CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
June 21, 2017

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, June 21, 2017 at 9:03 A.M. with Chairman Sheth presiding. Members present were Chairman Sheth, Mr. Hufnal, Mr. Keller, Colonel Ericson and Mr. Senato.

Staff members present were Mr. Dave Hugg, Mrs. Purnell, Mr. Diaz, and City Solicitor Mr. Rodriguez.

APPROVAL OF AGENDA

Mr. Hufnal moved to approve agenda as submitted. The motion was seconded by Mr. Senato and unanimously carried 5-0.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF MAY 17, 2017

Mr. Keller moved to delay the approval of the meeting minutes of May 17, 2017 until the next regular meeting due to late distribution and the absence of a member, so that all members would have the opportunity to review them. The motion was seconded by Mr. Senato and unanimously carried 5-0.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATION

Mr. Dave Hugg, Interim Planning Director of Planning and Inspections stated that the meeting today will be conducted in accordance with the agenda. There is one (1) application on the agenda under Old Business. The Application file will be read, and the floor will be opened for questions of the applicant by the Board and for public testimony. If the Board needs to consult the City Solicitor, they will recess to discuss legal matters. If the applicant must leave, they can contact the Planning Office at 736-7196 to learn of the Board's decision. A formal notice of the decision will be mailed to the applicants. Approved variances expire after one year if the approved project has not commenced.

All public notice for the new applications on this agenda was completed in accordance with Code requirements. The meeting agenda was posted in accordance with Freedom of Information Act requirements.

Chairman Sheth questioned Mr. Rodriguez on how to review the application since it had been before the Board previously. Mr. Rodriguez replied to review the application as an amendment.

Colonel Ericson questioned if the application was to go before the Planning Commission and whether a variation was needed for the site from the Planning Commission or the Board of Adjustment. Mr. Rodriguez replied from the Board of Adjustment and then to the Planning Commission.

OLD BUSINESS

Applicant #V-17-09 Revised 1310-1324 Forrest Avenue

1310-1324 Forrest Avenue. Margaret H. Johnson has requested a revision of the variance granted on March 15, 2017 from the requirements of the *Zoning Ordinance,* Article 3 §27.66 pertaining to the maximum allowed number of stories and allowable height of buildings located with the COZ-1 (Corridor Overlay Zone). Specifically, in its motion to approve the variance, the Board of Adjustment voted that the provisions of Article 3 §27.66 remain in force for the first 200 feet of depth of the property, as measured from the front property line. The applicant seeks to revise this restriction to the first 150 feet of depth. The revision is sought because the previously approved 200 feet is too deep to accommodate the previously proposed building. The position of the building has not changed. Subject property is zoned C-2A (Limited Central Commercial Zone) and subject to the COZ-1 (Corridor Overlay Zone). Tax Parcels are ED-05-076.10-01-01.00-000, ED-05-076.10-01-02.00-000, ED-05-076.10-01-03.00-000, ED-05-076.10-01-04.00-000, ED-05-076.10-01-04.01-000. The owner of record is Margaret H. Johnson.

Exhibits for the Record: Staff report, zoning exhibit, statements and plans submitted by the applicant. Legal Notice was published in the Delaware State News on June11, 2017. The public was notified in accordance with regulations.

Mr. Diaz gave a brief overview of the application.

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

Colonel Ericson asked Mr. Diaz to explain how the applicant was at a "competitive disadvantage" because he saw it as an increase in profit. The Board is not here to make sure the person maximizes their profits. There has been testimony in the past either in the first or second time that the number of units proposed would be making a profit. He questioned why is it necessary to increase the number. Mr. Diaz questioned for clarification "why is it necessary to increase the number" of units. Mr. Diaz replied that he did not think it was the Planning Staff's role to scrutinize how many units exactly the project needs in order to make a profit. At the last meeting, the applicant presented 37 units and stated they needed a certain minimum in order to build the project at all. Their competitive disadvantage was other projects that were subject to different restrictions under the *Zoning Ordinance* were allowed to build more units, and because of that they could realize the profit. Whereas, without a certain number of units this one would not have been able to realize any profit at all. It is not a question of maximizing the profit, it is a question of being able to realize any profit. Colonel Ericson stated that it was not a hardship. It does not follow the criteria of increasing a person's profit. This is the Board's third time hearing the application and it has also been before the City Council.

Colonel Ericson asked Mr. Diaz about setting a precedence. He has been on the Board for over 10 years and anytime the Board made an exception to the Code it was stipulated that it was a unique situation because of the shape of the land or whatever which causes the hardship. He did not see it in this case. He did not see the precedence Mr. Diaz was speaking of and asked which case. Mr. Diaz replied that he did not recall saying that. Colonel Ericson referred to the Report

"Competitive Disadvantage" item (b) (i) which states "although we are not supposed to speak in terms of precedence, there has been a precedence set by allowing the four story building within the COZ, which he did not understand and wanted to know which case that was. He would like to see the case where the Board set a precedence, because they are very careful not to do that. Mr. Rodriguez replied that the Board decided the last time when the variance was granted he believes this time it is just an amendment to the variance that was granted previously. It is an unusual situation because the curb line is normally the property line. In this particular case on Forrest Avenue, the property line is actually 55 feet beyond (back from) the curb line.

Colonel Ericson questioned whether the applicant should have known that before he ever brought it up the last time; that is due diligence. Mr. Rodriguez replied that he would think so. It is different and there are several properties on Forrest Avenue that have the same problem where the curb line is not the property line. In this case as previously mentioned 55 feet back from the curb line where the property line starts. They are asking for an amendment because it would change the location of the building. It would be good to consider when the variance was granted previously, everything was found necessary to grant the variance. We should not get in to anything other than the amendment.

Representative: Mr. Ed Ide, President, i3a Consulting Engineers.

Mr. Ide was sworn in by Mr. Rodriguez.

Mr. Ide testified that they requested to be heard again because when they were working on the plans and documents to present to the Planning Commission and as he and Mr. Diaz were looking over other plans, Mr. Diaz pointed out that the way the minutes were read showed that the 200-foot setback for the 3-story limitation was actually taken from the property line. In the presentation, the point of reference that was used was from the edge of the pavement which was 230 feet to the face of the building. When Mr. Malmberg presented (reading the minutes), it was requested generally 200-feet would suffice for that setback. When Mr. Malmberg turned to him and asked if it would be okay, he was still referencing it from the edge of the pavement. If it is actually referenced from the property line, it is approximately 50-60 feet back from the edge of the paving because it is so deep at that location. The 200-feet would push it into the portion of the building. In the new exhibit presented the building was kept exactly where it was when the variance was granted, it showed that 150-feet was a much more applicable distance. The 175-feet would work as shown in the exhibit as well. He asked Mr. Diaz and Mr. Hugg who consulted with Mr. Rodriguez whether the application could be administratively amended or would he need to come back before the Board of Adjustment to have the application amended. He is not present to ask for any other variances other than to amend the setback distance. They have gone through the exceptional practical difficulties with the last variance with respect to the geometry of the site. We know that it is long and narrow. In order to get the building and retail center set the way that it is set, they needed the variance for the 3-story facility. Originally, when it was presented the equitable owner requested that the facility be 4-stories, and it was compromised back down to 3-stories. This is the reason they are present today, to ask the Board to kindly amend the 200-foot setback from the property line to a 150-foot setback for the 3-story building.

Mr. Senato questioned whether an amendment to the motion can be done at a later time once the application was already approved. He also asked for clarification whether this was the right thing to do and proper procedure for an amendment. Mr. Rodriguez replied that the location of the building is not being changed at all. It just a matter of the measurements. It was a mistake because you normally measure from the curb line, and normally the curb line and the property line are the same. It was not discovered by the applicant in this case that the curb line was not the property line. The property line is actually 55-feet back from the curb line which is true for several properties on Forrest Avenue that is kind of unusual. He would classify the application as an amendment. He has never seen an application come back before the Board for amendment. It is pretty apparent that nothing has changed except the setback.

Colonel Ericson mentioned that there is a slight change because they are going from 37 to 44 units and there was a design change without requiring a variance.

Mr. Keller mentioned that the motion is not being amended, but the decision of case V-17-09. Mr. Rodriguez also stated correct.

Mr. Keller stated that in the decision the offset distance was inadvertently incorrect. Mr. Rodriguez replied correct.

Chairman Sheth asked the applicant how did he find the problem. Mr. Ide replied as previously stated he and Mr. Diaz were working on some additional items that had come up namely June Lane and a proposed bisecting road that was planned. They were reading all the documents and getting into the planning and zoning, and it was brought to his attention by Mr. Diaz that the motion was made from the property line and they had placed their arrow or leader for the measurement of the building off of the curb line or drive lane. He stated that this would need to be adjusted in order for the building to stay where they had it placed. There is no question about it; had they known to take it off the property line which they should have done, they would have known that the distance would have to be shorter than 200-feet.

Mr. Keller stated that he seems to recall some of the testimony given by Mr. Malmberg. There was a statement relating to the 235-feet. At that time, he had a concern about perhaps things in the future like changes of ownership, and an interest in preserving the COZ zone to a depth shy of the proposed apartment building. He proposed in discussion the 200-foot offset and he recalls Mr. Malmberg stating that he did not have a problem with the 200-feet. Mr. Ide also replied yes. Mr. Keller stated that today some confusion arose to the offset distance to which they both were referring. He personally had no problem in changing the distance to accommodate that, but he does have a problem with discussion as to an increase in the size of the building and the number of units that may or may not be ultimately constructed. He did not think that the Board was there today to again discuss changes such as that.

Mr. Keller questioned whether the building had changed in the planning. Mr. Ide replied that the physical size of the building has not changed at all.

Mr. Keller stated that he was encouraged by Mr. Diaz statement in the City Report recommendations to perhaps utilize a 175-foot offset. His interest as a Board member is still in

protecting and retaining the COZ for the front portion. He would be inclined to limit the distance to 175-foot so as to preserve as much as possible as he thinks was originally intended during the application and subsequent approval in March. Mr. Ide replied that Mr. Keller was absolutely correct. The intent was to preserve the COZ setback and perhaps make it as tight as possible, and make it specific to this project.

Mr. Hufnal agreed with Mr. Keller's assessment as to the application. Had the Board been given the information at the last meeting, the Board would not have necessarily done the 200-foot preservation of the COZ zone and possible compromised to the 175-foot offset. He noticed by the drawing that the building is actually 178-feet. Mr. Ide replied that is correct.

Mr. Hufnal questioned if the Board amended the offset to 175-feet if he would still be within the same perimeters of what was there before. Mr. Ide replied that is correct.

Mr. Hufnal questioned if that is so, why would the number of units change. Mr. Ide replied that when the owner went back to the architect to physically lay out the spaces they found some efficiencies to be able to increase the number of units within the same footprint of the 75x250 feet, which is the same number in square footage that was used before.

Colonel Ericson questioned if the units were going to be smaller. Mr. Ide replied yes and they are removing two (2) of the elevators. They still have elevators for the units themselves.

Chairman Sheth commented on the previous and current submissions.

Mr. Ide stated that he was before the Board today because there was a mistake from the measurement of the setback. When the Board previously acted and acted to preserve the COZ requirements, a number was picked so that the setback would work. Unfortunately, when he and Mr. Malmberg consulted the 235-feet should have been measured from the property line to the face of the building. They misspoke when they said the 200-feet was okay. Two hundred feet from that point would still have placed it up beyond the building to give enough room for that setback. He is stating today that 175-feet is acceptable. The building footprint has not changed at all. When the architect went back to look at the number of units that could be placed, he came up with a revised number for the applicant and owner for this project. Those number of units still work with the parking requirements and impervious area. The building height of 3-stories is still the same and the outside dimension of the building still has not changed.

Colonel Ericson commented that he agreed with Chairman Sheth regarding the previous submissions and he felt that it was hard to understand how an experienced person like Mr. Ide, Mr. Malmberg, and the City would all miss this and go through this whole procedure. The Board would like to know what is really going on. Mr. Ide replied that what he previously mentioned is exactly what is going on. When the request came back of 200-feet, he thought it would work as a setback; in his mind, they were still taking it from the edge of the road and that distance would work.

Colonel Ericson questioned the key issue; if this application was denied what affect would it have on the construction? Mr. Ide replied if the request is denied it would reduce the size of the apartment building.

Mr. Keller questioned as a point of clarification, in the decision rendered in the March application, the 200-feet depth issue was incorporated in the decision, but there is no mention of the number of units. He did not take it by virtue of that application approved in March, this subsequent request for a revision, and with their variance requested. He was looking at it only as an issue regarding the footage offset from the property line or the edge of the pavement. He did not consider the Board to have any interest today in revising the number of units to be built within a structure that is otherwise fully approved. The Board went through the entire process from four (4) stories after several months. A compromise was made to allow an approved a height of three (3) stories and that is still the case. As testified by Mr. Ide, the structure limits of the building have not changed. However, the number of rental units within the building changed. He did not see it as an issue before the Board today. If in fact, the Board reduces the offset from the 150-feet requested to a 175-feet, we would still accomplish allowing the building structure itself to be unchanged. Any issues involving Exceptional Practical Difficulty on profitability rest with the entrepreneur and not with the Board. He did not see issues that would be brought up today because otherwise he would agree with Colonel Ericson's statement. He thinks that the issue before the Board is the offset distance by virtue of their variance requested and the decision rendered in March.

Chairman Sheth mentioned that the 175-feet was discussed with Mr. Hugg and the City Solicitor. Any other issues will be discussed with the Planning Commission and not the Board of Adjustment.

Colonel Ericson mentioned in his opening remarks that he was bothered by the position that the City took in this matter and he did not think that it was legitimate comments.

Chairman Sheth questioned Mr. Ide if he agreed with the 175-feet. Mr. Ide replied yes.

Mr. Senato questioned for clarification that the only thing changing (if it does) is the requested footage. Mr. Ide replied no.

Mr. Keller mentioned that as a Board member he would be more inclined to lean to an approval for a 175-feet offset as opposed to a 150-feet offset. The applicant agrees with the 175-feet setback.

Chairman Sheth opened the public hearing.

Chairman Sheth opened closed the public hearing after seeing no one else wishing to speak.

Chairman Sheth questioned if there was any additional correspondence for the record. There was no correspondence from the public.

Discussion

Mr. Keller stated that in light of the variance request to simply move to amend the building zone ordinance decision of March 15, 2017 wherein the requirements for the COZ-1 where the zone was indicated at a 200-foot in depth measured from the front property line on Forrest Avenue. He would simply ultimately in his formal motion propose to change the measurement from the

front property line to a depth of 175-feet and leave all other matters that were concerned with the previous motion and decision of March 15, 2017 intact.

Mr. Keller asked if there were any comments. Mr. Senato and Mr. Hufnal agreed with Mr. Keller's previous statement.

Mr. Keller moved to approve the requested variance for application V-17-09 Revised as presented on June 21, 2017 which the variance requested a change in the dimension as measured from the front property line regarding the COZ-1 (Corridor Over Lay Zone) which applicant requested 150-foot depth as measured from the front property line. He proposes within the motion to establish the distance of 175-feet as measured from the front property line for the area within which for all matters regarding the COZ-1 (Corridor Over Lay Zone) will be adhered to otherwise. All other matters of the decision of March 15, 2017, application V-17-09 will remain intact. The motion was seconded by Mr. Hufnal and unanimously carried 5-0.

Mr. Senato questioned for clarification the number of units have increased from 37 to 44 and that there is no increase in the approval of this motion in units. Colonel Ericson replied that it did not need to be addressed because there is no variance required.

Roll Call

- ***Mr. Keller*** *– yes, in accordance with the terms and conditions of his proposed motion, the established testimony today, documentation presented in the City's report, and hearing from the applicant representative.*
- ***Colonel Ericson*** *– approval*
- ***Mr. Senato*** *– approval*
- ***Mr. Hufnal*** *– approval*
- ***Chairman Sheth*** *– approval*

Approval 5-0. Granted

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

Meeting adjourned at 9:45 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary