

ZBA Minutes 01/03/11

NEWMARKET ZONING BOARD OF ADJUSTMENT
TOWN COUNCIL CHAMBERS
JANUARY 3, 2011
7:00 P.M.

Present: Robert Daigle, Diane Hardy (Zoning Administrator), Chris Hawkins (Chairman), Gerry O'Connell, Wayne Rosa (Vice-Chairman)

Absent:

Chairman Hawkins called the meeting to order at 7:01p.m.

Chairman Hawkins asked for cell phones to be turned off unless someone is an emergency first responder. He explained this is a public meeting, not a public hearing so comments from the audience would not be entertained, although attendance is welcome and encouraged. He explained this is his first time chairing the Zoning Board of Adjustment (ZBA) and offered procedural guidelines:

Each member of the Board will be given an opportunity to speak once before allowing a member to speak again

During the course of Board discussions cross discussion should be avoided

If a member of the Board makes the same point another member wished to make, the second member can choose whether to add to the point or simply state they agree

If an item is raised under new business, unless it must be acted upon immediately, this item will be taken up at a future meeting

Chairman Hawkins noted the Board is one member short; there are also a number of alternate positions available. He encouraged residents to apply.

Pledge of Allegiance

Review and Approval of Minutes: 10/18/10, 11/8/10, 12/20/10

Chairman Hawkins noted the Board is in an unusual situation in that no member of the current Board was present for the October 18, 2010 meeting and only one current member was in attendance during the November 8, 2010 meeting. Since there has been no objection raised in the motion before the Board this evening relative to the accuracy or completeness of the minutes, he felt it was appropriate to approve the minutes as they have been presented.

Town Planner Diane Hardy noted she had one change she felt was substantive. Since she had been mentioned in the appeal, she wanted to ensure the minutes reflected the change. In the November 8, 2010 minutes, on page 2, line 1 the

minutes read: "The Town Planner would present the Finding of Fact to the Board prior to the Board making their decision." The minutes should read: "The Zoning Administrator would present the Finding of Fact to the Board prior to the Board making their decision." She noted this error was also made in the October 18, 2010 minutes on page 1, line 38. Planning and Zoning Administrative Assistant Sue Jordan has reviewed the televised meetings and found both these statements to be in error in the written minutes. In both minutes, Town Planner should be replaced with Zoning Administrator. She recommended this change be recognized since it has bearing on the case before the Board.

Chairman Hawkins noted this is one of the items raised in the motion for rehearing. Town Planner Diane Hardy stated it was a typographical error.

Action

Motion: Robert Daigle made a motion to table acceptance of the October 18, 2010 and November 8, 2010 minutes until the next meeting at which time the Board will have clarification.

Seconded: No second

Gerry O'Connell asked how acceptance of the minutes would affect the motion for rehearing before the Board this evening. Town Planner Diane Hardy noted this issue is raised in paragraph nine of the motion for rehearing: "Prior to the end of the October 18, 2010 hearing and after discussion had ensued regarding possible continuance of the hearing, counsel for the applicant requested that any deliberations of the applicant's petition occur in public. Despite such request, Mr. Shelton and Ms. Kwaks deliberated upon the case and formulated statements of fact set forth in Exhibit A, which is attached, according to the ZBA's own rules that the Town Planner is to present findings of fact to the ZBA." She submitted this statement is no longer correct, because it was based on the written minutes and there had been a typographic error.

Chairman Hawkins suggested there are a couple of ways to address the situation: the Board could determine whether making this change affects the substance of the argument; or to delay acceptance of the minutes. If a decision is made to grant a rehearing on some other basis, then this point will become moot. He suggested this change did not make a difference to him in terms of the motion for rehearing, but it may make a difference to the applicant who filed the motion for rehearing.

Attorney F. X. Bruton, legal counsel for the applicant, Vincent Jarosz, noted the change would not affect the argument he is making.

Robert Daigle withdrew his previous motion.

Action

Motion: Robert Daigle made a motion to accept the October 18, 2010 and November 8, 2010 meeting minutes as amended.

Seconded: Gerry O'Connell

Vote: All in favor

Chairman Hawkins requested a copy of Planning and Zoning Administrative Assistant Sue Jordan's memo be attached to the minutes of this meeting to show the reason the change was made.

Action

Motion: Robert Daigle made a motion to accept the December 20, 2010 minutes as presented.

Seconded: Wayne Rosa

Vote: All in favor

Regular Business

Consideration of a Request for Rehearing regarding the decision of the Zoning Board of Adjustment to deny the variance requested by Vincent Jarosz regarding the following case:

Vincent Jarosz, for a Variance reference Section 7.03(B) of the Newmarket Zoning Ordinance. The applicant requests a Variance to allow consideration for an accessory apartment in an existing detached structure. The lot is located at 10 Langs Lane, Tax Map R5, Lot 62-2, R1 Zone.

The case was heard on October 18, 2010 and November 8, 2010. The Motion for Rehearing and original application are on file and may be viewed at the Zoning Office of the Newmarket Town Hall during normal business hours.

Chairman Hawkins understood the Zoning Board of Adjustment has the authority to grant a rehearing based upon good reason, as stated in the Motion for Rehearing. He asked Board members if they had an opportunity to review the application for rehearing. All Board members acknowledged they had reviewed the application for rehearing.

Chairman Hawkins noted there are four grounds presented in the Motion of Rehearing: two members of the Zoning Board of Adjustment deliberated and formulated a "statement of fact" in violation of the ZBA's own rules; the ZBA erroneously determined the Variance would violate the spirit and intent of the ordinance simply because the ordinance prohibits the use; the ZBA erroneously determined the unnecessary hardship criteria was not satisfied because the applicant is able to make reasonable use of his land; and due to the mass resignations of the prior iteration of the ZBA, a rehearing should be granted to afford the applicant due process and fair treatment regarding the exercise of his appeal rights. He suggested beginning with the hardship element of the appeal suggesting this was the "meat" of the matter. If an appeal were granted based on this element, the Board would not have to address the remaining elements.

Wayne Rosa asked for clarification on the applicant's basis for appeal under the hardship criteria. Chairman Hawkins explained his understanding is the applicant is suggesting the standard that was applied during the initial hearing was "is the applicant able to make any reasonable use of his property?" The Motion for Rehearing is suggesting that is the incorrect standard to apply to this application; the standard that should apply is: "whether the proposed use is a reasonable use." Wayne Rosa felt the applicant was violated as a result of the incorrect standard being applied. He felt this was ground for rehearing.

Robert Daigle clarified that the applicant must only demonstrate the use they are proposing is a reasonable use of the property, although it may not be the only use for the property. Chairman Hawkins agreed. He noted it is important to understand the Board tonight is not deciding upon any substance of the application, but only determining whether there are grounds for a rehearing. The way he understood the hardship criteria is that it comes in several parts: whether there are unique conditions of the property that distinguish it from other properties in the area; whether there is a fair and substantial relationship between the purpose of the ordinance and the specific application of the ordinance provision to this property; and whether the use is reasonable in light of the unique circumstances of the property. He suggested if the

Board is confused after having read all of the documentation including minutes of the meetings which standard was applied, that might be grounds for granting the Motion for Rehearing.

Gerry O'Connell noted the way he was reading this is it isn't that the applicant has no use of the property; it's that denying the variance would put unreasonable hardship on this property versus any other property surrounding it. Chairman Hawkins explained the only thing the Board needs to decide tonight is whether after reading all of the documentation including meeting minutes, whether the correct standard was applied.

Town Planner Diane Hardy noted, if the Board is confused by this issue, that may be grounds enough for the Board to grant the rehearing, so the Board could hear all of the information and formulate a decision based on the facts presented. Chairman Hawkins agreed stating the confusion of the Board over whether the correct standard was applied is good reason to grant the requested rehearing. The Board has in good faith and in due diligence reviewed all of the information and has been unable to determine whether the correct standard was applied during the initial hearing of the application. He had read through the minutes several times and found it difficult to discern what individual members of the Board were saying compared to what their decision was.

Robert Daigle suggested the second paragraph of part three says it best: "The new law does not require, nor did Rancourt, an investigation of how severely the zoning restriction interferes with the owner's use of the land. It merely requires demonstration that due to special conditions of the property the proposed use is reasonable." Chairman Hawkins noted this was read off page 51 of The Five Variance Criteria in the 21st Century handbook for Land Use Boards. He noted the word reasonable is part of the issue of this application.

Robert Daigle referenced the petition for rehearing as well as the minutes while indicating the statement: ". . . rely on the standard that the applicant must show that he has no reasonable use . . ." Chairman Hawkins noted there was substantial discussion on this issue during the previous meetings.

Action

Motion: Robert Daigle made a motion to grant the rehearing request.

Seconded: Wayne Rosa

Vote: All in favor

Chairman Hawkins noted the Board would make every effort to have this rehearing scheduled for the next meeting in February. He suggested to the applicant and the applicant's legal counsel if there are certain dates they are unavailable, to connect with Planning and Zoning Administrative Assistant Sue Jordan to coordinate. Abutters will need to be re-notified.

Attorney F. X. Bruton assumed the Board would not require resubmission of the application. Town Planner Diane Hardy noted resubmission of the application would not be necessary. Abutters will be re-notified.

Old Business/New Business

Robert Daigle asked if it would be appropriate to discuss a date for the rehearing. Town Planner Diane Hardy noted that is done administratively.

Adjournment

Action

Motion: Robert Daigle made a motion to adjourn at 7:34 p.m.

Seconded: Gerry O'Connell

Vote: All in favor

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