

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**October 20, 2022**

**Members Present**

Lynn Perkins, Chairman  
Crystal Morin, Secretary

Donald Burgess

**Members Absent**

Craig Corbett, Vice Chair  
Allan Virr

**Alternates Present**

Michael Donlon  
Gaspar Obimba  
Richard Tripp  
James Dietzel

**Alternates Absent**

**Code Enforcement**

Robert Mackey, Code Enforcement Director

Mr. Perkins called the meeting to order at 7:00 p.m. with the salute to the flag. Mr. Perkins stated that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic and in accordance with the Governor's Emergency Order #12 this public body is authorized to meet now physically and also electronically. As such this meeting is being held and will also be providing public access to the meeting by telephone with additional access possibilities by video utilizing the ZOOM app for the electronic meeting. To participate in this meeting, you can be present or by dialing 323-909-140 or by clicking on the website address: [derrycam.org/TuneIn](https://derrycam.org/TuneIn) the phone numbers are 646-558-8656 or 312-626-6799 meeting ID: 323-909-140 or if anybody has a problem, please call 603-845-5585 or email at: [ginnyrioux@derrynh.org](mailto:ginnyrioux@derrynh.org). In the event that the public is unable to access the meeting, the meeting will be adjourned and rescheduled otherwise the meeting will end at 10:00 PM. Mr. Perkins said that all votes taken are taken during this meeting shall be done by roll call vote.

The Board members introduced themselves.

It was noted that due to the absence of Mr. Corbett and Mr. Virr that Mr. Obimba and Mr. Dietzel would sit for the following case.

**22-147          Aaron & Brenda Plummer**

**The applicants are requesting a variance to the terms of Article VI, Section 165-45.1(A) & Article XIII, Section 165-107(A) and Section 165-108(A) of the Town of Derry Zoning Ordinance to allow the reconstruction of the Kittredge Farms building as a two story structure with the business located on the first floor and a residential apartment on the second floor at 36 Maple Street, Parcel ID 29116, Zoned MHDR II**

Aaron Plummer & Arielle Plummer were present. Ms. Plummer reviewed the required criteria for the record.

**Board Questions**

Mr. Burgess said that he was sorry about the fire and that he has a concern with the proposed residence if there would be parking to the rear of the property. Mr. Plummer said that the parking is staying the same and there will be no paving to the rear of the building possibly one car.

Mr. Burgess asked if the area would have a clean-up and put parking to the rear. Mr. Plummer said that the whole second floor may consist of some office and storage area and living space as would be losing office area on first level but have not really set up design yet. He said that they were seeking to resolve parking issues and described the area for the record.

Mr. Dietzel asked if the apartment would be family occupied or rental. Mr. Plummer said it would be a small apartment for family.

Mr. Obimba asked what was the walk on roof. Mr. Plummer said that the previous building was level with the rear of the property and as such you could walk onto the roof.

Mr. Tripp asked where on the lot would the building be situated. Ms. Plummer said that the building will be in the same location as before.

Mr. Donlon asked if the studio apartment on the second floor will have stairs. Mr. Plummer said possibly a step or two into main but no stairs. He described the potential floor plan for the record.

Mr. Perkins asked if the studio apartment outlined would have to be built according to code. Mr. Mackey said yes.

Mrs. Morin asked if creating an area for the food truck or just the farm stand. Ms. Plummer said that they still plan on having the food truck.

There was some discussion with regard to the floor layout of the proposed second floor.

### **Code Enforcement**

Mr. Mackey provided the following information with regard to the property for the record.

- The applicants are requesting approval to rebuild the existing single-story business, destroyed by a fire, as a two-story structure. The building will have the existing Kittredge Farms business on the first floor and an apartment on the 2<sup>nd</sup> floor.
- The property is zoned Medium High Density Residential II (MHDR II). The business has existed for many years and is considered a legal, pre-existing, non-conforming. Similarly, the structure, which does not comply with the required setbacks, is also considered pre-existing non-conforming.
- The building could be rebuilt in the same footprint as a single story with the existing business, however, the expansion of the building to 2 stories and the addition of a residential unit on the 2<sup>nd</sup> floor requires Zoning Board approval.
- If approved by the Board, a certified plot plan locating the building on the lot should be required. It should also be noted that some of the parking for the business occurs on the abutting property.
- There are pictures in the file for review by the Board.

Mr. Perkins asked if the concerns with regard to stairways etc. would fall under the Code Enforcement Office. Mr. Mackey said yes, and also the Fire Department as will need to coordinate secondary means of egress for bedrooms etc.

Mr. Perkins informed the public that now would be the time to call in favor of the proposed request. He said if wish to speak press star 9 and someone will answer your call.

### **Favor**

LaFontaine, owner of 38 Maple Street, said he has no objection to second floor and have met with Tim and reviewed concerns with parking. He said as long as there is no parking to the rear then he had no concerns.

Mr. Perkins informed the public that now would be the time to call in opposition of the proposed request. He said if wish to speak press star 9 and someone will answer your call.

### **Opposed**

No one spoke in opposition of the request.

Mr. Burgess motioned to go into deliberative session.

Seconded by Mr. Obimba.

Vote: Unanimous.

Mr. Dietzel, Mr. Obimba, Mr. Burgess, Mrs. Morin, Mr. Perkins

### **Deliberative Session**

Mr. Obimba said that he has reviewed the information provided and considering what the applicant has gone through recently he said it was a noble request and that the spirit and intent of the ordinance was met.

Mr. Dietzel said that he feels that the applicant has met the required criteria. He said that he was fond of the business and looked forward to it returning.

Mr. Burgess said that he also felt that the applicant has met the criteria.

Mrs. Morin said that the applicant has met the criteria requirements and feels that it would increase value of surrounding properties with a new structure. She said that the fire was devastating and rebuilding would clean up the area.

Mr. Perkins said that he feels that the request for a second story was not going to have adverse effects to the neighborhood as the footprint will stay the same and only expand to add living space and office area. He reviewed the conditions for the record.

The Board reviewed the Findings of Fact for Case #22-147 as follows:

- The property is zoned Medium High Density Residential II (MHDR II).
- The existing single-story business, destroyed by a fire and was a total loss.
- The applicant is seeking to rebuild the structure which is a legal non-conforming business.
- The applicant is seeking to rebuild in the same footprint and expand for a second story to include the addition of a residential unit on the 2<sup>nd</sup> floor.

The Board also includes all facts found in the meeting minutes for this application and incorporates all meeting minutes into its finding of fact and decision.

Mr. Obimba motioned to come out of deliberative session.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mr. Dietzel, Mr. Obimba, Mr. Burgess, Mrs. Morin, Mr. Perkins

**Mrs. Morin motioned on case #22-147 Aaron & Brenda Plummer to Grant a variance to the terms of Article VI, Section 165-45.1(A) & Article XIII, Section 165-107(A) and Section 165-108(A) of the Town of Derry Zoning Ordinance to allow the reconstruction of the Kittredge Farms building as a two story structure with the business located on the first floor and a residential apartment on the second floor at 36 Maple Street, Parcel ID 29116, Zoned MHDR II as presented with the following conditions:**

- 1. Subject to obtaining all State & Town permits and inspections.**
- 2. Certified plot plan required to be submitted to Code Enforcement.**

**Seconded by Mr. Burgess.**

**Vote:**

**Mr. Burgess: Yes. Feel it is the public interest, observes the spirit and intent of the ordinance and substantial justice has been shown.**

**Mr. Dietzel: Yes.**

**Mr. Obimba: Yes. Feel it meets all 5 criteria.**

**Mrs. Morin: Yes.**

**Mr. Corbett: Yes.**

**The application was Granted by a vote of 5-0-0. Anyone aggrieved by a decision of the Board has 30 days to request a rehearing. After that the recourse would be to appeal to Superior Court.**

Mr. Donlon and Mr. Tripp would sit for the following case. It was also noted for the record that the following case was to be presented via Remote.

**22-148            David Morin  
                     Owner: Sara Baggar**

**The applicants are requesting a variance to the terms of Article VI, Section 165-32.1(A) of the Town of Derry Zoning Ordinance to include contractor and repair and sales of used cars and trucks as permitted uses for the proposed development of the property at 69 By-Pass 28, Parcel ID 08102-001, Zoned GC II**

David Morin, applicant via remote, reviewed the required criteria and the letter of explanation for the record

**Board Questions**

Mr. Tripp asked how much of the parcel was not under the utility easement. Mr. Morin described the plan for the record.

Mr. Tripp asked what was the fall zone. Mr. Morin said that the fall zone consists of the area of where the tower could fall which is delineated of 125' out.

Mr. Tripp said that in the information provided shows building in the fall zone and if that was permitted. Mr. Morin said that the buildings would not be located in the fall zone just parking. He said that there are a lot of road blocks to market the property due to the power lines and cell tower fall zone. Mr. Morin said that parking, septic and such would be in that area.

Mr. Tripp asked if variance request was for contractor and use car lot. Mr. Morin said yes as there is a need for contractors such as electricians, mosquito control etc. that need somewhere to be able to park their vehicles and have a small office area.

Mr. Perkins asked if clarify contractor fit. Mr. Morin said it would be trades people, small sales and service trades that need 2,000 – 4,000 square foot units and that the parcel will allow for abundant parking.

Mr. Perkins asked what were the plans for the residential piece if it would be removed. Mr. Morin said that there was not a residential use on this property that it was located at 67 By-Pass 28.

Mr. Tripp asked if the intent was to obtain the variance and sell the property. Mr. Morin said yes as he was working with the owner to market the property. The variance would assist in knowing what would be allowed to utilize the property.

There was some discussion with regard to plans submitted and approval request.

Mr. Perkins asked who owns the rights to the cell tower. Mr. Morin said that the cell tower was a tenant and that the property owner was the landlord.

Mr. Perkins said that the property has an existing variance for the cell tower and is unclear of the hardship criteria. Mr. Morin said that the hardship is the utility lines and the PSNH easement and the tower also makes the property difficult to make anything fit.

Mr. Perkins said he recalled residence push back from the prior variance request now seeking more relief to do more non-compliance. Mr. Morin said yes as the cell tower is located on a small portion of the property and is 125 feet tall which is barely visible. The property would meet all landscape requirements and ecstatic appearances as they were not seeking a 3 story medical facility.

### **Code Enforcement**

Mr. Mackey provided the following information with regard to the property for the record.

- The applicants are requesting a variance to allow the uses of “contractor” and “repair and sales of used automobiles” to be included as part of the future development of the property.
- The property is zoned General Commercial II (GCII) and the zoning ordinance does not list these uses as permitted in the district. Therefore, a variance is being requested.
- A variance was granted in April 2016 to allow the construction of a cell tower which currently exists on the property.
- Any future development of the property will require Site Plan approval by the Planning Board which will include Technical Committee Review.
- There are pictures in the file for review by the Board.

Mr. Donlon asked if the 4<sup>th</sup> part of the criteria could be expanded on. Mr. Morin said that if you look at surrounding properties the east side is owned by the Town, has the water tower, the north side has a house, electrical easement 125’ wide, south side is GC II zoning district so no issue with light commercial, the west side is the By-Pass and residential across the street over 200’ away so feel there would be minimal impact on the surrounding properties.

Mr. Tripp said that zoning has area where the uses were written and if could define uses being requested. Mr. Morin said that he feels if just add contractor and repair for used cars and trucks with auto sales as do not feel need new dealer to do automobile repairs.

Mr. Mackey said that contractor use is defined in the ordinance. The applicant is seeking repair and stand alone sales.

Mrs. Morin asked if the accessory use was to be repair with sales to be primary. Mr. Mackey said yes.

Mr. Perkins informed the public that now would be the time to call in favor of the proposed request. He said if wish to speak press star 9 and someone will answer your call.

### **Favor**

No one spoke in favor of the request.

Mr. Perkins informed the public that now would be the time to call in opposition of the proposed request. He said if wish to speak press star 9 and someone will answer your call.

### **Opposed**

No one spoke in opposition of the request.

Mr. Tripp asked if permitted would the applicant then go before the Planning Board. Mr. Mackey said yes, that they would require Planning Board Site Plan Review and TRC Review.

Mrs. Morin asked if the intention was for both businesses to enter and exit the property via the easement. Mr. Mackey said that would be up to the Department of Transportation currently the only entry way is allowed by the State.

Mr. Burgess motioned to go into deliberative session.

Seconded by Mr. Donlon.

Vote: Unanimous.

Mr. Tripp, Mr. Donlon, Mr. Burgess, Mrs. Morin, Mr. Perkins

### **Deliberative Session**

Mr. Burgess said that the applicant described proposed uses of contractor and auto repair as no noise but believe that will cause noise, vibration, and odors so would be contrary to the spirit and intent of the ordinance.

Mrs. Morin said that auto repair and tow trucks are loud and may pose an issue with the neighbors. She said that she felt that substantial justice criteria has not been met as other offices could go there so struggle as have allowed uses that would meet the criteria.

Mr. Donlon said that he struggles with the 5 criteria as the applicant is seeking to further expand the non-compliance as brought on willing by the owner when cell tower was granted.

Mr. Tripp said feel belief that the Town does not need more office space is subjective and that need more contractor and used car lots subjective. Feel that the hardship criteria has not been shown.

Mr. Perkins said that he felt that the hardship was self-imposed and the analysis being extreme or reasonable request by the applicant. The Town created ordinance as a way to move away from used car with repair facilities to another zone. He said that as far as substantial reasonable use has already been allowed with the variance granted for the cell tower and request would increase the non-conformity.

Mr. Tripp asked if would need to add repair sales.

Mr. Mackey said that sales only allowed as ancillary to repairs.

Mr. Perkins reviewed the conditions for the record.

The Board reviewed the Findings of Fact for Case #22-148 as follows:



- The property is zoned General Commercial II
- The applicant is not the current owner.
- The applicant is seeking to expand the use to include Contractor and Used car sales and repair.
- The hardship was not found as Board felt was self-imposed.
- The application was outside the boundaries of spirit of the ordinance.
- A variance was granted for Cell Tower use which currently exists.

The Board also includes all facts found in the meeting minutes for this application and incorporates all meeting minutes into its finding of fact and decision.

The Board also includes all facts found in the meeting minutes for this application and incorporates all meeting minutes into its finding of fact and decision.

Mr. Burgess motioned to go come out of deliberative session.

Seconded by Mr. Donlon.

Vote: Unanimous.

Mr. Tripp, Mr. Donlon, Mr. Burgess, Mrs. Morin, Mr. Perkins

**Mrs. Morin motioned on case #22-148 David Morin, Owner: Sara Baggar to Grant a variance to the terms of Article VI, Section 165-32.1(A) of the Town of Derry Zoning Ordinance to include contractor and repair and sales of used cars and trucks as permitted uses for the proposed development of the property at 69 By-Pass 28, Parcel ID 08102-001, Zoned GC II as presented with the following conditions:**

1. Subject to obtaining all State & Town permits and inspections.
2. Subject to Planning Board Site Plan approval & TRC Review.
3. Automobile repairs to be ancillary use to sales business.

Seconded by Mr. Burgess.

**Vote:**

**Mr. Tripp:** No. Feel self-imposed hardship.

**Mr. Donlon:** No. Do not believe applicant has met the 5 criteria, specifically the spirit of the ordinance and unnecessary hardship especially considering further noncompliance within the lot.

**Mr. Burgess:** No. Also feel self-imposed hardship and substantial justice has not been shown. Would also be contrary to public interest.

**Mrs. Morin:** No. No hardship has been shown and variance would be contrary to public interest.

**Mr. Perkins: No. Feel would compound impact of non-conformity. Spirit and intent of ordinance would not be met.**

**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.**

### **Other Business**

Mr. Mackey said that no cases were filed for the November 3, 2022 meeting so unless a rehearing request comes in there will not be a meeting scheduled.

### **Approval of Minutes**

Mr. Tripp motioned to table the minutes of October 6, 2022 to the next meeting.

Seconded by Mr. Dietzel.

Vote: Unanimous.

Mr. Dietzel, Mr. Obimba, Mr. Tripp, Mr. Donlon, Mr. Burgess, Mrs. Morin, Mr. Perkins

### **Adjourn**

Mr. Obimba motioned to adjourn.

Seconded by Mr. Burgess.

Vote: Unanimous.

Mr. Dietzel, Mr. Obimba, Mr. Tripp, Mr. Donlon, Mr. Burgess, Mrs. Morin, Mr. Perkins

Adjourn at 8:29 PM

Minutes transcribed from notes & tape:

Ginny Rioux

Recording Clerk

### **APPROVAL OF MINUTES NOVEMBER 17, 2022**

Mr. Donlon motioned to approve the minutes of October 20, 2022 as amended.

Seconded by Mr. Tripp

Vote: Unanimous.

Mr. Dietzel, Mr. Obimba, Mr. Tripp, Mr. Donlon, Mr. Virr, Mrs. Morin, Mr. Corbett, Mr. Perkins