

**TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
March 6, 2008**

Members Present

Andrew Myers, Chairman
Cecile Cormier, Secretary
Albert Dimmock

Members Absent

Christopher Lunetta
Michael Demeo

Alternates Present

Allan Virr

Alternates Absent

Dana Theokas

Staff Present

Robert Mackey, Code Enforcement Director

Mr. Myers called the meeting to order at 7:01 p.m. with the salute to the flag, and notice of fire and handicap exits. He explained meeting procedures and introduced the Board members.

Mr. Myers said that the Board was temporarily adjourned to meet with Town Counsel and would reconvene momentarily.

It was noted for the record that Mr. Virr would sit on the following case.

CASES

**CASE #08-103 Fiber Tower Corp.
Owner: SBA Properties, Inc.**

Special Exception to terms of Article III, Section 165-28B, 2b, to add 3 Dish Antennas & Equipment Cabinet to existing Telecommunications tower at 78A Warner Hill Rd., tax map 06089A. LMDR DISTRICT, Continuation from 2-21-2008.

Mr. Myers informed the applicant that there was only a 4 member Board and that they needed to carry 3 of the 4 votes in order to carry out be granted the special exception or that they had the option to continue.

Ms. Lugi said she was here with Gary Russer the RF Engineer for the proposed project and was hoping to be able to proceed tonight as Mr. Russer would be out of town for the next 2 weeks on business and not clear on what the best option would be.

Mr. Myers explained that the Board meets the first and third Thursday's of each month and that they could choose to return to the Board for a continuation that would also meet their schedule.

Ms. Lugi asked if they could continue to the first meeting in April 2008 so that Mr. Russer could be present and also have a full Board present for the case. Mr. Myers said that they would schedule the meeting as requested.

Mr. Virr motioned to continue case #08-103, Fiber Tower Corp., Owner: SBA Properties, Inc. to Continue the Special Exception request to terms of Article III, Section 165-28B, 2b, to add 3 Dish Antennas & Equipment Cabinet to existing Telecommunications tower at 78A Warner Hill Rd., tax map 06089A. LMDR DISTRICT to the April 3, 2008 meeting.

Seconded by Mr. Dimmock.

Vote:

Mr. Dimmock: Yes.

Ms. Cormier: Yes.

Mr. Virr: Yes.

Mr. Myers: Yes.

The application was continued by a vote of 4-0-0. Anyone aggrieved by a decision of the Board has 30 days to file a request for a rehearing. After that the recourse would be to appeal to Superior Court.

It was noted for the record that Mr. Dimmock would recuse himself from the following case.

08-104 Property Portfolio Group, LLC

Appeal Administrative Decision of Code Enforcement Officer in refusal to take action to require the installation of a residential buffer zone at 32 West Broadway, tax map 29195. CBD DISTRICT

Mr. Myers informed the applicant that there was only a 3 member Board and that he would require a unanimous vote order to carry out the appeal request or he had the option to continue.

Brock Griffith, assistant manager for Property Portfolio Group, LLC., PO Box 1208, Wilton, NH, said that he wished to proceed. He presented the Board with a letter and read it for the Board.

Mr. Myers said that the letter would be added to the record.

Ms. Cormier asked if the 20' buffer zone was part of the Land Development & Control Regulations and if he was asking the Code Officer to enforce the Land Development

Regulations? Mr. Griffith said that Property Portfolio Group has asked Code Enforcement to enforce the 20' buffer requirement but he has not acted on the request.

Ms. Cormier asked if he was requesting that Code Enforcement Officer to enforce a buffer on the property at 32 West Broadway to uphold in two places the Land Development Regulations and the Zoning Ordinance. Mr. Griffith said yes and that he believed that Code Enforcement should uphold the buffer requirements as outlined in the Zoning Ordinance which the Code Enforcement Officer is responsible for upholding and that buffer requirements are more extensively discussed in the Land Development Regulations.

Mr. Virr asked when the Planning Board approved the site was there a buffer requirement stipulated as part of a Planning Board decision? Mr. Griffith said originally when Planning Board waived official site plan approval there was mention of buffer zone requirements for the residential use adjacent to 32 West Broadway and 7 Central Street.

Mr. Virr said that he believed that the site plan was waived by the Planning Board and if so there would not have been any conditions to put on the property for reason that it was waived. He said that it was a Planning Boards right to waive a site plan review. He said that as part of an approval process the approval would have been conditioned upon a buffer zone and since there was no site plan review he was not sure how there are conditions that exist that weren't approved.

Ms. Cormier asked if there was a site plan review. Mr. Griffith said no there was not a formal a site plan review it was waived in the meeting and he has a copy of the minutes for the meeting that was held.

Ms. Cormier asked if there was a court case filed against the Planning Board from PPG. Mr. Griffith said that PPG filed an appeal and has been before the Zoning Board twice.

Ms. Cormier said that in 2006 PPG filed an appeal because the planning Board did not do a site review. Mr. Griffith said that was possible but would have to review his files.

Ms. Cormier said that she believed that the Town won that case then she believed that PPG requested that the Code Officer enforce the buffer zone as provided in 165-33E, however, the last sentence shall be as provided in Chapter 170, Land Development Control Regulations so the buffer zone is applied thru the Land Control Regulations. Mr. Griffith said that it is actually applied to the Zoning Ordinance. What the Land Development Control Regulations states is the specific requirements as to what a buffer easement is.

Mr. Virr asked what date was the site plan waived by the Planning Board. Mr. Griffith said that he believed that it was May 18, 2005 by Mr. Ochs.

The Board reviewed their information that was provided to them in their zoning packet.

Mr. Virr said that it was in May 2005, now it is March 2008 which is a lengthy time to appeal Mr. Mackey's decision. Mr. Griffith said yes they are both appealing Mr. Mackey's decision and appeal the Board's decision not to take action with regard to that as it has been remanded twice back to the Zoning Board and both times the Court has ruled that this is the Board that is responsible for enforcing the request.

Mr. Virr said that it is the Board's responsibility to hear administrative appeals but not the responsibility to question or second guess the Planning Board's decisions.

Ms. Cormier said that the Planning Board already made their decision that instead of a 20' buffer that a landscape buffer, which details were provided, was sufficient. She said that maybe in 2005 a lot of things could have happened in 3 years where the Town does not have jurisdiction. The Board is not police force for Planning Board for their conditions.

Mr. Myers asked if it was agreed that Planning Board did take a vote and that they did waive a site plan. Mr. Griffith said yes

Mr. Myers asked if it was agreed that the Planning Board did specify that there would be a buffer but did not require a 20' buffer. Mr. Griffith said that they did say that there should be a buffer but never really specified what the buffer would be.

Ms. Cormier said that there was some information that had been provided to them by Mr. Mackey from Bonnie Hall showing the landscape detail of 7 arborvitaes that were to be installed.

Mr. Myers asked if there was any pictures of the chain link fence that had been damaged and the rubble that had been allowed to be paved over. Mr. Griffith said that he believed that the pictures had been submitted previously and has not been repaired. He showed the Board approximately where the fence was in reference to their pictures.

The Board reviewed information with regard to damage to the fence and area that was not repaired with Mr. Griffith.

Mr. Myers asked if PPG was seeking to over rule the fact that Code Enforcement Officer would not enforce the Planning Board's requirement that there would be a buffer. Mr. Griffith said yes.

Mr. Myers said that the Planning Board did only require a 3' landscape buffer that was installed. Mr. Griffith said no that the Planning Board said that one of the conditions was to provide a landscape buffer details and what Bonnie Hall provided a 3' buffer and that was not adequate and was never really discussed.

Mr. Myers asked what was PPG actually looking to obtain this evening? Mr. Griffith said that he was seeking the 20' buffer easement between 32 West Broadway and 7 Central Street.

Mr. Virr asked if the 3' landscape detail that wasn't couched in terms of a buffer as if it was a buffer perhaps the Land Development Control Regulations then would define a buffer. Ms. Cormier said that was what the Planning Board had approved.

Ms. Cormier asked who drew out the plan. Mr. Mackey said that plan was drawn and submitted by the former owners of 32 West Broadway.

Ms. Cormier asked if this was the second time before the Board to request the Code Enforcement Officer to enforce the buffer requirement? Mr. Griffith said yes however this was the third time requesting that Code Enforcement enforce the 20' buffer requirement.

Mr. Myers asked when did Mr. Mackey not make this decision that you wish the Board to overrule. Mr. Griffith said that he was sent a letter on February 18, 2008.

Ms. Cormier asked if the request was made on February 18, 2008 and then a Superior Court case was filed. Mr. Griffith said that the February 18 letter was Mr. Mackey's second request and no response was made. There was a previous letter before that.

Mr. Virr asked what are the new facts that had not been heard before. Mr. Griffith said that there are no new facts that the Board has not heard before. He said that January 21 was the first letter that Mr. Mackey was sent and the second on February 18 which he has not responded to PPG's request to enforce the 20' buffer requirement.

Ms. Cormier asked if PPG was seeking an answer by January 29th. Mr. Griffith said that was correct.

Opposed

Douglas MacDonald, Attorney, Keane & MacDonald, representing Wells Fargo, presented the Board with the original letter that had been previously sent by fax. Attorney MacDonald said that foreclosure has taken place and he recently became involved with this matter 3 weeks ago and read his letter for the Board. Attorney MacDonald said that the Zoning Board does have the option to deny the appeal for lack of jurisdiction or if the Board did not dismiss the appeal he would like to request that the Zoning Board deny the appeal based on the fact that no new facts have been shown pertaining to this matter and opposed to granting the request due to the fact that this request has been litigated by both Superior and Supreme Courts. Attorney MacDonald also noted that it was the decision of the Planning Board that the motion was untimely.

Code Enforcement

Mr. Mackey said that an administrative appeal brought by the owners of 7 Central Street, once again seeks to have the Building Inspector order that 20 foot butter be installed between their property and 32 West Broadway – the former FireHall Restaurant. Mr. Mackey said that he has received 2 letters and Town Counsel has received a letter from Attorney John Griffith/Property Portfolio Group demanding/ordering that I take certain actions including requiring the owners of 32 West Broadway to install a 20 foot buffer in the rear of their property which abuts 7 Central Street. Copies of all letters were forwarded to Town Counsel for appropriate action. He believes that current subject of the appeal has already been dealt with by the Board as well as the courts in the original appeal of the issuance of the building permit for the former FireHall restaurant by the same applicant. This appeal also deals with the installation of the buffer. Attorney Griffith has failed to provide the Board with all the pertinent information in this case including copies of these decisions by the Supreme Court. I, therefore, believe the Board should refuse to accept jurisdiction in this matter based on the

reasons outlined in Attorney Steve Clark's letter to Attorney Griffith, dated March 3, 2008 (see enclosure). If the Board chooses to hear the appeal, I believe it should be denied based on the following:

1. Contrary to Attorney Griffith's assertion in the appeal, the Planning Board did not require that a 20 foot buffer be installed. In fact, they approved the plan submitted by the former owner's of the FireHall restaurant which indicated parking in the rear of the site as well as traffic flow around the building. Requiring a 20 foot wide buffer on this small lot would have eliminated both. There was a condition placed on the approval that landscape buffer details be provided and when landscape details were provided to the Planning Board, they determined that the owner's did not have to return to the Board (see enclosures re: Planning Board minutes dated February 1, 2006 and memo from George Sioras, Community Development Director). In the original appeal, the NH Supreme Court ruled that the Building Inspector had no discretion to contradict the Planning Board's implicit conclusion that the site plan did not violate the Town's zoning ordinance. I believe if this were not the case, a dangerous precedent could be set in that multiple appeals could be brought against an approved project long after a project had received Planning Board approval or be subject to the changes of local officials.
2. As noted in Attorney Clark's letter to Attorney Griffith, the court case heard before the Hillsborough Superior Court and cited in this appeal, was a private right of action which did not involve the Town and is not enforceable by the Town. In addition, this decision is not final as a motion to reconsider has been filed by the Intervener of the former FireHall property. (I have a copy should the Board wish to review this document.)
3. The case Attorney Griffith cites involving the Halcyon Club is currently under appeal and has no bearing on this case.

Mr. Mackey said that it should also be noted that the FireHall property is currently vacant. When a new occupant is proposed, review and approvals must be obtained from appropriate Town Boards and departments. There are pictures in the file for the Board's review and I have copies of the original plan reviewed by the Planning Board and the original Planning Board minutes. There also was an issue brought up with regard to the fence and again. The Town does not own the property anymore and do not know what control we have with regard making them do something about the fence.

Ms. Cormier asked if the Town owned the fence when it was damaged. Mr. Mackey said he was unsure.

Mr. Myers asked where the drawing came from that is in the Board's materials. Mr. Mackey said that the drawing was a landscape plan submitted to the Planning Board and there are some minutes attached to it and that the deposition was a different matter.

The Board reviewed the plan.

Mr. Griffith said that Attorney MacDonald mentioned that the appeal was not filed in a timely appeal as the occupancy permit was issued. He said he believed that the issuance of occupancy permit does not apply as it pertains to the occupancy of the structure. Mr. Griffith said that according to the Land Development Control Regulations Section 170-74D states that issuance of an occupancy permit shall not be construed as an approval or validation of this code or the other ordinance of the jurisdiction. He believes that they have filed a timely appeal.

Ms. Cormier said that she believes that Attorney MacDonald said that the timely appeal was regarding the Planning Board approval and then came to this Board to over rule or to have Code take jurisdiction and that is where the first court case came in. Mr. Virr said that he agreed.

Mr. Griffith said that he would like to have the Code Enforcement Officer utilize the procedure as provided RSA 676 and issue a cease and desist order on 32 West Broadway.

Attorney MacDonald said that to make clarification that it was the first case that is with Supreme Court case 154-NH610 that is relative to the first Planning Board appeal that was untimely.

Deliberative Session

Ms. Cormier said that she did not believe that the Board has jurisdiction and that either Supreme or Superior Court had also agreed that Code Enforcement also did not have jurisdiction.

Mr. Virr said that in reviewing the zoning ordinance that he believes that the Board does have an obligation to hear administrative appeals. He has a question with regard to accepting jurisdiction and the timeliness of the filing. He said he has a question whether that the Code Enforcement Officer has the right to overrule a Planning Board decision. Mr. Virr said that it was up to the Board to decide if he acted incorrectly and that he does not believe that he acted incorrectly and that PPG is seeking the Board to overturn the Code Enforcement Officers choice of refusal to take action and that it was an appropriate decision to make at the time.

Mr. Myers said that the Board does have jurisdiction in the sense that it is the Board's job to hear administrative actions and that is what the Board had just listened to for about an hour.

Mr. Virr said then the Board needs to vote on PPG's appeal of the refusal of the Code Enforcement Officer to take action.

Ms. Cormier said that Code has done nothing as Mr. Mackey has not taken action and how can the Board uphold his decision of not doing anything.

Mr. Virr said that if we were to grant the appeal or do not grant the appeal then we state the reasons as to why. He said that his reasons for not granting would be 1. Jurisdiction as I do

not believe it is the Boards jurisdiction to rule Planning Board matters. 2. And do not believe it is a timely appeal on the decision of issues in question. 3. And do not see any new facts that were presented that have not been aware of in the past. 4. Do not believe that Code Enforcement Officer has the right to make a decision.

Mr. Myers said that he was confused as to whether the Board has or does not have jurisdiction.

Mr. Virr said that he does not believe that the Board has jurisdiction.

Ms. Cormier said that she did not believe that the Board has jurisdiction over the case and that the Board does not make a decision either appealing or denying this.

Mr. Myers said that he believes a middle ground should be achieved and that we should make it very clear that we have given this a hearing and that the Board has looked at the facts and don't feel that we should be sitting as a super Planning Board and has considered what the Building Department has done and do not think that the appeal should be granted. In having that all put in the record that the Board does not feel that we have jurisdiction.

Mr. Virr said that he would like to see in the record as to the underlying reasons as to why we do not have jurisdiction.

Mr. Myers said that the underlying reasons that we do not have jurisdiction is that they are asking the Board to over turn something that Mr. Mackey did when Mr. Mackey had no grounds to take action when the Planning Board did what they did. He said that there are 2 demands on Mr. Mackey that were very blunt with no uncertain terms to force Mr. Mackey to take action when there was no basis for it as he had no duty to act. And that if he had no duty to act how can we take jurisdiction on the case. Mr. Myers said that he would entertain a motion on jurisdiction.

Ms. Cormier motioned case #08-104, Property Portfolio Group, LLC., on Appeal Administrative Decision of Code Enforcement Officer in refusal to take action to require the installation of a residential buffer zone at 32 West Broadway, tax map 29195, CBD DISTRICT, to not take jurisdiction.

Seconded by Mr. Virr.

Vote:

Ms. Cormier: Yes. Believe original decision was made by Planning Board and that Code Enforcement Officer cannot supersede a Planning Board decision and that it was also stated in the Supreme Court ruling in 2006.

Mr. Virr: Yes. For the reasons for being an untimely submission, that the Planning Board never required a 20' buffer, and this Board lacks jurisdiction as this request is a Planning Board issue. And that the Code Enforcement Officer did not err in his decision to respond.

Mr. Myers: Yes. Believe that Planning Board never did require a 20' buffer be installed and approved a plan of a 3' buffer was allowed with arborvitae trees. Do not believe that the Code Enforcement Office have

the basis for action for letters dated January 21, 2008 demanding action and then the second letter dated February 18, 2008 again requesting action where none was required. Agree, that granting such a request would set a dangerous precedent if jurisdiction were taken in this matter.

The jurisdiction was denied by a vote of 3-0-0. Anyone aggrieved by a decision of the Board has 30 days to file a request for a rehearing. After that the recourse would be to appeal to Superior Court.

Approval of Minutes

Mr. Virr motioned to approve the minutes of February 7, 2008 as written.

Seconded by Mr. Dimmock.

Vote: Unanimous.

Mr. Virr, Mr. Dimmock, Mr. Myers.

Mr. Virr motioned to approve the minutes of February 21, 2008 as written.

Seconded by Mr. Dimmock.

Vote: Unanimous.

Mr. Virr, Ms. Cormier, Mr. Dimmock, Mr. Myers

Correspondence

OEP Spring Zoning Conference scheduled for April 26, 2008.

Adjourn

Motion to adjourn by Ms. Cormier.

Seconded by Mr. Virr.

Adjourn at 8:30 pm

Minutes transcribed by:
Ginny Rioux
Recording Clerk

Approval of Minutes March 20, 2007

Mr. Virr motioned to approve the March 6, 2008 minutes as amended.

Seconded by Mr. Lunetta.

Vote: Unanimous.

Mr. Virr, Mr. Dimmock, Mr. Myers