CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
June 15, 2016

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, June 15, 2016 at 9:00 A.M. with Chairman Sheth presiding. Members present were Colonel Ericson, Mr. Senato, Chairman Sheth, Mr. Hufnal and Mr. Keller.

Staff members present were Mrs. Townshend, Mrs. Purnell, Mr. Diaz, Mr. Cook and City Solicitor Nick Rodriguez.

APPROVAL OF AGENDA

Mr. Hufnal moved to approve the agenda as submitted, seconded by Mr. Keller and unanimously carried 5-0.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF MAY 18, 2016

Mr. Keller moved to approve the meeting minutes of May 18, 2016 with the necessary corrections, seconded by Colonel Ericson and unanimously carried 5-0.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATION

Mrs. Townshend, Director of Planning and Community Development stated that the meeting today will be conducted in accordance with the agenda. There are 2 agenda items: one deferred item under Old Business, and one new item under New 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 adjourn 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.

OLD BUSINESS

Applicant #V-16-05

385 Saulsbury Road. Family Dental Associates c/o Christoper A. Nacrelli has requested a variance from the requirements of Article 6 §3.1 and §3.11 of the *Zoning Ordinance* for parking as related to the maximum allowed parking for the proposed use. Subject property is zoned C-PO (Commercial and Professional Office Zone) and subject to the COZ-1 (Corridor Overlay Zone). The Tax Parcel is ED-05-067.19-02-02.06-000. The owner of record is Christopher A. Nacrelli. *At its meeting of May 18, 2016 the Board of Adjustment conducted a public hearing regarding this case but deferred action because a representative was not present.*

Mr. Cook noted exhibits for the record: Staff report and plans submitted by the applicant. Legal Notice was published in the Delaware State News-on May 8, 2016. The public was notified in accordance with regulations.

Mr. Cook and Mrs. Townshend gave a brief overview of the application.

Representative: Mr. Troy L. Adams, Professional Engineer; Vice President of Mountain Consulting Inc.

Mr. Adams was sworn in by Mr. Rodriguez.

Mr. Adams apologized for not being present at last month's meeting due to a calendar issue. Mr. Adams testified that they are looking for four (4) more parking spaces. There are currently not enough spaces to allow the business to function as it should. There has consistently been four (4) vehicles parked in the established gravel area which will be removed and properly paved and striped. He stated that he came before the Board of Adjustment in October 2014 for a similar issue with parking at a dentist office on State Street. He stated that this current application needs 1 ½ spaces for each treatment room and they currently have eight (8) rooms and that would put them at 12 and there are 12 employees. This is the reason for the request of the additional four (4) spaces.

Mr. Senato questioned the water drain problem that was stated by a neighbor. Mrs. Townshend stated that information was provided and is also located in the minutes (she read the section of the minutes). Mr. Adams commented that there is currently a storm drain in the area, but he was not aware there was an issue, but will obviously be vetted more in the Planning Commission process.

Responding to Mr. Senato's question about the impact the drain would have on this request, Mrs. Townshend stated that the impact on the variance is to request additional parking spaces and that equates to additional impervious surface. If there is a drainage issue it could exacerbate it. The project does have an engineer on board and the engineer will be looking at the drainage of the site. This could be addressed through the site plan process. It could even be a matter of looking to see if the storm drain is clogged.

Responding to Mr. Senato's question if the application is approved it would be contingency that the storm drain would be a factor to eliminate any kind of flooding because of the new pavement being installed, Mrs. Townshend stated that it would be part of the site plan review to look at the property drainage. Colonel Ericson stated that it is really not an issue for the Board of Adjustment to consider. Mr. Senato stated that it was a point of information for him.

Mr. Keller raised a question about the location of the drainage within one of the proposed parking spaces and without further information on the submitted plan the Board was not aware of the type of inlet or if it is a drain that would support the weight of a vehicle or if it would require adjustment depending on the grade. He also wanted affirmation for the Board of Adjustment regarding notes on the plans that were not legible. He asked if the gravel would be removed, Mr. Adams stated yes sir. He asked Mr. Cook to confirm the number of existing parking spaces as a

result of legal nonconforming for the property, Mr. Cook stated that this is correct.

Responding to Mr. Keller's question whether the building extends into or beyond the building restrictions line and if it would be the same circumstance, Mr. Cook stated that is correct.

Responding to Mr. Hufnal's question that the applicant would make sure that his customers are parking on his property and not someone's else property which is very important since it is next to an open area owned by the City, Mr. Adams concurred.

Mr. Senato stated that he raised the issue because of a letter received from a neighbor and he wanted to make sure the concerns of the neighbor were met. If the application is approved, he wanted to make sure there was no added flooding to the area and the issue would be addressed with the engineer. Mr. Adams assured that his concerns would be fully addressed by the end of the project. He will make sure that it is adequately sized and that it is traffic baring.

Responding to Mr. Keller's question whether the engineer was aware of the current out flow, Mr. Adams stated that he was not and it was something that needed to be figured out.

Mrs. Townshend stated that the application would not go before the Planning Commission as it is an Administrative Site Plan, but the Kent Conservation District and Public Works will look at those items during the process.

Mr. Hufnal moved to approve variance application V-16-05 based upon the testimony given and the comments made in reference to the review by the Planning Office. The motion was seconded by Mr. Senato and unanimously carried 5-0. (note: The public hearing was held on May18, 2016 in the applicant's absence. There was no public testimony.)

NEW BUSINESS

Applicant #V-16-06

1310-1324 Forrest Avenue. Margaret H. Johnson has requested a variance from the requirements of *Zoning Ordinance* Article 3 §27.66 pertaining to the maximum allowed height of buildings located with the COZ-1 (Corridor Overlay Zone). Subject property is zoned C-2A (Limited Central Commercial Zone) and subject to the COZ-1. 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.

Mr. Cook gave a brief overview of the application.

Representative: Mr. Edward H. Ide III, President of I3a Consulting Engineering Firm.

Mr. Edward H. Ide was sworn in by Mr. Rodriguez.

Mr. Ide testified that he has been retained by the owner to bring the project forward. The owner of the 2.8-acre site situated on Forrest Avenue is Margaret Johnson. The property is located to the west of Betsy Ross and a small residential lot and gas station. As mentioned by Mr. Cook the base zoning is C-2A and allows for 75 feet of height, six (6) stories and the COZ-1 maximum

height is 35 feet and not to exceed two (2) stories in height. The variance request suggests that an Exceptional Practical Difficulty needed to be identified to allow for the height change. Their motive was geared towards density or maximizing the site for developing and to get as much as possible out of the property while addressing all of the requirements with the City of Dover, Department of Natural Resources, and Department of Transportation which all imposes cost implications. The previous sites were residential plots. With City approvals the corridor on Forrest Avenue has rapidly become more commercialized. There is commercial space directly to the east and west of the property. This forces the owner to move in the direction of developing it from a commercial space. While designing the site they have considered requirement of placing the building towards the front which is a COZ-1 requirement. The idea is to bring the elements of the building closer to Forrest Avenue to create a traditional look of buildings and to get people generally speaking to slow down and pay attention to the buildings as well as draw them in. The idea is not to create a tunnel effect to where you are creating a building that would be right on the street and have a massive structure that would be imposing. There are two (2) areas that address the Exceptional Practical Difficulty which are Lot Configuration and Competitive Disadvantage. With respect to the Lot Configuration it is narrow 236 feet wide and has a deep backline of 455 feet.

PRESENTATION

Mr. Ide stated that looking at the option of placing an apartment structure which is an allowable use within the zone they would be limited to the type and configuration of structure that needs to go there. Especially, when looking at the placement of some of the apartment buildings that are in proximity one would want to place the building that would run parallel to the Forrest Avenue. In this case it cannot be done due to the shape of the lot. The front of the lot has a large front back due to DelDOT right-of-way and setbacks, therefore; they are limited as to what can be done. It is generally not used for any visible storm water management system and they cannot park or build in that area. Looking at the narrow shape of the building they believe that the owner has developed a plan that addresses those concerns with placing retail at a single story structure and the apartment building towards the back. The site is not conducive for a typical storm water management system so a subsurface system will be utilized. In the past you could put a pond on the surface to allow for storm water management in order to keep the cost low, but with DNREC change in hierarchy on how they want to handle storm water they are forced to put storm water underground. They are limited to pushing storm water underground and below surface due to the layout of the site. As previously mentioned the literal intent of the COZ-1 is to pull the buildings towards the front of the site and have parking towards the rear. With the narrow site they have a limited amount of space for the entrance because the Department of Transportation dictates the size of the entrance which also reduces the amount of spaces provided for a building width. As we look at the Forrest Avenue corridor the majority of the buildings are one story with some exceptions. They feel that by placing a two (2) story apartment building that close to the road may be something that could be unappealing to the general nature of what is happening on the corridor which is retail out front and towards the back which is a different zone is the residential apartment. The owner has compromised by placing the single story retail in the front and putting the apartment building towards the back. They do maintain the building that was supposed to be placed in front of the site that is no more than two stories have been addressed with the retail space. They went with the current structure so that they could keep the overall height of the building low. When you measure the height of a gable roof or a roof that has

a bridge or peak the roof line is measured from the domain to the roof height of the structure. On a building of this size the height of this structure could ultimately be 16 to 18 feet if you use a standard 6-12 pitch. Anything lower than that would probably not look right with that type of structure. When you look at the distance between the varying height to the domain height you are probably looking at 8-9 feet which would leave an additional 8-9 feet that would sit above. They brought it down to the roof line as a low sloping pitch that cannot be seen, positive drainage, and it then brings the height of the structure down to roughly 41 feet and the top of the points are an elevation of 44-45 feet. The tallest element that sticks up is the elevation of 47-48 feet.

Mr. Ide stated that when the Woodmill Apartment buildings that sit directly behind this project is discussed it will show what elevations we are dealing with there. When you look at competitive disadvantage as he has gone to a lot of different municipalities and talk to a lot of different boards regarding competitive disadvantage or economic competitiveness that has kind of shied away. As an Exceptional Practical Difficulty we are going to look at this from a standpoint of the owner being at a competitive disadvantage. As pointed out by Staff there are a number of buildings within the vicinities of the site that are over two stories (The Grande Apartments located to the east side of the Modern Maturity Center and directly northeast of the proposed project). It is a four (4) story building that is within the COZ-1 zone and was approved through a PND, however; it did not come before the Board of Adjustment, but was approved by the Planning Commission. The four (4) story building has a gable roof and he assumed that the elevation of the ridge could be in the 55-60-foot range. The Woodmill Apartments that are located directly behind the proposed project site is not within the COZ-1, it is a three (3) story building with a gable roof and he assumed without measurement that it is ten (10) feet between floors, 30 feet plus the 18 feet puts it up close to 46-48 feet.

PHOTO

Photo handed out of Betsy Ross Restaurant on Forrest Avenue.

Mr. Ide stated that their site is directly to the west of the one story building (Betsy Ross). You can see the outline of the roof structure that is in the back of the Woodmill Apartments that probably measures between 45-47 foot. Other apartment buildings that were pointed out include Dover Country Club Apartments which are 3-story buildings further west of this site. It is their assumption that these apartments were constructed to maximize the site from a coverage perspective and address some storm water landscaping area open area to their advantage (meaning they developed the site to maximize the site). It ultimately comes back to some sort of competitive advantage to maximize the site to get the most return. As he researched competitive advantage and Exceptional Practical Difficulties he came across a case law that exist in Delaware between the Board of Adjustment and Quick Check Realty where they categorized variances between two (2) categories (use and area). They are asking for an Area Variance due to the height. He read a couple of quotes from the rulings of the case which basically stated that they would look at the Area Variance different than the Use Variance. He also gathered from the rulings that if the Board of Adjustment denies the variance request the harm done to the owner for wanting to be competitive would be far greater than the harm imposed to the community for allowing a 4-story building when you have a building that sits directly behind this site that could be the same height. As he read through Staff comments he also wanted to point out item 2:11 of

the report regarding the Area Variance where the Board of Adjustment is asked to evaluate the argument based on these conditions which he thought walks in line with the case study.

Mr. Ide stated that in summary they do maintain that the site is long, narrow, and difficult as is evident by the fact that it has been on the market for roughly three (3) years. Others have expressed interest in the site but generally speaking walked away because they felt it was an undevelopable site. The present design does positively address the needs of the COZ-1 by placing less than a 2-story building on the front of the parcel (retail space). The site is fully maximized and adheres to the code regulations with the exception of the height variance. There is a precedent for a 4-story building that was allowed in the COZ zone that is close proximity to this site. The owner has made an appropriate attempt to the design to bring the height down and using an attractive parapet design element in the overall height so they can keep the building in character with the surrounding areas. They have tried to keep the mass of the front building down and step the mass of the rear building up like the remainder of the buildings in the back. In looking at the case study and Nicola Pizza project in Rehoboth Beach which argued to the Board that a competitive disadvantage because they felt if they could not build a building that was over 5,000 S.F. which was a limitation, they could not stay economically competitive with Grotto Pizza. After being heard by the Board they allowed the case to be in favor of Nicola Pizza.

Mr. Ide stated that in closing they believe that the owner should have the right to not be competitively disadvantaged because of an area variance.

Responding to Chairman Sheth's question if it was 49 apartments, Mr. Ide stated that is correct.

Responding to Chairman Sheth's question of the number of bedrooms (1, 2, or 3). Mr. Ide stated that the site was designed to the parking standard of two (2) parking spaces for each room and one (1) for every four.

Responding to Chairman Sheth's question of the potential customers, Mr. Ide stated small families, early starter type families.

Mr. Chuck Spiegelman was sworn in by Mr. Rodriguez.

Mr. Spiegelman with McGinnis Real Estate Company testified that upon looking at the floor plans it does show two (2) bedrooms with a kitchen, family room, and two (2) bathrooms. It is marketed for military.

Responding to Chairman Sheth's question whether the apartments across the street was 55 plus, Mrs. Townshend stated that The Grande was 55 plus. The corridor overlay zone has a maximum building height of two-stories and 35 feet.

Mr. Ide stated that the plans show a different number of units within the space that are larger or smaller. The living room space is part of the kitchen space. There are one or two more types of units that falls between the maximum ones and the smaller ones.

Responding to Chairman Sheth's question whether this was a property condemned by the City,

Mrs. Townshend replied no, this is a different property. The property is directly across the street from Greentree Shopping center, the condemned property is further east.

Responding to Chairman Sheth's question whether there will be an office building, Mr. Ide stated that he did not think that an office element was planned for this building.

Responding to Mr. Hufnal's question whether the storm water management is going to be put underground, Mr. Ide replied yes.

Responding to Mr. Hufnal's question whether it would be placed along the east side of the grass plot, Mr. Ide replied yes and no. They will need to put subsurface exhortation underneath the parking spaces and have open landscaping space on the plot near the east side which will also have some subsurface exhortation underneath.

Responding to Mr. Hufnal's question whether the applicant adapted the roof of the building to bring it down to a maximum of 47 feet and the applicant is asking for a 12- foot variance, Mr. Ide replied yes, that is correct.

Mrs. Townshend wanted to add for the Board consideration that one of things when architectural goes to the Planning Commission the Commission has mentioned that they do not like flat roofs, but would rather see a gable roof. She questioned if this would bring it back, Mr. Rodriguez stated that it would bring it back because it is over 47 feet.

Colonel Ericson asked for clarification that if the application is approved the Planning Commission could still disapprove and keep the building at two (2) to stay within the code, Mrs. Townshend replied no. It is a permitted use so if it meets the code requirements their flexibility is more limited to the design of the project and the issue of the height is fully under the purview of the Board of Adjustment if a variance is granted. There would be some but limited flexibility on the part of the Planning Commission.

Responding to Colonel Ericson's question whether the Planning Commission determined it on The Grande apartments next to the Modern Maturity Center, Mrs. Townshend stated that it was different because it was a PND (Planned Neighborhood Design) and under the PND Ordinance the Planning Commission has the ability to set design guidelines that are separate from the normal bulk standards so they can allow for a taller building height under the provision of the PND and this site/project is not a PND.

Colonel Ericson stated that he understood the Exceptional Practical Difficulty based on economics that you want to make the maximum amount that you can on the property, he asked the applicant if he would still be making money if the building was 2-stories or 3-stories and if it would be economically feasible, Mr. Ide replied according to the owner; no. They have gone through rough estimate of 15-18 iterations of the site to make it work. This is the last effort that was made by the owner to try and get the site maximized. This is why the retail space was implemented into the project. Therefore; no the applicant could not make this economically feasible with a 2 or 3 story building.

Responding to Colonel Ericson's question of the Exceptional Practical Difficulty that it would not be economically feasible if it met the requirements of the COZ-1 zone, Mr. Ide stated that it is both the site layout and economic disadvantage. The site is long and narrow and to try to get a 2-story structure spread out just does not work. They cannot make the parking work and there is landscaping requirements between the parking stall and the face of the building that are 12 feet. This zone requires a 6-foot sidewalk and 6-feet of landscaping for safety. Again, they just could not get the layout to work.

Responding to Mr. Keller's question whether the applicant was referring to not simply eliminating 2-stories, but trying to spread it out as at 2-story structure and maintain the per code 48 units, Mr. Ide replied that is correct. Regarding the elevation, the owner has tried to bring the elevation down and introduce other elements such as a shallow peak roof. He was sure the owner would not be averse to creating some sort of mass effect much like the Eden Hill structure which is a flat roof with a gable roof. He was sure they could work some architectural element in to accommodate.

Mr. Keller mentioned in weighing the Exceptional Practical Difficulty test the difficulty must be inherent in the land and not personal to the owner. It sounds as if the argument being put forth that absent a 4-story structure this property is unusable from an economic standpoint. Absent the approval even on an Exceptional Practical Difficulty test he finds it somewhat hard to understand that the property could not be otherwise used or a developer make normal improvements to the property in character of the property as it is currently zoned.

Responding to Mr. Keller's question whether absent a 4-story structure this property is in fact unusable, Mr. Ide replied that he was not saying that at all. He was stating that you have a developer who is interested in developing this parcel the way that they need to develop it to make it work for them to go to a 4-story building with a retail space. They wanted to go with 3-story apartment buildings over the entire site corridor, but they mentioned to the owner from their perspective putting a 3-story building right on the corridor was not the right answer. So they asked how can you make this site work utilizing the apartment buildings that are already in characteristic of Forrest Avenue and directly behind it and how can you make it work with retail space and this is the way it was developed. Could someone else come in and look at the site and put in another pizza shop and maybe make it work, that is possible. Unfortunately, those people have not come up and the site has been vacant for three (3) years and there has not been a lot of interest. Now you have someone who has taken the time and spent the money to try to develop something that is realistically not out of character for that area. They have really tried to stay away from the economic competitiveness that is why in their response to Staff they looked at the density component, but unfortunately you cannot get away from it. There is a case in Delaware that states that the economic advantage or economic disadvantage is something that should be looked at. Ultimately that is the reason someone buys and develop the property for some sort economic advantage.

Responding to Chairman Sheth's question whether the 2-story could go on top of the retail shop and make it work, Mrs. Townshend stated that there is nothing in code that would prevent putting another story on top of the front building that would have residential. The code would allow that.

Mr. Ide stated that he spoke with Mr. Cook earlier regarding the intent of the COZ-1 and how it was developed to where you try to limit the height of the building. He wondered if there were any discussion about massing up towards the back of the site or it just strictly that the corridor overlay zone looks at a building being close to the corridor and they don't want to see anything larger than a 2-story structure. He asked if the issue was to not create a situation on Forrest Avenue where you have 3 or 4 story buildings to where there are no day lighting abilities or does this meet the intent of the COZ-1 by putting a low profile building and mass it towards the back. He was not sure if a secondary building could be in the COZ-1 and if there were height limitations.

Responding to Colonel Ericson's question of the approximate distance between the two (2) buildings, Mr. Ide replied the approximate distance between the two (2) buildings is 80-90 feet.

Responding to Mr. Hufnal's question of the distance between the Route 8 and the apartment building off the road, Mr. Ide replied the distance would be 235 feet. Directly behind this building is the Woodmill Apartments building that is 45 plus feet tall.

Responding to Mr. Senato's question of the distance from the road back to the street, Mr. Ide replied 75 feet. He stated that it was 75 feet from the start of the deceleration lane back to the face of the building, and 85-90 feet from the Public of Transportation right-of-way.

Mrs. Townshend stated that there was a corridor study of Route 8 that was done in the early 90's that made a series of recommendations that resulted in the development of the corridor overlay zone. The timing of this was that it was not a whole lot of development yet on Route 8 and there was a conscious effort to make sure that they did not end up with two (2) Route 13. That is kind of the reason for the corridor overlay zone.

Responding to Mr. Keller's question within the Staff Report the references to Dover Country Club Apartments, Woodmill Apartments, and The Grande Apartments were they not all either legal nonconforming or cases where they were perfectly in conformance with the zoning code, Mrs. Townshend replied that is correct. As the applicant mentioned Woodmill Apartments is outside of the COZ-1 (Corridor Overlay Zone) so they are subject to the height requirements of the zone that they are in. Dover Country Club predates the implementation of the Corridor Overlay Zone and The Grande went through the Senior Citizen housing PND process and had their bulk standards adjusted by the Planning Commission.

Responding to Mr. Hufnal's question whether the COZ-1 runs to Dover Kenton Road, Mrs. Townshend replied that it goes from the railroad track to Artis Drive and the City limits. If you recall the Board of Adjustment did grant a variance to the Dover High School.

Mrs. Townshend stated that the COZ-1 (Corridor Overlay Zone) especially as it relates to Route 8 was very much envisioned as a commercial corridor and you can see how it has grown. Some of the success stories of the Corridor Overlay Zone are the Blood Bank and the Cardiology Office projects were built with the requirements of the Corridor Overlay Zone. One of the things that has changed is our zones used to be more segmented, so there was less of mixing residential

uses in the commercial zone. That is something that has changed over time. The C2-A is a commercial zone and a number of commercial zones in the past did not permit apartments and that was in addition more recently. There has been some change to the base zones over time that the Corridor Overlay Zone has not been looked at in that context. The Corridor Overlay Zone was amended in 2006 or 2007 to get the elements of superior urban design to the Planning Commission a little bit of flexibility on things like parking and those issues, but it was not amended as it relates to building height.

Mr. Hufnal commented that he could see in the Corridor Overlay Zone not wanting to build 4-stories buildings right on the highway itself. However, they have lessened the impact of this by putting a single story in the front and 235 feet back is the 4-story building.

Mr. Senato asked for clarification that it is 75-80 feet to the retail section and from the street back to side part of the apartment buildings it is roughly 235 feet, and the height of the apartment building is 4-stories and the height of the retail space is 20-25 feet and the apartment buildings is 47 feet. Mr. Ide replied yes, when you look at the parapet height and the top you are close to 45-47 feet. Responding to Mr. Senato's question whether he was talking roughly 20 feet higher than the retail shopping center, Mr. Ide replied yes. As he referred to the photo he stated that this is an elevation is a perspective of someone on Forrest Avenue looking. Therefore, you can see what happens to the massing as someone is looking at it. Responding to Mr. Senato that the illusion would not hit you as a 4-story. Mr. Ide concurred.

Mr. Ide stated that the owner has looked to place the lower story to the front. As he referred to another photo view (A303) that shows another perspective of the lower story and how the 4-story sits behind. The corridor overlay zones allow for a maximum height of 35 feet and 2-story and the height of this building is less than that.

Responding to Mr. Senato's question whether it would be economically viable if the applicant went to a 2-story apartment building, Mr. Ide replied no.

Responding to Chairman Sheth's question the cost of the square footage for the retail space and expected rent the 1-2 bedroom apartments, Mr. Spiegelman replied anywhere from $14-$16 a square foot for the retail space and the rent for the smaller apartment unit he would estimate around $800-$900.

Mr. Keller stated that he still had difficulty with accepting the argument of Exceptional Practical Difficulty and it was mentioned that the property has gone unsold for three (3) years, Mr. Ide replied that Mr. Spiegelman office started listing the property in May 2013 and he was not sure how long it was on the market prior to that time.

Mr. Keller stated that it is difficult to state the rationale for a lack of a sale. Certainly the current economy not the most beneficial.

Mr. Spiegelman stated that there seems to be very little new development of raw land and they felt that they had an opportunity with a developer to get something going that was conforming to the neighborhood.

Mr. Ide stated that as mentioned earlier the Exceptional Practical Difficulty does not weigh solely on the economics of this project. The owner wants to develop the parcel and the parcel is a difficult site to develop because of the length and whether or not someone can stay competitive to build a small retail center to the back whether that it is economically viable for what is required by the Department of Transportation. Over the past 1 ½ years DNREC has changed their hierarchy regulations for storm water management that you simply cannot place an open storm water in an area because that is the economical way to do it. They want you to put everything underground now. The storm tech and rain tree systems for a 2-acre site is an easily $200,000 to install. Whereas digging a pond on this site would be in the $25,000-$30,000 range. Being an Engineer and developing these plans over the year and the way he sees the regulations changing it makes it more difficult for folks to economically develop a site. He is sure the owner is not saying he wants a competitive advantage over Woodmill Apartments and he is going to take those folks, but the owner is looking at the economics of developing this difficult site and what it is going to cost and what he needs to do to recover the cost.

Chairman Sheth opened the public hearing.

Mr. William Garfinkel who lives at 9 Freedom Drive in Bicentennial was sworn in by Mr. Rodriguez.

Mr. Garfinkel testified that he totally supports Staff recommendations to deny this request. He has lived in the area for 32 years and the overlay zone works. If you look at the area there is business, commerce, and a lot of people in the residential area. We do not need this encroachment closer to Forrest, because it just does not fit. It is a reason that the City of Dover put the overlay zone code in effect. There is a problem with people who think they cannot make enough money. Is that a compelling state interest to the people to destroy an area where the overlay zone has worked, no. The compelling state interest is to enforce the overlay zone. They have a business model problem because there is nothing wrong with the land, we just need someone to come up with a business model that works. There are thousands of people who live in the area. The area between is beautiful and works. Please do not violate the overlay zone.

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

Mrs. Townshend stated that the Planning Office received a letter from June Schamp of 1326 Forrest Avenue. Ms. Schamp is an adjacent property owner. The letter has been distributed to all Board members and will be entered into the record. The letter is in support of the project with a conditional preference stated. "I prefer 2 or 3 story building, however, if for financial reasons only a 4-story building would work for him, then I offer my support."

Mr. Keller stated that he was still concerned with the basis for the Exceptional Practical Difficulty considerations. He reiterated that the Exceptional Practical Difficulty must be inherent in the property and not personal to the owner. The property is vacant and per Mr. Ide the long narrow layout would be very difficult to develop, but yet there is a proposal in front of the Board for a commercial building and apartment complex. Apparently it is not too difficult. Can the property be reasonably used without the variance? He has heard nothing today to lead him to believe that it cannot be. Does the property have some unique shape? Again, the test is inherent

in the land is basically a rectangular lot. Is the variance request the least modification to the COZ-1 considerations? He thinks not. The request is for a 4-story and he asked if there was any consideration for a 3-story or an outgrowth for some issue raised for allowable commercial uses. It seems that there is a greater interest in maximizing the Development as well as the profits there from; as opposed to some distinct condition that would lend greater support to the Exceptional Practical Difficulty test.

Responding to Chairman Sheth's question if there were any other alternate plans, Mr. Ide stated that they have generated a number of plans. The owner who is interested in this parcel wants to build an apartment complex. The owner feels it is the best use for the property. They worked on a number of configurations of putting 2-story buildings apartment complexes in the front elevating the roof-line of the 35 feet plus 5 feet so you are up to 40 feet maximum height on the front which would go against what Mr. Keller mentioned regarding something being opposing to someone. There have been 15-18 different iterations of this such as combinations of different apartment buildings. Does it come back to economics, certainly? Is it the sole reason, absolutely not? As he pointed out the site has unique characteristics with respect of the way the drain stores the rear of the site so they have limitations with the storm water management. DelDOT requires a certain size entrance which has to be taken out for a 236-foot-wide parcel; therefore, limiting the amount of the area. When you look at the other apartment buildings in the general vicinity of Woodmill the plots are larger than the rectangular space. It is not a site that would work well for a typical apartment building layout that you would see. The owner's compromise is to go to a lower profile retail space to help make it economical viable for him to do this, otherwise he does not feel that he is able to do this. They are here today to address the Exceptional Practical Difficulty they have to use all of the tools that they can possibly use. Again, there is a case law that discusses the difference between Use and Area Variances and they evaluate each one of them differently. This also happened in Rehoboth. While economics are not the sole reason and if this site was more square where he could place the apartment buildings in a general configuration then they might not be before the Board today, but that is not the case because we are dealing with a site that has been vacant over 3 years with no interest. Now you have someone who is interested in the site and is doing the right thing by developing something that is generally in character with the rest of the area (as he referred to exhibit 2.11) where they are massing low and going higher. There are no daylight issues and we are not in Dewey or Bethany Beach where we are arguing a 10-story building where someone does not have benefits to the sunset. That is where height issues really are issues and we just do not see that. The Woodmill Apartments can be seen from Forrest Avenue.

Chairman Sheth stated that he understood, but we are dealing with the ordinance. The Board has always tried to help applicants, but not at the cost of something the Board does not feel comfortable with. Chairman Sheth suggested whether there could be an alternative, Mr. Ide stated that he did not have the authority to say that, they have been through a number of iterations to try to compromise to something less. The owner has looked at the idea of going to a 2-story and placing the apartment buildings over the retail space. Quite frankly the owner did not like the height and lowering it down to a 3-story building as a compromise he could not make it work. The owner did not like the fact if you go to a 2-story building with a gable roof it would be an overwhelming building right on the corridor. They looked at placing the 2-story facility for an apartment building and it is not an attractive look.

Mr. Hufnal commented that the COZ-1 was established to keep you from putting a great height of a building up to 35 feet right on Route 8. With the increase in size of the building being 235 feet back it has lessened the impact of the building being right on Route 8 by having a 1-story in the front. It is a shame that the building could not have been a 3-story because you would almost be down to the maximum height limit.

Chairman Sheth's questioned if the applicant would like to consult with the owner and come back before the Board?

Mr. Senato stated that his colleague had a point because he is not seeing a hardship or difficulty other than on the finance end of it and the owner not liking or disliking certain things. He questioned is there any way to compromise and consider the 3-story building behind the retail because you are only talking 20 feet and the building height would drop down almost level to the retail area. Mr. Ide replied that it is certainly a layout that has been provided to the owner previously and the owner stated no; he could not make that work. It does not mean that he cannot not go back more strongly and the owner again. They take the COZ-1 requirement to heart and when the plans were being laid out the owner was informed at the beginning. They have been designing these plans for the better of eight (8) months trying to come up with different configurations to make this work. It has been a puzzle and a balancing act to get the impervious area requirement, parking, storm water management, landscaping and height to work within the site which is not uncommon. It has just been a little more difficult with this site.

Mr. Senato commented that he was very familiar with the area since the 60's when it was two 2 lanes. Looking at the area as a whole the high percentage is residential. He had the same question as mentioned earlier regarding whether the owner would be willing to compromise. Mr. Spiegelman replied again that he did not know whether the owner would not compromise, but they have tried many different layouts that so far have not worked. He clarified that the property has been marketed by their company since 2013, but it has actually been on the market/vacant since 2009.

Mr. Keller stated that the strip of the corner has been populated by a number of single family dwellings for years with some devoted to business use, but looking at the appearance as you drive down Forrest Avenue it looks like mom and pop housing. Occasionally now properties have become vacant or posted for sale and perhaps did not represent itself to be the most attractive commercial development or use as a single unit. Now, some of the properties have become vacant and some contiguous properties have been joined and propose a greater potential as well. Since 2009 to present date he thinks a lot of the property has become more attractive for development.

Colonel Ericson and Chairman Sheth commented that it would be a year before the applicant could come before the Board again if the application was disapproved. He asked if the applicant would prefer the application be tabled and delayed until the next meeting so that he could get more information and discuss with the owner to see if it could be compromised. Mr. Ide replied that he would also need to contact the developer. Mr. Spiegelman stated that it was probably the best way to go.

Mr. Keller stated that it still haunts him to come before the Board of Adjustment with what represents itself as the least modification that is sought to overcome the shortcoming in your mind at least over the zoning code and the COZ-1 as opposed to kind of displaying a maximum modification if you will by the presentation made. He agreed with Colonel Ericson's suggestion.

Mr. Ide stated that the 4-story was not the maximum consideration. The owner looked at the 6-story building because it is allowed by the C-2A zone. They could not make a 5-story or 6-story building work from a parking rationale stand point. So, the compromise was to go to the 4-story.

Colonel Ericson commented that the Board of Adjustment looks at setting precedent. He thinks that what has been designed is attractive. He thinks that 200 feet back offsets the bulk in the building and it would not be that bad. He would hate to see that up and down the corridor because it would be defeating the purpose of the corridor.

Mr. Ide agreed with Colonel Ericson and so does the owner, that is why they did not want to go any larger than a single story on the front as this was their compromise.

Colonel Ericson stated that he would not like to see a 2-story on the front to make it economically feasible because it would not be attractive.

Mr. Ide they wanted to utilize the retail space to generate enough money to make the site work for him especially with everything he has going against him. As we look at this and the way the Board is technically is supposed to look at this they feel that it is not uncharacteristic with the rest of the site. The low retail space is in line with the COZ-1 request and the 4-story even though it is not within the COZ-1 you have buildings 50-60 feet behind it that are just as tall.

Chairman Sheth stated that he experienced the same questions and issues with regards to previous projects such as the Residence Inn and the Fairfield Inn, and Planning Commission's preference against flat roofs when it was built. He complimented Mr. Ide on a great job and the Board of Adjustment is there to help.

Mr. Ide stated that their dilemma with this is they will go back and talk with owner, but they know that they have tried a 2-story and a 3-story configuration and the footprint to get more apartments is not as great as the 4-story on that footprint. We know that combination does not work, but we believe that you will find it unappealing if they went to the 2-stories with the gable roof because it would be large and tall due to the main roof height that the gable roof is measured. As suggested we will go back and talk to the owner, but he knows the outcome because the owner does not want to go 2-stories on the front because of what he feels it is going to look like on the corridor and the 3-stories from an economic standpoint will not work for this site.

Mr. Senato commented that he received the impression that the owner is not going to compromise and it was mentioned many times through the entire presentation that the owner did not agree to any of the suggestions presented to him.

Colonel Ericson commented that as a Board member he would like the applicant and owner to

think about it because it is a significant departure from the corridor.

Mr. Spiegelman assured the Board that they would go to the developer and explain the options in detail.

Responding to Colonel Ericson's question whether there was a drawing of the 2-story building, Mr. Ide replied that he did not do a pretty drawing, but had sketches.

Mr. Spiegelman stated that he liked Colonel Ericson's idea to consult with the owner to make the decision and come back before the Board within a month.

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

Chairman questioned if there was any additional correspondence or phone calls for the record.

Mr. Cook stated that Mr. Garfinkel who is present called last week and expressed his concerns about the case which were conveyed at this meeting. He also met with Ms. Schamp yesterday and she also submitted a letter this morning that each Board member received.

Colonel Ericson moved to table variance application V-16-06. The motion was seconded by Mr. Senato and unanimously carried 5-0.

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

Meeting adjourned at 10:47 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary