

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
November 19, 2009

Members Present

Allan Virr, Chairman
Cecile Cormier, Secretary
Albert Dimmock
James Webb

Members Absent

David Thompson

Alternates Present

Ernest Osborn
John DeBonis

Alternates Absent

Michael Fairbanks

Staff Present

Robert Mackey, Code Enforcement Director

Mr. Virr called the meeting to order at 7:03 p.m. with the salute to the flag, and notice of fire and handicap exits.

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

09-118 John Agri (Continued from 10/15/2009)

Variance to terms of Article VI, Section 165-47B.1, to allow a two (2) lot subdivision which will result in the creation of a 1.03 acre lot where the Zoning Ordinance requires a 2 acre minimum, 6 Frost Road, parcel ID 03096-002. LMDR DISTRICT

Vern Dingman, V.W. Dingman & Sons, said that he was representing the applicant. He presented the Board with a plan of the property. He said that the property was subdivided in 1979 which consisted of 5 lots. In his research at the State level and with Mr. Bailey it was found to have been un-subdivided to construct the existing duplex making the two lots recombined and a new subdivision was established for the recombining of the 2 lots. What his client is trying to do is to go back to the original 1 acre lot with current frontage requirements. Mr. Dingman said that only requesting a variance due the size of the lot as it will meet current setbacks. He said that they were seeking to bring back the original 1979 subdivision as submitted in 1979 and presented the Board with a copy of the original plan.

Ms. Cormier asked if the plan was based the same as the original drawing done by Brian. Mr. Dingman said yes and also showing current wetland locations.

Ms. Cormier asked how many acres of wetlands was the property. Mr. Dingman said that 1.2 acres of upland wetland soils was for the smaller lot and 1.5 on the larger lot but they will meet code requirements.

Ms. Cormier asked what the hydric soil size would be per lot. Mr. Dingman said that the hydric soil was 1,835 square feet and the plan submitted also shows replacement of a State approved septic design. Total lot loading by State is 35,000 square feet of upland soils and the property is 10,000 square feet more that required on the duplex lot.

Ms. Cormier asked if the larger lot will have its own septic and if so had it been done. Mr. Dingman said that the test pits have been done and have been shown on the plan submitted to the Board it also indicates well radius and the plan shows that both lots will ascertain loading.

Mr. Virr asked if the application could be read for the record. Mr. Dingman read the application for the record.

There was some discussion with soil types and loading.

Mr. Dingman presented the Board with numerous letters from abutters in favor of the applicant's proposal.

Ms. Cormier stated that the abutters from following properties were in favor of the applicant's request:

Robert Hersey – 2 Frost Road
Mark Loveski – 181 Rockingham Road
Daniel McCullough – 11 Frost Road
Albert Jarvis – 18 Frost Road

Favor

No abutters were present.

Code Enforcement

Mr. Mackey said that the applicant's request is to subdivide an existing lot which will result in one of the lots having less than the required 2 acres in the LMDR zone. This lot is part of a parcel that was subdivided in 1979. At that time this parcel was two separate lots. Shortly after the subdivision was approved, the two lots were merged. This case was continued in order to give the applicant's engineer time to research the reason for this merger. Part of the purpose for the request is to separate the residential and commercial uses that exist on the property. The garage has approval for vehicle sales and dry storage. If the subdivision is

approved, a separate well and septic system will be installed on the garage lot. If approved, Planning Board subdivision approval will be required. As an area variance is being requested, the Boccia hardship standards will apply. There are pictures in the file for the Board's review.

Mr. Virr asked what size was the duplex lot. Mr. Dingman said that it would be 1 ½ acres as opposed to the original subdivision that was only 1 acre lots which were not sufficient to build a duplex at that time.

Mr. Virr asked if a variance would have been required to build a duplex on a 1 acre lot. Mr. Dingman said yes.

Mr. Virr asked if the garage was still allowed for auto repair. Mr. Agri said that no auto repairs are performed on the property.

Mr. Mackey said that the garage was a legal use on the property.

Ms. Cormier asked if the Planning Board ever limited to the number of vehicles on the lot. Mr. Agri said yes that they limited to have 6-8 vehicles for sale at a time on the lot but did not limit the number of vehicles on the property. The Board only asked me how many would be sold per month and told them possibly 6-8 as it would not be a large operation.

Mr. DeBonis asked if the existing garage on the lot would need to come back to the Board. Mr. Mackey said no as residential use is allowed and the existing garage is a pre-existing legal non-conforming use.

Opposed

No abutters were present.

Ms. Cormier said motioned to go into deliberative session.

Seconded by Mr. Dimmock.

Deliberative Session

Mr. Webb said that the business was operating and did not see a problem and the request still requires Planning Board approval.

Mr. Virr said that the commercial parcel is allowed to continue.

Ms. Cormier said that she sees a major problem as in 1979 the ordinance required 1 ½ acres to build a duplex and now stating that the property meets State regulations but the applicant has not proven that it meets Town soil requirements according to the Land Development Regulations.

Mr. Mackey said that any approval here would be subject to Planning Board approval.

Ms. Cormier said that she was uncomfortable voting on a plan that was questionable if it meets soil calculations and do not feel that the Board is in a position to accept a plan without all the required information stated on the plan.

Mr. Virr asked if in 1979 the lot size was legal for 1 acre lots. Mr. Mackey said yes a 1 acre lot was legal for a single family home.

Ms. Cormier said that a 1 acre lot was only for a single family but what was required for a duplex. Mr. Mackey said that there was no guidance for a duplex size lot as not permitted in an LMDR zone.

Mr. Dimmock said that he feels that the Board can do this and make the condition subject to Planning Board approval and meet all State approvals. He said that he felt that the plan should be allowed to go to the Planning Board and State for approvals to be able to subdivide.

Mr. Osborn said that he felt the same way as have to start somewhere and that if it does not meet soils the Planning Board would not approve.

Ms. Cormier said that should be subject to conditions with allowing 1 acre lot and larger lot would need to meet subdivision regulations.

Mr. Dimmock said that was the reason stating that it would need State approvals.

Ms. Cormier said that the Town could be more stringent on conditions than the State.

Mr. Virr said that the following conditions needed to be stated in vote:

1. Meet all Land Development regulations for lot size.
2. Subject to Planning Board approval
3. Must meet all Town and State inspections and approvals.
4. Lot 2 must meet 96.2 commercial use.

Ms. Cormier motioned on case #09-118, John Agri, (Continued from 10/15/2009) to Grant a Variance to terms of Article VI, Section 165-47B.1, to allow a two (2) lot subdivision which will result in the creation of a 1.03 acre lot where the Zoning Ordinance requires a 2 acre minimum, 6 Frost Road, parcel ID 03096-002. LMDR DISTRICT as presented with the following conditions:

- 1. Subject to Planning Board approval.**
- 2. Subject to all State and Local inspections and approvals.**
- 3. Lot 96-2 (commercial lot) must meet all Land Development Control Regulations or the variance is void.**

Seconded by Mr. Osborn.

Vote:

- Mr. Webb:** Yes. Believe it is a reasonable use.
- Mr. Osborn:** Yes. Believe it meets all the criteria and will be protected with soil stipulations.
- Mr. Dimmock:** Yes. Feel is a reasonable use of the property.
- Ms. Cormier:** No. Believe it is contrary to the public interest. Feel that it would be going backwards as the area will now be a 3 family vs. a 2 family area. Feel the 1 acre due to approximately 18,000 square feet includes wetland soils so not a true acre of dry land. Do not feel that it is consistent with the spirit and intent of the ordinance.
- Mr. Virr:** Yes. Believe substantial justice would be done and no abutters were present opposed to the request and there were several letters submitted in favor of the request.

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. DeBonis would sit for the following case.

**09-120 Beaumont & Campbell, Professional Association
Owner: Luc L'Etoile**

Variance to terms of Article VI, Section 165-46A, to allow a basement apartment in an existing duplex structure at 99 Chester Road, parcel ID 12019-001. MDR District.

Attorney Bernard Campbell, Beaumont & Campbell, Professional Association, said that he was representing owner Luc L'Etoile, and that Kim Spanos, the Real Estate agent was also present to speak in behalf of Luc L'Etoile. Attorney Bernard read the application for the Board. He noted that the past history of the property did have an elderly couple occupy the unit in question at one time and it was outfitted with handicap facilities. He said that the owner would not mind that a stipulation be made that the occupant must be of the age of 55 or older to keep the property as a low profile area.

Mr. Webb asked if the property was for sale. Attorney Campbell said that the L'Etoile's have relocated to Texas and that the property was currently for sale at the present time but need to clear up the property status before a sale could occur.

Ms. Cormier asked if there was a basement or if it was on a slab. Ms. Spanos said that the unit is built on a slab.

Mr. Virr asked if the property was being marketed as a 3-family. Ms. Spanos said that the property was being marketed as a 2-family dwelling.

Mr. Virr said that the Board did not have a building history on the property and asked if Mr. Mackey could give his summary of the property.

Code Enforcement

Mr. Mackey said the history of the property is a bit cloudy and did bring the building file if the Board wished to review. He said that the applicant's request is a use variance to permit a basement apartment in an existing duplex structure. The current status/use of this building has become an issue since the property was put on the market. Our files indicate that a building permit issued in January 2000 for interior renovations limited the structure to two dwelling units which tax records indicated was existing on the site that time. Apparently at some point since that time, work has been done to create a third living unit. The current use is considered a pre-existing non-conforming use in the Medium Density Zoning District. If approved by the Board, the structure will be required to meet current building and fire codes with regard to multi-family use and the sewer permit must be updated. The property is serviced by municipal sewer. As a use variance is being requested, the Simplex hardship criteria will apply. There are pictures in the file for the Board's review.

Mr. Virr asked when the building was built. Attorney Campbell said that the original structure was built in 1978.

Mr. Virr said that it appears that the proposal was to be built as a gas station convenience store. Attorney Campbell said that did not occur.

Mr. Osborn asked if the utilities were separate. Ms. Spanos said that two units were separate but the potential 3rd unit utilities were connected to one of the existing units.

There was some discussion with regard to the location of where the 3rd unit was located within the structure.

Mr. Dimmock asked if the property could be classified as a 2-family with an in-law. Mr. Mackey said that the zoning ordinance reads that an accessory apartment can only be constructed in a single family structure.

Mr. Virr asked if the 3rd unit was currently rented. Ms. Spanos said not at this time but had been utilized by an elderly couple in the past.

Mr. Virr asked if there was a record of the shed with electricity. Mr. Mackey said yes the building file did have a permit for the shed along with an electrical permit but there was no record of the original home permit which was not uncommon during that time frame.

Attorney Campbell said that the tax cards from the assessing department show the structure in 1973.

There was some discussion with regard to the property cards and status.

Mr. Webb said that the deed shows the applicant has owned the property since 1988 if they added the third unit. Attorney Campbell said that he believes that the building was 3 units as Mr. Mackey had pointed out that the L'Etoile's had applied for a building permit and during an inspection Mr. Mackey had noted a kitchen area located in the basement portion of the property that was finished out with handicap facilities. Attorney Campbell said that the 3rd

unit did not fit into the existing 2 family structure as they were currently located on the 2nd levels of the home.

Ms. Cormier asked how could the Board be assured that the unit would be only rented to a person aged 55 or over. Attorney Campbell said that they were willing to restrictive covenants and have them recorded into the property with the stipulation.

Mr. Dimmock asked if they were paying for 3 sewer hookups. Attorney Campbell said that they were assessed for 3 units when the betterment assessment went in and then the property was abated back to a 2 family. Attorney Campbell said that they may need to pay the Town more money for a 3 family structure.

Mr. DeBonis said that the property is located in the medium density residential zone which is single family only and this is currently a 2 family home with a questionable 3rd unit. He said that the Board could either deny the request or grant it with stipulations.

Ms. Cormier asked if duplexes were allowed at the time of construction. Mr. Mackey said yes.

There was some discussion with regard to sewer connection fees and Fire Department inspections.

Attorney Campbell said that the property was connected to Town sewer and that Ms. Spano's said that the property has its own well.

Opposed

No abutters were present.

Favor

No abutters were present.

Mr. Virr motioned to go into deliberative session.

Seconded by Ms. Cormier.

Deliberative Session

Mr. Virr said that the property is what it is and has been owned by the L'Etoile's for some time and they are here to rectify the situation to make the property legal. He said that there should be some restrictions to the motion such as it should be subject to Fire Department inspections and permits, restrictive covenant be in place that details out only a person of 55 years of age or handicap and subject to proper Town sewer connections.

Mr. Dimmock said that the applicants request is reasonable as they are not changing the property as it already is a 3-family and that we would only be allowing what the building is already being used as.

Mr. Webb said that his only concern was that the property was currently for sale and that they would be making more money on it.

Mr. Virr said that the property is currently marketed as a 2-family and that it needs to be a legal status before the sale can proceed.

Mr. DeBonis said that the L'Etoile's will benefit as if granted the property could be marketed as a 3 family structure. He said that he has no objection to the request.

Mr. Virr reviewed the conditions for the Board.

Mr. Dimmock questioned how a restrictive covenant could be made as they become null and void after 30 years.

Ms. Cormier motioned on case #09-120, Beaumont & Campbell, Professional Association, Owner: Luc L'Etoile, to Grant a Variance to terms of Article VI, Section 165-46A, to allow a basement apartment in an existing duplex structure at 99 Chester Road, parcel ID 12019-001, MDR District as presented with the following conditions:

- 1. Subject to Fire department inspections and approvals.**
- 2. Restrictive covenants to be placed on property limiting the use of the basement apartment for handicapped or over 55 years of age residents only. Said restrictive covenants to be reviewed by the town's attorney with the cost of the review to be paid by the applicant.**
- 3. Subject to recovery of any sewer hookup fees not paid for the basement apartment.**

Seconded by Mr. Webb.

Vote:

Ms. Cormier: Yes. Believe it meets the criteria.

Mr. Webb: Yes. Meets the criteria and there is no harm to the neighborhood.

Mr. DeBonis: Yes. MDR zone states can have accessory units.

Mr. Dimmock: Yes.

Mr. Virr: Yes. Property is what it is and that the owners are trying to correct the situation.

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. Osborn would sit for the following case.

09-121 Kristin McGarrell

Exception as provided in Article VI, Section 165-47A.1, to operate a Licensed Child Daycare from residence at 8 Twin Brook Drive, parcel ID 01006-010, LMDR DISTRICT.

Kristin McGarrell, owner, read her application for the Board.

Mr. Virr asked if there were set hours of operation. Ms. McGarrell said yes that she would like 6:30 am to 6:00 pm Monday – Friday and no weekends.

Mr. Virr said that there was no sign requested that if later decided wished to have a sign that she would need to come back to the Board to modify the request. Ms. McGarrell said that she wished to be allowed a sign.

Mr. Virr asked if there was ample turn around in the driveway. Ms. McGarrell said yes.

Mr. Virr asked how many children were being requested. Ms. McGarrell said that she was seeking 6.

Mr. Virr asked if that included her own. Ms. McGarrell said yes.

There was some discussion with regard to the article and sections.

Opposed

There were no abutters present.

Favor

There were no abutters present.

Code Enforcement

Mr. Mackey said that the applicant's request is for an exception to allow the operation of a family day care from the residence. As a single provider, the applicant will be allowed up to six full time and three after school children. A minimum of 35 square feet per child must be provided inside the dwelling. If approved, local health, zoning, and fire approvals must be granted prior to State licensing. A review of the property deed does not indicate any restrictive covenants. There are pictures in the file for the Board's review.

Mr. Osborn asked if they were planning on utilizing the fenced area in the rear yard. Ms. McGarrell said yes.

Mr. Osborn said that they might want to check for dead trees in the area and have them removed. Ms. McGarrell said that there are some that are not on her property and asked how would she have the neighbors remove them.

Mr. Virr motioned to go into deliberative session.

Seconded by Mr. Dimmock.

Deliberative Session

Mr. Virr said that the request was standard and reviewed the criteria for the Board.

Mr. Virr motioned on case #09-121, Kristin McGarrell, to Grant Exception as provided in Article VI, Section 165-47A.1, to operate a Licensed Child Daycare from residence at 8 Twin Brook Drive, parcel ID 01006-010, LMDR DISTRICT as presented with the following conditions:

- 1. Hours of operation 6:30 am – 6:00 pm Monday – Friday**
- 2. Subject to all State & Town permits and inspections.**
- 3. Sign not to exceed 3 square feet and not internally illuminated.**
- 4. No non-resident employees.**

Seconded by Mr. Dimmock.

Vote:

Mr. Dimmock:	Yes.
Mr. Osborn:	Yes.
Mr. Webb:	Yes.
Ms. Cormier:	Yes. Applicant meets the criteria.
Mr. Virr:	Yes. Meets all the requirements of 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.

Approval of Minutes

Ms. Cormier motioned to approve the minutes of October 1, 2009 as amended.

Seconded by Mr. Osborn.

Vote: Unanimous.

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

Ms. Cormier motioned to approve the minutes of October 15, 2009 as amended.

Seconded by Mr. DeBonis.

Vote: Unanimous.

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

Adjourn

Motion to adjourn by Ms. Cormier.

Seconded by Mr. Dimmock.

Vote: Unanimous.

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

Adjourn at 8:59 pm

Minutes transcribed by:
Ginny Rioux
Recording Clerk

Approval of Minutes January 7, 2009

Mr. Dimmock motioned to approve the minutes of November 19, 2009 as written.

Seconded by Mr. Thompson.

Vote: Unanimous.

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