

ZBA Minutes 09/08/11

NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING SEPTEMBER 8, 2011 MINUTES

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

Called to order: 7:01 p.m.

Agenda Item #1 - Pledge of Allegiance

Agenda Item #2 – Review & Approval of Minutes – 07/18/11

Action

Motion: Bob Daigle made a motion to accept the minutes, with the changes emailed by Chairman Hawkins on 08/08/11

Second: Bill Barr

Vote: All in favor

Agenda Item #3 – Regular Business

Matthew Heiman - Variance reference Section 7.08, 7.08(3), & 7.08(5), of the Newmarket Zoning Ordinance. The applicant requests a Variance to permit the placement of a second shed within the front yard of the property, 40" from the side property line, where 60" is required in the R2 Zone. The lot is located at 9 Stanorm Drive, Tax Map R3, Lot 4-8, R2 Zone.

Malisa Heiman presented the variance application. She stated they were requesting a 20 inch variance, for the placement of their shed. She asked if the Board would like her to go through each criterion.

Chairman Hawkins stated they had submitted a very comprehensive application. He thought what would be sufficient would be to assume the Board had read and understood the application and, if there was anything the applicant would like to add or clarify; they were free to do so. Ms. Heiman stated they had taken the opportunity to go around to their neighbors in the cul-de-sac and there were no objections to the variance request. She also had written statements from three of their abutters and they had voiced no objections. She submitted the documents for the record.

She stated they learned their property should have originally had 100' of road frontage. They purchased the property in 1994. The house was built in 1986. The property only has 85' of frontage, which is less than what is required in that zone. If they had the 100' minimum frontage that is required, they would not have ended up in violation of the shed setbacks.

Ms. Heiman stated they cannot build a garage, since they are so close to their neighbor's property. She and her husband enjoy riding motorcycles and they do not have a place to store their valuables. There is a legally nonconforming structure at the rear of their property. It used to be a container box and a shed was created by putting a roof on it. It is not secure and it is old. The slope of their backyard goes down about 45 degrees to the old shed. It is unreasonable to drive a motorcycle down the slope, through the backyard and over the leachfield to get to that structure. The two main reasons for the new shed are to secure their valuables and house the winter snow removal equipment. At this time, the snowblower is stored in the old shed. They have to go to the rear of the lot to get their snowblower. During the winter, in the dark and in ice storms, it is difficult. She stated her husband is active military and has been deployed overseas the last two winters and she has had to go down and take care of getting the snowblower and equipment out of the shed and up to the driveway by herself. Having the new shed in its current location is going to be a huge help should he be deployed again, which is always a possibility.

Chairman Hawkins asked if there were any members of the public here to speak on this application. There were none. He asked for questions from the Board.

Bob Daigle asked for clarification on the situation. He stated he understood the Building Official had noticed the shed, while on another inspection in the neighborhood, and advised the applicants to appear before the Zoning Board. Ms. Heiman stated that was correct and she apologized for the oversight. It was their understanding, at the time, since the shed was not a permanent structure, they did not need to get a building permit. They were not aware of the setback requirements when they placed the shed in its current location.

Chairman Hawkins asked what their intentions were for the existing shed. Mr. Heiman stated it was going to be used for seasonal storage. Ms. Heiman stated it would be used for the kids' bikes, hoses in the winter, a wheelbarrow, and those sorts of items.

Chairman Hawkins stated the property really drops off in the back; the house is situated on a shelf. Ms. Heiman stated one could imagine what it was like in the winter trying to get the snowblower up that hill in the dark.

Action

Motion: Bob Daigle made a motion to grant the variance, because of the unusual characteristics of the lot, the limited frontage, the fact the slope is too steep on the back and there are no objections to the spirit and intent or diminution of property values, as indicated by the abutters' letters.

Chairman Hawkins made an amendment based on his review of the evidence and view of the property that the factual information presented is very accurate and pertinent and he would be comfortable adopting the factual presentation made by the applicant as part of the Board's findings. Bob Daigle stated he was very agreeable to that.

Second: Bill Barr

Wayne Rosa asked if they were acting on one variance or all three. Chairman Hawkins stated he was comfortable acting

on all three. Chairman Hawkins clarified with Bob Daigle that this was his intent in the motion he made and he stated it was. Bill Barr also agreed.

Vote: All in favor

Russell Serbagi, Jr. & Timothy Nichols-Acadia Engineers & Constructors - Variance reference Section 3.04, Setbacks, of the Newmarket Zoning Ordinance, to allow the redevelopment of the property with the demolition of the existing abandoned building and the construction of a new 20,000 sq. ft. building that will encroach within the 10' setbacks required by the zoning ordinance at the side and rear of the building. The property is located at 13 Water Street, Tax Map U3, Lot 4, M2 Zone.

Gerry O'Connell recused himself from this application due to a conflict of interest. He represents the seller.

Timothy Nichols presented the application. He stated the intent of the conceptual site plan was just to show the setback encroachment, as everything else would have to go through Planning Board.

Chairman Hawkins stated he was not clear on the impingement of the setbacks. The applicant was calling the water side the front of the building and the rear is the church side. The setback impingement varies. Mr. Nichols indicated the shaded section on the plan as the setback encroachment. It ranges from 1 foot to 7 feet. The church is about 4 feet from the property line. The distance from the church building to the proposed building is approximately 10-12 feet. There is a 22 foot wide driveway there now. The Riverwalk easement (on the other side) is confining for them. The distance to the parking garage is about one foot from the proposed building. There was discussion of the cement stairway. The applicant would like it eliminated, but that is something they have to discuss with Rivermoor Landing.

Mr. Nichols went over the history of their interest in the property. He said it did not make sense to keep the existing building. The plan is to raze the building and lower the site about six or seven feet. There is currently some pedestrian access there now and they want to enhance that. The challenge is to get a financially viable building there with a mix of uses. Other constraints include parking. The current plan is to have one space per residential unit; the remainder would be for the commercial occupants. They are trying to maximize the parking in the current footprint and provide pedestrian access. They are in discussion with Rivermoor Landing to restrict access through their property.

Chairman Hawkins took a moment to explain, since there was not a full five-member Board available to hear this application and no alternates, the applicant could choose to wait until a five-member Board could hear their variance. The Board could find another person to sit and ask they be appointed by the Town Council to hear this application. The applicant chose to go forward with four members.

Mr. Nichols stated they wish to encourage more pedestrian traffic to use the Riverwalk. His own business will be relocated to this building. They would occupy about 40% of the commercial space.

The area contained by the retaining wall will be a landscaped courtyard, ideally for a restaurant with outside seating.

Wayne Rosa asked what happens to Water Street when they lower the grade of this property. Mr. Nichols stated they may have to reset some curbing when they put a sidewalk in, but that would be all that was necessary.

Bill Barr asked about the condition of the current building. Mr. Nichols stated it was pretty bad. There was not much that could be preserved. The stone foundation walls and columns were in rough shape, the whole building is shifted about 2 feet toward the river. It was constructed on a low budget. The frame would not comply with code. It served its original purpose.

Mr. Nichols explained where the residential and commercial units would be located in the building. They wanted to lower

the site to keep their building in the right perspective with the other buildings' heights. The building is proposed to be about 48 feet high. On the roof will be a solar PV system and they are installing a geothermal system. It would be a high performance building. Chairman Hawkins asked where the geo thermal system would be placed. Mr. Nichols explained it would be by the courtyard. Mr. Nichols stated this was a true mixed-use development in accordance with the Master Plan.

Chairman Hawkins opened the public hearing.

Rob Phillips, President of the Rivermoor Landing Condominium Owners Board of Directors, stated the public was not able to see the presentation, as the easel was turned away from them. Diane Hardy told them to feel free to go up and look and asked that the easel be turned around. Mr. Phillips stated he realized this meeting was only about the setback requirements. He stated, in walking the site with Mr. Nichols, they saw a lot of what they had to go through to accomplish this project. The cement stairway, which was mentioned earlier, would have to disappear, as there was going to be a "cut" between the two properties at that location. He stated the Rivermoor Landing Condominium Association has stated to Mr. Nichols they would not pay to have the stairway removed, but he expected the stairway would be a discussion before Planning Board. He had concerns about the intensity of some of the uses that may go in with respect to the traffic associated with them. He stated the encroachment into the setbacks were not a concern to them. They had other issues to work out with Mr. Nichols, but building into the setback was not one of them.

Chairman Hawkins clarified the only concern of the Zoning Board was the setback. He explained the purpose of having setbacks, according to the Zoning Ordinance.

Mr. Phillips stated the church was impacted more; Rivermoor Landing was a fair distance away. The other issues they have are related to the site plan.

Jim Wibel, 54 Rivermoor Landing and Vice President of the Rivermoor Landing Condominium Board of Directors, stated they heard the presentation last night from Mr. Nichols. They do have some things to work out. They are seeing this as a positive thing, as a building that is falling down is being replaced. He echoed the concerns expressed by Mr. Phillips about parking. Parking will be in short supply once all the development is completed downtown. He asked if there will be a fence on top of the retaining wall, since there will be a 7 foot drop. He was generally in favor, with some minor issues. They have ideas about emergency access. He would like to see it move forward to the Planning Board. He did not feel the setback encroachment was a major issue.

Ron Orcutt, Newmarket Community Church, stated the way the church is organized, the power of the church is the congregation. They have more input than the pastor or trustees. They are going to call a special meeting at the church and would like to have the presentation put forth to the congregation, so everyone could see what was going on. A presentation was given to the trustees and they were excited about the idea. There were concerns. They would like the congregation to have a say. Snow removal and water drainage are concerns. If there is any construction, will it damage the church's foundation or structure and where do they stand if it does? If there is any way to have a meeting in front of the congregation, it takes them two weeks to get the word out at Sunday services, for example. They would like everyone to have an idea of what is going on.

Wayne Rosa asked about the back of the church. How does this affect the church's windows? Ron Orcutt stated they don't have a water view from the church. There are windows on the second floor, but those rooms are all offices. There is an exit from the basement to the ground level and the fire escape. Wayne Rosa asked if a path or access is installed in back of the church, will that impact the church at all. Mr. Orcutt stated there is a handicapped elevator and sometimes people need to bring a van right up to it. There has to be enough room for that. Mr. Phillips stated the biggest change would be at the cement stairs.

Wayne Rosa asked Mr. Nichols what the grade difference would be between Water Street and the front of the proposed building. Mr. Nichols stated it will drop 2-3 feet along the street elevation. He stated they would bring the sill up a little higher to protect the building from flooding.

Bob Daigle mentioned the back side of the building and its proximity to the church. From a fire safety perspective they would be limited to working with only two exposures. He was concerned about how the Fire Department would effectively be able to get in there, especially with a retaining wall. Chairman Hawkins expressed concern about emergency access also. Bob Daigle stated a fire engine would not be placed on the Rivermoor parking structure, as it was not rated to handle that. They would only be able to get hand lines in there. Bob Daigle stated they are looking at 25' of separation right now as it exists. He was at the Town Hall fire in 1987 and that went quickly. Diane Hardy suggested the applicant meet with the Fire Chief, as this could be a major stumbling block for them with respect to meeting life safety requirements.

Bob Daigle mentioned they have not had any feedback from the congregation of the church. He would like to hold off on voting on this to get feedback from them. With the change in grade, the need for a retaining wall and the close proximity to the church, he is nervous. Also, if the parking garage is redeveloped in the future, the owners are going to want to put that up to the property line, as well. Chairman Hawkins agreed and stated people who redevelop don't typically want to make their property smaller.

Bill Barr stated, in Section 3.04 describing the spirit of the ordinance, the only thing that comes up contrary is the mention of proximity of structures affecting fire safety. That would be driven by building and life safety codes. He stated the Board would need a statement from a fire protection engineer to solidify their argument. Mr. Nichols stated a life safety code review would be part of a site plan process. Diane Hardy stated the Zoning Board could make that request for information. Chairman Hawkins stated this would come up in other processes, but fire safety is something the Zoning Board is obligated to look at. Mr. Nichols stated, if he meets the setbacks, they would still be dealing with fire access issues. Bob Daigle stated they would not be dealing with a retaining wall in that case. Chairman Hawkins stated putting these buildings closer together increases the risk of fire moving from one building to the other. Bill Barr suggested the Board assure the setback distance is sufficiently addressed by the fire protection engineer through the review process. Diane Hardy stated the Town works with SFC Engineering for fire protection engineering reviews. The Zoning Board does have the power to request independent studies.

Wayne Rosa asked, if access was obtained through the courtyard, would that help. Bob Daigle stated the Fire Chief would never put a vehicle into an area like that. If they had to do a third story rescue with a ladder, there are only two sides to work with. It is doubtful you could access from the church side of the building. Hand ladders would have to be used. If there is encroachment from above with fire escapes, it might make this even more difficult. Bill Barr stated this needed to go to a third party engineer.

Bill Barr asked the group from the church if they were requesting the Board to hold off on a decision tonight, in order for their congregation to be able to meet with the applicant. Ron Orcutt stated they would like to hear what is being proposed. They did see the trustees in good faith, but they do not have the ability to accept or deny anything. Mr. Nichols stated they were willing to give a presentation to the entire congregation.

Chairman Hawkins asked why any invasion of the setback was necessary. Mr. Nichols stated this was driven by the amount of square footage they need to make this project financially viable.

Diane Hardy suggested, in light of the fact the church congregation would like to hear about the application with a presentation and given the interest in getting more information from a fire protection engineer, it may make sense to continue the hearing for another month.

Chairman Hawkins asked what they were asking to have from a fire safety evaluation. Diane Hardy explained the third party engineer would review the plans and address fire safety implications with regard to the setback application. They would provide feedback for consideration by the Zoning Board. The cost is paid by the developer. She stated fire safety is one of several considerations in setback variances. This Board has indicated they do not have the background to make determinations regarding fire safety in this instance, therefore it is appropriate for the Zoning Board to ask for this information.

Mr. Nichols stated he felt they were in a gray area between setback variances and building codes. Bill Barr explained, in order for them to vote on whether the spirit of the ordinance is being maintained with granting the variance, one of the items in the text is fire safety and there is no evidence from the applicant to support that item. Mr. Nichols asked if it was better for that to be deferred to the Planning Board. Chairman Hawkins stated the ordinance states "the proximity of a structure to abutting lots affects fire safety". You are asking for a variance from that ordinance. That is one of the issues

the Board is obligated to take up. The burden of establishing whether you are entitled to the variance is on you, as the applicant. He stated he does not need a detailed knowledge of life safety codes to see that putting these buildings close together affects fire safety. That causes him to question whether the application should be granted. He stated the Board was trying to give him guidance on things he might be able to do to give the Board some assurance that granting the variance would not be contrary to the public interest and the spirit of the ordinance. The choice whether to go further and provide this information is up to the applicant. When the Board votes, they will vote on the evidence presented. The Board is giving you an opportunity to address their concerns. Mr. Nichols asked if it could be a conditional approval from Zoning Board to be pending as they go through Planning Board process. This is conceptual; there are things that could change. Chairman Hawkins stated the applicant was before the Zoning Board tonight with his application. Mr. Nichols stated it could be a conditional approval for a fire safety review. Chairman Hawkins stated the Board has to look at the evidence and decide whether or not it is sufficient. The applicant was asking the Board to make a determination in advance of pertinent evidence being presented. He did not see how they could judge in advance.

Regarding what Mr. Nichols said earlier about his reasons for having the building in the setback in the first place, Chairman Hawkins stated he had serious reservations about economic hardship being sufficient to satisfy hardship under the statute. Mr. Nichols stated the original concept was much smaller. In order to make the economics work, anything less than this does not work to do mixed use.

Chairman Hawkins stated he is hearing that the Zoning Board is not comfortable with the evidence presented. The applicant can ask the Board to put his application to a vote now or ask for more time to provide further information. It is up to the applicant. Mr. Nichols asked, in addition to the fire safety issue, was there any other information they would like to have from him. Wayne Rosa stated he would like to see the applicant meet with the church congregation. Chairman Hawkins stated he had concerns about whether the economic viability satisfies the hardship criterion.

Mr. Nichols stated the only thing he could say is it does not work for them financially, if they go with a smaller building. They can go higher, but that would take a height variance. They are restricted by the easement. He could show the financial analysis. He stated each abutting landowner encroaches on his property now. Chairman Hawkins stated the applicant might want to do some legal research on whether the Board has the power to suggest economic viability is not sufficient to prove hardship. Mr. Nichols stated mixed use is much more of a risk financially. Chairman Hawkins stated he is not expressing a view on the merits.

Chairman Hawkins stated Mr. Nichols has the option to ask for a vote tonight or ask for a continuance in order to gather more evidence. Mr. Nichols stated he would like to address the church's concerns. He understood there were three issues, the church congregation's involvement, the fire safety issue, and the hardship criterion. Chairman Hawkins stated he would make every effort to accommodate his closing schedule. Mr. Nichols asked for two weeks.

The Board decided to continue to Thursday, September 22, 2011.

Action

Motion: Bob Daigle made a motion to continue the public hearing on the application of Russ Serbagi and Tim Nichols we have been discussing here this evening to Thursday, September 22 at 7:00 p.m. here in the Council Chambers if it is available

Second: Wayne Rosa

Vote: All in favor

Tarbell Management LLC for a Variance reference Section 3.04 Setbacks, of the Newmarket Zoning Ordinance. The applicant requests a Variance to permit life safety balconies on the third floor to extend into the setback. One balcony will be 4'9" from the side property line and the other 10'2" from the other side property line, where 15' is required. The existing building is also within the setbacks. The property is located at 36 Elm Street, Tax Map U3, Lot 213, R3 Zone

Charles Tarbell stated, on the left side of the building, they were asking for less than a foot beyond what is already there. This is all to be built on the third floor. This comes after the Fire Department inspected the building and they suggested he contact SFC Engineering in Manchester. One of SFC's recommendations was to provide these balconies for the third floor. It is just balconies, no stairs. His building is in the setback already. Lt. Barr was the representative who initially came to look at the building. Wayne Rosa asked if this was a required inspection. Bill Barr stated the Fire Department is invited by residents into buildings, through accidental fires, for example. The Fire Department makes note of code violations.

Chairman Hawkins stated the applicant was proposing building balconies upon the recommendation of the Fire Department to make the building safer. Mr. Tarbell stated that was correct.

Action

Motion: Bob Daigle made a motion, because of the age of the building, its location on an older lot in town and the recommendation of the Fire Official that we grant the variance to construct the fire balcony

Second: Wayne Rosa

Bill Barr asked if this was something he should vote on, since he was involved with the process. Chairman Hawkins stated the purpose of the conflict of interest requirement was to make sure there was no financial benefit for the Board member or someone closely related to them in the outcome. He said Bill Barr was involved in the process and may have more specific knowledge of the building, but he did not see this as a disqualifying conflict. He asked Mr. Tarbell if he saw any problem with Mr. Barr voting on this. Mr. Tarbell stated he did not have a problem with it.

Vote: All in favor

Mr. Tarbell asked if he was all set to begin building. Chairman Hawkins and Diane Hardy explained part of his building permit had been denied and required the variance. The variance had been granted and the Building Official would be notified and, if everything else was in order and there were no other issues, he could issue the permit. Whether he was all set to begin actual work was between Mr. Tarbell and the Building Official.

New/Old Business

Gerry O'Connell asked why the Board had received tax maps this evening. Diane Hardy stated there had been some comment at a previous meeting that it would be helpful to have tax maps available. The Administrative Secretary made copies of the tax maps for each member to take home for their reference.

Diane Hardy stated the other paperwork the Board received has to do with a change in the RSAs regarding the role of Alternate members. The statute states Boards could include in their Rules of Procedure that alternate members could participate in discussions at meetings. They would still not vote unless appointed. Diane Hardy drafted Rules of Procedure on this subject for the Board to read over and discuss at a later meeting. Chairman Hawkins stated they could discuss it at their next meeting.

Chairman Hawkins asked if Diane Hardy had shared the Zoning Board's suggestions for modifications to the Zoning Ordinance, with the Planning Board. She stated she had and the Planning Board has set up a committee to review the Zoning Ordinance and make appropriate changes. She had discussed the changes with the committee this afternoon at

their first meeting. The suggestions of the Zoning Board will be considered. She will draft a letter regarding the Zoning Board's discussions and will include the approved Zoning Board minutes and give it to the Planning Board for their review.

Gerry O'Connell stated, at the Office of Energy & Planning conference they attended last June, his impression was that economic impacts could be considered as part of a hardship criterion decision. Chairman Hawkins stated he had read a court case stating economic hardship, in itself, is not sufficient. However, it is a factor the Board can consider. Gerry O'Connell stated they should go back to the instructor of the class and ask for clarification. Wayne Rosa stated what the instructor said economic hardship is a consideration and there will be more of it in the future and the Board should take that into account. Chairman Hawkins stated he did not disagree. He did not think in and of itself it is sufficient. The Board can consider it. Bob Daigle stated an applicant could come in and say they want to put a 90 story skyscraper here, because they could make millions of dollars. It has to have some other considerations. Chairman Hawkins stated they had to be careful, the Board cannot be talking about a previous application heard this evening. Gerry O'Connell stated this has to do with every application; it has been a sticking point. His impression was it was very hard for this Board to approve anything, because of economic hardship. If that cannot be a factor, nothing will pass. Chairman Hawkins stated he is agreeing it can be a factor.

Action

Motion: Bob Daigle made a motion to adjourn at 8:50 p.m.

Second: Bill Barr

Vote: All in favor