

TOWN OF DERRY  
ZONING BOARD OF ADJUSTMENT MINUTES  
September 17, 2009

**Members Present**

Allan Virr, Chairman  
David Thompson, Vice Chairman  
Cecile Cormier, Secretary  
Albert Dimmock  
James Webb

**Members Absent**

**Alternates Present**

Ernest Osborn  
Michael Fairbanks

**Alternates Absent**

John DeBonis

**Staff Present**

Robert Mackey, Code Enforcement Director

Mr. Virr informed the public that the meeting would be delayed momentarily to give the applicant time to arrive.

Mr. Virr called the meeting to order at 7:08 p.m. with the salute to the flag, and notice of fire and handicap exits.

**09-114R      Kastorion Realty**

**REHEARING of Case 09-114 Variance to terms of Article VI, Section 165-49.C.1, and Section 165-49.G.1.b, to construct a second story to an existing structure and to construct a two-story addition on an undersized lot which lacks required off street parking at 49 E. Broadway, tax map 30161. TBOD DISTRICT**

Joel Zeigler, Tyrus Porter Architect said that he was representing the applicant. Mr. Zeigler read his application for the Board. He said that he appreciated that the Board has taken the time to review the information presented and realize that there is a rigorous Planning Board process ahead of this project that will take into consideration all abutter concerns.

Mr. Virr said that previously had indicated that the addition would be no more than 5' and did not recall the Board having any issues with regard to the area variance portion of the application.

Ms. Cormier asked if according to the sketches supplied how much additional space would there be on the first floor level. Mr. Zeigler said that the addition would be 20' from the end of the building to the right-of-way.

Ms. Cormier asked what the extra square on the plan near the door was. Mr. Zeigler said that it was a post and the existing chimney.

Mr. Dimmock said that at the previous meeting the Board was informed that the dumpster truck was unable to access to dump due to the wires so they have to wheel the dumpster out onto Birch Street in order to empty.

Mr. Fairbanks asked with regard to #3 on the 1<sup>st</sup> floor revision plan it shows additional parking and if that was shown on the previous plan before. Mr. Zeigler said that Mr. Lampos thought it might be wiser that he thought it might be wiser to create the two tenant space to a one tenant space in the front first floor.

Leo Lampos, owner, said that he had originally wanted to keep the dumpster where it was currently located but this plan seemed to be the most friendly.

Tyrus Porter, Architect, said that the plan was to seek the maximum rental space available and this design will have less rental space with more service space area for the dumpster. It may become a 2 car attendant space. He said that it had previously been pointed out there was a need for more dumpster space.

Mr. Virr said that a lot of the issues will be discussed at the Planning Board level and not for the Zoning Board of Adjustment.

Ms. Cormier said that the Board could not grant a blanket variance that they needed to have a number with square footage before a variance could be granted. Mr. Porter said that they would like to be granted what had previously been requested on the square footage but if it changes due to Planning Board recommendations it would be less square footage than the request but not more.

### **Code Enforcement**

Mr. Mackey said that the property was located in the TBOD District which during the last hearing there was some confusion with regard to the side setback. The zone actually states that the side set back as a maximum of 5'. The proximity of the building to the property line next door will require the building to adhere to certain codes with fire rating etc. and it will need to meet all appropriate building and fire codes. Mr. Mackey said that the property is all one lot and not two separate lots. The parking requirements in the ordinance runs you in a circle as it refers you to the LDCR regulations which then is part of the Planning Board where they deal with on site and off site parking requirements. If the Board chooses it may put a condition that the plan is subject to obtaining all parking, water/wastewater services approvals from the Planning Board. There are pictures in the file for the Board's review.

## **Favor**

No abutters were present.

## **Opposed**

Charles Banister, 2 Birch Street, said that the plan shows the driveway of being 10' feet wide and that the right-of-way shown on the old survey map dated 1956 has not changed and is shared by his business and apartment, the Friendship Center that has 4 tenants over, the vacant Broadway Pets building and Leo Lampo's building. He said that he was concerned that if the variance was granted and the building allowed to expand that the now busy right-of-way will be totally blocked. He said that he now currently helps the trash removal company roll the dumpster belonging to the Chinese restaurant out to the street in the winter so it can be emptied as the truck is unable to access it by driving up to it to empty. The grease barrels are currently picked up by someone in a pick up truck and left at the gate as they also block the right-of-way when they empty the grease barrels. Mr. Banister explained the pictures that had been submitted to the Board. He stated that he was not concerned with the building expansion and the fire codes but concerned with the design layout of urban business area as this was not Boston where people expect to walk and have taxi, train or T-services or buses but not in the Derry area as this type of use does not work. Mr. Banister said that the Broadway Pets building actually fills the entire lot with the building which is not functionally equivalent to the surrounding area and is currently vacant. His main concern is the direct impact that the on the right-of-way with the over use.

There was some discussion with regard to the layout of the surrounding properties

Mr. Fairbanks said that the right-of-way concerns are not part of the variance request and the parking requirements are not part of the Zoning Board's jurisdiction. Mr. Banister said that the proposal was not to interfere with abutting properties and that if allowed it will directly interfere with all abutting properties.

Mr. Virr said that the off street parking issue needs to be addressed to the Planning Board. Mr. Banister said that he said that he disagreed as the notice that was sent to the abutters was to two sections of the zoning ordinance and did not understand why the Zoning Board was shuffling the matter to the Planning Board.

There was some discussion with regard to off street parking and right-of-way blockage

Ms. Cormier said that she believed that the Board had heard enough of the parking issues and motioned to close the public portion of the meeting and go into deliberative session.

Seconded by Mr. Dimmock.

## **Deliberative Session**

Mr. Virr said that the Board was here to address the area variance criteria.

Ms. Cormier said that she believed that the applicant has met the criteria.

Mr. Thompson said that he agreed.

Mr. Virr said that the applicant was unable to obtain additional area.

Ms. Cormier said that the only area the Board has jurisdiction over is 165-49.C.1 and should make the rest subject to Planning Board review.

Mr. Thompson said that the Planning Board will do if it was put in the notice of decision. He reviewed the statement made by Mr. Sioras during the previous meeting for the Board.

Mr. Mackey said that the original notice shows exemption does not exist according to zoning ordinance. The Planning Board is typically reviewed at Site Plan Review and is being worked on. He said that he had met with the Town Attorney with regard to the matter.

Mr. Virr reviewed the conditions for the Board.

1. Subject to Planning Board approval.
2. Construction to be completed within 2 years or variance shall be void.
3. Subject to all Town and State permits and inspections.

Mr. Dimmock said he agreed that the motion should be as outlined.

**Mr. Thompson motioned on case #09-114R, Kastorion Realty, to GRANT Case 09-114 Variance to terms of Article VI, Section 165-49.C.1, to construct a second story to an existing structure and to construct a two-story addition on an undersized lot which lacks required off street parking at 49 E. Broadway, tax map 30161. TBOD DISTRICT as presented with the following conditions:**

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

**Seconded by Mr. Dimmock.**

**Ms. Cormier said that she was uncomfortable with Section 165-49.G.1.b and would prefer to amend motion to eliminate.**

**Ms. Cormier motioned to approve according to 165-49.C.1 only and delete Section 165-49.G.1.b.**

**Seconded by Mr. Webb.**

**Vote:**

**Mr. Webb: Yes.**  
**Ms. Cormier: Yes.**  
**Mr. Thompson: Abstain.**  
**Mr. Dimmock: Yes.**  
**Mr. Virr: Yes.**

**Motion amended.**

Mr. Virr said that he felt that the Board was making a mistake to ignore the original request as it leaves an area for challenge and leaving as the original will address both issues of the ordinance that have been noticed.

Mr. Dimmock said that he believed that both Ms. Cormier and Mr. Virr were correct and that the Board may need to rethink the motion. He said that he disagreed with the fact of decision as he abstained previously due to the parking.

Mr. Virr said that the conditions stipulated should indicate that if the Planning Board denies that Section 165-49.C.1 is void. Mr. Virr said that he would entertain a motion to reflect that statement.

**Motion to withdraw previous motion to delete section 165-49.C.1.**

**Vote**

**Unanimous.**

**Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Thompson, Mr. Virr.**

**Ms. Cormier motioned to amend the conditions of approval that the Planning Board does not resolve the parking requirements that the variance shall be void and to include the first original motion.**

- 1. Subject to off street parking requirements resolved by the Planning Board.**
- 2. Subject to Planning Board approval.**

**Seconded by Mr. Dimmock.**

**Mr. Virr asked if the Board was clear of the motion that it would read as follows:**

- 1. Subject to Planning Board approval of off street parking requirements.**
- 2. Subject to Planning Board approval of Section 165-49.G.1 if not resolved Section 165-49.C.1 is void.**
- 3. Construction to be completed within 2 years or variance shall be void.**
- 4. Subject to all Town and State permits and inspections.**

**Vote:**

**Mr. Webb:** Yes.

**Ms. Cormier:** Yes. Believe the variance is not contrary to the spirit and intent of the ordinance. Meets the purpose of the ordinance and is consistent with the area variance requirements. Believe granting substantial justice will be done.

**Mr. Dimmock:** Yes. Agree with Ms. Cormier's statement.

**Mr. Thompson:** 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.**

**Correspondence**

Mr. Mackey said that the exception applications have been amended to reflect the changes that Town Council had agreed on. The section to remove the covenants was tabled indefinitely so that section remained in the applications.

Mr. Virr said that he would like to see a recorded copy of all covenants in the case file when requesting an exception.

Ms. Cormier said that if any properties have any easements that she would also like to request a copy of any recorded easements to be included with the applications.

Mr. Mackey said that he would try to obtain that information in any future cases.

Letter from Department of Environmental Services letter regarding 81 Chester Road.

**Adjourn**

Motion to adjourn by Ms. Cormier.

Seconded by Mr. Osborn.

Vote: Unanimous.

Mr. DeBonis, Mr. Osborn, Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Thompson, Mr. Virr

Adjourn at 8:30 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

**APPROVAL OF MINUTES 10-15-2009**

**Mr. Thompson motioned to approve the minutes of September 17, 2009 as written.**

**Seconded by Mr. Webb.**

**Vote: Unanimous.**

**Mr. DeBonis, Mr. Osborn, Mr. Webb, Mr. Dimmock, Ms. Cormier, Mr. Thompson,  
Mr. Virr**