

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES**

December 18, 2008

**08-BA-8
37 A & B Benny Street**

Those present at 7:30 p.m.:

Presiding: Clayton Foster

Members Present: Jeffrey Bergstrom
Cathy Johnston

Members Absent: Michael Harmer
Linda Shopland

Staff Members: Roger Akin, City Solicitor
Tom Sciulli, Building Director

1. APPROVAL OF MINUTES FROM MEETING HELD AUGUST 21, 2008

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

2. THE APPEAL OF HAROLD B. PRETTYMAN FOR THE PROPERTY AT A & B BENNY STREET FOR THE FOLLOWING VARIANCES:

A) CH. 32, SEC. 32-51 (A) A BUILDING WHICH IS NOT IN CONFORMITY WITH RD ZONING MAY BE ALTERED UP TO 20% OF THE CUBICAL CONTENT OF THE EXISTING BUILDING.

The above appeal was advertised in the *Newark Post*, and direct notices were mailed. There were no letters in objection to the appeal. Mr. Prettyman provided a petition in favor of his proposal with 16 signatures (see attached).

Harold B. Prettyman, 585 Upper Pike Creek Drive, was sworn in.

Mr. Prettyman, owner of 37 A & B Benny Street, stated he was requesting a variance on 37 A & B Benny Street because Section, 32-51 (a) of the code imposed an exceptional practical difficulty on the property. Mr. Prettyman requested clarification from Mr. Akin that his proposed plan called for an 80% variance rather than the 100% variance previously stated. The Code stated that a 20% increase was permissible without a variance. Therefore, Mr. Prettyman thought the variance was an 80% cubical content

variance. Mr. Akin agreed with Mr. Prettyman that it was an 80% cubical content increase, not 100%, due to the fact that as a matter of right the cubical content may be increased by 20% under the language of the Code.

Mr. Prettyman stated that the variance was necessary so he could modify his rental property, remain competitive and increase the marketability while relieving an economic difficulty. The variance would allow for a second floor addition providing each tenant with their own bedroom, an additional bathroom and laundry facilities. He further stated that the current units were small, consisting of two bedrooms, one bathroom, a galley kitchen and a living room. Each unit was without a laundry facility.

Mr. Prettyman further stated that an addition of the allowed 20% variation was so restrictive that it would have little effect on the marketability of the units. Additionally, an alteration this restrictive would only serve to create a building that looked odd, thereby creating a detriment to the neighborhood.

Mr. Prettyman stated that the current cubical content was 9,984 cubical square feet. An additional 20%, which was allowed without a variance, would equate to a 1,996 cubical square feet addition. Specifically, under those guidelines, a room 5 foot x 24 foot could be added to the front or rear of the building. A room that size would not meet the Building Code.

Mr. Prettyman further detailed two other options that would not conform to Code and would make the existing structure look odd, thereby creating a detriment to the neighborhood. The difficulty was how to add the addition while still staying within the Building Code.

Mr. Prettyman then proceeded to go through the Kwik Checks. The first factor was the nature of the zone where the property was located. The property was zoned RD – residential and would remain RD. Mr. Prettyman thought it was important to note that if the lot was a conforming lot, the addition would be permitted without a variance.

Mr. Prettyman continued by stating that the proposed addition met all the RD zoning requirements as follows:

<u>Requirements:</u>	<u>37 A&B Benny Street</u>
Square footage 6,250	8500 square feet
25% lot coverage	15% lot coverage
50 ft. minimum width	in compliance
15 ft. front & rear setback	in compliance
8ft./12ft. side yards	12ft/12 ft.
35 ft height	in compliance

In addition, the proposal would not change the use, occupancy, or the available parking. There would be no change to the nature of the zoning.

The second factor from the Kwik Checks was the character and uses of the immediate vicinity of the property. Mr. Prettyman pointed out his neighbors on Benny Street had many non-conforming lots. There were one story and two-story residential buildings up and down the street. There were building lots that don't meet setback requirements and buildings that have larger cubical content than what Mr. Prettyman requested. He further stated there were non-conforming uses with one rental unit that allowed up to six people. There were front and back duplexes, top to bottom duplexes, four unit buildings, and one-unit rental buildings. Mr. Prettyman believed this variance would not be the first in the vicinity; nor would it create a large cubical content building, and would not result in a building that was any different than what currently existed on the street.

The third factor in the Kwik Checks was the effect of the variance on other properties if it was granted. Mr. Prettyman stated that granting the variance would have a positive effect on the neighborhood by eliminating a currently vacant property and upgrading a 50-year old plus duplex. The upgrades suggested included installing a sprinkler system, among other things and he pointed out that the new appearance would have a positive effect on the street.

Mr. Prettyman continued by saying the use would remain the same, the number of people would remain the same, and the number of cars would remain the same. The only thing that would not remain the same was the increase in cubical content that was allowed in RD zoning. Therefore, Mr. Prettyman felt there would not be a negative effect on the neighborhood.

The fourth factor in the Kwik Checks was the effect on the applicant if the variance was not granted. Mr. Prettyman felt that if the restrictions were not removed, it would cause an unnecessary hardship or exceptional practical difficulty in his efforts to make normal improvements in the character of the permitted use of his property in order to remain competitive in the City of Newark's rental market.

Mr. Prettyman stated he would not be able to improve his property's marketability due to the fact that two people have to share a bedroom and the absence of laundry facilities puts him at competitive disadvantage. Mr. Prettyman added that the City of Newark rental market was changing. The current renters were driving more luxurious automobiles such as BMW's, Audi's and Infiniti's. New apartment buildings were being built which included all the amenities, air conditioning, dishwasher, microwave, washer/dryer, etc. Renters were no longer forced to share a bedroom or to rent housing

without these amenities. The renters have a choice and Mr. Prettyman wanted to remain competitive in that market.

Mr. Prettyman continued by stating if the variance was not granted he would continue running the risk of not being able to rent his property, which has been vacant for the past year. This has caused him economic difficulties because there was no rent money to offset the costs of taxes, rental permit fees, mortgage costs and the oil bills to heat the units during the winter months. In addition, Mr. Prettyman incurred costs to replace windows that were broken twice by vandals since it has been vacant. He pointed out that a vacant property drew a bad element that could do further harm to a neighborhood that could create a hardship for himself and for the neighborhood.

Mr. Prettyman said that if he only added the 20% that he was allowed, it may help his marketability, but would destroy the curb appeal and hurt the resale value of his property and that of his neighbors. He believed the variance had merit and passed the Kwik Check test and would be in the spirit of the ordinance. He thought the variance would be a win – win situation for the City of Newark for the following reasons:

1. A new building with a sprinkler system;
2. The property would be reassessed and additional taxes would be paid to the city;
3. The street would have a new building that met updated Building Codes; and
4. A building that met all zoning requirements, lot size, lot coverage, setbacks, height (all with the same occupancy and parking that already existed).

Mr. Prettyman also thought he would benefit by being the owner of a safer building that would remain competitive in the Newark rental market.

Mr. Foster asked Mr. Sciulli if he had anything to add and Mr. Sciulli said no. Mr. Bergstrom inquired as to the occupancy of the building. Mr. Prettyman stated that there were two units each, with a four-person permit. It has two bedrooms, front and back, one bathroom, a galley kitchen, and no additional room now for anything else. Mr. Foster asked Mr. Prettyman if he was proposing to repair by replacing the house. Mr. Prettyman answered no. He believed that he was still permitted to make any repairs. Once the downstairs was completed, it would equate to more than a 50% renovation, which meant, it had to be brought completely up to Code.

Ms. Johnston inquired if the signatures from individuals supporting the variance were people that lived on Benny Street or property owners. Mr. Prettyman advised there was only one property owner that was a resident on the street and she signed the petition supporting the variance. The remaining individuals that signed the petition were property owners that did not live on the street. Ms. Johnston believed that Mr. Prettyman addressed the first three items that the Board would have asked which would be the

number of people change, would there be additional parking needed, and did the footprint change. Ms. Johnston further stated that she appreciated Mr. Prettyman's presentation as well as his addressing the Kwik Checks.

The Chair opened the discussion to the public.

Jean White, 103 Radcliffe Drive, was sworn in. Mrs. White asked Mr. Prettyman when he last rented his property at A & B Benny Street. Mr. Prettyman stated it had been vacant as of June 1, 2008. Mrs. White clarified that Mr. Prettyman owned the property for ten years and asked in those ten years how many people lived in 37 A and how many people lived in 37 B? Mr. Prettyman stated it varied, but generally four people in each unit. Mrs. White asked Mr. Prettyman if he knew when the property was sub-divided into two units. Mr. Prettyman stated to his knowledge it was built as two units.

Mrs. White further stated that when she and her husband lived at 35 Chambers Street in 1971, most of the area was occupied by owner occupants. In her opinion the neighborhood has changed significantly in those 35+ years and in general not for the better. She further clarified her comments were directed to the issue, not to the applicant whom she respected. She pointed out that although the original application stated a 50% increase, it was actually a 100% increase of which 80% was more than the 20% that was allowed. The first point she wanted to make was that the property was grandfathered for two reasons by today's laws. RD zoning required 6,250 square feet per unit. There were two units on this property so it should have twice that much, but it actually had about 8,500 square feet for both units, which meant that it had roughly 68% of what it should have for two units. It was built as non-conforming because, by today's standards, Mr. Prettyman would be required to have two frontages, both 50 feet. Each one would have 6,250 square feet cubical content. This property has one frontage because the units were behind each other, and the units would not be permitted to be built by today's standards.

Mrs. White further noted that this property was grandfathered for the number of unrelated occupants which changed from four to three. Mrs. White could not remember the date that occurred, but believed it was a number of years ago. Currently, a unit that has unrelated occupants, (such as college students) could only have three unrelated people living together. If the unit is empty for a year, she believed it would lose that grandfathering. Therefore, the property did not meet the Code for two separate reasons. Mrs. White further stated that if Mr. Prettyman's property was land only, he could only have one unit and it could only have three unrelated people if it was a rental. She felt Mr. Prettyman's argument about not being able to compete was true, but it was clear to her that there were other options. One option was to change it to one unit, build the addition that was proposed, and that would give him a great competitive advantage. Mrs. White noted that Benny Street was an exempted street from the student rental ordinance and that there was no limit on the amount of student rentals allowed. Mrs. White noted that

the homes on the street were of varying styles and sizes, so some of them could be justified in this situation, and others such as this property would not be.

Mrs. White opposed granting this variance. In her opinion, the best thing would be to start over. However, in terms of the possibilities that existed for not building on top of it, but lessening the effect would be to make it one unit, not two, and still allow the four unrelated people.

Mrs. White provided photographs that she had taken of the property. She concluded by saying if the variance was granted, it would still be legally non-conforming because two units were not allowed on a property this small. In addition, four unrelated people were not permitted in a rental property in RD zoning. The variance could be given to build on top of the existing structure, but it would still be legally non-conforming due to the conditions listed above. Therefore, Mrs. White strongly opposed granting the variance. She urged the applicant to create one unit and keep the grandfathering for the four unrelated occupants which would still enable him to have four bedrooms.

Mr. Foster asked Mr. Akin to clarify if Mrs. White was accurate in that the number of allowable tenants was four unrelated people. Mr. Akin stated that Mrs. White was correct and believed the ordinance changed in the late 1990's. There have been a number of changes in the student rental housing ordinances. Mr. Sciulli further added that existing rental properties in RD district that existed prior to the changes in the 1990's allowed four unrelated people. New rental properties only allowed three. Mr. Sciulli asked Mr. Akin if two-family dwellings were permitted in RD zoning. Mr. Akin believed that with a special permit two family dwellings were permitted. Mr. Sciulli wanted to verify that the terms were being used properly and explained that the property was not a non-conforming lot, but rather a legal non-conforming use because the use existed prior to the adoption of the Code, eliminating that type of use in that zoning district.

Mr. Sciulli asked Mr. Akin if two-family dwellings were allowed in RD zoning as a matter of right. Mr. Akin responded that single-family semi-detached homes were permitted and two-family dwellings were not permitted in RD zoning. Mr. Sciulli further clarified a statement that was made earlier if the dwelling was to be built today, it would require 6,200 square feet per unit. That was not an accurate statement, due to the fact that more than a one unit dwelling in an RD zone was not permitted. A new building built today in an RD zoning district would have to be a detached or semi-detached single-family dwelling. Mr. Akin agreed that those were two permitted uses. Mr. Akin added that the other uses permitted as of right were student homes, but that didn't deal with the type of structure; it simply stated student rentals may be established in an RD district. For purposes of residential structures, a single-family semi-detached and single-family detached were allowed.

Mr. Sciulli clarified that it was a legal non-conforming use in that it was a two-family dwelling (or more commonly known) a duplex. Mr. Akin agreed and further stated that was fairly described as a duplex when looking at the photographs provided by Mrs. White, even though the common wall appeared to be running across the mid-way point of the building.

Mr. Bergstrom requested clarification about the grandfathering and the loss of the grandfathering use. The question was if the dwelling goes one year without being occupied, is the grandfathering nullified? Mr. Sciulli stated that he had to check the exact wording; however, he thought the Code says if the property was abandoned. Mr. Sciulli didn't think the fact that someone failed to rent a property and the property was vacant that it was abandoned. Mr. Akin stated the Section 32-51(b) used the verb "discontinued." When a non-conforming use has been discontinued for a period of a year, it was his experience with both the Planning and Building Departments if an owner had been actively marketing a rental but was having difficulty in a particular season or a particular school year, that was not a discontinuation or abandonment of the use, rather it was indicative of difficult market times for that owner. The City of Newark does not declare that as discontinuation for purposes of loss of the grandfathered use. Mr. Sciulli concurred with Mr. Akin's opinion.

Mr. Prettyman added that the building he proposed was permitted in RD zoning and he was not trying to obtain a variance for setbacks or any additional items. In reference to the units and the non-conforming use, the structure was not new and the non-conforming use was prevalent up and down Benny Street.

Mr. Foster inquired about the four cars parked in front of the house that were visible in the photographs that Mrs. White supplied. He inquired if there were four parking spaces available. Mr. Prettyman stated that there were four parking spaces on the left hand side of the building, to the right there were four additional spaces and there were two additional spaces with parking stickers that come with the rental. Therefore, there was adequate parking for the eight tenants that would reside in the house.

Mr. Prettyman further stated that when the second floor would be added, due to the requirement of the staircase, one of the bedrooms on the first floor would have to be eliminated. The second floor would have three bedrooms, a full bathroom, and a laundry facility. That was a necessity in today's rental market. Laundromats in the City of Newark have considerably diminished and most other rentals offer laundry facilities.

Mr. Prettyman reiterated that when the changes were completed, there would be a bedroom for each person; eight bedrooms total. There would be two full bathrooms in each unit, and each unit would have its own laundry facility.

Mr. Foster asked for clarification from Mr. Prettyman as to the number of bedrooms. Mr. Prettyman answered eight bedrooms total. Mr. Prettyman stated that when he finished with his addition, it would have the same number of people. He reiterated he was permitted to have four people per unit and the goal was to rent to four people per unit. Ms. White inquired if Mr. Prettyman rented to four people every time he rented, and Mr. Prettyman responded that he was not always able to rent to four people per unit. Mr. Foster clarified that it meant that the tenants currently had to share bedrooms and Mr. Prettyman agreed.

Mr. Sciulli asked Mr. Prettyman to clarify the fact that he had two bedrooms per unit now. Mr. Prettyman stated that currently there were two bedrooms per unit. Mr. Sciulli asked for confirmation of the placement of the bedrooms because of Mr. Prettyman's statement that the staircase would take the place of one bedroom. Mr. Prettyman stated that was indeed the case and that there would be three bedrooms on the second floor and one bedroom on the first floor.

Mr. Prettyman used Mrs. White's photographs to clarify the renovations. There was currently a boiler system in each unit which would be eliminated and a new heating system would be installed. One of the downstairs bedrooms would be lost due to the staircase and the heating unit. That bedroom would be moved to the second floor, creating three bedrooms on the second floor with a laundry facility and a bathroom. There will be updates including central air conditioning, a dishwasher, a microwave and a sprinkler system. The exact same thing would be done to the rear unit. It would not change the number of people residing there. The parking would remain the same, with eight parking spaces currently available. The only difference would be an updated building and Mr. Prettyman would be able to complete the improvements and be able to charge more for a single bedroom.

Mrs. White added if the variance was approved, it still was legal non-conforming, because one unit behind the other was not allowed. It was only because of the fact that it was grandfathered that the structure was there and grandfathered to allow four unrelated people to reside there. Mrs. White further stated that it didn't meet the Code; it just continued what was already the case, and that was why she thought there was another option for the landlord -- turn it into a one unit property. Mrs. White further stated that she used the term duplex for houses that were side by side with a shared wall and she was corrected by the Planning Director who stated that a duplex meant one on top of the other. She thought she may be incorrect, in that she was not sure it meant one behind the other. She further thought a semi-detached would be homes two in a row, each one having the 6,250 allowable square foot cubical content, with one wall in common.

Mr. Foster inquired if there was anyone else who wished to comment. There being no comments forthcoming, the discussion was returned to the table.

Mr. Bergstrom stated that Mrs. White was on target with her concerns about the Code. The property could be turned into a safer, more productive footprint. He was having difficulty seeing the downside to granting the variance. Mr. Bergstrom asked Mr. Akin's opinion on granting this large a percentage variance.

Mr. Akin stated that historically the board, on many occasions, looked at the size of the requested variance, especially in regards to cubical content, and has been reluctant to allow a non-conforming owner to go beyond the 20%. On the other hand, this may be a different case, and he said it was up to the Board whether they believed the applicant satisfied the Kwik Check factors in his presentation.

Mr. Prettyman added that in regard to the size of the variance, the reason the variance was so large, was because the property was so small. If the property were a different size and it was 25% of the lot, which was allowed under the zoning, he would not need to request this variance because 20% of the building should allow him to make the necessary changes.

Mr. Foster asked if the variance was granted, when would construction begin. Mr. Prettyman said he would start as soon as possible as the building was vacant and he would like to have it completed by September 2009. Mr. Foster verified that if Mr. Prettyman would have the project completed by year end, the grandfathering conditions would not be an issue. Mr. Foster suggested that Mr. Prettyman document his progress.

Mr. Akin added if the Board were to grant the variance, the Board recognized that substantial construction would take place at the property. He did not believe it would be possible to have tenants in the structure during construction, so the City would be hard pressed to say that Mr. Prettyman had abandoned or discontinued the use, whereas the construction was only a temporary condition and presumably when it was finished, it was the intention of the owner to lease the property.

Mrs. Johnston stated that she appreciated Mrs. White's input and thought she again did a remarkable job.

The Chair returned the discussion to the public for the second time.

Mr. Jim Bowden, 70 S. Skyward Drive, Newark, DE was sworn in. Mr. Bowden thought there may be an impact on the taxes Mr. Prettyman would pay on the property while under construction, while it was not rented. Mr. Akin responded by saying taxes were based on the appraised value of the property regardless of whether it was a single-family dwelling or a rental. Mr. Bowden asked if it would be reassessed since the size doubled. Mr. Akin stated it may or may not be reassessed and New Castle County has not reassessed for a very long time. In his opinion, in the current climate, reassessment

would probably happen sooner rather than later. Mr. Prettyman believed when it was reassessed the taxes would probably double. Mr. Bowden stated the property being reassessed was not the property that was grandfathered. Mr. Sciulli interjected that the property was a non-conforming use and the term grandfathered could also be used. The use of the structure was legally non-conforming so Mrs. White was correct when she stated that it would still be a legal non-conforming use. Mr. Bowden said his comment was based on the fact that when it was under construction, would it change anything based on the end result being different? Mr. Bowden's concern was if there was a fire, the owner would have to wait for his insurance company to make the adjustments and the contractor to rebuild and that could drag on for than a year. Mr. Akin clarified the City Code addresses that. If there was a discontinuation of more than a year, but not due to any deliberate act by the owner but an emergency, the clock didn't run against the owner.

Mr. Johnston stated that although Mrs. White made some valid points, she would vote in favor of the variance because it made sense to her specifically because the location is Benny Street. Mrs. Johnston further stated that she believed it would be an improvement. Mr. Foster stated he would vote in favor of the variance and he further stated that Mr. Prettyman did a great job with the Kwik Check analysis.

MOTION BY MRS. JOHNSTON, SECONDED BY MR. BERGSTROM: TO GRANT THE VARIANCE TO MR. PRETTYMAN AS STATED IN THE REVISED AGENDA WITH CONSTRUCTION TO COMMENCE WITHIN SIX MONTHS.

MOTION PASSED. VOTE: 3 to 0.

Aye: Bergstrom, Foster, Johnston.

Nay: 0.

Absent: Harmer, Shopland

MOTION PASSED UNANIMOUSLY. VOTE: 3 to 0.

3. Meeting adjourned at 8:38 p.m.

Tara A. Schiano
Secretary

Attachment