

**Town of Cumberland
Board of Adjustment and Appeals
Minutes of Meeting
October 12, 2006**

Present: R. Scott Wyman, Pete Wilson, Adrian Kendall, Matt Manahan, Sam Wilkinson
Absent: Ronald Copp, Andrew Black
Staff: William Longley, Code Enforcement Officer

The meeting was called to order at 7:00 p.m.

Mr. Wyman welcomed the applicants and gave an overview of the rules of procedure for the meeting. Stating there would be opportunity for public testimony.

Hearings and Presentations:

1. Variance: Cathy E. & Mark L. Brann & Kelly P. Brann request a variance of 1.20 + or - acres from the minimum lot size requirement of 4 - acres for an existing lot at 94 Lower Methodist Road, Tax Assessor Map U18, Lot 4 in the Rural Residential One (RR1) district; Alan E. Wolf, Esq., Representative.

Mr. Longley stated this application was tabled from the last meeting.

Mr. Wolf presented background as follows: The Branns' owned land on Lower Methodist Road that was configured as two parcels on the Town's tax maps. One parcel designated as parcel 4 consisted of 1.6 acres and contained a one and one half story building. The other parcel, designated as parcel 3, according to tax records, consisted of 7.75 acres and was vacant. The Town has been taxing parcel 3 and 4 separately. The town tax bills showed that the house lot was 1.61 acres and the vacant parcel was 7.75 acres. In April, 2002, a portion of the vacant land was listed for sale. The land was sold in the fall of 2002 to Chase Custom Homes for \$70,000. The closing on the land occurred in January, 2003, before a full survey of the land could be completed. After the survey was completed in March, 2003, a final deed was provided, describing the sold vacant land as 5.1 acres, leaving the house lot retained by Cathy, Kelly, and Mark Brann as 2.2 acres. The Town of Cumberland Zoning Ordinance requires a 4 acre house lot in this zone. As a result, after the survey, 94 Lower Methodist Road, a parcel with an existing structure on it, became nonconforming.

The Cumberland Zoning Ordinance provides that a use that becomes non-conforming by reason of enactment or amendment of the Ordinance may continue under certain conditions. Section 501 states the lot regulations in the zoning ordinance provide that any lot of record at the time of enactment or amendment of the ordinance may be built upon, except that if two lots come under common ownership, they will merge into one. Section 205.3.2 Applying these two provisions to the facts of this case, parcel 3, the house lot, existed as a lawful non-conforming use until it came under the same ownership as parcel 4. At that time, parcel 3 and 4 merged into one lot.

The merger did not prohibit a subsequent division of the property, so long as the parcels could be divided to meet the zoning requirements. Based upon the indication of acreage in the tax records, it appeared that such a division was possible. However, at the completion of the survey (after the closing) the total land area was almost two acres smaller than it should have been, leaving the parcel with the existing structure, rather than the vacant lot as nonconforming.

In this instance, the fact is that all involved reasonably believed that the house lot and the vacant lot would be properly divided into two conforming lots. Indeed, the town issued the building permit and the buyer of the vacant lot expended substantial amounts in reliance on it to construct a home. The Branns' provided Barbara McPheters, the Code Officer at the time a drawing of the proposal, which she said would conform to zoning regulations. Now that the home is constructed, the Branns' cannot undo the sale and put the lots back together. Equity prevents undoing the division, leaving no other option but to recognize the lot. The Branns' are requesting no action be taken by the Town and that the lot receive a variance of up to 1.8 acres.

Mr. Manahan stated the question is if it was reasonable for the applicant to assume the accuracy of the tax records and not a self inflicted hardship. Given the circumstances if it wasn't unreasonable for the applicant to rely on the tax records particularly the surveyor didn't question the tax records. The Branns' hired a professional who did not tell the Branns' they should be concerned about the acreage.

Mr. Wolf stated that is correct the Branns' relied on information from the tax records and the surveyor.

Mr. Martin asked about the factual dispute with the surveyor relying on tax records.

Mr. Manahan stated at the previous hearing the surveyor stated the tax records appeared to be very accurate with distances of .00 of an acre; based on the surveyor's information Ms. Brann assumed she was left with a remainder lot of four acres.

Mr. Wolf stated it was not Jim Fisher, but an employee of his firm.

Mr. Manahan asked for information on the appeal request, as he would rather grant an appeal than a variance.

Mr. Wolfe stated based on tax records of the two parcels when the Branns' purchased the property. The parcels were divided into lots and granted to family members during the 1950s. At that time parcel 4, with the house on it, was granted to Rita and Kenneth Brann. Rita is Cathy; Kelly and Mark Branns' mother. Parcel 3, the vacant land was also granted to Rita Brann from her Mother in 1983. Cathy, Kelly, and Mark Brann were granted parcels 3 and 4 in 1989. The interpretation appeal is that the lots existed as separate parcels. The land was combined in 1955 with the house lot; the remaining lot is less non-conforming than the original lot prior to the lots being combined. In balancing equities, there is little hardship to the Town in recognizing the lot. Indeed, recognizing the Branns' lot as an existing nonconforming lot is consistent with the Town's zoning ordinance and the concept of functional division. Functional subdivision is recognized by the courts because it does not amount to "an extension, expansion, or enlargement of the previously existing nonconforming buildings structure or use". The vacant lot that was developed meets the minimum area requirements for the zone. It is only the Branns' lot that is in question.

Mr. Manahan stated the Board has no "equitable powers".

Mr. Martin asked for background information on this hearing.

Mr. Wolf stated this problem was known by the applicants and hanging over their heads. They wanted a resolution. Mr. Longley has taken no action.

Mr. Wyman asked if this would prevent a sale of the property. The Town hasn't indicated intent to take enforcement action.

Mr. Longley stated it could affect the ability to obtain a mortgage on the property.

Mr. Manahan stated it could pose a financial hardship for the applicants.

Mr. Wolfe stated his clients are looking for a solution to the non-conforming lot.

Mr. Longley stated the Code Enforcement Officer has no path to correct the situation without authority.

Mr. Wolf stated the surveyor was present for questions.

Mr. Absuman, of Northeast Civil Solutions reviewed the procedure; his firm was hired to split a lot from what was considered a 9.35 +- acres. Their firm was not hired to survey the remaining parcel, but to survey for the conveyance of a 5.01-acre parcel. The surveyor relied on an old survey of lots 1, 2, 3, and 4 dated 1959 and tax maps. It is not required by State law to survey an entire piece of land to create a split.

Mr. Wilson asked if the art of surveying had changed, perhaps distances were not measured accurately over hills and topography.

Mr. Absuman stated the art of measuring has certainly become more sophisticated, out west wagon wheel rotations were used as a method.

Mr. Wilson asked if perhaps Town records were incorrect due to the method of measuring distances.

Mr. Absuman stated he didn't know, in referring to the deeds there are differences in how they were worded.

Mr. Manahan asked if Northeast Civil Solutions told Ms. Brann she would have 4-acres remaining.

Mr. Absuman stated Maine Law allows anyone to write a deed, and explained some instances of poor references such as zone lines for property lines. When the firm is approached for a deed split they look at assessing maps, and if there doesn't appear to be enough remaining land they recommend a full survey.

Mr. Martin asked if Ms. Brann raised the issue that she needed a remaining 4-acre lot.

Mr. Absuman stated she spoke with Jim Fischer not himself.

Mr. Manahan stated at the last hearing you stated you did not speak to the Branns' and had only reviewed the file at 3:00 p.m. The Board had requested more information; and tonight Mr. Fischer is unavailable.

Mr. Absuman stated he does not have a time line of who spoke to whom, he is more prepared this time, the assessing maps were referenced; there was no guarantee of the remaining acreage.

Mr. Manahan asked if there was conversation or question whether it was reasonable for the Branns' to rely on the tax records, with an informal assurance of 4.3 acres.

Mr. Absuman stated with any request they review the deed and minimum space and lot requirements. If there is no evidence of a shortage of land they do not recommend a full survey. Mr. Manahan asked if Tax Map had any disclaimers stating they can't be relied on for accuracy.

Mr. Longley stated people are advised maps are for assessment; they are not accurate for survey purposes.

Mr. Manahan asked if the Branns' were looking at their card is there a disclaimer.

Mr. Longley stated to his knowledge there is no disclaimer.

The Board discussed Ms. Branns' contract which didn't request the scope of work include assurance of a remaining 4-acre lot. The scope indicated assuring a 5.01 acre lot for sale to John Chase.

The Board discussed the assumption of Ms. Brann to rely on the surveyor to assure adequate land. She might not have understood that tax maps are for assessment only, and are not surveys.

Mr. Absuman stated if a house were built in the setback the Code Officer would have to rely on tax maps.

Mr. Longley stated based on this case he would not have issued a building permit. He would have required conformation of two conforming lots prior to issuance of a permit for Chase.

Mr. Longley stated today he had a request from a homeowner who had a buyer for his property who wanted to purchase his house and build a garage. The owner asked the Code Enforcement Officer to show him the property lines. It is out of the scope of the Code Enforcement Officer's job to show boundary or setbacks.

Mr. Manahan stated the builder / homeowner is obligated to build in the correct location it is not the Code Officer's responsibility.

Mr. Longley reviewed the Assessing records which show a 1.61 acre parcel today as of 9/14/06.

Mr. Wyman asked for public testimony in favor, neutral, or opposed that was not heard at the last hearing. There were no public comments. The public portion of the meeting was closed.

Mr. Manahan stated for record it is not automatic to rely on tax records.

Mr. Wilson moved to grant to Cathy, Mark and Kelly Brann a variance of 1.20 acres from the minimum lot size requirement of 4-acres for an existing lot at 94 Lower Methodist Road, Tax Assessor Map U18, Lot 4 in the Rural Residential One (RR1) district; and that they simultaneously go on record declaring that with respect to all property transfers occurring after tonight's date will be deem any lot size, shape, setback to be the result of any applicant who comes before this Board.

The motion was not seconded.

The Board discussed the motion, and agreed a basic motion addressing the request would be appropriate.

Mr. Manahan moved to grant to Cathy, Mark, and Kelly Brann a variance of 1.5 acres from the minimum lot size of 4-acres for an existing lot at 94 Lower Methodist Road, Tax Assessor Map U18, Lot 4 in the Rural Residential 1 (RR1) district.

Mr. Martin seconded.

VOTE: 4 in favor (Manahan, Wilson,
Martin, Wilkinson)
1 opposed (Wyman)

2. Public Hearing: Interpretation Appeal: Cathy, Mark and Kelly Brann request an interpretation of 1.20+ or - acres from the minimum lot size requirement of 4-acres for an existing lot at 94 Lower Methodist Road, Tax Assessor Map U18, Lot 4 in the Rural Residential One (RR1) district; Alan E. Wolf, Esq. Representative.

Mr. Wolfe requested to withdraw his request for an interpretation.

Mr. Manahan moved to approve the withdrawal of the interpretation request by Cathy, Mark, and Kelly Brann; at 1.20+- acres from the maximum lot size requirement of 4-acres for an existing lot at 94 Lower Methodist Road, Tax Assessor Map U18, Lot 4 in the Rural Residential One (RR1) district.

Mr. Wyman seconded.

VOTE: 4 in favor (Manahan, Wilson,
Martin, Wilkinson)
1 opposed (Wyman)

Adjournment: 8:15 p.m.

A TRUE COPY ATTEST:

R. Scott Wyman, Board Chair

Pam Bosarge, Board Clerk