

## NELSON ZONING BOARD OF ADJUSTMENT MINUTES

May 10, 2022

Meeting called to order at 6:59 pm

ZB members present: Jim Newcombe, Robert Roland, Bill Dunn, Keenan Blanchard and Amanda Bedard.

Also present were Ed Schillemat, Daryl Schillemat, Brenna Kucinski, Maury Collins, Bette Lenox, Bob Lenox, Cyndi Newcombe, Phil Castelli, Tom Newcombe, John Bunce and Lawyers-Tom Hanna, Gary Kinyon and Chris Drescher.

Jim Newcombe opened the meeting with the ZBA members introducing themselves.

### **Public hearing opened for Edward and Rita Schillemat at 7:09pm**

Tom Hanna announced he would be presenting for his client, Ed and Rita Schillemat. Tom proceeded to hand out a list of exhibits, supplemental records of the Town of Nelson and a variance application. Jim Newcombe asked if the ZBA could ask questions as they go or should they wait until the end of the presentation. Tom was ok with questions and if they were to be addressed later in his presentation he ask that we wait.

Tom first raised the issue of Bill Dunn recusing himself due to the fact he was a select board member when the previous hearing for the variance took place and the motion to rehear was presented to the ZBA by the selectmen. Tom Hanna said the application remains the same and he objects to Bill Dunn sitting on the ZBA for this hearing. Bill confirmed he was on the select board at that time, however this remand was taking things back to square one, and he would listen to all parties and be able to make a decision based on what was presented. Bill Dunn brought up the fact that the ZBA lawyer and ZBA members were in contact with the Schillemat lawyer when the suit was brought against the ZBA . Chris Drescher, lawyer for the ZBA, stated he had talked to Tom Hanna, in the beginning as co-defendants. Jim Newcombe said the only time he talked to Tom Hanna was to see if he was available to represent the ZBA in this case and when Tom was already hired by the Schillemat, Jim Newcombe asked if could refer him to a lawyer. With no rule for recusal and Bill Dunn refusing to do so, Tom Hanna wants his objection noted in the record.

Tom Hanna gave six exhibits, all of which are to be part of the record of the hearing. Tom Hanna referred to **Exhibit 1**- photographs. Tom explained the 2<sup>nd</sup> dwelling on the property was offered to Ed Schillemat about 20 years ago by Ethan Tolman when it needed to be moved off

school property. Ed Schillemat did obtain a building permit for the 2<sup>nd</sup> dwelling at that time. Tom explained the forms in the photograph where the proposed new dwelling is to be constructed were just forms and no concrete has been poured. Tom then went on to **Exhibit 2**, a letter from abutters, as well as surrounding neighbors of 25 Lehi Lane, who had all signed their support of the proposed Schillemat additional dwelling. **Exhibit 3** consists of the Nelson ordinances (2017 amended version). **Exhibit 4** consists of the August 7, 1990 Nelson Planning Board conditions of approval for the 7 lot subdivision. Tom talked about condition 5 which states the road must be constructed and maintained to the standards of the Nelson Town Roads. Tom states the road, even though private, is constructed like a Class V road so it should be considered a Class V road. Since each additional dwelling on a Class V road needs 2 acres and 50' of additional frontage this 3<sup>rd</sup> dwelling should be allowed without a variance. Tom stated the ZBA got it right in the very first hearing on October 25<sup>th</sup> and they should consider the language used as the rationale that no variance is needed. **Exhibit 5** - the Subdivision Plan approved on August 7, 1990 by the Planning Board and recorded at the registry of deeds on September 11, 1990. Tom stated Ed was going to the Planning Board with a traditional subdivision that consisted of strip lots with the proper road frontage. Everyone agreed it was not the best design and came up with the 7 lots off a private road as an alternative with specific conditions. Tom also stated the Nelson Zoning Ordinances don't limit the number of dwelling on a lot, neither did the subdivision, and the select boards options are to have the Planning Board change the Zoning ordinances, which would require a vote at town meeting. **Exhibit 6** consists of the agreement made between the Town of Nelson, Nelson Planning Board, Ed and Rita Schillemat and Daryl and Cheryl Schillemat that is recorded at the registry of deeds. The building permit for Ed's original house and the 2<sup>nd</sup> dwelling that was moved from the school property are included in Exhibit 6. Ed stated he went to the town for the 2 apartments that are located in the barn but there are no building permits found in the town file for them. Tom also stated if the Planning Board approves the 3<sup>rd</sup> detached dwelling that Ed has no plans for any additional dwellings on his property and it can be made a condition. In summary, if the board considers the private road a Class V road it does not need a variance and if they do not consider it a Class V road it does need a variance. Jim stated he couldn't find variances for the 9 other dwellings on the road so it must have been treated like a Class V road. Chris Drescher addressed the Class V road definition and that it is not maintained by the Town so technically can't be called a Class V road even though it may meet all the other qualifications. Jim asked if there were any instances where other towns have dealt with a similar situation and Tom said all the time. He sighted residential developments as close as Stoddard where there are home sites being built off private roads where the town refuses to take over the maintenance. Aten Rd in Stoddard was brought up as one of the roads where the residents are responsible for maintaining the road. Jim also asked about the waiver of liability that was a concern because it was never filed and Tom said it has been filed with the registry of deeds. Robert Roland asked if

the board was being asked to vote on a variance right now because he doesn't think one is needed. Robert was advised that it wasn't to that point yet, that Gary Kinyon, attorney for the select board, needs to have a chance to speak. Gary started by clarifying this is not a case of the select board against the Schillemts, it is a rehearing for a variance. Gary states, without question, a variance is needed. For this variance, we need to look at the zoning ordinances now, not what they were when the original subdivision was created. If we do, there is no road frontage on a public road, and there is no question, it is in the record, it is a private road. This was supposed to be a lot for a single family home for which there was a building permit. However there are no building permits for the apartments on file. The cabin, for some reason was given a building permit. We don't know why that was done but it should not have been. The intention of the Zoning Ordinance is to prevent developers from overdeveloping this rural area and that is what the select board is concerned with. Keenan brought up the alternative development and Gary said even if it was an alternative development at the time it still needs to go by the Zoning Ordinances as they exist today. It is not exempt from the ordinances just because the subdivision was an alternative plan. Tom spoke to the article we are here for is 3:5 requiring each additional dwelling unit needs 2 acres and 50 additional feet of road frontage on a Class V or better road. Gary and Tom agree a lot is not limited to one dwelling but the Nelson Zoning ordinances need clarification, but Gary says a variance is still needed when other zoning provisions are not met. Gary also made the point that you can't go forward on a variance on a lot where there are already zoning violations. Chris advised the board they only need to look at the variance brought before them. Keenan asked if it was the select board's opinion that this was an alternative development. Gary says he thinks it was, but that doesn't mean that none of the other zoning ordinances apply.

#### 8:30 PM SHORT BREAK

The hearing was opened to the public. Tom Newcombe, Planning Board Chair at the time of the final plan, says he worked on the original subdivision plan where the lots did have road frontage. Ed sketched out and brought to the PB what he thought was a better plan for the subdivision and Tom Newcombe said it looked pretty straight forward with 7 lots, which he believes to be the number strip lots the subdivision would have allowed, only the lots would be located off a private road to be maintained by Ed. Tom Newcombe said he does not recall using the words alternative development. The conditions of the subdivision were that one lot would never be built on and there would be no further subdivisions of any of the lots. Brenna Kucinski, select board chair, addressed the question of whether the select board considered it an alternative development and she said they did not. After examining the zoning ordinance and talking to Tom Newcombe, who was part of the actual final subdivision, it appears that was noted anywhere in the plan. Gordon Peery, who was the chair before Tom Newcombe, said they had talks about the alternative development and the PB agreeing that the alternative plan

was the best way to move forward but that was not the actual final subdivision vote. Keenan read where the PB minutes of 2/13/90 say they approved an alternative development. Jim brought up the fact that at the first hearing Gordon came and told them right from the get go that it was an alternative development and the board could just apply the 2 acre rule and have up to 5 houses on the 10 acres, which influenced the board and his decision. Brenna again says the way the select board sees it the original subdivision plan allowed for 7 lots with proper frontage on Murdough Hill Rd and 7 driveways where each lot would be allowed 1 house . Brenna thought the alternative plan not development was a much better solution to the original subdivision plan but still doesn't see how it is technically an alternative development. Robert thinks this all conforms to an alternative development so he still says it doesn't need a variance. Bob Lenox, an abutter and past ZBA member for over 15 years, pointed out the fact that there is no building inspector in town. Bob referenced that on more than one occasion things that the ZBA approved later turned into something totally different. The apartments have existed for years and Ed is being taxed on them and the so called illegal apartments should not even be in the discussion. Gary Kinyon says he hopes the board will vote to hear a variance. Jim still wants clarification on this being an alternative development. Jim referred to page 17 in the supplemental records where it says the PB unanimously approved an alternative development. Jim believes a separate meeting will be needed for deliberation as the board members need to go through all the additional information that was presented tonight. Tom Hanna asked to present the variance application even though a decision hasn't been reached yet whether one is needed or not. A copy of this variance application is attached. Tom stated the variance would not adversely affect the public interest and it would be in the spirit of the ordinance because of the quality of the road. If you consider it a class V road, there is an additional 2 acres and 50' of road frontage required for the 3<sup>rd</sup> detached dwelling. No further units can be a condition of the variance. Tom also added variances are not precedent as each case is supposed to be looked at individually. Tom then discussed the loss to the landowner is not outgained by the gain to the public. Tom explained Ed has had this 3<sup>rd</sup> detached home plans for some time and it would be a serious loss if it can't be built. Tom commented the select boards problem is with the Zoning Ordinances. There is 8-900 feet of forest buffer between any structures which is a substantial buffer. As far as hardship Tom explained the site has special conditions. Tom again states as far as frontage on a class V road, our position is because of the quality of the road it meets the standards of a public road. The special condition is that the condition of the subdivision required the road to meet the standards of a town road. Gary Kinyon asked the ZBA to consider hearing the variance request and that the ZBA is considering a variance and not the fact that Ed wants his grandson to move into a house on the property. Gary made the point that right now the private road is being maintained properly but it is at the mercy of the landowners and it is the PB's responsibility to consider safety. In conclusion Gary listed the zoning ordinances the property should not be exempt from: 3:1 no new lots less than

2 acres, 3:1.1 2 acres for single family unit only, 3:7 frontage on a class V road. Gary wants the board to think about the fact this is opening up holes for developers and the selectmen feel it is creating a big problem for the town. Gary said Ed has received a lot of personal benefit with all of his dwelling units and there is no hardship in not having this 3<sup>rd</sup> detached dwelling.

Jim makes the motion to continue the hearing until May 17<sup>th</sup> at 7PM in the Nelson Town Hall. Keenan seconded. Hearing adjourned at 9:39 PM.

Respectfully submitted:

Karen Castelli, Zoning Board Clerk

Jim Newcombe\_\_\_\_\_

Amanda Bedard\_\_\_\_\_

Robert Roland\_\_\_\_\_

Keenan Blanchard\_\_\_\_\_

Bill Dunn\_\_\_\_\_