

CITY OF DOVER
BOARD OF ADJUSTMENT
August 15, 2007

The Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, August 15, 2007 at 10:00 PM with Chairman Sheth presiding. Members present were Mr. Sheth, Mr. Senato, Colonel Ericson and Mr. Hufnal. Dr. Goate⁷ was absent.

Staff members present were Mrs. Townshend, Ms. Cornwell, Mr. Albert and Mr. Pepper. Also present were Mr. Paul Sunshine, Ms. Christine Moyle, Mr. Constantine Malmberg, Mr. Todd Hoernemann, and Mr. Donald Grower.

APPROVAL OF AGENDA

Colonel Ericson moved to approve the agenda as submitted, seconded by Mr. Senato and the motion was unanimously carried.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF JULY 18, 2007

Mr. Hufnal stated that on Page 14 midway down the page it said that he had made a motion in regards to the Monroe Terrace lands and was seconded by him, he believes it was seconded by Mr. Senato.

Mr. Hufnal further stated that on Page 16 halfway down the page, the paragraph that starts out with "Mrs. Townshend questioned" where it states that "the sign on Buckson Drive was offensive", he believes that he stated that "the sign was of no use". Also, the statement following "Why would you have to have a sign of that volume", change the word of volume to size.

Mr. Senato further stated on Page 7, next to last paragraph, Mr. Senato stated that his name was incorrectly spelled with an "r" on the end of it.

Mr. Hufnal moved to approve the regular Board of Adjustment meeting minutes of July 18, 2007, as amended, seconded by Mr. Senato and the motion was unanimously carried.

OPENING REMARKS CONCERNING DEVELOPMENT APPLICATIONS

Mrs. Townshend presented to the audience the policies and procedures that would be followed during these hearings.

NEW BUSINESS

Applicant #V-07-25:

44 Virginia Ave., Lands of Christine Moyle: Christine Moyle has applied to the City of Dover Board of Adjustment requesting a variance from the requirements of Article 4 §4.1 of the *Zoning Ordinance* pertaining to the rear yard set-back.

Subject property is zoned R-7 (One Family Residence Zone) and the Tax Parcel ID # is ED05-067.15-03-43.00. The owner of record is the Christine Moyle.

Representatives: Mr. Paul Sunshine, Representing Ms. Moyle.

Mrs. Townshend stated that the legal notice was published in the Delaware State News on August 5, 2007 and the public was notified in accordance with the regulations.

Mr. Sheth questioned if there were any members of the Board with a conflict of interest and there was none.

Mr. Sunshine stated that they make their application today on these grounds; Ms. Moyle did not learn of this infringement in the setback until the property was actually offered for sale, put under contract, and an inspection done on the property. Work was done pursuant to a permit that was obtained in 2005. After preliminary inspections were performed, City Inspector, Mr. Grant Prichard, inspected the preliminary plans for the improvement and inspected the property. He never noted that there was any problem with the setback. The improvements were put into place at that time.

Mr. Sunshine further stated that the potential purchasers of the property obviously do not want to purchase a property with the notion that they may be in the position to have to remove their back porch. There are some deficiencies in the improvements that were done versus the permit which was applied for that have all been corrected. The inspections have been completed at this stage and the permit has been closed out.

Mr. Sunshine further stated to deny the variance at this stage would require Ms. Moyle, a City of Dover resident, to remove the improvement at a considerable expense not only in the terms of having to pay someone for the demolition but also a reduction in her property value which seems to be an unfair price to pay at this stage. The setback is relatively minor which is less than four (4) feet on a thirty (30) foot setback and is not visible from the street. It does not change the character or nature of the neighborhood whatsoever and is actually in line with the character of the neighborhood. She is promoting neighborly friendliness by having a porch where people can congregate and meet with their neighbors.

Mr. Sunshine further stated that public notice has been sent out pursuant to the code and to his knowledge there have been no objections from any of the neighbors. The preliminary inspection of the application was conducted by Mr. Albert and he has recommended that this request be approved.

Mr. Sheth opened a public hearing and after seeing no one wishing to speak closed the public hearing.

Mr. Sheth questioned if there was any correspondence received regarding this application and there was none.

Mr. Hufnal moved to approve Application #V-07-25, 44 Virginia Ave., Lands of Christine Moyle based on the fact that the final inspection never caught the problem and an original permit was granted. To permit the structure to remain in its current form with it being in keeping with the character of the neighborhood and in conjunction of the recommendation of approval from Staff, seconded by Mr. Senato and the motion was unanimously carried.

Applicant #V-07-26:

302 Mockingbird Ave., Lands of Joseph & Dorothy Quinn: Joseph & Dorothy Quinn have applied to the City of Dover Board of Adjustment requesting variances from the requirements of Article 4 §4.1 of the *Zoning Ordinance* pertaining to the front yard set-back and Article 5 §1.12 concerning the location of accessory structures.

Subject property is zoned R-8 (One Family Residence Zone) and the Tax Parcel ID # is ED05-085.12-02-87.00. The owner of record is Joseph & Dorothy Quinn.

Representatives: None

Mrs. Townshend stated that legal notice was published in the Delaware State News on August 5, 2007 and the public was notified in accordance with regulations.

Mr. Sheth questioned if any member of the Board had a conflict of interest and there was none.

Mr. Hufnal moved to table Application #V-07-26, 302 Mockingbird Ave., Lands of Joseph & Dorothy Quinn due to the lack of representation, seconded by Colonel Ericson and the motion was unanimously carried.

Mr. Sheth questioned whether the applicant would have to reapply? Responding to Mr. Sheth, Mrs. Townshend stated that in the past, the Board has allowed for a one time deferral and then after that the applicant would have to reapply.

Applicant #V-07-27

College Road, College Road Management, Inc.: College Road Management, Inc. has applied to the City of Dover Board of Adjustment requesting a variance from the requirements of Article 5 §11.13 of the *Zoning Ordinance* pertaining to the filling of wetlands.

Subject properties are zoned M (Manufacturing Zone) and the Tax Parcel ID #s are ED-05-067.00-02-53.00-000, ED-05-067.00-02-54.00-000, ED-05-067.00-02-55.00-000, and ED-05-067.00-02-56.00-000. The owner of record is the College Road Management, Inc.

Representatives: Mr. Constantine Malmberg, Principle of the applicant; Mr. Todd Hoernemann, JCM Environmental; and Mr. Donald Grower, McCrone Engineering.

Mrs. Townshend stated that legal notice was published in the Delaware State News on August 5, 2007 and the public was notified in accordance with regulations.

Mr. Sheth questioned if there were any members of the Board with a conflict of interest and there was none.

Mr. Malmberg stated that this property located on College Road is adjacent to the Delaware State University and consists of approximately thirty (30) acres of which thirteen and a half (13 ½) acres of those are wetlands and not subject to the application today.

Mr. Malmberg further stated that the physical characteristics of this property is that there is a very clear divide if you look at the topographic lines between the wetland area and the rest of the property which is steep and drops about twelve (12) feet. The area that is being discussed today was a landfill years ago and it came under the jurisdiction of DNREC under a clean-up order. What happened is that the owner at that time had to excavate all of the landfill material as part of the clean-up order and remove it. They were then to go back in and fill the area back in with soils and they did that. The area over the years has settled slightly so that there is a pocket of water where the area we are discussing today is located. This pocket was man made by the settling of the area that was backfilled after the excavation of the landfill materials, and the filling of soils. This is the area that we are seeking to fill and is not associated with any other application.

Mr. Malmberg further stated that the Delaware State University is interested in buying this property and our engineer had to certify what portion of the property is designated as wetlands and what portion of the area were not wetlands. The City Code is not particularly clear about what are wetlands. Out of abundance of caution, McCrone, Inc. stated that they would write the City and find out what the City's position would be on this area that is non-jurisdiction wetlands for the Army Corp of Engineering purposes. It was quite a while before we heard back from the City of Dover so in the mean time, Mr. Malmberg called Mr. Mike Petit de Mange, former Director of Planning to see what the City's policy had been with regard to the general definition of wetlands under the City Code. It was his policy at the time, that if it was non-jurisdictional wetlands of the Army Corp of Engineers, that the City treated it as non-wetlands in the City Code.

Mr. Malmberg further stated that he agreed with Mrs. Townshend that it is not clear in the City Code. Mr. Petit de Mange sent him a copy of Article 5, Section 16 which defines wetlands and a more recent section of the Code then the general definition found earlier in the Code that states "those areas of lands which fall within the definition of wetlands currently used by the Army Corp of Engineers and those adopted by the State of Delaware in accordance with the US Army Corp of Engineers." This defines wetlands as those areas that the Army Corp of Engineers considers as wetlands. In the view of the Army Corp of Engineers these are non-jurisdictional wetlands and they can be filled and eradicated as they then become non-wetlands. It was suggested that they make an application not over the language of the Code and what the proper interpretation was; however, a simple variance for this application given the history of the site and the fact that this area was developed as a result of a man made extraction of land fill material that ended up with a small pocket that has developed over the years.

Mrs. Townshend stated that she would like to respond to some comments that were made. The issue with regards to the definition of wetlands in Article 5, Section 16 is specifically related to the woodland preservation section and the definitions within that section relates specifically to woodland preservation. She does agree that Staff needs to take a look at the code and make the definitions within the Code consistent; however, the structure of that indicates that for things outside of Article 5, Section 16, the Article 12 definition shall apply.

Mrs. Townshend further stated that the other issue is that the non-jurisdictional wetlands under the Army Corp of Engineers still meets the wetlands definition so even if we applied the Article 5, Section 16 definition it is still considered a wetland. What happened is that several years

back, the Army Corp of Engineers was regulating isolated wetlands and the Supreme Court stepped in and stated that under the authority of the Clean Water Act, which is how they were regulating them that they did not have the authority to regulate the isolated wetlands? What she had suggested was that a variance be brought forward and rather than argue the definition of wetlands, address how it should be applied. That this property has history as a landfill, Mr. Malmberg's argument that he may want to make for the variance should relate to the quality of the wetlands and not whether it is regulated by the Army Corp of Engineers.

Mr. Malmberg stated that it is his understanding that Staff is not recommending approval of the variance request and that there is no real hardship. If you look at the site and the setbacks that are imposed as the result of what happened in that we are not allowed to fill it, it does become a hardship.

Mr. Hoernemann stated that the smaller portion of the land .06 acres was created by the movement of earth and has some wetland species in it. The Code states that anything under a quarter of an acre is not regulated and he feels that this area is fillable. The larger area of the property was created from the entire disturbance. It contains very common wetland species, Red Maples, Sweetgum, and Wool Grass which are all very common wetland species and are very different from the land along the river where there are very unique species. This area has no value for wetlands because it was created by the movement of dirt and is included in the Brownfield area.

Mr. Malmberg stated that they could fill a quarter of an acre of the 1.05 acres so we are asking for a variance for less than $\frac{3}{4}$ of an acre.

Mr. Grower stated that the area involved is unique in that due to the nature of the position of the wetlands and the location of the building restriction lines, the property is extremely limited under this current situation. According to what the City of Dover follows for Code there is a one hundred (100) foot buffer from a wetland. We do have an area to the north that is under the jurisdiction of DNREC. Because the property was rezoned to the manufacturing zone when it was annexed into the City, there is a fifty (50) foot building restriction line that has to do with the fact that there is a different zoning over the adjoining pieces of property. The area under its present circumstance is rather limited in what can be developed. Any new development would require stormwater management so it will still be a restricted site.

Colonel Ericson stated that it is his understanding that if this is under $\frac{3}{4}$ of an acre that they could fill it without permission and it would no longer be considered wetlands is this true? Responding to Colonel Ericson, Mrs. Townshend stated that under a $\frac{1}{4}$ of an acre could be filled.

Mr. Grower stated that filling in this area would assist in being able to develop the property. With the lay of the land and then contours of the land, it all flows towards the St. Jones River and the stormwater ponds would also flow towards that direction.

Mr. Grower stated that you cannot place stormwater within a buffer or wetlands. Responding to Mr. Grower, Mrs. Townshend stated that by City Code, if it is considered a wetland and they received Kent Conservation District approval, they would not be able to place the stormwater in a buffer or wetlands. Even if they were going to use this for stormwater management, a variance

would be necessary.

Colonel Ericson further questioned that if this was disapproved, how would you use the land and what hardships would it cause? Responding to Colonel Ericson, Mr. Grower stated that with the existing stormwater regulations in place, you cannot influence any runoff onto your neighbor's property and even if there was a stream, your point of analysis is for stormwater. You have to restrict any post development runoff to the pre-development state and this typically requires a pond or a structure of some sort to hold the water back for purposes not only of quantity, but also quality of the run off. Without a lot of analysis, there is going to have to be some sort of a structure to place a stormwater pond. City requirements state that any building has to be a minimum of thirty (30) feet apart from each other in a manufactured zoned especially when it comes to a storage situation. As you begin to add all of these elements, we are restricted as to what we could do with the property. We have less than three (3) acres that would be developed out of a total of thirty (30) acres.

Mr. Malmberg stated that the small pocket of wetland because of the area that it is in, which is in the center of the main developable site of this property, decimates this property for development. To save three quarters of an acre of low value, man created wetlands from an old trash dump, you would wipe out about ten (10) acres of developable property. This is why this is the ultimate test of a hardship and why this property meets it.

Mr. Malmberg further stated that there are several collateral issues. If you are concerned about infiltration of water and water recharge, when this site gets developed, you cannot increase surface runoff which means that the pooling of water on this site will have to be accommodated in a retention pond somewhere so that these waters will still percolate into the ground and still function as a recharge so that we do not lose any recharge area. There is very little negative impact on the environment from filling a landfill that was ordered to be filled by the government some years ago which was not done very well and the impact from development of the manufacturing site that was recently zoned by the City for manufacturing in compliance with the Comprehensive Plan is significant.

Mr. Hufnal stated that when the highway department runs into a situation where they have wetlands and they fill it in for the highway, they have to re-create that somewhere else. You are saying that if this were allowed to be filled in and developed, than a pond would probably be required to go in here that would capture some of the wetlands that you are currently filling in. Responding to Mr. Hufnal, Mr. Grower stated that this would be a possibility as there is going to have to be a stormwater pond somewhere on this property to catch the water. This would not be the same thing as a swap of wetland where you purchase a piece of land and recreate the wetland somewhere else. This wetland would disappear; however, you have an area in the City of thirty (30) acres that when you exclude the area that cannot be developed due to City Code requirements, you only have three (3) acres that would be buildable.

Mr. Sheth questioned if there was any correspondence received regarding this application and there was none.

Mr. Sheth opened a public hearing and after seeing no one wishing to speak closed the public hearing.

Mr. Pepper stated that this is wetlands, and that is not a dispute. The applicant is not asking for an interpretation of wetlands. This is a straight variance case to determine if they should be permitted to fill the three quarters of an acre that they cannot fill on their own right. The applicant has given you the history and basically, if it had been done right in the 70's, they would not be here because it would not be wetlands.

Mr. Hufnal moved to approve Applicant #V-07-27 College Road, College Road Management, Inc., to allow the applicant to complete what would have originally been permitted to be completed had it been done correctly in the early 1970's which is to fill in this area, seconded by Colonel Ericson and the motion was unanimously carried.

Mr. Senato moved to adjourn the Board of Adjustment meeting, seconded by Mr. Hufnal and the motion was unanimously carried.

Meeting adjourned at 10:57 PM.

Sincerely,

Diane Metsch
Secretary