

ZBA Minutes 02/22/11

DRAFT
NEWMARKET ZONING BOARD OF ADJUSTMENT
TOWN COUNCIL CHAMBERS
FEBRUARY 22, 2011
7:00 P.M.

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

Absent: William Barr, Robert Daigle

Chairman Hawkins called the meeting to order at 7:09pm.

Pledge of Allegiance

Review and Approval of Minutes: 02/07/11

February 7, 2011

Gerry O'Connell noted on page 8 at the bottom, where he had expressed concern about adding a patio area on the Jarosz property. What is missing from that discussion is the fact he no longer had concerns after hearing William Barr's statements.

Wayne Rosa noted on page 7 he had been speaking about the exterior doors specifically being changed, not the exterior of the building.

Chairman Hawkins noted on page 7, second paragraph, the second sentence is incomplete. It should read: "He understood each application should be held on its own merits, but felt there must be a principal basis to distinguish one from another."

Zoning Administrator Diane Hardy went through editorial corrections with the Board. She suggested a process similar to the process the Planning Board uses where she makes her editorial review prior to submitting the draft minutes to the Board.

Action

Motion: Gerry O'Connell made a motion to accept the minutes from the February 7, 2011 minutes as amended.

Seconded: Vice-Chairman Rosa

Vote: All in favor

Robert Daigle arrived at 7:23pm.

Regular Business

Vincent Jarosz - Special Exception to allow an accessory apartment, reference Section 7.03(B). The lot is located at 10 Langs Lane, Tax Map R5, Lot 62-2, R1 Zone.

Zoning Administrator Diane Hardy explained the application has been posted, as required by law, and abutters have been notified.

Attorney F. X. Bruton noted he was representing the applicant for this application. Earlier this month the Zoning Board granted a variance relative to the applicant's interest in having an accessory apartment. The lot is located at 10 Langs Lane, Tax Map R5, Lot 62-2, R1 Zone. The variance permitted the applicant to locate an accessory apartment in a detached garage, which supports the single family home located on the property. Section 7.03(B) requires applicants to obtain a Special Exception for accessory apartments. The apartment is intended to have two parking spaces; a plan has been provided for the Board depicting the parking spaces. The unit would be an efficiency unit, meaning there would be no separate bedroom. The ordinance allows for up to one bedroom. The apartment will be 780 square feet. There are two overhead doors on the building that will be replaced. The garage door on the back of the building will be replaced with a normal standing doorway providing for access and egress.

CRITERION #1

The apartment shall be a minimum of 300 square feet and a maximum of 800 square feet of finished living space.

Attorney Bruton explained the accessory apartment would be 780 square feet.

CRITERION #2

The accessory apartment shall be either an efficiency apartment (without a separate bedroom) or a one-bedroom apartment.

Attorney Bruton explained this would be an efficiency apartment.

CRITERION #3

One of the units must be owner occupied.

Attorney Bruton explained the applicant, Vincent Jarosz, would continue occupying the single-family home on the property.

CRITERION #4

There will be at least two parking spaces identified for the accessory apartment.

Attorney Bruton explained documents have been submitted to the Board showing the two parking spaces and each space meets the required criteria including size and location. These parking spaces will not be located within the setbacks.

CRITERION #5

No exterior changes shall be made which significantly alters the appearance of the structure from the street.

Attorney Bruton explained the changes discussed would not significantly alter the appearance of the structure. None of these changes will be seen from the street.

CRITERION #6

Adequate water and sewer disposal shall be provided. If town water and sewer services the site tie in fees will be

Attorney Bruton explained the water and sewer disposal would be provided to the accessory apartment. The applicant is currently dealing with whether he needs to pay a fee for the water.

Chairman Hawkins asked if this site is serviced by Town water. Attorney Bruton explained this site is serviced by Town water. The water lines already exist within the location of the accessory apartment, which causes the confusion as to whether tie in fees must be paid for the water. Robert Daigle explained tie in fees are assessed on a per unit basis. He suggested if this location was to be an office space, tie in fees may not be necessary, but because it was going to be a residential dwelling tie in fees could be assessed. Attorney Bruton explained the impact fee discussion would be raised appropriately with the Planning Board.

CRITERION #7

The granting of the Special Exception would be consistent with Section 1.05(A)(2) of the ordinance.

Attorney Bruton explained this section discusses not expanding residential use in a zone, which does not allow residential use. In this instance, it is already a residential use in a residential zone.

Robert Daigle asked what happens to the accessory apartment use if five years down the road, Mr. Jarosz decides to move and rent the home he is currently living in. The ordinance variance and Special Exception would be granted under the premise Mr. Jarosz would live in the existing home, therefore fulfilling the owner occupancy requirement for the Special Exception. He asked what would happen if that changes. Attorney Bruton suggested the ordinance might be vague in that issue. He was unsure what would happen. The Board must consider the existing conditions in order to base their decision. Zoning Administrator Diane Hardy explained the Code Enforcement Officer would discover there is no owner occupancy therefore nullifying the approval for the accessory apartment.

Chairman Hawkins explained the Board does not have a full panel this evening. The applicant can move forward with the four members present realizing a positive vote of three must be obtained for any approvals. This positive vote of three would be easier to achieve with a full five member Board. The applicant can choose to continue the application until a full five member Board is present, or can choose to move forward this evening with the understanding the lack of a full Board would not be criteria that could be used for an appeal of any decision this Board makes.

Attorney Bruton understood the circumstances and wished to move forward this evening.

Zoning Administrator Diane Hardy suggested the Board discuss and vote on each Special Exception criterion individually. If, at the end of the discussion and voting the Board finds the application has met each criterion, the Board must grant the Special Exception.

Chairman Hawkins opened the public hearing at 7:35pm.

No comments.

Chairman Hawkins closed the public hearing at 7:35pm.

CRITERION #1 - 7.03(B)(1)

The apartment shall be a minimum of 300 square feet and a maximum of 800 square feet of finished living space.

Chairman Hawkins noted the applicant has submitted the accessory apartment will be 780 square feet, which falls within the required size.

Action

Motion: Robert Daigle made a motion the applicant has satisfied Section 7.03(B)(1).

Seconded: Vice-Chairman Rosa

Gerry O'Connell asked if a sketch of the apartment has been submitted. Zoning Administrator Diane Hardy noted a footprint of the apartment has been submitted.

Vote: All in favor

CRITERION #2 – 7.03(B)(2)

The accessory apartment shall be either an efficiency apartment (without a separate bedroom) or a one-bedroom apartment.

Chairman Hawkins noted the applicant has submitted the accessory apartment will be an efficiency apartment, meaning no separate bedroom.

Action

Motion: Robert Daigle made a motion the applicant has satisfied Section 7.03(B)(2).

Seconded: Vice-Chairman Rosa

Vote: All in favor

CRITERION #3 – 7.03(B)(3)

One of the units must be owner occupied.

Chairman Hawkins noted the applicant has submitted he is currently occupying the single-family home on the premises.

Action

Motion: Robert Daigle made a motion Section 7.03(B)(3) has been satisfied.

Seconded: Gerry O'Connell

Vote: All in favor

CRITERION #4 – 7.03(B)(4)

There shall be a minimum of two parking spaces per dwelling unit. A parking space shall be defined as a rectangular space 9-feet by 18-feet. Parking spaces shall be permitted in setbacks if the parking spaces are over 50-feet from abutting dwelling units.

Action

Motion: Robert Daigle made a motion Section 7.03(B)(4) has been satisfied based on the evidence submitted.

Seconded: Gerry O'Connell

Vote: All in favor

CRITERION #5 – 7.03(B)(5)

No exterior changes shall be made which significantly alters the appearance of the structure from the street.

Action

Motion: Robert Daigle made a motion Section 7.03(B)(5) has been satisfied.

Seconded: Vice-Chairman Rosa

Vote: All in favor

CRITERION #6 – 7.03(B)(6)

Adequate water and sewer disposal shall be provided. If town water and sewer services the site tie in fees will be

Chairman Hawkins suggested adding a condition that if the Planning Board determines the tie in fees must be paid, the tie in fees be paid. If the Planning Board waives the tie in fees, this condition will be satisfied.

Action

Motion: Robert Daigle made a motion the applicant has satisfied 7.03(B)(6) subject to the payment of fees paid.

Seconded: Vice-Chairman Rosa

Vote: All in favor

CRITERION #7 – 7.03(B)(7)

The granting of the Special Exception would be consistent with Section 1.05(A)(2) of the ordinance.

Chairman Hawkins noted the applicant has submitted this criterion has been satisfied because this is a residential use in a residential zone.

Action

Motion: Robert Daigle made a motion 7.03(B)(7) has been satisfied.

Seconded: Gerry O'Connell

Vote: All in favor

Action

Motioned: Robert Daigle made a motion to grant the Special Exception as submitted subject to the fee payment conditions.

Seconded: Gerry O'Connell

Vote: All in favor

Kevin Burke – Continuances of the following applications:

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. Continued from 02/07/11.

Chairman Hawkins explained to the applicant there are only four members of the Board present this evening. By law, an affirmative vote is with a quorum of three members. Achieving an affirmative vote will be more difficult with a Board of four than with a full Board of five. The applicant has the option to continue the application, without prejudice, until there is a full five member board or the applicant can choose to move forward with a four member Board with the understanding not having a full board is not reason for an appeal of any decision this Board may make.

Kevin Burke suggested he would like to proceed this evening. He noted the application before the Board includes two variances, but he would like to see the apartment grandfathered. The Board did a site walk this past Saturday. He felt the Board could see the space was an apartment. He provided letters from longtime residents stating this is an apartment; he provided insurance paperwork and photographs of the apartment. The footprint of the building will not be changed. The apartment cannot be seen from the street. The building is buffered by a field on one side and a graveyard on the other. He is simply trying to update what already exists. This home, inclusive of the apartments, has been part of the family for over 80 years.

Robert Daigle asked for a point of clarification. He asked if the Board determines the administrative decision was made incorrectly whether that would render the need for variances a moot point. If the Board determined the administrative decision was not made correctly, than in order to achieve the desired result, the applicant would need to move forward with the variance requests. Chairman Hawkins agreed stating if the Board finds the use is grandfathered, than no variances are required because the use would have existed prior to zoning ordinances being in place. If the Board finds the use has been abandoned, the Board would need to go on to consider whether the applicant has established entitlement to a variance under the imposed criteria.

Chairman Hawkins noted there is a provision in the ordinance, which states: "In the event that a non-conforming use is abandoned for any period of time its reestablishment shall not be permitted." This comes from Section 1.05(A)(1). He suggests "any period of time" is very vague.

Kevin Burke explained there were debts in the family. He discussed the history of the family explaining the house was left to his wife's aunt in 1973. The aunt passed away in November 2009 at the age of 92, and left the home to him and his wife. The aunt was on a fixed income and could not afford to fix up the apartment. He felt it was unfair to consider the apartment as abandoned, because he is being taxed for that space as "living space." If the aunt could have afforded to fix up the apartment, she would have. This space is within the confines of the building. The last person who lived there was his wife's uncle. When the uncle passed away, the aunt was unable to update the apartment for re-rental. The apartment was occupied until 1969. This has always been a family home. Since the aunt has passed away, taxes on the property have doubled. The person who wants to move in to the apartment is also a family member. He explained he is trying to update what already exists.

Vice-Chairman Rosa clarified the apartment was last rented in 1969. He asked if there was a kitchen, bathroom, etc. when it was used as an apartment. Kevin Burke answered it was a complete apartment. He had supplied photographs of what the apartment had looked like. The State of New Hampshire Insurance Department had stated this was a basement apartment. This was stated as of last year.

Vice-Chairman Rosa asked if the apartment was ever used as part of the main house. Kevin Burke explained there are three doors, which are all egress doors. There is no access from the apartment to the main part of the house.

Vice-Chairman Rosa noted the house was purchased in the early 1930s and has always been in the family. He noted there are two electric meters and a third on the other side. Kevin Burke agreed stating there is electricity, which runs to

the apartment.

Vice-Chairman Rosa asked Zoning Administrator Diane Hardy if she had discovered any letter from the family requesting the apartment be taken off the tax rolls. Zoning Administrator Diane Hardy explained the tax card indicates the basement space as being unfinished and is currently being taxed as unfinished. Kevin Burke explained there are three other spaces in the basement that are unfinished. He explained there had been empty chicken coops and rabbit cages on the property he had to take down, because the aunt was being taxed for these empty buildings. Zoning Administrator Diane Hardy explained the tax records go back to the 1970s showing this building as a duplex. She suggested there might be documents that suggest this was taxed at a different rate. She referenced a document dated 1977, which shows 442 square feet of finished space. Currently, this space is not being taxed as finished.

Robert Daigle asked if the Board had gotten clarification on the definition of abandonment. Chairman Hawkins referenced two cases (Lawler vs. the Town of Salem, and Town of Salem vs. Wixon). He noted these cases involved instances where there is no ordinance, which provides the definition of abandonment. Newmarket has an ordinance, which provides a definition of abandonment, which is not particularly helpful because there is no specific timeframe set. He referenced the Lawler Case explaining this was a situation where there was a non-conforming grandfathered trailer in Salem; someone took out a mortgage on the trailer and after a few years walked away from it. The Town of Salem took the property because taxes were not being paid, and demolished the trailer. The property was sold to someone who went to the Town of Salem, received a building permit to put a new trailer on the property. The abutters appealed this decision. The Salem Zoning Board of Adjustment decided the applicant was not entitled to a building permit, because the grandfathered use had been abandoned. He read from the New Hampshire Supreme Court decision: "Abandonment depends on the concurrence of two factors: an intention to abandon or relinquish the use; and some overt act or failure to act which carries the implication that the owner neither claim nor retain any interest in the use." The test becomes whether the cessation of the use are indicative of an intention to abandon the use and the vested rights therein.

Chairman Hawkins referenced the Town of Salem vs. Wixon case, where someone was operating a pig farm and stockpiling manure and other materials on the property. This use was discontinued in 1989; the farm had been a grandfathered non-conforming use. The property owner had intended to open a nursery, but had never done so. The property owner wanted to continue the stockpiling of materials, but the Town had found this accessory use was abandoned when the grandfathered non-conforming use had been abandoned.

Chairman Hawkins noted during Saturday's site walk, Kevin Burke had alluded to one or more fires. He asked when the fires took place. Kevin Burke answered the fires occurred in the late 1980s. There had been some water damage, as well. He filed a claim last year, but was denied because the claim had already been paid. The aunt had used the insurance money to fix up her side of the duplex, but couldn't afford to fix up the apartment, as well. Even though he was turned down for the claim, the State of New Hampshire Department of Insurance says this is a basement apartment and he has the photos to prove it.

Chairman Hawkins asked what this space has been used for since it has not been occupied. Kevin Burke answered it has been used for storage. He did not feel this space has been abandoned; it is part of the house. No changes have been made to this space until the remodel began.

Vice-Chairman Rosa did not feel there was intent to abandon this use. The property has not changed ownership and the ordinance is so vague it does not provide specific timelines. He feels this should be corrected in the ordinance.

Robert Daigle noted every five to ten years, he receives a card, which states what the tax card reads asking if there are any corrections, which need to be made. As far back as the 1970s this specific tax card shows this property as a duplex. No attention was called to the fact there is a third unit in the building. He agreed the use may not have been abandoned by walking away from it, but no action was taken to protect the use.

Vice-Chairman Rosa noted if the property had changed ownership, he might have a different perspective. Robert Daigle agreed stating he could understand why the administrative decision was made as it was.

Gerry O'Connell agreed with Vice-Chairman Rosa stating he did not see the structure being abandoned. This property has been in the same family and for a long time this space was an apartment. The argument the tax card was never updated is valid, but he asked how many residents actually review and understand the tax cards.

Kevin Burke explained, when he and his wife moved into the home, their main concern was to care for the elderly aunt. Once she passed away, the taxes on the property doubled. He noted the income that could be generated from this apartment would allow him and his wife to stay in Newmarket. The apartment is already there; they are simply trying to update it.

Vice-Chairman Rosa noted the only problem he has with this application is the desire to enlarge the existing apartment space into the existing wood shed space. This additional space was not part of the original apartment. Kevin Burke explained, even with the woodshed, the apartment is only 450 square feet. This is a small space. Gerry O'Connell didn't have an issue with the expansion into the woodshed, because it would maintain the original footprint of what already exists on the property.

Chairman Hawkins opened the public hearing at 8:09pm.

Kevin Burke noted all his abutters have supported this; he has letters from most of them.

Vice-Chairman Rosa asked if Chairman Hawkins was concerned with setting precedent. Zoning Administrator Diane Hardy explained someone came in to the office today with a similar situation. Five years ago a duplex was converted to a single family home. The property owner now wants to convert the home back into a duplex for economic reasons. Kevin Burke asked if the home has been in the family for over 80 years. Zoning Administrator Diane Hardy explained she did not know the particulars of the application. She understood the concern with setting a precedent when making a determination on appeals from administrative decisions. She agreed the ordinance needs clarification. She also noted the letter submitted with the application suggests the apartment has not been used in 50 years; this shows a pretty clear case of abandonment in her opinion.

Chairman Hawkins felt what is relevant is the intention of the users and whether the use has been abandoned. He didn't feel the case should ride on whether ownership has changed hands. He felt the use has been abandoned, because 42 years have gone by without the apartment being used as an apartment; damage was done to the apartment, while not in use, and the apartment has been used for storage purposes. This shows a clear abandonment of the use in his opinion.

Robert Daigle suggested the fact there was fire damage in the 1990s, which was not repaired in such a way as to allow the use of the apartment to continue, this provides evidence to him the use has been abandoned. Chairman Hawkins explained the vagueness of the ordinance tends to lead towards not finding in favor of a use, which has been non-existent for the past 42 years. The fact the property has stayed in the same family for 80 years doesn't provide evidence to continuance of the non-conforming use. He referred to the Wixon case, stating the property had not changed hands in this case at all and yet the Supreme Court felt the use had been abandoned after a period of two years. Robert Daigle noted, during the site walk, he had been of the opinion, if the applicant could provide evidence of continued use, he would be in favor of allowing the use to continue. Given the evidence before the Board now and the wording of the ordinance in stating abandonment of the use for any time, he felt the Building Official acted appropriately in this instance.

Action

Motion: Robert Daigle made a motion to affirm the Building Official's decision in this application.

Seconded: Chairman Hawkins

Gerry O'Connell understood some of the work has been started. He suggested this be looked at more closely since the applicant was told he could move ahead with some aspects of the work. Zoning Administrator Diane Hardy explained that is an enforcement issue.

Vice-Chairman Rosa felt the apartment may have been ignored for a number of years, but did not feel the applicants

intended to abandon the use entirely. Zoning Administrator Diane Hardy referenced the Lawler case noting “some overt act or failure to act” relinquished the right to the grandfathered use. She felt this instance is a failure to act in order to protect the grandfathered right.

Vote: In favor: Robert Daigle, Chairman Hawkins, Gerry

O’Connell

Opposed: Vice-Chairman Rosa

The appeal from administrative decision was denied based on a 3-1 vote of the Board. At this point, the Board will continue on with the variance request, as put forward by the applicant to allow use of the “basement apartment” as a dwelling unit.

CRITERION #1

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

Kevin Burke explained traffic would not increase, because the apartment would be 450 square feet and one person would be living in the unit. The house will remain the same. The neighbors and abutters support the project. There will be new windows and doors making the house more energy efficient requiring less fuel. The plumbing will be updated providing for less need for water. There will be a living room, kitchen, bathroom, bedroom, mudroom and a couple of closets. There will be a breezeway from the utility shed to the rest of the apartment and there would be a door for the bathroom, the rest of the apartment will be open concept. The apartment is in the back of the house and will not be seen from the street. This property is located in a primarily residential zone. There are some businesses in the area and there are several multi-family units in the area, as well.

Zoning Administrator Diane Hardy explained the applicant is interested in making a sizeable investment in the property, in order to bring the property up to code. The improvements will have a positive impact, not only on the applicant’s home, but also the homes and businesses in the area. By making these improvements, it also enhances the property value in terms of taxes to the Town.

CRITERION #2

Granting of the variance would observe the spirit of the ordinance.

Kevin Burke explained the apartment has existed in the home. The exterior footprint of the building will not change. The zoning law is too strict to allow him to use his home to its full potential. His driveway is the entrance to the Wentworth Cheswell graveyard. He has allowed the Town to park their maintenance vehicles in his driveway, while maintaining the graveyard. He also provides parking, which can be used for the graveyard.

Zoning Administrator Diane Hardy explained the M3 District is a mixed-use zone, which allows limited commercial use mixed with residential use. In the purpose statement of the zoning ordinance it states: “this is to be accomplished to the extent possible through the reuse of existing buildings within the district.” She noted the adaptive reuse and rehabilitation of existing buildings supports the spirit of the ordinance.

CRITERION #3

Granting the variance will provide substantial justice.

Kevin Burke explained they have already submitted plans, which were approved. The plumber has begun work and over \$8,000 has been put into the apartment this far. He is storing the materials for the renovations in the apartment, which is currently heated. Because work has had to stop, the cost for heating the uninsulated apartment has become costly.

Vice-Chairman Rosa noted the apartment is small and not suitable for school-aged children, therefore the apartment will not be a burden on the school system.

Robert Daigle referenced the Board's earlier discussion about unintentional abandonment, noting this would provide justice to the applicant for that reason.

Chairman Hawkins noted the building would be brought up to building and life safety codes, which is a benefit to the town, abutters and homeowners.

CRITERION #4

By granting the variance, the values of surrounding properties will not be diminished.

Kevin Burke explained there are businesses within eyesight of this property. A 450 square foot apartment would not negatively affect the values of surrounding properties. The apartment is barely visible from the street and all his neighbors support the project.

CRITERION #5

Owing to special conditions of the property which distinguish 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 to the property because. . .

Kevin Burke the apartment exists and will only be remodeled. The footprint will remain the same. There is an existing electric meter for the unit. This property has been a three unit building at one time, which makes it different from other properties in the area. He referenced several letters from abutters suggesting the apartment was there. No changes will be made to the outside of the building.

Zoning Administrator Diane Hardy explained each side of the duplex is much larger than the other homes in the area. She suggested with times and LEED certification providing for smaller homes, it is not unreasonable to suggest there would be three units in a home in excess of 5,000 square feet.

Chairman Hawkins asked if there are other homes in the area that are as large as this one. He suggested that would eliminate the size of the home as a unique aspect of the property. Zoning Administrator Diane Hardy explained this type of "work-force housing" situations are encouraged in communities like this as alternative forms of housing. Chairman Hawkins suggested this is not consistent with Newmarket's Master Plan. Zoning Administrator Diane Hardy disagreed, stating the Master Plan speaks to wanting higher density housing in the downtown area, with more sparsely spaced density in outlying areas of town. This is an area, which, over time, has been set aside as multi-family and duplex housing.

Kevin Burke explained in the near vicinity of his home there are homes with four and five units within them.

Gerry O'Connell explained this property is located within the M3 District, which allows for mixed use. Unless this applicant converts his property to a commercial property, he cannot make more units within the home. For this reason, he felt the specific restriction is unfairly applied to this property.

Robert Daigle noted one aspect, which makes this property unique is the fact, at one point, this home was a triplex; at some point this use was discontinued. The use the applicant is now proposing is clearly non-conforming, but the unique characteristics of the property make it such that there is a hardship.

Chairman Hawkins asked the Board what the hardship of the property is, which distinguishes it from other properties in the area. Robert Daigle noted this property has been in the same family for over 80 years and had a third unit within the home at one time. This use has since been abandoned, as the Board just previously determined. The size of the home is large and can accommodate the third unit without going outside of the original footprint.

Kevin Burke explained what makes his home different than other duplexes or multi-family units in the area is the fact this was a three unit home at one time. The third unit was lost as a result of the Board's earlier vote.

Vice-Chairman Rosa asked if the special condition could be there is space within the home that is not accessible from within the home.

Chairman Hawkins opened the public hearing at 8:46pm.

No comments.

Chairman Hawkins closed the public hearing at 8:46pm.

The Board discussed moving to the second hardship criteria and coming back to this criterion.

The proposed use is reasonable.

Robert Daigle explained this space has already been used as an apartment in the past, which makes the use reasonable.

Chairman Hawkins added the neighboring homes are also multi-family which would not depict this use as unreasonable.

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

Kevin Burke referenced the Table of Permitted Uses for this zone noting elderly housing, daycare and studio uses are allowed. These uses would be far more invasive than the apartment he is asking for. He explained he and his wife are trying to utilize the space within the house to help offset the cost of homeownership. He had assumed the studio apartment use was the use he is trying to upgrade. This is a historic house; he and his wife are interested in maintaining it.

Chairman Hawkins explained this criterion is difficult, because the applicant needs to show none of the permitted uses in this zone would work in this space. Robert Daigle explained the only possible use that would work in this space is some sort of a craft studio.

Vice-Chairman Rosa asked if the hardship could be the fact this house is set up the way it is. If the variance is not granted, the home has space that is not accessible from inside the home.

Robert Daigle suggested deliberating further on criterion #5a.

Zoning Administrator Diane Hardy asked if there were any other buildings in the area with a vacant third unit. Kevin Burke explained there are not other buildings in the immediate vicinity, which are similar to his. He has proved there was an apartment within the home. There is a third meter for the home. This is what makes this building unique.

Kevin Burke's wife explained there were no other buildings on the street with an apartment in it until the 1970s. This building was the only one with more than one unit in it until then.

Chairman Hawkins suggested continuing this application to the next meeting in order for Board members to continue their discussion.

Action

Motion: Robert Daigle to continue the application for Kevin Burke's request for variance to the next scheduled Zoning Board meeting for March 7th.

Seconded: Gerry O'Connell

Vote: All in favor

Cheney Property Management – Continuances of two variances. The first is reference Section 2.05 of the Newmarket Zoning Ordinance to allow a mix of non-residential and residential development in the B1 zone & the second is reference Section 3.04 to allow a 9.9-foot front yard setback where 15 feet is required and to allow an 8.2-foot side yard setback where 25 feet is required. The lot is located at 54/56 Exeter Road, Tax Map U4, Lots 12 & 13, B1 Zone. Continued from 02/07/11.

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

Gerry O'Connell noted he is the chairman of the Advisory Heritage Commission. Mr. Cheney voluntarily appeared before the Advisory Heritage Commission with a conceptual design. After being directed by the Advisory Heritage Commission to do so, he drafted a letter of support relative to the design of the application based on the conceptual design presented.

Gerry O'Connell explained professionally, he is a real estate broker and it is his job to procure tenants for clients who hire him to do so. In the future, if this project is approved and comes to fruition and he is hired to procure tenants for this project, he could benefit financially. There are no contracts in place as of yet. He noted this does not violate any rules of procedure or ethics but wanted to make sure everyone was well aware of this.

Chairman Hawkins suggested the applicant could determine whether this was an issue. Each Board member had the right to voice their opinion. He suggested due to the lateness of the evening, he would recommend listening to the application and continuing the application to the next meeting. He had no problem with Gerry O'Connell listening in on the application; Gerry O'Connell can decide at the next meeting whether he needs to recuse himself.

Attorney Mark Belleveau, representing the applicant, suggested the applicant has no concerns with any of the issues raised by Gerry O'Connell this evening and welcomed him to participate with the Board on this application.

Gerry O'Connell reiterated that he has no understanding or contract with Cheney Property Management on this project now or moving forward. He would hope, if this project does come to fruition, that he would be able to participate in competing for the opportunity to procure tenants.

Attorney Mark Belleveau noted he would be more comfortable if the Board made a determination whether Gerry O'Connell's participation would render a conflict of interest prior to presenting the application. If the Board determined Gerry O'Connell's participation did render a conflict of interest, the applicant would then be presenting to a three member Board. If that were the case, the applicant may choose to post-pone until there is at least a four member Board to hear the case.

Chairman Hawkins noted this is the first time the Board is hearing the potential conflict issue. He is not prepared to make a ruling on this at this time. He suggested continuing the application to the next meeting in order for Board members to digest the information and make a determination.

Robert Daigle noted if William Barr were present for the next meeting, it would put him at a disadvantage if the applicant were to continue their presentation this evening, because he would not have had the opportunity to hear the applicant's presentation tonight.

Robert Daigle encouraged residents to apply to the available alternate positions on the Zoning Board of Adjustment.

Attorney Mark Belleveau noted, after consulting with the applicant, they would like to continue this hearing to the next meeting to allow the Board an opportunity to make a determination on the issue at hand.

Action

Motion: Robert Daigle made a motion to continue the application for Cheney Property Management to the next Zoning Board of Adjustment meeting scheduled for March 7th.

Chairman Hawkins suggested if issues like this come up in the future, he felt it was appropriate to let him or Zoning Administrator Diane Hardy know about them before the meeting. This would not provide an avenue for deliberation on any application, so it would not be against the rules.

Seconded: Vice-Chairman Rosa

Vote: All in favor

Attorney Mark Belleveau understood the application before this was also continued to the next meeting and asked if he could check in with the Zoning Administrator to ensure the fifth member of the Board is expected to be present for the meeting in the event the Board concludes Gerry O'Connell must recuse himself from participating on this application.

Chairman Hawkins noted the first item the Board will address would be this possible conflict of interest issue.

New Business/Old Business

Vice-Chairman Rosa asked about the timeline for abandoned grandfathered uses. Zoning Administrator Diane Hardy explained she would bring the issue to the Planning Board since it is under their purview to address zoning ordinance changes. She agreed there needed to be clarification on abandonment of a grandfathered use.

Adjournment

Action

Motion: Robert Daigle made a motion to adjourn at 9:18pm.

Seconded: Gerry O'Connell

Vote: All in favor