

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**January 15, 2015**

**Members Present**

Lynn Perkins, Chairman  
Allan Virr, Vice Chairman  
Donald Burgess, Secretary  
Teresa Hampton  
Heather Evans

**Members Absent**

**Alternates Present**

Stephen Coppolo  
Katherine Prudhomme-O'Brien

**Alternates Absent**

Michael Demeo  
Dana Nauzers  
Daniel Taylor

Mr. Perkins called the meeting to order at 7:00 p.m. with the salute to the flag, and notice of fire and handicap exits and that this and all Zoning Board meetings are videotaped.

The Board introduced themselves for the record.

**15-100            Promised Land Survey, LLC**  
**Owner: New Wave Diversified, LLC**

**Applicant is requesting a Variance to the terms of Article VI, Section 165-47.B.2 & 3 of the Town of Derry Zoning Ordinance to allow the subdivision of the existing property to create a new building lot with less than the required frontage and lot width at 154 Hampstead Road, Parcel ID 09081, Zoned LMDR**

Neil McCarthy, engineer of Promised Land Survey, LLC, read the application for the record. Mr. McCarthy said that the property was originally subdivided in 2005 and at that time soil calculations and wetlands were delineated. He explained that the front lot would meet all requirements and that the proposed second lot meets soils and area, however, a variance to frontage as proposing a shared driveway with approximately 54' of frontage. The desire is to utilize the existing driveway and the property is located on a State road.

**Code Enforcement**

Mr. Mackey said that the applicant is requesting approval to subdivide (create) a lot with 54.02' of frontage in the Low Medium Density Residential Zone. This zone requires 150' of frontage and 150' of lot width. The lot area requirements will be met. Utilization of the existing driveway onto Hampstead Road is proposed as a common access to both

lots. The Planning Board will need to grant a waiver to the LDCR 170-25.A.5. Hampstead Road is a State controlled road. If approved, Planning Board subdivision approval will be required. There are pictures of the property in the file for review by the Board.

Mrs. Hampton asked if the proposal would be a non-conforming use. Mr. Mackey said no as the use is conforming that this is a dimensional variance as it does not have the required frontage.

### **Board Questions**

Mr. Perkins asked the Board to list their questions and then he would have the applicant address rather than going back and forth.

Mr. Virr said he wanted to know how long the proposed driveway was and had concerns of traffic as Olesen Road has issues of entering onto Hampstead Road as the area is heavy with traffic. He said that there was no ordinance with regard to shared driveways.

Mr. Burgess said that he wanted to know what type of driveway was going to be installed such as dirt or paved and wanted to know who New Wave, LLC was as there was no letter of authorization in the file.

Mr. Virr said that he had researched the Secretary of State records and New Wave, LLC is registered and not required to know who person is. He said that he felt that the audience should have a chance to see proposal as there was not one set up for public viewing.

Doug Paris, 25 Indian Rock Road, Windham, NH, said he was a member of New Wave, LLC and gave permission for Mr. Taylor to present case.

Mr. Perkins motioned for point of order as he said that he had seen Mr. Paris in the audience but did not know he was part of the case being presented. He said that he has had personal dealings with Mr. Paris and would leave it up to the Board if find that they wished he step down from this case.

Mr. Virr said that if Mr. Perkins had no insight to case presented then he did not have an issue of him sitting on case.

Board agreed and it was decided that Mr. Perkins would remain sitting on case as felt no conflict.

Mrs. Hampton said that she had concerns with the Land Use requirements on page 5014 section 674:24 which defines use of frontage, section 7 includes land covered by statute and #8 for distances to nearest buildings. She said in reviewing this she had concerns with structure setbacks as there may have been restrictions in 2005 that may have been made. The new lot lines may infringe on existing garage and if the frontage on existing well would remain in compliance. She felt that the soil lot size calculations and

comparisons were lower than required. And if well radius on new lot would meet requirements.

Mr. Mackey said that the engineer could speak further but feel the proposed plan meets lot size requirements. The applicant needs to prove soils etc. to Planning Board if they get that far as first need to obtain variance for insufficient frontage.

Mrs. Evans said that in 2005 when plan originally subdivided if there were any restrictions and if new lot lines meet the requirements with setbacks to existing garage. Mr. Taylor said that he was not aware of any restrictions in 2005 and nothing in deeds that he had found. With regard to the existing garage there would be approximately 17 feet to the lot line at the closest point.

There was some discussion with regard to soil study and calculations.

Mrs. Hampton asked how was the land on either side of the right-of-way being handled. Mr. McCarthy said that he didn't understand the question.

Mr. Burgess said that what he felt was being asked was how was the easement being handled for the driveway. Mr. McCarthy said that the plan presented did not show but would need easement and will be applying for waiver as existing lot will no longer have its own access.

There was some discussion with regard to width of driveway and sight distances of Hampstead Road.

### **Favor**

No one spoke in favor of the application.

### **Opposed**

Abutters John Milley, 169 Hampstead Road, John Carvalho, 9 Candlestick Lane, Sandown, NH, Gregory Dunton, 160 Perkins Street, #231, Lowell, MA, Ann & Herbert Goodrich, 6 Penny Lane, James Kelly, 7 Penny Lane, Lori Norton, 152 Hampstead Road, had the following concerns:

- Concerns with shared driveway
- Increased traffic in an already busy area
- Privacy loss concerns
- Wildlife and vegetation concerns
- Wetland impact
- Septic installation concerns
- Insufficient frontage requirement
- Feel will impact home values
- Concerned with reduced water pressure for existing wells
- Do not feel hardship has been shown other than financial gain

## **Rebuttal**

Mr. McCarthy said that there may be seasonal sight studies done and profiles have been done both ways with regard to traffic studies. He said that he did not have study available as they were Planning Board matters.

Mr. Mackey said that subdivision approval the applicant will need to provide site distances to the Planning Board.

Mr. Burgess asked if the 54' section would become part of the rear property and an easement would be required for existing lot. Mr. McCarthy said yes and a right-of-way would need to be established as part of conditions.

Mr. Perkins said that there were concerns with the wetlands. Mr. McCarthy said that there was a corner of the property that was said to be under water which had been flagged by wetland scientist in 2005 but have not been updated.

Mr. Perkins asked Mr. Mackey how long a test pit for a septic system was good for as done in 2005 which is 10 years ago. Mr. Mackey said typically a design was good for 4 years but unsure for test pit data. He said that soils will need to be updated for the Planning Board.

Mr. Virr asked if a traffic study would be required via Planning Board. Mr. Mackey said typically not required for one lot and is more for commercial or larger subdivisions.

Mrs. Hampton said she felt that wetland questions were out of the Boards purview.

Mr. Perkins said that they were good discussion points as plan shows soils and wetlands.

Mr. McCarthy said that the proposed plan was reviewed a number of ways and the proposed plan was designed with more buffer concerns.

Mrs. Hampton motioned to go into deliberative session.

Seconded by Mrs. Evans.

Vote: Unanimous

Mrs. Evans, Mrs. Hampton, Mr. Burgess, Mr. Virr, Mr. Perkins

## **Deliberative Session**

Mr. Burgess said that he felt a waiver needs to be a condition for existing lot and the new lot with regards to the shared driveway.

Mrs. Hampton said that most cases before the Board have abutter concerns and see what the applicant is requesting and it is up to the Board to determine if the proposed request meets the criteria for being granted a variance. She said that she feels hardship for both

sides as have enough land however citizens do not want to see more development as stating feel will diminish wildlife. All is difficult to weigh as to what is and is not hardship.

Mr. Perkins said that he has a question on hardship as lot had previously subdivided by former owner and now recently purchased with intent to further subdivide.

Mr. Virr said that the configure of the land is unable to subdivide without a variance but there is 3.59 acres of land need to be held onto and do nothing with create a hardship.

Mrs. Evans said that the previous owner had stated that they were told that there were no chances of further subdivision. She said that she had concerns with first part of criteria of public interest and frontage as 54' is two thirds less than the required frontage of 150'.

Mr. Virr said a condition of a traffic study be conducted for Planning Board submission be performed.

Mr. Burgess asked if an easement would be required to be given to the existing lot to get onto property.

Mr. Perkins said an agreement for the existing structure will need to be granted.

Mr. Mackey said the current property has 154' of frontage if when the back lot is created the driveway serving the home now will be on the new lots property which will then require an easement.

Mrs. Evans said that according to the ordinance 2 acres or larger is required based on soils and wanted to know if the Board required updated soil testing.

Mr. Mackey aid that the numbers of one lot is 150% over and other is 200+ but the Planning Board will review plan and decide if updated soils criteria need to be done.

Mr. Virr said that the applicant's first step is to be granted a variance and then the next step is Planning Board which plan will be under more scrutiny. He reviewed the following conditions to be part of the motion for the Board:

1. Subject to obtaining all Town & State permits and inspections.
2. Recommend traffic study performed for Planning Board.
3. Updated soils tests performed for Planning Board.

Mr. Virr asked if typically the Conservation Commission reviews plans.

Mr. Mackey said that conservation signs off and that the engineer will have to show wetlands on the plan.

Mrs. Evans motioned to come out of deliberative session.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mrs. Evans, Mrs. Hampton, Mr. Burgess, Mr. Virr, Mr. Perkins.

**Mrs. Evans motioned on case #15-100, Promised Land Survey, LLC Owner: New Wave Diversified, LLC to Grant a Variance to the terms of Article VI, Section 165-47.B.2 & 3 of the Town of Derry Zoning Ordinance to allow the subdivision of the existing property to create a new building lot with less than the required frontage and lot width at 154 Hampstead Road, Parcel ID 09081, Zoned LMDR as presented with the following conditions:**

- 1. Subject to obtaining all Town & State permits and inspections.**
- 2. Recommend traffic study performed for Planning Board.**
- 3. Updated soils tests performed for Planning Board.**

Seconded by Mr. Virr.

**Vote:**

**Mr. Burgess: No. Do not feel 54' of frontage is sufficient and see potential traffic problems if it were allowed.**

**Mrs. Hampton: Yes.**

**Mr. Virr: Yes.**

**Mrs. Evans: No. For the same reason as stated by Mr. Burgess with regard to frontage.**

**Mr. Perkins: No. No hardship has been shown.**

**The application was Denied by a vote of 2-3-0. Anyone aggrieved by a decision of the Board has 30 days to file a request for a rehearing. After that the recourse would be to appeal to Superior Court.**

**Approval of Minutes**

Mr. Virr motioned to approve the minutes of December 18, 2014 as amended.

Seconded by Mr. Burgess

Vote: Unanimous.

Mrs. Evans, Mrs. Hampton, Mr. Burgess, Mr. Virr, Mr. Perkins

## **Other Business**

Mr. Perkins said that he wished to have a review & discussion on covenants. He said that he had provided the Board with two legal opinions, the first from Attorney Steven Clark and the second from Attorney Lynne Sabean. The reasons behind this, is that Mr. Coppolo had raised several points on a previous case that warrants the Boards review.

Mr. Virr stated that Attorney Sabean had indicated that the Board should not be reviewing as they are agreements between the owner and an association.

Mr. Perkins said that in the 5 years that he has been on the Board he has seen this issue approximately 10 to 12 times. He said that he felt that it was significant to remember the points of the message in Attorney Sabean's letter with regard to case law.

Mr. Virr said that he felt that the covenants that are seen it is up to the Board to inform the applicant that the Board could not enforce but the neighbors can act upon them personally.

Mr. Burgess agreed and said that if covenants exists on a property that a neighbor can directly sue.

Mr. Coppolo said condo docs are costly to have drawn up.

Mr. Burgess said that if people in a development do not establish an association then they are unable to enforce covenants.

Mr. Mackey said that the Board has Attorney Steven Clark's opinion from 2009 stating that the Board should not be reviewing and to have item #10 removed from the application. In order to do this it has to go through zoning changes in a Planning Board process in order to modify or add language. In 2009 an opinion went to Planning Board to remove then it was brought before Town Council which in turn tabled it indefinitely. So it is still sitting there. Recently brought back to Town Council with Lynn Perkins, George Sioras and myself and Town Council seems acceptable to removing. However, Attorney Sabean feels where the process was not kept active that it would be best to start from scratch if the Board wishes to formally remove then it would need to go back to Planning Board, etc.

Mr. Virr said that he felt that it should be modified as feel have a responsibility to inform the applicant of possible problems.

Mr. Mackey said that the staff could possibly revise the verbiage on the application.

Mr. Coppolo asked if this only applied to special exceptions.

Mr. Mackey said that there are other types of special exceptions but this is the only place where there are the ten criteria that actually speaks to covenants.

There was some discussion on revising or elimination of item number ten on the list of criteria.

Mr. Coppolo said that he felt that it should be reviewed and either revised or eliminated as could create a liability.

The Board agreed and requested Mr. Mackey to consult with the Attorney for advice on removing or rewording.

Mr. Perkins said the other note of interest is to change Policy & Procedures with reference to Notice of Decision to correlate with RSA:676:3. He said he would like a motion to change existing Policy & Procedures to reflect the statute of 5 business days.

Mr. Mackey said typically any changes require two readings in a public meeting and then a majority vote.

Mr. Virr read page 9 item number 4 as follows to be considered as the first reading to change the existing Policy & Procedures:

4. The Board shall decide all cases within thirty (30) days of the close of the public hearing, provided all evidence has been submitted to the satisfaction of the Board. All findings of the Board shall be in the form of a motion. The decision shall be made on a form provided by the Board and shall be sent to the applicant and building inspector. The written decision of the Board shall be placed on file and made available for public inspection within 5 business days after the decision is made.

Mr. Virr said that it would be changing the section which currently reads 72 hours to 5 business days.

### **Adjourn**

Mr. Virr motioned to adjourn.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mrs. Prudhomme-O'Brien, Mr. Coppolo, Mrs. Evans, Mrs. Hampton, Mr. Burgess,  
Mr. Virr, Mr. Perkins

Adjourn at 9:35 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk



**Approval of Minutes February 19, 2015**

Mr. Burgess motioned to approve the minutes of January 15, 2014 as amended.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mrs. Evans, Mrs. Hampton, Mr. Burgess, Mr. Virr, Mr. Perkins