

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

DATE: AUGUST 18, 2010

CASE NO.: 8/18/2010-4

APPLICANT: BERNARD A FILION
5 GREELEY ROAD
LONDONDERRY, NH 03053-0184

LOCATION: 5 GREELEY ROAD, 3-163, AR-I

BOARD MEMBERS PRESENT: JIM SMITH, ACTING CHAIR
MICHAEL GALLAGHER, VOTING ALTERNATE
JOE GREEN, VOTING ALTERNATE
JAY HOOLEY, VOTING ALTERNATE
LARRY O'SULLIVAN, CLERK

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

REQUEST: VARIANCE TO ALLOW CREATION OF A LOT WITH LESS THAN 150 FEET OF ROAD
FRONTAGE AS REQUIRED BY SECTION 2.3.1.3.2.

PRESENTATION: CASE NO. 8/18/2010-4 WAS READ INTO THE RECORD WITH NO PREVIOUS CASES LISTED.

JIM SMITH: Who will be presenting?

JOHN MICHELS: Mr. Chairman, I'm Attorney John Michels. I represent Bernard Filion and I will be presenting.

JIM SMITH: Okay, go ahead.

JOHN MICHELS: Okay. First, before I get into the individual points, I'll just give overview of it. I assume you have a copy of the plan? Okay. What we're trying to do is create a lot with less than the required frontage. In this case, a lot with eighty three (83) feet. Mr. Filion wants to create this lot for his daughter. Currently, there are two (2) lots. One (1) is two point nine six (2.96) acres on the left hand side and there's seven point eight two (7.82) on the right hand side, which is Mr. Filion's lot. The plan is to reconfigure the lot on the left, the two point nine six (2.96) acre lot. Keep it, however, the same square footage and then create a four point four five (4.45) acre lot with a hundred and fifty feet (150) feet of frontage, which is Mr. Filion's house, and then create a lot in the back with three point three seven five (3.375) acres and eighty three (83) feet of frontage. The house will be back approximately three hundred (300) feet. It will use the, for a good part, the existing driveway. One of the interesting things about this case is that legally, you could have a house back there, you just have to build a three hundred (300) foot road. If you build a three hundred (300) foot road, you probably

could create in this, instead of one (1) lot, probably three (3)...you could probably create three (3) lots if you built a road. Now, this plan is not contrary to the public interest. Most house lots in town are somewhere between an acre and an acre and a half. This lot would be three point three (3.3) acres. It does not adversely affect any neighbors. It creates tax revenue and by creating only one (1) lot instead of three (3) lots, it lessens the impact on the community. It's not contrary to the purposes of the ordinance. It doesn't affect health or safety of the community. It doesn't affect anybody's light or privacy or safety. It protects the character of the community. This house is gonna be in back. It promotes the most beneficial use of the land. It lessens a road system by only...by not building a road to back here. It avoids congestion by doing a lesser impact. It would be a more efficient provision for public facilities such as a road because to build a road three hundred (300) feet, Janusz [the Town Engineer] would have to maintain it. He'd have to plow it. This is providing...part of the purpose here is to provide adequate housing choice within economic reach and being able to create a lot without having to build a road as economically feasible. By having only one (1) lot here instead of multiples, you're preserving more open space and you're preserving the character of the community. Substantial justice would be done because there are many lots with small frontage, including the lot immediately adjacent to this one. There are, you know, scattered through town, a number of lots with a short driveway and a lot in the back. This one is more substantial than a number of them. If the ordinance was turned down and they would...I mean, not the ordinance. If this request was turned down and they had to build a road, you would end up with unnecessary impervious surface because you would have...I did a short calculation that you would probably have eleven thousand (11,000) square feet of pavement here, where if you used the existing driveway and just added a little bit more pavement, you would probably add no more than fifteen hundred (1,500) to two thousand (2,000) square feet. So you are being much nicer to the land. You're cutting down the cost to the Town in terms of maintenance and plowing and it's substantial justice because there are other similar lots. It would not be in the public interest and it would be contrary to the ordinance to require the road to be built because what you would be doing is you would be requiring a heavier impact on the land. There are a couple of cases that the New Hampshire Supreme Court has decided. Levesque versus Salem, 128 NH 455 and U-Haul versus Concord, 122 NH 910, which basically said that if it's a permitted use, which housing here is, and you have a less impact and you have to get a variance for it, that is substantial justice. In this case, the value of the surrounding properties will not be diminished. The house is gonna be roughly three hundred (300) feet back. This single lot is not gonna decrease values. If we built a road and did what you could, what you would be allowed to do, you may not decrease values but you're making a much higher, intensive use of the land. The special conditions with this lot...the ordinance is to protect overcrowding. This is not overcrowding the land. You know, it's a large lot. The general purpose of the ordinance is not designed to prohibit this type of lot. A specific section would permit it, but the ordinance in general is set up to have housing scattered around, not build excess roads. And also a reasonable use of this particular parcel is one (1) house on three point three (3.3) acres and that would be far preferable to a permitted alternative, which would be a much higher use and therefore, I ask that you approve the variance.

JOE GREEN: I have a question for clarification. Looking at the drawing [see Exhibit "A"], could you show us...I get the part in the middle, the two (2) green lines and the yellow where the old lot lines were and the new lot lines...

JOHN MICHELS: Yeah.

JOE GREEN: I wanna know where it's actually within the one fifty (150) foot of the road. I'm looking at...

JOHN MICHELS: You mean...you're looking at the frontage.

JOE GREEN: Yeah.

JOHN MICHELS: Is that what you're looking for?

JOE GREEN: Yeah. Yup, I'm looking at the front. So I'm just wondering what...

JOHN MICHELS: Okay, if you're looking at the road...I don't have the colored thing in front of you...

JOE GREEN: Okay.

JOHN MICHELS: ...but, you know, if you take from the right hand side...

JOE GREEN: Yup.

JOHN MICHELS: ...the first lot is a hundred and fifty (150) feet. There's a hundred and fifty (150) feet. It sort of goes to a little beyond where the driveway is. So the lot that will remain with the house on is a hundred and fifty (150). Between that point and the next lot is a combination of three (3) things; thirty three (33) feet, a twenty (20) foot section and a thirty (30) foot section. They add up to eighty three (83) feet.

JOE GREEN: I see that.

JOHN MICHELS: That's why it is less than a hundred (100) feet.

JOE GREEN: There they are, right there.

JIM SMITH: Yeah, see, there's one, two, three (3).

JOE GREEN: Right.

JOHN MICHELS: Yeah, with fifty (50) feet, you could build a road through there.

JIM SMITH: Yeah.

JOE GREEN: It's because of the way it's angled, right?

JOHN MICHELS: Well, it's eighty three (83)...you know, maybe if went it across it some...I'm not good at the angles but it's, you know, I know it measures eighty three (83) feet.

LARRY O'SULLIVAN: Is there a curb cut...

JOHN MICHELS: Pardon me?

LARRY O'SULLIVAN: ...that's on this property that you're subdividing?

JOHN MICHELS: Today?

LARRY O'SULLIVAN: Yeah. Or will there be?

JOHN MICHELS: No. They're gonna use the existing driveway and just...

LARRY O'SULLIVAN: Okay, so there's an existing paved driveway.

JOHN MICHELS: That comes onto this and you see where it curves. What they would do is just go straight from somewhere on the curve, come back to this house. So the existing driveway would be continued to be used by both houses.

LARRY O'SULLIVAN: How far away is the driveway to the...what would that be, west on Greeley? The Whitten lot?

JOHN MICHELS: Oh, how far is the driveway? There's a little turn around spot that almost touches the new property line.

JIM SMITH: Essentially, what you're doing is, you're setting up one (1) curb cut to take care of two (2) lots.

JOHN MICHELS: That is correct.

JIM SMITH: A shared driveway.

JOHN MICHELS: A shared driveway. Yes.

JIM SMITH: Which usually don't work in the long term.

JOHN MICHELS: This is father and daughter.

JIM SMITH: That doesn't...

JOHN MICHELS: It may or may not work but I'm just, you know, that's what it...

JOE GREEN: When it's sold, yeah, we don't look at it as...

LARRY O'SULLIVAN: That's what it is today.

JOHN MICHELS: But the catch here is that the remaining lot, we'll call it the Filion lot, the biggest lot there. You know, if he wanted to at some point, he could build another driveway.

JAY HOOLEY: He has room to take a driveway in directly to the main...

JIM SMITH: He already has a second curb cut.

JOHN MICHELS: He already has a separate...

JIM SMITH: [indistinct] garage.

JOHN MICHELS: You know, he has one to an existing garage. Currently, that driveway is on an easement on the other land as it exists today. But, you know, we wouldn't...we'd just be using the existing driveway there. So...

JAY HOOLEY: Mr. Chairman, may I?

JOE GREEN: That's a good question, too.

JAY HOOLEY: May I?

JIM SMITH: Oh.

JAY HOOLEY: So the existing driveway today is actually on the Whitten lot?

JOHN MICHELS: That is correct. And there is an easement for it to be on that lot today.

JAY HOOLEY: But the Whitten lot is having a lot line adjustment.

JOHN MICHELS: That is correct. And the Whitten lot is staying the same size.

JAY HOOLEY: Moving west of his house.

JOHN MICHELS: Yeah, it's moving over and picking up some of the back and staying the same size.

LARRY O'SULLIVAN: Can I run this one more time? You're not adding a driveway?

JOHN MICHELS: No. Not adding a driveway.

LARRY O'SULLIVAN: You're not adding a curb cut.

JOHN MICHELS: Not adding a curb cut. Not adding a driveway.

JAY HOOLEY: They're gonna share a driveway that would then be on their own property that currently is on somebody else's property...

JOHN MICHELS: Yup, that is correct. It also, just from a practical point of view, would be under an easement, too, except it would be an easement on this...

JIM SMITH: You would have to have an easement to the lot that's on the right.

JOHN MICHELS: Yeah. Right. And it's now...the easement is to the lot on the left, it'll be to the lot on the right.

JIM SMITH: Okay. Anyone else on the Board have a question? Any questions about the points of law as presented? If not, I'll open it up to the public. Anyone in the public that has a...speak in favor of this? Against? Back to the Board.

JIM SMITH: Yes, Jay.

JAY HOOLEY: I'm not sure I see any problem with the five (5) points. It's interesting with the driveway, but hopefully that all works out.

JIM SMITH: Well, this approach has been tried multiple times in the past. It works, generally, for some timeframe, but usually, at some point, it turns into a problem. Generally on a change of ownership or when everybody starts getting upset on who's maintaining it and so forth.

JOHN MICHELS: But we aren't creating a new situation because this already exists. I mean, there's a...

JIM SMITH: Well, in this case...

JOHN MICHELS: It's an easement on somebody else's land already, which...

JIM SMITH: No, no, no, no.

JOHN MICHELS: Oh.

JIM SMITH: I'm not talking about the easement...

JOHN MICHELS: You're talking about the joint use.

JIM SMITH: Joint use.

JOHN MICHELS: Yes. That would be created new.

JIM SMITH: That would be new.

JOHN MICHELS: But there is a way to solve the problem if they get into a...

JOE GREEN: Well, we could require that, too, as part of the...right?

LARRY O'SULLIVAN: Be specific, Joe.

JOE GREEN: We could require two (2) entrances to the driveway. Separate entrances on each lot. A common driveway. I'm just wondering, I mean, when I'm looking at it, I'm just trying to think in my head, if the new house was situated where it's gonna be, that's a long way for, even if you parked here, to walk.

JIM SMITH: No, no, no. He intends to create an extension of that driveway to that point.

JOE GREEN: Okay. It's not...

JIM SMITH: You're gonna break into it at this point, right? Somewhere.

JOHN MICHELS: Yeah.

JIM SMITH: But from that point to here would be a joint use.

JOE GREEN: Right. Maybe it's more 'cause of that...is that an oak tree? Is that what it says?

JIM SMITH: Well...something. I don't know.

JOE GREEN: Twenty (20) foot on both sides.

JOHN MICHELS: Yeah, that's...they just mention the size of the trees there.

JOE GREEN: But what...I guess the question would be why is it...why do they want to keep the one driveway? Because that's the thing that we have the most problem with right now.

JOHN MICHELS: They wanna keep the one driveway because it's there, it's a long driveway. If you have to build another one, you're just adding costs, you know, and all also it's a, you know, it's a father and a daughter and, you know, you gotta go to do a new driveway. You're gonna have to go and do a drive...I'm gonna guess the driveway here, you know, you're gonna have to do another two hundred (200) foot driveway, you know? Which...you're gonna have to grade, you know, stump, grade...

LARRY O'SULLIVAN: Strip down all the trees.

JOHN MICHELS: Stripping it all. I mean that adds quite a bit of cost.

LARRY O'SULLIVAN: And impact.

JOHN MICHELS: And impact and the ordinance doesn't say you can't have...

[overlapping indistinct comments]

JIM SMITH: Okay. Okay, what you got; you see the yellow line?

MICHAEL GALLAGHER: Yup.

JIM SMITH: And that's the existing lot over here.

MICHAEL GALLAGHER: Right.

JIM SMITH: They're gonna create a new line like this...

MICHAEL GALLAGHER: Right there. Over there.

JIM SMITH: ...to create that lot. Then this would be the new lot on this side.

MICHAEL GALLAGHER: So they're creating to get the frontage here...

JIM SMITH: No, no, no. Just the frontage would be from here to here.

MICHAEL GALLAGHER: To there. Oh, that's eighty three (83).

JIM SMITH: That's the eighty eight (88) feet. Eighty eight (88) feet or whatever it is. And the problem is that this driveway starts here, meanders currently onto this lot for a variance, then it comes over here.

MICHAEL GALLAGHER: Yeah, I see it.

JIM SMITH: Now they're gonna bring it to this point then put an extension to this back location where then they'll...

MICHAEL GALLAGHER: Put another house.

JIM SMITH: Okay.

JOE GREEN: And you can't shape that any differently.

JIM SMITH: Well, I'm sure they could but it's just that it would be the cost of rebuilding the driveway. They're looking at the cost...

JOE GREEN: But what I'm talking about is here. So, on this part here, special circumstances, unnecessary hardships. By changing that small area here to make it a hundred (100) feet.

JIM SMITH: Well, okay, then you would create a problem with this lot because then you wouldn't have the hundred and fifty (150) feet of frontage on that lot.

JAY HOOLEY: Then you'd have two (2) that don't have the...

JOE GREEN: Yeah, that's right.

JAY HOOLEY: So the eighty eight (88) came from what you could have left if you wanted a hundred and fifty (150), correct?

JOE GREEN: Right.

JIM SMITH: So what they had must have been a hundred and fifty (150) plus eighty eight (88), which is two hundred and thirty eight (238) feet approximately?

JOHN MICHELS: Yup. Yup.

JIM SMITH: On the original lot.

JOE GREEN: Right.

JIM SMITH: So rather than create two problems, they kept the hundred and fifty (150) with the original lot to the right...

MICHAEL GALLAGHER: And that's the variance...

JOE GREEN: But there's a lot here, though, is all I'm saying.

JIM SMITH: That's a separate lot.

JOE GREEN: That's somebody else's, right? Okay.

JIM SMITH: Yup.

JOE GREEN: Yup.

JIM SMITH: They're buying...

JOE GREEN: Mm-hmm.

JIM SMITH: Well, actually, the lot on the right only probably had a hundred and eighty (180) feet to start off with. They're actually getting the fifty eight (58) feet from the other lot.

JOHN MICHELS: That's right. It only had...yeah, we're getting some from each lot.

JIM SMITH: Right.

JOHN MICHELS: But with this way, the way it is today, you could build a road and legally build it and so, in effect, what we're asking is that we not have to build the road. That's the practical effect of...

LARRY O'SULLIVAN: For one (1) house.

JOHN MICHELS: For one (1) house. Build a road for one (1) house.

JIM SMITH: [to Joe Green] No, that's a proposed new lot.

JOE GREEN: I'm saying if this was here...then it would not be...

JIM SMITH: Well, then you'd have a problem with...

LARRY O'SULLIVAN: Did we bring this back to the Board, Jim? Is this now at the Board? Are we still...?

JIM SMITH: Yeah, we were...

JOE GREEN: I apologize, yeah.

JIM SMITH: Yeah, we kind of...

JOHN MICHELS: Sorry about that.

LARRY O'SULLIVAN: I don't know where we're at, so I'm trying to figure out.

JIM SMITH: Okay, just to clarify. What Joe is looking at is trying to figure out how all the various frontages of the three (3)...the two (2) existing lots and the proposed third (3rd) lot. The way I understand it at this point, they're getting approximately fifty eight (58) feet from the lot on the left as you look at it, which is lot 163-1. They're getting about thirty (30) feet from lot 163 to give them a total of eighty eight (88) linear feet for the proposed lot, which is gonna be created on the rear of the overall property.

MICHAEL GALLAGHER: Back down here, so...

LARRY O'SULLIVAN: That's 163-2, right? Gotcha.

JIM SMITH: So what Joe was asking, if the lot line on 163-1 could be moved over further...

JOE GREEN: Sixty two (62) feet...

JIM SMITH: ...to give it additional frontage, I would suggest they probably would have a problem with negotiating with the owner of that property, to give him up that land.

JOE GREEN: Well, it's giving up that land but you could give it back here. That's what I'm saying. Is there any other way that it could be done?

JIM SMITH: Well, and again, I'm not...

JOE GREEN: Is there any other way it could be done? That's what I was going on. To be conforming. I mean, it's...

JIM SMITH: Well, to get that much frontage, I don't think they could do it.

LARRY O'SULLIVAN: Or closer to conforming, you mean, Joe? That's really what... 'cause you're never gonna get to conforming with that.

JIM SMITH: They couldn't get [indistinct] 'cause they need another seventy (70) some-odd feet.

JOE GREEN: Sixty two (62), right?

JIM SMITH: And by that time, you're right up to the edge of their driveway.

LARRY O'SULLIVAN: Mm-hmm.

JIM SMITH: Okay.

MICHAEL GALLAGHER: So you've got two (2) driveways going and then this third one down here would have to be negotiated through here.

JOE GREEN: Mm-hmm.

JIM SMITH: Right. Okay. Any further discussion? If not, I'd entertain a motion.

LARRY O'SULLIVAN: I think we ought to be specific about the motion if we are voting for approval here, because that's the way I'm looking at it right now is the issue that we all know is gonna be coming someday is that this is one of those flagpole lots, you know? It looks like a pole with a flag on the end 'cause it's way big in the back. And we've been trying to discourage that from development for a long time when, you know, in '80's anyway and this obviously has existed and we have to have a use for that land if they requested it and they made their case and it sounds to me that he's met all the points and I can't see how we can say that they eighty three (83) point whatever it was feet with this configuration hasn't been well thought out, well planned, well drawn and well explained according to our ordinances, so...

JOE GREEN: Using...

LARRY O'SULLIVAN: I don't have any issue with it.

JOE GREEN: Using the specifics that we have here.

LARRY O'SULLIVAN: Yeah. Specifics.

JOE GREEN: You're saying that there'd be no other negotiation possible with the other property line?

LARRY O'SULLIVAN: You think that...go ahead.

JOE GREEN: In other words, I just...

LARRY O'SULLIVAN: You think that there's a better way to do it.

JOE GREEN: I think it could be wider. I mean, this...I don't know, I mean, I can't...it's not for me to say that the Whitten property, they would be more flexible with the lines.

LARRY O'SULLIVAN: Well, you can ask if somebody has approached those folks about larger, you know, giving up larger space because obviously, they're giving up some kind of acreage here in trade for something in the rear, right?

JIM SMITH: I'll allow the question, then.

JOHN MICHELS: The answer is they've been asked and they've adamantly refused.

JIM SMITH: They were willing to give you the...

JOHN MICHELS: They were willing to trade the space, but they don't...they will not allow that line to come any closer. It starts messing with their privacy, you know, they just...they're not gonna do it. And we did try that.

JIM SMITH: Okay.

JOHN MICHELS: The first thing I thought when I saw the property.

JIM SMITH: Okay. So if there's no further comments, I'll entertain a motion. Jay?

JAY HOOLEY: I move that the Board approve case number 8/18/2010-4 for Bernard Filion at 5 Greeley Road, the Board finding that the request does meet the five (5) points of law.

JOE GREEN: [indistinct] spirit?

JIM SMITH: I think so.

JOE GREEN: Okay.

JIM SMITH: I mean, it's...

JOE GREEN: Public interest.

JIM SMITH: I think when you weigh the difference between having one (1) lot and three (3) lots, I think that makes it a big difference.

JOE GREEN: Mm-hmm.

JIM SMITH: Okay. I have a motion...

LARRY O'SULLIVAN: We have a motion on the floor and there's been some discussion before the second.

JIM SMITH: Okay.

LARRY O'SULLIVAN: Okay? So you're gonna have to help me 'cause I don't understand what you were speaking about, Jim.

JIM SMITH: Okay. He's made a motion. I'm asking for a second at this point. Then we'll go back and...

LARRY O'SULLIVAN: I'll second for discussion.

JIM SMITH: Okay. What I was suggesting is the idea of getting one (1) lot versus three (3) makes sense as far as the spirit of the ordinance goes.

LARRY O'SULLIVAN: Okay. I understand that.

JOE GREEN: And I had a little problem with the public interest when you brought up the fact that we were trying to refrain from doing these type of things, so that's the only thing that I brought up.

JIM SMITH: Okay.

JAY HOOLEY: I would observe that if the intent of the ordinance was to reduce crowding, that one (1) house way out back on three (3) acres on that road, where it will be one (1) of three (3) total homes I believe...

JOE GREEN: And that's what he said...

JAY HOOLEY: It's not so much of a crowding issue.

JOE GREEN: Right.

JAY HOOLEY: For me.

JOE GREEN: Okay.

JIM SMITH: Okay. The end of discussion on the motion. I'll ask for a vote. All those in favor of the motion?

JAY HOOLEY: Aye.

LARRY O'SULLIVAN: Aye.

JOE GREEN: Aye.

MICHAEL GALLAGHER: Aye.

JIM SMITH: Aye. So we've got five (5) for and anyone against? Okay, five (5) for.

RESULT: THE MOTION TO GRANT THE VARIANCE WAS APPROVED, 5-0-0.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Larry O'Sullivan". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

LARRY O'SULLIVAN, CLERK

TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

APPROVED NOVEMBER 17, 2010 WITH A MOTION MADE BY LARRY O'SULLIVAN, SECONDED BY JIM SMITH AND APPROVED 3-0-1 WITH MATT NEUMAN ABSTAINING AS HE HAD NOT ATTENDED THE MEETING.