

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
AUGUST 21, 2014**

Those present at 7:00 p.m.:

Members: Jeff Bergstrom, Presiding
Curtis Bedford
Kevin Hudson
David Levandoski
Jim McKelvey (arrived 7:16 p.m.)

Staff Members: Bruce Herron, City Solicitor
Renee Bensley, City Secretary
Michael Fortner, Planning & Development Department

(Secretary's note: Mr. Bergstrom announced a change in the order of the agenda with 14-BA-06 being heard first.)

1. APPROVAL OF MINUTES FROM MEETING HELD JULY 17, 2014:

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

2. APPEAL OF MR. & MRS. WALTER SWAMY, 15 ADELENE DRIVE FOR THE FOLLOWING VARIANCE (14-BA-06):

- a) Sec. 32-9(c)(5)c – building setback lines. The minimum building setback in an RS zoning district, exclusive of cornices and uncovered stems and uncovered porches, is 25 feet. This plan shows a building setback of 20.8 feet, requiring a variance of 4.2 feet.

ZONING CLASSIFICATION: RS

Ms. Bensley read the above appeal. The appeal was advertised in the *Newark Post* and direct notices were mailed to the surrounding neighbors.

Mr. Fortner, Development Supervisor, explained the applicant requested the variance to allow construction of a concrete patio with a roof. If the patio was uncovered, the variance for the setback would not be required.

Walter Swamy, 15 Adelene Drive, was sworn in. He explained that he recently experienced health problems and the roof would be helpful to him during inclement weather. Mr. Bergstrom verified there would be no walls.

There was no public comment.

Mr. Hudson clarified that the length of the patio would be five feet. He then reviewed the Kwik Checks.

- *The nature of the zone in which the property lies* – Stafford was residential.
- *The character of the immediate vicinity and the uses of the property contained therein* – Mr. Swamy spoke to one of his neighbors about the project, and there was no one who spoke against it.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – adding a roof to the porch would not affect the neighboring properties in any way.
- *Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements in the character of that use of the property* – from the front of the house to the curb line was 26.8 feet with a roughly 5 foot deep porch. Given the closeness of the house to the property, a 5 foot porch was not very deep and it would seem to run up against the current allowance. The porch was a normal home improvement, and the applicant stated it was needed for health-related issues. Mr. Hudson believed there was an exceptional practical difficulty in this case.

Messrs. Bedford and Levandoski agreed with Mr. Hudson's analysis. Mr. Bergstrom concurred regarding the exceptional practical difficulty and felt this was a relatively minor variance request that should not have an appreciable impact on the neighbors. Mr. Hudson added the 4.2 foot variance was de minimis in this situation.

MOTION BY MR. HUDSON, SECONDED BY MR. BEDFORD: TO GRANT THE 4.2 FOOT VARIANCE AS REQUESTED TO ALLOW A COVERED PORCH AT 15 ADELENE DRIVE.

MOTION PASSED. VOTE: 4 to 0.

Aye: Bergstrom, Bedford, Hudson, Levandoski.

Nay: 0.

Absent: McKelvey

3. APPEAL OF MATT & SUSAN DUTT, 107-109 SOUTH CHAPEL STREET, FOR THE FOLLOWING VARIANCES (14-BA-05):

- a) Sec. 32-11(a)(1)d – lot coverage. The maximum lot coverage shall be 20% for any lot which is to be developed for garden apartments. This plan shows 28.9%, requiring a variance of 8.9%.
- b) Sec. 32-11(a)(1)i – open area. The minimum open area shall be at least 40%. This plan shows 19%, requiring a variance of 21%.

- c) Sec. 32-11(a)(1)j – parking and loading spaces. All uncovered parking and loading spaces shall be located at least ten feet from all abutting perimeter streets and property lines. This plan shows the proposed parking spots to be less than 1 foot from the eastern property line and 3 feet from the southern property line, requiring a 10 foot variance and a 7 foot variance, respectively.
- d) Sec. 32-56.2(d)(1) – building setback lines. Minimum setback required in RM, under Sec. 32-11(c)(5) is 30 feet from the line of all perimeter streets. In any district, when the average setback of existing buildings is within 200 feet of the side lot lines and within the same block front and zoning district, and is less than such required distance, such building need not be set back from the front street line any further than such average setback. The average setback of buildings within 200 feet on Continental Avenue is 16 feet. This plan shows 8 feet, requiring an 8 foot variance.

ZONING CLASSIFICATION: RM

(Secretary's note: Board member McKelvey arrived at this time.)

Ms. Bensley read the above appeal. The appeal was advertised in the *Newark Post*, and direct notices were mailed to the surrounding neighbors.

Mr. Fortner, Development Supervisor, reported the plan was to replace a two unit structure on a single lot with a similar two unit building.

Matt Dutt, 193 S. Chapel Street, was sworn in. Mr. and Mrs. Dutt were the property owners at 107-109 S. Chapel Street and wanted to replace the 90-plus year old building. He reported a letter of concern was received from a Continental Avenue property owner regarding ground water issues in the area. Mr. Dutt stated there was currently no storm water management at the property and he was aware it would have to be included for the new unit which would be an obvious improvement. The Continental Avenue property owner also raised concerns about a decrease in the open area and stated the variance, if granted, would increase the value of the property.

Mr. Dutt presented a rendering of the proposed building. The property was located on the corner of Chapel and Continental which was a highly visible area and would be a vast improvement to the current structure. Following discussions with the Planning and Development Department it was decided both entrances would be on Continental (two doors instead of one shown on the rendering). There would be four bedrooms with four and a half baths and no increase in tenants or in units. The new building would have fire sprinkler systems and hard wired smoke detectors.

Mr. Dutt stated the reason for the variance was that the building was outdated with a choppy floor plan. The new structure would be more attractive and Code compliant. The current building size was 60' x 24' with a detached 20' x 20' garage that would be removed. The new building would be 67' x 24' with no garage. The current building was a legal non-conforming unit and did not meet the lot coverage and open area requirements. Mr. Hudson asked the current lot coverage

which Mr. Dutt said was about 21%.

Mr. Dutt explained the area was surrounded by student rental properties and the property was zoned RM. The number of units and tenants would remain the same. Mr. Dutt described updates that had been made to the current property and said there could be no further improvement without changing the floor plan. He felt it was not reasonable to change the floor plan without tearing the building down.

Mr. Hudson questioned the percentage of current open area. Mr. Dutt believed it was between 21-22%.

Mr. Levandoski asked the square footage of the living space in the current home. Mr. Dutt thought it was 1,600 square feet (without taking the garage into account) and would be increased to 2,000 square feet. The maximum height was 35 feet – the current building was three stories and would remain the same.

Mr. McKelvey asked Mr. Dutt why he designed a building that did not fit knowing the required setbacks in the zone. Mr. Dutt explained the lot currently was non-conforming and the building there today would not be approved. It would not make financial sense to put back what was there. There was not a dramatic change in the size of the building.

Mr. Bergstrom questioned whether the front porch was the major reason for the variance. Mr. Dutt explained the original plan was for entrances on South Chapel and Continental. It was later determined to place both entrances on Continental and eliminate the porch facing South Chapel. Mr. Fortner asked if the porch was what caused the encroachment. Mr. Dutt replied the setback was 15 feet and the porch was 7 feet, so that would be the encroachment. Mr. Bergstrom observed the plan was mostly on the existing footprint – in fact, it was moved back. Mr. Dutt added it was moved back 2 feet to meet the setback on the Chapel Street side. The square footage of the new building would be 7 feet larger than the current structure. Since the entrance was changed, it was 67 feet on the Continental side and 23.5 feet on the Chapel Street side.

Mr. Levandoski asked the current and proposed number of parking spaces. Mr. Dutt explained there were currently eight spots and that number would remain the same.

There was no public comment. As previously referenced by Mr. Dutt, a letter opposing the variances was received from Sherry Kitto, 12 Noel Drive, Middletown, DE.

The discussion was returned to the table.

Mr. Hudson said he was struggling with the unnecessary hardship or practical difficulty of this case.

Mr. Levandoski thought the improved safety for the students was an attractive aspect. He

said it was difficult to analyze the project without having signed engineering drawings to review and commented the new house looked huge in comparison to the old. He recommended adding a stipulation that there be no increase in the occupancy rate.

Mr. Dutt reported he owned the home since 1992 and did everything he could to make it more marketable. However the choppy, outdated floor plan was an issue that could not be resolved by renovation. The only way to correct it was to tear it down and start over again. Mr. Dutt emphasized that no additional tenants would be added and the basement would not be finished off to add living space.

Mr. McKelvey still did not understand why, since the house would be demolished and Mr. Dutt would start with a clean slate, that he would build a unit that required variances.

Roy Lopata, former Planning & Development Director was the development consultant representing Mr. Dutt. Mr. Lopata explained the current structure was an existing, non-conforming building and was an RM zoned property with two semi-detached dwellings. It did not come close to meeting the current Zoning Code standards. Developing the property today would require putting a property line down the middle and going through a totally different process with the Planning Commission and Council. Mr. Dutt was requesting the Board to take one set of non-conformities and replace them with a slightly different set. As a result, the new building would meet the Code – from his standpoint this was paramount with older buildings that were not being changed substantially in terms of tenancy. He felt the Board should focus on the variances and the practical difficulty. If the building was torn down and rebuilt, the lot was still non-conforming and two semi-detached units could not fit on the property and meet the current Code.

Mr. Hudson thought the issue was that two non-conforming properties would be up to Code (which was great) except for the portions of Code that do not work. Mr. Lopata replied that was the point – it was two units on one lot and in order to redevelop the 90 year old building and continue the same use which Mr. Dutt was entitled to (that was what legal non-conforming use meant), he could leave it alone and continue on forever. However, in order to make it Code compliant he needed to make it a slightly different size reconfigured building. Mr. Hudson asked whether that was the point of the newer building Codes so that the newer structures will abide by them. Mr. Lopata responded if Mr. Dutt did not propose to do anything the Code would not apply leaving a building that did not meet current standards. Mr. Lopata noted a single unit would be non-conforming and present economic hardship and said the practical difficulty of meeting the current Code requirements required a reconfiguration. From his point of view, one set of non-conformities was being replaced with another set and in exchange for approving that, the new building would meet the Code.

Mr. McKelvey asked Mr. Lopata to outline the trades the Board would be making if the variances were granted. Mr. Lopata reported building a semi-detached unit in the RM zone required 50 feet of lot width and 12,500 square feet of lot area for the two units. The major problem was the lot was not big enough under current standards. Mr. Lopata said Mr. Dutt was simply updating the

existing use and that the lot and the use were being mixed in this case. Mr. Dutt added the question should be whether the Board wanted to keep the current building which is not Code compliant or get a better property.

Mr. Fortner noted the current property was 698 square feet and building even a single-family house would require a variance. The unit was described as a duplex, a semi-detached, but under Code was actually a two unit apartment building because there was no lot line. In that regard it met Code in terms of density. Configuring the building in a way that a floor plan made sense would change the building layout enough to where the existing setbacks and the footprint would have to be changed. Mr. Bergstrom asked if there were any subdivision regulations at the time this lot was created. Mr. Fortner said it was created like a duplex but there was no lot line.

There being no public comment, the discussion was returned to the table.

Mr. Hudson reviewed the Kwik Checks.

- *The nature of the zone in which the property lies* – residential homes that were mostly student rentals.
- *The character of the immediate vicinity and the uses of the property contained therein* – the area was mostly homes of a similar nature rented out to students.
- *Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – the only issue raised regarding neighboring properties was the water issue which was addressed and would be remedied by storm water requirements.
- *Whether, if the restriction is not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements in the character of that use of the property* – Mr. Hudson was on the fence about this and asked for comments from other Board members.

Mr. McKelvey agreed the proposed building fit the neighborhood and would not interfere with the neighboring uses. He felt the hardship was questionable, however, and said the Board should be careful about someone bringing them a project that was too big for its lot. He understood swapping an old non-conforming property for a new one. The open area bothered him the most because without enough open area he felt the result might be water problems. If there was a way to solve that issue he did not see as much of a problem. He liked the idea of a new, safer building and thought this made the swap more acceptable.

Mr. Levandoski was in agreement with Messrs. Hudson and McKelvey. He believed making a property safer for the tenants was of utmost importance. He took Mr. Dutt at his word that the number of tenants would not increase and assumed there was some form of checks and balances by the City. He was in favor of the variances.

Mr. Bedford agreed with the other Board members and since the use of the property was

remaining the same, he felt it would be a better fit.

Mr. Dutt had no objection to the City imposing a restriction that the basement would not be finished. He pointed out that in regard to the four approved tenants, the City performed yearly inspections and he was a landlord who admitted the inspectors to his properties.

Mr. Bergstrom noted this was pre-Code construction that doubtless was conforming when it was built. The proposal actually decreased non-conformities associated with open space and did not increase the building size. He believed the only change as far as setback lines was the covered porch in the front which kept people safe when using the stairs to exit and enter the building. Further, the porch was set there after some consultation with the Planning Department. He would vote in favor of the project.

MOTION BY MR. HUDSON, SECONDED BY MR. LEVANDOSKI: THAT THE FOUR VARIANCES BE APPROVED AS REQUESTED FOR THE PROPERTY AT 107-109 SOUTH CHAPEL STREET.

MOTION PASSED UNANIMOUSLY: VOTE: 5 to 0.

Aye: Bedford, Bergstrom, Hudson, Levandoski, McKelvey

Nay: 0

3. The meeting was adjourned at 8:08 p.m.

Renee K. Bensley
City Secretary