

Dover Zoning Board of Adjustment

Thursday, October 21, 2004

MINUTES

Members Present: Richard Callaghan, Bill Colbath, Frank Landford, Ruth Gorton, John Levasseur, Masi Denison

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

ITEM # 1: CALL TO ORDER

Richard Callaghan brought the meeting to order at 7:10 p.m. and explained to the general public how the cases should be represented to the Zoning Board of Adjustment

ITEM # 2: APPROVAL OF MINUTES

A. Approval of the minutes for regular meeting of September 16, 2004.

Ruth Gorton stated that a correction had to be made on page 4 and 7.

Motion: Ruth Gorton made the motion to approve the minutes with the recommended corrections. John Levasseur seconded the motion. **VOTE: U/A**

Richard Callaghan asked Tom Clark if he received a response regarding appointing John Levasseur as regular member and Masi Denison as alternate member.

Masi Denison stated that she spoke with George Wattendorf and he stated to her that the issue of regular and alternate member had been settled and John Levasseur is in fact a regular member and Masi Denison is an alternate member.

Richard Callaghan confirmed with Tom Clark that he would contact George Wattendorf regarding the decision of regular and alternate member.

Masi Denison volunteered to be the alternate member for the meeting.

ITEM # 3: OLD BUSINESS

A. 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.

Tom Clark stated that he attempted to contact the representative for this case and is continually requesting that it be tabled. He stated that he tried to contact the representative to see if he would be willing to withdraw it as opposed to having an indefinite table and reapply when he has the information that the Board requested at the meeting of April 15, 2004. He has not heard from the representative and the option for the Board would be to either table again or continue the hearing based on the information

that was submitted. If the case is heard and denied, a new application and information would need to be submitted in order for it to be heard by the Board.

Motion: Bill Colbath made the motion to request that the applicant have his information at the next meeting or he can volunteer to withdraw. John Levasseur seconded the motion.

VOTE: U/A

B. Discussion and possible vote on proposed application changes.

Richard Callaghan announced that they would review the proposed application changes at the end of the meeting.

C. Z 04-26 Motiva Enterprises, LLC, (Applicant: Business Partners, Inc.), Old Rochester Rd., a/k/a Assessor's Map A, Lot 1-1, zoned B-3, requests a special exception as provided by the terms of Article VI, Section 170-19, and Article VII, Section 1709-52.C (3), to construct two multi-family dwellings (eleven units total).

Richard Callaghan announced that some information has developed since last month's meeting and feels it is important enough that it should be discussed at this meeting.

Bill Colbath submitted a letter that was sent to Steven Stancel, Planning Director, about the subdivision that took place after the special exception, (for the lot to be used as a gasoline station). He is asking why the project never came back to the Zoning Board for the special exception after it was subdivided into a smaller lot and substantially rearranged the site without coming before the Board again as a change. He confirmed with Chris Parker that this is a valid lot of record. He believes the Zoning Board should have reviewed it again because of these changes.

Tom Clark stated that subsequent to the Zoning Board's special exception, but prior to the Planning Board, the developer acquired an abutting parcel in Somersworth. He then did a lot line merger, demolished a single-family dwelling, added that lot to the front lot, and did some reconfiguration of the facility to make it a better site. The driveway on Route 108 moved further from Long Hill Road to make it a safer situation, the lot size was larger than the minimum requirement of 60,000 square feet, so the Department felt that it still meets the criteria of special exception. The Zoning Board does not review the technical merits of a case, it reviews the use, and as long as it met the conditions of special exception, the Department feels the use has not substantially changed. The plan has changed and as Chris Parker stated it was a procedural error and it probably should have gone back to the Zoning Board prior to getting approval by the Planning Board. Four years have transpired and the subdivision was part of that site plan approval. He stated that there is a statute of limitations and you have to appeal a decision within a reasonable time, not a reasonable time after you discover it.

Bill Colbath stated that the approved site plan has a phrase that the Zoning Board of Adjustment granted a special exception on this property and it was not the plan that was provided to the Board. Part of that presentation was to have a substantial distance and buffer of area so it would not affect residential property. The Board based their decision on a set of facts that suddenly changed after their decision was made and the Board was not consulted about it in any way.

Discussion ensued regarding the use of the property and concern with the abutters being notified of this change.

Tom Clark confirmed with Attorney Schulte that in the legal system, you would have to bring your claim for contract within so many days.

Attorney Schulte stated that if someone came forward now, in his opinion of any Court looking at that situation based upon the action of the Planning Board and the investment made by Motiva he does not see that any Court would allow a challenge with what happened four years ago. For the subdivision part, there is a statute of limitations because you have an appeal period and if you want to challenge that, you would have to challenge it within a reasonable time.

Discussion ensued regarding continuing the case.

Richard Callaghan asked if they should get a legal review.

Bill Colbath stated that they would not receive any different information than what Attorney Schulte stated and his judgment has always been fair.

Richard Callaghan asked if they should move forward on this case and asked for a vote.

Motion: Ruth Gorton made the motion to continue with the case. John Levasseur seconded the motion. **VOTE: 4 to 1 (Richard Callaghan opposed)**

Bill Colbath stated that he would be stepping down on this case, Masi Denison will be voting.

Kevin McEneaney represented the applicant and addressed the items that concerned the Board members at the last meeting. A letter was submitted from Pete Lavoie, Community Services Director confirming that there are adequate sewer and water facilities available at the site. Also submitted was a memo from Bruce Woodruff, City Planner, which states that there would be no impact on the intersections and the residential use would generate less than half the vehicle trips of the least severe of the commercial land uses shown. A new plan submitted shows a fence and or earth berm and vegetable screen between the car wash and the proposed building. They are looking to add whatever is appropriate to screen this area and that would be discussed at the Planning Board during site review. No commercial components will be added, it will strictly be eleven residential units. These units are intended to be condominiums and will be sold as individual units; the plan is to have eleven units, with seven, three bedroom units and four, two bedroom units.

Masi Denison asked if they addressed the concern with pedestrian traffic.

Kevin McEneaney stated that there are no sidewalks close to this area at all.

Chris Parker stated that there would be a sidewalk from Willand Pond Drive to Long Hill Road along New Rochester Road; it is part of a project for next year.

Discussion ensued regarding the right of way and square footage of the lot.

John Levasseur confirmed with Kevin McEneaney that they would be placing a solid fence for screening.

Motion: Frank Landford made the motion to approve the special exception. Ruth Gorton seconded the motion. **VOTE: 4 to 1 (Masi Denison opposed)**

Bill Colbath will be voting on the next case.

ITEM # 4: NEW BUSINESS

- A. **Z 04-28 Trela Associates, (Applicant: Gosport Properties, LLC), 10 Grove St., a/k/a Assessor's Map 31, Lot 15, zoned RM-8, requests a variance from the terms of 1) Article IV, Section 170-12, Table I, Part C-2 to establish an office use; and 2) Article XI, Section 170-45, H and I, to provide eleven (11) off street parking spaces, where a maximum of thirty-one (31) spaces may be required.**

Attorney Bruton represented the applicants who were present and stated that Kevin McEneaney was also present to answer questions if needed. A revised plan was submitted which highlights the ability to put two parking spaces on the property, the previous plan showed a lean-to area. This property is zoned RM-8 and is across the street from the B-2 zone, where this use is permitted and would not require any on-site parking. This building is a storage building and has never been used as a residential dwelling. The footprint of the building covers 70% of the property and is over 100 years in age. The intent by the applicant is to convert the building and to do substantial improvements to the structure and to the façade to create eight office suites within the entirety of the building. The use that they would utilize is commercial in nature, it is what the existing use has been for 100 years, and he proceeded to read the criteria submitted with the application. He stated that the application indicated that there were two parking spaces located on the property and that is the physical limitations of the property. It was also indicated to the Planning Department and in the application that they have the ability to lease up to eight parking spaces adjacent to this building.

Masi Denison confirmed with Attorney Bruton that the leased parking spaces were located across the street and the applicant has an agreement for the spaces.

Frank Landford confirmed with Attorney Bruton that a correction had to be made in the variance request for item number two, since they have only two parking spaces on the property and eight spaces that would be leased. He confirmed with Tom Clark that a sprinkler system may be mandatory and would be determined at some point.

Masi Denison confirmed with Attorney Bruton that they would be sold as separate units.

Attorney Bruton stated that if this was in the B-2 zone, it would be a permitted use, this is consistent with that zone, and this building has existed as various uses. It has never been residential.

Richard Callaghan asked what the length of the lease for the parking spaces would be.

Attorney Bruton stated that he spoke with the Planning Department about a commitment for five years, the Zoning Ordinance would require if you were to lease spaces for a special permit process that you would have and they were able to obtain that commitment.

Bill Colbath stated that they could place a condition that these leased spaces be provided forever.

Tom Clark stated this is residential and is across from commercial zoning district, which requires the spaces be on site or adjacent and the parking lot across the street would be appropriate.

Attorney Bruton stated that the requirement only requires a five-year lease and this is what they presented.

Bill Colbath stated that the units are forever and he would prefer that parking be provided for these units. This has been a storage building for many years and did not generate a lot of traffic.

Attorney Bruton stated that the City Ordinance requirement would be that it only is set up for five years and he does not have the ability to get parking beyond the five years. The site can only provide two spaces and they are just trying to bring more to the table. It is adjacent to the B-2 zone, which has no requirement for parking.

Tom Clark stated that if this building were across the street in a B-2 zone and the applicant was coming in for a change of use, parking requirements would not be binding on this building.

Richard Callaghan asked how this would affect the notice that was sent to the public. It is listed on the notice as providing eleven off street parking spaces and he has only two on site parking spaces.

Chris Parker stated that he is providing ten off street parking spaces, but only for five years, so this should change to two.

Richard Callaghan confirmed with Attorney Bruton that a condominium association would manage the units and asked if the association could be required to make an effort to provide a renewal of the parking spaces.

Attorney Bruton stated that it may create problems and you may be requiring them to do something in the future where those spaces may not be available, it might be a difficult restriction.

Motion: Bill Colbath made the motion to accept. Frank Landford seconded the motion. **VOTE: U/A**

Public Hearing Open

Sean Hussey abutter at 12-14 Grove Street, stated that he was concerned with the privacy of his tenant's units and what type of office use, would be located here. He is concerned with noise and the parking issue; they would diminish his ability to rent his units.

Tom Clark stated that even if they resolved the parking issues with the spaces that they are looking for there would be nothing that would prohibit any tenants or visitors of that building to use the on street parking.

Frank Landford confirmed with Sean Hussey that he has four units and has three parking spaces for his tenants located in the back.

Chris Parker stated that the Planning Department supports this request; it is a good use of the building. The concern would be the office uses; they would prefer no medical be permitted which would require an elevator and a lot of in and out high volume traffic. If this is approved you might make this a condition of approval. This is an upgrade to the building and if it had any affect to neighboring values, it would increase them.

Attorney Bruton stated that they would be happy to eliminate medical offices as an option. As far as noise concerning the abutter, he stated that they are looking to put in office space and most likely, the occupants would leave at five and go home. The only other alternative, which is permitted, is residential which is where people end up at night and would create more noise. This building is located in a zone that has many commercial uses adjacent to it.

Frank Landford stated that he feels it would be a better use than storage and if this were a residential building, they would have a bigger problem. He confirmed with Chris Parker that a City parking lot is located at the end of Third Street and Chestnut and is within 1,000 feet to this location and adjacent to this lot is the parking lot across from the Asia Restaurant.

John Levasseur stated that he does not think it is a good idea; it is not fair for the residents in the neighborhood to have to look for parking elsewhere. He stated that he is voting against this request.

Chris Parker stated that whatever use would be going in this building, parking would be a problem, it would be worse if this were a residential use because you would have to guarantee parking overnight and during snowstorms. Non-residential use is much more accommodating of the existing parking scenarios.

Discussion ensued regarding parking.

Richard Callaghan commented that he is going to suggest or look for the condition, that we approve this to provide two spaces and add the language that allows for the eight additional spaces based on the requirement for the five year permit and that the association has to actively pursue retaining that permit or renewing 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 (John Levasseur voted does not) face an unnecessary hardship. This conclusion is based on the following findings of fact: (1) Use – Parking, proximity to conforming zone, size/age of property location. Vote: 4 to 1 (2) Area – Building Use, allows reasonable use of the property. Vote: 4 to 1
2. It is the Board's conclusion that, if granted, the variance will (John Levasseur voted will not) deliver substantial justice. This conclusion is based on the following findings of fact: Allows building to be upgraded and continued. Vote: 4 to 1
3. It is the Board's conclusion that, if granted, the variance will (John Levasseur voted will not) 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 is not to limit or end use of old neighborhoods where previous zoning did apply. Vote: 4 to 1
4. It is the Board's conclusion that, if granted, the variance will not (John Levasseur voted will) result in diminution in value of surrounding properties. This conclusion is based on the following findings of fact: Improvements to the structure will have a positive effect. Vote: 4 to 1
5. It is the Board's conclusion that, if granted, the variance will not (John Levasseur and Richard Callaghan voted will) be contrary to the public or private interests or rights. This conclusion is based on the following findings of fact: There is a need for additional office space in the City. The use would be permitted if across the street. Vote: 3 to 2

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

1. ~~Ten off-site, off-street parking spaces shall be provided permanently, in addition to the two spaces on site.~~
2. No medical offices shall be allowed.

Motion: Bill Colbath made the motion to approve the conditions. Ruth Gorton seconded the motion.
VOTE: 3 to 2 (Richard Callaghan and Frank Landford opposed)

Attorney Bruton stated that his understanding was, when the Board made the findings of fact, they based the vote on a motion that was made earlier which requested no medical use and that there be eight spaces provided for at least five years and the association exercise good efforts to renew those spaces. He stated that the condition on the parking defeats the granting of this variance request.

Richard Callaghan stated that the applicant has the right to appeal.

B. Z 04-29 Linda Small, (Applicants: Robert and James Paolini), 19 Dover Point Rd., a/k/a Assessor's Map K, Lot 35, zoned R-12, requests a variance from the terms of Article V, Section 170-16, (Table of Dimensional Regulations), footnotes [5] and [16].

Attorney Schulte represented the applicants. This property currently contains a single-family residence on a parcel that is approximately 4.1 acres. It is zoned R-12, each lot is required to be 12,000 square feet and the applicants could have as many as fifteen units on this property. The Planning Board and the City Council considered whether this property and some adjacent properties would be re-zoned to a business use and with Planning Board recommendations, the City Council decided not to re-zone it. There was a lot of testimony at the public hearings on the attempt to re-zone it to commercial use and very strong preferences were expressed to retain the character of the neighborhood and to keep this property used for residential purposes. The new street would be fairly steep and the City would have to maintain it. Most of the trees on the lot would need to be removed, they would be single-family dwellings on full foundations with four bedrooms, two car garages, and the lots would be big enough to accommodate swimming pools, storage sheds, and may have fencing around each of the lots. Cluster development ordinances say that you can get at least as many houses with a cluster as you can with a standard subdivision and some additional density if you provide a certain amount of open space. The variance request is to allow the construction of fourteen units and to retain the existing dwelling. The conceptual design shows two townhouses together with the property line going between them, each townhouse would be on its own lot and the open land was pointed out on the plan submitted. Because of the crest of the hill, these new units would not be visible from Dover Point Road and most of the trees on the site would be protected. New townhouses would be built on a slab instead of full foundations so there would be minimal blasting and City water and sewer would service the site. The cluster concept is a significantly better design for this property because it screens it from the road and it preserves almost entirely the existing appearance of the property and the neighborhood. It would be possible to do an alternative cluster type development where you would have a dozen units instead of fourteen units, in order to make the project economically viable those units would be substantially bigger and the lot configuration would be different, it would have some greater impact on the trees that would need to be removed. The proposed townhouse condominium units would be similar to the ones located on Washington Street, Atlantic Avenue, and Back River Road. If the developer went with fewer units, you would have the same concept of duplexes divided by the property line. Each of these units, including the house would have two bedrooms. The total footprint of the fifteen buildings is 14,200 square feet; each of the town houses would have three parking spaces, one inside, and two outside. A condition of approval could be that there would be no swimming pools, no outside storage sheds, no

division fences. The Planning Board may require some fences for screening and landscaping, but you would not have division fences around each lot. These units would be more affordable units; they would have fewer bedrooms and less impact on the site and the neighborhood. Part of the hardship for the property is because of the particular topography, the land slopes up and levels out and they would be able to concentrate these new units on the back of the property where they are not visible and this proposal retains almost two acres of open space on the site.

Ruth Gorton confirmed with Attorney Schulte that the proposed design would take the steepness out of the street.

Frank Landford confirmed with Attorney Schulte that once the Planning Board and the Zoning Board approve the cluster subdivision, the open space becomes permanent.

Chris Parker confirmed with Attorney Schulte that the applicant is looking for approval of additional units.

Attorney Schulte stated that they are asking the ZBA to approve the number of units, they are looking for fifteen units, but could get at least eleven units with the density bonus. You could make it a condition if you grant the variance to allow more units to be added, only if the Planning Board agrees to accept this as a cluster development.

Motion: Bill Colbath made the motion to accept. John Levasseur seconded the motion. **VOTE: U/A**

Bill Colbath stated that the applicant is looking for the maximum number that the Planning Board will allow, plus three more units.

Attorney Schulte stated that the Planning Board would not look at a plan for fifteen units because their calculations would say that you are only allowed twelve, so unless they get relief from the Zoning Board they cannot present a plan to them for a preliminary hearing to allow a cluster development. He stated that they could do larger units, but it would move it closer to the street and it would somewhat reduce the open space that would require foundations.

Richard Callaghan confirmed with Attorney Schulte that they would not need approval from the Planning Board to build the ten single-family dwellings.

Public Hearing Open

Antonia Kretsepis, abutter at 15 Dover Point Road, stated that she is not in favor of this variance request and has lived here for 43 years. Allowing this project is not the expressed wishes of the neighborhood as the developer has stated. She stated that she is in favor of maybe three homes but there are trees in the back and provide a buffer. Allowing this proposed variance would reduce the values of the surrounding properties. They do not have City sewerage and no sidewalks are present. Many trees will be destroyed. This development would require maintenance and would have more lights, cars, dogs, noise, and children. She stated that the open space will be gone, and feels that her security would be in question.

Marilyn Follansbee, abutter at 25 Dover Point Road, stated that she and Toni Kretsepis fought hard to keep this area residential. They wanted it to remain the same and stated that she will fight against the ten single-family homes and does not want four houses next to hers. She stated that she does approve of

the cluster development over the single-family dwellings being built, but would like to see two units less than the proposed and likes the idea of the open land.

Robert Gaffney, abutter at 54 Dover Point Road, asked about being able to tie into the City sewerage if it was available.

Richard Callaghan read a letter that was submitted by Karl Heller, abutter at 10 Dover Point Road stating that he was not in favor of this variance request.

Attorney Schulte stated that this property will be developed residential and ten single-family dwellings would have a much greater impact on the site and the neighborhood and it does not need approval by the Zoning Board. They would be substantial size homes that would require substantial clearing.

Richard Callaghan confirmed with Chris Parker that Robert Gaffney might be able to tie into the sewer if it runs by his house.

Discussion ensued regarding natural vegetation and buffer.

Robert Paolini stated that he is one of the applicants, the setback requirement is 100 feet on the open space subdivision, and they would have nothing closer than 160 feet. If they were to revert to the larger duplex units, they would have to move them forward closer to the street. They would be much more visible from Dover Point Road. The plan presented is to keep everything as far back as possible and you may not see anything at all on this property.

Chris Parker stated that from a Planning perspective the cluster is better planning. It strives from where the Planning Department is trying to take this City as far as preservation of open space and this plan would be preferred. The Planning Department does not find a hardship with this plan because they have other alternatives. This plan would be more aesthetically pleasing and if any development takes place they would prefer the cluster subdivision, but the Department does not support this variance because there is no hardship.

Public hearing closed

Discussion ensued with the Board members and agreed that they did not see the hardship for this variance request.

Attorney Schulte stated that a hardship is the slope of the land and relocating the driveway would be safer for people going in and out of the development and the only way to relocate the driveway is to do a cluster development. If they can do the smaller units, they would not have to do the blasting of the ledge; the character of the land itself suggests that there is a hardship. In determining hardship, you are entitled to take into account economic determination and if they were to preserve the open space, they would need that many units in order to justify the development to protect the land. He asked if the City's position would be different if they were to reduce the units to fourteen.

Chris Parker stated that he did not think so, because the Planning Department does not see a hardship here, although the road makes more sense and you would not be able to see it from Dover Point Road.

Discussion ensued regarding economic hardship.

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: Multiple alternatives that are presented by applicant. Vote U/A
2. It is the Board's conclusion that, if granted, the variance will not (Frank Landford and Richard Callaghan voted will) deliver substantial justice. This conclusion is based on the following findings of fact: There is no injustice. Vote 3 to 2
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: Spirit and intent is to allow reasonable use of the land while controlling density. Vote U/A
4. It is the Board's conclusion that, if granted, the variance will (Frank Landford will not) result in diminution in value of surrounding properties. This conclusion is based on the following findings of fact: The approval of this variance will produce greater density than allowed and much greater density than properties in the proximity. Vote 4 to 1
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: This development will change the character of the neighborhood and will grant rights to the applicant, which are not granted to the general public. Vote U/A

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

Frank Landford left the meeting at 11:10 p.m.

B. Discussion and possible vote on proposed application changes.

Discussion ensued regarding the application changes and approving the new application.

Motion: Bill Colbath made the motion to accept. Ruth Gorton seconded the motion. **VOTE: U/A**

ITEM # 5: OTHER BOARD BUSINESS

Tom Clark announced that a workshop session is scheduled for the next meeting at 6:30 p.m. to discuss legal issues.

ITEM # 6: ADJOURNMENT

MOTION TO ADJOURN

Bill Colbath made the motion to adjourn at 11:20 p.m. and was seconded by Masi Denison. **VOTE: U/A**

List of Members

Term Expires

Richard Callaghan-regular member
 William Colbath-regular member
 Frank Landford-regular member
 Ruth Gorton-regular member
 John Levasseur-regular member
 Masi Denison-alternate member

04-13-06
 10-23-06
 04-10-05
 11-12-06
 11-12-06
 09-08-07