

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**March 19, 2009**

**Members Present**

Allan Virr, Chairman  
Christopher Lunetta, Vice Chairman  
Cecile Cormier, Secretary  
Albert Dimmock

**Members Absent**

**Alternates Present**

David Thompson  
James Webb  
Michael Fairbanks  
Ernest Osborn

**Alternates Absent**

**Staff Present**

Fred Kelley, Assistant Building Inspector

Mr. Virr called the meeting to order at 7:01 p.m. with the salute to the flag, and notice of fire and handicap exits.

It was noted for the record that Mr. Fairbanks would sit for the following case.

**09-104          Robin Altenbach**

**Exception as provided in Article VI, Section 165-46B, to operate Family Group Day Care Business from residence at 9 Forest St., tax map 11057-014. MDR DISTRICT, (Continued from 3-05-09).**

Robin Altenbach, owner, said that she was seeking to open a family group day care in her home and that her square footage area would allow her up to 8 children according to the State requirements.

Mr. Virr said that the Board had previously reviewed most of the points during the March 5, 2009 meeting and all were satisfied except the restrictive covenants on the property. He said that Town Council has advised that the Board should not vote against a covenant.

Ms. Cormier asked if any research had been done to see if there was any time period that indicated that the covenant had expired. Mrs. Altenbach said no.

Mr. Virr said that changes can only be made with a zoning change or with the Planning Board to lift the restriction. He said that the applicant could make a request to the Planning Board to consider changing the ordinance.

Mr. Lunetta said that he felt that the wording of the covenant had been taken literally and out of context and he reviewed the deed for the Board.

Mrs. Altenbach said that the use would not be changing her home as it would still be her residence.

Ms. Cormier said that she felt that the Board needed to review whether the residential use changes if allowing an in home business.

Mr. Dimmock said that at the last meeting it was suggested to continue the case to this meeting so as to obtain a legal determination. He said that he was not opposed to the applicant having a day care but the Town Attorney has stated that we can not go against a covenant and there was no date on the deed dissolving the covenant. Mr. Dimmock said that the abutters needed to have it legally removed with the Rockingham County Registry of Deeds before the Board could grant such a request as the rules state that the Board can not go against a covenant.

Mrs. Altenbach said that there were no businesses on her street.

Ms. Cormier read the covenant for the record.

Mr. Virr asked if there were any other questions for the applicant before the Board went into deliberative session.

### **Deliberative Session**

Mr. Fairbanks said that he agreed with what had been discussed but the Town Attorney states that the Board can not grant a business with a restrictive covenant. However, the area is a residential district and not commercial businesses are in the area and that this was only an in home business and not a commercial or industrial use.

Mr. Virr said that the daycare use would be open two thirds of the day. The Town Attorney advises that if the other requirements were substantially met that the Board could over look but at the end of the letter states that the abutters need to resolve the issue of the restrictive covenants.

There was some discussion with regard to covenants and their meanings and the zoning item number ten rule and the possible contradiction of wording and meanings.

**Ms. Cormier motioned to grant case 09-104, Robin Altenbach, Exception as provided in Article VI, Section 165-46B, to operate Family Group Day Care Business from residence at 9 Forest St., tax map 11057-014, MDR DISTRICT, as presented with the following conditions:**

1. Subject to obtaining all Town, Fire and State regulations and licensing.
2. No sign permitted.

Seconded by Mr. Fairbanks.

**Vote:**

**Mr. Fairbanks:** Yes.

**Ms. Cormier:** No. Believe use is contrary to covenant as zoning states home business is a business use.

**Mr. Lunetta:** Yes. Feel that the building and land use in question does not interfere with the property as a residential use.

**Mr. Dimmock:** No. Agree with Ms. Cormier that the Board has to go with the rules and regulations of the zoning ordinance. Feels that the Board should not be voting against their ordinance rules.

**Mr. Virr:** No. Covenants are there however vague and the Board does not have the powers to override a covenant within a deed. He said that the applicant needs to seek the removal of the covenant with the Planning Board or registry before the Board could grant such a request.

Mr. Lunetta said for the record that he felt that Mr. Dimmock's statement was inaccurate and inappropriate with the interpretation of the zoning ordinance and covenant restrictions.

**The application was Denied by a vote of 2-3-0. 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. Osborn would sit for the following case.

**09-105     Jean-Claude Alcime**

**Exception as provided in Article VI, Section 165-48A to operate Homecare Business (office only) from residence on 124 Walnut Hill Rd., tax map 13013-002.     LDR DISTRICT**

Jean-Claude Alcime, owner, reviewed his application for the Board. He stated that he had previously been before the Board for 19 Old Auburn Road and wished to transfer his exception to 124 Walnut Hill Road as this was his primary residence.

Mr. Thompson asked if he had previously obtained a temporary exception at this property. Mr. Alcime said no.

Ms. Cormier asked if according to her understanding that there was not a previous exception granted for this property. Mr. Alcime said that was correct.

Mr. Lunetta asked that needed an exception for this address as did not have previously even though had been operating business from this address. Mr. Alcime said that was correct as he was not aware that an exception was needed until the problem came forth on Old Auburn Road.

Ms. Cormier asked if the exception for Old Auburn Road would be required to be voided. Mr. Alcime said that the exception for that address was only temporary until March.

Mr. Dimmock said that he believed that the applicant met the requirements as no care will be done at the property just utilizing his computer, telephone and a desk. However he asked if the sign was imperative to the applicant as it was a residential area. Mr. Alcime said yes as the sign shows the location of his business as not clear on the street as the numbers very up and down the road.

Mr. Dimmock said that he recalled the previous request was to have care in the home. Mr. Alcime said that was for a different property with a different outline than what he is asking for today.

Mr. Virr asked if it was correct to say that he was a form of a subcontractor type where it was not a necessity to have people to come to the home. Mr. Alcime said that was correct as he frequently traveled to his workers but occasionally do have some clients at his home to complete paperwork but usually go to them.

There was some discussion with the details of the business use.

Ms. Cormier said that the sign was only 18" x 24" and it was within the 3 square foot limits so she did not see harm in allowing the sign.

Mr. Osborn said that he felt that small in-home businesses should have a small sign so as to help prevent cars driving up and down the street looking for the property.

Mr. Webb asked how many years has the business been operating before the fire. Mr. Alcime said that he had lost his job in 2005 and when searching for other employment his offers were all out of state such as China, etc. and did not want to relocate his family so he started his own business at that time.

Mr. Webb said that the business had been in operation for 3 years prior to asking for this exception. Mr. Alcime said yes as he was providing for his family and was not aware he required an exception for the business.

Mr. Thompson asked if there was years in planning first. Mr. Alcime said yes as he needed to be established before he could sell to his clients.

Mr. Dimmock said that he that he did not have a problem with the sign and that the applicant has been operating since 2005 and no one was aware of business use until relocated onto Old Auburn Road where it was then brought to the Board at that time.

Mr. Kelley said that the office had informed Mr. Alcime that when he had applied for the exception for Old Auburn Road that he would need to return to the Board to request an

exception for this property when his primary residence was able to be occupied and it was at the time of the fire the first sign was noted.

### **Favor**

No abutters were present in favor of the application.

### **Code Enforcement**

Mr. Kelley said the applicant's request is for an exception to operate a business from the residence. The business (True Care Professionals, Inc.) assigns workers to nursing homes, assisted living facilities, hospitals and private homes. The office portion of the business will take place at the residence. As the Board may recall, the applicant was granted a special exception for the same use at 19 Old Auburn Road. The applicant was temporarily residing there due to a fire at his primary residence at 124 Walnut Hill Road. The repair work has been completed and the applicant is now occupying the home and requesting the special exception for this location. A sign is being requested and, if allowed, a permit will be required. The proposal includes one (1) non-resident employee. A long driveway services the dwelling which is located approximately 100' from the road. There are pictures in the file for the Board's review.

### **Opposed**

No abutters were present in opposition for the application.

### **Deliberative Session**

Ms. Cormier said that she did not see harm in allowing the sign as long as it was not internally lighted. Mr. Kelley said that the sign would require a permit from the Code Enforcement Office and they would not allow that type of sign in the residential area.

Mr. Dimmock said that he was satisfied with the request. He said that he did not personally like signs but if they are approved by the Town then did not see a problem with it. The applicant had previously operated the business from his residence and then on Old Auburn Road with no major complaints so feel should grant his request.

Mr. Osborn said that he felt strongly about signs also but there should be some small sign indication of the business so traffic wasn't driving up and down street looking for the property. The request was only for a small computer based operation and did not feel that it changed the residential character of the neighborhood.

**Ms. Cormier motioned to grant case #09-105, Jean-Claude Alcime, an Exception as provided in Article VI, Section 165-48A to operate Homecare Business (office only)**

from residence on 124 Walnut Hill Rd., tax map 13013-002, LDR DISTRICT as presented with the following conditions:

1. One sign permitted.
2. One non-resident employee.

**Seconded by Mr. Lunetta.**

**Vote:**

<b>Mr. Dimmock:</b>	<b>Yes.</b>
<b>Mr. Lunetta:</b>	<b>Yes.</b>
<b>Mr. Osborn:</b>	<b>Yes.</b>
<b>Ms. Cormier:</b>	<b>Yes.</b>
<b>Mr. Virr:</b>	<b>Yes.</b>

**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 for the record that Mr. Thompson would sit for the following case.

**Marlene O'Connor**

**Request for Rehearing of Case 09-103, granted on 2-19-09, to replace single family structure with duplex at 1 South Railroad Ave., tax map 27077. MHDR2 DISTRICT**

There was some discussion with who would be sitting on the case and it was determined that the 4 full members and Mr. Thompson would be sitting for the case. Mr. Virr said that the Board needs to determine if there is any new evidence presented in order to be granted a rehearing.

Mr. Lunetta said that he believed that he voted against the original request and can see what Marlene O'Connor states but does not see any new evidence presented that would warrant a rehearing.

Ms. Cormier asked if the request was for 2 variances one for frontage of 25'. Mr. Virr said yes due to the Town made a change to the street and now the road is actually a driveway.

Mr. Thompson said that he had originally voted yes and has reread some of the items that Marlene O'Connor have stated and believe that they are getting there to their case for a rehearing but a lot of the items have been discussed. The audience during the first hearing did not state anything other than the fact that they didn't want a duplex there but in this request they are starting to address some issues that could get there to their case. Strongly believe that they deserve a rehearing and hope if granted that they come forward with strong evidence as to why this should not have been allowed other than just don't want it there.

Ms. Cormier asked if there was a house on there already and if it was a single family. Mr. Virr said yes however it was in disrepair.

Mr. Lunetta said that to be granted a rehearing there needs to have new evidence presented and do not see any new evidence presented that was not originally discussed.

Mr. Thompson said that when first presented the abutters came across that just did not want a duplex and that the Planning Board and Town Council changed the zoning in the neighborhood. They are stating that the Simplex test can not be granted based for financial gain and stating that it was granted due to unique size of lot.

Mr. Lunetta said that financial gains were discussed and advocated several times that the lot was not unique and pointed out that the lot alone in size and needed to look at building use.

Ms. Cormier said 2 criteria needs to be met in order for a rehearing to be granted. She reviewed the requirements for the Board. If the Board feels that they made an error or new criteria has been presented then it warrants a rehearing or if there is new evidence presented that would warrant a rehearing request.

Mr. Thompson said that the applicant is starting to get on the edge of what they need to have in order to be granted a rehearing so they need to do their research and present the reasons why it should not be allowed and not just because they don't like it. He said that he was going to vote to grant the rehearing request.

Mr. Virr said that the audience is not involved and any discussion needs to be addressed with the Board.

Mr. Lunetta asked since he personally felt that there was no new evidence presented and everything on there other than a disagreement of what the Simplex Test meaning is as he felt that all the information presented was discussed. He asked that where he originally voted against the application so he did not feel that he made a mistake but can he say that he feels that there should be rehearing because he feels that everyone that voted in favor made a mistake in granting the request.

Ms. Cormier said yes that if you feel that the Board made a mistake that it was allowed.

Mr. Virr said that he previously voted no the last time as he had listened to the abutters that were here in great numbers as they are now. A few years ago they had approached the Town and the Planning Board granted a change in that district to single family only and that this Board had previously turned down requests to build 2 family homes in that area. He feels that the Board made a mistake in going against previous cases and there is currently a single family house there now and that is sufficient and do not see why needs more than a single family home in there as it has nothing to do with who gains or doesn't gain. He said that he would like to go on record that along with Mr. Lunetta that he had originally voted no.

Ms. Cormier said that the handbook it also states if motion for the rehearing sites as a reason as a request of the failure of the Board to adequately explain its decision for example not addressing all 5 criteria for a variance the Board could allow the rehearing to complete its record and were all 5 points of the variance discussed and voted upon.

Mr. Virr said that they were not noted in the vote but the tape of the meeting will have it recorded and generally do not comment on the yes votes.

Ms. Cormier said that could be and that could be a reason for a rehearing so that the record is plain with all the criteria that every Board member actually states why they are voting the way that they are voting whether it be a yes vote or a no vote.

Mr. Thompson said that when he voted yes that he stated that it was done with a bad taste in his mouth when he stated it and reasons being that the people in the neighborhood did not present anything that showed why he should not vote in favor of the Mr. Cooper request and felt that he had met all the criteria.

Mr. Virr said that the record does not specifically shows the vote and that if this were challenged in Superior Court that the judge could remanded this back to the Board for clarification and the vote does state that anyone aggrieved by the decision of the Board could appeal the motion.

Mr. Thompson said that was another reason why they should be granted a rehearing.

Mr. Lunetta said that he is only hearing one member that he believes made a mistake and if that is judgment for a rehearing then two of the members voted no but the reasons being discussed for reasons presented here to grant the rehearing have been discussed.

Mr. Thompson said that he did not say that he made a mistake but that there was not enough evidence presented at the time but there is a little bit more to it than what is actually said here that suggests that there should be a rehearing.

Mr. Dimmock said that there isn't any new evidence presented that fine but feel that there has been no new evidence presented therefore feels that your supposing there is something more and unless there is new evidence presented it does not warrant a rehearing.

Mr. Thompson said that they are giving some new evidence in what is presented but not quite really enough.

Mr. Lunetta said that there has to be 2 criteria either new evidence that we didn't hear which is not here or a majority of the Board needs to agree that an error was made and that they deserve a rehearing.

Ms. Cormier said that all members do not have to agree but it states failure of the Board to adequately explain its decision for example not addressing all 5 criteria for a variance the Board could use a rehearing to complete its record.

Mr. Thompson said that a rehearing would clarify the record and that should be grounds enough for a rehearing. He said that he felt that if this were not granted tonight he felt that they have a perfect right as the record is not clear from the last meeting.

Mr. Lunetta said that it's not to change a decision just to process and clarify the record.



Ms. Cormier said that you would be rehearing the case as if it was a new case. Then at that hearing the Board needs to dot their i's and cross their t's and make sure that the criteria and everyone is explicated on why they are voting the way they are voting and if they are voting for Simplex or not quite sure but all the criteria should be addressed. She said that if it goes to court then the court says okay the Board said this, this and this they discussed all the facts and addressed all the criteria then their discussion probably or could probably be upheld.

Mr. Dimmock said that the Board already had done that.

Mr. Thompson said that he felt that the abutters are entitled to a rehearing. He said that he stated that if we were to grant the rehearing that they must have a better case than what they have presented.

Mr. Virr said that if this is going to be considered again that the Board addresses both the Simplex and Boccia test individually and come to agreement as to whether or not hardship has been met.

Mr. Thompson said those are the two things that they need to be working on.

Ms. Cormier said that all 5 criteria have agreed upon to grant a variance not just the hardship to get a variance but all 5 criteria have to be met.

Mr. Virr said that either the Board has made a mistake in law or we did not clearly state whether or not the requirements of the Simplex or the Boccia test were met. He said since voted no the last time he did not feel that his decision has changed his mind but he would ask for a rehearing and see where it goes.

**Mr. Thompson motioned to Grant a Request for Rehearing of case #09-103, Marlene O'Connor, granted on 2-19-09, to replace single family structure with duplex at 1 South Railroad Ave., tax map 27077. MHDR2 DISTRICT.**

**Seconded by Mr. Lunetta.**

**Vote:**

**Mr. Lunetta: Yes. Believe an error was made in allowing the original applicant a variance.**

**Mr. Dimmock: No. Do not feel that the Board has made any errors do not feel that the Board has missed anything and that applicant has presented any new evidence presented.**

**Mr. Thompson: Yes. Feel that some evidence has been presented to warrant a rehearing.**

**Ms. Cormier: Yes. Because the minutes show some inadequacies as it does not show in the voting that all 5 points of the criteria were taken into consideration.**

**Mr. Virr: Yes. Feel Board made error in not being specific in meeting the notes**

**regarding the 2 tests.**

**Rehearing request was granted by a vote of 1-4-0.**

### **Approval of Minutes**

Ms. Cormier motioned to approve the minutes of March 5, 2009 as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Webb, Mr. Fairbanks, Mr. Thompson, Mr. Osborn, Mr. Dimmock, Ms. Cormier, Mr. Lunetta, Mr. Virr

### **Other Business**

Mr. Kelley asked if the Board if they would like to request that the Planning Board to consider removing item #10 from the exception form and also on the exception form when the removal of the kitchen and the bathroom square footage was done as they are primary to the dwelling. He asked if the Board would like to present a rewrite and removal of item #10 that addresses covenants and put the kitchen and bathroom square footage back in for total square footage calculation purposes.

Mr. Virr said that they would like to have the Planning Board to consider it.

Ms. Cormier asked for them to change it as we have had advice from the attorney.

Mr. Dimmock said that the covenant was put there for a reason.

Ms. Cormier said that delete the second line and leave it to just saying 25% of total living area.

Mr. Kelley said that there are two issues as to whether the Board wishes to delete the #10 the covenant portion. He said that Mr. Dimmock has made himself known. And the second item is to change to indicate that the applicant can utilize the total square footage of living space when calculating their 25%.

Mr. Lunetta said that it would not be removing the covenant just makes it a civil matter between who wrote the covenant and the neighbors.

Mr. Dimmock said that it should not be removed because if there is a covenant than it should not be granted as it goes against the covenant.

Mr. Virr said that it would not make the covenant go away it just would not present the argument for the Board as it is a civil matter.

There was some discussion with regard to covenants and what their purposes are initially intentions.

Mr. Virr said that he wanted only full members to vote and in the event of a tie Mr. Webb will vote.

**Mr. Virr on question 1 should j reference to convents be removed from the requirements to obtain a special exception.**

**Ms. Cormier: Yes.**

**Mr. Lunetta Yes.**

**Mr. Dimmock: No. Do not believe that we have the right to get involved with getting involved with a convent.**

**Mr. Virr: Yes.**

**Motion approved by a vote of 3-1-0.**

**Mr. Virr said the second question relates to B2d with the kitchen and bathroom being excluded from the living area calculations and would like the sentence deleted from the form.**

**Ms. Cormier: Yes.**

**Mr. Lunetta: Yes.**

**Mr. Dimmock: Yes.**

**Mr. Virr: Yes.**

**Motion approved by a vote of 4-0-0.**

### **Adjourn**

Motion to adjourn by Mr. Thompson.

Seconded by Mr. Dimmock.

Vote: Unanimous.

Mr. Webb, Mr. Fairbanks, Mr. Thompson, Mr. Osborn, Mr. Dimmock, Ms. Cormier, Mr. Lunetta, Mr. Virr

Adjourn at 8:31 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

**Approval of Minutes April 16, 2009**

Mr. Dimmock motioned to approve the minutes of March 19, 2009 as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. Fairbanks, Mr. Webb, Mr. Osborn, Mr. Thompson, Mr. Dimmock, Ms. Cormier, Mr. Lunetta, Mr. Virr