

TOWN OF DUMMERSTON

Development Review Board

Application for Variances

Findings and Conditions

HEARING SPECIFICS

Permit Application Number: 3731

Date Received: June 22, 2023

Applicant: Susan Leslie Powers.

Mailing Address: 2002 Black Mountain Rd., Dummerston, VT 05301.

Location of Property: Parcel 644, 2002 Black Mountain Rd., Dummerston, VT

Owner of Record: Windham- Windsor Housing Trust.

Application: Variances (2) Dog Daycare Business known as Ellie's Pet Care, LLC.

Date of Hearing: September 19, 2023

INTRODUCTION AND PROCEDURAL HISTORY

1. This proceeding involves review of application #3731 for Variances (2) Section 728(5) and section 605(C) pursuant to Conditional Use and Site Plan Review for Home Business, under Sections 210, 715 – 727.
2. The subject property is a 0.3 acre parcel located at 2002 Black Mt Rd., in the Town of Dummerston (tax map parcel no. 000644). The property is more fully described in a Deed recorded at Book 117, Page 297, in the Town of Dummerston Land Records.
3. The property is located in the Productive Lands District as described on the Town of Dummerston Zoning Map on record at the Town of Dummerston municipal office and Section 220 of the Zoning Bylaw.
4. On August 30, 2023, notice of a public hearing was published in The Commons.
5. On August 30, 2023 notice of a public hearing was posted at the following places:
 - The Dummerston Town Office.
 - The West Dummerston Post Office.
 - The Dummerston School.

6. On September 3, 2023, notice of a public hearing was posted at the following place: 2002 Black Mt Rd., which is within view of the public-right-of-way most nearly adjacent to the property for which the application was made.
7. On August 30, 2023, a copy of the notice of a public hearing was mailed to the Applicant.
8. On August 30, 2023, a copy of the notice of public hearing was mailed to the following owners of properties adjoining the property subject to the application:
 - a. Haydock Roger, PO Box 1052, Brattleboro, VT 05302
 - b. Hickin Randall P, 1999 Black Mountain Rd, Dummerston, VT 05301
 - c. Newton Keri A & Joseph B, 2085 Black Mt Rd, Dummerston, VT 05301
 - d. Thorndike Frances P, 1245 Park Ave, New York, NY 10028
 - e. Windham & Windsor Housing Trust Inc, 68 Birge St., Brattleboro, VT 05301
9. The application was considered by the Development Review Board (DRB) at a public hearing on September 19, 2023.
10. The Development Review Board reviewed the application under the Town of Dummerston Zoning Bylaw, as amended April 6, 2022.
11. Present at the hearing were the following:
 - a. Members of the Development Review Board:
Alan McBean (Chairperson), Chad Farnum, Cami Elliott.
 - b. Others:
Roger Jasaitis (Zoning Administrator), Cindy Bacagalupe, Oriana Banos, Stacy Blackadar, Becky Burns, Michelle Carlson, Caitie Caroleo-Miller, Brett Castine, Louise Coenescu, Ali Cornellier, Lori Cornellier, Ronald Ferrara (Applicant Attorney), Sandra Feusi, Kathleen Fleischmann, William Gallagher, Matthew Goins (Applicant Attorney), Donna Harwood, Elizabeth Hickin (Interested Person), Randy Hickin (Interested Person), Susan Kapral, Elise Manning, Nicole McCourt, Megan McCourt, Ellen Nam, Susan Odegard, Philip Odegard, Inga Paluch, Sam Payne, Erin Pesut, Julie Potter, Leslie Powers (Applicant), David Reffi, Linda Renfro, Chris Renfro, David Schottland, Karli Schrade, Vickie Sterling, Andrew Wilcox
12. A site visit was conducted on September 19, 2023.
13. Present at the site visit were the following:
 - a. Members of the Development Review Board:
Alan McBean (Chairperson), Chad Farnum, Cami Elliott.
 - b. Others:
Roger Jasaitis (Zoning Administrator), Roger Haydock, Ronald Ferrara (Applicant Attorney), Matthew Goins (Applicant Attorney), Donna Harwood, Leslie Powers (Applicant) .
14. During the course of the hearing the following exhibits were submitted to the DRB:
 - a. Application for Variances, number: 3731.
 - b. Application to the DRB for Variances number: 3731.

- c. Email from Matthew Goins (Applicant Attorney) to Roger Jasaitis (Zoning Administrator) for clarification of the Variance request to the DRB for Application # 3731.
- d. Zoning Administrator Report dated September 6, 2023.
- e. Zoning Administrator Site Report dated June 24, 2021.
- f. Letter of support from Vickie Sterling and Pat Burke dated August 9, 2023.
- g. Email of support from Melissa Gullotti dated September 19, 2023.

FINDINGS OF FACT

Based on the application, testimony, exhibits, and other evidence the DRB makes the following findings:

1. Alan McBean (DRB) stated that the DRB follows the Zoning Bylaw in regards to the criteria considered for Conditional Use applications. If Townspeople want different criteria to be considered, they need to contact the Planning Commission to propose having the Zoning Bylaw updated.
2. Ronald Ferrara (Applicant Attorney), spoke for the Applicant; he reviewed the permit history of the business (Home Business), in that she became out of compliance with that permit.
3. Roger Jasaitis (Zoning Administrator) clarified that the original permit was for a Home Occupation. When the Applicant became out of compliance with that permit he informed the Applicant that she either had to come into compliance or apply for a Conditional Use permit for a Home Business.
4. Ronald Ferrara (Applicant Attorney), continued the review of the history, the Conditional Use permit application was denied by the DRB and the Applicant appealed to the Environmental Court. The Court allowed them to withdraw the appeal and reapply to the DRB with a new application. Mr. Ferrara continued that the site visit showed that the Applicant has made improvements to the property to help with noise, parking, visual impact and traffic and pointed to the application site plan. On June 19, 2023 the applicant filed the new application and followed up with clarification of the Variance requests on July 27th, 2023. The Variance requests can be allowed under the Bylaw Sections starting with Section 728, criteria; #2; size of the parcel ($\frac{1}{3}$ of an acre) restricts the ability to conform to the Bylaw. That speaks to the criteria; #4 that what goes on on a $\frac{1}{3}$ of an acre parcel behind fencing will not affect the essential character of the neighborhood. It will not affect the Agricultural or Productive Lands nature of the abutting parcels. With respect to the Boards criteria on Variances, In respect to criteria #3 that the hardship has not been created by the Applicant, the Applicant has not created the hardship, the hardship comes from the Applicant not being able to run her business and is on her. She has been trying to live and work and get along with her neighbors peaceably.

5. Matthew Goins (Applicant Attorney) stated criteria #4, the Variance if authorized will not affect the essential character of the neighborhood or district. He pointed out that the parcel lies between two larger parcels, between 30 to 40 acres, and that her parcel is only accessible by a private Right of Way shared by a neighbor who is not present most of the year. So this business could not possibly alter the character of the neighborhood.
6. Ronald Ferrara (Applicant Attorney), continued, in other Sections of the Bylaw that may apply, that in Section 605 Home Business (b), he felt that the application would not qualify, specifically #2, not more than 20 on site visits. He felt that the business is close to or exceeds that provision. Also that #3 Outside storage of goods or materials, that there is material visible from the roadway and would not comply with this provision. Under 605 (c), Conditional Use permit required, we feel that the application meets these provisions, specifically items are able to be visible and that off street parking is not the issue because the road is a private road and that the process is that clients drive up and drop off their animal and then leave and others queue up on the private road in turn. With respect to the other requirements of this Section, there are no retail sales, there is no signage, and it is during business hours. Lastly, the Applicant has proposed being open to additional fencing to aid in sound control and visual impact to adjoining parcels.
7. Cami Elliott (DRB) asked what the business hours are and what time the traffic occurs. Leslie Powers responded that the business hours are Monday through Thursday, dropoff from 7am to 9am. Outside play from 9am to 3pm. Pickup from 3pm to 5:30pm. She clarified that the clients drive up and park for 30 seconds to drop off the dog, turn around and leave.
8. Matthew Goins (Applicant Attorney) spoke to Section 620 (6) Parking, the parking is adequate to meet the Bylaw requirements for residents and workers on site. Ronald Ferrara (Applicant Attorney) clarified that the criteria for one parking space for every 200 square feet of space is typically for inside businesses but the dogs are outside. Also the Board may look to #9 Other Uses, parking as required by the DRB, the site plan shows there is adequate space for turning around, the clients park next to the "dog door" and then leave. He stated that Criteria #10 allows for more leeway in the parking area. Leslie Powers (Applicant) added that although there may be 20 dogs on site, there isn't 20 cars dropping them off because some owners have more than one dog.
9. Roger Jasaitis (ZA) raised the question if dogs are being boarded overnight and how does that affect the hours of operation? Ronald Ferrara (Applicant Attorney) clarified that it is 5 to 8 dogs overnight. Pick up and drop off times are adhered to for overnight boarding. Leslie Powers (Applicant) added that the dogs are kept indoors at night. Typically only 3 dogs except for the summer where it would be more. Cami Elliot (DRB) clarified that these numbers are in addition to Leslie's own dogs.
10. Matthew Goins (Applicant Attorney) spoke to Section 210; Productive Lands District, he feels that Conditional Uses are allowed in this District and this gives the DRB the right to allow this Conditional Use in this District and that Section 728 and 720 referencing Section 605 (c) 3 through 5 gives the DRB the freedom to allow for the Variances. We are asking

for a Conditional Use in relation to a Home Business and because it is a Productive Lands District it is an allowable request.

11. Rand Hicken (Abutter) stated that he has seen improvement in the way the business has been run over the past year and a half. He spoke about a list of the conditions; how many dogs per day, how many cars per day is important. Also the time of arrival and drop off has improved with less traffic on Friday, Saturday and Sunday. He doesn't see any improvement in "queue space" or parking. Regarding site changes on the site plan, Randy asked Ronald Ferrara (Applicant Attorney) to see the plan (offered). Randy feels that the site has not significantly changed since the last site visit. He does think that the traffic has slowed down on the road and that is a good thing. Randy stated a concern about the fencing on the parcel and its ability to decrease sound. He does think that the barking has lessened over the past year.
12. Ronald Ferrara (Applicant Attorney) stated that the existing fencing is 5 feet high, not 6 feet. He feels it is up to the DRB to determine if a taller fence is needed as a condition.
13. Randy Hicken (Abutter) is concerned about the "waiting area" at the end of the private road. He said everyone handles it differently, mostly on the driveway, but some on the Town road. Sometimes up to 4 or 5 cars queued up, but usually 2 or 3. Staggering arrivals would be helpful. He restated the drop off and pick up hours of the business. Leslie Powers (Applicant) clarified that weekend drop off and pick up is only 1 to 5 cars during the summer, less the rest of the year. She boards on weekends up to 8 dogs during the summer, less other times. Finally, the farm driveway should remain unblocked. He feels the number of dogs on site should be limited by a condition.
14. Elizabeth Hickin (Abutter) stated concerns about her driveway and it being blocked. Also the number of dogs on the weekends. She also thinks that the number of cars should be a condition.
15. Louise Coenescu stated concerns about increasing traffic on Black Mountain Road and that there should be designated parking on the private road.
16. Alan McBean (DRB) stated that the DRB is not here to judge Leslie or make a determination about the quality of her business.
17. Ronald Ferrara (Applicant Attorney) restated the issues raised by the abutters and stated that these are the types of issues that the DRB can control with conditions if the Board grants approval of the permit. He stated that the Applicant is willing to comply with any conditions in the interest of keeping the neighbors happy.
18. Matthew Goins (Applicant Attorney) stated that they have heard the concerns of the abutters and he concurs with Mr. Ferrara that the issues raised can be solved with conditions on a Conditional Use permit. He also restated that the Board has the ability to issue an approval under the Sections previously stated in the Bylaw.
19. Clients of the business spoke about the benefits of the business being a community service.

DECISION AND CONDITIONS

The DRB recognises that this is a popular business that serves a need in the community, however, the DRB can not make decisions based on popularity. It must follow the criteria laid out in the Zoning Bylaw and Town Plan. The Zoning Bylaw, voted and approved by the citizens of Dummerston, supports the Town Plan. The Town Plan is the vision of the community for where development is needed and appropriate in the Town. Based upon these findings, the Development Review Board denies the applicant Variances pursuant to a Conditional Use permit for a Home Business; Doggy Daycare, Dog Boarding for not meeting the requirements of the Zoning Bylaw and Town Plan.

The Applicant alleges that the business qualifies under 605 (c), Home Business, Conditional Use permit required. The DRB finds the following:

1. The business does not meet the definition of Home Business (Section 605, Section 605 (c) , 10).
 - a. **Home Business** is defined as: any business operated out of the principal dwelling or accessory structure of the business owner or operator, where the business aspect is secondary to the residential use and does not change the residential character of the property or the surrounding area.
 - b. For purposes of this Section, Home Business is considered an accessory use.

The DRB finds that this business includes activity predominantly outside the principal dwelling and the business aspect is not secondary to the residential use. The business as operated changes the residential character of the property and surrounding area. This is not an accessory use. The DRB finds that this business does not meet the requirements to be considered a Home Business.

2. The DRB finds that this business meets the definition of Kennel in *Article 8 Definitions*
 - a. **KENNEL**: a commercial establishment for boarding or breeding of dogs, cats or other small pets.

Sections 204 states “ If a Use is not listed in this bylaw, it is not allowed unless it meets the criteria of Section 121”. This business does not meet the criteria of Section 121. This Use (Kennel) is recognised as a Conditional Use elsewhere in the Bylaw. Sections 210 Productive Lands District and 720 Conditional Use Permits, requires a Conditional Use permit for this type of business. The Conditional Uses listed in the Productive Lands District do not include Kennel as an allowed Conditional Use. The DRB notes that there are four other Zoning Districts in Town that do allow this Conditional Use. The DRB therefore concludes that this Conditional Use (Kennel) is not allowed by this Zoning District.

3. The DRB finds that the business changes the character of the neighborhood as outlined

in Sections 721 and 210. Section 210 makes no mention of this type of commercial activity.

a. *Section 210 Productive Lands District*

1. *The primary purpose of the Productive Lands District is to recognize and provide for the continuation of economic value of agricultural and forest land that is in productive use or has potential for productive use. Another purpose is to preserve extensive woodlands and undeveloped fields, while accommodating low residential development that avoids the need for new roads.*

b. *The proposed development does not meet the requirements of Sections 721 of the Zoning Bylaw General Standards:*

The proposed Use shall not adversely affect:

(2) The character of the area affected;

The application does not meet this requirement. The proposed Use changes the character of the neighborhood which is predominantly farmland and forest. (Section 210)

(6) Furtherance of the provisions of the Dummerston Town Plan.

i. *Land Use Districts: Productive Lands; "...to preserve the rural character of Dummerston which is characterized by extensive woodlands and undeveloped fields, while accommodating low to very low density residential development..."*

The proposed development does not conform to the Town Plan. The DRB notes that Commercial development is not mentioned here.

4. *The proposed development does not meet the requirements of Sections 726 of the Zoning Bylaw Site Plan Review Procedure:*

1. *Compatibility with adjacent land uses.*

a. *The proposed development does not meet this requirement by not conforming to the Town Plan (see Section 721 (6) above).*

b. *The proposed development does not meet this requirement by not conforming to the purpose of the zoning district District (see Section 210 (1) above).*

The Applicant under Section 728 requested two (2) Variances.

1. *Variance Number One; Section 728 (5)*

The variance, if authorized, will represent the minimum that will afford relief and will represent the least deviation possible from these regulations and from the plan.

2. Variance Number Two; *Section 720 as referenced under Section 605 (c) Home Business; Conditional Use Required.*

In consideration of the Variance requests the DRB finds the following:

Variance Number One: The Applicant is not referencing a specific Section of the Zoning Bylaw that they are seeking a Variance from with this request. The Applicant is citing a criteria used to consider a Variance. Section 728 specifically states that all of the criteria outlined in this Section must be met in order to grant a Variance. The DRB will not dismiss one of the criteria that must be met to grant a Variance under this Section of the Bylaw. Considered generally, the DRB finds that the application does not meet the criteria to grant this Variance, specifically;

(3) The unnecessary hardship has not been created by the appellant;

The DRB finds that the Applicant has created this hardship by operating the business in excess of the existing Zoning permit (Home Occupation) and becoming out of compliance with the Zoning Bylaws then in effect. The Applicant continues to operate this business out of compliance with the Zoning Bylaw.

(4) The variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, substantially or permanently impair the appropriate use or development of adjacent property, reduce access to renewable energy resources, or be detrimental to the public welfare;

The DRB finds that this business will alter the essential character of the neighborhood or district in which the property is located as outlined in the Town Plan and Zoning Bylaw. Therefore the DRB denies this Variance request.

Variance Number Two: The DRB finds that the Applicant's business does not meet the requirements of the Bylaw to be considered a Home Business. Therefore the DRB denies a Variance from Section 605 (c) .

The following members of the Dummerston Development Review Board participated and concurred in this decision: Alan McBean, Chad Farnum, Cami Elliott.

Dated at Dummerston, Vermont, this 17 day of October, 2023.



Signed for the Dummerston Development Review Board



Print Name

NOTICE: This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding(s) before the Development Review Board. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 V.S.A. § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.