

**DOVER ZONING BOARD OF ADJUSTMENT
MINUTES OF PUBLIC HEARING
OCTOBER 17, 2002**

MEMBERS PRESENT: Dean Trefethen, Chairperson; Bill Colbath, Co-Chairperson; Richard Callaghan, David Ruoff, Frank Landford, Alternate; Art Corte, Alternate

MEMBERS ABSENT: Doug Cummings, Tom Dolbec, Alternate

STAFF PRESENT: Thomas Clark, Building Official; Christopher Parker, City Planner; Kate Pelletier, Recording Secretary.

Dean Trefethen explained how the Zoning Board of Adjustment meeting is run.

ITEM #1: NEW BUSINESS

A. Approval of minutes for regular meeting of September 19, 2002.

Rick Callaghan noted one correction to the minutes.

MOTION:

Bill Colbath made the motion to approve the minutes with one correction.
David Ruoff seconded the motion.

Vote U/A

B. Approval of minutes for special meeting of September 26, 2002.

Dean Trefethen noted one correction to the minutes.

David Ruoff noted one correction to the minutes.

MOTION:

Bill Colbath made the motion to approve the minutes with two corrections.
David Ruoff seconded the motion.

Vote U/A

ITEM #2: OLD BUSINESS

A. Z02-21 Kathleen L. White, 134 Court St, A/K/A Assessor's Map 21, Lot, zoned R-12 requests a variance from the terms of Article V, Section 170-16 to subdivide a parcel into three (3) lots, two (2) of which without frontage along a public right of way.

Dean Trefethen stated that the case had been tabled at the regular meeting of September 19, 2002

MOTION:

Dean Trefethen made a motion to untable the case.

Bill Colbath seconded the motion.

Vote U/A

Paul Connelly of Civilworks, 181 Watson Rd., represented the applicant. He stated that he did not have any new testimony or additional evidence to present to the Board.

Dean Trefethen stated that at the last meeting there was new information concerning the title searches and that all information was to be shared between the applicant and the abutters. He asked Paul Connelly if all pieces of information had been shared.

Paul Connelly stated that to the best of his knowledge, all information had been shared.

Attorney Donald Whittum, 40 Wakefield St., Rochester, represented the abutters. He stated that Attorney Harkinson had attended the last meeting for him. He stated that the abutters object to the granting of the variance because the White's do not qualify for one. He stated that granting the variance would not do substantial justice and that a number of people had applied to subdivide and build homes on private roads, however they were denied. He stated that granting the variance would also be contrary to public interest if services such as the Police Department, the Fire Department and Emergency Services were extended beyond a private way. He stated that the White's knew they wouldn't be able to subdivide their property when they purchased it and that they have sufficient land to construct their own road through that land. He stated that he did not believe the Board should grant the variance based on those reasons.

Dean Trefethen asked if the abutters and Attorney Whittum had seen the results of Attorney Schulte's title search and if they had, asked if they were in agreement.

Attorney Whittum stated that he had seen the letter and that the status of title of the road is murky.

Dean Trefethen asked if other attempts at subdividing the land on Mt. Pleasant took place prior to the new standards being set by the Supreme Court.

Attorney Whittum stated that the Supreme Court had watered down the requirements for meeting a hardship. He stated that if a person acquires a property knowing that they can't do something such as subdividing without relief, the Board and the Supreme Court would be harder on the applicant.

Bill Colbath stated that the crux of the abutters' argument was that they believed they had maxed out the number of houses that could be built on a private right of way. He asked who owned the right of way if the White's and the abutters do not.

Attorney Whittum stated that in the 1930's and 1940's road was referred to as a proposed way and at some point that changed to a right of way. He believed the road belonged to the abutters as they've maintained it for many years.

Bill Colbath wanted clarification on the ownership. He stated that someone had to own the land or it becomes public domain.

Attorney Whittum stated that someone would have to receive notice if the City was going to take the land but the City wouldn't know whom to notify.

Bill Colbath stated that he needed to know who owned the right of way.

Attorney Whittum stated that they knew that the City didn't own it because it was not a public road and that was all the Board needed to know.

Chris Parker stated that it was not a public right of way.

Dean Trefethen stated that through title searches, all of the property lines end and form the right of way.

Bill Colbath asked why one party has exclusive rights to use and control the right of way when none of the abutters own it.

Attorney Whittum stated that the issue was not ownership, but whether or not the right of way was a public way.

Bill Colbath asked how it was equitable for one party to obtain four subdivisions when the other party obtained none.

Attorney Whittum stated that what is done is done.

Bill Colbath stated that the Board's job is to decide what is equitable and fair to all parties.

Attorney Whittum stated that the two parties would have to go to court to determine ownership and that his clients would be willing to do so.

Dean Trefethen asked the Board if he should reopen the public hearing.

Chris Parker stated that there had already been two public hearings

Tom Clark stated that Mt. Pleasant was a proposed street at one point and if anyone wanted to claim ownership they would have to go through the process of adding it to their lot. He stated it was clear that the private road started at Court Street as it was shown on an older map running all the way over to Henry Law Avenue until it was abandoned when Mt. Pleasant Estates was built.

Frank Landford stated that both parties agree that Mt. Pleasant is a private way.

Attorney Dave Engel represented Mr. & Mrs. Davis of 136 Court St. He stated that he seconded Attorney Whittum's reasons why the variance should not be granted. He stated that a right of way could have been established too access the landlocked property in the rear. He stated that all parties involved agreed it was a private way and that there is nothing in the Zoning Ordinance allowing a private way as access to backland. He stated that the White's have sufficient frontage to establish a public way, therefore, there is no hardship to the land or the applicant, they simply do not want to spend the money to put in a road.

Steven White, 134 Court St., husband of the applicant, stated that he disagreed with Attorney Engel in not being able to use a private right of way to access land. In an ADS subdivision, the only way to access land is off a private right of way. He stated that the hardship in his case is unique in that they cannot keep their land as open space. He stated that he and his wife would limit what could be an eight-lot subdivision to three lots. He stated that his abutter on Tennyson Ave. did not have a problem with the proposal. He explained that he could go directly to the Planning Board and obtain an eight-lot subdivision. He stated that people who do not have a deeded right to pass over the land are holding them back. He explained that the abutters have used the right of way for thirty or more years and will continue to use it without objection, but the only person who had a deeded right to pass over it is Mrs. White. He stated that it felt as if the message being sent was to go ahead with the eight-lot subdivision rather than limiting the subdivision to two more lots, which would be in the best interest of Dover. Mr. White stated that they are willing to work with their neighbors, but they do not want to be forced to build an eight-lot subdivision.

Public hearing opened.

Bill Creighton, abutter, stated that the Mulligan family had been limited in their subdivisions and did not feel it was fair to grant the White's a subdivision after they had already been denied.

Colleen Dean, abutter, asked what the Board was here to decide. She wanted to know what the law was. She stated that when she wanted to subdivide her land, she was allowed to put her house in, but not allowed to subdivide her land. She stated that the White's did not have a hardship because they have access on Court St.

Chris Parker stated that the mother lot must have public frontage in an alternative design subdivision. He stated that in 1978 there was a subdivision and when the Mulligans tried

to come back in 1980 to subdivide again, the public frontage had already been passed, so he was denied. He stated that the same fact holds true in the White's case. He stated that the Planning Department was concerned that granting the variance would set a precedent.

Public hearing closed.

Dean Trefethen reminded the Board that the Planning Department did not support the variance request. He stated that Rick Callaghan, Art Corte, Frank Landford, Bill Colbath and Dean Trefethen would sit on the case.

Dean Trefethen stated that the issue was whether or not the way was private or public and to him, it was clearly a private right of way, though he did not know who owned it. He stated that there are different criteria today than there was twenty years ago and that the main issue now was an issue of hardship.

Frank Landford stated that he was not convinced of the hardship.

Art Corte agreed.

Rick Callaghan stated that the unclarity about who owns the property in some way causes a hardship. He stated that if the Board makes it's decision based solely on ownership of the property, the applicant could say that the hardship was inherent in the titles and deeds. He also stated that he was unsure if he'd feel comfortable putting in more houses on a road that was already too small. He stated that he might feel more comfortable if the road was upgraded to a City street or if it became a legitimate private road where the landowners come to some sort of agreement such as a road association where the road was maintained by the association.

Dean Trefethen stated that he had the same thoughts, however he felt uncomfortable doing that not knowing who owned the right of way.

Rick Callaghan stated that it could be beneficial to both parties.

Dean Trefethen asked who would pay for it.

Rick Callaghan stated that they would have to work that out themselves and that road associations are commonplace now.

Tom Clark stated that if the variance were granted, it would have to go to Planning Board anyway where there are minimum design standards even for private roads. He stated that he did not agree with the hardship in the deeds.

Dean Trefethen stated that the right of way is clearly not a public right of way.

Chris Parker stated that if it were a public right of way, the Whites' would not have been denied a variance in 1987.

Rick Callaghan stated that the right of way has gone unnoticed for a long time.

Chris Parker stated that he believed the Creightons had paved and maintained the road.

Rick Callaghan stated that they only did that in order to get in and out of their properties. He asked who was being taxed for the right of way.

Chris Parker stated that no one was. He stated that according to the Assessor's office, the lot lines should extend to the middle of the right of way so that all of the abutters own it.

Rick Callaghan stated that could be resolved in a civil case.

Dean Trefethen stated that the ownership of the right of way was really a civil matter. Since the City does not own the right of way, he did not want to put any conditions on granting the variance because the City does not own it.

Art Corte asked if Mr. White could update the road at his own expense.

Frank Landford stated that he did not think the road could be updated without the abutters' permission.

Dean Trefethen stated that he would not vote in favor of a variance that would be contingent on the neighbors working together. He stated that the fact that the Mulligans had maintained the right of way for all these years did not mean that they could claim ownership.

Frank Landford stated that he did not feel that there was a hardship in the case. He stated that the Mulligans had always maintained the road and that they had given the abutters with frontage on Court Street the right to use Mt. Pleasant.

Bill Colbath asked how if there was a hardship inherent in the rear lot when it was subdivided, how could the front lot not have the same hardship.

Chris Parker stated that when the four lots were created in the rear, there was no requirement for public frontage. He stated that if they were to propose the same subdivision today, they would have to seek approval from the Zoning Board.

Tom Clark stated that it was in May of 1979 that the public road frontage provision was put into place and that the other lots were created prior to that.

FIVE CRITERIA:

1. It is the Board's conclusion that, if the applicant complies with the strict letter of the ordinance she does not (Rick Callaghan vote does) face an unnecessary

hardship. There is no hardship because there are other alternatives to subdividing the land without needing relief from the ordinance.

2. It is the Board's conclusion that, if granted, the variance will not (Bill Colbath voted will) deliver substantial justice. The applicant would be getting greater rights than other abutters if the proposal were approved.
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. The proposal does not meet the requirements of the ordinance and there are alternative ways to provide proper access to additional lots.
4. It is the Board's conclusion that, if granted, the variance will not (Frank Landford and Dean Trefethen voted will) result in a diminution in value of surrounding properties. The proposal would not affect property values of abutters because the amount of open space would not be significantly changed.
5. It is the Board's conclusion that, if granted, the variance will (Bill Colbath voted will not) be contrary to the public or private interests or rights. The increased use of the right of way that this proposal would cause would create potential safety issues.

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

Dean Trefethen stated that David Ruoff had been called away from the meeting and that the Board had fallen below five members. He stated that the applicants would have the choice to continue with the remaining members of the Board or postpone until the next month's meeting.

ITEM #3

Z02-31 Larry & Bonnie Sanders, 23 Lisa Beth Circle, A/K/A Assessor's Map H, Lot 71, zoned R-20 requests a variance from the terms of Article V, Section 170-16 to construct a one-story side addition onto a single family dwelling within approximately thirteen (16) feet from a side property line where a minimum of twenty (20) feet is required.

Al Lofgren, Builder, represented the applicants. He stated that the applicants were proposing a one-story addition to the side of their house, the distance of which would be 16 feet from the side property line where a minimum of 20 feet is required. He stated that the distance between the proposed garage and the neighbor's garage is approximately 50 feet. He explained that the Sanders were long time residents of Dover, serving as a teacher and a doctor. He stated that the neighbors did not object to the proposal and that the Sanders would not object to a similar proposal from their neighbors. He asked that the Board consider the proposal and that the Sanders had been committed to Dover and had given a lot of their time to the community. He explained that the hardship in this case was that the Sanders wanted to continue living in Dover as they age. He explained that Mrs. Sanders had recently suffered a broken leg and had difficulty getting up to the

second floor and that they anticipate living on the first floor in the future and need more floor space on the first floor.

Art Corte asked if the Sanders had considered purchasing an elevator that runs up the side of the stairs.

Al Lofgren stated that was certainly an alternative, but that the homeowners did not want to do that. He explained that Mrs. Sanders suffers from winter blues and that she needed the sunlight that the addition would provide.

Bill Colbath asked why the homeowners could not expand in another direction.

Al Lofgren stated that the right side of the house is where the garage is and that they would have to go through the garage to get to the addition. He stated that there was an in-ground pool in the rear of the property preventing them from expanding there as well.

Dean Trefethen asked if the proposed addition would be bedroom and bathroom space.

Al Lofgren stated that the addition would be a sunroom in front and a master bedroom in the rear. He explained his method of doing renovations and what would be involved in renovating the Sanders' home.

MOTION:

Bill Colbath made the motion to accept the case.

Frank Landford seconded the motion.

Vote U/A

Public hearing opened.

None.

Public hearing closed.

Dean Trefethen asked for staff recommendations.

Chris Parker stated that the Planning Department did not support the variance request. He stated that there are other alternatives including building off of the back of the building or the garage, or constructing a 10' wide addition as opposed to a 14' wide addition to maintain the current setbacks. He stated that the majority of the lots in the subdivision are conforming.

Bill Colbath stated that he could see other places to build from with a lot of that size and be able to maintain the setbacks.

Rick Callaghan stated that he did not see a hardship in the case. He stated that the Sanders house was already close to their neighbor's house and the proposed addition would only be making it closer.

Art Corte agreed.

FIVE CRITERIA:

1. It is the Board's conclusion that, if the applicant complies with the strict letter of the zoning ordinance, they do not face an unnecessary hardship. There are alternatives to the proposal that would not require relief from the ordinance.
2. It is the Board's conclusion that, if granted, the variance will not deliver substantial justice. The proposal would grant greater benefits to the applicant than the abutters now have and the proposal would cause unnecessary density in the neighborhood.
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. There are alternatives that would not require relief from the ordinance.
4. It is the Board's conclusion that, if granted, the variance will (Dean Trefethen voted will not) result in a diminution in value of surrounding properties. The proposal would create unnecessary density due to the close proximity to the property line, which could cause some diminution to abutters.
5. It is the Board's conclusion that, if granted, the variance will be contrary to the public or private interests or rights. The proposal would grant greater rights to the applicant than enjoyed by abutters.

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

Dean Trefethen stated there was an appeal process and if the applicants were interested in learning more about that they could see Tom Clark.

ITEM #4:

Z02-32 Robert E. Lee, 10 Conifer Commons, A/K/A Assessor's Map E, Lot 19-1, zoned R-12 requests a variance from the terms of Article V, Section 170-16 to construct a front farmers porch addition onto a single family dwelling within approximately twenty-four (24) feet from a front property line as abuts a street where a minimum of thirty (30) feet is required.

Robert Lee stated that he was seeking a variance to construct a farmers porch. He explained that as his lot curves, the 30' setback still had to be maintained, thus the need for a variance.

Rick Callaghan asked if the applicant had considered a porch that didn't go all the way across the front of the house.

Robert Lee stated that he would still need a variance in that case.

Frank Landford asked what the width of the porch would be.

Robert Lee stated that the porch would be 8' in width and that there would also be stairs extending out beyond the porch. He asked if the stairs would also be encroaching in the setbacks.

Tom Clark explained that uncovered stairs could encroach 3' into the setback, but since the porch would already be encroaching, the stairs would need to be included in the variance request.

The Board discussed the setbacks.

The Board amended the plans to include the proposed stairs.

Chris Parker asked when the house was built and if the porch was envisioned at the time.

Mr. Lee stated the home was built in the spring and that at the time they couldn't afford the porch. He stated that had he realized at the time the home was being built, he would have moved it back further on the lot.

Art Corte stated that Mr. Lee's application stated that one of the reasons he wanted a farmers porch was to shield the house from the western sun, however, that could be easily achieved with awnings.

Mr. Lee stated that a porch would indeed shade the house from the sun and would also add aesthetic value to the home.

MOTION:

Bill Colbath made the motion to accept the case.

Frank Landford seconded the motion.

Vote U/A

Public hearing opened.

None.

Public hearing closed.

Dean Trefethen asked for staff recommendations.

Chris Parker stated that the Planning Department did not support the variance request. He explained that there were other alternatives such as awnings or relocating the porch to

a different location. He stated that the home could also have been built with the proper setbacks.

Rick Callaghan stated that Mr. Lee's house was one of the closest to the street in the neighborhood and that adding a porch would bring the house too close to the street and would not conform with the rest of the neighborhood. He stated that there were other alternatives to deal with shielding the home from sun including interior window blinds and window tinting.

FIVE CRITERIA:

1. It is the Board's conclusion that, if the applicant complies with the strict letter of the ordinance, he does not (Dean Trefethen voted does) face an unnecessary hardship. There are other alternatives that would not require relief therefore no hardship exists.
2. It is the Board's conclusion that, if granted, the variance will not (Dean Trefethen and Frank Landford voted will) deliver substantial justice. The proposal would grant greater rights to the applicant than the abutters.
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. The proposal would add greater density to a property, which is already near the minimum setback and is closer to the front than most other homes in the neighborhood.
4. It is the Board's conclusion that, if granted, the variance will (Dean Trefethen and Frank Landford voted will not) result in a diminution in value of surrounding properties. The proposal would increase the visual congestion of the neighborhood, which could be detrimental to abutters' values.
5. It is the Board's conclusion that, if granted, the variance will (Dean Trefethen voted will not) be contrary to the public or private interests or rights. The proposal would grant more rights to this property than enjoyed by abutters causing inequity in rights.

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

Dean Trefethen stated that there was an appeal process and if the applicant was interested in learning more about that to see Tom Clark.

ITEM #5:

Z02-33 Dover Central Realty Trust, D/B/A Sullivan Tire Co., 7 Central Ave., A/K/A Assessor's Map 16, lots 7 & 12, zoned Urban Multiple Use District (UMUD) requests a variance from 1.) Article X, Section 170-40B to relocate a non-conforming use; and 2.) Article XI, Section 170-46B to re-establish a loading bay within thirty-three (33) feet from the lot line of an abutting residential use where a minimum of one hundred (100) feet is required.

Attorney Malcolm McNeil represented the applicant. He stated that the property had been used for many years as a tire facility, which is a non-conforming use in the UMUD zone. He stated that the only dimensional type problems with the proposal would be relocating the loading dock, as the UMUD zone basically has no dimensional requirements. He stated that Sullivan Tire owned two lots, one of which the building currently sits on, the other a parking lot that also housed Roland's Sandwich Stand. He stated that the present building is 7,300sf and that the new building would be smaller 6,570sf. He explained that there was currently access to the building on Charles St. and Central Ave., and that there was very little green space or buffering on the properties. He stated that the new configuration of the building and lots would eliminate access off of Central Ave. leaving access that will be buffered, only on Charles St. He explained that there had been a change in the plan so that Roland's Sandwich Stand would be located inside the new Sullivan Tire building. He stated that a movement of the non-conforming use was being requested, just as it had in the Cochecho Country Club case. He stated that the alteration of the building was desirable and would decrease the impact in that area. He explained that the applicant was also seeking to relocate the loading dock and that the new loading dock would be further away from the abutting house and there would be buffering where there is none now. He stated that because of the improvements to the property, it would be unreasonable to strictly apply the ordinance in this case. He stated that the proposal would increase surrounding property values and would not be contrary to any public or private interests or rights.

Dana Lynch, Civilworks, 181 Watson Rd., stated that the new building would be placed approximately two feet away from the old building.

Frank Landford asked if that would allow for use of the old building while the new building was being constructed.

Dana Lynch stated that it would. He explained that the new building would be about 1' lower than the old. He explained the driveway and drainage. He stated that they would be doubling the amount of green space on the lot from 6,000sf to 13,000sf, which would all be landscaped.

Malcolm McNeil pointed out that the proposal would be reducing the non-conforming use by constructing a smaller building.

Frank Landford stated that he would like to see a sidewalk on the Central Ave. side of the building.

Dana Lynch stated that a sidewalk was in their plans.

Dean Trefethen asked if Roland's Sandwich Stand would be allowed a sign.

Tom Clark stated that he could have a sign as a separate tenant, either a wall or projecting sign.

Frank Landford stated that he was glad to see Sullivan Tire accommodating a small business.

MOTION:

Bill Colbath made the motion to accept the case.

Frank Landford seconded the motion.

Vote U/A

Dean Trefethen asked if the garage bays would be facing the Mill St. side.

Dana Lynch stated that they would.

Public hearing opened.

None.

Public hearing closed.

Dean Trefethen asked for staff recommendations.

Chris Parker stated that the Planning Department supported the request. He stated that the proposal closes off the Central Ave. access, decreases the non-conforming use, and is more pleasing to the neighborhood. He commented that the two lots would need to be merged.

Frank Landford stated that the proposal was certainly an improvement.

FIVE CRITERIA:

1. It is the Board's conclusion that, if the applicant complies with the strict letter of the zoning ordinance, he does face an unnecessary hardship. The proposal does not change the use of the property only it's location in the same zone on relatively the same parcel. Not allowing this would constitute a hardship.
2. It is the Board's conclusion that, if granted, the variance will deliver substantial justice. The proposal would allow a business to continue at essentially the same location while lessening its impact to abutters.
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. The proposal is the same use at the same location in a zone with very liberal uses allowed while decreasing impact on the neighborhood by increasing green space and decreasing driveway openings on two streets.
4. It is the Board's conclusion that, if granted, the variance will not result in a diminution in value of surrounding properties. The proposed improvements are not only aesthetically pleasing but the location of the building is further from other properties, which should help value of surrounding properties.

5. It is the Board's conclusion that, if granted, the variance will not be contrary to the public or private interests or rights. The proposal improves traffic and pedestrian safety issues and also increases green space.

MOTION:

Rick Callaghan made the motion to approve with one condition.

Bill Colbath seconded the motion.

Vote U/A

Therefore, based upon the foregoing, it is ordered that the application for the variance be granted with the condition that the two lots be combined into one lot.

MOTION:

Bill Colbath made the motion to adjourn.

Rick Callaghan seconded the motion.

Vote U/A