

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
April 17, 2008

Members Present

Allan Virr, Chairman
Christopher Lunetta, Vice Chairman
Cecile Cormier, Secretary
Albert Dimmock
George Chaloux

Members Absent

Alternates Present

Michael Fairbanks
David Thompson
Ernest Osborn
James Webb

Alternates Absent

Dana Theokas

Staff Present

Robert Mackey, Code Enforcement Director

Mr. Virr called the meeting to order at 7:06 p.m. with the salute to the flag, and notice of fire and handicap exits. He explained meeting procedures and introduced the Board members.

CASES

**CASE #08-109 Edward N. Herbert Assoc. Inc.
Owner: Daniel & Tina Sargent**

Variance to the terms of Article III, Section 165-20a, to allow construction of addition 20' from a wetland (75' required) at 293 Hampstead Rd., tax map 10098-002. LDR DISTRICT

Peter Zotti, Herbert Associates, said that he was here with Tina Sargent, owner, to request a variance so Tina Sargent could build an addition so her parents could reside with her. He presented the Board with a packet and reviewed the information for the Board. Mr. Zotti described the property layout and reasons for the location for the proposed addition and layout for the Board.

Ms. Cormier asked what the square area was on their map. Mr. Zotti said that it was a catch basin.

Ms. Cormier asked why it was necessary for a breezeway and what size was proposed. Mr. Zotti said that the breezeway was proposed as a 10' x 8' breezeway and was necessary due to the topography of the property.

Ms. Cormier asked why the addition could not just be added to the existing structure. Mike Danis, Designer, said that the space of the breezeway was due to the elevation level and this would allow the addition to be constructed without the use of a stairway into the home. He said also that it was for a way of entrance into the addition to add some privacy.

Ms. Cormier asked if the existing home was a split level and if the proposed addition could be turned. Mr. Danis said yes and that the addition was approximately 2-3' lower than the existing home so the use of a breezeway would eliminate the step up into the existing structure and make access easier into the home.

There was some discussion with regard to design layout of the proposed addition.

Mr. Virr asked if the addition would abut the 100' year flood plain or would part of the foundation be within the flood plain and would fill be added. Mr. Zotti said that the proposed addition would be above elevation of the flood plain and no fill would be added.

Ms. Cormier asked if the proposed plan was not part of Conservation Corridor. Mr. Mackey said that the proposed project did not fall within the 100 year flood and not part of the wetlands conservation overlay district that this was strictly just a setback issue.

Ms. Cormier asked if flood insurance would be required. Mr. Zotti said that he did not believe that would be required.

Mr. Dimmock asked if the septic system was a raised type system. Mr. Zotti said that it was a raised system as the State requires it to be 4' above grade and the existing grade was 263' so the system would be raised up a foot.

Mr. Dimmock said that there was already an existing system but would be installing a new one. Mr. Zotti said that was correct.

Favor

Daniel Bolduc, 282 Hampstead Road, said that he was in favor of the proposed use as it would increase the value of the homes in the area. and did not have a problem with the construction,

Code Enforcement

Mr. Mackey said that the applicants request is to construct an addition (for an accessory apartment) 20' feet from the edge of wetland greater than 1 acre in size. Wetland in question is a wooded type wetland greater than 1 acre. The construction is proposed to be out of the 100 year flood plain (Conservation Corridor) and comply with other required setbacks (see site plan). A new septic system design has been approved by the State DES to accommodate

the additional bedroom (see copy in packet). The lot is a pre-existing lot of record and the home was constructed in 1978. This request does not require a joint hearing with the Conservation Commission although Paul Dionne, Conservation Chairman, has been notified by e-mail. As this is a dimensional variance, the Boccia test will apply. There are pictures of the property in the file for the Board's review.

Ms. Cormier asked if Mr. Dionne had made any comments. Mr. Mackey said no and that Mr. Dionne had said that he may attend tonight's meeting.

Deliberative Session

Ms. Cormier said that she felt that the case meets the Boccia test requirements and reviewed the criteria for the Board.

Mr. Virr said that he feels the hardship issue has been established and that the proposed addition was not in the 100 year flood plain.

Ms. Cormier said that she would like a requirement that a silt fence be installed during construction and that use of an orange construction fence also be installed so contractors will use more caution to keep the integrity of the wetlands in mind.

Mr. Lunetta asked who would oversee the installation of a silt fence. Mr. Mackey said that if it was made as part of the motion the Code Enforcement Office would enforce its use.

Ms. Cormier motioned case #08-109, Edward N. Herbert Assoc. Inc., Owner: Daniel & Tina Sargent, to Grant a Variance to the terms of Article III, Section 165-20a, to allow construction of addition 20' from a wetland (75' required) at 293 Hampstead Rd., tax map 10098-002. LDR DISTRICT with the following conditions:

- 1. Installation of an orange construction fence and silt fence at 100 year flood setback.**
- 2. Construction to be completed within 2 years or variance shall be void.**

Seconded by Mr. Dimmock.

Vote:

Mr. Chaloux: Yes.
Mr. Lunetta: Yes.
Mr. Dimmock: Yes.
Ms. Cormier: Yes.
Mr. Virr: Yes.

The application was granted by a vote of 5-0-0. 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 step down and Mr. Osborn would sit for the following case.

**Case #08-110 Omnipoint Communications Inc.
Owner: Andre & Alice Boucher**

Special Exception to terms of Article III, Section 165-28B(2)(b) to install, operate & maintain a Wireless communications facility on and next to a pre-existing, nonconforming tower, including without limitation, coaxial cables, antennas and related radio communications equipment cabinets within the existing compound at 78 Warner Hill Rd., tax map 06089A, LMDR DISTRICT.

Brian Grossman, representing Omnipoint, said that the tower located at 78 Warner Hill Road was a pre-existing, non-conforming use and that he felt that the terms of the proposal was straight forward and that it was different than the previous case. He reviewed the proposed use for the Board. Mr. Grossman said that the proposed use was to enhance the 911 tower capabilities and comply with the FCC regulations. He said that construction would be in compliance with all building codes and FCC regulations.

Troy White, Radio Frequency Engineer, reviewed map for the Board and said that the proposed use was required to fill a gap in the area.

Ms. Cormier asked what the colored areas meant on the plan. Mr. White said that the yellow dot was the location of the existing tower and the gray dots were existing Omnipoint locations and the pink color showed the amount of expansion the installation of the proposed antennas would expand the services.

Mr. Virr asked if a casual observer would notice the installation of the antennas. Mr. Grossman said that one may notice but the visual impact would be minimal as there are several antennas on the existing tower.

Mr. Lunetta asked what the new base cabinets would accommodate and what size would they be. Mr. Grossman said that the new cabinets would be located within the 10' x 20' area and that they were approximately 83" tall and would be for telephone and power services.

Mr. Chaloux asked how large would the proposed five cabinets be. Mr. Grossman said that the cabinets were approximately 83" inches wide and approximately 8' feet tall and would house the power and telephone supply.

Mr. Lunetta asked how tall was the existing fence. Mr. Grossman said that he believed the fence was 8' tall.

There was some discussion with regard to wording of public notice and engineering studies.

Mr. Thompson asked what was the frequency of the antennas. Mr. Grossman said that he believed they were 1800-1900 megahertz each

Ms. Cormier asked if this was the same location that the neighbors had complained about the noise. Mr. Mackey said that this was the property that the owner of the property had a problem with the owner of the tower.

No abutters were present.

Code Enforcement

Mr. Mackey said that the applicant's request is to install up to 9 wireless telecommunication antennas at the height of 123' feet above ground level on the legal, pre-existing, non-conforming tower along with 3 BTS cabinets at the base of the tower within the existing enclosure. Section 165-28B, 2b allows for this co-location by special exception provided that the Board finds that the following three criteria are met:

- i. There is no increase in the existing height of the tower.
- ii. The proposed expansion of any ground support facility and buildings shall be otherwise meet all setback requirements and any buffer restrictions applicable to the lot.
- iii. The Board finds that the proposed expansion to the wireless communication facility is necessary and essential to providing the applicant's telecommunication service.

The original tower was constructed in 1986 and is 190' tall. The antennas are proposed to be installed at a height of 120' (123' to top of antennas). If approved, a building permit is required and the applicant must provide structural data indicating that the tower can support the additional antennas. There are pictures in the file for the Board's review.

Deliberative Session

Ms. Cormier motioned on case #08-110, Omnipoint Communications Inc., Owner: Andre & Alice Boucher to Grant a Special Exception to terms of Article III, Section 165-28B(2)(b) to install, operate & maintain a Wireless communications facility on and next to a pre-existing, nonconforming tower, including without limitation, coaxial cables, antennas and related radio communications equipment cabinets within the existing compound at 78 Warner Hill Rd., tax map 06089A, LMDR DISTRICT.

Seconded by Mr. Lunetta:

Vote:

Mr. Chaloux:	Yes.
Mr. Osborn:	Yes.
Mr. Lunetta:	Yes.
Ms. Cormier:	Yes.
Mr. Virr:	Yes.

The application was granted by a vote of 5-0-0. 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.

07-222R Frank Loverde & Lili Bao

Rehearing of Equitable Waiver of Dimensional Requirements to the terms of Article VI, Section 165-47B (granted on 12-6-07) to allow the existing addition (under construction) to remain within 9' of the side lot line (15' required) at residence on 14 Windham Depot Rd., tax map 03018-004. LMDR DISTRICT (Required due to improper abutter notification)

Frank Loverde, owner, said that the original permit was applied for in August of 2007 and the Town had looked up the property on a map and was told they had 42' to the lot line. He said that the Town issued the permit and they had hired a contractor and proceeded to build the addition. Mr. Loverde said that his contractor had seen the neighbor taking pictures of the property. He said that he had spoken to the neighbor with regard to the setback and then a few days later they had received a stop work order in which caused them financial harm as they lost money due to material damage. They obtained an equitable waiver approved and the contractor had pulled back a lot of the debris off the wall. They again received an additional stop work order so they are here again for an equitable waiver. He said that he has worked with Code Enforcement to comply with the request of removing the debris and a lot has been done already but the weather has not cooperated so that they can complete the clean up. He said that they were intending on cleaning up the yard and not going to leave in a state of disarray as he does live there.

Mr. Virr asked if they knew where the exact lot line was located. Mr. Loverde said not exactly but has an idea as they do have a partial stone wall on the property but it did not come all the way down to the front of the property.

Mr. Lunetta said that this should be heard as a new case and asked if the criteria could be reviewed. Mr. Loverde reviewed his request for the Board.

Ms. Cormier asked to clarify how the lot line was determined. Mr. Loverde said that the permit was based on the Town GIS system.

Mr. Lunetta asked if the proposed use would diminish the value to the surrounding properties. Mr. Loverde said that he believed that the proposed use would increase the value to the area.

Lili Bao, owner, said she was an engineer and that the original house was small and that the addition would modify the existing structure and make it more modern looking and increase the value to the neighborhood.

Mr. Mackey said that the property required an equitable waiver and that they need to meet the criteria in order to be granted.

Ms. Bao said that her intentions were to change the look of the home and add a new bathroom and create a larger living area. She said that the addition was almost complete and have been living in a half finished home for over half a year now.

Ms. Cormier asked if there have been any other surveys in the area. Mr. Loverde said that he did not believe so.

Mr. Virr asked if they were willing to clean up after the contractor and if there was any time frame in mind of how long it would be. Mr. Loverde said that they have always had the intent to clean up and have someone coming over on Saturday to view the area and hopefully can get a contract signed and the cleanup completed soon.

Mr. Virr asked if there would be a problem if the Board required a survey of the property. Mr. Loverde said that he would have a problem with the request as they have relied on the Town and originally believed they had 42' feet to the lot line as that was what they were told.

There was some discussion with regard to the location of the lot line.

Opposed

Stephanie and Jeff Hooton, 14.5 Windham Depot Road, said that the problem started due to the construction debris being over the stone wall. Mrs. Hooton said that the construction debris have buried the stone wall and do not feel that they will be able to restore the stone wall now. She said that they would have been at the first meeting but were not notified

Mr. Lunetta asked how old was the stone wall. Mrs. Hooton said that it was unknown but knows it is extremely old and have not seen it since November.

Mr. Osborn asked if there is a problem with putting the stone wall back if there was an inch either way. Mrs. Hooton said no but would have a problem if they were to lose feet. She said that they also now have a drainage problem and unsure if that was due because the stone wall has been covered over.

Mr. Chaloux asked how many feet of stone wall has been covered and if seeking to have the whole wall fixed. Mrs. Hooton said approximately 60' – 70' feet and only seeking to have the portion that was covered over fixed.

There was some discussion with regard to the condition of the existing wall and if a survey of the area existed.

Mr. Virr said that he felt that the contractor was negligent in his work and buried the stone wall. Fell that the owners could get together and eyeball where the wall was located or could go to a rental store and rent a transit and come to some sort of an agreement as to where the stone wall was located and asked if there was any objection to the addition. Mrs. Hooton said no that the addition looked good.

Mr. Loverde said that he has no objection to fixing the stone wall but there is a good portion where there was no wall and it never existed. He said that there may be remains of a wall but

not like the rear portion of the property. He said that he did not believe a 4' foot wall existed in the location and may be able to install a 1 – 1½ foot wall along the area.

Mr. Lunetta said that they were not here tonight to establish a wall but to either grant or deny an equitable waiver to the addition.

Code Enforcement

Mr. Mackey said the applicant's request is for an equitable waiver to allow the foundation & partial frame of a new addition to remain within 9' feet of the side lot line. A building permit was issued for the addition on 8-31-2007. At that time it was represented that the addition would be well over the 15' to the side lot line. The applicants had discussed the setback requirements with Fred Kelley. Based on the GIS plotting of the house, the applicant's believed they had more property on the addition side of the house and owned beyond the stone wall boundary. After the wall had been poured and the framing begun, we received an inquiry from the abutter regarding the property line. Based on a review of the information available, it was determined that the stone wall was not the boundary line and that the addition did not comply with the 15' setback requirement. At this point, the construction was halted and the applicant's were advised to apply for an equitable waiver. There are pictures of the property and addition in the file for the Board's review.

Deliberative Session

Ms. Cormier said that she felt that part of the problem is that the Town should never have given that measurement and hope that it is never done again.

Mr. Lunetta said that the Board should consider granting the waiver considering that the addition is considerably completed with no mention of the reconstruction of the stone wall as that was a civil matter.

Ms. Cormier said that she felt that there was a need to state a 60 day completion so as Code Enforcement has the ability to ensure that the project is completed.

Mr. Chaloux said that he felt that the debris and reconstruction of the stone wall should be completed in a timely manner.

Mr. Virr said the original equitable waiver had been granted and that there was no discussion with regard to the stone wall nor did the Board require a certified plot plan.

Ms. Cormier motioned on case #07-222R, Frank Loverde & Lili Bao, to Grant Equitable Waiver of Dimensional Requirements to the terms of Article VI, Section 165-47B (granted on 12-6-07) to allow the existing addition (under construction) to remain within 9' of the side lot line (15' required) at residence on 14 Windham Depot Rd., tax map 03018-004. LMDR DISTRICT (Required due to improper abutter notification) with the following conditions:

1. Debris and stonewall reconstructed within 60 days.

Seconded by Mr. Chaloux.

Vote:

Mr. Dimmock: Yes.

Ms. Cormier: Yes.

Mr. Chaloux: Yes.

Mr. Lunetta: No. Do not believe that the vote should be with the conditions as the conditions do not apply.

Mr. Virr: Yes.

The application was granted by a vote of 4-1-0. 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, Mr. Lunetta, and Mr. Virr were the original sitting members for the following case:

Riverbank

Owner: China Castle Inc.

Request for Rehearing of case 08-105, granted to Enterprise Bank on 3-20-08, to allow building of new bank within 18'4" of the front lot line at 47 Crystal Ave., tax map 36030.

Mr. Virr said that if you were driving south you see the Chinese Restaurant, the white house and the barn then McDonalds. He said that he drove the area the other day and saw the China Castle and did not see how you would tell that the house was closer than 18' feet to the lot line. Mr. Virr explained the pictures in the file.

Mr. Dimmock said that Riverbank had also had to obtain a variance to be closer to the wetlands as the property was already paved and that they felt that proposed bank would block their view. He said that there were several buildings in the area that were closer than the proposed bank was seeking.

Mr. Lunetta said that in reading the request that he hears the same arguments that were heard during the original meeting that he did not see any new evidence.

Mr. Virr said that he felt that this was all based on competitiveness.

Ms. Cormier asked if there was any discussion with the possibility of widening of Crystal Ave. Mr. Virr said that was never discussed.

Mr. Lunetta motioned to Grant Riverbank, Owner: China Castle Inc. a Request for Rehearing of case 08-105, granted to Enterprise Bank on 3-20-08, to allow building of new bank within 18'4" of the front lot line at 47 Crystal Ave., tax map 36030.

Seconded by Mr. Dimmock.

Vote:

Mr. Lunetta: No. Do not see any new evidence that has been presented.

Mr. Dimmock: No. No new evidence has been presented that was not discussed at the previous meeting.

Mr. Virr: No. Feel the Board made the right decision the first time and no new evidence has been presented.

The rehearing request was denied vote of 0-3-0. Recourse would be to appeal to Superior Court.

Adjourn

Motion to adjourn by Ms. Cormier.

Seconded by Mr. Lunetta.

Vote: Unanimous.

Mr. Chaloux, Mr. Thompson, Mr. Orsborn, Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Lunetta Mr. Virr

Adjourn at 9:32 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

Approval of Minutes June 5, 2008

Mr. Dimmock motioned to approve the minutes of May 15, 2008 as amended.

Seconded by Mr. Chaloux.

Vote: Unanimous.

Mr. Webb, Mr. Chaloux, Mr. Lunetta, Mr. Dimmock, Mr. Virr.