

**CITY OF DOVER BOARD OF ADJUSTMENT  
AGENDA  
Wednesday, June 20, 2018 at 9:00 AM**

**City Hall, Council Chambers  
15 Loockerman Plaza, Dover, Delaware**

ROLL CALL

APPROVAL OF AGENDA

APPROVAL OF MINUTES of April 18, 2018 Meeting

COMMUNICATIONS & REPORTS

1. Reminder: The next Board of Adjustment regular meeting is scheduled for July 18, 2018 at 9:00am in the City Council Chambers.

NEW BUSINESS

**Applicant #V-18-03**

500 West Loockerman Street. Robert Duncan has requested a variance from the requirements of the *Zoning Ordinance*, Article 3 §10.1 pertaining to permitted uses in the IO (Institutional and Office Zone). Specifically, the applicant seeks to continue the use of a part of the basement as an apartment for an in-residence caretaker. The site is located on the western end of Loockerman Street, west of Jerusalem Way, and north of North Street. It is 2.18 acres +/- in size and zoned IO (Institutional and Office Zone and subject to the H (Historic District Zone). Tax Parcel: ED-05-076.12-04-11.00-000. The owner of record is Robert Duncan.

ADJOURN

29 Del. C. § 10004(e)(2)

THE AGENDA ITEMS MAY NOT BE CONSIDERED IN SEQUENCE. THIS AGENDA IS SUBJECT TO CHANGE TO INCLUDE THE ADDITION OR THE DELETION OF ITEMS, INCLUDING EXECUTIVE SESSIONS.

**CITY OF DOVER**  
**BOARD OF ADJUSTMENT MINUTES**  
**April 18, 2018**

A Regular Meeting of the City of Dover Board of Adjustment was held on Wednesday, April 18, 2018 at 9:00 A.M. with Vice Chairman Ericson presiding. Members present were Vice Chairman Ericson, Mr. Keller, Mr. Hufnal and Mr. Senato. Chairman K.C. Sheth was absent.

Staff members present were Mrs. Purnell, Mr. Diaz, Mr. Swierczek, Mr. Hugg and City Solicitor Mr. Rodriguez.

**APPROVAL OF AGENDA**

*Mr. Hufnal moved to approve agenda as submitted. The motion was seconded by Mr. Keller and unanimously carried 4-0. Chairman Sheth was absent.*

**APPROVAL OF THE REGULAR BOARD OF ADJUSTMENT MEETING MINUTES OF JANUARY 17, 2018**

*Mr. Keller moved to approve the meeting minutes of January 17, 2018 with any necessary corrections. The motion was seconded by Mr. Senato and unanimously carried 4-0. Chairman Sheth was absent.*

**OPENING REMARKS CONCERNING APPLICATIONS**

Mr. Dave Hugg, Planning Director of Planning and Inspections stated that the meeting today will be conducted in accordance with the motion of the Agenda. There are two (2) applications on the agenda under New Business. This includes the Application originally scheduled for the March meeting of the Board which was canceled due to weather conditions. The Application file will be read, and the floor will be opened for questions of the applicant by the Board and for public testimony. If the Board needs to consult the City Solicitor, they will recess to discuss legal matters. If the applicant 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 new applications on this agenda was completed in accordance with Code requirements. The meeting agenda was posted in accordance with Freedom of Information Act requirements.

**NEW BUSINESS**

**Applicant #V-18-01.**

35 and 39 North New Street. Larlham Construction, LLC has requested two variances from the requirements of the *Zoning Ordinance*. The first request pertains to Article 4 §4.4 regarding the minimum lot area requirement. Specifically, the applicant seeks to permit a total lot size for Lot #2 of 1,650 SF, instead of the required minimum lot size of 1,800 SF. The second waiver request also pertains to Article 4 §4.4 regarding the minimum lot depth. The applicant is proposing that

all three lots have an average depth of 91.6 ft., instead of the required 100 ft. minimum lot depth. The site is located on the east side of North New Street, just south of Fulton Street. The site currently contains two parcels, with the parcel addressed as 35 North New Street being 0.14 acres +/- and the parcel addressed as 39 North New Street being 0.07 acres +/- . The two parcels combined are 0.21 acres +/- in size. Part of the proposal is to create three (3) new parcels on the site and reorient them to face north to Fulton Street. Subject property is zoned RG-3 (Group Housing Zone). Tax Parcels; ED-05-076.08-05-39.00-000 and ED-05-076.08-05-40.00-000. The owners of record are Larlham Construction, LLC.

Exhibits for the Record: Staff Report, zoning exhibit, and statement and plans submitted by the applicant. Legal Notice was re-published in the Delaware State News on April 8, 2018. The public was notified in accordance with regulations.

Mr. Diaz gave a summary presentation of the Variance Application Request.

*Vice Chairman Ericson questioned if there was any member present who had a conflict of interest and there was none.*

**Representative:** Mr. Nik Patel, Elliott Surveying.

Mr. Patel was sworn in by Mr. Rodriguez.

Mr. Patel testified the general purpose for the variance is mainly with the zoning. As it currently sits, they would like to maximize it with the townhouse proposal. They found after doing the calculations on the surveys that this configuration would be the easiest and simplest way to do it and minimize the number of variances that they needed to ask for. If they had left the townhouses facing New Street, the variances would increase whereas the lot further to the left would only be 84 feet deep. With the configuration here and with the parking coming around the alley into the back, they felt this was the most cost-effective way. He also believes visually it is a really good way to propose a townhouse to this area. When you look at the amount of area at 150 square foot less than the required and 8-feet short (for lot depth) of what the Codes require, they feel that no negative impact will come from granting the variance. With the existing homes already being typically row houses, the townhouses fit right into the existing look of the neighborhood. They do not feel that this proposal negatively impacts anything for the City of Dover and/or the neighboring properties. It is their hope that this request can be approved so that they can begin construction.

Mr. Keller questioned whether the ownership will be contemplated and retained under Larlham Construction LLC. Mr. Patel replied yes, he (Larlham Construction, LLC) will retain ownership once construction is complete. It will not be sold. He will be the landlord.

Mr. Keller questioned whether the townhouses would be rental units. Mr. Patel replied correct.

Mr. Hufnal commented if the parking was going to be used for all three (3) of the units as one space for each unit. Mr. Patel replied correct. They had originally proposed front driveways for each townhouse with one off-street. They spoke with the City of Dover who recommended and

requested that they try to make all the parking off-street space. There will be some needed easements to make sure the tenants have access. For the most part, the parking spaces will be hidden in the back and accessed by all three (3) units.

Mr. Hufnal questioned if it was facing New Street instead of Fulton Street then the restrictions would have been greater than what they are now. Mr. Patel replied correct, with the depth of the lot and with the square footage.

Mr. Keller questioned the parking lot to be contemplated for the three (3) townhouse lots to be sold. We would have given attention to cross easements for the various parking and lot to lot. Mr. Patel replied that they probably still will because the City of Dover asked that he look into it just in case for future sale. Two units will have to cross what he proposes as Lot #1. They will still want some sort of access easement, so everything is on the record moving forward.

Mr. Keller commented that Lot #3 would need some type of easement across Lot 1 and 2 for parking or traveling to the back yard and a similar circumstance for Lot 2 allowing Lot 3 across. He would presume these would be drawn into rental agreements. Mr. Patel replied correct, as some of the real estate items there will be no fences that will be allowed to block tenants to be able to cross. He will make sure that all this noted and on record as they move forward.

Mr. Keller questioned if the application has yet to go before the Planning Commission for Site Development Plan approval? Mr. Diaz replied correct.

*Vice Chairman Ericson opened the public hearing.*

*Vice Chairman Ericson closed the public hearing after seeing no one wishing to speak.*

*Vice Chairman Ericson questioned if there was any additional correspondence for the record. There was none. Mr. Diaz noted that the Legal Notice for this application was re-published in the Delaware State News on April 8, 2018. The public was notified in accordance with the regulations.*

*Mr. Senato moved to approve variance application V-18-01 that is in keeping with the nature and allowable usage in the RG-3 zone. It would also be improvement to this neighborhood and character.*

*Mr. Hufnal added an amendment to the motion to clarify that there were two variances that needed to be dealt with: Variance number one for Lot #2 to allow a decrease in the minimum allowable lot size from 1,800 S.F. to 1,650 S.F. or a difference of a 150 S.F. and the second Variance that all three (3) Lots minimum lot depth decrease from 100 feet to an average of 91.6 feet. Mr. Senato seconded the amendment.*

*Vice Chairman Ericson moved that all in favor of the motion signal by saying I. All in favor and unanimously carried 4-0. Chairman Sheth was absent.*

**Applicant #V-18-02**

59 Park Drive. Robert A. Payne and E. Jane Warren have requested a variance from the requirements of the *Zoning Ordinance*. The request pertains to Article 5 §11.21 regarding the requirement to maintain natural open space in a flood hazard area. Specifically, the applicant seeks to permit construction of a sidewalk from a planned new house located outside the flood hazard area, through the flood hazard area, to Greenhill Road. The site is located on the east side of Park Drive, just north of Greenhill Road. The site contains one parcel addressed as 59 Park Drive and is 0.78 +/- acres. Subject property is zoned R-10 (One Family Residence Zone). Tax Parcel: ED-05-077.06-01-14.00-000. The owners of record are Robert A. Payne and E. Jane Warren.

Exhibits for the Record: Staff Report, Zoning Exhibit, and statements and plans submitted by the applicant. Legal Notice was published in the Delaware State News on April 8, 2018. The public was notified in accordance with regulations.

Mr. Diaz gave a summary presentation of the Variance Application Request.

*Vice Chairman Ericson questioned if there was any member present who had a conflict of interest and there was none.*

Vice Chairman Ericson noted that Mr. Diaz stated that the Board might consider a motion to allow the applicant to build a sidewalk that reaches to Park Drive instead of from the porch to Greenhill Road. He conferred with Mr. Rodriguez that since this is not a part of the application and the Public Notice has already gone out and the Board cannot change it to include it. However, if the applicant would like to change the direction of the sidewalk they would have to come back before the Board of Adjustment.

**Representative:** Mr. Robert A. Payne and Mrs. E. Jane Warren, Owners.

Mr. Robert A. Payne and Mrs. E. Jane Warren were sworn in by Mr. Rodriguez.

Mr. Payne testified that Mr. Diaz's introduction pretty much covers what they would like to do. There has never been a house on this lot and they would like to build a house there soon. They understood the issue with the flood zone and they are trying to work around it. They received a LOMA (Letter of Map Amendment) from FEMA. They would like to put a sidewalk from the front porch out to Greenhill Road, so people can walk in and out of their house without too much trouble. This would also minimize the amount of impervious material if they go through part of flood plain instead of going all the way to the back of the house; then they would not need a variance.

Mrs. Warren mentioned that Mr. Diaz and Mrs. Melson-Williams have been incredibly helpful. They bought the Lot two years ago and have been in the planning stages because they have had difficulty getting the plans drawn. We are almost done. Mrs. Melson-Williams has been helping along the way. Therefore, they did the LOMA to push it back further (the flood plain). They called the office to find out if they could get a sidewalk. When they asked if they could get a sidewalk, they were told they needed a variance. Mr. Diaz has been incredibly helpful walking them through

the process. Their designer suggested they go for a variance and guided them. They do not think that it is unreasonable. They are trying to do it to Greenhill because it is a flatter surface and they wanted to be practical about it. The house is going to face Park Drive as they take advantage of the “mud pond” as she calls it. They wanted guests to be able to come in without having to take a long set of steps (which no one would probably ever use). That is their reason for going towards Greenhill Road because it is practical, and it would have less impact on the environment. They do have a Site Plan and they are at the point where they are almost ready to submit to the City of Dover. They met with their designer yesterday and they are only in town for this hearing. They currently live in Texas, but Ms. Warren is from Delaware and a native of Kent County. As a child she and her mother drove the street and she thought that it was one of the prettiest streets in Dover. Her mother passed four (4) years ago and during the time she was settling the estate and they were looking to come back to Dover, they happened to drive down the street and saw that lot for sale, they then made an offer within a week. It is really a dream come true to build a house on that lot.

Mr. Keller questioned how close the applicant was to coming to the point of where they would be seeing the initiating of construction since granting of a Variance starts a one-year period. Mrs. Warren replied that it was a great question. They are doing everything they can to get there. It has been difficult to do it at a distance. Oak Construction in Lewes is drawing the plans. They will not be doing the building, because they do not build in Kent County. The plans are about to go to the Engineer for structural and then bids afterwards. They are hoping to start building if they receive approval from the City regarding the permitting process. They hope the process is as easy as it was working with Mr. Diaz and Mrs. Melson-Williams. They would hope to build in the summer and not in the winter.

Mrs. Warren questioned if they started on the project and if the sidewalk was not complete would they be able to get an extension. Mr. Keller asked Mr. Hugg if he could help with what would trigger the commencement date on activation of the Variance, and if it would be approval of Site Plans and/or Permitting. Mr. Hugg deferred the question to Mr. Diaz but noted that you will find the building folks as friendly and helpful as you found the rest of his staff. He appreciates the comments and thanked Mrs. Warren. Mr. Diaz replied the City would consider the action on the variance within a year and would consider that to be the submission of an application for building construction through the Building Permit process.

Mr. Keller stated that he wanted to clarify that the applicant did not have to complete the construction within the one-year period, but you do have to commence the activity, which ultimately is going to bring about the construction placement of the home.

Mrs. Warren questioned whether they would need to have the sidewalk placed within the exact year. Mr. Hugg replied no, if you come in and start the Building Permit process they consider the action begun. If you abandoned the Building Permit at some point, then if the year has elapsed then you would lose the variance. If the Building Permit is active and for example it is three (3) years before you get to the point that the final sidewalk is installed, that would not be a problem.

*Vice Chairman Ericson questioned if there was any member present who had a conflict of interest and there was none.*

Mrs. Warren thanked them for the clarification.

Mr. Senato questioned if this was the Lot across from the Fireman's Memorial and if it was in the flood plain because he was not aware it was. Mr. Hugg replied the flood plain is very wide in that area. It comes almost up to the patio of the Frazier's Restaurant on the one side and includes pretty much the beginning of the bank. All the lots kind of have a slope and at the bottom of that slope they are in the flood plain.

Mr. Senato stated that he was aware that the Frazier's Restaurant had flooding a few years ago. He was not aware it went up that high.

Mr. Hugg also noted as a point of reference that was also mentioned by the applicant that most of the properties along Park Drive and several of them on Greenhill Road do have sidewalks or staircase sidewalks that come down the slope and are in the flood plain. This is kind of the pattern in that neighborhood.

Mr. Senato noted if the sidewalk was in a different area (rear) you would not have a problem, but because of the tranquility and the beauty of the front porch they want a walkway that puts it into a flood plain. He mentioned that he understood.

Mr. Keller commented that he appreciated the photographs submitted because one in particular on Exhibit F illustrates to him the addition of the applicant's sidewalk from the proposed home to Greenhill Road. He would not think it would be any more detrimental to that flood plain area than the existing sidewalk built by City of Dover and/or DelDOT at some point in time and all of which is a substantial portion of which lies within that flood zone area. He also appreciates the extent of the applicant working with FEMA and the certification by them in a letter of additional information which reads in part "FEMA has determined that the property is not subject to inundation by the flood having a 1-percent chance of being equaled or exceeded in any given year for a base flood. This does not mean the property is not subject to other flood hazards." However, it is not contemplated to ever be inundated. He noticed through the years any number of floods in that area, but he does not believe that he has ever seen one which went to the extent of the upslope of Greenhill Avenue and/or ever got to the top of that rising elevation that Mr. Hugg points out. That area in his estimation is truly beautiful and this vacant Lot has longed for a home of some sort as long as he can remember.

Mrs. Warren thanked Mr. Keller for the comments. She stated that even their Becker Morgan Surveyor said it was not in the flood plain; it's up a 10-foot hill. As a native Delawarean she was thinking she had been gone a long time, but she could not imagine it. She currently lives in the City of Houston, so they understand flooding. They are incredibly cognizant of not disturbing and they even looked into whether or not they needed flood vents. They were told that they did not need flood vents by Mike Purnell at Oak Construction who is very familiar with the entire flood issue. Mrs. Warren and Mr. Payne are very cognizant of flooding having gone through the inches of rain in Houston.

*Vice Chairman Ericson opened the public hearing.*

Mr. Rick Givens was sworn in by Mr. Rodriguez.

Mr. Givens testified that he is an adjacent property owner and he was present to support the variance. As he looked through the materials that were prepared by Bob and Janie, he particularly, while it may not be germane to this hearing he is appreciative of the fact that they are going to retain the trees on the property. Directly across from where they are proposing to put the sidewalk on the Greenhill Road (he lives at 424 Greenhill Road) there is already one in existence. It will certainly be in keeping with what is already there.

*Vice Chairman Ericson closed the public hearing after seeing no one wishing to speak.*

*Vice Chairman Ericson questioned if there was any additional correspondence for the record. There was none.*

*Mr. Keller moved to approve variance application V-18-02 which will allow the construction of a sidewalk from a planned new house located outside the flood plain hazard area through the flood plain hazard area to Greenhill Road. As submitted with the City's Report and Recommendation, it is found in his estimation that the proposed use is in keeping with the nature of the zone and residential character of the surrounding area. There is not any anticipated negative impact to surrounding properties, nor is the sidewalk expected "as sited within the report" to exacerbate flooding in the area due to the proposed design minimizing the amount of pavement added to the rather extensive existing sidewalk in that area. Mr. Keller concluded with recommendation for approval. The motion was seconded by Mr. Hufnal. Motion carries 4-0. Chairman Sheth was absent.*

Meeting adjourned at 9:44 A.M.

Sincerely,

Maretta Savage-Purnell  
Secretary





City of Dover

Board of Adjustment

June 20, 2018

V-18-03

Location: 500 West Loockerman Street

Applicant: Robert Duncan

Owner: Duncan Center, LLC c/o Robert Duncan

Tax Parcel: ED-05-076.12-04-11.00-000

Application Date: May 16, 2018

Present Zoning: IO (Institutional and Office Zone)  
H (Historic District)  
SWPOZ-3 (Source Water Protection Overlay Zone – Tier 3:  
Excellent Recharge Area)

Present Use: Office Building

Proposed Use: Office building including Caretaker's residence

Reviewed By: Eddie Diaz, Planner I

Variance Type: Use Variance

Variance Requested: Retroactively permit use of part of the basement as an apartment for an in-residence caretaker.

### **Project Description**

The applicant is requesting a variance from *Zoning Ordinance* Article 3, Section 10.1 – Institutional and Office Zone (IO), to allow continued use of a basement suite in the Duncan Center as a residence for a caretaker. The IO Zone does not permit this type of residential use. According to the property owner, the caretaker has used the space continuously for an unspecified number of years, though not longer than the 14 years that have passed since the Duncan Center opened in 2004. This application is to permit the use as an apartment under the zoning; other work may be required to ensure the apartment meets Building Code standards and is able to receive a Certificate of Occupancy appropriate to the use.

## Adjacent Land Uses

The 2.18-acre property is at the west end of Loockerman Street. It contains a 5-story building with office and public occupancy uses in its northeast corner and a parking lot in the rest of the space. To the northwest of the property is the Old Train Station, on lands owned by the State of Delaware zoned IO. Across Jerusalem Way to the east are a vacant lot and three parcels belonging to the New Jerusalem Baptist Church, zoned C-2 (Central Commercial Zone). Across North Street to the south is the soon-to-be-former campus of Chesapeake Utilities, zoned C-3 (Service Commercial Zone). Finally, across the railroad tracks to the west is a daycare center known as Kidz Inc, zoned IO. A map of the property and adjacent zones is given in Exhibit A.

## Code Citations

The list of permitted uses in the IO Zone is given in *Zoning Ordinance* Article 3 Section 10.1:

10.1 *Uses permitted.* In an institutional and office zone (IO), 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) Business, professional, or governmental offices.
- (b) Banks.
- (c) Research, design, and development laboratories.
- (d) Public and institutional uses including hospitals, medical clinics, libraries, police stations, courthouses, transit centers, schools, colleges, universities, places of public assembly, philanthropic and charitable institutions, parks, playgrounds, public indoor recreation centers, athletic fields.
- (e) Public utility rights-of-way and structures necessary to serve areas within the city.
- (f) Child day care centers, provided they are established in accordance with all applicable state regulations pertaining to child care and provided that they are established and maintained in accordance with article 5, section 14 of this ordinance.
- (g) Emergency shelters and transitional housing.
- (h) Adult day care facilities provided they are established in accordance with all applicable state regulations pertaining to adult care and provided that they are established and maintained in accordance with article 5, section 22 of this ordinance.

Transitional housing<sup>1</sup> is the only residential use permitted in the IO Zone. Currently, no zones specifically list “resident caretaker” or similar as a permitted use. Before Ordinance #2014-08 was adopted in 2014, some of the City’s commercial zones did list “living quarters for the use of the owner or caretaker” as a permitted use. However, this was removed in favor of allowing a broader range of residential uses in commercial zones, with the intention of encouraging mixed-use development (in the C-1, C-1A, C-2, and C-2A zones particularly). A caretaker’s residence could be developed in any of these commercial zones under the current code using the mixed-use provisions. However, a caretaker’s residence was never permitted in the IO- Institutional and Office Zone, either before or after the 2014 ordinance update.

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<sup>1</sup> Transitional housing is defined in the *Zoning Ordinance*, Article 12, as “a residential facility developed in a one-family dwelling unit that is established to provide transition from homelessness to permanent housing, and generally integrated with other social services and counseling programs to assist in the transition to self-sufficiency through acquisition of stable income and permanent housing.”

Prior to the development of the Duncan Center, the property consisted of several parcels, some zoned C-3. Though a caretaker's residence may have been permitted in the C-3 zone back in 2004, the property was completely rezoned to IO before construction of the Duncan Center building began.

The majority of residential uses permitted in the City, including caretaker's residences, must meet zoning criteria showing they contain one or more "dwelling units." According to *Zoning Ordinance* Article 12, a dwelling unit is defined as follows:

*Dwelling unit:* a building or entirely self-contained portion thereof containing complete housekeeping facilities for only one family, including any domestic servants employed on the premises, and having no enclosed space (other than vestibules, entrance or other hallways or porches) or cooking or sanitary facilities in common with any other dwelling unit. A boarding[house] or roominghouse, convalescent home, dormitory, fraternity or sorority house, hotel, inn, lodging, nursing, or other similar home, travel trailer, recreational vehicle, or other similar structures or vehicles shall not be deemed to constitute a dwelling unit.

The existing caretaker's residence in question in the variance application may meet the definition of a "dwelling unit." If it does not, it will have to be upgraded to one following a successful variance application.

### **Background for Applicant's Request**

According to the applicant, the basement suite received a Certificate of Occupancy (C/O) for use as a Crew Station for Norfolk Southern shortly after the Duncan Center opened in 2004. Though this would have been classified as an office use, because the office workers were away-from-home railway workers, more extensive accommodations were installed at the time than would be typical for an office or a break room. The City no longer has the permit document or a C/O document specific to the fitout of the Crew Station<sup>2</sup>, so the exact extent of the accommodations installed is unclear, but according to applicant testimony (Exhibit C) and a plan provided by the applicant (Exhibit B) the accommodations may have included two cots, a full bathroom with shower, lockers, a full or partial kitchen including a fridge, and a living area. The suite was not considered an apartment at the time because it was not a permanent residence for the railway crew who would occasionally sleep there.

An unknown number of years after the opening of the Center, Norfolk Southern moved out, and the current caretaker moved in, without any known alterations to the space. No permit application was filed to convert the office suite into an apartment, and no new C/O was issued for it as an apartment. Contrary to what the applicant appears to claim in their testimony, the old C/O for the office suite cannot serve as a C/O for an apartment unit. Though the office suite has many features in common with an apartment unit, there may be additional items required by the Building Code to achieve a full conversion.

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<sup>2</sup> City records indicate that permit #05-1865 was issued on May 17, 2006 for commercial renovations to the basement. The plans submitted with this permit application are no longer available. A Certificate of Occupancy associated with this permit was applied for on May 16, 2006. The C/O document itself is no longer available. The City has access to other permits and C/O documents for the building shell and select tenant fit-outs.

The office suite's unpermitted use as an apartment was discovered by the City Fire Marshal during an inspection, following a complaint from one of the building tenants. Though the space has been used as an apartment for several years, it must now receive a Certificate of Occupancy for an apartment unit to allow the use to continue. Before a C/O is issued, the City's building inspectors will need to verify that all Building Code requirements for an apartment unit are met. In addition, the apartment use will need to be a permitted dwelling unit under the zoning. Because the IO Zone does not allow this type of residential unit, the only way it can be permitted is through a use variance.

### **Review Standard for a Use Variance**

The *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 done.
- 2.12 *Use Variance*. A variance shall be considered a use variance if it would permit a use of the subject property that would otherwise not be permitted on the subject property. In considering a request for a use variance, the board shall determine that the following criteria exist and document them in their findings of fact:
  - (a) That there are physical conditions applying to the land or building for which the variance is sought, which conditions are peculiar to such land or building, and have not resulted from any act of the applicant or any predecessor in title; and
  - (b) That the aforesaid circumstances or conditions are such that the strict application of the provisions of this ordinance would deprive the applicant of all reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building, and that the variance as granted by the board is the minimum variance that will accomplish this purpose; and
  - (c) That the granting of the variance under such conditions as the board may deem necessary or desirable to apply thereto will be in harmony with the general purpose and intent of this ordinance, will not represent a radical departure therefrom, will not be injurious to the neighborhood, will not change the character thereof and will not be otherwise detrimental to the public welfare.

### **Review of Application**

As a part of the application, the applicant was asked to state how the requested variance relates to the above three criteria. The applicant did not respond individually to the three criteria; rather, they wrote one narrative which is given in Exhibit C. In the applicant responses below, Staff has divided the narrative into three sections relevant to each of the three criteria.

1. That there are physical conditions applying to the land or building for which the variance is sought, which conditions are peculiar to such land or building, and have not resulted from any act of the applicant or any predecessor in title.

#### **Applicant Response:**

"In mid-2004, the Duncan center opened. Shortly thereafter, the Norfolk Southern Railroad asked if the Duncan Center could build them a crew station in the basement. To

their specifications, the crew station included a full bathroom with shower, lockers, full kitchen including a standard refrigerator with ice making capability, a living area with sofas and an office for their communications and electronics. Jackson Architects created the schematic, and it was supplied to the City of Dover. A certificate of occupancy was obtained by the Duncan Center for the space. Norfolk Southern had occupied the space for many years. Norfolk Southern left for lack of business. The space was used as an apartment ever since.”

**Staff Response:**

The physical condition applying to the building is the current design of the office suite. It is somewhat peculiar because the accommodations installed make long-term habitation possible, even if that was not the original intent. As previously stated, just because habitation is possible does not mean all regulations to allow an apartment dwelling unit are met.

The history the applicant gives makes clear that the peculiar physical condition did result from a previous act of the applicant. Though the suite was designed to Norfolk Southern’s specifications, the owner of the building accepted them as a tenant and allowed the current caretaker to move in when they moved out.

2. That the aforesaid circumstances or conditions are such that the strict application of the provisions of this ordinance would deprive the applicant of all reasonable use of such land or building and the granting of the variance is necessary for the reasonable use of the land or building, and that the variance as granted by the board is the minimum variance that will accomplish this purpose.

**Applicant Response:**

“In April of 2018, Ronald Coburn of code enforcement for the City of Dover, put Bob Duncan on notice that Raymond Williams, the main custodian for the Duncan Center for the past 14 years, would be required to vacate because of a zoning issue. The current IO zoning does not allow for the existing apartment. The Duncan Center was granted a Certificate of Occupancy for the apartment this entire time, and it has never been an issue. Ronald Coburn informed Bob Duncan that he would have to make an application for this variance before May 21, 2018, or immediate discontinuation of the use of this residential space.

By Raymond Williams’ living in this apartment, the building has 24 hour monitoring which is necessary for a building of this size within the BID District. Raymond has alerted Bob Duncan and corrected unlocked doors, mechanical issues, and many other concerns needing attention during off duty hours. His presence has greatly helped maintain a secure building. The apartment is a vital asset to the Duncan Center, and if the variance is not granted, the space becomes a liability with an apartment that can never be rented. It has no adverse effect on anyone at any time.”

**Staff Response:**

If the applicant were ordered to cease using the unit as an apartment, he would not be deprived of all reasonable use of the land, because there are many other offices existing within the building that are permitted under the zoning. Staff is skeptical of the applicant's contention that if the current use were to cease, the suite could never be rented out in the future. Even if a new office use did not want to move in, the space could still be used for some other purpose applicable to the building as a whole, such as storage.

If the variance were not granted, the owner and the building tenants would be inconvenienced due to the lack of a 24-hour caretaker presence ready to resolve any security and maintenance issues that arise. However, a variance is not necessary to find a solution to these issues. The owner of the building could for instance hire more caretakers or security staff to work in shifts, so there is always someone on site. The unit in its current state could be used as a breakroom, so long as it is not anyone's permanent residence.

3. That the granting of the variance under such conditions as the board may deem necessary or desirable to apply thereto will be in harmony with the general purpose and intent of this ordinance, will not represent a radical departure therefrom, will not be injurious to the neighborhood, will not change the character thereof and will not be otherwise detrimental to the public welfare.

**Applicant Response:**

"The Duncan Center is one of Dover's largest buildings, and Bob Duncan took a huge risk investing in the area. Many argue the Duncan Center has changed the West Side of Dover. The building has been a crucial pillar in the development of downtown. This apartment has been occupied since nearly 2004, and there has never been an issue. If the variance is not granted, a hardship will be felt by both Bob Duncan and Raymond Williams. However, by granting, no hardship will exit [sic]."

**Staff Response:**

Allowing residential uses to collocate with some other uses such as offices and shops is in harmony with the intent of the *Zoning Ordinance*. Though the Duncan Center is not in a commercial zone, it is in the downtown commercial area, where many other buildings have both residential and commercial uses within them. While some allowable uses in the IO Zone may mix poorly with residential uses, offices are not among them, so the requested variance is not a radical departure from the Ordinance in this case.

Since the caretaker has lived in the space for many years already, permitting him to continue living there will not change the character of the neighborhood. Because safety is frequently an issue in this area of the City, forcing him to leave may in fact be injurious to the neighborhood and the public welfare at least in the short term. The security provided by a 24-hour on-site caretaker is invaluable, especially if by watching over the building he also watches over the building's immediate surroundings in the neighborhood. Though in time a team of caretakers working in shifts could substitute, they may not have the investment in the building or the neighborhood that a resident caretaker would.

**Variance Recommendation:**

Staff notes that the standard for a use variance is different and more stringent than the standard for an area variance, as it must be shown that the provisions of the ordinance would deprive the applicant of all reasonable use of the land. Additionally, the variance granted must be the minimum variance that would accomplish the applicant's purposes. Though the requested variance may be in harmony with the general intent of the *Zoning Ordinance*, these more stringent criteria are not met. Planning Staff must therefore recommend denial of the variance.

- The current state of the basement suite as a residential use is due to the applicant's prior actions.
- The applicant is not deprived of all use of the land, because there are many legal office units and a place of public assembly within the building.

**Advisory Comments to the Applicant**

- If the variance request is successful, appropriate permits and licenses to establish the use will be required, in compliance with the provisions of the variance, the dwelling unit requirements of the Zoning Ordinance, and all applicable sections of the Building Code and Fire Code.
- A Rental Dwelling License will be required for the apartment unit if approved.
- Any future improvements to the property are subject to Site Development Plan approval processes and appropriate permits from the City of Dover Department of Planning & Inspections and other agencies.

## GUIDE TO ATTACHMENTS

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Exhibit	Description/Author	# Pages
A	Zoning Exhibit Map (Staff)	1
B	Plan of Office Suite (Applicant)	1
C	Applicant Responses (Applicant)	2