

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
April 4, 2019

Members Present

Lynn Perkins, Chairman
Heather Evans, Vice Chair
Stephen Coppolo, Secretary
Michelle Navarro

Members Absent

Randall Kelley

Alternates Present

Donald Burgess
Evan Rathburn
Allan Virr

Alternates Absent

Crystal Morin
Craig Corbett

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.

Election of Officers

Mr. Perkins said that he felt it best to postpone the election of officers so as to have all primary members present and would like a motion to postpone to the next available meeting.

Mrs. Navarro motioned to postpone the election of officers to the next available meeting.

Seconded by Mrs. Evans.

Vote: Unanimous.

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

It was noted for the record that Mr. Perkins and Mrs. Evans would be recusing from the following case.

It was also noted that Mr. Coppolo would sit as Chair, Mrs. Navarro as Secretary and Mr. Burgess, Mr. Rathburn and Mr. Virr would also sit for the following case:

19-109 Stephen Vadney & Shannon L. Vadney

The applicants are requesting a Variance to the terms of Article VI, Section 165-45.1.A of the Town of Derry Zoning Ordinance to allow the construction of a four (4) unit multi-family building after the subdivision of the property at 5 Ferland Drive PID 31017-001, Zoned MHDR II

Attorney Brian Germaine, Germaine & Blaszk, P.A., said that he was representing Stephen & Shannon Vadney this evening and they were also present. Attorney Germaine read the required criteria for the record. He said that the property is unique in setting in the MHDR II zoning district and has created significant hardship on the applicants. Attorney Germaine stated that the case of Rancourt was on point in Supreme Court as simplex portion is a significant use in the environment. He said that they have supplemented the packet with a map showing the area of all the multi-family units abutting the property. Attorney Germaine said that his clients purchased this property with the intent to develop as multi-family and when heard of the zoning district change, they did not have ample time to submit the required engineering plans to the Planning Board. He said that the Vadney's have incurred significant cost as they have flagged out the wetlands and have also installed a cul-de-sac per the request of the Town. Attorney Germaine said that this property was before the Board before with more homes proposed and now has been reconfigured with less homes and meeting all the required setbacks.

Stephen Vadney, Ferland Drive, said that when they purchased the property it was zoned multi-family and started the process to build the area with multi-family structures then received a letter regarding the proposed zoning change. He said that he contacted the Planning Board to see what was required in order to keep his vested interest and was told that he needed to have plans submitted that day but he was unable to meet that requirement.

Board Questions

Mrs. Navarro asked what was the time from when purchased to the rezoning. Attorney Germaine said that they purchased in 2015 and the property was rezoned in 2017.

Mr. Coppolo asked if the property was a single deed or multiple lots. Kevin Hatch, Cornerstone Survey Associates, said Ferland Drive was originally owned and developed by Roland Ferland and that this lot was the parent lot where he kept his equipment.

Mr. Virr asked if the 150' prime wetland was resolved. Attorney Germaine said yes that they had hired a wetland engineer who flagged the property for the wetland setbacks.

Mr. Burgess asked if the 150' envelope move as now seeing that it meets setbacks. Mr. Hatch said that the original proposal was to have 6 units and used edge of wetlands as prime for setback as did not understand difference of defined wetlands as to very poorly drained soils. He said that in 2013 the request was for a special exception and now here for a variance.

Mr. Burgess asked what made this proposal different from the High Street property as they also had a plan in 2014 that was never finished so now building 3 single family structures. Attorney Germaine said that the Board is required to consider case by case and that this is a different project as is a cul-de-sac at the end of the road which was installed per Town requirements. His clients have also acquired a waterline easement from the property up the road as the Town has postponed bringing the waterline up the road due to the 4A project and during this time the zoning changed midstream. Attorney Germaine said that the applicants request meets all the requirements for granting of a variance due to the unique settings as surrounded by multi-family and his clients vested interest.

Mr. Burgess said that the option to purchase easement before doing and installing cul-de-sac to build the other home would not be fault of the Town. Attorney Germaine said that his clients purchased the property as MHDR and the zoning change happened very quickly and it was always in their intention to develop as with more units than seeking in this application.

Mr. Coppolo stated there were 2 ways of looking at the information presented: one to consider the historical information about the applicants' dealings with town, and the second was to. Attorney Germaine said that they are limited by meeting the 5 criteria and if meet then the variance should be granted. He said that this is a use variance which meets all 5 criteria factual and legally and should therefore be granted.

There was some discussion with regard to previous case of 2013.

Mr. Rathburn asked what was preventing the applicant from doing detached condos. Mr. Hatch said that the requirement would need to be 100' frontage per unit and not enough to do.

Mr. Coppolo asked if the previous application in 2013 was done prior to ownership. Mr. Hatch said yes. The request came in under a purchase and sales agreement with Mr. Ferland to see if they could build.

Attorney Germaine and Mr. Vadney explained the time line of events for the record.

Mr. Hatch said that in 2013-14 the Town was supposed to install town water but was reversed to put sewer line to another project. He said that the promise is there but has not happened so they went to the abutter to obtain easement to bring in from North High Street which is not easy but do able.

Mr. Coppolo asked how do all these events tie into the zoning change. Attorney Germaine said they do not but his clients purchased the easement to get certain size waterline to the property in order for it to service multifamily.

Mr. Coppolo asked if the line had been installed. Mr. Hatch said that the applicants purchased the easement in 2014 then realized what cost would be to tap into line so were waiting to see if the Town was going to install the line.

Mr. Rathburn asked if the subdivision were to go through what would the frontage be. Mr. Hatch said doing a rough scale it looks to be 180'.

Mr. Coppolo said that the Board was not here for frontage. Mr. Hatch said if granted then there are several additional layers the plan has to go through with the Planning Board.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting a variance to allow the construction of a 4 unit multi-family building on the property after it is subdivided into 2 lots. One of the lots would contain the existing 2 family dwelling and the other lot would contain the proposed 4 unit building.
- In 2017, the zoning designation of the property was changed from Medium High Density Residential (MHDR) to Medium High Density Residential II (MHDR II) MHDR II only permits the construction of single-family residential structures. Therefore, the applicant is submitting this request for a variance.
- A significant portion of the property contains Prime Wetlands and is, therefore also encompassed by the 150 foot buffer requirement. For the purposes of this application, the limits of the Prime Wetland were determined by a certified wetland scientist and are based on the limits of the very poorly drained soils classification. At this time no relief has been requested to allow for any encroachment into the Prime Wetlands or Prime Wetland buffer.
- In 2013, the applicant submitted an application for a Special Exception to encroach into the outermost 75 feet of Prime Wetland buffer in order to construct a 6 unit multifamily building. After a joint meeting of the Zoning Board, the Planning Board and the Conservation Commission, the request was denied by the Board.
- If approved by the Board, a more detailed site plan would need to be submitted for review by the Technical Review Committee and the Planning Board. Also, the water main would need to be upgraded.
- There are pictures of the property in the file for review by the Board.

Mr. Coppolo asked if the cul-de-sac tied into multi-family at the end of the road made a difference. Mr. Mackey said he did not know what the applicant was told to reason for the cul-de-sac easement granted to the Town.

Mr. Coppolo asked if the question on decision made on water line done by Town Council. Mr. Mackey said more of a Public Works decision had been bumped out due to another project and will be done but do not know when.

Mr. Burgess asked if it was just a 2-family if would still require cul-de-sac. Mr. Mackey said that Public Works had requested a turn around and engineering may have required any way.

Mr. Vadney said that he had an email from Mark L'Heureux and met Town standard pavement 4" requirement and built to Town specifications.

Mr. Hatch said that the construction was quality designed per Alan Cote's request.

Mr. Coppolo asked why it was an unnecessary hardship to these applicants to only be permitted to build a single family residence on this lot. Attorney Germaine said that the applicants must show uses and unique environment setting. The property is surrounded by multi-family developments. He said feel makes use reasonable unique of special circumstances and unique in setting as the end of the road is on a cul-de-sac.

Attorney Germaine reviewed criteria of Simplex test and said he felt the request was reasonable due to the location.

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 Mrs. Navarro.

Vote: Unanimous.

Mr. Virr, Mr. Rathburn, Mr. Burgess, Mrs. Navarro, Mr. Coppolo

Deliberative Session

Mr. Virr said the five criteria apply and need to review points to see if all met. He said that he did not feel that the test on general interest of the public has been met due to the location as he felt 4 additional units would be 8 plus vehicles coming out of Ferland Drive at a very tough intersection. Mr. Virr said that he also felt that the hardship was of own making in anticipation to develop and not knowing the lay of the land.

Mr. Rathburn said that he felt that the application meets the frontage for 2 detached dwellings and nothing would require a variance as reviewed scale and appears to be 180' to 200' frontage on Ferland Drive which would meet the single family requirement. He said that he sees water/sewer projects juggled all the time and did not feel basis for request.

Mr. Virr said that is not the proposal and need to review what is being presented.

Mrs. Navarro said that she did see a hardship as can build something else on the property.

Mr. Coppolo said that he reviewed the history and was trying to figure out how it was relevant to the 5 criteria for a variance. Mr. Coppolo said that he was not sure that the evidence presented regarding past statements allegedly made by the Town met the applicant's burden of demonstrating an unnecessary hardship. He said that the applicants made an investment and financial decision to wait for the Town to spend public funds to construct a water line, rather than to pay to build one themselves, and it was there decision to delay building for 3 years rather than building after purchasing the lot. The fact that the zoning of the parcel changed in the interim when the applicants were still waiting to benefit from a publicly funded water line is not an unnecessary hardship.

Mr. Burgess said he felt that the request did not meet the spirit and intent of the ordinance and substantial justice not observed as the applicant was previously denied in 2014 for different reasons now trying for variance with less units. He said that the spirit of ordinance is not adhered to as the area was rezoned. Mr. Burgess said that the applicant could have put in application for homes before investing in installing the cul-de-sac and made decision on own before being approved.

Mr. Coppolo said unable to rule on basis of previous request and need to focus on if the variance requested is warranted. He said there was a huge 24 unit complex next door.

Mr. Virr said that complex was built a long time ago and that zoning did not always match what was on the ground and felt that the zoning changes were made due to growth in the area. He said he felt that the request did not meet the first criteria and would not be in the public interest due to already a bad intersection and feel is a valid point of general public safety.

Mr. Rathburn said he felt that the applicant does have alternate opportunities as can have lesser units and satisfy ordinance.

Mr. Coppolo asked if it would change surrounding property values and if 4 units would change the character of the neighborhood.

Mr. Virr said it would not change the neighborhood as it would not be visible but the zoning ordinance was changed to prevent overcrowding.

Mr. Coppolo reviewed the conditions for the record.

Mr. Mackey said the Planning Board site review includes a TRC meeting that includes conservation to review the plans and the zoning ordinance requires Planning Board Site Review.

Mr. Burgess motioned to come out of deliberative session.

Seconded by Mr. Rathburn.

Vote: Unanimous.

Mr. Virr, Mr. Rathburn, Mr. Burgess, Mrs. Navarro, Mr. Coppolo

Mrs. Navarro motioned on case #19-109 Stephen Vadney & Shannon L. Vadney to Grant a Variance to the terms of Article VI, Section 165-45.1.A of the Town of Derry Zoning Ordinance to allow the construction of a four (4) unit multi-family building after the subdivision of the property at 5 Ferland Drive PID 31017-001, Zoned MHDR II as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. Subject to detailed site plan to be submitted for review to the Technical Review Committee and the Planning Board.**
- 3. Subject to Planning Board approval**

Seconded by Mr. Burgess.

Vote:

- Mr. Virr:** No. Feel based on criteria it would not be in the public interest of traffic pulling out onto North High Street. Does not meet criteria #5 as hardship is in own making of applicant.
- Mr. Burgess:** No. Do not feel variance would be in the spirit and intent of ordinance and does not meet unnecessary hardship criteria.
- Mrs. Navarro:** No. Applicant has not established hardship criteria and also concern of increase of traffic. Not in the public interest or spirit and intent of the ordinance.
- Mr. Rathburn:** No. Do not believe hardship criteria has been established.
- Mr. Coppolo:** No. Do not find met burden of showing variance would not be contrary to the public interest. Historical information presented doesn't meet criteria for granting of a variance. Applicant has not established unnecessary hardship.

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.

It was noted for the record that Mr. Perkins and Mrs. Evans resumed their positions on the Board. Also, that Mr. Coppolo would be stepping down for the following case and Mr. Burgess and Mr. Virr would sit.

19-111 Scott & Marni Ryan

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 construct a 12' x 24' garage less than 15 feet from the side property line at 10 Partridge Lane, PID 09059-023, Zoned LDR

Scott Ryan, owner, reviewed his criteria for the record and explained that after doing additional measurements he found that he could be 5' from the lot line verses the 3' that was requested. He described his property for the record.

Board Questions

Mr. Coppolo asked if the driveway was on his own property. Mr. Scott said that the driveway and carport were not all on his property. He said that the hardship is the large drop off to the front of the property and if required to meet setbacks then a ton of fill would be necessary which would be a substantial cost. Mr. Scott said that he has tried to find other suitable areas to build but unable due to the grading of the property.

Mr. Perkins asked if the drawings were from a professional surveyor. Mr. Scott said no that he put string on stakes and measured various points as the home is 40 years old.

Mr. Perkins asked how was it discovered that the driveway was not on own property. Mr. Scott said that it was noticed almost immediately and inquired with neighbors.

Mr. Virr asked if there had been any discussion with regard to a lot line change. Mr. Scott said no as they both own exactly an acre and did not think that was an option.

There was some discussion with regard to the grade of the property and possible locations for the garage.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting approval to construct a 12' x 24' garage within 3 feet of the side lot line on the driveway side of the property.
- The topography drops off steeply beyond the area where the garage is proposed.
- If approved, appropriate permits and inspections will be required.
- There are pictures of the property in the file for review by the Board.

Mr. Virr asked if there was even room to put the proposed garage in this location. Mr. Scott said yes as have drawn up plans with the best possible scenario and this was the best place where the most flat area was without having to bring in tons of fill.

Favor

Joe Burger, 12 Partridge Lane, said that he does not feel there would be anything wrong with the placement of garage in the proposed location.

Opposed

No one spoke in opposition of the request.

Board Questions

Mr. Perkins asked if there would be any objection to requesting a boundary survey as it would benefit both parties and was within the purview of the Board to request. Mr. Scott said he had no objection.

Mr. Burgess asked how would access to the proposed garage be obtained. Mr. Scott said that he was hoping to back into the garage and pull out. He said it would be great if he could face the opening the other way but it would be impossible due to grade of the property.

Mrs. Evans motioned to go into deliberative session.

Seconded by Mrs. Navarro.

Vote: Unanimous.

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

Deliberative Session

Mr. Perkins said that he did not see a problem with the proposed request. He said that the photos show the driveway slope and that the applicant has testified the geography of the lot and feel that this is a prime example of hardship challenge.

Mr. Burgess said that he tried to see if there would be any other solutions but viewed the property and the driveway is very steep.

Mrs. Evans said that after seeing drop off and applicant's testimony that she felt a hardship exists and agrees to being subject to a certified plot plan being made as a condition.

Mr. Virr said that in the past a previous vice chair stated that nowhere in the ordinance states have to have a garage.

Mr. Perkins said that past cases always are a subject but need to relate to specific conditions.

Mrs. Navarro said that she felt that hardship had been established and the direct neighbor was okay with the proposal.

Mr. Perkins reviewed the conditions for the record.

Mr. Burgess motioned to come out of deliberative session.

Seconded by Mrs. Evans.

Vote: Unanimous.

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

Mrs. Navarro motioned on case #19-111 Scott & Marni Ryan to Grant a Variance to the terms of Article VI, Section 165-48.B.4 of the Town of Derry Zoning Ordinance to construct a 12' x 24' garage less than 15 feet from the side property line at 10 Partridge Lane, PID 09059-023, Zoned LDR as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. Subject to obtaining a certified plot plan of garage location.**

Seconded by Mrs. Evans.

Vote:

Mrs. Evans: Yes.

Mrs. Navarro: Yes.

Mr. Burgess: Yes.

Mr. Virr: 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 that Mr. Rathburn would sit for the following case:

**19-112 Phil McCabe & Sal's Pizza
Owner: Salvatore Lupoli, Trustee**

The applicant is requesting a Variance to the terms of Article XII, Section 165-101.3.A.2 of the Town of Derry Zoning Ordinance to allow 4 building signs and 1 pylon sign at the property at 2 Lenox Road, PID 32032, Zoned GC

Phil McCabe, applicant, reviewed the criteria for the record. Mr. McCabe said that he had also provided pictures of the Billerica and Manchester sites with the button logo as the building is designed for a specific look and not sure if would want to remove.

Board Questions

Mr. Perkins asked if this request was 4 signs. Mr. McCabe said yes.

Code Enforcement

Mr. Mackey supplied the following information for the record:

- The applicant is requesting a variance to allow 4 building signs and 1 existing pylon sign at the property.
- Currently, the facility is being rebuilt and is under construction. This project has received a variance for building setbacks and has also received site plan approval from the Planning Board. At the time of site review building elevations were provided to the Planning Board which included the proposed signage. It was subsequently determined that a variance would be necessary as the Town's sign regulations (Article XII, Section 165-1d.3.A.2) limit the number of signs per business to 3.
- If approved, sign permits are required.
- There are pictures in the file, however, the building is currently encapsulated in plastic – please reference the proposed building elevations submitted with the application to view what is proposed.

Mr. Coppolo asked that as with a previous case where only one was allowed and this one is 3 is it due to different zoning districts. Mr. Mackey said yes that the previous case was Office Business District and this property is General Commercial which fall under a different set of rules.

Mr. Virr asked if window signs also classified as signage. Mr. Mackey said that the pictures provided are not of Sal's in Derry and window signs have not been regulated.

Mr. McCabe reviewed the sign requests for the Board.

Board Questions

Mrs. Evans asked if all the signs were to be illuminated. Mr. McCabe said that the button logos and large pylon sign would be illuminated.

Mr. Virr asked what would the hours of illumination be. Mr. McCabe said until close at 10:00 pm.

Mr. Burgess said that Walgreens has 3 signs and asking for one more. Mr. McCabe said yes. They were seeking to have one in the back. The windows are clear stickers.

Mr. Coppolo said the proposed signs were attractive.

Favor

No one spoke in favor of the request.

Opposed

No one spoke in opposition of the request.

Mr. Coppolo motioned to go into deliberative session.

Seconded by Mr. Rathburn.

Vote: Unanimous.

Mr. Rathburn, Mrs. Navarro, Mr. Coppolo, Mrs. Evans, Mr. Perkins

Deliberative Session

Mr. Perkins said that he did not see a problem with the request and mirrors Mr. Coppolo's statement that they have been in the community for a long time and would not wish to see them leave.

Mr. Coppolo said that he felt the request falls in the spirit of the ordinance and understand the reasoning of signage limits as would not want a strip mall setting.

Mr. Rathburn said he felt the request was reasonable as not facing residential area.

Mrs. Navarro said she felt it was a great upgrade.

Mrs. Evans said that Mr. McCabe gave a great presentation and not in objection to the request.

Mr. Perkins said a condition of lights to coordinate with normal business hours only.

Mrs. Evans motioned to come out of deliberative session.

Seconded by Mrs. Navarro.

Vote: Unanimous.

Mr. Rathburn, Mrs. Navarro, Mr. Coppolo, Mrs. Evans, Mr. Perkins

Mr. Coppolo motioned on case #19-112 Phil McCabe & Sal's Pizza, Owner: Salvatore Lupoli, Trustee to Grant Variance to the terms of Article XII, Section 165-101.3.A.2 of the Town of Derry Zoning Ordinance to allow 4 building signs and

1 pylon sign at the property at 2 Lenox Road, PID 32032, Zoned GC as presented with the following conditions:

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. All exterior light signs to be on only during normal business hours.**

Seconded by Mrs. Evans.

Vote:

Mrs. Evans: Yes.
Mr. Coppolo: Yes.
Mrs. Navarro: Yes.
Mr. Rathburn: 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

Mrs. Evans motioned to table the approval of minutes of March 21, 2019 to the next available meeting.

Seconded by Mrs. Navarro.

Vote: Unanimous.

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

Other Business

Mr. Perkins said that annual Spring Conference is being held on May 2, 2019 and Board members are encouraged to attend.

Mr. Perkins said that there is a conflict on the Boards meeting schedule as the Town Council has scheduled a budget workshop the same evening. He said that the Board has the option to postpone its regular scheduled hearing of April 18th to April 25th.

Mr. Mackey said that there are 3 cases to be on the next agenda but due to the budget workshop he would not be in attendance if the Board wished to hold the meeting on April 18th in room 207.

There was some discussion with availability of members and dates.

Mr. Coppolo motioned to cancel the regular scheduled meeting of April 18, 2019.

Seconded by Mrs. Navarro.

Vote: Unanimous.

Mr. Virr, Mr. Rathburn, Mr. Burgess, Mrs. Navarro, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Correspondence

Letter from Executive Council member Russell Prescott of District 3.

Adjourn

Mr. Burgess motioned to adjourn.

Seconded by Mrs. Evans.

Vote: Unanimous.

Mr. Virr, Mr. Rathburn, Mr. Burgess, Mrs. Navarro, Mr. Coppolo, Mrs. Evans, Mr. Perkins.

Adjourn at 9:32 pm

Minutes transcribed from notes & tape:

Ginny Rioux

Recording Clerk

Approval of Minutes May 2, 2019

Mrs. Evans motioned to approve the minutes of April 4, 2019 as amended.

Seconded by Mr. Kelley.

Vote: Unanimous.

Mr. Virr, Mrs. Morin, Mr. Corbett, Mr. Rathburn, Mr. Burgess, Mrs. Navarro, Mr. Kelley, Mr. Coppolo, Mrs. Evans, Mr. Perkins