

**ZONING BOARD OF ADJUSTMENT**

**CITY OF DOVER, NEW HAMPSHIRE**

**JUNE 22, 1995**

**MEMBERS PRESENT:** Dean Trefethen, Chair, William Colbath, Vice Chair, David Paolini, John Murphy, Richard Callaghan, Robert Mullan

**STAFF PRESENT:** Thomas Clark, Building Inspector, Bruce Woodruff, City Planner, Jamie McCulloch, Secretary

**1. OLD BUSINESS**

A.) Approval of the May 18, 1995 minutes.

**Corrections:** John Murphy stated that on page 5, the second to last paragraph, the sentence states the word "made" and it should read "make". Page 11, bottom, where it said Mr. Callaghan sat "of", it should read "on". Page 11 near top, Criteria #1 the word "proposed" should be "proposal". Page 3, top, instead of reading repair to expansion it should read repair and expansion. Page 12, paragraph that begins with discussion, it should read as built plot plans were not available to identify the setback of the porch."

**Motion:** John Murphy made the motion to accept the minutes of the meeting with the corrections. Bill Colbath seconded the motion. The Vote was unanimous.

**2. NEW BUSINESS**

A.) Z 95-13, Daniel and Carol Hashem, 116 Broadway, a/k/a Assessor's Map 27, Lot 292, Zoned B-3 requests a variance from the terms of Article X, Section 170-40 A. and B. to expand/increase a non-conforming use (Auto Service) in a B-3 Zoning District. (This item was tabled at the meeting of May 18, 1995)

David Hashem, son of the applicant Daniel Hashem was present to speak on behalf of the case.

Dean Trefethen stated that the Board had referred the case to the Technical Review Committee to get their recommendations on the proposal. He also stated that the City is proposing to have some fencing along Broadway and Pearl Street with a couple of entrances to allow access to the structure you are proposing to take over, and also the adjoining structure. Bruce stated that the Technical Review Committee did address the fencing, privacy slats, screening, sidewalk & curbing to separate the business from the sidewalk. They also discussed the limitations of where cars may enter and exit by striping the spaces.

Dean Trefethen asked David Hashem if he was familiar with the plan and if he agreed with it. Mr. Hashem stated that he thought it was an excellent plan, because they have had problems with the people that leave their cars to have work done on them, and to stripe the spaces will keep all of the cars out of the way which will also offer another 10 spaces for parking. Mr. Hashem stated that along the rear property line, there is some privacy fence there, the applicant stated that there is a 6' chain link fence that has been out there for years. They are pricing around to find the privacy slats.

There was no one else present to speak in favor or against the case.

**Public Hearing Closed**

*John Murphy did not sit on initial hearing or 2nd mtg.*  
~~Richard Callaghan was not present at the last meeting so he stepped down from voting.~~  
*Richard Callaghan*

**Findings of Fact**

- 1.) It is the Board's CONCLUSION that, if the applicant complies with the strict letter of the ordinance, he/she does/does not face an unnecessary hardship. Vote=Unanimous

This CONCLUSION is based on the following FINDINGS OF FACT: The building is suited to the intended use and is not suited to usual B-3 uses. The location is also suitable to intended use and not others.

- 2.) It is the Board's CONCLUSION that, if granted, the variance (will/will not) deliver substantial justice. Vote=Unanimous

This CONCLUSION is based on the following FINDINGS OF FACT: Allows expansion of existing adjacent business into a structure well suited for the intended use.

- 3.) It is the Board's CONCLUSION that, if granted, the variance (will/will not) be in harmony with the spirit and intent of the zoning ordinance. Vote=Unanimous

This CONCLUSION is based on the following FINDINGS OF FACT: B-3 zone allows commercial use and this will be in harmony with that intent.

- 4.) It is the Board's CONCLUSION that, if granted, the variance (will/will not) result in a diminution in value of surrounding properties. Vote=Unanimous

This CONCLUSION is based on the following FINDINGS OF FACT: Proposed improvements will probably enhance values.

- 5.) It is the Board's CONCLUSION that, if granted, the variance (will/will not) be of benefit to the public interest. Vote=Unanimous

This CONCLUSION is based on the following FINDINGS OF FACT: Proposal will alleviate parking and traffic problems now occurring at or adjacent to property.

**Motion:** Bob Mullan made the motion to grant the variance, seconded by William Colbath.  
Vote=Unanimous

**Conditions:** Recommendations of the Technical Review Committee must be followed.

THEREFORE, based upon the foregoing, IT IS ORDERED that the application for the variance be (GRANTED/DENIED).

- B.) **\*Z 95-14, Clara Fisher, 89 Stark Avenue., a/k/a Assessor's Map 17, Lot 38, Zoned R-12, requests a variance from the terms of Article V, Section 170-16 (Table of Dimensional Regulations) for a minor subdivision creating three (3) lots, two (2) of which would have non-conforming frontage along a public right-of-way (one lot with approximately fifty (50) feet of frontage and one lot with no frontage where one hundred (100) feet of frontage is required per lot).**

Attorney Anthony Hartnett was present to represent the applicant on behalf of the case.

Anthony Hartnett distributed a summary of evidence to the Board members. He explained the background of the property, it has been in the Fisher family since 1958. The lot is a long narrow lot that fronts Stark Avenue about 112 feet and goes back approximately 700 feet to the right-of-way at the Spaulding Turnpike.

Mr. Hartnett stated the applicant's position, from a technical standpoint, was that (although it is subject to some interpretation) that there is frontage on the Spaulding Turnpike with respect to the proposed third lot. He also stated that the applicant owns a small cape that is in close proximity to Stark Avenue. Mr. Hartnett went through the 5 Criteria with the Board members.

1) **Hardship**

He went over some case law with the board giving some examples of hardship as stated in the handout submitted to the members. He stated that any disability suffered by an owner as a result of interference with the right to use property in a manner that she sees fit without commence public advantage is considered hardship. He added that the applicant has a cape on a narrow lot, that is about 7 times longer than it is wide and that the acreage is about 2 acres. Referencing the topography of the land, he stated that it has a unique characteristic, in addition to the long narrow configuration of the lot and the fact that there is an existing home on one extreme end of the lot you have the two access points on Stark and Keating Avenue. He lastly added that it is their position that because of those characteristics which are inherent with the land, that constitutes hardship.

2) **Substantial Justice**

He stated that this has been defined as any loss to the applicant which is not outweighed by a gain to the public. This is basically a R-12 Zone, with a purpose to encourage permitted uses in that zone which are single-family residences. There is no utility or public benefit to have all of this back acreage appended to the Cape on Stark Avenue. There are 2 lots to be designed and built with in accordance of all of the technical requirements of the Planning Department and the Engineering Dept., with exception to the frontage requirements. There would be a substantial loss to Mrs. Fisher if this was not granted because of the fact that she would have little utility over the back acreage.

3) **Spirit & Intent**

He stated that what is significant is the fact that in the subdivision regulations Chapter 155-48 is the driveway ordinance which fits very nicely with the facts of this case because you have Stark Avenue where it is and Keating Avenue and you have a long narrow lot, which is a perfect example where the variance would be appropriate to permit utilization of that section. Access would be controlled with a scope by this proposal because you have 100 feet fairly limited reach of driveway and it dead ends at the property that is intended to serve, also you have control over the design because of 155-48. In the past the Board, in similar situations, has granted relief for property owners that have had lots like this, as he has cited a number of cases in the memo to the members. In Appendix A of the memo, it shows other properties in the city that have either received a variance for similar situations, or particular situations down on Dover Point Road that are sandwiched between Dover Point Road and the Piscataqua river.

4) **Diminution of Value**

He stated that according to an opinion from a Mr. Greg Koutrelakos, who has reviewed the plan, that the plan would not adversely affect the abutting property values. The main concerns to the abutters is that the area is very nicely wooded and a private area. He stated that when you are in a residential zone that is unrealistic to presuppose that the property is incapable of some development and it is simply going to remain in a wild state definitely into the future. He would submit that as long as a development is reasonable and controlled perhaps with some conditions, that would be the preferable approach for their concerns. These will be large lots, the front lot with the cape on it will have three quarters of an acre and would be squared off to be consistent with the lot to the south of it in terms of the back boundary line, and the middle lot would consist of almost .6 acres and the back lot against the Spaulding Turnpike would be a little under 1/2 acre. The driveway will be constructed and built, and the homes should be fairly good quality homes in the vicinity of 125,000 to 150,000 for the lot and the home and you have a limitation on traffic. There will not be through traffic or people turning around, and there could be a sign stating that the driveway is not a through street.

5) **Public Interest**

He stated that we are talking about a moderate use of the property with only 2 additional lots. Hayes Lane should not be adversely affected by this, because the traffic will bypass the road, and Central, Stark, Renaud and Birchwood should not see a substantial increase in traffic any more than people already use those roads as a shortcut between Stark Avenue and the lower part of Central Avenue. There would be an increase in tax revenues, and if families move the area and get jobs and shop in the area, there will be an increase in consumer spending. For all of the reasons stated, the applicant feels that all of the 5 elements have been satisfied and proven.

Dave Paolini questioned Tom Clark on the fact that the existing house is sitting awfully close to the lot line and he was not sure if you could subdivide on a piece of property with a non-conforming house. Tom Clark stated that as long as there is no increase to the existing non-conformity than that is not a consideration. Dave Paolini asked Mr. Hartnett what the reasons were for going with a private road versus a city road. Along Keating Avenue there is 50 feet of frontage, which would be sufficient for a city road. Mr. Hartnett explained that it would involve petitioning the city and the planning board to extend the road, and deed right-of-ways and easements, and it seems that there would be no other purpose other than the technicality of qualifying for the frontage requirements. Paolini stated that when people come before the board it is usually because they have a hardship that they cannot put a legal road in because they have a 30 foot right-of-way, and he added that as hardship goes, they can legally subdivide the property with a city road.

Hartnett said that he disagreed because he felt the situation should be taken into consideration as it exists, and as it exists now, the middle lot would not have any frontage on either Keating, Stark or the Spaulding Turnpike. Paolini stated when the board is looking for a hardship, it is usually because the applicant cannot do anything else with the land, and the applicant has had good use of this land. He also added that the applicant can put a city road into the property and have adequate frontage for both the lots. Hartnett stated that perhaps a city road would not be accepted or approved, and Paolini stated he felt that it would be approved based on the fact that if the applicant met the criteria, ~~that evening~~ instead of having 30 feet for a proposed ~~ROW~~, you would have a 50 foot proposed row. Hartnett stated that would require Mrs. Fisher to deed the property to the city, and for the city to accept the property, and there is the issue of the construction of the normal utilities, with bonding requirements, a question of whether it would have to <sup>have</sup> asphalt and the curbing, and all the requirements.

Attorney Robert Fisher, son of the applicant was present to give some feed back to the Board members. He stated that he wished to keep the entire project as simple as possible, with as little impact as possible. Also, he indicated on the site visit that the neighbors are concerned that the driveway is going to be going by their back yards, and he stated that the applicant is willing to provide a buffer zone to protect the rear of their lots. He also added that there was some question whether or not they actually had to be before the Board on that evening. When he read the statute, he had a feeling that he did not need any approval for the driveway, and the Planning Board stated to them that they needed to go before the ZBA. He also stated that they have no desire to put in a city road.

Dean Trefethan asked Mr. Hartnett <sup>how</sup> ~~who~~ they were proposing to extend Keating Avenue to the proposed private Road. Hartnett stated that would have to be a cooperative effort between the owner, the City and the developers in terms of what the City wanted the development to entail. Robert Fisher stated that they would be willing to do the construction work from the corner of Hayes Lane into the property, so long as that satisfies the City. Dean asked who will actually own the part of the property that is going to be the proposed private road. Hartnett stated that would be handled as a deeded right-of-way. The proposed lot 38A could own the fee interest of the land under the driveway and then an easement granted for 38B.

John Murphy stated that Hartnett has clearly indicated that he feels he does not need a variance for the back lot, and he felt that should be addressed before going any further in the discussion. Bruce Woodruff stated that technically, when you read the language in the ordinance it talks about frontage, meaning frontage on a public highway. The Spaulding Turnpike, ~~may~~ be considered a public right-of-way, but the city has never construed land abutting <sup>it</sup> as frontage and that is mainly because you have no access to the turnpike. Technically you can say it is frontage because it meets the definition in the ordinance as a public right of way, but I cannot find any instance when the city has construed that as frontage.

John Murphy questioned what exactly the applicant was applying for, and whether or not it was possible to receive a list of similar situations that were denied. Bruce Woodruff stated that Steve Stancel and Thomas Clark have determined that the applicant's request for the building of lots with no frontage would require two variances for the two lots.

**Motion:** Dave Paolini made the motion to accept the case, it was seconded by <sup>Bob</sup>Bill Callan. The vote was Unanimous.

### Public Hearing Opened

The following persons were present to speak against the case.

Martin Smith, 2 Hayes Lane, he went through the five criteria with the Board, stating that the hardship goes with the land, and it is present when the owner is prevented from using the land. The substantial Justice to be served is again, the economic problem with the owner not being able to develop the land or being able to make a return on their investment is not a criteria to be met by a variance. The spirit and intent of the zoning ordinance is to prevent overcrowding and development on lots that are substandard and that do not have frontage on a public or acceptable right-of-way. There will be a diminishing of Value ~~will be~~ due to the impact on the overcrowding and traffic, which will depend on the development of the property. The public interest is in the conformance with the zoning ordinance as they are, and it will be a cost to the city for street construction and sewer construction. Denial of the variance is the fact that the case cannot meet the five criteria and it cannot meet the hardship criteria.

Dennis Chalifour, 5 Hayes Lane, stated that there is a water runoff, and the area of the land that will have to be filled in to make the access to the property is the drainage or runoff from Hayes Lane to Keating and part of Renaud Avenue, so that would be another consideration when you talk about filling in that area at the bottom of Hayes Lane.

Ray Guillemette, 7 Hayes Lane, stated that he has lived at the property for 30 years, and that the building on the property would diminish surrounding values, and that the gravel road, or private road, because of the topography of the land would be hard for the abutters to take. He would like to see the city require the applicant put the road in, and as far as the economical environmental access to the Spaulding with the water runoff in the area, he would want written statements that this would not affect the turnpike's property.

Dan Hurley, 1 Keating Avenue, stated that he had a concern with the increase in traffic because he has two children. Also, he stated that he was concerned with the types of homes that would be built on the property, due to the possibility of a decrease in the value of his home.

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Judith Chalifour, 5 Hayes Lane, stated that she was concerned that when they extend Keating Avenue, they would be cutting down a lot of trees, and then you would be able to see the highway which will increase the noise and also decrease property values.

Robert Fisher stated that if the abutters wanted to avoid the matchbox type development, that they should realize that in order to avoid that possibility, they should let the plan before the board go through.

Dave Paolini stated that the abutters have to understand that the applicant can put a legal road on the property, with probably more than 2 two houses, possibly up to 4 houses.

No one else was present to speak in favor or against the case.

#### Public Hearing Closed

Dean Trefethen stated that he agreed with Dave Paolini on the fact that the abutters need to recognize that this is not the only alternative, and that there are other alternatives which would have a much greater impact. He also added that there could <sup>be</sup> future traffic problems in the area from houses that may be built.

William Colbath stated that he could not find a hardship with the case. He added that he could support a lot on the property with 50 feet frontage but he couldn't see putting in the center lot. Dave Paolini stated that he did not see himself finding a hardship with this 3 lot subdivision.

John Murphy questioned if the variance was denied and they wanted to put in a city street, where would it be. Dave Paolini stated that it would be where it is right now, except it would extend back 20 feet. John Murphy stated that he did not see a hardship relative to this case. He also added that there is nothing precluding the applicants ~~for~~ <sup>from</sup> putting a city street in, which is adequate use of the land.

Dean Trefethen stated that the intent of the city 45 years ago was to make access to the property, and that he could possibly see hardship for a 2 lot subdivision, but he does not see any justification for a 3 lot subdivision.

**Findings of Fact**

- 1.) It is the Board's CONCLUSION that, if the applicant complies with the strict letter of the ordinance, he/she **does/does not** face an unnecessary hardship. Vote 4-1. Robert Callan was opposed.

This CONCLUSION is based on the following FINDINGS OF FACT: A second legal lot could be created by extending the city right-of-way.

- 2.) It is the Board's CONCLUSION that, if granted, the variance (**will/will not**) deliver substantial justice. Vote 4-1. Robert Callan was opposed.

This CONCLUSION is based on the following FINDINGS OF FACT: There is potential for adequate use so no injustice exists.

- 3.) It is the Board's CONCLUSION that, if granted, the variance (**will/will not**) be in harmony with the spirit and intent of the zoning ordinance. Vote 4-1. Robert Callan was opposed.

This CONCLUSION is based on the following FINDINGS OF FACT: The intent of the ordinance is to create lots with property frontage.

- 4.) It is the Board's CONCLUSION that, if granted, the variance (**will/will not**) result in a diminution in value of surrounding properties. Vote 3-2. William Colbath & Dean Trefethen were opposed.

This CONCLUSION is based on the following FINDINGS OF FACT: It could become a developed area with ~~a~~ right-of-way extension so house lots could go there anyway.

- 5.) It is the Board's CONCLUSION that, if granted, the variance (**will/will not**) be of benefit to the public interest. Vote 3-2. William Colbath & Dean Trefethen were opposed.

This CONCLUSION is based on the following FINDINGS OF FACT: Proposal would be an attempt to limit potential development in the area.

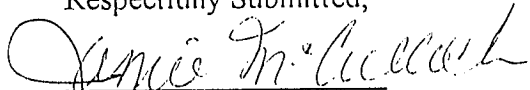
**Motion:** William Colbath made the motion to deny the variance, seconded by John Murphy. Vote 4-1. Robert Callan was opposed.

THEREFORE, based upon the foregoing, IT IS ORDERED that the application for the variance be (**GRANTED/DENIED**).

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Dave Paolini made the motion to adjourn at 9:50 P.M. seconded by John Murphy.  
Vote passed 5-0.

Respectfully Submitted,

  
Jamie McCulloch  
Jamie McCulloch