

Dover Zoning Board of Adjustment  
Thursday, February 16, 2006

MINUTES

**Members Present:** Richard Callaghan, Bill Colbath, Frank Landford, John Levasseur, Sam Reid, Masi Denison, Ruth Gorton, Otis Perry

**Staff Present:** Tom Clark; Building Official, Christopher Parker; City Planner, Jean Glidden; Recording Secretary

**ITEM # 1: CALL TO ORDER**

Richard Callaghan brought the meeting to order at 7:03 p.m.

**ITEM # 2: APPROVAL OF MINUTES**

**A. Approval of the minutes for regular meeting of January 19, 2006**

Ruth Gorton recommended a correction of a typo on page 7 and Masi Denison recommended a correction of a typo on page 1 and 5.

**Motion:** Bill Colbath made the motion to accept the minutes as amended. Ruth Gorton seconded the motion.

**VOTE:** U/A

Richard Callaghan announced and welcomed a new member that has been appointed to the Board, Otis Perry. He stated that case Z 05-37 Free Trade has been withdrawn by the applicant.

*Callaghan, Colbath, Landford, Levasseur & Reid will be voting*

**ITEM # 3: OLD BUSINESS**

**A. Request for motion for rehearing regarding ZBA Case Z 05-16 Churchill Realty Trust, Old English Village Rd., a/k/a Tax Map 38, Lot 12, zoned B-3, requests an appeal from an administrative decision as it relates to Article X, Section 170-40 and RSA 674:53.**

Richard Callaghan announced that his daughter is a Legal Assistant for the Law Firm that Attorney Bruton represents and if anybody has an objection with him voting to voice a concern.

Nobody voiced a concern regarding the statement.

Attorney Bruton stated that one thing that has been pointed out in the motion and believes that it is applicable in this case is RSA 674:39 provides for a statutory form of vesting. He believes it is applicable in this case because the issues that we have been discussing over the number of months relate to whether or not the apartments in Dover are subject to the density requirements that exist today in Dover, which is 5,000 square feet per unit exclusive of wetlands. Mr. Clark's decision was to suggest that the 120 units had to meet the density requirement that exists today and if you use the Rollinsford property for that purpose, you could not get up to 120 units. He agrees that if that were how you made those calculations, you would not get 120 units. The argument is that those requirements do not apply to this project and therefore they do not have to make that

calculation. The record is clear that there was no density requirement in Dover in 1972 when that site plan was approved and any subsequently enacted density requirements should not apply to those improvements. They ask that it be considered in the written material submitted. Either you can consider it under the statutory form of vesting or the common law standard of vesting, which is the same and has always existed and continues to exist as a legal theory.

Richard Callaghan stated that he has reviewed the information and he does not believe that he has seen anything significant enough to change his mind; however, on page 7 item 58, a comment is noted with a footnote, which states that he said, "There is no such thing as grandfathering." He stated that he did say that, however, it is in the center of a paragraph that is talking about the issue in the zoning and the laws. He stated that he knows that many properties are grandfathered and he meant not new construction is intended to be grandfathered.

Bill Colbath stated that he is confused with how vesting of the existing building has to do with improvements to be created. It seems that the argument that has been placed is that the applicant wants to vest these buildings here without the impact on any of the rest of the property and he feels that the density regulations cannot be applied to anything else because these exist. In my opinion, this is not new evidence or a new item.

Sam Reid stated that this is a difficult case for a variety of reasons. In his opinion, he does not think there is anything in the motion that would lead him to vote for a rehearing. He does not believe that the Board can resolve who is correct in interpreting the law.

**Motion:** Sam Reid made the motion to deny the rehearing. Bill Colbath seconded the motion. **VOTE: U/A**

*Callaghan, Colbath, Reid, Levasseur & Landford will be voting.*

**B. Z 05-35 Neale A. Hubbard, Earl St., a/k/a Tax Map 40, Lot 12, zoned Office & R-12, requests a variance from the terms of Article V, Section 170-16, to subdivide a parcel into 2 lots, one of which a frontage of seventy-five (75) feet along a public right of way, where a minimum of one-hundred (100) feet is required.**

Attorney Schulte suggested that a motion should take place before he speaks any further.

Bill Colbath said that it was tabled pending information, is the information available.

Attorney Schulte stated that a layout was provided in conjunction with the other variance application case Z 06-03 as it is for the same property. He stated that the concerns that were identified, as he understood was what would the building areas be and how the lots would be configured. He said that he was told they did not need a surveyed plan but a sketch of the plan showing the building areas. The sketch was submitted with case Z 06-03.

**Motion:** Frank Landford made the motion to remove the case from the table. Bill Colbath seconded the motion. **VOTE: U/A**

Attorney Schulte stated that this is a request for an area variance to subdivide a lot, which has about 40,000 square feet and is straddled by the zone line. The request was for the variance so that a lot would be created on the portion of the property, which is closest to New Rochester Road and a separate lot, which would encompass most of the office zone. The portion of the property on New Rochester Road would meet all of the zoning requirements. In December when they attended the ZBA, they thought they could put up as many as three residential structures on the portion of the property that was going to be in the front. Subsequent conversations with the planning staff and Mr. Clark persuaded him that there was an error and that in fact they could only get two units on that property. An existing structure on the property and the variance that is needed at the end of

tonight's meeting is a proposal of that structure being removed and a new duplex will be constructed. The proposal is that the property be subdivided so that he will have two lots each of which will be used for purposes, which are permitted within the zoning ordinance. The question is whether you renovate the existing structure, which is allowed under the ordinance, or whether you would remove the house and put it in a location that would appear to be better suited, as they would then meet all the setback requirements. One of the questions was, is there enough building area for the uses. He stated that he has sketched out the approximate location of the lots on the sketch provided. The primary purpose for frontage requirement is so that you do not get buildings sitting too close to each other, in this case if the second variance is granted you are going to have two duplex structures on the lots, both of which are permitted uses. If they had an additional 22 to 25 feet, they would not need a variance but they were unable to obtain additional frontage from the abutter on either side. The only way they can achieve their objective of having two duplexes is to get a variance.

Chris Parker asked Attorney Schulte if he knew how many of the lots have insufficient frontage.

Attorney Schulte said he did not know.

Sam Reid confirmed with Attorney Schulte that he is asking for a 25-foot variance. The front piece will be 100 feet and the other piece would be what was left over.

Attorney Schulte said that he wants a lot with 100 feet of frontage that will contain 10,000 square feet of buildable area considering the wetlands although there is no indication that there are wetlands.

Discussion ensued regarding wetlands and the building envelopes.

Richard Callaghan asked what happens to the building envelope for the house if you move the lines. If they have to move it a huge distance it would compromise the building area.

Attorney Schulte said that the line presented here would be pretty much, what they have to deal with. If they end up with 5,000 square feet of wetlands on this property, he would have a big problem, and it would not work although he does not see that happening. He said this plan is very close to what is going to end up being presented to the Planning Board for subdivision approval. The other thing that has not been addressed is that they have this building envelope on this property but there is a potential of extending it. It is set back 100 feet from the pond but there is some provision in the discretion of the Code Enforcement Officer to expand that up to an additional 25 feet, so he believes there is an adequate building area for a duplex to be constructed. The question tonight is whether we end up simply renovating the existing structure that is down by the shore or whether they end up getting a variance to tear that down and put up a new one. The question still is will this be one lot or two lots. The only issue presented in this hearing is have we met the requirements for a variance so that we do not have to have a 100 feet of frontage on the lot containing the peninsula.

Public Hearing Open

Brian Athearn 2 Earl Street stated that he does not see a hardship. The property owner does not live in the City and is not a resident of the City. Willand Pond is as high as it has ever been. It is 40 feet up on to the City property at this time. This lot is getting smaller. There is no outlet to this pond, it is spring fed, and the only thing it does is evaporate. Some Council members have already expressed the concern of the water pressure in that area and at this time, he has not had problems, although other people in the neighborhood do have problems with water pressure. If this is granted you will have five more water problems. This is a dead end road and to add four more units will add extra traffic to this area.

Public Hearing Closed

Chris Parker stated that as they were in December, the Planning Department is against this variance request. The question posed to Attorney Schulte earlier was about how many nonconforming lots as far as frontage there are in that area. In the past, the department has supported variance requests for lack of frontage when they have been in the context of other neighboring lots that also have inadequate frontage. He said that he did do the research and of the 266 lots that were originally created under the Lake View Park subdivision 102 years ago there are a total of 60 lots that are shown on the current City tax map. Of those 60, 6 do not meet the frontage; they all have 50 feet of frontage. Three of those lots are City owned; of 57 useable lots, three of them do not meet the frontage. Of those three, abutters own two. Therefore, in his estimation there are 56 lots, of which one has inadequate frontage. He agrees with the abutter who stated that there is no hardship. We have not seen that the area variance is needed for reasonable use of the property. There could be a duplex in the office zone on this property without the use of a subdivision here. A petition was submitted with 30 or more abutters whom signed saying that they did not feel this is in their best interest. Furthermore, in November this Board denied a request for a subdivision less than adequate frontage on Dover Point Road for similar reasons, inadequate frontage in an area that does not support that context. The Planning Department is against this variance request.

Bill Colbath stated that he still has the same concern that they are going to create a lot that is going to have little or no buildable envelope. It will become a problem once it is a lot of record and you would need a variance in order to build on it.

Ruth Gorton stated that it will be difficult to establish a buffer zone if the water rises as much as forty feet.

Bill Colbath asked what is going to be considered the mean high water line.

Tom Clark said that it is the annual average. It could be identified by soil type and vegetation. It may be a big difference in the building envelope, you could ask the applicant to have a soil scientist go out and establish it.

Sam Reid confirmed with Tom Clark that the existing building, which is not shown on the map, is on the shoreline.

Tom Clark stated that the ordinance does say from a pond it is a 100 feet but it can be no closer than 75 feet as long as they can determine that there isn't a reasonable space to build it outside that 75 feet. That would be determined if the variance goes through and the subdivision. They would have to show that there is not a way to be outside the 100 feet before they can grant the waiver for up to 75 feet. It would be at least 75 feet or go to the Planning Board for conditional use permit to be closer than that.

Discussion ensued regarding configuration of surrounding lots.

Chris Parker stated that when he did his analysis for area variance for frontage he looked only at frontage to see how many lots were inadequate.

Sam Reid confirmed with Chris Parker that the lot that is being proposed is 30,000 square feet therefore is fairly large compared to most of the other lots in that area.

John Levassuer asked if a soil test was expensive in order to see what the buildable envelope would be.

Attorney Schulte said his guess is that it would not be that expensive to have a soil scientist go out and walk over a piece of land. The setback question would be problematic and he asked Kevin McEneaney to answer that question. If you grant both variances tonight then they would go to the Planning Board and they would have to determine what the building envelope would be on the peninsula lot.

Kevin McEneaney said that they have a wetland issue and a pond location issue. To do an overall soil analysis it may be \$1500.00 to \$2000.00.

Richard Callaghan said that he hates to create a lot that is going to be virtually un-buildable and then you would need another variance.

Bill Colbath stated that he asked for a drawing to be created. The real issue of this drawing being attached to the other application is that it is automatically assumed that the Board is granting the lot being created so that you can then decide to put a duplex on it. He does not think it was appropriate to stick this drawing on the back of a secondary application. This should have been provided as information on this case that is being discussed, not attached to the second variance request on that same piece of property. The original request came in as the applicant wants to subdivide this and create two lots because we want to leave the existing house there. Now you state that you are going to tear the house down and build a duplex because we can get four units somehow. Where is the hardship?

Attorney Schulte said that there is an existing structure here. It could be converted into a duplex. They initially thought they could get five units but the most the applicant could get would be four units. There is sufficient building envelope in the office zone and a duplex is a permitted use. You could have either the single-family existing residence or a duplex residence where that single-family residence is currently located. It may be that this will not be the best place for a duplex; on the peninsula lot and that will be addressed when they get to the next variance request. He thinks they meet the hardship test because they cannot get sufficient frontage from someone else and there is no other way to obtain that objective other than through a variance. It is a big lot and spreads as it gets further back.

Richard Callaghan stated that he does not have enough information and this is a unique lot.

Frank Landford stated that he does not believe that a maximum use of the lot is the same as a reasonable use. The applicant is looking for a maximum use.

John Levasseur stated that he would like to see more information and thinks that a soil test is a determining factor in this request.

Attorney Schulte said that he would get that done and bring it back to the Board. He requested that the case be tabled to the April meeting.

**Motion:** John Levasseur made the motion to table to the April meeting. Sam Reid seconded the motion.

**VOTE: 3 to 2 (Bill Colbath & Frank Landford opposed)**

- C. **Z 05-37 Free Trade Inc., 40 Maple St., a/k/a Tax Map 30, Lot 18, zoned I-1/RM-10, requests a variance from the terms of Article I, Section 170-6, definition of accessory structure, to construct an accessory structure (detached garage) in a different zoning district from the principal building.**

Richard Callaghan announced that this case was withdrawn by the applicant, therefore will not be heard.

*Callaghan, Colbath, Gorton, Levasseur & Landford will be voting.*

- D. **Z 06-02 South Dover Investment Group, LLC, 31 Dover Point Rd., a/k/a Tax Map K, Lots 36 & 37, zoned R-12, requests a variance from the terms of Article V, Section 170-16, to construct a**

**building (congregate care facility) with a height of approximately forty-five (45) feet, where a maximum height of thirty-five (35) feet is allowed.**

Richard Callaghan stated that he was concerned with the public notice, as the building is slightly larger than the original request for use variance.

Discussion ensued regarding the public notice, and if the Board members felt the public has been adequately notified.

Richard Callaghan stated that the building is 12 feet longer than originally requested for the use variance and asked all Board members for a vote in favor of moving forward with the request. Vote 7 to 1 (Ruth Gorton opposed).

**Motion:** Bill Colbath made the motion to remove the case from the table to be heard. Frank Landford seconded the motion. **VOTE: U/A**

Attorney Schulte represented the applicant. He stated that the Board requested more information regarding why the building has to be as tall as what was proposed at the last meeting. There were also concerns about the appearance. The plan presented is for approval for the dimensional variance and the drawing shown on the easel is more to the original concept sketch that was presented originally for the use variance. The third floor is built into the roofline and between the second and third floors; there is an area of roofing, which helps create the appearance of a series of townhouses. Because of the span of the building a steel beam arrangement is at the top of the garage, which is the lowest level, there are floor trusses between the first, second and third floor and larger trusses supporting the roof. The height of the structure was able to be reduced from 44 feet 8 inches to 36 feet 8 inches. We are requesting a height variance of a foot and a half. If the topography of the property were different, you might be able to set this a little further into the ground but you need to have drainage so that it does not drain into the garage. The difference in height is for the truss system and for the mechanicals to run between the ceiling of the lower floor and the next floor above it. This building happens to be in one of the lower areas of the ground in this neighborhood. The altitude of the structures closer to town end up being taller than this building would be. The commercial building across the street is taller than this. They have attempted to have a large building appear to be a series of connected small buildings, which is what the original intention was. Kevin McEneaney is present to answer technical questions.

Chris Parker asked what is the reason why this could not be two stories and just wider as you have a lot of depth towards the rear of the property.

Kevin McEneaney said that it would be a savings in construction cost and this would allow open space of the property.

John Levasseur asked how close the final building would be to this rendition presented tonight.

Attorney Schulte said that they hope it would be very close to what they are building. If this is something that is acceptable, they will do whatever they can to make it as close as technically possible.

Chris Parker confirmed with Attorney Schulte that he filled out the use variance requirements as opposed to the area variance because he determined it is a Boccia question not the Simplex question and as it was being typed up, the wrong section was copied.

Bill Colbath stated that he is reiterating the question asked last month was why it had to be above the level that it was allowed to be. I asked for some specific reasons why and it appears you chose not to bring those reasons.

Attorney Schulte submitted a handout of a schematic building section. He stated that it shows what the architect has determined what needs to be done for the sizing and what he has determined is necessary for the floor trusses and for the roof truss system. This is what he determined would be needed to support the width of the building. This tells you the dimensions that he calculated understanding that they had a height limitation and they needed to do whatever they could to get it as close to or less than the 35 feet if possible.

Kevin McEneaney stated that the dimensions that are shown go to the peak of the dormers. They are looking for the 9-foot ceilings to make the living space look larger. He stated that he believes that the current plan shown is the most attractive design of all three presented for this building.

#### Public Hearing Open

Chris Parker stated that the Planning Department does not support this variance. They feel it does not fit the context of the neighborhood. The structure is overwhelming adjacent to the single-family houses that are not multi-story structures. They also feel that the hardship has not been demonstrated. What they have heard tonight is that they do not want to spend extra money to make this a two-story, longer and bigger building. The applicant is just trying to save money by going up. The department realizes that they have the right through the use variance to do 28 units but it does not mean that they have to do 28 units. If they cannot do it within the allowed height they feel that this board should not bend over backwards to get them the 28 units. The department does not support this variance.

#### Public Hearing Closed

Attorney Schulte stated that financial considerations could be taken into account on an area variance.

Chris Parker agreed but he thinks that it is the only argument that is being placed here and you do have reasonable alternatives.

Richard Callaghan confirmed that this would go to TRC and to the Planning Board if approved. He stated that it was an indication by Mr. Bird last month that the Planning Department has some ability to control the architectural design of this building. What stimulated that comment from Steve Bird was that the applicant made representation that without the approval of a height increase they would build a building with a flat roof.

Tom Clark stated that they have some specific ones to the nonresidential zones but he thinks that they have general ones for the residential areas. He proceeded to explain the Site Review Regulations and he stated that this building is subject to the architectural review design guidelines.

Chris Parker stated that the roof has a significant affect on the buildings character. Slopes are preferred.

Frank Landford stated that he does not like the three-story building, as it is overwhelming for the neighborhood. Two stories would be better for this area.

Richard Callaghan stated that he is undecided. He was adamantly opposed to what was seen last month and he is not knowledgeable enough to argue with the design and whether it is significant enough for three floors or not. He agrees with Mr. Parker as far as they have other ways to do this. He believes that their sole reason is to crunch more units in here so they can make more money. It would be cheaper to go up than go out. They do need places like this in the area. How much is one foot in height going to offend the rest of the community?

John Levasseur stated that he is comfortable with the new design shown tonight. This seems to work. He confirmed with Tom Clark that the building would be sprinklered. It is an added level of protection regardless of building height. Seven foot, six inches is determined to be a comfort zone.

Richard Callaghan stated that he was concerned with decreasing the ceiling height and increasing the footprint as that would increase the cost per unit for the potential owner. It should be built reasonable so it will be cost effective to the buyers.

Chris Parker said that some of these units are going to be 1400 square feet and will not be cheap no matter what.

Tom Clark said since money is being brought up again he talked about the Boccia analysis in the Handbook for Local Officials, in which it says that the second prong calls for an examination of other reasonably feasible alternatives. The Court clearly stated that the developer's financial considerations do indeed become part of the calculus of what is reasonable. Undue financial burdens should not be imposed upon a landowner, so the relative expense of alternatives must be examined.

Chris Parker stated that it is saying that if the other alternatives are unreasonable or not financially feasible you cannot put it under undue financial burden.

Richard Callaghan said his comment was more direct to the future owner.

#### **FIVE CRITERIA FOR AREA VARIANCE:**

1. The Applicant was to provide proof that special conditions exist and that literal enforcement of the ordinance would result in an unnecessary hardship. a) AREA: i. Did the Applicant demonstrate that the area variance is needed to enable the proposed use of the property given the special conditions of the property? No, Vote 4 to 1 (John Levasseur voted yes). This conclusion is based on the following findings of fact: There are alternatives that will comply with the ordinance and allow the 28 units. ii. Did the Applicant demonstrate that the benefit sought cannot be achieved by some other method reasonable feasible to pursue without the area variance? No, Vote 4 to 1 (John Levasseur voted yes). This conclusion is based on the following findings of fact: The applicant can build two stories and sell at a reasonable cost. No alternative methods were shown.
2. Did the Applicant provide proof that demonstrates how granting the variance will result in substantial justice? No, Vote 3 to 2 (Richard Callaghan & John Levasseur voted yes). This conclusion is based on the following findings of fact: Did not demonstrate clearly, why he needed the variance and what would result in substantial justice. The applicant did not show why we could not achieve the same result with other methods.
3. Did the Applicant provide proof that demonstrates how a variance would be consistent with the spirit and intent of the ordinance? No, Vote 3 to 2 (Richard Callaghan & John Levasseur voted yes). This conclusion is based on the following findings of fact: The request for a building taller than allowed was not proven to be consistent with the ordinance.
4. Did the Applicant provide proof that demonstrates the variance will not result in a diminution in value of surrounding properties? No, Vote 4 to 1 (John Levasseur voted yes). This conclusion is based on the following findings of fact: The request changes the neighborhood from single family to multi family thus reducing the value of the single-family homes. The larger structure also depletes the value of surrounding properties. No proof of the opposite was provided.
5. Did the Applicant provide proof that demonstrates the variance would not be contrary to the public interest? No, 3 to 2 (Richard Callaghan & John Levasseur voted yes). This conclusion is based on the following findings of fact: The increased size would not be a benefit to the public interest. Proof to prove otherwise was not provided.

Therefore, based upon the foregoing, it is ordered that the application for the variance be denied.

**ITEM # 4: NEW BUSINESS**

- A. **Z 05-35 Neale A. Hubbard, Earl St., a/k/a Tax Map 40, Lot 12, zoned Office & R-12, requests a variance from the terms of Article V, Section 170-16, to subdivide a parcel into 2 lots, one of which a frontage of seventy-five (75) feet along a public right of way, where a minimum of one-hundred (100) feet is required.**

Attorney Schulte requested that this matter be tabled until they receive a final resolution on the request for area variance for this same property.

**Motion:** Frank Landford made the motion to table pending resolution of request for area variance. Ruth Gorton seconded the motion. **VOTE: 4 to 1 (Ruth Gorton opposed)**

**ITEM # 5: OTHER BOARD BUSINESS**

Richard Callaghan stated that if anybody is interested in attending the NHOEP Planning and Zoning Conference they should submit the completed forms to the Planning Office.

**ITEM # 6: ADJOURNMENT**

**MOTION TO ADJOURN**

Frank Landford made the motion to adjourn at 9:30 p.m. and was seconded by Bill Colbath. **VOTE: U/A**

<b><u>List of Members</u></b>	<b><u>Term Expires</u></b>
Richard Callaghan-regular member	04-13-06
William Colbath-regular member	10-23-06
Frank Landford-regular member	04-10-08
Ruth Gorton-regular member	11-12-06
John Levasseur-regular member	11-12-06
Masi Denison-alternate member	09-08-07
Sam Reid-alternate member	04-13-08
Otis Perry-alternate member	02-08-09