

TOWN OF DERRY
ZONING BOARD OF ADJUSTMENT MINUTES
July 16, 2009

Members Present

Allan Virr, Chairman
David Thompson, Vice Chairman
Albert Dimmock
James Webb

Members Absent

Cecile Cormier

Alternates Present

Ernest Osborn
Michael Fairbanks
John DeBonis

Alternates Absent

Staff Present

Fred Kelley, Assistant Building Inspector

Mr. Virr called the meeting to order at 7:02 p.m. with the salute to the flag, and notice of fire and handicap exits.

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

09-113 Gina Marie Murphy

Exception as provided in Article VI, Section 165-47A, to operate business offering Dance Lessons from residence at 18 Adams Pond Rd., tax map 09040-001. LMDR DISTRICT

Gina Marie Murphy, owner, read her application for the Board.

Mr. Virr informed the Board that the Planning Board had approved the changes to the total living area and covenants issues.

Mr. Virr asked if there was anything that she would like to add in addition to her application for the Board. Mrs. Murphy said she had also submitted a letter explaining her hours of operation.

Mr. Thompson asked if the classes were for children or adults. Mrs. Murphy said they would be for all ages.

Mr. Virr asked if she would review the hours of operation. Mrs. Murphy said that she would like to operate from the hours of 9 am to 9 pm which she would technically be utilizing 9 am to 1 pm then start again at 4 pm to 9pm.

Mr. Virr asked if she did not request a sign at this time and later decided to utilize one that she would need to reapply to the Board for permission and instead may wish to rethink her request and ask for it with the possibility that she might need it later should the business do well. Mrs. Murphy said that she would like to request the sign at this time but may not use it at this time.

Mr. Webb asked if there would be 6 students at a time. Mrs. Murphy said that possibly but if the students are larger then the class size would be smaller.

Mr. Webb asked if the sessions were 1 hour each. Mrs. Murphy said that the classes were approximately 45 minutes to an hour each.

Mr. Webb asked if there would be 12 cars at once. Mrs. Murphy said that she was setting up her classes to have a 15 minute break between lessons so it would help with any traffic concerns.

Mr. Virr asked if some parents stay. Mrs. Murphy said that most parents would be dropping off but could stay but there would not be more than 6 vehicles at any time and it would still leave room for 4 more vehicles to turn around in the driveway as they park their personal vehicles in the garage.

Code Enforcement

Mr. Kelley said that the applicant's request is for a special exception for a home occupation to allow dance lessons to be conducted from residence. The Planning Board has approved the proposed amendments to the requirements for a home occupation and these are being forwarded to the Town Council for approval. Once approved by the Town Council, the application will need to be revised. In the meantime, the Board should review the application based on the changes approved by the Planning Board as these have been legally posted (see attached – items d & j). No sign is being requested. There appears to be adequate parking on site for the proposed use. There are pictures in the file for the Board's review.

Favor

No abutters were present.

Opposed

No abutters were present.

Deliberative Session

Mr. Thompson said that he felt that the request seems to meet the criteria and there is plenty of room as only utilizing 15% of the living space.

Mr. Dimmock asked that if approved would it still need Town Council's approval of the changes before operating. Mr. Kelley said no that they were only revisions to the ordinance that she would not be required to wait.

Mr. Webb said that he did not see a problem especially where the applicant was establishing a break window to assist with traffic.

Mr. Fairbanks said that he felt that the Board might need to clarify some parking stipulations and was concerned with the changes of classes with traffic coming and going.

Mr. Thompson said that there would be no on street parking.

Mr. Virr reviewed the conditions for the Board.

Mr. Thompson motioned on case #09-113 Gina Marie Murphy to Grant an Exception as provided in Article VI, Section 165-47A, to operate business offering Dance Lessons from residence at 18 Adams Pond Rd., tax map 09040-001,LMDR DISTRICT as presented with the following conditions:

- 1. Hours of operation Monday Friday 9:00 am 9:00 pm.**
- 2. No more than 6 clients at one time.**
- 3. Sign permit is required.**

Seconded by Mr. Webb.

Vote:

Mr. Fairbanks: Yes. Feel it meets the criteria for granting an exception.

Mr. Webb: Yes. Same reason as stated by Mr. Fairbanks.

Mr. Dimmock: Yes. Feel the applicant has presented her case and meets the requirements for an exception.

Mr. Thompson: Yes. Meets the criteria for an exception.

Mr. Virr: Yes. For the same reasons as stated.

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 step down and that Mr. DeBonis and Mr. Osborn would sit for the following case.

Variance to terms of Article VI, Section 165-49C1, G1b, to build 2nd story to exiting structure and build 2-story addition on an undersized lot without required off street parking at 49 E. Broadway, tax map 30161. TBOD DISTRICT

Joel Zeigler said he was from Tyrus Porter Architect firm that was representing the owner Mr. Lampos who was also present. Mr. Zeigler read the application for the Board. He said that the sketch was to show the similarity to the surrounding area and that the site plan shows where the property was located and the boundary of the CBD District. He read his letter of explanation for the Board.

Code Enforcement

Mr. Kelley said the applicant's request is for a variance(s) to expand a pre-existing non-conforming structure by expanding the footprint as well as adding a two story addition. The property is located in the Traditional Business Overlay District which has a minimum lot area of 7500 square feet. The applicant's property contains 3900 (+/-) square feet. Therefore, an area variance is required to expand the footprint as well as raise the height. Applicable setbacks are proposed to be met. The vacant land where the addition is proposed to be constructed is part of the same lot. In addition, Article VI, Section 165-49-G.1.b requires that off street parking be provided. As is commonly the case in the downtown area, the size of the lot limits on site parking. The uses proposed for the expanded building will comply with those allowed in the District. If approved, Planning Board Site Review will be required. The property is serviced by municipal water and sewer. There are pictures in the file for the Board's review.

Mr. Dimmock said that the proposed addition shows an overhang and he was unsure of the ordinances with overhangs along public sidewalks. Mr. Kelley said that structurally speaking that there have been complaints with regard to pigeon droppings, rain, snow, ice, etc. and that an overhang would help alleviate with weather conditions off the sidewalks and also with bird droppings. He said that an overhang would not impede the footprint of the structure.

Mr. Dimmock asked if the exhaust fan venting out on the side the neighbor's was allowed. Mr. Kelley said that it belonged to the neighbor and that they had just run the vent to the roof the proposed dwelling will also have venting to the roof area.

Mr. Thompson asked if the applicant had a deeded right-of-way to the back of the property. Mr. Zeigler said yes that the existing ally serves the abutting property as well.

Mr. Kelley said that the right-of-way serves several properties one being the applicant, Dr. Banister's office, the Friendship Center, the former Broadway Pets building.

Mr. Thompson asked if the proposal would require Planning Board approval. Mr. Kelley said yes.

Mr. Zeigler said that no changes were proposed to the alley and all the parcels would still have their right-of-way.

Mr. Virr asked what the distance of the side lot line was to the neighbor on Broadway was. Mr. Zeigler said it was 3' feet to the side lot line. The plan shows the adjacent building off the lot line and to assist with the exhaust fans they are proposed to extend up to the roof and will facilitate with snow removal.

Mr. Virr asked if the Fire Department will have access. Mr. Zeigler said that they have had a preliminary meeting with the Derry Fire Department and that they had felt that access was adequate and also Mr. Sioras from the Planning Department if you need additional information.

Mr. Webb asked if the 1600 square foot space that would consist of 2 offices with 6 desks each which is possibility for 12 vehicles where parking would be a problem. Mr. Zeigler said that they possibly would have 2 rooms of rentable space and that they did not feel that the proposed businesses would be of large capacity businesses and that parking would be taken up at the Planning Board review.

There was some discussion with regard to the downtown parking concerns.

Mr. DeBonis said that he was concerned with the 3' feet between the two buildings.

Mr. Virr said that one was proposing 3' feet and the other was 3' feet so it would be approximately 6' feet between the two structures.

Mr. Osborn said that it looked more like 5' feet.

Mr. Kelley said that was where the variance was required and that the proposed building would require sprinklers.

Mr. Osborn said that there would be no need for anyone to be in between the 2 buildings.

Mr. Zeigler said that the proposed structure was to be in keeping with the TBD district and would look like any other downtown building and that it would need to be built according to the Town codes.

Favor

No abutters were present.

Opposed

Charles Banister, 1 Birch Street, said that he was one of four properties that share the right-of-way and presented the Board with a copy of a 1956 survey and pictures showing the ally and right-of-way.

Mr. Kelley explained the pictures for the Board.

Mr. Dimmock asked that if the picture number 3 showed the ally and fence near Anthony's if it was 6-8' off the building. Mr. Banister said that the property line has been in question between Anthony's and Mr. Lampos for years.

Mr. Banister said that the ventilation hood for Anthony's used to come out the side of the building that is owned by Gina Cristallo. He said that when the fans were installed the vent fan had originally crossed over the lot line so there will only be 3-4' feet between the two buildings.

Mr. Virr said that the request was for an area variance and that the applicant will still need Planning Board Site Plan approval. The Board was only here tonight to determine the request for a variance to the 7500 square feet.

Mr. Banister said that he felt that the proposed request was unreasonable and that there was a lot going on the corner of Birch Street and Broadway now and with the proposed municipal parking lot of 19 spaces for public parking will be taken up by the new tenants in the proposed building. He said that his father had started the practice in 1946 and that parking has always been a problem and in the 20 years since he has taken over the business parking has still been an ongoing issue and did not feel that the proposal was a good idea.

Mr. Dimmock said that the diagram did not show a service corridor and asked if there would be one. Mr. Zeigler said that the adequacy of a service corridor would be determined by the Planning Board.

Mr. Dimmock said that if allowed was the proposed structure going to be able to be done as it appears as it would be a fantastic improvement to the downtown area. He said that he was also concerned with the downtown area and that it has a 10' easement and the buildings. He was concerned of where Dr. Banister would stand with the right-of-way usage.

George Sioras, Town Planner, said that the applicant has been in the office for a site plan determination review and there are some areas that would need to be addressed at the Planning Board Site Plan Review one of which would be the parking. The applicant would be required to show parking proposals for the proposed use. Any parking issues would be for the Planning Board's review at the applicant's formal site plan.

Mr. Thompson asked if the Town had occupancy permits for new businesses. Mr. Sioras said that any new businesses in the proposed structure was made clear to the applicant that the Planning Board wants site plans for each proposed tenant use.

Mr. Thompson asked so that any new business that planned on utilizing the proposed tenant space would need to go to the Planning Board. Mr. Sioras said yes but it would be for a change of use.

Mr. Osborn asked what was the use of the former Broadway Pets building. Mr. Sioras said that he was not able to answer that question.

Mr. Dimmock asked why the Town could not take over that building. Mr. Kelley said that the Town has been in contact with the owner and that they have no intention of occupying the structure and have no intention to do anything with the building. . If anyone was to occupy that building they would also be required to completely rehab the structure before any occupancy would be able to take place.

Mr. Fairbanks said that the proposed building would do a lot for the Town and he said that he knows that a lot of businesses do walk to work in Massachusetts. Mr. Sioras said that yes and it was a similar concept and that the applicant will need to supply parking arrangements. Site plan issues will be resolved at the Planning Board level.

Mr. Dimmock said that the Wall Street parking lot is so well used that he has never seen more than 2 cars in the lot at any given time. He said that it was poor location.

Mr. Sioras said that the new tenants will be asked what their prospective peak hours of operation will be and their parking requirement will be reviewed at the Planning Board.

Mr. Banister said that the statement made by Mr. Fairbanks of the Massachusetts having similar zoning and parking does not happen here. And agree with Mr. Dimmock that the Wall Street parking lot is a great parking area but it does not get utilized as no one walks distances here. Mr. Banister said that the infrastructure here needs to be established first with regard to the parking issues. He explained that in the photos he submitted showed 1 vehicle and 4 gas tanks along with a dumpster that is on wheels as the waste company is unable to enter into the right-of-way and empty the dumpster so they wheel it out onto Birch in order to empty it. Also in the winter months has assisted the waste hauler shoveling out the dumpster and wheel it down to the road. He said that he feels that the request is unreasonable at this time and they really need to show their parking plans.

Mr. Virr said that the issues with parking were site plan issues and not here for the Board's review.

Mr. Banister said that he has lost employees because he has requested them to park a block away and that it was difficult to make happen especially in the winter months when parking becomes a huge issue. He said that the 19 parking spaces are sorely needed by the surrounding properties and that swamping the area with an addition that can handle 12 desks would defeat the purpose of the new parking area. The right-of-way is currently shared by 4 properties which runs along the rear of the applicant's building along the Broadway Pets and Friendship Center that has 4 apartments over it not to mention gas deliveries, trash pick up, tenant parking, visitor parking, food deliveries, etc. and he also constantly getting blocked. He said that the tenants of the proposed project would utilize the right-of-way for parking and the new improved parking area would be overwhelmed when it hasn't even been built yet would be unfair to the surrounding abutters that have waited a very long time for this to happen. Mr. Banister said that the proposed project looks beautiful but just building to match the existing structures did not make sense.

Mr. Osborn said that the second floor would overhang the foundation so the carport under would not change the right-of-way. Mr. Banister said that the space proposed currently houses the dumpster, grease barrels, etc. and that the right-of-way is not large enough now to accommodate huge trucks backing in now for deliveries that constantly block the right-of-way. If the project is allowed the right-of-way will not exist. The plan now shows the proposal not in the right-of-way but building every other way so it will effect the right-of-way.

Katrina Lamos, daughter of owner, said that currently there are several businesses utilizing the area such as for the AA meetings that tend to dominate the parking spaces in front of their building now. She said that the two hour parking limit is not enforced now and have notified the police but they do not enforce the parking time limit now as people do abuse it now. She said that the project will be good for Derry and that it will bring more business to the downtown area.

Mr. Zeigler said that he wished to address three issues that had been brought up by the neighbor. He said that the alley congestion was a traditional urban problem and that the area is currently zoned TBD. He said that the Town had zoned the property to be the boundary of the TBD district which is to preserve the nature of the downtown area that his client was seeking to preserve the downtown look by proposing this project. Mr. Zeigler said that there will always be problems with parking as there is with all downtown districts. He said that to keep with the TBD the building required change to keep with the character of the downtown district look that the Town was trying to preserve.

Mr. Dimmock said that the photos that had been submitted by Mr. Banister showed gas tanks, dumpsters etc and where the items would be located when the addition was built. Mr. Zeigler said that the building would be serviced by municipal gas and that the dumpster/trash pick up will be handled inside the building and that there would be a space provided in the alley way as required by the Planning Board for any additional services.

Deliberative Session

Mr. DeBonis said that after listening to the Zoning Board intent from Mr. Sioras and the applicant's request to encroachment to the side lot line, he said that he did not have a problem with the bottom of the building being retail but has concerns with the side lot line encroachment.

Mr. Virr said that the applicant would never get 7,500 square feet of property and the issue of off street parking issues would not be resolved either way.

Mr. Webb said that he had a problem with parking and understands that it was not the Board's issue but believes that it would be unfair to other businesses in the area if they take all of the freed up spots as other businesses are anticipating the new parking. He said that he understood the utilization of the property but the request is also asking also for a variance for off street parking so he has a problem with that portion of the request.

Mr. Osborn said that with proper planning this proposal could work and feel that the applicant could come up with some better parking solutions if wished to proceed with the

proposal. He said that the applicant needs to meet other criteria with the Planning Board and that the Board was not here to design the plan before them. Mr. Osborn said that he felt that it would be a nice addition to the Derry area.

There was some discussion with regard to parking.

Mr. Virr said that the applicant's first step in this proposal was a variance from the Board and in so obtaining the Planning Board will have to decide if the off street parking concerns are addressed. He said that he understands Dr. Banister's concerns but they are Planning Board issues that would be addressed at the Planning Board site review.

Mr. Dimmock said that he disagreed with that as the request before the Board tonight was also relief to the off street parking. He said that if the proposal was allowed why they are not before the Planning Board instead of this Board requesting relief from parking.

Mr. Osborn said that the second floor use has not been determined at this time so the Planning Board will have to be involved to determine the utilization and parking requirements for the prospective tenants.

Mr. Dimmock said then the applicant should be asking the Planning Board for relief from the parking requirements.

Mr. Virr said that the Board could not get into parking requirements as that those matters would be reviewed by the Planning Board.

Mr. Sioras, Community Development, reviewed section G1B for the Board. He said that he was unsure as to why the parking section was listed on the applicant's application but the parking requirements fall under the Planning Boards jurisdiction and that the applicant could apply for a waiver requirement at the Planning Board level.

Mr. Virr said that he felt that the proposal would be a tremendous boost to the Downtown look. He said that if approved the Planning Board would determine the status of the off street parking concerns. He reviewed the conditions for the Board. Mr. Virr said that this was an area variance and means that the problem must be inherent in the land and in the amount of space allowed for the use.

Mr. Osborn motioned on case #09-114, Kastorian Realty Trust to Grant a Variance to terms of Article VI, Section 165-49C1, G1b, to build 2nd story to existing structure and build 2-story addition on an undersized lot without required off street parking at 49 E. Broadway, tax map 30161. TBOD DISTRICT, as presented with the following conditions:

- 1. Subject to obtaining all Town & State inspections.**
- 2. Subject to Planning Board approval.**
- 3. Construction must be completed within 2 years or variance shall be void.**

Seconded by Mr. Webb.

Vote:

Mr. Dimmock: Abstain.

Mr. Osborn: Yes. Feels the applicant has met the criteria with the information that was presented before the Board.

Mr. Webb: No. Feel allowing 3,200 feet of office space will be taking spot away from other businesses that have been looking forward to the new municipal parking area.

Mr. DeBonis: No. Reasons do not have to do with parking but the existing footprint. Feels it is unnecessary to leave a small clearance to a side alley.

Mr. Virr: Yes. Believe the conditions have been met.

The motion Failed by a vote of 2-2-1. 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 second reading of the ZBA Policy & Procedures and copies were available at the Town Hall Code Enforcement Office.

Mr. Dimmock motioned to accept the revised ZBA Policy & Procedures as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. DeBonis, Mr. Osborn, Mr. Fairbanks, Mr. Webb, Mr. Dimmock, Mr. Thompson, Mr. Virr.

Approval of Minutes

Mr. Dimmock motioned to approve the minutes of June 18, 2009 as amended.

Seconded by Mr. Thompson.

Vote: Unanimous.

Mr. DeBonis, Mr. Osborn, Mr. Fairbanks, Mr. Webb, Mr. Dimmock, Mr. Thompson, Mr. Virr

Adjourn

Motion to adjourn by Mr. Thompson.

Seconded by Mr. Dimmock.

Vote: Unanimous.

Mr. DeBonis, Mr. Osborn, Mr. Fairbanks, Mr. Webb, Mr. Dimmock, Mr. Thompson, Mr. Virr

Adjourn at 9:05 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

Approval of Minutes August 20, 2009

Mr. Thompson motioned to approve the minutes of July 16, 2009 as amended.

Seconded by Mr. Osborn.

Vote: Unanimous.

Mr. DeBonis, Mr. Osborn, Mr. Fairbanks, Mr. Webb, Mr. Dimmock, Mr. Thompson, Mr. Virr