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**NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING**

**FEBRUARY 11, 2019**

**MINUTES**

Present: Chris Hawkins (Chairman), Bob Daigle (Vice Chairman), James Drago, Steve Minutelli, Richard Shelton (Alternate)

Absent: Wayne Rosa (excused)

**Agenda Item #1 - Pledge of Allegiance**

**Agenda Item #2 - Review & Approval of Minutes: 02/04/19**

**Action**

**Motion: Bob Daigle made a motion to approve the minutes**

**Second: Richard Shelton**

**Vote: James Drago abstained due to absence**

**All others in favor**

**Agenda Item #3 - Regular Business**

***Kelby Ferwerda & Martin Ferwerda – Continuation of a public hearing for an application for a Variance from Section 32-89 of the Newmarket Zoning Ordinance to permit a density of six residential units per acre, where two are allowed, and a Variance from Section 32-56, Table of Permitted Uses to permit a multi-family residential use. If the variances are granted, the lots will be combined. The lots are located at 2 & 4 Beech Street Extension, Tax Map U2, Lots 107 & 108, R3 Zone.***

Chairman Hawkins stated they have read all of the submitted materials. He explained the meeting procedure. The applicant would present his material. He advised the public they were more than welcome to speak during the public hearing, they should state their name and address, and he will give three minutes a piece to give everyone a chance. If they have more to say after the three minutes, once everyone else has a chance to speak, they are welcome to come back up and speak. Once everyone has spoken, the public hearing will be closed and deliberations among the Board will begin and then they will proceed to vote, if it has not gotten too late in the evening.

Martin Ferwerda showed the Board a photo of the mobile home that they recently removed. He stated, regardless of what happens at this meeting, he could put another mobile home there or build a house. He also passed around another photo showing the remaining mobile home. He stated, if that second mobile home stays on the lot, it is because of this meeting. He can collect in rent what he earns in Social Security. He also had a photo of an alternative to what is there today, but not what they are proposing to build. The photo was of the newly constructed fourplex on Grape Street. The purpose was to show what sort of meaningful change they can make in the community, if given the chance.

He stated the proposed units would not be apartments. They would be middle income condominiums, which is appropriate for what Newmarket is becoming. He has been in the area for forty years and used to live up the street. Newmarket is not the city it was forty years ago. At that point, it had lost its mills. Its income base was declining. There were problems in the school. He stated he did not want to say “dumping ground”, but it was where UNH students would get into a house and you would have five, six or eight people in a very small house. All that has turned around. You have to thank the people of the town, who have had the foresight, the elected members, for the redevelopment of the mills done by Chinburg. It has really changed the town.

If they receive the variance, it is likely they will put three four-unit buildings on the lots. He passed around a paper showing, not what they were going to do, but how the buildings could easily sit on the land. The land consists of two one-acre lots that trace back to when the land was subdivided in the early 1970s. A total of five or six lots were subdivided from the parcel. The parcels that front on Elm Street are a third of an acre or smaller. There was no city water and sewer on Beech Street Extension, at that time.

There were two single wide mobile homes there for forty years. One has been taken down. It is a unique opportunity to add real value to the neighborhood and to the town. There will be increased real estate values and, as it currently stands, those two lots contribute $5,400 in real estate taxes combined. When this development is finished, they expect the total tax value to be $105,000. They are planning twelve units that will sell for $300,000 each. That is enough tax money to hire a new policeman or a teacher. The demand on Town resources will be minimal. They will also contribute about $27,000 in impact fees. He undertook this, because it was a unique opportunity. Both property owners just passed away and the second property owner’s family contacted him, because they saw what was going on at the other lot next door. He thinks this is a great town and this is an opportunity to add value to it. This will increase the values in that area. It is a unique lot. The variance should be granted.

***Chairman Hawkins opened the public hearing.***

Chairman Hawkins stated they had received some written comments from Sara Callaghan, Brian Hart, Cliff Chase and Jamie and Talisha Vatcher, all of whom do not support the proposal.

Drew Kiefaber, 50 Elm Street, stated he recommended the Board not grant the variance based on Criterion #2. The spirit of the ordinance would not be observed. The ordinance is very clear about what is permitted on a one acre lot in the R3 zone, which is a single family home or one duplex. Granting the variance would substantially increase the housing density on these lots. On Criterion #5, unnecessary hardship has not been demonstrated. The property can be developed, with multi-family dwellings within the requirements. The increased density requested is just a request. The New Village area has multi-family homes on individual lots. Granted the lots are smaller than current zoning, but they are consistent with zoning. They consist of a multi-family on an individual lot. If the applicants had desired higher density, they could have purchased property in a neighboring zone, which allows that higher density. Chairman Hawkins asked how long he has lived at 50 Elm Street. Mr. Kiefaber stated he has owned it since 1991 and lived there prior to that for four years as a college student.

Sue Beaulieu, 61 Elm Street, read from a prepared statement (see attached). She showed the Board a photo taken from her bedroom window. She showed the location of a metal fence indicating the property line. She submitted the photo and her statement for the record. Chairman Hawkins stated, when he thinks of New Village, he thinks of the area of Beech, Cedar and Elm Streets. Mrs. Beaulieu stated she does think of that as New Village, except for Elm Street. You are not in the Village. She considers Beech Street going into the Village, then from Elder Street back as Beech circles and becomes Cedar, then circles back out. She does not consider the houses across from her house on Elm Street as part of the Village, because you have not entered into the Village. Chairman Hawkins asked if, in her experience in living there for a long time, whether the statement that was made that the majority of dwellings in the Village have three or more residential units, was her understanding. Mrs. Beaulieu stated it was not. She knew there were some. She thinks of duplexes and single family homes in the Village. It is mostly duplexes, with some single family homes. The bulk of the high density is in the back near the river, like the Twin Rivers condominiums. Those units in back were not part of the original New Village and are not considered part of it now. They are considered to be in area north of the Village.

David Beaulieu, 59 Elm Street, next door to Sue Beaulieu. He stated he sees the same thing she does from her backyard. He is a lifetime resident in town. He submitted a prepared statement, but did not want to restate anything Sue Beaulieu said, because he agrees with everything she said. He covered a few points that were not mentioned. He believed that Criterion #2 being changed to twelve units would absolutely not be in keeping with the spirit of the ordinance.

Regarding the idea of substantial justice, they are not part of the Village and granting the variance would be a substantial increase in density to the abutters and does not follow Criterion #3. Granting the variance would create an injustice and does not follow the rules of Criterion #3.

The variance should be denied, due to lack of proof exhibited by the applicants. Their statement about the setbacks is misleading, self-serving, and does not provide abutters any benefit. He did not know if they intended to cut the trees or plant new ones. There is a large habitat that would be destroyed by cutting the trees. There are two to five deer out there pretty consistently. Over twenty turkeys go through there quite often. There is a natural bed-down area.

What he sees is Elm Street being a cross street for Main and Packers Falls. He never enters the Village by being on Elm Street. Granting the variance would diminish the value of the surrounding properties. The quality of life lost and privacy of abutters is not in the spirit of Criterion #4.

Criterion #5 is a self-imposed hardship. He is concerned with twenty four more vehicles or more. That is a lot for that street. The added traffic would create issues for those leaving by the Town Hall onto Route 152. It is already hard to get out. People will seek alternate routes and Pine Street will be one of those. The other side streets will fill up and there will be high travel, where there is none now. There will be 24-48people living there. That is a small piece of land for all of those people. There will be an increase in noise pollution and light pollution and possibly a crime increase. He had problems with attempted thefts and trespassing after the multi-units were built by the river near the Village. He questioned stress on the Town water supply. He believed there was a shortage. There always seems to be a Stage 2 ban. In 2016, there was talk of putting the water bans on private wells. That tells him there is a problem. It is a major and substantial loss of personal privacy. He has been on this property 34 years. The “dirt” mentioned is a natural hill, with an elevation of approximately 28’. He was concerned about blasting. That hill is riddled with ledge. He has ledge on his land that was not there 34 years ago. It is coming up through the ground. He was concerned about underground pipes. The old pipes and the ledge behind 57 Elm Street could be dislodged by blasting. He read a final summary (attached). He mentioned a wetlands map. He stated they talk about prime wetlands buffer, which is a 75’ area around the wetlands. He showed on the map the lot locations and submitted it to the Board and mentioned wetland setbacks. He showed a photo of the view from his backyard. 90% of this view will be gone. He submitted the photo for the record. He had fourteen signatures on a document from individuals in opposition to the variance.

Jamie Vatcher, 3 Beech Street Extension, stated he has been in town for five years. He already sent a letter to the Board, but wanted to talk more from the heart. He and his wife live directly across the street from the proposed site. He had addressed the variance in his letter and would like to say a few words now about Newmarket. After living in Dover, Newmarket was a breath of fresh air. The idea that a town could exist without a traffic light in the 21st century was a big selling point. They were concerned about the impact 24 cars would have on traffic on this road. Cars tend to speed through there, as well. The L & M Store creates a bottleneck for parking on both sides of the road. Condos will only contribute to increasing noise and add more traffic, light pollution, pavement and fewer trees. This would be an eyesore and would be against all that we love about this town.

Kristen Kiefaber, 50 Elm Street, stated she wanted to speak to growth. She is a teacher and has lived here since 1991. The town will grow, but there is a Master Plan in place for a reason, so we only grow so fast. We do not want exponential growth in town. Allowing people to triple growth on their lots is not in keeping with the Master Plan, something people have put a lot of thought into. She recommends following the zoning. There is no clear hardship. They can build two beautiful duplexes, which would be in keeping with the neighborhood or leave it single residential. There would be more tax dollars per student ratio. The applicant talked about big bucks for revenue, but it costs a lot to educate. The back abutter to this property is the railroad. There are abutters on the other side of the railroad. If the railroad was a road, those abutters would have been notified. They likely don’t know that this development could be going in.

Chairman Hawkins asked if there was any further public comment. There was none.

He stated he would give Mr. Ferwerda a chance to respond. Mr. Ferwerda stated most of Mrs. Beaulieu’s comments were Planning Board issues. The hill in her backyard will still be there. She owns it. Sue Beaulieu stated she did not. Mr. Ferwerda stated he walked the lot line and it goes right along the hill. He offered to provide a 50’ side setback and leave it in a forested state. He is making an additional effort to provide them with a backyard, which is forested and does not affect them, by leaving a side setback that is three times or more than what is required by the zoning ordinance. He is trying to accommodate his neighbors so when they look out of their windows, they see a forested area. He also agrees to have no structure within 100’ of their primary residence. This is a substantial difference from the zoning requirements that require a 15’ setback. The majority of Sue Beaulieu’s comments were Planning Board related, such as traffic and things like that. There is no intention of having residents park on the road. The abutters are a municipally owned building and a railroad. It is not like this is a purely residential neighborhood. There are varied uses. This is a unique opportunity to make a positive contribution to the town. It is a relatively large lot. If they are allowed to build, it will be great, because it will be a nice multi-family development generating revenue to support and help the town. The application shows why they feel they qualify for the variance. If it is denied, his son will just build a house or put a trailer on the land. Is that where we want this town to be going?

Mr. Ferwerda submitted a map showing the uses in the area. This excludes the back of New Village where the big multi-unit apartment buildings are. Chairman Hawkins stated he wanted to talk about the map. This is not the first application the Board has dealt with regarding New Village. The map the applicant submitted shows the locations of duplexes and triplexes, as well as fourplexes. Chairman Hawkins circulated the map around to the Board to look at.

Mr. Ferwerda stated the Zoning Board of Adjustment is a unique board. The State Constitution recognizes the natural inequity that exists in zoning regulations. It is up to the Board to weigh that. He stated their application was self-explanatory.

David Beaulieu requested they read his submittal, because he did not state everything that was in it. He said he disagreed with the applicant. He has lived here for 34 years. The zoning should stay the way it is. As the change will create big hardships for the direct abutters. Regarding the 100’ setback, the applicant is using part of his land mass to say they were 100’ from a structure. He resides on his whole piece of property.

Chairman Hawkins asked if there was any further public comment. There was none.

Chairman Hawkins stated they have not had a chance to read everything handed in this evening. The Board, however, has heard everything said. There were a number of objections in the record before. There have been a number of comments that could be construed as Planning Board considerations, but their job tonight is to gather up all the evidence and consider it, in light of the criteria they have to apply. He went over the five criteria. The members have been around long enough to understand what is relevant and what is not, in terms of the evidence presented to them and the limits to their power in these cases. They are not a Super Planning Board. They do not decide whether development is a good or bad idea, but whether the applicant has met the criteria.

A gentleman in the audience asked if the Board was accepting additional written comments. Chairman Hawkins stated he could submit those now. The gentleman was Mike Hickey, Cushing Road, and he stated he passes by this neighborhood a lot. He is looking at it from a planning standpoint and certainly a ZBA standpoint. His view was the neighborhood is a real gem. He has lived in different places and the wooded environment and the duplex environment should be preserved. He is hopeful the ZBA will think to do no harm and take a close look at the five criteria and how people have responded and judge accordingly.

Mr. Ferwerda stated last week a letter was given to the Board from Sara Callaghan and Brian Hart. He believes they live in Durham and are not residents of Newmarket. Diane Hardy stated they own property in Newmarket and have standing as abutters to present their concerns.

Chairman Hawkins stated they would take time to read Mr. Hickey’s letter and they did.

Chairman Hawkins noted regarding the law on variances, besides the five criteria, the ultimate burden is on the applicant to satisfy the criteria. They have to present enough evidence to get them over the top.

There was no further comment.

***Chairman Hawkins closed the public hearing.***

Chairman Hawkins asked what the source of the information was on the map submitted by Mr. Ferwerda about the number of units per lot. Mr. Ferwerda stated the tax cards and cross reference to electric meters on the structures. There could actually be more units than what is reported. He stated he thought that occurred a lot in the Village.

Richard Shelton stated he would like to put the application in perspective.

He read, “*To put the application in perspective, the properties located at 2 & 4 Beech* *Street Ext. are bounded to the north by 3 properties, located at 57/ 59/61 Elm Street and, 1 & 3 on Beech Street Ext. They are all single family properties. The building at 2 Beech Street Ext has been removed. To the south at 6 Beech St Ext, the property owned by the Town of Newmarket is also in the R3 Zone. At 8 Beech Street Ext and south of Pine Street, the area changes to the M2 Zone with Town-owned vacant lots, businesses, residences, and the Newmarket Town Hall on the corner of Main & Beech St Ext and a duplex on the other corner. The M2 Zone is not relevant to 2 & 4 Beech St Ext.*

*1) Granting the Variance would not be contrary to the public interest.*

*The applicant, in requesting the variance, is utilizing the density in the original New Village area that is the homes located from 1 to 25 Beech Street on the East side, continuing onto Cedar Street and connecting to Elm Street. The interior of that area was built out in the early 1900’s except for one interior lot that remained undeveloped and came before the Zoning Board, in Oct 2014 as an infill application. The Master Plan in supporting sustainable development and land use promotes compatible infill development. The applicant’s property at 2/4 Beech Street Ext in the R3 Zone is situated among 5 single family properties and adjacent property owned by the Town of Newmarket are all in the R3 Zone. There is no relevant connection to the applicant’s properties as an infill development with the densities found in the New Village. The applicant’s proposed variance application to build multi-family housing at a density of six (6) units per acre is out of character with the neighborhood and contrary to the public interest.*

*2) Spirit of the ordinance is observed because:*

*The Ordinance provides for orderly development by increasing the density from ½ unit per acre in the R1 Zone to 2 units per acre in the R3 Zone. By allowing this greater density of 6 units per acre, 12 units would be allowed on these two lots, whereas 4 units would be permitted under the current zoning. This marked degree (of change) would violate the Spirit of the Ordinance, therefore, the request for 12 units should be denied.*

*3) Granting the variance would do substantial justice because:*

*to approve this requested variance, on its merit, it must meet the other 4 criteria, if not it fails to meet this criteria, in that substantial justice would not be served.*

*4) If the variance were granted, the value of the surrounding properties would not be diminished:*

*if granted, the applicant states, “We would enhance the value of surrounding existing properties as our new structures will replace two 40 year old single wide mobile homes”. No evidence to substantiate that statement was submitted, when in fact, permitting 12 units where 4 are allowed, would have an adverse effect on the neighborhood in changing the environment and character of the area.*

*5) Unnecessary Hardship*

*A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*

*1. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property because:*

*The general public purpose of the ordinance and the specific application to the property is to guide the character of growth, development and change in order to provide for the public health, safety, and general welfare; prevent overcrowding of land and avoid undue concentration of population.*

*2. The proposed use is a reasonable one because:*

*The proposed use requested by the applicant is unreasonable as the applicants’ properties have no special conditions resulting in unnecessary hardship.*

*ZONING BOARD OF ADJUSTMENT CASE LAW*

*Hanson v. Manning, 115 N.H., 367 (1975) Hardship scrutiny has been brought into the present era when the court found evidence that the zoning restrictions would make development of the plaintiff’s land more difficult because of the existence of ledge and wetlands. The court pointed out, however that there was nothing to distinguish the plaintiff’s land from other land in the same area with respect to suitability for which it was zoned. It then went on to hold that “although RSA 31:72 (now RSA 674:33) authorizes the granting of a variance when the literal enforcement of the ordinance will result in unnecessary hardship, it does so only when that hardship is owing to special conditions. Absent special conditions which distinguish the property from other properties in the area, no variance may be granted even though there is a hardship.*

*B. Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable reasonable use of it.*

*Absent are special conditions that distinguish this 2 lot property from other properties in the area. These properties located at 2/4 Beech Street Ext. are not unique from other properties in the area It their setting, all properties are similarity burdened by the rail line and abutting property share the same mound of dirt and ledge.*

*ZONING BOARD OF ADJUSTMENT CASE LAW*

*No hardship, Crossley v. Town of Pelham, 133 N.H. 215 91900) Page D6. Landowners went before the Pelham ZBA for a variance to replace a one-car garage on their nonconforming lot with a larger two car garage. The neighbors appealed the granting of the variance to the superior court, claiming that the requisite unnecessary hardship did not exist in this case, where the landowners simply wanted a larger garage. The superior court found hardship, but was overturned on appeal to the Supreme Court. ‘The court noted that the hardship cited was a result of the landowners’ personal circumstances; that a one car garage or even no garage would still be a reasonable use consistent with the ordinance and that therefore the superior court erred as a matter of law in finding unnecessary hardship supporting the grant of the variance*

*Summary: Crossley V. Town of Pelham – The neighbors had homes also on undersized lots which could not accommodate a two car garage without variance relief. (The Courts found that even if the land is reasonably suited for a permitted use, no hardship can be found and no variance can be granted, even if the other four parts of the five-part test for the granting of a variance have been met.)* “

**Action**

**Motion: Richard Shelton made a motion that based on the factual findings of the ZBA and the evidence, as presented by the applicant, that it does not support the criteria for a variance from Section 32-89 of the Newmarket Zoning Ordinance to permit a density of (six units per acre) for twelve multi-family residential units whereas four units are allowed, and, therefore, the application requesting the Variance must be denied for the lots located at 2 & 4 Beech Street Extension, Tax Map U2, Lots 107 & 108, R3 Zone**

**Second: Bob Daigle**

Steve Minutelli stated the second variance request was not necessary. Chairman Hawkins stated that was correct, as multi-family use was allowed. Steve Minutelli agreed with the analysis, particularly about hardship. The other thing that was an issue for him was Criterion #3. The application says granting the variance would be substantial justice because granting the variance would allow construction of multi-family dwellings consistent with the uses and dwelling density of the existing dwellings in the Village. That is not clear for him. It was made abundantly clear in the presentation. That does not carry the day for him. He agrees with what Richard Shelton wrote. He wanted to add that, as it really jumped out at him there is only one sentence in the application dealing with that criterion. James Drago stated he thought what they were getting at in saying it was consistent with dwelling density was their map with the highlighted lots showing the density in the area. Chairman Hawkins stated James Drago is saying this map is the applicant’s way of addressing Criterion #3 and saying the multi-family dwelling is consistent with the uses in New Village. The Board agreed that was a fair reading of the material.

Bob Daigle stated the applicant made a number of attempts to appease the abutters, with setbacks and other things. He stated this was a Board that deals with facts. This is not the Planning Board and those are their issues. Any promises made here are not binding. New Village is not a comparable comparison, because it is a historic area. It was built to house mill workers. New Village was built in a completely different time. The densities there, do not apply here. There has been no evidence of the unique nature of the applicant’s lots. There is nothing unique on those lots to be able to say they need those densities. His own property has a lot of rock on it, too, but he’s not asking to build twelve units on it. The applicant failed to address how the lot is unique and why the hardship occurs. After reading the whole application, the only thing that came to his mind was they just wanted to make more money. This does not warrant a hardship.

James Drago stated his issue was this was not in compliance with the surrounding area. It is too much building for the land. He agrees with the sewer and water points. Twenty four to forty eight people is a lot and he remembers what happened a few years ago with the drought. He has lived here almost six years and most of them were in a drought. This is a concern.

Steve Minutelli stated the character of the neighborhood was important to him. The Village section of the R3 zone is only a portion of the R3 zone. The subject lots are surrounded by other homes. Looking at the surrounding properties, particularly on the south side, the character of the neighborhood is largely single family and also manufactured homes. To grant a variance would be inconsistent with the character of the neighborhood.

Chairman Hawkins agreed with a lot of what has been said. For him, the water and sewer is not a consideration, because there has been no objection from Public Works. His difficulties with the application are, as he reads it, it says this is New Village-like, it has all these densities, and therefore, I am entitled to a variance. There is no connection between this application and New Village. This property is not in New Village. That is a distinct area and is geographically separated from these lots. He did not think anyone would think of the south side of Elm Street as being part of New Village. That is why he asked Sue Beaulieu those questions. It is just not a relevant comparison. He stated Bob Daigle alluded to New Village being created under unique circumstances. He thought that was correct and, more importantly, the current zoning is very different than it was back then. He does not know if New Village could be created under current zoning. Also, something that has been alluded to and he totally agrees with is he does not see any unique conditions of the property and its setting or any connection between those conditions and the significantly higher density that is being sought here. The application is for two six-unit structures. We have seen tonight maybe it is three four-unit structures. That is a Planning Board issue. The densities are significantly higher than what is allowed under the zoning ordinance. He did not think they have hit hardship, spirit of the ordinance, public interest for the reasons alluded to, and there is a significant question based on the comments of the abutters about the values of surrounding properties. He has not seen evidence of anything different. For those reasons, he agrees the variance should be denied.

**Vote: All in favor**

**Motion carries 5-0**

**Agenda Item #4 - New/Old Business**

None.

**Agenda Item #5 - Adjourn**

**Action**

**Motion: Bob Daigle made a motion to adjourn 8:20 pm.**

**Second: James Drago**

**Vote: All in favor**