

Dover Zoning Board of Adjustment
Thursday, April 15, 2004

MINUTES

Members Present: Bill Colbath, David Ruoff, Ruth Gorton, John Levasseur

Members Absent: Richard Callaghan, Frank Landford

Staff Present: Thomas Clark, Building Official, Steve Bird, City Planner,
Jean Glidden, Recording Secretary

ITEM # 1: CALL TO ORDER

Bill Colbath explained that they had four members present that would be voting and offered the applicant the option to either proceed with their case or have the case postponed when five members would be present.

ITEM # 2: APPROVAL OF MINUTES

A. Approval of the minutes for regular meeting of March 18, 2004.

David Ruoff confirmed with Bill Colbath the correct wording of a paragraph on page eighteen and stated that it should be corrected to read as follows. The applicant is asking the Board to accept the financial problem, but the applicant is requesting a sale price of \$259,000.00. The applicant states that it is caused by the zone.

Motion: David Ruoff made the motion to approve the minutes as amended. John Levasseur seconded the motion. **VOTE: 3 to 1 (Ruth Gorton stated that she could not approve the minutes since she was not present for the entire meeting)**

ITEM # 3: OLD BUSINESS - NONE

ITEM # 4: NEW BUSINESS

- A. Z 04-10 Susan Norman, 188 Bay View Rd., a/k/a Assessor's Map J, Lot L-22-A, zoned R-40, requests a variance from the terms of Article V, Section 170-16, to construct an addition on to a single-family dwelling within approximately twelve (12) feet of a side property line, where a minimum of twenty-five (25) feet is required.**

Malcolm McNeill stated that he is the attorney representing the applicant and is electing not to proceed with their case and would like to have it scheduled for the next hearing when all members are present.

B. Z 04-11 Henry Kuziomko, 308 Dover Point Rd., a/k/a Assessor's Map L, Lot 112, zoned R-40, requests a variance from the terms of Article X, Section 170-41.A, to increase non-conforming structures.

Art Guadano with AG Architects stated that he is representing the applicant and they have completely revised their proposal that was heard at last months meeting. They have reduced the nonconformity and the new plans are to renovate two of the buildings; the Guest House would be renovated with a deck located on the South side of the house. The plans for the Road House would be to construct a dormer on the South side to the rear of the house and the third structure, which is within the 100' setback area of the Conservation District, will be removed and replaced with a new house located in the buildable area of the lot.

David Ruoff asked if he was making any changes to the roof or roofline on the Guest House.

Art Guadano stated that they would have a little bit of a change, but plans are to go no higher than what it is there right now. He stated that building the Main House would reduce the nonconformity that is within the Conservation District. The three structures and the accessory structure are existing buildings built prior to the enactment of the present zoning ordinance. Improvements to the structures would have a positive impact on the neighborhood and would increase property values.

David Ruoff confirmed with Art Guadano that their would be no difference to the Road House between this month and last months meeting and the difference to the Guest House would be that he is constructing the deck and would not have a raised roof. The only difference would be to demolish the Main House and build a new house located in the buildable area.

Bill Colbath confirmed with Art Guadano that they were constructing a double story home and would be conforming to the zoning ordinance for setbacks and height requirements.

Steve Bird asked if the crosshatched area shown on the plan was the footprint or a maximum footprint.

Art Guadano stated that it is the buildable area of the lot.

Motion: David Ruoff made the motion to accept. Ruth Gorton seconded the motion.
VOTE: U/A

Public Hearing Open
None
Public Hearing Closed

Steve Bird stated that the Planning Department has reviewed the proposal in light of the extensive discussion that occurred at the last meeting, the applicant has reduced the impact and the scale of the additions and it was in direct response to the suggestions made from the Planning Department and the ZBA. The applicant has significantly improved his application; therefore, the department is in favor of this variance request.

John Levasseur stated that at the last meeting he was concerned with the Main House being too close to the lot line and the Guest House having a raised roof. He stated that these concerns have been addressed at this meeting and is in favor of the request.

David Ruoff asked the applicant if he has spoken with his abutter Debbie James regarding her concerns that she had at last months meeting.

Henry Kuziomko stated that he spoke with her this afternoon. He stated that she supported this request and would have liked to be present tonight but had other obligations.

FIVE CRITERIA:

1. It is the Board's conclusion that if the applicant complies with the strict letter of the ordinance he/she does face an unnecessary hardship. This conclusion is based on the following findings of fact: Strict adherence to regulations is an unnecessary restriction, given the history of the property.
2. It is the Board's conclusion that, if granted, the variance will deliver substantial justice. This conclusion is based on the following findings of fact: Allow for reasonable use of the property without interference with surrounding properties.
3. It is the Board's conclusion that, if granted, the variance will be in harmony with the spirit and intent of the zoning ordinance. This conclusion is based on the following findings of fact: Does not change the nonconforming use.
4. It is the Board's conclusion that, if granted, the variance will not result in diminution in value of surrounding properties. This conclusion is based on the following findings of fact: Increase the value of the property and allow the neighboring property to increase.
5. It is the Board's conclusion that, if granted, the variance will not be contrary to the public or private interests or rights. This conclusion is based on the following findings of fact: Proposal decreases the nonconformity of the main living area and gives the abutters greater protection and increases the setback from the river.

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

- C. Z 04-12 Boston & Maine Corp., Broadway, a/k/a Assessor's Map 24, Lot 2-A, zoned I-1 and B-3, requests a variance from the terms of Article V, Section 170-16 to permit a lot line adjustment resulting in a rear lot line within approximately five (5) feet from the rear of a building, where a minimum of twenty-five (25) feet is required.**

Paul Connolly from Civilworks stated that he is representing the applicant and DF Richard. They used to keep hundreds of gallons of heating oil in a tank farm behind 85 Broadway, within the last decade that has been removed and replaced with a propane tank farm and that facility distributes propane fuel as well as parking, servicing and maintaining their fleet of vehicles. They have used land of the Boston & Maine Corporation to access the property from the rear. An opportunity arose where DF Richard was given the opportunity to purchase approximately 68,000 square feet of land from the B & M Corporation. They have entered into an agreement with Boston & Maine Corporation to purchase this land and because of the position, location, and existence of an existing structure, a lot line needs to be drawn between the tracks and the existing building. The building encroaches on the railroads minimum setback requirements from tracks to property lines that are in place for safety reasons. He stated that the most appropriate and reasonable thing to ask for was to request a variance from the Board to allow the rear setback to be 5 feet behind the existing building

where 25 feet is required. They would still maintain 25-foot setback between the property line and the railroad tracks as required by the B & M Railroad for safety reasons and distance between locomotives.

David Ruoff confirmed with Paul Connolly the building that he is talking about as shown as the wood frame building on the plan submitted. He confirmed that B & M Corporation currently owned all of this land and they were looking to sell 25 feet out and beyond to DF Richard.

Paul Connolly stated that the building is run down and it has suffered from neglect and a lack of maintenance on the part of B & M Corporation. It is a building of such substance that it does not warrant tearing down; it needs attention, with the replacement of windows, siding, and roof repair. It is on a foundation and they feel it would be an injustice to have to tear the building down in order to satisfy property line setbacks. He stated that DF Richard would like to use it for storage purposes and they would renovate the building. He stated that if they push the boundary line any closer to the railroad tracks it would press the envelope for safety reasons, in a way that is unnecessary in their opinion. He stated that he could draw the new lot line around the building, but it would continue to be unused and neglected. B & M Corporation as well as DF Richard has the most interest in this request and they will own on either side of this line requested to be 5 feet from the building.

David Ruoff confirmed that the only reason that they are not creating a lot line that will conform is that DF Richard would like to own and use the building.

Bill Colbath asked if they had any plans to fence the rear of the building.

Paul Connolly stated that they do not intend on doing that but B & M Corporation could impose that requirement on the purchaser.

Motion: David Ruoff made the motion to accept. Ruth Gorton seconded the motion.

VOTE: U/A

Public Hearing Open

None

Public Hearing Closed

Steve Bird stated that the Planning Department is in favor of this variance request. He stated that there would be no impact to abutters. An existing building has been there for a number of years. The only potentially affected abutters would be B & M Railroad who is a party to this lot line adjustment and the sale of the land. As the applicant indicated the intent of rear setback is to allow for separation between buildings, but in this case, it is abutting the railroad track and stated that they are in favor of this variance request.

David Ruoff stated that his concern was that there might be another way to give them access to the building and still create a conforming lot. They could lease the land and get what they want without having to request a variance. However, given the area, it would not make that much of a difference where the new lot line would be located. He asked Tom Clark if they were to grant this request and for some reason the building is destroyed or dismantled ten years from now, does this variance affect the setback requirement.

Tom Clark stated that by moving the lot line back you are creating a nonconforming structure. If it was destroyed by fire or other natural hazards that the ordinance suggests, as long as they begin reconstruction within one year they would have that grandfathered right to replace it.

FIVE CRITERIA:

1. It is the Board's conclusion that if the applicant complies with the strict letter of the ordinance he/she does face an unnecessary hardship. This conclusion is based on the following findings of fact: Either the building or the tracks would have to move and the 25' setback is required for public safety and thus should be considered at a greater weight than the building to rear lot line setback.
2. It is the Board's conclusion that, if granted, the variance will deliver substantial justice. This conclusion is based on the following findings of fact: It will allow for continued use of both parcels without the destruction of a substantial existing building.
3. It is the Board's conclusion that, if granted, the variance will be in harmony with the spirit and intent of the zoning ordinance. This conclusion is based on the following findings of fact: Spirit and intent was to keep building separations and there cannot be another building constructed with tracks in place.
4. It is the Board's conclusion that, if granted, the variance will not result in diminution in value of surrounding properties. This conclusion is based on the following findings of fact: No affect on surroundings other than to improve the buildings appearance, which should increase value.
5. It is the Board's conclusion that, if granted, the variance will not be contrary to the public or private interests or rights. This conclusion is based on the following findings of fact: No impact to abutters and allows continued use of both parcels.

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

Tom Clark announced that he is an abutter to the next case and the Attorney advised him to excuse himself from the proceedings.

- D. Z 04-13 Richard Santello, Chesley St., a/k/a Assessor's Map 29, Lots 74 & 74-A, zoned R-12, requests a variance from the terms of Article V, Section 170-14 and Article X, Section 170-39, to consider two (2) nonconforming lots, which are adjacent and in single ownership as separate buildable lots.**

Attorney Jim Schulte announced that he is representing the applicant and would like to inform the Board at this time that he is also representing Ray Martineau, case Z 04-15 and his applicant elected not to proceed with his case and would like to attend the next meeting when five members are present.

Attorney Jim Schulte stated that the property that they are discussing tonight is the subject of a 1929 subdivision. He stated that Grove Street has been constructed up to the intersection with Chesley Street. It was proposed to be extended up past lots 9, 10, 11 and 12, but it has not been built. Lots 11 and 12 have been built on, but not as originally planned and they are horizontal to Chesley Street, so that each of those lots would have 150' frontage on Chesley Street and a depth of 65' to 72'. Instead, the two lots identified as Croteau and Clark had a line was drawn between them so each of those lots has 75' of frontage and each is a 100' deep. It effectively split lot 11 in two. Lot 74-A is a lot that has 110' along with what would have been extension of Grove Street and has a width of 150' which

makes that lot 16,500 square feet. He stated that he submitted a document that is a photocopy of the 1956 tax maps for the City of Dover, which shows Croteau and Clark's property. He stated that the strip of land from lot 37 that extends out was in fact supposed to be a right of way that was reserved. Lot 74-A on the tax map is the same as what is showing on the current tax map, which is a piece that is 110' x 150'. He stated that he was informed that the 1950 tax map showed the same. Lot 74 was a consolidation of lots 9, 17, 18, 19, 20, 25, 26, 27, 28 and the roadway in between, but lot 74-A is lot 10 on the original subdivision and part of lot 11. They have been treated that way by everyone including the City since the two Chesley street parcels lot 75, and 76 were sold off.

Bill Colbath asked why one small lot is denoted as lot 73 and the other lots on the plan submitted showing 74 and 74-A to the Chesley Street side of that line are not denoted.

Jim Schulte stated that the lots along Chesley Street are now a single lot, which was designated as lot 73. Chesley Street is constructed about to the location shown on the tax map. The three or four smaller parcels are consolidated into a single house lot, which is lot 73 including what would have been the end of Chesley Street.

Bill Colbath asked if they were under separate ownership from lot 74.

Attorney Schulte stated that it was not and the Santello's have acquired it by different deeds but they own lot 73, 74, and 74-A. Because lot 73 is a conforming lot it would not be treated as being merged under the ordinance into lot 74 or 74-A. Application for a variance is to treat lot 74-A as a separate buildable lot, lot 74 and 74-A exceeds all of the dimensional requirements of the zoning ordinance. The combined property's are about 2 ¼ acres. The only criterion in the ordinance that is not met is the frontage, they have 40' of frontage for lot 74 and lot 74-A does not have street frontage. It is only because of the road frontage that either lot is nonconforming.

David Ruoff confirmed that the lack of frontage created the merger issue.

Attorney Schulte stated that one of these lots is almost 17,000 square feet and the other lot would be over 1 ½ acres. He stated that he read the information that was submitted by Attorney Boldt and he had a discussion with him when he was researching the deeds. He stated that history of the property comes down to the same point, the only issue is frontage and because the City has a policy that allows construction on lots which do not have street frontage. It was the decision of the Board on the Paul Street case previously and it was in an appeal filed off Dover Point Road where they had lots that did not have frontage on the street but had private rights of way to the street. If lot 74-A was identified as a separate lot it would be buildable. There is a statute that if you have a lot that does not have direct street frontage you cannot build on it, unless you get permission from the ZBA. The requirements for that permission are more liberal than a variance requirement. Mr. Santello is actually making a more difficult request than he might be required to. The applicant is asking to take a combined parcel of 2 ¼ acres in a zone where you only require 12,000 square feet for each residential lot and allow the construction of two houses, one on a lot of about 16,500 to 17,000 square feet and the other on the remaining land. In either event you would need some sort of relief, either a variance of special permission under the statute to allow lot 74-A to allow construction off a private drive. The City does allow construction off private drives and you can have as many as four homes. The variance request has the affect of eliminating or approving the only nonconformity, which is the frontage. They are asking to grant a variance to allow construction of a single-family residence on lot 74-A as a separate lot from lot 74 because with the variance for frontage both of the

lots would become conforming. Dimensions are clear and the deeds state that these two lots in the front are 100' deep and they know the frontage is 110'.

David Ruoff asked if that was consistent with the 1929 deed and would that be creating a lot.

Bill Colbath stated no, because it is consistent with the strip of land added to it.

Attorney Schulte stated that it does not separately call out the dimensions of this lot, but you can identify where it is and you know from what the other deeds are around this lot. They also know what they are being taxed on by the City. In the Dover Point case, one of the issues was how do you know it is a separate lot. It was not merged and the minutes of this Board's meeting at the time Doug Cummings had asked if the lots were being taxed as two separate lots. Dean Trefethen stated that if the lots have been taxed separately all of this time then there was no merging of the lots and in this case, the merger never occurred because of the interpretation of the ordinance. The City has not done anything to merge these lots and no notice was sent to the property owners that there was a merger. The lots are shown separately on the tax map, they receive separate tax bills for them, and that has been the case for the last 54 years and back to the time the two Chesley Street lots were carved out and sold. The hardship comes from the frontage; the lots were laid out with the intention that Grove Street was going to be extended. It was intended to be a street 40' wide and had that happened they would have frontage. Neither of these lots have sufficient frontage under the ordinance. They are both otherwise valid, nonconforming lots with the only nonconformity being the frontage. They have this large tract of land with these lots being significantly larger than most of the other lots in the neighborhood. Granting the variance would allow the development of a lot that would be on the square footage basis, an allowed six to eight single-family residences to be constructed if they had access to it. The applicant wants to develop two single-family lots, both of which will exceed the minimum zoning requirements and both of which will exceed the size of the abutter's property.

David Ruoff asked if the right of way would be over lot 74 and confirmed that it has not been created yet.

Attorney Schulte stated that lot 74 incorporates the 40' right of way and because this lot is shown as being abutting on that private right of way, it has an easement by implication. That right of way strip is now incorporated into lot 74. All of the utilities are located at this location, the land is suitable for development, and they are asking for only two lots where arguably you could put in a greater number of lots. You may need a variance for that because of the 40' frontage but you may have other ways, if you could get a fifty-foot access this property could be developed into a greater number of lots.

Ruth Gorton confirmed with Attorney Schulte that lot 74 and lot 74-A do not have buildings on the property and the utilities are along Chesley Street and he stated that it would be a matter of running up the utilities up that 40' strip of land. The abutter on lot 75 does have a right of way, but building a driveway at this location would not interfere with their right of way, it would be a shared right of way. Lot 75 has direct frontage on Chesley Street, for physical access, it shares that right of way.

Steve Bird asked if lot 75 uses that right of way that it obtained from lot 74 for parking of vehicles.

Attorney Schulte stated that he did not know the answer, but if they do, they probably should not. With a 40' strip of land, you could have driveways adjacent to each other and if lot 75 is using it and

the decision is made to allow them to continue to use it, you could have separate driveways that could be 10' wide, and they do have ample space to accommodate that size.

Steve Bird stated the right of way referred to that has been granted to lot 75 do not specify what the use of that right of way is for.

Attorney Schulte stated that it does not and he has a copy of the deed. One of the deeds that are in your file is the deed from the Bickford's into Mr. Lemoureux, it references a portion of the easement running from Chesley Street along land of Irene Jewell lot 75, to maintain a driveway for ingress and egress. The abutters Croteau own that lot and they have an easement for ingress and egress, but not specifically for parking.

Steve Bird confirmed with Attorney Schulte that the dimensions of this is across the right of way running from Chesley Street and that is the 40' right of way intended to be the extension of Grove Street. Earlier in the deed, it is described as it runs along the edge of what the right of way was, the right of way is consistently identifying what would have been Grove Street Extension. He stated that his presumption is that there is an easement or right of way across that portion of the 40' strip that provides access to lot 75. None of the people who have the easement would have the right to impede anyone else's use of it, so they all have the right to drive up and down, but none of them have the right to block it by parking.

John Levasseur confirmed with Attorney Schulte that it would be a private driveway and it would be a shared responsibility to maintain the driveway.

Bill Colbath asked Attorney Schulte if lot 73, 74 and 74-A are under common ownership at this time.

Attorney Schulte stated that he believes that Mr. and Mrs. Santello own all three.

Bill Colbath stated that lot 73 is not as it is depicted on the 1956 tax map that was submitted and asked if he had three separate deeds for this property and asked if it was a common practice to put two individual lots on one deed.

Attorney Schulte stated that he has two deeds, one deed for this property. The deed for lot 74 and 74-A is the same description that you have on the deed from Bickford to Lemoureux, as well as the deed from Lemoureux to Santello and the description for that runs along Chesley Street. He stated that he noticed three things that have happened and two of them are a result of people being sloppy or lazy. You may receive deeds that state that the description for this property is that you are conveying lot 74 on plan 65 with no dimensions and you hope that they did not type 64 when they meant 65, because the only description would be the lot number and it is the most susceptible of error. The next way is describing several lots. You would describe the perimeter of them and it would be less dictation and typing. The more elaborate way would be, for each piece, you would have a separate deed, and it would not be uncommon to get a description for two lots where you would only describe the perimeter. Merger can happen under the zoning ordinance if you do not meet the criteria, merger can also happen by action of the property owner, but merger by the property owner is a question of intent, which would be intending to combine.

Steve Bird stated that wouldn't another interpretation of why it was done in that way be that the landowner had the Attorney draw up the deed and that he was aware of the City's merger clause and

was specifically putting that language in the deed to dispute the fact that the City might consider those lots to be merged.

Attorney Schulte stated that it would be possible but they have two different issues. One is regardless of what a landowner wants to do the City can adopt an ordinance, which does in fact merge his property, that is something that is forced on the property owner without regard to intent and those ordinances can change from time to time. He stated that in 1989, the City of Dover's merger ordinance did change and the change was to result in fewer merges rather than more. The second one is regardless what the City does a property owner can merge lots.

David Ruoff confirmed that the Dube to Lemoureux corrective deed was filed as a correction because of the right of way. He stated that there is a description of lot 74, but the concerns for the Board is are you creating that lot or is the Board granting a variance to place two dwellings on this lot to have a line divided down the middle.

Attorney Schulte stated that they are asking the Board to approve and allow for building of the lot as reflected on the tax map, map 29, lot 74-A. Even though the zoning ordinance may say it is merged the tax map does not show it that way.

David Ruoff stated that if that has merged does the lot exist anymore.

Attorney Schulte stated that the question he answered had to do with describing and locating the lot. The zoning ordinance may say it is merged and the tax map does not show it that way, the current tax map shows the dimensions of that lot without regard to whether or not the zoning says the map is right. He stated that what you are approving is what the map shows as to the location of that lot, so what you would be approving is a parcel that is .39 acres approximately 16,500 to 17,000 square feet.

David Ruoff stated that if it is approved, would you describe it as the second parcel on the deed.

Attorney Schulte stated that the second parcel is a completely different piece. He stated he would go back to the original plan and would say that they are conveying lot 10 and the southerly and northerly half of lot 11 and he would give it a description. Starting on the easterly side of the right of way as shown on this plan at the northwesterly corner of land now or formerly of Croteau; thence running northerly 110 feet of to the southerly line of lot 9 as shown on the plan; thence turning and running at right angles in an easterly direction 150 feet. Land formerly of who ever owns lot 2 and you would go down lot 2 and half of lot 3 and come back across Clark and Croteau.

Bill Colbath confirmed that they have deeds for lot 73 and 74, combining 74-A and 74. He stated that you are asking for a building permit on 74-A, are you willing to stipulate on lot 74 that it will not be subdivided again.

Attorney Schulte stated that he does not think his client has thought about that, if you look at lot 73 there is land down at the end of Chesley, where you may be able to come in that side to develop that portion. He does know that if there was going to be a subdivision of lot 74 that required access up the driveway, it would have to come back to the Board for a variance, because the new lot would not have sufficient frontage.

Bill Colbath stated that this might have some weight on the decision as to what happens to lot 74-A. He stated that he would not suggest coming back four or five times looking for a variance to utilize a lot that supposedly exists without frontage. You would then have to come back with another area that you want to develop and you do not want to put a road in there even though the fact that the entire parcel is now under common ownership and through lot line adjustment get a 50' right of way placed in and subdivided.

Attorney Schulte stated that if they wanted to do that they would not be here tonight, one of the issues with this land is portions of lot 74 has a sewer line located from the City of Dover and it runs through it and up a ravine. The land slopes down and a stream is located at this location and because of the new wetlands ordinances there is a limited amount of things that you can do. The most that you could get out of this property would be because there is a private right of way to lot 75. You can have up to four homes off a private driveway; the most that could happen is if they would use that as access if they could meet the wetland setbacks. If they wanted to do a reconfiguration of this, you could get three lots, lot 75 and the Croteau home would be one of the four houses off a private drive.

John Levasseur asked how many houses would you would need in order to put a road in.

Attorney Schulte stated that he discussed this with a developer who said he put in a 400' long road and it cost over \$300,000.00. This would be a road that would be about 200' long and if you are going to spend \$150,000.00 just for the road; you are going to need more than three or four lots. He stated that this request tonight would be harder to argue if it did not have a lengthy history of lot 74-A being treated separately. It was originally carved out as a subdivided lot. The City has treated this as a separate lot all of these years and that is why he is not uncomfortable asking the Board for this variance.

Steve Bird stated to Bill Colbath that after they reviewed this application they asked the law firm of Donahue, Tucker, and Ciandella to answer two questions for them. The first question is was lot 74-A ever created as a separate lot and the second question was if so, is it currently a separate lot for zoning and development purposes in light of the merger clause. Those issues were crucial to have an opinion on because the variance request is asking you to set aside the merger clause and allow two lots to exist. The opinion that you have received tonight indicates that Attorney Boldt believes that lot 74-A was at one point a separate lot and the only deed reference that he was able to find that didn't treat lot 74 and 74-A as the same lot and describes only the perimeter never the interior lot of 74-A. The only deed he was able to find was one that was from 1949 and it describes the metes and bounds of lot 74-A. The metes and bounds described in that deed does not match the tax map, which is not unusual, tax maps are not surveys they are results of deeds that the City receives that are recorded at the Registry. The metes and bounds description that he was able to find describes a lot that is 75' x 150' not 114' x 150' as the applicant submitted indicates.

Attorney Schulte stated that he did look at the deeds and he did read the letter from Attorney Boldt and he concludes that it was established as a separate lot and his opinion is that under the ordinance. He stated that his response is that he does not feel that it makes any difference because the Board has the power to grant the variance and as long as they can identify where lot 74 is by the tax map, the question would be are you satisfied that it meets the criteria for the variance primarily for frontage so that the two houses can be built.

Bill Colbath stated that the burden is going to come down to consider two nonconforming lots that are adjacent and single ownership as single building lots and he is looking for evidence somewhere that says so, other than the fact that it is on the tax map incorrectly that they are two separate lots.

Attorney Schulte stated that what he has is a deed that follows a perimeter description for lot 74 and 74-A. It states that we intend to treat these as separate lots even though we are only giving you the perimeter of them and they reference lot 74-A on the tax map, it does not show up on the subdivision plan. The deed says if you want to know what is included you need to look at the tax map. Mr. Santello could have submitted an application for a subdivision to the Planning Board for this property and they would have said you do not comply because you do not have frontage and you would need a variance. Instead of a subdivision plan, a tax map and history confirm that it was conveyed and the dimensions are from the original eighty-year-old subdivision plan and history of this as being treated as a separate lot.

Motion: David Ruoff made the motion to accept. John Levasseur seconded the motion.

VOTE: U/A

Public Hearing Open

Bill Colbath read a letter that was submitted by Ellen Clark abutter at 1 Chesley Street, directly adjacent to the property in question. The letter stated that she is in opposition to the requested variance and attached a petition with fifteen signatures, which stated that the signatures register their opposition to the requested variance and ask the ZBA to deny the application.

Ruth Gorton stated that three families signed the petition that were notified of the variance request.

Public Hearing Closed

Steve Bird pointed out to the Board that legal counsel for the City is providing the advice to the Board that lot 74-A did exist based on the deed that he was able to find in his research. It is also his opinion that the City's zoning ordinance clause affectively merged those two lots and the City considers them as one lot for zoning and development purposes, even though the tax maps were not corrected and were taxed as two separate lots in the past. The variance before you tonight is the proper request, he is asking the Board to waive or grant a variance to the provision of the ordinance that merges two nonconforming lots in to one. He is asking the Board to find the five criteria that would justify those two lots to be considered not merged and considered as separate lots. The issue before the Board is has he met the burden of proof to prove the five criteria as to why those two should be considered separate lots and the answers to the questions were crucial enough in order for the Planning Department to give a recommendation. If they could not find anything to ever prove that they were two separate lots then they would be applying for the wrong variance. They are comfortable with the fact that there were two separate lots because of the deed that the Attorney found and the fact that based on the zoning ordinance that they were merged by the City for zoning purposes. The zoning request that is before the Board is what is the purpose of the merger clause in the ordinance, and the purpose is to combine nonconforming lots so that all of the nonconforming that exist in the City are eventually combined to be made in to lots that are conforming. Lot 74-A could be argued because of its configuration but it has no frontage and the applicant is not claiming it has frontage; frontage requirement is a common purpose of zoning to provide adequate spacing of homes. Lot 74-A has no frontage on a City street and is arguable whether it has a legal right of way to a City street. Frontage

also is a requirement because of safety reasons and spacing of houses so you do not have congestion. Looking at the argument for the variance request, it is the Planning Departments opinion that they did not feel that it met the criteria for granting a variance and therefore based on the evidence they recommend that the variance not be granted.

John Levasseur asked if he felt a subdivision was an option for the applicant.

Steve Bird stated that a subdivision is an option that is available for this applicant and any other person whom owns land. He stated that what they are saying is that the merger clause has a purpose and a reason for being in the ordinance and they are against a variance in the merger clause. The applicant did not apply for a variance to the frontage requirement, which he could do in the future if he is not successful tonight. He could come in and seek a variance from the frontage requirement that is in the zoning ordinance.

Bill Colbath asked if Attorney Schulte knew how these two lots were created, because it appears that lot 74-A was carved off despite the fact the road was never built.

Attorney Schulte stated that it was carved off in 1949 and he is not sure if the idea at that time was that they would build a road and all of these lots were on a recorded plan. Lot 74-A was marked off separate because it was conveyed out of the developer into somebody else and that is when that was created. The point that Mr. Bird raises is that at some point subsequent to that when the merger clauses were adopted into the zoning ordinance because of the nonconformity of frontage lot 74-A was merged back in to lot 74. He stated that if the primary purpose of frontage is to ensure spacing, this would still accommodate this request, a house built on lot 74-A will still have adequate spacing from all of the other surroundings. It does meet all of the required setbacks and the variance that they are asking for does relate to frontage.

David Ruoff stated that in response to the letter that was read in to the record, he has not seen a listing saying that lot 74-A was listed in the Assessor's office at 0.05 (2,178 sq. ft.) with an assessed value of \$100.00.

Attorney Schulte stated that there was a period of time when that was true. He stated that he has no idea how that could have happened because there is nothing in the history that would suggest that small piece was correct. Mr. Santello got a deed and went to the Assessor's office to question how this property is being described and pointed out to them the dimensions of what it was based upon the plans and it was corrected at that time. He is now being taxed on a parcel that is .39 acres.

Bill Colbath asked what was corrected.

Attorney Schulte stated that the tax records did show that lot 74-A was only .05 acres on the written record. The tax card showed it was too small and the applicant stated that it was not correct, so they corrected it at that time.

Discussion ensued regarding Chapter 170-39.

Steve Bird stated that when that provision was adopted originally in 1979, the reason it says for the purpose of zoning, is because the City at that point did not go and identify every nonconforming lot and change the tax maps, because the task is overwhelming.

David Ruoff stated that the applicant has a parcel that may exist at the Registry of Deeds describing metes and bounds by looking at a couple of different deeds. For purposes of zoning, the Board has to look at it as its all lot 74 and decide whether he has shown a hardship to get back to where he was before the merger took place. In a sense, you would be entitling them to sell off that parcel of land and develop it as a separate lot of record.

Steve Bird stated that one way to look at it is that you would be turning back time so that the lots would exist before the merger clause was put in place.

Bill Colbath stated that the difference between the case on Dover Point Road and this one is that the parcel on Dover Point Road had a right of way listed to it. The lot was created and had a right of way at that point and time. He stated that he does not have a problem with this being two lots, the problem is that legally it was combined into one lot because of the nonconformity so to allow the applicant to build on two separate lots that exist is the wrong request. The request should have been to create two lots with neither of them having sufficient frontage or one having insufficient frontage. He stated that

David Ruoff stated that the problem is that the two lots already exist in reality at the Registry of Deeds, which is why they have a problem with the merger.

Bill Colbath stated that being two individual lots on the tax maps, he asked if someone could go buy that lot and have a reasonable expectation that they could use it.

David Ruoff stated that you could buy the lot and have a deed written for that, but this ordinance would prevent you from using it.

Bill Colbath stated that he does not feel that the request is the correct request that they should be acting on. If they were going to allow him to create that lot without frontage and utilizing another lot with minimal frontage, that would be a different request.

David Ruoff stated that the applicant is not asking to create a lot, he is asking the Board to waive this provision to turn back time to use the lot that exists.

Attorney Schulte stated that if these two lots were in separate ownership, each of them would be buildable. He stated that you could grant a variance saying that this lot is exempt from the merger provision in the ordinance.

Bill Colbath stated that they would also have two identifiable deeds, but they are on one deed and that is the problem. The request was not to exempt you from that rule taking place it is asking the right to build on nonconforming lots and he sees one lot at this point and time. If they were under separate ownership there would have been an implied right of passage. They are in single ownership and this is why they are having this discussion and asked what the hardship is that is being placed on this one that was not placed on every other land owner that had that condition.

Attorney Schulte stated that frontage is not a serious issue because if you have a lot without frontage in separate ownership the City would allow that to be built upon. The hardship results from the creation of the adoption of the merger provision in the ordinance.

David Ruoff stated that he understands the issues. How is this any different from any other lot that would have been merged that lacked frontage. There are dozens of these old recorded plats around that never took place from the 40's and 50's. He stated that if the Board granted this one they would have to grant others that have come before the Board and is approaching this from a policy prospective.

FIVE CRITERIA:

1. It is the Board's conclusion that if the applicant complies with the strict letter of the ordinance he/she does not face an unnecessary hardship. This conclusion is based on the following findings of fact: Other possible use and methods of use. The applicant has not proven a hardship that can relate to the lot other than a two lot plan that was effectively turned into a single lot due to lack of frontage.
2. It is the Board's conclusion that, if granted, the variance will not deliver substantial justice. This conclusion is based on the following findings of fact: If granted the property owner will be granted a greater right then similar properties in similar circumstances.
3. It is the Board's conclusion that, if granted, the variance will not be in harmony with the spirit and intent of the zoning ordinance. This conclusion is based on the following findings of fact: Because the merger provision was to reduce nonconforming lots and this application is in opposition to that premise.
4. It is the Board's conclusion that, if granted, the variance will result in diminution in value of surrounding properties. This conclusion is based on the following findings of fact: Abutters are opposed in letter provided and thus feel that this would be detrimental to them.
5. It is the Board's conclusion that, if granted, the variance will be contrary to the public or private interests or rights. This conclusion is based on the following findings of fact: Allow a nonconforming lot to be recreated and cause possible confusion on addressing and locations for all reasons.

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

- E. Z 04-14 Charlotte Wood, 256 Knox Marsh Rd., a/k/a Assessor's Map H, Lots 40-C & 40-C-1, zoned B-4, requests a variance from the terms of Article IV, Section 170-12, Table I, Part A, to construct a multi-family project.**

Pamela Young stated that she is Charlotte Wood's daughter and stated that her mother has since passed on. She stated that her mother bought the property in 1977 and it was zoned RM-20 and she would like to change the zoning back in order to build 36 residential units. She stated that this is a hardship case at this time and they do not have any hotel, motel, or service clubs that are interested in this property. She stated that the map that she submitted had some choices for development. She stated that they do have some wetlands in the front of the property and stated that there is more than enough room to put 36 units deeper in the property and keep the front as wooded as possible. She stated that a barn is located on the property that was built in 1840 and recommends that the new units would be kept as the same similar style, a rural rustic look.

Bill Colbath asked the applicant what the hardship was that goes along with asking the Board to go back to RM-20.

Pamela Young stated that this property is not sellable in a B-4 zone in that particular position. They have exhausted every possibility that they have to find someone that is interested in a B-4 zone. They

~~have apartments that are immediately next door and condominiums across the street and the size of~~ the lot is not a lot that is suitable for commercial development. It also has wetlands in the front of the lot that would require a substantial bridging over the wetlands in order to proceed to the property and that is not something commercial developers are not interested in. There is a sufficient amount of frontage for commercial development but everything else is lacking from what they are looking for. It is too far from the freeway to lease out as a motel or hotel space to a major developer or as a service club. She stated that the B-4 zoning as outclassed the property and most of the land has not been built on since the early 1800's. The property just sets there and creates a hardship for her mother's estate because it was her only asset, she was paying taxes of almost \$4000.00 a year for twenty-seven years just to keep it going, and she did not know how to request a variance.

David Ruoff confirmed with Pamela Young that she would like to have 36 units and would keep them clustered behind the barn structure. It would keep them out of the view of most of the traffic and they would be a rural rustic look with the barn theme.

Bill Colbath asked if she had any substantiation for a lack of sales.

Pamela Young stated that she does not have anything in writing but the real estate agent was present but it appears that he has left. She stated that her lot has been for sale with a Coldwell banker sign located on the property. Kane Company has property for lease up the road that has not been leased and another one up that is further up where Shaw's was going to build a supermarket and that is up for sale and has not moved for three years. It is causing a hardship, she is the only child of a mother that has lived 77 years in New Hampshire and needs to sell this property so she can move back to California.

David Ruoff asked if they had utilities out at that location.

Pamela Young stated that they do have utilities at the curb.

John Levasseur asked how long has the property been for sale.

Pamela Young stated that it has been for sale for several years.

David Ruoff confirmed that she is looking to build two family dwellings, possibly up to 36 units in a B-4 zone and is asking the Board's permission.

Pamela Young stated that what she is asking for is the zoning to be changed to RM-20.

David Ruoff stated that you cannot change the zoning but what the Board does do is grant you variances so that this piece could be carved out and waive the provision for this. He stated that the Board has tables that they look at and have to follow and the zoning code breaks it down to different dwelling units.

Pamela Young stated that it would be 18 duplexes, which would be 36 units.

David Ruoff asked Steve Bird what is the rationale behind allowing hotels and motels, schools or daycare in the B-4 zone but not allow residential family dwellings.

Steve Bird stated that the City went through an extensive rezoning effort to find areas of the community that would potentially benefit from a change in zoning. The City's inventory of acres zoned for business and industrial was not adequate to meet the projected demand in the future. All of the residentially zoned land was being developed as allowed by the zoning and the supply of commercial, industrial land was not adequate for the future. From a long term point of view the City did not want to be caught short by having all vacant land be developed residentially right now and not have inventory in the future. The idea is you need to balance your commercial development with your residential.

Pamela Young stated that she agrees with that to a point. The growth pattern is not going back towards Madbury the pattern is still going back towards the freeway and this property is at the Madbury line. She stated that they are building a strip center on the road up further with a Kane Company sign stating commercial space for lease and it will carry banks and dry cleaners.

Bill Colbath stated that there is a consistency of B-4 zoning going down the road.

Pamela Young stated that she does not think the assessment by the Planning Department is unjust. She stated that the only thing that she is asking for is the ability to build these units because her mother bought the property with the initial intention of doing so and she stated that she is trying to sell her mothers estate and her mothers request was to see that the apartment units were built on that land.

Bill Colbath stated that the Boards job is not to plan anything; they are here to grant relief where something has been done to one parcel unjustly.

Pamela Young stated that she believes that this qualifies.

Bill Colbath stated that she would have to prove that it qualifies. He stated that the Board needs to know how long has it been on the market, what it has been trying to sell for and some comparable sales. Even if the real estate agent were present, he would have to come up with more than just stating he has been trying to sell the property for a long time and has not sold it. He stated that he needs to see on paper an idea of value, how long it has been on the market, what comparable sales were. He stated that she would need some kind of substantiation.

Charlotte Woods grandson Ryan Lewis stated that no one has come forth that wants to buy this property.

Ruth Gorton stated that the applicant mentioned the wetlands and has recognized the fact that a buffer is required. She suggested that she should also show that on the plan.

Bill Colbath stated that it would have to be a well documented problem to be even considered by this Board, the idea of that it hasn't sold so you need it rezoned so you can sell it is not a valid argument.

Pamela Young stated that it was discussed with her that since it used to be zoned RM-20 and her mother was the original owner of the property that it would be relatively easy to take advantage of the RM-20 zoning by the "grandfather clause" in California.

~~Steve Bird stated that the only way a grandfather clause would have applied is up until January of 2003 this was zoned RM-20. If the owner had received approval from the Planning Board for some multi-family project but had not actually started construction, it would be an argument for grandfathering and she chose not to go forward with a residential project.~~

Pamela Young stated that she was 76 years old and she did not know how to go forward with a residential project and she did not have the money to do so. She stated that her mother did not explain what was going on to her.

Bill Colbath stated that she could have sold it up until January 2003. She had 27 years to sell the property and it was never acted upon at that time. The notice was given to everyone that was located in the zone and it is a long process.

Pamela Young stated that they were only off by 15 months and her mother was paying taxes for 27 years. They now have a B-4 zoned piece of property that is no longer developable.

Bill Colbath stated that if she is going to make the financial argument that it is no longer valuable you are going to have to prove it and it is her case to prove.

Ryan Lewis stated that it is not being sold for a financial cause; it has been put up for sale because his grandmother had heart failure and it was going to pay for her medical bills. She was not trying to sell it prior to the rezoning and stated that his grandmother said it was okay to sell off the land. He stated that he has people interested in the property to develop apartments on the property and would appreciate the variance to be granted to build the residences to make it easier to sell at this point while he is in town. He stated that he to have to come back in two years to prove a point that the commercial property could not sell should not be an actual reason, it was up for sale because his grandmother was dying.

Bill Colbath stated that the Board has criteria that need to be satisfied and they do grant relief and it would have to be proven that relief is required for some reason. He stated that he does not have enough reasons to adjust it. They would have to prove that they could not sell it as it is zoned.

Ruth Gorton stated that the Board does sympathize but the Board needs material that is more objective.

David Ruoff suggested that they accept the case, listen to an abutter who is present, and table it pending further information.

Motion: David Ruoff made the motion to accept. Ruth Gorton seconded the motion.
VOTE: U/A

Public Hearing Open

Patrick Cragin stated that he is curious about the land because two weeks ago, ninety-five percent of it was under water and it does that just about every year. He stated that he has known Charlotte Woods for approximately 30 years and when she bought it, she had a daycare center. She had never mentioned apartments to him. He stated that he would not have a problem with the apartments being

where the barn is but does not know what they are going to do with all of the water that fills up the land.

Public Hearing Closed

Motion: David Ruoff made the motion to table the item pending further information. Ruth Gorton seconded the motion. **VOTE: U/A**

Ruth Gorton stated that she would not be present at the meeting in May.

F. Z 04-15 Ray Martineau, Back River Rd., a/k/a Assessor's Map I, Lot 56, zoned R-12, requests a variance from the terms of Article IV, Section 170-12, Table I, Part E, to establish a congregate care facility.

This case was announced earlier in the evening that it would be tabled for the next meeting when a full Board is present.

MOTION TO ADJOURN

Ruth Gorton made the motion to adjourn at 10:15 and was seconded by John Levasseur.

VOTE: U/A

List of Members

Richard Callaghan-regular member
David Ruoff-regular member
William Colbath-regular member
Frank Landford-regular member
Ruth Gorton-regular member
John Levasseur-alternate member

Term Expires

04-13-06
07-18-04
10-23-06
04-10-05
11-12-06
11-12-06