

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
April 21, 2011

Members Present

Allan Virr, Chairman
David Thompson, Vice Chairman
Albert Dimmock, Secretary
James Webb
Ernest Osborn

Members Absent

Alternates Present

John DeBonis
Betsy Burtis
Lynn Perkins
Donald Burgess

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.

Election of Officers

Position of Chairman

Mr. Thompson nominated Mr. Virr for the position of Chairman.
Seconded by Mr. Osborn.

Vote: Unanimous
Mr. Dimmock, Mr. Webb, Mr. Osborn, Mr. Thompson

Position of Vice Chairman

Mr. Virr nominated Mr. Thompson for the position of Vice Chairman.
Seconded by Mr. Osborn.

Vote: Unanimous
Mr. Dimmock, Mr. Webb, Mr. Osborn, Mr. Virr

Position of Secretary

Mr. Webb nominated Mr. Dimmock for the position of Secretary.
Seconded by Mr. Thompson.

Vote: Unanimous
Mr. Webb, Mr. Osborn, Mr. Thompson, Mr. Virr

It was noted for the record that Mr. Dimmock recused himself from the following case and Mr. DeBonis was appointed to sit for the following case.

11-103 Janet Fairbanks

Administrative Appeal of the decision of the Code Enforcement Director that Zoning Board approval is not required for two businesses being operated at 18 Worthley Road, Parcel ID 12009.

Janet Fairbanks, applicant, asked with regard to RSA 673:14 of disqualification of a member with regard to participation of a member if they are recused.

There was some discussion with regard to recuse and stepping down of a member.

Mrs. Fairbanks read the letter of explanation for the Board.

Mr. Thompson asked if Mrs. Fairbanks could explain how she was an aggrieved party in this matter. Mrs. Fairbanks said that she was not an aggrieved person but in reviewing cases that have come before the board in the past, she was seeking more of a consistency for the zoning laws which are currently in effect and if that makes her an aggrieved person then she was aggrieved person.

Mr. Thompson asked if she could explain where she lived in adjacent to 18 Worthley Road. Mrs. Fairbanks said that she lived on the other side of Town and Mr. Weatherbee lives on the other side.

Mr. Thompson asked if Mrs. Fairbanks could explain if she was injured by what is being conducted property in question. Mrs. Fairbanks said that she was not injured but was here on behalf of a constituent that she is following through on.

Mr. Thompson asked if she was here as a counselor or private citizen. Mrs. Fairbanks said that she is a Counselor 24 hours a day seven days a week and was asked by a constituent but had paid for the application out of her own pocket.

Mr. Virr asked if 18 Worthley Road had any effect on her personally. Mrs. Fairbanks said that it does not affect her personally but there are zoning laws that are in place and that she did have five cases of previous cases that had been before the Board for special exceptions and provided the Board with copies. She said that she was looking for some sort of consistency.

Mr. Webb asked if Mr. Mackey had been consulted in this matter showing the State of New Hampshire business information. Mrs. Fairbanks said that she had spoken to Mr. Mackey when she had submitted the case and that the State of New Hampshire business filings were included at that time.

Mr. Virr said that he did remember the cases that were just presented to the Board and that these are cases that Mr. Mackey made a discretionary decision and sent before the Board. The Board does not see any cases that Mr. Mackey does not send to them as he makes the discretionary decision not to require a special expectation. The Board does not see his discretionary decisions as they do not come before the Board.

Mrs. Fairbanks said that what is before you is 5 home based businesses that are nothing more than a computer and a desk and in looking for consistency how is it chosen which businesses are chosen to come before the Zoning Board for a special exception.

Mr. Thompson said that it is a discretionary decision that is made by Mr. Mackey by the powers that were granted to him when he was hired by Town Council.

Mr. Osborn said that most of the cases were of automotive related businesses as they require State licensing and that they are required approval from the Zoning Board so they can apply for their licenses through the State and most of them do not do anything with the exception but to be able to obtain a State license and purchase autos at auction.

Mrs. Fairbanks said that if they are only selling the cars on the internet and utilizing a desk and no cars on the property what made them require Board approval.

Mr. Thompson said that the State of New Hampshire requires that they have the approval from the Zoning Board before they are issued a State license.

Mr. Virr said that the Boards question is clear that every request that comes before us is deliberated and a decision is made and again if Mr. Mackey has made an administrative decision based on his discretion we would not see that and would not know if someone has a telephone and a computer and conducts a business.

Mrs. Fairbanks said that you have a right to appeal his decision and have the right to hear the appeal of his decision as I have the right to appeal it. In going forward if there is a gray matter in the ordinance as they currently stand that the Board have workshops to clarify and make it more concise of what is required and by whom and make it across the board if anything comes out of this.

Mr. Virr said that he agreed with that statement and would be good practice. He said that the Board needed to go back to the issue and go back and see if this meets the definition of an aggrieved person as the NH Supreme Court has drawn a very fine line of who qualifies to file an appeal. Mr. Virr said that this does not fit that definition as you have to be an aggrieved person.

Mrs. Fairbanks said that according to RSA 674:33 – Powers of the Zoning Board, states that the Zoning Board of Adjustment has the power to a. hear and decide if it is alleged there is error in any order, requirement, decision, or determination made by an

administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16.

Mr. Thompson RSA 676:5 II.b that a discretionary decision of whether or not to enforce the ordinance is not appealable to the Zoning Board of Adjustment.

Mrs. Fairbanks asked which one did one go by.

Mr. Thompson said exactly.

Mr. DeBonis said that if the applicant was directly an aggrieved party then would have a basis for an appeal but has stated by the applicant that they are not aggrieved. He said that the previous cases required State licensing and that Mr. Mackey was hired based on his knowledge as a Code Enforcement Officer so he did not see a direct grievance.

Mr. Virr read Goldstein vs. Bedford for the Board and said that the issue before the Board is that if the applicant has to have the standing for an appeal and the Board has to decide if the applicant has standing to file an appeal

Mr. Thompson said that this is nothing to who has a business or doesn't have a business that you are appealing the Code Enforcement Decision is all we want to hear.

Mrs. Fairbanks said that according to RSA 674:33 that she has a right to appeal.

Mr. Virr said that Mrs. Fairbanks has a right to appeal but the question of standing was a different matter.

Code Enforcement

Mr. Mackey said that this case involves an appeal of my decision not to require Zoning Board approval for the owners of 18 Worthley Road regarding 2 "businesses" being operated from the property. He said that he was requested by the applicant to investigate the matter and was furnished with copies of website and other information for the property. This is the same material contained in your packets. After reviewing this material, the websites for both businesses and discussing the issue with the owner, he had determined that Zoning Board approval was not required at this time. This was primarily due to assertions by the owner that no outward signs of business activity (i.e. non-resident employees, customers to the premises, etc.) was occurring. He said that he routinely receive inquires as to whether Zoning Board approval is required for internet based type businesses where the "business" consists mainly of a computer and telephone and subsequently no abutters would be aware of any activity taking place. I typically have not required that these types of businesses apply to the Board for a Special Exception. The Board may wish to review the attached document regarding "Standing" to appeal an administrative decision. There are pictures of 18 Worthley Road in the file for review by the Board.

Board Questions

Mr. Thompson asked how the Board could regulate a computer/telephone business if it was not in the Town Zoning Ordinance. Mr. Mackey said that he agreed with Mrs. Fairbanks that the Zoning Ordinance may need to be revisited and reviewed.

Mr. Virr said that getting back to the matter of two businesses being operated and documentation dating back to 2005 from the property that in reviewing the information provided that LLC's are very broad as they could have more than one actual profession assigned to them.

Mr. Mackey said that the LLC on a form is a type of licensing that he tends to look at what the type of businesses the applicant was performing.

Mr. Osborn said that some people operate from a post office and you would never know that there was a business at the residence.

Mr. Thompson asked if there was anything that the applicant would like to add.

Mrs. Fairbanks said that there were 2 businesses being conducted from the home and if understand that an LLC can be an umbrella for multiple businesses but one is a website design and the other one is a silver smith and that according to the zoning ordinance that special exception uses have a list of uses. Mrs. Fairbanks read the list of approved uses for the Board and said that it was a gray matter and felt that it needed to be reviewed.

Mr. Burgess said that RSA 165:46 and the LLC can be coupled with several licenses and read RSA 165:46 for the Board. He said that he believes that these people would have people coming to these people would be coming to his door and from what he can see here is that web business would not have to people coming to his home.

Mr. Webb said that there was a computer based business being operated in his neighborhood and does have UPS come several times a day.

Mr. Virr said that there was a retired couple in his neighborhood that have UPS deliveries several times a week but they were not operating a business.

Mrs. Burtis said that in 2008 a case of Serge Siny which appears to be a similar case that the Board reviewed.

Mr. Virr said that individual case came before the Board due to a complaint of tractor trailers being backed into a residential neighborhood and was sent to the Board due to a complaint and that he did not feel the need to discuss other cases.

Mr. Virr motioned to go into deliberative session.

Seconded by Mr. Thompson.

Vote: Unanimous.

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

Mrs. Burtis asked for point of order. She asked if the Board should be hearing from anyone that is in favor or opposed of the request.

Mr. Virr said that this was an appellant's appeal and to the issue of the Code Enforcement Officers discretionary issue and did not require that type of order.

Deliberative Session

Mr. Thompson said that according to RSA 676:5 requires standing that the applicant be aggrieved or have standing as and abutter that he was not hearing that the applicant has standing or was an aggrieved party in the matter so he did not feel that the appeal could be approved by statue as there was no documentation that the appellant has standing. He said that he had spoken to people at the local government center and received advice from Boutin & Alteri that the applicant would have to be a direct abutter or an aggrieved party.

Mr. Virr said that one of the tests of who is an aggrieved party is proximity to the property which can be an abutter or non-abutter but Mrs. Fairbanks lives on the other side of town. The question of whether she is injured by Mr. Mackey's decision, she has made it clear that she was not injured by the activity and has stated that she was not aggrieved party. He said that this appeal cannot proceed and must be denied as the appellant does not have standing.

Mr. Webb said that the applicant stated that they were not an aggrieved party and that he did believe that the zoning ordinance is not the issue at this time. Mr. Webb said that Mrs. Fairbanks said that she was not aggrieved so according to RSA 676:5 the applicant has not proven a case.

Mr. Virr said that there were a lot of various home businesses out there such as EBay buying and selling things, there are Tupperware, Avon, Pampered Chef, toy parties, etc. that sell items. He said that the list goes on and on and that there are also people that are required by their employer to have a website.

Mr. Virr said that he would entertain a motion.

Mr. Virr motioned to come out of deliberative session.

Seconded by Mr. Thompson.

Vote: Unanimous.

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

Mr. DeBonis said that for the record that as stated Mrs. Fairbanks stated she was not directly affected by this but by direction of an abutter or someone on the same road would be, he did not see the validity of the appeal.

Mr. Thompson motioned on case #11-103, Janet Fairbanks, Administrative Appeal of the decision of the Code Enforcement Director that Zoning Board approval is not

required for two businesses being operated at 18 Worthley Road, Parcel ID 12009, as presented.

Seconded by Mr. Osborn.

Mr. Virr said that a yes vote grants the appeal and a no vote denies the appeal.

Vote:

- Mr. DeBonis:** No. For the reasons as stated in deliberative session as there is no direct grievance for appeal.
- Mr. Webb:** No. Reasons that the applicant has stated that they are not directly aggrieved.
- Mr. Thompson:** No. Believe that the applicant has not shown standing as an aggrieved person.
- Mr. Osborn:** No. Read court decisions and realize that the applicant is not aggrieved as an abutter in that capacity.
- Mr. Virr:** No. The applicant has not met the test as an aggrieved person to file an appeal due to proximity and the fact that injury has not occurred to any extent and that the applicant stated that they were not aggrieved. With that being stated to the Board the applicant did not have standing so then the appeal has to be denied.

The application was Denied by a vote of 0-5-0. Recourse would be to appeal to Superior Court.

Mrs. Fairbanks said that regarding the issues that were brought before the Board this evening that she hoped that there would be meetings of the Board to revisit the ordinance. She said that there needs to be clarity and consistency across the Board.

Mr. Thompson said that he agreed but that the Planning Board makes the decisions and brings them to the Town Council.

Mrs. Fairbanks said that with technology today and understand that there may be businesses out there that need to be reviewed.

There was some discussion with regarding clarity and consistency.

The Board took a 5 minute recess. Reconvened at 7:53pm

11-101 Daniel Moge

Rehearing Request of case #11-101, Special Exception to the terms of Article VI, Section 165-47A.1 to operate an automotive repair garage at the residence, 9R Lesley Circle, Parcel 03103-033R, Zoned LMDR

The Board reviewed the information supplied for request.

Mr. Virr said that the applicant has supplied a petition that was signed by 22 neighbors in favor that was not supplied at the original meeting and asked if the Board felt that it was sufficient grounds to revisit the case.

Mr. Thompson said that the size difference was also a factor.

Mr. Virr said that the Board did receive an anonymous letter stating that the Board did the right thing in the original denial and now presented with 22 people stating that they are alright with the proposal and questioned if they made the right decision in denial the first time.

Mr. Osborn said that he realized that at the time he pointed out that no one was present to make opposition and now realize that sometimes neighbors do not like to make confrontation and upset their neighbor with disapproval.

Mrs. Burtis said that the letter did state that they would be uncomfortable at the meeting and that they did not want to hurt their feelings and under the same reasoning they could have signed this as they did not want to say no to him.

There was discussion regarding original reasons for denial.

Mr. Virr asked if a building permit was applied for if there would be any reasons for denial. Mr. Mackey said that he was unaware of any verbiage to deny as long as it met the requirements of the setbacks.

Mr. Webb said that he was against the request during the first meeting as the area was very congested and had a shared driveway and did not feel it would be ideal for an auto repair shop and it would be better suited in a commercial type area.

Mr. Burgess said that the area was totally residential and was not Route 102 or the By-Pass and that they should seek a more business use area and that there may also be environmental concerns.

Mr. Dimmock said that he felt that only the original members should be reviewing the case.

Mr. Virr said that all members were here and that the alternates would not be included in the vote.

Mr. Thompson said he would step down if the Board wished. Mr. Virr said that he wished he would sit in the absence of Ms. Cormier.

Mr. Thompson motioned to grant a rehearing to case 11-101, Daniel Moge, Special Exception to the terms of Article VI, Section 165-47A.1 to operate an automotive repair garage at the residence, 9R Lesley Circle, Parcel 03103-033R, Zoned LMDR.

Seconded by Mr. Osborn.

Vote:

Mr. Dimmock: Yes.
Mr. Osborn: Yes.
Mr. Thompson: Yes.
Mr. Webb: No. Do not believe new evidence provided and confirms the previous decision as it shows that there is all duplexes and do not feel that the Board made any errors the first time.
Mr. Virr: No. For the same reason as stated by Mr. Webb and not convinced that type of business should be located in a residential area.

The request for rehearing was granted 3-2-0.

Correspondence

Annual Spring Conference June 11, 2011

Other Business

Mr. Virr wished to thank the Board for voting him as chairman.

Adjourn

Motion to adjourn by Mr. Thompson.

Seconded by Mr. Osborn.

Vote: Unanimous.

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

Adjourn at 8:25 pm

Minutes transcribed by:
Ginny Rioux
Recording Clerk

Approval of Minutes on May 5, 2011

Mr. Osborn motioned to approve the minutes of April 21, 2011 as amended.

Seconded by Mr. Webb.

Vote: Unanimous.

Mr. Burgess, Mr. Perkins, Mr. Webb, Mr. Osborn, Mr. Dimmock, Mr. Virr