

## ZBA Minutes 02/06/12

### NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING FEBRUARY 6, 2012 MINUTES

Present: Bill Barr, Wayne Rosa (Vice Chairman), Chris Hawkins (Chairman), Diane Hardy (Zoning Administrator), Bob Daigle, Ea Ksander

Absent: Gerry O'Connell (excused)

Called to order: 7:03 p.m.

Adjourned: 8:14 p.m.

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

#### Agenda Item #2 – Review & Approval of Minutes: 12/05/11

##### Action

Motion: Bob Daigle made a motion they approve the minutes

Second: Wayne Rosa

Vote: All in favor

#### Agenda Item #3 – Regular Business

170 Main Street Realty Trust/Eva S. Brown/Matthew & Barbara Carano - Variance reference Section 1.05(B)(1)(a) and a Special Exception reference Section 1.05(B)(1)(a-f), of the Newmarket Zoning Ordinance. The applicant requests the Variance and Special Exception to permit the installation of a commercial hood vent fan on the outside wall of their building facing the abutting Town property. The existing side setback for the M2 Zone is ten feet. The Variance is required, as the addition of the vent fan will extend beyond the footprint of the existing building and will end up extending 1-2 feet over the lot line. The Special Exception is necessary to allow this horizontal expansion. The lot is located at 170 Main Street, Tax Map U3, Lot 159, M2 Zone.

Matthew Carano stated they were trying to open a restaurant in the building. They will be doing light cooking and have a four burner stove and griddle, so they need a hood and exhaust system. The exhaust system will come out through the wall facing the Pocket Park property. They have looked at other options to vent elsewhere on the building, but due to fire code, it prohibits them from venting anywhere else. There is also a ledge at the back of the building that prevents them from venting there. The only way they can open a restaurant space is if they can vent and it seems like this is their only option based on venting professionals and people who know fire codes, who they have talked to.

Diane Hardy clarified the nature of the variance and the special exception. She stated the applicant had been before the

Town Council to get permission, a permit, or an easement from them to be able to install the fan, as the building sits on the property line and the vent will encroach on the Town's park.

Chairman Hawkins stated they will take up the variance first.

Chairman Hawkins asked the exact location of the vent on the wall. Mr. Carano stated he drew it on the map he submitted, but he does not know where the exact location will be, as it will be determined by fire code. It will be somewhere in the vicinity of where he drew it, about ten feet off the ground.

Vice Chairman Rosa asked how far from the sidewalk it will be. Mr. Carano stated it will be about ten feet. There is a window on the second floor toward the back of the building. He would like to be as far back on the building away from the street as he can without infringing on the fire codes for the distance from that window. He clarified he means the window that is nearest to the front of the building on the park side.

Mr. Carano stated the Board had his preliminary floor plan, but he has made several revisions since. The stove will be a four burner stove to be located about where he had indicated on the preliminary plan. That is almost halfway down the building.

Chairman Hawkins asked why the vent could not go on the roof. He stated they were looking at punching a hole in the side of this stone building. There is already a vent stack and chimney going up through the roof. Mr. Carano stated the chimney was too small to vent for the purposes of the stove exhaust system. Chairman Hawkins explained the hardship criterion and how the Board needs to consider whether there are alternatives available to comply with the ordinance. Mr. Carano stated the only way to vent it through the roof would be on the outside of the building and then go straight up. You could not vent out of the chimney, as the inside area is too small to put the proper lining in it. Chairman Hawkins asked why there could not be another penetration through the roof made for this vent. Mr. Carano stated there was a second floor with an apartment. They would have to create an elevator shaft in order to put a venting system through the roof. Chairman Hawkins asked why that could not be done. Mr. Carano stated it was a huge cost difference and he did not know if the building was structurally sound enough to do it. He would have to speak to an engineer to find out. He also said his landlord would have a big problem with it, as they would be encroaching on the living space of the upstairs tenant.

Chairman Hawkins asked if he had discussed going through the roof with the landlord at all. Mr. Carano stated he had not. He stated the cost of doing it that way makes it prohibitive for them. Chairman Hawkins asked what the cost was. Mr. Carano stated it would probably be close to \$20,000. If they go out of the wall and then straight up, it would cost \$16,000. To build a chamber through the second floor would be north of \$20,000. He stated he spoke to several ventilation specialists to get information on his options. His goal had been to not punch a hole in the stone wall. He does care about the aesthetics. They want to open a business there and want it to look good. The specialist said there were two options; one is to go straight out of the building. The other is to go straight out of the building and up to the roof. To go through the stone wall, he was told it would cost around \$8,000. To go up would cost more like \$16,000. He stated he felt, if that cost \$16,000, building a chamber through the second floor would be at least \$20,000.

Vice Chairman Rosa asked if he could remove the chimney and use the space to go up through to the roof, replacing the chimney with the vent. Mr. Carano stated he did not know. He stated there would be two right angles to exhaust the system. He did not know if that was to fire code. Bill Barr stated horizontal venting was complicated. He did not know the answer. Vice Chairman Rosa stated the safest way may be the shortest way. If he vented directly outside, that might be the safest way. Three feet seems safer than going at an angle and then up. Mr. Carano stated you would need to be able to clean the ductwork. If it was in the location of the existing chimney, you would not be able to clean it. If you vent out the side, it is the easiest way to clean. Bob Daigle stated there are restaurants in Portsmouth where they had to go through the roof for venting.

Bob Daigle stated he had hoped to have some information on how loud the fan would be, such as a decibel rating. Chairman Hawkins stated he was not sure how big the fan was. Bob Daigle said this fan would be 30" x 33". The diameter is 30". Diane Hardy stated the Building Official, when she worked in Rye, had some hands on experience with this sort of thing and she had provided photos of fans on restaurants there. Chairman Hawkins stated the photo showed the fan to

be significant and unattractive, although he stated unattractive is not a consideration for a variance. Diane Hardy mentioned screening. She stated they had discussed this when Mr. Carano had come in with his application. Mr. Carano had said he would discuss that with the Town Council when he met with them to see if they had any ideas. Mr. Carano stated they did not ask him about it at that meeting. He stated the fan would be ten feet off the ground. He would like to make it as nice as possible. Vice Chairman Rosa stated painting it might be an improvement over a silver color.

Chairman Hawkins stated another difficulty he had with the application was the value of surrounding properties. He understood the applicant's written response to that criterion, stating a functioning restaurant would increase property values. That is not really the issue. The issue is the impact of the exhaust fan on surrounding properties. Mr. Carano stated he was not a real estate agent, so it would be tough for him to speak to what would detract from property values in the area. He would have a hard time believing that one hood vent in that neighborhood would detract from property values around it. Chairman Hawkins asked how it would not detract from that stone wall and that building. He stated they had received a letter today from a resident, not an abutter, who had a concern with a hole being drilled in the stone wall, whether the vent would be an eyesore and concern about the noise of it, plus the effect of the hot air blowing across people using the park, all valid points. He stated it ties into his point about property values. He explained part of this process is the burden is on the applicant to demonstrate to the ZBA there would not be an adverse impact on property values. He has struggled with that issue in this context. Mr. Carano stated his goal is to vent this as aesthetically pleasingly as possible. They like the building and it is their goal is to own it at some point. There is no other way for them to vent it. With that in mind, he believed the good that comes from having a wonderful working restaurant in that neighborhood would greatly overshadow any negative property values. That would greatly outweigh any impact. If he lived there, he would want another option for food.

Chairman Hawkins asked about the noise level. Bob Daigle stated it was a fully driven system and it is going to be loud. Mr. Carano stated there was precedent for it in the neighborhood, as there is a hood right across the street at the burger joint. Bob Daigle stated that was up on the roof. Mr. Carano stated his would be ten feet high off the ground. He stated, to sell the Panini's, they don't need a hood system. They need it for the preparation

of soups and desserts. That will not be done all day long, so the hood will not be on the whole day. They just need it for when they use the stove. Bob Daigle stated the problem he had was, in a few years, they move to a different location and someone else moves in and they are flipping burgers all the time and the fan will run all the time. Mr. Carano stated that was hypothetical. What if they gave the restaurant to their children and they continued to run it? Bob Daigle stated that was hypothetical, too. Mr. Carano stated he was not planning on moving from that space.

Vice Chairman Rosa stated there was discussion with Town Council about granting an easement only to the present occupants. Diane Hardy stated you can put a restriction on it. Vice Chairman Rosa stated the easement would not go with the land. Chairman Hawkins stated it is effectively a license. Mr. Carano stated they were concerned about the license issue only because that could be revoked. If he put tens of thousands of dollars into his business and someone revoked the license, it would be negative.

Vice Chairman Rosa stated he did not see how it could adversely affect the property values. There is a restaurant next door and across the street. Chairman Hawkins stated he was thinking specifically about the effect on the Pocket Park. The burden is on the applicant to show it would not impact the property values. He said it was not up to the Board to demonstrate that it might. Vice Chairman Rosa stated the Town Council is granting the easement. If the Council is okay with it, the ZBA has nothing to do with that. Chairman Hawkins stated he understands everyone's point. The Town Council does not substitute their judgment for ours. The ZBA has to exercise its own judgment.

Ea Ksander asked not knowing about the noise level or knowing exactly how far back the fan would be located and not understanding whether it could be adequately screened or decorated in such a fashion to minimize the impact, whether there was enough information to make a decision. Chairman Hawkins stated that was a good point. He explained to the applicant the ZBA has been in this situation before, where applicants have come in and the Board has not felt 100% comfortable with the evidence they have seen and there are significant questions to which they have received no answer. He told Mr. Carano it was entirely up to him, but he suggests he consider the Board's comments, the meeting be continued for 30 days, and the applicant comes back with additional information. They could also take a final vote on it tonight. Mr. Carano stated it would be difficult to get the information the Board is asking for. Chairman Hawkins stated whoever is providing him with that fan should be able to give him the decibel level of that fan when it is in operation. Having a clearer idea of precisely where the fan is going to go would be helpful. He is concerned about the property value criterion, because it is up to the applicant to demonstrate that it will not have a significant impact on surrounding property values. He stated he was not comfortable with the way it stands right now. He is giving him an opportunity to address those issues, if he can.

Ea Ksander asked if Mr. Carano had visited the property with the Fire Inspector to ascertain the location. Mr. Carano stated the Fire Code Enforcement Officer is Roger Connor. Roger Connor declined to give him any indication of how he could properly vent it. He told him he needed to do a code review with an engineer, who could draw up the specifics, which costs \$1,200. After the engineer's findings are sent to the Fire Inspector and he looks at it, he sends it back to the engineer with suggestions and the engineer looks at it again for \$1,200. It is cost prohibitive to do that. So, instead, he called the Fire Inspector for the State of NH, who gave him some indication on where stuff could be. Using that information, along with the hood ventilation specialist, he gathered the information he has.

Ea Ksander stated she is concerned, if he did not know exactly where it is going and the ZBA grants the variance, the fan could end up in a place that has more of a negative impact than it already would. Mr. Carano stated it has to be 10' off the ground and 10' away from an upstairs window, plus 3" for every degree of elevation. So, it will be somewhere close to where he drew it. Ea Ksander stated, if it could be further back than where he is showing it, that could make a difference on the abutting property, which is the concern. Mr. Carano stated you will still be able to see it. It won't be as far back as the retaining wall or under the window. If you are in the Pocket Park, you are going to see it. It will be ten feet above you on the wall.

Vice Chairman Rosa asked if he was familiar with the two restaurants in the vicinity, Rocky's Famous Burgers and The Riverworks. Mr. Carano stated he is. Vice Chairman Rosa asked if their fans were comparable or similar to the fan he is proposing to install. Mr. Carano stated he thinks they are bigger. He stated his fan is one of the smallest fans you can get. Vice Chairman Rosa stated he has walked by those restaurants and never heard their fans. Chairman Hawkins stated Rocky's fan is on the roof. He did not know where the Riverworks fan is. Ea Ksander stated that means the location of the Riverworks fan is doing what it should be doing. The public does not notice it and it does not cause an impact.

Vice Chairman Rosa stated he has walked by thousands of times. It is a noisy intersection. He does not think a fan will affect the quality of life in that area. Chairman Hawkins stated this is going into the Pocket Park. Mr. Carano stated the Town Council asked him to speak with Ree Cooper, from the Linked Together program, and they have been exchanging emails.

Diane Hardy stated, when they had the Arbor Day celebration at the Pocket Park, there was a lot of background noise. When people were speaking and there were people from the press there, you could barely hear them, because of the cars. Vice Chairman Rosa stated it is a very noisy intersection. He stated the Town Council was comfortable with the fan being there, so the ZBA has to pay attention to that. He stated noise was discussed.

Chairman Hawkins stated he was concerned about another criterion, the one that states there is no other reasonable use of the property. He has not seen enough evidence to convince him there is no other reasonable use of the property. There have been many other uses of that property.

Bob Daigle stated he is concerned there is no parking there. If another restaurant goes in there, on any night, you can't park there.

Diane Hardy stated this building is a historic building. It is part of the Newmarket Industrial and Commercial Historic District, which has been listed on the National Historic Register since 1981. The building dates back to 1840, so it is indeed a historic structure. In the past, when there have been projects before the Planning Board, they have, as a courtesy, sent applications to the Advisory Heritage Committee, for their review and counsel. Many times they came back with recommendations that would help minimize the impact to the historic resource. Mr. Carano stated he spoke to Adam Schroadter and he spoke with Gerry O'Connell about it and they agreed there was no problem. Diane Hardy asked if the Committee officially met about the application, as they have in the past. Given that there is additional data that needs to be collected, perhaps it might be in order to add that to the list and have them weigh in. Their role in this process is advisory, but sometimes they come forward with some great recommendations.

Bob Daigle asked about a time frame for getting an easement drafted. Mr. Carano stated he spoke to the Town Administrator today and dropped off a preliminary document and he seemed to think it would be done at the end of the month.

Bill Barr stated they are looking at voting on the variance at this point. Does it matter what is being done, as far as the fan, for that argument? It deals with any expansion. Chairman Hawkins stated the vent fan is a fixture and a part of the building, so it is an expansion. There was discussion on how to proceed with the variance and special exception. It was decided, no matter what caused the expansion, these criteria still need to be met.

Chairman Hawkins asked, again, what Mr. Carano's preference was. He stated he could take a few minutes and talk it over with the other people with him. He stated he would be more comfortable seeing something in writing from the Advisory Heritage Committee.

Bob Daigle stated he would like to see a draft of the easement. The Board is flying blind right now with "he said, she said". He was not comfortable with that.

Ea Ksander stated she would be curious to know if the use changes and the vent hood were no longer needed, could the building be restored, given the historic nature and the unique stonework. Mr. Carano stated he has been assured that could be repaired in such a way that no one would know the difference. Chairman Hawkins stated there are a lot of unknowns at this time.

Bob Daigle stated this is one of the entrances to the Main Street project. It is one of the first things people see when they get up into this area, as the letter from the citizen mentioned.

Vice Chairman Rosa asked if this could be hidden. He asked if he could plant arborvitaes or some other screening there. Mr. Carano stated he would do that, if it was consistent with fire codes. Vice Chairman Rosa stated the Town would have to plant them, as it is on Town property. Diane Hardy stated the easement could include this. Mr. Carano would have to go back to the Town Council to talk to them about it. Bob Daigle stated, if he had been on the Town Council, he would have handled it the same way. Let's consider it, move it over to the Zoning Board and they will flesh out any issues with it.

Chairman Hawkins asked what Mr. Carano wanted to do. Mr. Carano wanted to discuss it with the people with him. Chairman Hawkins stated they would take a brief recess at this time.

The Board recessed at 7:53 p.m. and returned at 8:05 p.m.

Mr. Carano asked if he could meet with the Board sooner than 30 days from now, as he is already paying rent on this space. Chairman Hawkins stated they would do their best to accommodate him.

Mr. Carano asked for guidance in how he could demonstrate this would not decrease property values around the restaurant. Diane Hardy stated realtors have written letters based on their experience. Chairman Hawkins stated Mr. Carano is free to talk to the staff or the Tax Assessor. The Zoning Board is quasi-judicial, so they cannot give advice like that, because they would be prejudging what he is doing. But Mr. Carano is free to talk to anyone in Town Hall about this. Diane Hardy recommends he talk to some local realtors, also.

Mr. Carano asked, if a realtor gave him a letter, would it have to be a realtor who does not have a conflict. The Board told him that was correct. Gerry O'Connell's name came up. Chairman Hawkins stated Gerry O'Connell felt he had an indirect financial interest in the outcome. Mr. Carano stated that was true, but not really. Mr. Carano stated this was their only option in town. He looked at the space Gerry O'Connell was marketing, but the building at 170 Main Street is their only option. He stated there is no conflict. Ea Ksander stated it is not only conflict, it is perception of conflict. Mr. Carano stated he would talk to someone else then.

Ea Ksander suggested that Mr. Carano share the letter from the concerned citizen with anyone giving him advice on the diminution of property values.

Action

Motion: Bob Daigle made a motion to continue the meeting at 6:00 p.m. on February 14, 2012

Second: Bill Barr

Vote: All in favor

Agenda Item #4 – Other Business

None.

Agenda Item #5 – Adjourn

Action

Motion: Bill Barr made a motion to adjourn at 8:14 p.m.

Second: Ea Ksander

Vote: All in favor