

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: JULY 15, 2009

CASE NO.: 7/15/2009-3

APPLICANT: BERNARD FILION
5 GREELEY ROAD
LONDONDERRY, NH 03053

LOCATION: 4 OLD NASHUA ROAD, 3-131, C-I

BOARD MEMBERS PRESENT: VICKI KEENAN, CHAIR
YVES STEGER, VOTING MEMBER
JIM SMITH, VOTING MEMBER (RECUSED)
MICHAEL GALLAGHER, VOTING ALTERNATE
LARRY O'SULLIVAN, CLERK

ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/
ZONING OFFICER

REQUEST: USE VARIANCE TO ALLOW A MOTOR VEHICLE
MAINTENANCE AND REPAIR USE IN A COMMERCIAL-I
ZONE WHERE PROHIBITED BY SECTION 2.4.1.2.1.2

PRESENTATION: Case No. 7/15/2009-3 was read into the record with eighteen previous cases listed. Jim Smith asked for the restrictions applied to Case No. 12/17/2007-5. Larry O'Sullivan finished reading all previous cases into the record before reading said restrictions.

VICKI KEENAN: Do we want to hear the restrictions now or later on that 2/17/2007 [sic]? [actual case date: 12/19/2007-5].

LARRY O'SULLIVAN: That's where we figured we were gonna be. Mike Brown made a motion "to grant the Use Variance request for Case No. 12/19/2007-5 in that the applicant met the five points of law for a use variance per the application that was presented at the December 19, 2007 meeting and that the approval of the use variance is based on the following two (2) conditions: [1] that the variance will only be valid upon [the] approval of [sic] the Londonderry Planning Board of an approved signed site plan and [2] that the use variance be valid for the use that was proposed at the December 19, 2007 meeting as part of this application and subsequently in the approved site plan and should a change of use be proposed in the future, this use variance will no longer be valid" [see decision page, Case No. 12/19/2007-5]. Yves

44 seconded and it was approved, five, zero (5-0) with the restrictions. I think that's what you
45 were driving at, that one.

46

47 VICKI KEENAN: Mm-hmm. That's exactly it.

48

49 YVES STEGER: Mm-hmm.

50

51 LARRY O'SULLIVAN: Okay.

52

53 VICKI KEENAN: Yup.

54

55 LARRY O'SULLIVAN: Now, why this is in front of us, I'd like to hear Richard, if you don't
56 mind, Madam Chairman...

57

58 VICKI KEENAN: No. I would like to hear that.

59

60 JIM SMITH: Okay, before you go any further, I'd like to step down on this one because I've
61 had so much history with this particular location over the years.

62

63 LARRY O'SULLIVAN: Yup.

64

65 JIM SMITH: So I just don't feel I can listen to it with a completely open mind.

66

67 VICKI KEENAN: Understood. Do we have to vote on...?

68

69 LARRY O'SULLIVAN: Now you have to give an option.

70

71 YVES STEGER: So we are only four (4) now.

72

73 TONY MARCOTTE: I'll proceed with...

74

75 LARRY O'SULLIVAN: Now you have to give an option.

76

77 VICKI KEENAN: Right, so I just have to state it for the record. So now, there are four (4)
78 members. You need three (3) concurring votes in order for it to pass, so you have a choice to
79 either continue the hearing or to proceed with four (4) voting members.

80

81 TONY MARCOTTE: I'll proceed.

82

83 VICKI KEENAN: Okay. And then, Richard, do you want to provide some commentary on
84 this?

85

86 RICHARD CANUEL: You know, I...

87

88 VICKI KEENAN: Before we hear the case?
89
90 RICHARD CANUEL: Yeah. You know, when I saw this application come in, I was sort of on
91 the fence on whether we should allow the application to...even allow the variance request,
92 simply because of the restrictions based on that last case you just read. After consideration and
93 after looking at that case, the restrictions of that case said that that variance would be negated if
94 a change of use were to occur on the property.
95
96 LARRY O'SULLIVAN: Mm-hmm.
97
98 RICHARD CANUEL: A change of use is only going to occur if the Zoning Board grants the
99 variance.
100
101 YVES STEGER: Mm-hmm.
102
103 RICHARD CANUEL: So right now, we don't have a change of use, so that's why I was on the
104 fence and I struggled with that one, so I figured the best venue would be right here before this
105 Board to take a look at that, you know, in an open, public session like this, rather than just
106 outright deny the applicant's...you know, apply for the variance.
107
108 LARRY O'SULLIVAN: What we're talking about is waiving the requirements of the Route 102
109 Corridor Performance Overlay District. If they've been waived and there has been construction
110 or anything that has been done to the lot that was allowed by this variance, that means it goes
111 away by hearing this variance tonight.
112
113 RICHARD CANUEL: It goes away if you grant the variance. You don't have any change of
114 use if you don't grant the change of use variance. You know, there's no change of use occurring
115 now. See, that's why I struggled with this one.
116
117 VICKI KEENAN: So we would grant a new variance, which would, in essence, remove the
118 previous use variance.
119
120 RICHARD CANUEL: Would negate the previous variance, that's right.
121
122 VICKI KEENAN: So they would no longer...
123
124 LARRY O'SULLIVAN: Now they're no longer in...
125
126 VICKI KEENAN: Right.
127
128 LARRY O'SULLIVAN: They still have to have the Performance Overlay District. They are still
129 in the Performance Overlay District.
130
131 RICHARD CANUEL: That's right. That's right. Then the restrictions of the Performance

132 Overlay District wouldn't come back into play. The restrictions of the underlying district would
133 come back into play. That's right.
134
135 YVES STEGER: So, essentially, any approval that we would make would make the place non-
136 compliant per our restrictions.
137
138 RICHARD CANUEL: It's existing, nonconforming now.
139
140 LARRY O'SULLIVAN: Did we get a plot plan and the drawings that we were looking for?
141
142 VICKI KEENAN: The last time around.
143
144 YVES STEGER: The last time around. Oh, yeah. There was plenty. I remember that case.
145
146 VICKI KEENAN: Yeah, I do, too.
147
148 LARRY O'SULLIVAN: Are they here on the system?
149
150 VICKI KEENAN: There is a plan, a plot plan. Actually...
151
152 TONY MARCOTTE: Tony Marcotte. I submitted a plan that was the site plan that was
153 required as part of the variance but I wasn't aware of the wording of that restriction until you
154 just said it. The last phrase.
155
156 VICKI KEENAN: Tony, can you just speak to who you work for and...?
157
158 TONY MARCOTTE: Yeah, I work for MDP Development and I'm here because I used to work
159 for Bedford Design as an engineer and I've represented Bob Filion throughout this process, so, if
160 there are any questions to the history of what went on over the past four (4) years, at least I can
161 answer them. So he asked me to come and represent him, so I agreed since I did have
162 knowledge of the process to do it, knowing that there were eighteen (18) previous cases, it's
163 probably not my favorite case to come and do but as a favor to Bob, having done the previous
164 cases, I agreed to come here this evening.
165
166 VICKI KEENAN: So can you give us, spend some time giving us some background and then
167 sort of walk through the application.
168
169 TONY MARCOTTE: Sure.
170
171 VICKI KEENAN: Okay.
172
173 TONY MARCOTTE: One of those, the number seventeen (17), was when we were here for the
174 vehicle/truck repair and one of the questions was all of the uses on the site. So, there was a
175 question of what existed at the time, so we prepared a plan but also described the uses at the

176 variance hearing of the overlay district. At that time, Mr. Filion didn't want to have vehicle
177 repair. He was going to do it himself, he decided he didn't want to do it, so we didn't continue
178 that on.
179
180 YVES STEGER: Mm-hmm.
181
182 TONY MARCOTTE: Now he has somebody that wants to rent two (2) twenty (20) by forty (40)
183 spaces that we thought was gonna be used for warehouse space for Northeast Doors and they
184 don't need the space, so now he wants to lease it as vehicle repair, so, it's basically coming back
185 for that same case with the information.
186
187 VICKI KEENAN: So the truck repair would...you're doing that now and that would remain?
188
189 TONY MARCOTTE: No, that's the proposed use that we're coming here to be approved.
190
191 YVES STEGER: Mm-hmm.
192
193 LARRY O'SULLIVAN: There's no repairs done.
194
195 VICKI KEENAN: Motor vehicle maintenance and repair?
196
197 YVES STEGER: Last time it was continued and it was never approved.
198
199 LARRY O'SULLIVAN: That's right, there was no...
200
201 VICKI KEENAN: Oh, got it. Okay, that's right.
202
203 YVES STEGER: Okay?
204
205 VICKI KEENAN: Alright, thank you.
206
207 TONY MARCOTTE: Right and then he...
208
209 YVES STEGER: That one I remember very, very clearly.
210
211 VICKI KEENAN: That's right.
212
213 TONY MARCOTTE: Because there was a question on what actually existed on site and what
214 type of businesses were there.
215
216 YVES STEGER: Mm-hmm.
217
218 TONY MARCOTTE: So we brought that information to the next...the overlay district but we
219 didn't bring the vehicle repair, which I guess we should have, 'cause now he wants to do it. But

220 as I said, I didn't realize the wording of the variance until you just read it, saying should there
221 be any other proposed change of use, the variance goes away, so I don't know what to do 'cause
222 there's an approved site plan for what the variance was granted, so...

223
224 YVES STEGER: Mm-hmm.

225
226 LARRY O'SULLIVAN: I think it might be a good idea to ask for a continuance. That's an
227 opinion.

228
229 VICKI KEENAN: I would agree with you.

230
231 YVES STEGER: Yeah.

232
233 TONY MARCOTTE: What would I do in the meantime? What...how...?

234
235 LARRY O'SULLIVAN: What would you need to get? What would you need to bring with you?

236
237 TONY MARCOTTE: Yeah.

238
239 VICKI KEENAN: I think you need to go back and sort of noodle the idea of whether or not you
240 wanna continue with this application because what you just said, how you've got the site plan
241 approval...

242
243 TONY MARCOTTE: Yeah. Does it make the site plan...

244
245 YVES STEGER: Would just disappear.

246
247 LARRY O'SULLIVAN: I think I would have some time with Richard in order to...

248
249 YVES STEGER: Immediately.

250
251 LARRY O'SULLIVAN: ...get it squared away. There's more to the cost of this, based on the
252 restrictions that were placed two (2) years ago.

253
254 TONY MARCOTTE: Right. Yup.

255
256 LARRY O'SULLIVAN: Then I think first...

257
258 TONY MARCOTTE: Until you read it, I read through the file but that restriction didn't stand
259 out to me as...

260
261 YVES STEGER: Mm-hmm.

262
263 TONY MARCOTTE: ...only we had been here before with the truck repair...

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LARRY O'SULLIVAN: It gets confusing, yeah.

YVES STEGER: Mm-hmm.

VICKI KEENAN: Mm-hmm.

RICHARD CANUEL: Let me add, if I could, you know, before we require the applicant to wait and come back again for another meeting, that vehicle repair existed on that property when the Wallboard Supply Company was there as an accessory use to repair their own vehicles. That has existed as an existing, nonconforming use and was allowed to continue as long as they made no changes. During the period where it was decided whether they wanted to continue that use there and the continuance of the variance, that use has been discontinued. If we look at the requirements in our zoning ordinance, not only in the Table of Uses is vehicle repair not permitted in the zoning district, in that C-I, but if you look at the specific provisions in the ordinance under the C-I zoning district, motor vehicle repair is strictly a prohibited use. If you look onward to the Performance Overlay District requirements, which this property is also subject to, one of the prohibited uses is motor vehicle repair. That is a type of use that is not compatible with the intent of the Performance Overlay District. I would not recommend that the Board grant a variance for this particular use because that is something that is definitely contrary to the spirit of the ordinance. You know, as the Board knows, the intent of granting a variance is still to remain within the confines of the ordinance and the intent of the Master Plan. The Master Plan, you know, the intent is to reduce the impact of those type of uses in the overlay districts. Motor vehicle repair is an intensive use that's strictly prohibited in that district and it's prohibited for a specific reason. So, regardless of if we consider all the other previous variances or what occurred with the approval of the site plan, I can't recommend that the Board grant a variance for this particular use simply because of those restrictions that are specifically stated in the ordinance.

LARRY O'SULLIVAN: We understand that, too, Richard. My reason for my questions at all have been so that we get up to date with what is happening on this property now.

YVES STEGER: Well...

LARRY O'SULLIVAN: 'Cause I think that's one of the stakes in the ground we were looking for.

YVES STEGER: We could make a decision on this case based on the five (5) points of law for use.

LARRY O'SULLIVAN: Absolutely.

YVES STEGER: If he meets everything...

307
308 LARRY O'SULLIVAN: They're not prepared for that, though.
309
310 VICKI KEENAN: Well, are you prepared to continue with the case and present it based on the
311 five (5) points of law or...?
312
313 TONY MARCOTTE: I guess I just need to answer the question...
314
315 VICKI KEENAN: Yeah.
316
317 TONY MARCOTTE: ...the site plan has been approved but that the site improvements have not
318 been completed so where...the question is, if you approve it, one of the numbers said that they
319 site plan is now null and void.
320
321 LARRY O'SULLIVAN: Mm-hmm.
322
323 TONY MARCOTTE: So...
324
325 LARRY O'SULLIVAN: You lose the variance that you had last time.
326
327 YVES STEGER: Yup.
328
329 LARRY O'SULLIVAN: Yes.
330
331 TONY MARCOTTE: Even though it's already approved by the Planning Board...
332
333 LARRY O'SULLIVAN: Correct.
334
335 TONY MARCOTTE: ...you're saying we couldn't do it.
336
337 LARRY O'SULLIVAN: Absolutely.
338
339 RICHARD CANUEL: Well, I don't think it's the site plan that's null and void. It's the waiver
340 of the requirements for the overlay district...
341
342 LARRY O'SULLIVAN: The POD, right.
343
344 VICKI KEENAN: Right.
345
346 YVES STEGER: Yup.
347
348 RICHARD CANUEL: ...and requirements for the underlying district.
349
350 LARRY O'SULLIVAN: Mm-hmm.

351
352 YVES STEGER: But it comes to the same results. The final results are the same.
353
354 RICHARD CANUEL: Right.
355
356 TONY MARCOTTE: Based on that, I don't know how to rectify that.
357
358 LARRY O'SULLIVAN: So, the cost...you have to justify the cost of that in your own mind. Did
359 you want to redo that or just present anyway and take your chances?
360
361 TONY MARCOTTE: No, I'd like to continue it and then if we decide to not proceed, I'll say by
362 letter that we withdraw our application next month but given the choice of what's there, it's not
363 worthwhile for the two (2) bay units used to come under the requirements of the overlay
364 district. I think that outweighs the cost benefit of renting those two (2) bays. But I'd have to
365 speak to the owner to actually say [inaudible].
366
367 YVES STEGER: Mm-hmm.
368
369 LARRY O'SULLIVAN: Did you want to hear from the public? In case there's anybody here...?
370
371 VICKI KEENAN: Yeah, is there...why don't we open it up to the public. Thank you. Is there
372 anyone who wants to speak in favor of this application? Anyone who is opposed that would
373 like to come and ask questions? And state your name and address for the record, please.
374
375 DEBBIE MASON: Yup. Debbie Mason, 8 Old Nashua Road. That was one of my questions,
376 was the site plan has been signed but no site improvements that I have seen have been
377 implemented. So that was my concern.
378
379 VICKI KEENAN: Okay.
380
381 DEBBIE MASON: So...and I was obviously against the repair shop, even though I can hear
382 some repair going on. So...
383
384 LARRY O'SULLIVAN: Yeah, but that's an enforcement thing. We don't get involved with that.
385
386 DEBBIE MASON: Exactly. And I've had a hard time with enforcement, so...I've called. I've
387 called and basically the police have told me they need direction from the Planning Board or this
388 Board of what to do when they're non-compliant. And some of that might have been before the
389 actual plan was signed off. But now that I know...I don't think I've called since that plan was
390 approved. But now that I have it in my hand, I'll be able to go, "Well, here's the signed plan." I
391 can get a copy of it and show it to them.
392
393 LARRY O'SULLIVAN: And Richard, for...what was it, Donna? What was your name?
394

395 DEBBIE MASON: Debbie Mason.
396
397 LARRY O'SULLIVAN: Debbie. For her information, should she be calling the police or should
398 she be calling your office or...?
399
400 RICHARD CANUEL: She should be calling our office. Yes.
401
402 LARRY O'SULLIVAN: Richard.
403
404 DEBBIE MASON: Okay.
405
406 RICHARD CANUEL: And our former...
407
408 LARRY O'SULLIVAN: Frank?
409
410 RICHARD CANUEL: ...Zoning Enforcement Officer was working on an enforcement action
411 on the property owner there to comply with the site plan, so...
412
413 DEBBIE MASON: Okay.
414
415 LARRY O'SULLIVAN: Former? I missed something there.
416
417 RICHARD CANUEL: You didn't know that Frank was discharged from his position?
418
419 DEBBIE MASON: I knew that.
420
421 LARRY O'SULLIVAN: I missed that.
422
423 RICHARD CANUEL: Oh, okay.
424
425 DEBBIE MASON: I knew that and that's why I called the police and it was also off-hours. It
426 was in the middle of the night, there was a truck running, so that's... but now that I
427 know...And I also...
428
429 RICHARD CANUEL: Yeah, well, that's a nuisance issue that the police should address
430 anyway, but...
431
432 DEBBIE MASON: And I also did something online, too, on that a while ago. We're talking a
433 while ago now, but...
434
435 RICHARD CANUEL: Okay.
436
437 DEBBIE MASON: But now that I know...
438

439 LARRY O'SULLIVAN: But Richard, you do have a home phone, right, that she can call at any
440 hour of the day?
441
442 RICHARD CANUEL: No, I do not.
443
444 [laughter]
445
446 YVES STEGER: I will give you a phone number.
447
448 VICKI KEENAN: Yeah, I was just gonna say, can you...?
449
450 LARRY O'SULLIVAN: All of our phone numbers are listed.
451
452 DEBBIE MASON: Yeah... 'cause they do...
453
454 LARRY O'SULLIVAN: But the Zoning Board doesn't do enforcement.
455
456 DEBBIE MASON: ...operating hours on the site plan. It's six (6:00) to six (6:00), Monday to
457 Friday, however, they work Saturday and Sundays and it's hard to, when I have Estey Lumber
458 right across the street from them, chopping wood and they're chopping wood, it's... I feel they
459 should have put some Saturday hours on there to cover that but they didn't and... But I'll call.
460 You'll be hearing from me.
461
462 RICHARD CANUEL: Yes, please call my office.
463
464 LARRY O'SULLIVAN: Thank you, Debbie.
465
466 DEBBIE MASON: Thank you.
467
468 VICKI KEENAN: Thank you. Is there anyone else that would like to speak for or against this
469 application? Okay, with that said, why don't we bring it back to the Board and is there a motion
470 to continue the case until next month... when I'll be on vacation?
471
472 YVES STEGER: Thank you. You have already continued two (2) of them and I'm paying the
473 price for not showing up for two meetings. Actually, do we need to make a motion? Because
474 it's at the request of the applicant, so we don't even need to do a motion.
475
476 VICKI KEENAN: I think we do, don't we? Yeah, we have to continue it.
477
478 LARRY O'SULLIVAN: We have to, we've always accepted or denied motions to request.
479
480 YVES STEGER: I'll make a motion that we continue this Case 7/15/2009-3 at the request of the
481 applicant.

482
483 VICKI KEENAN: Is there a second?
484
485 MICHAEL GALLAGHER: I'll second.
486
487 VICKI KEENAN: There's a motion to continue this case at the request of the applicant and a
488 second...
489
490 LARRY O'SULLIVAN: To August?
491
492 VICKI KEENAN: ...to the August meeting. I don't know what the date is, Jaye. I don't know if
493 I need to state that. Is there any discussion? Okay, all those in favor, signify by saying 'aye.'
494
495 LARRY O'SULLIVAN: Aye.
496
497 YVES STEGER: Aye.
498
499 MICHAEL GALLAGHER: Aye.
500
501 VICKI KEENAN: Aye. Opposed? Abstentions?
502
503 TONY MARCOTTE: Thank you.
504
505 VICKI KEENAN: Thank you.
506
507 RESULT: THE MOTION TO CONTINUE CASE NO. 7/15/2009-3 WAS APPROVED, 4-0-0.
508
509 RESPECTFULLY SUBMITTED,
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511
512
513 LARRY O'SULLIVAN, CLERK
514 TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY
515
516 **APPROVED AUGUST 19, 2009** WITH A MOTION MADE BY LARRY O'SULLIVAN,
517 SECONDED BY JIM SMITH AND APPROVED 4-0-2 WITH NEIL DUNN AND MATTHEW
518 NEUMAN ABSTAINING AS THEY HAD NOT ATTENDED THE JULY 15 2009 MEETING.