CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
May 21, 2014

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, May 21, 2014 at 9:00 A.M. with Vice Chairman Ericson presiding. Members present were Mr. Hufnal, Colonel Ericson, Mr. Senato, and Mr. Keller. Chairman Sheth was absent due to a conflict of interest.

Staff members present were Mrs. Townshend, Mrs. Purnell, Mr. Cook, and City Solicitor Nicholas Rodriquez.

APPROVAL OF AGENDA

Mr. Keller moved to approve the agenda as submitted, seconded by Mr. Senato and unanimously carried 4-0. Chairman Sheth was absent due to a conflict of interest.

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

Mr. Senato moved to approve the meeting minutes of March 19, 2014 with the necessary corrections, seconded by Mr. Keller and unanimously carried 4-0. Chairman Sheth was absent due to a conflict of interest.

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.

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.

Mr. Cook, Planner I, submitted the following items for the record: staff report, site plan, photos, exhibit email, and a letter submitted by the applicant.

The legal notice was published in the Delaware State News on May 11, 2014, and the public was notified in accordance with the regulations.

Vice Chairman Ericson questioned if there was any member present who had a conflict of interest

and there was none.

Representative: Mr. Glenn Mandalas, Attorney on behalf of Kalpkish, LLC Owner.

Attorney Mandalas stated that they were seeking a variance for the Super 8 Motel. There is a portion of the property that has a restaurant and the wine and spirit store that fronts on the highway and the hotel has frontage on Oak Lane. The applicant is seeking to subdivide the property for various reasons to include his desire to make improvements to the business and remain competitive in the market with other similar businesses. The applicant is requesting a variance from the rear yard setback for the restaurant and the wine and spirits portion of the property. It would be a variance from 10 feet or the building height to approximately 3 feet or less, which is a 7 foot variance to the rear of the businesses that front on DuPont Highway. They are also requesting a variance from the side yard requirement for the motel property. The side yard of the motel property is the portion that backs up to the restaurant and wine and spirits. The variance is from a 25 foot side yard setback to 16.8 feet. This would be 8.2 foot variance request. If approved the variance would commit them to seek a subdivision, but nothing at the property is planned to change. The configuration of the building will remain the same. Under the banking industry for the financing terms for motel type properties are significantly different than the financing terms for other types of commercial endeavors. Jan Jenkins Senior Vice President and the Chief Lending Officer of the First National Bank of Wyoming had commented on this during their discussion. When he inquired about the distinction between hotel properties verses some other personal endeavors, she responded by stating that "the restaurant and the liquor store are rented and produce cash flow. They produce sufficient cash flow to service their respective debt (the debt the bank would hold on those buildings). That makes those properties more attractive to the bank and consequently we would provide a more attractive interest rate. The motel does not cash flow and even with the rental income from the liquor store and the restaurant would not cash flow. You can always look at the motel as a spec building every night. You don't know whether there will be sufficient tenants in your motel each night to service your debt. By subdividing out the restaurant and the liquor store with their respective cash flow, those properties are graded higher by the bank and are not looked at as troubled debts. The motel is another story, but the bank at least gets a portion of the total debt upgraded to a performing loan."

Exhibit
Email from Jan D. Jenkins

Attorney Mandalas also discussed a case of WAWA verses New Castle County Board of Adjustment. He stated that the case would add application to the variance request that has been made today. The WAWA convenient store was seeking to upgrade its facility by adding fueling stations. Some of the New Castle County environmental regulations prohibited WAWA from putting in the underground gasoline tanks in that particular area. WAWA argued that there were other convenient stores in the area that had grandfathered gasoline tanks and because of that WAWA had the inability to compete with other convenient stores who had the fueling stations. New Castle County argued that the variance in that instance was a use variance requiring a more difficult unnecessary hardship standard. Today we are seeking an area variance. WAWA was arguing in contrast with New Castle County that it was an area variance. It has a less burden and exceptional practical difficulties. The court acknowledged that the WAWA variance request did not fit neatly within the use or the area categories. Therefore it analyzed the variance request

under the undue hardship test and exceptional practical difficulties test. The reason it is relevant is because of the comments made relating to the exceptional practical difficulties test. The first being that in the context of a use variance, economic hardship alone is not in of itself sufficient to justify the granting of a variance. When looking at the WAWA application in the context of an area variance the court made some more refine observations in the context of an on-going commercial business. When reviewing an area variance request the Board must look to whether a literal interpretation of the *Zoning Law* results in exceptional practical difficulties of ownership. There is something peculiar about owning this commercial endeavor that creates exceptional practical difficulties. The court further noted that economic benefit and/or hardship may constitute exceptional practical difficulties for the purpose of an area variance (which is being considered today) where the change sought is minimal. This is the first time that he was aware (this is a 2005 case) that a court has said in the context of an area variance where the change is minimal and contributes to economic benefit or competitiveness. The court was looking at whether or not a business could compete with other similar businesses in the area. "The economic hardship or competitiveness can only serve as a sole basis for the variance where the change is minimal. The court concluded that WAWA proposed addition of a fueling station was indeed minimal because in the current market place many convenient stores provided pumping facilities for their customers. The WAWA proposal would not change the character of the district. The court concluded by stating that economic competition is valid concern for an area variance. So, how does that case apply to what we are considering today in the context of a hotel, restaurant, and wine and liquor store? We have the burden of proving exceptional practical difficulty today. As Staff indicated and the WAWA case confirms that economic hardship alone cannot form the basis for granting a variance. However, as the WAWA case is instructive in it shows that economic competition
(the ability to compete in the market place), which is different than economic hardship, can form the basis for granting an area variance, but again the change has to be minimal. As we have demonstrated here if the variance is not granted the restaurant and the wine and liquor (spirit) store will be subject to the same unfavorable financing terms as the motel. Our ability to compete with other restaurants and spirit stores has been and will continue to be significantly diminished because of the burden of the motel financing requirements that they were required to live under because the other businesses are attached to the motel property. Not only will the change in this case be minimal but there will be no change. The building will look exactly as they look now, no reconfiguration of the structure; the character of the neighborhood will remain exactly as it is. So, where we have economic competitiveness as an issue and not plain economic hardship, and the change is indeed minimal. The court and WAWA demonstrates that it is sufficient to demonstrate an exceptional practical difficulty for the purpose of an area variance. He mentioned the four criteria and analysis from Staff. The legal standard is satisfied and the economic competitiveness will be hindered if the variance is not granted in the ability to make normal improvements to the business which are permitted uses will be diminished in the absent of a variance. With the ability to obtain more attractive financing you can see enhancements in the area of the neighborhood simply because there would be more money available to do improvements.

Responding to Mr. Keller's question of whether there would be any testimony by Mr. Gregory Scott, Attorney Mandalas stated no, unless there were some technical questions.

Representative: Mr. Gregory Scott, Professional Engineer, Scott Engineering Inc.

Mr. Gregory Scott was sworn in by Mr. Rodriquez.
Responding to Mr. Keller's question whether he had any presentation, Mr. Scott stated no.

Responding to Mr. Keller's question regarding the Site Plan dimension, and the minimal area involved with the request for the rear setback line for proposed lot number one (1) there were a couple of dimensions given on the plan at westerly corner of 7.0 foot +/- offset and a 7.2 foot +/- offset, he was thinking it would be a minimal 3 foot +/- request, Mr. Scott stated that the dimensions shown on the plan are from the main structure of the building at the first floor level off the proposed property line so the closet is 7.0 feet from the proposed property line. There is an overhang on the second story that has the balcony that projects over which would actually be closer. He stated that he did not have the dimensions, but they would be anywhere probably between 0-3 foot off the line. He would need to go back and calculate exactly what the setback distance would be. The line is certainly flexible.

Colonel Ericson stated if the Board of Adjustment approved 3 foot and it turned out that only 2 or 0 foot was needed then you would need to come back before the Board of Adjustment, therefore he would need the exact number.

Mr. Scott stated that originally the client wanted to hold the sidewalk that was there at one time as the setback. The client would want to go as close as 0 feet to the front building property line. When the line was placed they were not at 0 feet. He stated that they probably would be within ½ foot of the property line with the overhang of the second story.

Responding to Mr. Keller's question whether the request for the variance for the rear yard setback on that property would be 0 – ½ feet, Mr. Scott stated that the setback requirements would be 10 foot the height of the building. He stated that he could accommodate up to 1 foot easily. If they stay at 0 as a variance then whatever they have off of that is what was meant.

Responding to Mr. Keller's question whether he was correct that it is currently 7 and/or 7.2 feet off, Mr. Scott stated for the first floor. The overhang is even closer than that.

Responding to Mr. Keller's question whether the measurement is from the overhang or from the face of the structure, Mrs. Townshend stated that you would need to account for the overhang. If you allow for a 1 foot rear yard it would be able to accommodate that. If anything would move it would be the lot line.

Responding to Mr. Hufnal's question if it is closer than 1 foot then the survey would have to be adjusted or is there no room for adjustment, Mr. Scott stated that there is room for adjustment.

Responding to Mr. Hufnal's question if it is closer than 1 foot then he could move the line to make it one foot, Mr. Scott stated correct.

Responding to Mr. Keller's question whether the data column on the plan is reflects that the total area of the tax parcel is 3.35 acres and lot one (1) if a variance was approved as proposed indicates an area of 0.80 acres and the residual parcel noted as such would have a proposed of 3.35 acres, he is correcting that it should probably be the 2.55 acres, the difference between eight tenths of an acre and 3.35 total, Mr. Scott stated correct. Lot one (1) would be the smaller acre.

Responding to Mr. Keller's question whether the submission and commentary regarding Oak Lane status. It is indicated at a 50 foot width. Were they aware of any actual active dedication for Oak Lane at the 50 foot width? If Oak Lane was a parcel of a recorded subdivision, Mr. Scott stated that they have not found any record of a subdivision plan showing Oak Lane or any easement. They have not done an exhaustive title search of the property. There was a survey performed by Gerald Donovan & Associates in 1999 that was very vague on the area that he has shown as cross hatch between Oak Lane and this property indicating that it was residue lands of Louis Edgell that he retained. It was also between the little stub street that went up to this property to prohibit access coming across from there. Looking at the properties in the vicinity of Oak Lane and the surrounding areas they could find nothing that indicated that the residue parcels existed. Again, although they have not done an exhaustive title search on the property, but the monumentation that was found for the adjourning property lines actually butt right up to the property line for Kalpkish.

Mrs. Townshend stated that it was looked at by Staff and there was a discussion at the pre-application meeting about Oak Lane and whether it could be used as frontage. The original application that was submitted did not acknowledge that it was frontage. Staff looked at some of the history that was added to the report. Oak Lane is on the City's street list of a street maintained by the City. There are a number of places in the City where formal dedication did not happen for whatever reason. In the cases where the City has maintained the right-of-way as a City street for a number of years then it is considered a City street. Typically it is an excess of 20 years. The City has been maintaining it since the 1960's. In the 1960's the property was annexed into the City. From the time this property has developed the City has been maintaining the street. Therefore, we consider it a City street based on that.

Responding to Mr. Keller's question whether for acceptance if there was any formal City process or criteria that would be involved in acceptance of a street or land zoned by some entity that is seeking City acceptance, Mrs. Townshend stated that the City has a formal dedication process and it is typically with newer subdivisions. There are a number of places around the City that predate current processes where it is a City maintained street, City owned street used as such City funds to pave it and keep it up and formal dedication for whatever reason did not happen. These were the things that happened in the 1960's and 1970's. Because it has been consistently maintained by the City it is considered a City street.

Mr. Keller stated that these types of reservations for property protection from buffers are not uncommon to him that he has seen through the years and he wanted to know if there was an active act of dedication by virtue of a plan by the underline fee holder which he could only presume was Lewis Edgell whereby he retain a reservation and if there was any dedication subject to this reservation. It would play into whether or not this residual parcel (parcel to the larger of the two) as proposed would perhaps be without frontage as a legal matter, not a maintenance matter. Responding, Mrs. Townshend stated that Staff did not do an exhaustive search for dedications, but Staff did look at the history. Also responding, Mr. Rodriguez stated that he agreed with Mrs. Townshend that the City has it by adverse possession of the use for over 20 years and he did not think that was a question. The reservation by Mr. Edgell would be destroyed by adverse possession based upon the use of the City for 20 years. He certainly agrees with the research done by Mrs. Townshend.

Responding to Mr. Hufnal's question whether it was because of the use and the maintenance performed over the years by the City of Dover, Mr. Rodriguez stated yes, that is correct.

Responding to Mr. Keller's question if any action the Board of Adjustment took or gave consideration to for this application the residual parcel is noted on the plan would be considered to have Oak Lane frontage, Mr. Rodriguez stated correct.

Responding to Mr. Senato's question whether he would presume that 7.0, 7.2, 0-1/2 feet are speculative on what the applicant want in the approval of the current meeting. Are they definite as to exactly what is needed, Mr. Mandalas stated that for clarity as to the rear yard lot one (1) they are requesting a one (1) foot of a rear yard setback.

Responding to Mr. Senato's question that there is no question on the figures and the applicant is asking for one (1) foot, Mr. Mandalas stated correct.

Responding to Mr. Keller's question of the data column on the plan item #13 the cross access easement is hereby granted to parcel one (1) and to the residual parcel for the purpose of egress and ingress, and parking with the clarification on Oak Lane he thought that item #13 may be very pertinent if there was not public access from Oak Lane, but as the property exists today the major access to the rear hotel is via the northerly open area in any event. Is there any standard for cross access easements as to language or acceptance, Mrs. Townshend stated no, as long as it is noted on the plan, the Planning Office does not typically dictate the language for cross access easement.

Responding to Mr. Keller's question whether he could contemplate ownership and engineering certification signatures on the plan to come to the City, Mrs. Townshend stated yes, the next step in the process would be that it go before the Planning Commission and as part of the review that Staff does for the Planning Commission there is detailed review of the data column. Any correction that needs to be in the data column will be a part of the DAC (Development Advisory Committee) report and once the corrections that are required coming from Planning Commission, then they would submit their sealed plans that would be signed by the engineer and owner of record. The City would then sign it and it can be recorded.

Responding to Mr. Keller's question of the Staff report on page two (2) in the code citation breakdown box with what is required in the C-4 *Zoning* and the requested lot one (1) residual lot, he was not sure if they were requesting a 324.8 foot width or depth side yard, the only thing that he saw pertinent was the side yard which requires a 25 foot side yard and the applicant is requesting a 16. 8, Mrs. Townshend stated that the only area that the Board of Adjustment would need to make a decision on is the residual parcel regarding the side yard and parcel one (1) regarding the rear yard which is noted as two feet in the table, but if it was less than two feet in the table we would look at one foot. Staff put all of the bulk requirements in the table so that you would know where it rates with the requirements.

Responding to Mr. Keller's question whether it appeared that they were requesting those specific dimensions which are not the case, Mrs. Townshend stated no.

Mr. Mandalas stated that the 16.8 feet from the plan that is shown on the table is taken from the corner of the building and there is an overhang. The dimension should be taken from the overhang. He asked if this was correct, responding Mrs. Townshend stated correct.

Mr. Mandalas apologized as this is extremely important to this application. If it is not 16.8 feet what would they need to accommodate for the balcony; responding to Mr. Mandalas, Mr. Scott stated that without the drawing he could not state 100%, but he felt confident that within 1 foot they could make the line work from the overhang.

Responding to Vice Chairman Ericson's question if the Representative wanted to delay the meeting until next month so that the applicant could have exact measurements on both, Mr. Scott stated that based on the applicant's requirement to get the variance application done before the Planning Commission.

Vice Chairman Ericson stated that this is not the consideration, the consideration is having the information accurate and the Board of Adjustment does not want to give something that you do not need or do not want. If you are unsure of both measurements he would feel much more comfortable if you would present the Board of Adjustment with the exact measurements.

Mr. Senato stated that based on his previous comments and what he has heard his suggestion would be to defer the application until next month because as in the past there have been too many times that applicants have come up with speculative figures and now we have another one and he cannot clear in his mind to come up with exclusive answers to exactly what these figures are. He would like to have the exact figures.

Vice Chairman Ericson stated that he concurred with Mr. Senato thoughts.

Mr. Mandalas questioned if there was anything else the Board of Adjustment wanted to see the next time, Mr. Keller stated that if the motion passes he think that it would be appropriate to have all the references of dimensions and area, notations, on the two-story brick and block building which in essence the motel behind the restaurant where the 16.8 +/- feet is shown as well as the left side of the drawing 17.0 feet he questioned if the dotted line was the face of the building and the solid line was the overhang, responding to Mr. Keller, Mr. Scott stated correct.

Mr. Keller asked if it could be labeled for clarity when the dimension is corrected.

Mr. Senato stated that the Board of Adjustment's action needs to be as specific as possible so they can make a definite conclusion as to what is going on rather than speculation.

Mr. Keller stated that under the data column note #2 that he read, he questioned what improvements were on the site that are not shown, Mr. Scott stated curbing and gutter. He stated that not all the building was shown, they located physically the buildings in the vicinity of proposed variance, and they did not physically locate the back corners that are far away from that area. They are located based on plans that they had previously from aerials. They do not have physical dimensions from the property lines. They do not fall under the area of request.

Responding to Mr. Keller's question whether he was familiar with the Jerry Donovan survey of 1999, Mr. Scott stated correct.

Responding to Mr. Keller's question whether there were any improvements shown on that survey that is not reflected on the plan as above ground improvements, Mr. Scott stated that what is shown is that there were some changes in some of the connection between the buildings, the pool was removed, in the rear of the property some buildings were demolished and there is a path.

Responding to Mr. Keller's question whether in his estimation that there are no improvements not shown on this plan submission that would play into the requested variance offset, Mr. Scott stated correct.

Mr. Senato moved that application V-14-06 be deferred until next month in order to have exact measurements and dimensions for the overhang of both buildings and any changes. The motion was seconded by Mr. Hufnal and unanimously carried 4-0.

Vice Chairman Ericson declared the public hearing open.

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

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

Mr. Senato moved to adjourn the meeting, seconded by Mr. Hufnal and unanimously carried 4-0.

Meeting adjourned at 9:59 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary