

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
October 18, 2012**

**12-BA-7
Matthew Egan/Cornell Homes
Newark Preserve**

**12-BA-8
Kevin Mayhew, Terry Lane LLC
123 New London Road**

Those present at 7:00 p.m.:

Presiding: Jeff Bergstrom

Members Present: Kevin Hudson
Paul Faust

Absent: Clay Foster
Howard Smith

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

1. APPROVAL OF MINUTES FROM MEETINGS HELD SEPTEMBER 20, 2012

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

2. THE APPEAL OF MATTHEW EGAN, CORNELL HOMES FOR THE FOLLOWING VARIANCE ON LOTS 19-81 AT NEWARK PRESERVE (A.K.A. WILSON FARM):

A) CH. 32 SEC.13 (c)(1) – HEIGHT OF BUILDING SHALL NOT EXCEED THREE STORIES OR 35 FEET. THE PROPOSED HEIGHT OF SOME BUILDINGS WILL BE 39.25 OR 39.66, BASED UPON MODEL CHOSEN.

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.

Matthew Egan, Cornell Homes, 12 White Clay Drive, Newark, DE, was sworn in. Mr. Cornell stated there are two issues at stake. The first was an aesthetic. It was his

opinion the higher roof line presents a better view from the street from an initial point of sale and a resale perspective. Mr. Egan provided drawings and pictures of projects with the higher roof line. The second, more important issue was the several requests at his Twin Lakes property for an additional (4th) bedroom, which they were not able to provide. The proposed 4th bedroom at the Newark Preserve would be located in the attic space. He further stated three families were moved from the Twin Lakes development to a project outside the City (Hudson Village). It was a lost opportunity to settle three families inside the City. Mr. Egan added with the trend of blended families, there is a desire for additional bedroom space.

Mr. Bergstrom asked Mr. Egan if the hardship was the need for more space. Mr. Egan replied the additional height is required for the additional bedroom. Mr. Egan clarified the attic space has the bonus room (4th bedroom).

There was no in the public that wished to comment.

Mr. Faust addressed the Kwik Check factors decided by the Delaware Supreme Court in 1978.

- The nature of the zone which the property was located. There would be no change.
- The character of the immediate vicinity would remain the same as well.
- The adjoining neighborhood would not be negatively affected.
- If it were not removed, the restriction would create unnecessary hardship or exceptional practical difficulty for the owner in relation to efforts to make normal improvements. Mr. Faust was in agreement. If a unit was available that could offer more bedroom space you create a situation of the potential for more buyers.

He would vote in favor of the variance.

Mr. Hudson stated he was in agreement with Mr. Faust for the first three Kwik Check factors, however he did not believe the unnecessary hardship or exceptional practical difficulty factor had been proved. Mr. Hudson stated the Code was in place before the purchase of the property.

Mr. Bergstrom stated he concurred with Mr. Hudson. It was his opinion no evidence had been presented that the project would fail without the additional 4th bedroom. Mr. Bergstrom asked how many units were affected. Mr. Egan stated 53 units. Mr. Bergstrom stated the height would be very visible as they located near/on Casho Mill Road. Mr. Bergstrom asked if the Planning Department had thoroughly reviewed the project and the facts were accurately stated. Mr. Mike Fortner, Planning Department indicated the facts were accurately stated. Mr. Bergstrom asked for

clarification of the ceiling heights. Mr. Egan stated the first floor was eight feet, the second floor was nine feet and the third floor was eight feet.

Mr. Faust wished to add to consider the aesthetics. It was his opinion the properties with the higher pitch and the recessed roof line are more appealing.

Additionally Mr. Hudson stated, Delaware Law economics alone is not enough of a hardship by itself. Mr. Herron generally that was true, however the Board was required to do was weigh all four of the factors, and why one factor may be more important than another when coming to their decision. Mr. Bergstrom stated there had been testimony sales had gone outside of the City due to certain buyers needing additional bedroom space for blended families. It was Mr. Hudson's opinion Council should address the issue.

Mr. Bergstrom stated overall the project has floundered for a few years and he would like to see it go forward for the good of the community and would vote in favor of the variance.

MOTION BY MR. FAUST SECONDED BY MR. BERGSTROM: THAT THE VARIANCE BE APPROVED AS REQUESTED.

MOTION PASSED: VOTE: 4 to 1.

Aye: Bergstrom, Faust, Smith

Nay: Hudson

2. THE APPEAL OF KEVIN MAYHW, TERRY LANE LLC TO CONSTRUCT 12 NEW TOWNHOUSE STYLE APARTMENTS AT 123 NEW LONDON ROAD, FOR THE FOLLOWING VARIANCES:

A) CH. 32-11 SEC.11(a)(1)(d) – REQUIRES A MAXIMUM LOT COVERAGE OF 20%. PLAN SHOWS 35.8% LOT COVERAGE REQUIRING A 15.8% VARIANCE.

B) CH. 32-11(a)(1)(h) - REQUIRES A MINIMUM LOT SIZE OF ONE ACRE. PLAN SHOWS 28% OPEN SPACE REQUIRING A 12% VARIANCE.

C) CH. 32-11(a)(1)(i) - REQUIRES AT LEAST 40% OPEN AREA. PLAN SHOWS 28% OPEN SPACE REQUIRING 12% VARIANCE.

D) CH. 32-11(a)(1)(j) – REQUIRES ALL UNCOVERED PARKING AND LOADING SPACES TO BE LOCATED AT LEAST 10 FEET FROM ALL ABUTTING PERIMETER STREETS AND PROPERTY LINES. PLAN SHOWS PARKING 7 FEET FROM REAR LOT LINE, REQUIRING A 3 FOOT VARIANCE.

Mr. Fortner, Planning Department wished to note that Item E no longer applied and would therefore be removed from the request.

Ms. Schiano read the above appeal and stated it was advertised in the *Newark Post* and direct notices were mailed. Two letters in favor of this project were received and will be kept on record in the file.

Lisa Goodman, Esquire, Young, Conaway, Stargatt & Taylor, LLC was present to speak on behalf of her client, Kevin Mayhew. Additionally, representatives from Hillcrest Engineering were present to speak on behalf of Mr. Mayhew, if needed. Ms. Goodman had provided handouts for the Board and presented a Power Point slide presentation on the handout for further clarification. Ms. Goodman explained the property was a collection of seven parcels that have five houses on the parcel. The addresses are 107-131 New London Road. Ms. Goodman stated the properties were in significantly poor repair. They were currently rentals. The proposal was to take seven lots, combine them, remove the houses that currently exist and to build the new project which consisted of twelve units. Twelve units was the number of units permitted by Code for RM zoning. (RM zoning is 16 units were acre) Ms. Goodman stated no two townhouses are alike. .Mr. Faust made lots. if the restriction had not been removed variances In addition, Mr. Tucker reiterated that Mr. Longo stated the driving force between the variances was the attempt to try to produce a superior architectural design that was consistent and would fit in with the standards on the street but would also be updated.

- Mr. Tucker believed the variance would not cause a serious or adverse impact to the neighbors and it was their assertion there would be a potential positive impact.
- If the restriction were not removed, would that cause the owner an unnecessary hardship or exceptional practical difficulty to make normal improvements in the character or the use. Mr. Tucker stated what was “normal” on Prospect Avenue was multi-family with narrow piano key lots with smaller overall square footage. It was his opinion that Mr. Lisa was experiencing an exceptional practical difficulty because he was trying to make a normal improvement.

Mr. Tucker believed the testimony presented satisfied the Kwik Check factors and the area variances should be granted.

Mr. Foster asked how the height compared with the existing homes. Mr. Longo stated the existing homes were very close to the 35 feet height restriction. The addition of the porch increased the height. He further stated the Code could be met by constructing the porch flat on the ground. However, by doing that, he believed the architecture was being compromised.

Mr. Smith asked for clarification if multi-family homes were the same as semi-detached. Mr. Ziegler stated several of the properties were multi-family but the proper term should be duplex.

Mr. Bergstrom confirmed there was a letter in support from Mr. John Smith, an owner of six properties on Cleveland Avenue, whose properties were behind Mr. Lisa's properties.

Ms. Jane Creswell, 26 Prospect Avenue, was sworn in. Ms. Creswell objected to adding four houses on a lot that should have two. She stated there were only five residents on Prospect Avenue, and the remaining were student rentals. She further stated the cars and the noise from the parties were outrageous. Ms. Creswell referred to a case from 2001 regarding 28 Prospect. The property owner applied for a variance to rent a garage that had been previously used as an art studio. The applicant had wanted a variance for a one bedroom apartment and was denied because there wasn't enough room for two residences on the same property. She found it ironic the applicants were proposing four homes when there wasn't enough room for three legally. It was her opinion the impact to the residents would be detrimental because they would be students not families. Ms. Creswell asked how many residents would be in each unit. Mr. Tucker responded each unit would contain three bedrooms.

Ms. Barbara McKeown, 21 Prospect Avenue, was sworn in. Ms. McKeown concurred with Ms. Creswell about the loud parties, added traffic and the addition of the second duplex would be too many additional residents.

Mr. Kevin Heitzenroder, 271 Beverly Road, was sworn in. Mr. Heitzenroder commended the development team on the project. It was his opinion there were some neighborhoods that were "tired" and the rejuvenation of some neighborhoods was a welcomed improvement. As a resident of the City, he was in support of the granting of the variances. Mr. Hudson asked if Mr. Heitzenroder owned rental properties in Newark, to which Mr. Heitzenroder stated he did and his most recent project was Campus Edge on Delaware Avenue.

Mr. Hudson asked what the aggregate amount of rentals allowed? Mr. Ziegler stated the total amount of renters permitted in the four units would be 12. The current number of renters was 6 and if the variances were granted, the number would increase to 12.

Mr. Longo added although six more people would be living at 45 Prospect Avenue, it was his opinion the better structural features (nice architecture) attracted a better student rental population and the students act in accordance to the architecture. Mr. Longo knew this to be a fact as he has been doing this for a long time. If students are put in mediocre housing they will act mediocre; if they reside in updated units people

take pride. In addition, there were many updated safety features, i.e. sprinkler systems, alarm systems, better plumbing and wiring, etc. Mr. Longo believed the suggested improvements would benefit the neighboring property owners and add value to their homes.

Ms. Creswell agreed the proposed project was visually appealing. However, with regard to the parking situation, although adequate parking was being provided, it would not stop all the friends from visiting with the added cars and noise.

Mr. Tucker added that the property at 26 Prospect Avenue was a property that had similar bulk standards as 45 Prospect Avenue.

Mr. Hudson addressed the Kwik Check factors:

- The nature of the zone which in which the property was located was zoned RD and would remain so.
- The character of the immediate vicinity was predominantly multi-family and residential and would remain so.
- If the relevant restriction on the property were removed, such removal would seriously affect the neighboring properties and uses. Mr. Hudson believed there had been conflicting testimony whether or not there would be an effect. Mr. Hudson said the variances requested were large and increasing the size of a building on a property did have an effect on the community several ways: he believed there was a visual impact, and there was a conflict over whether an increase in the number of students had an impact as well. Increasing the number of tenants had a serious effect on neighboring properties.
- 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. Hudson stated the Kwik Check factor stated when the requested dimensional change was minimal and the harm to the applicant if the variance denied was greater than the probable effect on the neighboring properties if the variance is granted. Mr. Hudson had issues with the variances being large. It was also his opinion that factors of practical difficulty or unnecessary hardship were not very well covered. He was not certain if these variances would be considered normal improvements. He further stated the existing buildings were not being improved but rather the construction of a new building required large variances. Based on these factors, Mr. Hudson stated he would not support the variance.

Mr. Bergstrom addressed the first variance request with regard to minimum lot area. Although there was a substantial variance requested for the properties, the proposal was to have four lots that were approximately the same size, which were bigger than 75% of the lots on the street. It was Mr. Bergstrom's opinion that the Kwik Check was satisfied criteria and he would vote in favor of the variance.

Mr. Foster understood the negative effect it would have on the neighborhood, and encountered similar issues in his neighborhood with parking issues. However, Mr. Foster said he would vote for the variance because it was his opinion the benefits negated the disadvantages.

Mr. Hudson stated he vote against for the reasons stated earlier. He had doubts and questioned whether the benefits would outweigh the disadvantages. He countered the testimony from Mr. Longo that students take better care of updated “architecture” and it was his personal experience as a resident and a former student that student tenants did not take better care of better rentals.

Mr. Smith stated he agreed the variances requested were large. However, recognizing that most of the surrounding properties were similar to what was being proposed, he believed it was a benefit to the street and would vote in favor of the variance.

Mr. Faust concurred and stated the whole composite in his opinion would be beneficial to the neighborhood. Updated properties and new architecture were evident all around the City. He further stated the additional students were a concern on that street, but it was his opinion that law enforcement should take care of issues on a case by case basis when they occur. He would vote in favor of the variance.

MOTION PASSED: VOTE: 4 to 1.

Aye: Bergstrom, Faust, Foster, Smith

Nay: Hudson

Mr. Hudson addressed the Kwik Check factors for the second variance:

- In regard to the nature of the zone, which is residential, would remain so.
- The character is multi-family and would remain so.
- If the relevant restriction were removed, it would not seriously affect the neighboring properties and uses.
- If the restriction were not removed it would create an unnecessary hardship or exceptional practical difficulty. Mr. Hudson believed in this instance it was not proved, and because it was a minimal variance, he would vote in favor of the variance.

Mssrs. Smith, Faust, and Foster stated they would vote in favor of the variance because it was a minimal variance.

Mr. Bergstrom agreed this variance met the Kwik Check factors and was a reasonable request and he would vote in favor of the variance.

MOTION BY MR. BERGSTROM, SECONDED BY MR. FAUST: THAT THE VARIANCE FOR LOT COVERAGE BE APPROVED AS REQUESTED.

MOTION PASSED: VOTE: 5 to 0.

Aye: Bergstrom, Faust, Foster, Hudson, Smith

Nay: None

Mr. Hudson addressed the Kwik Check factors for the fourth variance.

- The nature of the zone was residential and would remain so.
- The character was multi-family and would remain so.
- If the relevant restriction were removed, would it seriously affect the neighboring properties and uses. The variance requested a decrease to a lot width of approximately 25 feet and there were currently other existing lots on the street with a similar lot width.
- If the restriction were not removed, it would create an unnecessary hardship or exceptional practical difficulty. It was Mr. Hudson's opinion the Kwik Check factors had not been met. Mr. Hudson would not support the variance.

Mr. Smith agreed it was a significant variance request, however he believed it was consistent with the character of the neighborhood. He would support the variance.

Mr. Bergstrom concurred with Mr. Smith and believed it was appropriate under the conditions.

Mr. Faust stated he believed it was not an unfair request for the location.

Mr. Foster agreed and would vote in favor of the variance.

MOTION BY MR. BERGSTROM, SECONDED BY MR. SMITH: THAT THE MINIMUM LOT WIDTH VARIANCE BE APPROVED AS REQUESTED.

MOTION PASSED: VOTE: 4 to 1.

Aye: Bergstrom, Faust, Foster, Smith

Nay: Hudson

Mr. Hudson addressed the Kwik Check factors for the fifth variance.

- The nature of the zone was residential and would remain so.
- The character was multi-family and would remain so.

- If the relevant restriction were removed, would it seriously affect the neighboring properties and uses. A five foot height variance was requested. He believed there was no testimony whether this would affect the neighboring properties.
- If the restriction were not removed, it would create an unnecessary hardship or exceptional practical difficulty. It was Mr. Hudson's opinion the home could be constructed at the ground level and the variance would not be needed. However, after balancing the factors, he would support the variance.

Mr. Smith stated based on the age of the homes on the street that were similar, he would support the variance.

Mr. Bergstrom stated the street scape generated by the project was very respectful of the neighboring homes. He noted a property owner of six adjacent properties spoke in favor of the project as did Mr. Heitzenroder who owns a number of properties in the community nearby. It was his opinion the community opinion was predominantly favorable. He would vote in favor of the variance.

Messrs. Faust and Foster stated it was his opinion the variance was not an excessive request after considering there were similar homes on the street. He would vote in support of the variance.

MOTION BY MR. BERGSTROM, SECONDED BY MR. SMITH: THAT THE EIGHT VARIANCE BE APPROVED AS REQUESTED.

MOTION PASSED: VOTE: 5 to 0.

Aye: Bergstrom, Faust, Foster, Hudson, Smith

Nay: None

Mr. Foster thanked the public for their input. He suggested the residents contact their Councilman to discuss the parking issues.

Ms. Creswell added that she would suggest to her neighbor to make another attempt to get a variance for her garage to be allowed to be used as a studio apartment. It was her opinion that residents should be permitted to have the variances if the developers were granted variances.

3. THE APPEAL OF MARK SISK, EQUIRE, ON BEHALF OF SMD CONTRACTORS, FOR THE FOLLOWING VARIANCES FOR A PROPOSED MAJOR SUBDIVISION CONSISTING OF EIGHT TOWNHOUSE APARTMENT UNITS AT 30, 34, 38 AND 42 CHAMBER STREET:

- A) SEC. 32-11(A)(1)(D) – REQUIRES A MAXIMUM LOT COVERAGE OF 20%. PLAN SHOWS 32.2% LOT COVERAGE REQUIRING A 12.2% VARIANCE.
- B) SEC. 32-11(A)(1)(H) – REQUIRES A MINIMUM LOT SIZE OF ONE ACRE. PLAN SHOWS A LOT SIZE OF 0.454 ACRE VARIANCE.
- C) SEC. 32-11(A)(1)(I) – REQUIRES AT LEAST 40% OF AREA TO BE OPEN SPACE. PLAN SHOWS 30.6% OPEN SPACE REQUIRING A 9.4% VARIANCE.
- D) SEC. 32-11(A)(1)(J) – REQUIRES ALL UNCOVERED PARKING AND LOADING SPACES TO BE LOCATED AT LEAST TEN FEET FROM ALL ABUTTING PERIMETER STREETS AND PROPERTY LINES. PLAN SHOWS 21 OF THE 22 OPEN PARKING SPACES LESS THAN 10 FEET FROM PROPERTY LINES OR PERIMETER STREETS, REQUIRING A VARIANCE TO PERMIT 21 PARKING SPACES TO BE LOCATED CLOSER TO THE ABUTTING PERIMETER STREETS/PROPERTY LINES.
- E) SEC. 32-11(C)(5)A – REQUIRES A 30 FOOT MINIMUM BUILDING SETBACK LINE FROM THE LINE OF ALL PERIMETER STREETS. PLAN SHOWS A SETBACK OF 19.3 FEET FROM CHAMBERS STREET AND 25.8 FEET FROM BENNY STREET, REQUIRING VARIANCES OF 10.7 FEET AND 4.2 FEET RESPECTIVELY.
- F) SEC.32-11(C)(5)C – REQUIRES A 25 FOOT MINIMUM BUILDING SETBACK LINE FROM ALL EXTERIOR LINES. PLAN SHOWS 7 FEET REQUIRING A VARIANCE OF 18 FEET.

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

Mr. Mark Sisk, Esquire, was present to speak on behalf of his client, Matt and Susan Dutt, the property owners. Mr. Sisk stated the area homes were constructed in the 1940's. Although they were all Code compliant and maintained well, when access to subflooring or interior wiring was required, entry must be made via a 12 inch crawl space, which was very difficult. They were not hardwire alarmed, nor do they have sprinkler systems. It was Mr. Sisk's opinion that these revitalization projects raise the bar for people who have existing properties.

Mr. Matt Dutt, 193 S. Chapel Street, was sworn in. Mr. Dutt stated the properties would have sprinkler systems and hard wired smoke detectors that would be up to current Code. There would be 38 parking spaces located in the back of the property. The four units in question have been rental properties for decades. Mr. Dutt has his office on-site and it was his opinion that helps alleviate any problems that may arise. Mr. Dutt stated the "out buildings" would be torn down, if the variance is approved.

Mr. Dutt explained that 30 Chambers Street was located on the corner of Benny and

Chambers. The property was built in the 1940's and due to the 12 inch crawl space that Mr. Sisk mentioned, the property was a maintenance nightmare. In addition, the floor plan of a 70 year old home was very outdated. The bedrooms were very small, with only one bathroom and are inadequate for what the students want. Both 34 and 38 Chambers Street had the same issues.

In regard to 42 Chambers Street, Mr. Dutt stated in the past, he had little difficulty renting the property. However within the last ten years, the market has changed. There have been improvements to many of the rentals in the City from Cleveland Avenue to Delaware Avenue. Students have better choices and the parents of these students want their children in safe, clean houses. Mr. Dutt provided pictures of the neighboring home that he renovated in 2010. He provided a letter in support from Tom Passmore, a neighbor located across the street. He had also spoken with another neighbor, a woman in her 80's and her son who supported his project. In addition, developer and landlord Hal Prettyman supported his project.

Of the 15 homes on Chambers Street, 13 of them were student rentals. There are dorms located nearby so it was essentially a student area.

Mr. Foster asked why should there be eight units rather than six. Mr. Dutt stated it just "seemed to fit". In addition, it was viewed more favorably by the bank. Mr. Foster inquired what the total number of tenants would be and was told there were currently 15 and he was proposing 32.

Mr. Smith asked if the four lots would be turned into one and Mr. Dutt said that was to be his plan. Mr. Smith asked if the remainder of the immediate area was still RD zoning. Mr. Dutt stated further down was BN, but Mr. Dutt's property and the immediate vicinity was BC.

Mr. Bergstrom confirmed the applicant was proposing to change the zoning. If Council were to deny the rezoning request, the buildings would not be constructed.

Mr. Hudson inquired if the variances should be considered aggregate or separately. Mr. Sisk suggested the variances be considered in the aggregate since the project going forward was contingent upon the approval of the rezoning by Council.

Mr. Bilodeau asked Mr. Sisk what the applicant believed constituted the exceptional practical difficulty and hardship. Mr. Sisk stated considerable economic difficulty and the land itself. The four lots were built the 1940's, and the land was an odd shaped rectangle. The structures were extremely old and dated.

Mr. Kevin Heitzenroder, (sworn in under Item #2) owner of the 5 townhomes located across the street from this property voiced his support for the project. It was his opinion

the homes in question look terrible and he welcomed the changes.

Mr. Bergstrom confirmed with Mr. Sisk that minimum lot size in the proposed zoning district (RM) was one acre.

Mr. Hudson asked how far the parking and loading spaces would be located from the property line. Mr. Sisk stated it appeared to vary slightly as the property line extended up Chambers Street, but approximately five feet.

Mr. Faust addressed the Kwik Check factors.

- The nature of the zone was residential and would remain so, however there was a reclassification in the zone from RD to RM that would be required from Council.
- The character 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. Faust's opinion the changes were favorable to the neighborhood in terms of aesthetics.
- If the restriction were not removed, it would create an unnecessary hardship or exceptional practical difficulty. It was his belief the older properties in the City are in need of either total rehabilitation or total tear-down which would result in a complete rebuilding. He believed the landlords/property owners should be commended. He would support the variances.

Mr. Foster concurred and 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.

Mr. Smith concurred with Mr. Foster and Mr. Bergstrom's statements.

Mr. Hudson stated since the variances are being considered as an aggregate, it was his opinion that overall he would support the variances. The setback concerned him slightly. Additionally, the neighbors are supported the project.

MOTION BY MR. HUDSON, SECONDED BY MR. FOSTER: THAT THE VARIANCES BE APPROVED AS SUBMITTED; WITH THE CONDITION THAT THE REZONING BE APPROVED BY COUNCIL.

MOTION PASSED: VOTE: 5 to 0.

Aye: Bergstrom, Faust, Foster, Hudson, Smith

Nay: None

The meeting was adjoined at 8:52 p.m.

Tara A. Schiano
Secretary

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