

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
SEPTEMBER 21, 2017**

Those present at 7:00 p.m.:

Members:	Jeff Bergstrom, Chairman Kevin Hudson Dave Levandoski Bill Moore Jim McKelvey
Staff:	Bruce Herron, City Solicitor Tom Fruehstorfer, Planner, Planning & Development Department Sarah Campanelli, Secretary

The chairman called the meeting to order at 7:00 p.m.

1. APPROVAL OF MINUTES FROM MEETING HELD JULY 20, 2017:

MOTION BY MR. HUDSON, SECONDED BY MR. MOORE: TO APPROVE THE MINUTES AS PRESENTED.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Levandoski, Moore, McKelvey.

Nay: 0.

Recused: 0.

2. The appeal of Kevin Mayhew, property address 47 Church Street, for the following variance:

- **Sec. 32-10(a)(6.1) –Taking of nontransient boarders in a one-family dwelling by a nonowner occupant.** – A one-family dwelling occupied by a nonowner occupant may not take more than two boarders (maximum 3 unrelated persons). The application requests to have a 4-person unrelated occupancy at 47 Church Street. A one-person variance is required.
ZONING CLASSIFICATION: RD

John Tracey, an attorney from Young, Conaway, Stargatt and Taylor, advised he would be speaking on behalf of the applicant, Kevin Mayhew. Mr. Tracey stated this property was constructed in 2013. At that time, several variances were obtained, by unanimous approval without opposition, for purposes of removing what was the existing structure and building a new 2-story structure on the property. No variance was sought for an extra person. Mr. Tracey said the reason that no variance was sought was misconception. Mr. Mayhew had been under the impression that kind of relief would be a use variance, which had a very stringent standard under the Delaware Code. It was later, in part by action from this Board, that he realized this type of relief was an area variance subject to the less restrictive Kwik Check standard. This led to Mr. Mayhew attempting to pursue this relief.

Mr. Tracey stated the house contained 4 bedrooms, all of the safety features required under the Newark Code for sprinklers and fire suppressants and 4 off-street parking spaces. He did not feel this would tax the use of Church Street by others seeking to park there. The 4th bedroom had never been leased because

of the limitation to 3 tenants. He noted Mr. Mayhew was not aware of any extra people having been in there. The motivation for the application submitted for this meeting was that Mr. Mayhew had seen the direction in which the City had been moving since 2013. Mr. Tracey stated there were 3 principle examples that signified the City moving in this direction. The first was the decision of the Board of Adjustment regarding 3 Prospect Avenue in 2015. The Board had approved the demolition of a single 4-person unit and the replacement of that with a duplex with an extra person variance being given. The second was the Rental Needs Analysis Study that had been going on in the City. The third was the recommendation of the Planning Commission which led to the decision by Council to approve the Cleveland Station project.

Mr. Tracey explained that in the case of Prospect Avenue in 2015, the Board had found that an area variance was appropriate to allow when someone was demolishing an old structure and reconstructing a new structure. They had found that a one-person variance was appropriate as part of the overall benefit to having a new structure on the street. He felt this application was similar if not disjointed because there were area variances obtained in 2013 for the Church Street property. With regard to the Rental Needs Analysis, Mr. Tracey explained that Phase 1 put forward the fact that the University of Delaware kept growing and there was a need for additional rental units in the City on a year by year basis. He added that the University was showing no signs of contracting their enrollment goals. This took into account not just the undergraduate student body, but also the graduate students and the ELI students who lived mostly off campus. Phase 2 suggested expanding the number of streets to which the student home ordinance would apply and increasing the maximum number of non-related individuals from 3 to 4 in those units. The goal was to push the student population away from spreading out into neighborhoods that were not traditionally student-occupied.

The third issue was the approval of the Cleveland Station project by Council. That project allowed for the construction of a 17-unit townhouse complex between Church Street and Cleveland Avenue. Mr. Tracey noted this was relevant because it included a density limitation of 85 individuals which broke down into 5 people per home. 2 of the 17 homes that were part of Cleveland Station were located on Church Street. On Church Street, there was a total of 12 homes. 10 were student homes. Of these 10, 2 had a density permission of 5 or more, 4 had a density permission of 4 and 4 had a density of 3, including Mr. Mayhew's property. This was the only new home that was a 2-story home and had a limitation of 3 occupants.

In summary, Mr. Tracey felt his client was being disadvantaged in terms of not being able to use the property to its fullest extent within the meaning of zoning. There was also a distinct trend to allowing the ability to have more than 3 occupants in the rental unit. He stressed that they were seeking one person per bedroom and no more. This was considered an area variance which was subject to the Kwik Check standard.

Mr. Tracey reviewed the Kwik Checks.

1. *The nature of the zone in which the property is located-* is RD, which permits this type of use. This request did not change that.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – The majority of homes were student rentals. The majority of those homes allowed for 4 or more occupants.
3. *Whether, if the relevant restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – No, the addition of 1 student to 1 home would have no impact on surrounding properties.
4. *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. Tracey understood this would have been easier to accomplish if it had been paired with the variances obtained in 2013. This was simply a misconception on the applicant's part. Mr. Tracey stated the arguments for 3 Prospect Avenue remained valid here. The owner made significant upgrades to the property by demolishing an old house, replacing it with a

new structure compliant with all City health and safety codes. To offset that investment, the owner was allowed to use the property in a reasonable fashion with something this Board deemed appropriate. Mr. Tracey felt Mr. Mayhew had an economic disadvantage which the Board was permitted to consider under an area variance. In particular, the inability to improve one's business or remain competitive with others as a result of limitations in the Code may be a legitimate basis for exceptional practical difficulty. Mr. Tracey felt this was especially true when the change sought by the applicant was minimal. Mr. Tracey advised a case involving the New Castle County Board of Adjustment had found that minimal was not a numerical quotient but is instead a reflection of the impact of the proposal on the community. Mr. Tracey calculated that there were 37 total students on the street. He felt that if one more was allowed, it was a minimal addition.

Mr. Tracey felt they had met the standard for Kwik Check, satisfied the requirements and that this was an appropriate request.

Mr. Hudson noted that on the written application, it said there were properties on the street that had been grandfathered in. Mr. Tracey said that was correct. It was a mixture of properties that had been grandfathered in and new construction.

Mr. Moore recalled that Mr. Tracey had said there were streets that had been exempt, including Church Street. Mr. Tracey explained that there were certain limitations in the Code for areas where students could reside in groups greater than 2. There were a number of streets listed in the Code that were exempt from that limitation, meaning they were allowed to have students in numbers of 3 or 4 and this included Church Street. Mr. Hudson asked if they were exempted from normal properties already. Mr. Tracey said that was correct.

Kevin Mayhew, 103 Elma Drive, was sworn in. Mr. Mayhew added that Ordinance 99-14 identified 19 streets that were already predominantly student rentals. These streets were allowed either 3 or 4 students per house depending on the zoning district. Streets not on this list had to abide by the 2 unrelated occupants rental restriction. Mr. Tracey followed up that if someone had an existing rental on the street that had more than 3, the house was grandfathered in at that higher number. Mr. Moore asked why this variance request was here if the street was already exempt. Mr. Fruehstorfer pointed out that the Cleveland Station development was a different zoning district than 47 Church Street which was why it was allowed greater than 5. Mr. Fruehstorfer stated 47 Church Street was only allowed 3 unrelated occupants because it was zoned RD.

Mr. McKelvey asked if this property needed a zoning change rather than a variance. Mr. Hudson advised it was up to the applicant how they wanted to proceed. Mr. Fruehstorfer added that a zoning change would not make sense as this property was not next to other RM properties. Mr. Bergstrom asked if there were limits to the size of the property that would be zoned RM. Mr. Fruehstorfer said there were and this property would likely conform to that but that it would need to be an acre. Mr. Tracey stated that Cleveland Station had combined at least 3 different zoning districts to make the RM district.

Mr. Moore asked Mr. Herron whether he agreed with the applicant's position that this was an area variance rather than a use variance. Mr. Herron agreed that it was not definitively either an area or use variance but in those situations, one went with the classification that was more appropriate. Here, he agreed that this was more akin to an area variance than a use variance. A use variance would mean that no rental units would be permitted and the applicant was seeking to add them. Due to the fact that tenants were already permitted at this property, it was more akin to an area variance. Mr. Herron agreed that the Kwik Check factors would apply. Mr. Hudson asked if this variance would have the same effect as a zoning change. Mr. Herron said that theoretically it could but that argument could be made with respect to any application that came before the Board. Mr. Herron did not think this was dispositive. Mr. Tracey referred again to the Prospect Avenue example though that had pertained to a home grandfathered in that permitted 4 which was being torn down

and replaced with 2 new homes. The Board had used the Kwik Check standards to grant the variance for one additional person in the second home.

Mr. Moore noted that Mr. Tracey had classified the reasoning for not seeking the variance earlier as a “misconception”. Mr. Tracey said that the variance had not been part of the application at that time because he had thought it was a use variance. It was only after the Board’s decision in the Prospect Avenue case that the decision was made to go forward. Even then, Mr. Mayhew had waited to apply because he was part of the Rental Needs Analysis group. Mr. Moore understood that but asked why they had not pursued a use variance. He asked if they had thought they would not be able to meet the use variance test. Mr. Tracey explained that the use variance standard was extremely difficult for anyone to meet. This was the unnecessary hardship standard. The lynchpin of the analysis was that, if the applicant could use his or her property under the existing zoning classification and with a reasonable economic benefit, it was very difficult to get a variance. Area variances only looked at the numbers. Mr. Tracey noted that under use variances, economic considerations could not come into play. However, under the Kwik Check test, economic consideration was viable when determining whether to grant an area variance.

Mr. McKelvey noted that Mr. Herron had advised the Board to decide each case on its own merits and not to be influenced by past cases. Mr. McKelvey asked if there was a precedent factor. Mr. Herron answered that each case needed to be judged on its own merits and the factors present that were unique to each application. He felt the point Mr. Tracey was making was that this needed to be considered as an area variance as it was in 2015. Mr. McKelvey clarified that the precedent to follow was that it was an area variance, not to follow an example set by another house on the street. Mr. Herron clarified that this was not a binding precedent but it was a factor the Board could consider.

Mr. Bergstrom opened the floor to public comment.

Joseph Word, 55 Church Street, was sworn in. Mr. Word advised he lived most of his life on Church Street before leaving and renting out the home. Mr. Word understood Mr. Mayhew’s position about wanting to utilize his property to the fullest. Mr. Word was concerned that the City was continuously allowing bigger buildings around that area. He also noted that the addition of 1 person would really mean 3 people because of their visitors. He had just ridden down the road before coming to this hearing and shared that it was hard to get his car around the corner because there were people parked on both sides. Mr. Word pointed out that there used to be “No Parking” signs up and down Church Street. He felt this was not being enforced. He was concerned about the ability to use public services on this road including removal of snow, garbage trucks or emergency vehicles. Mr. Word said there were still people on this street who were residents of Newark and paid their taxes and felt some consideration should be given to them. He was worried the City was catering too much to the students.

Donna Jackson, 46 Church Street, was sworn in. Ms. Jackson shared the same concerns as Mr. Word. She shared that there had been incidents in the past where trash had not been picked up because the trucks could not get down the street. Ms. Jackson said the same had happened with snow piling up. She agreed that 1 student would bring many more friends with them who had cars. Ms. Jackson pointed out that the only 2 residents on the street lived at the very end and needed to be able to access their homes.

Jean White, District 1, was sworn in. Ms. White referred to pg. 5 of the application which asked, “Has a previous application for an appeal been filed?” The applicant had answered, “yes, a different item.” Ms. White had visited the City Secretary’s Office and discovered the previous application had also been for this property as had been explained by Mr. Tracey. Ms. White suggested that this question be changed to ask if an application had ever been filed for the same property. Ms. White had obtained the minutes from the meeting in 2013 when the other variances had been approved. She said these variances related to the 2 side yards. It

stated in the presentation that either an existing house would be moved from another lot in Newark or a new one would be built. Ms. White speculated that the reason for the restriction of only 3 occupants in a rental home was to limit the parking and traffic on these streets, as well as some negative behavior from college students. Ms. White noted that on streets that were not exempted, non-owner occupied rental homes had to be 3 properties away from each other.

Ms. White stated that the March 21, 2013 Board of Adjustment minutes read that Matt Longo, Mr. Mayhew's attorney at the time, had confirmed that the home on this lot would be a 3-bedroom home. She presumed that this had some effect on the Board's decision to grant variance. Ms. White wondered what the intent of building the house with an extra bedroom was. She summarized that the application for this variance stated two reasons. She felt it was really one reason which was the economic reason. Ms. White felt that rulings in general did not set a precedent, however, if the Board approved a 4th person to live in 47 Church Street, it may persuade the other 3 homes with a 3-person limitation to seek a variance as well. Ms. White felt there were definite detriments for Church Street should this happen.

Mr. Moore asked for clarification that the minutes from the 2013 meeting specifically stated that the house to be constructed would only have 3 bedrooms. Ms. White said that was correct and showed the copy of the minutes to the Board members. Mr. Moore asked the applicant to respond to that. Mr. Mayhew stated that in 2013, he was starting his Campus Walk project and had a house on New London Road that he had all intentions of moving to this lot. That house had 3 bedrooms. Mr. Mayhew said that after getting the approvals, he had obtained estimates for moving the house and found it was not feasible. He had then decided to build a new house. Mr. Mayhew addressed the parking concerns. He advised that Church Street was no parking on either side and that he went there frequently and did not see anyone parking there. He did not believe there was any concern about that. He acknowledged there was sometimes tightness getting onto Church Street from New London Road because New London Road had parking on both sides. Mr. Mayhew said he had provided 4 off-street parking spaces. He also noted that some of the older houses did not have adequate off-street parking. He responded to the worry that other houses on Church Street with the limitation of 3 people would come before the Board seeking a 4th. Mr. Mayhew stated these houses were not 4-bedrooms.

Mr. Mayhew advised he had been on the Rental Housing Needs Assessment Study Committee and they had seen research that when overcrowding was observed in a house, the reason they cited was to limit 4 to 3 so as not to create conditions that in the opinion of the Code official, endangered the life, health, safety or welfare of the occupants. He felt that because this house was built with the 2014 Code standards, including hardwired smoke detectors, CO2 detectors and fire sprinkler system, by putting an extra occupant in this house it would not endanger the health, safety or welfare of the occupants. Mr. Hudson noted that fire protection systems were not part of Kwik Checks.

Mr. Levandoski asked Mr. Mayhew if he would come before the Board to request a 4th person if the house had only 3 bedrooms. Mr. Mayhew was not sure. He shared that when he had explained to the members of the Planning Commission that there were unused bedrooms around campus on student exempt streets, the members had been very surprised. Mr. Mayhew felt it was common sense that he should be able to use this empty bedroom to help deal with the high demand of students. Mr. Hudson asked where the recommendation from the Rental Housing Needs Assessment Committee went. Mr. Mayhew responded it went to the Planning Commission to go before Council. Their recommendation was that a 4-bedroom house on a student exempt street should be allowed 4 tenants.

Mr. Hudson noted that part of the previous variance request in 2013 was based on the fact that there would only be 3 bedrooms. Mr. Hudson asked how this affected the current variance. Mr. Tracey answered that the variance in 2013 was not based on the number of bedrooms but the setbacks. Mr. Hudson pointed out it was

a represented fact that there would be 3 bedrooms. Mr. Tracey said it was internal to the house and had nothing to do with the variance. The limits had been how big the house could be and there was no prohibition on number of rooms in the Code. Mr. Hudson felt that when people came before the Board, they often added unnecessary tidbits, such as fire protection systems. Mr. Tracey argued that it was still part of the argument being made because they were taking an older house, that was not considered sufficient for those purposes, and replacing it with new construction that better reflected the City's ideals with regard to safety. As part of that investment of resources to make the upgrade, the owner would be asking for an additional person to help defer the expenses. Mr. Hudson pointed out that part of the original argument for variances was the idea of a 3-bedroom house. Mr. Tracey felt it was more about fitting the house on the pie-shaped lot. He felt adding a bedroom was not expanding because the house would be the same size. Mr. Bergstrom stated the issue was that the applicant had chosen to build a 4-bedroom house.

Mr. Word challenged Mr. Mayhew's statement about parking. He said that if someone went to Church Street now, they would have trouble getting down the street due to the parked vehicles on both sides. Mr. Word also disagreed with the statement that some houses did not have adequate off-street parking. He noticed that the signs had been taken away and had not been put back up.

Mr. Bergstrom noted that parking regulations were not before the Board tonight but they needed to take into consideration whether adding one person would add to an untenable situation. Mr. Hudson clarified that the issue at hand was not whether parking was actually allowed but whether people parked there in practice. Mr. Word added that parking permits were provided for guests, but that the permit was not intended to be used on a regular basis. Mr. McKelvey shared that he had visited the property in question just before this meeting and stated he had seen cars parked illegally on both sides of the street. Mr. McKelvey could imagine that this was a problem and added that all the cars he had seen displayed neighborhood parking stickers.

Mr. Moore noted that Mr. Mayhew had planned to move a house that contained 3 bedrooms. However, the minutes read that the intention was to construct a new home or move an existing home. Mr. Moore felt that if Mr. Mayhew was going to construct a new home, it did not make sense for him to build a 4-bedroom when he knew about the 3-tenant max. Mr. Mayhew stated his intent was to move the existing house and that was the footprint he was using. When he had found it was not feasible, he decided to construct a new home using that footprint and found that he could fit another bedroom.

Mr. Hudson reviewed the Kwik Checks.

1. *The nature of the zone in which the property is located*- Church Street was a mixture of homes including new construction for student properties.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – some residential, homeowner occupied and some rentals.
3. *Whether, if the relevant restrictions upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – Mr. Hudson noted that adding another student to this property would lead to more visitors. He pointed out that Mr. Word and Ms. Jackson had testified that the street was already congested and that vehicles had a hard time traversing the street for trash removal. He felt that adding another car, plus visitors, would have an effect on the neighboring properties.
4. *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 did not think there would be any hardship for the owner. As was stated in the 2013 minutes, this was supposed to be a 3-bedroom house. The expectation was always that it would only be rented to 3 people. He noted that the applicant was requesting this because he felt the City was moving in a direction of removing limitations. Mr. Hudson believed that the case on Prospect argued that they needed 4 tenants to help pay for the

construction. Regarding the Rental Needs Assessment, Mr. Hudson said this was not part of Kwik Checks but the recommendation would still go to Council. He felt that Council should decide whether that recommendation was appropriate or not, not the Board of Adjustment. Mr. Hudson pointed out that Delaware courts have stated that phasing out of non-conforming properties was the goal, not to expand them. Mr. Hudson added that the applicant was not prohibited from having 4 tenants, only 4 unrelated tenants. He mentioned that the Board needed to be aware that while they did not set precedents in theory, future applicants would remember the variances they approved.

Based on the Kwik Check factors, Mr. Hudson would likely be voting no to the variance.

Mr. Moore felt that Mr. Hudson had echoed his feelings. He understood the parking problems and agreed that there were issues. Mr. Moore agreed that the Kwik Check factors had not been met and would not vote to approve the variance.

Mr. Levandoski agreed with Messrs. Hudson and Moore's statements. He felt that the record clearly showed that a 3-bedroom house was to be constructed. Mr. Levandoski would not vote to approve the variance.

Mr. McKelvey felt it was incumbent upon the Board to weigh heavily the concerns of the people living on this street. He had personally seen the parking problem and understood their concerns about public services not being able to be provided. Mr. McKelvey agreed with Mr. Hudson's Kwik Check analysis and would be voting against this.

Mr. Bergstrom concurred. He pointed out that this recommendation would go before Council to decide whether this was something they wanted to approve. Mr. Bergstrom was disappointed that the Board kept getting into these parking situations.

MOTION BY MR. HUDSON, SECONDED BY MR. MCKELVEY: TO DENY THE VARIANCE AS PRESENTED.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Hudson, Levandoski, Moore, McKelvey.

Nay: 0.

Recused: 0.

3. The meeting was adjourned at 8:17 p.m.

Sarah Campanelli
Secretary