

City of Hallowell
Board of Appeals
July 8, 2019
7:00 pm

1. Call to Order

Mr. Platt called the meeting to order at 6:30.

2. Roll Call / Quorum

Mr. Platt took the roll call and established a quorum.

Present:

Board of Appeals: Teresa Cloutier, Philip Davidson, Joshua Platt, David Young Jr.

City Solicitor Amy Tchao

Appellant: Hallowell Overlook Homeowners Association

Defendant: Doug Ide, Code Enforcement Officer

3. Administrative Appeal of the Code Enforcement Officer's Issuance of a Driveway Permit for Map 2 Lot 4-B

At Mr. Platt's request, Mr. Ide summarized the events leading to the appeal. Hallowell Overlook is a fourteen-lot subdivision. Overlook Drive passes between private lots before entering the subdivision. The owner of a lot through which it passes was granted a permit for a driveway entering on Overlook Drive. The Hallowell Overlook Homeowners Association contends that the subdivision ordinance limits the number of lots that can access Overlook Drive. It is his contention that the limit applies only to the subdivision and not to private lots outside the subdivision. He said he has consulted with Ms. Tchao since the June 17 meeting but has not consulted the Maine Municipal Association (MMA) legal team since then. Ms. Tchao noted that her sole reason for speaking with Mr. Ide was to gather facts, and they did not discuss the issues in the case.

Mr. Platt summarized the presentations at the June 17 meeting and opened the floor to questions from the Board members.

Mr. Davidson asked where the subdivision starts; Mr. Ide pointed out the boundary on the approved subdivision plan provided to the Board. Mr. Ide said he does not consider the access road as part of the subdivision, and during approval the Planning Board considered it, insofar as it was considered, as access to the subdivision. Mr. Davidson asked if Mr. Blouin plans to subdivide his lot; Mr. Ide explained that Mr. Blouin's proposal is not a subdivision because he is dividing a lot into only two lots. There was discussion of the non-conforming lot that was created when the street was accepted, and Mr. Blouin observed that it is too small and too steep to be developed. Mr. Davidson asked for an explanation of the MMA legal team's opinion; Mr. Ide said that he had discussed the case with MMA legal, and they agreed with his stated opinion.

Ms. Cloutier cited §9-848 and asked for an opinion on the status of the road as a local road vs. a collector road or an arterial road and if the entire street is a proposed local road in the subdivision and is subject to the fifteen-lot limit. Ms. Tchao observed that this is a unique situation like a lollipop. Whether or not the access road is part of the subdivision and subject in its entirety to the provisions of the subdivision ordinance is tricky because it was developed as required by the subdivision ordinance and subsequently became a City street including areas within and without the subdivision. It is important that the entirety of Overlook Drive was accepted as a City street and became a local street. If the public is paying for maintenance of the street, the question is should it be treated any differently than any other public street for the purposes of determining whether a driveway or access permit should be approved. Regarding the fifteen-lot limit, she cited §9-830(2)(B), which requires that a subdivision with more than fifteen lots must have two access points. She said she interprets this as a restriction not upon the road construction but upon the subdivider and the subdivision. There are no covenants on the street acceptance; there are covenants on the subdivision but not the public street. She also cited §9-803(2) which states that Subchapter 8 applies to all land and buildings proposed for subdivision; this brings up the question of whether an access road to a subdivision is

part of the land considered for subdivision. She added that the ordinance does speak about access roads to subdivisions and imposes requirements and performance standards on them even if the roads themselves are not part of the subdivision. Mr. Ide cited a letter from Jim Coffin, the surveyor who prepared the subdivision plan, referring to the road as a public local street. Ms. Tchao pointed out that when the ordinance uses the term local street it is referring to the performance standards that would apply to local streets, which makes sense because it is commonplace for roads in subdivisions to be accepted as public streets.

Ms. Cloutier asked whether the Board should be dealing with past instruction to the parties regarding driveway permits. Ms. Tchao told the Board that it should not consider past instruction. She said there is clear case law establishing that the Board of Appeals is a body of limited jurisdiction provided by statute, and the application of doctrines such as equitable estoppel are not within that jurisdiction. Mr. Ide noted that the fifteen-lot limit was an interpretation he inherited from former CEOs and used himself until he reexamined the issue and came to a different conclusion.

Mr. Platt observed that Mr. Morrill knew the lot was for sale but was told that a driveway would not be permitted and asked Mr. Ide for confirmation. Mr. Ide said that probably happened before he became Code Enforcement Officer, but he did not doubt that was the case; he added that the fifteen-lot limit in the ordinance was not imposed as a safety issue but because it is a threshold for state review. There is nothing in the record to show that the Planning Board considered it as a safety issue. Mr. Platt observed that the ordinance does consider safety.

Mr. Davidson asked Mr. Morrill why the bottom lot was not included as part of the subdivision; Mr. Morrill said it was providing access to the subdivision and was assumed all along that it was part of the subdivision. Mr. Davidson pointed out that it was not included in the delineation of the subdivision, just as an abutting lot. Mr. Morrill said it was included strictly as access, not as a lot, in order to avoid creating a sixteenth lot. Mr. Davidson noted that it could have been included as part of the common area and asked why it wasn't. Mr. Morrill said it is a common area lot because the taxes are shared among the lot owners and the sign is on it. Mr. Ide added that it could have been included as common area but wasn't.

Mr. Platt said he was still wrestling with the fact that it is a public street and whether that allows the permitting of another driveway outside of the subdivision. Mr. Ide likened the situation to shoreland or floodplain management zoning, which affect only the land within that zone; he maintained that the subdivision area is subject to limits, not the area outside the subdivision. Ms. Tchao cited the standards for dead-end streets [§6-236(2)], which limit length but not the number of lots.

Tom Federle, counsel for the Homeowners Association, was recognized. He agreed that it was a tricky issue, but a lollipop without a stick is not a lollipop. He maintained that road is a fundamental element of the subdivision, that the fifteen-lot limit is elemental to the subdivision, and that the subdivision standards trump the general standards. He said the fifteen-lot limit is a safety issue established by the ordinance and asked if having it accepted as a city street throws the safety concerns out the window. He admitted that there were no restrictions in the easement for the road, but also no reservations of rights. He pointed out that the Blouin lot has access to Winthrop Street and concluded that the stick is part of the lollipop and the standards must apply.

Mr. Platt asked if there were any other cases where developers have proposed a subdivision not adjacent to a road; Mr. Ide said he knew of none. Mr. Platt asked Mr. Ide if the Planning Board's original decision was to negate Mr. Blouin's proposal; Mr. Ide said the Planning Board was not involved because there are no approvals required from the Planning Board for Mr. Blouin's proposal. Mr. Platt asked what the additional cost of constructing a driveway to Winthrop Street was; Mr. Blouin said the quote was \$18,000: \$8,000 for one lot and \$10,000 for the other.

Mr. Ide asked to respond to Mr. Federle's comments and was recognized. He said that the subdivision approval standards require the Planning Board to examine safety, but the fifteen-lot limit is not part of that standard. He pointed out that technically it is a fourteen-lot subdivision and this would be the fifteenth driveway. He also said that reserved rights don't have to be stated: they are there. He observed that nothing in the Planning Board's approval treats the road as part of the subdivision. Mr. Platt questioned the statement that this was a fourteen-lot subdivision; Mr. Ide said the subdivision included a right-of-way to the back lot which was not part of the subdivision and was described as undevelopable during the Planning Board's consideration. He added that the Findings of Fact for the subdivision approval specify fourteen lots.

Tammy Morrill pointed out that at the time Mr. Blouin purchased the property the Code Enforcement Officer determined that a driveway from Overlook Drive was not allowed, but that was changed after the purchase.

Mr. Davidson asked when the road was made public; Mr. Ide said it was accepted in 2012.

John Richards, a homeowner, pointed out that the expense of building the road was paid by the purchasers of the lots.

Dan Laflin told the Board that there was a similar situation when he developed the Chamberlain Drive subdivision. He retained land on either side of the road and later conveyed that land to abutting owners who were then able to access Chamberlain Drive.

Mr. Morrill pointed out that §9-848(2) says that if its standards conflict with Chapter 6, then the standards of §9-848 apply. Ms. Cloutier pointed out that this covers the standards laid out in subsection 2, but the fifteen-lot limit is established in subsection 3, not subsection 2. Mr. Ide said that since Chapter 6 is silent on the number of lots, there is no conflict. Mr. Morrill noted that he had to meet the road design standards in Chapter 8 for the entire road, including a variance for the 12% grade for the front section of the road.

Nathan Pierce, a homeowner, commented that the ordinance says the standards apply to any street providing access to the subdivision, not a portion of that street.

Mr. Federle added that the fifteen-lot limit is a road requirement; the developer cannot deny private access but the City must. Mr. Blouin observed that it is a City street, and when the City accepted it the situation changed.

Ms. Tchao observed that §9-848 has subsections: subsection 2 deals with streets that provide access to a subdivision and outlines standards for those streets; subsection 3 deals construction standards and states that these standards apply to all streets within a subdivision. The ordinance seems to make a distinction between streets providing access to a subdivision and streets within a subdivision. Ms. Cloutier observed that it seems to be a question of whether the land under the portion of the street outside the subdivision was considered part of the subdivision. Ms. Tchao concurred.

Mr. Morrill reiterated that he had to develop the road under subdivision standards. Ms. Cloutier asked what portion of the ordinance details the standards required for street acceptance; Ms. Tchao said they are in Chapter 6. Mr. Morrill said the inspector used the standards in Chapter 9. Mr. Ide confirmed that the City Manager's recommendation to the City Council for acceptance of the street references only Chapter 9.

The Board recessed for five minutes.

Ms. Tchao told the Board that statute requires them to approve a written statement of Findings and Conclusions. She recommended issuing a written decision by deliberating tonight, appointing a member of the Board to draft a Findings of Fact and Conclusions, and returning at a later date to vote on the Findings of Fact and Conclusions. Alternatively the Board could vote and prepare findings tonight.

Mr. Platt asked for a volunteer from the Board to draft a summary decision. Ms. Cloutier volunteered.

The Board closed the public comment portion of the meeting and deliberated on its findings and conclusion.

Mr. Platt invited comments and questions from the Board.

Mr. Davidson noted that the issue of the subdivision is complicated by the sale of the abutting lot and the acceptance of the road.

Mr. Young questioned whether the front lot is part of the subdivision; he said it seems that the lower lot is separate from the subdivision.

Mr. Davidson mentioned the time frame and said that whether or not the road is still part of the subdivision after being accepted by the City is the first question the Board must consider: who has rights to the road. Ms.

Cloutier agreed that that was the basic issue. Mr. Davidson said that his opinion is that if it is a public road and the subdivision starts part-way up the hill, other lots must have access.

Mr. Platt observed that it is not an easy decision and recommended that the City Council make the ordinance more clear. He noted that Mr. Morrill planned the subdivision with the understanding that the abutting lot could not be developed. He also noted that the developer spent money to construct the road, but he agreed with Mr. Davidson that once the road was accepted it must be public and the driveway permit could be issued. Mr. Young pointed out that the subdivision plan seems to indicate that the road is separate. Mr. Platt agreed that the lower lot was separate, but he was not yet convinced that the lower part of the road is separate. The question is whether the land beneath the road is part of the subdivision.

Ms. Cloutier noted the exclusion in §9-803. She said that it seems to her that the distinction between streets and access roads having to comply with Subsection 2 and local roads within the subdivision having to comply with dead-end limit seems to point to the dead-end limit only applying to the local road within the subdivision and the remainder of the public road not being governed by that.

Mr. Platt asked the Board members if they wished to vote this evening or return at a later date to take a vote.

Ms. Tchao asked the Board if it wished to read through the draft findings of the factual background provided by the Code Enforcement Officer. Mr. Platt suggested recessing for five minutes to allow everyone to review the draft findings of fact. The rest of the Board concurred.

The Board recessed while Mr. Ide made photocopies.

Mr. Platt asked Ms. Tchao to summarize the Board's options. Ms. Tchao suggested the Board review the draft findings which, except for the last two paragraphs, are a procedural finding of facts. The Board members concurred that the summary was correct. Ms. Tchao observed that Ms. Cloutier has drafted a reasoning for the Board's conclusions; she recommended that the Board members read Ms. Cloutier's draft and comment on it. She pointed out that if the Board is comfortable with the draft it can vote tonight.

Ms. Cloutier read her draft:

Section 9-803 of the Hallowell Ordinance provides that the provisions of Subchapter VIII, Land Subdivisions, apply to "all land and buildings proposed for subdivision within the boundaries of the City of Hallowell". The Board agrees that the land underlying that portion of Overlook Drive that runs through the parcel owned by Paul Blouin, which is the subject of this appeal, is not "land [that was] proposed for subdivision".

Although it is true that Section 9-848(2) does apply to "Street, private roads, or common drives that provide access to a subdivision", that section does not contain the 15-lot limit for dead-end streets at issue in this appeal. That limit is contained in Section 9-848(3), which applies to "proposed local streets" for the subdivision. Given the structure of the ordinance and the distinction between Section 9-848(2) and (3), the Board finds that the requirements set forth in 9-848(3) do not apply to portions of an access road that lie outside of the boundaries of the subdivision. The portion of Overlook Drive passing through the Blouin lot is a public road passing through a private lot and the driveway standards referenced by the CEO in granting the permit apply.

The Board members studied Ms. Cloutier's draft. During its review, the Board added the phrase "including 9-848(3)(B)(7) governing dead-end streets" following "set forth in 9848(3)" in the third sentence of the second paragraph.

Mr. Morrill asked for permission to address the Board on a factual issue and was recognized. He asked where §9-848 begins and ends. He said the Association feels that the whole section applies. Ms. Tchao noted that this is a legal interpretation, which is a matter for the Board's deliberation.

Mr. Platt asked the Board if it wished to vote or to continue to develop the Findings of Fact and return at a later date to vote on them.

Motion to accept the Findings as discussed earlier that were drafted and have been reviewed with the insertion of the legal conclusions that were reached and read into the record.

Moved: Cloutier

Seconded: Davidson

Unanimously approved

Ms. Tchoa explained that tonight is the date of the decision, even though the written decision will be issued tomorrow. The deadline for appeal is 45 days from tonight.

4. Adjournment

Motion to adjourn.

Moved: Davidson

Seconded: Cloutier

Unanimously approved