

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
September 21, 2017

Members Present

Lynn Perkins, Chairman
Heather Evans, Vice Chairman
Randall Kelley, Acting Secretary
Michelle Navarro

Members Absent

Stephen Coppolo

Alternates Present

Donald Burgess
James Webb

Alternates Absent

Code Enforcement

Robert Mackey

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.

Mr. Perkins informed the public that case # 17-121 Provencal One Family Trust, Arthur and Ruth Provencal, Trustees have submitted a letter to continue this case to the October 5, 2017 and will not be heard this evening.

Mr. Mackey said that the applicant originally requested to have their meeting rescheduled to the October 5, 2017 meeting but have since withdrawn their case and a new letter is in the case file.

Mr. Perkins asked Mr. Burgess to sit for the following cases due to the absence of a member.

It was noted for the record that Mrs. Evans would recuse herself for the following case due to a conflict of interest.

Mr. Perkins asked Mr. Webb to also sit on the following case:

The applicant is requesting a variance to the terms of Article VI, Section 165-34.H of the Town of Derry Zoning Ordinance to allow a portion of the required buffer to be reduced from 10 feet to 5 feet and the installation of a 6' high stockade fence in this area rather than a single row of evergreen type trees at 84 West Broadway, Parcel ID 26045, Zoned OMB

Andrew Lane, owner, read his application criteria and his letter of explanation for the record.

Board Questions

Mr. Perkins asked when was the property purchased and when did he pave the area. Mr. Lane said that he purchased in July of 2016 and paved this past March.

Mr. Burgess asked what was the problem with the evergreens. Mr. Lane said that there is a lot of trees and shrubs to the rear of the property which choked the evergreens out. Mr. Lane said that the evergreens in the front of the property are doing well as have plenty of sunlight.

Mr. Perkins asked when were the shrubs removed by the neighbor. Mr. Lane said on March 26, 2017 they were all cut down as she thought they were her bushes until he showed her his plot plan.

Mr. Webb asked if he had received a plot plan showing the 15' buffer when he purchased the property. Mr. Lane said that he had received a plan but was unaware of the buffer zone.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting approval to allow the required 10 foot wide buffer abutting a residential property to be reduced to 5 feet. In addition, they are requesting that they be allowed to substitute a 6 foot fence in this area rather than the required plantings. The pavement in this area has already been installed.
- Typically, this would involve requesting a waiver from the Planning Board but because these requirements are specified in the Zoning Ordinance (see attached) the regulations can only be modified by variance which is the purview of the ZBA.
- This matter was brought to my attention by the abutter to this property after the additional pavement had been installed.
- The original site plan for this property was approved by the Planning Board in 2003 and the building constructed in 2003-2004.
- If approved, Planning approval of the modified site plan will be required.

- There are pictures of the property in the file for review by the Board.

Mr. Webb asked when was the buffer established. Mr. Mackey said that the property is located in the OBD in the Land Development Control Regulations which were established in the late 80's and the OBD restrictions were created was in the early 2000's. He said that the property was built in compliance in 2003/04 and constructed with a 10' buffer of evergreens in place. He said that the trees in the front of the lot grew quickly but the back growth did not fare so well. He said that the matter was brought to the attention via the abutter.

Mr. Kelley asked if the fence area was the only area missing the arborvitaes or was it all the way to the road. Mr. Lane said just were the shrubs were removed in the back of the property.

There was some discussion with regard to the width of the pavement and plowing.

Favor

Heather Evans, Gulf Road, said that she has been a client of Lane, Rifkin for the past 5 years and the property has always been very well kept. She said that she felt that the request was reasonable and was in favor of the applicant's request.

Opposed

No one spoke in opposition of the request

Board Questions

Mr. Perkins said that a stockade fence was presented but there has been discussion with installation of a vinyl fence and asked if that would pose a problem. Mr. Lane said he was open to installing a vinyl fence.

Mr. Burgess said he suggests installation of vinyl as it last longer.

Mr. Webb said that he agreed with Mr. Burgess that a vinyl fence lasts longer.

Mr. Perkins asked if a condition of installing a vinyl fence would be acceptable. Mr. Lane said yes.

Mr. Mackey said that wording is typically a solid vinyl fence.

Mr. Kelley motioned to go into deliberative session.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mr. Webb, Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mr. Perkins.

Deliberative Session

Mr. Perkins said that he did not see any concerns with the request as there was no opposition of buffer and applicant is here seeking forgiveness.

Mr. Webb said that he understands the reason for requesting forgiveness. He said that he has concerns with the diagram with the door in the rear of the building if the basement if the use of basement level is legal.

Mr. Kelley said that the pavement done suggests that the lower level is already in place so that is beyond the scope of the applicant's request.

Mr. Burgess said that as long as the applicant installs a vinyl fence he was comfortable with the request.

Mr. Perkins said that the stockade fence and walkway was more of a code matter and not purview of the Board. Here for ordinance to reduce the buffer requirement.

There was some discussion with regard to the width of the walkway.

Mr. Webb said a condition to be made that the walkway not to be used for parking.

Mr. Burgess said that the change to a vinyl fence was discussed with the applicant but the restricting and painting of his lot was not discussed so did not feel that should be imposed without first discussing with the applicant.

Mr. Perkins said that would be fine to have a sign of no parking posted in the area and could phrase as no parking sign to be designated in the new walkway area.

Mr. Kelley motioned to come out of deliberative session.

Seconded by Mrs. Navarro.

Vote: Unanimous.

Mr. Webb, Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mr. Perkins.

Mr. Kelley motioned on case #17-119 - Andrew Lane, TTE, 84 West Broadway Revocable Trust to Grant a variance to the terms of Article VI, Section 165-34.H of the Town of Derry Zoning Ordinance to allow a portion of the required buffer to be reduced from 10 feet to 5 feet and the installation of a 6' high stockade fence in this area rather than a single row of evergreen type trees at 84 West Broadway, Parcel ID 26045, Zoned OMB as presented with the following conditions.

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. No parking designation in new walkway.**
- 3. 6' high solid vinyl fence along side of building only.**

Seconded by Mr. Webb.

Vote:

Mr. Kelley:	Yes.
Mr. Burgess:	Yes.
Mrs. Navarro:	Yes.
Mr. Webb:	Yes.
Mr. Perkins:	Yes.

The application was Granted by a vote of 5-0-0. 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.

It was noted for the record that Mrs. Navarro would step down for the following case and Mr. Webb and Mr. Burgess would sit.

**17-120 Todd Boyer
 Through his attorneys Beaumont & Campbell PA**

The applicant is requesting a variance to the terms of Article VI, Section 165-42.A of the Town of Derry Zoning Ordinance to construct two (2) multi-family (five unit) townhouse buildings on the property at 111 Franklin Street Extension, Parcel ID 35004, Zoned IND IV

Attorney Bernard Campbell, Law Offices of Beaumont & Campbell, said he was here representing Todd Boyer who is also present along with Doug McGuire from the Dubay Group. Attorney Campbell read the application criteria and reviewed the letter of explanation for the record. He also reviewed the plans submitted for the record. Attorney Campbell said that the proposal is a reasonable use for the area and he feels that the request meets the criteria due to lot size and special conditions.

Board Questions

Mr. Perkins asked when did the applicant purchase the property. Attorney Campbell said it was purchased in November of 2016.

Mr. Perkins asked if there was any specific plan when purchased. Attorney Campbell said no.

There was some discussion with regard to allowed uses in the area and transitional use of proposal.

Mr. Webb asked if there would be a 50' buffer requirement. Attorney Campbell said that a buffer would be required if the use was for industrial but they were seeking a variance for multi-family so did not feel that would be a requirement.

Mr. Mackey said that the buffer would be for industrial use and proposal is for a residential type use so buffer would not apply.

Mrs. Evans said that during testimony it was stated that there was a former motorcycle shop use. Attorney Campbell reviewed some of the former uses for the record.

Todd Boyer, applicant, said that the former businesses lasted less than 4 years. He said that the business/retail use was unable to survive and that the last use of the property was 2 apartments.

Mr. Perkins asked when was the last habitable occupancy. Mr. Boyer said he believed it was in 2014.

Mr. Perkins said that the building did appear to be in rough shape. Attorney Campbell said that none of the previous uses fall under the allowed uses and that the non-conforming status lapsed.

Mrs. Evans asked if the property was purchased as foreclosure. Mr. Boyer said yes.

Mr. Perkins reviewed the aerial photo pointed out that transitional use had started to occur in the area; noted an electricians office was established further down on Franklin St Ext.

There was some discussion with regard to reasonable use.

Mr. Perkins asked how this use would be transitional as the use across the street is a lot of similar size that could easily fit into this area. Attorney Campbell said that what his client is proposing would be less of an impact and an industrial structure would require a buffer zone which would limit the area of what could reasonably fit on the lot. He said the lot across the street is significantly larger and that once you carve out for buffer any type of industrial use would not fit in this area.

Mr. Perkins raised the questions that, shouldn't the applications property maintain the transition of the zoning district. Furthermore, he a comparison to the lot across the street.

Mr. Burgess said that there are 5 to 6 businesses in the area that have their own doorway and acceptable uses for the zone. He felt that there are other uses available other than an apartment complex. Attorney Campbell said that the observation was correct and a multi-tenant site in terms of putting this size of a building on the lot would not fit. Feel the problem of such a small lot would for industrial use would be unsustainable.

Doug McGuire, Dubai Group, described the proposed plan for the record. He also described what would be needed if utilized as industrial such as loading dock/parking areas etc. would be limited.

There was some discussion with regard to uses in the surrounding area.

Mr. Perkins addressed Mr. Boyer's thoughts regarding best for the community if felt the best use for the property was rental property being the best use for the community. Mr. Boyer said he felt that the best use would be similar to what is currently there and that the proposed use would work best with the rest of the area. He said as best for community he was looking at the nature of the site and feels housing would be a better use.

Mr. Kelley said that a better fit for the community where it cost \$13,000 per child in the school system would not be housing. A better fit would be a possible indoor facility such as a trampoline use etc. He said that he felt that the prior businesses failed due to inexperience and that there are other options to consider. Attorney Campbell said that the statement of cost per child was irrelevant as studies show numbers are down. He said that the proposals are limited due to the lot size as use of an indoor trampoline facility would require restrooms and multiple parking the lot would not support that type of construction. The business office uses he felt that the abstract would argue that reasonable suited such as a lawyer or accounting service use reasonable for a business office he did not feel would want to build in this location with business use across the street.

There was some discussion with regard to business uses.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting approval to construct 2, 5 unit townhouses on the property which is zoned Industrial IV.
- There are no residential uses permitted in this district (other than hotels), therefore, a variance is required.
- After a review of the conceptual site plan, it is unclear whether the intent of the proposal is to otherwise design the project to be in accordance with the regulations for multi-family in the Medium High Density Zoning District, where the use would be permitted by right i.e. density, setbacks, etc.
- If approved, Planning Board site review will be required where items such as parking, lighting, landscaping, etc. will be discussed.
- There are pictures of the property in the file for review by the Board.

Favor

No one spoke in favor of the request.

Opposed

No one spoke in opposition of the request.

Mr. Burgess motioned to go into deliberative session.

Seconded by Mr. Kelley.

Vote: Unanimous.

Mr. Webb, Mr. Burgess, Mr. Kelley, Mrs. Evans, Mr. Perkins

Deliberative Session

Mr. Webb said that the wording in the application says no result in impact to area and he feels that there would be an impact. He said he feels that there has been no hardship shown as there are other uses that will fit.

Mr. Kelley said that the proposed use does not fit the spirit and intent of the ordinance as there are zoning changes being made as we speak.

Mr. Perkins said the ordinance is established to transition from one use to another. He said that he was having a hard time with substantial justice as already over community requirement for workforce housing and that he does not view as what is already abutting the property. With regard to hardship he said that he has concerns on merit as currently the structure sits could be a 3-unit apartment, and he was unsure of existing condition of the current structure intact. Mr. Perkins said that with regard to the question of welfare to community observed, he said that he felt was no, as it would be taking away from the fact of the community sustaining itself. As for reasonable use he felt there was nothing showing why it was unable to be used in same footprint.

Mr. Burgess said he felt it was contrary to public interest and that the industrial land zoning has other uses that could be utilized. As for the spirit of the ordinance he did not feel was upheld as industrial property could be used. He said that substantial justice is not shown as also as stated other uses could be utilized. Value of surrounding properties diminished he said that there are industrial property all around so he did not feel there would be a value difference.

Mrs. Evans said that she agrees with the Chair's statement. She said that the hardship has not been proven as there is prior history of primary business use.

Mr. Perkins reviewed the conditions for the record.

Mr. Burgess motioned to come out of deliberative session.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mr. Webb, Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mr. Perkins.

Mrs. Evans motioned on case #17-120 - Todd Boyer, Through his attorneys Beaumont & Campbell PA to Grant a variance to the terms of Article VI, Section 165-42.A of the Town of Derry Zoning Ordinance to construct two (2) multi-family (five unit) townhouse buildings on the property at 111 Franklin Street Extension, Parcel ID 35004, Zoned IND IV as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. Subject to Planning Board Site Plan approval.**
- 3. Proposal to comply with multi-family regulations for MHDR .**

Seconded by Mr. Burgess.

Vote:

Mr. Burgess:	No. Believe contrary to the public interest and no substantial justice has been shown.
Mr. Kelley:	No. Do not see substantial justice Feel there are other businesses that could be put there.
Mr. Webb:	No. #1 - Feel would be an impact to the community. #2 – Feel zoning rules are established for a reason. #3 – No substantial justice has been shown why it couldn't be utilized for what is allowed.
Mrs. Evans:	No. Feel no substantial justice has been shown also no hardship has been shown.
Mr. Perkins:	No. No hardship has been shown. Property could be used for other uses. No substantial justice not shown.

The application was Denied by a vote of 0-5-0. 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.

Mr. Perkins said that due to the time that he would like a motion to continue case #17-123 to a date to be determined.

Mr. Kelley motioned to continue case #17-123 to the October 5, 2017 meeting.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mr. Webb, Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mrs. Evans, Mr. Perkins.

The Board took a brief recess and reconvened at 9:25 pm.

Mr. Perkins said that due to the encroaching of the 10:00 hour that the Board could motion to extend time.

It was noted for the record that Mr. Webb would sit for the following case.

17-122 Jeffrey Moulton
Owner: Thomas S. Ward & Andrea Nervi Ward

The applicant is requesting a variance to the terms of Article VI, Section 165-48.B.4 of the Town of Derry Zoning Ordinance to replace the existing home with a new home which will be located less than 15 feet from the side property lines at 25 Germantown Road. PID 19092, Zoned LDR

Jeffrey Moulton, Moulton Engineering, PLLC, said he was representing the owners. He read the application criteria and letter of explanation for the record.

Board Questions

Mr. Webb asked what the setbacks were going to be. Mr. Moulton explained the setbacks shown on the plan for the record.

Mr. Perkins asked if the applicant could expand the 2nd floor without being before the Board. Mr. Mackey said that adding a second floor would be expanding volume so he would typically send them to the Board for a variance. There is no blocking of any view.

Mr. Burgess asked why not make the structure taller as already encroaching on boundary already. Mr. Ward said that he worked with an architect and that this plan worked better due to all the structural changes that would have needed to be made.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting a variance to remove the existing residence and replace it with a new home of approximately the same footprint.

- The proposal will result in the side setback for the structure changing from 2.5 feet to 4 feet on one side property line and from 17 feet to 14 feet on the other side property line.
- The property is located on Germantown Road which is a private road not maintained by the Town. Therefore, if approved and per RSA 674:41 II, a waiver of municipal liability and responsibility will need to be recorded with the deed.
- As this is waterfront property, a State Shoreland Permit will be required (and is in process).
- The septic system for this home is shared with the abutting residence and is located across the street on a separate parcel.
- There are pictures of the property in the file for review by the Board.

Favor

No one spoke in favor of the request.

Opposed

No one spoke in opposition of the request.

Mrs. Evans motioned to go into deliberative session.

Seconded by Mr. Kelley.

Vote: Unanimous.

Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mrs. Evans, Mr. Perkins.

Deliberative Session

Mr. Kelley said that he understands the water issues with the property.

Mr. Perkins reviewed the conditions for the record.

Mr. Burgess motioned to come out of deliberative session.

Seconded by Mr. Kelley.

Vote: Unanimous.

Mr. Webb, Mrs. Navarro, Mr. Kelley, Mrs. Evans, Mr. Perkins.

Mrs. Evans motioned on case #17-122 – Jeffrey Moulton, Owner: Thomas S. Ward & Andrea Nervi Ward to Grant a variance to the terms of Article VI, Section 165-48.B.4 of the Town of Derry Zoning Ordinance to replace the existing home with a new home which will be located less than 15 feet from the side property lines at 25 Germantown Road. PID 19092, Zoned LDR as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. Subject to obtaining a permit from the State as required by the Shoreland Water Quality Protection Act.**
- 3. Subject to recording of Release of Municipal Liability & Responsibility with the NH Rockingham County Registry of Deeds**

Seconded by Mr. Kelley.

Vote:

Mr. Kelley:	Yes.
Mr. Burgess:	Yes.
Mrs. Navarro:	Yes.
Mr. Webb:	Yes.
Mr. Perkins:	Yes.

The application was Granted by a vote of 5-0-0. 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. Burgess motioned to approve the minutes of September 7, 2017 as amended.
Seconded by Mr. Kelley.**

Vote: Unanimous.

Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mrs. Evans, Mr. Perkins.

Other Business

Mr. Perkins said that the Law Lecture Series on Saturday, October 14, 2017 in Concord.

Adjourn

Mr. Burgess motioned to adjourn.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mr. Burgess, Mr. Kelley, Mrs. Evans, Mr. Perkins.

Adjourn at 9:50 pm

Minutes transcribed from notes & tape:

Ginny Rioux

Recording Clerk

APPROVAL OF MINUTES October 5, 2017

Mr. Burgess motioned to approve the minutes of September 21, 2017 as amended.

Seconded by Mrs. Navarro.

Vote: Unanimous.

Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins.