

1 ZONING BOARD OF ADJUSTMENT

2 268B MAMMOTH ROAD
3 LONDONDERRY, NH 03053
4

5 DATE: NOVEMBER 18, 2009
6

7 CASE NO.: 11/18/2009-5
8

9 APPLICANT: INEZ O. PAUL REVOCABLE TRUST
10 HENRY E. PAUL, TRUSTEE
11 75 LITCHFIELD ROAD
12 LONDONDERRY, NH 03053
13

14 LOCATION: 69 LITCHFIELD ROAD, 11-89-1, AR-1
15

16 BOARD MEMBERS PRESENT: YVES STEGER, ACTING CHAIR
17 JIM SMITH, VOTING MEMBER
18 MICHAEL GALLAGHER, VOTING ALTERNATE
19 LARRY O'SULLIVAN, CLERK
20

21 ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/
22 ZONING OFFICER
23

24 REQUEST: AREA VARIANCE TO ALLOW A REDUCTION OF THE
25 CONSERVATION OVERLAY DISTRICT BUFFER
26 REQUIRED BY SECTION 2.6.3.2 AS RECOMMENDED BY
27 THE CONSERVATION COMMISSION.
28

29 PRESENTATION: Case no. 11/18/2009-5 was read into the record with no previous cases
30 listed. Clerk O'Sullivan also read Exhibit "A" into the record, a letter from the Londonderry
31 Conservation Commission.
32

33 ** [See also minutes of Case No. 11/18/2009-4 for abutting map and lot 11-89]
34

35 JIM SMITH: At this point, Richard, are you telling us that this variance is not required?
36

37 RICHARD CANUEL: Well, that's the way I looked at it. I looked at the ordinance, you know,
38 it's an existing residential property. The use is not changing. It's a use that's allowed by the
39 ordinance in the Conservation Overlay District. It does enjoy some protection by the ordinance
40 because it is an existing residential property, existing residential structure, existing residential
41 use. So, in my opinion, a variance is a moot point. But like I said, because the Conservation
42 Commission had already given a recommendation to the Planning Board and also sent a
43 recommendation to this Board, that's why we're here to hear the case. So it's up to this Board to
44 decide whether it's even necessary to have this variance and go through that process.
45

46 LARRY O'SULLIVAN: Shall we hear from Mike about this? Mr. Speltz?
47
48 RICHARD CANUEL: Sure, yeah. Absolutely.
49
50 JIM SMITH: Well, okay, I think on procedure, is it not...I may be wrong, my interpretation,
51 that the Zoning Officer's the one who has to make the decision that this is, in fact, in violation or
52 would be a violation of the zoning regulations? Not the Planning Board and not the
53 Conservation Commission?
54
55 RICHARD CANUEL: Well, in my opinion, looking at the ordinance and looking at the case, it's
56 not a violation of the ordinance.
57
58 JIM SMITH: Then, in that case, I would think it would be moot.
59
60 RICHARD CANUEL: That was my opinion as well.
61
62 JIM SMITH: Because you're the one that was...
63
64 RICHARD CANUEL: Yeah.
65
66 JIM SMITH: If they want to appeal your decision to bring it to this Board, then that would be a
67 different situation.
68
69 RICHARD CANUEL: Well, that was my opinion as well. But like I said, because the comment
70 was already out there from the Conservation Commission to the Planning Board and to this
71 Board as well, it was too late to dead end it at that point, so...
72
73 YVES STEGER: And I heard the discussion on the letter about, you know, if there was any
74 additions or so, but they would have to go to the Planning Board anyway if that was to
75 happen...
76
77 RICHARD CANUEL: Yeah.
78
79 YVES STEGER: ...in which case, they would have to ask for...
80
81 JIM SMITH: No, because under that provision, there are certain protections of those residential
82 properties and there's some ability for those to be expanded under the ordinance, the way
83 they're written.
84
85 RICHARD CANUEL: Yeah.
86
87 JIM SMITH: Is that correct?
88
89 RICHARD CANUEL: Well, if there's a reduction in the buffer to allow expansion to structures,
90 that's done by Conditional Use Permit, which is administered by the Planning Board anyway,

91 so that's not the purview of this Board in the first place. So if there's any reduction in the C.O.
92 District because of structures to be expanded, that's not for your...

93
94 YVES STEGER: That's correct.

95
96 RICHARD CANUEL: ...for you to review anyway.

97
98 LARRY O'SULLIVAN: Can we get another expert opinion from the Conservation Commission?
99

100 RICHARD CANUEL: Yeah, it's up to this Board. Yeah, I mean, Mike's right here. Sure,
101 absolutely.

102
103 LARRY O'SULLIVAN: Since he's here.

104
105 MIKE SPELTZ: The Conservation Commission's concern is that there's a line drawn on the
106 plan and you looked at the plan. Now, we can clearly agree that the existing structure, namely
107 the house, and we can probably agree that the paved portion of the driveway, if it's paved, fall
108 under...it's not in this subsection of the zoning ordinance, but a more general protection that all
109 existing uses have from changes in ordinances, that, I think, is the basis of Richard's argument.
110 And we agree. But the problem is that that line that demarcates the overlay district runs
111 entirely through the parcel, so there's more there than just a house and a driveway. And we
112 wanna define exactly where that line is. We don't want to leave it at a hundred (100) feet. We
113 don't want to say that there's forty (40) feet of Conservation Overlay District, then there's a ten
114 (10) foot driveway line that's out of the district, then there's more overlay district on the other
115 side of the driveway. So we want to be able to simply say this part of that lot, namely the
116 driveway and the lawn, are out of the overlay district. That's a variance to what the zoning
117 ordinance requires. So the argument is not over the structure...or the structures if you want to
118 count the driveway as a structure. It's the land that's in that overlay district and not a structure.
119

120 YVES STEGER: But...without the subdivision and the addition, there was a portion that was
121 part of the overlay district, correct? In that lot.

122
123 MIKE SPELTZ: Well, no, because that was an existing lot that was grandfathered.

124
125 YVES STEGER: No, no, I'm saying even though it's grandfathered, it is in the overlay district,
126 correct?

127
128 MIKE SPELTZ: Yes. Yes.

129
130 YVES STEGER: But that one is grandfathered, so the only thing we need to look at is the
131 addition, correct?

132
133 MIKE SPELTZ: You mean the subdivision.

134
135 YVES STEGER: The subdivision, yes.

136
137 MIKE SPELTZ: Right. Once a subdivision was created, the lot lost its grandfathered status.
138 The lot did. Admittedly, the existing structures did not. Again, not because of anything in the
139 subdivision...
140
141 JIM SMITH: No...because here's where I would argue. When you read 2.6.3.6, it's entitled
142 "Pre-Existing Residential Structures, Uses, and Lots." So each one of those things is treated
143 separately.
144
145 RICHARD CANUEL: Right.
146
147 JIM SMITH: So, the driveway would be a residential use, in my mind, so that is a pre-existing
148 and enjoys the right to stay there forever. So the lot, I have to say, is changed but the other
149 things haven't changed. So when you read down here under 2.6.3.6.1.1, "The dwelling or
150 residential use lawfully existed prior to the adoption of this Section by the Town Council," so
151 those are exempt. So I would say the driveway and the house are there legally.
152
153 MIKE SPELTZ: I agree.
154
155 JIM SMITH: So why would you have to change the buffer?
156
157 TIM WININGS: I think their concern is the lawn area and how it's maintained. They don't
158 want...
159
160 JIM SMITH: But that's a residential use.
161
162 TIM WININGS: It is a residential use.
163
164 JIM SMITH: And it's in existence.
165
166 TIM WININGS: And they were willing to take that out of it, so we're just trying to get the
167 specifics and because this has not been applied before, we're trying to set a precedent here on
168 interpretation and make sure everybody's on the same page.
169
170 JIM SMITH: Richard...
171
172 YVES STEGER: So essentially your argument is that because of the subdivision, the
173 grandfathering does not exist anymore?
174
175 LARRY O'SULLIVAN: Mm-hmm.
176
177 JIM SMITH: No...
178
179 YVES STEGER: Which means...
180

181 JIM SMITH: No, it's...
182
183 LARRY O'SULLIVAN: The use itself.
184
185 JIM SMITH: The way it reads...
186
187 LARRY O'SULLIVAN: It is residential.
188
189 RICHARD CANUEL: That changes the lot but it doesn't change the use.
190
191 JIM SMITH: "Pre-Existing Residential Structures, Uses, and Lots."
192
193 YVES STEGER: Uses and lots.
194
195 JIM SMITH: So, all three of them are treated separately.
196
197 RICHARD CANUEL: Right.
198
199 YVES STEGER: Okay.
200
201 JIM SMITH: So you change the lot but still leave it as a residential use. That use hasn't
202 changed. The house hasn't changed. So those are still pre-existing, protected uses.
203
204 LARRY O'SULLIVAN: Uses.
205
206 YVES STEGER: Yeah.
207
208 LARRY O'SULLIVAN: Mm-hmm. Why would he need...I don't understand why we would
209 need a variance...
210
211 RICHARD CANUEL: That's what I'm saying. The reduction does not apply because they
212 enjoy an exemption because they're an existing use. If you read further into that section, it says
213 'the dwelling and the residential use that lawfully existed prior to the adoption of this
214 ordinance.' It's exempt. So then that buffer would not apply. So then applying for a reduction
215 in that buffer is a moot point.
216
217 YVES STEGER: And any concerns we would have about what happened to that
218 subdivision...so that additional lot would have to go in front of the Planning Board anyway if
219 there was anything because that one would not be grandfathered, so if they wanted to put a
220 structure in there...
221
222 JIM SMITH: Well, that would be a different issue.
223
224 RICHARD CANUEL: Right.
225

226 YVES STEGER: I understand.
227
228 JIM SMITH: Yeah.
229
230 YVES STEGER: I understand. I understand.
231
232 LARRY O'SULLIVAN: I think what you're looking for is you want a finding from this Board on
233 whether those uses...I'm sorry, whether those items, the use, the land, and the...what was it,
234 the...?
235
236 YVES STEGER: The lots?
237
238 LARRY O'SULLIVAN: ...the lot itself were separate items that can be grandfathered?
239
240 MIKE SPELTZ: I don't know that we have an issue over the lot itself. I think Richard just
241 summarized that. That there's definitely the lot has lost its grandfathered status and we're in
242 agreement that the clearly defined uses, and I included the house and the driveway among
243 those, there's no argument there. But there is other areas and I haven't been to the land itself to
244 exactly tell you what's there. I'm sure there's a street, there's sort of a gravel area, there's
245 probably a swale. There might be some bushes that are wild or not wild. There's some grass
246 that might be mowed or not mowed. So there's an area of ambiguity there and what I'm trying
247 to do is establish a precedent that says rather than, in the future, argue about what was an
248 existing use and how it was used and how that lawn was maintained, we just move the line, get
249 it so that we push the Conservation Overlay District back closer to the wet area and we don't
250 ever have to get into these kind of arguments. In this particular case, I'm pretty satisfied that
251 there's never gonna be a problem but we are setting a precedent of how we deal with this
252 situation of a lot that loses its grandfathered status as uses in the overlay district.
253
254 LARRY O'SULLIVAN: Well, I think we just agreed that it wouldn't lose it. That our finding
255 would be that it doesn't lose its grandfathered use.
256
257 TIM WININGS: From a practical matter, what it really means is that if you interpret it that it
258 does not need the variance and the buffer stays at one hundred (100) feet, any future additions
259 or uses that the owner wants to place within that buffer then would require additional variances
260 or approvals from Town in some form or matter.
261
262 YVES STEGER: Mm-hmm. Yeah.
263
264 LARRY O'SULLIVAN: Mm-hmm.
265
266 RICHARD CANUEL: No, it would not. I'm sorry, no. If you look at that section that we're
267 talking about under "Pre-existing Residential Structures, Uses and Lots," it says,
268 "Notwithstanding other provisions of this section, the construction of additions and extensions
269 to one and two family dwellings and accessory residential uses shall be permitted within the
270 CO District," so it's a moot point. I mean, they can put additions onto the building in the C.O.

271 District. It's protected as an existing use and existing structure by the ordinance. So it wouldn't
272 require an additional variance.
273
274 TIM WININGS: Well, say they wanted to put a swimming pool in.
275
276 RICHARD CANUEL: If that's a use that's permitted in the C.O. District, which it's not, they
277 would require a variance for something like that. But an addition to the existing residential
278 structure would not require any additional variance...
279
280 TIM WININGS: So it's a minor point but one that...
281
282 MIKE SPELTZ: Well, Richard, I'd have to disagree with you there because the "provided that"
283 says that the use "lawfully existed prior to the adoption," so, in Tim's example, if there was a
284 swimming pool there before, then, you know, I don't see that you could add one.
285
286 RICHARD CANUEL: Right.
287
288 LARRY O'SULLIVAN: I agree you couldn't add it. Not without a variance, right?
289
290 RICHARD CANUEL: Right. Yeah.
291
292 LARRY O'SULLIVAN: The swimming pool, that is.
293
294 RICHARD CANUEL: Yes. That would be a new structure, that's a structure that's not allowed
295 in the C.O. District. That would require a variance. But to put an addition to the existing
296 residence, it would not require any additional approval to do that, other than a building permit.
297
298 YVES STEGER: I'm still at a loss because you're ready to move the buffer zone and reduce it,
299 even though we could keep it where it is by just saying there is no need for a variance.
300
301 MIKE SPELTZ: Right.
302
303 YVES STEGER: And you probably would have no more protections or less protection than if
304 we did a variance. Is that correct?
305
306 MIKE SPELTZ: That's correct. But we would be very clear and unambiguous about what is a
307 prior and what is an existing and what is a future use and what can and cannot happen in that
308 gray area that's in the overlay district still because we have not considered it here but there's
309 nothing on the ground to show what was going on there. It's not the house, it's not the
310 driveway. There's this other forty (40) feet or so. I mean, as it turns out, if you look on the plan,
311 you'll see that the overlay district comes on the other side of the driveway.
312
313 YVES STEGER: So, if we go through the variance at this time and we change the overlay
314 district, that would automatically change the status from grandfathered to new, correct?
315

316 RICHARD CANUEL: I don't think so. All you would be doing is granting a variance to reduce
317 the buffer itself on that particular property. You can do that. I don't think it's necessary to, but
318 the Board can certainly do that.

319

320 LARRY O'SULLIVAN: I don't see the benefit.

321

322 RICHARD CANUEL: Yeah, I don't see why you need to. That was, when I looked at the case
323 myself, it's like, it's not necessary to grant the variance to do that because the property is already
324 protected by the ordinance as a pre-existing use.

325

326 LARRY O'SULLIVAN: And it would be protected even if we grant the variance.

327

328 RICHARD CANUEL: It would still be protected by the requirements of the ordinance, yeah.
329 Any construction within that C.O. District would have to comply with the parameters of the
330 C.O. District provisions in the ordinance.

331

332 LARRY O'SULLIVAN: I don't think you're ever gonna eliminate the need to have the Board
333 hear stuff that is new in the C.O. areas or the requests by, you know, people who are doing
334 subdivisions or what have you. It would be nice to be able to say you're never gonna need a
335 variance if, you know, we have the precedent but every case is heard on its own merits, so...

336

337 RICHARD CANUEL: See, in my opinion, there's greater chance of protection by not reducing
338 the buffer, so...

339

340 YVES STEGER: That's what I was thinking, too. We're definitely in uncharted territory here.

341

342 JIM SMITH: Well, I think our way out of this is to defer to the Zoning Officer's interpretation
343 and follow his interpretation which says a variance is not required. So this case is a moot case,
344 should never have been brought to the Board in the first place. The only way that it could get to
345 this Board would be if either the Conservation Commission or Planning Board or some other
346 interested party...

347

348 LARRY O'SULLIVAN: Appeal.

349

350 JIM SMITH: ...was to appeal his appeal his decision to this Board. And that would be the only
351 way it could legitimately get to us.

352

353 RICHARD CANUEL: Yes.

354

355 YVES STEGER: I think that's a good wording.

356

357 RICHARD CANUEL: I mean, like I said, the Board can certainly make a decision to grant a
358 variance to reduce the buffer but...

359

360 JIM SMITH: But you haven't made a decision...

361
362 RICHARD CANUEL: ...I think it's a moot point. I don't think it's necessary.
363
364 JIM SMITH: You haven't made a decision.
365
366 YVES STEGER: Yeah.
367
368 RICHARD CANUEL: No.
369
370 JIM SMITH: Until you make a legitimate decision, nobody can appeal your decision.
371
372 RICHARD CANUEL: Right.
373
374 YVES STEGER: What do you think?
375
376 LARRY O'SULLIVAN: I think we're here and we ought to do it.
377
378 YVES STEGER: Yeah.
379
380 LARRY O'SULLIVAN: Let's get it over with.
381
382 YVES STEGER: No.
383
384 JIM SMITH: No, I mean, he hasn't made a decision. If he hasn't made a decision, how can we
385 hear the case?
386
387 LARRY O'SULLIVAN: We wouldn't have it listed it here if he didn't make a decision.
388
389 RICHARD CANUEL: Well the thing is, this didn't come to me to make a decision in the first
390 place. This went to the Planning Board first because it's a subdivision. And because it's a
391 subdivision that involves the Conservation Overlay District, the application was sent to the
392 Conservation Commission for review. That's required by our ordinance. And based on their
393 comments is why the applicant is applying for the variance. That's why we're here. It didn't
394 come to my office for review first because they didn't apply for anything. They didn't apply for
395 a building permit, they didn't apply to do anything in that particular district. So it wasn't under
396 my jurisdiction to review in the first place.
397
398 JIM SMITH: Okay. Well...
399
400 LARRY O'SULLIVAN: So I would reiterate what I said before is that we're not making any use
401 changes, we're not making any construction changes, there's nothing new, there's a lot line
402 difference. So as far as I'm concerned, there is no need for it either.
403
404 YVES STEGER: Yes, I agree. What do you think?
405

406 JIM SMITH: I think...

407

408 YVES STEGER: Essentially, we can say the Zoning Board decides that there is no need for a
409 variance based on 2.6.3.6, existing conditions, and then if somebody thinks that we are in error,
410 then...

411

412 JIM SMITH: No, see, that's the problem with that.

413

414 LARRY O'SULLIVAN: What we need to do...If you don't mind, if we need to do anything, it
415 isn't gonna be that, it's gonna be that we agree with the Zoning Officer, his decision that there is
416 no...and that way we can eliminate the need for an appeal because that way there won't be an
417 appeal. It's already been heard. Capice? Anybody...?

418

419 JIM SMITH: Okay, I think...here's where I have a problem. If somebody is going to appeal the
420 interpretation of the zoning regulation, the interpretation, by ordinance, is supposed to be made
421 or is required to be made by the Zoning Officer. If the Planning Board or the Conservation
422 Commission had a question on either of those two issues, they should have sent that question to
423 the Zoning Officer for a decision. Then and only then, if he made the decision that it required a
424 variance, then the case should have come forward. Since that hasn't been done, the procedure
425 has not been followed, so therefore, I think the whole thing is moot and there's no point in
426 discussing this any further and I think this is a dead case until someone makes a formal
427 application to the Zoning Officer to interpret this section of the zoning regs which has not been
428 done. It's not part of our purview.

429

430 YVES STEGER: Yeah, our understanding of the zoning ordinance is that a variance is not
431 required.

432

433 JIM SMITH: No, because it's not even that ballpark.

434

435 LARRY O'SULLIVAN: It hasn't gotten that far.

436

437 MICHAEL GALLAGHER: Right.

438

439 JIM SMITH: It's not in that ballpark.

440

441 RICHARD CANUEL: Well, see, the thing is, you have an application before you. You need to
442 make a decision on that application. If your decision on the application is that a variance is not
443 required based on the requirements of the ordinance, then that is your decision. You need to
444 make a decision one way or another. Whether to grant a variance or that a variance is not
445 required. You know, one way or the other. You need to make a decision on the application.

446

447 LARRY O'SULLIVAN: I'd like to make a motion. Are you ready for a motion?

448

449 YVES STEGER: Yeah, sure.

450

451 LARRY O'SULLIVAN: I'd like to make a motion that a variance isn't required for case
452 11/18/2009-5.

453
454 YVES STEGER: Anybody wants to second that?

455
456 JIM SMITH: I'll second it.

457
458 YVES STEGER: Okay. Any further discussion? Okay, anybody in favor, say 'aye.'

459
460 MICHAEL GALLAGHER: Aye.

461
462 JIM SMITH: Aye.

463
464 LARRY O'SULLIVAN: Aye.

465
466 YVES STEGER: Aye. Anybody against, say 'nay.'

467
468 [no response in opposition]

469
470 RESULT: THE MOTION THAT A VARIANCE IS NOT REQUIRED FOR CASE NO.
471 11/18/2009-5 WAS APPROVED, 4-0-0.

472
473 RESPECTFULLY SUBMITTED,

474
475
476
477 LARRY O'SULLIVAN, CLERK
478 TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

479
480 **APPROVED DECEMBER 16, 2009** WITH A MOTION MADE BY LARRY O'SULLIVAN,
481 SECONDED BY YVES STEGER AND APPROVED 4-0-2 (VICKI KEENAN AND NEIL DUNN
482 ABSTAINED AS THEY HAD NOT ATTENDED THE MEETING).