

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

DATE: AUGUST 15, 2012

CASE NO.: 8/15/2012-1

APPLICANT: LEONARD SANTOSUOSSO III
5 RED FERN CIRCLE
LONDONDERRY, NH 03053

LOCATION: 7 COTEVILLE ROAD; 13-74-1; AR-I

BOARD MEMBERS PRESENT: MATTHEW NEUMAN, CHAIR
JAMES SMITH, VOTING MEMBER
LARRY O'SULLIVAN, VOTING MEMBER
JAY HOOLEY, VOTING MEMBER
NEIL DUNN, CLERK

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

REQUEST: VARIANCE TO ALLOW AN OFFICE AND STORAGE FACILITY FOR A
CONSTRUCTION BUSINESS WHERE OTHERWISE NOT PERMITTED IN THE
AR-I ZONE BY SECTION 2.2, TABLE OF USES.

PRESENTATION: Case No. 8/15/2012-1 was read into the record with ten previous cases listed. The Clerk also read "Exhibit A" into the record, a letter in opposition from an abutter.

LARRY O'SULLIVAN: How does this substantially differ from the last variance request [i.e. Case No. 3/21/2012-3]? Richard?

RICHARD CANUEL: Excuse me?

LARRY O'SULLIVAN: Any idea why we're hearing this as opposed to the last time we heard it and we denied it?

RICHARD CANUEL: Well, let me say this, maybe help the Board's decision one way or the other. New Hampshire case law, specifically *Fisher v. the City of Dover*, helped to establish what has come to be known as the "Fisher Standard" specifically for instances where an applicant subsequently comes back to the Board again and again with a variance request which is very similar. Basically, what the court stated in that case was that the Board needs to make a determination that there's some material difference in the application, that there are some circumstances that differ in the nature and degree from the application that was before the Board previously that they denied. The Board needs to make this determination first, you know, otherwise there's no finality to the Board's decision and then the applications can keep coming back to the Board again and again. So, you know, whether you think there is, you know, substantial difference or not because there is

46 some similarity there, you need to make that determination first and that determination has to be based on
47 facts before the Board. And, of course, as you know, the burden of proof is always on the applicant.
48

49 LARRY O'SULLIVAN: Well, the most recent zoning for that...or underlying zoning for that parcel right now, may
50 I ask what that is?
51

52 RICHARD CANUEL: What the zone is? It's agricultural-residential.
53

54 LARRY O'SULLIVAN: Okay. And...okay. That's enough I guess.
55

56 MATT NEUMAN: Alright, so we truly to...
57

58 LARRY O'SULLIVAN: Make a determination of whether we're gonna hear it or not.
59

60 MATT NEUMAN: I think...is it up to the applicant to present any material differences or are we gonna go off
61 the application?
62

63 LARRY O'SULLIVAN: We have an application in front of us, so why were wouldn't we go out there?
64

65 RICHARD CANUEL: You can do that one of two ways, of course, you can base your determination on the facts
66 that you have in the application before you or you can ask the applicant provide you that information verbally
67 tonight. Until you make that determination, this is not a variance hearing. Once you make that determination
68 on the merits of the application that it can go forward, then you can open it as a case.
69

70 MATT NEUMAN: I mean, I'm inclined to have the applicant come and present the differences and then make
71 our decision there.
72

73 LARRY O'SULLIVAN: As opposed to...?
74

75 MATT NEUMAN: Simply...
76

77 LARRY O'SULLIVAN: Well, let's get this in order. I would like to hear the differences and then how all the facts
78 flow into our requirements, alright? So I'd like to know what the difference is between what was proposed
79 and we denied last time and what this proposal is for. I think that's a very simple statement, frankly. Or could
80 be. What we had in front of us the last time was a request to be residential and a warehouse, correct? Now
81 we're being asked to be...well, I'm not even quite sure all this is going to be.
82

83 NEIL DUNN: If I may, the last case on 3/21/2012-3 was requested "a variance to allow a commercial business
84 office in an existing residential building where otherwise not permitted by Section 2.2, Table of Uses."
85

86 JAY HOOLEY: And this application states there is currently an apartment on the property which is currently
87 rented and would continue to be used as a residential rental unit.
88

89 LARRY O'SULLIVAN: Where is that?
90

91 JAY HOOLEY: Page...two (2).
92
93 MATT NEUMAN: Two (2).
94
95 JAY HOOLEY: Under the first paragraph, in the first paragraph.
96
97 LARRY O'SULLIVAN: Yes, I see. Alright, so what would be the significant difference between what was
98 requested and this? Anybody?
99
100 JAY HOOLEY: I'm unclear of any substantial difference that I see in the application.
101
102 MATT NEUMAN: I don't either.
103
104 LARRY O'SULLIVAN: What we can do is we can ask the applicant, though, Matt.
105
106 MATT NEUMAN: Well that's...what I'm...
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108 LARRY O'SULLIVAN: If there's a specific item or specific items...
109
110 MATT NEUMAN: Mm-hmm.
111
112 LARRY O'SULLIVAN: ...and then we can hear the rest of the case if we so decide. What do you think?
113
114 MATT NEUMAN: Alright, why don't we do that. We'll have the applicant come forward. And if you can
115 identify yourself and your address.
116
117 JONATHAN BOUTIN: My name's Jonathan Boutin and I'm representing Leonard Santosuosso. I work out of
118 Londonderry.
119
120 MATT NEUMAN: Okay. And if you could share with the Board what the [indistinct] differences from the
121 previous...
122
123 JONATHAN BOUTIN: You know, Mr. Canuel has pointed out the standard appropriately but there's a distinct
124 difference and it's not just that there has to be a substantial difference in the application. It's "or the
125 circumstances." So to address the first problem, whether or not there's a substantial difference in the
126 application, the first application earlier this year was for the office use. This application is for both an office
127 and a storage use because if they...if the Board feels they can't grant a variance for the office use, the
128 applicant would still like to use it as a storage facility because occasionally, he's got windows or other things in
129 houses that he can't put in that he would need to have somewhere dry and safe to store. The point of fact
130 that really is the most important for the Board to consider is whether the circumstances are different. At the
131 time of the first hearing, there was not available the information that we have subsequently learned and
132 we've submitted an affidavit to this Board that the prior owner continued to use the property as a business up
133 through August of last year. So there's a variance that still runs with the property. At the first hearing, there
134 was a decision made that an application for a building permit in 2004 had brought the property into
135 conforming use. I don't think the information was available to the Town that the use had continued. And this

136 Board does have the authority to make a determination merely that a variance still exists on the property.
137 And so that information is also before the Board, which is the factual and circumstances difference we would
138 point out which satisfies the Fisher Standard so that the Board can hear this matter.
139
140 LARRY O'SULLIVAN: What year was that? Since '04?
141
142 JONATHAN BOUTIN: The...it went from a drywall business, which was approved, to, in 2003, a company called
143 "Apex Tent Rental" bought it and that business had been operating from 2003 through August of 2011.
144
145 LARRY O'SULLIVAN: And it had a variance?
146
147 JONATHAN BOUTIN: It used the same variance that was already in place.
148
149 MATT NEUMAN: How did we not have knowledge of this variance?
150
151 JONATHAN BOUTIN: The variance was approved in 1986. The Board does have knowledge of the variance
152 that was approved.
153
154 MATT NEUMAN: Do we...?
155
156 JONATHAN BOUTIN: And a variance runs with the land unless it's abandoned.
157
158 LARRY O'SULLIVAN: And that's, I suspect, what the issue is, is that...
159
160 JONATHAN BOUTIN: The...
161
162 LARRY O'SULLIVAN: ...our...well, I'm sorry, I won't...
163
164 NEIL DUNN: No, the only question I wanna bring up, in accordance with the minutes from the last...when we
165 heard this back in...pardon me again...
166
167 MATT NEUMAN: March.
168
169 NEIL DUNN: ...March, our understand and I think Richard spoke to it, that the variance was granted but the
170 property had been converted back to a conforming residential use and so just because somebody maybe ran
171 out of there with a business, we wouldn't necessarily know that.
172
173 JONATHAN BOUTIN: But it's...
174
175 NEIL DUNN: And whether it was legit or not, I guess is my point.
176
177 JONATHAN BOUTIN: I'm sorry. The person that pulled that permit for improvements on the building was the
178 same person whose affidavit I've put before you and he said at no point did he waive the use or stop operating
179 it as a business.
180

181 LARRY O'SULLIVAN: He didn't have to waive it, though. You can just abandon it. You...
182
183 JONATHAN BOUTIN: But he didn't abandon...he never abandoned it and he never stopped using it as a
184 commercial use.
185
186 LARRY O'SULLIVAN: I think we have an issue with our records, would we?
187
188 RICHARD CANUEL: To tell you, I think that's actually irrelevant because the Board has already heard those
189 issues on the previous application.
190
191 LARRY O'SULLIVAN: Mm-hmm.
192
193 RICHARD CANUEL: As I said earlier, the Board needs to make the determination that there's something
194 materially different about this subsequent application than what was brought before the Board previously.
195 Otherwise, you cannot lawfully hear the merits of the case.
196
197 JIM SMITH: Well...
198
199 MATT NEUMAN: Go ahead...
200
201 RICHARD CANUEL: I mean, you need to take a look at, you know, is the applicant merely resubmitting the
202 same application or has the applicant made some change to that application to address the Board's concerns
203 from the previous variance.
204
205 LARRY O'SULLIVAN: That's why I was asking specifically if you could specific about what's the difference
206 between what you're asking for now and what you asked for three months ago or five months ago. You know,
207 the situation is we had the information, we granted a variance a while ago. We believed that it...well, our
208 understanding was that the request for a variance came because the building was residential and then it was
209 not in our table of use in a residential area, so...to use it a commercial. So, if it would be possible to be using a
210 nonconforming...you have a nonconforming use in that building, that's not a valid variance unless it was
211 approved by the Board. So I don't understand how it would be significantly different. This case to the last
212 one. Does anybody else see where I'm at here?
213
214 MATT NEUMAN: [Indistinct].
215
216 NEIL DUNN: I guess my only thought was if we weren't aware that it would...had been businesses, but
217 according to the minutes, we went through all that it had been businesses. That the business...the point when
218 the applicant came last time was it was a residence. Somebody was living there and that's where the
219 abandonment, if you will, or the complying with the new use, and we went through a discussion all about that,
220 so I really don't...
221
222 LARRY O'SULLIVAN: See a significant difference?
223

224 NEIL DUNN: ...see where it changes. But as far as the...at that point in time when we heard it, there was no
225 business in there. It was a residential use, so it went back to that and I don't see where there's anything
226 substantial. We talked about previous businesses being there and the continuation of the variance...

227
228 LARRY O'SULLIVAN: Mm-hmm.

229
230 NEIL DUNN: ...from previous ones and we addressed the fact that because it was a residential building at that
231 time, there was nothing in it when the applicant came back that it was now considered, you know, a
232 residence...a residential and back to conforming use. So I think that's kind of where I think it changed, if you
233 want...if we can use that word, but...

234
235 LARRY O'SULLIVAN: When was the...before this last request for a variance, what was the prior one? In what
236 year was it?

237
238 NEIL DUNN: In 2003, there was a request by the Town of Londonderry, a variance to allow an existing building
239 to be used as a machine which is not permitted in the AR-I and it was denied.

240
241 MATT NEUMAN: What year was that?

242
243 NEIL DUNN: 2003.

244
245 LARRY O'SULLIVAN: I know we've had this property again and again while I've been on this Board and was
246 that...well, my recollection is that it was a residence by our records and by our understanding. And that there
247 was, at one point, I don't know for how long, but for a period of time, there was nothing but a residence there.
248 And for a while it was even vacant. Completely vacant. So...I mean, I only go back to 2000, but 2003 I can
249 remember a little about, but anyway, in my opinion, we don't have a significant difference between this
250 request and the prior.

251
252 MATT NEUMAN: Jim? Jay? Do you have any...?

253
254 JIM SMITH: Okay. The information that you came up with about the use being continued...

255
256 JONATHAN BOUTIN: Yes.

257
258 JIM SMITH: ...when did that come to light?

259
260 JONATHAN BOUTIN: Sorry?

261
262 JIM SMITH: When did you find out about it?

263
264 JONATHAN BOUTIN: I was able to get the affidavit a couple weeks ago. I talked to the guy for the first time to
265 confirm the information probably at the end of...a little bit after I submitted the application. When Leonard
266 went to buy the property, that was some of the information he found out that there was an existing variance
267 and there was an existing nonconforming use on the property, so, you know, it say when we...he first knew
268 about it, he first knew about it as far back as last year and he bought it with the understanding there was a

269 nonconforming use there. But as far as when I first learned about it and could verify the information and then
270 went and had the affidavit signed and attested by a notary, that's within the last few weeks.
271
272 JAY HOOLEY: If I could pose a question, Mr. Chairman?
273
274 MATT NEUMAN: Go ahead, Jay.
275
276 JAY HOOLEY: So is it your premise then that the 1986 variance for the drywall and well drilling has continued
277 as the nonconforming or...but that appears to have...
278
279 JONATHAN BOUTIN: Well, it went from the sheetrock business to the tent business, yes.
280
281 JAY HOOLEY: Right, but the use for which that variance was granted changed apparently, if that is what
282 happened somewhere along the line then.
283
284 JONATHAN BOUTIN: It changed, but if it's not a substantial or significant change, then it doesn't require a new
285 variance. The welding shop is a substantial and significant change. That would have required a different
286 variance. But going from a sheet rocking business to a tent business is similar enough. In going from a tent
287 business to an office and a storage business is also a very similar use.
288
289 MATT NEUMAN: And Richard, when was this converted to a conforming use?
290
291 RICHARD CANUEL: In 2004 there was a permit to renovate the structure to a single family dwelling. But, you
292 know, rather than discuss those issues, I think the Board needs to specifically address what the applicant is
293 applying for today compared to what he applied for previously.
294
295 MATT NEUMAN: Mm-hmm.
296
297 RICHARD CANUEL: And see if there is...
298
299 MATT NEUMAN: No, you're right.
300
301 RICHARD CANUEL: ...is some material difference in degree of the use he's applying for compared to that
302 previous application...
303
304 LARRY O'SULLIVAN: Right.
305
306 RICHARD CANUEL: ...and see if the application has merits first, then we can have all these other...
307
308 MATT NEUMAN: You're right....
309
310 RICHARD CANUEL: ...material discussions.
311
312 LARRY O'SULLIVAN: Well, he said in that meeting, "My wife, she's here, she runs the office and she doesn't
313 wanna go there and run it there. She wants to stay where it's convenient, at our house now, just answering

314 phones," [Minutes, Case No. 3/21/2012-3, page 7]. So you don't want an office there. So I don't understand
315 how there's a significant difference.

316
317 JONATHAN BOUTIN: The first application was for an office. This application is for an office and storage. Or
318 one or the other if the Board sees fit to only grant a partial variance. That's where the material difference is.
319 There's a specific request for storage that was not in the first application.

320
321 JIM SMITH: I think in the text here, if you read it, there's reference to having deliveries there, so there's an
322 implication of storage already in the original case.

323
324 JONATHAN BOUTIN: There was an implication of it. It wasn't specifically applied for.

325
326 JIM SMITH: But it was brought up. It was considered. So I don't see it's a significant difference.

327
328 MATT NEUMAN: No, I'm finding it hard...

329
330 JAY HOOLEY: In the verbal presentation, it was presented that the facility would be used for storage of, I
331 believe, a showroom, if memory serves me. A showroom of kitchens and...

332
333 JONATHAN BOUTIN: And that was the initial proposed use. Now we're asking if he can just use it for storage.

334
335 MATT NEUMAN: Or an office. [Indistinct] office.

336
337 JONATHAN BOUTIN: Yes, whatever would...

338
339 MATT NEUMAN: And the Board's previously...

340
341 JONATHAN BOUTIN: The property's pretty much useless without something.

342
343 MATT NEUMAN: I'm struggling to find a difference. A material difference.

344
345 JONATHAN BOUTIN: The State...the requirement is not just a difference in the application. There's also a
346 difference in the circumstances. And the Board could hear it, if they decide the circumstances with the new
347 facts in front of them create a reason to hear this. So...

348
349 JAY HOOLEY: Were any of those facts not available at the last application?

350
351 JONATHAN BOUTIN: They weren't brought forward, no. The affidavit wasn't brought forward either.

352
353 JAY HOOLEY: But that historical data was available. It was not presented.

354
355 JONATHAN BOUTIN: I suppose that's true.

356
357 JIM SMITH: I think the part where I'm getting would be there is an appeal process on any variance...it's denied
358 or whatever and there's a certain timeframe when someone is given the opportunity to present any new

359 information that may have bearing on that case. I think that window of opportunity has long since gone by
360 and to bring it up two months later or three months later just doesn't make sense to me. So I...
361
362 MATT NEUMAN: Unless there's anything else that anybody wants to ask, I'd agree to probably...if someone
363 wants to make a motion on it. Whether or not we're going to hear the case or not. If there's a material
364 difference, then we're gonna move forward.
365
366 RICHARD CANUEL: What may be helpful is, you know, if the Board reads the actual application today and then
367 read the application request previously...
368
369 MATT NEUMAN: Mm-hmm.
370
371 RICHARD CANUEL: ...and see if that helps.
372
373 [Board members reviewed the information before them. Elapsed time; 2 minutes, 40 seconds].
374
375 LARRY O'SULLIVAN: Are you ready?
376
377 MATT NEUMAN: Anyone need more time?
378
379 LARRY O'SULLIVAN: I didn't know if you needed an interruption or you wanted an interruption.
380
381 MATT NEUMAN: No, I was just about to...
382
383 LARRY O'SULLIVAN: Last time we had four (4) people, four (4) members. And it failed two-two (2-2-0) I think.
384
385 MATT NEUMAN: Yup.
386
387 JIM SMITH: Yeah.
388
389 LARRY O'SULLIVAN: So I made the motion last time to approve it. I believe what's in front of us today is the
390 same thing that was in front of us last time. However, this time, we've got five (5) voting members.
391
392 MATT NEUMAN: Which...
393
394 LARRY O'SULLIVAN: So as far as I'm concerned, that's the only significant difference on this side of the fence.
395
396 MATT NEUMAN: Which isn't of significance.
397
398 LARRY O'SULLIVAN: And I understand it's not a significant thing. What I'd like to see if we remembered was
399 did we offer the applicant the opportunity to make the decision that they wanted to wait until they had a full
400 Board or not? Do we remember that? 'Cause I don't.
401
402 JIM SMITH: I'm pretty sure we did. I mean, we...
403

404 LARRY O'SULLIVAN: It's pretty standard stuff.
405
406 JIM SMITH: We're very consistent about doing that.
407
408 MATT NEUMAN: Right.
409
410 LARRY O'SULLIVAN: Right. Other than that, I don't see a significant difference. And I think if the facts were...
411
412 JAY HOOLEY: What was the date of the original...?
413
414 JIM SMITH: March.
415
416 LARRY O'SULLIVAN: If the facts were available and they weren't presented, it isn't it up to us to dig 'em up.
417 It's up to the applicant to dig 'em up, so we shouldn't go down that path as far as I'm concerned.
418
419 MATT NEUMAN: Does anyone have...? You need a couple more minutes, Jay?
420
421 JAY HOOLEY: No.
422
423 MATT NEUMAN: Jim? No?
424
425 JIM SMITH: I don't think so.
426
427 MATT NEUMAN: Neil? Alright. Can I have a motion then?
428
429 LARRY O'SULLIVAN: I'd like to make a motion that we don't hear case 8/15/2012-1 since there's no significant
430 difference between the prior application which was denied and the current application.
431
432 MATT NEUMAN: Is there a second?
433
434 JIM SMITH: I'll second.
435
436 MATT NEUMAN: All those in favor?
437
438 LARRY O'SULLIVAN: Aye.
439
440 JIM SMITH: Aye.
441
442 NEIL DUNN: Aye.
443
444 JAY HOOLEY: Aye.
445
446 MATT NEUMAN: Aye. Opposed? Okay.
447
448 RESULT: THE MOTION NOT TO HEAR CASE NO. 8/15/2012-1 WAS APPROVED, 5-0-0.

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RESPECTFULLY SUBMITTED,

A handwritten signature in cursive script, appearing to read "Neil Dunn", with a long horizontal flourish extending to the right.

NEIL DUNN, CLERK

TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

APPROVED SEPTEMBER 19, 2012 WITH A MOTION MADE BY NEIL DUNN, SECONDED BY JAY HOOLEY AND APPROVED 3-0-0.