

**TOWN OF CHESTERFIELD, NH
ZONING BOARD OF ADJUSTMENT**

**MINUTES
August 13, 2013**

Present: Chairman Burt Riendeau, Andy Cay, Harriet Davenport Renee Fales
Alternate Kristin McKeon.

The board took a moment of silence in remembrance of Carol Ross.
The Zoning Board of Adjustment met at the Chesterfield Town Office on August 13, 2013.
Riendeau explained the process of the meeting.

Eric and Diane Powers request an Equitable Waiver of Dimensional Requirement from the 4 acre requirement for 2 family dwellings based on Code Enforcement Officer providing a building permit in 2006. The property is located at 47 Norcross Landing, W. Chesterfield NH (Map 13D, A3) Residential district.

Present: Eric and Diane Powers

Eric noted that all of the abutters may not be residential abutters. There is a lot that does not have any buildings, but has 12 owners.

Eric noted that they received a letter from Chet Greenwood (Code Enforcement) dated January 17, 2013 regarding adding additional living space. This letter talked about the septic and structural, electrical and plumbing changes and noted that if the additional space was a rental unit, it would need kitchen facilities. There was no mention of needing a variance. The Powers responded to the letter with a letter dated January 21, 2013. This letter indicates that there have not been any structural, electrical or plumbing changes that have not been addressed with building permits. Chet Greenwood sent a letter dated May 2, 2013 regarding the septic system and indicated that it was recently brought to his attention that 2 family dwellings in the residential zone are only permitted on lots with 4 or more acres. Eric Powers read through the requirements for an Equitable Waiver of Dimensional Requirement with their answers from their application:

674:33-a Equitable Waiver of Dimensional Requirement.

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

(a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
“We were notified by Code Enforcement Officer that he had been made aware of a four acre requirement for two family dwellings in May 2013. Our building construction had approved permits begun in August 2006 – now complete.”

Eric Powers added that the process of adding to the house began in 2006, they have all the necessary permits and they had assistance from a Town of Chesterfield Official through the whole process.

(b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority; “ We inquired about two family zoning requirements before beginning construction and were told that one and two family dwellings were permitted. All of our permits and inspections were approved by Chesterfield Code Enforcement Officer.”

(c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
“Our project began with an existing 1300 square foot Ranch – ends now with a 3900 square foot duplex, substantially increasing the property value and values of properties in the neighborhood.”

(d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.
“Construction is now complete – borrowed significantly to finance. Rental income is a large source of loan financing repayment.”

Eric Powers noted that they had an inspection in June of 2010 and there was only four (4) punch points that needed to be done. In his letter dated June 19, 2013 it notes that he was not aware that the home was not in compliance until May of this year.

Riendeau opened the meeting to public questions or comments.

Annie DiSilva (Abutter) of 41 Norcross Landing noted that last year there was an approval of a development up the street, which allows an additional 9 homes to be built in this neighborhood. She noted that she is afraid if the Powers are approved, that other homes in the area will also decide to make their homes two (2) family dwellings and how can we say no to others, if this application is approved. DiSilva noted that her main concern is the lack of water in the area. DiSilva noted that there is a huge water resource problem in the area and the more homes and/or families that are allowed, just add to the issues. DiSilva noted that this is a health risk as it can affect personal hygiene and house hygiene. James Corliss (Vice-President of the Planning Board) noted that there is nothing before the planning board currently that would indicate anyone is trying to change the regulations. Corliss noted that under the present regulations, a permit would not be issued under these circumstances. Riendeau noted that the applicant is not trying to change the regulations; they have a unique situation and are here to find a solution to their unique situation. Riendeau noted that had this issue been caught the permits would not have been issued. DiSilva noted that when the Powers did have tenants in the building, her home did not have water again, and now that the tenants have moved out, there is water again. Charlie Cathcart (Abutter) noted that if a requirement could be put regarding the number of people allowed to live in the building, it may assist with the water

problem. Eva Wilson (Abutter) noted that the house has been the same way for 7 years, the applicants did not do anything wrong and she does not have an issue with the board granting their request. Diane Powers noted that when they began the process, it was a two family home as they were two unmarried people living with the children. She noted that it was not until 2012 that renters moved into the house. McKeon noted that she has looked through the Code Enforcement Officers' file and there is no mention of an additional kitchen. McKeon noted that it was called an addition each time there was a permit request, however nothing mentions adding a kitchen. Diane Powers noted that it was Greenwood that stated that the home needed an additional kitchen. The contractor drew up a rough draft drawing and a lot was done verbally. Diane Powers noted that Chet has been out many times and has inspected the property. Diane Powers noted that in the very beginning there was no intent to have another kitchen, and when it was decided they needed another one, Greenwood told them verbally that they did not need to do anything additional. Riendeau looked at the tax card and noted that the codes is 1010 which is a single family home. It was noted that the permits that are listed are all listed as additions.

Fales moves to close the public portion. Davenport seconded the motion; which carried unanimously.

Board Discussion

Cay noted that there is a list of items that equitable waiver of dimensional requirements can be applied to and this is not an example of such an item. McKeon asked if they would have to apply for a variance after the fact? Riendeau asked Town Administrator Rick Carrier how it was decided that the applicant would need to file this type of application. Carrier noted that Carol Ross informed them that she was in the same boat and said they would need to file an equitable waiver. It was also noted that Greenwood had stated in a letter that they needed to file an Equitable Waiver. Eric Powers noted that the Dimensional Requirement refers to the 4 acre requirement that they are not able to meet. Cay noted that it is not a dimensional problem as the regulation clearly states the need to have four acres and this lot is clearly not 4 acres. Cay noted that this is an ordinance interpretation error.

Cay moves to re-open the public portion. Fales seconded the motion which carried unanimously.

Diane Powers noted that the error was made by the Town Official in granting the approval for a two family home. Powers stated that Greenwood told the Powers that they were already approved and did not need to do anything additional. Powers noted that Greenwood has known all along that it is a two family home. Eric Powers noted that they are looking for a waiver from the 4 acre requirement. Cay noted that the Powers did the right thing by going to a Town Official, and were given the wrong information, however that does not automatically give the applicant an out. McKeon noted that because there is nothing in writing from Greenwood indicating his knowledge or lack of knowledge in this situation, she would like some time to get information from Greenwood. McKeon noted that none of the applications mention a kitchen and none of the plans show a kitchen.

McKeon moves to continue the hearing to September 10, 2013 to give the board time to get input and information from Chet Greenwood. Davenport seconds the motion which passes by majority vote.

Robert Del Sesto is requesting an appeal from an Administrative Decision of the Planning Board's decision of July 1, 2013 concerning applicability of provision to the Chesterfield Zoning Ordinance and the Planning Board's decision to waive or vary provisions of the Chesterfield Zoning Ordinance when it approved the Paul Saba (Big Deal) plans for a Minor Site Development of property located at 1474 Route 9, Chesterfield NH (Map 11A, B1) in the Commercial/Industrial District.

Del Sesto noted that he had a presentation planned, but his computer was not cooperating, so he apologizes for the presentation.

Del Sesto noted that he is appealing a decision of the Planning Board and their interpretation and modification of the Zoning Regulations. Del Sesto noted on the face, it appears that the Planning Board has essentially granted a variance, which they do not have the power to do. Cay noted that whatever the Zoning Board does tonight has no legal validity. Del Sesto noted that the Zoning Board has the right to find that the Planning Board exceeded their authority. Cay asked Carrier if he looked at the RSA's to confirm that this is a viable option. Carrier noted that the RSA does indicate that this issue can in fact be brought before the Zoning Board, but he is not sure that Del Sesto has standing to bring such an application. Riendeau asked Del Sesto to prove that he has standing to bring forth this appeal. Del Sesto noted that "in layman terms" anyone affected by a decision has the right to appeal".

Del Sesto provided the minutes from the December 19, 2011 Planning Board meeting where the board decided that they would recommend to change the zoning from Residential to Commercial. Del Sesto showed the Town Report which indicates the Town voted to change the district and Big Deal is now zoned Commercial/Industrial. Del Sesto stated that it was previously non-conforming in the Residential Zone and had been for many years. Del Sesto indicated that this was beneficial to the applicant due to the fact that they do not have to come before the Zoning Board for many things such as a change in use, or expanding use etc. Del Sesto noted that the value of the business increased and now he can sell the property to more potential buyers as the property restrictions are less. Del Sesto handed out the July 1, 2013 Planning Board minutes and the board read them over. The board reviewed the approved plans. Del Sesto noted that with the Zoning Change, it is now a conforming use in a commercial area. Del Sesto read Zoning Ordinance 502.3 Replacement with permitted use, which states that "any building, structure, or land in or on which a non-conforming use is replaced by a permitted use shall thereafter conform to the regulations for the district in which such structure is located, and the non-conforming use may not thereafter be resumed." Del Sesto noted that this property falls under this ordinance. Del Sesto read Zoning Ordinance 400, Off Street Parking and Loading, which states "After the effective date of this Ordinance, and building erected or enlarged by more than 25 percent of its gross floor area above ground level and any lot used in or occupied for any purpose shall comply with the off-street parking and loading requirements set forth herein." Del Sesto continued by reading Zoning Regulation 400.0 Off Street Loading/Unloading, which states "All commercial and industrial uses shall provide adequate off-street space for deliveries, loading and unloading. Such space shall not occupy the yards established by the setback requirements of this ordinance and shall not be the same space used to satisfy parking requirements." Riendeau asked if the new parking, loading and unloading space is located in the side setback. Del Sesto noted that it is located in the front setback. Del Sesto noted that it has always been this way.

Fales asked what it was that Del Sesto was appealing. Del Sesto noted that the Planning Board has essentially granted a variance for 400.2 noting that this is less non-conforming than it was in the past. Del Sesto noted that he believes that Saba needs a variance because they cannot meet the requirements of 400.2. Fales noted that the area for loading/unloading is separate from the parking area. Del Sesto noted that the approved loading area cannot accommodate the number of delivery trucks and not interfere with the parking.

Riendeau opened the meeting to public questions and/or comments.

James Corliss (Vice-Chairman of the Planning Board, attending the meeting as a representative from the Planning Board) noted that the Planning Board's intent was not to grant a variance. Corliss noted that the change adds more parking (which is not required) and a loading/unloading area and the site becomes more conforming. Mike Bentley (Attorney representing Paul Saba/Big Deal) noted that the building itself is non-conforming. It is a pre-existing building and was erected before there were regulations restricting such use. Bentley noted that the most important issue is that Del Sesto has no standing to appeal the Decision of the Planning Board in this case. Bentley noted that although Del Sesto previously served on the Planning Board and has had an active interest in the Town for many years, The Supreme Court has already decided in 2011 in Golf Course Investor of NH, LLC v. Town of Jaffrey that general interest is not sufficient to have standing. An appeal must come from a party with particular harm to them or their property. Bentley noted that according to the decision in the Supreme Court case, to have standing to appeal to the ZBA, the residents must have been aggrieved by the Planning Board's decision. Bentley noted that they used four tier of facts, proximity of the challenging party's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the challenging party's participation in the administrative hearings. Bentley noted that Del Sesto is located in West Chesterfield, and Big Deal is in Spofford. Bentley noted that there is no injury being claimed. Bentley noted that Mr. Del Sesto has "no real dog in the fight". Bentley stated that the appeal should be denied due to lack of standing.

Del Sesto noted that there is a responsibility of the board in Town to maintain safety for the people in the town. Del Sesto noted that he was approached in the past by two people who noted it was dangerous to attempt to leave that property. Del Sesto noted that although he does not have an abutting property, he has been to the property. Cay asked Del Sesto if he had standing to be making this appeal. Del Sesto noted that he believes his standing is safety. Cay noted that safety does not have standing here in this instance. McKeon noted that she would like to see other cases having to do with this issue noting that this is a commercial property and the case deals with a residential property. Bentley noted that the case involves a golf course and condominiums, and is very similar to the case at hand. Del Sesto noted that he feels he is personally affected by the approval because it is a safety problem.

Fales moved to close the public portion of the hearing, McKeon seconded the motion which passed unanimously.

Discussion

Cay moves that Robert DelSesto has no standing and the appeal is denied. Fales seconds the motion.

The board discussed where it states who has standing. It was noted that the RSA's do not discuss who has standing, and the regulations do not note who has standing to appeal. It was noted that the case that Bentley provided, does include references to other cases where the four tiers were again noted as being a basis for standing. Cay noted that the decision rendered in Golf Course Investors of NH, LLC v. Town of Jaffrey was made based on the information that came out of Weeks Restaurant Corp. V. City of Dover, 119 N.H. 541: 544-45 (1979) . It was noted that the four tiers needed for standing were clearly stated.

The vote was called.

Riendeau noted that a "yes" vote was a vote to deny the appeal based upon the lack of standing. A "no" vote does not deny the appeal, and also does not automatically give standing.

The motion that Robert Del Sesto has no standing and to deny the appeal carries by majority vote.

Review May 14, 2013 Meeting Minutes

Cay moves to approve the May 14, 2013 Meeting Minutes. McKeon seconded the motion; which carried unanimously.

Adjourn: The meeting adjourned at 10:05

Respectfully submitted,
Tricia Lachenal
Secretary

Approved

Burton Riendeau
Chairman, Zoning Board of Adjustment
Date _____