

Montpelier Development Review Board
August 3, 2009
City Council Chambers, City Hall

Subject to Review and Approval

Present: Philip Zalinger, Chair; Jack Lindley, Alan Blakeman, Jeremy Hoff, Roger Cranse and Daniel Richardson.
Gwen Hallsmith, Zoning Administrator.

Call to Order:

Philip Zalinger, Chair, called the August 3, 2009 meeting of the Development Review to order at 7:00 P.M.

Review of July 20, 2009 Minutes:

Mr. Lindley moved approval of the July 20th minutes as printed, with Mr. Richardson seconding the motion. The July 20, 2009 Development Review Board Minutes were approved 5 to 0.

Comments from the Chair:

Mr. Zalinger, Chair noted that the next Development Review Board meeting is scheduled for Monday, August 17th which is Bennington Battle Day and celebrated by the state. State offices are closed. Since the Development Review Board acknowledges and recognizes various other holidays during the year that he thinks Bennington Battle Day is worthy of being recognized.

I. Sketch Plan Review for a two-lot subdivision – MDR

304 Berlin Street

Applicant: McKee, Giuliani & Cleveland

Owner: Norman Kelley

Mr. Zalinger explained that the sketch plan review process is informal and a preliminary review of the subdivision plan. He asked Mr. Kelley if the parcel had been before the DRB before.

Mr. Kelley replied yes, years and years ago when it was sold to him by a developer for the Sherwood Drive area. That was back in the 60's or 70's.

Mr. Zalinger said this application is based upon the amended plan delivered to them on Friday.

Ms. Hallsmith said she had placed on their desks the amended plan that was dropped off on Friday. There are two lots – Lot 1 and Lot 2. Lot 2, in fact, according to the amended sketch plan, is connected to Mr. Kelley's house which is the lot up on Sherwood Drive by this very narrow connecting piece about two feet wide. That is likely because otherwise Lot 2 would not have any road frontage.

Mr. Kelley said it actually does. The blow up of that 2 foot strip is at the bottom left hand corner of the map. That is a purpose to maintain as a contiguous piece of property the two acres on the right as well as his present residence which is on Sherwood Drive.

Ms. Hallsmith said without that connection Lot 2 of 2.48 acres does not have any road frontage. Is that correct?

Mr. Kelley said it has a right-of-way, right up ahead where it says Sherwood Drive.

Ms. Hallsmith said she understands that a 60 foot right-of-way does connect to Sherwood Drive but that doesn't necessarily count as road frontage under the zoning. Clancy and she did a site visit today. They looked at the property because it is an unusual proposal to have this dog leg connection. The zoning actually speaks to this issue in § 718 (d) where it doesn't allow unusual configurations like this unless they are required by topographical

features or natural resource issues. Under the zoning the plan Mr. Kelley submitted on Friday doesn't comply with the zoning. On the site visit it is a big lot. The combination of Lot 1 and Lot 2 are large. There is a fairly steep hill between the house and garage that is located on the map. She understands Mr. Kelley has been using the garage for his business over time. There is quite an adequate driveway that serves the lot from Sherwood Drive, but there isn't any road frontage that is connecting the lot to Sherwood Drive except now that very narrow strip that he is proposing to be created adjacent to the other lot.

Mr. Zalinger said one fundamental question he has whether he plans to attach Lot 2 to his residential parcel.

Mr. Kelley replied that was the purpose at this time, yes. It may be developed way down the road, but he probably wouldn't be the one to do it.

Mr. Zalinger said what troubles him as an administrator in this capacity is that Lot 2 is being subdivided from Lot 1, and then there is the appendage to his personal residential lot. How are you going to create that two foot connecting piece, by deed?

Mr. Kelley said no, it would be by default. In other words, he just wouldn't deed it out. He owns Lot 2 at the present and that is just part of Lot 2 which will remain in his possession.

Mr. Zalinger said he owns Lot 1 and Lot 2. Mr. Kelley replied yes.

Mr. Zalinger inquired who resides at Lot 1. Mr. Kelley said that is going to be sold.

Mr. Zalinger asked if it was a rental property. Mr. Kelley said the house is for sale.

Mr. Zalinger said there is a house he has constructed on this parcel. Now he wants to subdivide a parcel which has the residence on it, create parcel 2 at the same time. There is a matter of real property law. He is wondering how he is going to merge title to the small strip to the residence parcel he owns on Sherwood Drive, which he acquired at a different time.

Mr. Kelley said he thinks they can write a deed joining the two. He checked with Mr. Twombly, the Tax Assessor, before he did this, and he said this would be acceptable.

Mr. Zalinger said he can assure him that the Tax Assessor will find all of his land so it's not really up to him to approve or disapprove of his plans. If he and his spouse own the property at Sherwood Drive and the deed recorded at Volume 179 page 447, the land at 484 Sherwood Drive, is that his principal residence? Mr. Kelley replied yes. He would have acquired that by a deed some time ago. He owns it with his spouse. If he owns title to these other parcels by reason of a different deed or in a different name, such as himself individually or business, the ownership isn't interchangeable so you can't really attach that two foot stretch to the residential parcel unless you deed it to yourselves with the clear intention of annexing it to the residential parcel. Do you wish to have Lot 2 appended to the residential parcel?

Mr. Kelley said he was thinking about that.

Mr. Zalinger said then it wouldn't be a separate parcel. Then, no new parcel will be created. Only one new parcel will be created – Lot 1. If his intention is to not have Lot 2 become a separate independent parcel but rather to create a new residential parcel of his own on Sherwood with a spur that runs east and the remaining land he did not convey out with the house, then under subdivision law he has appended that remaining acreage to the residential parcel, and no new parcel is being created. He isn't sure that is what his intention is.

Ms. Hallsmith said she believes that is what his intention is. The question is whether he can do it. Under §718 (d) it says lots with irregular shapes, curves, jaws, dog legs, bowling alleys, etc. shall not be approved.

Mr. Zalinger said Lot 2 will not be created. Lot 1 will be created and the balance of the property will be appended to 484 Sherwood Drive. The lot on 484 Sherwood will change shape, but it won't be a new lot with boundaries.

Mr. Hoff said if they are creating Lot 2 they are essentially creating a nonconforming lot because it doesn't have frontage. Then, the fact there is common ownership between Lot 2 and the residential lot they merge because you can't create a nonconforming lot.

Ms. Hallsmith said then that lot is a lot of irregular shape.

Mr. Zalinger said if two abutting landowners exchange property a new lot is not created. Whatever is transferred from one to another is annexed to lots that already exist, so the annexation of Lot 2 through the connector piece to Sherwood Drive doesn't create a new lot; it changes in a somewhat unusual manner the configuration of the existing 484 Sherwood Drive parcel. They are connected. However, tenuously, but there is nevertheless a connection. Frankly, he doesn't see how the zoning ordinance is disadvantaged if we include a provision that contemplates there will be no subdivision of 484 Sherwood Drive in the future.

Ms. Hallsmith said unless the zoning changes. Clearly, there is enough land here and very good access to that lot from Sherwood Drive; there is a lot of acreage. She doesn't see any harm done. She is just trying to point out what the ordinance says.

Mr. Richardson said our ordinance doesn't allow that as a substitute for a driveway.

Ms. Hallsmith said it does allow it when the lot already exists, but what she configures is not allowed is the creation of lots without frontage. Like the lot directly adjacent to this land, according to the map in their packet, the current tax map, unless one of these other lots doesn't have the line, the backland #50 might actually be access through what would be Lot 231 or 273. It is a large landlocked parcel. Creating a lot without frontage is a bit of a problem. If this Lot #50 on the map already exists prior to the passage of this zoning ordinance and the landowner to that backland acquires a right-of-way from Sherwood Drive into that property that is at least 30 feet wide according to the ordinance, then you could allow development there. Right now under the city's current ordinance the zoning doesn't allow for lots without frontage. We had this same issue with the Elks Club's proposal.

Mr. Hoff said they are making the applicant go through two steps. Why two feet for the strip connecting the two pieces of land?

Mr. Kelley said on the map at the bottom there is a two foot extension on the 484 Sherwood Drive lot at the east end and a 14 foot extension on the west end. That was done to comply with the city regulations for the house at 484 Sherwood Drive because it did not have enough lot space. The city asked him to add so much more space to make that house legal from setbacks.

Mr. Richardson said part of the concern is that it creates a very irregular shaped lot by using that two foot extension. That was what the setback was when they built the house, and that was what the city made him do. At the point he is laying out a new site plan or asking for a new subdivision he isn't really tied to that two foot amount. There is nothing prohibiting him from having the surveyor draw the line a different way so the lot wouldn't be quite as peculiar, which might alleviate some of the concern.

Mr. Kelley asked what if that two foot piece were 10 feet to allow him to have access from where he lives to the lot below. Would that make a difference?

Ms. Hallsmith replied it might impinge upon the driveway or the setbacks required from the house he has on Lot 1. Often in closings and title searches if the driveway isn't completely on the land that is in question that often is an issue for clear title. She can understand the rationale for why he did it this way. There is a lot of land here and good access from Sherwood Drive. It is just the ordinance says that makes it unusual and irregular and possibly falling under §718 (d).

Mr. Zalinger said if the intention is to append this parcel to 484 Sherwood Drive, then it is not being created as a separate parcel and it needs no access.

Mr. Richardson said the applicant needs to think long term what his intentions are with the lot, which is not obviously for the Board to decide. There is some flexibility now with what he does and he should be thinking ahead.

Mr. Zalinger said this is a sketch plan. Certainly, they would like the zoning office to know precisely what the ordinance says about what is being petitioned. Let's say Lot 2 was going to be created. He doesn't think the absence of frontage or the existence of a right-of-way is relevant if it is going to be attached to 484 Sherwood Drive. Secondly, it follows to him that the applicant needs to know that the DRB is viewing this as Lot 2 being appended to the residential parcel in perpetuity with the assumption he isn't coming back to the Board, or his successors aren't coming back to the Board, and seek to subdivide Lot 2 from 484 Sherwood after the dust clears from this matter. Zoning boards don't wish to have applicants achieve a longer purpose by taking it in smaller bites, one at a time, and defeating the scheme and design of the zoning ordinance. They would want to have the rear acreage to 484 Sherwood Drive perpetually. His other concern is that two feet just about gives him room enough for a wheelbarrow so he wonders if it offers him much in the way of practical access.

Mr. Kelley said that is why he asked Ms. Hallsmith about extending it to a realistic piece of land so they would have access with a tractor or pickup.

Ms. Hallsmith said he could submit whatever plan he likes. It looks to her from the site plan that if they start to impinge upon the setback requirements of the existing home, or if the driveway for the existing home is on his land, then it is a problem. The plan the office did receive shows further development on this lot which is why they are raising some concerns.

Mr. Zalinger said if the applicant is presenting the plan to the Board as not creating a second lot but rather changing the configuration of 484 Sherwood Drive, then that is a subdivision he thinks the Board could support. They don't want some subsequent applicant to come in and say they want to develop Lot 2 because it hasn't been presented that way to the Board. That is not the plan presented to the DRB.

Mr. Kelley said he would like to comment on Mr. Hoff's a few minutes ago. That is a developable piece of land. He has reached the point where he isn't working any longer and the garage isn't being used except to store junk and at some time he would like to have that available for development. Seven years ago he proposed to the Department of Public Works and asked for access to that lot and they gave him a curb cut and access to the lot on the right-of-way. The curb cut is in and paved and the driveway exists. His intentions are honorable, but he thought when he got to the point he couldn't walk down those two feet without having to get into his car and drive down and in the other driveway that he could sell it.

Mr. Zalinger said that was why he brought up the subject. There is nothing wrong with that being his long term plan, but the Board doesn't want it presented to us as Lot 1 with a change to 484 Sherwood and at a future date come back to them in a different configuration as Lot 2, which is really masquerading as 484 Sherwood. Let's call this by its real name, and if this is a subdivision he should address it as such and not a change in the configuration of 484 Sherwood. Let's present it as Lot 2 as a stand alone lot and deal with it as he ultimately believes it will be.

Mr. Kelley asked if he could maintain the two feet right of access.

Mr. Zalinger said there were other ways to do it. He could retain an easement or a license in the sale of Lot 1 for his personal use as long as he owns 484 Sherwood Drive. There are a lot of other ways to do it without retaining title and fee ownership. Lot 1 has boundaries that are true to the survey. You don't have to create a strange line. He could retain rights, easements or a right-of-way over and upon it for 10 feet wide for 10 years, or for however long he wants to use the wheelbarrow to have access up there. Then, they will approach Lot 2 in its real costume, which he really wants a developable lot and a permit for that. That might be a clearer approach.

Mr. Kelley replied that sounded reasonable.

Mr. Zalinger said then they will have to deal with the zoning ordinance and how the zoning ordinance views creation of Lot 2 having its access by a right-of-way. He doesn't pretend to know right now to know what it says and he isn't sure the zoning office has gone all the way through the ordinance and looked at all of the configurations. He has changed his approach to a clear creation of a new lot, too.

Ms. Hallsmith reminded them that this is sketch plan review so this isn't the moment when it is approved or disapproved. It is just an opportunity to give the applicant some feedback so he can go back to the drawing board and figure out what the best approach is going to be.

Mr. Lindley asked when the 60 foot right-of-way was created.

Mr. Kelley replied it was 6 or 7 years ago.

Ms. Hallsmith said Clancy also identified a number of different pieces of information that will have to be included in the submission for the next time. The applicant should go back and talk to Clancy about that. There are items like the environmental features and the plan statement and a narrative about how the plan adheres to all of the zoning requirements. That is an important part of any application. The applicant and his lawyer go through and review the zoning and present to the DRB in a clear way how it complies so it addresses some of the issues around frontage and access and provisions about lot shape.

Mr. Zalinger said those were the Board's comments and observations and they look forward to seeing him back when he has polished his plan further.

Ms. Hallsmith told the Development Review Board that there is a recent court case in the Town of Jericho on this exact question. The Jericho case dealt with the issue where they had the same provision in their zoning plus the provision requiring frontage, and the court denied their application because it said they had to comply with both provisions. Section 607 (a) applies to lots that are already in existence but not lots that are being created.

II. Variance Request from Rear Yard Setback – HDR

16 Msgr. Crosby Avenue

Applicant/Owner: Marilyn Turcotte

Mr. Zalinger administered the oath to the applicant, Marilyn Turcotte.

Ms. Hallsmith said Ms. Turcotte is asking for permission to extend a deck. There is an existing outlying area of her existing deck and she is proposing to extend it a short distance with a cover over it. It is impinging on the setbacks on the city park side of the property, but it does not increase the distance between the property line and the overall house even though it does increase the length of which that distance is within the setback.

Ms. Turcotte told the DRB she put in an accessory apartment in her house so the entrance is from the front of the building. She enters from the side which is off the porch. She has an office in her home so when she put in the apartment she did not rent that 16 x 16 space above her office because of noise. She is a therapist so she can't have music or people making noise up there. Unfortunately, there is one stairway in the house and that goes to the apartment so she doesn't have access to that room above her office. Eventually, she would like to try to put a stairway that begins on the enclosed porch into the house and up to the upstairs room so she can have access to it. The porch wouldn't become a year round use, but she would probably move the office upstairs and the downstairs section of the home could become part of her living space. She has a section of the house that she doesn't have access to unless she climbs a ladder on to a porch and go through a window. She has also had an invasion of skunks over the last five years. She was away and when she rented her house they moved in and had babies and every year they return. As long as she has to repair all of that she hopes to extend it out.

Mr. Cranse asked if she could describe what the covering would be like. Is that going to be an extension of the roof?

Ms. Turcotte replied yes, part of the curved roof that is there.

Mr. Zalinger said the application says it is a rear yard variance because he finds himself losing focus because there is a home occupation, an office and an accessory apartment. He really doesn't think any of that is relevant to the variance request because it really is just spatial and the rear lot setback.

Mr. Richardson asked if there was any way the porch could be extended along the shared side with the city park.

Ms. Turcotte said she is looking for an extension on the back part of the house. There is a very steep hill there so there isn't any room there.

Mr. Richardson asked if the hill in the back yard was steep as well.

Ms. Turcotte said it is short and levels out.

Mr. Zalinger asked what is the distance east/west of the proposed addition. What is the length? It is going to be 4 feet wide.

Ms. Turcotte replied that the length would be 16 feet.

Mr. Zalinger asked Ms. Hallsmith if they knew what the side yard setback was. It is really only the rear yard setback they are concerned with. The rear yard setback is 30 feet.

Ms. Turcotte said there is and was a back porch when she purchased the house.

Mr. Richardson asked if she had any sense of when the porch was built. Was it around the same time the house was built, or was it a later addition?

Ms. Turcotte said the people who owned it before her lived there for 33 years so she has no idea.

The DRB reviewed the variance criteria.

Variance Criteria: §1006.B(1)(a)-(f)

- a) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lots size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to such conditions, and not the circumstances or conditions generally created by the provisions of the zoning regulation in the neighborhood or district in which the property is located.*

Mr. Zalinger said he would point out that the existing house is already set within the rear yard setback and it was many years before the zoning ordinance had been adopted. Mr. Richardson said he would also add that this is a shallow lot that if the 30 foot setback was enforced there wouldn't be really any space on which to build a house to begin with. Mr. Zalinger added that the point was that the building pre-existed the zoning ordinance. Ms. Turcotte said she believed the house was built in the late 1800's. It is already within the rear yard setback.

- b) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning regulation and that the authorization of a variance is, therefore, necessary to enable the reasonable use of property.*

This is the kind of situation where we point out that the variance the applicant has requested doesn't increase the incursion into the setback. It doesn't go any further than the incursion already is. It continues the incursion on the same parallel line, but there is no increase in the incursion. The rear porch is already 26 feet into the rear yard setback.

- c) *That the unnecessary hardship has not been created by the appellant, and the hardship relates to the applicant's land, rather than personal circumstances.*

It is apparent that the house was built in the 19th century and predates the zoning ordinance. Therefore, it is not any personal action or circumstance of the applicant. She didn't create the hardship by building the house to conform within the 30 foot setback and then ask for a deck within the setback. Mr. Hoff said he would note that since there was testimony given to the effect that the applicant created a room in the house that didn't have access that what they are really looking at here only applies to the porch to the extent that if she were to place a stairway within the porch or over part of the porch that wouldn't be covered by this application. Mr. Richardson said he would suggest they aren't taking testimony on a stairway. Mr. Zalinger said the variance they are being asked to consider is the variance to add a porch.

Ms. Turcotte said if the porch is approved, and then she wants to put a set of stairs inside the porch is that still asking for another zoning permit.

Mr. Hoff said he thinks there is a question that she will need to ask the zoning administrator at the point she plans to deviate from the plan she submitted as to whether or not an additional variance is needed for increasing the development. Ms. Hallsmith added she would also need to consult with the building inspector.

Ms. Turcotte said the stairway would be in the porch and in the house. It would not come outside of anything they are approving today. It would be inside the building.

Mr. Zalinger said he is uncomfortable with the discussion about the stairway.

- d) *That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use of development of adjacent property, reduce access to renewable energy resources, nor be detrimental to the public welfare.*

She will continue to use the property as her principal residence with an apartment. He thinks they can conclude that this will not adversely affect 14 Msgr. Crosby nor will it adversely affect the city park.

Ms. Turcotte replied her neighbor below her would be the only people who would see it. They called and said they didn't have any trouble with it. Mr. Zalinger said all the Board can do is take note that they aren't present to object. Mr. Zalinger said he believes they can conclude that there will be no detriment to the public's use of the park to rear and side of this property.

- e) *That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the zoning regulation and from the Montpelier Municipal Plan.*

Mr. Zalinger said if the plan continues the existing line, both to the north and to the west of the property, they can conclude that it is the minimum variance to afford relief.

- f) *The variance will not result in the initiation of a nonconforming use of land.*

It is a continuation of the residential rental and home occupancy use of the property.

Mr. Richardson moved for a variance approval for 16 Msgr. Crosby Avenue, with Mr. Blakeman seconding the motion. Mr. Zalinger asked if they would accept a friendly amendment and suggest it to grant a variance of 28feet in the rear setback for a porch addition. The variance was granted on a vote of 6 to 0.

Adjournment:

Upon motion by Mr. Lindley and Mr. Hoff, the Development Review Board adjourned on a vote of 6 to 0.

Respectfully submitted,

Gwen Hallsmith, Director
Planning and Community Development

Transcribed by: Joan Clack