

CITY OF DOVER

DOVER ZONING BOARD OF ADJUSTMENT - MINUTES

Meeting Type: Regular Meeting
Meeting Location: Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date: **Thursday, December 20, 2007**
Meeting Time: **7:00 pm**

1. ATTENDANCE

- Members Present: Richard Callaghan, Sam Reid, Bill Colbath, Otis Perry, Jim Kelley, Masi Denison, Frank Landford
- Staff Present: Tom Clark; Building Official, Jean Glidden; Recording Secretary

2. APPROVAL OF PRIOR MINUTES OF NOVEMBER 8, 2007 & NOVEMBER 15, 2007

Motion: Sam Reid made the motion to accept the November 8, 2007 minutes. Otis Perry seconded.
Vote: U/A

Motion: Sam Reid made the motion to accept the November 15, 2007 minutes. Otis Perry seconded.
Vote: U/A

Callaghan, Colbath, Reid, Kelley, and Perry will be voting.

3. OLD BUSINESS

- A. Continuation of deliberations regarding case #Z 05-35 Neal 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 with frontage of seventy-five (75) feet along a public right of way, where a minimum of one-hundred (100) feet is required.

Note: This item was discussed at the meeting of October 18, 2007.

Motion: Reid made the motion to remove from the table. Colbath seconded. Vote: U/A

Callaghan stated that on November 8, 2007, a straw vote took place and two members (Callaghan and Reid) put together a list of the facts and a summary of the findings. He stated that their findings are not assigned to any of the particular criteria, as many of them are the basis for multiple criteria. The findings will be read for the record and if the members feel a discussion should take place they need to raise their hand in order to voice their concern. This is left open for individual judgment on how the findings should be applied. After the findings of fact are completed, the criteria will be voted on for a final official vote. He announced to the public that copies of the draft findings are available in order to follow along with the reading.

During the reading, the following corrections were discussed and entered in the findings of fact. #29 Reid suggested that the word former be added to the sentence. It should read current or former property owners. #30 Earl was added at the beginning of the sentence. Earl Street borders the waterfront. #45 the word not was added to the sentence. It should read the applicant did not sustain its burden.

DRAFT FINDINGS OF FACT:

Preface



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The Superior Court remanded this case to the ZBA for evaluation on 8/22/2007.

The court found the ZBA erred in the findings generally because the ZBA considered the future use of the land rather than the road frontage.

The ZBA granted a rehearing upon the request of the applicant. The hearing was not de novo pursuant to The Board Of Adjustment In New Hampshire A HANDBOOK FOR LOCAL OFFICIALS.

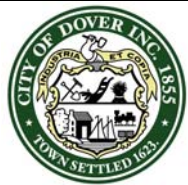
The ZBA reheard the case and focused on the area variance request as it relates to Dover Zoning Requirements and the Dover Master Plan for relief on the requirement of road frontage.

The ZBA understands that the Burden of Proof is on the applicant for each criteria.

The ZBA employed case law of *Boccia v. City of Portsmouth, 151 N.H. 85 (2004)*; *Gelinas v. City of Portsmouth, 97 N.H. 248 (1952)*; *Vigeant v. Town of Hudson, 151 N.H. 747 (2005)*; and *NH RSA 674:33* in rendering these findings.

Findings

1. The applicant is seeking a variance for road frontage relief in asking to create two lots of which one will only have 75 feet where 100 feet is required.
2. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-14, has 110 feet of road frontage.
3. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-13, has 50 feet of road frontage.
4. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-4, has 160 feet of road frontage.
5. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-2, has 150 feet of road frontage.
6. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-9, has 250 feet of road frontage.
7. In the evidence provided by the applicant, one of the seven surrounding properties, Lot 40-10A, has 200 feet of road frontage.
8. In evidence provided by the applicant, one of the seven surrounding properties, Lot 40-10B, has 150 feet of road frontage.
9. The applicant's current lot 40-12 has 175 feet of road frontage on Earl Street.



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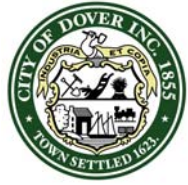
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10. Six of the seven properties exceed the minimum of the 100-foot frontage requirement.
11. The single lot with 50 feet of road frontage is grandfathered because the development was designed allowing lots of 25 feet of frontage.
12. The following table demonstrates the distribution of current and requested property road frontages.

| Road Frontage (feet) | Number of Properties | |
|-------------------------------------|----------------------|-----------------|
| | <i>Existing</i> | <i>Proposed</i> |
| 50 | 1 | 1 |
| 75** | 0 | 1 |
| <i>100 ft minimum road frontage</i> | | |
| 100** | 0 | 1 |
| 110 | 1 | 1 |
| 150 | 1 | 1 |
| 150 | 1 | 1 |
| 160 | 1 | 1 |
| 175* | 1 | 0 |
| 200 | 1 | 1 |
| 250 | 1 | 1 |
| Total Number of Properties | 8 | 9 |

* Applicants current property. ** Applicants proposed properties.

13. The road frontage for the applicant's lot is consistent and equitable with the other lots on Earl Street.
14. At the February 16, 2006 hearing, City Planner Chris Parker presented his analysis of frontage of lots in the neighborhood. The minutes from that meeting confirm that Mr. Parker's opinion was that there were 56 lots in the neighborhood and only one did not have frontage that complied with the 100-foot requirement.
15. The ZBA finds that the creation of a new lot, which has 75 feet of road frontage, would be inconsistent with the zoning ordinance because zoning is to provide equitable and reasonable road frontages that are consistent with other lots in the neighborhood.
16. The abutters and neighborhood residents submitted a petition with 30 signatures opposing the granting of a variance to the applicant.
17. During hearings held on this request since it was filed on November 2, 2005, five abutters testified that they were opposed to the variance request. At least two abutters testified at more than one hearing.

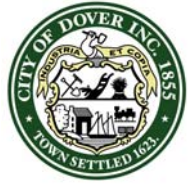


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18. The creation of a new lot with only 75 feet of road frontage would be unjust to the neighbors and or abutter whose property uniqueness are enhanced due to their current road frontages that exceed the minimum road frontage requirement.
19. The creation of a new lot would contribute to increased density therefore not conforming to the spirit and intent of the ordinance.
20. The creation of a new lot that has a non-conforming frontage of only 75 feet does not serve the public interest. Allowing for the approval of a non-conforming lot in a mostly conforming neighborhood increases the density of lots for that neighborhood, thus not being in accordance with the public's interest.
21. Without the variance, there is limited or no loss to the Applicant since the lot can still be utilized in different ways.
22. If the variance is granted, there is no benefit or gain to the general public.
23. Enforcing the ordinance requiring 100 feet of frontage maintains the spirit and intent of the ordinance and the public interest on behalf of citizens of Dover.
24. Granting the variance would create an injustice for the abutters and is therefore contrary to the public interest.
25. Without a variance, the Applicant could keep the existing home in the wetlands setback or build a new structure on the lot.
26. Earl Street is a very narrow, substandard dead end street off from NH Route 108.
27. Earl Street is a 250 foot paved street that would require a pavement extension to provide access to the additionally requested lot.
28. There are currently only four single-family homes on Earl Street.
29. Earl Street has a unique and essential character due to the history of the neighborhood and the current or former property owner's acquisition of adjacent lots, which forms lots of unusual size and shapes.
30. Earl Street borders the waterfront of Willand Pond that provides an esthetic quality for the neighborhood.
31. Earl Street does not have sidewalks to facilitate safe pedestrian passage.
32. Earl Street is accessed from State Route 108, which is a main connector to Rochester, NH and Northeast Somersworth. The traffic on that road is already a great burden to residents along it as indicated by public complaint. Residents complain about how long it takes to get access to Route 108 due to the constant traffic flow on it. Additional traffic generated from Earl Street would be adverse to vehicular safety.
33. Allowing this variance would create an injustice to the current residents of Earl Street due to the likely loss of the localized essential character that the dead end street with lots of comparable road frontage provides.



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34. The spirit and intent of the ordinance requiring 100 feet of road frontage is to regulate density and clearances in the neighborhood.
35. If this variance request were granted, the applicant would be able to build an additional residential structure on a lot that currently has only enough frontage for one residential structure.
36. The ZBA finds that this variance would increase the number of residences on Earl Street from four to five, thus increasing the density of residential structures on the street.
37. If this variance request were granted, there would be increased vehicular traffic on Earl Street thus creating a safety hazard to pedestrians.
38. The applicant refers to the adjacent vacant lots currently owned by the City as land that will remain as open space. Applicant argues that open space should be considered in the variance request to offset the increased density that a lot with 75 feet of road frontage would create.
39. The applicant argues the abutting City lots will remain undeveloped because the City would not sell the applicant the land.
40. The City is free to sell the land in the future or develop it in some other way.
41. Utilizing the City land as part of the basis for addressing the issue of increased density and congestion from the proposed lot, could preclude the rights of future use on that land, therefore creating an injustice to the public interest.
42. Utilizing the abutting City land as part of the basis for addressing increased density and congestion could preclude the rights of future development of that land, therefore causing diminution in value of the City land.
43. The ZBA finds that the City owned vacant lot does not provide any relief to the issue of increased congestion or density.
44. The applicant argues that the creation of two lots of which the square footage for both do not meet zoning requirements would meet the spirit and intent of the ordinance.
45. The applicant did not sustain its burden of proof in establishing how two lots with one having less frontage than required by zoning ordinance would meet the spirit and intent of the ordinance.
46. If the variance were granted, it would increase the number of lots on Earl Street and the potential for construction congestion.
47. The ZBA finds that if the variance were granted it would result in inequitable allocations of road frontage for the neighborhood lots.
48. The applicant has argued the lot proposed to be subdivided is in a mixed zone of Office and Residential Use.



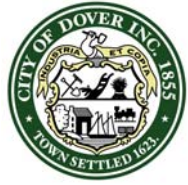
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49. The letter provided by the applicant's witness, Realtor Gregory A. Patch was not dated, but appears to be faxed from him on June 15, 2006.
50. The applicant did not provide any credentials on Gregory A. Patch to support his opinions as expressed in his undated letter and at the hearings at which he spoke.
51. The letter provided by Gregory A. Patch stated, "That building a duplex style home on each lot would not have an adverse effect on property values in the area."
52. The letter provided by Gregory A. Patch states "the subdivision of the lot at 3 Earl Street, Dover NH which would create an additional building lot, would not have a negative effect on property values in the area."
53. Gregory A. Patch provided verbal testimony at a hearing on December 15, 2005 indicating that the construction of rental units on the proposed lots could devalue surrounding property values depending on the occupants' upkeep of the property.
54. The applicants witness stated that there would be a limited impact on the surround properties. The criteria calls for no impact. Gregory A. Patch provided verbal testimony on April 20, 2006 that indicated the land has numerous permitted uses, that Mr. Hubbard is a skilled investor who will build something that would give him a good return on his investment, and that the residential use will have the least impact on the values of surrounding property.
55. The ZBA finds that the real estate agent's testimony and letter are not credible based on their inconsistency.
56. Gregory Patch, in either his testimony or letter, did not address how creation of a nonconforming lot with road frontage of 75 feet may or may not affect the property values.
57. Gregory Patch did not present any credentials indicating his ability to provide property appraisals.
58. At least one abutter testified that granting this variance would reduce the value of his property value.
59. The ZBA finds the applicant did not carry his burden of proof that the non-conforming frontage of 75 feet would not diminish the value of surrounding properties.
60. The abutters witness was not a professional property appraiser.
61. The neighborhood residents' testimony on the issue of property values and private rights carry an equal voice in this matter because of their years of residency give them knowledge of the neighborhood.

During the reading after #52 regarding Gregory Patch's testimony, Callaghan stated that he has the audio recording available and could queue to the points that were actually said versus what was in the minutes. After reading the findings, Callaghan asked if any of the members had any comments to add. If no comments are made a final vote should take place on the criteria.



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Perry added that since the list was read for the record, the findings of fact should be voted on as discussed.

Motion: Kelley made the motion to approve the preface and the 61 findings of fact as amended. Colbath seconded. Vote: 3 to 2 (Reid and Perry opposed).

Callaghan moved on to the criteria.

FINDINGS OF FACT: 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 an area variance is needed to enable the proposed use of the property given the special conditions of the property? Yes, Vote 4 to 1 (Callaghan voted no).

ii. Did the Applicant demonstrate that the benefit sought cannot be achieved by some other method reasonably feasible to pursue, without the area variance? Yes, Vote 4 to 1 (Callaghan voted no).

2. Did the Applicant provide proof that demonstrates how granting the variance will result in substantial justice? No, Vote: 3 to 2 (Reid & Perry voted yes).

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 (Reid & Perry voted yes).

4. Did the Applicant provide proof that demonstrates the variance will not result in a diminution in value of surrounding properties? No, Vote: Vote 3 to 2 (Reid & Perry voted yes).

5. Did the Applicant provide proof that demonstrates the variance would not be contrary to the public interest? No, Vote: 3 to 2 (Reid and Perry voted yes).

Callaghan stated that based on the vote it is ordered that the application be denied.

Motion: Colbath made the motion to deny the variance. Kelley seconded. Vote: 3 to 2 (Perry and Reid opposed).

A lengthy discussion took place regarding the written findings and when the document becomes official. It was agreed upon by all of the members that the 61 findings with the amendments are the official findings as they have been voted on and adopted by the Board.

4. NEW BUSINESS

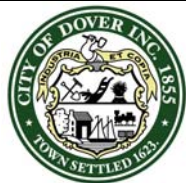
None

5. OTHER BOARD BUSINESS

A. Administrative Workshop

No discussion

B. Discussion of upcoming election of Chairperson & Vice-Chairperson



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Callaghan read a letter for the record written to Vice Chair Bill Colbath in which it states that he is resigning from Chair on January 7, 2008 upon taking the oath for City Councilor Ward 6 position. He thanked all who serve on the board and thanked them for continued support and the time given to better the City. He stated that he would be stepping down as Chair for the ZBA at the conclusion of this meeting upon the election of a successor to the Chair position. He asked to consider voting in a new Chair, which would mean one tonight and most likely a vote in January for the annual election.

Clark mentioned that the rules of procedure that have been adopted by this Board state that you cannot have an election until January.

Reid added that if the Chair steps down the Vice Chair normally steps in.

Kelley suggested waiting until January as it is the normal cycle.

Callaghan stated that it is his preference to leave the Board with an order of command and requests that the Board vote for a Chair. He said he consulted with Attorney Krans and his advice is that the Board can vote tonight and still hold their annual vote in January.

Perry nominated Reid. Reid nominated Colbath. Colbath stated that he would prefer not to be Chair and nominated Denison. Reid stated that he would support Denison as Chair.

Motion: Colbath nominated Denison as Chair. Reid seconded. Vote: U/A

6. ADJOURN

Motion: Perry made the motion to adjourn at 8:11 p.m. Reid seconded. Vote: U/A

| <u>List of Members</u> | <u>Term Expires</u> |
|----------------------------------|---------------------|
| Richard Callaghan-regular member | 04-13-09 |
| William Colbath-regular member | 10-23-09 |
| Frank Landford-regular member | 04-10-08 |
| Masi Denison-regular member | 01-24-10 |
| Sam Reid-regular member | 11-12-09 |
| Otis Perry-alternate member | 02-08-09 |
| Jim Kelley-alternate member | 05-23-10 |