

**CITY OF NEWARK  
DELAWARE  
BOARD OF ADJUSTMENT  
MINUTES  
MARCH 19, 2015**

Those present at 7:00 p.m.:

Members: Jeff Bergstrom, Presiding  
Curtis Bedford  
Kevin Hudson  
David Levandoski  
Jim McKelvey

Staff Members: Bruce Herron, City Solicitor  
Tara Schiano, Secretary  
Michael Fortner, Planning & Development Department

**1. APPROVAL OF MINUTES FROM MEETING HELD FEBRUARY 19, 2015:**

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

**2. THE APPEAL OF BACHU PATEL FOR THE PROPERTY AT 70 E. MAIN STREET FOR THE FOLLOWING VARIANCE: (15-BA-04):**

- a) **Sec. 32-51(a)** – *non-conforming uses, structures and buildings*: A building, structure, or use which is not in conformity with the provisions of this chapter (Chapter 32; Zoning) may be continued in its present location provided that no subsequent alteration or addition is made which would extend said building, structure, or use for more than 20% of the cubical content of the building or buildings or structure or structures existing and used for the non-conforming use, or for more than 20% of the lot area existing or used for non-conforming use.
- The existing site has a volume of 15,600 cubic feet. The total cubical content increase permitted for this non-conforming structure is 3,120 cubic feet (20%). Your plan shows an increase of 19,210 cubic feet (123%). A variance of 16,090 cubic feet (103%) is required.

**ZONING CLASSIFICATION: BB**

Ms. Schiano read the above appeal. The appeal was advertised in the Newark Post and direct notices were mailed to the surrounding neighbors within 500 feet.

Chairman Bergstrom asked Mike Fortner, Planning & Development Department to describe the non-conformity in the building as he believes it necessary to know before deliberating the case. Mr. Fortner stated there is a 15 foot minimum rear yard. Mr. Fortner said this property has no rear yard. In addition, there is a lot width minimum of 20 feet, existing lot width is 14.26 feet.

Minimum lot area is 3,000 feet with existing lot area on the property of 1,873 square feet.

Mr. Dave Dalby, Architect for the project started with a brief history of the project. He stated the property was known for years as the “Newark Newstand.” It is a small structure situated between the Indian Sizzler and Newark Five & Dime. It is a single story building with a filled-in basement. In January of 2012, the building was demolished. The applicant went before the Planning Commission to construct a three-story structure with three rental units. The Planning Commission did not approve the three-story building, but permitted a two-story structure. A one-story structure was then constructed to enable the applicant to generate some income from a storefront, which was a permitted use. The new structure was built within the existing limits of the property line. Mr. Dalby stated an oversized foundation complete with sewer and water lines was constructed to provide for future potential growth of rental units. A second application was made to the Planning Department for site plan approval. The application did not go forward, as the Planning Department informed them of the 20% requirement which they claim they had not been made aware of with the initial application.

Mr. Fortner stated if the Board approves the plan, the applicant will still have to get a Special Use Permit for the two units because BB zoning does not permit apartment units by right. Mr. Dalby stated the intent is to have two rental units constructed above the existing store for income. It is the applicants opinion the addition of these units will improve the general appearance on Main Street as it currently is a one story building situated between two 2-story buildings. Mr. Dalby provided two renderings that will be entered into the record. Mr. Dalby stated the drawings depict the relationship of the building to the adjacent structure. Mr. Dalby stated the front of the units will sit significantly back from Main Street as to not affect the egress from the apartments above the neighboring Indian Sizzler restaurant. Mr. Dalby stated the entire roof area will be fenced as it is a Code requirement (42’ fall protection). It is also done to prohibit people from jumping from windows onto the roof. It was Mr. Dalby’s opinion the construction of the building will control some of the graffiti on the National Five & Dime. Mr. Dalby stated the applicant needs two units to make it financially feasible. Mr. Dalby also reported the applicant has no flexibility with lot coverage as the entire property line is covered with the original building.

Mr. Hudson asked what the condition of the roof was. Mr. Dalby stated a temporary roof exists. If the two units are approved, the additional roof will go up two floors and eliminate the problem of people climbing on the roof. Mr. Hudson asked if there were any existing drainage issues with the current roof. Mr. Dalby stated there are gutters in use and updated stormwater management will be added to tie into existing systems. He further stated there are existing problems with properties on both sides. He further reported there is only six inches between the two buildings. The applicant continues to work with the adjacent property owner to eliminate the water problem.

Mr. Subash Mazumdar, Newark, DE registered architect was sworn in. He was present to speak on behalf of Mr. Samee, as his architect. Mr. Mazumdar asked the total depth of the building from Main Street to the rear of the rear of the building. Mr. Dalby replied 123 feet. Mr. Mazumdar

stated the majority of the building will be located in the front of property. Mr. Mazumdar asked if the second floor of the building will be “pushed back” away from Main Street. Mr. Dalby stated the second floor setback from Main Street will be approximately 30 feet. Mr. Mazumdar stated if the applicant is permitted to build according to the proposal, then at least two of the existing upstairs windows at the Indian Sizzler will be blocked. Mr. Dalby stated they will be egress windows as approved by the initial Special Use Permit. Mr. Mazumdar asked Mr. Dalby what the anticipated gap between the two buildings would be. Mr. Dalby stated the gap would be 3 feet, 4 inches. Mr. Mazumdar stated the concern is that half of the upstairs windows of the Indian Sizzler restaurant will be covered with the new structure if the applicant’s variance is granted. In addition, Mr. Mazumdar is concerned additional drainage issues occurring with buildings so close together. Mr. Dalby stated the applicant is committed to controlling the rainwater from the roof for both properties.

Mr. Dalby stated the 3 feet, 4 inch distance between the two buildings only applies to the roof on the lower building. The distance of building to building is four feet. (44 inches is the building access requirement.

Mr. Bergstrom asked Mr. Fortner if the adjacent building is equipped with a sprinkler system. Mr. Fortner stated he believed it was not.

Mr. Hudson asked if the apartments above Indian Sizzler meet the emergency Code for egress. Mr. Fortner indicated he was not certain.

Mr. McKelvey confirmed that all issues i.e. stormwater will effectively be addressed if and when the Board of Adjustment approves the applicant’s variance request. Mr. Fortner stated the applicant will have to get approval from Code Enforcement/Building. Mr. Bergstrom confirmed it is only the Board’s task to consider the area variance.

Mr. Kazi Samee, 72 E. Main Street, Newark, DE was sworn in. Mr. Samee is the owner of the Indian Sizzler restaurant and building. Mr. Samee is concerned if the variance were granted to the applicant he may not be able to rent his second floor because the proposed plan will block some of the windows on his property. Additionally, it was Mr. Samee’s opinion that he tried to help his neighbor, Mr. Patel, when he did the construction by letting him use his parking lot. Mr. Patel reported when it rained all the stormwater rain into his basement. Mr. Samee stated he did not have this issue prior to the construction of Mr. Patel’s new building. Mr. Samee said he had spoken with Mr. Patel’s contractor who stated nothing could be done. Mr. Samee stated he gets a lot of water in the basement of 72 E. Main Street. Mr. Samee would like the stormwater drainage issued rectified. He thanked the Board for their consideration.

Mr. Patel stated when he constructed his building he had spent approximately \$15,000-\$20,000 to correct issues with Mr. Samee’s building. It was Mr. Patel’s opinion that Mr. Samee’s building had water issues with his building because (allegedly), Mr. Brian Sargenti, City Inspector had told him so.

Mr. Dalby stated that an increase in volume would not increase the roof area. Mr. Bergstrom reiterated it was not an issue for the Board of Adjustment but for the Building Department.

There being no further questions from the public the matter was returned to the Board.

Mr. Hudson reviewed the Kwik Checks.

- *The nature of the zone in which the property is located* – is BB (Main Street).
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – consists of businesses with apartments above and is both mixed commercial and residential uses (multi-dwelling). Mr. Hudson stated it is important to note that the applicant's building is one-story and the surrounding buildings are multi-story.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Hudson stated there is a conflict with the applicant and the neighbor that the two back windows along the adjacent wall and whether the covering of those would seriously affect the marketability of renting the apartments above the Indian Sizzler.
- *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* – in this case, it was Mr. Hudson's opinion there were issues, (i.e. people going up onto the roof) and problems with graffiti and vandalism by students. Additionally, there is run-off from the neighboring Indian Sizzler apartment's rooflines.

Mr. Hudson stated he is not certain at this point whether the final Kwik Check factors is being met by the applicant. It was his opinion obstructing the windows does seriously affect his decision to approve the variance. He would vote no on the application.

Mr. Levandoski stated he concerned with the windows being blocked at the Indian Sizzler apartments, but in his opinion the location of being on Main Street and the convenience may offset the windows being obstructed.

Mr. Bedford concurred with Mr. Levandoski but did also express concern about the windows being obstructed.

Mr. McKelvey stated the current layout at Indian Sizzler should be respected and if there is a way for the two parties to agree that would be preferred. It was his opinion that if they were unable to come to an agreement, then the existing property should have the advantage. Mr. McKelvey believed the final Kwik Check factor was not being met. He believed adding two stories onto the existing property was not necessarily a "normal" improvement.

Mr. Bergstrom stated he was taking the most issue with the large percentage increase in the proposed area variance. He believed there was an issue with having enough parking should the variance be granted. It was the opinion of Mr. Bergstrom that this exceptional variance request should be decided by Council. Mr. Fortner stated this request is before the Board of Adjustment because the building is already non-conforming. He further stated it is not unusual for a building to increase in size by this kind of percentage because if the building was already conforming the applicant could construct the additional two stories. He asked for the Board to keep that in mind when making their decision.

Mr. Fortner reiterated if the Board grants the variance it allows them to go forward and go before Council. It is not an assurance they will be permitted to build the structure according to plan. The applicant needs two things before they go forward; a Special Use Permit for the two units. Council could grant them both or Council could grant one or none. Additionally, they will go before the Planning Commission for a parking waiver (for four spots) because there is no parking. The existing business would be grandfathered.

Mr. McKelvey asked if the Board is permitted to grant the variance with “notations.” It was his opinion something could be noted such as “The Board is not enthused about this variance request but it’s not the Board of Adjustment’s job to make this kind of decision due to various concerns.” Mr. McKelvey asked if anything like this had been done previously by the Board. Mr. Bergstrom suggested certain things can be noted, such as stormwater management issues resolved prior to construction.

Mr. Levandoski suggested the stormwater issues be verified by the City prior to any conditions set in place by the Board.

Mr. McKelvey stated there is an issue on the non-conforming use and how much it can be altered. It is his concern that a limit on the volume of change is wise so a non-conforming use doesn’t completely blossom into something too large. Additionally, it is Mr. McKelvey’s opinion that the neighboring properties must be respected. He does not believe the windows should be obstructed. He does not believe this variance request is a normal improvement and maintenance of the property.

Mr. Hudson confirmed the non-conformity is in the width of the building which is only 14 feet and there is not a 15 foot setback in the rear. Those are the two conditions that make it non-conforming.

Mr. Levandoski stated there are several other “robust” projects taking place in and around Main Street. It was his opinion if there was an “area” you wanted to have the additional population it would be the Main Street area. It was his opinion it would not add a lot of nuisance to the City and increase traffic because most of the tenants are going to walk. Mr. Levandoski suggested the apartments may not be the 860 square feet the plan is suggesting.

Mr. Bergstrom suggested the Board take a brief recess.

**MOTION BY MR. HUDSON, SECONDED BY MR. LEVANDOSKI: TO PERMIT THE BOARD A FIVE MINUTE RECESS.**

**MOTION PASSED UNANAMIOUSLY**

The Board returned to the floor after a five minute recess.

Mr. Bergstrom stated he did not take issue with the first two Kwik Check factors. He believed the obstructed windows can be solved by skylights and does not believe people are entitled to windows on property lines in an urban district. The lack of parking is not up to the Board to decide. Mr. Bergstrom believed the applicant would have difficulty surviving with a one story property amongst multistory buildings. Mr. Bergstrom would vote in favor of the variance. He further believed the final decision would be made by Council.

Mr. Levandoski addressed the Kwik Check factors:

- *The nature of the zone in which the property is located* – is BB with multiple businesses with apartments above. (Main Street).
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – consists of businesses with apartments above and is consistent with the vicinity.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Levandoski stated there are multiple buildings with business and apartments; so in his opinion there would be no negative impact adjacent to that property.
- *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* – in this case, even though it was a very large variance, it was Mr. Levandoski's opinion that it is consistent with other properties in the downtown district.

**MOTION BY MR. LEVANDOSKI, SECONDED BY MR. BEDFORD: TO GRANT THE VARIANCE AS SUBMITTED AFTER CAREFUL CONSIDERATION.**

**MOTION PASSED. VOTE: 3 to 2.**

**Aye: Bedford, Bergstrom, Levandoski.**

**Nay: Hudson, McKelvey**

**3. APPEAL OF HAL PRETTYMAN 163 S. MAIN STREET, FOR THE PROPERTY AT 102 PIKE WAY FOR THE FOLLOWING VARIANCES:**

- a) **Sec. 32-12(a)(1)(e)** – minimum lot size. The minimum lot size for any high-rise apartment is 2 acres. Your plan shows 1.21 acres. A variance of .8 acres is required.
- b) **Sec. 32-12(c)(5)** – building setback lines. The minimum setback from all perimeter streets is 30 feet. Your plan shows 27.9 feet. A variance of 2.1 feet is required. (Please note that Section 32-56.2(d)(1) does not apply because the existing buildings on the side lot lines are in a different zoning district.
- c) **Sec. 32-12(c)(5)(c)** – buildings setback lines. Each story or part of building...shall be set back 25 feet from all exterior lot lines. Your plans shows a side yard of 15 feet. A variance of 10 feet is required.

**ZONING CLASSIFICATION: RM**

Ms. Schiano read the above appeal. The appeal was advertised in the Newark Post and direct notices were mailed to the surrounding neighbors within 500 feet.

Mr. Hal Prettyman, 163 S. Main Street, Newark, DE, was sworn in. Mr. Prettyman provided a petition signed by his neighbors. It will be entered into the record. It was Mr. Prettyman's opinion that he was experiencing a hardship in developing his property. He further stated the curbs, roads, underwater stormwater management were already in place. Mr. Prettyman stated the Site Plan had been reviewed by all departments in the City. No significant issues were found, with the exception of the three variances needed. DELDOT has reviewed and found no issues.

Mr. Prettyman stated granting the variance for lot size will enable them to have a smaller footprint of the building which will allow them to create more open space, provide parking, create larger rear setbacks (43 feet) and will also create a side setback of 40 feet. The proposed building will have 25% open space on the first floor. The applicant stated they have tried to purchase neighboring property and none are interested in selling.

Mr. Prettyman addressed the Kwik Check factors:

- *The nature of the zone in which the property is located* – is a residential area and is currently zoned RM.
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – consists of multi-family residential rental homes.

Surrounding properties have been given variances for lot size.

- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Prettyman stated it was his opinion it would have a positive effect if granted. The proposal includes significant open space.
- *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* – it was Mr. Prettyman's belief that in this case, because of the amount invested (\$750,000 worth of pre-existing infrastructure already in place) alone the proposal needs to go forward as it so the proposed plan can remain the same with the increased open space, decent floor plan etc.

Mr. Prettyman stated they have been granted similar variances in the area. He believes the requested variances have merit and the proposed project will be a good project for the neighborhood.

There being no further comment from the public, the matter was returned to the Board.

Mr. Hudson confirmed that Al Schweitzer had secured the previous variances. Mr. Prettyman stated that was the case. Mr. Hudson confirmed Mr. Prettyman would still need a rezoning. Mr. Prettyman stated he would need to go before the Planning Commission and then go before Council.

Mr. Levandoski asked the applicant if he had considered eliminating one of the apartments so he would not have to get the one side yard variance. Mr. Prettyman stated it wasn't feasible for a variety of reasons, continuity, stormwater management, etc.

Mr. Hudson asked if the applicant could alter the plans to make it a three story versus a four story. Mr. Prettyman stated with the proposed floor plan and with over 25% open space on the first floor it wasn't feasible. The first floor open plan will include a coffee bar and a common area. In addition, there will a total of 43% open space on the site. Mr. Prettyman further stated the proposed project meets the requirement for lot coverage.

Mr. Bedford addressed the Kwik Checks.

- *The nature of the zone in which the property is located* – is consistent with the surrounding properties.
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – is primarily rental properties.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – it was Mr. Bedford's opinion it would greatly improve the property.
- *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. Bedford stated the proposal would make a lot of sense for the applicant.

Mr. Bedford stated he would vote in favor of the variance

Mr. McKelvey addressed the Kwik Checks.

- *The nature of the zone in which the property is located* – is consistent and fits together with surrounding properties.
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – again fits consistently with surrounding properties.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – it was Mr. McKelvey's opinion it would not negatively affect the neighboring properties.
- *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. McKelvey stated it would not be feasible to move the existing infrastructure.

Mr. McKelvey stated he would vote in favor of the variance because it fits with the Kwik Check factors.

Mr. Hudson addressed the Kwik Checks.

- *The nature of the zone in which the property is located* – is mostly a residential area.
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – there are single family dwellings located behind the property as well as multi-family dwellings around it.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – it was Mr. Hudson's opinion that the factors affecting the development of the area is traffic for this area. He did not believe that increasing traffic would help the area.
- *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 stated it he did not see an exceptional practical difficulty in this request. He stated it was a large chunk of property that the applicant could do anything he so chose within the limits. In addition, he did not think that a four story building would fit in the area.

Mr. Hudson stated he would vote no.

Mr. Levandoski addressed the Kwik Checks.

- *The nature of the zone in which the property is located* – is mostly rental housing with a lot of growth in the area in the last several years.
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – again are mostly student rentals so it will remain consistent.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Levandoski stated he did agree with Mr. Hudson and the traffic is quite heavy. However, it was his opinion that for the most part this area is close to UDEL campus and would be convenient for walking for the students and they wouldn't necessarily be using cars.
- *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. Levandoski stated the applicant had gone to great lengths to meet with variance staff at the City to make some concessions

Based on the Kwik Check factors, Mr. Levandoski would vote in favor of granting the variances.

Mr. Bergstrom addressed the Kwik Checks.

- *The nature of the zone in which the property is located* – is mostly residential housing
- *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – again are mostly student rentals so it will remain consistent.
- *Whether, if the restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Bergstrom stated the variances are simple set back variances and they do not have to do with the height of the building.
- *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. Bergstrom stated he would not be a hindrance and allow the applicant a chance to go before Council and the Planning Commissions to figure out whether or not this is appropriate. He would support them in their efforts.

Mr. Bergstrom would vote in favor of granting the variances.

**MOTION BY MR. MCKELVEY, SECONDED BY MR. HUDSON: TO GRANT THE VARIANCE AS REQUESTED.**

**MOTION PASSED. VOTE: 4 to 1.**

**Aye: Bedford, Bergstrom, Levandoski, McKelvey**  
**Nay: Hudson**

- 5. The meeting was adjourned at 8:13 p.m.**

Tara A. Schiano  
Secretary