

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**August 25, 2011**

**Members Present**

Allan Virr, Chairman  
David Thompson, Vice Chairman  
Albert Dimmock, Secretary  
James Webb  
Ernest Osborn

**Members Absent**

**Alternates Present**

John DeBonis  
Betsy Burtis  
Lynn Perkins  
Donald Burgess  
Louis Serrecchia

**Alternates Absent**

**Staff Present**

Robert Mackey, Code Enforcement

Mr. Virr called the meeting to order at 7:00 p.m. with the salute to the flag, and notice of fire and handicap exits.

Mr. Virr informed the public that the Board would be taking a brief recess in order to meet with Counsel. The Board reconvened at 7:17 p.m.

Mr. Virr said that the meeting tonight is a special meeting and not a regular scheduled meeting with regard to an Administrative Appeal of the Building Inspector to allow a drug and alcohol halfway house to go into a General Commercial zone where the existing use as a boarding house is a deleted use in the Zoning Ordinance on April 18, 2003. That in itself requires the town boards to review a change of use on that property and a public meeting. Mr. Virr said that since the decision of the building inspector is being questioned that would like to hear from Mr. Mackey.

**Code Enforcement**

Mr. Mackey said that the Board could read his memorandum into the record that it would be an explanation of where we are at.

Mrs. Burtis asked if the Board was restricting questions prior to July 29, 2011 correct.

Mr. Virr said that was correct and asked Mr. Mackey to explain the chain of events prior to July 29, 2011.

Mr. Mackey said that the property in question was the former Mariners Inn which is considered by the Town as a pre-existing non-conforming use as a boarding house/rooming house by virtue of the fact that you will not find that particular use listed anywhere in the zoning ordinance as permitted use by the Town. He said as such be allowed to continue as long as it has not been abandoned for more than a year which was not the case here.

The property was sold by the original owner and picked up by another entity that proceeded to perform some renovations to the property and at that time a meeting was held with regard to having a site plan done for the property. The owners also purchased two other properties next to the property the two family dwelling next door to the community center and the single family next door to the Mariners. The eventual plan being to tear down the single family and add in some parking. He said that there was some discussion with regard to use of the building and the original plan was just to do some cosmetic renovations and continue the use.

At some point around June it came to the Town's attention that the Granite House was the proposed tenant. At that point the Code Enforcement Office contacted them and had them come in to discuss their plans with the Code and Planning Offices and the owner of the property and representatives for the Granite House for the proposed use. The issue of them about having a site plan was discussed. This was going to be done which would deal not only with the parking but the use of the property which was supposed to be in the works.

Mr. Mackey said that there was an issue with property in the back and an old right-of-way and their surveyor is trying to clear the cloud with the title of the property and to this day that has not happened and there has been a subsequent site plan submitted basically that does not deal with that anymore because of the title issue so the parking that they are going to put in now comes out onto Broadway. Up until that point there have been conversations with regard to Granite House and discussions in what they were going to use and again what was described that at that time it did appear that they would fall under the rooming house definition. He said that there was no definitive decision made and part of what we wanted to see happen was a site plan prepared that would deal with the expanded parking and also deal with the proposed use of the property and then again it would go through the process and somewhere along that time the appeal was filed.

### **Board Questions**

Mr. Virr asked Mr. Mackey if he had made an administrative decision that would or would not require a site review.

Mr. Mackey said no that nothing was definitive nor was anything in writing and that the thought was that going forward that it would go before the Board and that the appropriate

questions would be asked and that the use would be specifically noted on the site plan and go to the appropriate Boards.

Mr. Virr asked if ordinary responsibilities that you do make administrative decisions and they are followed up by correspondence to the applicant.

Mr. Mackey said typically yes.

Mr. Virr asked if as of July 29, 2011 if there was no administrative decision made correct.

Mr. Mackey said yes.

Mr. Virr asked if any other members of the Board had any questions of Mr. Mackey and that only full Board Members could participate in any questions.

Mr. Thompson asked if an occupancy permits issued as it appears that one building is full and the other has a half a dozen tenants.

Mr. Mackey said that he was unsure about the two-family but did know that the Mariner's was occupied.

Mr. Thompson asked if they had occupancy permits.

Mr. Mackey said no formal occupancy permit has been issued.

Mr. Virr said that that would have been subsequent to July 29, 2011 date that we are working off of the alleged administrative decision was made.

Mr. Webb asked if they were running under a renovations permit and the Mariner's Inn believed that no occupancy would be needed.

Mr. Mackey said that they could perform cosmetic renovations and continue to operate without an occupancy permit as they were going through the required permit process.

Mr. Osborn asked if they could continue to operate and increase the amount of tenants without a variance.

Mr. Mackey said no that an expansion would require a variance. The Town has historically looked at the property with 16 occupants as a pre-existing non-conforming use and any expansion would require a variance.

Mr. Thompson asked if electrical and plumbing work had been done.

Mr. Mackey said yes that the service had been upgraded. There have been things that have occurred since the July 29, 2011 with regard to the building but not pertinent to the 29<sup>th</sup>.

Mr. Thompson asked if during the conversation with Mr. Trefethen were you just shooting the baloney in the office and he felt you were making an administrative decision.

Mr. Mackey said that the first time any conservation had occurred between himself and Mr. Trefethen was when he was taking the pictures of the property for the Board.

Mr. Osborn said that observantly as an aggrieved abutter he was able to file an administrative appeal.

Mr. Virr asked that since July 29, 2011 has a site plan review been scheduled.

Mr. Mackey said not scheduled at this time to the Planning Board as of yet. He said that basically as he understands the process is a site plan is submitted and it goes first to a Technical Review Committee for review and comment. The meeting is then scheduled and any deficiencies or things that need to be corrected are noted at that time then it may or may not involve another TRC meeting and when the staff is satisfied that everything is on the plan that needs to be then it will be scheduled for the Planning Board. He said as of today it has not been scheduled for the Planning Board

Mr. Virr asked if a variance had been applied for and in process for proper Board hearings.

Mr. Mackey said yes and that they are scheduled for the Board on September 15, 2011 and in the site plan process.

Mr. Virr asked if Mr. Trefethen had any he would like to share.

Mr. Thompson said to Mr. Trefethen that the Board will only hear information from July 29, 2011 to the present and nothing before that.

Steve Trefethen, Manager of Dom Vincent, LLC and owner of 40 West Broadway, said that he had been in contact and was contacted by Town Councilors that an administrative decision was made and because it is something that is made without public knowledge that he did not want to lose his thirty day right to file an appeal. Mr. Trefethen said that the property had been occupied without proper approvals.

Mr. Virr said that the Board is speaking to an administrative decision was allegedly made prior to July 29, 2011.

Mr. Trefethen said that he was informed by a Town Councilor and email correspondence that an administrative decision was made and that use was allowable providing it was a boarding house and remained 16 occupants.

Mr. Thompson asked if there had been any specific communication with Mr. Mackey saying that a change of use was not required.

Mr. Trefethen said that he was told but that he did not have anything official from Mr. Mackey and when an administrative decision comes that he would receive nothing.

Mr. Thompson said that Mr. Mackey had not made an official decision and that it appears that whoever informed you of an administrative decision being made was in error. And that he felt that there was no standing as there was not a case.

Mr. Virr asked if Mr. Trefethen could tell the Board of his general concerns.

Mr. Trefethen said that he would like to present his case and if he was not in the proper forum then the Board needs to be told that he is not in the proper forum.

Mr. Virr said that he does not know if there is a case.

Mr. Thompson said that he felt that there is no case as there had been no administrative decision made by Mr. Mackey.

Mr. Trefethen said that he will never be informed and that the Board could not take his rights away as there is no process for that and that he was informed by council that Mr. Mackey made a decision that it could exist as a grandfathered clause as a 16 room boarding house and could use that as a boarding house without a change of use.

Mr. Virr said that Mr. Mackey supported that in his testimony.

Mr. Trefethen said that he did hear that Mr. Mackey stated that and that the issue is whether it is a boarding house or is it and the problem is compounded as there are a thousand issues in the TRC report as there are issues there such as fire and life safety and other issues.

Mr. Thompson said that those are Planning Board issues.

Mr. Osborn said that they need to go thru the proper channels and that the Board was here tonight to see if Mr. Mackey made a mistake.

Mr. Virr said that he was asked to state concerns and why was this appeal made.

Mr. Trefethen said that a decision was made to allow that use to remain as a grandfathered use and allow the Granite House to go in there under the same use.

Mr. Virr asked what is looking to be accomplished here since a site review and planning board review and possibly a variance will be required. What is the reason for being here tonight.

Mr. Trefethen said that he wants this to go through the proper channels and only direct abutters will get noticed so he will not ever get noticed.

Mr. Trefethen said that only direct abutters will be notified and of which his property was not a direct abutter so he would not be notified. He said that according to the RSA

that Mr. Mackey quoted reads further that other properties could be notified if they would be directly affected by the decision and his application was rejected so they only notified direct abutters and said that he felt that his property would be directly affected and so would other properties in the area and that they should have been notified also.

Mr. Virr said that the only issue here for the Board is was an administrative decision made and if it was made was it correct. He said that he read the material presented and understand the concerns and that if he could generalize his concerns then the Board would listen.

Mr. Trefethen said that he would address the issues if the Board wants to hear the case but not here to boil it down. He said that they moved in for a reason maybe Mr. Mackey as he understands feels that they thought they had the right to move in because the zoning said they could as it was a boarding house.

Mr. Thompson said that it has nothing to do with the appeal to administrative decision and if there is evidence to present that specifically says that shows that you think that Bob Mackey made it does not concern this Board of who moved in only to what decision Mr. Mackey made then will hear that concern or there is no standing.

Mr. Trefethen said that he has standing as he was notified by a council that a decision was made a Town Councilor as a representative and has no other way to be notified.

Mr. Dimmock asked if he had that in writing.

Mr. Thompson said that he would like to see it.

Mr. Trefethen said that he did have it in writing but not here with him as that is he was not here for that issue.

Mr. Thompson said yes he was here speaking to that issue as if he had proof from Town Councilor's then would like to see it.

Mr. Virr said that he had previously spoken to the Board to be recognized by the Chair before speaking.

Mr. Dimmock said that we could sit here and argue whether we are or are not doing the right thing but this is a quasi-judicial Board and which means that we are judges in the eyes of the law. He said that if you go before a judge saying you been notified by town council then you must have proof of that for them to accept and that the Board is unable to accept his word on that as that then you must present that proof. He said that he was not stating that he was against him just that if have proof then it must be presented otherwise it is considered hearsay.

Mr. Osborn said that Mr. Trefethen said has to realize that there has been a variance applied for and that the Board speaking about this is inappropriate as even this appeal is unable to be discussed prior to the meeting. He said that the Board is asking to have Mr. Trefethen speak only to the administrative appeal as the Board is unable to speak to the

occupancy that needs to be addressed to the Town maybe there is a point that needs to be addressed to the notification process but that is not a matter for this Board.

Mr. Webb said that he can sympathize what Mr. Trefethen is trying to address tonight and that the Board is only here to see if Mr. Mackey has made an administrative error with that in mind that the Board needs to focus on that and not on the case and that only as a variance has been applied for.

Mr. Virr said that the Board does not need to discuss the variance twice. He said that he is not saying that there are not concerns but need only to hear reasons for administrative appeal.

Mr. Trefethen said that there is no time as they are already moved in and the tenants are there.

Mr. Virr said that is since July 29<sup>th</sup> and that the Board is only talking about an administrative appeal decision that was allegedly made on or before July 29<sup>th</sup>.

Mr. Thompson said that the meeting in September he could voice his opinion of them moving in as there has been no evidence made that Mr. Mackey has made an error and if Mr. Trefethen can convince the Board that an error was made then the Board would like to hear it.

Mr. Trefethen said that discussions have gone on that a boarding house is alright and maybe Mr. Mackey needs to be asked more questions as discussions have gone on that it is an okay use as a boarding house. He asked of when is it a decision and would he get that in writing when is it a decision if it is stated by a town official

Mr. Thompson asked Mr. Mackey if it was the property owner that was notified and is there anyone else notified.

Mr. Mackey said yes typically only the owner is notified if it is only a change of use and not a full site plan.

Mr. Thompson said that only the Planning Board gives waivers and that this Board only gives variances and where they are trying to change it from 16 to 31 tenants that is where the variance is needed to expand the non-conforming use and that you can address on the September meeting. He said that questions to site plan review would be with the Planning Board also questions with regard to parking lot and it will be notified in the newspaper.

Mr. Trefethen said that they would not be able to expand that unless they obtain a variance and that he would not get a letter of notification and would never be notified.

Mr. Virr said that it is notified in the newspaper and on the cable channel.

Mr. Trefethen said that the Board has indicated that they are a quasi-judicial Board and they are moved in there and that needs to be addressed and that was a decision that was made.

Mr. Thompson said that if there is a problem with the RSA then that needs to be addressed to the State legislative.

Mr. Virr asked if there was anything else to be added.

Mr. Trefethen said that there is more that he would like to address but the Board is not willing to hear it.

### **Favor**

Janet Conroy, 16 High Street, said that she had more of a question to ask the Board and if it was correct in her understanding that the question of the Building Inspector's decision that there had been no decision and that there has been a variance application made that will be heard on September 15, 2011.

Mr. Virr said that was correct and that he apologizes as he should have limited it to the abutters to speak.

Mr. Osborn asked if there was an application for a variance filed for September 15<sup>th</sup>.

Mr. Mackey said that an application was made so it was scheduled for September 15<sup>th</sup>.

### **Opposed**

There were no abutters present.

### **Board Questions**

Mr. Dimmock said that he sees that Attorney Germaine was present this evening and would like to know if he had anything to add to this case.

Mr. Virr said that he was not involved with this case.

Mr. Mackey said that he wanted to clarify for the record that any decision that was made when it was found that the Granite House was moving was that they did come in and there were discussions in that they described their use and it was determined that they could move forward. They were told that if kept as a rooming house with the understanding that they still needed to go through the site plan process. He said that part of it was yes that they still needed to clarify the use and go forward with the process of a site plan review with regard to the parking and the unfortunate part is that they did move



in without doing that process and that the Town is dealing with that issue and it has complicated the matter.

Mr. Thompson asked who the applicant was for the variance on September 15, 2011.

Mr. Mackey said that the Granite House was the applicant requesting the variance.

Mr. Thompson said that he did not feel that they could request a variance as they were not the owner of the building.

Mr. Mackey said that they have a letter of authorization by the owner.

Mr. Thompson said that when the variance comes before the Board it states that a Robert Nano is the owner but the deed indicates a Damiano Nano so it is a bit confusing.

Mr. Virr motioned to go into deliberative session.

Seconded by Mr. Webb.

Vote: Unanimous.

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

### **Deliberative Session**

Mr. Virr said that no administrative decision was heard and the Board has heard testimony from Mr. Mackey.

Mr. Thompson said that there had been no discussion with Mr. Trefethen and Mr. Mackey prior to the filing of the appeal and that it was only hearsay and he did not find any evidence shown that a decision was made.

Mr. Virr said that he failed to see that this meeting has any jurisdiction and that the Board should make a motion to dismiss the appeal without prejudice for lack of jurisdiction as no administrative decision was made. He said that he appreciated Mr. Trefethan's prompt action as a concerned citizen but unfortunately where an administrative decision was not made then there was nothing to appeal.

Mr. Osborn said that there was no decision made at any time so how can we say that he made a wrong decision.

Mr. Osborn motioned to come out of deliberative session.

Seconded by Mr. Thompson.

Vote: Unanimous.

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

**Mr. Thompson motioned to Dismiss without prejudice case for lack of merit.**

**DISMISSED, WITHOUT PREJUDICE**

**Seconded by Mr. Osborn.**

**Vote:**

**Mr. Webb: Yes. Dismiss the case without prejudice.**

**Mr. Dimmock: Yes. Agree with Mr. Webb.**

**Mr. Osborn: Yes.**

**Mr. Thompson: Yes.**

**Mr. Virr: Yes.**

**The Administrative Appeal was Dismissed by a vote of 5-0-0.**

### **Approval of Minutes**

Mr. Virr said that the minutes of August 4, 2011 will be taken up at the next regularly scheduled meeting.

### **Adjourn**

Motion to adjourn by Mr. Osborn.

Seconded by Mr. DeBonis.

Vote: 9-0-0

Mr. Serrecchia, Mr. Burgess, Mr. Perkins, Mrs. Burtis, Mr. DeBonis, Mr. Osborn, Mr. Webb, Mr. Dimmock, Mr. Thompson, Mr. Virr

Adjourn at 7:59 pm

Minutes transcribed by:

Ginny Rioux

Recording Clerk

### **Approval of Minutes October 20, 2011**

Mr. Thompson motioned to approve the minutes of August 25, 2011 as amended.

Seconded by Mr. Webb.

Vote: Unanimous.

Mr. Burgess, Mr. Perkins, Mr. Osborn, Mr. Webb, Mr. Dimmock, , Mr. Thompson, Mr. Virr