



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT - AGENDA

Meeting Type: Regular Meeting
Meeting Location: Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date: **Thursday, July 21, 2011**
Meeting Time: **7:00 pm**

1. ATTENDANCE

2. APPROVAL OF PRIOR MINUTES OF JUNE 16, 2011.

3. OLD BUSINESS

4. NEW BUSINESS

- A. * Z 11-14 Richard Callaghan, 26 Horne Street, Tax Map 35, Lot 18, zoned R-12, owner Richard Callaghan, 32 Horne Street, appeals an administrative decision by the Zoning Administrator in a Notice of Zoning Violation letter to the applicant dated May 2, 2011 that the use on the property is a rooming house which is not allowed by right in the R-12 zone.

- B. * Z 11-15 Janice L. Greene, 90 Glenwood Avenue, Tax Map E, Lot 19E, zoned R-12, owner, Janice L. Greene, 90 Glenwood Avenue, requests a variance from the terms of Article IV, Section 170-12 B & the R-12 district Table of Uses and Dimensional Regulations, Side Setback for principal buildings, to construct an attached garage and porch with a side setback of ten (10) feet, where fifteen (15) feet is required.

5. OTHER BOARD BUSINESS

- A. Vote on revised Operating Rules.

6. ADJOURN

*If the application is accepted for discussion, the **public hearing** will be held that evening.

Persons with questions or wishing to see the plans are invited to visit the Planning Office, Monday-Thursday from 8:30 am to 5:30 pm. You may also view materials at www.dover.nh.gov, a map showing project locations can be found at www.dover.nh.gov/planhome.html. Follow us on Twitter @DoverNHPlanning and find us on Facebook at www.facebook.com/pages/Dover-NH/City-of-Dover-NH-Planning/446789895351



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1. ATTENDANCE

Members Present: Sam Reid (Chair), William Colbath (Vice Chair), Jim Kelley, Otis Perry, Frank Landford, Joshua Cote (Alternate)

Members Not Present: Jennifer Stone (Alternate), Chris Prior

Staff Present: Bruce Woodruff (Zoning Administrator), Michele Alexander (Recording Secretary)

Chair called the meeting to order at 7:04 p.m.

2. APPROVAL OF PRIOR MINUTES OF MAY 19, 2011.

W.Colbath and J.Kelley abstained as they were not present at the meeting.

Motion: O.Perry made the motion to approve the minutes as written. J.Cote seconded. Vote: (3-0) U/A

3. OLD BUSINESS

None

4. NEW BUSINESS

- A. * Z 11-12 Marcia Wentworth Revocable Trust, owner, 6 Brick Road, Tax Map 28, Lot 9-C, zoned Office, (applicant Changing Places, LLC) requests a variance from the terms of Article IV, Section 170-11 D, 170-12 A & the O Zone Table of Uses, footnote 5, to construct 24 - 2 bedroom apartments in 4 - three story buildings on one lot, where a maximum of four apartments are allowed.

Chair announced that the public notice did not indicate Marcia Wentworth Revocable Trust as owner, and that the owner/applicant had the choice to continue or table to the next meeting for corrected notice.

J.Schulte, attorney, representing the applicant said applicant would move forward tonight. He presented the proposed plan to the Board. He indicated the existing multi-family units in the surrounding neighborhood and pointed out the height of existing 3-4 story buildings. He discussed that the proposed project would entail widening of the entrance way to the lot by exchanging land with an abutter, and in addition an easement will be granted which will create a buffer from the project will be granted to the abutter approximately 20 feet in width. He noted that it would be possible to create a City street and sub-divide the property into six buildings with four units each. He explained the proposed development would be more compact and efficient, with four buildings with six units in each. He discussed that there were only a handful of single-family homes along Central Avenue, with mostly commercial and multi-family existing. He explained the proposed development was in the spirit of the zoning ordinance, would have less impact than other allowable use options, is in keeping with the character of the neighborhood, and that the land has little commercial potential therefore creating hardship as currently zoned.

J.Kelly asked for clarification on the site plan. J.Schulte clarified the multi-family homes were the striped areas indicated and explained the character of the buildings surrounding the project.



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Public hearing opened

Gregory Heal, 4 Floral Avenue, explained that he lived in the neighborhood and that he saw a sign posted about this meeting and a neighbor informed him about the proposed project. He said he was not notified as an abutter. He expressed concern about traffic on Brick Road, that the road is narrow, and would be difficult for passage for emergency vehicles. He is also concerned about water run-off, and he is concerned about impact on property values. He explained that neighborhood is quiet, with existing apartments facing away from his neighborhood, and with very little foot traffic currently. He has concerns about safety with increased population.

Chair explained that since he was not a direct abutter, he would not have received formal notice.

Valerie Ester, of 2 Floral Avenue, is concerned about light and noise, affecting the neighborhood and the natural environment. She hopes this will be taken into consideration by the Board.

Bruce Bellanger, an owner of an apartment building on Brick Road, is concerned about traffic and the impact on congestion and asked if a traffic study had been done. He asked for clarification on the proposed development because he had been late to this meeting. Chair reiterated statements made by Attorney Schulte and answered a question regarding a lot on the site plan with non-conforming frontage.

Morgan Brown, 12 Brick Road, is a home owner on the hill. She is concerned about lighting and the natural environment. She had a question about the density, and is concerned about impacts. She had a question about the proposed use in comparison to the allowed use if the property were subdivided.

F.Landford asked M.Brown if she lived in a single family home. She replied yes.

_____ 4 Brick Road, is concerned about traffic in the neighborhood. Parking is full at existing apartments he noted and there are noise impacts from the existing apartments.

J.Kelly asked the Zoning Administrator if apartment owners are responsible for adequate parking.

B.Woodruff noted that apartment buildings that pre-date current zoning regulations are unenforceable for current parking regulations provisions for on-site parking.

J.Schulte spoke, and he said adequate parking will be provided for the project. He explained the definition of multi-family, and reasons for the limit of 24 units for this lot size. If the variance was not granted the applicant would seek to subdivide creating the same density over a larger area of the land. Drainage is being provided according to the site regulations. He discussed screening would be maintained between abutting properties.

Chair asked J.Schulte to address light and noise. J.Schulte replied that regulations for downcast lighting will be adhered to. He explained that they hope to rent to a high-quality level of tenant, including employees of Wentworth Douglas.

B.Woodruff provided staff comments:



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B.Woodruff noted the traffic study would be considered at the time of Planning Board site review, and was not the purview of this decision. Lighting concerns would be addressed through City standards.

B.Woodruff explained the applicant's property has a conservation district in the form of steep slopes. These steep slopes are currently mostly wooded on the lot with the exception of a single family structure and driveway/yard area. The lot has a nonconforming frontage of 33 ft. It was created after a frontage variance was granted in 1984 (no conditions). The original lot had hundreds of feet of frontage on Ascension Ave. (Abbey Sawyer Lane). The lot contains 118,100 sq. ft. area or 2.711 acres. The lot contains sufficient total area to support what would be required to be six separate lots with city frontage, each with four units on the lot. This would require construction of a city street and there is currently not enough frontage (50 ft.) on Brick Road to do so.

The requested action may not be technically consistent with the Master Plan which guides development in the City of Dover; however the large area of the lot in the zone where the minimum size is 10,000 sq. ft., coupled with the very small frontage (created by variance with no conditions), and the average lot size in the neighborhood is significantly smaller and the greater depth of the O zone here makes this lot unique.

The Planning Department recommends the Zoning Board hold the public hearing, and approve the variance with the condition that both fencing and vegetal screening be required for the development (not just the parking areas) on the property boundaries that abut single family residential uses at Planning Board site review application time.

Public hearing closed.

J.Kelley spoke. He stated he respected the developer's proposal but questioned the Planning recommendations. B.Woodruff explained that impact to land would be lessened by this proposal. J.Kelley commented this then was the lesser of evils. B.Woodruff stated less impact.

J.Kelley asked when Brick Road would be improved. B.Woodruff stated off-site impacts would be addressed at the time of site plan review. J.Kelley asked about budget impacts and how they would affect Brick Road improvements. S.Reid clarified that the developer may bear some of the cost of improvements.

W.Colbath asked staff to clarify what 1984 variance request was for. B.Woodruff clarified it was a variance for road frontage.

W.Colbath asked for clarification on minimum lot size and asked staff if six lots were possible. B.Woodruff clarified the applicant's engineer would need to address this question. W.Colbath and O.Perry discussed approving a lesser number of units.

Motion: O.Perry made the motion to approve the variance with a maximum number of units of 12.
J.Kelley seconded. Vote: U/A

O.Perry added that staff conditions for vegetation and screening be included in the motion. J.Kelley stated he was concerned about erosion, and impact. S.Reid stated that an office could be there which could have equal or greater impact. O.Perry noted clustering the lot is good conservation practice, he also pointed out



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the single-family homes and multi-family homes in the neighborhood had commercial property in the area and doesn't feel 12 units would have detrimental impact for the neighborhood.

Chair re-opened the public hearing.

Attorney Schulte discussed a preceding case in which the Supreme Court ruled that the ZBA does not have the right to re-design a development by only approving a lesser number of units than requested in the application. B.Schulte also explained that B.Stowell has designed a plan for 5 lots with four units on each with a City Street, and could with a private street create 6 lots. He presented this concept plan.

Chair asked is there was any rebuttal from the public.

Valerie Ester spoke again about quality of life and land, and expressed concern about beauty and neighborhood character changing.

W.Colbath asked for clarification about lot sizes.

B.Stowell of Tri-Tech answered that the lots on the conceptual are all over 20,000 square feet. W.Colbath asked for clarification on the math of the conceptual. B.Stowell explained this was developed as a conceptual in accordance with subdivision regulations and the lots designed to meet the regulations. J.Kelley asked if the conceptual would have more impact than the proposed. B.Stowell answered the proposed had the least impact.

Public Hearing closed.

Motion: O.Perry moved to withdraw the motion. J.Kelley withdrew his.

S.Reid noted that the applicant would like to build the development which would have less impact. B.Woodruff said he came to the same conclusions of less impact with this proposal.

O.Perry noted he agrees with staff and agrees the proposed has less impact, more buffer space with the proposal, and thinks the proposed is a better plan and is keeping with modern planning practice of cluster developments. J.Cote stated he thinks that the cluster development is best use of land, but is concerned about 24 units maximum. O.Perry stated increased density is often granted for developments with less impact. S.Reid stated proposal has less impact than the conceptual presented. F.Landford stated minimum lots sizes should be larger in the City zoning ordinances, and that the public would have a chance to speak at the Planning Board meetings.

W.Colbath made a motion to deny the application. No one seconded. Motion died for lack of second.

Motion: O.Perry made a motion to approve subject to staff conditions. F.Landford seconded. Vote: (4-1) approved.

- B. * Z 11-13 Marcia Wentworth Revocable Trust, owner, 6 Brick Road, Tax Map 28, Lot 9-C, zoned Office, (applicant Changing Places, LLC) requests a variance from the terms of Article IV, Section 170-11 D, 170-12 A & the O Zone Table of Uses, footnote 5, to have residential apartments occupy



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the first floor in the four newly constructed three story buildings, where residential is allowed only on the second story or higher of newly constructed buildings.

J.Schulte, attorney for the applicant spoke. He explained the request was to build buildings with least impact, and to keep the height of the buildings lower. He explained lots on side-streets do not have offices typically and the neighborhood is primarily multi-family with little commercial in the area back from Central Avenue.

J.Kelley asked what is the incentive for underground construction. J.Schulte said lower cost, and accessibility for the tenants. He explained another reason was to keep the building low and keep the view-line.

Public hearing opened

There were no other comments from the public.

Chair requested staff comments.

B.Woodruff stated staff supported the application as a reasonable use.

Public hearing closed.

Motion: J.Kelley moved to approve the variance. O.Perry seconded Vote: (4-1)

F.Landford advised the public they could appeal the decision.

5. OTHER BOARD BUSINESS

A. Discussion on proposed Operating Rules Revisions.

B.Woodruff explained the process of developing the revisions, and noted sections of that draft that had been changed.

O.Perry asked for clarification on changes in relation to current operating procedures. B.Woodruff clarified.

Motion: F.Landford moved to approve the rules and adopt the rules at the next meeting. O.Perry seconded. Vote: U/A

6. ADJOURN

Motion: O.Perry made the motion to adjourn at 8:35 pm. J.Kelly seconded. Vote: U/A

SPECIAL EXCEPTION REQUIREMENTS

1. Explain how the requested use would be essential or desirable to the public convenience or welfare.

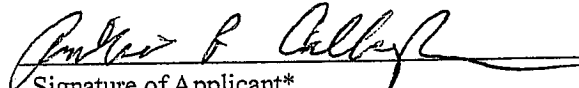
2. Detail how the requested use would not create undue traffic congestion or unduly impair pedestrian safety.


3. Describe how the requested use would not overload any public water, drainage or sewerage system or any other municipal system to such an extent that the requested use or any developed use in the immediate area or in any other area of the City will be unduly subjected to hazards affecting health, safety or the general welfare.

THIS SECTION OF THE APPLICATION MUST BE COMPLETED BY ALL APPLICANTS

IV. As applicant of standing of this request, I certify that the information herein is complete and accurate.

IMPORTANT
PROPERTY IDENTIFICATION SIGN
MUST BE POSTED ON THE PROPERTY
FOR THE 5 DAYS PRIOR TO HEARING.
FAILURE TO POST MAY RESULT IN
APPLICATION NOT BEING ACCEPTED


Signature of Applicant*


Signature of Owner*

*Both Signatures Required

The applicant waives the requirement of holding a hearing within thirty (30) days of receipt of the application, pursuant to RSA 676:7, II:

Signature of Applicant

Date

**APPEAL TO AN ADMINISTRATIVE DECISION
CALLAGHAN V. DOVER ZONING ADMINISTRATOR**

SUMMARY OF APPEAL

The Dover Zoning Administrator (DZA) issued a written directive (Attachment 1) dated May 2, 2011 to Charlene and Richard Callaghan (Appellant) stating the "*dwelling structure*" at 26 Horne Street was being used as a "*rooming house*" since there were individual leases per occupant, and, to be compliant with zoning, there must be only "*one rental agreement per unit*" (Ref. Attachment 1: Lines 12,14, 25-26)

The Appellant will argue and demonstrate to the Zoning Board of Adjustment (ZBA) that the written directive from the Dover Zoning Administrator (DZA) is a combination of errors in the application and interpretation of the Dover Zoning Ordinance (DZO), as follows. The written directive:

1. is not supported or authorized by Dover Zoning Ordinance (DZO); and
2. does not reflect any reasonable interpretation of the code; and
3. does not have sufficient substantive evidence to support the directive given, and therefore, is an ultra vires action and cannot be enforced.

BUILDING DESCRIPTION

The BUILDING and land at 26 Horne Street was purchased by the Appellant in July 1976 comprising two DWELLING UNITS (A & B), Unit A was the primary home for the Appellant and Unit B was rented to others. In July 1983 Appellant moved to another location and rented out both DWELLING UNITS. The USE did not change from when the Appellant purchased the property to present.

In DWELLING UNIT A, four (4) individuals rent/share six (6) ROOMs, four (4) of which are ROOMs for sleeping purposes.

In DWELLING UNIT B, two (2) individuals rent/share four (4) ROOMs, two (2) of which are ROOMs for sleeping purposes.

Included are a kitchen/eating area for each DWELLING UNIT, plus basement personal storage.

The tenants are given exclusive rights to one room (bedroom) via their lease, which also commits them to sharing the DWELLING UNIT with each other.

Under the terms of the six (6) leases, which now exist, the Tenants are equally accountable for, but not limited to, per DWELLING UNIT, obtaining and paying for utility services, housekeeping, safety and health standards, and maintaining a peaceful and desirable living environment, yet independently responsible for a proportioned payment of rent.

The leases are typically one (1) year (August to August).

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ARGUMENTS

- I. **The Appellant argues that the findings and directives of the DZA are not enforceable as written because they are not supported by the current DZO.**

[1 - APPLICABILITY] The Appellant argues that the DZA cannot enforce the current DZO against 26 HORNE because the current DZO is not applicable to 26 HORNE and the DZO prior to 1987 must be applied as the basis for enforcement.

[1A] The Appellant argues that the USE of the BUILDING at 26 Horne Street (26 HORNE) is "grandfathered" and therefore the DZA cannot enforce the current DZO.

DZO 170-5 Applicability. [Amended 6-10-87 by Ord. No. 13-87] states *"This chapter shall not apply to existing BUILDINGS or STRUCTURES, nor to the existing USE of any BUILDING or STRUCTURE or of land to the extent to which it is used at the time of enactment of this chapter."*

(Hereafter referred to as "grandfathered under the APPLICABILITY clause".)

The DZO APPLICABILITY definition complies with, and is reinforced by New Hampshire Statute under NH RSA 674:19 Applicability of Zoning Ordinance, which states

"A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration." Source.1983, 447:1, eff. Jan. 1, 1984.

The Appellant proposes that the language from both the DZO and the RSA which states that a zoning ordinance *"[...] shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration[.]"* is clear and definitive. Therefore, any deviation from that language is arbitrary and cannot be enforced.

The Appellant offers that the current USE of 26 HORNE has not changed since the enactment of the 1987 amendments to the DZO.

Therefore, the Appellant argues that the current DZO cannot be applied to 26 HORNE, and, consequently, the DZA cannot find that the USE of 26 HORNE is a ROOMING HOUSE under the current DZO.

The Appellant requests that the ZBA agree that the USE of 26 HORNE cannot be deemed a ROOMING HOUSE under the current DZO, as it is grandfathered under the APPLICABILITY clause in the 1987 amendments.

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Further, the Appellant reserves the right to further appeal an unfavorable finding by the ZBA based on the constitutionality of a change of USE imposed by the DZA and/or ZBA decision.

[1B] The Appellant further argues that, with respect to the compliance of the property prior to 1987, the burden of proof has shifted to the enforcement official because the Dover Planning Director has failed to provide the Appellant with the relevant code, as requested. (Ref. Attachment 2: Notes 1, 3, 5)

In *Bio Energy LLC v. Town of Hopkinton*, 153 N.H. 145, 155 (2006), the Court stated that “[t]he burden of establishing that the use in question is fundamentally the same use [as the ‘grandfathered’ use] and not a new and impermissible one is on the party asserting it.”

The Appellant offers the APPLICABILITY clause as written in the current DZO, and as presented in the above section. The Appellant further offers that the current USE of 26 HORNE has not changed since the enactment of the 1987 amendments.

The Appellant offers that, via email correspondence with the the Dover Planning Director in response to an inquiry on applicability of the DZO, the Appellant received the following excerpted response:

“Regarding the grandfathering, I still feel that the clause only apply [sic] if you can show an approval from prior to 1948, when the code was adopted, showing the rooming house use. Knowing that there was no PB [Planning Board] at that time, and limited staff functions prior to the 60s, I would be willing to discuss with Woody applying the clause if you can provide an approval prior to 1987, the last amendment.” (Ref. Attachment 2: Note 2)

The Appellant proposes that the Dover Planning Director’s email is indicative of an assumption that 26 HORNE was not in compliance prior to the enactment of the 1987 amendments without any substantive evidence to support that assumption. The Appellant has attempted to obtain the requisite information to prove compliance prior to 1987, but has yet to receive the requested applicable code (that prior to the 1987 amendments) from the Dover Planning Director as promised. (Ref. Attachment 2: Notes 1, 3-5)

According to NH RSA, a ZBA decision must be “prima facia” lawful and reasonable. Further, ZBA decisions may only be set aside or vacated by the court for an error of law or if the decision was found to be unreasonable. (Ref. NH RSA 677:6, below.)

NH RSA 677:6 Burden of Proof “In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be “prima facia” lawful and reasonable. The order or decision appealed from shall not be

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set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable."

This is further supported by the zoning case *Biggs v. Town of Sandwich*, 124 N.H. at 426, 470 A.2d at 931, where the court states, "[o]n appeal, we will not decide whether we agree with the findings below, but whether there was evidence upon which they could be reasonably based".

The Appellant argues that the burden of proof must now be on the enforcer of the code who suggests that the USE of 26 HORNE prior to the 1987 amendments was a ROOMING HOUSE and not in compliance at that time, as the DZA and the Dover Planning Director suggest is the case now. To ask the Appellant to provide documentation of compliance prior to 1987 is unreasonable. To the best of the Appellant's knowledge, no such instance occurred which would challenge the compliance of the property and therefore the Appellant has no knowledge of any documentation of compliance or non-compliance of the property. If such documentation exists, the City should have records of prior zoning decisions and or zoning regulations, which should be made available to the Appellant.

The Appellant suggests that the ZBA should consider that the Appellant has made attempts to meet its burden of proof, but has been prevented from doing so by the Dover Planning Director. Thus, as the NH Energy and Planning Handbook on Zoning Adjustment, October 2010 (NHOEP Handbook) provides, the ZBA's inquiry into the issue of compliance prior to 1987 should support the Appellants proposition that the burden of proof has shifted. (Ref. NHOEP Handbook, below.)

NHOEP Handbook: *"During the testimony, the board may, and should, ask questions. Although the burden of proof is technically on the person making the appeal, the board should determine to its satisfaction whether or not the case is sufficiently stated. In the questioning, care should be taken to avoid the appearance of trying to build a case for or against the petitioner."* The decision of the ZBA should be built on a solid basis for the Court may overturn their decision in *Simplex*, 145 N.H. at 729. *It [the court] "may set aside a ZBA decision if it finds by the balance of probabilities, based on the evidence before [it], that the ZBA's decision was unreasonable."*

The Appellant argues that without any evidence to deny grandfathering from the DZO, the denial is arbitrary. The Appellant suggests that the ZBA request substantiated evidence from the DZA that demonstrates the 26 HORNE was in non-compliance under any previous applicable zoning code.

The Appellant requests that the ZBA agree that the burden of proof with respect to the compliance of 26 HORNE prior to 1987 has shifted to the enforcing authority because it's unreasonable to expect the Appellant to have knowledge of compliance without having access to the necessary relevant code.

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[2 - DWELLING STRUCTURE] The Appellant argues that the term “dwelling structure”, as used by the DZA in his letter, does not apply to 26 HORNE. (Ref. Attachment 1: Line 12)

The DZA's written directive states “*You indicated to me that you were renting rooms by individual, [...] in the **dwelling structure** [...].*” (emphasis added) (Ref. Attachment 1: Lines 9-12.)

The Appellant offers that the term “*dwelling structure*” is only used in the Dover Housing Standards definition of Mobile Home Parks:

126-1 Definitions “*MOBILE HOME - A transportable, single- family, one- level **dwelling structure** built on a chassis of which wheels are an intrinsic part and are designed to remain so, [...].*” (emphasis added)

The Appellant further offers that (1) 26 HORNE is not a MOBILE HOME and that (2) the DZA determination based on this term of art is inapplicable and unenforceable as it is not defined in the DZO.

The Appellant requests that the ZBA agree that the term “dwelling structure” and its related requirements do not apply to 26 HORNE and, consequently, cannot be enforced by the DZA.

[3 - ROOMING HOUSE] The Appellant argues that the DZA's finding that 26 HORNE is a ROOMING HOUSE is incorrect and should be reversed because the physical attributes of the property do not meet the definition of a ROOMING HOUSE under the DZO.

The DZA's written directive states “*I (DZA) stated at our meeting that your arrangement [of 6 Leases] met the definition of [ROOMING HOUSE] in the Dover Zoning Ordinance....*,” (Ref. Attachment 1: Lines 14-15)

The following definitions are excerpted from the current DZO:

DZO 170-6 Definitions. *ROOMING HOUSE means any BUILDING in which not more than five (5) ROOMs are rented to not more than ten (10) persons, said ROOMs being for a sleeping purpose for compensation.*

DZO 170-6 Definitions. *ROOM means an unsubdivided portion of the interior of a DWELLING UNIT, excluding bathrooms, closets, hallways and service porches.*

DZO 170-6 Definitions. “*BUILDING means any STRUCTURE built for the support, shelter or enclosure of persons, animals, chattels or property of any kind and which is constructed and permanently affixed on the land. Such "BUILDING" includes open porches, open breezeways and any roofed areas. This in no way is to be construed to*

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include a trailer, mobile home or any other like product..." [Amended 6-10-87 by Ord. No. 13-87]

DZO 170-6 Definitions. *STRUCTURE means a framework of support.*

[3A] The Appellant argues that the BUILDING at 26 HORNE does not meet the definition of ROOMING HOUSE because it contains more than the five (5) ROOMS, "*said ROOMS being for sleeping purposes for compensation,*" permitted under the definition. (Ref. Definition of ROOMING HOUSE, above.)

The Appellant offers that 26 HORNE contains ten (10) rooms plus bathrooms, porches, basement, hallways, etc., of which six (6) ROOMS are used for sleeping purposes. (Ref. Building Description, above.)

The Appellant requests that the ZBA agree that 26 HORNE does not meet the definition of a ROOMING HOUSE under the DZO because it exceeds the number of ROOMS, as written in the definition, i.e., 26 HORNE contains six (6) ROOMS for sleeping purposes.

[3B] The Appellant further argues that the BUILDING at 26 HORNE does not meet the definition of a ROOMING HOUSE under the DZO because it contains ROOMS which are intended for purposes other than sleeping such as common living, eating and cooking purposes.

The Appellant proposes that, under the definition of ROOMING HOUSE, the referenced ROOMS, for which compensation is received, must be for sleeping purposes only. (Ref. Definition of ROOMING HOUSE, above.)

The Appellant offers that the ROOMS for which compensation is received include not only rooms for sleeping purposes, but also rooms for other living, eating and cooking purposes. Each DWELLING UNIT in 26 HORNE includes a kitchen and common living area which are leased to the co-tenants, collectively. (Ref. Building Description, above.)

DZO 170-6 Definitions. "*DWELLING UNIT means a BUILDING or entirely self-contained portion thereof containing complete housekeeping facilities not in common with any other DWELLING UNIT, except for vestibules, entrance halls, porches or hallways.*" [Amended 12-08-10 by Ord. No. 2010-10.27-13]

The Appellant requests that the ZBA agree that 26 HORNE does not meet the definition of a ROOMING HOUSE under the DZO because the total number of ROOMS rented are not intended solely for sleeping purposes, i.e., each DWELLING UNIT also contains rooms for eating and cooking, as well as common living areas. (Ref. Building Description, above.)

[4 - R12 DISTRICT ZONING] The Appellant argues that the USE of 26 HORNE is not in violation of the R-12 District zoning.

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The DZA's written directive states "*and that a rooming house use was not allowed in R-12 District.*" (Ref. Attachment 1: Line 15-16)

The Appellant agrees that (1) 26 HORNE is subject to R-12 District zoning, and (2) a ROOMING HOUSE is not allowed in the R-12 District.

The Appellant, through this Appeal, argues that 26 HORNE is not a ROOMING HOUSE and, thus, is not in violation of the R-12 District zoning.

The Appellant requests that the ZBA agree that 26 HORNE is not a ROOMING HOUSE and does not violate the R-12 District zoning.

II. The Appellant argues that the definition of ROOMING HOUSE in the DZO is in conflict with other related definitions and, when considering these other definitions for clarification, they reinforce that 26 HORNE is not a ROOMING HOUSE.

[5 - INTERPRETATION] The Appellant argues that the DZA had the authority and duty to strictly interpret the DZO when applying the definition of ROOMING HOUSE to 26 HORNE, but failed to do so properly, and, when that interpretation is under review by the ZBA, other relevant sources may be considered to clarify any ambiguities.

According to NH RSA, when applying the language of the ordinance, the DZA may not make a decision on a discretionary basis, but must be based on a strict interpretation of the terms of the ordinance. (Ref. RSA 676:5 II(b), below.)

RSA 676:5 II(b) "A decision of the administrative officer includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings."

The NHOEP Handbook, in addition to several court decisions, makes plain that where the ordinance is clear, its text will govern. However, if the ordinance is not clear, then the adjudicatory body can consider (and often does) other sources in addition to the intent and meaning of the ordinance to apply a reasonable, and not arbitrary, interpretation. *Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727 (2001); *Hurley v. Town of Hollis*, 143 N.H. 567 (1999); *Healy v. Town of New Durham*, 140 N.H. 232 (1995); *Harrington v. Town of Warner*, 152 N.H. 74 (2005); NHOEP Handbook, below.)

NHOEP Handbook: "In determining the intent and meaning of a provision of the ordinance and map, the board is restricted to a fairly literal interpretation. The intent of

APPEAL TO AN ADMINISTRATIVE DECISION
CALLAGHAN V. DOVER ZONING ADMINISTRATOR

the law is an important consideration, but must be spelled out in terms specific enough to be understood. The board of adjustment cannot make its determination on the strength of a statement of purpose alone when that statement is not backed by concisely phrased provisions. "The construction of the terms of a zoning ordinance is a question of law.... The proper inquiry is the ascertainment of the intent of the enacting body.... Where the ordinance defines the term in issue, the definition will govern." (citations omitted) *Trottier v. City of Lebanon*, 117 N.H. 148, 150, 1977. *When an appeal is made to a board of adjustment under this provision, the board must apply the strict letter of the law in exactly the same way that a building inspector must. It cannot alter the ordinance and map or waive any restrictions under the guise of interpreting the law.*

The Appellant offers, through the referenced court decisions and the NHOEP Handbook, that the decisions of DZA and ZBA must be based on the strict, but reasonable, interpretation of the DZO. As presented in the preceding sections, a strict interpretation of the DZO should yield that 26 HORNE is not a ROOMING HOUSE. However, discussions with the DZA and his letter suggest that there may be some ambiguities in the application of the DZO to 26 HORNE. The appellant seeks to resolve these ambiguities through this appeal and the referenced relevant sources in the following sections.

The Appellant requests that under its authority as offered above, the DZA consider the following relevant sources to clarify the apparent ambiguities in the DZO and reasonably, but not arbitrarily, agree that 26 HORNE is not a ROOMING HOUSE under the DZO.

[6 - APPLICATION OF NH RSA] The Appellant argues that 26 HORNE, under the NH RSA, is not a ROOMING HOUSE, but comprises RENTAL UNITS as distinguished by the definition of TENANT or TENANCY under the NH RSA.

The following definitions are excerpted from the NH RSA:

~~NH RSA 540:1 Definitions III. RENTAL UNIT means a suite of one or more rooms located within a single building rented by the owner to one or more individuals living in common for nontransient residential purposes.~~

NH RSA 540:1 Definitions IV. *The term TENANT or TENANCY shall not include occupants or occupancy in the following places and the provisions of this chapter shall not apply to: (a) Rooms in rooming or boarding houses which are rented to transient guests for fewer than 90 consecutive days.*

The Appellant offers that 26 HORNE is comprised of two DWELLING UNITS, each comprising "a suite of one or more rooms located within a single building rented by the owner to one or more individuals living in common for nontransient residential purposes". (Ref Building Description, above.)

**APPEAL TO AN ADMINISTRATIVE DECISION
CALLAGHAN V. DOVER ZONING ADMINISTRATOR**

Further, the Appellant offers that the lease of the DWELLING UNITS in 26 HORNE is to occupants which are not transient guests, as the lease terms are for one (1) year or more. (Ref. Building Description and Definition of TENANT or TENANCY, above.)

The Appellant proposes that, because the definition of TENANT or TENANCY under the NH RSA exempts "*rooming or boarding houses which are rented to transient guests for fewer than 90 consecutive days,*" ROOMING HOUSES are those which are rented to transient guests for fewer than 90 consecutive days. The Appellant further proposes that, based on the definition of TENANT or TENANCY, occupants which rent for longer than 90 days are considered nontransient.

The DWELLING UNITS in 26 HORNE are rented to occupants for longer than 90 consecutive days and are, thus, considered rented for "*nontransient residential purposes.*" Furthermore, the space rented comprises multiple rooms "*within a single building [which are] rented by the owner to one or more individuals living in common*". (Ref. Building Description, above.)

The Appellant requests that the ZBA agree that 26 HORNE is not a ROOMING HOUSE, as it is distinguished by the NH RSA and, instead, find that 26 HORNE meets the definition of a RENTAL UNIT under the NH RSA.

[7 - APPLICATION DOVER HOUSING CODE] The Appellant argues that 26 HORNE, under the Dover NH Housing Code, is not a ROOMING UNIT, but is, instead, a DWELLING UNIT.

The following code is excerpted from the Dover NH Housing Code, Chapter 119:

Dover NH Housing Code 119-34 defines a *ROOMING UNIT* as any room or group of rooms forming a single habitable unit used or intended to be used for living and sleeping, but not for cooking or eating purposes.

Dover NH Housing Code 119-34 defines a *DWELLING UNIT* as room or group of rooms located within a dwelling and forming single habitable unit with facilities which are used or intended to be used for living, sleeping, cooking and eating.

The Appellant proposes that, while the Dover NH Housing Code does not explicitly define a ROOMING HOUSE, its definition of ROOMING UNIT may be applied analogously because a ROOMING UNIT, similar to a ROOMING HOUSE, does not permit rooms for cooking or eating purposes.

The Appellant further proposes that the Dover NH Housing Code definition of DWELLING UNIT is analogous to the DZO because the rooms for cooking and eating purposes under the DZO can be considered analogous to "*housekeeping facilities*" under the Dover NH Housing Code.

**APPEAL TO AN ADMINISTRATIVE DECISION
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The Appellant offers that 26 HORNE does not comprise a single habitable unit which is limited to living and sleeping purposes. In fact, the rented "group[s] of rooms forming single habitable units" include kitchens which are used for cooking and eating purposes. Consequently, there are no ROOMING UNITS (DWELLING UNITS without a kitchen/dining area) in 26 HORNE.

The Appellant requests that the ZBA agree that 26 HORNE does not comprise any ROOMING UNITS because the physical characteristics of 26 HORNE comprise rooms for cooking and eating purposes, which are prohibited from ROOMING UNITS under the Dover NH Housing Code, and instead constitute two (2) DWELLING UNITS. Consequently, the Appellant also requests that the ZBA agree that 26 HORNE is not a ROOMING HOUSE.

[8 - APPLICATION OF NFPA 1: FIRE CODE] The Appellant argues that 26 HORNE, under the National Fire Protection Association (NFPA) Code 1 (Fire Code), is not a ROOMING UNIT, but is, instead, a DWELLING UNIT.

The following are the relevant excerpts from NFPA Code:

NFPA Code 1, 3.3.170.06 LODGING or ROOMING HOUSES. A building or portion thereof that does not qualify as a one- or two-family dwelling, that provides sleeping accommodations for a total of 16 or fewer people on a transient or permanent basis, without personal care services, with or without meals, but without separate cooking facilities for individual occupants.

NFPA Code 1, 3.3.170.20 ONE- and TWO-FAMILY DWELLING. One- and two-family dwellings include buildings containing not more than two dwelling units in which each dwelling unit is occupied by members of a single family with not more than three outsiders, if any, accommodated in rented rooms.

NFPA Code 1, 3.3.170.20.1 ONE- and TWO-FAMILY DWELLING UNIT. A building that contains not more than two dwelling units with independent cooking and bathroom facilities. [5000, 2009]

NFPA Code 1, 3.3.27 BUILDING. Any structure used or intended for supporting or sheltering any use or occupancy. [101, 2009]

NFPA Code 1, 3.3.86 DWELLING UNIT. One or more rooms arranged for complete, independent housekeeping purposes, with space for eating, living, and sleeping; facilities for cooking, and provisions for sanitation. [5000, 2009]

The Appellant proposes that the NFPA Code 1 definition of ROOMING HOUSE may be considered analogous to the definition of ROOMING HOUSE in the DZO because of the limitation on the number of occupants, as well as the restrictions that the purpose of the space

**APPEAL TO AN ADMINISTRATIVE DECISION
CALLAGHAN V. DOVER ZONING ADMINISTRATOR**

must be for "*sleeping accommodations*" and be "*without separate cooking facilities for individual occupants*". (Ref. NFPA Code 1 LODGING or ROOMING HOUSE definition, above.)

In considering whether 26 HORNE would qualify as a ROOMING HOUSE, it is important to recognize that, under the NFPA Code 1, TWO-FAMILY DWELLINGS are exempt from the ROOMING HOUSE definition by the language which states "[a] building or portion thereof that **does not qualify** as a one- or two-family dwelling." (emphasis added) (Ref. NFPA Code 1 ONE- or TWO-FAMILY DWELLING definition, above.)

The Appellant argues that 26 HORNE, under the NFPA Code 1, is a TWO-FAMILY DWELLING and, therefore, not a ROOMING HOUSE. The Appellant offers that 26 HORNE comprises not more than two DWELLING UNITS with independent cooking and bathroom facilities. (Ref. Building Description, above.)

The Appellant requests that the ZBA agree that 26 HORNE is not a ROOMING HOUSE, in consideration of the definitions established under NFPA Code 1, because it qualifies as a TWO-FAMILY DWELLING.

III. The Appellant argues that the DZA's directive with respect to lease agreements constitutes an ultra vires action and, consequently, is unenforceable.

[9 - RENTAL OF COMMON SPACE] The Appellant argues that the DZO does not prevent the renting of individual rooms with common space to renters and, consequently, cannot be enforced by the DZA.

The DZA's written directive states "*The DZO does not have a clause stipulating familial relationships between persons occupying a dwelling unit, so that is not in play here, but you cannot rent individual rooms with common space to renters.*" (Ref. Attachment 1: Lines 26-28)

The Appellant agrees that the Definition of FAMILY is "*not in play here,*" as it was repealed in 1990. [Repealed 08-01-90 by Ord. No. 8-90]. (Ref. Attachment 1: Line 27)

The Appellant argues that the language "*but you cannot rent individual rooms with common space to renters*", or similar words or variants, is not found in DZO and, therefore, cannot be enforced. (Ref. Attachment 1: Lines 27-28)

The Appellant requests that the ZBA agree that the DZA's directive with respect to the renting of "*individual rooms with common space to renters*" is unsubstantiated and, therefore, unenforceable. (Ref. Attachment 1: Line 28)

**APPEAL TO AN ADMINISTRATIVE DECISION
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[10 - LEASE AGREEMENTS] The Appellant argues that the DZA does not have the authority under the DZO to direct how lease agreements are administered.

The DZA's written directive states, "[t]he purpose of this letter is to inform you in writing of the above determination [that you are operating as a ROOMING HOUSE] and to allow you the opportunity to change the way you lease to tenants." (Ref. Attachment 1: Lines 30-31)

The Appellant argues that the DZA has not provided sufficient evidence to support his directive regarding the administration of lease agreements. (Ref. Attachment 1, in which no citations are provided to indicate this authority, and Attachment 3, in which via email the Appellant attempted to get information that supported the directive.)

Further, the Appellant argues that there is no provision in the DZO which determines the means and method of compensation for ROOMs rented. Therefore, the DZA's directive with respect to leases, which attempts to make such a determination, is beyond the DZA's authority and is arbitrary. Consequently, the DZA's directive with respect to leases is unenforceable.

The Appellant requests that the ZBA agree that directing the way a property owner leases property is beyond the scope of the DZA authority.

[11 - DZA AUTHORITY]. Appellant argues that the DZA's written directive to have separate leases for each unit is arbitrary and an ultra vires action - beyond the scope of the DZA.

"[S]ince the power of a [municipal] agency is derived from the state enabling act, a condition may be imposed only if it is authorized by statute.... [A]bsent a legislative grant, an attempt to exercise such authority is ultra vires and void." 83 AM. JUR. 2d *Zoning and Planning* § 562, at 450 (1992) (footnotes omitted).

"Ultra vires act of municipality is one which is beyond powers conferred upon it by laws." Black's Law Dictionary 1522 (Bryan A. Garner ed., 6th ed., West 1990).

The Appellant offers that the DZA suggested that the zoning question regarding the USE of 26 HORNE could be resolved if Appellant changed its lease administration methods. The DZA's letter indicated that the USE would be in compliance "if [Appellant] simply rented each of the two units to [its] lessees in one rental agreement per unit." (Ref. Attachment 1: Lines 25-26)

The Appellant further offers that nothing in the DZO addresses or directs the administration of lease agreements, thereby not providing the DZA with the authority to make such directives.

The Appellant requests that the ZBA agree that the directives of the DZA with respect to lease administrations are beyond the power of the DZA and cannot be enforced.

**APPEAL TO AN ADMINISTRATIVE DECISION
CALLAGHAN V. DOVER ZONING ADMINISTRATOR**

CONCLUSION

In general, the Appellant concludes that the DZA's findings are incorrect and the associated directives are unenforceable.

The Appellant respectfully requests that the ZBA reverse the written directive of the DZA by:

1. Finding that the DZA incorrectly interpreted the current DZO as it applies to 26 HORNE because:
 - a. 26 HORNE is grandfathered under the 1987 amendments APPLICABILITY clause because no evidence of prior non-conformity has been presented by the party claiming non-conformance, OR
 - b. under the current DZO, 26 HORNE is not a ROOMING HOUSE;
or
2. Finding that, if the 1987 DZO or any previous amendments are applicable to 26 HORNE, 26 HORNE is not a ROOMING HOUSE based on a reasonable, strict interpretation of the current DZO; and
3. Finding that the DZA does not have the authority to direct how rooms are rented and leases are administered and, thus, such directives are unenforceable.

CHRISTOPHER G. PARKER, AICP
Director
c.parker@dover.nh.gov



288 Central Avenue
Dover, New Hampshire 03820-4169
(603) 516-6008
Fax: (603) 516-6007
www.dover.nh.gov

City of Dover, New Hampshire

DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

NOTICE OF ZONING VIOLATION

May 2, 2011

Charlene & Richard Callaghan
32 Horne Street
Dover, NH 03820

Re: Property at 26 Horne St., Dover
a/k/a Assessor's Map 35, Lot 18

Dear Mr. and Mrs. Callaghan:

In response to a written complaint, an investigation into the use at the above referenced property was initiated. As you know, I met with you on April 15, 2011 to discuss the allegations in the complaint. Some of the complaints are being handled by appropriate building, health and life-safety inspectors, and are not the subject of this letter.

9 During our meeting, I asked you how many tenants you were renting to and what the
10 arrangement for renting to those tenants was at the subject property. You confirmed
11 for me that the property was configured as a duplex, which use is allowed by right in
12 the R-12 zoning district for a dwelling that has existed prior to May 27, 1964. You
indicated to me that you were renting rooms by individual, written lease to four persons
in one unit and to two persons by individual, written lease in the second unit in the
dwelling structure for a total of 6 leases.

14 I stated at our meeting that your arrangement met the definition of "rooming house" in
15 the Dover Zoning Ordinance, and that a rooming house use was not allowed in the R-12
16 district. We discussed uses in the district and definitions. You requested some time to
do some more reading of the ordinance requirements and of the Housing Standards
regulations, and to set up a meeting with the other inspectors to discuss your next
steps and/or set up an inspection of the premises.

We met again with the inspectors on April 25, 2011, where inspection times were
scheduled and where I again reiterated that what was occurring at the subject property
was in fact a rooming house use that is not allowed in the district and that said use
must cease. I explained to you in both meetings that you could become compliant with
25 zoning if you simply rented each of the two units to your lessees in one rental
26 agreement per unit. The DZO does not have a clause stipulating familial relationships

27 between persons occupying a dwelling unit, so that is not in play here, but you cannot
28 rent individual rooms with common space to renters.

30 The purpose of this letter is to inform you in writing of the above determination and to
31 allow you the opportunity to change the way you lease to tenants by following the
suggested action above by no later than August 1, 2011.

Please contact me within ten (10) days to let me know if you intend to comply and establish a schedule of compliance that meets the August 1st deadline or not.

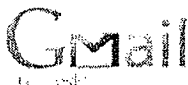
I also want to let you know that per statute, you have thirty (30) days from receipt of this letter to appeal (to the Zoning Board of Adjustment) my decision regarding the rooming house determination.

Sincerely,



Bruce W. Woodruff
Zoning Administrator

cc: C. Parker, Planning Director
A. Krans, General Legal Counsel
T. Clark, Building Official



Richard Callaghan <rpcallaghan@gmail.com>

26 Horne

Rick Callaghan <rpcallaghan@gmail.com>
To: "Parker, Christopher G." <C.Parker@dover.nh.gov>

Wed, May 25, 2011 at 8:45 AM

Hi Chris,



Just a reminder--still awaiting the ordinance prior to 1983.

Thanks,
Rick



On 5/11/2011 7:42 AM, Parker, Christopher G. wrote:
Sure. Might not be today, but will be this week.

Chris

Christopher G. Parker, AICP
Director of Planning and Community Development
City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: c.parker@dover.nh.gov
p: 603.516.6008 f: 603.516.6007

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Twitter: @DoverNHPlanning

-----Original Message-----
From: Rick Callaghan [mailto:rpcallaghan@gmail.com]
Sent: Wednesday, May 11, 2011 7:29 AM
To: Parker, Christopher G.
Subject: Re: 26 Horne

Thanks Chris,

Thanks for gathering the complaint information. I am hoping for electronic copies of emails including photos.

I guess it is fair to assume you found the archived zoning regulations that existed prior to the 1987 adoption, as I requested. You apparently feel that those zoning regulations still place the use in non-conforming status.



Could you please provide me with copies of those documents that you use in making this determination?

Thanks,
Rick

On 5/9/2011 1:43 PM, Parker, Christopher G. wrote:
Rick

I will be collected the complaints from the various offices and getting them to you.



Regarding the grandfathering, I still feel that the clause only apply if you can show an approval from prior to 1948, when the code was adopted, showing the rooming house use. Knowing that there was no PB at that time, and limited staff functions prior to the 60s, I would be willing to discuss with Woody applying the clause if you can provide an approval prior to 1987, the last amendment.

Let me know if you have any documentation.

Chris

Christopher G. Parker, AICP
Director of Planning and Community Development
City of Dover, NH
288 Central Avenue
Dover, NH 03820-4169
e: c.parker@dover.nh.gov
p: 603.516.6008 f: 603.516.6007

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Twitter: @DoverNHPlanning

-----Original Message-----

From: Rick Callaghan [mailto:rccallaghan@gmail.com]
Sent: Friday, May 06, 2011 3:04 PM
To: Parker, Christopher G.
Subject: 26 Horne

Hi Chris,

I got a letter from Woody regarding the zoning violation.



I had not heard back from you on the grandfather clause in the applicability section. Did you get a chance to research that and if so, what did you find.

I was also wondering where we were on my request for any other complaints filed against me along with supporting documents, like photos.

Can you update me on these.

Thanks,
Rick

Please consider conserving our natural resources before printing this e-mail and/or any attachments.

This electronic message and any attachments may contain information that is confidential and/or legally privileged in accordance with NH RSA 91-A and other applicable laws or regulations. It is intended only for the use of the person and/or entity identified as recipient(s) in the message. If you are not an intended recipient of this message, please notify the sender immediately and delete the material. Do not print, deliver, distribute or copy this message, and do not disclose its contents or take any action in reliance on the information it contains unless authorized to do so. Thank you.
Please consider conserving our natural resources before printing this e-mail and/or any attachments.

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-----Original Message-----

From: Rick Callaghan [<mailto:rpcallaghan@gmail.com>]
Sent: Tuesday, April 19, 2011 10:37 AM
To: Woodruff, Bruce
Subject: Monica Taft Complaint

Hi Woody,

Sorry I did not get back to you sooner. As you might recall, I have a lot going on this week. I can meet next Monday as you requested. I am looking forward to meeting with all the AHJ (Authorities Having Jurisdiction) on each of the matters included in the Monica Taft complaint.

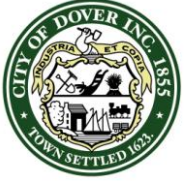
Based on your recommendation I have researched the internet via Google to find something that relates to "Generally Accepted Zoning Standards" you referenced. I have not yet found anything that says a rooming house is determined by how the lease is written. In fact, I cannot find anything that uses a lease to define a certain type of occupancy. In general, I find that a rooming house is a day to day rental for no more than 90 days and does not have a kitchen.

As I said when we met, I need to be able to tell my tenants what regulation, rule, code, or law, requires us to modify an already legal binding document. It would be helpful if you could direct me to the information that says how I must administrate my rental using leases.

If supported by the code, we will change our leasing agreement to include all tenants on one lease with provisions equal to the obligations under individual leases as you suggested.

I would also request that each of the AHJ inspect the premises for all the Monica Taft claims. We can make arrangements for the visits with at least 24 hour notice to the tenants.

Respectfully,
Rick



ZONING BOARD OF ADJUSTMENT – ABUTTER NOTICE

Meeting Type:	Regular Meeting
Meeting Location:	Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date:	Thursday, July 21, 2011
Meeting Time:	7:00 pm

INTENT: To appeal an administrative decision stating that the subject property is being used as a rooming house which is not allowed in the district. Applicant's appeal is based on argument that the decision is not supported by the ordinance, is an incorrect interpretation of the ordinance, and that insufficient evidence to support said decision exists.

LOTS/UNITS PROPOSED: none

AGENDA ITEM #: 4-A

ZONING DISTRICT: R-12

FILE: Z11-14

APPLICANT(S): Richard Callaghan

OWNER(S): Richard Callaghan

LOCATION: 26 Horne Street,
(Tax Map 35, Lot 18)

ACREAGE: 25,669 Sq. Ft. or 0.589 acre

EXISTING LAND USE: rooming house or duplex

PROPOSED LAND USE:
to be determined

SURROUNDING LAND USE: Single family houses, duplexes

ZONING HISTORY: Zoned R-12 since 1979

PREVIOUS ZBA ACTION: None

ATTACHMENTS: None

PLANNING BOARD APPROVAL REQUIRED: no

Dear Property Owner: As an owner of abutting property, which is either adjoining or located

directly across the street from the subject parcel, you are hereby notified of the public hearing on the bolded item below. The full Zoning Board of Adjustment agenda is as follows:

1. Attendance
2. Approval of Prior Minutes of June 16, 2011.
3. Old Business
4. New Business

A. * **Z 11-14 Richard Callaghan, 26 Horne Street, Tax Map 35, Lot 18, zoned R-12, owner Richard Callaghan, 32 Horne Street, appeals an administrative decision by the Zoning Administrator in a Notice of Zoning Violation letter to the applicant dated May 2, 2011 that the use on the property is a rooming house which is not allowed by right in the R-12 zone.**

B. * **Z 11-15 Janice L. Greene, 90 Glenwood Avenue, Tax Map E, Lot 19E, zoned R-12, owner, Janice L. Greene, 90 Glenwood Avenue, requests a variance from the terms of Article IV, Section 170-12 B & the R-12 district Table of Uses and Dimensional Regulations, Side Setback for principal buildings, to construct an attached garage and porch with a side setback of ten (10) feet, where fifteen (15) feet is required.**

Other Board Business

- B. Vote on revised Operating Rules.

5. Adjourn

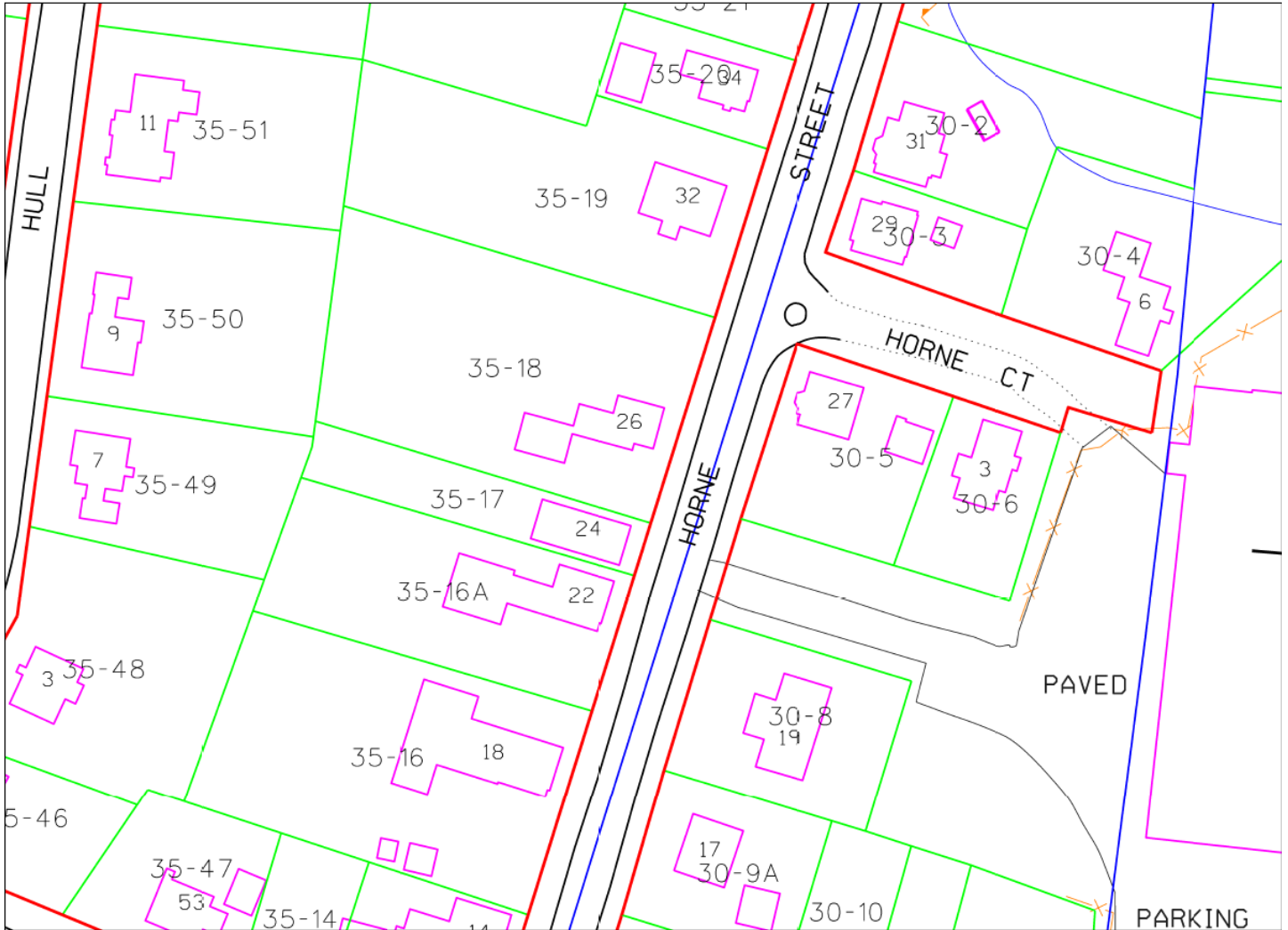
*If the application is accepted for discussion, the **public hearing** will be held that evening. Persons with questions or wishing to see the plans are invited to visit the Planning Office, weekdays from 8:00 am to 4:00 pm. You may also view materials at www.dover.nh.gov/planhome.html, a map showing project locations can be found at www.dover.nh.gov/planhome.html. Follow us on Twitter @DoverNHPlanning and find us on Facebook at www.facebook.com/pages/Dover-NH/City-of-Dover-NH-Planning/446789895351



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT – ABUTTER NOTICE

Meeting Type: Regular Meeting
Meeting Location: Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date: Thursday, July 21, 2011
Meeting Time: 7:00 pm





CITY OF DOVER

ZONING BOARD - STAFF MEMO FILE #Z11-14

Application Type: Appeal of an Administrative Decision
Applicant(s): Richard Callaghan
Owner(s): Richard Callaghan
Location: 26 Horne Street, (Tax Map 35, Lot 18)

INTENT: To appeal an administrative decision stating that the subject property is being used as a rooming house which is not allowed in the district. Applicant's appeal is based on argument that the decision is not supported by the ordinance, is an incorrect interpretation of the ordinance, and that insufficient evidence to support said decision exists.

LOTS/UNITS PROPOSED: None

AGENDA ITEM #: 4-A

ZONING DISTRICT: R-12

EXISTING LAND USE: Rooming House
(subject of appeal)

PROPOSED LAND USE: Rooming House
or duplex

SURROUNDING LAND USE: Single family and two-family houses, some three family.

PREVIOUS ZBA ACTION: No.

PB APPROVAL REQUIRED: No.

ATTACHMENT: none

APPLICATION IS COMPLETE: Yes

NOTICES AS REQUIRED: Yes

STAFF RECOMMENDATION:

The Planning Department recommends the appeal by denied based upon the record and definition of rooming house in the ordinance.

Summary of Request and Background

This appeal is the result of meetings with the property owner concerning how best to address a zoning complaint from an individual whose family member had rented one of the rooms from the property owner. As some of the issues were either health or life-safety related, they are not addressed here. The zoning issue is one of allowed vs. not allowed use in the district. As you know, all

determinations of type of uses are dependent on terms and definitions contained either in the DZO or in generally accepted land use definitions used across the country, usually promulgated by the American Planning Association or similar organization. The administrative decision to determine that the use is a rooming house was based on comparing what the owner said was happening with those definitions. Indeed, the owner's appeal narrative states that tenants rented by lease by the room. It should be noted that since Dover does not have a definition of family, the solution advanced to the owner was to redo the existing individual room leases and replace with a collective singular lease for each self-contained dwelling unit in the structure. Please refer to the code violation correspondence, attached.

Reason for Staff Recommendation

Simply put the use and circumstances of the rental arrangements fit the definition of rooming house (not allowed by right) and not that of two dwelling units (allowed by right).

The DZO definition section states:

ROOM means an unsubdivided portion of the interior of a **DWELLING UNIT**, excluding bathrooms, closets, hallways and service porches.

ROOMING HOUSE means any **BUILDING** in which not more than five (5) **ROOMS** are rented to not more than ten (10) persons, said **ROOMS** being for a sleeping purpose for compensation.

From "A Planner's Dictionary" (APA):

Rooming house (See also boarding house; lodging house) A residential building with three or more sleeping rooms for lodgers, and wherein no dining facilities are maintained for the lodger, as distinguished from a boarding house. (Home-stead, Fla.)

A building in which three or more rooms are rented and in which no table board is furnished. (Danville, N.Y.)

A building with not more than five guest rooms where lodging is provided for compensation pursuant to previous arrangements, but not open to public or overnight guests. The term includes a lodging house. (Belmont, Calif.)

Any building or part of any building or dwelling unit occupied by more than three persons who are not a family or by a family and more than two other persons and where a fee or other consideration is charged for periods of occupancy usually longer than one night and where a bathroom or toilet room is shared. This term includes any building or part of any building in which one or more persons share a toilet room or bathroom with occupants of one or more second-class dwelling units, as defined in [local code]. (Milwaukee, Wisc.)



CITY OF DOVER

ZONING BOARD - STAFF MEMO FILE #Z11-14

Application Type: Appeal of an Administrative Decision
 Applicant(s): Richard Callaghan
 Owner(s): Richard Callaghan
 Location: 26 Horne Street, (Tax Map 35, Lot 18)

Following are verbatim Definitions from Dictionaries and Jurisdictions online:

A **rooming house** is a building that is divided into small flats or single rooms which people rent to live in.

Rooming House Definition:

Rented residential premises where an individual shares a kitchen and bathroom with others. In *Foster*, Justice Hayes used these words to define rooming house in the context of residential tenancy but in the absence of a statutory definition:

"... a place where a person lives and shares a kitchen and bathroom with others."

Noun 1. **rooming house** - a house where rooms are rented

rooming house

a house with furnished rooms for rent

room·ing house (roo^o mⁱng, r^{oo}m^o ing)

noun A house where lodgers may rent rooms.

a private house in which rooms are rented for living or staying temporarily.

From Norwalk, Ct.:

Rooming House Licensing & Affordable Housing

Rooming House Licensing

The definition of a rooming house is any dwelling or part of any dwelling containing one or more rooming units, in which space is let by the owner or operator to three or more persons who are not husband or wife, son or daughter, mother or father, or sister or brother to the owner / operator.

Regulations

No person shall operate a rooming house or shall occupy or let to another for occupancy any rooming unit in a rooming house unless this person holds a valid rooming house permit issued by the Director of Public Health.

Excerpt from an LA County Zoning Amendment Recommendation Report prepared by their Planning Department:

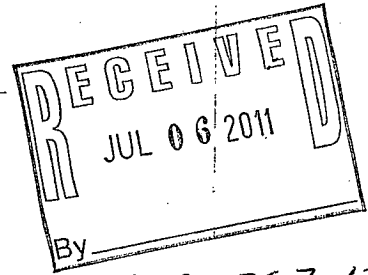
Part 2 of this report discusses new terms and provisions that focus on boarding and rooming houses. Specifically, the proposed ordinance creates a clear distinction between group homes inhabited by families and those operating as boarding houses. Since boarding houses are incompatible with lower density residential neighborhoods, this difference will work toward the broader goal of neighborhood protection. Modifying existing definitions of *family* and *boarding/rooming house* and adding the definition of *single housekeeping unit* provides effective tools for the City to enforce its zoning laws with respect to transient types of group homes operating in single-family neighborhoods. This objective is primarily met by defining a *family* as persons living as a *single housekeeping unit* with residents under one lease; at a *boarding/rooming house* lodging is provided to individuals under two or more leases.

Please note that the "objective" written about in the last sentence above, that persons living as a single housekeeping unit with one lease, is the advise given to the owner to solve the rooming house issue.

Recommendation

The Planning Department recommends the Zoning Board hold the public hearing, weigh the evidence and definitions and deny the appeal based on the record and owner's appeal narrative compared to the definitions.

CASE # 211-15 DATE RECEIVED 7/6/2011
 AMOUNT PAID \$ 208.⁰⁰ TIME RECEIVED 3:20 pm



CITY OF DOVER
 ZONING BOARD OF ADJUSTMENT
 APPLICATION

I. APPLICANT Janice L. Greene PHONE #: 603-767-1381
 ADDRESS 90 Glenwood Ave, Dover, NH
 PROPERTY OWNER Janice L. Greene
 ADDRESS 90 Glenwood Ave, Dover, NH
 PROPERTY LOCATION 90 Glenwood Ave, Dover, NH
 BRIEF DIRECTIONS off Central Ave, Glenwood is opposite the
Shaws/Hammond Intersection. - over the turnpike, toward 6th St.
 ZONE R-12 ASSESSOR'S MAP E LOT #(S) 19 E

TYPE OF APPEAL: (Please check off one)

- VARIANCE ARTICLE IV SECTION 170-12
- VARIANCE (Physical Disability - RSA 674:33-V) ARTICLE _____ SECTION R-12 Text
- SPECIAL EXCEPTION ARTICLE _____ SECTION _____
- ADMINISTRATIVE DECISION ARTICLE _____ SECTION _____
- EQUITABLE WAIVER ARTICLE _____ SECTION _____

Describe briefly your plans for this property:

To Attach a 24'x30' garage & an 8'x20' farmers
porch, all attached to the house, with a
side setback of 10 ft., whereas 15 ft is
currently required.

II. REQUIREMENTS SUBMITTED: (Please check off)

- A. Plot plan drawn in accordance with a boundary line survey to scale not less than 1" = 40', (9 copies). They need to include the lot dimensions including area in square feet, and also the size and location of existing and proposed buildings if applicable, including setbacks.
- B. List of abutters including addresses and map and lot number of parcels who adjoin or are directly across the street or stream from property.
- C. Application fee of:

\$100.00 VARIANCE	\$ <u>100.⁰⁰</u>
\$100.00 SPECIAL EXCEPTION	\$ _____
\$25.00 APPEAL FROM ADMINISTRATIVE DECISION	\$ _____
\$100.00 EQUITABLE WAIVER	\$ _____
- D. Certified letters fee:

# of abutters <u>5</u> X \$8.00 =	\$ <u>40.⁰⁰</u>
Applicant & Owner <u>1</u> X \$8.00 =	\$ <u>8.⁰⁰</u>
Foster's newspaper public notice	\$ <u>60.00</u>
TOTAL	\$ <u>208.⁰⁰</u>

III. **NARRATIVE:** Complete the section pertaining to your request for a variance. Keep your answers brief and be prepared to explain them in detail at the meeting. The burden of proof is on the applicant. If you need more space use an additional sheet of paper

VARIANCE REQUIREMENTS: (PLEASE TYPE OR PRINT IN INK)

1. Provide proof that demonstrates the variance will not be contrary to the public interest.

My neighbors around my property feel it will look very attractive with the farmers porch, an will increase all property values.

2. Provide proof that demonstrates how a variance observes the spirit of the ordinance.

By allowing me to have a 10 ft. side setback, there is still 46 ft. between my neighbors garage + my new proposed garage

3. Provide proof that demonstrates how a variance will result in substantial justice.

Along Glenwood Ave - The number of houses with or without garages:
With Garage - 58
Without Garage - 20

I am only asking to add a few feet to setback line, for a standard 24ft. two car garage.

4. Provide proof that demonstrates the variance will not diminish the values of surrounding properties.

By adding the \$40K garage + farmers porch, it will not only increase my property value, but all properties around me. My neighbor has already asked me for the name of my builder + plan layouts.

5A. Provide proof that literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Unnecessary hardship standards are:

(i) Special conditions of the property that distinguish it from other properties in the area; and

My side property boundaries are narrow, and my house was built at an angle, making it rather impossible to put garage any where else.

(ii) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(iii) the proposed use is a reasonable one.

My initial interest in the addition of the garage + attached farmers porch, is due to my recently taking care of my aging mother @ my house, and anticipate her living @ me in the near future. She is very afraid of walking in the snow.

OR

5B. If the criteria in subparagraph 5A above are not established, provide proof that an unnecessary hardship exists if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

SPECIAL EXCEPTION REQUIREMENTS

1. Explain how the requested use would be essential or desirable to the public convenience or welfare.

2. Detail how the requested use would not create undue traffic congestion or unduly impair pedestrian safety.

3. Describe how the requested use would not overload any public water, drainage or sewerage system or any other municipal system to such an extent that the requested use or any developed use in the immediate area or in any other area of the City will be unduly subjected to hazards affecting health, safety or the general welfare.

THIS SECTION OF THE APPLICATION MUST BE COMPLETED BY ALL APPLICANTS

IV. As applicant of standing of this request, I certify that the information herein is complete and accurate.

IMPORTANT
PROPERTY IDENTIFICATION SIGN MUST BE POSTED ON THE PROPERTY FOR THE 5 DAYS PRIOR TO HEARING. FAILURE TO POST MAY RESULT IN APPLICATION NOT BEING ACCEPTED

Jamie L. Greene
Signature of Applicant*

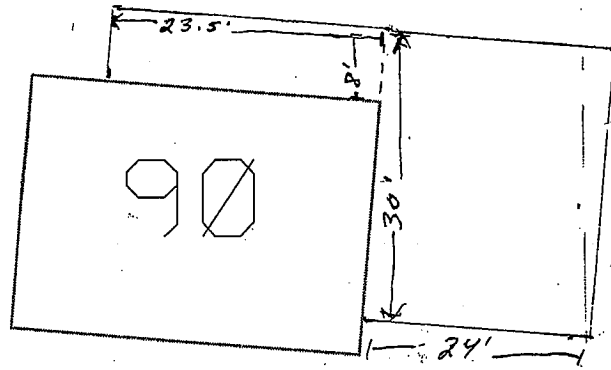
Jamie L. Greene
Signature of Owner*

*Both Signatures Required

<i>The applicant waives the requirement of holding a hearing within thirty (30) days of receipt of the application, pursuant to RSA 676:7, II:</i>	
_____ Signature of Applicant	_____ Date

EOP

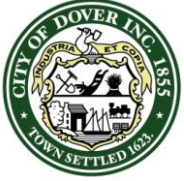
GLENWOOD AVE



15' SIDE SETBACK

E-19E





CITY OF DOVER

ZONING BOARD OF ADJUSTMENT – ABUTTER NOTICE

Meeting Type:	Regular Meeting
Meeting Location:	Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date:	Thursday, July 21, 2011
Meeting Time:	7:00 pm

INTENT: To obtain a side setback Variance to allow 10 feet of side setback for the construction of an attached garage and porch where 15 ft. is required.

LOTS/UNITS PROPOSED: none

AGENDA ITEM #: 4-B

ZONING DISTRICT: R-12

FILE: Z11-15

APPLICANT(S): Janice L. Greene

OWNER(S): Janice L. Greene

LOCATION: 90 Glenwood Avenue,
(Tax Map E, Lots 19E)

ACREAGE: 17,066 Sq. Ft. or 0.392 acre

EXISTING LAND USE: single family dwelling

PROPOSED LAND USE:
single family dwelling with attached garage and porch

SURROUNDING LAND USE: Single family houses, many with attached garages

ZONING HISTORY: Zoned R-12 since 1979

PREVIOUS ZBA ACTION: None

ATTACHMENTS: None

PLANNING BOARD APPROVAL REQUIRED: no

Dear Property Owner: As an owner of abutting property, which is either adjoining or located directly across the street from the subject parcel,

you are hereby notified of the public hearing on the bolded item below. The full Zoning Board of Adjustment agenda is as follows:

1. Attendance
2. Approval of Prior Minutes of June 16, 2011.
3. Old Business
4. New Business
 - A. * **Z 11-14 Richard Callaghan**, 26 Horne Street, Tax Map 35, Lot 18, zoned R-12, owner Richard Callaghan, 32 Horne Street, appeals an administrative decision by the Zoning Administrator in a Notice of Zoning Violation letter to the applicant dated May 2, 2011 that the use on the property is a rooming house which is not allowed by right in the R-12 zone.
 - B. * **Z 11-15 Janice L. Greene**, 90 Glenwood Avenue, Tax Map E, Lot 19E, zoned R-12, owner, Janice L. Greene, 90 Glenwood Avenue, requests a variance from the terms of Article IV, Section 170-12 B & the R-12 district Table of Uses and Dimensional Regulations, Side Setback for principal buildings, to construct an attached garage and porch with a side setback of ten (10) feet, where fifteen (15) feet is required.
5. Adjourn
 - B. Vote on revised Operating Rules.

Other Board Business

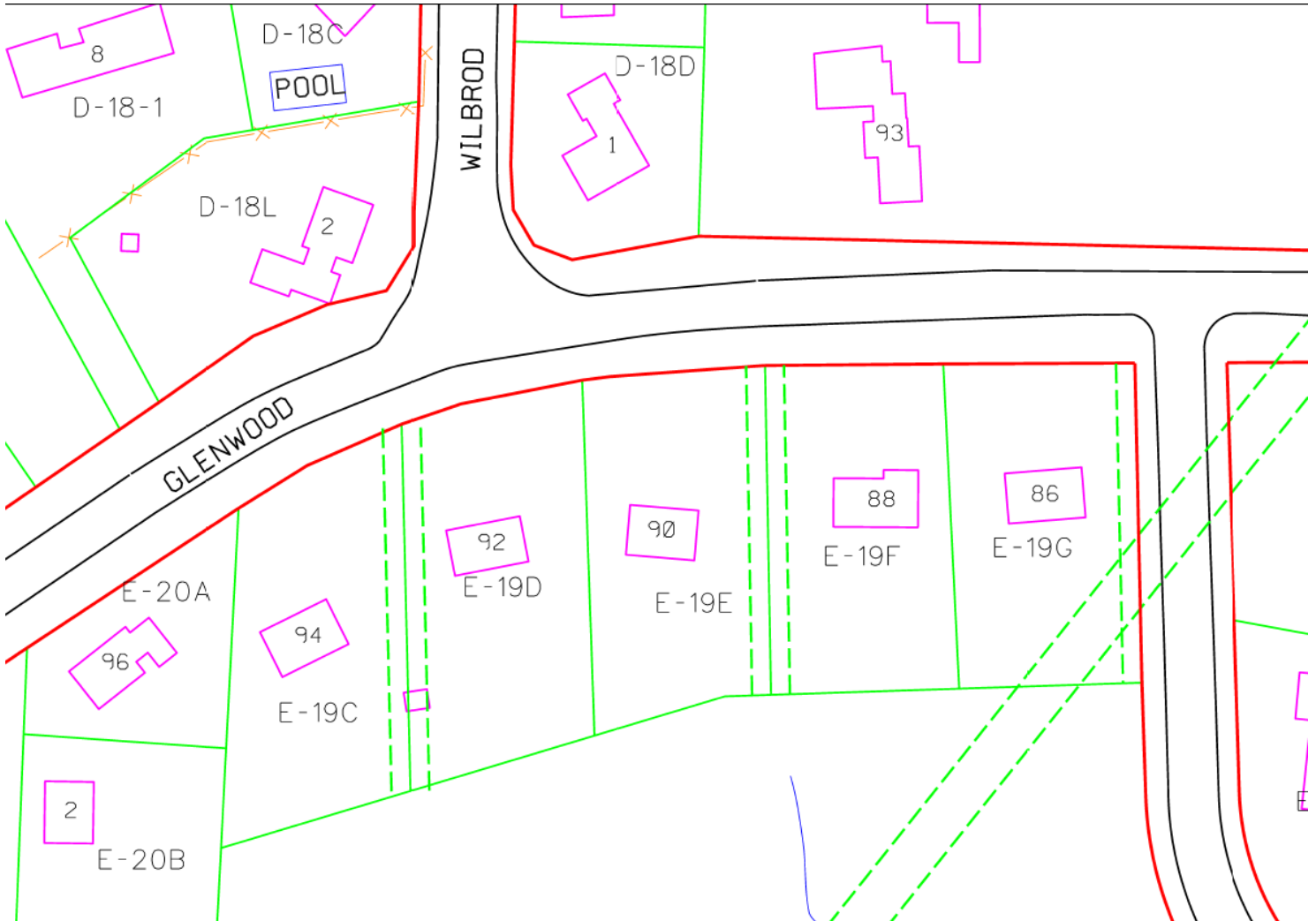
*If the application is accepted for discussion, the **public hearing** will be held that evening. Persons with questions or wishing to see the plans are invited to visit the Planning Office, weekdays from 8:00 am to 4:00 pm. You may also view materials at www.dover.nh.gov, a map showing project locations can be found at www.dover.nh.gov/planhome.html. Follow us on Twitter @DoverNHPlanning and find us on Facebook at www.facebook.com/pages/Dover-NH/City-of-Dover-NH-Planning/446789895351



CITY OF DOVER

ZONING BOARD OF ADJUSTMENT – ABUTTER NOTICE

Meeting Type: Regular Meeting
Meeting Location: Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date: Thursday, July 21, 2011
Meeting Time: 7:00 pm





CITY OF DOVER

ZONING BOARD - STAFF MEMO FILE #Z11-15

Application Type: Dimensional Variance
Applicant(s): Janice L. Greene
Owner(s): Janice L. Greene
Location: 90 Glenwood Avenue, (Tax Map E, Lots 19E)

INTENT: To obtain a side setback Variance to allow 10 feet of side setback for the construction of an attached garage and porch where 15 ft. is required.

LOTS/UNITS PROPOSED: None

AGENDA ITEM #: 4-B

ZONING DISTRICT: R-12

EXISTING LAND USE: Single family

PROPOSED LAND USE: No Change

SURROUNDING LAND USE: Single family houses, many with attached garages

PREVIOUS ZBA ACTION: No.

PB APPROVAL REQUIRED: No.

ATTACHMENT: none

APPLICATION IS COMPLETE: Yes

NOTICES AS REQUIRED: Yes

STAFF RECOMMENDATION:

The Planning Department supports the request.

There is not enough land width on the opposite side of the lot. The dwelling does not have a garage, unlike many of the surrounding properties and is situated roughly equidistant from each side line at a slight angle to them. Construction of the proposed 24 ft. wide garage would most likely require an 11.5 ft. side setback, but the applicant is asking for 10 ft. to be conservative. The proposed construction will not encroach into the easement.

Reason for Staff Recommendation

The requested action is consistent with the Master Plan which guides development in the City of Dover. The spirit and intent of the setback requirement is still met if relief is granted because sufficient light, air, views and access will be maintained between the adjacent properties. The applicant cannot construct what her neighbors have primarily because of the narrowness of the lot when compared with surrounding properties and the attached garage cannot reasonably be located anywhere else off the main structure. A detached garage could be constructed at ten feet, but would be too close to the main structure and would not fulfill the needs of the applicant.

Recommendation

The Planning Department recommends the Zoning Board hold the public hearing, and approve the variance.

Summary of Request and Background

The applicant's property is located on the south side of Glenwood Ave and has a utility or drainage easement along the eastern boundary where the garage is being proposed.