

## ZBA Minutes 04/13/11

NEWMARKET ZONING BOARD OF ADJUSTMENT  
TOWN COUNCIL CHAMBERS  
APRIL 13, 2011  
7:00 P.M.

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

Absent: William Barr (excused)

Chairman Hawkins called the meeting to order at 7:03 p.m.

Pledge of Allegiance

Review and Approval of Minutes: 03/7/2011

Action

Motion: Vice-Chairman Rosa made a motion to approve the minutes from the March 7, 2011 meeting.

Seconded: Robert Daigle

Town Planner Diane Hardy discussed her editorial changes.

Vote: All in favor – Andrew Gagne abstained

Andrew Gagne abstained from the vote because he had not been present at the meeting.

Chairman Hawkins appointed Andrew Gagne to sit in for William Barr as a voting member.

## Regular Business

Cheney Property Management – Continuances of two variances. The first references Section 2.05 of the Newmarket Zoning Ordinance to allow a mix of non-residential and residential development in the B1 zone & the second references Section 3.04 to allow a 9.9-foot front yard /setback where 15 feet is required and to allow an 8.2-foot side yard setback where 25 feet is required. The lot is located at 54/56 Exeter Road, Tax Map U4, Lots 12 & 13, B1 Zone.

Cheney Property Management - Continuation of Variance referencing Section 7.02(C)(3), of the Newmarket Zoning Ordinance. The applicant requests a variance to permit six residential units on the second floor of a proposed mixed-use building. Maximum density in the B1 zone for a mixed-use development is one unit per acre. The lots, which will be merged when this development goes before the Planning Board, are .917 acres. The lot is located at 54/56 Exeter Road, Tax Map U4, Lots 12 & 13, B1 Zone.

Attorney Mark Beliveau, representing the applicant, explained they are before the Board requesting three variances to allow the construction of a single building on what would become a consolidated lot. Both residential structures on the lots would be removed; and the access points from both lots would be removed. These lots would be combined, a building constructed and 53 parking spaces would be located in the rear of the lot. The bottom floor of the building would be commercial and the top floor would have six residential units. Residential use is not permitted in the B1 Zone which is why a variance is needed.

Variance reference Section 7.02(C)(3)

### CRITERION #1

Granting the variance will not be contrary to the public interest.

### CRITERION #2

Granting of the variance would be consistent with the spirit of the ordinance.

Attorney Mark Beliveau stated the proposal would not alter the essential character of the neighborhood, because there is a heavy residential use in the neighborhood. There is also a historical residential use on this property. The depot style architecture would be aesthetically pleasing for the area. This proposal would eliminate two access points on Route 108 creating a safer travel way.

Attorney Mark Beliveau explained the proposal would camouflage the residential use, by the architecture of the building. There is more than enough parking spaces provided. He felt the spirit of the ordinance would be observed.

### CRITERION #3

Granting the variance would do substantial justice.

Attorney Mark Beliveau noted granting this variance would not cause any harm to the general public that does not outweigh the benefit to the applicant.

**CRITERION #4**

The value of surrounding properties would not be diminished.

Attorney Mark Beliveau explained this is a well-designed property. The uses are compatible with the other uses in the area. The architectural design will be aesthetically pleasing. By eliminating the two access points, it creates a safer travel way, therefore increasing the value of abutting properties.

**CRITERION #5**

Owing to special conditions of the property that distinguishes it from other properties in the area, denial of the variance would result in unnecessary hardship because:

No fair and substantial relationship exists between the general public purpose of the ordinance and the specific application of that provision to the property.

Attorney Mark Beliveau explained the corner of one of the properties is just less than 100 feet from the railroad tracks. The yellow blinking emergency light along Route 108 creates limitations that are unique to this parcel. There is a very large duplex set back ten feet from the property line. There is no parking provided. The driveways for both properties are incredibly steep. The grade is much higher than the road and rises up in the back. The proposal is for the front of the property to be at street level. There will be self-sustaining ledge or a retaining wall in the back effectively creating a corner lot.

Attorney Mark Beliveau explained there is no fair and substantial relationship between the general purpose of the ordinance and the specific application of the ordinance to the property.

Variances reference Section 2.05 and 3.04

**CRITERION #1**

Granting the variance will not be contrary to the public interest.

**CRITERION #2**

Granting of the variance would be consistent with the spirit of the ordinance.

Attorney Mark Beliveau discussed the reasons that support front yard setbacks. He explained the reason the variance is needed is because the roof overhang extends into the front yard setback. He felt with the patio proposed, it would encourage rather than discourage pedestrian activity. Adequate site distance would be provided as the encroaching structure would be above line of sight.

Attorney Mark Beliveau explained by removing the duplex it will create a larger side setback than what exists today. There will be enhancement of sunlight and air circulation, as well as fire access. He believed the abutting neighbor has submitted a letter of support for the project.

Andrew Gagne asked about storm water detention, as well as landscaping or fencing to hide the structures. Walter Cheney explained all storm water retention would take place underneath the parking area.

Andrew Gagne asked what uses would be provided on the first floor. Attorney Mark Beliveau explained the commercial uses have not yet been decided, but will be uses permitted in this zone. Andrew Gagne asked if the residents would be allowed to use the patio area. Attorney Mark Beliveau answered the patio area will be for the first floor tenants.

Chairman Hawkins opened the public hearing at 7:26 p.m.

Peyton Carr, of Bay Road, a former Zoning Board of Adjustment member, suggested, on paper, this proposal looks like a wonderful concept. He asked about the residential aspect of the proposal noting the Master Plan Chapter 5 addresses housing. He encouraged Board members to review the chapter prior to making any decisions on this application. The Master Plan discusses Newmarket being out of line in terms of the percentage of multi-housing units. He suggested, although an aesthetically pleasing proposal, it goes against the Master Plan's intent to bring more single family homes into Newmarket. He also suggested the close proximity to the railroad tracks is a concern. From a tax base issue, if these were condominium units, the Town gets more tax revenue. He expressed concern about school age children in these units since a statement during one of the meetings was the units would be two or three bedroom units.

Al Knight, of 59 Exeter Road, noted the building is proposed to be 50-feet by 150-feet, which is larger than the drug store. The proposal is to be three (two) stories high. He suggested the existing buildings are one and two stories. When this land was originally purchased it was intended to be office buildings. He understood there has been difficulty with being able to get the third office building at the Corporate Park constructed. This was also supposed to be a Dunkin Donuts at one point. He expressed concern with paving the entire property for parking referencing the flooding concerns in Newmarket. This is an unsafe area due to Route 108 traffic, the proximity of the railroad tracks, the slope of the hill, and the number of vehicles that will be accessing the site.

Town Planner Diane Hardy explained, if the Zoning Board of Adjustment grants the requested variances, the application will still need to go before the Planning Board for site plan review. Part of the site plan review process is an in-depth review of things like storm water management, parking, design and layout, traffic flow, safety of the site, etc.

Town Planner Diane Hardy referenced the Newmarket Zoning Ordinance 2.02 – M2 District, Multi-Family Housing suggesting, if the Board does approve the variances, the Board can place a condition on the approval to include a market study to show the market can absorb the additional units, as well as to show the impact on the schools.

#### CRITERION #1

Granting the variance will not be contrary to the public interest.

#### CRITERION #2

Granting of the variance would be consistent with the spirit of the ordinance.

#### Action

Motion: Vice-Chairman Rosa made a motion that granting the variance request reference Section 2.05 and 3.04 would not be contrary to the public interest and would be in keeping with the spirit of the ordinance intact. The purpose of the B1 District is to provide areas suitable for business and these businesses shall be segregated from residential uses to prevent conflict and undue impact on residents by business development. The proposed building will not alter the essential character of the neighborhood as there are already comparable structures in the area. The proposed building will not conflict with the explicit or implicit purpose of the ordinance because by controlling the density, by allowing first floor businesses and six residential units on the second floor it will prevent congestion and provides more than adequate parking. The spirit of the ordinance would be observed because the purpose of the B1 Zone is to provide areas suitable for the businesses which serve the community and/or people who pass through town; this proposal does that.

Seconded: Robert Daigle

Robert Daigle felt the ordinance is explicit in stating the purpose of the ordinance is to prevent the mixture of business and residential use. He felt this proposal is inconsistent with the spirit of the ordinance.

Gerry O'Connell felt the proposal is getting much closer to the intended use of the ordinance. He felt the proposal would enhance the public rights, the essential character of the neighborhood and will enhance safety for the tenants of the property, as well as the travelers along Route 108.

Andrew Gagne noted a hotel is a permitted use in this area. Although it is a commercial use, it is a residential/commercial use in nature. He noted this proposal is a better use of the land, because it provides for permanent residences versus a hotel for transients with the comings and goings of travellers.

Gerry O'Connell noted there was a great uproar when the Town had to come to terms with the fact the mill redevelopment would require a residential component to make the rehabilitation economically feasible to accomplish. He noted this is a similar situation. In order to make the project economically feasible, he understood the need for the residential component. It would be in the developer's best interest to encourage businesses that would work well with residential uses.

Vote: In favor: Andrew Gagne, Gerry O'Connell, Vice-

Chairman Rosa

Opposed: Robert Daigle, Chairman Hawkins

### CRITERION #3

Granting the variance would do substantial justice.

Action

Motion: Vice-Chairman Rosa made a motion the benefit to the applicant would not be outweighed by the harm to the public or to any other individuals. In fact, there would be a great benefit to the public by combining the two lots and eliminating the two existing entrances to Route 108 and promoting the purpose of the B1 Zone to encourage business along Route 108.

Seconded: Robert Daigle

Robert Daigle felt the proposal would be a good use in that area and the design would enhance the neighborhood.

Vote: All in favor

### CRITERION #4

The value of surrounding properties would not be diminished.

Action

Motion: Vice-Chairman Rosa made a motion the values of surrounding properties would not be diminished. The proposed building would be consistent with the redevelopment that has been taking place along Route 108 for the past twenty years. The way the residential units will be incorporated into the building will not adversely impact the surrounding property values.

Seconded: Gerry O'Connell

Vote: All in favor

#### CRITERION #5

Owing to special conditions of the property that distinguishes it from other properties in the area, denial of the variance would result in unnecessary hardship because:

No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

#### Action

Motion: Vice-Chairman Rosa made a motion the purpose of the B1 District is to provide areas suitable for businesses which serve the community and/or people passing through along Route 108. Because of the two undersized lots, they cannot be expected to be used for the purpose of the B1 Zone; by combining the two, that purpose can be met.

Seconded: Gerry O'Connell

Chairman Hawkins asked how the necessity of the residential use is represented in the hardship the property has. Attorney Mark Beliveau referenced the Simplex Supreme Court case stating the court had determined that, due to the special conditions of the property, the variance request was reasonable. He explained the distinction must be that the lot(s) are unique to others in the area; not necessarily that the use that is proposed works well with the lot. He felt the proposal meets this standard because of the unique configuration of the lot and how it is different than other properties in the area. He explained the reason the applicant is asking for a variance is because they are proposing a use that is not permitted in this zone. The purpose of a variance is to bend the ordinance regulations if the proposal meets certain criteria. Although residential use is not permitted in this zone, the fact: there is historical residential use on this property; the purpose of the zone is to bring in business use; and the safety features of the site will be enhanced, all are unique to this proposal.

Gerry O'Connell noted there are already three residential units on this parcel. There is already a residential component on this property prior to the development of this proposal. He suggested if the purpose of the district was followed to the letter of the law, the areas surrounding the downtown would not be as vibrant if residential and commercial were not incorporated together.

The Board discussed at length how the residential component of the proposal is included in the hardship variance criteria. Attorney Mark Beliveau explained the proposal is attempting to segregate commercial and residential use by providing commercial on one floor and residential on another floor. Due to the unique conditions of the site, this proposal works for this site.

Vote: In Favor: Gerry O'Connell, Vice-Chairman Rosa

Opposed: Robert Daigle, Andrew Gagne, Chairman

## Hawkins

### CRITERION #5

Explain how if the criterion subparagraph 5A are not established an unnecessary hardship will be deemed to exist if, and only if, special conditions of the property that distinguish it from other properties in the area the property cannot be reasonably used in strict conformance with the ordinance and a variance is therefore necessary to enable reasonable use of the property.

#### Action

Motion: Robert Daigle made a motion that unnecessary hardship exists owing to special conditions of the property distinguishing it from other properties in the area and the property cannot be reasonably used.

Seconded: Gerry O'Connell

Vote: In Favor: Gerry O'Connell, Vice-Chairman Rosa

Opposed: Robert Daigle, Andrew Gagne, Chairman

## Hawkins

#### Action

Motion: Robert Daigle made a motion to deny the variance request from Section 2.05 of the Newmarket Zoning Ordinance because all criteria had not been met.

Seconded: Andrew Gagne

Vote: In Favor: Robert Daigle, Andrew Gagne, Chairman

## Hawkins

Opposed: Gerry O'Connell, Vice-Chairman Rosa

Town Planner Diane Hardy explained the applicant has the option to withdraw the next applications based on the previous vote. Attorney Mark Beliveau suggested he would like to continue.

### Variance Reference Section 3.04

## CRITERION #1

Granting the variance will not be contrary to the public interest.

## CRITERION #2

Granting of the variance would be consistent with the spirit of the ordinance.

## Action

Motion: Vice-Chairman Rosa made a motion the purpose of setbacks is for a variety of reasons including: to limit the proximity of the structure to the road; to maintain the character of the neighborhood, to encourage or discourage pedestrian activity and to prevent buildings from blocking site distance for cars. The proximity of structures to abutting lots affects fire safety and the provision of adequate sunlight and air circulation. By granting a 9.9 foot front yard setback, the variance will not conflict with implicit or explicit purposes of the ordinance. There are already many properties across the street which are close to Route 108. The 9.9 foot front yard setback will encourage pedestrian activity, which is consistent with the purposes of the B1 Zone. Site distance will not be impaired because the grade will be lowered, and, in fact, will be an improvement over what is there now. Therefore, this variance of 9.9 foot front setback will not threaten public health, safety or welfare or otherwise injure public rights. By allowing the 8.2 side yard setback, this will allow for dumpsters to be placed in this area and be somewhat hidden by the approximate five foot cut in grade in this area. This will also allow for traffic to flow around the parking area, thus allowing for five to seven additional parking spaces. This variance will not alter the essential character of the neighborhood. This variance of 8.2 side yard setback will not threaten public health, safety or welfare or otherwise injure public rights. The spirit of the ordinance would be observed because the purpose of 3.04 Setbacks, to encourage pedestrian activity, will be met. Fire safety and the provision of adequate air flow and sunlight will not be affected in an adverse way. The resulting built environment will provide a visually consistent streetscape.

Seconded: Gerry O'Connell

Andrew Gagne understood the voicemail referenced during the previous meeting left by Mr. Thorpe, who did not see the proposed dumpster location as an issue, but he felt if some of the parking spaces were removed, the dumpster could be out of sight of the street and not within the side setback. Vice-Chairman Rosa disagreed stating this dumpster would be well-fenced. He felt it was important to keep the parking spaces. There is a larger benefit in the additional parking spaces and having the dumpster screened than in moving the dumpster.

Gerry O'Connell noted moving the dumpster location could increase the view from potential tenants which would also be unsightly. The Board discussed the relevance of the location of the dumpster with the variance criteria being discussed.

Attorney Mark Beliveau noted he has spoken with the applicant and he would like to withdrawn the application for the variance request the Board is currently considering, as well as the application for variance request reference Section 7.02(C)(3).

Vice-Chairman Rosa withdrew his motion.

Gerry O'Connell withdrew his second.

Chairman Hawkins noted the Board would accept the withdrawal of the application for variances reference Sections 3.04 and 7.02(C)(3).



Robert & Jane Dane – Continuance of Variance, reference Section 3.04(B), of the Newmarket Zoning Ordinance. The applicant requests a Variance to permit the construction of a shed with a 5' setback from the property line, where 25' is required in the R1 Zone. The lot is located at 2 Wiggin Drive, Tax Map R6, Lot 20-45, R1 Zone.

Chairman Hawkins noted the Board has conducted a site walk and has reviewed the application information. This is a continuation from a previous meeting.

Robert Dane submitted a copy of the R6 property map with approximate locations of area homes on their lots for the entire neighborhood.

Chairman Hawkins noted the applicant had provided a letter from Richard White noting he had no objections to the proposal.

Robert Dane referenced the R6 map indicating most of the homes are located closer to the front of the lots providing more back yard than front yard, which would allow more space to place the shed away from the required setbacks. His property is different in that the house on the lot is located about 400-feet from the front of the lot providing a larger front yard than back yard.

#### CRITERION #1

Granting the variance would not be contrary to the public interest.

#### Action

Motion: Gerry O'Connell made a motion that granting the variance would not be contrary to the public interest because placement of the shed, as proposed, would not have a negative effect on the public because it would not be visible from the road and no other structures abut the property.

Seconded: Vice-Chairman Rosa

Vote: All in favor

#### CRITERION #2

If the variance were granted, the spirit of the ordinance would be observed.

#### Action

Motion: Vice-Chairman Rosa made a motion the proposal does not cause overcrowding of land or structures and still provides a sense of community and small town atmosphere as suggested by Section 1.02 of the Zoning Ordinance. This will not alter the essential character of the neighborhood and not threaten the public health, safety, welfare or otherwise injure public rights.

Seconded: Robert Daigle

Robert Daigle expressed his concern with approving this and having to apply it to all other properties in the area and whether they, too, would be in keeping with the spirit of the ordinance. Robert Dane referenced the unique aspects of his property compared to other properties in the area. He suggested the only abutter this shed could possibly affect has no objections. Gerry O'Connell notes the Board is supposed to look at each application on an individual basis. The Board needs to look at this lot and determine if this lot is different enough to warrant a variance.

Andrew Gagne noted the Board was just discussing the convenience of locating a dumpster near the business. The Board should also consider the convenience of locating the shed near the house.

### CRITERION #3

Granting of the variance will do substantial justice.

#### Action

Motion: Gerry O'Connell made a motion that granting the variance would do substantial justice because it would allow storage for garden equipment so the homeowners could pursue their gardening interest and the shed would be located near the garden. The benefit to the applicant is not outweighed by any burden to the general public.

Seconded: Robert Daigle

Vote: All in favor

### CRITERION #4

Granting the variance will not diminish the value of surrounding properties.

#### Action

Motion: Robert Daigle made a motion granting of the variance would not diminish the values of surrounding properties.

Seconded: Gerry O'Connell

Vote: All in favor

### CRITERION #5

Owing to special conditions of the property that distinguishes it from other properties in the area, denial of the variance would result in unnecessary hardship because:

No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

#### Action

Motion: Robert Daigle made a motion that owing to the special conditions of the lot, no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

Seconded: Gerry O'Connell

Robert Daigle explained the house is located at the back of the lot, the owner has sited the shed near the garden and in close proximity to the water spigot. He noted there are other locations on the property where the shed can be located.

Vice-Chairman Rosa noted with all the conditions of the property (the location of the house, the garden, the water source, the septic system, the well, etc.), he did not feel there was another logical place for the shed to go. He referenced the Bacon case and the Shoppfield versus the Town of Enfield where Justice Nadeau judged each case stating the reasoning behind the decision was based on an approach that is more considerate to a constitutional right to enjoy their property. In addition, the applicant needs to prove the use for which they seek a variance is reasonable, considering the property's unique setting in its environment, their proposals are entitled to deference.

Chairman Hawkins explained the statute as it is written is intended to define what reasonable is. Gerry O'Connell suggested upon Vice-Chairman Rosa's explanation, if the shed was located any other place on the property, it could inhibit the applicant's ability to enjoy their property. This would create an unnecessary hardship.

Robert Dane asked if this would be a moot point if the shed was on wheels. Town Planner Diane Hardy read the definition of structure from the Zoning Ordinance. She suggested a wheeled structure that is not affixed to the ground would not fall under the purview of the Zoning Board. She explained when she first came to work for the Town, she was asked to revise the shed ordinance because the Zoning Board of Adjustment had been granting so many variance approvals. Leniency was provided to allow sheds to be located within 5 feet of a property line within certain zones, because of the conscious effort to exclude certain areas in town based on average lot size. It was felt within the R-1 zone there should be ample area for a shed to be located given the minimum lot size in that zone. She suggested there should be some credence to a similar request for placement of a shed, if there no adverse effect to adjacent properties, there is no detriment to public health and it's in keeping with the character of the neighborhood there should be no basis for turning it down.

Robert Dane noted there were specific requirements for siting the shed including stabilization measures. The Code Enforcement Officer had suggested temporary structures for extended period of times would not be allowed. Town Planner Diane Hardy explained the application before the Board is for a permanent shed structure. This is what the Board should be deliberating on.

Vote: In Favor: Andrew Gagne, Gerry O'Connell, Vice-

Chairman Rosa

Opposed: Robert Daigle, Chairman Hawkins

2.) The proposed use is a reasonable one.

Action

Motion: Robert Daigle made a motion the proposed use is a reasonable one.

Seconded: Gerry O'Connell

Vote: All in favor

#### Action

Motion: Robert Daigle made a motion to grant the variance since all five criteria have been met.

Seconded: Andrew Gagne

Vote: In Favor: Andrew Gagne, Gerry O'Connell, Vice-

Chairman Rosa

Opposed: Robert Daigle, Chairman Hawkins

#### Old Business/New Business

Vice-Chairman Rosa asked if anything has been done about the grandfather regulations. Town Planner Diane Hardy noted the Planning Board has been very busy with other projects. This issue will be raised with the Planning Board when a comprehensive review of the ordinance is done. There are several changes that need to be done.

Gerry O'Connell noted the Zoning conference is coming up. He suggested it would be beneficial for all members to attend.

#### Adjournment

#### Action

Motion: Andrew Gagne made a motion to adjourn at 9:51 p.m.

Seconded: Robert Daigle

Vote: All in favor