?

Mike Warren: He provided a new one when he could see everything.

Brendan Masterson: that's in February?

Mike Warren: Yes, the first one got misused because it had no widths on it. The one that the chair has is the official one.

Tom Smiley: This map is dates February 5<sup>th</sup>, and this was based on an actual on-site survey?

Mike Warren: Absolutely.

Tom Smiley: We need a clean copy.

Zach Bowman: Is there a survey from prior to the violations being issued, out of curiosity?

Mike Warren: No

Tracy Kellogg: Wasn't there a submission by Colin Houston?

Mike Warren: No, I haven't even had any communication with him since...

Tom Smiley: anything else you would like to present to the Town?

Kyle Barnett: Reserve on the option and the opportunity to continue to present and supplement

Tom Smiley: Of course, we'll continue the public hearing. As to the site plan as-builts, we'll need to have that stamp that we can look to. That is an official document. Videos and pictures are one thing but unless they are included by an engineer, we can't validate their origins or usefulness. We need to focus on the engineers reports and official documents stamped by a licensed professional.

Tracy Kellogg: Do we have any engineered reports or documents showing conformity with the site plan or planning board submission?

Tom Smiley: with an updated site plan, an as built, typically you would get an engineers report that speaks to their site visit.

Kyle Barnett: My understanding is that a request has been made by prior counsel for a complete file that was submitted to the planning board, it hasn't been provided for reasons that are not explained.



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Tom Smiley: I meant specifically with the evidence that was just submitted? As built site plan, typically, they come with an engineers report that speaks to their site visit what their observations were.

Kyle Barnett: So, a letter from the person who did the Survey? We can get you that.

Tracy Kellogg: Over the last couple years, there's been site visits with your engineer Kirk Rother, can you provide any reports that shows what his findings were, to certify the conditions and findings?

Kyle Barnett: I don't, and my response would be that it should not be necessary because the issue as far as I can see it is weather or not it was built to specification as reviewed and approved by the planning board, and it had to be because the planning boards wouldn't have granted its approval. The sponsor must be able to rely upon the planning boards approval. So, weather an engineer goes out there 13 or 14 years late, isn't relevant or going to make much of a difference. It was approved. Even if you make the argument that the planning board didn't do its job, that can't be the responsibility of the project sponsor.

Tom Smiley: Our question isn't if it was approved or when it was approved, the question is, was it in compliance on February 26<sup>th</sup>, 2020, when there was a site inspection and violations issued. It is not just about if it was or wasn't built then, but was it built to the site plan and maintained to those standards as of the inspection in February 2020.

Kyle Barnett: Absolutely, and to address that, I need to know what exactly this guy is saying they did wrong. If you're saying the roads are not wide enough or roads are too wide, we can address that with the survey. I need more specifics than what are provided in the violations as written.

Tom Smiley: The basis of the violations are the roads are not currently maintained to the site plan, and the stormwater management systems are not currently maintained to the standard. It's not "were they when each phase was approved, but are they today?" And who is responsible to maintain them? I know a lot of work has been done out there since the February 26<sup>th</sup> inspection, so clearly there was an acceptance at some level that some works needs to be done here. If there's anything that supports your as-built site plan that says no everything is fine, I'm looking for anything else that would support that. Any additional proof that there's nothing wrong with the site.

Kyle Barnett: What I have is the survey, and I can certainly get something from the person who did it to support that. And to the extent that I have or find anything that meets your reasonable request I'll certainly provide it.

Tom Smiley: Part of our job is to determine if the correct determination was made. And we can either affirm it, reverse it, or somewhere in between. If you can demonstrate to me that there is zero reason for the violations, that is what we need to ascertain. Proof that the stormwater is to plan, the roads are to plan, and the HOA is established, that goes into our decision.

Kyle Barnett: We've given you what we can give you on the roads and the HOA. If there's anything else, we can give you on the stormwater we'll certainly follow up.



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Scott Davis: Town Engineer – We’ve been out there twice to inspect as a joint effort between the Town and the developer, the developers engineer, we went out, we pulled tapes, and we were in complete agreement on everything we witnessed out there; Our reports reflected that. If Mr. Rother who was out there would like to submit a letter stating that has changed, we’re happy to go back out and look at it, but the days that we were out there doing the inspection, we all agreed on the dimensions as we were both holding the tape measure together. The measurement and observations of the road conditions and widths was a joint effort out there. As far as the stormwater, there were supposed to be ponds in certain areas that were never constructed, certain areas that were not build according to the plans. Our assignment was to inspect and ensure that the roads and the stormwater was built to the approved plans that the town has. We have nothing else to go by other than the signed plans by the planning board and the developer. We took those plans and went out to field verify. The process is that the Town Engineer is supposed to inspect throughout the build process, however, we were not the Town Engineer throughout the entire durations of the project. It was noted that the previous Town Engineer did inspections, but we have not or yet to see any inspections or sign offs on the construction prior to our request to inspect to the site plans. We ourselves, Peak, has not signed off on any of the construction. We had worked with Mr. Rother, who was the engineer for the developer, and he was very good about discussing the issues. Items that are noted in our reports were items that were agreed upon jointly during the site inspections by both engineers. The town code states that the Town Highway Superintendent and the Town Engineer get together to certify the roads and I do not remember seeing anything in the town code about a surveyor being the one to do that. We have worked with Mr. Post, who is reportedly responsible for the surveys provided, but its news to me that it’s a certified as built, but none the less. I do believe that Mr. Rother could submit a report showing that something has been changed, and we would be happy to go back out and look at that.

Tracy Kellogg: <submitted evidence to the ZBA> 2 reports provided by Peak, one dated February 2020 and one July 2021, from which they reviewed the roads and bearing points and determined nonconformity with the site plan. We’ll label these exhibit B and exhibit C. I’ll provide Kyle with copies.

Tom Smiley: It sounds like Rother did site visits with Peak. We would like copies of any reports that Kirk Rother provided in terms of recommendations or findings during the site inspections. Any communications that you had with him in terms of what the findings were.

Mike Warren: In the other court, there is a motion to dismiss because the town has not provided the required discovery for over a year, it’s all documented, I can give you copies of that too

Tom Smiley: It frankly doesn’t have any bearing on this.

Mike Warren: We needed that, that’s why.

Tom Smiley: If there is a dismissal there, it’s two separate matters

Tracey Kellogg: Here is the inspections from the Fire Chief and the building Department.

Shawn Marks: Dave’s not here tonight. On February 25<sup>th</sup> Dave Allen, head of the department, I’m the second code enforcement officer; Dave came to me and asked if I would pop out to the Dutchess Farm





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subdivision and do a visual inspection and gather qualitative and quantitative findings to support the findings from the previous engineers visit. On the 26<sup>th</sup> of February I went out there, took some photographs, took some quantitative measurements of the roadways, the general grade, slopes, and construction of the roadways, had a look at the stormwater; all my observations were based off the approved and submitted site plans and subdivision maps. My findings are in the inspection reports that Tracy Kellogg provided to the ZBA. I went back out again, I believe it was June 12<sup>th</sup>, 2021, with Scott Davis, Mr. Warren, Dave Allen, to do a re-inspection. We noticed that there had been some improvements, which we were happy to see. I took new photos, measurements, and provided the findings in my report of June 12<sup>th</sup>, 2021, inspection.

Kyle Barnett: Can we get those reports, the ones that were just being referred to?

Tom Smiley: Of course

Tracy Kellogg: There was also an as built from January 20, 2019, from John Post. We have that in record as well.

Kyle Barnett: I think that's the one that Mr. Masterson was referring earlier.

Tracy Kellogg: This one shows the profile of the roadway.

Tom Smiley: They appear to be the same. The one I'm looking at doesn't have a stamp

Kyle Barnett: We'll make sure you get the stamped version

**OPEN TO PUBLIC COMMENT**

Richard Newman: Ok, I can't help myself. Mr. Marks did the inspection but who wrote the report without any specificity and what happened there? How did that ball get dropped?

Tom Smiley: I don't know. It was written by Dave Allen, the other CEO, Shawn is one of a couple, and I can't tell you why he didn't have more specificity.

Tracy Kellogg: We have one attorney who's asking for specificity, and we have a code enforcement officer who's just making the statement that those roads were in non-compliance, that they were not built to the standards. He may not have referenced specific sections, and that's an issue for the zoning board is to review, the argument whether specificity is required.

Richard Newman: May I respond to that? I live there, and I got the same report, and my wife and I looked at it and said, "what's the problem"? So, I understand that it was written for what the problem is, but as a citizen, I couldn't for the life of me figure out what the specific problem was.

Tracy Kellogg: Can I ask what your address is?

Richard Newman: 17 Morgan Lane.

Tracy Kellogg: So, you're one of the early structures?



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Richard Newman: Yes, been there for 12 years

Tom Smiley: As a point of clarification, it wasn't weather or not the roads were built to that standard, it's the state of the roads on that date relative to the violations and the site plan. They very well may have been built to the full standard, and degraded to a point, they may not have been built to standard, I'm saying because I don't know and we're trying to get all the documentation.

Richard Newman: I understand and as a person living there, I'd like to know, "this is a violation of code, 1.73 subsection d, and it has to be done because of the failure to do", but what we have is "this is a violation because someone said it's a violation". It doesn't give me as a citizen and understanding of what that is.

Tom Smiley: This process is the response to just that; we didn't get the information we need, this isn't a fair violation, That's the exact argument that the counsel has made.

Tracey Kellogg: The board can ask for more specificity

Tom Smiley: Precisely why I'm asking for any other or more documentation that would suggest that everything was in compliance. Part of our charge is either reaffirm the notice of violation, cancel the notice, or land somewhere in between and amend the notice of violation.

Kyle Barnett: One of the issues, as I looked at this, if I had something specific back when this thing was issued, send the guy out and go check this x,y,z because that's what they're claiming you did wrong, the problem is we don't have that with the information we've been given.

Mike Warren: And an amount of time to fix it

Tom Smiley: Yes, and a reasonable amount of time to address it. I'm not hearing anything else from the public, I would like to schedule a site visit. All board members are welcome to join. Is there a time of day, day of the week, between now and Sept 22 that works better or best?

Mike Warren: The board members can come out any time that they want. I have a job; I don't have to be there?

Tom Smiley: You don't have to be there, you can have a representative there, that's fine also.

Mike Warren: I would have objections to people that are there not to be fair. The board members absolutely. In fact, the planning board made site visits several times during the process. Took tours, even before it started, they wanted to see everything.

Tom Smiley: Is there a time of day or day that works best? If the board members do not cross discuss, we are fine to go all at the same time, and we are not a quorum.

<Board discussed possible dates for the site visit>

***Site Visit set for 1 p.m. on Thursday September 16<sup>th</sup>, 2021***



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Tom Smiley: Mike, you expressed concern over people other than the board showing up? I would like the code enforcement officers and the Town engineer to come.

Kyle Barnett: We've raised an issue with Peak, that they are the town engineer, the conflict issue that was tabled

Tom Smiley: Ok, pending resolution of that, it may be Peak, it may be an alternate engineer approved by the town.

Kyle Barnett: we'll work that out with Tracy in the meantime

Richard Newman: are homeowners allowed to join?

Tom Smiley: Absolutely

Egidio Tinti: Are we going to be a quorum at that point?

Tom Smiley: We won't. The way we avoid being a quorum is we don't talk to each other about anything on site. We don't cross discuss. We can ask questions, we can look at stuff, but cannot discuss.

Tracey Kellogg: We could schedule it as a meeting if needed?

Kyle Barnett: I like Tom's suggestion better.

Tom Smiley: I'm hearing counsel is fine with us joining as a group we just don't cross discuss the project with each other. No group conversations.

Mrs. Newman: this should go without saying, its not that we don't want to town to enforce its codes, we want the place to be safe and well maintained, and when ownership is turned over to the HOA that they are good roads. Its just that up until now, it's been very confusing and the lack of specificity. Looking at other roads and other stormwater control systems in the town, it's been very confusing

Tom Smiley: A lot of these old roads were built long before there were codes and standards, let alone an approved site plan presented to the town and approved by the planning boards. A lot of roads with poor drainage.

Zach Bowman: Roads that don't even exist anymore

***Motion to extend the public hearing to September 22<sup>nd</sup>, 2021, by Brendan Masterson, second by Kathie Grambling, call of the roll unanimous. (5-0)***

Zach Bowman, Tom Smiley, and Tracey Kellogg discussed the Accessory Apartment Law and how it relates to the Application for 3772 Main Street, Norman. Tracy Kellogg gave her interpretation of the law and how it applies and how it does not apply.

Questions to ask and follow up on:

- Is a variance required for lot size?



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- If there is a potential hinderance in the verbiage of the law that severely limits its intended use and spirit, that a potential change be made to better facilitate the intent and spirit of the law
- Does granting the side yard variance in turn grant approval or ability to be approved for an Accessory Apartment

***Motion to adjourn by Andy Nilsen, second by Zach Bowman, call of the roll unanimous (5-0)***

***Adjournment at 8:54 p.m.***

FINAL APPROVED MINUTES

Michelle Solcberg

Approved September 22<sup>nd</sup>, 2021

Approved