

ZBA Minutes 02/07/11

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

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

Absent:

Chairman Hawkins called the meeting to order at 7:01p.m.

Cheney Property Management - Two variances, reference Sections 2.05 & 3.04 of the Newmarket Zoning Ordinance. The applicant requests the variances to permit a mixed use building in the B1 zone. The first floor will be used for uses permitted in the B1 zone. The second floor will consist of six residential units. The lot is located at 54/56 Exeter Road, Tax Map U4, Lots 12 & 13, B1 Zone.

Chairman Hawkins noted during the application review, Zoning Administrator Diane Hardy discovered this application would need an additional variance. The applicant's attorney submitted a letter requesting a continuance to allow time to prepare the additional variance request. Abutters will be notified of the additional variance request.

Action

Motion: Robert Daigle made a motion to continue the application for Cheney Property Management to the next Zoning Board meeting, scheduled for February 22, 2011.

Seconded: Gerry O'Connell

Vote: All in favor

Pledge of Allegiance

Review and Approval of Minutes: 01/03/11

Action

Motion: Robert Daigle made a motion to accept the minutes from the January 3, 2011 meeting.

Seconded: Vice-Chairman Rosa

Zoning Administrator Diane Hardy noted she had submitted editorial changes to the Board. She discussed these changes.

Vote: All in favor – Bill Barr abstained.

Bill Barr abstained from voting because he had not been present at the meeting.

Regular Business

Vincent Jarosz - Variance, reference Section 7.03(B), of the Newmarket Zoning Ordinance. The applicant requests a Variance to allow consideration for an accessory apartment in an existing detached structure. The lot is located at 10 Langs Lane, Tax Map R5, Lot 62-2, R1 Zone.

Attorney F.X. Bruton noted the applicant was before the Board requesting the same relief. In November 2010, the Board had found the application not to be contrary to public interest and that substantial justice would be done. The Board also had found property values would not be diminished by granting the variance. The Board did not feel the spirit and intent of the ordinance had been met and also had not felt the application met the hardship criteria. The Board at that time denied the request for variance. There was a change in membership of the Board. During this time, the applicant had presented a request for a rehearing, which was granted by the current membership of the Board. His intent tonight is to present the entire application anew.

Attorney Bruton explained the property is located at 10 Langs Lane, Tax Map R5, Lot 62-2, in the R1 Zone. The applicant intended to create an accessory apartment within an existing structure on the property and had been instructed, by the Building Inspector, a variance would be required, because Section 7.03(B) states accessory apartments must be entirely contained within the detached, single family residence. The existing structure is a detached garage located on 1.26 acres of property. It is unique in terms of size and shape. He described the configuration of the lot, including the original larger lot, which has been subdivided and is now known as Candice Lane. The property contains a single-family home and five detached structures. The garage, which serves the house, currently is separated by an existing firewall; the location where the accessory apartment is proposed is made up of 780 square feet of living space and is serviced, by heat, air conditioning and water. In addition to the variance requested, the applicant will also have to apply to the Board for a Special Exception. If the Special Exception is granted the accessory apartment would be considered a permitted use. The application before the Board is almost identical to an application granted by the Zoning Board in September 2009, at 156 Exeter Road. The reason the applicant needs the variance is because the garage is not attached to the home.

Attorney Bruton explained it is impossible to construct a structure to attach the home and garage due to setbacks, existing site conditions, and an existing septic system. Granting the variance would be consistent with the uses of surrounding properties and would also be consistent with the spirit and intent of the ordinance.

CRITERION #1

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

Attorney Bruton explained the use being requested, by granting of the variance, represents a reasonable use and would allow for orderly development. One of the purposes of Newmarket's accessory apartment ordinance is to provide for small affordable residential units, which will assist various segments of the population. In addition, the ordinance specifically allows, by permitting the accessory apartment, the homeowner to offset the costs associated with homeownership. By

granting the variance, use of an existing building would be allowed. There would be no exterior alterations. The use would not alter the essential character of the neighborhood. There are abutting parcels, which have multiple dwelling units on them.. For these reasons, granting of the variance would not be contrary to the public interest.

Chairman Hawkins asked what the other structures on the property were used for and whether any of those structures generated revenue for the homeowner. Attorney Bruton answered the other structures are used for storage; mostly for storage of fire equipment. No revenue is generated from this private storage.

Attorney Bruton showed where the existing septic tank is located on the property and the proximity of the system to the house and garage.

CRITERION #2

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

Attorney Bruton explained, if the Variance and Special Exception were granted, the proposed use would be in keeping within the spirit of the ordinance, because it would then be a permitted use and would not be unique to neighborhood properties. The specific reference in the ordinance which requires accessory apartments to be located within the single-family detached home suggests the intent is to limit construction. With the proposal before the Board, this is exactly what the applicant is trying to achieve. There is an existing single-family detached home, with a detached garage servicing the home. Within the garage, there is additional space, which could be used for the accessory apartment. Rather than building a structure to attach the home and the garage, in order to meet the requirements, the applicant is requesting relief from that requirement to avoid unnecessary construction. This proposal better meets the spirit of the ordinance, rather than requiring additional structure construction. In addition, new construction would damage the existing septic system requiring construction of a new septic system. Granting the variance would observe the spirit of the ordinance by promoting small, affordable housing. The other test for this criterion is whether the variance would duly and in a marked degree violate the ordinance's basic zoning objectives. He felt this application better observes the ordinance than what could otherwise be required.

Chairman Hawkins wanted to make it clear the Board is not requiring the applicant to construct a structure between the house and garage. That may be an option the applicant wants to investigate if the variance is denied, but reiterated that is not being required.

Chairman Hawkins noted he had driven up Langs Lane and Candice Lane counting the number of detached garages; of about 56 homes, 12 of them had detached garages. He suggested the Zoning Board could also take into consideration the cumulative effect of granting the specific variance for other properties within the neighborhood. Attorney Bruton explained each case is unique and must be critiqued on its own merits. He noted this would be a permitted use with the Variance and Special Exception. This use would not alter the character of the neighborhood at all. There is significant vegetative buffer between the garage and the abutting property.

CRITERION #3

Granting the variance would do substantial justice.

Attorney Bruton explained granting the variance would provide substantial justice, because the property would be allowed to be used similarly to other properties within the area. Case law suggests the standard to use when determining this criterion is whether the benefit to the applicant outweighs any burden to the public. The benefit to the applicant would be significant; as allowing the accessory apartment would allow for the revenue to assist in the costs of homeownership. Granting the variance would also provide affordable housing to the community. There is no burden to the public as the size and number of bedrooms for the accessory unit has been limited. There would be no additional construction.

CRITERION #4

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

Attorney Bruton explained the value of surrounding properties would not be diminished, because the proposed use would be entirely contained within the existing structure. There is significant buffering between the properties. He referenced photos he provided showing the layout of the property and the buffering. The applicant indicated proposed parking. If the Special Exception is obtained, this will be a use permitted as a matter of right. He showed the area proposed for parking.

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.

Attorney Bruton explained the general purpose of the ordinance is to promote orderly development and to protect the health, safety and general welfare of the population. In this proposal, the applicant intends to maintain the status quo, by using the existing structures on the property. The property is much larger than other properties in the area and is large enough to sustain the existing and proposed uses. The ordinance speaks to providing affordable housing, while allowing homeowners to generate revenue to offset the cost of homeownership. The purpose of requiring accessory apartments within the single-family home is to avoid additional construction. While the garage is detached from the home on this property, by granting the variance to permit an accessory apartment within the garage, it would eliminate the need to build an additional structure on the property and disrupt the existing septic system. There is no relationship between the specific restriction and the application of that in this instance. By granting the variance, this specific purpose will be maintained. If the variance were denied, the applicant would experience unnecessary hardships.

Robert Daigle asked if there is any indication the existing septic system could fail and a new system would need to be installed regardless of whether or not the variance is granted. Attorney Bruton answered there is no indication currently the existing septic system is not in perfect working condition. If, in the future, the septic system fails, as every system has an opportunity to do, the homeowner would then need to fix or replace it, regardless of whether the variance is granted. The facilities in the garage are also in good working order and have been in the garage for approximately 20 years. He noted the connection between the single-family home and the garage is with the septic system, as they both share one system.

Attorney Bruton discussed the difficulty in applying a blanket hardship criterion to each individual application, which comes before the Board. He noted the Supreme Court also struggles with this criterion.

Chairman Hawkins noted he is not aware of a case where the hardship is a man made one (i.e. septic system, detached garage, number of structures). Attorney Bruton explained the criterion speaks to special conditions of the property. He noted the septic system being located between the two buildings creates a hardship for this property. This application does not violate any inherent nature of the ordinance, because of the lack of construction and substantial vegetative buffer.

2.) The proposed use is a reasonable one.

Attorney Bruton explained this use would be reasonable because it is a permitted use in this zone. Accessory apartments are limited in size and number of bedrooms.

Chairman Hawkins opened the public hearing at 8:12 p.m..

Jeanette Fernald, of 6 Candice Lane, understood accessory apartments must be located within the original footprint of the home. She also understood the Board has no jurisdiction to change the ordinance. She explained this property used to be a farm, as much of Candice Lane was. She explained the odd shaped parcel was created when the property owner added a throughway from his property to Candice Lane. She noted there are a number of cars on the property that are not registered to the property owner. She asked how the Board would determine this apartment would only be a studio. The septic system is old; she expressed her concern with not having to update the system to reflect the additional use. She noted everyone would like the opportunity to generate extra revenue. She didn't see this as a hardship. She asked if there really would be no hardship to the public. She asked how many vehicles would be parked regularly in the driveway. She questioned that as being an orderly development, asking how many other properties would be allowed an accessory apartment. She referenced the covenants and restrictions for Candice Lane stating there should be no dwelling unit less than 800 square feet of living space.

Chairman Hawkins expressed his concern and confusion with using a man made structure as the hardship for an application. Attorney Bruton explained this is not a violation of an ordinance that is being bootstrapped into requesting a variance. This is a unique parcel, which exists as it does with permitted uses. The application and proposal is trying to avoid an increase in the existing uses. The Board has the right to waive specific requirements of the ordinance providing the application observes the purposes of the ordinance.

Attorney Bruton referenced Jeanette Fernald's statements stating there has been no merger of the lot; this parcel was created as part of the subdivision. This application is as conservative as it could be under this ordinance.

Zoning Administrator Diane Hardy clarified for Jeanette Fernald this application does not meet the criteria outlined in the zoning ordinance for accessory apartments. The Zoning Board can provide the relief necessary as a waiver to those requirements.

Action

Motion: Robert Daigle made a motion to close the public comment period at 8:28 p.m.

Seconded: Gerry O'Connell

Vote: All in favor

CRITERION #1

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

CRITERION #2

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

Vice-Chairman Rosa felt the proposed use would not conflict with the purpose of the ordinance according to Section 7.03. There would be no exterior changes with the exception of the exterior doors to be changed. This proposal would not alter the character of the neighborhood. The proposed accessory apartment would not injure the public health, safety or welfare.

Chairman Hawkins explained he continues to struggle with the possible cumulative effect this application could have. He understood each application should be judged on its own merits but felt there is a principal basis from one to another.

Robert Daigle explained he has known the applicant for over thirty years, having served together on various boards in

town, as well as on the Ambulance Corp together. This acquaintanceship would not prohibit him from providing an unbiased opinion on the application before the Board.

Vice-Chairman Rosa echoed Robert Daigle's statements.

Action

Motion: Vice-Chairman Rosa made a motion the proposed use, an accessory apartment, does not conflict with the purpose of the ordinance, which according to Section 7.03 allows one accessory apartment per detached single dwelling with a Special Exception by the ZBA. There will be no alterations with the exception of the rear overhead door with the replacement of an atrium door with windows located at the exterior of the building. This will not alter the character of the neighborhood. The variance would not jeopardize the public health, safety or welfare and would not injure public rights.

Seconded: Robert Daigle

Vote: All in favor

CRITERION #3

Granting the variance would do substantial justice.

Gerry O'Connell noted there does not seem to be any harm to the public by granting the variance.

Action

Motion: Vice-Chairman Rosa made a motion stating, in this requirement, the benefit to the applicant, the accessory apartment without joining it to the main house, will not be outweighed by harm to the general public or other individuals. There will be no substantial change to the exterior. It is on a private septic system. The apartment will be a studio apartment and will not be conducive to children living there and will not be a burden on the school system. The property abuts a mobile home park so the property is similar (in density) to other area properties. As a result, the benefit to the applicant would outweigh any burden to the public.

Seconded: Gerry O'Connell

Vote: All in favor

CRITERION #4

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

Action

Motion: Vice-Chairman Rosa made a motion that by not substantially altering the building, which the accessory apartment will be in and the fact there is already multiple buildings on the property, granting the variance would not diminish the value of surrounding properties or increase the values of surrounding properties.

Seconded: Robert Daigle

Gerry O'Connell felt as long as the proposal as presented is what occurs he did not see any issue. He expressed concern with adding a patio area. He suggested excessive noise could cause issues in a neighborhood setting. He suggested since it was a studio apartment the number of people would be restricted. Zoning Administrator Diane Hardy explained the Board could not restrict the number of occupants per dwelling unit. The Board could add a condition on the approval restricting additional exterior construction. Robert Daigle added the property owner lives at the property and would have an interest in keeping the property maintained and well managed..

Attorney Bruton suggested not imposing the condition of no exterior changes, because it could limit a resident's ability to hang a plant or flagpole. He recommended stating this use be used as a studio apartment.

Chairman Hawkins noted a studio apartment is a one-room apartment; there is not a separate bedroom.

Zoning Administrator Diane Hardy read from the zoning ordinance which defines an accessory apartment as: "a self contained residential unit complete with its own kitchen and bathroom incorporated within an existing family structure which is subordinate to the primary residence and is either a studio or one bedroom apartment."

Chairman Hawkins noted there would also be fire safety codes which would need to be adhered to and would limit the number of residents.

Vice-Chairman Rosa read from Section 7.03(B) stating the accessory apartment will be either an efficiency apartment (without a separate bedroom) or a one-bedroom apartment.

Vote: All in favor

CRITERION #5

Owning 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 that the purpose of Section 7.03 Accessory Apartments is to ensure adequate provision of small, affordable residential units to help homeowners to generate revenue to help offset costs of homeownership and to limit the number of bedrooms to prevent excessive growth in the number of school age children. Because of the special conditions of the property, the septic system is located between the house and garage prohibiting a connection between the two structures, the provision "the accessory apartment shall be contained entirely within the detached single family residence" is a restriction on the property that does not serve the property in a fair and substantial way.

Seconded: Robert Daigle

Chairman Hawkins noted he continues to struggle with the man made hardship reference as opposed to land features, which could create a hardship. Robert Daigle explained the conditions of the property existed before zoning changed, providing for grandfathered uses. The septic system was already located on the property, before zoning provided an ordinance for accessory apartments. The requirement that accessory apartments be contained within the single-family

home is a restriction placing undue hardship on this particular property, because of the location of the septic tank. If the septic tank had been installed after the ordinance for accessory apartments had been put into affect, he would have a different opinion on whether this was a hardship, but because the septic system was there long before the ordinance for accessory apartments, he felt it does create a hardship on the property and for the property owner.

Gerry O'Connell didn't see there being a major difference between man made hardships or naturally occurring hardships. He read from the Board's handbook relative to the suggested approach of granting a variance, stating the applicant must establish the property is burdened by the zoning restriction in a manner that is distinct from other properties in the area. He felt this property was distinct, because other properties in the area do not have septic tanks between two structures.

Bill Barr asked for clarification as to why this Section was written to require accessory apartments to be located entirely within an existing single-family dwelling. Zoning Administrator Diane Hardy explained the purpose was to keep the visual appeal as a single-family unit, in order to keep it consistent with other homes in the neighborhood. It provides restrictions to limit the size, so school age children are not likely to live within the accessory apartment. Bill Barr felt granting the variance would maintain the intent of the ordinance, since the accessory apartment would be contained within the existing garage with no exterior changes.

Vote: All in favor

2.) The proposed use is a reasonable one.

Action

Motion: Vice-Chairman Rosa made a motion the proposed use is a reasonable one because the special conditions of the property caused the proposed use to be a reasonable use of the property. The proposed use will not alter the character of the neighborhood.

Seconded: Robert Daigle

Action

Motion: Robert Daigle made a motion to reopen the public hearing at 9:07 p.m.

Seconded: Bill Barr

Vote: All in favor

Jeanette Fernald felt the septic system had been updated when the property owner renovated his home, so it cannot be 30 years old.

Chairman Hawkins noted this is the first step in this process. The applicant still needs to comply with all building and life safety codes. The septic system would be reviewed as part of that process.

Action

Motion: Robert Daigle made a motion to return to deliberative session at 9:08 p.m.

Seconded: Gerry O'Connell

Vote: All in favor

Robert Daigle felt because this use is permitted with a Special Exception in this zone, that provided reason to believe this is a reasonable use.

The Board voted on the motion made prior to reopening the public session relating to criterion #5-A-2.

Vote: All in favor

Action

Motion: Vice-Chairman Rosa made a motion to grant the variance to permit an accessory apartment in an existing detached structure located at 10 Langs Lane, Tax Map R5, Lot 62-2, R1 Zone.

Seconded: Gerry O'Connell

Vote: All in favor

Kevin Burke – Appeal from Administrative Decision. Decision to be reviewed: The Building Official's interpretation that the remodeling of space on the lower level was creating a third unit, which is not a permitted use in the M3 Zone.

Variance reference Section 2.03(B)(1) Permitted Uses M3 Zone, of the Newmarket Zoning Ordinance, to allow multi-family housing.

Variance reference Section 3.03(B) Dimensions Table Residential Density, of the Newmarket Zoning Ordinance, to allow three dwelling units.

The lot is located at 206 South Main Street, Newmarket, NH, Tax Map U4, Lot 109, M3 Zone

Kevin Burke provided a brief history of the property explaining his wife's grandmother owned the property. He and his wife moved to the home six years ago when they came to care for his wife's elderly aunt. When she passed away, the property taxes doubled, because the aunt had been getting a discount on taxes due to her age. He and his wife reviewed the Table of Permitted Uses for the M3 Zone to determine a way to offset the increase in property taxes. The house has always been a three-family home. He provided evidence of this being true. They began making plans to renovate the third unit. All the work done has been up to code. Six weeks after the Building Inspector provided approval for the work being done, he was told an administrative decision had been made and work was to cease. He explained the footprint of the building has not changed. There is a field on one side of the home and the Cheswell Cemetery on the other side. He has letters from all of his abutters expressing they are in favor of the renovation.

Zoning Administrator Diane Hardy explained she had researched Town tax records showing this property as a duplex. When Building Inspector Dan Vincent discovered it was a three-unit building, he made the decision work needed to stop, because multifamily units are not permitted in the M3 Zone. The applicant also doesn't meet the density requirement for the district. If the structure had been a three-unit building, it seems the use of the third unit at some point was abandoned, so any grandfathered use was also abandoned.

Kevin Burke explained his wife's aunt lived in the home alone until they moved up to care for her. The aunt did not have the financial means to maintain the apartment. They are now trying to update the apartment that already exists. The footprint does not change nor are there any exterior changes. The apartment cannot be seen from the road, as it is located in back of the house. He provided photographs of the house and the unit specifically. He explained he is paying taxes on this living space currently. The last time this apartment was used as living space was 1969. There are letters to support the fact this was an apartment.

Chairman Hawkins noted there is a lot of new information the Board is receiving tonight and has not had enough time to review the information. He suggested continuing this application to provide the Board time to review the new information.

The Board asked for a sketch to show how the parking would be configured.

Kevin Burke noted, if he had known, he would have come before the Board before beginning construction. He explained the Building Inspector gave the plumber the permit and came down three times for inspections.

The Board continued this meeting to February 22nd at 7:00pm and the site walk was scheduled for February 19th at 10:00am.

Chairman Hawkins suggested any additional evidence be provided to the Zoning Office prior to the meeting, so the Board will have time to review the information prior to the next meeting.

Action

Motion: Robert Daigle made a motion to continue Kevin Burke's application to February 22nd at 7:00 p.m. and to do a site walk at 10:00 a.m. on February 19th.

Seconded: Gerry O'Connell

Vote: All in favor

Zoning Administrator Diane Hardy noted this is a public site walk and abutters are welcome to attend.

Kevin Burke explained there were renovations done to the apartment he could provide photos of. He noted the apartment would be for one person, because it would be 450 square feet. The home ties into the municipal sewer system.

Adjournment

Action

Motion: Vice-Chairman Rosa made a motion to adjourn at 9:46 p.m.

Seconded: Robert Daigle

Vote: All in favor