

CITY OF DOVER
BOARD OF ADJUSTMENT
December 19, 2007

The Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, December 19, 2007 at 10:00 AM with Chairman Sheth presiding. Members present were Mr. Sheth, Mr. Senato, Dr. Goate, Colonel Ericson and Mr. Hufnal.

Staff members present were Mrs. Townshend, Ms. Cornwell, Mr. Albert and Mr. Pepper. Also present were Mr. John Kelly, Mr. Robert Nash, Mr. Doug Liberman, Mr. Conny Malmberg, and Mr. Phil McGinnis.

Dr. Goate stated that he would recommend hearing New Business; Applicant #V-07-38 first and then Old Business, Applicant #V-07-36 last.

APPROVAL OF AGENDA

Mr. Dr. Goate moved to approve the agenda as amended, seconded by Mr. Senato and the motion was unanimously carried.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF NOVEMBER 28, 2007

Mr. Senato moved to approve the regular Board of Adjustment meeting minutes of November 28, 2007, as submitted, seconded by Mr. Sheth 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-07-38:

406 & 410 S. Governors Ave., Lands of John & Laura Kelly: John & Laura Kelly have applied to the City of Dover Board of Adjustment requesting a variance from the requirements of Article 4 §4.14 of the *Zoning Ordinance* pertaining to the front-yard setback.

Subject property is zoned C-2A (Limited Central Commercial Zone) and the Tax Parcel ID #s ED05-077.09-03-28.00-000, ED05-077.09-03-29.00-000, and ED05-077.09-03-30.00-000. The owners of record are John & Laura Kelly.

Representatives: Mr. John Kelly, Property Owner; Mr. Robert Nash, Charles Murphey Associates.

Mrs. Townshend stated that legal notice was published in the Delaware State News on December 9, 2007 and the public was notified in accordance with the regulations.

Mr. Sheth questioned if there were any members that had a conflict of interest and there was none.

Mr. Kelly stated that what they are asking for is a variance from the front yard setback. The building they are proposing would be directly along the front of Governors Avenue and with the placement of the building, we would utilize the full property. Mr. Kelly handed out a drawing of the proposed building.

Colonel Ericson asked Mr. Kelly to explain his variance and why they wanted to do it? Responding to Colonel Ericson, Mr. Kelly stated that because the property is on a corner, we have two front yard setbacks. We would like to set the building right on the property line of Governors Avenue as well as Bank Lane so in order for us to do that, we need a variance on the front setback.

Colonel Ericson further questioned if there are properties in this area with similar setbacks? Responding to Colonel Ericson, Mr. Kelly stated that yes there are, just south of the site is a property owned by Michael Harrington. North of the site there are several properties one of them is the Becker Morgan Group, Inc. building. To the east, most of the buildings on the Green are that close as well as a building owned by Joe McDaniel which is currently an attorney's office located on Bank Lane.

Dr. Goate' questioned the applicant that if they felt that if they did not receive approval for this request would it be detrimental to your plans? Responding to Dr. Goate', Mr. Kelly stated that yes, absolutely because to be able to fully utilize the property, we have to meet the proposed setbacks. We would not be able to provide parking and the economic feasibility of the project would not be feasible.

Ms. Cornwell stated that in that Zoning District the front yard setback is twenty-five (25) feet. Based on the size of the property, you have a very small building and it would be pushed much farther back because they would have to meet twenty-five (25) feet on both Governors Avenue and Bank Lane. Both properties to the northeast and across the street are all in the Historic District which encourages buildings to be closer to the right-of-way. The building that is being proposed is in keeping with the Historic District even though the applicant is not required to do that since the proposed building is not in the Historic District. The applicant is proposing an application that is in keeping with the character that already exists in the surrounding Historic District.

Mr. Nash stated that his company is the one that completed the land survey of this property. Currently, there are two buildings on the property. On Governors Avenue, the buildings that are existing protrude a little more than the proposed building. In order to facilitate parking and movement within the lot, we feel that this variance would be most helpful if it is granted.

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

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

Mr. Senato moved to approve Application #V-07-38, 406 & 410 S. Governors Avenue, Lands of John & Laura Kelly as presented, seconded by Colonel Ericson and the motion was unanimously carried.

OLD BUSINESS

Applicant #V-07-36:

Forrest Avenue, Lands of DoveView LLC: DoveView LLC has applied to the City of Dover Board of Adjustment requesting a variances from the requirements of Article 5 §10.173 of the *Zoning Ordinance* pertaining to the formula for determining Cash-In-Lieu of recreation area construction and Article 5 §10.175 to allow for the phasing of the Cash-In-Lieu payments.

Subject property is zoned IO (Institutional/Office Zone) and the Tax Parcel ID #: ED05-076.07-01-30.00-000. The owner of record is DoveView LLC.

Representatives: Mr. Doug Liberman, Larson Engineering; Mr. Conny Malmberg, Attorney on Behalf of the Applicant; and Mr. Phil McGinnis, Dover Consulting Services.

Mrs. Townshend stated that legal notice was published in the Delaware State News on December 9, 2007 and the public was notified in accordance with the regulations.

Mr. Sheth questioned if there were any members that had a conflict of interest and there was none.

Mr. Senato moved to lift Application #V-07-36 Lands of DoveView LLC from the table, seconded by Colonel Ericson and the motion was unanimously carried.

Mr. Liberman stated that this project is a 192 senior housing unit complex on the north side of Forrest Avenue. The site is located just west of the intersection of Saulsbury Road and Forrest Avenue. The Modern Maturity Center is directly next to the site to the west and we are providing connection from the site for seniors who are living in the development. They will be able to walk across the site and access the services provided by the Modern Maturity Center. This site was original approved as a Concept Plan in 2003 and later approved by the Planning Commission in 2004 and 2006. We are here to talk about the open recreation area associated with the project. The original design as it came through, did not change aside from the number of buildings as we had five (5) buildings originally proposed and we are now proposing four (4) buildings to provide larger apartments for seniors; however, the overall layout did not change. Between the first approval and the second approval, there was a determination by the City that a stormwater management pond would not count towards the active open space area. Originally, the site had 1.41 acres of open space and totally met the open space requirement for the site. When we went back through the second time, we agreed to pay a fee in lieu for the active open space not realizing that it would end up being as much as it is.

Mr. Malmberg stated that a few unique qualities of the property is the Senior Planned Neighborhood Design in an I/O district. It is the only one of its kind in the City of Dover as there is no density requirement and is more of an institutional use and there is no density requirement set forth in the Ordinance. When the cash-in-lieu option of the Ordinance was

developed, this overlay area did not exist. While the change from the use of the stormwater pond to cash-in-lieu was a surprise to his client, they continued to go forward with their plans at that time as they were, at that point, they were knee deep into the design and into the plans it was not like they could change direction and add the open space. As the project was going through the design, it was suggested to them that when the interpretation that the water feature in the center of the property would not be included in the open space, his client was advised that redesign was not necessary as they could utilize the cash-in-lieu program. They did not know, at that time, that if you apply the formula as it is set forth in the ordinance, that the dollar amount ended up being significantly higher than both his client and the City expected it to be.

Mr. Malmberg stated that Staff recommended they take this case before the Board of Adjustment because this is the board of last resort when something does not make sense. The cash-in-lieu portion of the *Zoning Ordinance*, when it was designed and developed, was done at a time when a senior overlay in an I/O district did not exist. This amount is simply unfair to his client. What was developed in consultation with Mrs. Townshend, the Engineer, and the Appraiser was that we had Mr. Liberman develop a revised site plan that would show you what the maximum traditional family use would be if placed on the site. A diagram was presented that was developed in accordance with the City Ordinances and assuming an R-20 Zoning District which is the maximum family residential district and the Planned Neighborhood Design Concept which gives you the smallest lots and a townhouse use which is as dense as you can get for a traditional family neighborhood use. With that, we ended up with 39 units on 6.7 acres. We felt that the fairest way of calculating it from their perspective as well as the City's was to max out the residential use because this really is the way that the Ordinance was designed. Step two of this process was to come to a logical conclusion of what would be an appropriate number. We had Mr. McGinnis appraise the property based upon the highest family residential use you could make of the area and come up with an appraisal that would apply outside of the unique situation of the Overlay District for senior housing.

Mr. McGinnis stated that where he came in on this process was through a glitch in the Zoning Regulations because of a pie density use in an I/O district which is a residential use you will not find in any other residential district; therefore, there is the ability to place 192 units on this six (6) acre tract. The question is whether the cash-in-lieu was appropriate at that level since most of the cash-in-lieu issues have been for single family attached residential subdivisions although they are of much greater size or land of 50, 60, or 70 acres in size. We are squeezing an awful lot of units onto a very small parcel. An issue that he noticed as he looked at this site is that there is three tenths of an acre for the entrance boulevard that is part of the land area of 6.7 acres; however, it is a cross access easement that is not developable since it is the entrance boulevard for two other sites. There is only 6.4 acres that ends up being developable. The question becomes if the 192 units which is a value in use equation under the circumstances are we developing what is the appropriate way to land at point B? So we started looking at the market value for the I/O use in trying to equate to a typical single family residential subdivision for cash-in-lieu of. 6.4 acres is not going to yield many single family detached housing units because there are setbacks between each home. He suggested that they look at single family attached which is a townhouse concept which still gives you high density relative to competing sites for cash-in-lieu of where it might be considered from developers. After that, he was given a copy of this plan and this is what they appraised. Their conclusion is that the site, if developed as townhouses, would appraise at \$25,000 per lot which works out to \$975,000; however, on a

per acre basis for the entire 6.7 acres it works out to \$144,745. All this is taking the \$975,000 for 39 townhouse lots and dividing by the number of acres. This would give it a market value as recreation open space discounting the value in use that the developer is proposing which is a unique use.

Colonel Ericson questioned Staff that the amount of cash donation in the *Zoning Ordinance* under Article 5, Section 10.173 states that “a cash donation shall be equivalent to the appraised value of the land area pursuant to Section 10-16”, do you accept this appraisal as being correct? Responding to Colonel Ericson, Mrs. Townshend stated that no, we do not and this is why they are before the Board of Adjustment. The issue is that the Ordinance has us calculate it based on the appraisal used for obtaining construction financing. The \$107,966.30 is equivalent to the value based on this appraisal of $\frac{3}{4}$ of an acre. We are comfortable with this figure if you accept their report.

Colonel Ericson further stated that we should not be naïve on this because if we go with the \$400,000, that money will not magically appear, it will come from those who buy those apartments and what we will be doing is greatly increasing the cost of each apartment, is this correct? Responding to Colonel Ericson, Mr. Malmberg stated that this is correct as the costs that go into a project ultimately end up being the cost basis and usually the developers and builders look for a certain percentage of return above that. The cost works out to \$2,308 per unit in this particular case that will be passed onto seniors and is part of the reason that the City is supporting this application.

Dr. Goate’ stated that Mr. Malmberg has made a position in the last couple of minutes as the essence of where he stands, what is the reaction of the City Planner? Responding to Dr. Goate’, Mrs. Townshend stated that she agrees with the applicant that this is an amount that she does not think was ever anticipated. When Ms. Cornwell did the calculation we all jumped back when we saw the number. She does believe that there are many portions of the *Zoning Ordinance* that deal with residential development that when written, had single family housing in mind. The nature of this being over 28 units to the acre makes it unique. The applicant is providing 20,000 plus square feet of active recreation so it is not like they are not providing any active recreation for the site. We are concerned with setting precedent and will be looking at the Ordinance to see if there are ways that it needs to be changed and is unsure what the outcome of that will be. This application is a PND in an I/O district which normally, residential uses would not take place in an I/O district zone so it does have factors that make it unique. You need to consider the precedent and consider what the applicant has presented for their rationale in getting to this number; however, the \$107,966 is not a drop in the bucket in terms of the amount. If you are not comfortable in reducing the amount, the other option that Staff felt might be viable is prorating the amount over five different installments that you would then tie twenty percent prior to issuance of building permits and then twenty percent with Certificate of Occupancy for each building.

Mr. Malmberg stated that one point forgotten is that his client was knee deep in the design when the interpretation of the City excluded the area that had originally been included by the engineers as open space. This was an important factor in going forward with the cash-in-lieu of and it was not until the point of building permits with the completed design that they realized that the calculated amount was terribly high. The second point is that part of the application was for

phasing; however, we are not interested in option #2 with the full amount and he would request that they withdraw the phasing application as this would not grant his client relief. Option #2 is an after thought and not the relief that they are looking for. The relief they are looking for is a logical reinterpretation of the Ordinance.

Mr. Sheth opened a public hearing.

Mr. Zach Carter – Director of Parks & Recreation for the City of Dover – Stated that he is here today representing his department to say that he is not in favor of granting this variance. His concern is with the applicant requesting an alternative for the formula to be used with the cash-in-lieu amount. In the Code under Article 5 Section 10.173 it states how it should be done. His concern is that in changing that and granting a variance, we are leaving it wide open for the future. Anytime that we have a large development whether it is apartments or condominiums on a small piece of land, it would affect what is going to happen. He feels in support of the City and the Code that we have we should follow this Code. On the same note, being that it is such a large amount of money, he would be willing to support phasing of the payment. We are not looking for the money; it is our concern of what we would like to have is the land to provide recreational opportunities for the people who will be living in these developments. It is not their purpose to go out looking for cash in lieu of. In this situation, unfortunately, they could not provide the space required and the other option is the cash-in-lieu. It is his feeling and his departments feeling that the variance should be denied and we continue to go by the way the Code is written and to follow that Ordinance. As far as the amounts, he knows that they have varied, he cannot tell you the top amount as he did not do that research and was not prepared to answer that question. We have not had that many cash-in-lieu of donations. He believes that there is a development that just went through with a cash-in-lieu of what would be more than \$20,000.

Responding to Mr. Carter, Mrs. Townshend stated that we did not calculate the cash-in-lieu because at that point, they were looking at donation of land.

Also Responding, Ms. Cornwell stated that Somerset Park did pay cash-in-lieu of around \$19,000; however, they calculated it differently because they are actually under twenty (20) units which means they would pay a different percentage based on the appraisal of the land.

Mr. Malmberg stated in response to Mr. Carter's statements, the concern that the floodgates would be open because of the precedential affect, he feels that this has been covered. The second comment is with concerns of providing open space for the residential uses. This is again, a unique property for a couple of reasons. One is that it is located next to the Modern Maturity Center and it is a senior complex and that is a recreational facility so that is satisfied in this particular case.

Mr. Sheth closed the public hearing.

Mr. Pepper stated that he feels that the issue before the Board of Adjustment is whether the granting of relief is justified and he feels that a case could be made that it is. He is concerned with how they get to point B. If you decide that relief is appropriate, creating a new appraisal based on a hypothetical different development does tremendous violence to the cash-in-lieu

Ordinance. You are better off doing what the Board of Adjustment typically does and take a look at it and find what is appropriate. When you decide that a variance and setback is appropriate, you do not come up with any kind of mechanicalistic calculation to what the new setback should be you just look at the property and use your own best judgment. Or, if your best judgment in this case is that they be granted relief, he feels that it is more appropriate to abate it by a percentage. This fulfills the usual Board of Adjustment rule much better than taking Mr. McGinnis's hypothetical appraisal and doing some mathematical calculations to try to give it some air of defensibility. You are better off making the findings that this is a unique situation and decide to abate a certain percentage of the cash-in-lieu calculation.

Colonel Ericson questioned that if we were going to abate it by $\frac{3}{4}$ when the next project comes before us, what formula do we use? This property is unique in that you do have a huge recreation center right next to the property and he does not think that we will find this again in the future. If we just used a rough estimate, we would almost be obliged to use a rough estimate in the future for other properties. He is sensitive towards the City's needs in that we do need recreation area for the people; however, those in an over 55+ community it is a different matter. The recreational needs may not be as great.

Colonel Ericson further stated that with Option #1 it give you a better option because it gives you a way to look at it in the future. Responding to Colonel Ericson, Mrs. Townshend stated that Staff could address this by bringing an amendment forward to the Planning Commission and to City Council. The challenge is when the applicant agrees to do the cash-in-lieu which is based on their appraisal that is used to obtain construction financing which generally happens after approvals.

Dr. Goate' stated that we are accepting the recommendation of Staff which is extremely important rather than debating back and forth. It is also in keeping with our attorney's request that he successfully brought it to a level that would be the approval approach. The other thing that is sitting out there in the future is that Staff is going to have to face this with perhaps future projects.

Colonel Ericson stated that they really need direction from the Planning Commission. If we could approve this on a one time basis and then recommend future applications would be pending further guidance from the City Planning Office who would handle it in the future?

Mr. Hufnal stated that he feels that we would see this issue in the future. This is the first time we have seen this issue and we will see it again in the future because as land becomes less available we may see concentrated housing like this. The Code is outdated and we have already stated that. The cash-in-lieu formula designed when the senior housing in the I/O district did not exist so we are faced with particular issues here. If we get Staff to look at this Ordinance for future applications, he does not really see us setting a precedent, if we accept what was recommended by Staff as Option #1. Some concession needs to be made because of the fact that this is presented in a time when it does not truly fit what Code currently states.

Dr. Goate' moved to approve Applicant #V-07-36 Forrest Avenue, Lands of DoverView LLC for Option #1 with the fact that we then request Planning Staff to bring together their thoughts about this approval and what their thoughts are if in case something of this nature

comes along in the future that you would be prepared for that next application and that the cash-in-lieu predates the PND Ordinance of active open space requirement that goes back to 1995 and the PND which was developed on 1996. (Motion maker was advised to use Staff's written motion in report) Move for approval of the variance from the requirements of Article 5, Section 10.173 and for denial of the variance from the requirements of Article 5, Section 10.175, accepting the per acre value submitted by the applicant's appraiser, requiring that the applicant pay a cash-in-lieu amount of \$107,966.30 before the issuance of any additional building permits, with the following rationale for approval of the variance from Article 5, Section 10.173:

- *The subject property is zoned IO (Institutional and Office Zone), with a Senior Planned Neighborhood Design (PND) overlay, noting that residential uses within the IO district would not be permitted without this overlay.*
- *The applicant is providing 20,313 square feet of active recreation area through a walking path, fitness circuit, shuffle board court, and a pavilion/picnic area, but that the amount provided does not meet the 275 square feet per dwelling unit.*
- *The density of the complex is 28.53 dwelling units per acre, which significantly exceeds the typical densities of residential development in the City of Dover and that most applications which pay cash-in-lieu are smaller, single-family residential developments.*
- *The development is a residential development for seniors only and will not have the diversity of ages that a typical residential development has.*

seconded by Colonel Ericson and the motion passed with a 4-1 vote with Mr. Senato opposed.

Mr. Senato stated that the attorney kept stating several times that the over 55+ area does not need any type of recreational area and yet in the motion there are several areas where the 55+ seniors will have some form of recreation in your development so it seems kind of contradictory. He feels that when this new program was put in that they would provide recreation for all ages so to eliminate one sector is a discriminatory quote. He feels that all developments need some form of recreation area.

Colonel Ericson moved to adjourn the meeting, seconded by Mr. Senato and the motion was unanimously carried.

Meeting adjourned at 11:13 AM

Sincerely,

Diane Metsch
Secretary