CITY OF DOVER BOARD OF ADJUSTMENT
AGENDA
Wednesday, May 21, 2014 at 9:00 AM

City Hall Council Chambers
15 Loockerman Plaza, Dover, Delaware

ROLL CALL

APPROVAL OF AGENDA

APPROVAL OF MINUTES OF March 19, 2014 Meeting

NEW BUSINESS

Applicant #V-14-06
328 North DuPont Highway. Kalpkish, LLC has requested a variance from the requirements of Article 4 §4.14 of the *Zoning Ordinance* pertaining to the front and rear setbacks. The applicant proposes subdividing the property into two parcels, front and rear. The new subdivision line would run between two existing buildings. Subject property is zoned C-4 (Highway Commercial Zone). The Tax Parcel is ED-05-068.13-01-79.00-000. The owner of record is Kalpkish, LLC c/o Kishor C. Sheth.

ADJOURN
29 Del.C. § 10004(e)(2)

THE AGENDA ITEMS MAY NOT BE CONSIDERED IN SEQUENCE. THIS AGENDA IS SUBJECT TO CHANGE TO INCLUDE THE ADDITION OR THE DELETION OF ITEMS, INCLUDING EXECUTIVE SESSIONS.

CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
March 19, 2014

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, March 19, 2014 at 9:00 A.M. with Chairman Sheth presiding. Members present were Mr. Hufnal, Colonel Ericson, Mr. Senato, Chairman Sheth, and Mr. Keller.

Staff members present were Mrs. Townshend, Mrs. Purnell, Mrs. Harvey, Mr. Cook, and Deputy City Solicitor William Pepper. Additionally, Mrs. Dawn Melson-Williams and Attorney Glenn Mandalas.

APPROVAL OF AGENDA

Mr. Hufnal moved to approve the agenda with the reverse of application V-14-05 being first on the agenda, seconded by Colonel Ericson and unanimously carried 5-0.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF FEBRUARY 19, 2014

Mr. Keller moved to approve the meeting minutes of February 19, 2014 with the necessary corrections, seconded by Colonel Ericson and unanimously carried 5-0.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATIONS

Mrs. Townshend, Director of Planning and Community Development stated that the meeting would be conducted in accordance with the approved agenda. She reviewed the procedures for the meeting. She noted that approved variances expire after one (1) year if the approved project has not commenced; that all public notice for the application on this agenda were completed in accordance with code requirements; and the meeting agenda was posted in accordance with the Freedom of Information Act requirements.

Mrs. Townshend stated that following the action on application V-14-05 she and Mr. Pepper will be leaving the dais and Mrs. Melson-Williams will be the primary Staff Advisor and Mr. Mandalas will be the legal counsel to the Board.

NEW BUSINESS

Applicant #V-14-05:

74 Laurel Drive. Thomas Bugbee and Sherrill Brekke have applied to the Board of Adjustment for a variance from the requirements of Article 5 § 11.211 (c) of the *Zoning Ordinance* pertaining to new construction within the flood hazard area. They have specifically requested to build to a six (6) foot contour. Subject property is zoned R-10 (One Family Residence Zone). The Tax Parcel is ED-05-077.14-01-32.00-000. The owners of record are Thomas J. Bugbee and Sherrill L. Brekke.

Mrs. Townshend, Director of Planning and Community Development, submitted the following items for the record: staff report, updated property survey, and a Power Point presentation submitted by the applicant.

The legal notice was published in the Delaware State News on March 9, 2014, and the public was notified in accordance with the regulations.

The Board of Adjustment reviewed and approved a variance for this property in May 2013. A change to the condition on the approval subsequently after the change was approved, it was determined that there was some erroneous information shared on the record. In order to make sure the record is clean and everything is correct in terms of the variance it was determined that the most prudent approach was to submit a new application.

Chairman Sheth questioned if there was any member who had a conflict of interest and there was none.

Representative: Mr. Thomas Bugbee, Owner.

Mr. Thomas J. Bugbee was sworn in by Mr. Pepper.

Mr. Bugbee testified that he came before the Board of Adjustment in December 2013 for a variance to allow for construction of a single family residence to the 6-foot contour line instead of a 7-foot contour line. When the testimony was given, they thought they had to go off of a 35-foot front yard setback. This was incorrect. He received permission from the HOA (Home Owners Association) to go from the 25-foot setback. A recent survey was then performed by Scott Engineering to make sure if the home could fit within the 25-foot setback to the 7-foot contour line. The home will not fit; therefore, the owners are before the Board of Adjustment asking for approval to go back to the 6-foot contour line from the 25-foot setback.

Mrs. Townshend stated for clarification that when the application was reviewed in December 2013 it was believed at that point that the owners had to build to the 35-foot setback and not the 25-foot setback. The Board of Adjustment had previously approved construction to the 7-foot contour line in December based on the information presented on that date and they were allowed to go beyond the 7-foot contour line and stay above the 6-foot contour line. Because the information was erroneous, the owners and Planning Department wanted to make sure that the Board of Adjustment decision was based on correct information. With the new survey the applicant still determined that the house could not be placed and be above the 7-foot contour line and this is the reason it is back before the Board of Adjustment.

Mr. Keller stated that as mentioned by Mrs. Townshend it was his recollection as well. He had raised a question about a deed restriction being in effect or not during the course of the previous hearing. The motion at the December meeting was to include presentation of evidence that in fact a deed restriction would prohibit the applicant from building from the 25-foot setback line as opposed to the reporting of the 35-foot setback requirement. That apparently has been overcome and even though the house seems to depict the third variation of a proposed structure to be built, this was not a real concern to him. The circumstance otherwise even with moving up to the 25-foot setback line will still apparently, at least, if not further, impact any elevation beyond the or less than the 6-foot flood elevation line. He was appreciative of having the information brought back to the Planning Department with the 35-foot matter resolved.

Responding to Mr. Hufnal's questioned whether it was the same size square foot house, Mr. Bugbee stated yes. There was a minimum requirement of 2000 S.F. that was previously 2800 S.F. so the home could fit, but it stills does not fit with the new survey. It requires more space.

Chairman Sheth declared the public hearing open.

There being no one wishing to speak, Chairman Sheth declared the public hearing closed.

Chairman Sheth questioned if there was any additional correspondence for the record. There was none.

Colonel Ericson moved to approve application V-14-05 based upon the testimony given and the documents received. The motion was seconded by Mr. Keller and unanimously carried 5-0.

Applicant #V-14-01:
128 South Queen Street. Joe W. Burden has appealed the decision of the City Planner to the Board of Adjustment regarding the use of the subject property as a rooming house. Subject property is zoned RG-1 (General Residence Zone). The Tax Parcel is ED-05-076.12-70.00-000. The owner of record is Joe W. Burden. *The hearing of this appeal was postponed from the January 15, 2014 meeting at the request of the applicant.*

Mrs. Melson-Williams, Principal Planner, submitted the following items for the record: summary report, exhibits 1A, 1B, 1C, 2A, 2B, location exhibit maps, staff report, and a letter from adjacent property owner.

- 1A- A copy of the Appeal as filed by the Applicant.
- 1B- Letter from Property Owner dated November 21, 2013.
- 1C- Letter from Planning Director dated November 21, 2013 providing information appeal processes.
- 2A- Letter of Suspension of Rental Permit dated November 15, 2013 from Planning Director: Unlawful Use as Rooming House.
- 2B- Letter of Code Violations from Code Enforcement Officer dated November 18, 2013 with Pages 1 and 2 (of 11 pages) listing violations associated with this Appeal Request on Rooming House.

The legal notice was published in the Delaware State News on March 9, 2014, and the public was notified in accordance with the regulations.

Chairman Sheth questioned if there was any member who had a conflict of interest and there was none.

Representative: Mr. David Zerbato, Attorney on behalf of Mr. Joe W. Burden, Owner.

Mr. Joe Burden was sworn in by Attorney Glenn Mandalas.

Responding to Mr. David Zerbato's question when the property was purchased, Mr. Burden testified that he purchased the property roughly ten (10) years ago as a rooming house.

Responding to Mr. David Zerbato's question of the use of the property, Mr. Burden testified that he used the property as an apartment in the front with one (1) family, and four (4) bedrooms in the back that consist of four (4) people living in the back.

Responding to Mr. David Zerbato's question whether the use of the property had changed from the time of purchase, Mr. Burden testified that the use of the property as a rooming house was never changed.

Responding to Mr. David Zerbato's question whether he enlarged the use of the property from the time it was purchased, Mr. Burden stated no.

Responding to Mr. David Zerbato's question the use of the property at the time the rental license was suspended; Mr. Burden stated that he used the property as an apartment in the front and four bedrooms in the back the same as it was purchased ten (10) years ago. The license was suspended last year and it was stated by the City that it could not be used as a rooming house. He stated that his tenants were displaced and are walking around on the streets with their bags on their backs with no place to stay.

Responding to Mr. David Zerbato's question whether any construction was performed on the property since purchasing other than regular or routine maintenance, Mr. Burden stated yes, he stated that the property was inspected a year ago and it passed inspection including the rooming house. Now all of a sudden everything is wrong with the property.

Mr. David Zerbato's stated that given Mr. Burden's testimony and referencing Article 7 of the *Zoning Ordinance* stated that the ordinance contained a provision until 2003 that permitted the use as a rooming house. Mr. Burden has used the property as a rooming house as it was used in the past. Under the *Zoning Ordinance,* the property is permitted to continue to be used as a rooming house for a minimum of 20 years after the amendment to the *Zoning Ordinance* which was in 2003. He was not arguing the exact date or the length of the use, but it is clear that the very minimum of the use is 20 years and they are well within that time period to use as a rooming house.

Responding to Chairman Sheth's question whether he owned any other rooming houses, Mr. Burden stated no. He stated that there are plenty of rooming houses in Dover that he was aware of in residential areas.

Responding to Chairman Sheth's question whether a separate license was needed for a rooming house and a single family home at the same property, Mrs. Melson-Williams stated that the rental program for the City of Dover licenses have different types of housing units. If you are renting a single family home that is one type of license and the fees are different. Apartments have a type of rental fee as well. When you get into a rooming house it most likely falls under the provisions associated with the lodging house provisions of the Dover Code of Ordinances which is a different fee structure. To her knowledge this property did not hold that type of lodging house license. The lodging house covers dormitories, hotel spaces, where people are in the location for a temporary or shorter period of time such as a transitional situation.

Responding to Chairman Sheth's question whether there could be two (2) licenses for the same property, Mrs. Melson-Williams stated typically no, because the use will fall into one category or another.

Responding to Mr. Keller's question whether Mr. Burden had anything to do with the property prior to purchasing, Mr. Zerbato stated that he questioned Mr. Burden's knowledge of the use of the property prior to him purchasing the property.

Responding to Mr. Keller's question whether there were some oversight or management responsibilities for the property prior to purchasing it, Mr. Burden stated no.

Responding to Mr. Keller's question whether there was a better recollection when the property was purchased, Mr. Burden stated that he could not find the title and was not able to go and obtain the title.

Responding to Mr. Keller's question whether he was aware of the date of the acquisition by Mr. Burden of the property, Mr. Zerbato's stated no specifically. He had requested to Mr. Burden that he have a copy of the deed, but he had not reviewed a copy of the deed as of today.

Responding to Chairman Sheth's question whether it was before or after 2003, Mr. Zerbato's stated that he did know the specific date.

Mr. Hufnal stated that it is listed in the information provided that the property was for sale in October 2001. Responding to Mr. Hufnal's question whether the property was purchased shortly after that time prior to the change of the *Zoning Ordinance* in 2003, Mr. Burden stated that it was right around that time when he purchased the property.

Responding to Mr. Senato's question whether he had owned the property since 2001, Mr. Burden stated somewhere around that timeframe, he was not sure of the exact date.

Responding to Mr. Senato's question whether the property was currently vacant, Mr. Burden stated yes. It was condemned last year.

Responding to Mr. Senato's question of the reason the property was condemned and if the property was vacant prior to it being condemned, Mr. Burden stated no, tenants were living at the property. It was condemned last year because the City stated that it could not be used as a rooming house, but two (2) apartment houses. At that time he filed an appeal because when he purchased the property it was used as a rooming house.

Referring to statements from the City, Mr. Senato stated that there was a request for extensive repairs to the home and that it was unfit for human occupancy.

Responding to Mr. Senato's question whether the property was condemned because of all of the violations dealing with the property, Mr. Zerbato stated that they only appealed the issue of the rooming house.

Responding to Mr. Hufnal's question whether each year the rental license is supposed to be renewed and if the owner had renewed the license during the inspection in 2011 or had it lapsed, Mr. Burden stated that each year he pays the rental permits and he pays the amount that is owed for each property.

Responding to Mr. Hufnal's question whether there was a Conditional Use on the property when it was purchased and if so; did it change hands to the new owner, was the property vacant for a long period of time such as a year for any period? Mr. Burden stated no.

Responding to Mr. Hufnal's question of whether a Conditional Use would expire on a property if it is not used in a period of time, Mr. Mandalas stated that under the ordinance that was referenced by Mr. Zerbato in Article 7 a legal Non-Conforming Use (not a Conditional Use) would be allowed to continue unless it was discontinued for a period of one (1) year as a rooming house, then the grandfather right would terminate.

Responding to Mr. Hufnal's question of whether a rental property could be used if the rental license was not renewed, Mr. Mandalas stated that it is correct to say that the owner needs to have a rental license in the City of Dover that is consistent with whatever use is being made of the property.

Mr. Hufnal stated that upon reviewing the report that there was no valid rental license for 2011-2012. Mr. Burden stated that every year he pays his rental permits as he does every year including this year when he paid $4800. He stated that he paid for all of his rental properties. If it was not paid it was because he did not receive the information.

Colonel Ericson stated that there needs to be clarification. According to Mr. Zerbato that it is grandfathered to have a rooming house for 20 years, but Mr. Mandalas stated that it was Legal Non-Conforming if it is not used for one (1) year then the Conditional Use is gone.

Responding to Mr. Ericson's question of which of the information stated above is correct, Mr. Mandalas stated that he thinks that he and Mr. Zerbato would agree that this property is reviewed under Article 7 to the extent that it was used as a rooming house when the ordinance changed to prohibit rooming house and at that time it became a legal non-conforming use. Under the provisions of the City Zoning Ordinance if the use terminates for a period of a year the legal non-conforming status or grandfathered status would expire at that time.

Mr. Zerbato stated that the information Mr. Mandalas stated was correct. He was referencing another provision Article 7§1.51 which stated that under certain circumstances some non-conforming uses would only be prohibited for a certain period of time because it is a residential zoning district. The non-conforming uses would only be prohibited for the greater of the 20 years or 40 years since the date of construction plus some other caveats because the home was constructed much longer ago that at minimum, the 20 year window would apply in this situation; however, there is some ambiguity as the statue reference the effective date of the ordinance which he believed was 1976. Because the amendment was in 2003 he would take the position that at a minimum, the non-conforming use would be permitted to continue for at least 20 years.

Colonel Ericson stated that therefore both attorneys disagree and have different interpretations.

Mr. Zerbato stated that he and Mr. Mandalas are consistence after 2003 when the ordinance was amended; it became a legal non-conforming use and was grandfathered. He was referencing the length of how long the use could be permitted to go forward. The ordinance is not exactly on point given this situation and given that it was an amendment verses the original effective date. He believed at minimum it should be permitted to be grandfathered in for at least a minimum of 20 years.

Responding to Colonel Ericson's question of the date people were kicked out and living on the streets, Mr. Burden stated November 2013.

Mr. Zerbato stated that in the documents that have been introduced on the record on exhibit 2A is a letter of the suspension of the rental permit that required that all persons vacate no later than November 22, 2013.

Responding to Colonel Ericson's question of whether he had read the letter that was received from a residence at 123 South Queen Street that stated there were a lot of allegations of illegal behavior from people living there and if he had any policies in his units, Mr. Burden stated that he tries to help the homeless and he does not do background or credit checks. He stated that he will begin doing background and credit checks in the future. He assumed he had people in the units with bad behaviors because he rented to anyone whether it was a sex offender or prostitute, etc. He stated that he will now do what he needs to do such as background and credit check as other landlords in order to protect himself.

Responding to Mr. Zerbato's follow up question of whether he had reviewed the notice of criminal drug or prostitution activities that is referenced in the letter either from neighbors, residents, or any other person, Mr. Burden stated that he had not received anything from anyone.

Responding to Mr. Senato's question of whether he was aware if there were any complaints to the Police Department on record for this property, Mr. Burden stated that he was sure the police had been to the property a couple of times, but he had not received any complaints from the police.

Mr. Senato stated there had been complaints by the general public in that area for rowdiness and hypothetically prostitution, etc.

Chairman Sheth stated that the City Solicitor discussed the suspension of the non-conforming use and at the same time the City Code Enforcement Officer and Mrs. Townshend justified the reason of the suspension.

Colonel Ericson stated that of course there would be disagreements, but since the information was in the packet regarding the use of the property he was concerned. It is important that Mr. Burden testify his procedures.

Mr. Keller stated that he was curious about whether the City had defined code for the difference between a rooming house, student home, and apartment house. In the information provided each of those terms are capitalized and he wanted to know how they were distinguished. It sounds

many times as if the three (3) terms are used rather interchangeably and he is lead to believe that they should not be and cannot be under the code.

Responding to Mr. Keller, Mrs. Melson-Williams stated that the *Zoning Ordinance* in Article 12 includes a series of definitions. Specifically a student home is defined in the RG-1 establishment of a student home as a Conditional Use process. It was actually added to the code in January 2003. She read the definition for a student home, garden apartment, mid-rise apartments, multiple dwelling, and dwelling unit.

Colonel Ericson stated that when evaluating whether a variance should be approved there are several criteria that are reviewed. He read the criteria.

Mr. Mandalas interrupted to make sure that everyone was clear that today's proceedings is an Appeal of Decision of an administrative offer, it is not a variance request, the job of the Board of Adjustment today is review the actions of the Administrative Officer which in this case is the Planner Director Mrs. Townshend who made interpretation of the code and determined that the property was being used as a rooming house and it is not permissible under the code. So the sole responsibility of the Board of Adjustment today is to determine if the Administrative Officer decision that the property was not properly being used as a rooming house was correct or incorrect. The Board of Adjustment decision again is to affirm or reverse the decision of the Administrative Officer, but not granting or denying a variance request.

Responding to Colonel Ericson's question whether if this was approved by the Administrator and she used the letter and information as such for part of the decision to disapprove and if it is brought up can it then be discussed, Mr. Mandalas stated that the letter is appropriate to be considered in the aspect whether it gives any credibility to the idea that the property is being used as a rooming house or not. There has been some discussion about various definitions. There is an agreement that the property is presently being used as a rooming house so there is no need to determine what the property is being used as. He thinks the real question for the Board of Adjustment to decide is if it has continuously been used as a rooming house and was it being used as a rooming house at the time Mr. Burden purchased it. If it was, has Mr. Burden continuously used it as a rooming house throughout the time he has owned the property? If Mr. Burden has used it as a rooming house then under Article 7 he has the right to continue that legal non-conforming use. If he did not continue the use and there was a period of time (one year) that it was not used as a rooming house then he does not have the right to use it as a rooming house any longer because the legal non-conforming status would have expired at that time.

Responding to Mr. Senato's question of whether the Administrator could testify so that they could hear her side of the story in order to make a decision, Chairman Sheth stated yes.

Responding to Mr. Keller's question of whether specifications of a student house, apartment house, and apartment type dwellings had such language with a rooming house, Mrs. Melson-Williams stated that there is not a specific definition of a rooming house. It would send you to a common dictionary definition. In a rooming house situation typically things such as cooking and restroom facilities those are held in common. If you look at the definition of a dwelling unit specifically means that you do not share your kitchen or bathroom with another dwelling. The definition of a rooming house may also be contained in the Building or Fire Code which means

other provisions would have to be in place in the unit itself. She could confirm if there are additional definitions in the main part of Dover Code regarding a rooming house.

Responding to Mr. Keller's question of whether there was any limitations of the number of inhabitants or individuals per square footage, Mrs. Melson-Williams stated that typically the Building or Fire Code may govern a square footage per person in some of their requirements. Previously, when rooming houses were a permitted use under the code they were limited to a total of five (5) roomers. That provision has since been removed from the *Zoning Ordinance* when it was deleted in 2003. It is not something that is specified in the *Zoning Ordinance* that a dwelling has to equal so much square feet.

Responding to Mr. Keller's question that back in 2001-2003 when the property was acquired, was he aware of the type of usage prior to his acquisition of buying the property and if the previous owner lived in the premises or rental property only, Mr. Burden stated that he had no idea if the previous owner lived in the premises.

Responding to Mr. Keller's question of whether upon his acquisition of the property were there any inhabitants at that the time of purchase, Mr. Burden stated yes.

Responding to Mr. Keller's question of whether the structure of the building was an apartment in the front and a number of boarders in the back, Mr. Burden stated that when he purchased the property there was an apartment up front with one family and four (4) individual rooms with four (4) people living in the back with two (2) commonly shared bathrooms in the back.

Chairman Sheth declared the public hearing open.

Mr. William Pepper, Deputy City Solicitor, Representing the Planning and Inspections Department

Mr. Pepper stated that Mr. Burden acquired the property October 2007. He presented a copy of the deed. This would clarify when the property was purchased.

Mrs. Ann Marie Townshend was sworn in by Attorney Glen Mandalas.

Mrs. Townshend testified that she wanted to specifically address the issue of non-conforming use that Colonel Ericson asked about. As previously stated by Mr. Mandalas, Mrs. Townshend read Article 7 § 1:1(3) and Mr. Zerbato was referencing Article 7§ 1:5(3) which she also read. She read Article 7 § 1:5. In the code citation if you read chronologically it sets up yes non-conforming use may continue to exist essentially in perpetuity unless certain things happen and one of them is if it is discontinued for a period of one (1) year or more. There is also a finite expiration time which she believes the twenty (20) years indicates. Because the non-conforming use ceased for a period of more than one (1) year it has since expired. The inspection and licensing record demonstrates that there was a period of time that the property was not licensed as an apartment house. There was a period of time that they believe was three (3) years during which the property was vacant and when Mr. Burden applied for a rental permit for the dwelling he applied for a single family dwelling permit.

Responding to Colonel Ericson's question the dates of the three (3) years expired timeframe, Mrs. Townshend stated that the detailed information will be provided by Code Enforcement Inspector.

Mr. Ron Coburn was sworn in by Attorney Glen Mandalas.

Mr. Ron Coburn, Code Enforcement Officer with the City of Dover.

An exhibit dated February 17, 2011 was given to the Board of Adjustment members. Mr. Coburn testified that he did an inspection on the property on that date. Mr. Coburn stated that the back bedroom doors had deadbolt locks and numbers on them which indicated they were being used as a rooming house. In a letter to Mr. Burden he asked that all deadbolt locks and room numbers be removed from the bedroom doors. The property could not be used as a rooming house without Conditional Use approval.

Responding to Mr. Pepper's question the type of license the property had, Mr. Coburn stated that at that time there was no license on the property. Also, in his letter to Mr. Burden he stated that prior to the renting of this unit(s) he must obtain a City of Dover rental license. Mr. Burden did obtain a Single Family Dwelling permit and that was resolved June 6, 2011.

Responding to Mr. Pepper's question of whether there were follow up inspections, Mr. Coburn stated that he did a couple of inspections. He did not do the final inspection because he was called away on military duty.

Responding to Mr. Pepper's question of whether the locks were removed when he did the second inspection, Mr. Coburn stated that the locks and numbers had been removed from the doors.

Responding to Mr. Mandalas's question the date of the first inspection, Mr. Coburn stated that the first inspection was February 16, 2011.

Responding to Chairman Sheth's question of whether at the time of the first inspection they had a rental dwelling permit for a single family dwelling, Mr. Coburn stated that at that time they had no rental dwelling permit.

Responding to Mr. Hufnal's question of when the property was up for sale by the previous owner, between then and when the property was purchased by Mr. Burden in 2007, was this the timeframe the property was vacant for three (3) years, Mr. Coburn stated he did not know.

Responding to Mr. Hufnal's question of whether the Non-Conforming Use expired because the property was not being utilized, Mr. Coburn concurred.

Responding to Mr. Hufnal's question that prior to Mr. Burden purchase the Non-Conforming Use expired, Mr. Coburn concurred.

Responding to Mr. Hufnal's question that with the Non-Conforming Use for more than a year and Mr. Burden did not apply for a rental dwelling permit which had also expired, Mr. Coburn concurred.

Responding to Chairman Sheth's question that the property may have been used without a valid rental dwelling license, Mr. Coburn concurred.

Mr. Hufnal stated that in the 2011 inspection it notes that the rental dwelling permit was required, but the property was not in use and the Non-Conforming Use permit had expired. When the inspection was done on April 23, 2012 again there was no valid rental permit. It appears that many times since Mr. Burden purchased the property in 2007 that it went without a valid permit. Responding to Mr. Hufnal, Mr. Coburn stated that again when he did the inspection in 2011 there was no valid rental permit for the property.

Colonel Ericson asked for clarification that the owner died in 2003 and the property was up for sale and purchased by Mr. Burden in October 2007, the Non-Conforming Use expired, but the code changed in 2003 and the property was no longer a rooming house. Responding, Mr. Coburn concurred.

Exhibit

Mr. Matthew Brown was sworn in by Attorney Glen Mandalas.

Mr. Matthew Brown, Code Enforcement Officer with the City of Dover.

Responding to Mr. Pepper's question whether Mr. Brown did the recent inspection on the property, Mr. Brown stated yes, he did the one on November 2013.

Responding to Mr. Pepper's question the items found on the use of the property when he did the inspection, Mr. Brown stated that he found as far as the use of the property the same exact same items that were in the Mr. Coburn case in the 2011 inspection. There were padlocks on the doors and they were locked. Not all the doors had numbers on them, but three (3) of the four (4) units in the back had numbers on the doors. At that time, he did not have access to the front units. Mr. Burden did provide access at a later time. When inspected there was an upstairs and downstairs unit to the front apartments.

Responding to Mr. Pepper's question of whether there were locks on the refrigerators, Mr. Brown stated yes, there were several locks.

Responding to Mr. Pepper's question of whether the utility usage was checked for the property from 2007-2010, Mr. Brown stated yes, he asked that they refer to the last four (4) pages of the handout it shows that Mr. Burden had electric and water service from November 1, 2010 to December 6, 2013 until such time when the City of Dover had condemned the property. The previous owner Selma Thomas had electric service from December 10, 2003 to November 27, 2007 which shows a three year gap between Ms. Thomas and Mr. Burden. Ms. Minnie Fenwick (estate) had service from July 1, 1973 to November 10, 2003.

Responding to Mr. Pepper's question of the timeframe that there was no utility service, Mr. Brown stated there was no service from November 27, 2007 to November 1, 2010, roughly 3 years.

Responding to Mr. Pepper's question about the water consumption, Mr. Brown stated that the water consumption was zero. On page 2 of the handout the water and electric consumption for the last year which is consistent with 4 to 6 occupants of a residence. From 2007 to 2010 there was no water consumption.

Responding to Mr. Keller's question of the listing Minnie Fenwick (estate), Mr. Brown stated that it is listed in the H.T.E. computer system which is used for the billing in the Customer Service Department. Minnie Fenwick (estate) of, and he believes that it was initially in her name and then transferred to the estate of her until it sold.

Responding to Mr. Keller's question of the date, Mr. Brown stated that it was discontinued December 10, 2003. It does not show the date that it transferred from her to the estate of her.

Responding to Mr. Keller's question of whether it would typically coincide close to the date of her death, Mr. Pepper stated no. It will automatically transfer from the living person to their estate and there would not be any change in the electric system until the property actually transfers by deed.

Responding to Mr. Keller's question with the City's records suddenly taking on the estate of Minnie Fenwick that someone had approached the City and/or paperwork had transpired, Mr. Pepper stated that Selma Thomas purchased the property probably in December 2003 and electric service was maintained until November 2007 in which case it elapsed from November 2007 to November 2010 when it was then put in Mr. Burden name. Essentially during Mr. Burden's initial three (3) years of ownership the property had no electric and consumed no water.

Responding to Chairman Sheth's question the reason for the *Zoning Ordinance* change on January 1, 2003, Mr. Pepper stated that rooming houses were becoming a problem in the City of Dover and the *Zoning Ordinance* change was an attempt to solve the problem. The adoption of student housing was a similar situation. It was presumed to be getting out of control and some regulations were wanted to be brought forth.

Responding to Chairman Sheth's question of whether if there are a lot of complaints from the neighborhood and also during a City Council discussion there were a lot of law and order issues is the ordinance normally passed; Mr. Pepper stated that this is typically what happens.

Mr. Pepper handed out a copy of the deed

There were no cross examinations from the attorneys.

There being no one else wishing to speak, Chairman Sheth declared the public hearing closed.

Chairman Sheth questioned if there was any additional correspondence for the record. There were three exhibits, the Deed 2007, copy of the inspection letter and violation listing from 2011, summary of case work and violation information for a number of years as part of the correspondence that was previously given to the Board of Adjustment of a letter dated January 10, 2014 this in response to a neighbor located at 123 S. Queen Street.

Closing remarks from the Attorneys

Mr. Zerbato stated that in closing Mr. Burden testified that when he purchased the property it was being used as a rooming house. The testimony by the two (2) witnesses from the Planning & Inspections Department both testified that during their inspection there were separate locks and numbers on the doors which indicates that they were being used as separate rooms. The fact that there was no license is not the issue at hand; the issue at hand is whether the property was actually being used as a rooming house. The license would be a separate issue. Mr. Burden testified that he used the property as a rooming house throughout his ownership of the property. The use continued throughout since the amendment in 2003 and therefore a prior nonconforming use which should be permitted to continue even when the current rental license was terminated in November 2013 the property was still be used as a rooming house. The use should be permitted to continue on under Article 7 of the Dover Ordinance.

Mr. Pepper stated that in closing it would be an interesting question as to whether the failure to get the appropriate license would vitiate a legal nonconforming use. We do not have to reach that issue today, the undisputed evidence is that the property had no electric or water consumption for three (3) years from the time it was purchased by Mr. Burden until 2010. It could not have been used as a rooming house without electric and water. Therefore; we have a three (3) year interruption under the code Article 7 § 1:13 discontinuance for a year or more requires them to comply with code. This is the situation that we have today and the Board of Adjustment should uphold Mrs. Townshend's decision.

Colonel Ericson commented that Mr. Burden applied for a single family housing permit, but was in fact using further purposes. The property did have a Non-Conforming Use when the code change, but it had a one year limit and that was exceeded because it had no electricity or water used for over three (3) years. The Non-Conforming Use has expired and no longer in affect and the code should be followed as currently written.

Mr. Hufnal stated that he agreed with Colonel Ericson comments that with the lack of service for the three (3) year period the Non-Conforming Use approval expired and without valid permits he would support the City decisions.

Colonel Ericson moved to affirm the decision of the Administrator Official due to suspension of rental license and no electric or water service for three (3) years, the property is not permitted to be used as a rooming house, in addition to all of the presentation of evidence and relying upon the well documented evidence of the Code Enforcement Officers with the historical records of their inspection criteria and City Council presentation of the distinct dates, times, and places of evidence regarding the transfer of ownership, etc. This motion was seconded by Mr. Senato and unanimously carried 5-0.

Chairman asked if there were any additional questions, there was none.

Mr. Senato moved to adjourn the meeting, seconded by Mr. Hufnal and unanimously carried 5-0.

Meeting adjourned at 10:31 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary

City of Dover

Board of Adjustment

May 21, 2014

V-14-06

Location:	348 North DuPont Highway
Applicant/Owner:	Kalpkish, LLC c/o Kishore C. Sheth
Tax Parcel:	ED-05-068-13-01-79.00-000
Application Date:	April 11, 2014
Present Zoning:	C-4 (Highway Commercial Zone)
Present Use:	Hotel, Retail
Reviewed By:	Bill Cook, Planner I
Variance Type:	Area Variance
Variance Requested:	*Zoning Ordinance*, Article 4, Section 4.15 - Front Yard, Rear Yard

Project Description:

The applicant is proposing to create two (2) parcels of land from an existing 3.35 acre +/- parcel, on the site currently occupied by Super 8 Motel. The parcel would be subdivided into a 0.80 acre +/- parcel ("Lot #1) with frontage on North DuPont Highway, and a 2.55 acre +/- parcel with frontage on Oak Lane. Two buildings exist on the current lot. A new lot line running in a north-south direction is proposed between the existing building located at the front of the existing lot, and the building located at the rear of the existing lot.

The applicant is requesting an area variance from the *Zoning Ordinance* Article 4 §4.15 for the reduction of the rear yard for "Lot 1" from 10 feet or equal to building height to approximately 3 feet or less. For the "Residual Parcel" to be located in the rear of the current property, the applicant requests a reduction of the right side yard requirement from 25 feet to 16.8 feet +/-.

The original application submission requested waivers for the rear yard requirement for "Lot #1," and the front yard and lot width requirements for "Residual Parcel." At the time it was believed that the "Residual Parcel" would not have frontage on Oak Lane due to a reputed strip

of residual lands ranging from approximately 1 foot to 20 feet located between Oak Lane and the subject property. Prior surveys showed the strip of land as reserved by Louis Edgell. The applicant was unable to substantiate through deed research that the strip of land currently exists, believing that the reserved lands were extinguished through right-of-way dedication for Oak Lane, and that the subject property does in fact front along Oak Lane. Staff research found that the subject lands were annexed to the City in December, 1963. Aerial photographs dating before that time show a driveway or (likely unimproved) road leading to the vicinity of the houses that remain today. Staff determined that since the full 50 foot right-of-way is fully maintained by the City, is on official City maps, and is on the Department of Public Works list of maintained public streets, for purposes of this application the subject property has frontage on Oak Lane.

This application is associated with application SB-14-04 for a minor subdivision of 348 North DuPont Highway. This case is scheduled to be heard before the Planning Commission at its meeting of June 16, 2014, pending the outcome of the variance application.

Adjacent Land Uses

The property is located on the southwest side of North DuPont Highway and is zoned C-4 (Highway Commercial Zone). The adjacent property to the north, Silver Lake Apartments, is zoned RG-2 (General Residence Zone) and has a private entrance drive off North DuPont Highway. Nearby properties also zoned C-4 include a Friendly's restaurant immediately adjacent to the subject site to the south, and another commercial property (Sound of Tri-State) located across Oak Lane farther southeast. Four residential properties are located on Oak Lane directly across or visible from the subject property and are zoned R-8 (One-Family Residence Zone).

Code Citation

	C-4 - Required	Requested – "Lot 1"	Requested – "Residual Lot"
Minimum required:			
Lot width (ft.)	150' per building	199.5'	324.8'
Lot depth (ft.)	150'	175.3'	348.4'
Front yard (ft.)	30'	30'	30'
Side yard (ft.)	25'	25'	16.8'

	Rear yard (ft.)	10' or equal to building height: Lot 1 Building= 17.2" Residual Lot Building= 19.3"	<2'	67.3'

Exceptional Practical Difficulties Tests
Article 9 §2 dictates the specific powers and duties of the Board of Adjustment with regard to granting variances. Specifically the Board must determine:

2.1 Variance – The board shall have the authority to authorize variances from provisions of the Zoning Ordinance that are not contrary to public interest where the board determines that a literal interpretation of the Zoning Ordinance would result in undue hardship or exceptional practical difficulties to the applicant. In granting variances, the board shall determine that the spirit of the Zoning Ordinance is observed and substantial justice is done.

2.11 Area Variance. A variance shall be considered an area variance if it relates to bulk standards, signage regulations, and other provisions of the Zoning Ordinance that address lot layout, buffers, and dimensions. In considering a request for an area variance, the board shall evaluate the following criteria and document them in their findings of fact:

(a) the nature of the zone in which the property lies;
(b) the character of the immediate vicinity and the contained uses therein;
(c) whether, if the restriction upon the applicant's property were removed, such removal would seriously affect neighboring properties and uses; and
(d) whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the Zoning Ordinance.

1. The nature of the zone in which the property lies.

Applicant Responses:
"The property is located within a C4 zone, which is a highway commercial zone, and the properties in this area are of like zoning. The zone in which this property is located includes, as permissible uses, those uses traditionally associated with commercial areas surrounding a well-traveled highway. Such uses include Motels and eating establishments, theaters, offices, and retail establishments. The present uses of the property (which are not proposed to change) are permitted uses, consistent with the nature of the zone."

Staff Response:

The requested variance is consistent with the nature of the zone in which the property lies. The property is zoned C-4 (Highway Commercial Zone), which is the highway zone characterized by a wide variety of commercial, retail, and hospitality uses. The existing motel use is permitted in the zone, and the subdivision of the parcel into two parcels does not impact the present use on the resulting two properties.

2. The character of the immediate vicinity and the contained uses therein.

   Applicant Responses:
   "The present uses of the property complement the character of the immediate vicinity. Restaurants, motels, and wine and spirit stores are prominent on DuPont Highway. In this commercialized zone, the character of the immediate vicinity includes a density of commercial establishments, providing the retail consumer with a multitude of consumer options without the necessity of excessive travel."

   Staff Response:
   The requested variance does not change the character of the immediate vicinity at the present time. The zoning will remain the same and the hotel use, allowed within the C-4 (Highway Commercial Zone), is expected to continue. While single family residences are found across Oak Lane, this condition is not unusual along parts of DuPont Highway where some residences pre-dated commercial development on the highway, as well as annexation to the City.

3. Whether, if the restriction upon the applicant**'**s property were removed, such removal would seriously affect neighboring properties and uses.

   Applicant Responses:
   "Because there is no proposal to reconfigure the existing structures on the property, there would be no effect on neighboring properties and uses. The proposed variance merely recognizes the present use of the property and permits its continuation."

   Staff Response:
   The applicant proposes continued use of the property as a motel, which would not impact neighboring properties any differently than at the present time. Any future redevelopment of the property would likely initiate Planning Commission review, at such time impacts of such development to neighboring properties or uses would be considered.

4. Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the Zoning Ordinance.

   Applicant Responses:
   "Given the present nature of the financing industry, if the variance is not granted (and the property is not ultimately subdivided), the owner will have difficulty obtaining financing and making normal repairs and improvements to the motel portion of his property. This

difficulty will be a detriment to his ability to be competitive in the marketplace with other similarly situated motels in the vicinity. If the owner is unable to make such normal and traditional repairs and improvements, rather than maintaining the property as a motel property on a prominent highway in the City, the property could become dilapidated and create a tarnished appearance in one of the City's main corridors."

Staff Response:
Based on the information presented, the applicant wishes to subdivide the property into two parcels to that he can obtain financing to make improvements to the motel. While the consideration of exceptional practical difficulty should not be exclusively financial, the financial difficulty can be considered by the Board in review of a variance application. In this case, the ability to obtain financing to improve the property is used to justify the variance. According to the applicant, the ability to subdivide the property into two parcels would allow the applicant to obtain financing to make improvements to the property. As presented by the applicant, the exceptional practical difficulty relates to ability to obtain financing to improve the existing uses and buildings on the property, not to expand the buildings and uses.

Staff recommends that evidence be presented by the applicant that the ability to obtain financing for improvements to the existing buildings is hindered without the proposed subdivision that requires the requested variances.

Variance Recommendation:
Staff recommends approval of the variance for reasons as follows:

- The proposed variance would be in keeping with the character of the zone and the surrounding areas and may actually improve the character of the area due to the ability to improve the existing buildings on the property
- There is no development proposed as a part of this variance request, so there would be no detraction from the character of the area.
- The applicant has indicated that his ability to obtain financing to improve the existing improvements on the property could be hampered unless the property can be subdivided.

SCOTT ENGINEERING, INC.
Consulting Engineers • Surveyors • Land Planners

April 11, 2014

Ms. Anne Marie Townsend
City of Dover
Department of Planning and Inspections
P.O. Box 475
Dover, DE 19903

RE: Board of Adjustment Application for Variance
Super 8 Motel
348 N. Dupont Highway
Dover, DE
Tax Map Parcel #ED-05-068.13-01-79.00-000
SEI Project No. M-4101

Dear Ms. Townsend:

Thank you for meeting with me and Mr. Sheth on Tuesday, April 15th to discuss the desired variance for the above referenced property. Enclosed herein to support the variance request is the following items:

1. Board of Adjustment Application
2. Check in the amount of $300 for the application fee
3. Request for Mailing List Form
4. Project Contact List Form
5. Electronic File (PDF) of photos and Word Document of response to questions.

You had indicated at our meeting that due to the short time frame to submit the application that you would allow us additional time to get a plan submitted to you. We will get a plan submitted as soon as possible next week to accompany the application. Thank you for your leniency with that item.

The owner is proposing to subdivide his property into two parcels. The new subdivision line will run in a north-south direction between the two existing buildings near the front of the site and then run back to U.S. Route 13. See the sketch plan attached showing the approximate location of the boundary of the property in red and the proposed new subdivision line in yellow. It is proposed that the new subdivision line run along or relatively near the rear building line of the front building. Based upon this, our client is requesting a waiver of the required rear yard requirement of 10' or equal to the building height for the front parcel and a waiver of the required front yard of 30' for the front parcel. The height of the front building is approximately 17.2'. The height of the rear building is approximately 19.3'.

It should be noted that the property only has frontage on U.S. Route 13 and does not have frontage off Oak Lane. It is understood that since the rear parcel will not have frontage on U.S. Route 13 or Oak Lane to meet the required lot width of 150', that the owner will need to get a

22 Old Rudnick Lane • Suite 2 • Dover, Delaware 19901 • Tel.: 302-736-3058 • Fax: 302-736-3059
info@scottengineering.com • www.scottengineering.com

waiver of that requirement from the Planning Commission and that cross access easements will need to be provided for each parcel for ingress/egress and parking.

The owner is requesting an area variance for the property. Based upon the request it is believed that the request addresses the criteria for the variance as follows:

(a) The nature of the zone in which the property lies;

The property is located within a C4 zone, which is a highway commercial zone, and the properties in this area are of like zoning. The zone in which this property is located includes, as permissible uses, those uses traditionally associated with commercial areas surrounding a well-traveled highway. Such uses include Motels and eating establishments, theaters, offices, and retail establishments. The present uses of the property (which are not proposed to change) are permitted uses, consistent with the nature of the zone.

(b)The character of the immediate vicinity and the contained uses therein;

The present uses of the property complement the character of the immediate vicinity. Restaurants, motels, and wine and spirit stores are prominent on DuPont Highway. In this commercialized zone, the character of the immediate vicinity includes a density of commercial establishments, providing the retail consumer with a multitude of consumer options without the necessity of excessive travel.

(c)Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect neighboring properties and uses;

Because there is no proposal to reconfigure the existing structures on the property, there would be no effect on neighboring properties and uses. The proposed variance merely recognizes the present use of the property and permits its continuation.

(d)Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the zoning ordinance.

Given the present nature of the financing industry, if the variance is not granted (and the property is not ultimately subdivided), the owner will have difficulty obtaining financing and making normal repairs and improvements to the motel portion of his property. This difficulty will be a detriment to his ability to be competitive in the marketplace with other similarly situated motels in the vicinity. If the owner is unable to make such normal and traditional repairs and improvements, rather than maintaining the property as a motel property on a prominent highway in the City, the property could become dilapidated and create a tarnished appearance in one of the City's main corridors.

Thank you for your consideration in this matter. If you have any questions or require additional information please let me know.

Sincerely,

SCOTT ENGINEERING, INC.

Gregory R. Scott, P.E.



Site Aerial



Photograph 1
Front of Liquor Store and Restaurant Looking West



Photograph 2
Separation between Buildings Looking North



Photograph 3
Separation between Buildings Looking South