

ZBA Minutes 04/08/13

NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING APRIL 8, 2013 MINUTES

Present: Chris Hawkins (Chairman), Wayne Rosa (Vice Chairman), Bob Daigle, Bill Barr, Elaine Winn, Richard
(Alternate)

Called to order: 7:00 p.m.

Adjourned: 9:29 p.m.

Agenda Item #1 – Pledge of Allegiance

Agenda Item #2 – Review and approval of minutes: 01/28/13, 03/04/13

01/28/13

Action

Motion: Bob Daigle made a motion the Board accept the minutes as presented

Second: Bill Barr

Vote: All in favor

03/04/13

Action

Motion: Bob Daigle made a motion the Board accept the minutes as presented

Second: Wayne Rosa

Vote: All in favor

Agenda Item #3 – Regular Business

Election of Chairman and Vice Chairman

Action

Motion: Bob Daigle made a motion that the Board maintain Chris

Hawkins as Chair and

Second: Bill Barr

Chairman Hawkins asked if anyone on the Board had an issue with voting on both positions at the same time. No one had any problem with that.

There were no further nominations or any discussion.

Vote: All in favor

Chairman Hawkins welcomed Elaine Winn and Richard Shelton to the Board.

Agenda Item #4 – Regular Business

William Pothier – Continuance for Special Exceptions reference Sections 1.05(B)(1) & (2) and Variances reference Sections 1.05(B)(1)(b) and 1.05(B)(2)(c), of the Newmarket Zoning Ordinance. The applicant requests the Special Exceptions and Variances to permit the expansion and raising of an accessory building, which is a non-conforming structure, five feet to prevent flooding from high tides and rising water levels. The lot is located at 8 Bay Road, Tax Map U2, Lot 356, R2 Zone.

Chairman Hawkins asked Elaine Winn and Richard Shelton if they had an opportunity to review the application and the previous meeting minutes. They both stated they had.

Chairman Hawkins explained the Board's application procedure.

Attorney Scott Hogan represented the applicant.

Chairman Hawkins asked if there were additional variances, for which they were going to apply. Attorney Hogan stated he would be addressing those this evening.

Attorney Hogan gave an overview of why the applicant is before the Board. He stated the property is a single lot with a primary residential structure. The structures they are here about have always been deemed accessory structures, called a boathouse and barn. He showed photos. The reason for the applications was to rebuild and raise these structures. He showed photos of the Mother's Day Flood event, where the building was substantially under water.

Attorney Hogan stated the structure that existed was a classic, odd Yankee construction. There were 55-gallon drum foundation pilings under it. The foundation itself was always haphazard and in structural disrepair to a great extent. Under the building, there is an old stone culvert that comes out from the embankment, comes under the entire building and discharges water to the river. Bill Pothier stated the water flows year round, from a very low flow to a very high flow. Attorney Hogan stated the function he heard most for it was it was some kind of infrastructure that passes stormwater. It does seem to run regularly. He is not sure what the contributing land area is. It is likely it had intercepted some stream or underground hydrology. It is passing water all the time. Sometimes it is quite a lot. That was one of the primary focuses,

between the flood problems and the fact that there was this drainage structure under this historic boathouse/barn facility. That was one of the things driving the design considerations, once Bill Pothier got down to proposing what he wanted to do.

Attorney Hogan showed an aerial photo. He stated, in the past, the structure that is on the water has been described as a boathouse and the structure behind it has been described as a barn. The two of them sit slightly off center from each other. The rear building is oriented a bit toward the residence. Between the two, if you were going from the barn into the boathouse, there had been a catwalk that went over an open space. If you looked down from the catwalk, there was a sluiceway. He had spoken to Bill Pothier and his builder and they described this catwalk structure and said there were remnants of an old roofline that existed above it. Most of what was on either side of the catwalk was open to this sluiceway.

Attorney Hogan stated the original proposal was to rebuild these buildings and one of the primary considerations was to raise the building up, so it would be out of the flood conditions (plain). When he got involved, he understood this was generally the description of the proposal. He showed a photo of the old structures. They had electricity. There was water in the boathouse. The boathouse had some kitchen facilities. It had some septic facilities. There was a toilet that discharged right into the sluiceway to the river. There were some bunks.

Attorney Hogan stated, in the process of raising the building above the flood danger, one of the primary construction design considerations was trying to maintain the integrity of the area around the sluiceway. Historically, there has been a lot of erosion and sedimentation and instability in terms of the soils. One of the primary considerations was to provide a much more stable situation for the sluiceway. He showed a photo, post-construction. He stated one side was rip-rapped at the suggestion of the Building Inspector. During the construction process, there was substantial contact between the property owner and the Building Inspector. He stated, if you go straight back, you come back to a square, stone culvert. He showed a photo of it mid-construction. During the construction process, Bill Pothier spent substantial revenue to make this a much more stable condition, in terms of the foundation and the area around the culvert.

Attorney Hogan stated the prior plans show two separate buildings connected by this catwalk. The rebuilt buildings were built to mimic that condition. During the construction process, the decision was made to take that space between the two buildings, where the catwalk was, and roof them together. If you go out there now, you can see from the inside, particularly if you are in the boathouse looking back toward the barn, where none of the walls are sheet rocked yet, the angle of the buildings like they did before. There is that offset. You can see internally that they are two separate buildings. The decision was made to enclose and roof them and to bring the walls out to each side, because it made eminent sense to have that area enclosed and floored, so it is not open to the elements and storm water. Before you could fall off of the catwalk and you would be down into the sluiceway.

Attorney Hogan stated, during the construction process, the decision was made to take that space between the connecting catwalk and frame it in. Now, when you look at the two buildings, you cannot see between them. With this fact, someone raising a building that is higher or in a place it wasn't before, people become concerned about their views being blocked or having a view shed affected like it wasn't before. When he came to this site, he was surprised. From the condominium facility, the view anyone is enjoying is the view down the river. When you look at the views from the mill to this site, particularly during leaf-on conditions, you almost cannot see these buildings period. Otherwise, even during winter, the only view from that perspective is across from these buildings to Bill Pothier's residence. He was also struck, that these were old, dilapidated buildings on very insignificant and potentially structurally unsound foundations and were to some extent an eyesore. The buildings that are there now, where Bill Pothier has spent a fairly dramatic (large) amount of money, are dramatically better looking architecturally. They are more stable, more energy efficient, provide a more stable area for the sluiceway and eliminate the erosion and sedimentation problems that existed. From that perspective he has a hard time understanding the concerns of people looking onto this property from abutting properties.

Attorney Hogan stated he would address the specific variance and special exception requests that have been made and talk a little bit about what may be another variance that will be required. When Bill Pothier applied for the special exceptions and variances, in the application, he was clear that he wanted to continue the existing uses of these two structures. In his application, he represented those as having residential aspects. The potential residential use of this structure is the other outstanding issue right now. He has spoken with Diane Hardy at length about this. An accessory apartment requires it to be connected to the primary structure. There are other issues that will have to be addressed beyond the current applications before the Board.

He stated this has gone on for some time now and the building itself is in mid-construction. It does not have doors, windows or siding. The building material that is on the outside has a six month warranty and Bill Pothier is coming up against that now. After that point, if the siding is not on, the warranty expires. He stated Bill Pothier would like to get the buildings weather tight with windows and doors and have it so the elements are not affecting the interior. If the Board is going to look at some particular structural alteration, it needs to be addressed and the Board needs to figure out what makes the most sense.

Chairman Hawkins stated there is a lot of discussion in the applications before the Board right now regarding use. He wanted to be abundantly clear that Attorney Hogan is not going to address that portion of the application tonight. He stated Attorney Hogan will talk about exactly the issues that are before them tonight. Attorney Hogan stated that was correct. He stated the only ones are the Special Exception requests for Section 1.05(B)(1) and (2) and the Variance requests for 1.05(B)(1)(b) and 1.05(B)(2)(c). Chairman Hawkins stated these are related to the height of the structure and the horizontal expansion of the structure. Attorney Hogan stated that was correct. Chairman Hawkins asked him if those were the only issues that are before the Board tonight from Attorney Hogan's point of view and Attorney Hogan stated yes.

Attorney Hogan stated, for the Special Exception requests. He would address 1.05(B) (1) first. He read the section regarding the Special Exception. He stated, in terms of the post-construction structure, from speaking to Bill Pothier and his builder, the structure's square footage footprint is smaller than what was there before. When they walked out there, they could see the builder had found reference points, before the structures were taken down. He made marks on the stone wall and established other boundaries, so it was clear where the old structure was and where the new structure needed to go. Given the construction techniques utilized, there was a slight reduction in the size of the structure that is closest to the water. In terms of it being no closer to the lot line or outside of the footprint of the prior structures, their position is that it is not. Chairman Hawkins asked if an existing conditions survey had been done. Attorney Hogan stated it was not.

Attorney Hogan stated the next requirement for the Special Exception is that the expansion is not in the 100-year floodplain. That item also pertains to the other Special Exception request. The property is within the 100-year floodplain. That is why there are also two Variance requests for that item. The argument is that the post-construction condition is dramatically improved in terms of shoreline stabilization. He will be talking about that.

He stated, for the next requirement, when they went about this project, they were keenly aware of the fact there was this flooding condition and unique sluiceway under the building. When they designed it, it was dramatically more expensive to go with the design considerations that maximized the protection and integrity of the sluiceway to stabilize the site.

He stated, for sanitary sewage and water supply, it is a dramatic improvement over the rough utilities that were there. Municipal water and sewer are hooked-up now.

For the next item, he stated there was no issue of making the lot less adequate. The only area that is different is the enclosure of the catwalk area. It contributes to maintaining the integrity of the sluiceway. Storm water management is a primary design consideration for any project. In the past, there were two buildings and an open catwalk, where it would rain and the soils would take in storm water. This seems to be a better situation. There is now a roofline, the water is directed, you know where it is going, and you are maintaining the storm water and preventing erosion. There were silt fences and hay bales placed during construction and materials were brought in to stabilize the driveway. It is a better situation than it was before, at a fairly high price tag.

He stated the last requirement was for public safety, in terms of it affecting abutting properties. Historically, there has been a pretty ugly, unstable structure there. When the Town reassesses this property, the value will rise significantly and that has the effect of contributing to the value of neighboring properties. There are no unmitigated impacts on residential properties, such as blocking a view, light, or noise. Across the board, it is an obvious improvement. If you live in the mill or for anyone outside of this property, this is an improvement. Bill Pothier has had people write letters in support of this project. This is a better situation. The utility issues of water and sewer and getting onto a municipal infrastructure, given the conditions that existed in the past, are an improvement.

Attorney Hogan read Section 1.05(B) (2). He stated there is no issue with the blocking of sunlight, with the mill next door. As far as the view, Bill Pothier took him to the mill and they looked at his property from there. He could not imagine there is any view from that vantage point that is possibly blocked in a way that is measurable. He thought the abutting property

owners from the other side would have been more likely to complain, but they have not. He stated Bill Pothier has received a wide spectrum of support from people regarding what an improvement this is over what was there before.

For the next requirement of exceeding height limitations, he stated that is not an issue.

Regarding the next requirement about the 100-year floodplain, he stated this is why they have the second variance request.

Attorney Hogan stated the last requirement is the same as applied to the last Special Exception regarding rendering the lot less adequate.

Attorney Hogan stated the two variances pertain to floodplain requirements for the two Special Exceptions. He explained the difference between Special Exceptions and Variances. He talked about the variance law. Under prior variance standards, it was almost impossible to get one. The Supreme Court said the previous law was too onerous and restrictive. There is a new standard now.

For the first criterion, he stated he talked about it a bit in the Special Exception context. He stated there have been a substantial investment and a dramatic expenditure to get to the level of improvements they are talking about. Given that, it has the effect of dramatically increasing the property value. It then increases the revenue to the Town and increases the value of surrounding properties. There would be no decrease in the value of surrounding properties.

For the second criterion regarding public interest, he spoke about the Chester Rod and Gun Club case. He stated the only thing they are talking about, in terms of the variance requests, is the fact this property is in the 100-year floodplain. He stated you ask what the purpose is for the 100-year floodplain. He stated you look at your ordinances and you look at the State Shoreland Protection and wetland statutes. The issues are septic impacts and making sure you have stable soils. Sediment siltation into water bodies is one of the biggest pollutants. This project dramatically improves the septic situation. That is black and white. The condition here was not ideal. Getting onto municipal infrastructure is in the public interest. There is a dramatic improvement over the situation under the building in terms of the construction techniques and the way they provided for the integrity of the sluiceway. He did not know where the water is coming from, but the condition at this property now relating to the sluiceway, culvert and embankments are dramatically improved. The increased value of the property brings more revenue. Chairman Hawkins stated people don't make changes to their properties to devalue them. Attorney Hogan stated he did not agree, as there are situations with feuding neighbors. There is no way to argue that there has not been substantial investment and improvements made to this property that increase the environmental protections and add to increased property tax revenue. All of those are in the public interest. The standard that has to be met is this will not be contrary to the public interest. Chairman Hawkins stated there had to be more to it than someone spending a lot of money to make improvements to their property. Attorney Hogan stated the effect of all of those improvements and the money that has been spent is to specifically improve the environmental and the site specific situations. Given, the way these buildings used to be configured, he does not know anyone who would have replicated the condition of these two buildings with a catwalk open to the sluiceway. The improvements are all in the public interest and not contrary to it.

The next item, unnecessary hardship, Attorney Hogan stated often gets the most attention and has the least understanding. It has changed the most with changing variance law. This most specifically demonstrates where the NH Supreme Court has said we should be on variance requests. He explained the definition of unnecessary hardship. He stated, starting with "special conditions of the property that distinguish it from others in the area", he has never seen a situation where you have this infrastructure under an existing structure with a sluiceway, in terms of something that is driving every design consideration. Bill Pothier represented in his application that it was probably an additional \$30,000 in construction costs to provide the stable foundation and rip rap to maintain the integrity of the sluiceway and surrounding soils. The fact of having this sluiceway and the structure being right on the river and subjected to flooding, he did not know that there was a case to be made that there is another property in the area that resembles this in any way. Chairman Hawkins asked how that related to the horizontal expansion. He stated that he understood raising the building is in the spirit of the ordinance, because it is less prone to flooding. He asked how the criterion being addressed now relates to the horizontal expansion and to the decision that was made during the construction process to take away the catwalk. Attorney Hogan stated it doesn't, because in the context of the two variances, they are only related to the 100-year floodplain issue. There is no expansion of the structure issue. Those are caught up in the special exception requests. The only variances requested are the 100-year floodplain requirements. In that respect, the fact the building was raised was to improve the conditions in terms of flooding and potential erosion. The integrity of the buildings and soils are affected. Chairman Hawkins stated he understands the vertical change, he is asking about the horizontal

change and how it relates to the hardship criterion. Attorney Hogan all of that went to the fact, if you look at the condition that existed and then look at the condition that is there today, in terms of the enclosure, it is a dramatically better situation in terms of all of the purposes of the 100-year floodplain. Instead of storm water falling between these two buildings and what they could have done with a catwalk with enclosed roofing, you have a situation now where it is all captured by the roof and rooflines. It is done in a way where it is specifically designed to take the water off the building itself and deal with the storm water, erosion and sedimentation issues. This is a weird old Yankee design that was there and an unstable mess underneath. There was no protection from storm water falling on the soils. There was no way to regulate the way it came and went on the site. When you look at the purposes of the 100-year floodplain, all of those are enhanced by the design that is out there right now.

Bob Daigle stated he was looking at the architect's plans that show a nice, little breezeway to keep with the intent of the original footprint. He understands and appreciates the foundation plan being improved. What they are seeing is a major expansion of the building and a significant deviation from the architectural plans. He was not sure why. It bears a minor resemblance to what was submitted for the building permit with the architect's plans. If he had followed the plan, it would have been in keeping with the conditions of the permit from the Wetlands Board, with no increase of the footprint. He was not seeing that the construction meets the intent of what was there. It is a significant deviation.

see the old buildings set at. If you go inside, that is maintained in terms of the internal structure of both buildings. When the catwalk was there, there were environmental and safety concerns with it. Bob Daigle stated that was not submitted. Richard Shelton asked if there were any photos of the catwalk. He did not believe there was ever a catwalk there. Attorney Hogan stated the plans he has seen show the two buildings with that structure indicated. He showed a plan that Adam Fogg did some time ago showing the space between the buildings. Richard Shelton stated there was always space between the buildings.

Richard Shelton stated the storage building had a big, long workbench that went from one end to the other, where they stored all their tools to build boats. They built the boats in the little building nearer the road, not the big one. There was never a hole cut in the side of that building to go into the big building. Richard Shelton stated he grew up over there. He said there was no catwalk where you could walk from one building into the next. Attorney Hogan stated, on plans he has seen, there is a connection between the two buildings. Richard Shelton stated there were no doorways there. He would like to see a picture of it. He has been looking with the Atherton children and they can't find a photo of the inside of that building when Bruce Atherton was building boats.

Wayne Rosa stated, on the application that was made, it shows he was going to have the little breezeway between rather than it building it straight across and enclosed.

Richard Shelton stated prior to the two buildings being ripped down, he did not believe there was a connection between them.

Attorney Hogan stated the proposed use is a reasonable one. That requirement has been wound into what hardship means. It has to be a reasonable use. When you compare it to what used to be there with the condition of the structure and site, and you look at the property values on the water, this is a reasonable use. The old structure was on 55-gallon drums. This is a pretty reasonable use. It is not a dramatic expansion. It will not impact the neighbors. In terms of reasonable, he would submit that it is.

For the next criterion regarding substantial justice, he stated the guide in determining that is that any loss to the individual that is not outweighed by a gain to the public is an injustice. He was not sure what gain there was to the general public by denying the variance request. He was trying hard to understand, from the abutters' and Town's perspective, why connecting these two buildings is raising objections and presenting impacts on another property owner. He stated, in terms of the criterion of any loss to the individual that is not outweighed by a gain to the general public, objectively, it makes sense what they did. Given the condition of the building right now, the Town and some abutters are talking about making them cut out the space between the two buildings and making them create two separate buildings again. This is a dramatic cost to the property owner.

Attorney Hogan stated the condition of the building right now has no doors, windows or siding. The owner wants to protect his investment by at least getting it weatherproofed. If they put doors, windows and siding and then have to cut out the middle section of the building, it is not a small undertaking. He knows that is not a consideration for this Board, but in terms of this variance consideration, what gain to the general public is there, when you weigh that against the cost to the property owner. From many abutters' perspective, whether there is a space you can see through or not, he did not see how that makes any aesthetic difference. There is no aspect of this that is blocking anyone's view through some angle of the building. He goes back to saying, if you look at the before and after pictures, they are pretty dramatic. There

was an unattractive, unstable structure and now you don't have that. You have improved water and sewer service, storm water management, and the stability of soils.

The last criterion pertains to whether the spirit of the ordinance is observed. In terms of the 100-year floodplain provisions, this is a dramatic improvement. The purposes are met much more squarely than what was there previously.

Attorney Hogan stated, one of the primary considerations, is to figure out a way they can move forward to at least weatherproof the building. The issue of the residential use is not before the Board tonight.

Chairman Hawkins reiterated what he said at two previous meetings, that whatever work Mr. Pothier undertakes, even if these applications are granted, there is a possibility that the use variance could be denied. It still has to be the case that any work Mr. Pothier undertakes at this point is at his own risk, until and unless these requests are granted. He has said it before and it is important to keep saying it. Attorney Hogan stated that was understood.

Attorney Hogan submitted the photos to the Board.

Chairman Hawkins stated the building permit expires on April 13. Until the Board acts on these requests that clock is at a standstill. Attorney Hogan stated he understood.

Attorney Hogan stated Bill Pothier stated there may have been some recent letters in support of the application. He asked if the Board had received them. Chairman Hawkins stated they received a letter from Robert Leavitt and Eric Bernardis that are supportive. There are a number of communications and emails in the file, some of which are supportive and some of which are not. He had a letter that came in from "A Concerned Citizen" anonymously. He stated he does not assign a lot of weight to it, not that it is necessarily wrong, but they appreciate if someone is going to send something to the Board, that people put their names on it. He stated people should not be afraid to put their names on it, so the Board can thank them and appreciate what they have to say.

The Board passed the photos amongst themselves. Chairman Hawkins stated that had seen some of them in Bill Pothier's previous presentation.

Wayne Rosa asked if everyone was in agreement that this structure has been raised about five feet. Bob Daigle stated the building was raised more than that. Wayne Rosa stated he meant the foundation. Bob Daigle stated the second floor, overall height, was closer to eight or nine feet higher.

Chairman Hawkins opened the public hearing and asked Drew Kiefaber to speak.

Drew Kiefaber, Chairman of the Newmarket Conservation Commission, stated he was asked by the Chairman of the Zoning Board to look at this and bring it forward to the Conservation Commission. It was discussed at their March 14, 2013 meeting.

He stated there was a Wetlands Permit applied for in 2007 and granted in 2008 for the reconstruction of the properties. On that permit, item number five says the Newmarket Conservation Commission did not report. At that point in time, the Conservation Commission had no comment on that permit or not one that made it to DES. The permit states "replace in kind to existing barn buildings 875 sq. ft., 500 sq. ft.". Relative to conservation-related issues onsite, in general, he agrees with what Attorney Hogan has said in that the improvements to the sluiceway, as far as the concrete walls and increase in height is probably an improvement relative to siltation into the river. He was not certain of this, but regarding where the water is coming from, he knew there is a small stream that parallels Lamprey Street. It cuts across Lamprey Street near Sanborn Ave and goes behind some homes on Lamprey Street and then disappears. Richard Shelton and Bob Daigle stated it crosses Dame Road and drains into big fields. Drew Kiefaber stated that was correct, then it disappears on the north side of Bay Road. It was his assumption that was what was coming out of this sluiceway. He did not know if there was any storm water that also goes into that or not.

Drew Kiefaber stated, from a conservation perspective, having the building floor higher would be somewhat of an advantage, as far as if there are any materials on the floor in a flooding situation, they are more likely to stay out of the river.

Drew Kiefaber stated there is no obvious environmental impact from the building reconstruction itself. One comment is that the building reconstructed as it is does have additional impervious surface area, additional roof, compared to what the preexisting structures had. In general, the more impervious surface area, the more likely it is that there will be pollutants in the rivers. That is also an area of town that has an extremely high impervious surface ratio, with paved roads and a high density of buildings.

Drew Kiefaber stated there was some concern about one of the structures being used as a garage and a vehicle being parked in there. If it leaks fluid and it goes through the floor, it would go directly into the river.

He stated the Conservation Commission does not have a strong perspective one way or the other. The biggest things would be the slight increase in impervious surface, the potential for fluids leaking from a vehicle and going into the river and somewhat balancing that is the decreased likelihood of anything going into the river in a flood because the floor is higher.

Attorney Hogan stated he felt they ended up with a better situation with impervious surface. Historically, the water would have fallen between the buildings and gone down a steep unstable embankment to the sluiceway. The water now goes off the rooflines and is directed away.

He stated cars do leak sometimes, but this is a poured concrete floor, which is an excellent barrier for any oil or gas leakage. It is not in the weather. There is no increased environmental impact.

There were no other public comments.

Chairman Hawkins closed the public hearing.

Richard Shelton gave a history of the property. He grew up on "Durham-side", which is North Main Street. He knows the area well. There is a book by Sylvia Getchell, "The Lamprey River Village-The Early Years". It states there was a ferry below the falls that crossed the Lamprey River. There was no bridge crossing the river and due to the terrain it appears that crossing was at the river's edge of the Pothier property. Lamprey Street is a very early street that started at the river's edge, hence the electric bill reflecting an address of 2 Lamprey Street for the outbuildings. There is a good chance that the Atherton house was 1 Lamprey Street. At one time, four buildings were located on the property, the Atherton house, the barn, the boathouse and a small residence in front of the storage shed. This small residence was used when Mr. Shelton was in his "early years". Spike Hersham had a gun shop there, where he would buy and sell guns and he would build wooden boats in the building behind the residence. This small house was where the driveway is now in front of the boathouse. Later on, a lady that the Atherton children called "Nana" lived and died where the gun shop was in that same little house. Later Shirley Varney lived at that same house. After Shirley left, that house was removed by Richard Atherton. He did not recall the year. Early records reflect all of the buildings were on one lot. A tax card from 1975 shows the small house and the outbuildings. The first building was a small residential building of 893 sq. ft. The second building was called a "storage shed" and was 20' x 24' and the third building was a "utility barn" and was 24' x 32'. The 1994 tax card shows only two buildings, one at 480 sq. ft. and the other at 825 sq. ft. He did not know how it grew in size. The "utility barn" was, to the best of his recollection, built in the early 1950s. The "utility barn" was where they stored the materials to build the boats and the area fisherman utilized the building to store their equipment, such as motors, gas, oyster tongs, clamming equipment, etc. He had a friend who stored things in there. The "utility barn" was the bigger building and the smaller one was where they built the boats. The building called a storage shed on the tax card was actually where they built the wooden boats. Spike Hersham taught Bruce Atherton the art of wooden boat building and Bruce built a number of boats in that building. That building was set on pilings and was 480 square feet. It was removed and replaced with a building that is 22.8' x 24.5' and rotated 90 degrees with a square footage of 558 sq. ft. To the best of his recollection, the workbench in the 20' x 24' building ran down the complete side wall adjacent to the storage barn. The storage barn wall

facing the 20' x 24' building was built with a solid wall. His research leads him to believe there were no doorways installed to access the buildings other than the ones that were in place when they were built.

Richard Shelton stated, on 04/23/08, the State of NH Department of Environmental Services (DES) issued a permit stating "replacing in-kind two existing barn buildings one of 875 sq. ft.". He stated that size grew again on that bigger building. He continued to read, "...and one of 500 sq. ft.". He stated that one also grew. He continued to read, "...in the developed upland tidal buffer zone including replacement of deteriorated substandard piling foundation with concrete footing foundation within the same footprint". He did not know why the two buildings increased in size. He stated most people would agree this is black and white. There is now a question of relevancy. There were two separate buildings when built: one of 480 sq. ft. and the other of 768 sq. ft. that have been replaced by one of 550 +/- sq. ft. and one of 820 +/- sq. ft. that are connected and in direct violation of the DES permit. He stated the applicant has flagrantly taken it upon himself to disregard the permit issued by the State of NH DES by installing a foundation outside of the previous footprint of buildings that were demolished and due to that violation and not obtaining Zoning Board variances needed prior to construction there needs to be a very strong consensus among this Board as to why the applicant's building should remain.

Bob Daigle stated a perfectly reasonable floor plan exists that was submitted with the original building permit for this project. As far as the horizontal expansion, he was not sure he could understand the need for the horizontal expansion when the architect drew up a perfectly viable plan that met the intent of everything. He was referring to the "Ground Floor Plan" page A2 of the drawings. All of a sudden there is something else out there. He understood how construction projects evolve. The Wetlands Permit from the State and demolition and construction permit from the Town all said "on the same footprint". He did not see that an expansion was necessary. There was a viable plan for horizontal expansion. This relates to the unnecessary hardship criterion. He did not see there was an unnecessary hardship for the simple reason there is a viable floor plan drawn up by the architect that meets all of the criteria of the State Wetlands Permit and of the building permit from the Town.

Bill Barr stated the Board could take up the Section 1.05(B)(2)(c) variance first since, to him, there was adequate evidence to suggest the allowance of the vertical expansion and then take up the other.

Wayne Rosa agreed with Bob Daigle. He stated the fact that it is already built confuses things a little bit. He stated he hears what Richard Shelton says about the size. This foundation was not surveyed or pinned. He did not doubt the square footages were what he said. He felt they were reasonably close. He did not have an issue with the vertical expansion. He sat in the parking lot three times to see if anyone's view was restricted and he did not see that it was. He did not think any abutters were harmed that way. He stated he would vote no for the horizontal expansion.

Bill Barr stated his take on this was that the variances for the 100-year floodplain have sufficient evidence. He had an issue with granting the Special Exception where it says "the owner demonstrates that no other expansion which reasonably fulfills the intended purpose can be achieved in conformance with this ordinance". He stated that was where the problem was. If he had built it to the original architect's plan with the building permit, no horizontal variance would be required. He clarified further, as far as the five criteria are applied to the expansion not in the 100-year floodplain, both vertical and horizontal, sufficient evidence has been presented to allow those two variances. What he did have a problem with was, if you look at page five of the Zoning Ordinance for horizontal expansion part (c) it says, "The owner demonstrates that no other expansion which reasonably fulfills the intended purpose can be achieved in conformance with this ordinance". The original building permit shows the original purpose can be fulfilled in conformance with the original submission. If it was built to the building permit, there would be no need for a horizontal Special Exception.

Chairman Hawkins stated he had difficulty with no existing conditions plan. They are taking on faith whether the structure is closer to the lot line. He has no reason to believe it is not closer, but the burden is on the applicant. He is mindful of the way that they approach this, because of the application that was before the Board a while ago with the issue of the trailer behind Jade Garden. That was very similar. That was a case where there was a pre-existing nonconforming structure, they had an existing condition plan and an as-built, and those demonstrated clearly they were outside the footprint of the existing structure and the ZBA denied it on that basis. He was aware every case is judged on its own merits. Regarding the lack of evidence of whether the structure is closer to the lot line, he is willing to let that concern go.

Chairman Hawkins does not understand how the horizontal expansion relates to the criteria of unnecessary hardship they have been presented. He understood the purpose of the variance process and it exists to give people relief where it is appropriate, but it is troubling that a set of plans was submitted and then deviated from. That is not a good precedent.

Bob Daigle stated vertical expansion would have been appropriate to take it out of the flooding. Chairman Hawkins stated he did not have any difficulty with that concept either.

Wayne Rosa stated, in going over the plans submitted with the building permit, it shows a concrete wall, but he cannot find any indication of height. He was not sure they can say he was in violation of not following the plan. He felt they were entitled to the vertical variance.

Bill Barr suggested they could take up the variance for 1.05(B)(2)(c) for the floodplain for the vertical expansion and then look at the Special Exception for 1.05(B)(2) and deal with the vertical issue and get that out of the way. Then they could take up the more complicated issue of the horizontal expansion.

Action

on Motion: Bill Barr made a motion to grant a variance to the Newmarket Zoning C
evidence presented tonight

Second: Wayne Rosa

Bill Barr stated, specifically, they were talking about a portion of the structure when the setback may be enclosed or expanded upwards if a Special Exception is granted and no part of the structure is located within the 100-year floodplain.

Bob Daigle stated they were looking at the overall height of the peaks. Diane Hardy stated it meets the current 35' height requirement. Bill Barr stated this is just a variance for the 100-year floodplain.

Bob Daigle stated they made liberal use of this. The peak is quite a bit more than 5 feet higher than what it was. Wayne Rosa stated he built the roofline according to the plan and the Town granted him a permit. Bob Daigle stated he would have granted the variance to get the first floor away from the flooding. He would have looked strongly at the overall height of the building. There are no abutters on the Lamprey Street side saying anything about any restriction of their view.

Vote: Bill Barr, Chris Hawkins, Wayne Rosa, Elaine Winn in favor

Bob Daigle opposed

Motion passes

Bill Barr stated they should move on to the Special Exception for Section 1.05(B)(2) of the Newmarket Zoning Ordinance. This is for the vertical expansion only.

Action

Ordinance Motion: Bill Barr made a motion to grant a Special Exception for Section 1.05(B)(2) of

Second: Wayne Rosa

Vote: Bill Barr, Chris Hawkins, Wayne Rosa, Elaine Winn in favor

Bob Daigle opposed

Motion passes

Chairman Hawkins stated they were now moving on to Section 1.05(B)(1)(b) for the variance for horizontal expansion.

Action

present the record with the Motion: Bob Daigle made a motion to deny the variance application under 1.05(B) sufficient evidence or otherwise satisfy the requirements of unnecessary demonstrating that a conforming use can occur based on the requirements of the ordinance

Second: Wayne Rosa

Bill Barr asked the applicant if it is possible, pertaining to the original building permit, to construct the building according to the permit or if there is some overriding reason why that is impossible. Bill Pothier stated he hired an architect to come out and take the measurements and dimensions and draw up plans. He gave the plans to the builder and the builder built it as it now stands. He stayed largely out of it. The Town Building Inspector was over there on a regular basis. He stated they had met with the builder yesterday. Anything that can be done to retrofit the building to be consistent with original plans will be at a great expense and he does not yet know how he would do it. He would have to remove that section and maintain the integrity of the buildings the way they are. He asked if they would have to cut out the sluiceway, and how they would maintain the integrity of that structure. They had a two hour discussion yesterday and the builder is unsure of how to do that. He stated the building was built as one large piece. It will be difficult to take out that section and reduce it.

Attorney Hogan stated he understands the motion is to deny the variance, because some other viable option exists and the unnecessary hardship requirement is not met. He stated the old hardship requirement looked at what other viable options someone might have. That is not hardship anymore. It is whether it is a reasonable use and whether there are special conditions of the property that distinguish it from those in the area. He hasn't heard yet what the benefits are that would result from cutting out the middle section of this building. He has given a lot of evidence for it being the way it is right now, but he has not heard anything that would be a benefit to cutting these two buildings to make them separate. He stated there was no flagrant violation of anything here. Bill Pothier has just described how this project went and it is the way most of them go. The Building Inspector was on the site a lot and made specific suggestions for construction techniques. There was no intention to be a scofflaw. They spent a long time walking around with David Price from NH DES addressing their concerns. The same questions of what the benefits would be came up. He has not heard one thing yet in terms of what that would be. It would be a gigantic cost to the property owner and result in a much worse condition and project. In terms of there being another option that exists, that is not the hardship criteria anymore. He did not ask the question of what the benefit would be lightly.

Richard Shelton asked what the Zoning Board was for if an applicant can build something and then change it as he sees fit. It is up to the applicant to abide by the ZBA rules. Not after the fact. His issue was the horizontal expansion. They went from a 480 sq. ft. building to 550 +/- . There should have been a variance before that went in. Attorney Hogan stated Bill Pothier applied for a building permit and the Town granted it. Then the Town came out and watched it being built. Richard Shelton stated three different Building Officials, all part-timers, were involved in this and that is why we are here. Attorney Hogan stated the negative result of that should not be on the shoulders of a property owner who is trying to improve the situation. That is what variances are for. There was never any intention to do this without permission and just ask for forgiveness later. From Bill Pothier's perspective, the builder decided this was made practical sense to do. He stated somewhere in this process someone has to say here is what the benefit is to making this property owner at this point cut these two buildings into two. Chairman Hawkins stated the fact that the building is built is incidental. He looks at it as if the building does not exist. That is not what is before them to consider. What they are considering is, from day

one, if this application had been before us, what the Board would have done. The ordinance says expansion of a structure in the 100-year floodplain is not to be done. The question is how the horizontal expansion of the structure plays into that. The spirit and intent is to not allow the expansion of use in the 100-year floodplain, because it is hazardous and is a bad idea. That is what has happened. There has been an expansion of the structure that is inconsistent with the express purpose of the ordinance in that respect. The applicant has to come back with evidence that satisfies the criteria. He struggles with where the connection is between the horizontal expansion of the structure and the intention of the ordinance. He did not see it.

Bob Daigle stated the point was brought up about the Town making the property owner bear the cost of this. The contractor has some onus in this, too. He deviated from a set of plans. The contractor has a responsibility to build buildings to the plans that are specified, especially when there are Wetlands Permits that say "on the same footprint". He did not feel the Board is the bad guy. They are looking at an ordinance and there are a variety of options to work within a 100-year floodplain. It is not built according to the plans and this is a perfectly good set of plans to build by. Attorney Hogan stated he understood that point and he hoped the Board did not feel he was categorizing them that way. The point of that conversation was whether it was them coming in at that stage of the process or right now. If they came in then and said here are all of the benefits and reasons for doing this, this fact we are having this conversation tonight or then does not change anything. The evidence is the same. The benefits are the same, environmentally, stabilization and so forth. He hoped that point was not lost on the Board members. It should be the exact same discussion. Chairman Hawkins stated the fact that the building is built is unfortunate, but it is not one of the five criteria.

Bill Barr stated Section 5.06(B) of the Zoning Ordinance regarding the floodplain protection overlay district states a purpose for including that criterion in the Special Exception. He read the section.

Chairman Hawkins stated this goes back to the point he was making. If this had been built in conformance with the footprint of the existing structure, it would not even be within our jurisdiction. If this was a brand new application with no prior development on it, the ordinance pretty clearly would be saying you could not get a building permit to build in the floodplain without making a heavy duty showing to satisfy the points. Wayne Rosa said there is a permit dated 2008 from NH DES that says "within the same footprint". That supersedes the Town's building permit, it supersedes everything. Bob Daigle stated, if the applicant had applied to DES and proposed what is built out there now, they probably would have approved it. He stated the Board has to consider whether they would grant these applications before them if he had come in with them in the first place prior to construction. Wayne Rosa stated the Board could not have granted it, because DES said "within the same footprint". Chairman Hawkins stated they could grant it subject to whatever DES stated. The ZBA can only consider what is within the scope of its jurisdiction. Whatever DES does is outside the scope of this Board's responsibility. Diane Hardy stated the Building Inspector could turn down the building permit based on the DES decision. That is an administrative role. The ZBA is a judicial body and can decide otherwise within its own jurisdiction.

Bob Daigle stated, in order to adjudicate this properly, the Board has to view this as the old building is still up and Mr. Pothier comes in and says he has a floor plan that keeps the basic intent and it matches what he has built out there right now. Would the Board grant it? Chairman Hawkins stated the Board has to approach it analytically. He stated forget what is sitting there now. The Board should put themselves back on day one, looking at it before the old structure was demolished or even that it is a pristine, undeveloped piece of property. Forget there is something built there already. The variance process is to see whether there is going to be relief from the strict requirements of the ordinance based on evidence that they have satisfied the criteria. Wayne Rosa stated the Board still has to look at the fact there were previous buildings there. Bob Daigle stated they have the right to protect their property and rebuild. Chairman Hawkins stated, if you rebuild and you alter the footprint of the original structure, then you are subject to the terms of the ordinance that are in effect. He has not conformed to the plans that were submitted and is not within the footprint of the old structure, therefore the Board has to take up the variance request and determine whether there is sufficient evidence to satisfy the requirements of the variance statute.

Bill Barr stated he was going to vote no to the motion. He stated, based on the definition he read before, he felt there was evidence that says that the horizontal expansion does not aggravate flooding, it does not put people at more risk, does not affect the habitat or aesthetic qualities. He does not know about the National Flood Insurance Program. He felt there was no good reason to deny the variance. He stated, when it comes to granting the Special Exception, he would have a lot of trouble with part (c). He supported the variance, but not the Special Exception.

Bill Barr stated there is a motion to deny the variance. If you look at Section 5.06, it is applicable, it says: "Boundaries. This overlay district shall include all areas, which are inundated with water during the 100-year flood". That is what is being talked about here. If you go to "Purpose", part (B), "...aggravate flooding, require rescue, used as a habitat or aesthetic

qualities". It sounds like that is the purpose of having a floodplain protection overlay district, to maintain those qualities. You don't want to make the flooding worse, which he did not feel the horizontal expansion would do, you don't want to put people at risk, which he did not feel the horizontal expansion would do. It won't affect habitat. This is not a substantial area. It is aesthetically probably more pleasing than two separate buildings. He did not know about the National Flood Insurance part. He stated, if the Board was to deny the variance, these are really the factors they should be considering based on the evidence presented. He felt, from a discussion standpoint, if the Board does grant the variance, then they get to the Special Exception and that is where the Board gets into line (c). He did not think there was a good reason to deny the variance.

Chairman Hawkins explained that a "yes" vote is a vote in favor of denying the variance.

Vote: Bob Daigle in favor

Bill Barr, Chris Hawkins, Wayne Rosa Elaine Winn opposed

Motion fails

There was a discussion on whether to proceed with the Variance approval or Special Exception. It was decided the Variance should be addressed first.

Action

floodplain Motion: Bill made a motion that the Board approves the Variance requested in 1.05(B)

Second: Bob Daigle

Vote: Bill Barr, Chris Hawkins, Wayne Rosa, Elaine Winn in favor

Bob Daigle opposed

Motion carries

Attorney Hogan asked to speak. Chairman Hawkins allowed it. Attorney Hogan stated he understood what the discussion was about. The Board is looking at the Special Exception requirements and the one that members are mulling over is "The owner demonstrates that no other expansion, which reasonably fulfills the intended purpose can be achieved in conformance of the ordinance". He stated, if they think about that in the context of what they just said, the requirements and purposes of the floodplain that were just enumerated, "the owner demonstrates that no other expansion which reasonably fulfills the intended purposes..." that the Board just discussed, for all the reasons that were talked about tonight, how it is better to have it enclosed, better to manage the storm water, it is easier to control the sedimentation. The requirement under the Special Exception requirements is not that there is just something else that someone could do. It is whether they have demonstrated that no other expansion which reasonably fulfills the intended purpose can be achieved. He just wanted to frame it that way for the Board's consideration.

Action

Motion: Bill Barr made a motion to deny the Special Exception request pursuant to 1.05(B)(1) because there is insufficient evidence to satisfy criterion (c)

Second: Bob Daigle

Chairman Hawkins reiterated the motion that Bill Barr feels that there is insufficient evidence to satisfy criterion (c). This is a motion to deny the Special Exception under 1.05(B)(1), specifically in reference to (c) for insufficient evidence to demonstrate that no other expansion that would reasonably fulfill the intent and purpose can be achieved in conformance with the ordinance. He asked if everyone was clear on what they were doing. No one responded negatively. There was no further discussion.

Vote: Bill Barr, Chris Hawkins, Wayne Rosa, Bob Daigle in favor of denying the Special E

Elaine Winn opposed

Motion carries

Agenda Item #4 – New/Old Business

Chairman Hawkins stated that the court dismissed Mr. Cheney's appeal to Superior Court for being untimely. There is a motion to reconsider, because Mr. Cheney asked for relief beyond the appeal.

Chairman Hawkins stated there was a seminar to understand the variance criteria on April 29 in Bedford, NH.

Agenda Item #5 – Adjourn

Action

Motion: Bob Daigle made a motion to adjourn at 9:29 p.m.

Second: Bill Barr

Vote: All in favor