

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
April 16, 2009

Members Present

Allan Virr, Chairman
David Thompson, Vice Chairman
Cecile Cormier, Secretary
Christopher Lunetta
Albert Dimmock

Members Absent

Alternates Present

James Webb
Michael Fairbanks
Ernest Osborn

Alternates Absent

Staff Present

Robert Mackey, Code Enforcement Director

Mr. Virr called the meeting to order at 7:00 p.m. with the salute to the flag, and notice of fire and handicap exits.

Election of Officers

Mr. Dimmock nominated Mr. Virr for the position of **Chairman**.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Thompson, Mr. Dimmock, Mr. Lunetta, Ms. Cormier, Mr. Virr.

Mr. Virr nominated Mr. Thompson for the position of **Vice Chairman**.

Seconded by Mr. Dimmock.

Vote: Unanimous.

Mr. Thompson, Mr. Dimmock, Mr. Lunetta, Ms. Cormier, Mr. Virr.

Mr. Dimmock nominated Ms. Cormier for the position of **Secretary**.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Thompson, Mr. Dimmock, Mr. Lunetta, Ms. Cormier, Mr. Virr.

Mr. Virr informed the public that the two parties on the agenda have agreed to switch the order of their hearings this evening.

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

09-104R Robin Altenbach

Rehearing of Exception as provided in Article VI, Section 165-46B, to operate Family Group Day Care Business from residence at 9 Forest St., tax map 11057-014. MDR DISTRICT

Robin Altenbach, owner, read her application for the Board.

Ms. Cormier asked if the requested hours of operation for 8 children was for the whole day or for four in the AM and then 4 in the PM. Mrs. Altenbach said that would be depending on who signs up for daycare as she has some families that would need morning services and some that would need afternoon daycare.

Mr. Virr asked if they would be all at the same time. Mrs. Altenbach said no.

Favor

Marie McCarthy, 7 Forest Street, said that she lives next door and has no objection to the applicants request and also did not feel that there would be any impact to the neighborhood

Joanne Loveys, 8 Forest Street, said that she had no objection with the proposal and thought it was a great idea.

Code Enforcement

Mr. Mackey said that the Planning Board is moving ahead with the deletion of #10 and is scheduled for the May 6th meeting then it will have to go for a public hearing possibly on the 20th then onto Town Counsel for approval.

Mr. Dimmock asked if State statue that Mr. Webb indicated could be read again for the record.

Ms. Cormier read Chapter 170-E – pertaining to Child Day for the record.

Mr. Dimmock said that the RSA appears to have shot down item #10 and it did not appear to be an issue with granting the request.

Mrs. Altenbech said that during the meeting that the rehearing request there was a question regarding the petition. She said that it was done to show that the homes on Forest Street were in favor of her proposal and that she did not pursue the full estate as she was not seeking to change the covenant at this time. She said that if she needed to do that she would be consulting a lawyer and pursuing it further at a later date if necessary.

Deliberative Session

Mr. Dimmock said that he believed that all grounds pertaining to this request have been discussed and the only hold up was item #10 of the rules and regulations. However, Mr. Webb pointed out that there was a State RSA that overrules our ordinance and he felt that the request should be granted.

Mr. Virr said that the last meeting there was an issue regarding the covenant but Mr. Webb had found that there was an RSA stating what a family day care facility was and that the Planning Board is seeking to change the rules and regulations so he did not feel that there was an issue.

Ms. Cormier said that the word covenant is still there and just because the Planning Board is working on changing the ordinance does not make it go away at this time.

Mr. Virr said that the Town Counsel had also stated that if the Board found that the applicant had met the criteria then it could grant the request.

Mr. Fairbanks said that he did not feel than an RSA overrides a covenant but just indicates that the request for a family day care is still considered a residence.

Ms. Cormier motioned on case #09-104R, Robin Altenbach, to Grant Exception as provided in Article VI, Section 165-46B, to operate Family Group Day Care Business from residence at 9 Forest St., tax map 11057-014. MDR DISTRICT, as presented with the following conditions:

- 1. Must obtain all necessary permits and water/sewer updates prior to construction.**
- 2. A minimum of four (4) parking spaces must be provided.**

Seconded by Mr. Fairbanks.

Vote:

Mr. Fairbanks: Yes. Feel that the applicant has presented her case and meets the criteria.

Ms. Cormier: Yes Feel that the applicant has met all criteria.

Mr. Lunetta: Yes.

Mr. Dimmock: Yes. Agree with Ms. Cormier.

Mr. Virr: Yes. For the same reasons as stated by Mr. Fairbanks and Ms. Cormier.

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.

09-103R Marlene S. O'Connor

Rehearing of Case 09-103 – Variance granted to terms of Article VI, Sections 165-451A, and section 165-451B-1b, to allow single family structure to be replaced with duplex at 1 South Railroad Ave., tax map 27077. MHDR2 DISTRICT

Marlene S. O'Connor & Lee O'Conner, 23 Norton Street, said she was a direct abutter to the property.

Mr. Virr asked if they had their application with them and if they could read it for the record. Mr. O'Conner said that they had submitted an initial letter with a petition that had 59 signatures on it and also submitted another letter dated 4/16/2009. He read the letter for the Board. He explained that the property located at 30 Fairview Ave. had been denied a duplex in 2007 and that the property is currently listed for sale and the virtual tour by the real estate company only shows pictures of the neighborhood homes that are single family and not of the duplex that was located directly across the street. He felt that if the real estate company did not show the duplex photo was due to the fact that they were depicting the area as being a single family neighborhood.

Mr. Fairbanks asked how this information pertained to this case and if the property was located in the same community. Mr. O'Conner said that the video shows single family homes and not the two duplexes that were located next to the property.

Mr. Virr said that the previous applicant for that parcel had purchased the property in 2007 and that was one of the reasons that the application had been denied. Mr. O'Connor said that his intent for submitting that information was to validate the opinion of the neighborhood as being a single family community.

Code Enforcement

Mr. Mackey said that the Board needs to keep in mind that the variance has been granted and that the Board may wish to hear both sides so as to hear the reasons for upholding the existing decision of the Board or rescind the existing variance.

Attorney Frank Cimler, representing Kevin Cooper, said that the first order of business tonight is to strike evidence submitted and read for the record by the applicant. Attorney Cimler said that according to RSA 677:3 that it must be stricken from the record as the information was not entered in at the initial time of the application and therefore must be stricken. He read the RSA for the record.

Mr. Virr said that the court has established that residents can have input in any appeal. Attorney Cimler said yes that was correct but grounds state that the information must be submitted in advance so the opposing party has time to also review and time to prepare for the rebuttal process.

Mr. Thompson said then the Board should only be discussing the original application. Attorney Cimler said that was correct.

There was some discussion with regard to what evidence could be discussed and what had been submitted.

Mr. Mackey said that the applicant had brought the additional information into the office earlier this morning and was placed into the Board's packets. He explained to the Board that if the case went to court that all information submitted needed to be available for the courts review process.

Mr. Virr said that in reviewing the information submitted and listening to the applicant that he has not seen any different objections that were not originally presented and discussed at the previous meeting. He said that he understood that people have a right to speak up and agree that there are several items that are issues but that the Board had granted the request for a rehearing as it was implied that they had not clarified the record.

Attorney Cimler said that he just wished to stand that his objection be noted for the record.

Mr. Thompson said that if the applicant was unable to add any addition information other than the original application then he objects for Mr. Cooper submitting new evidence. Attorney Cimler said that he was not presenting any new evidence and said that the Board had not made a mistake in law and a reversal would be contrary to what the law allows.

Ms. Cormier asked where the 2 new duplexes were located with regard to the site. Todd Connors, Sublime Engineering, said that the red squares on the diagram represented the existing duplexes in the area but did not know which where the new duplexes in question. He said that some buildings were 100 years old and unsure if any were duplexes prior or when duplexes actually came into the neighborhood.

Mr. Virr asked if there was an existing driveway on the property now. Mr. Connors said yes.

Mr. Virr asked when did Mr. Cooper acquire the property. Mr. Connors said that he believed the property was purchased in 2003.

Mr. Fairbanks asked if duplexes were allowed when the property was originally purchased. Mr. Connors said yes.

Mr. Dimmock asked if Mr. Cooper owned prior to the change in the zoning ordinance. Mr. Connors said yes.

Mr. Lunetta asked if the original site plan of 12 units prompted the change in zoning. Mr. Connors said that he guessed that it had something to do with it.

Ms. Cormier asked if the request was for the 2 variances. Mr. Connors said yes, one was for insufficient frontage and the other was for permitted use and both were granted.

Mr. Virr asked what Mr. Cooper's original intent was for the property when purchased. Mr. Connors said that the property allowed for 27 units but plan drawn out and submitted for 12 units. The Planning Board denied without prejudice due to the lack of legal frontage. He said that the lot was then rezoned by the time of the expiration of all appeals.

Ms. Cormier asked if it would be in all fairness if the Board reviewed the criteria for the variance.

Mr. Virr asked if the original criteria could be restated. Mr. Connors said that he was not here to argue the existing case just argue against their case and is willing to answer any questions that the Board may have with regard to what the applicant had submitted.

Mr. Dimmock said that he believed that the Board was here tonight to see if the applicant had met the burden of proof and to clarify the record. Mr. Connors said that he had watched the tape and reviewed the minutes and that Mr. Thompson said that the applicant was on the edge of something but did not say what.

Mr. Thompson said that the applicant was granted the rehearing as originally thought that they were on the edge of something new that had not been presented and do not see that in their application now other than the items that had been discussed at the previous meeting. He said that he felt that all people have a right to be heard and thought that the abutter had the right to do so. Mr. Connors said that he did not disagree with that but still unsure of why they were here tonight.

Mr. Lunetta said that he believed that they were here tonight for 2 reasons. First one was being for new evidence that was not presented of which there was none. The second being that the case was not documented properly so the Board needed to clarify the record.

Mr. Virr said that he believed that all 5 points need to be addressed and stated for the record.

Ms. Cormier asked when was the lot subdivided. Mr. Thompson said that the deed states 1967.

Mr. Connors said that he believed that the intent was that the road was to be built to give frontage to the parcel and that the plan on record at the Rockingham County Registry is dated May 23, 1967.

Mr. Virr asked if it was the intent of that time to create the 2.5 acre parcel. Mr. Connors said yes and the right-of-way.

Ms. Cormier said that the statute of limitations of a road from the time of plating to time period of approval believes automatically expires after 20 years and that would have been in 1987 with a cut off in 1989.

There was some discussion with regard to the time frame of the proposed project.

Mr. Lunetta asked if when a homeowner submits an application is it applicable to have an application in at the time of submission.

Mr. Mackey said that need to have the application in at time of application as bound by zoning. The only exception is if there was an approved site plan on record.

Ms. Cormier asked if the Planning Board denied the plan in 2005. Mr. Connors said that the first hearing was on April 1, 2005 and then the second was May 4, 2005 where it was discovered that the right-of-way had expired.

Ms. Cormier asked who discovered that the road had been discontinued. Mr. Connors said that he was unsure who made the initial findings but the Planning Board denied the plan on June 1, 2005 without prejudice.

Mr. Dimmock said that the Planning Board denied the 12 unit project. Mr. Connors said that yes due to the fact that there was no frontage.

Mr. Osborn asked if there was frontage was gained could it go back to the Planning Board for the full 12 units. Mr. Connors said no because of the zoning change and unable to create frontage.

Mr. Lunetta said that the original site plan was for 12 units but due to changes in the zoning was unable to build and now coming in for 2 units and the zoning still is the same as when requested the 12 why not build 6 units. Mr. Connors said that the request in the original case was for 2 units and felt that would be a reasonable request. He said he was not here to argue against the original case.

Ms. Cormier said that the time line needed to be reviewed and said that the original property was subdivided in 1967, the RSA with regard to right-of-ways has a statue of limitation and therefore expired the existing right-of-way, the applicant was in negotiation to purchase the property in 2004 and made actual purchase in February of 2005, submitted to Planning Board in April of 2005, second Planning Board meeting in May of 2005, Planning Board denied in June of 2005 due to the right-of-way access, the zoning changed in December of 2005. She said that the property was 2.5 acres which consisted of approximately 65,000 square feet and is dry and with no encumbrances could be sufficient for 6 individual lots so did not see where a duplex would be an unreasonable request.

Mr. Virr said that this was an unusual case and that Board has heard and read over the case and that the variance was already granted previously but asked if there was any abutters present that wished to speak.

Frederick Blaisdell, 2 South Railroad Ave., said that when the plan originally came forward that they do not have hardship within the property and feel that the Board should see how narrow the streets are before they grant the variance request.

Deliberative Session

Mr. Thompson said that he had stated earlier that the Board was here to any new evidence to contradict the Board's original decision but did not hear any new evidence from the applicant and also to clarify the record as the record was not clear. He said that during the meeting that the request for the rehearing was granted that he had spoken to the audience and was later informed that that was not allowed. He said that he still felt that the record was incomplete and that he has re-read the papers submitted but can see no reason to deny Mr. Cooper his variance as he did not see any new evidence other than the items that had been discussed at the previous meeting except a petition. Mr. Thompson said that he did not feel that an error in law had been made by the Board.

Mr. Virr reviewed the 5 points of criteria for the board. #1 - No new evidence was presented that supported any diminishes of value. #2 - Do not see where public interest has been violated. #3 - Denial would be unnecessary hardship, believe that there is a hardship as there is financial loss to a businessman that purchases a lot with the intent of building out. #4 - Believe that substantial justice is done by the fact that the right-of-way was dissolved without prior knowledge. #5 - Do not believe that granting of the variance would be in contrary of the spirit and intent of the ordinance as there is existing duplexes in the area and were allowed at the time the property was originally purchased.

Mr. Lunetta said that he disagreed that intentions of the property do not grandfather into the fact that the zoning of the area had been changed.

Ms. Cormier said that Mr. Cooper had purchased the property in 2005 and was denied due to a quirk in the zoning law. Town did not petition to have the zoning changed the neighborhood petitioned.

Mr. Lunetta said that the Planning Board did not just decide to change the zone the neighborhood had asked for a zoning change.

Mr. Mackey said that the way changes in zoning take place is that the Planning Board needs to agree on the changes and hold public hearings then it goes before Town Counsel for approval.

Mr. Dimmock said that the Planning Board denied the site plan due to the fact that the right-of-way did not exist not for the number of units.

Ms. Cormier said that uniqueness of the parcel is that it is so large and that the neighborhood is not strictly single family and that there are existing duplexes in the area.

Mr. Lunetta said that the neighborhood consists of small roads etc. and that the Town said enough and decided that it was for single family homes.

Mr. Virr said that it was time for a vote and that he would entertain a motion. He said that the motion needs to be made to grant to rescind the original variance and a no vote would be to uphold the existing variance.

Ms. Cormier motioned to Grant Marlene S. O'Connor and rescind variance Granted on February 19, 2009, case #09-103, Kevin Cooper.

Seconded by Mr. Thompson.

Mr. Virr noted for the record that a vote of Yes would rescind the variance that was granted and a No vote would mean that the variance would still be granted.

Vote:

Mr. Thompson: No. Feel that the Board has not made an error in judgment on any Simplex or Boccia requirements.

Mr. Lunetta: Yes. Believe that the Board should rescind the variance as additional evidence was presented.

Mr. Dimmock: No. Did not prove any new evidence that was not discussed during the first meeting. Feel that Mr. Cooper did prove hardship as was in process of utilizing the property but change in zoning was made during his initial application.

Ms. Cormier: No. [Feel that the criteria that was presented this evening tend to disagree with the facts as stipulated this evening, and did not prove that one more duplex would degrade property values in the area.](#) Restriction under the special unique circumstances exists as Mr. Cooper had purchased the property in good faith and was in the process of building multi-family in the area with the Planning Board and was denied due to a finding in the State Statue in the expiration of the right-of-way and the fact that it was not built. The other uniqueness is that the lot has 65,000 square feet of usable land and having a duplex on it will not diminish the value. Injustice to Mr. Cooper due to circumstances that were beyond his control.

Mr. Virr: No. For the reasons for #1 - No new evidence was presented that supported any diminish of value. #2 - Do not see where public interest has been violated. #3 – Denial would be unnecessary hardship, believe that there is a hardship as there is financial loss to a businessman that purchases a lot with the intent of building out. #4 – Believe that substantial justice is done by the fact that the right-of-way was dissolved without prior knowledge. #5 – Do not believe that granting of the variance would be in contrary of the spirit and intent of the ordinance as there is existing duplexes in the area and were allowed at the time the property was originally purchased.

The motion of Granting the variance was upheld by a vote of 4-1-0. Recourse would be to appeal to Superior Court.

Approval of Minutes

Mr. Dimmock motioned to approve the minutes of March 19, 2009 as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Fairbanks, Mr. Webb, Mr. Osborn, Mr. Thompson, Mr. Dimmock, Ms. Cormier, Mr. Lunetta, Mr. Virr

Mr. Dimmock motioned to approve the minutes of April 2, 2009 as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Fairbanks, Mr. Webb, Mr. Osborn, Mr. Thompson, Mr. Dimmock, Ms. Cormier, Mr. Lunetta, Mr. Virr

Other Business

Mr. Lunetta stated that this was his last meeting as he was resigning.

Mr. Virr accepted his resignation.

Board said Thank you for his time served and wished him well.

Adjourn

Motion to adjourn by Mr. Dimmock.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Fairbanks, Mr. Thompson, Mr. Osborn, Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Virr

Adjourn at 8:59 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

Approval of Minutes May 21, 2009

Ms. Cormier motioned to approve the April 16, 2009 minutes as amended.

Seconded by Mr. Thompson.

Vote: Unanimous

Mr. DeBonis, Mr. Fairbanks, Mr. Osborn, Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Thompson, Mr. Virr