**NEWMARKET ZONING BOARD OF ADJUSTMENT**

**SEPTEMBER 24, 2018**

**MINUTES**

Present: Chris Hawkins (Chairman), Bob Daigle (Vice Chairman), Wayne Rosa, James Drago, Richard Shelton (Alternate)

Absent: Steven Minutelli (Alternate), Diane Hardy (Zoning Administrator) - excused

**Agenda Item #1 - Pledge of Allegiance**

**Agenda Item #2 - Review & Approval of Minutes: 09/17/18**

The minutes were under review and not ready for this meeting. They will be addressed at the next meeting.

**Agenda Item #3 - Regular Business**

***Donald Eaves III – Continuation of public hearing, for an application for a Special Exception from Section 32-234, of the Newmarket Zoning Ordinance, and a Variance from Section 32-234(b) to allow an accessory apartment in an existing detached structure. The property is located at 21 Bald Hill Road, Tax Map R7, Lot 19-7, R1 Zone.***

Chairman Hawkins stated the Board had attended a site walk at the property on Saturday, September 22, 2018. All members present tonight were there, except for Bob Daigle. He stated he would be listening to discussion of Saturday’s site walk at tonight’s meeting intently. There was no formal discussion while at the site walk between members of the Board. They did take a good look around the property and Mr. Eaves was kind enough to host them.

Chairman Hawkins asked Mr. Eaves if there was anything he would like to say or add to the application at this time. Mr. Eaves asked if there was anything he could present to them, at this point, to give him hope. Chairman Hawkins stated they will find that out once the Board begins their discussion. He stated a septic plan was added to the file based on questions that arose at the last meeting.

Chairman Hawkins stated the primary issue that got them hung up at the last meeting was hardship. He stated the lot is large, just a shade under three acres. The road side is largely level, then it drops off toward the back of the property. Originally, it was two separate lots that were consolidated, so it is quite a large parcel. The well is on the right, as you face the house. The septic is on the left in the front. They had received the septic plan for reference. It does drop off to the back and to the left. It is level up to the house. There is a bathroom in the outbuilding. It looks like it may have been a horse stable at one time. There is a workshop in there. The bathroom appears to be slightly below the level of the septic by about a foot.

Chairman Hawkins stated, at the last meeting, they were discussing hardship and the issue of there being something unique to the property relative to others in the area that would distinguish it from them.

Wayne Rosa stated there is about 800 sq. ft. upstairs, where the apartment would go. Mr. Eaves stated it would be well within the parameters of the ordinance. Wayne Rosa stated, if it was on one floor it was 20’x40’. There is room on either side of the house to build a 20’x40’ addition. He suggested on the left side, facing the house. He knows Mr. Eaves has a concern about the rocks, but he did not feel that was a concern, it is just a retaining wall.

Bob Daigle stated he did not attend the site walk. He has been by the property many times. There are a number of homes with outbuildings, so his situation is not unique in the respect. As far as rocks being there, that is typical of New Hampshire. There are boulders on most of the lots there. Mr. Eaves stated there are no boulders on the abutting properties. They do not have the slope or drop off at the houses that he has, which makes it unique.

Richard Shelton stated he thought the accessory apartment could be part of the main structure. He stated he did not think they got enough information to do otherwise. He felt the unnecessary hardship criterion was a critical part of this decision. He did not think the unnecessary hardship criterion was met, because he can put the apartment in the lower level of his house or add on to either side of the building.

James Drago stated this is difficult, because they need to go by the codes and regulations and what is in the books. The only thing he can see being a hardship in this case as presented is the financial hardship. He stated, going by what is in the book, he agrees with Wayne Rosa and Richard Shelton that it does look feasible, from a construction perspective, to be able to add on both sides of the main dwelling. He understands what the applicant is saying would be a financial hardship, but based on what they have as guidelines and looking at the main structure, he did not see anything that would prevent it being part of the main dwelling.

Bob Daigle stated he agreed with James Drago 100%. Going by the financial hardship, he can present that, applicants have in the past, but he had to have provided information about it, like estimated costs. The Board would have to have some data in front of them to consider that. Just saying that there is financial hardship is not evidence. It is just a statement.

Chairman Hawkins stated they had an applicant come in who wanted to build a number of condominium or housing units. He told the Board how much it would cost to build a road, but they had nothing other than him saying what it was going to cost and it was not enough information. The Board doesn’t inquire about people’s finances, but, if they raise it as an issue, he felt they were entitled to ask for the evidence.

Richard Shelton stated, under the criterion for spirit of the ordinance, “If the ordinance contains a restriction against a particular use of the land, the Board of Adjustment would violate the spirit and intent of the ordinance by allowing that use. While, a single, detached accessory apartment might not greatly affect the neighborhood in overall value, the addition of such projects might well be significant. For this reason, uses such as a detached accessory apartment would be inconsistent with the spirit of the ordinance”.

Chairman Hawkins stated his feeling is consistent with what he has heard here.

Mr. Eaves asked, when an accessory apartment is attached to a structure, was it required that you maintain or have a door or access to it from the internal structure. Bob Daigle stated yes. Mr. Eaves asked, with a bedroom on the side with the well and the garage blocking how he would install a door there. And the other side has a master bedroom and another bedroom on it, with bathrooms in the way that would prevent him from putting a door to access the apartment from the inside. Richard Shelton stated there would be a door there and it can remain locked. Bob Daigle stated it just has to go into the building. Mr. Eaves stated he does not know how that is feasible. Chairman Hawkins stated he did not know what the building code requires. Wayne Rosa stated he is confused by the requirement of having a door there. He does not know why that is there. Bob Daigle stated his interpretation is the main building is owner occupied and the accessory apartment is attached to it, so it for the owner to be able to gain access. The origin of the accessory apartment is the mother-in-law apartment. Wayne Rosa stated that was fine if you had a door in between, because it is your mother-in-law. Richard Shelton stated it can remain locked. Mr. Eaves stated the intent was for his mother-in-law, not that it is anything to be considered for the variance. It is confusing why you would need that door here and it is confusing why he would need the variance he is asking for. He stated Chairman Hawkins stated at the last meeting there is a stack of cases, with the same roadblock of a detached structure. This is confusing to a lot of people and it is not very clear. Whichever way this goes, you are basing this on an opinion that is going to end up on a stack over here of confusion. That ordinance should be taken back to its drawing board and revised, so it’s clearer on its reasoning. Chairman Hawkins stated they are dealing with the laws that stand today, which says there has got to be a demonstration of special conditions of the property that distinguishes it from other properties in the area. The primary thing they are looking at is whether there is some condition of the property that would make it a hardship to construct an apartment that is attached to the structure in terms of the details of construction. In terms of whether there needs to be a door and where that needs to be is not what they are here to decide tonight, if it is even in their jurisdiction to decide that. They need to look at the law as it stands today. The way the variance criteria are applied has changed over the years and it has changed in the direction of making it easier for applicants to demonstrate hardship. It used to be virtually impossible. The current state of the law is still a burden that needs to be met. Regarding the criteria for accessory apartments, there is a statute now that it is done by Special Exception. The fact remains based on the evidence they have and what they observed on the site walk and his judgement is there is the ability to add the accessory apartment on the existing house. There is nothing inherent on the condition of the property that would make it an unusual hardship or unnecessary hardship to make that a possibility. It may be easier to do it in a detached structure, but that is not the test the Board applies. Chris Hawkins stated the purpose in general, of not allowing accessory apartments in detached structures to get around the subdivision requirement.

Bob Daigle stated that part of the ordinance is a local requirement, not a State requirement. In Durham, you can have a detached unit. The State has been pretty good about giving the Board latitude to do what we wish on a community basis, but it is not entirely in our purview to make the rules. The Board interprets them and tries to apply the guidance they have from court cases and things like that to the individual situation. If you want the rules changed, it is the Town Council and Planning Board that initiates those changes.

Wayne Rosa stated he is a supporter of individual rights and property rights. While he sympathizes with the applicant, as a Board member, he looks at the rules and has to interpret and apply them accordingly. While this situation goes against everything he believes in regarding the right to do what you want on your property, the rules do apply and he will have to vote no.

Mr. Eaves stated they are looking for uniqueness. He asked if anyone knew how many of his abutters have walkout basements, like he does. There are none. All of them have bulkheads, except for him. If he puts an addition on, he will have to pour footers and have the financial burden of that, and he would have to find a location for the placement for a door in between, so it is acceptable. It is a financial thing (hardship) in order for him to make it fit in with the spirit of the ordinance. They are binding his hands in such a way and he doesn’t know a way around. He has presented unique aspects of his property. He does not see how they do not see that it does meet the intent of the hardship criteria.

Richard Shelton stated he sympathized with him, but he is looking at the ordinance. He cannot change the ordinance. It is what it is. He does not believe he qualifies to put this accessory unit in the other building. It can be attached to the house or made part of the main structure. He would have to vote no, because there is no way in his mind that his vote would change.

Mr. Eaves stated, given what they said and their role is mainly interpreters of the ordinance, they mentioned a Board or place he could go to have a discussion about changing this regulation. He asked who that would be. Richard Shelton stated they have been trying to change that rule in Newmarket for more than ten years. Mr. Eaves asked why it has been held up. Richard Shelton stated because they won’t pass it. It goes to the Planning Board.   
The Planning Board reads it for about three years, then it goes to the Town Council to make it part of the ordinance and they turn it down.

Wayne Rosa stated he could appeal this decision.

Mr. Eaves asked what the Board’s general consensus was on why this was happening this way. Richard Shelton stated he interprets the ordinance, he doesn’t make it. He stated he does not go looking to change the ordinance. What’s here is here. That is what he looks at, when these cases come before the Board. He sympathizes, but, as far as he is concerned, his hands are tied, because it says, “Accessory apartments shall be prohibited” if it is in another building. Chairman Hawkins stated that was why you need a variance and a special exception. Richard Shelton stated you need a variance and you have to show you something like you have wetlands around your house or your house is compacted where you can’t move it and there is nothing else (no other feasible alternative). When he looked at the site, he felt he could put an addition on the side of the house. He is not looking at what it is going to cost him. He looks at whether he can do it or can’t do it. Obviously, this would be more of a financial hardship. He looks at what you can do and can’t do. That’s what makes up his mind.

Chairman Hawkins stated he wanted to be clear. The decision would be the same if the person who owned the house had all of the money in the world. He understands that it is a hardship. They cannot make decisions, particularly in the absence of any specific information. Everybody has a hardship. It is a hardship for anybody to put an addition on a house. Everybody who comes in says it is a hardship and very expensive for them to do it that way, so they want to do it another way, but it is inconsistent with the ordinance. That is something they consider, but they have to look at what the law is and what the code provides. James Drago stated that was what he was getting at earlier.

Richard Shelton stated he was not the first one to come before the Board with the same issue. There have been a few of them.

Chairman Hawkins stated the applicant has options if he is dissatisfied with the decision. Diane Hardy can explain this to him in detail. You ask for a rehearing and then you can take an appeal to Superior Court. If the court tells them the Board was wrong, then they are wrong. Richard Shelton stated he had 30 days to ask for the rehearing. Chairman Hawkins stated Diane Hardy will have all of the details of how that works.

Mr. Eaves stated, because of work and such, the 30 day appeal will not be something he can do, but he does plan on appealing this. Chairman Hawkins stated he should talk to Diane Hardy to get the details of exactly what he needs to do. The first thing is to ask for a rehearing. Wayne Rosa stated he could present new evidence at the rehearing that might convince them to vote a different way and they can have a rehearing. He stated none of them feel good about this decision. Chairman Hawkins stated to talk to Diane Hardy. She is the full time Planner and this is what she does every day.

Mr. Eaves stated he came from an area in South Carolina and his function was procedures at the nuclear plant. He likes to understand the processes of how things come into being, then understand the options to allow for change of nonsensical procedures. Chairman Hawkins stated his best way to find that out is to talk to Diane Hardy. She works with the Planning Board and has been here for years. Bob Daigle stated she deals with getting the zoning ordinances changed and reviewed. They did a Master Plan review and made some edits to the   
Zoning Ordinance just recently. She is very familiar with the steps.

**Action**

**Motion: Chris Hawkins made a motion to deny the Variance based on failure to satisfy Criterion 2, which is the spirit of the ordinance being observed, and, based on the information and the record, failure to satisfy the unnecessary hardship criterion, specifically that the property is not distinguished from other properties in the area and that there will be no unnecessary hardship if the Variance is denied and that the remaining criteria, that being #1, #3, and #4, are satisfied based on the record presented**

**Second: Richard Shelton**

**Vote: All in favor**

**Action**

**Motion: Bob Daigle made a motion to deny the Special Exception, because the applicant does not meet all of the conditions, the Variance not being granted (Variance referred to was for Section 32-234(b))**

**Second: Richard Shelton**

**Vote: All in favor**

**Agenda Item #4 - New/Old Business**

None.

**Agenda Item #5 - Adjourn**

**Action**

**Motion: Richard Shelton made a motion to adjourn**

**Second: James Drago**

**Vote: All in favor**