

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
July 21, 2011**

MEMBERS PRESENT

Joseph Malcarne, Chairman

John Calogero
Charles Canham

Macy Sherow III
Arthur Weiland

Arlene Campbell, Secretary

MEMBERS ABSENT

Norma Dolan
Frank Kealty

ALSO PRESENT
Bob Fennel, ZEO

Chairman Malcarne called the meeting to order at 7:33 pm.

Chairman Malcarne asked the secretary if the application on the agenda was properly advertised and adjoining neighbors were notified. Ms. Campbell responded positively.

Chairman Malcarne informed the public that the meeting was being recorded.

INTERPRETATION APPLICATION:

AVILA SUBDIVISION – property owned by Jorge and Linda Avila located at 2497 Salt Point Turnpike, **Tax Grid No. 6566-00-743897 and 6566-02-518881.**

Applicants are seeking an Interpretation whether the two parcels were legally combined in accordance with the provision of Article II of the Town of Clinton Zoning Ordinance.

Jorge Avila and his lawyer, Patrick Moore appeared for this case.

Mr. Moore explained his application. He began by stating that these lots were erroneously combined and done by the Town Assessor in 1997.

Town of Clinton Subdivision and Lot Line Adjustment regulation (Local Law No. 2 of 1995) states that “All applications for Lot Line Alteration must be submitted to the Planning Board for review and approval”.

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES**

July 21, 2011

Or page 8 of the Subdivision Regulations (Sec. 13 BN-7 Approval of Lot Line Adjustment states that “Any merger of lots by deed requires approval by the Planning Board for the Lot Line Adjustment and subsequent filing of such approval with the County Clerk.”

Mr. Moore remarked that this law was ignored by the Town Assessor. There is a municipal error on this property which is correctible. This error could have been caught by a municipal employee at that time.

Mr. Moore noted that the Avilas were not aware of this error until recently. He stated that the intention during the time when the lots were merged was to put a horse barn. The Avilas found out that there was a restriction and covenant on Talleaur Lane about horse barns which knocked out the Avila’s intention.

The Avilas are currently looking to sell these properties. Mr. Moore noted that there was neither development nor creation of new structures on either parcels. He pointed out on the map the original lines on these properties.

Mr. Moore indicated his conversation with the town attorney about this case. He quoted that the town attorney opined that he has the alternative of seeking an interpretation from the Zoning Board of Appeals or directly proceed to the Planning Board for approval of the re-subdivision.

Mr. Moore cited a case that recently occurred in Wappingers Falls. There was an error in the issuance of building permit in constructing a house on a property that was under Conservation Easement. After the house was constructed, the Building Inspector claimed that the building permit should have not been issued. The property owner filed a lawsuit against the town. The Court of Appeals ruled out that municipal employees who make errors are always subject to correction.

Mr. Moore stated that the point of this case is that – there is a notion in the law that errors made by town employees are correctible. In this case, Bill Raucci (previous Town Assessor), combined these lots without the review of the Town Law.

Mr. Moore noted that they’re simply asking the board to allow the correction of an error that was done. He asked the board to consider his appeal that these lots be uncombined and establish the original boundary lines. The Assessor didn’t have the authority to combine these lots.

Chairman Malcarne opened questions and comments from the board.

Mr. Canham indicated his conversation with the current Town Assessor. He quoted that Mr. Fennel’s letter dated June 8, 2011 concurred that the merging of these lots in 1997 should have gone before the Planning Board. Mr. Canham noted that the letter doesn’t state whose responsibility it was. Based on his reading of the law, Mr. Canham stated that

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
July 21, 2011**

there is nothing in the law that states whose responsibility an error was. He opined that it is part of applicant's responsibility to ensure that actions are in accordance with the law.

Mr. Canham commented on Mr. Moore's statement about who to blame about this error. Neither the ZEO nor the town attorney states that this is a correctible error. There is a substantial benefit in combining these lots. Mr. Canham commented that this is a common issue where property owners combine lots in order to save money on taxes. There is nothing wrong with that. Mr. Canham stated that it is just a matter of going through the right process if combining these lots. Mr. Canham noted that the fact of the matter is – this has been a single lot for 14 years with substantial benefit. The town attorney and the ZEO didn't recognize that this is anyone's mistake.

Mr. Moore remarked that he wasn't assigning blame to anybody. He was just trying to explain that there was an error committed in combining these lots.

Mr. Canham noted that the town assessor doesn't have any authority to combine lots as far as he know.

Mr. Moore stated that if the County had caught this before, the error should have been corrected earlier.

Mr. Canham and the applicant's attorney exchanged views about this case. Mr. Canham expressed his strong concern about setting precedence on this case. Somebody who did the same thing (illegally combining lots) can come before the board and ask to have the same remedy. This is a very odd precedence.

Mr. Canham opined that there is a solution that would not require the Zoning Board of Appeals or town attorney to give a solution /interpretation that would create or set an unusual precedence. The fact that this is now one parcel with two conforming buildable lots, Mr. Canham opined that there is a straight forward process in requesting a subdivision before the Planning Board. It might take a couple of months but it's the right process according to the town law. There is a remedy which is to go before the Planning Board.

Mr. Moore stated that he understands Mr. Canham's concern. He responded to Mr. Canham's remark earlier about the substantial benefit that the Avilas received from merging these lots. He stated that he didn't do a research about the extent of the tax benefit that the Avilas had in merging the lots. He noted that the tax benefit is the only benefit that the Avilas received from merging these lots over 14 years. However, if they are talking about extensive benefit by an error from a town employee, then they are assessing blame or some responsibility to them. Mr. Moore noted that he's trying to avoid putting blame to somebody.

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
July 21, 2011**

Mr. Canham responded to the above remark. If there is blame here, it is not solely on the town employee. There is nothing in the town law that says that it is solely the town employee going through these steps. The applicant has a role here. There is a shared responsibility in this case to understand the law. He reiterated that there is a substantial benefit for property of this size in merging lots.

Mr. Moore questioned the substantial benefit in merging these lots. Mr. Canham responded that there is a substantial benefit (\$\$\$) over the period of 14 years in combining these lots per his research.

Chairman Malcarne asked Mr. Canham his understanding about this case. Mr. Canham responded that he doesn't agree that this is solely a correctible error on a part of the town employee. These are shared responsibility.

Chairman Malcarne expressed his thoughts about this application. These are separate lots with 2 deeds that were illegally combined in 1997. He cited that if these lots were legally combined then it can be subdivided without a problem. Since these lots were illegally merged, it is now a question of – “How do you legally subdivide these parcels if they weren't legally merged?”

Mr. Canham stated that these lots are now figured as one lot.

Mr. Moore cited the instance that he had mentioned earlier (Wappingers Falls's case). There was no illegal act when the building permit was issued. There was an error. With regards to Avilas's case, it was illegal act for Mr. Rossi to combine these lots.

Mr. Canham concurred that it was an illegal act for the town assessor to merge these lots. It should have been followed by a Planning Board approval.

Mr. Calogero asked the applicant's attorney “How many deeds does this lot currently have?” Does this property still have 2 deeds? Mr. Moore responded, “No”. It has one deed.

Chairman Malcarne made a follow up question about the deed. Has it always been one deed? Mr. Moore explained that there were two deeds before on these lots. He was asked to do deed consolidation after Mr. Avila married Ms. Baldwin approximately 4 years after the lots were merged.

Mr. Calogero read the zoning regulation about the Lot merger. **“Any merger of lots by deed requires approval by the Planning Board for the Lot Line Adjustment and subsequent filing of such approval with the County Clerk.”**

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
July 21, 2011**

Mr. Calogero commented that it seems that these lots remain one lot until property approval procedure is followed.

Mr. Weiland agreed with Mr. Calogero. The combination of these deeds is another error. These deeds were illegally merged. There are still 2 lots.

Chairman Malcarne opined that since these lots were merged by the Town Assessor and deeds were consolidated (both procedures) without Planning Board approval, then he doesn't see how these lots were legally combined.

Mr. Canham noted that he didn't realize that combining of lots by deed also require Planning Board approval. He asked, "Whose responsibility is it to go before the Planning Board for approval?"

Mr. Moore noted that these lots only have one Tax ID number.

Mr. Fennel expressed his thoughts about this case. There is a distinction between what the assessor does and what does the law says. Assigning numbers (Tax ID) is just pure administrative function. The Zoning Officer noted that he's not a lawyer but he thinks that Deed is what really matters.

Mr. Moore cited an instance as a result of combining lots illegally. Supposed there was a developmental scheme to construct a structure on the property and neighboring property owners were notified. Neighboring property owners brought an action to the town against the development since no merger of lots was done properly. A judge will argue that there's no proper merger of lots therefore development of this property is tossed out. Mr. Moore opined that the judge will say that's a very good point. Further subdivision or development of this property can't proceed since there was no proper merger of lots. Mr. Moore commented that even if the Planning Board approves this subdivision, this would be a fatal flaw.

The board exchanged thoughts about whether this is one lot or 2 lots.

Chairman Malcarne commented that based on his reading of the law, he doesn't see anywhere in the law about any justification stating that this is one deed and one parcel. These lots were illegally merged.

Mr. Canham suggested that the remedy here is to go before the Planning Board for a subdivision process.

Mr. Weiland expressed his concern about the structures by the setback. He asked if there are setback issues on these structures. When were these structures created?

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES
July 21, 2011**

The chairman agreed that there is precedence. He explained that legally where is the writing that combines these lots together.

Mr. Fennel stated that he doesn't think that the town committed an error here. The form that was submitted by Mr. Rossi was signed by the applicant. It clearly states that there was a notice that this combination requires Planning Board approval. The applicant has the responsibility to do that. It was put on the notice that the applicant has the obligation to request an approval from Planning Board for the lot merger. The applicant preceded a huge benefit over the years. He asked, "Why should someone be rewarded after doing something illegal?"

Mr. Moore remarked that they are not asking to be rewarded for anything. He noted that he's asking the board to determine whether or not the act to combine these lots was done legally since there were ramifications elsewhere.

Mr. Calogero questioned a phrase on Mr. Moore's letter addressed to the Chairman dated 6-15-11 about a statement "It is our position and Mr. Fennel's also, that the Zoning Board should interpret what occurred as illegal joined lots, and they should be separated."

Mr. Fennel stated that he agreed that these lots were illegally combined but in fairness to the citizens, they shouldn't get away for doing this act illegally.

Mr. Calogero commented that there has been a loss in the town (appropriate amount of tax). This should be stopped.

Chairman Malcarne analyzed the case. The board wasn't asked to interpret the benefit nor the consequence of such act. The interpretation is – "Were the lots combined legally? Is this now one lot?"

Mr. Malcarne opined that these lots were illegally combined considering the time that took place. He added that he doesn't think that he has the authority to say that this is one lot since ZBA doesn't have the purview to combine lots. On the other hand, the board can say whether the merging of these lots were legal or not.

Mr. Canham reiterated that he thinks that the remedy is – to go before the Planning Board. Go through the process of combining these lots and later uncombined or subdivide legally. He noted that he doesn't think that the ZBA could step in for a remedy to correct the whole set of errors.

Mr. Fennel agreed with Mr. Canham's concept. The act of the Assessor on this case was simply an administrative act. The assessor decided to treat these parcels as single parcel and taxed it as such. It has nothing to do with the zoning. If property owners want to treat lots as one taxable lots or give one or two tax numbers, these are all meaningless to

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES**

July 21, 2011

the zoning law. When these lots were combined by deed, then that's when violation occurred. The act to assign one or two numbers is meaningless to the zoning law.

Mr. Calogero asked the Zoning Officer about his thoughts/input for this case.

Mr. Fennel responded that after finding out that these lots have one deed, Mr. Fennel stated that the act to combine these deeds should have gone before the Planning Board.

Chairman Malcarne questioned Mr. Canham's suggestion about going before the Planning Board for proper subdivision process approval. Chairman Malcarne commented that in doing this suggestion, we are recognizing this as one lot.

Mr. Canham concurred. It has one deed.

Mr. Fennel explained his letter per his conversation with the current Town Assessor. Mr. Fennel noted that the current assessor is also a lawyer. The Zoning Officer stated that the town assessor's understanding is – the administrative combining of these lots has nothing to do with the zoning. There were still two deeds and in fact two parcels when the merger of the lots took place. When the deeds were combined into one deed then that was the act of violation since it should have been gone before the Planning Board for approval.

Mr. Canham concurred with Mr. Fennel. The law clearly states that merger of lots by deed requires Planning Board approval. They were treated as one lot for tax purposes. The applicant did not invoke the Planning Board's requirement. Once the lots are merged by deed then these lots were combined illegally.

The panel discussed different options about a remedy. Mr. Weiland stated that the subdivision's intention is for 2 lots to have 2 deeds. Right now the merging of these lots and the 2 deeds were illegal.

Chairman Malcarne stated that he wasn't comfortable with the idea of sending this case before the Planning Board since by doing that you're saying or labeling this as one lot. The proper procedure was not followed to make these lots into one lot. There is a question whether the Zoning Board of Appeals is the appropriate body for this issue to be considered. Chairman Malcarne opined that it seems that this is a clerical error that took place and can be corrected.

Mr. Calogero suggested that maybe Mr. Moore can talk to the Dutchess County and admit that there was a clerical error in combining these lots and perhaps this error could be reversed.

Mr. Fennel disagreed. He said that there are people who would say that everything was illegally done. He asked, "Why can't the board make a decision about the case that was illegally done?"

**TOWN OF CLINTON
ZONING BOARD OF APPEALS MEETING
FINAL MINUTES**

July 21, 2011

Chairman Malcarne motioned to open the public hearing, seconded by Mr. Calogero, all Aye, 5-0.

Mr. Zeifert of 288 Hollow Road spoke and shared what he remembered in the past about the previous Town Assessor.

The board agreed to close the public hearing. Chairman Malcarne motioned to close the public hearing, seconded by Mr. Sherow, All Aye, Motion carried, 4-0.

After all the discussions were made, the board passed a resolution, to wit:

Mr. Canham motioned that the Town of Clinton Zoning Board of Appeals finds that the joining of the lots with **tax grid numbers 6566-00-473897 and 6566-02-518881**, and merging of the deeds, on properties owned by **Jorge and Linda Avila** on 2497 Salt Point Turnpike, did not follow the Subdivision Regulations Local Law No. 2 of 1995 and were therefore illegally merged.

Seconded by Mr. Weiland.

Discussion. None.

All Aye, Motioned carried, 5-0.

APPROVAL OF MINUTES:

Chairman Malcarne motioned to accept the amended minutes of May 26, 2011, seconded by Mr. Canham. All Aye, Motion carried, 5-0.

ADJOURNMENT:

Chairman Malcarne motioned to adjourn the meeting at 9:50 pm. Seconded by Mr. Calogero, All Aye Motion carried, 5-0.

Respectfully Submitted By:



Arlene A. Campbell
Zoning Board of Appeals Secretary

Cc: Carol Mackin, Town Clerk