

## ZBA Minutes 05/21/12

### NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING MAY 21, 2012 MINUTES

Present: Chris Hawkins (Chairman), Wayne Rosa (Vice Chairman), Bill Barr, Gerry O'Connell, Bob Daigle, Ea Ksander (Alternate), Richard Shelton (appointed by Town Council as Alternate member for this meeting only)

Called to order: 7:01 p.m.

Adjourned: 8:06 p.m.

#### Agenda Item #1 – Pledge of Allegiance

Agenda Item #2 – Review & approval of minutes: 05/01/12

#### Action

Motion: Bob Daigle made a motion to accept the minutes as amended, changing “8 penny nails” to “80 penny nails”

Second: Wayne Rosa

Vote: All in favor

#### Agenda Item #3 - Regular Business

Second Reading of an amendment to the Zoning Board of Adjustment Rules of Procedure to amend the language regarding the election of a Chairman and Vice Chairman by the Zoning Board from being held in the month of June to being held at the first Zoning Board of Adjustment meeting following Town elections in March

Chairman Hawkins read the amendment. This can now be voted on at the next meeting.

William Morgan d/b/a Angel View Pet Cemetery & Crematory – Continuation of a Public Hearing for a Variance, reference Section 5.01(D)(5)(a), of the Newmarket Zoning Ordinance. The applicant requests a Variance to permit an animal crematorium to provide crematorium services for equines and large companion pets. The property is located within the Town's Aquifer Protection Overlay District. Ash remains are considered “solid waste” in accordance with regulations set forth within the NH Department of Environmental Services. According to Newmarket Zoning Ordinance Section 5.01(D)(5)(a), the “disposal, storage and staging of all solid waste” is prohibited within the Aquifer Protection District. The lot is located at 426 Wadleigh Falls Road, Tax Map R5, Lot 52-1, B3 Zone. Continued from May 1, 2012

Chairman Hawkins stated he and Wayne Rosa are recusing themselves due to conflicts of interest. He stated Richard Shelton is here, having been appointed by Town Council as an Alternate for the purposes of this meeting, and Ea Ksander has been appointed as a regular full Alternate. Chairman Hawkins and Wayne Rosa then recused themselves.

Diane Hardy stated the Board needed to elect a Chairman to preside over this public hearing. The remaining Board members can vote, the Alternates cannot, as they have not been appointed by the Chairman to fill in the vacant seats yet.

Motion: Gerry O'Connell made a motion to appoint Bob Daigle as Chairman for the meeting

Second: Bill Barr

Vote: All in favor

Chairman Daigle appointed Richard Shelton and Ea Ksander to fill in for the recused Board members.

Chairman Daigle asked if the five member board was acceptable to the applicant. F X Bruton, an attorney with Bruton and Berube in Dover, NH, represented the applicant and stated that was acceptable.

Attorney Bruton stated Bill Morgan, owner of Angel View, was here to answer questions. Attorney Bruton stated the Town currently owns the parcel. The Town has an agreement with Mr. Morgan and his company to sell the old Department of Public Works (DPW) building to him and put the property to use and back on the tax rolls. He stated the property has been under agreement for quite a while and they have been working with the Town to get the necessary approvals to move the project forward.

He stated the parcel was recently subdivided into three lots. The subdivision is now finalized and recorded at the Registry of Deeds. He showed a copy to the Board.

He stated the building has not been used for many years. This is an opportunity to put the property back on the tax rolls, with a business that will be unobtrusive. The property is intended to be used as a pet crematorium. He explained, when you have a crematorium you don't have "remains", you have "cre-mains". The deceased pets are picked up or delivered to the site by the owner. There is a furnace that burns at an extremely high rate that incinerates the animal quickly.

He stated when he went before the Planning Board, the concept of the aquifer came up and there was a discussion of whether the cre-mains are solid waste. In the Zoning Ordinance, you are not allowed to discharge or store solid waste in the aquifer district. This type of solid waste is not typical solid waste. It is not toxic. It had to be determined over the years by the State as to whether it really is solid waste. He stated the sense was that it would be called solid waste, but there wasn't the kind of concern that would normally occur over other solid waste. They are here to seek relief from the restriction of the ordinance.

He stated the cre-mains are created and placed in a kind of bucket. The bucket is then used to transfer the cre-mains into a plastic bag, which is placed in a box, and the cre-mains are either shipped to the owner or they are picked up by the applicant and brought to his site in Middleboro, MA. In Middleboro, there is a pet cemetery at the crematorium, so the owner has the option of burying the cre-mains in the pet cemetery. A pet cemetery will not be part of this property in Newmarket. There is no intention of burying any cre-mains or remains in the property. There is no disposal of any cre-mains even within the plumbing. When they are done with the bucket, they wipe it clean with a rag and those rags are then incinerated in the furnace. There is no disposal at all of cre-mains/solid waste. He stated he provided a brochure about the business to the Board, which the members had received.

He stated the purpose of the aquifer district is identified in their application. He read the purpose. He stated the kinds of activities going on, when the site had the DPW, would probably have involved a lot of solid waste. The crematorium would be fairly benign, with low and, they believe, no impact on the aquifer at all given the process that is involved. He stated one thing they will have to do separate from this variance will be to go to NH Department of Environmental Services (DES) and satisfy all of their requirements. The applicant is familiar with this, having done it with the Commonwealth of Massachusetts, meeting all of their criteria and installing all of the filters and items that DES is concerned with, particularly regarding the air. They are looking at the aquifer in this context.

Attorney Bruton went on to state, in terms of the criteria for the variance, they believe granting of the variance would not be contrary to the public interest. The proposed use represents a reasonable use and would permit orderly development, would encourage a use that can be appropriately and safely located in this area, and it would not include an expansion of the building. The location of a crematorium would assist various segments of the population, not only of Newmarket, but of the surrounding areas, as well. By restricting its activities to cremation only and removal of the ash to their Middleboro facility, the applicant is clearly protecting the public health and general welfare. They believe this presents a safe and appropriate utilization of excess Town property and will allow the property to go back on the tax rolls for the Town.

The second criterion is whether the spirit of the ordinance would be observed. They believe the use is suitable considering the surrounding properties. There are sand and gravel excavations in the area. The former use of this building was for the DPW and it had quite a bit of 24 hour use. This use will be conducted under normal business hours. The test when considering the spirit of the ordinance is whether the variance would unduly and in a marked degree conflict with the ordinance such that it violates its basic zoning objectives. When we are talking about the aquifer district, the intent is to limit or avoid the discharge of any solid waste into the aquifer and that is exactly what this business is doing. There will be no discharge at all into the aquifer. It is not just limited, there would be absolutely none.

The third criterion is substantial justice. They believe the use is suitable for the area, that it would provide no burden to the public at all, but would provide a benefit to the applicant, the Town in terms of selling the property, and the general public.

With respect to the values of the surrounding properties not being diminished, the properties have a value already associated with them premised upon the existing buildings and past use. This is a lesser use than the previous DPW use. It does not involve the expansion of any buildings.

Regarding the unnecessary hardship criteria, the ordinance promotes orderly development and serves to protect the health, safety, and general welfare of the general public. In this case, the solid waste would specifically be removed from the site and would not be discharged at all. There would be no use of the solid waste near or around the plumbing facilities. There would be no infringement upon the purpose of the ordinance given the restrictions that the applicant is coming to the ZBA with. The property is unique in its location to the surrounding uses, in terms of the gravel activities and in light of the fact that it was used as a DPW garage in the past.

He stated there is also a very significant buffer around the area and this will have a positive impact and will shield any of the surrounding properties from the use. There is no conflict between the general public purpose of the ordinance and the specific purpose of the aquifer protection overlay district.

To answer the question of whether the use is a reasonable one, the facility will operate with normal business hours and the use will be appropriate and reasonable in light of the general nature of the area. That area not only includes the excavation activities, but there is an area in the vicinity where there is the storage of a large amount of tractor trailers. This use is less intensive. The fact that it is self-contained and there will be no discharge in the aquifer suggests that it will be a reasonable use.

Attorney Bruton stated, in addition to Mr. Morgan, a fellow operator of a crematorium, John Silva, who operated a crematorium in Dover, is present and is familiar with how NH deals with issues involving crematoriums.

Richard Shelton stated he served as a State Representative in Concord in 1999 and 2000 and he served on the Environment and Agricultural Committee and he heard many cases pertaining to sludge and solids. He stated the applicant will be subject to all of the rules of 147A and 147B, in terms of hazardous waste. Attorney Bruton stated he was not sure that was the right statute in terms of crematoria. This is only a solid waste issue; this is not a hazardous waste. Richard Shelton stated he wanted to make sure the applicant was subject to the rules of 147A and 147B. Attorney Bruton stated the Town's Attorney gave them an opinion stating they had to come to the Zoning Board, because of the solid waste issues. If they had to deal with hazardous waste issues, too, the State would require they be subject to those rules. He stated perhaps the Zoning Board could suggest to the Planning Board that they make sure they comply with those rules if necessary, but, as he understood it, those laws are not applicable to this project, because it is not

considered hazardous waste. Solid waste is not always hazardous. Richard Shelton stated if these rules are applicable, he wants them used. Attorney Bruton stated they agreed and, if they are applicable, they would comply with them.

Richard Shelton read from a list of remarks he had written, "The applicant will utilize the Best Management practice of NH Rule 485C and subject to all other NH rules associated with Env W 421 and all of its sublistings." Attorney Bruton stated it said in their application they would definitely be in compliance with DES.

Richard Shelton read, "The premises may be open for inspection by a Town official without prior notice given during the hours of operation only." Attorney Bruton stated that was agreeable.

Richard Shelton read, "The applicant will maintain a daily manifest of all cremations and have it made available to the Town Health Officer or any other Town official that may be associated with the applicant's operation." Mr. Morgan stated they did maintain a manifest.

Richard Shelton asked what was meant in the application by "The applicant will handle the solid waste produced by the cremations". He asked if this was daily, weekly or monthly. He asked how long will the remains stay on site. Mr. Morgan stated, in most cases when they do individual cremations, they are picked up by the owner or they are returned to the owner within a day or two. They are not on the site for any length of time. He stated sometimes owners have an adjustment period where they can't come down to the facility and they might have to hold remains. They do not stay on site a full week. Usually the turnaround time is 3-4 days.

Richard Shelton read, "The solid waste will be placed on an impervious area and stored in a covered container within the existing building." He asked if there will be no outside storage. Mr. Morgan stated there would be no outside storage.

Mr. Morgan gave a brief background of his business. He stated he started with a pet cemetery and crematory thirty years ago. They have a very clean record with the Town of Middleboro. He stated they should feel free to call the Town of Middleboro and ask about Angel View. They do things right and there is no reason they would have anything going into the aquifer at all. On a cremation, what takes place is, when a pet is placed into the crematory, it is consumed by the flame and heat. What goes up through the stack is just a vapor. You don't see any smoke or anything like that. It is a light heat wave that would go up through there. Each state has its own requirements for certain temperatures for the unit. You cannot put a unit into any state without that company meeting the standards of the state. The units they will be putting in there would have to be preapproved by the State of NH. There is no smoke, no odor and, if a pet comes in, there are freezers to store them in until they could place them into the crematory. They have a 30'x30' walk-in freezer. It is a very clean operation and very reputable.

Bill Barr stated, Attorney Bruton had mentioned they did not believe this type of solid waste was hazardous or harmful to the aquifer. He asked if they had any data to support that. He stated there could be a mishandling accident or a mistake and the materials could be no longer under control. Mr. Morgan stated when they place a pet into the crematory, the body is there, and it is consumed by the heat and the temperature. What is left is the same as what happens in a human cremation. The body tissue and organs go up into a vapor. What is left when they open up the crematory is the skeletal structure. In Massachusetts, the minimum temperature the crematories have to run at is 1800 degrees. There are chart recorders the State checks on a periodic basis, to make sure the units are running right. When they open up the crematory, the skeletal structure is very white and very brittle. Once that is removed, because of the high temperature, there is no contamination. From there, the remains go into a bucket they use to cool the ashes and then they go into a processor that breaks the skeletal structure down into very fine powder. At that point, it is placed into a plastic bag and put into an urn. It is then returned to the owner. In no way does this ever come in contact with any water.

At the Middleboro facility, they do have a solid waste permit with the State. If there are any ashes that need to be buried, they are buried in Middleboro. For storage, they use 55 gallon drums and place ashes in there and that would be transported down to the facility. Nothing would be stored around the building.

Bill Barr stated if there was loss of control of the material, the materials could enter the ground uncontrolled. In that case, is there any evidence that would suggest that this waste would be any challenge to the aquifer? Mr. Morgan stated he has never had an incident where that had come up in thirty years of business. Attorney Bruton stated he thought what the ordinance was concerned with was solid waste that involved with commercial and industrial projects and when that is stored outside. Part of the intent of the ordinance may have been to prohibit those kinds of industrial uses. They have

looked at this with the Planning Department and the Town's Attorney and DES does not characterize this as hazardous waste. The lack of designation of "hazardous" is meaningful, because this is only referred to as "solid" waste. The aquifer district does prohibit solid waste and that is why they are here. The solid waste, in this business, is stored in a controlled environment. Also, it is all within impervious surfaces, so there is no drain. The facility is not located near the plumbing. Those are the kinds of checks and balances they have in place to make sure there is no discharge. He wanted to address the hazardous side of this, because they did work with the Town and understand that, even in NH and according to DES, there is no designation that the cre-mains are a hazardous substance.

Mr. Morgan stated regarding the question of whether they had any proof this was not hazardous, he has an engineer that works with his business, because they have to report to the state on a quarterly basis. There was a study done on the cre-mains and it was proven there was nothing detrimental in the remains that would not allow them to be buried in their cemetery in MA. He understands this is a water aquifer. He will get a copy of the study for the Board's records.

John Silva stated you would have more issues with waste by burying a body. By the time you get ashes, they are pretty sterile. Uncremated people are a more hazardous waste, especially to our water. With all the drugs and things that people take, it is worse than putting diesel fuel into the ground. The euthanizing drug is the worst thing you can put into the ground. That why it is all coming to cremation. There is nothing left to hurt anyone. It is a bone meal. Owners of a rose garden will take all the bone meal they can get. It is a great product, there is nothing bad about it. There would be no problem from a spillage.

Gerry O'Connell stated he had read they were not expanding the building. He asked if it might be expanded later on. Mr. Morgan stated no.

Ea Ksander stated this was an organic material and we should not be concerned about the contamination issue. She asked if his current facility was not able to keep up with his current needs. She wondered what it was that brought them here. Mr. Morgan stated they have five crematories operating right now. There was an opportunity to expand into NH and this property came available. He wants to promote the business up here, as he has in MA.

He stated they cremated both of President Bush Sr.'s pets, including "Millie". He traveled to Maine, picked up the deceased pets, brought them to Middleboro, did the cremation, and Mrs. Bush drove down with the Secret Service in one instance and he hand delivered the remains back to Kennebunkport himself the other time. They have had an outstanding reputation for 30 years. He is Past President of the International Association of Pet Cemeteries and has helped people set up operations like he is trying to do now. He is trying to provide a good service, jobs for the community and will, hopefully, be able to buy the building and land from the Town.

Bob Daigle stated this is a large pet crematorium. He asked what they consider a large animal. Mr. Morgan stated they do not distinguish between sizes of pets. His facility in MA is on 28 acres, but it is a totally different operation than what they are proposing here. If someone came in with a large pet, they want to be able to help them with that service. Bob Daigle stated they would be dealing with everything from cats and dogs to horses. Mr. Morgan stated that was correct.

Bob Daigle asked about the 55 gallon drums. Mr. Silva explained that some people do not want the ashes back, so the crematorium people have to remove them. They fill a 55 gallon drum with whatever ashes they have to get rid of, seal it and truck it back to be buried at his MA facility. Mr. Silva said 99% of the people take their ashes back home. Mr. Morgan stated there are different options if someone does not want the ashes back. In MA, they have a garden where they can scatter the ashes, which is approved by the State. They are not proposing to do that up here. They can also bury ashes at the MA facility and they have a State permit to do that. There would not be burying anything up here.

Bob Daigle asked how long the facility would operate at any given time. Mr. Morgan stated the MA facility usually operates between 7:00 am and 5:00 pm. Diane Hardy asked about the hours of operation and if that was five days a week. Mr. Morgan stated they offer services on Saturdays, because people generally have that day off, so it's six days a week.

Mr. Morgan stated his Middleboro facility is open for anyone from the Town to go and look at. He encourages it.

Diane Hardy asked what fueled the incinerator. Mr. Morgan stated they have natural gas in MA. He stated it would be

propane gas here. She asked if they had any material safety sheets that would list chemicals or materials used in the process. Mr. Morgan stated there are no materials used in the process. Diane Hardy asked if there would be conditions on the solid waste permit by DES. Mr. Morgan stated he would have to meet whatever requirements they set forth. Mr. Silva had two facilities in Dover and he is familiar with the permit process and will be working closely with him on this project. They will definitely meet all State regulations. Diane Hardy stated in a worst case scenario for some sort of mishandling, the Town could call in DES and they would serve as a mediator. Attorney Bruton stated there is a project he is involved with where DES has issued conditions to the permit and retained jurisdiction. There will be jurisdiction by the State. They will be utilizing the services of an engineer for the site plan review process and he is sure that issue will be fleshed out then. Diane Hardy asked if they had filed their air quality permits. Attorney Bruton stated they have not moved beyond this step.

Richard Shelton stated he would like to go over the criteria.

For Criterion #1, he stated the applicant will utilize the Best Management Practices of the NH Rules 485C restricting his activities to the cremation and removal of the ash remains to his Middleboro facility, thereby protecting the public health and general welfare of the town.

For Criterion #2, the spirit of the ordinance will be observed, as this use is permitted under Section 2.07(C) of the B3 District as a flexible use development and all solid waste generated and produced by cremations will be transported off site, in an orderly timeframe stipulated by the applicant's statement of fact.

For Criterion #3, granting the variance would do substantial justice, because the applicant would be allowed to utilize the property as it was intended and the Town would be able to sell excess property that has not generated any income and is no longer needed, thereby adding the proceeds of the property to the general fund and long term to the tax base.

For Criterion #4, granting the variance, as there is an existing vacant building that was previously utilized as a Town Public Works building and was used on a 24 hour basis and need and has remained vacant for many years. As the applicant's use will be much less intensive than the previous use by the Town, the fact that there is a very significant amount of buffering of the building, the value of surrounding properties would not be diminished.

For Criterion #5, no fair and substantial relationship exists between the general public purpose of the ordinance provisions and the specific application of that provision to the property, because this property is unique in its setting, as it is directly over the Town's aquifer protection overlay district, as well as most, if not all, of the B3 zone, which borders the towns of Durham and Lee and the R1 Zone in Newmarket. Given the location of the property, the prior use of the building on the site that was utilized on a round the clock basis, as needed by the Town's Highway Department, large scale excavation activity in the adjacent area and single family homes in the B3 District is unique. As a proposed use in the Aquifer Protection District, it will produce ash from cremation, which is considered solid waste and is a prohibited use. This solid waste will be handled as per NH Rules 485C, the Best Management Practice and, as there will be no burial on site, it will be moved offsite in a timely manner in accordance with NH Code Administrative Rules Env WS 421 of the process and disposal of the ash, which is considered solid waste, ash generated by crematorium, no long storage or burial onsite. The applicant has met the unnecessary hardship of Criterion 1. By meeting Criterion 1, we don't have to go to Criterion 2.

## Action

Motion: Richard Shelton made a motion to approve the application, as stated in his readings of the five variances and the following conditions:

1. The applicant will utilize the Rules of RSA 147, Rule 485C Best Management Practice and all rules associated with Env W 421 and all its sublistings if applicable.
2. The solid waste will be stored in a covered container and placed on an impervious area within an existing building until removed from the site.

3. The premises will be open for inspection by a Town Official without prior notice given during hours of operation.
4. The applicant will maintain a daily manifest of all cremations and have it ready to be available for the Town's official for review and compliance.
5. The applicant's solid waste will be removed offsite as scheduled weekly.
6. To provide a report for our files and our review and that it meets all of the appropriate environmental rules with DES.

Bob Daigle stated, when he worked for many years with Newmarket Public Works out of that building, they were working with raw incinerator ash and washing it off of the equipment at the site. The water, with this ash in it, was found to be drinking water quality and that was raw incinerator ash. He found it difficult to see that a carcass of a couple of dogs or a horse would be a detriment.

Attorney Bruton did not want the applicant to walk into an unintended consequence, because of a condition involving a third party. Diane Hardy stated the applicant did have discussions with DES as to how this waste was categorized, whether it was solid waste, hazardous waste. Is there a contact there who could provide confirmation of the type of waste this is to appease this. She said, if this is solid or hazardous waste, the Town does not have jurisdiction over it, because it is preempted by DES. Attorney Bruton stated because the applicant represented that he had a report that it was not hazardous, why not say that this would be subject to submitting a report that identifies it not to be hazardous. That would satisfy everyone's criteria. Mr. Morgan stated the report was done a number of years ago, the remains were tested for any hazardous waste and there was nothing hazardous found. In most cases, when you buy bone meal, it is crushed bone. There is nothing hazardous about it. He will get the report. Attorney Bruton suggested, if the Planning Department reads the study and sees that it addresses the concerns, he would think that would work. Diane Hardy stated it would depend on how technical the report was. She could consult with DES. Attorney Bruton stated the applicant would work with her. Bob Daigle stated DES is the regulator anyway. Richard Shelton stated they would be covered under the RSAs. It is in the conditions and they have to meet them.

Gerry O'Connell stated they should not unduly burden the applicant with having to meet something, when we don't even know what we want them to meet. He stated they should drop the condition. It is covered under the RSAs.

Bob Daigle stated, to summarize, there is a motion on the floor with conditions and one is to provide a report for our files and our review and that it meets all of the appropriate environmental rules with DES.

Second: Gerry O'Connell

Vote: All in favor

#### Agenda Item # 5 – Adjourn

##### Action

Motion: Richard Shelton made a motion to adjourn at 8:06 p.m.

Second: Bill Barr

Vote: All in favor