

TOWN OF DOVER ZONING BOARD OF APPEALS SPECIAL MEETING HELD ON TUESDAY, JANUARY 22, 2008, AT 7:30 PM AT THE DOVER TOWN HALL:

PRESENT: Chair Marilyn VanMillon
Member George Wittman
Member Anthony Fusco
Member Rosalind Cimino

Also in attendance was Secretary to the Board, Maria O’Leary, and attorney, George Rodenhausen of Rapport, Meyers.

Chair VanMillon called the meeting to order at 7:35 pm and began with the Pledge of Allegiance.

CONTINUED PUBLIC HEARING: James Dwy – Z 2007-05 – The applicant seeks an interpretation of the definition of Municipal uses found in the Zoning Law of the Town of Dover Use Table and an appeal seeking a reversal/modification of the decision of the Town of Dover Code Enforcement Officer (CEO) dated May 22, 2007. The applicant requests that the Zoning Board of Appeals interpret the Use Table, and more specifically Community Use and Municipal Use and thereby determine that the use of Mr. Dwy’s property as a United States Post Office was not a “municipal” use as was determined by the CEO, but that in fact the Post Office use was a retail business, a service business, or both. This property is located on Pleasant Ridge Road (CR 21) in the HM District, Grid #7060-04-886098.

In attendance were the applicant, Mr. James Dwy, and his attorney, Mr. Lewis Stadler.

Chair VanMillon read the public hearing as it appeared in the Poughkeepsie Journal.

Chair VanMillon: The public notice that was read appeared in the Poughkeepsie Journal on January 16, 2008. Mr. Dwy has given us a letter; she further continued to read the letter and asked if there were any comments.

Mr. Stadler: When we were here previously, we submitted a letter of submission based upon the opinion of the Town’s Planner, which was given to the Board, and a copy to myself, dated October 27. What we can do is go over the items in the submission. Mr. Dwy is here after submitting an application to the Zoning Board as indicated in the public notice; he has been the owner of the old Wingdale post office for many years. The post office left and caused an issue as to what can be used on the property.

Originally, Mr. Dwy’s application seeking an interpretation of the definition of municipal uses caused the fact that after we requested an opinion from the Code Enforcement Officer he made a determination that the Post Office use of Mr. Dwy’s property was a municipal use as listed in the table of uses under the Dover Zoning Law. We took the position that he was incorrect in making that determination so we also submitted an

application to reverse or modify that decision of the CEO, and the CEO's decision was made on May 26, 2007.

The applicant further requested that the Board make the determination that the prior use of Mr. Dwy's property as a Post Office was not a municipal use but that it was, in fact, a retail business, a service business, or both. Once we submitted the documents to the Board, it is our understanding that the Board requested an opinion from the Town's Planner regarding what he felt that the prior use as a Post Office was on Mr. Dwy's property. We did get a copy of a short letter from the Town Planner dated October 22 whereby it appeared that the Town Planner agreed with the applicant's position that the former post office use of the property was not a municipal use; however, he also took the position that the Post Office use was not a retail or service business. As indicated, we disagree with his position in that respect.

Just to give the Board some additional facts on the property we have listed in our submission, basically, Mr. Dwy has been the owner of the property that the Wingdale Post Office operated out of subject property for approximately 50 years until it moved to a new location on Route 22. In about the year 2002, Mr. Dwy sold the property to another individual who attempted to get some permits from the town, but because he was unable to obtain the permits, he was unable to pay the mortgage that was held by Mr. Dwy, so Mr. Dwy had to take the property back. Once he took the property back, he again attempted to comply with the request of the Building Department to do whatever they said he had to do to be able to use the building again. When he took the property back, it was in a damaged condition, and he hired a contractor to repair the damage and to protect the property from possible theft of the tools that were left in the building. He did some work on the property in terms of making sure it was water tight, and so forth. I guess he rebuilt the walls to the same condition as they were prior to the work that was done. As a result of doing the work, he was issued a Stop Work Order by the Code Enforcement Officer, so he immediately contacted the Code Enforcement Officer to ask what he had to do in order to get the permits to again use the property; and this goes on for a number of issues here as to what happened after that.

Initially, I'm told that the Code Enforcement Officer told Mr. Dwy that he needed a site plan, a floor plan, and he provided those to the CEO. Once he provided those items, he told him that he would have to go to the Planning Board, before he can get permits to again use the property and then get a permit from the Building Department. He also had to submit a plot plan, a floor plan and a survey map, and subsequently Mr. Dwy filed the appropriate forms and paid the fees and was asked to be put on the Planning Board Agenda, this was back in January 2004. He was then told that he couldn't go to the Planning Board because the CEO notified the Planning Board that there were violations on the property and they had to be cleared up first. He was then instructed to see the CEO and an appointment was set up, according to Mr. Dwy, to meet the CEO at the property, but the CEO didn't show up at the scheduled time and place, nor did he call and tell him that he wasn't going to be there. When Mr. Dwy asked why he hadn't showed up, Mr. Dwy was simply told that he had to get a qualified structural engineer to sign off that the building meets building codes. Mr. Dwy asked at that point what else

was needed to move this thing along and obtain the permit, and he was told he needed a structural engineer and an electrical engineer and a flood elevation certificate and Board of Health approval. The only items that were requested were provided, other than the Board of Health approval, but for that, he retained the services of Frank Fowler, a licensed professional engineer, who had a number of conversations with the Dutchess County Health Department both in their office on numerous occasions and also at the site.

They went to the site with the representative of the Health Department, various tests were taken, and the results of communication from the Building Department was that Mr. Dwy had to tear some of the sheetrock walls out that they put up to allow the inspector to look behind the walls; and then another appointment was made for the engineer and the CEO to meet at the premises to determine what, if anything else, was required. At that point, Mr. Dwy was told that some of the siding that had been put on the building had to be taken off so to allow the Building Inspector to get a clear look at the roof rafters which hadn't been disturbed, except for the side that Mr. Dwy put the siding on. After he contacted the Building Department to ask if any comments were needed, he put the siding on and was told no.

The engineer drafted a letter and indicated to the CEO to go over the work that had been done and another attempt was made to get on the Planning Board Agenda to do whatever had to be done in order to realize the use of the property. I guess certain situations happened at that point where the CEO told the Planning Board that he hadn't received the letter from the engineer, even though it had been provided, so again, Mr. Dwy could not get on the Planning Board Agenda. Subsequently, through a number of communications, Mr. Dwy was again informed that he could not get on the Planning Board Agenda for site plan approval due to the fact that it is the position of the Board and the CEO that the property needed to get Board of Health approval before he can obtain site plan approval.

There were various letters back and forth between the engineer hired by Mr. Dwy, the Health Department, and to the Town Attorney asking what could be done to move this thing along. Simply, the answer he got was you can't do anything unless you get Board of Health approval. The basic fact is, as indicated by the letter submitted by Frank Fowler attached to the submission, this property cannot, in any way, meet current Board of Health regulations because it is just simply too small; it has a system on there that worked properly for 50 years but the problem that Mr. Dwy has is that he was told that he can't get site plan approval because it's a change of use and, therefore, he needs Board of Health approval. The fact that the septic system never failed after 50 years of occupancy, when the building was a Post Office there were two bathrooms in the place and there were seven employees using them. There has been no structural size or shape change to the building, and now I'm told that there is only one bathroom on the premises, so obviously, there is lesser usage of water. Again, we were made aware that the Town Planner's position relative to our position is that the use of the property as a Post Office was a combination of a retail business and service business but then he had said that the Post Office didn't fall within either of those categories, but that he has

taken the position that Section 145-10 B. indicates that this is a type of use, the Post Office, is a type of use that is unlisted, and therefore, somebody who was proposing that type of use would have to go to the Town Board.

We feel that the type of service, the merchandise that is provided by the Post Office, clearly falls into the definitions of retail business or service business found in the Town of Dover Zoning Law Section 145-74, the definition section. We submitted those with the prior submission, but just to go over it, a retail business is defined as, “An establishment selling goods to the general public for personal and household consumption, including but not limited to an appliance store, bakery, delicatessen, drugstore, florist, grocer, hardware store, liquor store, newsstand, shoe store, stationery store, convenience store, and variety store.” The fact is, when you read this definition, it certainly curtails more uses than that are specifically listed here, because you have specifically the words, “including but not limited to.” The Post Office clearly sells things to the public for personal use, meaning boxes, packaging material, stamps, envelopes and other things like that.

The definition of a service business is defined in Section 145-74 as, “A business or nonprofit organization that provides services to the public, either on or off the premises, including but not limited to building, electrical, plumbing, and landscape contracting, arts instruction or studio, automobile service station, business and educational services, catering, health club, house cleaning services, locksmith, photocopying, repair and restoration services, tailoring, typing, and word processing. “Service business” does not include retail business, restaurants, warehouses, or other uses separately listed in the Use Table. A convenience store that sells gasoline and auto supplies but does not repair or services vehicles shall be considered a retail business.” Again, the Post Office performs a service to the public in the way of delivering packages, letters and so forth, sells money orders, things of that nature, so we have felt right from the beginning that the prior Post Office business at the property was a retail business or service business.

Again, we feel the Town Planner’s position where he relies on Section 145-10 B., we feel that is incorrect. We believe that a business use, a retail business or service business are clearly what the Post Office was and is permitted in the HM zone. For further example, if you look through the current Town Zoning Code, you will find different use categories, and then under the business uses, you find retail businesses not listed elsewhere, or services businesses not listed elsewhere. There are many businesses that are not listed elsewhere in this use table and there is no indication from the Planner that those types of businesses would have to go to the Town Board to get a Special Permit.

The things I’m talking about, just a couple of examples, there’s no listing specifically under business uses for a bank. It’s also not listed in the definition of a service business, but if you follow the logic of the Town’s planner, a bank business would have to go before the Town Board, the same thing like a UPS store or some type of delivery store, those things are not listed under service business in the Code, or even a retail business, let’s say a necklace supply business, it’s not listed anywhere in the Use Table

in the Town of Dover, it is simply a retail business; again, does that mean that you would have to go to the Town Board to get a Special Permit to do a necklace supply business, or say another service business, like a funeral home, or something that isn't listed as indicated, but would have to go to the Town Board.

It certainly is our position that the Post Office, again, is a service business or a retail business and at this point would go for a Special Permit. Also, so the Board is aware, subsequent to our last appearance and after being advised of the position of the Town Planner, we submitted a Freedom of Information Law request to the Town Clerk asking for a number of items, but two of the items requested have not provided; I had a phone conversation with the Town Clerk and she did send me a letter saying that she needed more time to provide that information; she indicated that she can't provide the information until near the end of the month. The items that I requested were copies of each and every application made to the Town Board during the period of time of April 28, 1999, which was when the Zoning Code was enacted, to the present for Special Permits issued pursuant to the Town of Dover Zoning Law, Section 145-10 B., which is the Section talked about by the Planner. We also asked for a copy the minutes of each and every Town Board meeting at which an application pursuant to the Town of Dover Zoning Law, Section 145-10 B., was made to the Town Board from April 28, 1999 to present. Again, I haven't gotten those items yet, if there are any; there's a pretty good chance that there isn't any, but in a letter dated January 15, 2008, sent to me by the Town Clerk, she indicated that they will complete the search by January 31 for Special Permits issued by the Town Board per Section 145-10 B., so we don't have that yet.

There's no question that Mr. Dwy's situation is a unique situation and it's not many times that this Board or any other Board is going to be asked to act upon a change of use for a Post Office that moved out of it's place, and now it's being asked to use that property for something else permitted on the building regulations and on the Use Table, but also not being able to comply with the current Board of Health regulations. So, we have a pretty unique situation because basically what happened is the Town has taken the position through the CEO that because it's a change of use from a Post Office to a retail business or service business, the owner of the property has to get Board of Health approval.

The fact is, it's just impossible to get Board of Health approval, there's no way to meet the current regulations. There are exceptions to what Mr. Dwy would have to do if, in fact, this was not a change of use; basically, if you had a different use of the premises that's in the same category as the prior use and you meet some other qualifications, then you don't need site plan approval and, therefore, you don't need Board of Health approval, which is what we are seeking. We feel that the Town planner's position should disregard this for various reasons, due to the unusual circumstances in this case.

There's no question that the ZBA can interpret of the Zoning Laws of the Town and we would ask the ZBA to interpret this situation in that a Post Office prior use of this property was a retail business or service business, or both, and that will allow the

applicant to continue to use this property for another retail or service business on this property. I want to make sure I emphasize that if the ZBA maintains the position of the Town CEO and the Town Planner that a change of use will occur from a Post Office to a retail business or a service business, then Mr. Dwy simply will not be able to use his property for anything, because there's no other use that's similar or the same as a Post Office; so basically what the Town is saying, unless a Post Office use is utilized by Mr. Dwy's property, which is not going to happen because we only need one Post Office in that area, that he will just not be able to use his property because he can't get current Board of Health approval. So, in essence, the Town is making it impossible for Mr. Dwy to use his property in any way.

Attached to the submissions of the letter dated January 18 from Frank Fowler addressed to the Board, says, "Regarding the above referenced parcel of land, the purpose of this letter is to summarize certain facts concerning the status of that land relating to it's ability to obtain Dutchess County Board of Health approval for the exiting structure. Over the course of the last three years, continued correspondence with the DCHD has taken place. This communication has both letters to the DCHD and meetings held at the Wingdale site and at the Poughkeepsie office (See attachments). Based upon my communications with DCHD, it has become clear that the subject parcel of land cannot meet current DCHD regulations. As the attached correspondence indicates, the DCHD would not object to a use as a small business, however the Department would not grant any approvals to the existing system. That existing septic system which has served the old Post Office functioned for many years and to the owners knowledge has never failed. A proposed small business with less water usage would certainly not be expected to cause any problems. On this basis, we feel confident that any proposed small business use of the existing structure which can demonstrate a reduced flow rate from that of the old Post Office usage, based upon current NYS Health Department application rates, warrants approval. If you have any questions regarding this letter, please do not hesitate to contact me." This was signed by Frank Fowler.

The Board should be aware that we submitted in our last submission that the Health Department, even though they knew they couldn't give approval for the current system because it can't possibly meet the current regulations and we have submitted a letter from the Health Department dated February 15, 2006, which was submitted to the CEO and also submitted in prior papers to the Board. It says, "Dear Mr. Hearn: This department does not object o the change in use of the above referenced facility to a small business use. The aforementioned statement does not in any way suggest that approval or suitability of the existing sanitary treatment and disposal system and/or well has been granted by this department."

The reason I quoted that letter is because it can't be approved because it can't meet current regulations, but I'd assume they wouldn't have written that letter if they felt there was a problem with the property being used for a small business use. If this Board doesn't make a determination that that the Post Office use was a retail business or a service business, Mr. Dwy, who owns a piece of property in the Town of Dover, would

own a piece of property that is worthless. If it is determined that the prior Post Office use was a retail business or a service business, it would allow Mr. Dwy to continue to use his property; and based upon a number of Sections of the Town Zoning Law, basically 145-10 F. states, "...A change of ownership, tenancy, or occupancy, or a change from one use to another within the same category, shall not be considered a change of use..." which would not be key in the requirement for Board of Health approval. We would, again, ask the Board to decide that the prior Post Office use was a retail business or a service business and thereby prevent the total loss of use of the property.

Mr. Dwy: The Board of Health has met with them several times and they said the system is more than adequate; the reason why it can't comply with today's regulations is because of the increased required distances from the property lines, and the surrounding property is vacant land. If you move the system away from that property, then it wouldn't comply because it would be too close to the river. Presently, it is far enough from the river, but it's too close to the property line, but it's a well-functioning system and they had no objections to that because I completely uncovered the existing system in front of an engineer and he took notes and took them to the Board of Health, and they said they had no objection to that system working, but they can't say that they approve it because it complies with today's regulations because it doesn't, so, it's the regulations, basically, that are existing. The changing of this retail business of approval of saying that the Post Office was a retail business would get us away from having to comply with the current regulations on the septic system because it wouldn't have to be considered at that time for a change of light business; and a light business, traffic wise, would be minimum compared to what the Post Office and them stores used to bring in; they had traffic down there that was limited parking and things like that. Any kind of light retail business would not have any kind of traffic like that.

Chair VanMillon: Are there any comments from the Board?

Member Wittman: We've accepted this letter into the record?

Chair VanMillon: Yes.

Member Wittman: There are a lot of issues here that have been brought up, which I am not denying that other things exist; however, the original application was for an interpretation of the municipal designation. I realize that there may be ramifications from that, but we are not asked for a use variance, we're being asked specifically for a definition, so I think we should confine our discussion to what the definition is, or is not, and if you follow that reasoning, disregard any other factors until we're asked for some other sort of variance.

Attorney Rodenhausen: I think the interpretation the applicant has asked includes whether it's municipal and also whether it's retail or service business; in other words, they're asking for two decisions that it's not municipal and that it is retail or service, I think we can interpret both of those to answer his questions to deal with the approval.

Chair VanMillon: Roz, any comments?

Member Cimino: No.

Member Wittman: The other thing is Mr. Stadler brought up the point that he has requested information which may or may not exist or have a bearing on the decision; I certainly don't want to cut off any submission of any additional information which may affect the decision.

Chair VanMillon: We would have to hold the public hearing open.

Member Wittman: That would be required in order to meet the deadline, if that deadline is going to be met by the Town Clerk.

Mr. Stadler: We didn't want to come in and ask for another public hearing but we wanted to bring up to the Board that we did request this information on January 3rd.

Member Wittman: I think your point is well taken; I'm not asking you to ask for that, I'm saying that I certainly do not want to make any decisions here which are pre-mature in submission of the data through no fault of your own.

Mr. Stadler: I understand that the Board is asking if we want to ask them to hold off on making a determination.

Mr. Dwy: We thought we didn't submit enough reasons so far.

Member Wittman: If you think it will have some addition bearing on it, I personally would not want to make a decision until that is submitted. If you think it's superfluous at this point, then I think that maybe you should state that.

Mr. Dwy: If we need to do it, we need to do it.

Member Wittman: Do you want to think about it for a few minutes?

Mr. Stadler: If we indicate to the Board that we want them to make a determination, is the Board prepared to go ahead and make the determination this evening, or will the Board require additional time anyway?

Chair VanMillon: I, personally, would feel uncomfortable about closing the public hearing and making the determination and then finding out on February 1 that you received something that could have influenced our interpretation or our decision.

Member Wittman: I would have to leave that decision to Mr. Stadler. I can only think that he must feel that it has some bearing on the case or he wouldn't have asked for the FOIL.

Mr. Stadler: Obviously, the bearing is to see if whether that Section has ever been used prior to this application. It will not necessarily determine the issues here; it'll just maybe give the Board some ideas as to what the Town Board did with a particular interpretation. I have no idea whether there have been any submissions to the Town Board since 1999.

Attorney Rodenhausen: None of us know whether the Town Board has had to act on any of that, but more likely than not, they hadn't; and I just wonder if, if it turns out they hadn't, how does that affect their decision?

Mr. Stadler: It's a good question, if they have, then it's OK, then nobody has had an issue similar to this Board; the question is, who is making all these decisions for things that are not listed under the use category? Was it the Zoning Board making the decision, or was it the CEO making the decision? It just brings up more questions. If that Section was used by the Town Board in the past, it could give some indications as to how they reason their thinking on a particular use; there are a number of different things it could show. I probably agree with the attorney's position that there probably haven't been any applications.

Attorney Rodenhausen: It might be relevant to look at all the site plan approvals for a commercial use that's not specifically defined as a separate category or a separate use in the chart. Somebody has said that if it's not defined in the chart, it's a separate use, but its general retail or general service. I guess that there are a lot of decisions that show that someone has taken that definition and applied it to other similar uses.

Mr. Stadler: I've got to believe that that's the case for any use that's not listed under the Use Table under business uses; there's not a whole lot that are listed in the retail business definition, there were some, but obviously, now all. Somebody would have had to make a determination whether a particular use fell in to a retail business or a service business, especially based upon the language included in the definition, it says, "including but not limited to," so somebody had to make that determination. Here, the definition from the Town's planner, in his opinion, causes us a problem with this because it's now saying that the Post Office use under the current Zoning Law would have to go to the Town Board.

It's kind of a funny argument because we're not asking for a Post Office use, we don't want a Post Office use, let alone would a Post Office use ever be there again, but what he's saying is that because the Post Office is now an unlisted use in the Town of Dover, that any other use of the property by Mr. Dwy now has to have site plan approval and also Board of Health approval, because unless it's not a change of use he would have to go through all those other things, which is impossible for him to do. It's kind of a circular argument in putting the applicant in a "catch 22" situation; you just can't comply; certainly, if he was able to, he would have long ago gone to the Planning Board, submitted a site plan and hopefully would have gotten an approval, but he can't

because he's been stopped because the Town has taken the position that he needs to get Board of Health approval, which we have proven through the engineer's letters.

Attorney Rodenhausen: How much weight do you think the Zoning Board should give to the opinion of the person who actually drafted this law? I know working with the Town Board, going through the process, I wonder what weight we should give to that.

Mr. Stadler: I think we should give no weight to it because I think his opinion is wrong.

Attorney Rodenhausen: I know you think it's wrong, but the fact that he was there when this was drafted and he's still working for the Town as a planner. To me, it's a pretty significant thing that he actually said, "this is my understanding of what those words intended."

Mr. Stadler: Let me correct my statement. I think he's right in one of his opinions, that this is not a municipal use, so I think they should strongly accept his opinion there, but with respect to the other item, I certainly believe that he's wrong in that situation, because of the fact that the Post Office use clearly can be considered a retail business or service business, so I don't think it's a separate category, I think it falls within that category. I wonder where he was with other applications before the Board for everything that wasn't specifically listed in the use category. Whether he has been asked that or not, I don't know, but now our position is that he incorrectly takes that position especially in the situation we're involved with here based upon the facts that we have presented to the Board and based upon this unfortunate situation Mr. Dwy is in and he's trying to do everything that the Town is asking him to do, but physically, it's impossible to do it, and therefore leaves him in a position where he will own a piece of property that's worthless.

Attorney Rodenhausen: I assume that if the Department of Health would give you a variance on this, you could get it then go to the Planning Board for site plan and be done. Have you really pushed the Board of Health to see if there is any variance for an old, existing system which has not failed in over 50, or whatever, years? They have already said that they don't mind the change in use; they recognize that they have 100' restrictions, but would they not give a variance to you?

Mr. Stadler: I'm not the person who spoke to the Board of Health, Mr. Fowler did and I specifically asked him to ask them that, but my understanding is that they did not consent to that.

Mr. Dwy: They told me they legally could not because they can't say it meets today's standards, but they did say that the system was sufficient. In our original refusal to proceed was only about the municipal use. We defeated that problem then they came up with the big issue of retail use, that the Post Office was a retail use and that whole property was retail for, as long as I can remember, and I'm 73 years old, and I was in this town that long.

Attorney Rodenhausen: The reason I'm asking this is that the July 19, 2005 letter from the Department of Health says that the compliance with 75-A cannot be achieved because the 100' setbacks could not be met. It also mentioned the floodplain, which I think you took care of. That doesn't say that they would never consider granting a variance. The other letter says that they have no objection to the change of use. It seems to say that from their professional opinion, the system is adequate to handle it, then they say that this doesn't mean that they approve it; they don't say that they would never approve it. The reason I'm asking this is that you're putting the Board through a difficult exercise that defend exactly what these words mean.

Mr. Dwy: No, because the main issue is that it's retail; in that way, we don't have to comply with the Board of Health.

Mr. Stadler: I think what is being said is that if the Board doesn't have to go through this exercise, they would prefer not to if they could get a variance from the Health Department. Again, I didn't personally speak to them on the phone, I spoke to Frank Fowler on numerous occasions and I believe he requested that of the Board and I believe they returned that they couldn't give any type of variance. Again, if the Board's going to put off a decision tonight, we can certainly go back to the Health Department to see if they can clarify their position.

Attorney Rodenhausen: Just to make sure it's not a mute question, in other words, is it really true that the only way for you to use this business is to get an interpretation that says that this was a retail service? Let me bring up to the Board, too, that the point that Joel Russell makes in his e-mail letter was that this is a federal facility, which I think the Postal service still is, even though it's an independent arm of the executive branch, it still is a federal facility, and federal facilities are in a unique category. Even though they're regulated by owner, in that case you have to because federal facilities are entitled to be wherever they want to be in a town like state facilities, so state and federal facilities, which is what he calls it, is a kind of unique case, it wasn't addressed in the Zoning Law, and going from a state or federal facility to a private retail/service use he considered a change of use. It's just something to keep in mind that federal facilities are usually considered different from private businesses in zoning. At least there are different rules that apply to them. Whether that determines this, I'm not saying, I'm just bringing up the point.

Mr. Stadler: I don't know if that shows that the fact that Dover, because there have been two new Post Offices in the Town of Dover, one in Wingdale and one in Dover, which we have obtained copies of some of the applications, but they were required to go before the Planning Board to obtain site plan approval, so there was no exemption for that business, that entity, in the Town of Dover.

Attorney Rodenhausen: My experience with that is that the Postal service asked to go to those boards so that they could say that they have complied.

Mr. Stadler: I'm not even sure if it was the Postal service, I think it was the owners of the buildings that went to the Board.

Attorney Rodenhausen: If we're going to continue this, what we could do is take the opinion and state, "there it is." There would be no need for a public notice. I know it's not relevant, as you were saying, but the question of interpretation, but it is relevant to whether we have to go through this. If the Department of Health would grant a variance considering that it's a system which has worked, that it's an existing system, my thought is that they would give some credit to the fact that it's existing, that the lot is small and that there's no other way to do it and the Health Department is not going to shut you down unless they feel that the system is unable to handle the load in a safe way. And they seem to be saying, "We wouldn't do that because we think the system is fine."

Mr. Dwy: As a result of many meetings with the Board of Health, they've gone as far as they could go to say that they have no objection verbally, that it's a very good system, it works well, but they cannot actually say that it complies, which the Building Inspector wanted, that it complies with today's regulations; they can't, because it doesn't. And I don't think, even if we could have ten more meetings with the Board of Health, I don't think they will give us anything more than what they've already submitted. Even though they could say off the record personally to me and my engineer just what I said.

Attorney Rodenhausen: We should ask the Town engineer his opinion on that.

Member Wittman: But, he's not the one who is going to sign off on it, whether it's approved or not. You rightfully point out the fact that the real problem here that Mr. Stadler has pointed out before is the fact that the Health Department doesn't want to grant, if we could call it, "a variance" from their own regulations in this particular instance, and they're putting it off on to the Town of Dover to make the decision on something the Town of Dover, the Health Department tells us, has no business making the decision on, so, here we go again.

Mr. Dwy: The Building Inspector indicated, in other words, if they left it up to the Zoning Administrator, he would not approve it, unless it complies, he (the Building Inspector) told me he personally will not approve it if they don't say it complies. And it really is up to the Building Inspector or Zoning Administrator, but he won't do it, I don't know why, but they told him he could.

Mr. Stadler: Are you saying that the Health Department is saying that it's up to the CEO?

Mr. Dwy: Yes, the Building Inspector and the CEO.

Member Wittman: If that is their position, they should state that and say, "OK, we're leaving it up to the CEO."

Mr. Dwy: I told them that, but they won't put it in writing, so here we go again. The retail thing that we're asking for, this would not be necessary. It really would entail a lot of months and months and engineers again and all that, which we've already gone through for four years.

Attorney Rodenhausen: If you were to get an interpretation in your favor, and you did not have to go for site plan, you still would have to get a building permit for whatever work you're doing. Would the Building Inspector or CEO give you a Certificate of Occupancy without having had the Health Department tell him the system is adequate for the use?

Mr. Dwy: We wouldn't have to go to the thing with that interpretation; if we get the interpretation, according to the Zoning in that zone, it's not required.

Attorney Rodenhausen: But you would still need a building permit.

Mr. Stadler: We would only be required to get Board of Health approval if it is a change of use, so if the determination is that there was no change of use, then Board of Health approval is not required, it's an existing system.

Attorney Rodenhausen: I was just wondering what it is zoned for Building Code compliance whether giving a building permit for a change in the structure, the number of bathrooms...

Mr. Dwy: There are no changes to the structure; the change was the part that was damaged, and it was replaced with the original, or better, walls and things like that, the footings were inspected and engineered, we've covered all that, the electrical, the square footage, everything, so it's not like we're asking for approval of an addition or a change in the building or anything like that.

Mr. Stadler: All we're saying is that it's not a change of use...

Attorney Rodenhausen: I'm just wondering if he can issue a Certificate of Occupancy for the Building Code if there's no specification from the Department of Health.

Mr. Stadler: It would be the same for any other application that's made, let's say, a bakery or a shoe store, I don't believe you would have to get Board of Health approval if it's in the same use category.

Chair VanMillon: If they change the use of the building, would they have to get Board of Health approval?

Member Cimino: It depends on what they are changing it to; if they go to a food establishment, then absolutely. I would think that if the use is the same type of retail, because we've run into that in the past where they went from what was zoned for retail and then they wanted a food establishment, it wasn't zoned for food, which triggers a

whole different level. I think, and I haven't been here for the last few meetings, that I'm a little concerned at the fact that we're being asked to make a decision when the Board of Health won't put their money where their mouth is, and so it's hard because it's like it hangs on us and the Board of Health is telling you that if they just say OK, we won't bother you. That's the way I interpret it; if we give you the interpretation you're asking for, then they'll say it's OK.

Mr. Dwy: If all the like business changed from one to the other, is it required and, if anything, especially if it's a lesser use and this is certainly a lesser use. If a book store, attorney's office...

Member Cimino: Do you know what's going to be there?

Mr. Dwy: Anything that is permitted under the light business use. It could be a real estate office, an attorney's office, a book store...

Member Cimino: Excuse me one second, (to Attorney Rodenhausen) didn't we go through something like that on the Planning Board with the applicant next to the Odunsi site, Coldwell Banker, they couldn't get anything, by the railroad tracks, it was a very small building, and he just wanted to rent it out, and I believe Mr. Mill had a very pre-determined use that he was going to make it a real estate office, and so it was a very limited use and he met the parking regulations, but still, the septic was a very big issue that the Board of Health had a problem with.

Mr. Dwy: But yet, he got permitted.

Member Cimino: He did.

Mr. Stadler: And, how was that?

Member Cimino: Because, I believe, and I would have to read the file again, I believe that the Board of Health finally said that this use, they went back and said, this is what we want here, we want a real estate business there; and I believe the Board of Health granted that based on the use that they had; so if you had someone that you wanted to put in there, I wonder if that would make a difference to them.

Mr. Stadler: We assume that since the letter that was submitted said, "This department does not object to a change of use from the above referenced facility to a small business use." This is from the same public health engineer at the Health Department, so he's indicated that that's not an issue for him, and I know what the Board is saying, but just put yourself in Mr. Dwy's position.

Mr. Dwy: You're not giving me approval on this issue, like you said, that the Board of Health says the system is OK, you're not; all I'm asking you do is say that, yes, the Post Office did sell retail and that it was a retail business as well as a service business. You're not saying, "Jimmy, you can go ahead and use that septic system."

Mr. Stadler: If there is a problem obviously with it, then when the Board of Health comes in they'll say what has to be done to take care of it, but you can't get to that position, according to the Town, use it without Board of Health approval.

Member Cimino: So, a positive determination from the ZBA will not trigger site plan in front of the Planning Board?

Attorney Rodenhausen: An interpretation that this is a change of use would trigger site plan approval, but an interpretation that it is not a change of use would not. If you were to hold, as an interpretation that the old Post Office was a service and a retail business, then, I suppose you can have two uses on one lot, and then the applicant has the possibility to go either way with service or retail. Are you talking about one business or more than one business here?

Mr. Dwy: My final request is that if you agree that a Post Office was a retail business, we would then go forth and do anything we have to do, if you just admit that it is a retail business.

Attorney Rodenhausen: You're asking for it to be both retail and service, aren't you?

Mr. Dwy: Yes. If we do that and there are some other requirements we have to do for whatever use we put in there, we will comply with it, otherwise, we won't do it.

Mr. Stadler: Except you can't comply with the Board of Health approval.

Mr. Dwy: No, but I said that it would be anything that would come under the definition of light business, that would not have to comply. And then if they said we had to do certain things, and it may not hinge on the acceptance of the septic system when it comes into play, but basically for an office, how much would you use a small bathroom compared with the number of employees that were there before and they had two bathrooms and now it's only one small bathroom, they could even say that you're limited to one small bathroom.

Attorney Rodenhausen: We're still unclear about one thing, in going over this letter of February 15, 2006, that was addressed to Tom Hearn from the Department of Health saying that the Department did not object, did Mr. Hearn then say to you that this was not enough for him?

Mr. Dwy: Yes, it would have to comply with the Board of Health.

Attorney Rodenhausen: This does not constitute an approval in his mind?

Mr. Stadler: That's correct. We even presented that, I believe, to Shannon LaFrance, and Mr. Kelly, and we have letters in the file that says, "Sorry the Town cannot approve it so we cannot move forward" even though we presented that letter.

Chair VanMillon: This letter is two years old, and since then, businesses have moved into this Town and now the Board of Health has said that their septic system, it's a limited use or a specific use.

Member Cimino: I don't remember the exact specifics, but I would absolutely check and see if that septic system was adequate all along that they had to do major renovations with that septic along the swamp.

Member Wittman: Let me just change the topic here very slightly, but it bears on this. Up until this meeting, we only had three people on the Board on this issue, so we would take a unanimous opinion here because that's the quorum, and Roz is new to the Board, and I believe she has expressed the fact to me that she was going to refrain from doing anything on this because she has not as yet reviewed the entire record.

Member Cimino: Not as adequately as I'd like to be, so I would have abstained from the vote.

Member Wittman: If we were, and I'm not proposing this, but if we were to extend this to another meeting to do a number of different things, say that Mr. Stadler had asked for other information that he has filed under FOIL, and also that George has asked, too, to again go back to the Department of Health and say, "Look guys, how about a variance?" You've danced around this issue, you're the only ones who can grant a variance on this sort of thing; give us a yes or no on granting a variance." If Roz would like to bring herself up to speed on this, then that would extend it to four votes where we would not need three concurring votes in order to grant or deny something.

Mr. Dwy: We just mentioned Board of Health because it was the background of coming up from what we went through up to at this point.

Mr. Stadler: The Board is taking the position that we should submit this, even if we don't have to.

Member Wittman: The other thing is the fact that would extend to another vote in the sense that you only need three out of four to pass or deny anything as opposed to unanimous. I see that it might be in your favor.

Mr. Dwy: No, I have no problem with that, when they keep bringing up the Board of Health approval, all we really need is the interpretation of the retail business, I thought it was a slam-dunk.

Mr. Stadler: In that sense, you are correct that we're asking the Board to make an interpretation of what the use was as a Post Office. I guess what the Board is indicating for now is that they would prefer not to make that determination if they don't have to and see if there is a way around it by seeing if the Board of Health can issue a variance and I'm pretty sure that the answer is going to be that they won't do that.

Mr. Dwy: We'll do whatever we have to do.

Attorney Rodenhausen: It would be nice if we could have the clarification that either yes, there are variances available, or no, no variances are available, and then it may help you, but then it may not, and I think it's worth finding that out. Also, as the Chair was saying, that is a two-year old letter and we would like to see something more current.

Mr. Stadler: Well, if that's the position of the Board...

Member Wittman: A lot of this depends on how you feel about it.

Mr. Stadler: Again, if I were to say make a decision tonight, it doesn't appear that it will be a terribly favorable decision.

Member Wittman: We haven't made that conclusion, but we're trying to do everything we can; if it were entirely within the Town's purview to decide on these issues, you would certainly have the right to say, "Hey, what else could they do?"

Mr. Stadler: It is, actually, within your purview to make that decision this evening. It's up to the Board whether they want more information as we're waiting for more items from the Clerk and the Board appears to be asking for additional information from the Health Department. But the fact is, theoretically, the Board doesn't need that information from the Health Department to make a decision as to whether the Post Office use was a business use or a service business.

Attorney Rodenhausen: But, obviously, the second step after we say yes, the interpretation is your way, and then your next step is you go ahead and change your use. So, in essence what the Board does is it gives you the green light to go ahead, almost saying yes, go ahead, the system is alright.

Mr. Dwy: We would comply with all the other regulations.

Attorney Rodenhausen: We don't know what the Department of Health is going to do, are they going to come and look at you or not, it sounds like they're not.

Mr. Dwy: They won't be involved if we get the determination, and you cannot say that the Post Office did not sell retail.

Attorney Rodenhausen: On your assessment of where we are, I think it's important that the Board has in front of it the very clear recommendation from the draftsman of this law that says, "This is what it's supposed to mean." And for the Board to overturn that, is a significant step and so if you think you could help us if that's what you want us to do, I think it's worth continuing for another month to try to get more information.

Mr. Dwy: We'll do whatever we have to do.

Mr. Stadler: I want to raise the point again that I'm not quite sure that it means a whole lot, but if you look at Section 145-10 B., the words are somewhat clear that if you wanted to determine that every word in this Zoning Law is there for a reason, the words that the Planner used as written is, "In the event that a particular proposed use does not fit into one of the categories shown in the use table." Well, we're not talking about a particular proposed use. It's kind of an odd way to look at this thing or to react to this thing; the word clearly is it's a particular proposed use; we're not asking for a particular proposed use to be addressed by the Town Board. What's happening here is that the Planner is saying that this provision applies because a Post Office is not specifically listed in the use category, so therefore, you'd have to look at Section 145-10 B. and that says, "In the event that a particular proposed use does not fit into one of the categories shown in the use table, you now have to go to the Town Board." It's really kind of another circular argument where no one would want to be because we're not proposing any use as a Post Office, so if you want to give some type of authority to all the words that are in the Zoning Law, this doesn't make sense; it's not a proposed use that we're asking the Town Board to make a decision on, it's a prior use that was in effect from prior ordinance which now is being used against the applicant to say well, a Post Office is unlisted, so you have to go to the Town Board; we don't want to go to the Town Board because we don't want it to be a Post Office.

Attorney Rodenhausen: There are some very interesting uses of the words under "F" that say, "A change of use is the initiation of a use that is in a different use category, as listed on the Use Table, from the existing use;" so you are going to a use based on the Use Table, which is retail or service from the existing use, we're having trouble defining the existing use that you're asking us to. There's an interesting point in "B," when you read the definition of "F," try to understand where the consultant's opinion fits in. I could use a little more time on this.

Member Cimino: I will absolutely be up to speed by the next meeting.

Chair VanMillon: Can I have a motion to continue the public hearing to February 20, 2008 at 7:30 pm?

MOTION: Member Fusco motioned to continue the public hearing until February 20, 2008 at 7:30 pm; seconded by Member Wittman.

VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Aye

Chair VanMillon: The next item on the Agenda is: Motion to set the regularly scheduled ZBA meetings for the year 2008. The only other days that are open during the week are Mondays or Fridays. I know personally for me that Fridays are terrible because it's the

only day I have off, and most of the time I am out of town. Tuesdays aren't good because there is court and they are in and out of here all the time.

Member Wittman: And it's pretty hectic; they like to use this for their private conferences.

Member Cimino: Also, another thing we have to keep in mind that if we do have a meeting while another event's going on, the microphone on the camcorder picks up every conversation everywhere.

Attorney Rodenhausen: We have a conflict on the third Wednesdays, but there are two of us, so one of us could come here; Tuesdays and Thursdays are generally better.

Chair VanMillon: Tuesdays and Thursdays are not good here.

Member Cimino: As you know, I tape all of the Board meetings, and they're usually on Tuesdays and Thursdays.

Chair VanMillon: I would like to entertain a motion to move the meetings starting in March to the 2nd Wednesday of each month starting at 7:00 pm pending approval of the Town Clerk.

MOTION: Member Wittman motioned that the regularly scheduled ZBA meetings be changed to the 2nd Wednesday of each month starting at 7:00 pm beginning March 12, 2008 pending approval of the Town Clerk; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Aye

Attorney Rodenhausen: I would like to get a sense of where people are on this application; normally, this is done in executive session.

Chair VanMillon: Can I have approval of the December 19, 2007 minutes?

MOTION: Member Wittman motioned to approve the December 19, 2007 minutes; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Abstained

MOTION: Member Wittman motioned to go into executive session to seek advice from counsel at 8:55 pm; seconded by Member Fusco.

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VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Aye

MOTION: Member Fusco motioned to reconvene at 9:15 pm; seconded by Member Wittman.

VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Aye

MOTION: Member Wittman motioned to adjourn the meeting at 9:15 pm; seconded by Member Fusco.

VOTE: Chair VanMillon – Aye
Member Wittman – Aye
Member Fusco – Aye
Member Cimino – Aye

Meeting adjourned at 9:15 pm.

Respectfully submitted by:

Maria O'Leary
Secretary to the Zoning Board of Appeals