

**DOVER ZONING BOARD OF ADJUSTMENT
MINUTES OF MEETING
SEPTEMBER 21, 2000**

MEMBERS PRESENT: Dean Trefethen, Chairperson, Bill Colbath, Co-Chairperson, Rick Callaghan, Tom Dolbec, Doug Cummings, Bob Mullan and David Ruoff

STAFF PRESENT: Thomas Clark, Building Official and Steve Bird, City Planner

ITEM #1:

A. Approval of minutes for regular meeting of August 17, 2000

MOTION:

Bill Colbath made the motion to accept the minutes.

Bob Mullan seconded the motion.

U/A

ITEM #2:

Old Business

A. Consideration of a Motion for Rehearing request submitted by Donald & Eleanor Bryant and Bernard and Eleanor Duffy concerning Zoning Board of Adjustment case Z 00-20 regarding property owned by Motive Enterprises, 169 Silver St. A/K/A Assessor's Map 11, lot 4 zoned B-3/RM-10.

The Board members took a few minutes to read the information that was presented to them just prior to the meeting in regards to this case.

Dean Trefethen reminded the Board that in order for a request for a rehearing to be granted, the applicant needs to present new evidence, or that the Board feels an error had been made in the vote.

Dean Trefethen asked the Board members if anyone feels that an error was made in its decision last month and is there new information presented by the applicant?

Rick Callaghan feels that the topics are the same that had already be heard and talked about. However, he feels that there is substantially more information presented and feels that the Board should review the case. One answer he would like to get is in the expansion of the nonconforming use, and how by that greater land area that is being consumed in that nonconforming use, how that is being effected by the current zoning ordinance. He asked if the Building Official could give his opinion on that.

Dean Trefethen asked if that was specifically raised in the application?

Rick Callaghan stated that there is a comment in the application for the rehearing.

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David Ruoff stated that he also read that provision but did not see any new evidence that was not brought up and discussed at the last hearing.

Rick Callaghan agreed that it was discussed but his viewpoint is that it has become shaded because of the new presentation with new facts and details. He feels that there is substantial information that would justify at least a discussion of what was done.

Dean Trefethen advised the Board that it was the applicant's responsibility to include all necessary and pertinent information the first time.

Dean Trefethen asked for any other comments.

There were no other comments.

Rick Callaghan stated that it is not his intention to overturn the vote or that he has changed his opinion, but that he just wanted to be certain that the Board has given every opportunity to all of the concerns, for and against.

Bill Colbath does not feel that there is a lot more information in the request that warrants a rehearing.

MOTION:

David Ruoff made the motion to deny the request for a rehearing.

Bill Colbath seconded the motion.

Four in favor and 1 opposed (Rick Callaghan opposed)

ITEM #3:

Z 00-25 Rachhpal Singh, 110-112 Broadway, A/K/A Assessor's Map 27, Lot 185, zoned B-3, requests a variance from the terms of Article V, Section 170-17 to construct an accessory structure (detached garage) within two (2) feet of a side property line and within seven (7) feet of a rear property line, both where a minimum of ten (10) feet is required.

Rachhpal Singh stated that he and his neighbor had a combined garage and would now like to make two separate garages.

Dean Trefethen asked how far from the property line the applicant's neighbor is planning to place his garage?

Mr. Singh answered that his neighbor will build the same distance that he is and that they are using the same driveway and would like two separate driveways.

Tom Dolbec sat on this case.

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Rick Callaghan asked the applicant if he has any idea what size garage his neighbor will build?

Mr. Singh answered around sixteen by eighteen feet. The same size as his.

Bill Colbath asked what the size of the original garage was?

Mr. Singh answered that he was not sure of the exact size.

Dean Trefethen asked (1) if it was a one-car or a two-car garage, and (2) if there is any reason why he can't go further from the side property line?

Mr. Singh answered that (1) it was a one-car garage, and (2) that he has already poured the foundation. However, he will have his lot survey so that he will know exactly where the property line is.

Rick Callaghan feels that there is not enough information presented. No information on how big the foundation is, and how big the other structure will be and where it will be located.

Bill Colbath also questions the drawing that is presented. Feels that it is not clear enough.

Rick Callaghan would like to know where the side property line is. If this is to be granted the Board needs to be prepared to grant the neighbor the same.

Tom Dolbec is concerned with the cost of moving the foundation.

Bill Colbath stated that a plan should be presented showing measurements to scale so that it is known where the property line is.

MOTION:

Bob Mullan made the motion to accept the case

Rick Callaghan seconded the motion.

U/A

Dean Trefethen asked for staff recommendation.

Steve Bird stated that the Planning Department has a problem with the hardship. They feel that there are other places on the lot that the garage can go. Therefore they cannot support the variance request.

PUBLIC HEARING OPENED

No comment

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PUBLIC HEARING CLOSED

MOTION:

Bob Mullan made the motion to table the case until a certified plot plan is submitted to the Board.

Tom Dolbec seconded the motion.

U/A

ITEM #4:

Z 00-26 Downeast Energy, 63 Fourth St. A/K/A Assessor's Map 31, Lot 2, zoned RM-8 requests a variance from the terms of Article X, Section 170-40A & B to expand a non-conforming use (fuel storage facility).

Mark Theborge, General Manager for downeast Energy, stated that without the ability to install a storage tank they would have to travel back and forth to Maine. They will have a level of security to offer their customers should there be a shortage in propane. They have removed 4 storage tanks since 1991 and now they are asking to have 1 propane tank. NFPA requires that they locate propane tanks fifty feet from existing tanks. This requirement makes them consider the best location for the tank and that is outside the fenced area just above the river. He discussed this with Asst. Chief Clymer and Chief Bibber of the Fire Department and both agreed with them that the best location is where they propose to put it. Unfortunately this location expands their nonconforming use. They are here tonight to ask to have this variance granted to better serve their customers. Mark introduced Don Nickles who would explain the operations.

Don Nickles, Propane Operation Manager, gave a history of the company.

Doug Cummings sat on this case.

Bill Colbath asked (1) where the four tanks that were removed were located, and (2) what were their size?

Mark Theborge answered (1) that they were underground storage just outside the building that were dug up and removed. This was based on some testing which found that they were leaking in 1990-1991. (2) One tank was 4 thousand, one was 3 thousand, #2 fuel and a bigger tank, and another 10 thousand gallon tank.

Steve Bird asked (1) if they had looked at placing this tank within the fenced in area so that they would not have to expand the nonconformity, and (2) how much truck traffic would this generate in addition to what they have today?

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Don Nickles answered (1) no because NFPA has required setback where tanks have to be a certain footage away from buildings, and (2) right now they are running one propane delivery truck. It is parked at the office facility so they are not adding traffic. They are also running oil trucks out of there. There would be an occasional transport trailer that would be running in and out of there approximately once every two weeks.

MOTION:

Bill Colbath made the motion to accept the case.
Doug Cummings seconded the motion.
U/A

Dean Trefethen asked for staff recommendations.

Steve Bird stated that he did speak with Ron Clymer of the Fire Department to get his input on this. He has reviewed the plan and feels that the proposed location is a safe area and it would comply with NFPA standards. He suggested that, if the Board should grant this variance, to add a condition which stated that it would have to comply with the NFPA code 58. That is the code that states the setback requirements. The Planning Department also reviewed it to make sure that it wasn't within 100 feet from the river. The City has an ordinance that a structure has to be set back 100 feet. They also feel that this would be a small increase in the nonconformity and they would support this variance request with the Fire Department's condition. They also suggest another condition be added that the driveway entrance be repaved because it is in disrepair.

PUBLIC HEARING OPENED

John Kageliery, an abutter, stated that they have an approved plan to construct 20 apartment units on their site just east of this property. They do not at this point have any opposition to this request. However, they are concerned about the traffic and industrial activity in this area. They would like to have more information on the future plans for this site.

Mark Theborge and Don Nickles responded that they have no future plans other than general improvements.

PUBLIC HEARING CLOSED

FIVE CRITERIA:

1. It is the Board's conclusion that the applicant does face an unnecessary hardship. The fire safety code requirements mean the new tank needs to be outside of the current business area of the property, thus constituting a hardship on this property.

2. It is the Board's conclusion that the variance will deliver substantial justice. It allows a reasonable updating of the business needed by shifting customer needs.
3. It is the Board's conclusion that the variance will be in harmony with the spirit and intent of the zoning ordinance. The intent of the ordinance allows for continued use of a nonconforming operation. This updating and additional tank is within that goal.
4. It is the Board's conclusion that the variance will not result in a diminution in value of surrounding properties. The proposed location is such that no abutters will be adversely affected.
5. It is the Board's conclusion that the variance will not be contrary to the public interest. It allows the business to service a shifting customer base while satisfying safety requirements.

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

MOTION:

Bob Mullan made the motion for a condition that the driveway and entrance area be repaved. Bill Colbath seconded the motion.
U/A

ITEM #5:

Z 00-27 Guy & Patricia Philbrook, 30 Belanger Dr., A/K/A Assessor's Map L, Lot 45-6, zoned R-20 requests a variance from the terms of Article V, Section 170-16 to construct a partially enclosed front porch addition onto a single family dwelling with a front setback of approximately thirty (30) feet from a front property line as it abuts a street, where a minimum of thirty-five (35) feet is required.

David Ruoff sat on this case.

Richard Lak represented the applicant. He presented the Board with pictures of the house. Due to the sloping at the rear of the property, the addition could only be placed at the front. He reviewed the 5 criteria.

Patricia Philbrook stated that she had looked at the possibility of placing the addition on the back of the house however, the turnpike noise would be a negative to them. Also, the porch on the back is already 10-12 feet off the ground and she has an infant daughter and it is not safe for her to play. They had looked at the sides however, one side has the driveway and is impractical, and the other side is too close to the next house. The front provided a nice

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opportunity to have part of it closed in and part of it open to get away from the traffic noise and to provide a very safe play area.

MOTION:

Bill Colbath made the motion to accept the case.
David Ruoff seconded the motion.
U/A

Dean Trefethen asked for staff recommendation.

Steve Bird stated that the Planning Department can not support this variance request because this is a new subdivision and a new house. It was built with the setback and zoning in mind. This house lines up with all the other houses on the street and if this variance were granted the others would likely follow with similar requests. The turnpike was raised as a hardship and we feel that it was there when the houses were built and that is probably why the houses were built where they were. He feels that this is not seen as a hardship in this case. Based on this the Planning Department cannot support this variance request.

PUBLIC HEARING OPENED

No comments.

PUBLIC HEARING CLOSED

Dean Trefethen agrees with the Planning Department on the issue of the turnpike and that the Board would be setting a precedent.

FIVE CRITERIA:

1. It is the Board's conclusion that the applicant does not face an unnecessary hardship. This property allows expansion in other directions that would conform to setbacks.
2. It is the Board's conclusion that the variance will not deliver substantial justice. The proposal would grant the applicant more rights than abutters.
3. It is the Board's conclusion that the variance will not be in harmony with the spirit and intent of the zoning ordinance. The intent is to have substantial setbacks in this zone and this proposal would defeat that goal.
4. It is the Board's conclusion that the variance will not (Bill Colbath voted will) result in a diminution in value of surrounding properties. All of the abutters were in favor of the proposal, so they feel it would not affect them.

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5. It is the Board's conclusion that the variance will (Dean Trefethen voted will not) be contrary to the public interest. The proposal would contribute to congestion of the area.

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

Dean Trefethen informed the applicant that she has twenty days to appeal.

ITEM #6:

Z 00-28 Paul & Valerie Moreau, 12 Crestview Dr., A/K/A Assessor's Map D, Lot 22-6, zoned R-20, requests a variance from the terms of Article IX, Section 170-33 A to replace a stockade fence with a height of ten (10) feet where the maximum height is six (6) feet.

Valerie Moreau stated that they have a 25-year old fence and they will have to take it down to do some work on the property. Once the fence is taken down it will probably crumble and they would like to replace it in its present size. She presented pictures of the property and a letter from the abutter. She stated that the abutter's house sits quite higher than their house does and does not offer much privacy in their back yard.

Tom Dolbec sat on this case.

The Board and Tom Clark discussed replacing a nonconforming structure and the intent of replacing portions of a structure at a time.

Dean Trefethen asked the applicant if she plans to replace the fence with a similar one?

Valerie Moreau answered that it will be replaced with the same kind of fence and size.

MOTION:

Bill Colbath made the motion to accept the case.

Bob Mullan seconded the motion.

U/A

Dean Trefethen asked for staff recommendations.

Steve Bird stated that the Planning Department supports this request if replaced with the same kind. There is just a portion of the fence that is ten feet and because of the landscape this fence does not stand out.

PUBLIC HEARING OPENED

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Dean Trefethen read a letter from an abutter, Mrs. Philip Williams, that states she does not have a problem with the fence that is being proposed.

PUBLIC HEARING CLOSED

FIVE CRITERIA:

1. It is the Board's conclusion that the applicant does (Dean Trefethen voted does not) face an unnecessary hardship. The fence ordinance was enacted after the fence was originally erected, but the reasons for having a ten-foot high fence remain.
2. It is the board's conclusion that the variance will deliver substantial justice. It will allow the fence to remain in its current configuration and to fulfill its original intent.
3. It is the Board's conclusion that the variance will (Dean Trefethen voted will not) be in harmony with the spirit and intent of the zoning ordinance. The intent is to not have fences that unduly block sight lines and this proposal agrees with that concept.
4. It is the Board's conclusion that the variance will not result in a diminution in value of surrounding properties. The fence has been there for sometime with no effect on abutters.
5. It is the Board's conclusion that the variance will not be contrary to the public interest. The proposal has no effect on the public.

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

ITEM #7:

Z00-29 Douglas Dodd, 50 Fieldstone Dr., A/K/A Assessor's Map A, Lot 39-21 zoned R-40 requests an Equitable Waiver from Dimensional Requirements regarding article V, Section 170-16 to maintain a foundation for a single family dwelling with a front setback of approximately forty-three (43) feet from a front property line as it abuts the street where a minimum of fifty (50) feet is required.

Doug Cummings sat on this case.

Douglas Dodd stated that he has built a lot of houses in Dover and this is the first time that he has had to appear before the Board. He has been very careful with the setback and is well aware of the City's requirements. When the hole is dug for the foundation it is usually 2 or 3 feet bigger all around than what the foundation is intended to be. Then the foundation contractor cannot go much further within that hole than a couple of feet. In this case it was so low. The topsoil was stripped off and then it was staked out, first to the center of the road to the edge of the right-of-way and then the other fifty feet and then they stake out the house.

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Somehow during that week the stakes were either taken out or moved by children playing in the area. He heard from his foundation man that it was poured and he called for tarring and inspection and he also called the engineer to do the as-built. His engineer notified him of the problem and then he contacted Tom Clark. That is why he is before the Board now. He reviewed the criteria.

MOTION:

Doug Cummings made the motion to accept the case.
Bill Colbath seconded the motion.
U/A

Dean Trefethen asked for staff recommendation.

Steve Bird stated that the Planning Department supports the request for an Equitable Waiver. We are not aware of any evidence that contradicts the claim that this is an honest mistake.

Rick Callaghan asked if there will be a porch on the house?

Doug Dodd answered that the part of the foundation that sticks out furthest to the road is the garage. The house is set further back than that by about 5 or 6 feet and there will be a small porch on the front of the house, and he believes that it will not come out any further than the existing garage foundation.

PUBLIC HEARING OPENED

No comments.

PUBLIC HEARING CLOSED

FOUR CRITERIA

1. It is the Board's conclusion that the request does involve a dimensional requirement.
2. It is the Board's conclusion that the nonconformity was discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser, AND the violation was not an outcome of ignorance of the law or bad faith but resulted from a legitimate mistake.
3. It is the Board's conclusion that the nonconformity does not constitute a nuisance nor diminish the value or interfere with future uses of other property in the area.
4. It is the Board's conclusion that the cost of correction does outweigh any public benefit to be gained.

Therefore, based upon the foregoing, it is ordered that the application for Equitable Waiver of Dimensional Requirements be granted.

Bill Colbath stepped down from this case due to a conflict of interest. Tom Dolbec and David Ruoff sat on this case.

ITEM #8.

Z 00-30 Stasia Panopoulos, requests an Appeal From An Administrative Decision in connection with Article X, Section 170-40 as it relates to a property owned by Steve Whitcomb, 56 St. Thomas St., A/K/A Assessor's Map 9, Lot 18 zoned RM 10.

Atty. Jim Schulte represented Stasia Panopoulos. He gave an account of the property ownership and how it has been unused. Mrs. Panopoulos' tenants were parking in the right-of-way. However, during this past summer the new owner, Steve Whitcomb, asked several of the people to move their vehicles because he could not get in and out with his truck to the building. The building had been unused and because of the difficulty in parking, the tenants parked there. In June of this year the building had been removed and a Building Permit had been obtained for a new foundation on this property. Mr. Whitcomb had informed one of the tenants that he intends to use the building as a workshop and not as storage. A workshop is a commercial use and it is not a permitted use. So what is being addressed tonight is a nonconforming use of land. The ordinance states that if a nonconforming use of land ceases for a period of more than six consecutive months, than such use of the land will conform to the current regulations.

Dean Trefethen asked Tom Clark for clarification.

Tom Clark said that this property has a long history. There has been a safety concern in making the building secure. Mr. Whitcomb requested a determination on the current use and any proposed use. They had to address two issues. The nonconforming use and the nonconforming structure. The nonconforming structure was addressed by saying that if any building had been demolished, any new structure would have to conform to today's code. So that is not an issue. The issue is the nonconforming use. To clear up the question of the B-2 zone on the Building Permit Application, this is due to an erroneous zoning designation on the tax card. There is no question that this is a RM-10 zone. The application, completed by Mr. Whitcomb, does state the proposed use to be a storage building. So there is no question in his mind that the proposal is for a storage building. The next question is how long this building has been in use. In speaking with the former owners, Tom has not been able to establish a period of time that the building has not been in use. We know that it is a storage building and has been used as a storage building. Looking at the provision that allows for the continuation of a nonconforming use, provided it has not been discontinued for a set period of time, it is his determination that if you tear down a nonconforming structure, which would benefit the neighborhood and the City because it was in a state of disrepair and a fire hazard, the new building would enhance the neighborhood even though it is a nonconforming use. It would also decrease the overall size of the building. So based on the information he received from

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the former owners and the current owner that it had been used on a continuing basis, the permit had been issued just for the foundation knowing that Mrs. Panopoulos is an abutter, objects to the property. He advised Mr. Whitcomb to go this way and allow the appeal time to run its course before he made his decision on the balance of the building. There is no approval for anything beyond the foundation, but it has been approved with the intent that a storage building would be built on it.

MOTION:

David Ruoff made the motion to accept the case.
Rick Callaghan seconded the motion.
U/A

The Board members and Tom Clark discussed the definition of storage use and commercial use and the frequency use of the building.

Dean Trefethen asked for staff recommendation.

Steve Bird stated that the Planning Department supports the Building Inspector's decision.

PUBLIC HEARING OPENED

Steve Whitcomb stated that the building will be only for storage. They do not need an office or telephone. He presented two letters to the Board. One was from Paul Ayer stating that the building has been used for storage, and the second was from Kimberly Quint stating that she used the building for storage up until it was torn down.

Stasia Panopoulos stated that she had a store on Portland Ave. that she closed. After one year she was told by City hall that she had lost her grandfather clause. She couldn't even use it for storage. No one has been in this storage building for two years. She lost her grandfather clause and he can go ahead. She does not feel this is fair.

Jim Moore, 50 St. Thomas St., stated that he is against the building. He has not seen anyone there for the last two years. The telephone building is on the corner and there has been an increase in traffic and activity and causing more difficulty for residential parking.

Mary Lebreque of 10 Belknap St. stated that she is opposed to this building. She is concerned with the amount of trucks that will be going in and out and the safety of her small children.

PUBLIC HEARING CLOSED

Dean Trefethen clarified the legal right-of-way. The applicant has a legal right by deed to use the right-of-way regardless of when he last used it, and he has the right to ask that cars be moved. The right-of-way is not the issue. The use of the building is the issue before this Board.

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Bob Mullan asked who has the burden of proof as to the length of time that this building has not been used as storage?

David Ruoff stated that the burden of proof lies on the one appealing. It is storage regardless of how many times people go in and out. He does not see enough incontinuity to over-rule the Building Inspector's decision.

Rick Callaghan supports the Building Inspector's decision based on the information presented.

MOTION:

Rick Callaghan made the motion to uphold the Administrative Decision.
David Ruoff seconded the motion.
Three approved and two opposed (Tom Dolbec and Bob Mullan opposed)

MOTION:

Bob Mullan made the motion to adjourn.
David Ruoff seconded the motion.
U/A

List of members:

Term Expires

William Colbath – regular member	10/23/2000
Robert Mullan – regular member	12/31/2000
Dean Trefethen – regular member	12/31/2000
Thomas Dolbec – alternate member	12/15/2001
John Murphy – regular member	12/31/2001
Douglas Cummings II – alternate member	1/22/2002
David Ruoff – alternate member	4/13/2002
Richard Callaghan – regular member	4/13/2003