

DOVER ZONING BOARD OF ADJUSTMENT
JUNE 22, 2006
MINUTES

Members Present: Frank Lanford, John Lavasseur, Bill Colbath, Ruth Gorton, Richard Callaghan

Members Absent: Sam Reid, Masi Denison, Otis Perry

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

Chairman Callaghan brought the meeting to order at 7:00 PM.

Rick Callaghan explained this is a continuation of the deliberations on the following case: **#Z05-35 Neale A. Hubbard, Earle 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 which a frontage of seventy five (75) feet along a public right of way, where a minimum of one-hundred (100) feet is required.**

He said at the last meeting they left off where the Board members would format their thoughts on the Findings of Fact explaining why they voted the way they did. He would collect the answers from each member, and with the assistance of counsel, put them together in a verbiage that would be conducive to court language. He explained that the counsel would not advise them to change their minds or tell them that they made a mistake, but he would simply make sure that everything was worded correctly.

He asked everyone to explain their thoughts and to write them on the Findings of Facts sheet that was handed out. He asked also asked that they articulate their comments for the record. Rick Callaghan announced that the first item on the next month's agenda (July 20th) would be to read what he compiled and if anyone has any objections to it, it could be done over again.

Richard Callaghan explained that the time that Atty. Schulte has to appeal begins after the ZBA gives the final Findings of Fact. Mr. Callaghan stated that the Board members made their individual votes and it was unanimous on every criterion. The expectation this evening is that a reason is given by each member on why they voted no.

John Lavasseur stated that after reading it over, he has changed his vote. He said that on the first question he voted yes, and now he votes no and explained that it is the logic of the question.

Richard Callaghan stated that he wanted John to go with what he was comfortable with. He doesn't know what the law says but, nobody can say that you cannot change your mind.

Richard Callaghan said that they may need to take another vote and it may impact the overall outcome.

Chris Parker stated that he felt that the Board should take a vote and read the Findings of Fact.

Richard Callaghan asked each member to articulate their Findings of Fact starting with hardship as follows:

HARDSHIP:

Ruth Gorton voted that there was no hardship. She read in the NH Planning and Land Use, on page 256, under Comprehensive Shore Line Protection, that building on non-conforming lots shall be limited to single family residential structures. This variance would create a non-conforming lot, not surrounded by land, but by shorefront therefore, it's not similar to the County Farm Rd. decision that the Board made. This is within protected shoreland as stated in 483-B:9. She also said that on page 250 of the NH Planning and Land Use book it says that reasonable levels of development in the protected shoreland shall conform to the zoning ordinances. In the handbook on page 14, she read, restriction is necessary on this property, relief can not be granted without frustrating the purpose of the ordinance. Page 15 of the handbook stated that there is potential harm to private land owners it is necessary to promote a valid public purpose. She felt that granting the variance would create both a private and public nuisance. The lot abuts City property and protected shoreland. This would be unreasonable use, unreasonable interference with several others' rights and rights common to the general public.

John Lavaseur stated that this is where he had a conflict. There are two parts to this question. The applicant has to provide proof that special conditions exist and that the literal enforcement of the ordinance would result in an unnecessary hardship. He said that is one way of looking at it and again, the same question - The applicant demonstrate that the area variance is needed to enable the proposed use of the property given the special conditions. He said when you consider the proposed use, he would need a variance, but he sees no hardship either. He said that he found he was having trouble with the question because it is asking for two contradictory things. How does he answer both of them? This proposed use requires a variance but he finds that there is no hardship. The fact that the applicant can presently increase the residential units by 100% contradicts the claim of injustice. He's on the fence.

Frank Lanford stated that he felt that the applicant has sought more benefit than what is reasonable for this lot. The applicant is looking for maximum benefit where a reasonable benefit would be allowed.

Bill Colbath stated that he voted that there wasn't a hardship. The property has no special conditions in relations to the surrounding properties other than a substantially

smaller building envelope due to wetlands restriction. It seems irresponsible to create a lot with a substantially non-buildable area. He said that throughout the hearings he said that he wasn't sure he understands the benefit being sought other than to create two lots. By creating two lots we would be maximizing the use and getting 4 units or at a minimum, 3 units. He said that he's not sure that the benefit of having 3 units couldn't have been achieved by just applying for a variance for placing 3 units on that lot, given the open area that's available.

Rick Callaghan stated that there is no hardship because the existing property is a conforming property with reasonable allowed uses of both Office and Residential or a combination thereof. One area variance criterion requires the ZBA to consider special conditions of the property. The intent of that criterion was to provide relief to one property not one property divided into multiple properties. The applicant is claiming a hardship on a lot that does not exist, merely proposed. The proposal to subdivide the land and claim a qualified hardship exists while being a self imposed hardship does not meet the spirit and intent of the legal requirements for the variance for an individual property.

He said that he agrees that the applicant can't build as desired, or make as much money as desired without the variance, but the property can be used in some other reasonably feasible method that would not impose an undue financial burden. He added that the property owner bought the property knowing what the zoning regulations were. If there was some hardship at that time that would have interfered with the future plans of that property, it should have been addressed prior to the purchase.

SUBSTANTIAL JUSTICE

Ruth Gorton stated that losses to individuals is outweighed by gain to the general public as City land is public land and it abuts the lot. There has been testimony that there is already a loss of fish in the pond. Configuration of the property and the presence of wetlands compel the owner to make practical and conforming use of the property in a more reasonable and conforming manner. The property has other options of design and the variance would result in a nonconforming lot on protected shoreland, abutting public land. The second prong Boccia variance would not injure public and private rights of others.

John Lavaseur said that as it is the present single family dwelling may be replaced by a duplex. This could be considered a reasonable increase in density.

Frank Lanford stated that his feeling is that sufficient proof that the variance would deliver substantial justice has not been provided. The applicant is taking one lot with a buildable area and making two lots, one that meets the area standard and the other that will now be a nonconforming lot with a small building area.

Bill Colbath stated that he felt the applicant has use of the property equal to neighboring properties and with the Office zone being added, has a greater use than some of the surrounding properties.

Rick Callaghan stated that although the original development plans indicate lots of very small size that would be non-conforming today, they have merged over time and now only one or two of them are non-conforming. The rest are owner occupied single family homes on conforming lots. Allowing the property to be formed that is non-conforming by reasons of road frontage, would be unjust to the abutting property owners because they would not be entitled to the same relief. Allowing two properties to be formed with the intended use of building two two-family rental structures would be unjust to the abutting property owners because it increases the residential density for the neighborhood.

Rick Callaghan said that the applicant cites one case where the Dover ZBA granted a variance for a similar request that was presented by Mr. John Murphy. He believes that the Murphy case was substantially different because of the open land surrounding the property, no resistance from the abutters, and there were no bodies of water or parks to protect.

SPIRIT AND INTENT:

Ruth Gorton felt that the characteristics of the parcel of land determine that no hardship exists. Four families create excessive density and congestion. This calls for examination of other reasonable feasible alternatives. The excessive use is not reasonable. There was testimony of the abutters and a petition of 30 signatures. People feel this would injure their private rights. Creating a nonconforming lot bordered by shoreland increases congestion on the dead-end street as the plan is to have two two-family homes on two subdivided lots resulting in an increase of 4 families.

John Lavoisier stated that the variance is inconsistent in that it could greatly increase a local population density.

Frank Lanford felt that the variance would not be with the spirit of the ordinance. The ordinance regulates density and spacing of structures. These two lots would each have a small building envelope, smaller than most surrounding lots.

Bill Colbath said that the spirit and intent of the ordinance was to use frontage to regulate spacing and density. This proposal will crowd units close to each other and radically increase density in the neighborhood to a level greater than surrounding properties.

Rick Callaghan stated that the spirit and intent of the zoning ordinance includes, but is not limited to, maintaining equitable density and use, maintaining the quality of life in and around neighborhoods, protecting the environment and bettering the City of Dover with future development. This request for a variance increases the existing density and thus changes the quality of life in the neighborhood. The increase in density also increases the risk of having a negative environmental affect on Willand Pond and its surrounding. This would allow construction development that is contrary to the zoning ordinance and therefore, adverse to the betterment of the City of Dover.

DIMINUTION IN VALUE:

Ruth Gorton stated that there was testimony to both sides of this question as to whether or not this would result in a diminution of value. She said that her feeling was that because of the single family homes in this area and because the residents are concerned with their property values that the applicant has not provided sufficient proof that a diminution of value would not happen.

John Lavasseur found that the two proposed duplexes would be inconsistent with the design of surrounding single family dwellings.

Frank Lanford said that the applicant has not provided sufficient proof. The applicant has provided one realtor's opinion. Quite a few of the neighbors stated that they were worried about their property values.

Bill Colbath stated that the introduction of two new units, plus a possible additional unit, meaning four total units, will very likely affect the surrounding property values. The residents indicated, as did the realtor testimony, that the management of these units could be very detrimental to property values and life styles.

Rick Callaghan felt that the new construction or land development in any zone should improve the value of surrounding properties. In this case we would allow a very desirable lot that compliments the surrounding properties to be divided into two less desirable lots, and that can only diminish the value of the surrounding properties.

He said that he tends to agree with the abutters based on his personal experience that rental properties do not get the same property maintenance or have the quiet and peaceful outdoor activities as owner occupied residential structures. Though this is a use issue, it is the intended use of the property if the variance is granted. Rental occupancy could be additionally detrimental to the value of existing abutting property. He agrees with the abutters that if the property is developed as zoned, the office environment would be less intrusive to their peaceful and private quality of life during the off business hours.

PUBLIC INTEREST:

Ruth Gorton stated that this plan increases the density on land that abuts public land (City owned land) and it increases congestion. She quoted Bacon vs. Enfield, which was upheld because it didn't want to set a precedence and she felt that the Board didn't want to do that. She said that case was with regard to a woman who wanted a gas tank, too close to the water. For one person it might not be a major thing but it would set a precedence.

John Lavasseur felt that significantly increasing the population near a confined body of water puts it at substantial risk of contamination.

Frank Lanford said that the neighbors have stated it would not be in their interest. Four living units on this shore land lot will stress this piece of shoreland which would not be in the public interest.

Bill Colbath stated that to insert the additional number of units would cause an adverse affect on the Earle Street area and likely adversely affect the neighboring property owners' lifestyle.

Richard Callaghan stated that Willand Pond is currently a well maintained and developing recreational area with walking trails, fishing and winter activities like cross country skiing and ice skating. The Willand Pond area was once the site of Burgett Park and later called Central Park and was the site of a bandstand and dace pavilion, and outdoor theater, baseball diamond and a casino. It was the place at the end of Central Avenue and an attraction for people from Dover and area communities. It has a historical value and is now a gem for Dover and Somersworth to share. The recreational area and pond is surrounded mostly by trees and a few private homes. This variance would allow one property to be developed into two and thus increasing population at and around the waterfront. The addition of multiple family housing or even more housing than currently allowed, on or near the area, is not in the publics' best interest.

Chairman Callaghan collected the opinions from the Board members. He said that he would present his interpretation of the collective opinions. He explained if he makes any errors in his judgment of what the opinions are, it will be addressed. As for the John' s change in vote, he doesn't have a clue what it means. He collected the copies of the opinions from the members.

Jim Schulte stated that since there are written findings they should be part of the official record. Jim Schulte stated that if they are not made part of the public record you could be adversely affecting the integrity of the whole process.

Discussion ensued with regard to the records being part of the public record.

Rick Callaghan stated that he would have copies made for himself and the originals would be left with the file.

Tom Clark handed out a consent form for the e-mail addresses for the Zoning Board members. It is a form stating that once you get the address you won't use the City web site for anything deemed to be improper. The contact information will be needed also for Matt Wentworth, the IT person, will be contacting you to set up the links.

Adjournment

Bill Colbath made the motion to adjourn.

Ruth Gorton seconded.

VOTE U/A