



City of Dover
Board of Adjustment
July 17, 2024

V-24-02

Title: Property at 1494 McKee Road - Application for a Variance

Location: On the west side of old segment of McKee Road (cul-de-sac segment) located to the west of McKee Road between Brandywine Drive and the intersection of McKee Road with Scarborough Road

Address: 1494 McKee Road, Dover, DE

Owner: Abhay Patel
(Equitable Owner noted in submitted documents as India U.S. Society of Delaware)

Tax Parcel: ED-05-067.00-01-09.00-000

Application Date: June 14, 2024

Present Zoning: R-8 (One Family Residence Zone)
COZ-1 (Corridor Overlay Zone)

Present Use: Vacant Tract of Land (partially woodland)

Proposed Use: Community Center (New Building)

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 3 §27.61 for future construction of a building. The Variance Request seeks relief from the maximum setback as it relates to the front yard in the Corridor Overlay Zone. The front yard setback requirement is a minimum of 40 feet and a maximum of 50 feet along McKee Road for a non-residential building.

Project Description

The property is located on the west side of the old segment of McKee Road (cul-de-sac segment) located to the west of McKee Road between Brandywine Drive and the intersection of McKee Road with Scarborough Road. A Conceptual (Site) Plan sheet shows the project (See Exhibit E).

The Applicant has requested a variance from the requirements of *Zoning Ordinance*, Article 3 §27.61 for future construction of a building. The Variance Request seeks relief from the maximum setback as it relates to the front yard in the Corridor Overlay Zone. The front yard setback requirement is a minimum of 40 feet and a maximum of 50 feet along McKee Road for a non-residential building.

The new non-residential building, a proposed Community Center for the India U.S. Society of Delaware, would be subject to a separate Conditional Use Site Development Plan review process with the Planning Commission.

See the Applicant's description of the project given below (excerpt from their narrative Letter submission: Exhibit D).

Applicant's Description:

I am writing on behalf of Abhay Patel, Owner of the vacant 10 acre parcel located at 1494 McKee Rd, Dover, DE 19904, (Equitable Owner, India U.S. Society of Delaware, mailing address being 1712 Windswept Ct, Dover, DE 19901.

We are requesting a variance to the minimum 40' and maximum 50' front yard setback requirements set forth in the City of Dover's zoning regulations for the above-referenced parcel. The request is necessary due to the unique layout of the property and the Corridor Overlay Zone (COZ-1) designation affecting the eastern 390' (+/-) portion of the parcel. This variance is critical in order to proceed with a conditional use application for a Community Center that is being proposed on site.

Property and Adjacent Properties: Zoning and Land Use

The 10.0140 acre +/- property is zoned R-8 (One Family Residence Zone) and is subject to the COZ- 1 (Corridor Overlay Zone). The subject property was created with Minor Subdivision Application SB-03-04 Lands of Marshall and Boyd that was reviewed and recorded on October 22, 2003. At one point in 2005 an application for the tract's development as a residential subdivision of 18 lots to be known as New Haven Estates was proposed (Application SB-05-04 New Haven Estates Conceptual Subdivision Plan); but the project did not proceed and has expired.

There are several adjoining residential properties also fronting this old segment of McKee Road that are zoned R-8. Located further to the south of this property is the land platted as a residential subdivision known as Somerset Park Subdivision (SB-04-10); it is also zoned R-8 (One Family Residence Zone) and consists of a series of thirteen (13) lots which have not been developed. To the southwest is part of the Fox Hall neighborhood (at the terminus of Troon Road and Phillip Court) that is zoned R-10 (One Family Residence Zone). Adjoining to the north, is The Meadows with single family detached dwellings in the portion of the neighborhood area zoned R-8. Across both segments of McKee Road to the east, the land is zoned IPM (Industrial Park Manufacturing Zone) with properties including a manufacturing facility and multi-tenant warehouse buildings.

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

R-8 (One Family Residence Zone)

The subject project area is zoned R-8 (One Family Residence Zone). *Zoning Ordinance*, Article 3 Section 1 lists the permitted uses, conditional uses, and other provisions of the R-8 zone. For the proposed development as a Community Center Building, the use (classified as a philanthropic and eleemosynary institution) would require Conditional Use approval. In the R-8 zone, there are specific conditions and have specific requirements for development. It sets the front yard setback for the building at a minimum of 50 feet and the other setbacks from property lines at 25 feet. See code excerpt below.

Article 3 Section 1

1.14 The following uses are permitted, conditional upon the approval of the planning commission in accordance with the procedures and subject to the general conditions set forth in section 10.1 and to any specified requirements set forth below:

(a) Places of worship, including parish houses; [and] schools, including nursery schools, kindergartens and day care centers in accordance with article 5, Supplementary Regulations, section 14. Child day care facilities; philanthropic and eleemosynary institutions; hospitals and sanitariums for general medical care; and funeral homes subject to the following requirements:

- i. Any school permitted under this paragraph [subsection 1.14(a)] shall be a nonprofit organization within the meaning of the Internal Revenue Act and shall be registered effectively as such thereunder.
- ii. Any school permitted under this paragraph [subsection 1.14(a)], other than a kindergarten, nursery school, or day care center, shall occupy a lot with an area of not less than two acres, plus one acre for each 100 pupils for which the building is designed.
- iii. Any kindergarten or nursery school permitted under this paragraph [subsection 1.14(a)] shall be limited to a maximum of 50 children in zones R-8 thru R-20 and a maximum of 100 children in all other zones. At least 100 square feet of outdoor play space per child shall be provided. Outdoor play space shall be fenced or otherwise enclosed on all sides and shall not include driveways, parking areas, or land unsuited by other usage or natural features for children's active play space. Fencing or other enclosures shall be a minimum height of four feet. The minimum lot area for each ten, or remainder over the multiple of ten, children shall be the same as the minimum lot area requirement for each dwelling unit in the districts in which such uses are to be located.
- iv. No such building or part thereof shall be erected with less than a 50-foot front yard or nearer than 25 feet from any other street or property line.
- v. The sum of all areas covered by all principal and accessory buildings shall not exceed 20 percent of the area of the lot.
- vi. Courts shall conform to the requirements of article 5, section 3 hereof.

COZ-1 (Corridor Overlay Zone)

The front portion of the property is located within the COZ-1 (Corridor Overlay Zone). The *Zoning Ordinance* details the requirements of the COZ-1 in Article 3 §27 and its subsections. The Corridor Overlay Zone as a planning and growth management tool is designed to foster attractive, efficient, and economically vibrant urban corridors along Route 8/Forrest Avenue and Saulsbury/McKee Roads. To this end, more stringent standards are applied to development taking place along the corridors. The development guidelines related to project design include front yard setbacks, building placement, parking, site access, building height, open space and landscaping, lot configuration, and architectural review. For this location, the Variance Request seeks relief from the front yard setback provisions of the COZ-1. The front yard setback requirement is a minimum of 40 feet and a maximum of 50 feet along McKee Road. This means the building would have to be built starting at 50 feet from the front property line. The Code does allow for the Planning Commission to increase the front yard setback to a maximum of 90 feet if the project is determined to be superior urban design; however, the project seemingly can't take advantage of that provision given the shape of the parcel. See Code Excerpt from *Zoning Ordinance*, Article 3 §27.61.

Article 3 Section 27
27.6 *Development guidelines.*
27.61 *Setbacks:*
a. Front yards.

	Residential	Nonresidential
	Min. Max.	Min. Max.
McKee/Saulsbury	60' to 80'	40' to 50' *
Route 8—Artis Drive to Mifflin Road	60' to 80'	None
Route 8—Mifflin Road to Saulsbury Road	40' to 60'	40' to 60' *
Route 8—Saulsbury Road to R.R. line	20' to 30'	20' to 30'
Subdivision streets	(Setback provisions of article 4 shall apply)	

* When the applicant can demonstrate to the satisfaction of the planning commission through the site plan review process that the proposal involves a superior urban design, the maximum setback may be increased to no more than 90 feet from the property line on Route 8 from Mifflin Road to Saulsbury Road and on McKee and Saulsbury Roads.

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.

Applicant's Proposed Project and Variances Requested

The Applicant has submitted a Conceptual (Site) Plan Sheet (Exhibit E). This plan/drawing depicts the proposed building placement and other site improvements as currently proposed. The new non-residential building is proposed as a Community Center for the India U.S. Society of Delaware. The project has requested a variance from the requirements of *Zoning Ordinance*, Article 3 §27.61 for future construction of the building. The Variance Request seeks relief from the maximum setback as it relates to the front yard in the Corridor Overlay Zone. The front yard setback requirement is a minimum of 40 feet and a maximum of 50 feet along McKee Road for a non-residential building. The Variance Request would allow the placement of the building at a location exceeding a maximum setback of 50 feet; the plan shows an estimated placement at 238 feet +/- from the front property line/street line at the street and approximately 50 feet from the nearest property line (side setback).

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 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: The subject property is located, partially, in the Corridor Overlay Zone (COZ-1) and is zoned R-8. The Corridor Overlay Zone (COZ-1) is established to promote superior urban corridor development, foster coordination among corridor properties and adjacent lands, preserve the functionality and efficiency of the roadway, and achieve a visually balanced streetscape that is friendly to both pedestrians and motorists. The R-8 zoning permits residential development at a density of 8 units per acre, characterized by residential uses including single-family homes and related community facilities. Specific permitted uses in R-8 zones include one-family detached dwellings, public buildings and structures, and places of worship, subject to planning commission approval.

Staff Response:

The subject property is zoned R-8 (One Family Residence Zone). The R-8 zone predominately allows for one-family dwellings (residences) with a minimum lot size of 8,000 SF per lot (estimated at 5.4 dwelling units per acre). However, there are a series of uses that are allowed through a Conditional Use review process with the Planning Commission. The Conditional Use process could allow for the development of places of worship, schools, day care facilities, and other institutional uses. The proposed use of the property as a Community Center building is permitted as a Conditional Use in this R-8 zone.

The subject property is also subject the COZ-1 (Corridor Overlay Zone) which contains provisions related to the design of the development on the property. The COZ-1 includes guidelines for bulk standards like setbacks and height along with guidelines for the design and location of site elements such as building placement, parking, and landscaping.

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

Applicant Response: The immediate vicinity of the parcel consists of single-family residential properties, manufacturing facilities (across the street), professional offices, and a few churches. The area is diverse in its uses, and the introduction of a Community Center would complement the existing community-oriented facilities. The proposed Community Center will serve as a communal space for the Indian community, providing recreational and social services that are currently lacking in the area.

Staff Response:

The subject property at 1494 McKee Road is a vacant lot. It is surrounded by residential properties in the form of single family detached dwelling units found on individual lots or on lots within the residential subdivisions of The Meadows and Foxhall (and the yet to be developed Somerset Park). To the east of the site across the McKee Road right-of-way area are properties in industrial use. The rear of the subject property and adjacent properties are woodland areas with some areas of wetlands.

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

Applicant Response: Removing the front yard setback requirement would not adversely affect neighboring properties. The proposed Community Center is designed to be consistent with the character of the neighborhood and will enhance the community's amenities. The placement of the Community Center further back on the parcel, as requested, ensures that it does not interfere with the privacy or views of surrounding properties. Additionally, the design includes landscaping and buffering to maintain the aesthetic harmony of the area.

Staff Response:

Planning Staff notes that the placement of a building to comply with the front yard setbacks of the COZ-1 and the side yard setbacks of the R-8 would result in a building placement in the narrow portion of the parcel closest to McKee Road rather than in the portion of the tract where the parcel width expands greatly to the rear of the lots fronting on McKee Road. This format of building placement at the front of the parcel, while limiting the size of the building, would bring the building in closer proximity to the buildings/residences on the series of lots along McKee Road resulting in a greater impact to those neighboring properties. The granting of the Variance allowing the building to be placed (setback) much further back on the overall parcel will allow for setbacks of at least 25 feet and up to 50 feet or more from adjacent properties. This also allows the ability to maintain and/or establish screening vegetation of the development from the adjoining properties. 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 existing layout of the parcel, with its limited frontage along the right-of-way (approximately 138' +/-), however, as the southern property line (150' +/-) and northern property line (161') head in west towards the rear of the property, they narrow slightly to a width of approximately 64', significantly constraining the placement of the proposed 9,700 sq ft Community Center and parking area within the front portion of the property as the statute requires.

Adhering strictly to the 40' to 50' setback requirements would make it impractical to position the Community Center in a manner that accommodates both functionality and compliance with the zoning ordinance. This restriction creates a hardship as it limits the ability to develop the site effectively for the intended community use, thereby hindering the project's feasibility and the community's benefit.

Staff Response:

The pre-existing size and configuration of the property limits the ability to comply with the setback provisions of the *Zoning Ordinance* related to the COZ-1 zoning district. Planning Staff notes difficulty in development of this parcel based on its form of a

narrow neck-like area fronting on McKee Road with a significantly larger wide area of the parcel (width over 450 feet) to the west at the middle and rear of the parcel. This parcel's shape would limit development to a single detached dwelling or other small building properly placed at the front of the parcel meeting the setbacks or require the development of a street right-of-way from McKee Road into the parcel to then develop in a series of lots. Requiring the placement of a building with a minimum front yard setback of 40 feet and a maximum front yard setback of 50 feet greatly reduces the buildable area and seeming would limit the ability of the applicant to pursue a development of a Community Center building with a Conditional Use Site Plan application. 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 a more reasonable approach to building placement on the parcel configuration of the subject property at 1494 McKee Road. The granting of the Variance would allow relief from the requirement to place the building at the maximum front yard setback of 50 feet. Planning Staff finds that the Applicant has demonstrated 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 for a variety of uses in the R-8 zoning district; however, any development would be subject to the requirements of the setbacks of the R-8 zone and the maximum setback requirements of the COZ-1 zone.
- The maximum front yard setback acts as a build-to line requiring that the building placement not exceed that location; thus, the ability to alter the building placement to a location where more space is available on this parcel.
- Even the alternative maximum setback of 90 feet that the Planning Commission could consider for this parcel does not resolve this building placement issue due to the parcel's shape.
- The location of the property now fronts on the old segment of McKee Road which may be viewed as not the true corridor that the COZ-1 (Corridor Overlay Zone) was envisioned to guide development along when the COZ-1 provisions were adopted by Ordinance into the *Zoning Ordinance* on March 18, 1992. This old segment of McKee Road was created with the realignment of McKee Road and the construction of Scarborough Road which connects McKee Road/Saulsbury Road corridor to North DuPont Highway (circa 1997-2002).
- The granting of the Variance creates a better opportunity for the development to fit on the parcel where a larger buildable area is available to accommodate the building, site circulation, tree preservation and tree plantings for screening from adjoining properties.
- For certain uses such as the proposed Community Center, a Conditional Use Site Development Plan application to the Planning Commission 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 Conditional Use/Site Development Plan and construction activity Permits approvals for construction of a Building on the property. A Conditional Use Site Development Plan for a building of this proposed use requires an application and review process involving the Planning Commission. 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 Letter	2
E	Conceptual Site Plan prepared for India U.S. Society of Delaware (Revision Date 6/14/2024)	1