

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
December 20, 2012**

**12-BA-10
Nick Baldini
Kershaw Commons**

**12-BA-11
63 W. Cleveland Avenue**

Those present at 7:00 p.m.:

Presiding: Clay Foster

Members Present: Jeff Bergstrom
Paul Faust
Kevin Hudson

Absent: Howard Smith

Staff Members: Bruce C. Herron, City Solicitor
Michael Fortner, Development Supervisor, Planning &
Development Department

1. APPROVAL OF MINUTES FROM MEETINGS HELD OCTOBER 18, 2012

There being no additions or corrections, the minutes were approved as received.

2. THE APPEAL OF NICK BALDINI FOR THE PROPERTY AT KERSHAW STREET KNOWN AS KERSHAW COMMONS FOR THE FOLLOWING VARIANCES:

A) CH. 32 SEC.11 (a)(1)(d) – MAXIMUM LOT COVERAGE SHALL BE 20% FOR ANY LOT WHICH IS TO BE DEVELOPED FOR GARDEN APARTMENTS. PROPOSED PLAN SHOWS 25%, REQUIRING A 5% VARIANCE.

B) CH. 32 SEC. 11(a)(1)(i) – REQUIRES AT LEAST 40% OF AREA TO BE OPEN SPACE. PLAN SHOWS 37%, REQUIRING A 3% VARIANCE.

Ms. Schiano read the above appeal and stated it was advertised in the *Newark Post* and direct notices were mailed. No letters in favor or opposition of were received.

Mr. Mike Fortner, Planning & Development Supervisor stated the applicant was before the Board in October, 2012. The item was tabled because the engineer in charge of the project was unable due to family emergency. The applicant was re-applying to the Board with minor modification to the variances previously requested in October.

Ms. Lisa Goodman, Esquire from Young Conaway Stargatt & Taylor, LLP was present to speak on behalf of her client, Mr. Nick Baldini of Baldini Exchange, LLC. Ms. Goodman stated the application before the Board was for two minor variances to permit the completion of the permitted density for the apartment complex located on E. Cleveland Avenue. Ms. Goodman distributed color site plans and elevation to show the proposed project will look like. The documents were entered into the record. Ms. Goodman stated the apartment complex consisted of multiple pieces of property that had been assembled over time. The complex was located on both sides of Kershaw Street. The overall acreage for the parcels is 2.25 acres with Kershaw Street running in between two sections of the complex. The complex consists of 30 units and properly zoned RM. Both sections of the property are unique in shape and that in itself poses constraints and challenges in making changes. RM zoning permits 16 dwelling units per acre. The site currently had 13 units. With the addition of five units, the total units would be 15.6 dwelling units per acre.

The proposal was to build five additional townhouse apartments on the site. The whole site will be compliant with regard to parking and setback. It was her belief the variances that were sought were very minor. The maximum lot coverage that was permitted for RM zoning was 20%. The site was currently 22% and the proposal was to go to 25%, a 3% variance request. With regard to open space, 40% was required in RM and 37% was proposed, also a 3% variance.

Ms. Goodman addressed the Kwik Check factors decided by the Delaware Supreme Court in 1978.

- The nature of the zone would remain consistent. It was zoned for apartments and would remain so.
- The character of the immediate vicinity nature of the zone was consistent with the surrounding areas as they are apartment complexes as well.
- If the relevant restriction on the property were removed, such removal would seriously affect the neighboring properties and uses. Ms. Goodman stated the classic test of exceptional practical difficulty would be something inherent in the land itself. That would also include the lands developed state. She stated there are multiple parcels all of which are oddly shaped. In addition, there are constraints of the existing development on the site. (Developed one piece at a time). In addition, there was a public street (not a private street) that runs through the property.

Mr. Bergstrom asked Ms. Goodman about the variance request that was before the Board in August, 2011 for 82 & 98 Kershaw Street. Ms. Goodman stated she was not familiar with the project.

Mr. Nick Baldini, 202 Redberry Court, Hockessin, DE was sworn in. Mr. Baldini stated the houses on 82 Kershaw Street and 98 E. Cleveland Avenue were in need of repair. After discussion with the Building Department about the possibility of demolishing both houses, he decided to table that project

There was no one present from the public that wished to speak.

Mr. Foster suggested both variances be considered together when discussing the Kwik Check factors.

Mr. Faust addressed the Kwik Check factors:

- The nature of the zone which in which the property was located was zoned RM and would remain so.
- The character of the immediate vicinity was predominantly apartments and would and would remain so.
- If the relevant restriction on the property were removed, such removal would seriously affect the neighboring properties and uses. It was Mr. Faust's opinion it would remain the same so there would not be a negative effect.
- It would create an unnecessary hardship or exceptional difficulty if the restriction were not removed for the applicant in relation to the efforts to make normal improvements in the character of the permitted use. Mr. Faust stated it was his opinion the new construction going on in predominantly "student areas" that needed revitalization was a favorable thing.

Mr. Hudson concurred with Mr. Faust's analysis. One factor he was not sure about was whether the pre-existing road should be counted as inherent in the land that would determine the fourth Kwik Check factor (unnecessary hardship or exceptional practical difficulty). However, given the diminutive request on both variances and in considering it was his opinion there would not be a serious effect to neighboring properties and uses. With those issues in mind, he would vote to approve the variances.

Mr. Bergstrom agreed completely the variances are minor in size and will not offend the neighborhood and will improve the quality of housing in the area. He would vote in favor of the variances.

Mr. Foster agreed as well with Messrs. Bergstrom, Faust and Hudson and would vote in favor of the variances.

MOTION BY MR. BERGSTROM, SECONDED BY MR. HUDSON: THAT BOTH VARIANCES BE APPROVED REQUESTED.

MOTION PASSED: VOTE: 4 to 0.

Aye: Bergstrom, Faust, Foster, Hudson

3. THE APPEAL OF CLEVELAND AVENUE, LLC. FOR THE FOLLOWING VARIANCES AT 63 W. CLEVELAND AVENUE:

- A) SEC. 32-16.1(1)(d)(1) – REQUIRES A MINIMUM LOT AREA OF ONE-HALF ACRE. PLAN SHOWS .457 +/- ACRE, REQUIRING A .043 ACRE VARIANCE.**
- B) SEC. 32-16.1(d)(2) – REQUIRES A MAXIMUM LOT COVERAGE OF 25%. PLAN SHOWS 28%, REQUIRING A 3% VARIANCE.**
- C) SEC. 32-16.1(d)(4) – HEIGHT OF BUILDING OR STRUCTURE SHALL NOT EXCEED THREE STORIES OR 35 FEET. PLAN SHOWS FORTY FEET, REQUIRING A FIVE FOOT VARIANCE.**

Ms. Schiano read the above appeal and stated it was advertised in the *Newark Post* and direct notices were mailed. One letter in favor of was received and was entered into the record.

Ms. Lisa Goodman, Esquire from Young Conaway Stargatt & Taylor, LLP was present to speak on behalf of her client, Cleveland Avenue Holdings, LLC., Mr. Kevin Heitzenroder. In addition, Mr. Mark Ziegler, Project Engineer was also present.

Ms. Goodman stated the variances requested will enable her client to construct three townhouse apartments on a property that is slightly less than ½ of an acre. Ms. Goodman stated the property is a combination of two parcels, the first parcel being the larger parcel that fronts Cleveland Avenue is .354 acres. It was zoned BN, a commercial. Both parcels were currently vacate and located in area that was generally residential, church use (which was also considered residential use) some University uses and additionally the parcel is located next to the Elks Lodge on the right side. There is a slight encroachment of the Elks Lodge onto the property in question, however this was not an issue. Ms. Goodman stated the property was not suited for commercial use, due to smaller size and the less than ideal location.

Ms. Goodman stated the proposal was both parcels to BLR to permit residential use that was consistent with the neighborhood and the area. The proposal included six units and is designed to fit the long narrow parcel. Access would be from both Cleveland Avenue and New London Road and would aid in good circulation of car traffic. The

parking would be fully Code compliant with additional parking available. Code required 18 parking spaces. There are 27 proposed parking spaces. Garages would be provided as well. The variances being sought are small. For the first variance a half acre lot size is required, the plan showed the proposal is .043 of an acre short. The second variance would be for maximum lot coverage. A very small variance request of 3% is needed. The third variance was for a height variance. A five foot variance is requested. The variance is needed for design purposes (peaked roof) not for additional living space.

Ms. Goodman addressed the Kwik Check factors.

- The nature of the zone would remain consistent. It was zoned residential and mostly rentals and would remain so.
- The character of the immediate vicinity nature of the zone was consistent with the surrounding areas. The proposed zoning change would make the character more consistent.
- It was Ms. Goodman's opinion if the variances were granted, there would not be an adverse effects to the neighboring properties.
- If the relevant restriction on the property were removed, such removal would seriously affect the neighboring properties and uses. Ms. Goodman stated the classic test of exceptional practical difficulty would be something inherent in the land itself. That would include the narrow shape of the parcel, the existing development pattern with the building that partially encroaches on the property,

Mr. Hudson inquired about the five foot height variance. He asked what part of the structure is protruding above the 35 foot limit. Ms. Goodman replied it was the peak the roof. Additionally, Mr. Hudson stated it appeared the main reason the height variance was needed was to put the garages underneath the structure. Mr. Hudson was not certain that met the unnecessary hardship or exceptional practical difficulty. Ms. Goodman stated it has become the recent trend. It was her belief that exceptional practical difficulty was a broad standard and she believed that design was a legitimate reason.

Mr. Faust asked if DELDOT had approved the ingress/egress. Ms. Goodman stated they had a letter of no objection from DELDOT.

Mr. Foster asked how the proposed structures compared with other new buildings in the area. She stated they are comparable with similar height variances being granted. Ms. Goodman stated the County had recently changed their Code to a forty foot height restriction.

Mr. Kevin Heitzenroder, 271 Beverly Road, Newark, DE was sworn in. He wanted to state his proposed City projects look aesthetically pleasing. It was his opinion the higher elevation was preferred the public. It was his belief that in the near future the

City's Planning Commission and City Council would be proposing to change the maximum height to forty feet from the existing thirty five feet.

Mr. Nathaniel Johnson, resident of Todd Estates and Treasurer of the Elks Lodge, was sworn in. Mr. Johnson stated the proposed structures were aesthetically pleasing. Mr. Johnson was concerned there wasn't sufficient clearance between the two buildings to permit a fire truck. Mr. Mike Fortner, Planning and Development Supervisor stated there was adequate clearance.

Mr. Mark Ziegler, McBride & Ziegler, was sworn in. He confirmed there was a lane proposed which would more than adequately permit any vehicles including a fire truck to access the buildings in question.

Mr. James Roy, 5 Ridley Court, New Castle, DE, was sworn in. Mr. Roy represented the property owner to the rear of the proposed project, which was owned by his mother. His concern was the project exceeding the Code. He also voiced concerns about area traffic and noise, which although noted was not the purpose of this Board to address.

Mr. Malvin Utley, 1012 Mayflower Drive, Newark, DE, was sworn in. Mr. Utley stated he was the former interim director of Missions for the Delaware Baptist Association. Mr. Utley stated his experience with the developers had been very positive and he believed they had integrity. Mr. Utley had worked with them on 6 projects over the years and each time the experience was positive and professional.

Mr. Kevin Mayhew, 103 Alma Drive, Newark, DE, was sworn in. He stated he was the owner/developer of Campus Side, Emily Bell Place and various other projects. He wished to state he was in favor of granting these variances. He believed the high quality projects would be an attribute to the City and increased property values of neighboring homes.

Ms. Goodman wished to remind the Board members the purpose of the Board of Adjustment was to consider the variance requests at the related to the City Code and to provide diminimous relief when warranted. It was Ms. Goodman's opinion this project met those standards.

Mr. Hudson addressed the Kwik Check factors.

- The nature of the zone was largely residential and rentals and would remain so;
- The character of the immediate vicinity and uses was primarily student rental and would remain so.
- If the relevant restriction were not removed, would it seriously affect the neighboring properties and uses, It was Mrs. Hudson's opinion the first two

variances are small variances that would not affect the neighboring properties. The height variance is a larger variance.

- If the restriction were not removed, it would create an unnecessary hardship or exceptional practical difficulty. It was his belief the first two variances are small and although it was his opinion there was not a significant hardship, but when weighing the factors, these variances would not have a serious effect on neighboring properties and uses. Mr. Hudson does not see believe the height variance met the Kwik Check factors. He would vote no for the third variance.

Mr. Foster concurred with Mr. Hudson and wished to express his appreciation to the individuals who had spoken on behalf of the project and the neighborhood. He also added that he was always very supportive when the projects included sprinkler systems.

Mr. Bergstrom agreed and believed the project satisfied the Kwik Check requirements and would be a benefit for this area of the community. He reiterated it was not the venue to discuss whether the property should be rezoned or not.

Mr. Faust concurred with Messrs. Bergstrom and Foster and stated since the variances are nominal and in accordance with the Kwik Check factors, he would vote in favor of the variances.

MOTION BY MR. BERGSTROM, SECONDED BY MR. FOSTER: THAT THE THREE VARIANCES BE APPROVED AS PRESENTED.

MOTION PASSED: VOTE: 3 to 1.

Aye: Bergstrom, Faust, Foster

Nay: Mr. Hudson

The meeting was adjoined at 8:17 p.m.

Tara A. Schiano
Secretary

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