



City of Dover
Board of Adjustment
August 14, 2024

V-24-04

Title: Property at 1151 N. DuPont Highway - Application for a Variance

Location: East side of Route 13/North DuPont Highway and north of the intersection with College Road and north of the entrance drive to Bally's/ Dover Motor Speedway

Address: 1151 N. DuPont Highway, Dover, DE

Owner: Tung Ching Lin

Tax Parcel: ED-05-057.00-01-30.01-000

Application Date: July 12, 2024

Present Zoning: C-4 (Highway Commercial Zone)
SWPOZ (Source Water Protection Overlay Zone: Tier 3 – Excellent Recharge Area)

Present Use: Restaurant Building (vacant)

Proposed Use: New Restaurant Building with drive-through

Reviewed By: Dawn Melson-Williams, AICP, Principal Planner

Variance Type: Area Variance

Variances Requested: Request has been made for a Variance from the requirements of *Zoning Ordinance*, Article 4 §4.15 for future construction of a new restaurant building with drive-through and site improvements. The Variance Request seeks reduction of the side yard setback of 15 feet to 8.5 feet to accommodate the drive-through canopy.

Project Description

The property at 1151 N. DuPont Highway is located on the east side of North DuPont Highway north of the intersection with College Road. It is the second property (building) passed the signalized intersection with the entrance drive leading to Bally's Hotel & Casino and the Dover Motor Speedway. The property currently includes a vacant fast-food restaurant building with drive-through surrounding by a circulation drive and parking areas. Access to the property is via

a shared right-in/right-out entrance with the adjoining property to the north (Grotto's). On the eastern portion of the property there is a circulation drive that travels south to link to Bally's entrance drive. A Conceptual (Site) Plan sheet shows the project (See Exhibit E). The existing conditions of the property are shown on Exhibit F, an ALTA Survey.

The Applicant has requested a Variance from the requirements of *Zoning Ordinance*, Article 4 §4.15 for future construction of a new restaurant building with drive-through and site improvements. The Variance Request seeks reduction of the side yard setback of 15 feet to 8.5 feet to accommodate the drive-through canopy. The new restaurant building with drive through, a proposed Raising Cane's, would be subject to a separate Site Development Plan review process.

Property and Adjacent Properties: Zoning and Land Use

The 1.13 acre (49,149 SF) +/- property is zoned C-4 (Highway Commercial Zone) and is subject to the SWPOZ (Source Water Protection Overlay Zone: Tier 3 – Excellent Recharge Area). The two adjoining parcels also fronting are zoned C-4 (Highway Commercial and include a restaurant (Grotto's) and a multi-tenant building with retail stores and a restaurant. To the east are the properties of Balley's Hotel and Casino and the Dover Motor Speedway which are zoned RC (Recreational and Commercial Zone). To the west, across DuPont Highway is the main campus of Delaware State University that is zoned IO (Institutional and Office Zone). A majority of the surrounding area is also subject to the SWPOZ (Source Water Protection Overlay Zone)

A Map Exhibit (Exhibit B) prepared by Staff is attached to this Report. It shows the subject property's location and the surrounding zoning. Map Exhibit C shows an aerial view of the area.

Code Citations

C-4 (Highway Commercial Zone)

The subject project area is zoned C-4 (Highway Commercial Zone). *Zoning Ordinance*, Article 3 Section 16 lists the permitted uses, conditional uses, and other provisions of the C-4 zone. For the proposed redevelopment of the property for a new restaurant building with drive-through, the use as a restaurant with drive-through would require Site Development Plan approval. See the following excerpt of the permitted uses in the C-4 zone.

Article 3

16.1 *Uses permitted.* In a highway commercial zone (C-4), no building or premises shall be used, and no building or part of a building shall be erected, which is arranged, intended, or designed to be used, in whole or in part, for any purpose, except the following:

- (a) Retail stores.
- (b) Business, professional or governmental offices.
- (c) Restaurants.
- (d) Personal service establishments.
- (e) Service establishments.
- (f) Hotels and motels.
- (g) Places of public assembly.
- (h) Bus terminal.
- (i) Wholesale, storage, warehousing, and distribution establishments.
- (j) Indoor or outdoor recreation and amusement establishments.
- (k) Hospitals and medical centers.
- (l) Drive-throughs.

In the C-4 zone, there is a set of bulk standards for development outlined in *Zoning Ordinance*, Article 4 Section 4.15. It sets the side yard setback for the building at 15 feet. See code excerpt below; the side yard setback requirement is highlighted (the subject of this variance request).

Article 4 Section 4.15. - C-3, C-4, R-C, IO, and CPO zones.

Bulk and parking regulations for service commercial (C-3), highway commercial (C-4), recreation and commercial (R-C), institutional and office (IO), and commercial and professional office (C-PO) zones are as follows:

	C-4
Minimum required:	
Lot area	
Lot width (ft.)	150
Lot depth (ft.)	150
Front yard (ft.)	20
Side yard (ft.)	15
Rear yard (ft.)	10 or equal to bldg. height
Side or rear yards which adjoin a residence zone (ft.)	30
Off-street parking	
Per 300 sq. ft. floor area or	1
Per employee (whichever is greater)	1
Maximum permitted:	
Building height	
Stories	6
Feet	75
Floor area ratio	4.0
Lot coverage	75%

SWPOZ (Source Water Protection Overlay Zone: Tier 3 – Excellent Recharge Area)

The purpose of the Source Water Protection Overlay Zone (*Zoning Ordinance*, Article 3 §29) is to provide a safe drinking water supply and to ensure that groundwater is adequately protected and maintained. This site is subject to the Tier 3: Excellent Recharge Area. The *Zoning Ordinance*, Article 3 Section 29 lists a series of uses are prohibited throughout the SWPOZ, including in the excellent recharge area. The restaurant with drive-through use that this project proposes is not a prohibited use. SWPOZ: Tier 3 Lands are additionally subject to specific rules regarding impervious coverage if the redevelopment is subject to Planning Commission review. The maximum coverage within Tier 3 Lands is typically 30% or 60% if infiltration is used in the development's stormwater management with accommodations for redevelopment activities.

Additionally, the following definitions are part of the *Zoning Ordinance*:

Setback: The distance between the street line and the setback line.

Setback line: A line extending between the two side lot lines of a lot or a parcel of land, which is parallel to, and a stated distance from, a street line.

Street: A street shown on the official map of the City of Dover and improved to the satisfaction of the planning commission.

Street line: The dividing line between a lot and a street.

Yard, front: An unoccupied ground area fully open to the sky between the street line and the setback line. The minimum width of the front yard is equal to the setback.

Yard, rear: An unoccupied ground area fully open to the sky between the rear lot line and a line parallel thereto.

Yard, side: An unoccupied ground area fully open to the sky between any property line other than a street or rear lot line, and a line drawn parallel thereto, and between the front and rear yards.

Applicant's Proposed Project and Variances Requested

The Applicant has submitted a Plan Sheet (Exhibit E). This plan/drawing depicts the proposed building placement and other site improvements as currently proposed. The new restaurant Building with drive-through and associated site improvements is to be constructed after demolition of the existing building and site features on the property. The Applicant has requested a Variance from the requirements of *Zoning Ordinance*, Article 4 §4.15 for future construction of a new restaurant building with drive-through and site improvements. The Variance Request seeks reduction of the side yard setback of 15 feet to 8.5 feet to accommodate the drive-through canopy. The main mass of the building complies with the setback requirements.

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 above criteria. The applicant's response (Exhibit D) along with a Staff assessment of the application in accordance with the required criteria is provided below.

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

Applicant Response: Parcel is zoned C-4 Highway Commercial which permits the proposed use, a Restaurant and Drive Through as a by right use.

Staff Response:

The subject property is zoned C-4 (Highway Commercial Zone). The C-4 zoning district is a commercial zoning district that allows for a variety of retail stores, restaurants, offices, and service establishments among other uses. The proposed use as a restaurant and drive-through are permitted uses. The C-4 zone has bulk standards related to setbacks for placement of buildings on a parcel. The property is also subject to the SWPOZ (Source Water Protection Overlay Zone: Tier 3 – Excellent Recharge Area) which has provisions related to prohibition of certain uses and limitations on impervious surface coverage to protect water resources.

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

Applicant Response: There is currently a Grotto's Restaurant to the west and a Chipotle and Vitamin Shoppe to the east of the site. Located to the rear is the Dover Downs Casino and along our frontage is Rt. 13 (DuPont Hwy). In addition, the site currently contains a former Boston Market restaurant which is now closed and vacant as a result of the Company's bankruptcy.

Staff Response:

The subject property at 1151 N. DuPont Highway current includes a vacant restaurant building. It is located along a major commercial corridor (DuPont Highway). The adjoining parcels include a restaurant (Grotto's) and a multi-tenant building with retail stores and a restaurant. To the east are the properties of Balley's Hotel and Casino and the Dover Motor Speedway. To the west, across DuPont Highway, is the main campus of Delaware State University.

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

Applicant Response: Our client's intention is to redevelop and revitalize the parcel to include replacing the existing aged and vacant building with a new 3,364± SF building and increasing landscaping around the site to be more visually appealing. The variance is being requested in order to construct a canopy over the permitted drive through lanes which will not negatively affect the adjacent commercial restaurant property. This is because the canopy encroachment is minimal and the nearest use has a grass and parking area, none of which would be impacted by the proposed canopy.

Staff Response:

Planning Staff notes that the placement of the new building complies with the setback requirements except for the canopy roof extension over the dual drive-through lanes on the south side of the building. The building is located on the parcel so that the dual drive-through lanes allow for stacking on-site of multiple vehicles in line leading up to the menu board/ordering location and the food pick-up area. The site circulation and parking lot area is separated from the drive-through lanes. This should avoid the stacking on vehicles into the shared entrance drive with the adjacent property to the north as other circulation options are available. Where the canopy roof would encroach into the 15-foot side yard setback of the south property line, it is next to a parking lot area on the adjacent property. The proposed side yard setback is 8.5 feet from the property line; it is 8.5 feet to canopy roof. The setback requirement does not apply to the location of the drive-through lane (pavement). Therefore, the requested Variance should not impact the use of neighboring lands.

- 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 Response: The proposed drive-through canopy is considered a structure (although not enclosed) and is within the 15' side setback. Canopies are essential to the fast-food business, preventing employees and customers from being exposed to the weather, such as rain, snow, UV rays, while waiting for their order to exchange hands and are considered a normal and essential improvement for the proposed use. Removing the proposed order point canopy will drastically decrease the customer experience, which puts the financial viability of the project at risk, but it also risks the customer's and employee's safety, and it is simply not possible to provide a canopy that will meet the setback requirement.

Staff Response:

The existing format of the property's circulation drive areas and location the existing entrance (from DuPont Highway and to Bally's Entrance drive) affects the proposed site design layout. The variance request is related to construction of a covered area in the form of a canopy over the dual drive-through lanes. While it appears that there is space to move the building the 6.5 feet to the north so that the canopy would comply with the side yard setback that option may not work with the needed widths and turning radii of the circulation drives of the parking lot and drive-through lanes. The size of the canopy roof could also be reduced to comply with the side yard back but that would functionally not cover both drive-through lanes. Covered drive-through lanes at the point of ordering and food pick-up are commonplace with restaurants with such operations. The Planning Staff Planning Staff finds that an exceptional practical difficulty may be determined to be present.

Variance Recommendations

Staff recommends approval of the Variance that would allow construction of the canopy over the dual drive-through lanes for the proposed new restaurant building at 1151 N. DuPont Highway. The granting of the Variance would allow the reduction of the side yard setback from 15 feet to 8.5 feet for the canopy. Planning Staff finds that the Applicant has strived to demonstrate an exceptional practical difficulty; they would incur by not having this Variance granted.

Staff recommends **approval** of the variance for reasons as follows:

- The *Zoning Ordinance* permits development of restaurants and drive-throughs in the C-4 zoning district; however, any building would be subject to the requirements of the setbacks for the C-4 zoning district.
- The *Zoning Ordinance* does not include additional or alternative requirements related specifically to drive-throughs. The canopy is attached to the building and must follow the setbacks for the building. This size and configuration of the canopy encroaches into the side yard setback and would require a variance.
- The canopy is a roof only and the sides are open which will visually minimize how close it is to the property line.
- The granting of the Variance allows for improvements to the operations of the restaurant use allowing a covered area for the customer to receive their food order and to protect employees as well. This design allows for two drive-through lanes with the canopy roof coverage for two areas of customer service thus reducing potential vehicle stacking issues on the remainder of the property.
- For this redevelopment project of a new building and site improvements, a Site Development Plan application will be required subject to the provisions of the *Zoning Ordinance*.

Advisory Comments to the Applicant

- If granted, the variance becomes null and void if work has not commenced within one (1) year of the date the variance was granted. At present there is no provision for extension.
- If the requested variance is granted, the Applicant must still obtain the appropriate Site Development Plan and construction activity Permits approvals for construction of a Building on the property. A Site Development Plan for a building of this proposed use requires an application and review process. Depending on the size and scale of the project it may qualify for Administrative review or Planning Commission public hearing and review. Contact the Planning Office to discuss steps for application submission.
- The Applicant should be aware that whenever the Board of Adjustment denies an application for a variance, such application for a variance, or an application on the same property, which is substantially similar, shall not be accepted for reconsideration by the Board of Adjustment sooner than one year from the date of denial (*Zoning Ordinance*, Article 9 §3.8).

GUIDE TO ATTACHMENTS

Exhibit	Description/Author	# Pages
A	BOA Application Form	1
B	Zoning Map Exhibit (Staff)	1
C	Planning & Inspections View Map – Aerial Map/Zoning Map Exhibit (Staff)	1
D	Applicant's Written Responses: Narrative	1
E	Conceptual Site Plan prepared for Raising Cane's Proposed Development (Dated 7/2/2024)	1
F	ALTA/NSPS Land Title Survey for Raising Cane's -Dover at 1151 North DuPont Highway (Dated 11/22/2023)	1