

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
June 4, 2009

Members Present

Allan Virr, Chairman
David Thompson, Vice Chairman
Cecile Cormier, Secretary
Albert Dimmock
James Webb

Members Absent

Alternates Present

Ernest Osborn
Michael Fairbanks
John DeBonis

Alternates Absent

Staff Present

Robert Mackey, Code Enforcement Director

Mr. Virr called the meeting to order at 7:01 p.m. with the salute to the flag, and notice of fire and handicap exits.

09-110 Justin Mason & Katie Jordan

Equitable Waiver of Dimensional Requirements to terms of Article VI, Section 165-46C4, to allow existing deck to remain within 12.4' of the side lot line and allow shed to remain within 5' of the side lot line (15' required) at residence on 151L Rockingham Rd., tax map 02090. MDR DISTRICT

Attorney Luke Webster, Wiggin & Nourie, PA, representing owners, read the application for the Board. Attorney Webster said that the original property was subdivided and approved by the Planning Board in 1979 with a shared driveway and both lots have duplexes. In 1982 the property was conveyed to Robert & Joan Giusti who later applied for a building permit in 1992 to build decks onto each side of the existing duplex. In 2002 they conveyed the property into a condex and his clients purchased the property in 2008. Attorney Webster said that the problem with the deck and shed came to be an issue when his clients asked the owners of 153 Rockingham Road to not park on a portion of the shared driveway. A survey was performed in April of 2009 and inspections conducted to verify that the deck and shed were not built as the previous owners had thought as the lot line was not straight but at an angle. Attorney Webster said that his clients are seeking to have the property comply with the ordinance and are requesting an equitable waiver for the shed and deck.

Mr. Fairbanks said that according to the building permit the previous owner had met the setback requirement. Attorney Webster said that the property line was thought to be straight but it goes off at an angle. He explained the location of the deck and shed for the Board.

Mr. Virr asked if when the applicant purchased the home in July if they had obtained a mortgage plot plan as it would have noted the deficiency. Attorney Webster said that the violation was not disclosed to the buyers at the time of purchase. According to items 3 and 4 of the criteria it is customary for homes to have sheds and decks. Attorney Webster said that the property located at 153 Rockingham Road was located a substantial distance away from his clients deck and shed and that no windows were located on that side. He said that the cost of correction would be a substantial cost for the applicant for removal.

Mr. Fairbanks asked if the shed was permanent or if it was located on blocks. Attorney Webster said that the shed was currently on blocks.

Ms. Cormier said that according to the photos it would be difficult for the applicant to relocate the shed as there is a hill on that side of the property.

Mr. Dimmock asked if the 8' x 8' shed was constructed on the property. Attorney Webster said yes that the shed was only 8' x 8' and was unsure of how it arrived as it was there when his clients purchased the property.

Mr. Dimmock asked if the shed was allowed if a permit was required and what would be the cost as it was not a taxable structure. Mr. Mackey said that the shed still falls under the definition of a structure. He said that he was unsure when definition came in but have always required to obtain a building permit.

Ms. Cormier asked why these people should be required to obtain a permit and acquire the fee when the shed was build in the 1980's. Mr. Mackey said that this way a permit would be on file along with waiver for record purposes.

Favor

No abutters were present.

Code Enforcement

Mr. Mackey said that the applicant's request is for an equitable waiver to allow an existing deck and shed to remain too close to the side property line. Our records indicate that the deck was constructed in 1992 and the shed apparently around that same time frame. We do not have a permit record for the shed. As the structures have existed for more than ten years and no enforcement action has been taken other than to advise the owners that they need to apply for an equitable waiver, only the first criteria under item #2 on the equitable waiver form applies. If approved, we request that the applicant obtain a building permit for the shed. There are pictures in the file for the Board's review

Opposed

Wendy Chabot, 153 Rockingham Road, said that she had spoken with someone and was told that the shed could be 5' feet from the lot line and that believed that all sheds are to be located 15' feet from the lot line.

Mr. Thompson asked why there was a concern now. Ms. Chabot said that she did not know what an ordinance was until July of last year. She said that there is a flat area at the bottom of the hill that is suitable for a shed and all other neighbors have their sheds located in the back yards.

Linda Chabot, 153L Rockingham Road, said that their lawyer expressed the parking concern via a letter. When the previous owner had resided there was under the understanding that the parking was common and was not aware of any issues until they had received the letter from the lawyer and for 5 years there had never been any problems.

Heath Cabot, 153 Rockingham Road, he said that the shed is an eyesore when he sits on his deck and that it should not be allowed to remain in it's present location. He said that he was told that the shed was going to be torn down.

Mr. Virr asked how long have they lived at their residence. Mr. Chabot said that they have resided at their property for 5 years and feel that the applicant has tried to steal their land.

Attorney Webster said one survey had been done and then after noticed encroachment notified the owner and that is why here tonight.

Ms. Cormier asked who owned the shrubs. Attorney Webster said that 153 Rockingham Road owned the shrubs.

Mr. Fairbanks said that there was a joint driveway in the deed. Attorney Webster said yes it was for lots 2-90 and 2-90-1 for access only.

Mr. Dimmock said that there was a statement made that the shed was to be torn down. Attorney Webster said that he felt that his client should not have to tear down the existing shed and relocating it would be difficult due to the layout of the land.

Mr. Virr asked when the shed needed to be replaced could it be replaced at another location. Attorney Webster said yes.

Deliberative Session

Mr. Virr said that he felt that the applicant has met the requirements.

Mr. Thompson said that he agreed that the shed has been in existence for 17 years and relocating it would be difficult.

Mr. Osborn said that he also agreed and that the shed had been there a long time with no complaints.

Mr. Virr said that the condition of obtaining a permit is required.

Mr. Dimmock said that the shed has been there for 17 years and the abutters there for 5 years with no problems of the location. He said that he feels that the new owners should have checked where the lot lines were when they purchased the property and did not feel that the Town should get permit fees for something that has been in existence for 17 years.

Mr. Thompson asked if there was any way of waiving the permit fee.

Mr. Mackey said that only Town Council can waive the permit fee.

Mr. Virr said that the applicant has paid for the application and an Attorney and do not feel that a \$25.00 permit fee would be an issue at this time.

Ms. Cormier said that the application is also for an equitable waiver for the deck. She said that she thought that the Town checks for lot lines when permits are obtained.

Mr. Mackey said that typically with projects that they rely on the applicant to know where their lot lines are located.

Ms. Cormier asked if certified plot plans were required. Mr. Mackey said that the office does require certified foundation plans for new construction only.

There was some discussion with regard to the applicant having to pay the permit fee for the existing shed.

Mr. Virr reviewed the criteria for the Board.

Ms. Cormier said that she had roughly measured and that the neighbor is approximately 90' feet from the deck.

Mr. Virr said that there should also be a stipulation that the shed not be replaced in the same location.

Ms. Cormier said that that stipulation may not be legal.

There was some discussion with regard to the shed and deck replacements.

Mr. Thompson motioned on case #09-110, Justin Mason & Katie Jordan, to Grant an Equitable Waiver of Dimensional Requirements to terms of Article VI, Section 165-46C4, to allow existing deck to remain within 12.4' of the side lot line and allow shed to remain within 5' of the side lot line (15' required) at residence on 151L Rockingham Rd., tax map 02090. MDR DISTRICT as presented with the following conditions:

- 1. Must obtain a building permit.**

2. Shed can not be replaced in present location.

Seconded by Mr. Webb.

Vote:

Mr. Webb: Yes. Believe it meets the requirements.

Ms. Cormier: Yes. Believe all 5 criteria have been met.

Mr. Dimmock: Yes. For the same reasons as stated by Ms. Cormier & Mr. Webb.

Mr. Thompson: Yes. Feel that hardship has been met.

Mr. Virr: Yes. For the same reasons as stated.

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. Webb would step down and that Mr. Osborn would sit for the following case:

09-111 Jean-Pierre & Rosilda Bonenfant

Variance to terms of Article III, Section 165-10, Article VI, Section 165-46C4, to raze 2 structures and replace w/single family structure too close to front lot line (17.7') at residence on 81 Chester Rd., tax map 55048. MDR DISTRICT

Mr. Thompson asked if the applicant wished that he step down for this case as he was an indirect abutter to the property. Mr. Bonenfant said that he did not mind if he remained a sitting member for his case.

Craig Bailey, Brian L. Bailey Associates, Inc. said that he was representing owners. Mr. Bailey read the application for the Board. He said that the lot has historically been known as the "Cat O'Nine Tails" which was located on the right side of Route 102 across from the Town sewer pump station. Mr. Bailey said that presently there are two small cottages on the property, the small green one is currently being rented and the red building is not being lived in at the present time.

Mr. Thompson asked if the red building was condemned. Mr. Bailey said that he was unsure but did know that it was not being lived in at the present time.

Mr. Bailey said that the green building was currently located approximately 24' feet from the front setback line and the applicants proposal is to remove the two buildings and replace them with one single family home. The unique problem is the Shoreland Protection Act and that they are seeking to please both the Town and the State. The 50' required buffer zone with the proposal of the new building would be further from the lake but still within the buffer zone. The property is non-conforming today but the proposal would make it less non-conforming.

Mr. Virr asked if the property was going to have a garage. Mr. Bailey said yes that it would be located under.

Mr. Thompson asked if it was a 2 car garage. Mr. Bonenfant said yes.

Mr. Bailey said that the 17' 7" is the average setback of what is located on Chester Road as the immediate neighbor on the right is 16' 6" from the road. The proposed new structure would be more conforming with the State of New Hampshire and that no trees in the buffer would be removed except one that would interfere with the proposal.

Mr. Dimmock asked if the tree was located in the buffer. Mr. Bailey said yes but that the tree was located outside of the magical buffer that the State has.

Mr. Dimmock asked if the property would be serviced by Town sewer. Mr. Bailey said yes and that there was a private well located in the front of the red building.

Mr. Bailey said that a plan for erosion control has also been submitted to the State and explained the plans for the Board.

Mr. Thompson asked if they had heard anything from the State. Mr. Bailey said yes as they have accepted the application. However, the State has a 75 day period in which to render any decisions and that the plan was stamped in on Monday and assigned a reviewer yesterday. Mr. Thompson asked if the property was all small lots. Mr. Bailey said that the property was combined in the late 1990's and is currently one lot at the present time.

Ms. Cormier asked if the plan that was submitted to the State showing the temporary impact area if the State was going to allow it. Mr. Bailey said that the area showing where the old house sits has to be restored to a lawn and special area has been designated that is to be for mother nature only and that the applicant could not mow, plant or touch the area that it would revert back to all natural conditions.

Ms. Cormier asked if the new home would be in line with other homes. Mr. Bailey said yes.

Mr. Thompson asked if Mr. Dimmock was aware if the State Highway has a setback requirement. Mr. Dimmock said that he was unaware of any special setbacks required by the State and that felt that all the Board needed to do was to allow to build too close to the front setback with the stipulation that it meets all State requirements.

Ms. Cormier asked if the property had been surveyed. Mr. Bailey said yes.

Mr. Virr said that if the variance was granted that the State would have the final decision for building within the Shoreland Protection Act. He said that the location of the two cottages currently affords a nice view of the lake now and that he felt that need to encourage that the structure does not exceed 2 stories in height.

Favor

Arthur Caras, 44 North Shore Road, said that everyone that lives around the lake knows that this type of property is currently an eyesore and that allowing to build a new home would be

an asset to the area. If the applicant was to rebuild the red building it would still not be favorable and said that he felt that the proposal was best suited for the property.

Code Enforcement

Mr. Mackey said that the applicant's request is to remove two (2) existing structures on the property and construct a new single family dwelling. The proposal will place the new dwelling 17.7' feet from the front lot line. This is somewhat less than the average front setback which is allowed to be utilized under Article III, Section 165.20 of the zoning ordinance. The average front setback is 20.45' feet. The proposal will also require a waiver from the State of New Hampshire Department of Environmental Services under the Shoreland Protection Act which requires a 50' foot primary building setback from the normal high water line of the lakeshore. If granted by the State, they will typically specify plantings and other mitigation strategies for the property as part of the reconstruction. The area directly abutting Abbott Brook contains land located in the 100 year flood zone (construction corridor) and cannot be disturbed. No development is slated for this area. The property is serviced by municipal sewer and a private well. As previously stated, both a local zoning variance and a State Shoreland waiver will be required in order for this project to move forward. If approved, proper erosion controls will be required while construction is taking place. There are pictures in the file for the Board's review.

There was some discussion with regard to the Shoreland Protection Act and the availability of Town sewer.

Opposed

There were no abutters present.

Deliberative Session

Mr. Thompson said he felt that there was no problem and as stated by the applicant the property has been in disrepair for some time.

Mr. Osborn said that the proposal would be a big improvement to the area and that he felt that it certainly needs to meet the requirements of the State.

Mr. Virr said that hardship had been established.

Mr. Dimmock said that he remembered having meals when it was the "Cat O'Nine Tails" and that in giving the status of the property stands today anything would be a vast improvement.

Mr. Virr reviewed the conditions for the Board. He said that the applicant was subject to obtaining all State and Town permits, the structure is limited to no more than two stories in height and that the structure must be completed within 2 years or the variance shall be void.

There was some discussion with regard to height of a structure and expansion of a non-conforming structure.

Mr. Osborn asked if there was a height restriction of buildings in the Town.

Mr. Mackey said that there was nothing written that he was aware of but knows that the Fire Department has some criteria.

Mr. Thompson motioned on case #09-111, Jean-Pierre & Rosilda Bonenfant, to Grant a Variance to terms of Article III, Section 165-10, Article VI, Section 165-46C4, to raze 2 structures and replace w/single family structure too close to front lot line (17.7') at residence on 81 Chester Rd., tax map 55048. MDR DISTRICT, as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits.**
- 2. Must be completed within 2 years or the variance shall be void.**

Seconded by Mr. Osborn.

Vote:

- Ms. Cormier:** Yes. Feel that it meets the criteria. There are special conditions located within the property. Meets the Boccia analysis and that substantial justice would be done as it would be an enhancement of the area. No property values would be diminished and is not contrary with the spirit and intent the ordinance.
- Mr. Dimmock:** Yes. Agree with Ms. Cormier that substantial justice would be done and that it would not diminish property values in the area.
- Mr. Osborn:** Yes. Feel that it meets the criteria.
- Mr. Thompson:** Yes. Meets the criteria and that an enhancement would be great.
- Mr. Virr:** Yes. Hardship has been demonstrated. Agree with Ms. Cormier that it meets the criteria.

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.

Correspondence

Survey of Municipal Law – Knowing Territory

Other Business

Mr. Thompson reminded the Board that they have a workshop meeting scheduled for Monday, June 8, 2009 in room 207 at 7:00 pm.

Mr. Mackey said that the Board may want to discuss what their summer schedule will be for the months of July & August.

Mr. Dimmock said that the Board typically has met only one time for each month and it was typically the third Thursday of the month.

There was some discussion with regard to dates and it was determined that the Board's summer schedule would be the following dates:

**July 16, 2009
August 20, 2009**

Adjourn

Motion to adjourn by Ms. Cormier.

Seconded by Mr. Thompson.

Vote: Unanimous.

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

Adjourn at 8:32 pm

Minutes transcribed by:
Ginny Rioux
Recording Clerk

Approval of Minutes June 18, 2009

Mr. Thompson motioned to approve the minutes of July 4, 2009 as amended.

Seconded by Mr. Dimmock.

Vote: Unanimous.

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