

ZBA Minutes 05/01/12

NEWMARKET ZONING BOARD OF ADJUSTMENT MEETING MAY 1, 2012 MINUTES

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

Absent: Bill Barr (excused)

Called to order: 7:02 p.m.

Adjourned: 8:25 p.m.

Agenda Item #1 – Pledge of Allegiance

Agenda Item #2 - Review & approval of minutes: 02/06/12, 02/14/12, 03/05/12

Action

Motion: Bob Daigle made a motion to accept the minutes of 02/06/12

Second: Wayne Rosa

Vote: All in favor

Action

Motion: Bob Daigle made a motion to accept the minutes of 02/14/12

Second: Wayne Rosa

Vote: All in favor

Action

Motion: Bob Daigle made a motion to accept the minutes of 03/05/12

Second: Wayne Rosa

Vote: All in favor

Agenda Item #3 – Regular Business

Tong Da Zheng – Public Hearing to permit the replacement of a residential manufactured housing unit with a new residential manufactured housing unit.

The applicant is requesting:

Variance reference Newmarket Zoning Ordinance Section 1.05(B)(1)(a), Non-Conforming Structure to permit the new structure to be located closer to the lot line than the previous structure

Special Exception reference Section 1.05(B)(1) Non-Conforming Structure to permit the horizontal expansion caused by the placement of the new structure

Special Exception reference Section 1.05(B)(2) Non-Conforming Structure to permit the increase in the height of the new structure, whereas the previous structure was on a slab and the new structure will be on a foundation, increasing the height of the structure by at least three feet. The lot is located at 168½ Main Street, Tax Map U3, Lot 161, M2 Zone.

Attorney Gregory Wirth represented the applicant. He stated there was originally a 1970 mobile home on a footprint on this lot, which was located about 65' off of Main Street. The mobile home fell into disrepair and the owner wanted to replace it with a new structure almost on an identical footprint. The replacement structure's footprint is off by two to three feet. Attorney Wirth stated, in terms of height, he spoke with the contractor, Joseph Farnese, and his indication was the structures will be exactly the same height or within a couple of inches. Attorney Wirth was not sure the height was an issue. He stated they should keep in account that the preexisting mobile home had egress from the front, which went onto the abutter's property. The new structure will have egress in different directions, so it will not be exiting onto the abutter's property and will be more in tune with the applicant's lot. That would be an improvement in terms of impact on the abutter.

He stated, in looking at the strict analysis for the variance and the issue of impact on surrounding property values. There was a manufactured housing unit on the lot for at least 25 years. Replacing this with a new structure will have a positive impact and removing the egress so it does not involve walking on the abutter's property, will increase values. Other than that, there is no impact. They are not changing anything and there is no impact on light or sight. This is an area like a bowl behind the restaurants and it butts up almost against ledge. It is very difficult to move this structure anywhere other than where it is anticipated to be placed.

In response to Criterion 2, he indicated the preexisting mobile home was there forever and single family is a permitted use in the zone, excluding mobile homes. Taking that into account, this is clearly not contrary to the public interest.

In response to Criterion 3, he stated the preexisting mobile home was there forever. All the applicant wants to do is get rid of a structure that was in a state of disrepair and put a new structure in on a footprint that is off by two or three feet, but only because of the makeup of the property and the difficulty of getting access along the 20 foot right of way that comes off of Main Street into there. Where it is being placed now is the only place you can do this without blasting some ledge, which is not the best idea.

In terms of the spirit and intent of the ordinances, single family residences are permitted by right in this zone and this is a replacement of something that has been there for an excess of 25 years. He thought it was clearly in the spirit and intent of the ordinances.

In terms of unnecessary hardship, he stated, if you take a look at this property, there is really nothing else you can do with it other than place a manufactured housing unit on the almost identical footprint. He took a look at the site prior to the meeting and the current foundation almost butts up right to ledge, so moving it back or forward is really not an issue,

you cannot do it. You may have a few feet to move it sideways, but there are underground utilities and public water and sewer. There are no impacts on Town services, no site issues, no light issues, and no overburdening of schools.

Taking into account the five factors for a variance, the applicant has clearly met each of those. He stated the height issue is not an issue. The contractor stated the height will be the same. It may look different, because there was a berm in front of where the concrete is now and it makes it look a little higher, but the height of the two structures will be exactly the same or within 2 inches.

He stated, regarding the Special Exception, given the location and access to the lot and the characteristics of the lot, the three foot change in the footprint is required to avoid having to blast ledge and to avoid a situation where you cannot use the lot. There is no change to water and sewer. This does not render the lot proportionately less adequate and there is no impact on abutters other than a positive impact. There is no impact to public health, safety, general welfare and moving the egress is a positive impact.

Chairman Hawkins stated there were only four members present this evening and they need three or more votes to pass the applications. He asked if the applicant had any objection to proceeding with the four members. Attorney Wirth stated he did not think it was an issue. He took a moment to verify this with the applicant. After conferring with his client, the applicant, Tong Da Zheng, he stated they would go forward with the four member board.

Chairman Hawkins opened the public hearing.

Jennifer Jarvis, owner of 164 Main Street, stated her property is the Riverworks Restaurant, which abuts the applicant's property to the front. She had put together some packets of information documenting some of the things she would like to make statements about and gave them to the Board members. She stated the packets contain a timeline of what has been happening on the applicant's property and includes letters that have been received by the applicant. She also included the documents that were given to the applicant when the preexisting mobile home was deemed unsafe by the Town and some history of property maintenance, including letters the applicant received from the Town. She also had plot plans, one done for herself by Atlantic Survey, one done for Pelletier in 1981, and a copy of one done recently, which had been submitted by the applicant.

She stated regarding Criterion 1, the applicant says the newer modular structure would be a benefit to the area. She agreed, comparing a trailer that was an imminent danger to a new modular, that the newer home would be an improvement. However, it was not until the Town forced the applicant to repair or demolish the mobile home that the applicant started to consider repairs or replacement.

She stated the applicant has a history of property neglect and that is contrary to the public interest. In the twenty one years she has been working at 164 Main Street, there has not been much, if any, property maintenance done on his property. The grass is allowed to grow up past the trailer and the steps rotted away. Regarding the egress mentioned earlier, there were two sets of stairs, one of which went onto his property. They rotted away and were not replaced. The other steps came down and turned and did not exit onto the applicant's property, but off to the side onto her property.

She stated the trailer was finally deemed unsafe by the Town on 10/06/09, as a result of an electrical inspection. There were tenants living in the trailer at the time.

She stated the applicant also owns another parcel abutting her property. She has attached photos of other property maintenance concerns that she has brought to the applicant's attention on several occasions, but he has ignored her requests to repair the damage on her property and also to fix his own equipment. She has no reason to believe that, moving forward, the applicant will be any more responsible regarding property management. She stated granting variances to increase the size and location of the structure owned by the applicant, who has a history of property neglect and who violated the conditions of his original building permit, would be contrary to the public interest. This property also has a history of tenants that have been contrary to the public interest and she attached a statement about that. She stated granting a variance would only allow this to continue.

Mrs. Jarvis stated granting a variance to locate the structure closer to the lot line is also contrary to the public interest, because it reduces the passageway, limiting the ability to drive around the corner to reach the emergency exit on the abutter's property. She attached photos showing differences in the clearance, while turning the corner. In several plans, it says there is a 20 foot passage, but there is no longer 20 feet around that corner. When you go up the driveway and make the corner to the applicant's property, there is no longer that 20 foot passageway. Elderly and handicapped people drive up that passage to use the emergency exit of the Riverworks as a handicapped entrance and exit to the restaurant. It was already a very complicated maneuver to make this corner and now the distance is reduced. The inability to snowplow around this corner is also contrary to the public interest, because it limits her ability to remove snow from the emergency exits.

Regarding Criterion 2, she stated the applicant contends, by granting the variance, it will be a benefit to the area and surrounding properties. The spirit of the ordinance is to protect all property owners' rights, not just the applicant's. Granting the variance will have multiple negative impacts on the abutter's property, in which the spirit of the ordinance would not be observed. The limitations placed on the abutting property would not be in the spirit of the ordinance. She stated details of this are mentioned throughout the five criteria.

Regarding Criterion 3, she stated the applicant states that no other reasonable use of the premises is possible without the variance, but clearly a structure existed before without the need of any variances or special exceptions. The applicant could replace the structure on the same footprint and had been given a building permit to do just that. The applicant knew, before he got his building permit, that he needed to replace the structure on the same footprint or else he needed to go to the ZBA to change it. The applicant told the Town he was replacing on the same footprint and, therefore, did not need to go to the ZBA. The applicant then went ahead and built a foundation that was not on the same footprint. The applicant had no intentions of replacing on the existing footprint and it was not until the Town caught the applicant violating his building permit and forced the applicant to stop work that the applicant became concerned with applying to the ZBA. The applicant applied for a building permit knowing he had to replace the mobile home in the original footprint and completely ignored this condition of his permit. The applicant knew he needed to go to the ZBA from the very beginning if he wanted to change the footprint and the applicant showed complete disregard for this process. Granting variances and special exceptions that directly and negatively impact abutting property values and the ability of those abutting property owners to use their property to an applicant who has shown a history of noncompliance to the Town ordinances, building permits, and timelines and to an applicant who had repeatedly shown disregard for abutters' property and safety would not do substantial justice. She stated the applicant also states that the loss to the applicant, as a result of the failure of the Board to grant the applications, significantly outweighs any gain to the general public. Any loss to the applicant is a direct result of the applicant's violations of his original building permit. The applicant had and continues to have options. He made the decision to violate his building permit and build a foundation that he knew was nonconforming. What about the loss to the abutters' properties that follow the rules and regulations? The burden has been placed on the abutters repeatedly to force the applicant to follow the rules and regulations. After the applicant repeatedly and knowingly violates these regulations, he now wants the Town to consider his loss. Granting a variance, at this point, would be an injustice and would set a dangerous precedent.

Regarding Criterion 4, she stated the applicant states the values of the surrounding properties would not be diminished, because the new modular home is of an increased quality than the preexisting home. She agreed a newer modular home is nicer than a condemned mobile home, but without property maintenance, it will eventually look like the old condemned home. The applicant also states that the change in the footprint will be de minimus. The applicant knew where the property lines were located and yet continued to dig up and cause damage to abutter's property. The applicant said he would repair the damages in August 2011 and the damages still exist, as shown in photos she submitted. The damages have yet to be repaired after several requests.

She stated the applicant had footings poured for the foundation walls on the abutter's property and, when approached said, "It's only six inches. You won't even see it, when we cover it up with dirt." When she explained to the contractor they had no right to build on her property, he cut back the foundation and she was appreciative of that. He cut back the footings, so they were no longer on the property line. The applicant knew where the property lines were, yet continued to dump debris and store equipment on the abutter's property. She provided a picture of equipment still sitting on her property today. It was not until the Building Inspector ordered the applicant to remove the debris did it get removed. None of this has been de minimus for her. She stated the change in the footprint diminishes her property value, because the reduction in setbacks limits her ability to use her property in several ways. It affects how she can properly maintain the driveway to provide access to the handicap entrance and the emergency exits. A twenty foot passage would no longer exist. There would only be 15¾ feet between the foundation wall and the steps of her emergency exit. It limits her ability to build fences or outside structures, because the setbacks have been reduced. It limits her ability to place her propane tank on her property, because the setbacks have been reduced. The applicant has a history of repeated public safety and property management concerns and, with the foundation that much closer, it only diminishes abutters' property

values even more.

Mrs. Jarvis stated the roofline has changed, so the watershed has changed. She was concerned about the potential for water damage. With the closeness of the building to the property line, she is concerned that the roofline will be encroaching, which will diminish her property value.

Regarding Criterion 5, she stated a fair and substantial relationship does exist. The applicant could build on the original footprint. The subject premises can be reasonably used in strict conformance with the ordinance. Granting the variance would result in unnecessary hardship to the abutters.

Jennifer Jarvis stated she did not see any variances for parking, but noticed in the application it said they were going to have parking and it also showed an egress. What the plan does not show is where the passageway ends and her property exists. She highlighted an area of her plan to indicate an area they have left off of their plan. The applicant indicates they will go over the right of way, then over her property to a parking area. The highlighted area is her property. She showed the Board where she was talking about on the plan. There has not been a parking area there for the applicant's property in the past, according to plans dating back over 30 years. The applicant has shown parking and parking access on this current plan, but what he left out is where the right of way ends and where her property and parking are located. He left out that he does not have permission to pass over her land to reach his proposed parking. She and the applicant have had discussions over the years about parking. The applicant knows that she parks her cars and stores snow removal on this piece of property. When the previous trailer still existed, she had suggested he put parking straight ahead, because he could go up the right of way and have parking at the top of the hill, before he made the turn. He said he didn't want to do that, because he did not want to go to the ZBA. The applicant also owns a parking lot that is a direct abutter to this property in question tonight and he has a stairway from it to access this parking. She is not sure he needs parking as a condition, but since he mentioned it in the plan, she felt she should bring it up.

Her other concern was whether it was a safety concern that the foundation footings have been altered. They have been cut back. According to the plan of the new modular home, there is an exit in the rear of the building, but, as the applicant's attorney just said, it's all ledge back there, so she can't see how they are getting out the back door and which way they would be going.

The other entrance they have that is on the right on the proposed structure and where the foundation wall currently sits is 7½ feet away from a propane tank. How they are going to get stairs in and provide an exit is a concern for her and it is also a safety violation. Eastern Propane was just up there and said you need ten feet.

Her other question was how the modular building was going to get onto the new foundation. She has asked and was told it would be airlifted over her property and over the applicant's other property. She called her attorney, as she was concerned about damage to her property, and was told she owns the air rights over her property. None of this had been brought up to her, until she went up to the Town Hall to ask. There has been no discussion about lifting buildings over her property. She is concerned about logistics, property damage insurance, and loss of business and none of this was discussed.

She stated the applicant was well aware of these things before starting and this is a clear case of "it's easier to ask for forgiveness, than permission." The decisions made by the Board will set a precedent and will impact the abutter's property.

She stated another abutter sent the Board a letter and has asked her to make sure it was read at the meeting in its entirety.

Chairman Hawkins stated the Board received a letter from Eva Brown, who owns the property at 170 Main Street and is also an abutter. He read the letter, which is on record in the file, voicing opposition to the application. She mentions the applicant has included a parking lot as part of his plans. She stated the applicant's responses to Criteria 1 and 2 state this will benefit the area and surrounding properties. She disagreed, because the applicant has not shown responsibility for this property in recent years and she had no reason to believe he will do a better job in the future. She described the past problems with the property. She also stated the new foundation is in violation of existing ordinances and is almost directly on the border of the property and this does not bode well for his future behavior. She expressed concern about the proposed asphalt driveway and parking lot causing large amounts of water to be channeled down the slope to the back

of her property. There is bedrock under her building and limited drainage capacity. Neither the asphalt parking lot nor proposed extension of the road ever existed before. She commented on previous renters of the mobile home that was removed. She inquired as to how the modular home would be placed on site and expressed concerns about the possibility of it being lifted over other buildings. She stated the addition of the asphalt parking area would cause harm to two abutters. She felt a custom made home could have been built on the original footprint. Chairman Hawkins stated, by reading this letter, he did not intend to imply any endorsement of the views expressed therein.

Susan Labrie, Code Enforcement Officer, stated she was not here to promote or provide any opinion. She wanted to point out a few facts for this case for the Board's consideration.

She stated she would like to call the Board's attention to the pictures provided by Jennifer Jarvis. Although the survey shows there may be about a foot between the property line and foundation wall, the pins are out there, with a string pulled taught between the pins, and the property line is a straight property line there. It shows the foundation, in some parts, to appear to be a little bit closer than one foot. Bob Daigle asked if they were pins or eighty penny nails. He was out there and there were no pins. Susan Labrie stated she was out there about 2 ½ weeks ago and, unless someone removed them, the pins were there. They had requested the surveyors go out there and identify pins and put up some flagging up. It was supposed to be well-documented and identified for the Board. Diane Hardy stated there were orange flags out there. Bob Daigle stated he did not see anything when he was there. Chairman Hawkins stated a photo shows a string pulled taught across the foundation. He asked who set the rods and pulled the string. An unidentified person in the audience stated he pulled the strings.

Susan Labrie stated Attorney Wirth had explained they could not push the structure back any further or they would have to blast. She was confused as the other structure was located back further than the existing foundation. She did not understand why the old structure could be in that location, but the new one could not.

She stated she noticed the application for the modular home provided to her is different from the one provided to the ZBA. What the paperwork does not show is the roofline. Her concern was how far the roofline extends over where the foundation is. She would like to make sure the roofline does not go over the property line and does not increase the runoff and drainage.

She had not heard about additional parking on the property prior to tonight, but if there is additional parking proposed or impervious area that will be created, she would be concerned about drainage. She would require a drainage study at that point.

She was concerned, because the applicant never provided a topography plan. The reason this is important is the applicant says the structure is the same height as the old one, which may or may not be true. There are no reference points to say that it is, as she does not know from what point the 12 ½ feet is measured. The plans show the foundation wall is at 104.2, but she has no way of knowing where the old foundation wall was. The applicant is saying the grade will be brought up to 103 feet 6 inches, but she does not have any way of knowing what existing grade is. Does that mean additional fill is being brought in? Is the existing foundation wall higher than the old one? That would mean the structure is going to be higher.

Her other concern was that it did not show the egress. She stated she sees the door, but she did not know the elevation of the door or existing grade. Do they need a landing? Will that violate setbacks? Where would any stairs go? Would those be in violation of setbacks, as well?

She stated the nature of her concerns were that Attorney Wirth stated he did not believe a height variance was required, because the structure is exactly the same height as before. She has no way of knowing that from what was submitted to her. The height of the old structure might have been 12 ½ feet tall and the new one might be 12 ½ feet tall, but if she is measuring from different levels, the overall height is going to be different. There is no topography depicted to show what the existing grade is, where the existing slab is, what final grade will be or what the top of the final foundation wall will be. Fill being brought onsite would bring drainage concerns, but it is more a violation of the zoning, as the structure will be higher than it was and that is not permitted.

Susan Labrie also stated the propane tank needed to be ten feet to any opening, such as a window or door. It is possible that it needs to be 10 feet from any structure or wall that is combustible, too. Robert Daigle stated it is 10 feet from any

opening.

There were no further public comments and Chairman Hawkins closed the public hearing portion of the meeting.

Attorney Wirth stated he wanted to focus on what they were here for instead of what they were not here for. They were here for a variance request and two special exceptions. They were not here to punish Mr. Zheng for things he may or may not have done two or three years ago or things he may or may not do in the next three years. As he indicated, the manufactured housing unit that was there was in a state of disrepair. The Town asked him to remove it and he did. He is here to put a new structure on the site.

Attorney Wirth stated he visited the site and, other than the fact it is a construction site, it was clean. He stated the Board could not deny him a variance just because he may not take the trash out in two years. He stated he needed to say that, because a lot of things that were said tonight were not relevant for the analysis that this Board needs to go through. They were talking about a roughly three foot change in the footprint.

He stated they were also not talking about a parking lot, parking, or putting asphalt over an abutter's property. They were only here for the variance and special exceptions. There is no plan before this Board to put in parking or expand the driveway or anything else. In terms of the 1980 plan showing the twenty foot passageway, it shows the twenty foot passageway is completely on the abutter's property. What the applicant does on his property has nothing to do with that twenty foot right of way, unless they encroach over the lot line, and they are not doing that according to the survey that has been done by a licensed land surveyor.

Attorney Wirth stated, in terms of the footings, they are not on the abutter's property. Nothing is on the abutter's property or will be.

He stated in terms of whether they took any action on the site, they may not have taken action on some things, because Mr. Zheng was provided with a cease and desist order. When that occurred, he stopped doing everything and did not do anything without prior Town approval. To punish him for following an order provided by the Town would be wrong.

He stated this lot is very small. When they talk about the LP gas tank that may or may not be in the way, they should know the LP gas tank is the abutter's tank. It is not Mr. Zheng's tank. There are two gas tanks, one is Mr. Zheng's. The abutter's gas tank is the one that may be in the way. He has not found any easement for that tank to be there or any contractual right for that abutter to have her LP gas tank on Mr. Zheng's property. If it is there, it is there with Mr. Zheng's blessing, as we sit here. If it is going to get in the way, it may be an issue they have to take care of. That should not stand in the way of Mr. Zheng being able to reasonably use his property.

He stated the roofline will be the same, it will not encroach. If the Building Inspector takes a look at it and indicates that there is any issue of encroachment, it will be changed. They are not asking for an encroachment over the lot line for the roofline.

The property has been surveyed. He understood there is some string and poles out there. When he was there two hours ago, at least one pole was lying flat. His understanding is they have been put in and taken out and put in and taken out. He does not know what is accurate. He does know the plan showing the footprint being completely within the lot lines is accurate.

He stated, in terms of why they are putting the trailer where it is, the previous manufactured home was not on a foundation, it was on a typical support for that structure. They had to put the new foundation where it is otherwise they would have had to blast.

He stated Mr. Farnese is here and he has measurements and can respond to any roofline encroachment questions. He stated, assuming they need a special exception in terms of moving upward, this meets the criteria for a special exception.

They are within the maximum height in the district. They were not dealing with light or sight issues. They were not increasing the impacts.

Bob Daigle stated his understanding was a building permit was granted to put a manufactured home on the same footprint and that the issue is before the Board now, because the footprint was moved, for lack of a better term, for the contractor's convenience. What they have here is they are asking forgiveness rather than permission. Chairman Hawkins stated it is written on the building permit that it be in the same footprint.

Bob Daigle stated, as far as the height, they do not have any reference points, so that is moot. Vice Chairman Rosa stated he did not see how they could even act on that.

Vice Chairman Rosa stated the process that is typically involved on a close lot like this is you would get a surveyor in three or four times and he would locate the existing building. You would rip down that building and he would come back in and pin it again. You would excavate and the foundation person would come in and put the foundation where the pins would be. After it was poured, in this instance, you would take some elevations for the height and you would then have a certified foundation. None of that was done. He had a problem with that.

Bob Daigle stated there is a reasonable use of that lot. Put the building on the same footprint.

Vice Chairman Rosa stated he would argue against what Attorney Wirth said about how they could not have put the foundation in the original position. Bob Daigle stated it just would have been more difficult.

Gerry O'Connell asked what the date of the survey was. Diane Hardy stated the survey was done on March 17, 2012. There was no preconstruction survey. A sketch was provided with the building permit application. Attorney Wirth stated the survey was done, because there was a question of whether the new foundation was encroaching. Diane Hardy stated it was done at the request of Town staff to have some real data to work with. Joseph Farnese, the contractor for the job, stated there was a survey prior to this one. Diane Hardy stated a sketch was provided, not a survey. The Town was not notified that the structure would be in a different location prior to its installation.

Chairman Hawkins stated he felt it was established the applicant had not complied with the terms of the building permit otherwise they would not be here. He suggested the Board look at the variance criteria first. He stated if there are encroachment issues or issues with the use of the easement beyond the terms of the easement, those are legal questions that will get resolved elsewhere. The ZBA's jurisdiction is limited to the variances and special exceptions and specific statutes involved.

Chairman Hawkins stated he agreed that the applicant did not have an adequate explanation of why this building is not in the same footprint as the old building. It was the applicant's choice to not proceed in the same footprint. To the extent that there is hardship, it is, in his mind, a self created hardship and not a hardship forced by a specific, special condition on the property. You can have reasonable use of the property, if you simply observe the same footprint. A structure can exist within that footprint, so there is no deprivation. There is a reasonable use. To the extent there is a special condition that is caused by the foundation not being in the same footprint, in his mind, it is a self created hardship. That is not a hardship that qualifies as unnecessary hardship under the terms of the statute.

Chairman Hawkins stated, so his view was clear on the record, he did not believe the applicant had satisfied any of the criteria. He stated you are looking at an area that is highly congested already. He has viewed the property with the Code Enforcement Officer and he has paid attention of what is going on with the property as he drives by every day. There are always cars parked there, which is okay, but since this is not on the old footprint and subject to the full scope of the ZBA's review, he thought emergency access to this property is severely compromised by the new foundation's location. Public safety is an issue and he would view this as being contrary to the public interest, because of difficulties with access to the structure.

He stated, in the same vein, he thought the spirit of the ordinance was not being observed, because part of that is you can have a variance provided public safety and other relevant issues are preserved. He does not believe they were being preserved and, because this is not in the same footprint, it is subject to the full scope of review.

He did not think substantial justice was done, because the only loss to the applicant is self created by virtue of failure to comply with the express terms of the building permit. Reasonable use of the property can still be made simply by sticking with the old footprint.

He stated they have heard some evidence from Mrs. Jarvis and Mrs. Brown that, because of the movement of the new structure closer to the property line, they may have more difficulties with snow removal and it could have an impact on their property values, making a difficult circumstance that occurred with the grandfathered structure in place even more difficult. He thought you could make a case there was a diminution in value of surrounding properties based on the evidence presented.

He stated he did not think that any special condition of the property is linked to any hardship. The hardship is self created. He did not think there was a deprivation of any reasonable use of the property, because reasonable use can be made simply by utilizing the old footprint.

He stated he would reject this based on all five of these criteria.

Vice Chairman Rosa asked, if the Board denied this, would the applicant still have the option to take that foundation out and go back to the original footprint and rebuild. He asked if that timeframe was still legal. Chairman Hawkins stated the building permit is good for one year. Mr. Farnese explained construction had to start within six months and the permit was good for one year. The building permit application was filed before the one year expiration date. Diane Hardy stated if they remove the foundation and, if they build on the original footprint, they could do that and be legal. Vice Chairman Rosa stated he realized this was not an issue before the Board tonight, but he had wanted it stated in the record. He did not want to see the applicant denied use of his property.

Action

Motion: Bob Daigle made a motion to deny the variance request for Section 1.05(B)(1)(a) because the application does not satisfy any of the criteria, especially the hardship criteria, as reasonable use of the property can be maintained by placing the new building on the same footprint as the old one.

Second: Wayne Rosa

Vote: All in favor

Action

Motion: Bob Daigle made a motion they deny the Special Exception to Section 1.05(B)(1) Nonconforming and Section 1.05(B)(2), because the variance for the footprint failed

Second: Wayne Rosa

Vote: All in favor

William Morgan d/b/a Angel View Pet Cemetery & Crematory – Public Hearing for a Variance, reference Section 5.01(D)(5)(a), of the Newmarket Zoning Ordinance. The applicant requests a Variance to permit an animal crematorium to provide crematorium services for equines and large companion pets. The property is located within the Town's Aquifer Protection Overlay District. Ash remains are considered "solid waste" in accordance with regulations set forth within the NH Department of Environmental Services. According to Newmarket Zoning Ordinance Section 5.01(D)(5)(a), the "disposal, storage and staging of all solid waste" is prohibited within the Aquifer Protection District. The lot is located at 426 Wadleigh Falls Road, Tax Map R5, Lot 52-1, B3 Zone.

Chairman Hawkins stated there were some procedural issues. Looking at the applicant's packet, the applicant has been working with Doucet Survey. He has a personal and professional conflict involving Doucet Survey and, while it may be somewhat attenuated, he was not comfortable sitting for this application due to potential perception of a conflict of interest, so he recused himself from this application.

Vice Chairman Rosa stated he had to recuse himself from this application. He is an abutter, by way of property he owns on Route 152. He stated he comes in totally impartial, but is aware his participation in this decision could be challenged and affect the application.

Chairman Hawkins stated this deprives the Board of a quorum. The Board will let the Town Council know they need to appoint some members for this application to, hopefully, have a five member board hear it. They will continue this for a date in May to fall after the Town Council meets, which is May 16. They will continue to May 21. Attorney Bruton, representing the applicant, stated he would ask they continue to May 21, 2012. He stated he would prefer to have a five member board.

Action

Motion: Gerry O'Connell made a motion to continue this hearing to May 21, 2012 at 7:00 p.m. at the same venue

Second: Wayne Rosa

Vote: All in favor

First Reading of an amendment to the Zoning Board of Adjustment Rules of Procedure to amend the language regarding the election of a Chairman and Vice Chairman by the Zoning Board from being held in the month of June to being held at the first Zoning Board of Adjustment meeting following Town elections in March.

The proposed amendment was read.

Agenda Item #4 – Other Business

Diane Hardy stated they had a legal opinion regarding whether someone who is not an abutter could participate in a public hearing. Legal counsel advised they could participate in a public hearing. If they have a standing as an aggrieved party, they can appeal the decision, but they would have to prove they are an aggrieved party. Chairman Hawkins stated, if someone is not an abutter, when they get up to speak at a public hearing, they should be asked how they are directly impacted by the approval of the application. They should explain what their interest is. If a judge ever has to review the case, they would have a better idea of who has standing and who does not. There is a record upon which to act.

Agenda Item #5 – Adjourn

Action

Motion: Gerry O'Connell made a motion to adjourn at 8:25 p.m.

Second: Bob Daigle

Vote: All in favor