TOWN OF ALTON
ZONING BOARD OF ADJUSTMENT
SPECIAL MEETING MINUTES - APPROVED
September 25, 2018, 6:00 P.M., Alton Town Hall

CALL TO ORDER

Paul LaRochelle called the meeting to order at 6:20 P.M.

Board Members Present:

Paul LaRochelle, Chairman
Lou LaCourse, Vice-Chairman
Paul Monzione, Clerk
Tim Morgan, Member
Steve Miller, Alternate
Frank Rich, Alternate

Others Present:

John Dever, III, Code Official
James J. Sessler, Esq., Town Counsel
Shawn Tanguay, ZBA Counsel
Tom Sargent, Town Assessor

APPOINTMENT OF ALTERNATES

Tim Morgan MOVED to nominate Steve Miller as a full-voting member for this meeting. Paul Monzione seconded. Motion PASSED by a vote of (4-0-0).

STATEMENT OF THE APPEAL PROCESS

The purpose of this hearing is to allow anyone concerned with an Appeal to the Zoning Board of Adjustment to present evidence for or against the Appeal. This evidence may be in the form of an opinion rather than an established fact, however, it should support the grounds, which the Board must consider when making a determination. The purpose of the hearing is not to gauge the sentiment of the public or to hear personal reasons why individuals are for or against an appeal, but all facts and opinions based on reasonable assumptions will be considered. In the case of an appeal for a Variance, the Board must determine facts bearing upon the five criteria as set forth in the State's Statutes. For a Special Exception, the Board must ascertain whether each of the standards set forth in the Zoning Ordinance have been or will be met.

APPROVAL OF AGENDA

Paul LaRochelle asked John Dever, III, if there were any changes to the agenda since it was posted; John Dever, III, stated, no.

Paul Monzione MOVED to ACCEPT the agenda as presented. Frank Rich seconded. Motion PASSED by a vote of (5-0-0).

CONTINUED FROM SEPTEMBER 6, 2018

Case #Z18-18 **Francis X. Bruton, III, Esq., of Bruton & Berube, PLLC, Agent for Wayne Capolupo of Colchester Properties, LLC, Owner**	**21 Silver Cascade Way** **Map 39 Lot 11**	**Rehearing regarding the denial of an Administrative Appeal** **Lakeshore Residential (LR) Zone**

This rehearing is regarding the denial of an Appeal of an Administrative Decision by the ZBA dated May 3, 2018, re: denial of restoration of five (5) lots (Lots 10, 11, 12, 110, and 111) pursuant to RSA 674:39-aa.

Francis X. Bruton, III, Esq., came to the table. He thanked the Board for attending the meeting, and wanted to make it clear for the record that at the previous hearings, he introduced several documents, evidence, and testimony for this rehearing and proposed that information also become part of this record. Paul LaRochelle stated that this hearing was to consider any new evidence. Francis X. Bruton, III, Esq., passed around copies of the subdivision plan and the tax map showing the lots in question. He wanted to go over some of the key points from the last hearings to get everybody on the same page. He stated that when he was before the Selectmen a while back, Colchester Properties, LLC, received relief for Lot 112; leaving five (5) lots that did not get unmerged, which was why they requested this rehearing. He pointed out that Henry Boyd, LLS, from Millennium Engineering had provided information at the previous hearing that the lots were actually valid lots of record. He stated that Phil Stiles, Esq., had provided an opinion that these lots were valid lots. Francis X. Bruton, III, Esq., thought that there was ample information provided by everyone that these lots were subdivided as a result of recording the plan in 1961.

Francis X. Bruton, III, Esq., stated this subdivision occurred before the Town had adopted Subdivision Regulations, so his reasoning was that when the subdivision plan was recorded, it created six (6) separate lots. He stated the reason why Lot 112 was granted to be unmerged was because the plan referenced metes and bounds and there was a solid line that indicated a boundary line. He stated that Mr. Capolupo was looking for the unmerger of all of the lots, which would allow him to go forward with DES as six (6) unmerged lots.

Francis X. Bruton, III, Esq., stated that a couple of things that he raised at the last hearing was that the case law, from his perspective, seemed clear that improvements that happened after a subdivision were things that the Statute looked at when you got to the next level of analysis, which was, was there a voluntary merger by either the owner or the predecessor in title. In that case, the Statute clearly required overt action and that was what the cases had focused on when looking at voluntary mergers. He quoted Roberts v. Town of Windham, 2013, where within a subdivision, a resident built a garage within 2" from another lot pointed directly at the other lot; a seasonal cottage was built across a boundary line; and there was a bunkhouse, which stemmed the question of whether that was an accessory dwelling on a lot. Since the bunkhouse did not have running water or a bathroom, it was deemed to be an accessory. All of these facts suggested that the owner had voluntary merged their lots. The courts thought that a conveyance of a lot with a perimeter description was not evidence of a voluntary merger; they also thought that being taxed as one lot was not evidence of a voluntary merger. Those overt actions showed that a voluntary merger took place. He thought that in the case of Colchester Properties, there was a subdivision created and then there were subsequent improvements to the lot; the subdivision plan showed what was out there now. He noted the gates and walkways on the other lots, which were already there at the time of the subdivision; therefore, those were not subsequent to the act of subdivision.

Francis X. Bruton, III, Esq., quoted Town of Newbury v. Landrigan, 2013, where the owners had provided a subsequent plan on record that showed old lines, so there was an intention to abandon certain lots that were depicted on a plan, but that was not the case with Colchester Properties. In addition, Landrigan used the perimeter boundaries in order to satisfy some setback requirements; the property was treated as one zoning lot.

Francis X. Bruton, III, Esq., quoted Robillard v. Town of Hudson, 1980, where the court looked at whether or not two (2) lots, which had been previously subdivided, maintained their nonconforming status as two (2) lots because the ordinance had changed and the owner at the time wanted to build a single-family home on one of the lots. The owners argued that lot was nonconforming. A subsequent change in the ordinance prompted that, but the court stated that was one zoning lot due to the owner pulling a building permit and they built a duplex using the two (2) lots.

Francis X. Bruton, III, Esq., thought that the Court would look at these cases as overt actions with respect to the use of the property, after subdivision, that then created a voluntary merger. He stated that the lots were laid out and used as depicted prior to the subdivision and he felt that was a significant reason why the lots should be allowed to be unmerged.

Francis X. Bruton, III, Esq., stated that Cochecho Associates created the subdivision and had conveyed Lot 112 to the Matt's and then subsequently conveyed the remaining five (5) lots to the Matt's as well. When that chain was created, it was noted at Tract 1 and Tract 2, with Tract 2 referring to the five (5) lots. When the Selectmen heard this case initially, they looked at the two Tracts and thought that the five (5) lots were actually one lot and could not be unmerged. He referred back to the Roberts v. Town of Windham, and noted that using the perimeter description for Tract 2 was not the overt act that the Courts looked at; therefore, he thought that the lots should be unmerged. Francis X. Bruton, III, Esq., stated that the legal description for Tract 1 and Tract 2 was carried forward to Colchester Properties. He noted that for Tract 2, it used all of the numbers that were provided on the subdivision plan, which referred to separate lots.

Francis X. Bruton, III, Esq., stated when the Town created their tax maps, they inserted the property lines as depicted on the plan and they also identified each of those lots with the exact number that was provided on the plan. The chain of title always referred to these lots as being separate lots of record even though they were comprised of Track 2; the lots on each side of the perimeter lot were small. He also pointed out that the Selectmen had asked why the previous owners did not look into this issue and take care of it then. He shared that the involuntary merger RSA was not available until 2011 when the State enacted 674:39-aa; this was enacted to protect the property interests of individuals. The State also enacted 674:39-a, which was how to proceed with a voluntary merger. In that last sentence, it stated that no town shall merge lots of an owner without the owner's consent.

Francis X. Bruton, III, Esq., stated that one of the things provided in his motion for a rehearing was a letter from an abutter. He shared that Mr. Capolupo, Manager for Colchester Properties, had some discussions with the abutters and one abutter's concern was that they did not want to see travel on the right-of-way in excess of what already occurred on Lot 12. Mr. Capolupo's suggestion was to only have three (3) of the five (5) lots deemed buildable. Francis X. Bruton, III, Esq., stated that the unmerger needed to take place so the lots could be unmerged in order to satisfy some DES regulations. Mr. Capolupo and his abutters came up with a plan that Lots 110 and 111, which had access on Route 28A, would be "buildable" lots, along with Lot 12, but it already had a building. Mr. Capolupo further discussed having restrictions on Lots 112, 10, and 11, which would designated as "unbuildable". Francis X. Bruton, III, Esq., stated that Mr. Capolupo wanted to reserve the right to build a dock on Lots 112 and 10 with access to the two (2)

lots at the top; an easement for septic purposes might be needed for the two (2) interior lots. Francis X. Bruton, III, Esq., thought that this could be a condition of approval.

Paul Monzione stated that the Board was present to make a determination on a reconsideration of their decision that the Town was right, that there was a voluntary merger of the lots. He did not think that the reason why the Board was there, was to hear a new application about three (3) lots versus unmerger of all the lots. He was not prepared to address any of that and he did not think it was appropriate and rightfully before the Board. His understanding was that the Board was there to determine on a rehearing whether their decision was wrong to begin with. Francis X. Bruton, III, Esq., understood where Paul Monzione was coming from, but what he was looking for from the Board was to say that there were six (6) lots.

Henry Boyd, LLS, came to the table. He thought that the Board believed that the lots were individual lots at some point because at the last hearing there was testimony about whether they were lots and whether the 1960 subdivision plan intended to create lots or not. Steve Miller called for a point of order. He asked the members of the Board that during an appeal, if brand new evidence could be presented for consideration. If so, why couldn't the whole case be hashed out again from the start with additional small nuances that somebody might have thought of since the last hearing. Shawn Tanguay, Esq., stated that the Board granted a motion for a rehearing and the idea was that the moving party for the rehearing was entitled to present any evidence that may show errors or omissions by the Board. He did not think it was substantive in terms of the actual property in question, but what was happening at this hearing was Mr. Boyd was showing an example of another plan that dotted lines could constitute boundary markers for a subdivision plan; he did not consider this new evidence and was in fact a tool to use to clarify prior testimony by Mr. Boyd. Paul Monzione stated that if what Attorney Bruton wanted to present could have been presented in the first hearing; he did not understand how he could present it at the rehearing. The ZBA was a quasi-judicial Board. He pointed out that no one could go into a Court motion, have the Court deny the motion, and then think of some better arguments three (3) weeks later and file a motion for a reconsideration on a misapprehension of law of fact because everything needed to be ready on the day the court proceeding was scheduled, otherwise there would be no end to a Court case. He was under the impression that Attorney Bruton was here to demonstrate why the Board got it wrong, not because they thought of a new argument. Shawn Tanguay, Esq., stated that he did not think what Francis X. Bruton, III, Esq., was presenting was new evidence to consider, rather it was to help support testimony that occurred in the prior hearing.

Henry Boyd, LLS, stated that he was there to prove that the lots had existed at one time. He noted that there was testimony given at the last hearing that the lots were shown as dashed lines because they intended to be eliminated. These lots have only ever been shown on that one plan. Steve Miller called for a point of order again. He stated that if Attorney Bruton's theory was true, it looked like there could be no end to the case. He pointed out that the proposal was not made part of the summary. He thought that once an expert witness was called, he thought that the case was being opened up for full evidentiary procedures again and it did not appear that it made procedural sense. Henry Boyd, LLS, stated that the two (2) plans that he had, there was testimony offered that if the property intended to have separate lots of record, there would have been metes and bounds. He showed Section 1, page 1 of 2, of a plan from the Town of Hampton, that did not note any bearings or distances, but they did have solid lines to indicate the lot lines. He stated that the testimony that was presented from the Board indicated that dashed lines did not ever represent subdivision lines. He shared a 2014 subdivision plat for Map 9 Lot 205 from the Town of Seabrook that indicated property lines as dashed lines. He pointed out that back in 1960, there were no requirements that plans were drawn in certain ways, like there are now. He stated that just because the plan was not as detailed as they were today, did not mean that the lots were any less valid. Steve Miller asked if either of the two plans were ever challenged in a Court of law. Henry Boyd, LLS, was not sure.

Francis X. Bruton, III, Esq., asked that the two plans be noted. Henry Boyd, LLS, gave Attorney Bruton a copy of the two plans for the record.

Francis X. Bruton, III, Esq., noted that the abutter were in support of the unmerger. He pointed out that the improvements to the lots were done before the subdivision occurred. He noted that at the last hearing, James J. Sessler, Esq., brought up their DES application, but the testimony by Mr. Boyd showed that the use of the lot as one lot was not specific in terms of obtaining the relief from DES. When a building permit was to be obtained, then the specific size of the lot needed to be provided. Francis X. Bruton, III, Esq., noted that there was a request for an abatement by a predecessor in title. He shared that the owner only had one lot number and they did not have the remedy for an unmerger. In the case of Roberts v. Town of Windham, being taxed as one lot did not necessarily mean that the owner agreed to be merged as one lot.

Paul LaRochelle invited James J. Sessler, Esq., to speak. James J. Sessler, Esq., stated that after the first hearing, the Town had the chance to contact the Town's surveyor, Norway Plains, to talk about the testimony that was given by Mr. Boyd and Mr. Stiles about the relationship of plans and dashed lines and ways they conveyed property. In that discussion, the Board discovered that the Town's surveyor did some extensive work in the Southern, Central, and Northern sections of the development in question. The surveyor suggested to look at the fourth plan. He pointed out that originally there were only three plans submitted with the application, but there was a fourth plan done in 1959. The plan was recorded on September 9, 1959, at the Belknap Registry of Deeds, Plan 13 Page 976 & 977. This fourth plan indicated dashed lines; Attorney Sessler passed out a copy to the Board. Francis X. Bruton, III, Esq., interrupted Attorney Sessler and stated that if they were not able to submit new information regarding this case, then he objected to the Town being able to submit new information because this was specific to this case. He pointed out that when Mr. Boyd had a chance to talk earlier he talked about the original evidence that was presented in the case. Paul LaRochelle stated that the Board got a chance to listen to Mr. Boyd and noted that he would like to do the same for Attorney Sessler. Steve Miller stated that the Board agreed that Mr. Boyd was allowed to submit the two plans he was referring to into the record.

James J. Sessler, Esq., showed the Board that the overall perimeter plan, which was the land that was sold by Robert L. Knight to Cochecho Associates. The plan showed a solid perimeter boundary of the entire land that constituted the Southern, Central, and Northern sections of the development. On the interior, there were five (5) lots marked with dashed lines. Each one of the five (5) lots were conveyed separately to Mr. Knight; the first 2 were conveyed in 1921, the third was conveyed in 1928, the fourth was conveyed in 1929, and the fifth and final lot was conveyed in 1949. In his opinion as a land conveyancer, and in the opinion of the Town's surveyor, the dashed lines constituted abandonment of the original property lines from the original five (5) lots that made up the overall development. Attorney Sessler was aghast that neither Mr. Boyd nor Mr. Stiles referred to the 1949 plan.

James J. Sessler, Esq., wanted to discuss the DES Wetlands Application. He noted that in a letter from NH DES dated May 9, 1995, the application was denied for placing the riprap on the shoreline. The letter further stated, "The applicant has not complied with the plan requirements per Rule Wt 404.04." James J. Sessler, Esq., stated that there was some requirement that required the owner at the time, Robert Matt, to produce some sort of plan. That plan showed the combined lot, not the individual lots, and it showed frontage along the lake to the outside perimeter to the one lot.

James J. Sessler, Esq., shared the requirements for Rule Wt 404.04. One of the requirements called for cross sections and plan views for the proposed installation; another one required sufficient plans to clearly indicate the relationship of the project to fixed points of reference, abutting properties, and features of the

natural shoreline. The abutters on the plan were shown at the perimeter lot and not on the interior lots, which was why they were denied the first time. Frank Rich asked James J. Sessler, Esq., about the dotted lines on the plan, and he wanted to know what lot it was he was referring to when he referred to the perimeter lot. James J. Sessler, Esq., stated that there was a perimeter description in the deed as one lot. He stated that after the perimeter survey was done, Cochecho Associates developed their subdivision plan where they created the Southern, Central, and Northern sections. Frank Rich pointed out that lots were created to the left and to the right, but yet the perimeter lot is only one lot. James J. Sessler, Esq., stated that was where the waterfront estate was that consisted of the house, 3 garages, and boathouse. In his opinion, the lot was not conveyed and divided up because the owners were selling it as one waterfront estate. He shared that when the surveyor, Mr. Davis, was creating the subdivision, he probably thought about further dividing up that lot into smaller lots, but in retrospect when it came time to sell the property, the owners decided to sell it as one waterfront estate. Frank Rich asked if the Town taxed the lots as separate lots. James J. Sessler, Esq., stated, not that he was aware of.

James J. Sessler, Esq., explained that when the Town of Alton started compiling information to create tax maps back in 1973, they used existing subdivisions, plans, and deeds. So, when the town's surveyor was creating the map with Cochecho's property on it, they used the plan from Cochecho that showed the dashed lines for the interior lots, which was why those dashed lines were shown on the tax maps today. It was not an admission that there were separate lots.

James J. Sessler, Esq., stated that a comment was mentioned that the amenities were free standing and could stand alone. He thought that the evidence showed that was not correct. He shared that the boathouse had a walkway that ran along the shore and up to the house lot, which crossed a boundary line. The other issue was the electrical pole; it came down crossing the upper lot, but the service box was on a neighboring lot.

Paul Monzione asked if there was any available parking for the boathouse. James J. Sessler, Esq., thought that was what the garage was for, but that was on a different lot. He pointed out that the chain of title was missing one of the important plans, which was the very first plan that Mr. Boyd and Mr. Stiles did not represent.

Paul LaRochelle opened public input.

Steve Gray came to the table. He stated he was a former owner of Curry Realtors for 30 years here in town and was still an active broker in Maine, New Hampshire, and Massachusetts. He represented Wayne Capolupo and the sellers on the sale of this property. He recalled that when trying to sort out some issues regarding selling the property that he spoke to Tom Sargent, and expressed that he was aware that Tom Sargent could not possibly remember every conversation that he had with people. He stated that he wanted to see how the Town was viewing the lots. He stated that Tom Sargent indicated that he felt that the lots had not been merged and it was partially based off a previous prospective purchaser who did a lot of research to see what they could do with the lots. Steve Gray thought that was what Tom Sargent indicated as his understanding. Tom Sargent objected. He stated that he remembered talking to Steve Gray and told him that he did not know anything more than what was presented; he declined that he stated anything about a merger.

Allen Dougherty came to the table. He owned 13 & 15 Silver Cascade Way, direct abutter. When he first heard that the property may be developed or subdivided and the merging or unmerging of property lines, he was concerned about the impact of people coming onto this property because he maintained and controlled the right-of-way that had access to all of that property from the lakeside. After he attended the

first hearing, he had spoken to Wayne Capolupo and that was when he told him that the intention was to unmerge the lots and ultimately create three (3) lots out of it in the end. He was pleased to hear that because it would minimize the impact on him and the land. Frank Rich asked how he and Wayne Capolupo envisioned how the lots would look. Allen Dougherty stated that he sent a letter to Paul LaRochelle with how he understood what was going on, and that included that Lots 112 and 111 would eventually become one lot and would allow a house to be built on Lot 111. Access to the lake would be from that piece of property. On Lot 12, where the boathouse was located, and Lot 11, where the garage and the house that burned down were located on would become one lot, with access through Lot 112 and up through his property. Lots 110 and 10 would also become one piece of property, with Lot 110 being the buildable side. He noted that he sent a letter to the Board back on July 5, 2018, stating what he just represented to the Board. He stated if these lots were to be unmerged, there would be stipulations with doing it in this manner, creating three (3) lots. Frank Rich stated that the Board was not here for that. Allen Dougherty was unaware that he could not put in any stipulations to their decision. Frank Rich stated that this was just a rehearing, and they were there to decide whether an involuntary merger took place.

Barbara & George Howland came to the table. Mr. Howland stated that they were the least affected by this issue because they lived on the other side of the brook. However, they bought their lot from Jed Downing in 1965, and at the time when they bought their lot, they met Bob Matt who owned all of the lots under consideration. He stated that he and his wife remembered the big house by the lake before it burned down, and they were very upset when that happened because it was such a beautiful structure. At that time, the house included the boathouse and the dock, the big garage, and the two (2) other buildings up at the top of the property near the road. He stated that after he and his wife started building their home, Bob Matt asked them if they would be interested in buying the lot where the brook ran through. Mr. Howland thought at some point in time, somebody was under the impression that the lot in question did in fact have separate lots and that they could be sold. Bob Matt offered $1,000 a foot for that lot, which had 100 feet of frontage, but they were not interested in buying. Mr. Howland stated that before Mr. Capolupo bought the property, Ricky Matt, Bob Matt's son, who owned the property with his sisters and his mother, came to Mr. Howland asking him if he knew of anybody that might like to purchase some of the lots. Mr. Howland stated that he ate breakfast one morning with Ricky Matt and he showed him a map of the separate lots. Mr. Howland stated that Ricky Matt wanted to keep the boathouse for himself and sell the other lots in order to buy out his sisters, whom neither one wanted anything to do with the property. Mr. Howland stated that at that time, the owner was under the impression the lots were separate lots. Paul Monzione asked what year it was he had the discussion with Ricky Matt. Mr. Howland stated it was the year before Mr. Downing sold the property to Mr. Capolupo, because Ricky Matt was still hopeful that his sisters would come together. Mr. Howland thought that discussion happened in 2015. He shared that he was good friends with the Matt family. Ricky Matt was heartbroken that his sisters did not want anything to do with the family, so he ended up purchasing some property on Rattlesnake Island. Lou LaCourse asked what year it was when Bob Matt offered to sell the lot with the brook. Mr. Howland stated that was back in 1967, because that was just after Bob Matt lost the house due to the fire.

Francis X. Bruton, III, Esq., stated that the deed for the property was in the file and Ricky (Richard) Matt was part owner. Attorney Bruton passed out copies of the deed to the Board members so they would have it handy. Steve Miller asked if the property was ever owned as tenants in common. Attorney Bruton stated the deed did not provide for joint tenants, so the default would be tenants in common.

Frank Rich asked Mr. Capolupo when he purchased the property, if he was under the assumption that he was purchasing separate lots, and if yes, who told him that information. Mr. Capolupo stated, yes, and that his real estate agent informed him that there were separate lots. After having spoken to the Town's

Assessor, and with his experience with representing the owners that were selling the property, and after consulting with his attorney, he was under the impression that the lots were separate. Frank Rich asked if Mr. Capolupo purchased title insurance on this research. Mr. Capolupo thought he did. Steve Miller asked what the description was in the title insurance document. Frank Rich asked if it showed the description in the title insurance. Francis X. Bruton, III, Esq., interjected and stated that he was not sure that Mr. Capolupo understood the nuances between a title insurance policy and what it did. Attorney Bruton wanted to clarify that the merger concept really related to a zoning map, which related to what someone could build on it. He noted that title insurance did not relate to whether it was a zoning map or not, it related to whether or not there was a good marketable title. Frank Rich noted then there should be a good marketable title for six lots. Attorney Bruton stated that was not the purpose of a title insurance policy. A title insurance policy talked about the marketability of the property and it could use in its description, as this deed did, perimeter descriptions of Track 1 and Track 2. Unless there was other evidence with respect to what was a title insurance policy, he asked that the Board not look at that per say. Frank Rich asked when Mr. Capolupo bought the property, did he check the tax maps to see if each lot was identified. Mr. Capolupo stated he was shown a site plan of the property that showed six lots. Frank Rich stated that someone would have had to pay the taxes on the property for either one lot or all of the lots. Francis X. Bruton, III, Esq., stated that he submitted the tax card and it showed it was one tax lot. He noted that the court had indicated that if a piece of property was taxed as one lot, that did not determine that there was a voluntary merger. Paul Monzione stated, “that in and of itself”, that was what that case stated. He mentioned that Attorney Bruton kept repeating that case, but what the case said was in and of itself did not mean it was merged. Attorney Bruton agreed with Mr. Monzione’s interpretation of the case. Francis X. Bruton, III, Esq., stated that the Town had treated this property as one tax map, but with all the lot numbers. The Town taxed it as one lot and he wanted the Board to keep in mind that the remedy of unmerging did not come about until 2011 and the second thing was that when this law came about, there was a posting requirement. The Legislature understood that laypersons would not understand that they could seek this relief, so for five years there was a posting requirement to post a sign that stated property owners had the right to unmerge. When this deadline was extended, the Legislature forgot that they required that.

Francis X. Bruton, III, Esq., addressed some of the comments from earlier. He noted that there was parking in front of the boathouse, and he shared that the garage was used for parking at the house. He then referred to the plan that James J. Sessler, Esq., brought up earlier. He noted that the plan did not have lot numbers on them, plus it was prior in time. The 1961 plan represented a reconfiguration of the property. Paul LaRochelle asked if anyone at any point in time stopped to think that maybe they should be paying taxes separately for all the lots. Lou LaCourse noted that if he was to buy his neighbor’s property, would he have one title or two. Francis X. Bruton, III, Esq., stated that when he did conveyancing, multiple properties could be described in one deed, as separate tracts, or multiple properties within a tract using a perimeter description.

James J. Sessler, Esq., stated there was testimony from a real estate agent that he talked to Tom Sargent and Mr. Sargent told him something that was adverse to the position that he took before the Selectmen and what he took before the Board today. James J. Sessler, Esq., stated that he had been with the Town since 1986, and in his experience, it was a common problem with Town officials stating information that was adverse to the Town’s position. Attorney Sessler stated if it was not in writing, then what people said could not be proved, especially when it came to someone’s property rights.

James J. Sessler, Esq., wanted to address whether there was a procedure for unmerging properties before the advent of the Statute. He stated that Attorney Bruton’s statement was not correct because the Town had been unmerging properties since before he was the Town’s attorney. He was aware of the Robillard

case when it was written by the Supreme Court in 1980. When a property owner was looking into unmerging their properties, the Town looked at the intent, the objective actions of the owner, and if there was no intent to merge, they would unmerge the lots.

Steve Miller asked if there was any economic benefit to the Town whether the property was one lot or six lots. Attorney Sessler stated it would probably be more economic to the Town if there were six lots. Steve Miller asked if the Town received an economic benefit based on the Board's decision. Shawn Tanguay, Esq., stated to the Board that was not the standard by which the case was being evaluated on. Francis X. Bruton, III, Esq., stated that when lots were unmerged, there were more tax bills.

Paul Monzione asked if the deed granted a specific right-of-way for any of the lots in question over any lots in question. Francis X. Bruton, III, Esq., stated there was a 20-foot right-of-way. Paul Monzione asked if that was on any of the lots in question. Francis X. Bruton, III, Esq., stated that the 20-foot right-of-way talked about a number of different lots, but was not part of the five (5) lots in question; although it did refer to the lots in Tract 2, Lot 12, 110, and 111. Paul Monzione noted that the language that actually conveyed the right-of-way was not referencing those lots. Francis X. Bruton, III, Esq. stated it did reference the lots because it was the above described premises, which were Lots 10, 11, 12, 110, and 111. Paul Monzione stated that those lots benefited by the right-of-way on Lots 14, 15, and 112, but those lots were not benefiting of a right-of-way over any of the other five lots.

Steve Miller MOVED to close the public input.
Paul Monzione seconded. Motion PASSED by a vote of (5-0-0).

Shawn Tanguay, Esq., thought that the Board should make a motion to determine whether or not there had been a voluntary merger by the origin of the chain of title. Paul Monzione stated that sometimes before the Board got to the motion, there would be a motion, a second, then discussion and a vote; sometimes before they got to that, they would deliberate after the public session was closed, then a motion could be formulated based on that deliberation. Steve Miller called for a point of order. He asked if the Board was going on record, like a Variance, stating their individual reasoning on how they felt the case should be adjudicated or would the Board just have a general discussion then call for a vote. Tim Morgan thought that last time, each Board member gave their own reasons for why they voted the way they did, and he thought that would be a good process to do again. Steve Miller agreed.

Steve Miller MOVED to have each Board member, after deliberations, give their own individual statement as to why they voted the way they did.
Tim Morgan seconded. Motion PASSED by a vote of (5-0-0).

Paul Monzione noted that the involuntary merger Statutes that were referenced by Francis X. Bruton, III, Esq., were completely irrelevant to anything the Board was discussing, other than the fact that they did express how the Legislature looked at this concept of merger and that it was a serious matter. He stated that this was not an involuntary merger situation where the Town decided that two nonconforming lots should be merged and forced the merger onto the property owner, and then the Legislature stating that Towns should not do that and enacted a statutory scheme with posting notices informing people that they could undo what the Town had done. He shared that none of that had anything to do with this case. He noted that by definition, merger assumed several lots being merged into one. All of the evidence, discussion, and arguments about these lots existing as several lots, if they did not, then nobody would be here because there would be no merger; they would have been one lot since inception and would have remained one lot. By virtue of the fact that the Town had made a determination that a voluntary merger occurred, by definition, the Town was saying that at some point there was an issue as to whether there

were multiple lots. If there were multiple lots, the lots merged by virtue of the different things that had occurred with the lots. The argument about dotted lines and whether there were five or six lots was important, but it was not determinative. For the purposes of this hearing, there was more than one lot, but the question was, were they merged voluntarily by the owners in the chain of title, and if so, how were they merged. He noted that the court case law stated how multiple lots could be merged into one lot by the owner and he thought that was what the Board focused on the first time the Board heard the case. They identified the facts that supported their opinion, and in his opinion, none of the facts presented today changed his opinion, other than the testimony from the abutter who had lived next to the property for a really long time. He talked about the fact that he was being offered some lots for sale, but all that meant was that one of the several owners who were conveyed this property by percentages, had an idea that perhaps they could sell a lot or two, but he did not find that determinative on whether a proper subdivision was created or whether a merger had occurred prior to that time.

Tim Morgan thought that Paul Monzione had a good overview of the case. He wanted to thank Mr. Dougherty for his letter and for attending the meeting. Tim Morgan thought that the three-lot presentation was a good solution, but that was beyond what the Board had jurisdiction over. All the Board could consider were the two positions, either the applicant's or the Town's. He thought that the Town had met its burden of proof. He mentioned that unfortunately, the dotted lines predated any recording Statutes and Planning Board approvals, so the Board did not have the codified requirements that the Board would have nowadays to lean on and look at. Since it predated the Statutes, he thought that the applicant's predecessor intended or attempted to create a subdivision; however, he thought that there were several indicators, not one overt action in and of itself but a series of actions soon after the 1961 intention, that the plan was abandoned or ignored. He pointed out that the property was conveyed to Mr. Matt as a single lot. Tim Morgan thought that Mr. Matt did not just acquiesce to a single tax bill, but he actually went in to talk to the Town Assessor and argued for a reduction because of the topography of the one lot that he owned. Mr. Matt did not argue that they were separate lots; he represented to DES that it was one lot; he treated it as one lot with the walkways and electrical service, then it was conveyed as one lot. Tim Morgan thought that whatever was intended in 1961 was soon abandoned.

Steve Miller noted that this Board had done all of the necessary due diligence that a case of this seriousness had required. He thought that the Board had gone out of their way to listen to any and all testimony from any and all individuals who were willing to present or supply an affidavit or a letter. He stated that the Board accepted every piece of evidence that had been presented. He shared that the Board had heard from everyone that was willing speak. He shared that the Board had numerous meetings with all parties being represented. He also pointed out that the Board conducted a site walk for this location to validate testimony and to see for themselves whether the Board could determine if this property consisted of numerous lots.

Lou LaCourse stated that none of the information presented at tonight's hearing was any different from the information the Board heard during the previous presentation and he did not think that any of the information had shown any evidence of errors or omissions on the part of the Board's previous decision.

Frank Rich disagreed. He thought that the perimeter lot consisted of individual lots and they should be considered individual lots based on the deed. He pointed out that it was a tract of land with lots and to suggest it was different than what the buyer was buying and the seller was selling, whether it was taxed under one tract did not convince him that the lots were not separate lots. When he looked at the map, on both sides of the one huge lot, there were all small lots. He did not understand how a large lot was left in the middle of all the other small lots. He stated that when you looked at the five lots, they were much bigger than the lots on the left and to the right of this one lot. Paul Monzione stated that the question was

whether they were merged. Frank Rich was not convinced that the lots were merged. He thought that the testimony from Mr. Dougherty was great because he had been there since 1941. Frank Rich stated that he was convinced that the intention was they were separate lots even though they were taxed as one; that was not hearsay because he lived there. He noted that Mr. Dougherty was offered at separate times from separate owners the chance to purchase a lot; whether they were lots or not, he thought they were separate lots. Paul Monzione thought that the lots might be merged by law at the time the gentlemen was offering to sell them as separate lots; maybe he thought he could sell them as separate lots. He stated this had to do with cohesiveness of use. The fact that an application was submitted to DES stating that the property was one lot was a little suspect, because that lot was described to a governmental entity that this property was one lot with the idea that it did not have to be disclosed that there was more than one lot. He shared that the things that the applicant was doing now for DES was dependent upon there being several lots; he wanted to know why someone would misrepresent information to a governmental entity simply because the application that was being filed did not require to identify separate lots. He thought that the application should have been presented correctly. He talked about the different structures on all the lots and he stated that the parcel was treated as a cohesiveness of use as one parcel. He thought that the project might have started off as individual lots, but through the way the owners, through the chain of title, treated, used it, and represented it, it merged by law. When the Selectmen had their job to determine whether there was a merger by the owner, he thought that the Selectmen made the right decision. Frank Rich wanted to know why the Selectmen allowed the unmerger of one of the lots; he thought maybe that they were suspect that there were several lots. Paul Monzione did not know why the Selectmen allowed the unmerger. Frank Rich thought that the Selectmen, after allowing the unmerger of Lot 12, should have gone further and deemed the rest of the property one lot. Paul LaRochelle stated that it looked pretty clear when the property was developed that the intent was to be one piece of property. The location of the boathouse to the house, the location of the sheds, where the garage was built into the ground, the way the structures were built, it was clear to him that it was one lot. Frank Rich thought that the Selectmen should have said that and kept to that. He thought it led to this merger being in question. He further shared that it may have been the intention of the owner at one time, in his discretion, if he did not say anything about the lots he would have paid less tax, so he left it alone; that still did not mean that he merged them. Paul LaRochelle stated that act would have created a merger because the owner knew that they knew the lots should have been taxed separately. Paul Monzione stated that if the owner was willing to treat the property as one lot for his own economic benefit to be taxed less, then that had to be taken into consideration as to whether there was a voluntary merger because the owner was willing to treat the property as one lot. Frank Rich stated in 1960, there were lots. Paul Monzione thought there was a question of whether there were lots based on the way the plan was drawn, but for purposes of this hearing and the Board's decision, he thought there were separate lots; now the questions was, were they merged by virtue of the way that people dealt with the lots. For example, the representation to DES, the tax map, the cohesiveness of use, the paths, the electrical service, the location of the house, etc. Paul LaRochelle thought that maybe the original intention was one lot and after 1960 the owner decided that they could probably separate the property and sell of the lots. Frank Rich asked if people had that intention, why would the owner ask someone if they wanted to purchase a lot from them. Steve Miller thought maybe the owner needed the money. Frank Rich wondered if the owner was making an assumption, or were they really separate lots. Steve Miller thought that the owner had an interest from someone wanting to purchase a lot, and then the owner would figure out how to make their property into separate lots afterwards.

Steve Miller thought that a voluntary merger did occur for several reasons. First was the deed and actions the lots were merged; the dashed lines meant that the lot lines were being abandoned; the lots lack interior markings and steel stakes; after the site walk, it looked like it was one waterfront property because there was a home, a path to the boathouse, the fact that the boathouse may have had plumbing and/or electricity,

he did not think it was applicable to the case that was cited about the bunkhouse because it was probably normative to have those types of amenities; the wetlands plan integrated everything into one lot; a number of years went by without any type of challenges being brought forth; the whole area was indicative of a sophisticated quality waterfront estate; the gated pillars were essentially part of the wall; the concrete pathways crossed boundary lines; it was taxed as one lot; there was only one 911 address for the property; notices were sent out a few years ago to determine what the address was for a specific lot and nobody mentioned anything that this property had more than one address; the original lot lines were not applicable to any standards today; the dashed lines signified abandonment of specific lots; and he did not see a specific right-of-way for each of the individual 5 or 6 lots because in order to access the lots, other lots had to be crossed to access them. Steve Miller thought that a voluntary merger occurred and was still in existence today.

Paul Monzione MOVED that the application for Case # Z18-18 be DENIED, that the ZBA's original decision denying the appeal and finding that a voluntary merger had occurred, and that the Town had met its burden of proof, be upheld.
Tim Morgan seconded.

Steve Miller MOVED to call the roll by name.
Paul Monzione seconded.

Steve Miller voted yes.
Lou LaCourse voted yes.
Paul LaRochelle voted yes.
Paul Monzione votes yes. For the record, the basis of his yes vote included the same things he identified as set forth in the Notice of Decision, many of which were also identified by Mr. Miller, which included the purported interior boundaries lacking any physical markers; the overall boundary of the entire property; identified improvements to the property such as the driveway, multiple paths, various areas of the property; the general layout of the buildings all support the concept of voluntary merger; the entire property was identified as a single address for 911; there was no division as to use of the waterfront; the DES application; and the tax bill taxing the property as one parcel.
Tim Morgan voted yes.

Francis X. Bruton, III, Esq., asked that the Board provide a written Notice of Decision.

ADJOURNMENT

At 8:30 P.M., the meeting adjourned.

Respectfully submitted,

Jessica A. Call
Recording Secretary

Minutes approved as submitted: November 1, 2018