CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
December 17, 2014

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, December 17, 2014 at 9:06 A.M. with Chairman Sheth presiding. Members present were Mr. Hufnal, Colonel Ericson, Mr. Keller and Mr. Senato.

Staff members present were Mrs. Townshend, Mrs. Purnell, Mr. Cook, Mrs. Melson-Williams, City Solicitor Bill Pepper, Mrs. Harvey, and Mr. Glenn Mandalas (counsel for Board regarding V-14-10).

APPROVAL OF AGENDA

Mr. Hufnal moved to approve the agenda as amended that the New Business of Application V-14-13 will be heard first and Old Business will be heard afterwards, and also the deletion of Application V-14-14, seconded by Mr. Senato and unanimously carried 5-0.

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

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

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATION

Mrs. Townshend, Director of Planning and Community Development stated that the meeting would be conducted in accordance with the agenda as amended. There is one item listed under Old Business. An update on correspondence received will be provided. There is also one item under New Business (new application). 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 application on the agenda today was completed in accordance with code requirements. The meeting agenda was posted in accordance with Freedom of Information Act requirements

NEW BUSINESS

Applicant #V-14-13

185 Saulsbury Road. Energizer Personal Care Division – Playtex Products has requested a variance from the requirements of Article 4 §4.16 of the *Zoning Ordinance* for parking. Subject property is zoned IPM (Industrial Park Manufacturing Zone) and is subject to the COZ-1 (Corridor Overlay Zone). The Tax Parcel is ED-05-067.19-02-11.01-000.The owner of record is Playtex Manufacturing Inc.

Mrs. Ann Marie Townshend, Director, submitted the following items for the record: Staff Report and plans submitted by the applicant.

The legal notice was published in the Delaware State News on December 7, 2014, and the public was notified in accordance with the regulations.

The initial variance request changed somewhat in terms of the amount of the parking reduction. The Board of Adjustment members were provided with the change in their packet in the form of a letter from the applicant and the current request is reflected in the Staff Report.

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

Representative: Wayne Rossi, Director of Engineering

Mr. Rossi was sworn in by Mr. Pepper.

Mr. Rossi stated that the variance request is based on the calculated number of parking spaces per code which would be 710. At the end of construction they will provide 648 parking spaces. Based on their shift of employees, the worse possible condition for them is a shift change of people coming and going. The worse possible case would be in the neighborhood of less than 600 and they are providing 648 parking spaces.

Responding to Mr. Senato's question whether a year ago there was a discussion regarding parking for Playtex, Mrs. Townshend stated that it was for Proctor and Gamble. It was the same type of issue, but part of the problem is that one space per 800S.F. for IPM Zone is perhaps excessive.

Responding to Mr. Hufnal's question whether with the construction of the bio-retention area and the reduction in the number of spaces would improve the stormwater management on the property, Mr. Rossi concurred. It involves the reduction of fifteen (15) spaces.

Responding to Mr. Keller's question regarding the shift change numbers provided whether there were any knowledge of an experience whereby there was a bottleneck caused by the great number of vehicles during the change of shifts. It just seems like a lot of cars fighting for parking spaces. Mr. Rossi stated that the biggest challenge is after the back spaces have been taken when the shifts starts to move forward. They have never had that kind of bottleneck situation. If you look at the distribution of the parking some of it is on the north and south side of the property. This helps distribute the need for parking spaces. They also have multiple entrances and exits to the facility.

Responding to Mr. Keller's question whether there were a lot of bicycle riders as employees and if there was bicycle racks provided, Mr. Rossi stated that there were a small percentage of bicycle riders.

Chairman Sheth opened a public hearing and after seeing no one wishing to speak closed the public hearing.
Chairman Sheth questioned if there was any additional correspondence for the record. There was none.

Colonel Ericson moved that Application V-14-13 be approved as submitted based on the testimony heard today and the documents presented. The motion was seconded by Mr. Senato and unanimously carried 5-0.

OLD BUSINESS
Update on Appeal Applicant #V-14-10 Lands of Mitten (and Request for Reconsideration) concerning certain real property located at the South side of Lafferty Lane, Dover, Delaware (Tax Parcel ED-05-077.00-01-26.00-000 and ED-05-077.00-01-27.00-000).

Representative of the Appellant: John Paradee on behalf of Mathew Mitten.

Mrs. Melson-Williams provided an update on the Appeal Application. She presented a series of correspondences that were received since the November 19, 2014 Board of Adjustment meeting. The exhibits were provided to the members in their packet so that they are entered into the record. The items are a series of letters identified as correspondence C-1 through C-6.

Mr. Mandalas stated the current status is that Mr. Paradee has asked for a Request for Reconsideration. Since the time of the November 19, 2014 meeting to the meeting today the City has instituted an action in the Court of Chancery concerning this property. The action is sort of overwhelming what is occurring at the Board of Adjustment. Mr. Paradee is requesting in his most recent letter that the Board of Adjustment would move today to reconsider the Appeal and then immediately move to stay the Reconsideration until the Court of Chancery action is worked out. He stated that Mrs. Townshend issued a dismissal and withdrew the fine that accompanied the citation that was issued. The dismissal of that fine "moots" the Board of Adjustment Appeal. Mr. Paradee has taken some issue with that and has stated that the fine was not what was being appealed, but it was the requirement for an approved Site Plan.

Mr. Pepper stated that the Appeal before the Board of Adjustment was for a fine. The administrative determination of a Site Plan requirement was made in 2006. Any Appeal that was filed in 2014 of that administrative determination was untimely. The Appeal of the Fine is now moot because it has been dismissed. It would be the Department's initial position that there is nothing to hear so the Board of Adjustment does not need to act on the Request for Reconsideration. The second position would be that due to the Court of Chancery litigation there is no reason for the Board of Adjustment to act on the Appeal. If for some reason after the Court of Chancery litigation settles and is complete, then the motion to reconsider could be taken up.

Mr. Hufnal questioned if the Board of Adjustment had dismissed the case and if the City had removed the fines then only item in dispute is the Site Plan that does not come before the Board of Adjustment anyway because it would go before the Planning Commission. Mr. Pepper stated that as former President Judge Vaughn stated the Boards of Adjustment do not hear Site Plans. Mr. Hufnal went on to state that there is nothing for the Board of Adjustment to review. Mr.

Pepper stated that this would be his opinion.

Mr. Keller stated that he would have to agree with Mr. Pepper's statement regarding the somewhat simplified actions that have been taken or pending otherwise. He thought the conclusive reaction of the Board of Adjustment took place last month. He also agreed that it appeared as though one of the contestant matters was in fact the imposition of the fine for the certain actions which the fine has been merely lifted by the City. He asked if this was correct. Responding, Mr. Pepper stated that the City dismissed the fine and from his perspective that was the only thing before the Board of Adjustment last month.

Mr. Keller stated that the Board of Adjustment is in no position if they gave reconsideration to anything. They cannot require the City to then impose fines or reactive fines. Responding to Mr. Keller's statement, Mr. Pepper stated that no, it is out of the Board of Adjustment purview. It is an administrative determination to be made by the executive section of the City.

Mr. Paradee spoke on behalf of the appellant. He stated that would first like to start by apologizing profusely to the Board of Adjustment, Staff, and Mrs. Townshend in particular for any role that he may have played in allowing this matter to become unraveled to the point that we find ourselves in today. He acknowledged that perhaps he could or should have inquired to confirm if and when this matter might be considered by the Board of Adjustment in November. But the God's honest truth is that he did not receive any notice or agenda packet like he did for the hearing this morning. He honestly had no idea that the matter was going to be heard by the Board of Adjustment on November 19, 2014 until Mrs. Townshend called him at 9:05a.m.that morning. He was already on his way to Wilmington for another matter and it was simply impossible for him to turn around and come back. He hoped that everyone knew from his appearances before the Board of Adjustment and his experience with the City that he is a fairly diligently kind of person that he would not intentionally blow off an important matter before the Board of Adjustment. He again apologized and asked for the Board of Adjustment understanding, forgiveness and consideration.

As Mr. Mandalas mentioned, a couple of things have happened since the November 19, 2014 hearing. The City had dismissed the citation and the fine. The City has also filed suit in the Court of Chancery. Mr. Paradee had discussed both developments with Mr. Mandalas after he received a letter from Mr. Mandalas. His sense of the matter is that dismissal of the citation does not necessarily moot the Appeal because it leaves in place the administrative determination that a Site Plan is required. He would respectively disagree with his good friend Mr. Pepper about the status of the administrative determination and their ability to challenge it, because the history of the matter is when the initial administrative determination was made a number of years ago it was challenged. His client did what he is trying to do now and that was to come into compliance without prejudice to his position that no Site Plan was required. This was done by his client. The administrative determination at that time was challenged in a timely fashion and yet it was resolved because they obtained Site Plan approval and it was ultimately extended and then it lapsed. Then a new administrative determination was made that another Site Plan approval was required and absent that, enforcement action would be taken, and was in fact taken and a new citation was issued. So, the issue was put in play again a second time. He would respectively submit that it triggers a new right of Appeal on behalf of his client which he pursued in a timely

fashion. This should not be all that difficult; all he is trying to do is protect his client's Constitutional rights by preserving the status quo. He suggested that the Board of Adjustment would vote to reconsider the matter today, but not actually reconsider it. In a sense we would be put back where we were on the November 19, 2014 agenda. He is not asking for the merits of the matter to be addressed at this point, but return to the status quo. He has a matter of fundamental fairness for reason of due process and notice, but then stay the consideration of the merits because the City after all has elected to pursue its remedies in the Court of Chancery. He thinks that it is an inappropriate venue for this matter given the history; but it would allow both parties to preserve their positions in the status quo. It would not cause any harm, hardship or inconvenience for anyone and essentially leaves everything where it would have been on the November 19, 2014 agenda and allow the Court of Chancery to deal with it so that the Board of Adjustment would not have to. If this cannot be done then his client is putting him in an unfortunate position of having to file another action in the Superior Court to challenge the dismissal that was made without notice or an opportunity to be heard. He does not want to do that and he does not think the Board of Adjustment wants to do that either. It is a waste of everyone's time and resources when the easiest thing to do in his opinion would be to put them back on the agenda as they were in November and call a time out and let the City and appellant deal with it in the Court of Chancery. As a practical matter, he expects that his client will file his Site Plan application anew in the very near future; most likely before the end of the calendar year or shortly thereafter. In any event that application will either be approved or denied on its merits. If it is denied, he suspects that will be the end of it.

Colonel Ericson questioned if a person does not show up for a Court of Chancery what do they do with the case; do they go on and on. Mr. Paradee stated that Mr. Pepper may have to respond in terms of what the City's intentions and timeline would be, but the Court of Chancery is certainly able to issue an injunctive relief meaning that his client must cease all activity at the site. The Court of Chancery has the ability to move fairly quickly. He does not believe that it is the City's intention to ask for a temporarily restraining order. It probably would not come to head in the next 30-days, but it could be decided within six months.

Colonel Ericson stated that his concern was that this has been an issue for nine (9) years regarding Site Plan approval, extension, etc. The precedent before the Board of Adjustment is that if the party does not show up normally they dismiss the case. To change that there would need a pretty good reason as to why. He does not see any damage being done to his side if in fact it stays as is, because the Board of Adjustment met, looked at what was there, and came to a decision. It seems to him at that time it is over. Everything that happened afterwards has no effect on their decision at that time.

Mr. Paradee stated that he understood Colonel Ericson's concern, but as he indicated in the correspondence his client did not have any notice of the November 19, 2014 hearing. To deny his Appeal without notice or an opportunity to be heard is a serious problem. The easiest thing to do, as stated previously, would be to stay in these proceedings in favor of the Court of Chancery proceedings because that is where the City has elected to go. If the City wanted to proceed on the Appeal before the Board of Adjustment it would be done if it was timelier or if the City thought it would be more efficient they would be happy to do that, but they have not had their day in court. He is just trying to preserve that opportunity. He appreciates the time the Board of

Adjustment members take from their work to give time and consideration in reviewing the applications. When someone does not show up, he would be upset and offended as well. He honestly did not know the hearing was going forward on that day. Again, to dismiss the case without giving them the opportunity to present the case is a fundamental denial of due process.

Colonel Ericson stated that once you have a chance to present the case before Court of Chancery they will be the ones making the decision. Mr. Paradee concurred that the Court of Chancery would be making the decision.

Colonel Ericson stated that there would be no need for the Board of Adjustment to reconsider. Mr. Paradee concurred. If the Court of Chancery decides the matter then they would stipulate to dismiss the case before the Board of Adjustment so that the Board would never have to deal with it again which he felt was appropriate. Therefore for the record, if the Court of Chancery resolves the matter the Board of Adjustment will never hear from him or his client again on this matter.

Chairman Sheth questioned since the City is going before the Court of Chancery and whether Mr. Paradee was going to Appeal the case in Superior Court. Mr. Paradee stated if needed.

Chairman Sheth stated that the City's goal is to approve the Site Plan or correct the violation, Mr. Paradee concurred.

Chairman Sheth stated that even if the item is taken to Court of Chancery or Superior Court it will take 6-8 months and it will continue to run as is and that is not the City's goal. The City wants to stop the violation and that is the reason for the new Site Plan. Mr. Paradee concurred with Chairman Sheth's statement.

Chairman Sheth stated that no issue is being resolved by both parties going to court. Mr. Paradee agreed that it was a fair statement.

Chairman Sheth stated that the Court of Chancery will decide what to do.

Responding to Chairman Sheth's question regarding the Court's decision, Mr. Mandalas stated that Superior Court does have authority to remand a Board of Adjustment Appeal. He did not think that the Court of Chancery on any scenario would remand the City's action; he thinks the Court of Chancery would decide whether a Site Plan is required. The Board of Adjustment has three (3) options before them today: (1) do nothing and let the dismissal stand, (2) vote to reconsider and stay the reconsideration until a later date, or (3) vote to reconsider and hear the Appeal as soon as January and whatever happens in Court of Chancery action happens.

Mr. Mandalas stated that the questions about whether the Appeal was filed in a timely manner, whether it deals with a fine or Site Plan approval are all things that can be decided at the outset of the rehearing should you reconsider. He did not think that a decision needed to be made today on that aspect.

Colonel Ericson's referred to a letter from Mr. Paradee dated December 10, 2014 of Mr. Paradee's discussion with Mr. Mandalas which said "he agreed that the proposal seems to make

sense for all concerned." Mr. Paradee was agreeing with the fact that he was recommending reconsideration of the dismissal and a stay until a later date, Mr. Mandalas stated that he thinks it is an option that has some appeal on different levels. One it insures that there is not a Superior Court Appeal filed that creates another layer of litigation. Secondarily, to the extent that there was actually or if there was no notice whatsoever, it cures whatever concerns you might have whether an applicant received notice or not. It leaves options open if you were to move to reconsider and stay. It does not mean that you would actually have to vote differently than you previously voted. It does maintain the status quo. The Court of Chancery action will probably be more determinative of this matter in any event.

Mr. Senato commented on the tremendous amount of discussion at the last meeting that was due to basically asking the question where the appellant is or attorney for the appellant. Then the Board of Adjustment went back and forth as to who received the notice and who did not and who sent what, etc. To him it seems to be the basic issue, but he did not think it is an issue today that should force them into making a decision today to change any decision that was made in November. Because there is no proof and he is not asking for any whether the appellant or attorney received or did not receive notice or if the City sent notice. That is an issue between the two parties. The Board of Adjustment as individual members made a decision at the last meeting based on the fact that the neither appellant nor the attorney was present. The Board of Adjustment was present and prepared to hear the case and a decision was made to dismiss the case based upon the fact that no one showed up. Not the fact that he or she did not receive notice. There is really no option in his mind because the option was made at the last meeting. He also got the impression that we are afraid or do not want the Superior Court to kick it back to the Board of Adjustment. Any issue that was brought up in the last 15 or 20 minutes is a moot issue. If the Board of Adjustment makes a decision at a meeting and then a month later for whatever reason they are advised to change the decision it would be setting a bad precedent. Good, bad, or indifferent a decision was made by the Board of Adjustment. Whatever comes out of the Court of Chancery or Superior Court is the time when the Board of Adjustment should consider this particular issue if it ever comes up again.

Mr. Keller commented that he failed to see what is to be gained by doing anything over and above the action taken last month by the Board of Adjustment. The Board of Adjustment does not maintain status quo. The action of the Board of Adjustment last month and additionally the subsequent action by the City to dismiss the fine that was part of the considered Appeal, bringing his estimation conclusion to that at least aspect of what Mr. Paradee said was at least a dual position on his client's part as to the considered interpretation by the City whether or not a Site Plan approval was required. Secondly; the imposition of the fine and whether it was apparently appropriate or not was a spin off the lack of a Site Plan Approval. The action by the Board of Adjustment last month and the subsequent dismissal of the fine sets to rest whatever subsequent action is going to take place. If he heard Mr. Pepper correctly, there would not be re-imposition somehow of the fine in any event. He takes that the City has no interest in taking that step in any event. The first part of the Appeal application was in regards to whether a Site Plan approval is an obligation of the activity at that site remains open, but the City is taking definitive action by proceeding with the Court of Chancery action and that determination would not be made by the Board of Adjustment in any event. He does not see anything to be gained by the Board of Adjustment giving consideration to backtracking or lifting the action that has already been given

a considerable amount of consideration. He has trailed through over nine years of paperwork from August of 2005 to include approvals, denial, subsequent extension, etc. It amazes him to this day that a Court of Chancery action is necessary to perhaps bring to a final conclusion as to whether or not a Final Site Plan Approval is required. As Mr. Paradee stated, his client was progressing finally with readiness for a Site Plan Approval and it could be ready by the end of this calendar year or shortly thereafter.

Responding to Mr. Keller's question whether, if the client obtains Site Plan approval it would even bring a halt to the Court of Chancery action as to the requirement for it? Mr. Paradee stated yes, it would. His client previously received Site Plan approval and he intends to seek it again to moot the issue, because if he received Site Plan approval this controversy would go away.

Responding to Mr. Keller's question regarding Braun Engineering; Mr. Paradee stated that Braun Engineering has been the biggest problem in this entire unfortunate affair. His client's engineer David Braun failed to get the job done in a timely fashion; therefore, his client has had to hire another engineer to start over. This is the reason they are where they are at the current time.

Chairman Sheth stated that last month he voted for dismissal of the Appeal. In his 23-24 years of service he has never had a case where a notice was sent when there was a deferral and a statement show up next time. This case was not regarding a variance it was about a fine. He also reiterated what was previously stated by the other members regarding the notice, not showing up, and decision by the Court of Chancery and Superior Court.

Responding to Chairman Sheth's question about whether a letter was sent or not, does not matter given the benefit of a doubt that it was sent, Mr. Senato concurred. He stated that his main point is whether it was this case, past cases, or future cases as he asks the chairman, members, Mr. Mandalas now that if there was a case next month or thereafter and no one shows up, but notices were sent, then what do they do. Is the Board of Adjustment then obligated to give anyone another chance to speak if they do not show up for a meeting? A decision was made and it does not make a difference about who received or did not receive a notice.

Responding to Chairman Sheth's statement that by learning from this case, in the future anytime the Board of Adjustment defers a case then a motion can be made that the other party needs to be informed. Mr. Senato stated that in other words hypothetically if this situation is the first issue then we inform them.

Colonel Ericson stated that a lot of time was spent last month discussing the same issue "what is the right thing to do." The Board of Adjustment made a decision and after that decision the City decided to dismiss the fine. Therefore, he has no idea why the appellant would want to go to the Superior Court and state that your civil rights were violated by the Board of Adjustment. If the Superior Court states that the Board of Adjustment did violate your civil rights, then the Board of Adjustment will hear the Appeal. It seems in good faith that the Board of Adjustment did everything possible to make the right decision. Now that there is no fine, he sees no reason to go over this again.

Colonel Ericson questioned why the appellant would want to go before Superior Court. Mr.

Paradee stated that he did not think that the Board of Adjustment would be creating any precedent by following the course that he is suggesting because of this reason: If a notice is sent to someone and they receive it and do not show up then the case should be dismissed, but the reality in this case is he did not receive any notice. He did not think that the City can prove that they sent the notice. Interestingly enough for the first meeting, he did receive a packet and for the December meeting he received a packet, but he did not receive a packet for the November 19, 2014 meeting. In his November 20, 2014 letter, the day after the hearing he specifically stated in his letter that if the City sent a notice of the rescheduled hearing to him and his client, they never received it. He went on to read the remainder of the letter. Dismissing the fine gets rid of the penalty, but it does not get rid of the administrative determination that a Site Plan approval is required. By law, their only recourse when the Board of Adjustment leaves the administrative determination in place then they have to Appeal to Superior Court. If the dismissal stands then the administrative determination that a Site Plan Approval is required stands, but not withstanding that they have forgiven the fine. This will have to be challenged within Superior Court within 30-days of November 19, 2014 which is today. If this issue does not get resolved today he will have to file suit against the City, which is a ridiculous waste of time and money when it could be taken to the Court of Chancery by reconsidering and staying. He was trying to find a solution which preserves the status quo.

Responding to Mr. Keller's question whether the case is already in Court of Chancery, Mr. Paradee stated yes and no. If they wanted to challenge the administrative determination with Superior Court and file an Appeal it has to be done within 30-days. The fact that the City filed suit against them to enforce the City remedies does not change that.

Responding to Colonel Ericson's question on whether the mailing was done, Mrs. Purnell stated that all mail was sent. Mr. Paradee and his client were only sent an agenda because the October meeting was deferred and they already had the packet. The mailing is sent by regular mail and not certified mail; so therefore; we do not have proof that it was received. The reason Mr. Paradee received a hand delivered packet this month was because we did not want him to say he was not aware of the meeting and did not receive any notice.

Mr. Keller commented on the discussion of whether or not public notice requirements were met. The Board of Adjustment was guided by counsels advice that in fact they had overcome any presumption of irregularity by virtue of the acknowledgement by Mrs. Purnell that mail was in fact made and that there was otherwise adequate posting. Mrs. Melson-Williams affirmed similar actions. There is no assurance ever that everyone that is aware of the activities is going to present them at any given meeting, but the Board of Adjustment was guided appropriately so that due notice was given. He still failed to see what would be gained on his client's behalf filing an Appeal in Superior Court.

Chairman Sheth stated that the case came before the Board of Adjustment because there was not another avenue. Mr. Paradee stated that it was correct.

Chairman Sheth stated that until the Board of Adjustment makes some type of decision for other cases, not this case; then there will be a reoccurrence. This is the first time the Board of Adjustment has had a case like this.

Responding to Chairman Sheth's question whether there had been a case similar to this one in the past, Mrs. Melson-Williams stated that during her 10-years with the City she has not been a regular participant as Staff to the Board of Adjustment; therefore, she could not comment on this precedent or history.

Responding to Mr. Hufnal's question whether they could stay at the decision until the Court of Chancery makes a ruling and their ruling will probably include the Site Plan and then Mr. Paradee's next step would be to dismiss the case anyway, Mr. Paradee concurred. Mr. Hufnal went on to say that he could not see a need even though Mr. Mandalas has given the Board of Adjustment three (3) options. Mr. Paradee stated that they would have a hard time with raising the defense in Chancery that a Site Plan Approval was not required because that is an argument that they would have to bring to the Board of Adjustment and Superior Court.

Responding to Mr. Keller's question why Mr. Paradee would challenge the case in Court of Chancery if he was readily prosecuting the preparation of Site Plan for approval, Mr. Paradee stated that if they do not get Site Plan approval then they would like to preserve the argument that they were not required to get it in the first place.

Mr. Keller stated that referring back and reading over the stack of paperwork received, a Site Plan was always a criteria and the Planning Commission has always extended the Site Plan; therefore, it was always a necessity.

Mr. Paradee stated that when they pursued Site Plan approval the first time, they did it without regard to their position that they were not required to do it. They were just trying to be a good cooperate citizen and get Site Plan approval and they did. They still maintain to this day that they are not required to have a Site Plan Approval. The activity that has been going on at the site from their view is "grandfathered" from the *Zoning Ordinance*.

Mrs. Townshend was sworn in by Mr. Mandalas.

Mrs. Townshend stated that her concern with the Appeal shifting from the fine to the fact that a Site Plan approval is required is because contrary to the statements made today that was not previously contested. If you look over the correspondences early in the enforcement of the case going back to 2006-2007, Mr. Paradee acknowledges that a Site Plan approval was required. We have now had nine years where the City has allowed them to operate while obtaining the Site Plan Approval and we are still not there. The Site Plan approval that was granted was conditional and granted by the Planning Commission, but not for the site as it is laid out currently. The contention that Site Plan approval is not required and appealing that determination is stale, because that determination was made and not disputed in 2006 or 2007 as seen through the correspondence.

Mr. Paradee stated that it was not consistent with his recollection, but if that is what the records show then that is what it shows. They do challenge whatever enforcement actions the City attempted to take prior to them obtaining Site Plan approval before. They never wavered from that challenge, but instead obtained Site Plan approval. If the record reflects that a Site Plan

approval is required then he will stand by that.

Colonel Ericson stated that if the Board of Adjustment stays with the dismissal and it goes to Superior Court then the Board of Adjustment will receive a decision from them.

Responding to Chairman Sheth's question if it was likely, Mr. Mandalas stated that he was not sure if it was likely or not. He would guess on an Appeal such as this one the Superior Court would make a decision whether the dismissal was appropriate or not.

Responding to Chairman Sheth's question if the decision was not appropriate, Mr. Mandalas stated that the case would come back to the Board of Adjustment because Superior Court would state that the case was inappropriately dismissed and the case lives on. As to whether the Board of Adjustment could hear this case in January, he did not think the Court of Chancery action precludes the Board of Adjustment from hearing the Appeal. If the Board of Adjustment was to hear the case, the decision may be instructive to the Court of Chancery. He thinks the Board of Adjustment still has the three (3) options as mentioned earlier.

Mr. Paradee stated that he never thought this would be this difficult and at this point his brain hurts. He apologized to the Board of Adjustment if all of this was causing them to do flips. He never thought it would get to this point. He respects and appreciates the job of the Board of Adjustment and whatever decision is made he will honor.

Colonel Ericson stated that the Board of Adjustment tried very hard to make the right decision by balancing the City codes and the needs of the individual case. They are not attorneys but they try to do their best in their common sense to make the right decision.

Mr. Paradee agreed with Colonel Ericson. He has appeared before a lot of administrative boards and this Board is as conscientious and hardworking as any of the ones he has appeared before. He appreciates all of the efforts.

Responding to Mr.Hufnal's question whether Option #2 was to vote to reconsider sometime in the future and that could be after the Court of Chancery ruling, Mr. Mandalas concurred. Mr. Hufnal questioned if it was after the Court of Chancery that ruling may be to declare everything that is required anyway so it would be mute for the Board of Adjustment to have another hearing, Mr. Mandalas concurred. The Court of Chancery action may resolve all the issues. Mr. Hufnal questioned if the vote to reconsider would take care of Mr. Paradee's concern and would also not make the Board of Adjustment to make a decision until after Court of Chancery and then the case could be withdrawn anyway, Mr. Mandalas concurred.

Colonel Ericson asked Mr. Mandalas if he could state once again the second recommendation so that everyone understands. Mr. Mandalas stated that the second option would be a motion and an approval of the motion to reconsider the application at a later date and then an immediate motion to stay the application until some future time.

Responding to Colonel Ericson's question of the City's position, Mrs. Melson-Williams stated that the City would follow the legal counsel to the Board.

Chairman Sheth questioned if there was a motion would there be a need to go to Superior Court. Mr. Paradee stated that if the Board of Adjustment moved to reconsider and stay as mentioned in Option 2, then there would be no reason to go to Superior Court.

Mr. Mandalas stated that there is no right answer. Comments were made by Mr. Senato on the Board of Adjustment final decision. There was testimony on the record the last time that notices were sent and you have new testimony on the record today that notices were not received. The reason it is before the Board of Adjustment because there was a request for reconsideration by the applicant.

Colonel Ericson stated that it was the reason he stated earlier that he would welcome the Superior Court affirming what the Board of Adjustment decided.

Chairman Sheth stated in the future he would like a notification to be sent whether it is via email, telephone, or letter regarding a deferral or dismissal.

Mr. Senato responding to what was previously stated by Mr. Paradee, that if someone receives a notice then the case should be dismissed if they are not present. But he did not receive a notice; therefore, the case should not have been dismissed. There will be a set standard in the future for anyone so that the Board of Adjustment does not have to go through this again.

Mr. Keller stated that he had no reservation or fear of this case or subsequent cases arising from the lack of appearance of an appellant. It might or might not happen again. The Board of Adjustment is obligated to hear the case at-hand even in the absence of an applicant for a variance. While they may or may not give consideration to a non-appearance, they nonetheless may declare a dismissal of that particular application. There is relief to that applicant in the absence of the applicant or appellant appearing. So, they do not have to reinvent the wheel or undertake discussion in how the Board of Adjustment procedurally handles these kinds of matters. Appellant review goes to Superior Court. An applicant with a variance request is prevented from reappearing on that same matter for a one year period. If the applicant is granted he is obligated to undertake action to pursue the approved variance request. There are standards in place. Appellants or applicants may not be pleased with the methodology of the formulation of those steps to resolve the matter, but nonetheless they are in place. We never have the assurance whether an applicant is going to appear or not. He stated that he thought there were some cases within the last five (5) or six (6) years where there was failure of an applicant to appear. He does not have any fear or reservations as to how those would progress or be handled in those kinds of circumstances. FOIA responsibilities for adhering to due public notice, etc. are the standard and procedural steps made by the City of Dover with regards to that and their code. Anyone at any time can state that they did not receive, see, or hear the notice or if they are not a participant, but a neighbor a mile away and they had interest but did not see the notice, could it be reconsidered.

Chairman Sheth stated that this case is not about a variance and that is why they have never heard this before. A variance case cannot be heard unless the applicant is present.

Colonel Ericson stated that the problem is you have a City of Dover employee that we have

worked with for a long period of time and has been very reliable. She stated that notices were mailed and then you have Mr. Paradee whom he has worked with on the Kent General Foundation Board, a man with very high integrity who stated that he did not receive the notice. How do you evaluate what happened? A decision was made last month and he said let it ride.

Mr. Keller, Colonel Ericson, and Mr. Senato stated that they would not be presenting a motion for reconsideration.

Mr. Hufnal stated that based on the fact that the case has already gone to Court of Chancery he would not be presenting a motion for reconsideration.

Mr. Senato stated that a very interesting point was made regarding already having a precedence in place for variances. He questioned why that same procedure would not be applied to something else like this. Mrs. Townshend responded by stating that she believes it does. She was not sure that any action from the Board of Adjustment was needed in terms of the procedures because Staff has already started to look at the procedures. Again the notice is not sent certified mail. We know that it is sent, but we do not know if it was received. Anytime it is a variance or an appeal if someone does not show up, they can make the case that they did not receive the notice. There has already been a discussion with the office about requiring email addresses with applications and sending items via email with a returned receipt for verification. While we have used the process that we have always used, this shows that we could do things better in the future.

Responding to Mr. Senato's question why it could not be sent registered mail other than the cost factor involved because it could eliminate any problems in the future, Mrs. Townshend stated that there is a cost factor and until this application there have not been any issues. With the opportunity of electronic communication, we can have something that creates the record that something has been sent and received without creating additional cost.

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

Meeting adjourned at 10:38 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary