

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**October 3, 2013**

**Members Present**

Allan Virr, Chairman  
Lynn Perkins, Vice Chairman  
Donald Burgess, Secretary  
Teresa Hampton  
Joseph Carnevale

**Members Absent**

**Alternates Present**

Tyler Whitehorn

**Alternates Absent**

David Thompson

Mr. Virr called the meeting to order at 7:05 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.

**13-118            John T. O'Connor**  
**Owner: Yvon Cormier Construction Corp.**

**Applicant is requesting an Appeal of an Administrative Decision as follows: “to show that the Code Enforcement Officer’s decision was in error and he made an unlawful decision when he determined that Dumpster Depot LLC., Mr. Virr said that it is not Dumpster Depot, LLC, it is actually Accurate Transport, falls under Article VI, Section 165-41, Industrial District III, Section A: Permitted Uses as a “Contractors Yard”. Parcel 08017, 41 Ashleigh Drive, Zoned IND III.**

Mr. Virr informed the applicant and the public that this appeal of an Administrative Decision was not a regular case hearing and this type has characteristics in the 10 years of sitting on the Board have never had such a case presented before him that they are rare. He stated that this was a public meeting but not having testimony from the public as it is addressing the ordinance and essentially the Board is hearing. There will be no comments from the public.

Mr. Virr said that the first issue that needs to be clarified is who the applicant. Mr. Virr asked Mr. O'Connor if solely or as a group. Mr. O'Connor said that he was doing solely but based on the criteria of the document supplied had to list the owner and the applicant and the site applicant seeking the use.

Mr. Virr said that the Board has some jurisdictional problems and may want to reconsider and get the support of those people that represent the abutters whether it is the group or other abutters as have equal interest. Mr. O'Connor said that he was a direct abutter and agreed that other abutters had equal interest.

Mr. Virr said that the reason that the Board is not able to accept jurisdiction is that if Mr. Mackey did make a "decision" regarding that it being able fit into a contractor's yard definition that decision would have been made on April 21, 2013. Which means that any appeal would have had to have been made within 20 days of April 21, 2013. Mr. Virr said that the appeal basis solely on the decision of Mr. Mackey's ruling or discussion, or commenting, or opinion, or whatever you want to call it would have had to been made August 21, 2012 and it was made on April 21, 2013 which is evidenced on plan of Accurate Transport.

Mr. Virr said that in Derry we have a Technical Review Committee and that Mr. Mackey does not decide all things. That committee consists of Public Works Director, Code Enforcement Officer, Fire Department, Conservation Commission and Police Department all have to sign off and that sign off is an okay to proceed with a proposed plan to the Planning Board and then it is up to the Planning Board to consider if the it fits as a contractor's yard. If it if they decide that it does not then it would have to come to the Zoning Board for a variance in the Industrial III section there is no definition. Mr. O'Connor said that the technical review notes were never supplied to the Planning Board.

Mr. Virr said that if agreed to the ruling of no jurisdiction the Board will convert the appeal to an appeal to the Planning Board and hear the case and will re-notify abutters.

Mr. Virr asked if the timeliness issue that the Board has were clear to him. Mr. O'Connor said that he did not have case law in front of him and believed there was a case law that was up to 5 or 6 months in Hudson. The issue of a contractor's yard wasn't presented to the Planning Board and that it was the Town Administrator who asked the Chairman or Director of Planning if this was construed as contractors yard and it was then known that there was no definition of a contractors yard in zoning.

Mr. Virr said that the Board is not going to hear the case to appeal of the Code Enforcement Officer as it is untimely the but still timely if convert it to the Planning Board decision as in the application submitted to the Board the face states one of the reasons is that Mr. Mackey made an error in calling it was a contractors yard but in the body of the attachments a lot of issues are raised regarding the approval of the Planning Board's decision on its approval of Dumpster Depot. Mr. O'Connor asked if the Board would be hearing tonight or setting date.

Mr. Virr said that the Board was not hearing the case tonight but willing to hear on October 17, 2013. Mr. Virr said that if the group of people wish to have Mr. O'Connor speak for them that they would need to supply a list and state the capacity if it is abutters or a group of abutters. He said that they all would need to sign giving authorization for him to speak.

Mr. O'Connor asked if it could be on one form with all the signatures. Mr. Virr said yes.

Mr. Burgess said that any additional information that may be submitted needed to be in 10 days prior to the meeting.

Mr. Virr said that according to the Board's policy and procedures they require any information to be submitted to the Board 10 days in advance of the meeting. Mr. O'Connor said that the packets are exhibits and points that he would also like to submit for the Boards review.

Mr. Perkins informed Mr. O'Connor that if he was unable to put all his information together within the ten days that the Board will offer a postponement and if there is an issue with the next meeting please let the Board know 10 days prior to the meeting.

Mr. Virr also said that Mr. O'Connor could grant someone else authorization to speak in his absence.

Mr. O'Connor asked if the Board could give a clarification of the 10 days if it was calendar days or 10 business days as he was concerned of having only 4 days to prepare if it was 10 days from the date of the meeting. Mr. Perkins said that it was 10 calendar days in advance of the scheduled meeting.

Mr. Virr explained to the public that the case would be re-noticed as an appeal to the Planning Boards decision and at that time they would have a chance to speak but did ask if there was any general questions that the Board could try to assist with tonight.

There was some abutters in the audience that had some concerns as to what may or may not occur.

Mr. Burgess motioned to go into deliberative session.

Seconded by Mr. Carnevale

Vote: Unanimous.

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

### **Deliberative Session**

Mr. Virr said that the motion needs to be crafted to refuse jurisdiction on appeal of administrative decision to the Code Enforcement Officer and that Mr. Mackey is not accountable for comments and opinions. He said that the reasons for refusal is due to untimely filing of appeal.

Mr. Burgess said that the Board should be made available all previous Planning Board meeting materials.

Mr. Virr said that RSA 677:15 specifies that Town official has to turn over whole case file 10 days prior to the meeting.

Mr. Burgess asked if the second part of the motion could be read again as he felt something was missing.

Mr. Perkins stated that the applicant needs to submit a list of parties represented along with their signatures as of September 13, 2013.

Mrs. Hampton said that she felt that there needs to be something about the abutters or parties that Mr. O'Connor is representing needs to be in the motion.

Mr. Virr said that Mr. O'Connor will be providing that material.

Mr. Perkins reviewed the conditions for the Board as follows:

- 1. Refuse jurisdiction.**
- 2. Board will convert appeal to Planning Board decision of August 21, 2013.**
- 3. Applicant must submit list of parties representing as of September 13, 2013 along with signatures authorizing representation.**
- 4. Any additional material must be submitted no later than 10 days prior to the Zoning Board hearing on the matter.**

Mr. Carnevale motioned to come out of deliberative session.

Seconded by Mr. Burgess.

Vote: Unanimous.

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

**Mr. Perkins motioned to refuse jurisdiction on case 13-118, John T. O'Connor, Owner: Yvon Cormier Construction Corp. of an Appeal of an Administrative Decision as follows: "to show that the Code Enforcement Officer's decision was in error and he made an unlawful decision when he determined that Accurate Transport, LLC belonged in the category of a contractors yard. The Code Enforcement Officer is not accountable for comments and opinions and reason of refusal is due to untimely filing as presented with the following conditions:**

- 1. Refuse jurisdiction.**
- 2. Board will convert appeal to Planning Board decision of August 21, 2013.**
- 3. Applicant must submit list of parties representing as of September 13, 2013 along with signatures authorizing representation.**
- 4. Any additional material must be submitted no later than 10 days prior to the Zoning Board hearing on the matter.**

**Seconded by Mr. Carnevale.**

**Vote:**

**Mrs. Hampton:** Yes.  
**Mr. Carnevale:** Yes.  
**Mr. Burgess:** Yes  
**Mr. Perkins:** Yes.  
**Mr. Virr:** 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 to Superior Court.**

Mr. Virr said that the Board will have notices sent to all the abutters with regard to a rehearing of the Planning Boards 8/13/2013 decision.

It was noted for the record Mr. Perkins stepped down for the following case and that Mr. Virr appointed Mr. Whitehorn to sit.

**13-119            Howard and Sara Bethke**

**Applicant is requesting a variance to the terms of Article VI, Section 165-33.C.5 of the Town of Derry Zoning Ordinance to allow the Construction of a 6' x 10' shed too close to the side property line. PID 30110, 10 Marlboro Road, Zoned CBD.**

Howard Bethke, owner, read his application for the Board.

**Board Questions**

Mr. Carnevale asked if the shed would be placed on cinder blocks. Mr. Bethke said yes.

Mr. Virr said that he had driven by the property and found that it was extremely narrow and that the applicant's choice of locations were limited and that the proposal would be too close to the lot lines but felt that there was really no other placement for it.

Mrs. Hampton asked if the wet area in the rear of the property and asked if it would create wet area problems for neighbors if placed in the rear of the property. Mr. Bethke said yes and that his neighbor had removed a garage that helped elevate some of the water issues.

Mr. Virr asked if it would disturb the natural water flow and noted that the wet area was delineated on a map. Mr. Bethke said that it was seasonal and that there was a drainage area near Walgreens that gets clogged on occasions and that he has to contact the Town to clean out.

**Favor**

No one spoke in favor of the application.

## **Opposition**

No one spoke in opposition of the application.

Mr. Bethke said that there was a letter submitted with his application from his neighbor at 12 Marlboro Road in favor of his request.

Mr. Burgess read the letter from 12 Marlboro Road in favor of the applicants request for the record.

## **Code Enforcement**

Mr. Burgess read Mr. Mackey's report for the record as follows:

- The applicant is requesting a variance to locate a 6' x 10' shed 6' from the side lot line.
- If approved, a building permit will be required.
- There are pictures in the file for the review by the Board.

Mr. Carnevale motioned to go into deliberative session.

Seconded by Mr. Burgess.

Vote: Unanimous.

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

## **Deliberative Session**

Mr. Virr said that the condition of being subject to all Town permits and inspections be placed no closer than 6' to the side lot line. Mr. Virr said that he was going to break protocol in order to ask the applicant how far from the street that the proposed shed would be located as that was not part of the testimony.

Mr. Bethke said that he had not measured the front setback but can fit 3 cars end to end in his driveway.

There was some discussion regarding the length of vehicles and driveway.

Mr. Burgess reviewed the following conditions for the motion:

1. Subject to obtaining all Town permits and inspections.
2. Shed to be no closer than 6' to the side lot line and no closer than 20' to the front lot line.

Mrs. Hampton motioned to come out of deliberative session.

Seconded by Mr. Carnevale.

Vote: Unanimous.

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

**Mr. Burgess motioned on case #13-119, Howard and Sara Bethke, to Grant request of a Variance to the terms of Article VI, Section 165-33.C.5 of the Town of Derry Zoning Ordinance to allow the Construction of a 6' x 10' shed too close to the side property line. PID 30110, 10 Marlboro Road, Zoned CBD.**

- 3. Subject to obtaining all Town permits and inspections.**
- 4. Shed to be no closer than 6' to the side lot line and no closer than 20' to the front lot line.**

Seconded by Mr. Carnevale.

**Vote:**

**Mr. Carnevale: Yes.**

**Mr. Burgess: Yes.**

**Mr. Whitehorn: Yes.**

**Mrs. Hampton: Yes.**

**Mr. Virr: 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.**

**Other Business**

Mr. Virr said that the previous reading of changes that need to be made to the ZBA Policy & Procedures that became effective August 31, 2013 amending RSA 637:15 need to be revised to the following and stated that the following changes would be considered as a first reading:

5. The following time limits shall apply to appeals to the Board of Adjustment and requests for rehearing:
  - a. Any appeal of a decision of the administrative decision taken under RSA 676:5,I, shall be filed with the ZBA within twenty (20) days from the date of the decision and shall specify the alleged error or errors in such order, requirement, decision, or determination. The officer shall forthwith transmit to the Board all papers constituting the record upon which the action appealed from was taken.

- b. Any appeal of a Planning Board decision taken under RSA 676:5, III, shall be filed with the ZBA within thirty (30) days from the date of the Planning Board approved or disapproved the application and shall specify the alleged error or errors in such order, requirement decision or determination. The Board shall forthwith transmit to the Zoning Board all the papers constituting the record upon which the action appealed from was taken.

Mr. Virr motioned to accept as first reading.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mr. Whitehorn, Mr. Carnevale, Mrs. Hampton, Mr. Burgess, Mr. Perkins, Mr. Virr

Mr. Virr said that the next reading will be at the October 17, 2013

### **Approval of Minutes**

Mr. Whitehorn noted that page 5 of the September 19, 2013 minutes read that he voted on the case and it should read Mr. Perkins as he did not sit for that case.

Mr. Perkins motioned to approve the minutes of September 19, 2013 as amended.

Seconded by Mr. Burgess.

Vote: Unanimous

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

### **Other Business**

Mr. Virr said that some of the Board members had attend one of the three Municipal Law Lecture Series held at the Derry Municipal Center on Wednesday and invited the Board members that had not attended to join them for session 1 next Wednesday from 7:00 – 9:00 pm.

Mr. Virr said that there were 3 new members appointed to the Board by Town Council that may still need to be sworn in but would like to welcome Ann Marie Chase, Heather Evans and Susan Kopetz to the Board.



### **Adjourn**

Mr. Burgess motioned to adjourn.

Seconded by Mr. Perkins.

Vote: Unanimous.

Mr. Whitehorn, Mr. Carnevale, Mrs. Hampton, Mr. Burgess, Mr. Perkins, Mr. Virr

Adjourn at 10:06 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

### **Approval of Minutes October 17, 2013**

Mr. Carnevale motioned to approve the minutes of October 3, 2013 as amended.

Seconded by Mr. Burgess.

Vote: Unanimous

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