CITY OF DOVER BOARD OF ADJUSTMENT
AGENDA
Wednesday, August 20, 2014 at 9:00 AM

City Hall Council Chambers
15 Loockerman Plaza, Dover, Delaware

ROLL CALL

APPROVAL OF AGENDA

APPROVAL OF MINUTES OF July 23, 2014 Meeting

NEW BUSINESS

Applicant #V-14-09
10 Maggies Way. Ferguson Enterprises, Inc., has requested a variance from the requirements of Article 4 §4.15 of the *Zoning Ordinance* for parking as related to the definition of "floor area" in Article 12 of the *Zoning Ordinance*. Subject property is zoned C-3 (Service Commercial Zone). The Tax Parcel is ED-05-078.00-01-10.01-000. The owner of record is Chung Sing, LLC, to be conveyed to Ferguson Enterprises, Inc.

ADJOURN
29 Del.C. § 10004(e)(2)

THE AGENDA ITEMS MAY NOT BE CONSIDERED IN SEQUENCE. THIS AGENDA IS SUBJECT TO CHANGE TO INCLUDE THE ADDITION OR THE DELETION OF ITEMS, INCLUDING EXECUTIVE SESSIONS.

CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
July 23, 2014

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, July 23, 2014 at 9:00 A.M. with Chairman Sheth presiding. Members present were Mr. Hufnal, Colonel Ericson, Mr. Senato, and Mr. Keller.

Staff members present were Mrs. Townshend, Mrs. Purnell, Mr. Cook, Mrs. Harvey, City Solicitor Nicholas Rodriquez, Mrs. Melson-Williams, Mr. Brown, and Intern Faith Spady.

APPROVAL OF AGENDA

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

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF JUNE 18, 2014

Mr. Hufnal moved to approve the meeting minutes of June 18, 2014 with the necessary correction, seconded by Mr. Senato and unanimously carried 4-0. Mr. Keller abstained since he was not present at the June 18, 2014 meeting.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATIONS

Mrs. Townshend, Director of Planning and Community Development stated that the meeting would be conducted in accordance with the approved agenda. She reviewed the procedures for the meeting. She noted that approved variances expire after one (1) year if the approved project has not commenced; that all public notices for the applications on this agenda were completed in accordance with code requirements; and the meeting agenda was posted in accordance with Freedom of Information Act requirements.

Mrs. Townshend stated that there were two (2) items on the agenda. The old business item is a variance and the new business item is an appeal. Prior to consideration of the appeal she will be leaving the dais and Mrs. Melson-Williams will take over as the Planner.

OLD BUSINESS

Applicant #V-14-07

547 Pennsylvania Avenue. Nicholas Adams has requested a variance from the requirements of Article 4 §4.1 of the *Zoning Ordinance* to allow the construction of an addition to encroach into the front yard setback. Subject property is zoned R-8 (One Family Residence Zone). The Tax Parcel is ED-05-068.17-01-26.00-000. The owner of record is Nicholas A. Adams. *This application was heard on June 18, 2014 by the Board of Adjustment. At that meeting the public hearing was closed and action deferred. Today we resume consideration of this application.*

Mrs. Harvey, Planner I, submitted the following items for the record: staff report, report and plans submitted by the applicant.

The legal notice was published in the Delaware State News on June 8, 2014 and July 13, 2014. The public was notified in accordance with the regulations.

Mrs. Townshend stated that last month the Board of Adjustment requested additional information. Today the applicant has additional information. Also, to present members have received the staff report and the meeting minutes that include the motion from Robert Duncan's variance request from September 17, 2008, property located at 555 Pennsylvania Avenue. The motion read as follows: "*Colonel Ericson moved to approve Application V-08-16, 555 Pennsylvania Avenue, Robert M. Duncan the reason being, the new garage and the new addition in the rear will enhance the neighborhood, it will update an old building, the garage variance in the front is only one foot and will make it safer for them to get in and out, in the rear a three foot addition would only go to the former retaining wall and would not cause any further runoff to the lake that is already occurring as it was already covered land, and furthermore, that the variance include the lot coverage to be increased by five percent so that a driveway could be built in the front of the home, seconded by Mr. Hufnal and the motion was unanimously carried."*

Mrs. Townshend stated that a 1 foot intrusion into the front yard setback and an increase in the lot coverage to go to 40% was approved. The building permit that was issued included the requirements that the variance approval allowed for up to 40% lot coverage and a 1 foot variance from the front yard setback.

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

Representative: Mr. William Byler Jr., Architect representing the owner.

Mr. William Byler was sworn in by Mr. Rodriguez.

Mr. Byler stated that he had some additional information to present to the Board of Adjustment. This information would be photos of the adjoining property at 555 Pennsylvania Avenue located to the north, also the siting of the construction of the garage. It shows graphically what currently exists in the field in support of the variance application. He distributed photo copies to the Board of Adjustment members and Mrs. Townshend. The map shows the proposed garage on the plan and the corner of the existing house. The front yard setback is 25 feet from the property line and the street curve. The 10 foot dimension +/- back gives you the right-of-way of the street all the way across. The proposed garage encroaches into the front yard setback approximately 11 feet. This would leave 14 feet +/- from the property line to the face of the proposed garage. To the north of 555 Pennsylvania Avenue there is a hatched area that shows the position of the existing garage that is encroaching into the front yard. The applicant would like to demonstrate that there is a precedent set for the encroachment into the front yard by his neighbor. The sheet on the left side shows the proposed setbacks for that property. The other supporting comment regarding the variance request is that practical difficulty exists on this site in the rear simply because of the proximity of the lake. The slopping site, contours and configuration do not enable this resident to be able to position a garage addition on the rear side of the house. He is presenting this also as an Exceptional Practical Difficulty. In addition to this variance request the applicant would like to

introduce another variance to exceed the lot coverage maxium of 35% to allow 38.25% due to the proposed addition. Seeing that there is already a variance request to move from 35% to 40% on the adjourning property they wanted to include this variance request in this action today if possible. A copy was handed out to all members.

Mr. Nicholas Adams was sworn in by Mr. Rodriguez.

Mr. Byler stated that the site map graphically represents the existing house, impervious surfaces, proposed 24x30 garage addition, and the proposed area of the new drive. There is also a proposed cross hatched area of existing impervious surface that indicates if this variance request is denied they are able to remove some of the existing impervious surface to get under the 35% maxium allowed in this particular zone. The request is to be able to keep the existing impervious surface as they are and include the proposed garage and drive which would be 38.25%.

Representative: Mr. Nicholas Adams, Owner.

Mr. Adams stated that the above information was included in their response to the City and Mrs. Harvey also noted that the original request was for 38.25% lot coverage.

Mr. Byler stated that the packet given to the members included the 8 ½ x 11 map of the proposed garage and includes photographs that the members already had. It shows the view towards the north from the applicant's property viewing the existing construction and the existing garage that is constructed on the adjourning property.

Mr. Adams stated that also included in the packet is a Goggle Earth image of the site as it exists today. It shows his property and the property at 555 Pennsylvania Avenue.

Colonel Ericson stated that at the last meeting most of the discussion was in regards to Mr. Duncan property got a 1 foot variance and he questioned if Mr. Adams was asking for 11 foot variance, Responding Mr. Adams stated yes.

Colonel Ericson's questioned as he referred to the left side drawing where the hatched marks were located if it would be an additional 10 feet beyond what Mr. Duncan was approved and therefore it would be out in front of it, Mr. Byler stated that the position of Mr. Duncan's constructed garage is in front of the proposed variance that they are requesting.

Colonel Ericson asked if it could be demonstrated on the drawing.

Mr. Byler stated that by measuring the existing conditions from the curb they were able to determine that from the curb back to the wall of the garage is 22 feet on Mr. Duncan's property and they are going to be about 24 feet back from the curb. From the property line they are going to be about 14 feet back and Mr. Duncan's garage is actually about 12 feet back.

Mr. Adams stated that what they are proposing to construct would encroach into the front yard setback actually less than Mr. Duncan's current garage as built.

Responding to Colonel Ericson's question whether the hatched area was Mr. Duncan's garage, Mr. Adams concurred.

Mr. Hufnal commented that he was still confused and stated that if the Board of Adjustment had approved Mr. Duncan's 1 foot setback, and and the proposed garage was claimed to encroach less than Mr. Duncan's, then how would the Board be approving 14 feet?

Mrs. Townshend responded that Mr. Duncan was granted a variance to encroach 1 foot into the front yard setback, and the building permit specifically noted this. The Office did not require an as built survey before issuing a Certificate of Occupancy, so it appears based on the information presented that it is highly likely that the garage construction was not in accordance with either the building permit issued or the variance approved by the Board of Adjustment. Upon speaking with the Deputy City Solicitor this issue will need to be addressed separately from this case. It would at the least become a likely issue at the time of the sale of Mr. Duncan's house if it was not built in accordance with the variance. It could mean reappearing before the Board of Adjustment, but she was not sure. The information provided by Mr. Byler showed that the garage on the Duncan's property was not constructed in accordance with the variance and building permit issued in 2008.

Mrs. Townshend stated that there were several issues today. The applicant left last month's meeting thinking that his proposed garage would not be closer to the street than Mr. Duncan's garage and how does it appear that way. Therefore, it was reexamined. One of the concerns expressed by the Board of Adjustment at the June meeting was that the character of the area would be impacted by the perceived intrusion of the garage closer to the street, and that the proposed garage was potentially a greater intrusion than the neighbors existing garage. Based on what exists on the Duncan property (which is not as approved), the Adams garage would be further back than the currently constructed Duncan garage.

Mr. Hufnal questioned whether the applicant would consider reducing the 30 foot wide garage so that it would be back within Mr. Duncan's projected area. The new information has shown it is less. Mrs. Townshend stated this was correct, The other issue is that based on the information Mr. Byler has provided, there is 10 feet between the curb and the property line. There is still 24 feet from the curb line and not the property line. There are no sidewalks. Usually the 10 feet within the right-of-way is the sidewalk and buffer, and this is a street without sidewalk. She was not sure if that makes a difference.

Colonel Ericson suggested that in the future the City require Mr. Duncan to get within the variance approved and take a part of the garage away before selling the house.

Mrs. Townshend stated this is a separate issue, but typically there have been prior cases whereby a property goes for sale and the title insurance company confirms that the owner has built into the setback. Errors not caught at the time of construction must then come before the Board of Adjustment to request a variance, which the Board has typically approved. This case is different in that a variance was issued and the owner appears to have exceeded what was granted.

Colonel Ericson stated that Mr. Duncan knowingly exceeded what was approved, Mrs. Townshend stated perhaps.

Responding to Colonel Ericson's question where the Board of Adjustment would stand if this variance is approved, and in one year the Board of Adjustment would need to revisit the property and would it need to be disapproved; Chairman Sheth stated that this question would arise again since information has been given. He recalled an owner in Crossgates who built an extra bedroom without a variance and the extra bedroom had to be demolished. Today the Board is discussing a case that will have questions in the future whether all like it or not.

Mrs. Townshend suggested to the Board that for this variance request, a decision should be made based on the merits of the application presented. The applicant is requesting a variance to go approximately 10.77 feet into the front yard. They have shown that what is on the ground at the neighboring property projects further, but they have also indicated that they cannot build onto the back of the house because of the proximity to the lake. What needs to be considered is if such intrusion into the front yard is warranted due to the inability to build in the rear of the property. Normally it would be possible to build to the setback, but in this case they cannot go closer than 75 feet from the lake.

Colonel Ericson stated that he was bothered that the Board of Adjustment would be setting a precedent which would cause to the Board to approve Mr. Duncan's at a future date because the Board set a precedent regarding this property before them today. He questioned whether it would it be better to defer this application until Mr. Duncan's issue was resolved.

Responding to Chairman Sheth's question whether the Duncan property should be ignored and a decision independently made on the property before the Board today, Mr. Rodriguez stated that a decision would have to be made strictly in regards to the Adams property. The issue of the Duncan property not be built in accordance with the variance granted is a separate issue, and that case would need to be address separately if it were to appear before the Board of Adjustment.

Mrs. Townshend stated that the City side would need to determine whether to wait until a property transfer or act now. She would suspect on that property the Board of Adjustment granted a variance to go 1 foot into the front yard and up to 40% lot coverage. She would suspect that they are also in excess of 40% lot coverage. At some point whether it is 2 months or 10 years the Board of Adjustment will probably be in the position to make a determination regarding that property. The application today needs to be based on the merit of the case presented, and take the Duncan's variance out of the equation. The issue at the meeting last month was stated that this garage would project further than Mr. Duncan's garage and now we have documentation that it would not. She was not necessarily sure if Mr. Duncan's property would be used as the benchmark.

Colonel Ericson stated that if they just disapprove a 1 foot variance like Mr. Duncan's then it the variances would be the same.

Chairman Sheth stated it is about what the Board of Adjustment does today in litigation.

Mr. Hufnal stated that part of the reasoning for the 40% allowance was that the Silver Lake shoreline gets shorter as it goes north, and the Duncan's property has even a shorter distance of shoreline because of the profile of the lake. Mrs. Townshend concurred.

Mrs. Townshend stated that if Mr. Duncan had come forward and requested a 13 foot variance, we do not know what the Board of Adjustment would have done. He requested a foot and so her concern with saying a foot would be presuming that is all the Board of Adjustment would have approved. Again, this case needs to be judged based on its merits and not with regard to Mr. Duncan's property or what is there.

Responding to Colonel Ericson's questioned if it was being stated that Mr. Duncan did something apparently illegal and he went a lot more than he should have and we are going to justify the place next door to almost be out towards where Mr. Duncan is, so how can the Board of Adjustment ever go back and tell Mr. Duncan that he would need to demolish the garage or move it in a foot. Who sets the precedent of 1 foot, Chairman Sheth stated that you decide based on the merit of the case presented before you today not based on Mr. Duncan's property.

Colonel Ericson stated that the precedent that was established in the neighborhood must be considered, which was 1 foot.

Mrs. Townshend stated that if the Board of Adjustment feels the need to get legal advice from Mr. Rodriguez before making a decision, then the Board can move to open an Executive Session. Her concern is that it not be tainted one way or the other either in favor of the variance or against because the neighbor did something they were not permitted too.

Colonel Ericson suggested deferring the case until the Duncan case is resolved. Have Mr. Duncan come in for another variance. He would hate to put the Board of Adjustment in a position where they approved something based upon an illegal act. Meeting with Mr. Rodriguez would be a good idea.

Chairman Sheth stated that after finding all the information would he make changes.

Mr. Byler stated that he was not aware of the information. He and his applicant had no idea of what variance was granted to Mr. Duncan prior to making the map. They were just staking out the yard and could see that his garage was even encroaching further. It was not until later after meeting with Mrs. Townshend that they discovered that the Duncan garage had projected further than it should have. There is a concern from Mr. Adams that he does not want to "throw his neighbor under the bus." He did not know how to process this without bringing this information forward.

Mr. Adams asked if Mr. Hufnal recalled making the comment that they granted a 1 foot variance and Mr. Adams stated that he did not necessarily believe that 1 foot existed on the property. Mr. Adams stated that Mr. Hufnal stated that 1 foot would be in character with the neighborhood. Adams stated that at the time he thought he was asking no more than what Mr. Duncan had asked for. They made the application through the normal process, submitted drawings, and have done things the correct way. His architect Mr. Byler has been available for any questions. They

have appeared before the Board of Adjustment twice because they felt that the application merits the Board's consideration and approval. His neighbor Mr. Townsend spoke in favor of the application at the last meeting. He would be injured by the decision of the Board if it ruled based on the new information surrounding the Duncan property. Mrs. Harvey's response to the Board of Adjustment was that it would not be out of character in the neighborhood to build a garage because every other property in the neighborhood has a garage. The applicants have expressed and explained their Exceptional Practical Difficulty with respect to their inability to build at the rear of the property, and also explained what Mr. Hufnal mentioned earlier about the angle of the lake. He asked that the Board of Adjustment consider this application on the merits presented before them today and that the garage would not be out of character with the neighborhood, and that the garage that exists on the adjoin property is in character with the neighborhood, and is an attractive property and building. Furthermore, there have not been any protests from neighbors that the property is not in character with the neighborhood. He feels that what they are asking for today is reasonable and would represent an improvement to the neighborhood.

Chairman Sheth stated that the Board of Adjustment will definitely think independently and not be influenced by any other issue or the Duncan's property. The Board of Adjustment strictly follows the ordinance and the hardship that is perceived by City Council as approved. They cannot ignore the Duncan property. That case will likely return since something done illegally and discovered during a title search would come back to the Board as a variance request.

Mr. Hufnal commented that there was support of the application from Mr. Townsend who did not think it would look out of character with the neighborhood. Also, there were no negative factors from anyone else in the neighborhood that stated it would not be presentable.

Mr. Keller asked Mr. Hufnal if there was the possibility that the observations were made by neighbors was of the existing and perhaps illegal Duncan garage projecting, and the neighbors perception of what was physically there, but perhaps not legally there, Mr. Hufnal stated that it could have been.

Mr. Keller stated that the Board of Adjustment cannot ignore what is presented to them as evidence; they must rely on the testimony given . Part of his pause with some of the comments made is that in fact some of Mr. Adams support for the variance request is based upon (not to Mr. Adams knowledge) the existing footprint of the Duncan's addition, and thereby Mr. Adams has expressed this this would be very little change to what is already there, but now there is a dilemma in the Duncan's property since it may or may not have been approved as built. He could appreciate Colonel Ericson's position that the Board may be tossed back and forth; one basing consideration for Mr. Adams variance request upon something that the Board of Adjustment now knows may be illegal, only then perhaps be confronted with an application by the Duncan's property to be basing his allowance to remain as-is based upon the granting of Mr. Adams's variance to approximately the same footprint. Be that as it may, has Mr. Adams given any consideration to a one (1) car addition whereby he would be perfectly within the existing setback? Responding, Mr. Adams stated that the question was asked at the last meeting, they considered, but it would not work for their circumstances. They have multiple cars that they would like to keep. There have been situations where cars on the street have been broken into and they are looking for the opportunity to cover and secure both vehicles on their property.

Responding to Mr. Keller's question in reference to the plan provided by Mr. Byler whether the space was unfinished bonus, if there was a bonus room to be built on top of the garage, Mr. Adams stated that it was added space that will be unfinished space for storage. On the existing property today there is a half basement. This would allow for additional storage.

Responding to Mr. Keller's question in reference to the plan that it states unfinished bonus, he questioned if it was Mr. Byler's notation, Mr. Byler stated that it does say "unfinished bonus."

Responding to Mr. Keller's question whether it could be converted to living space, Mr. Byler stated that the plan is not to convert it to living space, but use a storage space.

Responding to Mr. Keller's question whether the Duncan's property was living space or a garage, Mrs. Townshend stated that the front is the garage.

Responding to Mr. Keller's question as to what took place when it was built, if they knew with certainty, Mrs. Townshend stated that we do not know anything with certainty, she has not been inside. To the best of their knowledge it is a garage.

Chairman Sheth stated that the Board of Adjustment was going to disregard the Duncan's property information that was submitted as far as making a decision is concerned since the Board of Adjustment already has the information.

Colonel Ericson questioned how the Board of Adjustment cannot consider the information in this case since the testimony has been given and what the Board of Adjustment thought was legally there made a big difference on how they are going to decide this case. When you ask for 11 feet that is a long way into the setback.

Mrs. Townshend stated that the point is Mr. Duncan's property should not be used to influence the Board of Adjustment in either direction. The Board of Adjustment should look specifically at the circumstances surrounding Mr. Adams property. There is public testimony regarding his variance request and what Mr. Adams has expressed to be his Exceptional Practical Difficulty. If you take any testimony that relates to the Duncan's property out of the equation, does this stand on its own to get a variance, if not it is a decision that the Board of Adjustment needs to make.

Chairman Sheth stated that as Mr. Keller had mentioned earlier that the neighborhood character is being questioned.

Mr. Senato's comment if Mr. Duncan had conferred with the *Zoning Codes* it would put his existing building in line with Mr. Adams. He agreed with Colonel Ericson that from an individual standpoint being a member of the Board of Adjustment that he is not influenced by anything or anyone other what they look at and what the zoning is and what they have to decide as a Board of Adjustment member. He could see a future problem and the precedent could be set. It is something to be taken into consideration. He not only has to think of the present, but of the future and how it will affect the Board of Adjustment, as well as future building and zoning.

Colonel Ericson stated that if the Board of Adjustment completely ignored the Duncan's residence and the garage was not there and the applicant came in for asking for 11 feet into the zone, he would say it would change the character of the neighborhood, and whether the Board of Adjustment would be prepared because it would be setting a precedent for everyone.

Colonel Ericson moved that the meeting recess into Executive Session to discuss legal matters with the Attorney, seconded by Mr. Senato and unanimously carried 5-0.

Mr. Senato moved that the Board of Adjustment come out of recess from Executive Session, and resume the regular meeting, seconded by Mr. Hufnal and unanimously carried 5-0.

Mr. Adams requested that the Board of Adjustment move forward and consider the request that has been put forth. As a measure of good faith and as an effort to show his commitment to following through and building this correctly as they have from start to finish, they would volunteer to produce an as-built survey post-construction so that the Board of Adjustment would be assured that they are building as stated and he would be constructed in accordance with the approval. He hoped that the Board of Adjustment would take that into consideration as a sign of good faith that they (including his Architect) are committed to following the procedures that are set forth by the Board of Adjustment and by the City of Dover. Because they are committed to wanting to follow the rules and improve properties in the City where he lives and calls home that will add value, not only as a homeowner, or for his neighbors, but also for the City to have the opportunity to continue to perhaps reassess and gain from the improvements made.

Responding to Colonel Ericson's question for the record whether the applicant was looking for a variance for 10.77 feet encroachment into the front yard for the construction of a two (2) car garage and 38.25% lot coverage, Mr. Adams concurred.

Colonel Ericson moved for approval of variance application V-14-07 Lands of Nicholas Adams located at 547 Pennsylvania Avenue for a 10.77 feet encroachment into the front yard setback for the construction of a two (2) car garage and 38.25% lot coverage based upon the testimony given, documents submitted, and legal advice given during the Executive Session, seconded by Mr. Hufnal and the motion was unanimously carried 4-0 with Mr. Keller abstaining from the vote because of absence during the first hearing of this application.

Mr. Adams stated that he appreciated very much the long responsibilities of the members of the Board of Adjustment. He spent twelve (12) years in State Government prior to his work at the bank and last serving as the Deputy State Treasurer for the State of Delaware and working with numerous volunteers and appointed boards. The service is commendable and he understands the Board of Adjustment responsibilities and the decisions before you today. He wanted the Board of Adjustment to know how much he value and appreciate their thoughtfulness as they move forward in this process and your support of this application.

NEW BUSINESS
Appeal Application

Applicant #V-14-08:
1235 South Bay Road. Mark Lillard, Fain Auto Sales, LLC, has appealed the decision of the City Planner to the Board of Adjustment regarding the denial of a Building Permit (#14-623), and the interpretation of *Zoning Ordinance*, Article 6, Section 3.6 regarding parking drainage and surfacing. Subject property is zoned C-4 (Highway Commercial Zone). The Tax Parcel is ED-05-086.00-01-13.00-000. The owners of record are Adolfo Q. & Honorato M. Bengzon.

Mrs. Melson-Williams, Principal Planner, submitted the following items for the record: staff report with Exhibits 2A and 2B, Application, Letter and Exhibit (Exhibits 1A, 1B, and 1C) submitted by the applicant.

The legal notice was published in the Delaware State News on July 13, 2014, and the public was notified in accordance with the regulations.

Mrs. Melson-Williams stated that 1235 South Bay Road is also referred to as 1235 Bay Road. The report describes the procedures specifically related to Appeals. In this case, it is an Appeal from the determination by the City Planner regarding the use of the proposed gravel area as a parking area on the property. The applicant applied for a Building Permit #14-623 that proposed the installation of a 10x14 foot gravel area to be located directly in front of the building. The Building Permit was actually approved and granted for the installation of the gravel area. However, it was noted in the Permit review comments that the proposed gravel area cannot be used as parking as it is not a hard dust free surface which is required for permanent parking areas. Exhibit 1A is the application to the Board of Adjustment for the Appeal, Exhibit 1B is the letter from the applicant dated June 13, 2014, describing the situation, Exhibit 1C is the special notes and comments from the Building Permit specifically pages 2 and 3 of the permit that outlined the parking requirements for permanent parking spaces and access drives for the *Zoning Ordinance* provisions. The copies of the determination by the City Planner are attached as Exhibits 2A and 2B. Exhibit 2A is the complete application that was filed for the Building Permit and Exhibit 2B is the copy of the Building Permit as reviewed and prepared for issuance. The applicant was made aware of the permit comments, however; the permit has not been formerly issued at this point. Again, this is an Appeal to the Board of Adjustment to determine the interpretation of a permanent parking area, and if gravel qualifies as other hard paved dust free surface for use as a servicing material in parking area. There is some additional background information provided in the report related to C-4 zone. Motor vehicle sales is a permitted use in the C-4 zone. Some information regarding the parking requirements are contained in the Zoning Ordinance including the specific language for Article 6, Section 3.6 on drainage and surfacing which is the subject of the Appeal today. There is additional information provided about the property at 1235 Bay Road about the licensing and permits over recent time, and Code Enforcement cases related to cars parking on the grass.

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

Representative: Mark Lillard, Fain Auto Sales LLC

Mr. Mark Lillard was sworn in by Mr. Rodriguez.

Mr. Lillard stated that his primary issue is the interpretation of the code. When first presented with the code it was stated that it needed to be used for parking. He has done a lot of research with other Municipalities and with the Delaware Code itself for the City of Dover. He could not figure out because most of the time when parking is discussed it is for employees or customer parking. The area for which he applied for a permit was to showcase vehicle inventory. There is nothing in the Delaware Code that states or restricts inventory display to a hard or dust free surface. Also, he could not locate a definition of "permanent parking areas." If needed, he could post some restrictions to section off that area, but realistically it is just a front line display for the dealership. They received some information of changes from September 13, 1999. There are multiple properties across the entire City that have gravel on their lots including car dealerships. They could not find anything in terms of inspections. Upon speaking with Code Enforcement Officer Matt Brown he stated that gravel could be added to existing gravel covered areas as long as the lot has been maintained. Mr. Lillard stated he could not find any information on the procedures that Code Enforcement Officers use as fair indicators to make sure it is being maintained. The property had gravel in the past, but was not maintained. With most other non-conforming conditions, anytime more than a certain percentage of renovation or improvement is made, the site must be brought up to the current code. This also could not be found in writing along with other codes. Mr. Lillard in his appeal noted (including photos and addresses) other properties around the City with existing gravel. He stated that there is just too much vagueness in the code. They have complied with the DMV, which said nothing about the inability to park cars on the gravel. They are very compliant with financial regulatory agencies such as the Division of Labor and Division of Revenue. It is not that they do not want to be compliant; they feel that they are being treated fairly as everyone else, have invested much money in this business, and they are not willing to walk away from it. They have renovated the property, put life back into it, and turned it into a successful business where every other business past the overpass has failed. He knows that the City of Dover is trying to get small businesses to be successful that is why they have the downtown renovation projects. They are trying to do the same thing they are just a half mile outside of where the City of Dover have their program set up. Realistically they do not think that they are hurting anyone for them to be able to showcase their inventory. It does have an actual impact on their sales. They have seen a 40% increase in sales since they have started. It is detrimental to their business if they cannot park cars where it is visible because of the 32,000 cars that pass each day. He is not here to throw anyone under the bus; he just wants to be able to continue operating his business.

Responding to Mr. Senato's question whether the gravel area was going to be used primarily just for automobile show in front of the building, Mr. Lillard stated yes that was the only intended use. They have a large lot on the side that they have resealed where all the customer and employee parking is located. Other vehicle inventory is also located in the resealed area. But, they have nothing in the front to showcase vehicle inventory.

Responding to Mr. Senato's question whether there would be people walking around the cars on the gravel which would present dust and debris, Mr. Lillard stated eventually they would like to

asphalt the area, but it is expensive. They have talked with Pioneer and the plan is within 18 months that area would become asphalt which would give them a better surface. In addition, the gravel will help the drainage for the front area.

Responding to Mr. Senato's question whether the area of a 10x40 is a financial issue, Mr. Lillard stated that for him personally it is a cost issue for him to pave it at this time.

Chairman Sheth read Article 6, Section 3.6 and stated that the Board of Adjustment refers to the code when making a decision. The Code Enforcement Officers try to enforce the codes. If it is contrary to the requirements of the City of Dover and at the same time if you have any questions you may contact Mrs. Townshend.

Colonel Ericson stated that the applicant is questioning what is considered an open parking area and a permanent parking area.

Vice Chairman Ericson replaced Chairman Sheth because he had to leave the meeting for another appointment.

Mrs. Ann Marie Townshend was sworn in by Mr. Rodriquez.

Mrs. Townshend reminded the Board of Adjustment that this is an Appeal and not a variance. When you talk about a variance it is in regards to one property, a decision that the Board of Adjustment makes on an Appeal will apply across the City of Dover on all properties to which this provision would apply unless the ordinance is changed. Colonel Ericson would be correct if you look at:

Article 6 Section 3.6 Drainage and Surfacing

(a) All open permanent parking areas and access drives shall be properly drained and all such areas shall be provided with paved asphalt, concrete or other hard, paved, dust free surfaces.

(b) All permanent parking areas shall be enclosed with upright concrete curbing at least six inches in height. The planning commission may relax this requirement for a portion of a parking area when there is a demonstrated need to convey Storm water to a proposed or approved Storm water management area. Curbing shall not be required for loading areas, handicapped access and for parking spaces accessory to a one family or two-family residence (see also article 6, section 5.3).

The issue at question for the Board of Adjustment is what is considered "permanent parking area." When you look at permanent parking you are looking at is it being improved so that it can routinely have cars parked on it. In her view, what the applicant is proposing is a permanent parking area. Temporary parking would be for instance when NASCAR or Special Events are held and there is parking on the grass. If the intent is to have cars continually parked,it is considered a permanent parking area that must be provided with asphalt, concrete or other hard, paved, dust-free surface. The City of Dover uses asphalt or concrete, but some sidewalks are built with pavers. The pavers can withstand the vehicle weight and it does not create dust or loose stones. There are a number of non-conforming lots and driveways throughout the city. There are others that are likely code violations. Mrs. Townshend stated that gravel lots and drives exist throughout the City, but if the City determines that gravel could be used to meet the requirements for parking, then any neighborhood, commercial parking lot, or other place in the

city providing parking could have a gravel area instead of a paved area. From the City's perspective, they have consistently applied the code when people have submitted permits for gravel driveways. The applicants have been told no, they cannot construct a gravel driveway. In the case of an Appeal to the Board of Adjustment you are interpreting the ordinance and how it will be applied uniformly across the city. Perhaps this could be a variance, but the applicant has not requested a variance. Her concern is the city-wide effect. Additionally, she added that there are cases where gravel has been used in what they do not characterize as a parking area, but for contractor yards where equipment is stored behind a fence. In those cases it has been clearly on a Site Plan approved by the Planning Commission. It has been very clear that it is not a parking area; it is for equipment storage and is screened from public view. In this case we would be saying if gravel is permitted then any parking area anywhere in the city could be gravel.

Responding to Mr. Senato's question whether the 10x40 area would be used to show automobiles that are being sold since he has other vehicles on the property for show and sale, what would be the configuration of the rest of land, paved or gravel, Mrs. Townshend stated that it is paved.

Responding to Mr. Senato's question whether the applicant was asking for the same 10x40 to be gravel for the same usage as the rest of the property, Mrs. Townshend stated yes as she understands it.

Responding to Vice Chairman Ericson's question whether it was currently grass area, Mrs. Townshend stated yes, that was the violation that Mr. Brown issued for parking on the grass. This is an issue that is seen citywide that property owners often get cited for. It is one of those violations that could appear one minute and not the next. This is a recurring issue that the City has with vehicle sale locations.

Mr. Keller commented as he referred to the building permit application that the description of the work to take place is gravel and 10x40 areas, but the applicant did in fact sign the Certification whereby all work will be performed in accordance with the applicable Codes and Ordinances. He would hope as a preliminary that the applicant would have been guided and/or knowledgeable of the allowance and/or restrictions with regards to that as a parking area.

Mr. Lillard stated that they are not using the area as a parking area, but to showcase inventory. You cannot discriminate one industry against another. If he was going to sell fruit or icicles in front of the business it is no different and there is nothing in the Delaware Code regarding inventory. Take out the fact that it is a car, but just inventory. No one will be using it to park as customers or employee. In addition, there is nothing in the code regarding asphalt milling which is something completely different. It was not being used frequently back in 1999 when this ordinance was created. There have been no amendments made to this code in about 20 years. He has researched other municipalities and the City of Dover is the only place in the State that does not allow dealers to do this. Is it because it has not been updated, and it is a one-sentence code. There is too much gray area. He stated that at first meeting he and Mrs. Townshend did not have a pleasurable experience. He did not want to say too much and overstep his boundaries. He was not sure if it was just against him, but the City cannot hide behind the veil of vagueness to selectively enforce codes. The city just admitted that they have a lack of due diligence. The city is not keeping up with the codes around town with other dealers. The fact is if the code was enacted in 1999 then there should be no place in the City after 1999 that should have been allowed to have a gravel lot. If he goes back through the Freedom of Information Act is he going

to find one, all it takes is one property that has been approved for gravel (he can already tell the city that they have and there is). He has found multiple properties around town, even car dealers, that have gravel, along with long-standing places such as Spence's Bazaar, which is completely gravel, where customers park in the dusty area and there is food being sold there. Mr. Lillard said that he knew where the complaint came from, and understood that an inspectors mother lives across the street, and learned in conversation with Mr. Brown that there is no way to enforce every code violation around town just like a cop cannot pull over every person who speeds (these were Mr. Brown's words). He felt that he had been met with adversity when others around town were being treated in a completely different way. They do not feel that they have been treated fairly in this regard. Again, this is not a parking area for customers or employees, it is showcase for inventory. If we remove the fact that they are cars, and substitute that word for inventory, he challenged to be shown one place in the Delaware Code that states inventory cannot be displayed on gravel.

Mrs. Melson-Williams stated that Mr. Lillard has referenced that the Delaware Code (Del. Code) this is not what this body enforces. For clarification, the Board of Adjustment relates to the City of Dover regulations, and the Del. Code references the State of Delaware code(s). The City of Dover is governed by the City Code of Ordinances, specifically the *Zoning Ordinance* in Appendix B.

Mr. Lillard stated that he did check on the City of Dover codes and called Mrs. Townshend several times to reference the City of Dover codes.

Mrs. Townshend stated for clarification, in her previous testimony she demonstrated that the code is not vague. The code requires all permanent parking areas be asphalt, concrete or other hard, paved, dust free surfaces. If we want to argue what is permanent or parking and what is not she would have concerns with that. There have been dealerships across the city where there have been issues with parking on the grass and vehicle display on the grass that the city has consistently enforced the code. They cannot be cited or caught in every instance. There are five Code Enforcement officers. This is a product display where the vehicle is parked. It is not similar to a fruit stand. The other case is the idea of selective enforcement, the city is not selective in their enforcement. To the degree that they can the city has a proactive Code Enforcement program. The five Code Enforcement Officers deal with grass complaints, trash complaints, and complaints such as this and housing inspections of rental properties. Are they going to catch everything, absolutely not. They are out there responding to complaints and looking for violations so that they can keep the appearance of the City up. There are over 3000 Code Enforcement violation cases each year. She would not call that selective; she would say that they are doing the absolute best that they can. She thinks that they are doing a fine job with the staff available. She understands that the applicant is not happy with the application of the code, and that he has been singled out, but the city is routinely writing up car dealerships for parking on the grass.

Responding to Vice Chairman Ericson's question the estimation of how many car dealerships per year are written up, Mrs. Townshend stated that Code Enforcement Officer Mr. Brown could answer that question.

Mr. Matthew Brown was sworn in by Mr. Rodriquez.

Responding to Vice Chairman Ericson's, Mr. Brown stated that with 1/3 of the city that he monitors, he has cited at least seven (7) possibly eight (8) dealerships. He would need to refer to the records since January 1, 2014.

Responding to Vice Chairman Ericson's response from the dealership after their citation; Mr. Brown stated that they follow the same procedure for every violation of a vehicle parking on grass. Violators are given a first notice and then are allowed fourteen (14) days minimum to correct the violation, then a second notice will usually be accompanied with a picture and again they are given fourteen (14) days minimum to correct the violation, then there will be a third notice which includes a citation to the business which is $50, and a fourth notice which includes a citation that is $100. The fifth notice will then be turned over to his supervisor who is Tim Taraila who would meet with the Mrs. Townshend and determine if they need to post the vehicles and have the situation abated. He has not gotten that far with a car dealership, with the exception of one car dealership. Residences and other commercial properties that are not car dealerships are fined all the time as well.

Responding to Vice Chairman Ericson's question whether these violations were for displaying inventory on the grass, Mr. Brown concurred. There is one car dealership in the city that is routinely requesting a Special Event. In their request for Special Event Permit it grants them the permission to park on the grass for a specific period of time.

Responding to Vice Chairman Ericson's question, Mr. Brown stated race weekend or liquidation sales were such types of events. Also, Mrs. Townshend stated that Winner Subaru Volkswagen recently had a Special Event Permit where they had a sale on the grass lot near the mall for a week. It was very clear to them that once the event was over the vehicles would need to be removed from the grass area. That is the issue of permanent parking versus temporary parking.

Responding to Vice Chairman Ericson's question whether in the past two (2) years had anyone been allowed to put in a permanent parking space using crushed stone as opposed to hard surface, Mrs. Townshend stated that she cannot speak prior to 2006, because she started with the city in 2006. In her time with the City, the department has not issued Permits for that. Part of the challenge has been that for a number of years, even during her time with the city, driveways were seen as an improvement not requiring a Permit because it was not a building. Somewhere around 2007 or 2008, this changed and driveways required a Permit because they affect lot coverage. The decision was made that a driveway, patio, and anything that affects the lot coverage needs a Permit so that zoning compliance can be verified. She is certain that there are places in the city that have stone driveways. They were likely installed prior to the time the city was requiring a permit. As Spence's Bazaar was mentioned, Article 7 addresses non-conforming uses to the area requirements, and that any nonconformity for more than a year is allowed to continue unless it is expanded or abandoned. So there are many instances of non-conformity, but the issue is if the city makes an interpretation other than what the code is intended to allow, then we would see begin to see it everywhere.

Responding to Vice Chairman Ericson's question whether some of the gravel lots are Grandfathered, Mrs. Townshend stated that most probably are.

Responding to Vice Chairman Ericson's question whether at one time they were legal, became non-conforming after 1999, was the City applying the law to her knowledge, Mrs. Townshend stated that with the exception of when the city was requiring a permit for a driveway, they did not have a system to verify cases prior to 1999.

Mr. Brown stated that during their inspections if there is an existing driveway and it is being used, but needs to be freshened up and the size does not need to be increased, then they are allowed to add gravel and keep it maintained. All residences or businesses are advised if they are to increase the size of the area at all they need to apply for a permit and go through the Planning Office. He considers a gravel area to be abandoned when it becomes overgrown with grass to the point where the grass has to be maintained cut constantly.

Responding to Mr. Senato's question whether the 10x40 area for the sale and show of automobiles, Mr. Lillard concurred.

Responding to Mr. Senato's question whether the other automobiles on the lot will also be shown for sale, Mr. Lillard concurred.

Responding to Mr. Senato's question whether the other automobiles were on paved property other than the 10x40, Mr. Lillard concurred.

Mr. Lillard again expressed the vagueness. Mr. Brown seems like a great guy, but stated that he gave out six (6) or seven (7) violations. When he was cited for the gravel he went around and looked and he told him about four (4) of the violations. So of those six (6) or seven (7), four (4) of those was brought to his attention by Mr. Lillard. The code should state that if the grass gets to a certain point then it needs to be maintained. It cannot be left as one sentence and leave it up to the interpretation. If the City are relies on citizens to make complaints to help with enforcement, then why can't the city listen to citizens regarding how code interpretation is being enforced? The City cannot enforce first and ask questions later. When he initially called the City and asked them if the code included inventory, customer parking collecting data, the city did not have answers for him. Because they had already written the citation they could not go back and change it; and that was the issue at hand. The city keeps bringing up residential driveways, but we are not talking about a residential property, and he is talking about a C-4 commercial property that is only going to be used for vehicle display. The city can wrap whatever bow around it that they want because it does not have to set a precedent for everyone. Rent-to-Own Auto Sales located at 43 Saulsbury Road, Dover, Delaware 19904 has an all-gravel lot and has been in business less than 18 months. He received the FOIA information at 11:00 A.M. the day prior to the meeting and was not able to do any type of research with the City Clerk's Office regarding the FOIA (Freedom of Information Act). He will guarantee the city that he will find dozens that have had permit approvals for gravel. He has driven around and the gravel looks good. To freshen it up you have people who are absolutely re-doing the entire lot. Ambruso Funeral Home just re-did their entire lot with gravel. This is not a fresh up; it is taking out the existing and putting in all new. He would like to see the permit or how it was enforced.

Vice Chairman Ericson stated that the Board of Adjustment is looking at the fact that a Building Permit was submitted to build a parking lot and the question is did the Administrative Staff of the City follow the Codes and in Article 6 Section 3.6 and are they consistently enforcing it where they could and from their testimony they are to the best of their ability.

Mr. Brown stated that in addition, Mr. Brown stated that "they receive a first notice and they are given fourteen (14) days minimum to correct the violation, then the second notice will go out that is usually accompanied with a picture and again they are given fourteen (14) days minimum to correct the violation, then there will be a third notice which includes a citation to the business which is $50, fourth notice which includes a citation that is $100, the fifth notice will be turned over to his supervisor who is Tim Taraila who would meet with the Mrs. Townshend, Director and determine if they need to post the vehicles and have the situation abated." Mr. Lillard stated that he questioned Mr. Brown on the process.

Mr. Keller commented that he did not think, nor should the Board of Adjustment delve into the sufficiency of enforcement. Violations are often given regarding automobile parking lots for vehicles parked in the public right-of-way which were ordered to be moved, but it was not uncommon to return two (2) days later to have them all back in the right-of-way again. This jeopardized clear zones, causing potential for auto accidents, and risks to public utilities and public safety. In instances of non-conforming use throughout the City or State, there is a physical impossibility to have immediate enforcement. The existence of other non-conforming areas does not give license to the allowance for additional non-conforming uses. Given that experience as well as the testimonies given today that, is Board is concerned with the specific provisions of the *Zoning Ordiance.* He would hope that Mr. Lillard would have looked into the obligations of the permit when the application was signed warranting compliance.

Mr. Lillard was not in agreement with the decision and felt that there should be some amendments to the code at some point.

Vice Chairman stated that Administration made a decision and it is pretty concrete what the statue and code states. If Mr. Lillard feels that there are exceptions then he suggested he talk with his Representative or Councilman. If he has any recommendations to make changes to the code then submit it in writing to the Director.

Mr. Rodriguez stated that Mr. Lillard had a very narrow question as mentioned by Vice Chairman Ericson the City Planner interpreted the code correctly on permanency and on the surfaces of the gravel whether it qualified are the only two (2) issues. Whether the Planner interpreted the code on those two (2) issues based upon this application correctly.

Vice Chairman Ericson opened a public hearing and after seeing no one wishing to speak closed the public hearing.

Vice Chairman Ericson questioned if there was any additional correspondence for the record. There was none other than the ones previously mentioned.

Mr. Senato moved that Appeal Application V-14-08 interpretation of Article 6 Section 3.6 regarding permanent parking and hard, paved, dust-free surfaces should be affirmed as a correct interpretation of the Code by the Administration as it applies to the applicant based on the testimony heard today. The motion was seconded by Mr. Keller and unanimously carried 4-0. Mr. Sheth excused himself the meeting at 10:45 a.m.

Mr. Senato moved to adjourn the meeting, seconded by Mr. Keller and unanimously carried 4-0. Mr. Sheth excused himself from the meeting at 10:45a.m.

Meeting adjourned at 11:18 A.M.

Sincerely,

Maretta Savage-Purnell
Secretary

City of Dover

Board of Adjustment

August 20, 2014

V-14-09

Location:	10 Maggies Way
Applicant/Owner:	Chung Sing, LLC To be conveyed to: Ferguson Enterprises, Inc.
Tax Parcel:	ED-05-078.00-01-10.01-000
Application Date:	July 17, 2014
Present Zoning:	C-3 (Service Commercial Zone) AEOZ (Airport Environs Overlay Zone) Noise Zone B Accident Potential Zone II (APZ-II)
Present Use:	Billiards Hall
Proposed Use:	Wholesale Plumbing Supply Sales
Reviewed By:	Bill Cook, Planner I
Variance Type:	Area Variance
Variance Requested:	A reduction of the required parking from 90 spaces to 14 spaces for the C-3 zoning district.

Project Description

The applicant is proposing to use the property as a wholesale plumbing supply sales and distribution facility. The property was most recently utilized as a billiards hall and has an active Business License for such use.

The 1.2908 +/- acre property is located at 10 Maggies Way near the intersection of South Little Creek Road and Horsepond Road. The existing structure is approximately 9,978 S.F. with site improvements including a paved parking lot with 56 marked spaces. The Planning Commission approved a Site Development Plan (S-97-22) at its meeting of December 15, 1997.

In addition to the interior modifications to the existing structure to include a drive-in door to the facility, the applicant proposes enclosing a portion of the existing parking lot with a fence for use as outdoor storage for plumbing supply materials. The proposed outdoor storage area is 16,817 S.F.

The applicant is requesting an area variance from the requirements of *Zoning Ordinance* Article 4 §4.15 for parking.

Adjacent Land Uses

The property is located on the south side of Maggies Way. All other properties on Maggies Way are also zoned C-3 (Service Commercial Zone). The property abutting the subject site to the south is a landlocked portion of Kent County with similar commercial uses, and properties farther south on Horsepond Road in the City limits are zoned C-3 and IO (Institutional and Office Zone). The properties on the west side of Horsepond Road are zoned IPM (Industrial Park Manufacturing Zone).

The areas surrounding the subject property are primarily non-residential. Due to the proximity of Dover Air Force Base, the subject property is part of the Airport Environs Overlay Zone (AEOZ). The AEOZ identifies areas impacted by high levels of aircraft noise and the potential for aircraft accidents. The subject property is located in Noise Zone B and Accident Potential Zone II (APZ-II).

Code Citations

The proposed use is permitted in the C-3 (Service Commercial Zone) zone per Article 3 §15.1.f of the *Zoning Ordinance* which allows "wholesale, storage, and warehousing establishments."

The proposed use is among the list of compatible land uses ("wholesale trade") specified for the AEOZ in the Land Use Compatibility table found in *Zoning Ordinance* Article 3 §22.6.

Zoning Ordinance Article 3 §15.3 regarding "enclosed buildings" in the C-3 zoning district states that:

> *Enclosed buildings:* All permitted uses and all storage accessory thereto, other than off-street parking, shall be carried on in buildings fully enclosed on all sides, except for outdoor eating areas associated with restaurants and outdoor sales areas approved by the city planner.

In the case of V-14-09, the City Planner has indicated approval of the proposed outdoor sales and storage area as being compatible with the site and usage.

Zoning Ordinance Article 4 §4.15 for parking in the C-3 zoning district requires the greater of one (1) parking space per 300 S.F. of floor area or one (1) parking space per employee.

Article 12 of *Zoning Ordinance* provides the following definition of Floor Area:

Floor area: The sum of the gross horizontal areas of the several floors of the building or buildings on a lot, measured from the exterior faces of exterior walls, or from the center line of party walls separating two buildings. For purposes of calculating minimum parking and loading space requirements and calculation of floor area ratio, the "floor area" tabulation shall exclude cellar and basement areas used only for storage or for maintenance and operation of the building; shall exclude exterior stair towers; and shall exclude enclosed or partially enclosed garage parking and loading space areas, but shall include all outdoor storage and sales areas in use for more than 21 days in a calendar year.

Table 1 shows a summary of the existing, required, and requested parking provisions for the site under the existing and proposed development scenarios for the site.

Table 1
Off-Street Parking Calculations
10 Maggies Way (V-14-09)

	Floor Area	Parking Spaces
Current Conditions		
Existing Structure	9,978	
Existing Parking		56
Required Parking		34
Proposed Conditions		
Existing Structure + Outdoor Storage Area	26,795	
Required Parking		90
Requested Parking		14

Exceptional Practical Difficulties Tests

Zoning Ordinance Article 9 §2 dictates the specific powers and duties of the Board of Adjustment with regard to granting variances. Specifically the Board must determine:

2.1 Variance – The board shall have the authority to authorize variances from provisions of the Zoning Ordinance that are not contrary to public interest where the board determines that a literal interpretation of the Zoning Ordinance would result in undue hardship or exceptional practical difficulties to the applicant. In granting variances, the board shall determine that the spirit of the Zoning Ordinance is observed and substantial justice is done.

2.11 Area Variance. A variance shall be considered an area variance if it relates to bulk standards, signage regulations, and other provisions of the Zoning Ordinance that address lot layout, buffers, and dimensions. In considering a request for an area variance, the board shall evaluate the following criteria and document them in their findings of fact:

(a) the nature of the zone in which the property lies;
(b) the character of the immediate vicinity and the contained uses therein;
(c) whether, if the restriction upon the applicant's property were removed, such removal would seriously affect neighboring properties and uses; and
(d) whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the Zoning Ordinance.

Review of Application
As part of the application, the applicant was asked to summarize how the requested variance relates to the criteria. The applicant's response is provided below along with a staff assessment of the application in accordance with the required criteria.

1. The nature of the zone in which the property lies.

   Applicant Responses:
   "The subject property is located within a business park, zoned for C-3 Commercial use."

   Staff Response:
   The requested variance is consistent with the nature of the zone in which the property lies. The property is zoned C-3 (Service Commercial Zone), which is a commercial zone characterized by a wide variety of commercial, wholesale, storage, and service uses generally serving business customers rather than the general public. The proposed use is permitted on the site, and the outdoor storage area is in character with that use and permitted in the zone. Additionally, the use befits the intent of the Airport Environs Overlay Zone (AEOZ) which is appropriate to uses that typically have low customer traffic and/or low levels of on-site employment.

2. The character of the immediate vicinity and the contained uses therein.

   Applicant Responses:
   "Moreover, the subject property is surrounded by other commercial uses, including warehouses and other businesses which are compatible with the applicant's proposed use. And finally, there are no residential dwellings anywhere near the subject property."

   Staff Response:
   The requested variance does not change the character of the immediate vicinity at the present time. Other surrounding properties are of a similar nature characterized by simple commercial structures between approximately 7,000 and 19,000 S.F. in size. The subject property in its current arrangement is over-parked, and appears to have more parking per S.F. of building area than the surrounding properties on Maggies Way.

3. Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect neighboring properties and uses.

   Applicant Responses:
   "Granting the area variance sought by the applicant here would not seriously affect neighboring properties and uses in any adverse manner."

   "The business operation is a relatively low-intensity activity, and typically involves no more than 3-5 employees and 5-6 wholesale customers at any given time. Accordingly, vehicle traffic is very low and, consequently, the amount of parking required to support the business operation is minimal."

Staff Response:
The majority of properties on Maggies Way have less parking provided than the one (1) space per 300 S.F. of floor area required in the C-3 zone. The parking provided at surrounding properties appears more than adequate for their uses. The applicant has indicated that the enclosed outdoor sales and storage area will continue to be used for employee parking, thus further reducing demand on the fourteen (14) spaces that they propose providing on the site.

4. Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in his efforts to make normal improvements in the character of that use of the property that is a permitted use under the provisions of the Zoning Ordinance.

Applicant Responses:
"Unfortunately, the combination of Article 4, Section 4.15 of the City of Dover Zoning Ordinance (the "Code") and the definition of "floor area" under Article 12 of the Code creates a rather strange anomaly which includes the square footage of any outdoor storage space in the calculation of "floor area" for purposes of determining the total number of required parking spaces for any business in the C-3 Commercial Zoning District. The Code provisions appear counter-intuitive, at least in this instance, as the Code would require the business to add 1 additional parking space for each 300 square feet of outdoor storage space utilized, something which is impossible to accomplish when the outdoor storage space proposed by the applicant would be competing for the same square footage as the existing parking lot. Stated otherwise, it is impossible to add more parking spaces at this site while simultaneously adding outdoor storage space in place of existing parking spaces. That is, given the current layout of the subject property, the applicant cannot possibly satisfy the Code's heightened parking requirement and still make a productive use of the property - there is simply not enough room on the site to accommodate both the outdoor storage capability required for the business to succeed and the additional parking contemplated by Section 4.15 of the Code. This is the epitome of an "exceptional practical difficulty" which justifies the granting of an area variance.

"… for the reasons detailed above, denying the area variance sought by the applicant here would create exceptional practical difficulties for the applicant in its efforts to make normal improvements in the character of a use of the property (warehouse storage) that is permitted under the City Code."

Staff Response:
Based on the information presented and the application of the parking regulations of the *Zoning Ordinance*, the inclusion of the outdoor storage area would create a total floor area of 29,675 S.F. thus requiring a total of ninety (90) required parking spaces. Providing this number of parking spaces on the property would not be possible due to the size of the lot, and would impact the viability of the property for the intended use.

Variance Recommendations:

Staff recommends approval of the variance for the reduction of parking to fourteen (14) spaces for reasons as follows:

- The proposed variance would be in keeping with the character of the zone and the surrounding areas.
- Surrounding properties of similar type and uses appear to have greater demand for building and storage square footage than for employee or customer parking since parking areas appear not close to being fully utilized (as observed from site visits and aerial photography).
- The parking proposed by the applicant exceeds the expected employee parking required. Furthermore, the applicant has indicated that employee parking will take place inside the fenced outdoor storage/sales area leaving the parking provided available for customers.
- The applicant has indicated that fourteen (14) spaces are more than double the maximum number of customers expected at the facility at any given time.
- The intended use would also be permitted in the IPM (Industrial Park Manufacturing Zone), which has a parking ratio of one (1) space per 800 S.F. of floor area. The wholesale use requires less parking than other commercial uses, from a practical standpoint.

EXHIBIT A

Application for Variance

Ferguson Enterprises, Inc.

Ferguson Enterprises, Inc. is a wholesale distributor of plumbing parts and supplies, seeking to locate a new wholesale storage and distribution center in a business park (zoned C-3 Commercial) located on Maggies Way (off of Horsepond Road) in Dover, Delaware (east of SR 1 and just south of South Little Creek Road). The business operation is a relatively low-intensity activity, and typically involves no more than 3-5 employees and 5-6 wholesale customers at any given time. Accordingly, vehicle traffic is very low and, consequently, the amount of parking required to support the business operation is minimal. Meanwhile, the need for adequate wholesale storage space is significant. Hence, the ratio of required parking spaces to required square footage of wholesale storage space is extremely low for this business operation. Furthermore, because a number of the plumbing parts and supplies carried by the business cannot be easily or efficiently stored and/or moved indoors, it is important that the business be able to store a significant amount of its inventory outdoors (in addition to inventory stored indoors).

Unfortunately, the combination of Article 4, Section 4.15 of the City of Dover Zoning Ordinance (the "Code") and the definition of "floor area" under Article 12 of the Code creates a rather strange anomaly which includes the square footage of any outdoor storage space in the calculation of "floor area" for purposes of determining the total number of required parking spaces for any business in the C-3 Commercial Zoning District. The Code provisions appear counter-intuitive, at least in this instance, as the Code would require the business to add 1 additional parking space for each 300 square feet of outdoor storage space utilized, something which is impossible to accomplish when the outdoor storage space proposed by the applicant would be competing for the same square footage as the existing parking lot. Stated otherwise, it is impossible to add more parking spaces at this site while simultaneously adding outdoor storage space in place of existing parking spaces. That is, given the current layout of the subject property, the applicant cannot possibly satisfy the Code's heightened parking requirement and still make a productive use of the property – there is simply not enough room on the site to accommodate both the outdoor storage capability required for the business to succeed and the additional parking contemplated by Section 4.15 of the Code. This is the epitome of an "exceptional practical difficulty" which justifies the granting of an area variance.

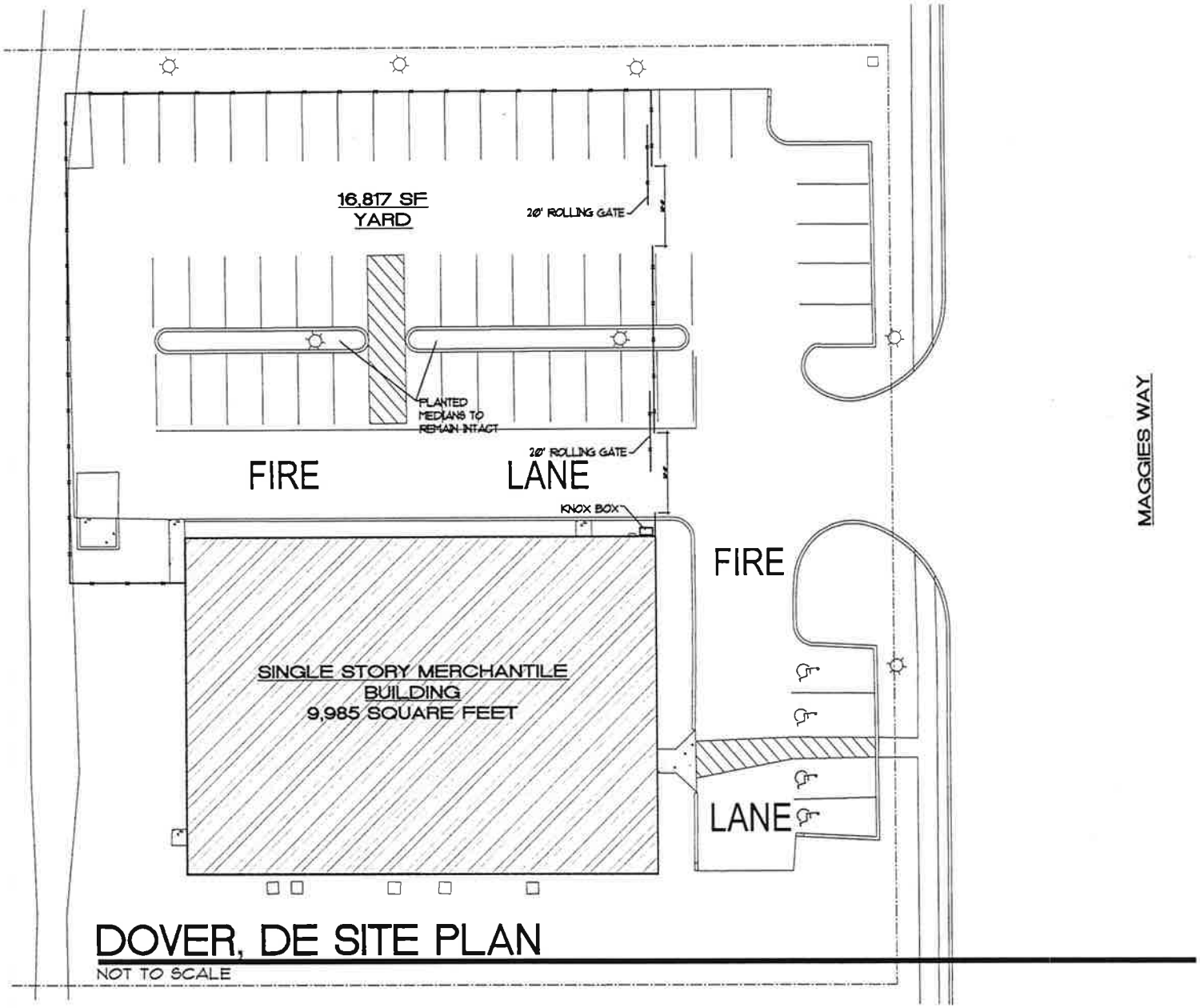
Granting an area variance from Section 4.15 of the City Code in the instant case is also warranted for each of the following additional reasons:

1. The nature of the zone in which the subject property lies, the character of the immediate vicinity, and the uses being made of surrounding properties all support the granting of the area variance sought by the applicant here. The subject property is located within a business park, zoned for C-3 Commercial use. Moreover, the subject property is surrounded by other commercial uses, including warehouses and other businesses which are compatible with the applicant's proposed use. And finally, there are no residential dwellings anywhere near the subject property. Thus, the applicant's proposed use and the variance sought to accommodate

same are both consistent and compatible with the nature of the zone in which the property lies and the character of the immediate vicinity.

2. Granting the area variance sought by the applicant here would not seriously affect neighboring properties and uses in any adverse manner. Conversely, for the reasons detailed above, denying the area variance sought by the applicant here would create exceptional practical difficulties for the applicant in its efforts to make normal improvements in the character of a use of the property (warehouse storage) that is permitted under the City Code.

For all of the foregoing reasons, Ferguson Enterprises, Inc. respectfully prays that the City of Dover Board of Adjustment grant an area variance for the subject property from the parking requirements set forth in Section 4.15 of the City Code, thereby allowing the applicant to add 16,817 square feet of outdoor storage space at the subject property (as reflected on the applicant's site plan drawing enclosed herewith) while providing a total of fourteen (14) parking spaces (which is more than adequate for the applicant's business, as the applicant's employees will be parking inside of the outdoor storage space) in lieu of the number of parking spaces otherwise required by the Code.



DOVER, DE SITE PLAN

NOT TO SCALE