

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**January 21, 2010**

**Members Present**

Allan Virr, Chairman  
Albert Dimmock  
James Webb

**Members Absent**

David Thompson  
Cecile Cormier

**Alternates Present**

Ernest Osborn  
Michael Fairbanks  
John DeBonis

**Alternates Absent**

Stephen Popp

**Staff Present**

Robert Mackey, Code Enforcement Director

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. Osborn and Mr. DeBonis would sit for the following case.

**10-100            Douglas & Rosalind Hartley**

**Special Exception to the terms of Article XIII, Section 165-108C, to allow the change of use from a grocery/convenience store to a 55 seat capacity restaurant, serving breakfast, lunch and light fare throughout the afternoon at 91 West Broadway, Parcel ID 26-066-002, OB DISTRICT**

Douglas & Rosalind Hartley, 3 Boyd Road, owners. Mr. Hartley said that they have owned and operated JP's Highway Superette for 26 years. He said that when they first purchased the property there were 9 other convenient stores in the Derry area however today only his store and he believes Brother's, which was formally Bartlett's, and the East Derry store are the only ones still operating. He said that today there are 22 convenient stores most of the with gas and in addition to multiple drug stores along with Wal-Mart that now sells milk and beer that they are competing with. His son had approached him six years ago with regard to converting the store into a small breakfast, lunch facility but at that time they were not ready to let go of the store. He said that however, today they find themselves working to pay the electric bill and \$600 plus in taxes a month. So the thought of possibly having his son Mark

who was actively seeking purchase a restaurant and start his own business seemed to be a viable solution. Mr. Hartley said that he has spoken to Jeannie Knuuttila who is a real estate agent about possibly leasing the store and seemed to be another viable solution but she thought that someone might want to do a pizza place, etc. there. His first thought was no as there was a pizza place right up the street. He said that next he wrote to George Sioras in November and had a very quick response and met with him who informed him that he was not zoned for a restaurant nor is a convenience store. So he set up a meeting with Mr. Sioras and Mr. Mackey on December 22, 2009 with his proposal to seek venture to a 55 seat restaurant which served breakfast, lunch and a light fare and was told that he needed approval from the Zoning Board and would require site plan approval from the Planning Board. Mr. Hartley said that the convenience store presently has in and out traffic and in the past 25 years they have been selling cigarettes and alcohol and feel that it would be better to sell bacon and eggs. He said that Janet Conroy said that the reason that the state imposed a tax on cigarettes to see if people would quit but they haven't. The store where there used to be isles of groceries is now diminished and now just have a few snacks, soda, beer and lottery tickets. He said that he did not feel that the convenient store will survive much longer and felt that a restaurant would be much better suited use for the building. He explained a few of some of the ideas that they might do with the interior to keep with some of the theme of Derry.

Mr. Dimmock asked how many years has the store existed. Mr. Hartley said that the Evelyn Newell's book the 1963 edition shows Hi-Way and Chevron Station possibly as early as 1960.

Mr. Webb asked if the land that the building was on was as it was outlined in the GIS map provided. Mr. Hartley said that he believed that was correct.

Mr. Fairbanks asked if the property was split with the auto place. Mr. Hartley said that the store and garage were two separate entities but believe that they now touch. He said that the Planning Board had approved the installation of their cooler on the side of the building. The garage had had a fire which at the time was owned by Joe Pickard which was contained to the second floor but when the structure was rebuilt it was within inches of the store.

Mr. Virr asked if the two structures touch. Mr. Hartley said that they do now.

Mr. Fairbanks asked if they were structurally attached. Mr. Hartley said that he was unsure but knows that it appears that their cooler supports the second floor.

Mr. Fairbanks asked if he knew that he was restricted to make any structural alterations. Mr. Hartley said that the only change he believed that would be made would be that the cooler would be coming out and revamping where the cooler was located.

Mr. Virr asked if he owned the abutting property and if the parking was to be on lot 01. Mr. Hartley said yes and that the store has always utilized the front for parking for the store. He said that there was nothing formally drawn up and realizes that if the store was leased to anyone other than family that that would need to be something that would allow an easement to use that area for a parking lot.

Mr. Dimmock said that in viewing the GIS map is it correct to assume that the apartment tenants park in the back and not in the parking lot. Mr. Hartley said that was correct that his tenants parking in the back portion of the property.

There was some discussion with regard to structural changes and what would be allowed.

### **Code Enforcement**

Mr. Mackey said the applicant's request was to change the use of the property from a convenience store to a 55 seat capacity restaurant serving breakfast, lunch and a light fare throughout the afternoon. The property is located in the Office Business zoning district. The existing use of the property for a convenience store is a prohibited use in this district that has existed for many years. Therefore, it is considered a legal, pre-existing non-conforming use. The proposed restaurant is also a prohibited use in this district and would also be considered non-conforming. Under Article XIII, Section 165-108C, the owner of a property containing a non-conforming use can apply to the Zoning Board for a Special Exception to change to another non-conforming use provided no structural alterations are made. In deciding whether or not to allow the special exception the Zoning Board must determine that the proposed use is equally appropriate or more appropriate to the district than the existing non-conforming use. This is not a variance request. In rendering a decision, the Board may wish to consider the purpose section of the Office/Business District as outlined in Article VI, Section 165-34A of the zoning ordinance. If approved, Planning Board site review will be required. In addition, appropriate permits and inspections will be required as well as a food service license from the Derry Board of Health.

Mr. Dimmock asked if it was right to assume that the Board needs to decide if the proposed use is appropriate for the area and the applicant is asking the Board to grant them permission to make it a different non-conforming use as the business has been existence for 20 plus years and was there before the zoning laws became in effect so now requesting to make a restaurant not a convenience store. Mr. Mackey said that the Board needs to review the uses of what is allowed in that office business district as convenience stores and restaurants are prohibited uses and the Board needs to look at what is being proposed verses what is there today is more reasonable or more appropriate what is there now.

Mr. Webb asked if an easement for parking would be appropriate to request if the properties were separated or one or the other sold if it would create an issue or would that be a Planning Board matter. Mr. Mackey said that the Board could make that a condition that the Planning Board addresses the parking requirements.

Mr. Virr said that the Planning Board would address the issues of parking.

### **Favor**

Fred Oven, owner of 94 West Broadway across the street, said that he was in favor of the proposal to allow the Hartley's to use the property as presented.

## **Opposed**

No abutter's were present.

Mr. Virr motioned to go into deliberative session.

Seconded by Mr. DeBonis.

Vote: Unanimous.

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

## **Deliberative Session**

Mr. Virr said that he did not feel that the request was difficult as it already is non-conforming use and do not feel that making it into a restaurant would be much of a change. Feel that the Board does need to stipulate some conditions.

Mr. Webb said that he has visited the store and it is difficult to exit at times and feels that a restaurant would ease some of the burden with the traffic issues.

Mr. Virr said that the customers would park and then back out to exit.

Mr. DeBonis said that he had no issues with the proposed request.

Mr. Virr said that the Board needs to stipulate conditions and reviewed them with the Board.

Mr. Dimmock said that the Code Enforcement Office would be deciding if there needed to be any changes.

Mr. Osborn said that they may need to make some structural changes due to the age of the structure.

**Mr. Dimmock motioned on case #10-100, Douglas & Rosalind Hartley, to Grant a Special Exception to the terms of Article XIII, Section 165-108C, to allow the change of use from a grocery/convenience store to a 55 seat capacity restaurant, serving breakfast, lunch and light fare throughout the afternoon at 91 West Broadway, Parcel ID 26-066-002, OB DISTRICT as presented with the following conditions:**

- 1. Subject to Planning Board approval.**
- 2. Subject to all State & local permits and inspections.**
- 3. Subject to obtaining food service license from the Derry Board of Health.**

**Seconded by Mr. Osborn.**

**Vote:**

- Mr. Webb:** Yes. Believe the particular use would be good and would be less traffic.
- Mr. DeBonis:** Yes. Also believe that would be good for the community and owners as the small Mom & Pop stores are failing.
- Mr. Osborn:** Yes. Do not feel that the use will be any worse and will bring more jobs into the Derry area.
- Mr. Dimmock:** Yes. Feel will bring more jobs into the area and will be an asset to the area knowing people that will be running the restaurant will be
- Mr. Virr:** Yes. Believe that changing this from one non-conforming use to this type of non-conforming use would be an improvement to the area.

**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.**

**Approval of Minutes**

Mr. Dimmock motioned to approve the January 1, 2010 minutes as amended.  
Seconded by Mr. DeBonis.

**Vote: Unanimous**

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

**Adjourn**

Motion to adjourn by Mr. Dimmock.

Seconded by Mr. DeBonis.

Vote: Unanimous.

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

Adjourn at 7:45 pm

Minutes transcribed by:  
Ginny Rioux  
Recording Clerk

**APPROVAL OF MINUTES February 4, 2010**

Mr. Dimmock motioned to approve the minutes of January 21, 2010 as written.

Seconded by Mr. Webb.

Vote: Unanimous.

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