CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
November 19, 2014

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, November 19, 2014 at 9:07 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, and City Solicitor Bill Pepper, Mrs. Harvey, Mr. Brown, and Mr. Glen Mandalas.

APPROVAL OF AGENDA

Colonel Ericson moved to approve the agenda, seconded by Mr. Hufnal and unanimously carried 5-0.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF OCTOBER 15, 2014

Mr. Senato moved to approve the meeting minutes of October 15, 2014 with the necessary corrections, seconded by Mr. Hufnal and unanimously carried 4-0. Mr. Senato abstained because he was not present at the last meeting.

OLD BUSINESS
Applicant #V-14-10

Responding to Chairman Sheth's question how to proceed with the application, Mr. Mandalas stated that there was only one case on the agenda today which is an Appeal. Unfortunately, the appellant is not present so there are a couple of options: (1) confirm that the appellant was aware that the meeting was today and at this time, or (2) defer the case.

Mrs. Townshend stated that she spoke with Mr. Paradee today in regards to the meeting. He stated that he was unaware that the meeting was today. He requested that the Board of Adjustment show mercy and defer to the December meeting.

Mr. Pepper stated that he was aware that Mr. Paradee requested last month that the Appeal be deferred until the November meeting. The Board of Adjustment has been meeting on the third Wednesday of each month since he began the position of Deputy City Solicitor in 1989. Everyone is aware when the Board of Adjustment meetings occur. Mr. Paradee asked that the Appeal be deferred until November, and he is not present.

Responding to Chairman Sheth's question of the legal implications, Mr. Mandalas stated that the Board of Adjustment needs to know if Mr. Pepper is requesting that the case be dismissed based upon the non-appearance of the appellant. Mr. Pepper stated yes. Mr. Mandalas went on to state that a practical legal implication is that the Appeal needs to be taken 30-days from the time that the person becomes aggrieved under the statue. If the case is dismissed today, the 30-days will have expired and he was not sure if there will be an opportunity for them to request an Appeal

again. Mr. Pepper stated that they could appeal again only if the next time they are fined. Mr. Mandalas stated that the next time they are fined they would have the same argument over whether it was an appropriate fine or not to make an Appeal at that time.

Colonel Ericson stated that he would like for someone to establish for the record that they were properly notified. If the case is dismissed then the applicant would have to pay more fees. Were they notified by telephone or in writing?

Mrs. Melson-Williams stated that for the October meeting the Applicant/Attorney requested via email that was provided to the Board of Adjustment an extension of time to pass the agenda item on to the next available meeting of the Board of Adjustment in November. The Board of Adjustment took action on October 15, 2014 meeting to defer as requested. When information is prepared for the Board of Adjustment and the agenda is properly published and posted. Typically the application package is sent to the applicant(s) and that she cannot confirm.

Responding to Colonel Ericson's question if it was the normal procedure, Mrs. Melson-Williams stated yes. It is not sent certified it would be sent regular mail. The Board of Adjustment agenda and packet is also posted on the City's website. There are certainly public postings of the agenda.

Responding to Colonel Ericson's question whether they have justly provided notification to the applicant that they would have reasonably shown up to the meeting today, considering what has already been stated, Mr. Mandalas stated that it is not uncommon for Boards to not make specific mailings to applicants. If there is some expectation especially when represented by counsel then an applicant or their attorney will be following the postings and the publications to ensure that their client is present. Mr. Mandalas stated that they should have known.

Responding to Colonel Ericson's question from a legal standpoint whether the case can be either dismissed or postponed, Mr. Mandalas stated yes.

Mr. Mandalas stated that Mr. Pepper on behalf of the Director of Planning is requesting that the case be dismissed based upon the failure of Mr. Paradee and his client to show up at the October meeting and today's meeting.

Colonel Ericson stated that the dismissal by Mr. Pepper does not mean that the Board of Adjustment has to approve it. The dismissal in his mind could cause the applicant financial burden. He wanted to make sure the Board of Adjustment is on good legal ground before making a decision.

Chairman Sheth stated that if the Board of Adjustment follows procedure then they can move forward, Mr. Mandalas stated that the applicant was not present so the Board can move forward with the proceedings and there are no other cases for an opening or closing of a public hearing.

Mr. Mandalas stated that the Board of Adjustment is purely deciding now whether to defer and allow the appellant some accommodations for them to be at the next month meeting without having any additional fees or to dismiss.

Responding to Mr. Keller's question the implications of a dismissal, what is the next step for the appellant to appeal the Board of Adjustment decision to dismiss, would it be Superior Court? Mr. Mandalas stated that it would be Superior Court if it was the decision to appeal the Board of Adjustment decision to dismiss.

Responding to Mr. Keller's question about the ramifications of simply deferring action today, postponing until the next meeting, ensuring that there is due notification to the appellant, would the standing fines and penalties continue to accrue simply for that additional possible 30-day period as opposed to a dismissal today the fines would still run would they not in any event.

Chairman Sheth stated that whatever is done will have a precedent.

Mrs. Townshend stated that when something is under an Appeal the department does not continue to issue fines. The fines that have been issued still sit there, but no additional fines are issued during the appeal process.

Responding to Colonel Ericson's question whether the case is dismissed the applicant would have to reapply and pay the fees, Mrs. Townshend stated only if there are additional fines, then they would have to appeal those fines. At this point, if the Board of Adjustment dismiss, the applicant cannot re-appeal unless there is another violation issued.

Responding to Colonel Ericson's question whether the case would then go to Superior Court, Mr. Mandalas stated that it is possible it could go to Superior Court. It is also possible that the Board of Adjustment dismissal would have the effect of affirming the City's decision. If no additional fines were issued the appeal is now dismissed. The only way to challenge the City's determination is to go on to Superior Court, but they would first have to challenge the City's dismissal.

Mrs. Townshend stated that there is currently one (1) $500 fine which is doubled because it is more than 14-days. It was more than 14-days between the issuance of the fine and the Appeal. The role of the Board of Adjustment is to determine if in fact if the Inspections and Planning Department was correct in the application of the code.

Responding to Mr. Mandalas's question whether there were other items on the agenda for next month, Mrs. Townshend stated yes, there are two other items.

Mr. Mandalas stated that the Board of Adjustment members came out today for this sole hearing and if the Board of Adjustment was thinking about deferring the item, they would not want to come out again for just this single agenda item. But, since there are other items on the agenda for next month and there was question whether if the applicant would appeal to Superior Court or where it might go, it may make the best sense to defer and allow it to be on the agenda for next month.

Mr. Senato stated that it is rare that the Board of Adjustment has a meeting once a month and people are not aware, but the point is that in his personal opinion there is no concrete proof that the attorney was notified, although standard procedure is to do mailing and mailing is not 100%.

He believed that the item should be deferred until the next meeting because there is a percentage of a loophole that there was no notification to the person(s).

Mrs. Townshend stated that if the Board of Adjustment votes to defer the matter, she would suggest that there be cost applied because just for having five of the Board of Adjustment member's present and legal counsel the City is incurring hundreds of dollars.

Responding to Mr. Senato's question of the cost to whom, Mrs. Townshend stated the City. The appellant should have to pay since they deferred voluntary once in which they indicated November and then they did not show up today. Maretta actually handles the mailing.

Mr. Senato stated that there is a reasonable doubt as to whether or not notification was given regardless of what the appellant or attorney states and whether the Board of Adjustment meets once a month or not. The appellant should not be penalized because of the question of notification. If the case is not deferred then the appellant has the right to go to the Superior Court. He is giving the appellant the benefit of the doubt because no one in the City is giving him 100% proof that the mailing was done. In this case registered mailing to the appellant should be given with deferral until the next meeting.

Mrs. Townshend stated that Maretta does not have a voice due to laryngitis, but she did indicate by nodding that the mailing was done. Notices are never sent to the applicant by certified mail. Her concern that in the middle of something you change procedure and then there is the expectation every time that certified mail goes to the applicant. Again, whatever the Board of Adjustment decides is fine, but if the mailing was sent, the property owner requested last month to defer and specifically mentioned November, and if the Board of Adjustment choose to defer, she would simply request that some of the cost that the City incurred by being here today get passed on to the appellant.

Mr. Senato questioned under the code there is a section that the Board of Adjustment has the right to refer all cost.

Mrs. Townshend stated that the code specifies on an Appeal the Board of Adjustment can if they find it in favor of the appellant have the option of returning the $200 Appeal fee to the appellant.

Chairman Sheth stated that he has been an applicant for a variance before the Board of Adjustment five (5) times; he stated that he is the applicant and he was informed each time when the meeting was going to be held. This year he came before the Board of Adjustment twice and it is his responsibility as the applicant to not assume when the meeting is going to be held, therefore, the Planning office informs the applicant and attorney when the application is submitted. Mr. Paradee was aware of the meeting last month when he requested to have the meeting tabled until the November meeting and he would be ready because he had some engineering issues. If the applicant or attorney does not show up will the Board of Adjustment do this for everyone next time? He stated that the cost that was mention by Mrs. Townshend has to be factored in and should it be paid by the appellant.

Responding to Chairman Sheth's question whether the violation of the code could be discussed,

Mr. Mandalas stated that Board of Adjustment should not discuss the merit of the Appeal without the appellant being available to make their case.

Colonel Ericson stated the reason for the original question is that there were a lot of reasons the appellant should have known about the meeting and it seems that it is the Attorney's job to check the exact date of the meeting. He was not comfortable with assigning a fee because it has not been done in the past and he would not know how to measure what that fee should be. This case started in 2006 and has gone through the Planning Commission numerous times and extensions have been given. It seems that the behavior for this case is to delay, delay, delay, and never follow through. Looking at that, he does not see any reason to reward them for not showing up. He stated that dismissing the case is probably the right answer.

Mr. Keller stated that he had a bit of reservation about a dismissal only in that Mrs. Townshend speaks in term of standard procedures. He would be more inclined to a deferring of the action given no true assurance that there has been due notice under FOIA (Freedom of Information Act). One can or cannot look at the city's website or any direct mailing to the appellant. Every established Board of Adjustment meeting requires due notice to the public if he is not mistaken. Typically that standard procedure is by public notification via newspaper. To his understanding it was not done in this case, there was reliance on the previous deferring of this particular action to today's meeting. The applicant has a direct interest naturally and the Board of Adjustment does not know if there were members of the general public or neighbors, etc. that may have had some interest in hearing the Appeal, contributing testimony, which they would of otherwise been afforded virtue of a public notice had they seen it in the newspaper. He stated that he would not like to see a dismissal and then to have a subsequent Appeal to Superior Court wherein it comes to light that there was not public notice and perhaps have a reversal based upon that lack of due public notice via the standard operating procedure of running a newspaper publication.

Chairman Sheth's questioned Mr. Keller whether the case was tabled in October, Mr. Keller stated that there was a motion to defer.

Chairman Sheth stated that the case was tabled and in twenty-three (23) years this is the first time the question has come before the Board of Adjustment that an applicant states they have never been notified. He stated that he was not talking about other people; he is referring to the applicant. He stated that the applicant is the one who has come and asked to come before the Board of Adjustment. The applicant is given all necessary information. You are asking the Board of Adjustment to take responsibility for the applicant that they may have forgotten.

Colonel Ericson stated that public notice and mailing was done. It is standard knowledge that the Board of Adjustment meets once a month at the same time. The Attorney requested they and he has a responsibility to follow through and it is posted on the website. The Board of Adjustment has given ample cause for this appellant to show up. Most people who do not show up or call in and ask for it to be deferred do not even know about it. In his mind to dismiss is the proper way to go.

Responding to Mr. Hufnal's question whether the case has been deferred twice in the past two months, if the case is deferred and it goes to the next meeting in a letter to the applicant/attorney

could it state the position that the case has already been deferred twice and at the next meeting there could be a possibility of dismissal, Mr. Mandalas stated yes.

Responding to Colonel Ericson's question whether the Attorney would know that the case could be dismissed today, it is his job to know that, Mr. Hufnal stated that it should be his job to know.

Chairman Sheth suggested that if a letter needed to be done, it could state that this is your final notice, why would you need a pre-judgmental dismissal.

Mr. Mandalas stated that as a matter of notice there has been ample notice in this case. Certainly under the FOIA (Freedom of Information Act) those notices have been done and it is general acceptable practice that if you are going to defer an item as it was done last month to this month it is announced publicly during that meeting that it will be on next month that is sufficient for FOIA notice purposes. The state statue also requires notice under the Board of Adjustment section for these and that notice was done last month and the mailing went out to the neighbors. So it is a matter did the City comply with the FOIA and Title 22 requirements for notices of Board of Adjustment. He stated that the City has complied with all that. There is no specific requirement under the State Code or under the City's Code requiring that individual notice even be sent to the applicant. Although it was sent to the applicant/attorney based upon the testimony.

Mr. Senato stated that he agreed with Colonel Ericson that at this point the Board of Adjustment could be setting some form of precedent and may be not, but there are two issues to consider.

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

Mr. Senato moved that Appeal V-14-10 be dismissed based upon the testimony of City Staff, that neither the Appellant nor the Appellant's legal representative appeared at the November 19, 2014 hearing after requesting that the Appeal hearing be deferred from its originally scheduled date, October 15, 2014, to "the next available meeting of the Board of Adjustment (in November)", seconded by Colonel Ericson.

Decision/Roll Call Vote on Motion

Mr. Keller stated that based upon the clarification of the above information mentioned by Mr. Mandalas regarding FOIA, and particularly in light of the unusually long/prolonged duration of the 2006 case which has been eight (8) years of action, delays, and notifications, he would be more inclined to go with a dismissal than deferring this action once again.

Mr. Keller stated that due to primarily the absence of the appellant and party of interest to appear after awareness of the appellant and parties involved as to the meeting being held today which stems from a unduly long/prolonged activities regarding this property, multiple violations of established code by Code Enforcement and City Administration, repeated attempts at corrections of violations have gone unheeded, current violation still stand, otherwise in the absent of testimony today by the appellant he votes (aye) in favor of the dismissal.

Colonel Ericson voted (aye) based upon the testimony given in the fact that proper notification was given and of the past behavior of the applicant.

Mr. Senato voted (aye) the applicant did not appear for the meeting, standard procedures from City Staff was completed regarding notifications, based on City Solicitor comments regarding notifications and the long jeopardy of the case.

Mr. Hufnal voted (nay) because he understood all of the significance of what the Board of Adjustment tried to accomplish in the past couple of months, but he would like to hear the issues before the Board of Adjustment instead of going before Superior Court.

Chairman Sheth voted (aye) because the City requested a dismissal for the case, the case was tabled last month (October), and the applicant did not show up this month (November), they were given enough time to address their complaints and issues.

Motion carried four (4) aye, and one (1) nay.

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

Meeting adjourned at 9:49 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary