 **NEWMARKET Zoning BOARD OF ADJUSTMENT**Monday, May 16, 2022
TOWN COUNCIL CHAMBERS
7:00 PM

**Present:** Bob Daigle (Chair), Wayne Rosa (Vice Chair), Bart McDonough (Director of Planning & Community Development), James Drago, Steve Minutelli, Henry Smith (Alternate) and Al Zink.
**Absent:** John Greene (Alternate)

The Chair called the meeting to order at 7:01 PM

**#1 Pledge of Allegiance**

**#2 Review and Approval of Minutes**a. February 14, 2022

**Motion:** **Steve Minutelli** made a motion approve the draft minutes of February 14, 2022.
**Second: Wayne Rosa
Discussion:** None **Vote:** **Unanimously** **Approved**The voting members this evening include: **Bob** **Daigle**, **Wayne** **Rosa**, **James** **Drago**,
**Steve** **Minutelli**, and **Al** **Zink**.

**#3 Regular Business**

**1. Petitioner CC 86 Main LLC is requesting the following on real property with an address of 86 Main Street Tax May U2, Lot 52, M2 Zone.**

1. ***Appeal of an Administrative Decision*:** a decision made by the Building Inspector concerning the imposition of impact fees assessed for six new apartments.

Mr. Henry B. Stebbins Esq., from Stebbins, Lazos, and Van Der Beken P.A., Attorneys at Law in Manchester, was present this evening representing Mr. H. Benjamin Stebbins, the principal owner of the property at 86 Main Street. Attorney Stebbins reviewed the historical value of this property and the age and renovations required to add the 2 studio and 4 one bedroom apartments to the 2nd and 3rd floors. Attorney Stebbins stated that the impact fees, according to the ordinance, should have been assessed at the time the Building Permit was issued. Mr. Stebbins was never told of any possible impact fees until the Interim Building Inspector, Mr. Peter Rowell, billed him prior to issuing the Certificate of Occupancy. Attorney Stebbins also reviewed the documents submitted to the ZBA for this appeal. He asked that the ZBA 1) overrule the decision of Peter Rowell because they feel his action was improper and illegal in withholding the issuance of a Certificate of Occupancy to the applicant for the project until the previously unassessed (and never mentioned) impact fees (both sewer and water hook-up fees) in the amount of $25,728 were paid, and 2) order the refund of these fees to the applicant, with interest. Attorney Stebbins did acknowledge that the fees were paid on March 31, 2022 under protest.

The Chair opened the meeting to public comments at 7:10 PM. There was none, so public comment was closed at 7:11 PM.

The Chair stated that they should exhaust their appeals through the Planning Board for a waiver or adjustment of the Impact Fees, before coming before the ZBA. The Planning Board has the means to make this decision, not the ZBA.

**#1 Motion:** **Bob** **Daigle** made a motion that, while it is true that the Newmarket zoning ordinance states that impact fees shall be assessed by the CEF prior to or as a condition of the issuance of the Building Permit on a new development, and that section 32-238(g)1 states that no building permit shall be issued for new development as defined in this section until the CEF has assessed the impact fees. It is also true in New Hampshire that every person is presumed to know the law and so an applicant is presumed to know the law. That is cited as Town of Nottingham vs
Newman 147 N.H. 136 (2001) and Bennett vs. Town of Hampstead 157 N.H. 477, 485 (2008). It therefore has to be presumed, the plaintiffs knew that impact fees are part of the ordinance and are required for new developments. Given that the plaintiff has not exhausted his options with the Planning Board, it is premature for this Board to rule on a waiver to the impact requirement. Further the CEF does not have the authority to waive impact fees as set out in the zoning ordinance. Given that the impact fees are clearly required by the ordinance, the CEF acted appropriately in assessing them when an error was discovered and this board upholds that decision. That being said, the Board would recommend that the plaintiff return to the planning board to request an alternative calculation method and request relief. If relief is then denied by the Planning Board, the plaintiff may return to the ZBA, without prejudice, and request a variance from the fees based on the criteria, specifically the hardship criteria of the appeal process.
**Second:** **Al Zink
Discussion:** Members had difficulty with the motion as written and found error on both sides of this issue. **Bart McDonough** recommended that this matter be heard before the Planning Board.

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 **Bob Daigle** withdrew his motion.
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**#2 Motion**: **James** **Drago** made a motion that the Zoning Board Adjustment is the inappropriate Board to hear this case. The Zoning Board of Adjustment recommends the Planning Board of Newmarket is the appropriate Board to approve or deny the case. The Board, therefore, does not have an opinion at this time. Should there be a need in the future to come back to the Zoning Board, the case will be heard without prejudice.
**Second: Al Zink
Discussion: Steve Minutelli** plans to vote no.
**Vote: Approved 3-2-0** (voting against – **S. Minutelli** and **B. Daigle**)

Attorney Stebbins is not willing for the appeal to be tabled. He is also not willing to withdraw his appeal. They do, however, appreciate the recommendation to go back before the Planning Board, but insist that they were following the procedures set out by RSA 674:21 Innovative Land Use Control. They may still appeal directly to the Superior Court.
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 **Henry** **Smith** (Alternate ) excused himself from the meeting for the evening.

1. **Petitioner CC Railroad Street LLC is requesting the following on real property with an address of 3 Railroad Street, Tax Map U3, Lot 138A, M2A Zone:**
2. ***Appeal of Administrative Decision:*** A decision made by the Building Official regarding Sections 32-5 Nonconformity, 32-9 Special Use Permits, 32-11 Definitions, 32-46A M2A District, 32-56 Table of Permitted Uses, and 32-89 Dimensions Table, concerning the rehabilitation of the structure, specifically the decisions that the lot requires 50’ of frontage and that the application demonstrates a horizontal expansion of the existing structure.

1. ***Special Exceptions:*** (1) Sections 32-5(2)(b) *Nonconformity*: to permit the upward expansion of a nonconforming structure, (2) Section 32-46A M2  *District:* to permit 8 dwelling units on a property of less than 2 acres.
2. ***Variance****:* Relief from Section 32-*89 Dimensions Table*: to permit 8 dwelling units on a nonconforming lot that is less than an acre in area.

Mr. Henry B. Stebbins Esq., from Stebbins, Lazos, and Van Der Beken P.A., Attorneys at Law in Manchester, was present this evening representing Mr. H. Benjamin Stebbins, the principal owner of the property at 3 Railroad Street, Tax Map U3, Lot 138A, M2A Zone. Attorney Stebbins reviewed the two plans provided to the Board: one of an existing conditions of the property and one of the proposed building project. He also described to history of the property once owned by the Boston & Maine RR and used as two warehouses. With regard to the Appeal of Administrative Decision, they felt that the CEF made two mistakes: #1) the lot is a pre-existing, grandfathered lot, which was approved as part of a sub-division (in the early 1970’s) prior to the ordinance for a 50’ frontage was put in place. On plan No.2, the shaded area shows the deeded easement that has been used as such for a very long time. #2) They intend to reduce the size of the horizontal non-conformity by 1,100 sq. ft. not expanding the footprint. They believe the CEF misunderstood that they plan to go up vertically to 3 stories and reduce the horizontal footprint.

The Chair opened the meeting to public comments at 8:06 PM. There was none, so public comment was closed at 8:10 PM.

**Bart** **McDonough** stated that “(2) Section 32-46A M2  *District:* to permit 8 dwelling units on a property of less than 2 acres” is for the M2 District and this property is under the M2A District. This should be presented to the Planning Board for a Special Use Permit.

Attorney Stebbins withdrew that from (b) Special Exceptions of the petition.

**#1 Motion**: **Bob Daigle** made a motion to overturn the CEF decision regarding the horizontal expansion and the 50 foot frontage with the provision that information confirming the existence of the right of way into the parcel be provided before any work is accomplished on the site.
**Second: James Drago
Discussion:** None
**Vote**: **Approved 5-0-0**Regarding:Section 32-5(2)(b) *Nonconformity*: to permit the upward expansion of a nonconforming structure. Attorney Stebbins stated that the upward vertical expansion to 3 stories (45’ in height) including 8 units of 2 bedrooms each unit with parking will not have any impact on the neighboring properties. In fact, it should be a significant improvement as it will remove deteriorated eyesores and building a modern, code compliant, attractive building in its place. The neighborhood is comprised of office and residential buildings. They will also increase the pervious soil area for better drainage.

**#2 Motion: Steve Minutelli** made a motion to approve this special exception as provided in 32-5(2)(b) of the Newmarket Zoning Ordinance to promote the upward expansion of a non-conforming structure.
**Second: Wayne Rose
Discussion:** None
**Vote: Approved 5-0-0**Regarding: *Variance:* Relief from Section 32-8 *Dimensions Table*: to permit 8 dwelling units on a nonconforming lot that is less than an acre in area.

The Chair wants more specific information on the rental unit need. There is no historical designation for this property. Mr. Stebbins needs 8 dwelling units to recoup his costs for creating a totally new building which will meet code and enhance the neighborhood. Mr. Stebbins is four parking places short, but has access to more parking spots in the area on lots U4 16 (where Horizon Engineering is located).

**#3 Motion**: **Al Zink** made a motion that the Zoning Board of Adjustment grant a variance to the parcel containing a land area of about 855 sq. ft. shown in the plan marked Robert B. Meserve et al. Trustees of the Boston & Maine RR to allow 8 units.
**Second: Bob Daigle
Discussion:** None
**Vote: Approved 5-0-0
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 **3. Petitioner Bradley Curth is requesting the following on real property with an**

 **address of 9 Creighton Street, Tax Map U3, Lot 16, R4 Zone:**

1. *Variance*: Relief from Section 32-87(2) *Setbacks* to build a deck staircase that would be 4.5 feet from the property line, where 10 feet is allowed.

Mr. Bradley Curth did not appear before the Board this evening. **Bart McDonough** would like to give him an opportunity to make the next meeting.

**Motion: James Drago** made a motion to continue to the next meeting on June 6.
**Second: Bob Daigle
Discussion:** None
**Vote: Approved 5-0-0

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**4. Petitioner 11 Chapel Street LLC is requesting the following on real property
 with an address of 11 Chapel Street, Tax Map U2, Lot 3, M2 Zone:**

1. *Variances*: Relief from the following sections:
2. Section 32-89 *Dimensions Table*: to permit a third residential unit on a lot containing 0.1946 acres.
3. Section 32-89 *Dimensions Table*: to permit a setback in excess of 10 feet.
4. Section 32-5(1) & (3): to permit the expansion of a nonconforming uses, where the lot does not meet dimensional requirements.

Attorney Christopher Mulligan, from Bosen & Assoc. of Portsmouth NH, is here this evening presenting Mr. Keper Connell, owner of the property located at 11 Chapel Street at the intersection of Chapel and Granite Streets. There are three structures on the property. Two are dwelling units that have been there for many years and the third is a refurbished barn approved for a business last year. The first variance requested is to permit a third residential 2 bedroom apartment in the barn. For many reasons, the retail business fell through and now Mr. Connell would like permission for a third dwelling on the 0.1946 acre parcel.

After a conversation with **Bart** **McDonough**, Attorney Mulligan withdrew the request for a variance from #3 above, “Section 32-5(1) & (3): to permit the expansion of a nonconforming uses, where the lot does not meet dimensional requirements.”

Attorney Mulligan prepared a detailed memorandum explaining the criteria for the variance request.

Eric Weinreib P.A., Altus Engineering in Portsmouth, was available via zoom to answer questions and was helpful to the members.

The Chair opened the meeting to public comments at 8:54 PM.
Mr. David LeGault, Vice President of the New Market Historical Society, came forward to speak. The Historical Society is a direct abutter to the property under consideration this evening. They did have a previous problem with tenants from 11 Chapel Street using their lawn area and there were parking issues, but they have since put up a fence and have had no further problems. He is not against this proposed plan by Mr. Connell and just wanted to be sure that the current owner or any future owners advise the tenants of the property line. He was pleased to meet the owner of the property.
There were no further comments and the Chair closed public comments at 8:56 PM.

**Bart** **McDonough** pointed out that the deficiency in parking spaces and the upgrades to the retaining wall would need to go back to the Planning Board for approval.

**Motion: Steve Minutelli** made a motion to grant a variance from Section 32-89 to permit a third residential unit and to permit a setback in excess of 10 feet at 11 Chapel Street. Finding of Facts: presented by the applicant.
**Second: James Drago
Discussion:** None
**Vote: Approved 5-0-0**

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**#4 New/Old Business**

**Bart** **McDonough** announced that he is planning a new information package format for the meetings.

 **#5 Adjourn**

 **Motion: Steve Minutelli**
**Second: James Drago
Discussion:** None
**Vote: Approved 5-0-0**

The meeting was adjourned at 8:50 PM

Respectfully submitted,

Sue Frick, Recording Secretary