

CITY OF DOVER
BOARD OF ADJUSTMENT MINUTES
August 14, 2024

A Regular/Hybrid Meeting of the City of Dover Board of Adjustment was held on Wednesday, August 14, 2024, at 9:00 A.M. in person in the City Council Chambers and using the phone/videoconferencing system Webex. Members present were Chairman Sheth, Mr. Wagner, Mr. Senato, and new member Mr. Christian Swalm. (Note: There is a vacant seat with one member not yet appointed.)

Staff members present were City Solicitor Mr. Rodriguez, Mrs. Melson-Williams, Ms. Katherine Oehmke and Mrs. Savage-Purnell.

Mrs. Melson-Williams mentioned as noted on the agenda, we have some membership details to report. First, we are welcoming Christian Joshua Swalm, a new Board of Adjustment member that was just appointed July 22, 2024, to complete a term that will expire in July 2025.

Also, we welcome returning Board of Adjustment member Richard D. Senato as reappointed on July 22, 2024, for a three-year term to expire in July of 2027.

Mr. Senato asked to add the Resolution for Mr. Keller to the agenda. The Resolution was already a part of the current agenda.

APPROVAL OF AGENDA

Mr. Senato moved for approval of the agenda with the request to add the Resolution that was already a part of the agenda. The motion was seconded by Mr. Wagner unanimously carried 4-0.

Chairman Sheth asked if there were any questions. There was none.

APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF JULY 17, 2024

Mr. Senato moved to approve the meeting minutes of July 17, 2024, with the necessary correction. The motion was seconded by Mr. Wagner unanimously carried 4-0.

Chairman Sheth asked if there were any questions. There was none.

COMMUNICATIONS & REPORTS

Mrs. Melson-Williams mentioned the next regularly scheduled meeting for the Board of Adjustment is September 18, 2024, with a 9:00 am start time in the Council Chambers and with a virtual format. We have a filing deadline that occurs later this week, so we'll certainly confirm with you when that meeting has been formally scheduled. If we don't receive any applications, we will not be having that meeting.

Correspondence Received

There was a letter received shortly after your meeting in July from Mr. Glenn Mandalas who is serving as legal counsel for Staff as part of that July meeting. That letter dated July 17, 2024 was forwarded by email to all members of the Board.

SPECIAL RECOGNITION**Resolution honoring the service of Mr. James N. Keller to the Board of Adjustment.**

Mrs. Melson-Williams stated that Staff prepared a resolution, and I will read that into the record and then we'll seek a motion for its adoption. I did speak to Mr. Keller yesterday, and he was unsure if his schedule would allow for attendance today, and in any case, we'll move forward with this and certainly ensure that he gets the resolution.

(See attached Resolution)

Chairman Sheth asked if there were any questions or if anyone would like to make a statement?

Mr. Senato mentioned that he enjoyed working with Mr. Keller on the Board. He was diligent. He took care of the minutes very well and he was an outstanding member of the Board of Adjustment. I was very happy and honored to have worked with him during the years that he served. I wish him the best in his future endeavors. Thank you.

Chairman Sheth mentioned that he will definitely be missed. We miss him right now.

Mr. Senato moved to approve the Resolution honoring the services of James N. Keller to the Board of Adjustment, seconded by Mr. Wagner, and unanimously carried 4-0 of the members present.

OPENING REMARKS CONCERNING APPLICATION

Mrs. Dawn Melson-Williams, Principal Planner stated the meeting today will be conducted in accordance with the agenda. There is one Variance application on the agenda under New Business for consideration. The application file will be referenced by title, a summary will be presented by Planning Staff, an opportunity will be given for the Applicant to present, the floor will be opened for questions of the Applicant by the Board, and then the public hearing will be opened for public testimony. The Chair may set parameters on the length of time for each speaker giving public testimony in order to ensure an efficient meeting. The Chair will open the Public Hearing to proceed with public testimony on the item. If you are a member of the public and would like to address the Board please raise your hand, when the Chairman calls you, please step down to the podium and please sign in. For the record we will need your name and address, we also need to know if own property within 200 feet, in which case you would have received a mailed notice of the meeting. If you have joined us online, an opportunity will also be provided for you to speak. We ask that you be as brief as possible and that your statements be limited to the Application before the Board. *(In the interest of allowing for an opportunity for all members of the public to speak, it is suggested that the Chair direct that the public testimony of each speaker will be limited to three (3) minutes.)* The Board may consult with the City Solicitor to discuss legal matters. If the applicant or member of the public must leave, they can contact the Planning Office at 736-7196 to learn of

the Board's decision. A formal notice of the decision will be mailed to the applicants. Approved variances expire after one year if the approved project has not commenced. All public notice for the items on this agenda was completed in accordance with code requirements and will be noted specifically with the item. The meeting agenda was posted on August 7, 2024, in accordance with Freedom of Information Act requirements.

NEW BUSINESS

Application V-24-04

Property at 1151 N. DuPont Highway. A Request has been made for a Variance from the requirements of *Zoning Ordinance*, Article 4 §4.15 associated with 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 property is zoned C-4 (Highway Commercial Zone) and subject to the SWPOZ (Source Water Protection Overlay Zone: Tier 3 – Excellent Recharge Area). The owner of record is Tung Ching Lin. Property Address: 1151 N. DuPont Highway, Dover DE. The Tax Parcel ID is ED-05-057.00-01-30.01-000.

Mrs. Melson-Williams stated that there is the Application Variance Request, a Report from Staff and a listing of Exhibits labeled A through F. The Legal Notice was published in the Daily State News, also previously known as the Delaware State News, on August 2, 2024, and the property owners within 200 feet of the subject site were notified by Letter sent by the Planning Office in accordance with the established procedures for the Public Notice on this Application

Mrs. Melson-Williams gave a brief overview of the Application V-24-04. Currently, there is a vacant restaurant on that site. Today, the request for a variance is related to *Zoning Ordinance*, Article 4 §4.15 regarding the future construction of a new restaurant building with drive-through and site improvements. The Report includes information, more specifically on the property and the adjacent properties. We find this along the Route 13 commercial corridor. The Report includes Code Citations from the C-4. The proposed use as a restaurant with a drive through are both uses permitted in the C-4 and the variance request is really related to the bulk standard for a side yard setback. The C-4 zone requires a side yard setback at 15 feet and they are seeking something other than that. The Source Water Protection Overlay Zone doesn't really affect the Variance Request that has been made. The Report continues giving a reminder to the Board that you are to look at the series of four items that make up the "exceptional practical difficulties test." The Report beginning on page 5 gives the applicant's responses to each of those four tests and the Staff response as well which in some cases is a little more detailed. Overall, the Staff is recommending approval of the variance for that side yard setback, feeling that the applicant has strived to demonstrate that exceptional practical difficulty in making the case. We have some notes regarding if you choose to approve the variance and what that may mean for the Applicant. This site in order to redevelop would be subject to other review processes beyond today's meeting. I will also reference the attachments which range from the actual Board of Adjustment application forms, several Zoning Exhibits for Application purposes provided by Staff, the applicant's written narrative, and then a Conceptual Site Plan that details their request as well as what's known as an ALTA title survey, which is a survey of the existing conditions on the property.

Chairman Sheth asked about the former Boston Market. Mrs. Melson-Williams responded by

stating that we'll hear a little more detail from the applicant. The Boston Market was developed a significant number of years ago, and with this project, they were looking to demolish that building and redevelop and reorganize the site by placing a building in a slightly different location with parking and drive-through. Under our current Code provisions for C-4, they're having to seek relief for a side yard setback.

Chairman Sheth said I understand that the Boston Market did not have a drive-through. Mrs. Melson-Williams replied, they had a minor one I believe on the north side of their building, but it did not include a canopy system similar to this.

Representative: Ms. Pamela Scott, Esquire, Saul Ewing LLP

Ms. Pamela Scott was sworn in by City Solicitor Mr. Rodriguez.

Presentation

Ms. Pamela Scott mentioned good morning to members of the Board. I'm here on behalf of the applicant Raising Cane's which is a fast-food restaurant relatively new to the Delaware area. I have with me as part of my team: my associate Mackenzie Peet, Esquire; also, David Kuklish, PE with the civil engineer for this project with Bohler Engineering; and Anna Weisel who's with the Raising Cane's project development team. If there are any additional questions beyond my presentation. They will be able to assist with that. For location purposes, here is the site along with Route 13. It's actually the parcel in the middle. As Mrs. Melson-Williams had indicated, the property along Route 13 in this area is zoned C-4 for commercial and our property is obviously within the C-4 Zone. Here are a few pictures of the existing Boston Market located on the property. There is a small drive-in window associated with the existing Boston Market that they never had any type of canopy over the area for people to come through the drive-through. There are a few more pictures of the existing site. Here's the picture of the surrounding uses; our site is designated with the red marker. To our immediate left is the Grotto's Pizza, to the right is the Chipotle and the Vitamin Shop, and then to the rear of us is the Dover Speedway along with the Bally's Dover Casino Resort. There are several other retail uses in the area. As Mrs. Melson-Williams mentioned, we are proposing a fast-food restaurant with a drive-through. This is an illustrative plan showing the basic layout of the proposed restaurant, the parking and circulation, and the proposed landscaping that will be added. As you can see from this photo on the right-hand side, the little area that sticks out is the canopy with the two drive-throughs (lanes). Basically, in terms of meeting the requirements of your Code, we meet or exceed all the requirements with respect to lot area, etc. As you can see in terms of the side yard setbacks, while the building that is proposed will exceed the requirement for 15 feet, the canopy itself over the drive-through will extend 8.5 feet into the side yard setback. There's another plan. This was what was submitted in connection with the Application showing our site and the adjoining two sites on either side of us. Here is a close up of our building with the proposed area of the canopy that is shown with the circle. That shows how it is extending into the side yard setback. This is a proposed elevation that shows what the building would look like if you were basically standing looking at the building itself. And as you can see, we're showing the canopy area and two-aisle drive-through. As Mrs. Melson-Williams indicated the Code does have several requirements that need to be met for purposes of seeking an Area Variance.

These standards were also qualified in what's known as the Kwik Check case, which is a several Delaware cases in terms of the standards for Area Variance. So just to repeat what those standards are, we are looking at the character of the area where the property is located. We're looking at these surrounding uses. We are looking at what the impact is of the Variance, if it is granted or what the impact is on neighboring properties and finally, we're looking at what the impact would be on the applicant if the Variance is not granted. Those are the four standards we review for the purposes of this Variance. In terms of the nature of the zone, we've already indicated that this is the Highway Commercial District (C-4) which permits the proposed use for the restaurant and drive through. This site is the site of the former Boston Market Restaurant which did have a small drive-through window area. The former site is closed and vacant due to bankruptcy; it has since closed all of its restaurants. Grotto's Pizza is located to the west of the site. Chipotle and Vitamin Shoppe are situated to the east of the site. Dover Speedway and Bally's Casino are located to the rear of the site. The site has frontage along Route 13 (DuPont Highway). In terms of the impact of the variance on the neighborhood properties, Raising Cane's is proposing to redevelop and revitalize this site. They would be taking down the existing building and replacing it with a 3,364 square feet building that would have two drive through aisles. We will be adding additional landscaping to the site as part of this project. We will be constructing the canopy over both drive aisles. We do not believe it will negatively impact the adjoining properties especially the most effective property to the east, which is the Chipotle and Vitamin Shoppe. Right next to that area basically is an open parking area, the building adjacent to that site is somewhat removed from the building.

We believe that the encroachment from this canopy is minimal and as such will not negatively impact the adjoining properties. In terms of the affect on the project if the variance was to be denied, while the canopy is identified as a structure it is not enclosed. It is an entirely open area. We are not able to reconstruct or reconfigure things on this site to avoid a Variance due to how the parking layout and the circulation works on this site. So, we don't really have any alternatives in terms of seeking a Variance for the canopy. As you were probably aware, canopies over drive isles have become basically requirements in the fast-food business. They protect customers and employees from the elements. They serve to enhance the customer experience, and we have found that basically this is what customers are expecting when it comes to a drive through facility. It is considered a normal and essential improvement for this type of a restaurant. If we were to remove the canopy from this project, it would significantly diminish the customer experience, jeopardize the financial viability of the project, and pose risks to the safety of both customers and employees. I would note that in the Staff Report, they have advised as well in reviewing the application that it recommends the needed requirement of seeking a variance for this particular application.

Chairman Sheth asked how many feet is the drive-through from the highway. Ms. Scott responded It is approximately 120 feet. We don't want any cars extending out into Route 13. I think the way the circulation pattern for the drive-through is set up on this site that will not happen. This concludes my presentation, and I will be happy to answer any questions.

Chairman Sheth asked what the restaurant was geared towards. Ms. Scott replied that Raising Cane's is basically known for their chicken fingers and that is what they offer in their restaurant. As I said, they are new to this area and recently opened the facility in Newark, Delaware. They've been one of the fastest expanding restaurants.

Chairman Sheth asked if there were any other questions?

Mr. Senato mentioned that he understands the variance, but looking at the aisle coming in he would presume that under the canopy there are two order taking or receiving areas. Ms. Scott replied correct.

Mr. Senato asked if one would be to the left and one would be closer to the road to the right. Ms. Scott replied yes.

Mr. Senato asked if anything was decreased then there would be a difficulty as far as keeping the customer driving in the drive-through.

Ms. Scott replied that it would certainly affect the efficiency of the drive through. Yes.

Mr. Senato asked the question about the canopy (south section) as he referred to a section of the material in his packet. He asked if the canopy was to the right.

Ms. Scott replied yes, correct. The canopy is on the right-hand side. I don't know how many people go to Chick-Fil-A but my experience is with Chick-Fil-A. In order to get people through the lines, they also have employees outside taking orders.

Mr. Senato asked if they would be operating similar to Chick-Fil-A. Ms. Scott replied yes.

Mr. Senato asked if there was a difference of 6.5 feet from the 15 feet. Ms. Scott replied yes.

Chairman Sheth opened the public hearing.

Chairman Sheth asked if there was anyone who would like to speak in favor of the project.

Mrs. Melson-Williams mentioned to Chairman Sheth that she needed to go to the folks that have joined online. Looking at the list, the folks that have joined us online this morning are all part of the project team. I'm going just identify them for the record, and none of them have indicated a need to speak. Those include Jena Cooper from Bohler Engineering; Melissa Brotschul, and I'm not sure what group she is with of the project team. But then there is also Spencer McNichols, who is, I believe part of the architecture group as well for this. So that is all that have joined us on the line. There are no members of the public wishing to speak in regard to your case this morning.

Chairman Sheth closed the public hearing after seeing no one else wishing to speak (online or in the meeting room).

Chairman Sheth asked if there was any correspondence. There was none.

Chairman Sheth asked if there were any other questions or comments from the Board members?

Mr. Senato moved to approve the requested variance for V-24-04 where the applicant is requesting a reduction of the side yard setback of 15 feet to 8.5 feet which is the difference of 6.5 feet. I believe that the applicant has proved exceptional difficulties in the fact that based on what the canopy is

used for. I believe it would be the best interest to have the motion approved. I would like to mention the fact that in motion that this would in no way set any kind of precedent for the future. That every type of the situation should be on a one-on-one basis. The Applicant has proved that this is a needed operation, and they approve it along with the Site Plan, photos, and the reasons provided by the Applicant at this meeting. The motion was seconded by Mr. Wagner unanimously carried 4-0.

Chairman Sheth asked if there were any other questions?

Chairman Sheth mentioned that in his absence Mr. Senato would chair the meeting.

Mr. Senato made a motion to adjourn the meeting. It was seconded by Mr. Swalm and unanimously carried 4-0.

The meeting was adjourned at 9:44 A.M.

Sincerely,
Maretta Savage-Purnell
Secretary