

**TOWN OF DERRY**  
**ZONING BOARD OF ADJUSTMENT MINUTES**  
**November 07, 2013**

**Members Present**

Allan Virr, Chairman  
Lynn Perkins, Vice Chairman  
Donald Burgess, Secretary  
Teresa Hampton  
Joseph Carnevale

**Members Absent**

**Alternates Present**

Tyler Whitehorn

**Alternates Absent**

Ann Marie Chase  
Heather Evans  
David Thompson

**Code Enforcement**

Robert Mackey

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 and a reminder that this and all Zoning Board meetings are videotaped.

The Board introduced themselves for the record. Mr. Virr noted the Recording Secretary was not present this evening and the minutes were to be prepared from a video tape of the meeting.

Mr. Virr advised the Board is present this evening to address an appeal brought forward by Mr. John O'Connor. The Board will review any zoning related issues. The Board does not need to abide by any zoning related issues and will determine if the Planning Board had sufficient evidence and testimony to reach the decision it did on August 21, 2013. The ZBA will determine if the decision of the Planning Board was in violation of the Zoning Ordinance. The ZBA will look at zoning issues only.

Mr. Virr explained the abutters have agreed to allow Mr. O'Connor to speak on their behalf, but if someone feels strongly they need to address the Board, that will be allowed. Rules will apply which he will outline later. Mr. Virr noted in the materials provided by Mr. O'Connor, there was an opinion letter that outlined variance criteria. The ZBA is not hearing a variance this evening, and Mr. O'Connor will have the opportunity at another date to oppose or support a variance application if the ZBA determines one is needed. He could not speculate or voice an opinion at this time as to whether Accurate Transport would meet the variance criteria.

**13-121**

**John T. O'Connor**

**Owner: Yvon Cormier Construction Corp**

**Continued from October 17, 2013**

**Applicant is requesting an Appeal of an Administrative Decision as follows: “to show that the Planning Board’s decision of August 21, 2013 relative to site plan approval of the property located at 41 Ashleigh Drive, was in error and the Board made an unlawful decision when it determined that Accurate Transport, Inc. falls under Article VI, Section 165-41, Industrial District III, Section A: Permitted Uses as a “Contractors Yard”, Parcel 08017.**

Mr. O'Connor, 13 Arrowhead Road, advised he was representing the neighbors and other abutters affected by this site plan. He is also the Vice Chairman of the Derry Planning Board and has recused himself from decisions on this issue as he is a direct abutter to the Accurate Transport, LLC site plan. The recent Planning Board approval allowing the permitted use of Accurate Transport, LLC and the recent denial of a rehearing has been very contentious and he had been told this has been one of the most disputed Planning Board and Zoning Board decisions the Town of Derry has ever heard. As noted in the media reports, those disputing the Planning Board’s decision that this is an allowed use include the Town Administrator, Town Councilors, members of the Conservation Commission, as well as over one hundred residents of Derry. All of the TRC minutes were omitted from the ZBA documents received from the Planning Board. The Board can see from the many questions asked during the Planning Board meetings relating to the TRC minutes that the applicant was not honest when before the Planning Board. It also appears that Accurate Transport, LLC, although not directly in the Ground Water Conservation District, directly abuts that corridor and aquifer which flows to Pelham. Leachate draining from the dumpsters could go into the aquifer. His concern is that residential homeowners who are likely to use these dumpsters for renovations are not required under NH DES document WMD 22 to get permits for disposal of paint chips that contain lead, a concern for the aquifer and any stormwater that flows to Hood Pond. (See Attachment #2 dated October 10, 2013)

Accurate Transport, LLC, being classified as a Waste Hauler by the Department of Environmental Services requires them to register with DES. When he asked DES for the past tonnage reports going back to 2001, the year they were established in New Hampshire, DES stated they had just applied and there are no past records. With that being said, he will begin his appeal testimony, of which the Board has a copy. The Board member’s packets should have exhibits that support his arguments. Also included are the most recent arguments, dated October 27, 2013.

Mr. O'Connor said the purpose of the appeal of the Planning Board decision of August 21, 2013, relative to the site plan approval was in error and the Planning Board made an unlawful decision in determining that Accurate Transport, LLC falls under Article VI, Section 165-41, Industrial III district, Section A, Permitted Uses, as a Contractor’s Yard. (See Exhibit A). Under the current Town of Derry Zoning Ordinance, published July 19,

2013, Article II, Word Uses and Definitions, Section 165-5, Definitions, there is no listing or definition for “Contractor’s Yard.” (Exhibit B). The definition of Contractor’s Yard had been repealed by the Planning Board on May 14, 2012, and deleted June 14, 2012 by the Town Council (Exhibit C). Prior to its removal, the definition of Contractor’s Yard was a “Carpenter shop, plumbing, electrical, roofing, contracting or similar service establishment.” At the Planning Board meeting on May 1, 2013, Mr. Phil Sykes of 6 Donmac Drive wanted to confirm that Dumpster Depot was a storage and maintenance facility and not a trash transfer station. Mr. David Paul, the applicant, confirmed Dumpster Depot would not be a transfer station. (Exhibit D) At the public hearing on June 19, 2013, George Sioras, Director of Planning, was asked if a Contractor’s Yard was a permitted use. His reply was that Bob Mackey, the Code Enforcement Officer, took the position that Contractor’s Yard is a permitted use. Mr. Anderson said Mr. Mackey determined the site is a Contractor’s Yard and Freight and Terminal. However, the definition of Contractor’s Yard no longer exists and Dumpster Depot cannot be permitted use of this definition. (Exhibit E and C). At the Planning Board meeting on June 19, 2013, Mr. O’Connor asked a question regarding whether the applicant is required to comply with the Department of Environmental Services and Waste Management statutes and rules. RSA 149:M, Solid Waste Management and DES’ Administrative Rules Env-Sw 300, Permits, includes Transfer Stations. The applicant spoke with Mr. Wheeler, the Director of Waste Management and Mr. Paul reported that DES would classify Mr. Paul’s operation as a Waste in Transit Facility and would fall under the new Administrative Rules, Env-Sw 408.6, Waste in Transit Storage Area which is truly not a permitted use. (Exhibit F). At the August 21, 2013 Planning Board meeting, in Planning Board deliberation, Mr. Tymula, the engineer, reaffirmed DES’ position that Dumpster Depot is a Waste in Transit Facility. The Town of Derry Planning Board Administrative Assistant contacted Mr. Wheeler at DES and confirmed Mr. Tymula’s statement that Dumpster Depot is a Waste in Transit Facility (Exhibit G).

The DES Waste in Transit rules are as follows under Env-Sw 408.6:

“Subject to Env-Sw 408.02, no permit shall be required to temporarily store waste while in transit to an authorized facility, provided that:

- (a) The waste shall arrive at the storage facility in covered container(s), to include a waste collection vehicle;
- (b) No waste shall be removed from or added to the container(s) while at the storage facility;
- (c) Not more than 150 cubic yards of waste shall be stored at the storage facility;
- (d) The waste shall be stored no longer than 4 days from date of receipt; and
- (e) The waste shall not be stored in a manner or for a time period which has the potential to result in conditions adversely affecting the environment, public health or safety, including conditions that attract insects or vectors, generate odors or leachate, or have the potential to cause fire or explosion.”

The Town Administrator asked if trash was permitted in any zone and the Planning Director said no. The Planning Board conditionally approved the Dumpster Depot as a Waste in Transit Facility and allowed it to store up to 5 truckloads of waste; however, seven truckloads would be returning to the facility which would be the equivalent of 210 yards of waste. DES rules only allow for 150 yards of waste, therefore Dumpster Depot

would be in violation of DES rules and would also be in a non-permitted zone. If Dumpster Depot was categorized as a DES Waste in Transit Storage Area, as approved by the Planning Board, they would also be required to follow DES' rule Env-Sw 104.56, Types of Waste, "... means a category of waste, at least as specific as the following, which describes the belonging waste by its material composition or other distinguishing characteristics:

- (a) Ash;
- (b) Bulky waste;
- (c) Construction and demolition debris;
- (d) Hazardous waste;
- (e) Household hazardous waste;
- (f) Household infectious waste;
- (g) Infectious waste;
- (h) Municipal solid waste;
- (i) Putrescible waste;
- (j) Recyclable materials;
- (k) White goods; and
- (l) Yard waste."

All of the above listed waste would be permitted unless the Planning Board set conditions exempting certain types of waste. The Planning Board only exempted Municipal Solid Waste. All of the above listed waste would be allowed at the site. The Zoning Board has jurisdiction to review the Planning Board's decision that Dumpster Depot is classified as a Contractor's Yard. The Zoning Board, under RSA 674:33, Powers of the Zoning Board of Adjustment:

I. The zoning board of adjustment shall have the power to:

- (a) Hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16; and
- (b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
  - (1) The variance will not be contrary to the public interest;
  - (2) The spirit of the ordinance is observed;
  - (3) Substantial justice is done;
  - (4) The values of surrounding properties are not diminished; and
  - (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

Mr. O'Connor would submit that using the Zoning Board's criteria is further proof for not allowing a contractor's yard as a permitted use. His response under the criteria is that the location of the site is in the Industrial zone III, which falls in the newly formed Tax Increment Finance (TIF) district; that this TIF district has brought the town high end businesses such as Woof Meow, Panera Bread, Super Walmart, recently Verizon Wireless, and also other stores in that development. Dumpster Depot would not add any significant taxes to our tax base and would not significantly reduce the municipal bond. The addition of this Waste in Transit facility, would not promote the health, safety, and general welfare of the community. The response to the Planning Board hearings was

overwhelmingly in opposition of such facility. There is no substantial public gain, only a loss to the community. Not only will the value of the surrounding neighborhood have their house values diminish, the businesses that adjoin the Ashleigh Drive business development area would be negatively affected by the lower end businesses.

Mr. O'Connor stated he has provided information on two NH Supreme Court cases regarding Ordinances that do not define a word such as "contractor's yard". One example is Bartlett Board of Selectmen vs. Bartlett Board of Zoning. Further explanations cited is in Townsend, "Because the Ordinance in this case does not define 'premises' we look to the common approved usage of the word." When the Derry Planning Board removed the term "contractor's yard" and replaced it with "commercial service establishment" under Section 165-5 (Exhibit B), the only possible choice for Dumpster Depot which is a Waste in Transit facility, may be a general contractor, and at that it is a stretch. The Black's Law Dictionary, 9<sup>th</sup> edition, 2009, commonly used by the Supreme Court, defines general contractor as, "one who contracts for the completion of entire projects, including purchasing of all materials, paying subcontractors, and coordinating all work". There is no way Dumpster Depot could be considered a general contractor according to the common approved usage of the word. In his Attachment #3, Mr. O'Connor stated MBAC vs. Town of Weare, 147 NH, page 328 on December 27, 2001, the Supreme Court supports his appeal that Accurate Transport could not meet the criteria previously outlined in the five (variance) criteria. It would not promote the health, safety and general welfare of the community, there is no substantial public gain, only a loss to the community, and not only will the surrounding neighborhoods have their house values diminished, the businesses that adjoin Ashleigh Drive business development area will be negatively affected by adding lower end businesses. In Exhibit M, the State of New Hampshire Office of Energy and Planning sets out how a Board should conduct themselves while in deliberative session. During the August 21, 2013 deliberation, new evidence and plans were submitted and accepted without giving the abutters the opportunity for rebuttal. Therefore, his suggestion was to have the applicant reapply for a new site plan application hearing. He also submitted Attachment 1 which is a rebuttal to the Planning Board Chair requesting a reconsideration of the Board's decision related to Accurate Transport, LLC, 41 Ashleigh Drive, as submitted by Mrs. Brenda Wilson. The Chair read a statement and she was not allowed to rebut it.

In closing, Mr. O'Connor would ask this Board to carefully review RSA 674:44 and LDCR Section 170-47 which states the Boards should provide for the safe and attractive development or change or expansion of use of the site and guard against such conditions that would involve danger or injury to health, safety and prosperity by reasons of inadequate drainage, or conditions conducive to flooding of the property or other undesirable elements of pollution such as noise, smoke, soot, particulates and other discharge to the environment which might prove harmful to persons, structures or adjacent properties and inadequate provisions for fire safety, prevention and control and provide for the harmonious and aesthetically pleasing development of the municipality and its environs." With all due respect, for the Planning Board's judgment, Mr. O'Connor believes he has shown the Planning Board erred in its decision to grant approval for the Accurate Transport, LLC site plan. Therefore, he respectfully requests the Zoning Board reverse the Planning Board's decision to categorize the Accurate Transport, LLC, also known as Dumpster Depot, site as a contractor's yard and a

permitted use in an Industrial III zone. We still want to be known as “Spacetown” not “trash town”.

Mr. Virr noted a lot of the items raised by Mr. O’Connor are items that are concerns of members of the Board as townspeople, but as members of the ZBA, they are focusing solely on zoning related issues and whether or not variance criteria have been met are not for this meeting. They will look at zoning related issues only. He asked if the Board members had questions of Mr. O’Connor?

### **Board Questions**

Mr. Carnevale asked how it is a loss to the community and what is the community going to gain from this? Mr. O’Connor said the permitted use allowing Dumpster Depot to come into that particular location, under the rules of the Planning and Zoning Boards, are required to look at the community as a whole and this particular location in adding a Dumpster Depot in an area that has high end businesses there are other pieces of property adjacent to that property that will diminish any other future businesses coming in. As one approaches the roundabout, prior to where Dumpster Depot would be located there are three major pieces of property. He would not expect that next to Dumpster Depot with 350 dumpsters, especially in the middle of August sitting out there in the sun that an Olive Garden would want to establish their facility there. Who would want to buy that piece of property? That property would now be devalued and would bring in someone who does not care. That creates a domino effect into the other businesses that go into the Flagship and down to Panera Bread, La Carreta, the liquor store, Hannaford and all those other high end businesses right around that area. That will start diminishing their values; this is not what would be called an anchor that would support businesses for the community of this town.

Mr. Burgess said he has been listening to what has been said. He has read through six meetings and watched five video and has heard the same thing twenty five times. He knows part of the problem would be under prohibited uses but what is there in Industrial III and Industrial IV is industrial buildings. Somewhere down the road, most of those types of businesses that would move into that area would have some sort of fumes, dust, etc. He is not sure they can hang their hat on prohibited uses in that respect. Mr. Virr felt Mr. Burgess was skirting close to talking about conditions for a variance which is not something they will deal with tonight. Mr. Burgess felt it was part of the zoning and that is what he was trying to get at. Mr. O’Connor said he felt he made a good case that under permitted uses the town does not allow waste. Waste has not been permitted since 1980 in any particular zone. Accurate Transport has gone out of their way to make sure they were known as a Waste in Transit and they want to handle waste. Waste is not a permitted use. He thinks he defined that very well within contractor’s yard and even commercial service establishment. Mr. Burgess said he had been led to believe that it is mostly demolition debris and not household waste. Mr. O’Connor maintained that if one went by Mr. Paul’s testimony that it is mostly construction use based on renovations of households. Any household constructed prior to 1980 has lead paint. So any construction that has sanding or paint chips gets adhered into those dumpsters. During periods of rainfall, it collects because they don’t get washed prior to coming back.

Mr. Virr interrupted and stated these are not zoning related issues. Mr. Perkins agreed the Board is not testing the variance criteria but he felt the Board was looking at whether or not the prohibited uses do tie in. He differentiates from Mr. Burgess' point in that the waste that could come in could be things such as "infectious waste" under Exhibit F, but they are on a mass, uncontrolled aspect. It makes him wonder if those types of waste would qualify under prohibited uses and whether or not that ties in Subsection B into this application. Mr. Virr felt it all tied in together. He asked Mr. Mackey to read his staff report.

### **Code Enforcement**

Mr. Mackey said he did not have a lot to add other than it is the zoning related aspects the Board must deliberate on. He can only speak for Code. The members have the packets from the Planning Board. Regarding the Planning Board meetings, the ZBA members have read through the information provided and watched the DVDs of the meetings. In his mind the two big things are the permitted use and what Mr. Burgess was discussing, the provision in the ordinance that could be carried through to all the Industrial zones in town. The zoning does speak to uses that are noxious and offensive and the ZBA would need to look at that. However, in looking at the material provided by the Planning Board, what the Planning Board did when it ultimately voted, was to put a number of conditions on the approval. Whether that offset any concerns is part of what the ZBA would need to deal with. He was available for questions.

Mr. Virr asked if Mr. Mackey is a member of the Technical Review Committee (TRC). He is. Mr. Virr asked in Mr. Mackey's function in reviewing this particular site plan, what is Mr. Mackey's function and how does he come about signing off on it; what is the process? Mr. Mackey said there are multiple entities involved. Public Works looks drainage, engineering and a site development perspective; the Police Department provides input; the Fire Department reviews fire related issues. His role would be the zoning related aspects such as is it a permitted use, or whether a use is allowed, buffers, different aspects that relate to the zoning aspects. A plan comes before the TRC and gets reviewed, issues discussed; the applicant may need to come back based on any issues that were raised that needed to be addressed. Mr. Virr then asked if Mr. Mackey makes a suggestion or recommendation that it might fit under "Contractor's Yard", that is not a decision making process. Is that not for the Planning Board to decide? Mr. Mackey said ultimately. At any point if the Planning Board feels as it is going forward with its review that some part of that, if it is a zoning related issue, is not correct, they would say no, this needs to go to the Zoning Board. Typically, he would pick that up at the beginning of the process and advise the applicant to go for a variance prior to getting to the Planning Board. But with approval of the site plan, that is the ultimate approval of the plan which says that everything is approved. Mr. Virr confirmed that the Planning Board grants conditional approval, not final approval in this particular case. Mr. Mackey said the Planning Board typically imposes conditions such as establishment of escrow and any other conditions the applicant would need to meet. Mr. Virr knows that this has been discussed in the past and in the previous meeting when Mr. O'Connor's appeal was converted from an Appeal of the decision of the Code Enforcement Officer, it had been pointed out that for Mr. Mackey in his role on the TRC, it is not a case of actual approval if Mr. Mackey says a use might fit under "contractor's yard" or under "freight and

trucking”. It is really ultimately the Planning Board’s responsibility to determine the use is correct. It does not appear that was in actuality what happened.

Mr. Burgess said from what he can see, that from the first meeting to the last meeting, it was always stated that Mr. Mackey made the determination. He did not see that was his particular job to do that. It would be the job of the Planning Board or the Zoning Board to make the determination that something fit in the zone. Ms. Hampton noted Mr. Mackey said that “ultimately” it was the Planning Board’s decision and ultimately she believed it was the Zoning Board’s decision because this is a Zoning Board issue, not a Planning Board issue. Mr. Virr said he was speaking to the presentment part of it, not the approval. The presentment of the proposed site plan is the point where ultimately, the Planning Board has to determine whether it is an allowed use. Mr. Perkins felt the Chair was suggesting the Planning Board had to qualify that the use was an appropriate use and they needed to test it themselves. Mr. Burgess noted at the May 1<sup>st</sup> meeting, Mr. Granese asked if the use was an accepted use in the zone and it came back that “Mr. Mackey determined this was an accepted use”. Mr. Virr stated there were others who had spoken up and did not believe this was an allowable use in the zone; Mr. Dimmock, the Council Representative, was one of them. Mr. Burgess said the Town Administrator also had questions.

Mr. Virr said at this particular point, he was hoping that the Mr. Sioras, the Planning Director, could have been present, but Mr. Mackey has explained the role of the TRC and the part that he plays in that. Mr. Perkins asked if Mr. Mackey could answer in the absence of Mr. Sioras. In the transition from 2012 to 2013 Zoning Ordinances, the definition for Contractor’s Yard was left out. Was there any reason for that? Mr. Mackey said that started with the Industrial IV zoning. Industrial IV abuts Industrial III and this particular parcel. The Zoning Board has dealt with cases in the Industrial IV. The way that district evolved was that particular zone was a catch all for a mix of industrial uses. Originally, prior to the zoning change, there were some industrial uses listed, but also there was retail business. In reality how the zone evolved, there were a bunch of different uses, such as restaurants, the Sports Zone, and there were things that were not necessarily retail business such as chiropractic offices. A definition was added, Commercial Service Establishment, to take in those types of businesses in that zone. That is where that came from. He did not recall specifically, but thought that Contractor’s Yard was eliminated and at some point the thought was to look at the other industrial zones to see if those needed to be adjusted. Mr. Virr said he had confirmed that definition was more along the line of commercial services than contractor’s yard. But they will discuss that later. He was also hopeful Mr. Paul would be here this evening, but he was unable to attend.

Mr. Virr said Mr. O’Connor presented a good case but some of the things presented were things the Board would not concern themselves with this evening such as the DES definition of Waste in Transit. They are not bound by that at all; it is what the town puts into its Ordinances. That will be discussed when the ZBA talks about permitted uses during deliberative session.

Mr. Virr opened the floor to the public but cautioned there were rules to be followed. People had to approach the podium, state their name and address for the record, and that



they not act in a disrespectful or disruptive manner. The ZBA, under its own rules of procedure was not bound to accept evidence presented to the Board including recordings on a cell phone this evening. People approaching the podium would be allowed three minutes to speak. This Board will meet until 10:00 p.m. If the meeting could not be concluded at 10:00 p.m., it would be continued to the next meeting which is scheduled in two weeks. The Board asked that anyone speaking not be repetitive if someone else has covered an issue.

Brenda Wilson, 4 Greenwich Road, thanked the Board for its time this evening. This has been a long six months for some of those here tonight who have worked tirelessly for the betterment of their neighborhood community as well as the betterment of the town. It consumed their spring, summer, and fall and they would like to see nothing more than this end tonight. John O'Connor has done an incredible job presenting the facts tonight and she would like to thank him on behalf of her family and all the other citizens of Derry that they represent tonight. They have firmly believed from day one upon learning that Dumpster Depot might become their newest neighbor that this type of business did not belong on Ashleigh Drive and it is not zoned for this type of business. They have pleaded with the Town Council to do something, anything, to right the wrong that was done when the Planning Board voted this cancer into their community. They have stated over and over that someone in this town has to be responsible to look at this project in its entirety, not just piecemeal, to see the bigger picture and the inconsistencies the applicant has made since the process began in May. They have also been told, *ad nauseam*, that the Planning Board is a "yes" board; she begs to differ. In fact, another project was denied by the Planning Board on the same night they were there. Imagine that some of them even had the audacity to tell some of her neighbors that this was a done deal and to sell now. The Planning Board also had the power to put conditions on the plan that would have prevented the applicant from pursuing this application, but then in August, he asked for more time and everything changed. She is not here to rehash all of that but to give information she feels the Board deserves and has a right to know. She feels it is important for the ZBA to know how the applicant has deceived every town employee and town Board. On April 8, 2012, Mr. Tymula and Mr. Paul lied to the Conservation Commission when presenting the application when they said the dumpsters stored on site would be empty and would be cleaned out at a waste management site prior to returning to the site for storage. We now know that was a lie. On November 9, 2012, Mr. Paul and Mr. Tymula lied to the Technical Review Committee when they stated the dumpsters on site would be empty and that the location was good because it was out of the way. They lied when they said it would be a truck maintenance and dumpster repair facility. On January 11, 2013, Mr. Paul and Mr. Tymula presented a different plan to the TRC with the building located on the other side of the cul de sac, putting it closer to the neighborhood abutters. Mr. Paul and Mr. Tymula lied again to the Technical Review Committee saying the dumpsters would be empty. On May 15, 2013, Mr. Paul lied to the Planning Board and citizens of Derry when he stated it is illegal to clean dumpsters. He lied when he said the dumpsters are sent out empty and returned empty. Clearly this is a pattern to deceive. It was also stated the following, which has yet to be addressed: that the lot falls in the 100 year floodplain and the site plan says it is not. Our position is clear; this business clearly falls under Industrial III, prohibited uses. Waste in Transit storage areas which states "waste shall not be stored in a manner or for a time period which has the **potential** to result in conditions adversely affecting the environment". Full

dumpsters held for any amount of time that may have anything from lead, asbestos, mercury, etc., in them at some point all have this potential.

Mr. Virr noted the 3 minute time frame was up and another's time could not be given to Mrs. Wilson. He granted one minute to finish up.

Mrs. Wilson continued, stating once a dumpster has been left at a customer's site the applicant has no control over what is thrown in them. The applicant would have the Board believe that by emptying and dumping them, this prohibits them from putting pollutants into the ground and possibly leaching directly into an aquifer or into the water supply. Any dumpster, empty or full, could contain more than trace amounts of asbestos, lead, turpentine, battery acid, chromium or other hazardous materials. It was the Zoning Board of this town that a few years back denied the owner of the land a request to change the zoning in order to develop a golf course. One of the main reasons given for the denial was because of the chemicals and other potentially hazardous materials that would need to be used to maintain the golf course. There was the potential for these things to leach into the aquifer or the neighborhood wells. That precedent should be carried forward tonight in the applicant's request to put Dumpster Depot on Ashleigh Drive; it should be denied. On behalf of my family and my neighborhood behind me supporting me tonight, we know what a task it is to read and understand the mountain of paperwork and videos and we sincerely thank you for taking the time that it takes to make an educated, well informed decision. Everything else she could say on the matter is in the packets, including the rebuttal to our appeal that was denied by the Planning Board. Mr. Virr confirmed the Board had all that information and Mrs. Wilson's time was up.

Mrs. Wilson thanked the Board and made mention that the five members who voted yes on the Planning Board all did so with the remarks that this business did not belong there. Mr. Virr advised she was not allowed to ask questions of the Zoning Board.

Mr. David Fischer, 19 Donmac Drive, believed Mr. O'Connor covered most of the key points that justify the Zoning Board's support for nullifying the Planning Board's decision to approve the request by Dumpster Depot to relocate their undesirable business in our community. He would like to remind the ZBA that Mr. Paul and his hired spokesperson have lied to us and deceived everyone repeatedly throughout this process about their intentions. Despite their claims to the contrary, they do not have the right to jeopardize the health and safety of the people who reside in our community regardless of whether or not it is zoned industrial. Their deplorable business and blatant disregard for the health and safety of the people in our community should be major factors when the ZBA makes its decision. The best interests of Derry and the surrounding community were not considered throughout this whole ordeal. Their lies have been clearly documented for the ZBA in the materials that were submitted in preparation for this meeting. He is certain that history would repeat itself if they were given the opportunity to speak to the Board this evening to validate their intentions and proposed accommodations. Please beware of their history of deceitful behavior. On behalf of the residents of this community he urged the Board to send a message back to them that their business is totally unacceptable in our community under any and all circumstances. He thanked the Board for its careful consideration of their request.

There was no further public comment.

Mr. Perkins made a motion to enter deliberative session, seconded by Ms. Hampton.

Vote: Unanimous

Mr. Carnevale, Mr. Perkins, Mr. Virr, Mr. Burgess, Ms. Hampton

### **Deliberative Session**

Mr. Virr said he heard what the people had to say and understood their concerns. The ZBA is acting in a judicial capacity and the only thing they have any say over is zoning related issues. The only zoning related issue that seems to come forward is, is this an allowed use? To that end, he would like to go through some of the allowed uses and possibly even tie them back to definitions. Section 165-41, the Industrial III district, lists the permitted uses. He was reading from what he assumes to be the latest edition of the Ordinance. He suggested going through the list, knowing what type of business this is, which sounds like a Waste in Transit, which is not allowed in any zone. The list of permitted uses began with Manufacturing. The Board agreed there would be no manufacturing. Warehouse and Wholesale Use: the Board did not feel this fit. Professional Office uses in buildings of greater than 10,000 square feet: The Board said definitely not. Public Utilities: No. Machinery and Transportation equipment, sales, service and repair: The board did not feel that fit. Freight and Trucking terminals, offices and brokers: Mr. Virr felt freight and trucking terminals brought to mind merchandise being brought between two locations. Mr. Burgess thought similar to UPS. Contractors Yard: Mr. Virr said when he thinks of this he thinks of Benson's Lumber or a landscaping business which might keep various aggregates or mulch and bins on hand. Another member suggested an electrical contractor or plumbing contractor or lighting. Mr. Perkins said he felt it was similar to PSNH but other members said PSNH would fall under Public Utility. With regard to commercial services, Mr. Virr could see why that was done because the ZBA was getting all kinds of variance requests to operate retail businesses, such as the sale of classic cars and auto repair. They even had an application for a skate park. There is a mix in that Industrial IV. Eliminating the contractor's yard definition means that it is what Planning says it is. But Planning says, and he has documentation, that it is commercial service establishment, which could include shoe repair, a barber or beautician, a retail shop of some kind; that is what they envisioned would be in the TIF district. That kind of a mix is already going on Ashleigh Drive, with Verizon and Panera. Over near Hannaford there is a UPS store, a restaurant, the state liquor store; there are all kinds of uses. He believed that was the general idea of commercial service establishment.

The Board continued down the list of permitted uses. Parking Garage: no. Animal hospital, veterinary clinic: no. Bulk Fuel and distribution; printing establishment; contract cleaning establishment; industrial supply establishment; hotel/motel, were all uses the Board felt did not fit. Brewery; Enclosed recycling of non hazardous materials and wireless communications facilities also did not fit. Enclosed recycling might be the closest fit but the use is not recycling. Ms. Hampton noted that occurred at the town dump. Mr. Virr noted that was a municipal use. Mr. Burgess said a transfer station was also not allowed. Mr. Virr felt it was interesting and it may come back to the Board, that

Section 165-41.B discussed prohibited uses which stated, “any industrial use of land, building, structure or equipment which would be injurious, noxious, or offensive by way of the creation of adverse traffic impacts or conditions, odor, fumes, smoke, dust, vibrations, noise or other objectionable features or hazardous to the community on account of fire or explosion or any other cause shall be prohibited in this district. Sexually oriented businesses are prohibited in this district.” That may pop up some time in the future.

Mr. Burgess recalled the Board had spoken of this in the past and had been told something, but what he has seen in the package they had from August 21<sup>st</sup> and perhaps June 19<sup>th</sup> was that they put in a 40 foot buffer zone. What the ZBA can be told and what is written down are two different things. That is something that would have to come back to the Zoning Board because they are removing ten feet. Mr. Virr said that is a non issue and he has it in writing that the 50 foot buffer is in place. In addition to that there would be an additional 40 foot no-build zone so there would be 90 feet between the abutters and Mr. Paul’s property if he purchases it. Mr. Burgess said that is not what it says; it [the Planning Board motion] never mentioned an additional 40 feet. It just says a 40 foot non buildable zone. Mr. Virr said that would need to be taken up with Mr. Sioras. The ZBA members have talked about this before because it came up at one point. Mr. Virr said buffers are a Planning Board issue. Mr. Perkins felt the ZBA had run the test on all the permitted uses and was not sure they had found one there. Mr. Burgess said anything he looked up that could be a contractor’s yard or definition of general contractor did not seem to meet the definition of a Waste in Transit facility. Mr. Virr found a definition on line, which is not evidence. He had wondered what other communities called this type of thing. He found that contractor’s yard only once in a town called Beckett, Massachusetts. It described just what the Board talked about before, such as a lumber yard or electrical or welding supplies. Mr. Burgess said his experience is that a general contractor can be just about anybody but none of that resonated to contractor’s yard. Mr. Virr said despite what the members may think individually, the evidence shows that the Planning Board in this case did not follow the Ordinance when it permitted a contractors yard. He does not see even in their motion for conditional approval that they stated the use; that information was in their packet. Maybe they were remaking themselves into a Waste in Transit facility but there are not allowances for Waste in Transit in the Town of Derry. There is only the municipal transfer station. Mr. Burgess noted that Mr. Tymula, on June 19<sup>th</sup> and the 21<sup>st</sup> of August said he was using the definition of Waste in Transit facility.

Mr. Perkins asked if the Board could look at the prohibited uses and see if they tied in, based on Mr. O’Connor’s testimony and Exhibit F. Mr. Virr called the Board’s attention to Section 165-15, Offensive Uses, which read, “No use that is injurious, noxious, or offensive to the neighborhood by reason of emission of odor, fumes, dust, smoke, vibration, etc., shall be permitted in any district.” Section 165-155, Nuisances Prohibited, states, “At no time shall a public nuisance be created or allowed to continue.” But, the Board is getting dangerously close to talking about a variance which has not been requested. His opinion is that one should have been requested at the beginning.

Mr. Burgess opined that the facts given to them to see if the Planning Board may have overlooked these pieces of Section 165-41; it does not look like they went through it in its entirety to see if any other things fit. Mr. Virr felt the Planning Board stabbed around it

but did not go into detail. Mr. Burgess said the Zoning Board asked several questions about different things but there was nothing definitive. Ms. Hampton felt the ZBA did not need to look at variances if the applicant did not have a case. If they do have a case, then yes, they need a variance. Mr. Perkins felt that might come up in the future. Mr. Virr said the Zoning Board cannot negate the Planning Board approval. Ms. Hampton asked why not? Mr. Virr said the Zoning Board had the authority to question the Planning Board's treatment of Section 165041 of the Town of Derry Zoning Ordinance. He thinks if the Board should have a motion, it would be that they would uphold the appeal of Mr. O'Connor. Mr. Burgess said they always do things in the affirmative. Mr. Virr felt a vote to uphold the appeal would be to affirm Mr. O'Connor's petition; but it boils down to the fact that the ZBA believes the Derry Planning Board erred in its decision pertaining to permissible uses allowed in the Industrial III zone. Ms. Hampton said she thought the Board had already voted on that.

Mr. Burgess moved to come out of deliberative session, seconded by Mr. Carnevale.

Vote: Unanimous.

Mr. Carnevale, Mr. Perkins, Mr. Virr, Mr. Burgess, Ms. Hampton.

Mr. Virr moved in the case of John T. O'Connor, case #13-121, the applicant is requesting an appeal of an administrative decision as follows: "to show the Planning Board's decision of August 21, 2013 relative to site plan approval of the property located at 41 Ashleigh Drive, was in error and the Board made an unlawful decision when it determined that Accurate Transport, Inc., falls under Article VI, Section 165-41, Industrial District III, Section A, Permitted Uses as a "Contractor's Yard". The motion is to uphold or grant Mr. O'Connor's appeal. Mr. Burgess seconded the motion.

Ms. Hampton felt there was no motion. Mr. Virr said he read the motion. His further definition would be discussed after the vote and he would sum it up. This is the wording he prepared for the motion.

**Vote:**

Mr. Perkins supports Mr. O'Connor's appeal and finds contractor's yard definition does not apply in this case. Mr. Carnevale voted yes. Mr. Burgess voted yes and did not find contractor's yard met the definition of Waste in Transit yard. Ms. Hampton voted yes for the same reasons stated by Mr. Burgess and Mr. Perkins. Mr. Virr voted yes as well. The vote was unanimous.

Mr. Virr said in granting this appeal by Mr. O'Connor, it is after consideration of a few materials submitted to the Board by the applicant and others and significant testimony by not only the interested parties but by the abutters, and input from Mr. Mackey and the deliberative session in which the ZBA drilled down in the definitions to see where it could fit. The ZBA finds that the Planning Board, in making its August 21, 2013 decision to grant Accurate Transport, Inc.'s site plan, erred in its construction, interpretation and/or application of the Derry Zoning Ordinance. Because the site plan fails to meet the requirements of Section 165-41 of the Town's Zoning Ordinance (pertaining to permitted uses in the Industrial III district), the Planning Board's approval

was improper. Consequently Mr. O'Connor's appeal of the August 21, 2013 decision is granted and the matter is remanded to the Planning Board for further proceedings consistent with this decision. Mr. Virr stated this means that the Planning Board is going to have to obtain a variance. It will need to come back to the ZBA and be heard as a variance.

Mrs. Wilson asked if the applicant or the Planning Board had to come back? Mr. Virr said the Planning Board will have to get Mr. Paul to apply for a variance. It is not the way the ZBA likes to do things. If a variance is required it should be acquired up front. That is not the case here, but this appears to be a misunderstanding. However, it was in error. When Mr. Virr says it is remanded back to the Planning Board, he means the Planning Board has to go back and ask Mr. Paul to apply for a variance. Mr. Virr noted that any aggrieved party has 30 days to request a rehearing; after that date, any recourse would be to Superior Court.

Mr. Virr thanked those in attendance; it has been an orderly meeting. He felt Mr. O'Connor represented the abutters well.

### **Approval of Minutes**

Mr. Carnevale motioned to approve the minutes of October 17, 2013 as amended.

Seconded by Mr. Burgess.

Vote: Unanimous

Mr. Carnevale, Mrs. Hampton, Mr. Burgess, Mr. Perkins, Mr. Virr

### **Other Business**

### **Adjourn**

Mr. Burgess motioned to adjourn.

Seconded by Mr. Carnevale.

Vote: Unanimous.

Mr. Whitehorn, Mr. Carnevale, Mrs. Hampton, Mr. Burgess, Mr. Perkins, Mr. Virr

Adjourn at 8:15 p.m.

Minutes transcribed by:  
Elizabeth Robidoux  
Planning Assistant