

**CITY OF NEWARK
DELAWARE
BOARD OF ADJUSTMENT
MINUTES
AUGUST 17, 2023**

Those present at 7:00 p.m.:

Members:	Jeff Bergstrom, Chair James Cloonan Kevin Hudson Mark Morehead Chris Rogers
Absent:	None
Staff:	Paul Bilodeau, City Solicitor Mike Fortner, Senior Planner Tara Schiano, Director of Legislative Services Diana Reed, Deputy Director of Legislative Services

Mr. Bergstrom called the meeting to order at 7:01 p.m.

1. Approval of minutes from meeting held February 16, 2023 & May 18, 2023:

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: TO APPROVE THE FEBRUARY 16TH, 2023 AND MAY 18TH, 2023 MINUTES.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Rogers, Cloonan, Hudson, Morehead.

Nay: 0.

Absent: 0

Mr. Rogers and Mr. Bergstrom abstained from voting on the May 18th, 2023 minutes due to not being present.

Mr. Morehead abstained from voting to approve the February 16th, 2023 minutes due to not being present.

2. 3. The appeal of Kimberly Sprout, property address 109 Timberline Drive, for the following variances:

Mr. Bergstrom entertained a motion to move Item #3 on the agenda before Item #2.

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: TO MOVE ITEM #3 ON THE AGENDA TO ITEM #2'S PLACE.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Rogers, Cloonan, Hudson, Morehead.

Nay: 0.

Absent: 0

Mr. Morehead notified the chair this applicant was his neighbor and owned the property approximately 4-5 blocks away from his own.

Ms. Schiano read the facts of the case into the record.

- **Sec. 32-9(c)(6) – Rear Yards.**

- i. Except as specified in Article XVI, Section 32-56.2 (e)(1), (2), (3) of this chapter, a rear yard shall be provided on every lot and shall be as follows:

- 1. Interior Lots:

- a. (c) RS – 30 Feet

- 2. Corner Lots: In an RH, RT, RS and RE district, the rear yard may be reduced 20% in depth to allow for the “skewing” of a residential dwelling on the lot.

- On a Corner lot, the required rear yard setback is 24 feet. Applicant is proposing a 16-foot setback. An 8-foot variance is requested

Mr. Bergstrom swore in Kimberly Sprout, 109 Timberline Drive.

Ms. Sprout explained she wished to put a half-screen porch & half-deck on the rear of her house. This addition would extend the rear of the house out by 12 feet. As she planned on residing in her house long-term, she wanted to install this deck before her retirement. She explained she currently has a 6-foot privacy fence only in the backyard. She had communicated to all affected neighbors and collected signatures in support of her request. She pointed out one affected neighbor had not signed due to not being able to meet in person but sent their support via text. She specified these neighbors are across the street, to the right side at 107 Timberline Drive, and those to the left and directly behind her property on Panorama Drive. All neighbors were aware and did not state any objections.

Mr. Cloonan asked if the house directly right adjacent to her property on Panorama Drive is the most affected.

Ms. Sprout believed the house directly behind her on Panorama Drive would be the most affected.

Mr. Rogers asked if that is Lot #152 on Ms. Sprout’s mortgage inspection plan.

Ms. Sprout confirmed this was so. That resident’s signature of support was included in her list.

Mr. Hudson asked what the nature of the surrounding area is.

Ms. Sprout stated the area is residential housing. She explained nearly all houses in the area have decks and porches except for her own.

Mr. Hudson asked for Ms. Sprout to describe her lot.

Ms. Sprout stated the lot is oddly shaped because it is on the corner. The house sits crooked on the lot, and there are no straight lines running parallel to the home. She shared she has a decent-sized front yard and around the side that is closest to Panorama Drive. She was not aware of the footage between her lot and the lot adjacent to her on Timberline Drive. There is a very small rear yard against Lot #152.

Mr. Hudson asked to confirm if this is a corner lot.

Ms. Sprout confirmed so.

Mr. Bergstrom asked if the removal of this restriction will negatively affect her neighbors' lots.

Ms. Sprout believed not, as she currently has a privacy fence. Her neighbors would only be able to view the roof of the screened in porch. She did not believe it would encroach on her neighbors.

Mr. Bergstrom asked for Ms. Sprout to describe her hardship in the event the restriction is not removed.

Ms. Sprout explained she would like to have a nice deck and screened-in area to enjoy her backyard without pests and bugs. She stated in the 25 years she has lived at her property, the tree has grown into her flat-stone patio and caused it to become lopsided. She wished to make this area more usable. She noted the space was not big.

Mr. Rogers asked where the 16 feet number in her application originated from. He did not see a dimension of this value on the mortgage inspection plan. He saw a 29.7-foot dimension.

Ms. Sprout understood the requirements state there needs to be 24 feet from any structure on the lot to the property line. If she installs the 12 feet of deck in the yard, it will only leave 16 feet to the property line.

Mr. Rogers asked if the 16 feet value is the distance between where the deck and the porch intersect.

Mike Fortner, Senior Planner, clarified the calculation would have been from the corner of the new structure to the property line.

Mr. Morehead stated that based on this response, the calculation was not correct, and that the value should be 17.7 feet.

Mr. Bergstrom stated the value would be so if the property was square, however it may be closer if it is skewed. He stated the Planning Department's calculation was what was presented to the board.

Mr. Hudson stated 12 feet subtracted from an existing 29'7" setback from the corner was 17 feet. The variance required was 6'7" not 8 feet.

Mr. Morehead stated the required rear yard setback is 24 feet. This was less of a variance than what had been advertised.

Mr. Hudson presented the *KWIK Check Factors*.

1. *The nature of the zone in which the property is located* – It is of residential zoning.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – As testified, it consists of single-family homes. According to testimony, most already have rear porches.
3. *Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – As heard by the board, there is a privacy fence blocking most of the property. All surrounding neighbors, especially those most impacted, support the applicant's wishes. Mr. Hudson did not observe any serious effect.
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* – As stated, the applicant's patio is currently buckling due to tree growth. She would like to create this deck to enjoy it in her retirement and protect herself from the surrounding bugs during so. Mr. Hudson viewed this case as a variance request for a corner lot with a skewed house on the property. This obviously would affect building and setbacks.

Mr. Hudson stated he would likely approve this variance due to these factors.

Mr. Cloonan, Mr. Morehead, Mr. Rogers, and Mr. Bergstrom concurred.

Mr. Bilodeau asked if there would be public comment to accept.

Ms. Schiano stated this meeting was not advertised as a hybrid meeting and was not broadcasted remotely. This virtual portion of this meeting only served as a test for staff of the new system and was not available to the public.

Mr. Hudson noted he would approve a variance for 8 feet as requested, but it would most likely be slightly under. He asked if setting a condition that building begins within six months would be appropriate.

Ms. Sprout stated her quotes needed to be redone and were expired. She asked if there can be an extension as winter is approaching. While her intent is to go forth with the project, she is reliant on a contractor doing so.

Mr. Hudson agreed for one year.

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: TO APPROVE THE VARIANCE FOR 8 FEET AS REQUESTED, ALTHOUGH IT WILL MOST LIKELY BE SLIGHTLY UNDER, WITH THE CONDITION THAT BUILDING BEGINS WITHIN A YEAR.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Rogers, Cloonan, Hudson, Morehead.

Nay: 0.

Absent: 0

5. 1. The appeal of Temple Beth El Inc., property address 301 Possum Park Road, for the following variances:

Ms. Schiano read the facts of the case into the record.

- **Sec. 32-60(a)(1) – Sign standards in residential districts.**
 - Residential districts permit 1 sign. Applicant is proposing 2 signs. A variance is requested for the additional sign.
 - Residential districts require a maximum area of 4 square feet per sign. Applicant is proposing a 35 square foot sign and an 11 square foot sign. Applicant is requesting a 31 square foot variance for the first sign and a 7 square foot variance for the second sign.
 - Residential districts permit a 6-foot-high sign. Applicant is proposing a 7-foot-high sign. A 1-foot height variance is requested.
 - Residential districts require a 5-foot setback from the right of way. Applicant is proposing a 0-foot setback. A 5-foot variance is requested.

Mr. Bergstrom swore in the applicant's representative, Douglas Goldberg, 45 East New Churchman's Road.

Mr. Goldberg explained he was contacted by Temple Beth El as their current signs are very old, deteriorated, and make it hard for visitors to find them. Both locations requested for the new signs are where the existing signs are already placed. The sign at the front of the property on Possum Park Road is carved out of deteriorated wood with floodlights. The sign in the back of property by the entrance to the synagogue is equally deteriorated.

Mr. Goldberg explained a challenge with this property is the abundance of large, mature trees in the front of the building along Possum Park Road. This obscures the visibility of the synagogue to passing drivers. The sign at the property's corner serves as the only indicator and entrance of the building. The sign sits at the end of the property's driveway. Mr. Goldberg stressed it is crucial for the synagogue to have a sign placed there for new visitors, events, and speedy drivers.

Mr. Goldberg explained another issue is the placement of the existing sign is essentially the only area available, within the setback. He stated directly behind the existing sign's location is a whole line of foliage and trees which prevent the sign from being moved back. If the trees behind the sign were removed to facilitate moving the sign, the adjacent trees would still obscure the view of the sign. Placing the sign anywhere else on the property renders it ineffective. He stated this was the basis for the request for a 0-foot setback as opposed to 5-feet.

Mr. Goldberg shared the existing sign is much bigger than 4 square feet, at approximately 20 square feet. He believed a sign bigger than 4 feet was needed to effectively direct drivers where to go when advertising churches, synagogues, schools, and other facilities even in a residential area. Due to this reasoning, he felt the requested size was appropriate on a busy road such as Possum Park Road.

Mr. Goldberg stated the second proposed sign was designed to be kept in proportion with the existing sign. It is a scaled down version of the first sign and serves to notify visitors they are approaching the correct door.

Mr. Goldberg stated if they installed a smaller sign along the roadway, the letter sizing would be illegible. The largest letters on the existing sign are 12 inches high and the smallest letters are five inches high.

He stated these sizes give an optimum readability of approximately 60 feet. If the sign size was reduced by half, the visibility would also be reduced to 30 feet. He believed this is not practical and does not provide effective alert for the busy traffic on Possum Park Road. Mr. Goldberg shared that he received a letter of no objection from DelDOT after their own inspection.

Mr. Rogers asked for clarification if Mr. Goldberg was the sign vendor. Mr. Goldberg confirmed he is with Tupp Signs, Inc.

Mr. Rogers asked how he knew of the distance the lettering's height could be read from.

Mr. Goldberg proceeded to share a letter sizing visibility chart. He explained a readable distance for maximum impact is 10 feet per inch. As the largest letters are 12 inches high, they would be readable from 120 feet. As the smallest letters are 5 inches high, they could be readable from 50 feet. Averaged together, the readable distance is approximately 60-70 feet.

Mr. Cloonan clarified this would be for the proposed sign.

Mr. Bergstrom asked how big the letters of the existing signs were.

Mr. Goldberg stated the existing lettering is approximately 8-10 inches high. He estimated the letters are averagely the same as proposed. He noted the sign itself would be much bigger as the existing sign is 20 square feet. This was due to the modernized design elements.

Mr. Hudson asked for the square footage of the proposed first sign.

Mr. Fortner clarified it is 35 and 11 square feet.

Mr. Cloonan asked for the size of the existing second sign.

Mr. Goldberg responded it is 18 square feet.

Mr. Cloonan noted a smaller size was being proposed for the second sign. Mr. Goldberg pointed out the slight difference could be seen in the comparative pictures presented.

Mr. Cloonan asked if both signs will be in the exact same locations as those that currently exist.

Mr. Goldberg stated this was correct.

Mr. Hudson asked for clarification that these signs are internally lit as opposed to digitally lit.

Mr. Goldberg responded they are traditional internally lit signs.

Mr. Cloonan asked if there are neighbors to the surrounding area of the second sign or if that was obscured.

Mr. Goldberg explained the second sign is in the middle of the property, surrounded by its parking lot and trees. It is not visible to the public at all.

Mr. Bergstrom asked if this would stay on during the entire day.

Mr. Goldberg believed the existing signs are on a timer and the proposed signs would likely follow suit. He estimated the timer will shut them off around 10 p.m.

Mr. Cloonan asked if the prior mentioned issue of prospective visitors passing by the building had been documented.

Mr. Goldberg stated this issue was communicated to him by Temple Beth El. He stated the issues are occurring due to the existing signs' deterioration leading them to become illegible.

Mr. Cloonan noted this related to the deteriorating condition. It would not be the case with a sign in new condition of the same size as the existing signs.

Mr. Goldberg stated a clearer, easier to read sign will improve the situation in the same placement.

Mr. Cloonan asked if a new sign of the current 20 square feet would be readable.

Mr. Goldberg stated Temple Beth El's the current sign is designed completely different. Its design is very simple and compact. Tupp Signs, Inc., created a neater design at their request. He stated the actual signage portion proposed is not much larger.

Mr. Cloonan asked for the size of the signage portion. He stated the graphics presented the sign itself, but all matters consider the sign as a whole, so it is all a part of the area. He found knowing the sizing of the signage to be important.

Mr. Bergstrom asked if the sign would transition from a pedestal style to a monument style. He asked if sight distances and visibility were considered for those backing out of the property.

Mr. Goldberg confirmed this was correct.

Mr. Bergstrom stated a monument below the sign could possibly obscure anything behind the sign from being seen. It could potentially be dangerous for anyone backing out onto Possum Park Road. The current pedestal setup of the sign still allows for fast moving cars to be seen underneath. While he appreciated the aesthetic of the proposed sign. In addition, he noted there appears to be ten feet between the sign and the roadway, noting it was not shown on the plot plan and asked why this was.

Mr. Goldberg understood this sign is bulkier. He stated the area not shown is a utility easement and believed there was room to see traffic between the edge of the sign and the edge of the road.

Mr. Rogers asked if he could see the letter from DelDOT.

Mr. Hudson asked if the 35 square feet in the proposed sign included the monument itself.

Mr. Goldberg stated the sign itself is under 4 feet by 7 feet.

Mr. Hudson stated his calculation was 36 square feet for the sign sans the monument.

Mr. Goldberg's calculation was the sign itself is 30 square feet.

Mr. Hudson stated 108 inches is 9 feet. Mr. Goldberg responded 35 square feet is correct.

Mr. Hudson asked if that included the monument.

Mr. Goldberg explained the gray top and bottom portion of the sign is all structure.

Mr. Fortner considered the structure as a part of the sign but clarified he did not conduct the initial permit review. If the sign alone is 35 square feet, the monument is not calculated into the signage.

Mr. Bergstrom asked if there was any input from the surrounding neighbors about the signs.

Mr. Goldberg stated all neighbors have signage of similar size or larger.

Mr. Bergstrom asked if this is a residential neighborhood.

Mr. Goldberg explained it is residentially zoned, but ultimately a commercial area.

Mr. Cloonan noted only a small portion of this area was included within City limits. He assumed the residential portion within Newark does not have similar signs.

Mr. Goldberg assumed most of the residential area was back off of Possum Park Road and behind the synagogue. He did not know for certain.

Mr. Hudson asked if the property of Leslie and Roger Case is a residential home.

Mr. Goldberg noted the Millcroft property next to the synagogue.

Mr. Hudson stated there is a road between the two that provides entry to the Hunt at Louviers. On the other side of that road is Millcroft. To the northwest, there are houses. He understood there is a church across the street.

Mr. Goldberg was not aware of any contact made.

Mr. Bergstrom asked if the public submitted any comment on this hearing.

Ms. Schiano responded there was none, and direct mail notices were sent.

Mr. Rogers asked if Mr. Goldberg could submit his dimensional chart. He asked for its source.

Mr. Goldberg responded it was from the sign association.

Mr. Bergstrom noted this had been reviewed before at prior Board of Adjustment hearings for the City. It consisted of optics.

Mr. Morehead assumed this included speed, as well.

Mr. Bergstrom stated it was simple projection if the viewer was stationary, but relates more to speed, legibility, size of road signs, and other contributing factors.

Mr. Morehead noted this is a residential zone, so many assumed it is a neighborhood. He asked if Mr. Goldberg could describe the nature of the surrounding area on the road. He pointed out the document presented stated the road is 80 feet wide. He believed this to be a major thoroughfare.

Mr. Goldberg explained it is a busy two-lane highway. Most of the properties around the area are commercial, such as the church, retirement home, and other businesses. He believed this is not a traditional residential road. He stated it is a higher speed travel area rather than a road where many pull in and out of their driveways. The area is very commercial.

The chair opened the floor to public comment.

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

Mr. Rogers asked if the sign is able to be replaced as an existing nonconforming use of the same size.

Mr. Bilodeau shared the existing signs are nonconforming uses. They had already existed when the property was annexed into the City. The applicant would be able to place signs of the exact same size in the exact same spots under that use, as long as the footprint remained the same. He shared the applicant needs the variances due to enlarging a nonconforming use.

Mr. Cloonan stated the applicant needs a variance for each item, regardless of whether there were signs before.

Mr. Bilodeau explained the main issue is due to the size of the signs. It was his opinion the applicant did not need a variance to have two signs since they already had two that were nonconforming.

Mr. Bergstrom asked if the Religious Land Use Act had been discussed. Mr. Bilodeau confirmed it had not been.

Mr. Hudson presented the *KWIK Check Factors*.

1. *The nature of the zone in which the property is located* – As stated, there is a mix of business and residential. This property is a synagogue, and across the street there is a church.
2. *The character of the immediate vicinity of the subject property and the uses of the property within that immediate vicinity* – As heard by the board, the character is vegetated. With the Millcroft Senior Living next door, the synagogue is not actually in the neighborhood. The road in front of it has a speed limit of 50mph.
3. *Whether, if the restriction upon the applicant's property were removed, such removal would seriously affect the neighboring properties and uses* – As heard by the board, there are many mature trees blocking the view of the sign. Neighbors should not see this sign. Direct mail notices were sent out and received no response.
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* - As heard by the board, the sign

is falling apart. Clear signage is needed to enter and locate the property in the surrounding trees.

Mr. Hudson added the signs will be placed in the location of the previous. DeIDOT has expressed no objection to putting up the sign on its road.

Mr. Hudson noted the internal sign will not be viewed anywhere else and will be replacing a pre-existing sign. He believed the front sign is rather large. However, if the monument is not taken into the signage size, he was inclined to approve it.

Mr. Rogers stated the applicant was restricted to where the signs could be placed. He did not believe there should be an issue with the setback, especially due to the existence of a letter of no objection from DeIDOT. He believed this should be taken into consideration when discussing sight distance issues.

Mr. Rogers noted the applicant testified the increased size and lettering will improve visibility. He believed this to be a factor in their favor, given the 50mph nature of the roadway. He believed it is important that there is ample visibility of the sign and the lettering for those to see the entrance. As the applicant requests to replace existing signage in the same location, he was inclined to vote in favor. He stated the second sign is internal. He did not have any issue with its size or that it is a second sign.

Mr. Rogers reiterated all adjoining property owners were notified, the hearing was duly advertised, and there is nothing on record stating the signs would have a negative impact to the surrounding community.

Mr. Morehead questioned whether the variance is even required for the second sign, noting both signs are pre-existing, and one is internal. He was comfortable hearing DeIDOT has signed off regarding the line of sight concerns. He believed the proposed sign could potentially pose an issue with sight lines but wondered if this was a misconception easily drawn as it is not the same as the current type of sign.

He additionally noted this is a non-traditional neighborhood. The double yellow middle line and white lines on each side are indicators this is a commercial road as opposed to a neighborhood road. He was inclined to support this request. He believed if implemented well, this will improve the safety of the area.

Mr. Cloonan generally concurred with the rest of the board. He stated this site is unique as it falls under Newark zoning, but the actual location is an area with numerous businesses. Most board members are familiar with that roadway and its correlating traffic. He found it important to note the signs will be in the exact same location as their predecessors. He believed there should be no variance needed for those as they are grandfathered in.

He continued that in the context of exceptional difficulty, he relied on Mr. Goldberg's signage expertise to justify a larger sign for visibility. While not entirely sure of this factually, he noted it would be in character with other signage along that roadway. With those facts, he was inclined to vote in favor.

Mr. Bergstrom concurred with the rest of the board. He believed this was an excellent presentation from the applicant to share the necessity of DeIDOT's approval, necessity of signage based on road conditions and aesthetic of the signs. When considering the zoning, the signs are a special case. There is no harm to the surrounding neighbors that have been expressed. The signage increases public visibility for those entering and exiting the synagogue along with driving along the road. For these reasons, he was inclined to vote in favor.

Mr. Bilodeau clarified this motion is for all five variances.

MOTION BY MR. HUDSON, SECONDED BY MR. CLOONAN: TO APPROVE THE VARIANCES REQUESTED WITH THE STIPULATION THAT CONSTRUCTION BEGINS WITHIN SIX MONTHS.

MOTION PASSED. VOTE: 5 to 0.

Aye: Bergstrom, Rogers, Cloonan, Hudson, Morehead.

Nay: 0.

Absent: 0

3. The appeal of James Lisa, property address 39 Choate Street, for the following variance:

Ms. Schiano read the facts of the case into the record.

- **Sec. 32-9(a)(3) – Taking on non-transient boarders or roomers in a one-family dwelling by an owner-occupant** – A one-family dwelling occupied by a nonowner occupant may not take more than two boarders (maximum 3 unrelated persons). Applicant is proposing an occupancy increase from 3 to 7 people. A 4-person variance is requested.

Mr. John Tracy spoke on behalf of the applicant Mr. James Lisa. He reiterated that the application is to request an occupancy increase from 3 to 7 people, however, they would like to revise and reduce the request to 6 people instead of 7. This property was formerly an owner-occupied home until Mr. Lisa purchased it a few months ago. It is surrounded almost entirely by student housing, B Zoning projects and higher density R Districts. The proposal includes no physical changes to the property for both externally and internally. It is proposed to be used as currently exists. It is a home that predates current zoning by at least 60 years. The structure is approximately 3600 square feet with 7 bedrooms, 3.5 bathrooms, 2 laundry rooms, 2 kitchens and a minimum of 5 off-street parking spaces. The prior owners had effectively been using the property as a duplex (top/bottom) since at least 2001.

Mr. Tracy explained the first floor and second/third floor are separated by locking doors at the top of the stairways at both the back and front of the structure. Because of the size of the home and the number of bedrooms, the request is to use the structure for student housing of 6 individuals in two dwelling units. While the initial request was for 7 individuals, in looking at the property, it is evident the property was laid out as a duplex and was more conducive to two units of 3 bedrooms.

Mr. Tracy testified that a copy of the zoning map was included in the application; the property is surrounded by higher density zoning of BB, BC, BLR, RM and RS. He reported that there is another property nearby at 11 Center Street which is a duplex just like this property with two sets of permits but a smaller dwelling than this dwelling. As student housing is a permitted use in this part of the City, this is considered an area variance as opposed to a use variance and is governed by the Kwik Check Standards and we believe it does fit comfortably within that standard.

Mr. Tracy stated that the nature of the zone where the property is located is an RS District which permits student housing. The house has existed on the property for approximately 125 years and is not proposed to be modified as part of the application. The surrounding area is almost entirely student housing with a similar duplex only a block away with the same zoning category, therefore, increasing the capacity of the property from 3 to 6 students would not be inconsistent with this area. This area is particularly focused

on student housing and is where it would be desired to be located compared to some of the ancillary more residentially dominated areas.

Mr. Tracy continued by stating the character of the immediate vicinity and uses of the neighboring properties are all essentially student housing of various types and sizes. This proposal seeks to account for the conversion of the property formally into a duplex by recognizing that with the 7 bedrooms, 3.5 bathrooms, laundry room and 2 kitchens, it has effectively been a duplex for a number of years. Therefore, the addition of 3 more students into the structure than otherwise permitted by the Code would not be out of character with the area.

Mr. Tracy continued the Kwik checks stating if the restriction is lifted would such removal seriously impact the uses of neighboring properties. He believed it would not, as it is already a focal point of student housing. The internal layout of the property shows the property has been a duplex for several years and the house pre-dates the zoning codes by decades. In addition, the property has 5 off-street parking spaces which can accommodate more parking than what is required by Code. There is room to add additional parking in the rear if it is deemed necessary.

Mr. Tracy moved to the next Kwik check; if the restriction were not removed the applicant would suffer exceptional practical difficulties in the use of the property. He explained this is a unique situation as the request is not to add or change anything. It is because it is a very large building that was not clearly contemplated. Zoning does not look parcel by parcel; it is an envelope that is placed over an entire area and this board is here for opportunities to address when these unique situations come into place. This is what has happened here, where the existing structure is only recently going to be converted to student housing when it has been owner occupied.

Mr. Tracy continued stating the difficulty is found in the practical use of the building. In an area of student housing, it means the only practical use for this property would be student housing. If the property is limited to only three students, it would be a waste of space and resources. Additionally, it would lend itself to difficulty in finding tenants who could afford the rent as well as the utilities for such a large structure. Alternatively, if there are only three students, it becomes a regulatory nightmare with both the city and the property owner. When there is a property of this size, it lends itself to those not on the lease to try to take up residence within the structure. The applicant is trying to be above board by requesting approval.

Mr. Tracy stated that the property was purchased a month ago and advertising for tenants has not yet begun. The applicant believes that given the size of the structure and the fact that it has effectively been converted into a duplex, having 6 permits for the structure, is appropriate. Lastly, variances are typically reviewed under broader general standards to ensure that the granting of a variance would not be contrary to public interest, it would be upholding the spirit of the Code and would not substantially impair the intent and purpose of the Code. Per the case *W.E. Cleaver & Sons v. New Castle County Board of Adjustment*, collectively these standards are reviewed to ensure that the granting of the variance will not give rise to unacceptable threat of injury to the public health, safety, morals, or welfare. We believe in this instance, none of that is present. There is an area that has been essentially designated as a student population area of different sizes of structures and collections of students.

Mr. Hudson questioned whether the area had been designated.

Mr. Tracy stated he meant designated not by the city but in terms of all the houses surrounding the property are student occupied houses. There is a concentration of student population in the immediate area.

It is an appropriate use of property, and it is an appropriate relief that they are seeking. He finished by stating that he would be happy to answer any questions the board may have.

Mr. Cloonan did not understand why it is not a use variance instead of an area variance.

Mr. Tracy stated because student housing is permitted, students are permitted, but there is a maximum number. They are simply looking to exceed that number. It would be same case as someone who wants to reduce the required setback of a property making it a numerical change, the use itself is permitted but you want to somehow change or extend the boundaries of that use. In this instance, if it is a permitted use and it is permitted, and all you are seeking to increase that number, it is an area variance.

Mr. Bilodeau stated these applications come up occasionally, the last time being in 2018. It is typically treated as an area variance. The analysis is that the use is residential and what they are seeking is relief on the manner of that use. If they wanted to operate some sort of business, that would be a use variance.

Mr. Cloonan asked if a duplex was acceptable in that particular zoning area.

Mr. Fortner stated that a duplex is not permitted in an RS zoning district which is why they are using the phrasing of single-family rental but increasing the number of occupants. This house is a non-conforming structure and has two kitchens, so it is effectively a non-conforming type of use.

Mr. Cloonan agreed that is what was referenced in the presentation. However, he asked for clarification on whether the units were separated with locking doors and would be treated as two units with three students each.

Mr. Hudson questioned that duplexes are not permitted, and the property is already non-conforming.

Mr. Fortner stated that the duplex came in as a comparison later, but he is not sure if the City was aware of the two kitchens. The argument could be made that it was an existing non-conforming duplex but was existing as a single-family house.

Mr. Bergstrom asked if there was one set of utilities.

Mr. Fortner stated he was unsure, but it does have two kitchens.

Mr. Tracy noted Mr. Lisa was present and indicating that there is only one set of utilities.

Mr. Fortner stated that there have been houses in the past where a duplex was converted into a single-family house meaning it ceased to exist as a duplex. Once that happens, it becomes a single-family house, and the duplex is no longer permitted. This appears to meet that standard. There are no walls separating it, it simply has two kitchens.

Mr. Tracy stated that was why he was referring to it as “effectively a duplex”. He did not know what it was licensed as with the City, but from the inspection of the house and the presence of two sets of everything separated on floors it has effectively been carved up in this manner for at least twenty years or more. The previous owners were siblings living in the home in what appear to be two separate units, upstairs and downstairs. This is why they have referred to it as “effectively a duplex”.

Mr. Hudson asked if was “effectively non-conforming”.

Mr. Tracy stated that it was being used in the same manner as 11 Center Street which he mentioned previously in his presentation. That property is recognized as a duplex but is non-conforming as well because RS zoning does not allow duplexes.

Mr. Fortner stated that duplexes that are existing continue as duplexes, but when they do not exist as a duplex, they lose that designation which is what he believed is the case here. However, it is a house that is set up like a duplex.

Mr. Hudson explained that is what he was saying, if it is effectively a duplex, it is effectively non-conforming.

Mr. Fortner stated that they are not asking for a duplex.

Mr. Tracy stated we have not done any renovations; this is how the house was when it was purchased in July.

Mr. Rogers asked if there was a consideration to request rezoning.

Mr. Tracy stated not of this one house. His client does own other properties in the area and that could be something he considers in the future, but for the purposes of where it stands now, they did not want to request just this one lot.

Mr. Morehead asked why the applicant did not ask for the variance for it to be deemed a duplex.

Mr. Tracy stated that the application was submitted on the deadline date, and he had not looked over the facts of the case and photos closely enough until after the application had been filed. Then he realized it was more closely two units which is why he reduced the request from the number of bedrooms, 7, to 6 because it seems that is how the house was operated. He did not know if they could change their request once it had been filed.

Mr. Fortner asked for clarification on whether changing the request to a variance for a duplex would cause it to become a use variance instead of an area variance, making it a more difficult variance request.

Mr. Bergstrom stated residential is residential. He asked if it converts from an owner-occupied unit, what are the additional safety requirements.

Mr. Fortner was unsure. It was a building code.

Mr. Tracy stated the applicant would make any upgrades required.

Mr. Bergstrom stated he wanted to be sure they were at least required to get a modern smoke detection system tied to the whole house.

Mr. Tracy invited Mr. Lisa to respond to the board’s questions.

Mr. Bergstrom stated that Mr. Tracy was a respected member of the bar and has appeared before the board in the past, as such is not required to be sworn in for testimony. However, Mr. Lisa as the property owner would need to take an oath prior to speaking. Mr. Bergstrom then administered the oath to Mr. Lisa.

Mr. Bergstrom asked Mr. Lisa to provide his full name and address for the record. Mr. James Lisa, 206 Haystack Lane, Wilmington Delaware.

Mr. Lisa stated they intend to follow the required safety codes to obtain a rental permit in the City of Newark. This is the first time he has owned multiple houses in the City of Newark with rental units. This property is also the first one he has purchased without an existing rental permit. His anticipation was to request the permit from the Planning & Development Department, which they did. He figured once they issued the permit or gave a conditional approval, a Code Enforcement inspector would come through and tell him what changes or upgrades are needed to issue the license. He expects to make any changes the City required.

Mr. Bergstrom stated that there is a big difference between requirements for an owner-occupied property and a rental property.

Mr. Fortner stated that Mr. Lisa would be required to apply for a rental license which is subject to a property inspection.

Mr. Bergstrom wanted to ensure the property owner was aware and willing to do so.

Mr. Lisa stated they are willing and want to comply. He agreed life safety was important and that they intend to make any safety modifications required by the City.

Mr. Rogers asked if this was a conditional use request which is required to be approved by Council.

Mr. Tracy stated it is not, as it is a straight variance because it is a permitted use. They are simply seeking to increase the number of allowable occupants.

Mr. Rogers recalled seeing somewhere that it was a conditional use.

Mr. Bilodeau stated it was not a conditional use permit. It was a variance and would go to Superior Court if appealed.

Mr. Rogers stated he held issue with the Exceptional Practical Difficulty requirement when Mr. Lisa had just bought the property. He was aware of what the regulations were. Now it is a month later, where Mr. Lisa was claiming students cannot afford it.

Mr. Tracy stated it was a fair point. However, he noted case law is very clear that if “you know you might need relief it does not prohibit you from going to seek relief for an area variance” (Leryokos v. New Castle County Board of Adjustment). A commercial operator was buying property for a car wash and knew the property did not meet the area requirements. However, knowing it did not meet the requirements did not prevent them from applying for and ultimately receiving approval of those variances. Similarly, when buying property and already owning a property next door, a buyer does not always realize until looking at it in full that it leans itself another way and was clearly modified to accommodate more people.

He stated this property dates back 120 years and is 3,600 square feet, knowing its restrictions does not prevent an applicant from seeking relief. He stated there are not significant exceptional practical difficulties, but they are a balancing test between the harm to the community and the harm to the applicant. In this case, there is no harm to the community because this is an area dominated by student housing of various density and sizes. There is however harm to the applicant because, A) It will be difficult to find tenants who want to take on this type of space and everything it consists of, and B) You rent to three tenants and open yourself up to problems of other individuals trying to live in the unit as well due to the space and size.

He continued stating that the applicant wants to come and seek appropriate relief and comply with the regulations and be "above board". They want to acknowledge what they have, how the house has been used and how it is designed and laid out. These conditions already exist at the property, and they are not seeking to modify the house in any way. They wish to simply use it legally as currently designed. They have come in requesting to reduce their request from the initial 7 to 6, two units of 3 tenants.

Mr. Tracy responded to Mr. Morehead's earlier question, stating it became obvious to him how the house was designed. He believed asking for 7 occupants was unrealistic when the property functions effectively like a duplex. This would allow 6 occupants just like the property located at 11 Center Street which has two permits for 3 occupants each and is what they are seeking in this petition.

Mr. Bergstrom asked if any board members had any additional questions for the applicant.

Mr. Morehead asked if there is access from one level of the duplex to the other.

Mr. Tracy stated there are stairwells at both ends of the structure that have existing deadbolt locking doors on the first floor and the second-floor units.

Mr. Morehead asked for confirmation that the intent is to use the space as two separate dwelling units. Mr. Tracy confirmed that is the intent.

Mr. Morehead believed the applicant was requesting the wrong variance. The units described are effectively a duplex and he believed the variance requested should be for a duplex, not an occupancy limit increase.

Mr. Tracy stated if the Board is comfortable with the application being phrased with 6 individuals in the house, either way it would work because the bedrooms are split between the levels. Whether the variance is for a duplex or an occupancy limit, it would still only be 6 individuals in the property.

Mr. Morehead noted there are a lot of historic properties in the City. His understanding of the occupancy law in the City is the effort to limit the expansion of occupancy limits and to maintain any historic houses. This is such that if buying a large property, it can only be rented to three individuals. This makes it so landlords would not see a benefit to buy these properties. It would allow the neighborhoods that have these larger houses to remain owner-occupied neighborhoods. He referenced Mr. Tracy's earlier comment stating there was not a lot of harm. However, he believes there is harm to the community that every landlord in town will come to the Board stating that because the property has a certain number of bedrooms, their occupancy limit should be raised. It will have been this case that set the precedent.

Mr. Morehead did not hold issue with the number of people in the structure but was concerned about what they are calling the structure, one dwelling unit versus two dwelling units. They should discuss student rentals accurately.

Mr. Tracy understood Mr. Morehead's concerns. He was aware there is decided effort on the limitation of student occupancies in an attempt to keep them from spilling into the more residential neighborhoods by limiting the number of unrelated people that can occupy a structure. The Board analyzes every property to see how it is unique and where it is located. In this case, there is a particularly large structure that is surrounded by student housing. He does not feel that his argument based on how the house is used could be converted to another house like that on Corbit Street. If there is a large structure on Corbit street, that is an entirely different factual scenario than what we have here. The area surrounding this property makes it look like an anomaly if it is considered one unit.

Mr. Tracy believed that at the end of the day, the circumstances of each individual request need to be noted, including where the structures are located and what surrounds them. He believed the restrictions on students were designed to keep 4, 5 and 6 students from moving into properties and locations that were not designed to be student housing. He did not think anyone could sit in this meeting and say that Choate Street, Center Street, and the surrounding streets are not dominated by student housing. He did not believe that their arguments in this case can carry over into future discussions when the circumstances are unique to this structure.

Mr. Hudson stated it would not set a precedent for every applicant. It is everyone after that case that set a precedent. He noted Corbit Street is mostly student housing.

Mr. Tracy stated while it is student housing, it is also mostly large separated single-family houses.

Mr. Hudson clarified Mr. Tracy stated that it is surrounded by student housing, same as Corbit Street.

Mr. Tracy stated this case is different because it is surrounded by a more densely populated student housing area. This 3,600 square foot home is surrounded by townhouses, apartments, and duplexes. Corbit Street primarily consists of single residences with some duplexes. He considers Corbit Street from a physical layout and design standpoint to be far different from Choate Street, which is in the center of town.

Mr. Cloonan asked what the Comprehensive Plan says for this area and its desired designation.

Mr. Fortner stated the Planning Commission has designated this as part of Focus Area 3 and would include what they call New Center Village from New Street/Center Street to North Chapel. When it did get to Council, the size had been shrunk down to primarily North Chapel Street. The neighborhoods next to it were all removed, and it has the designation of low-density. It is an exempt street in the student home ordinance, so it was designated by the Council as an area with a high student population. The rest of the neighborhood does not have the same designation.

Mr. Bergstrom asked if there were any additional questions for the applicant and received none. Mr. Bergstrom asked if the hearing was advertised as required and whether any written public comment had been submitted for this hearing.

Ms. Schiano stated the hearing was advertised as required, direct mail notices had been sent and no written comments had been received.

Mr. Hudson recapped the Kwik Check Factors. The nature of the zone where the property is located is a low-density residential. The character of the immediate vicinity of the subject property and their uses has been heard to be BB and student housing all around. Whether if the relevant restriction on the property were

removed, such removal would affect neighboring properties and such uses, he believed Mr. Morehead had a point regarding the impact on the student housing around it. This impact would be that granting a variance for something like this where any large structure could then come before the board would cause harm. Whether if not removed the restriction would cause unnecessary hardship or exceptional practical difficulty for the owner in relation to make normal improvements in the character of the permitted use of the property, he did not believe this is a normal improvement at all as the request is to double the normal occupancy limit.

Mr. Hudson recounted one of the hardships provided by the applicant is the difficulty to regulate the number of tenants in the property due to the size and that it would be extremely difficult to manage in compliance with the Code. He believed that purchasing a property when the purchaser is aware it will be almost impossible to manage is not a hardship. The Board's purpose is not to make every economic venture successful.

Mr. Hudson stated over time Newark has changed and the need for such structures, large family homes, no longer exists, especially in the central business district. He believed this was an opinion but under the impression family homes were in demand within the City. Whether, when it was adopted the city zoning code did not properly contemplate existing structures that had a capacity higher than the new zoning limits, he believes that City Council knows the City, especially downtown. Changes to these restrictions would require approval of the legislature if the Code was not properly considered.

Mr. Hudson concluded by stating trying to double what the limit is in a home for student housing is not normal improvements and that it was too big of a request that would send the City down a path of additional larger structures being requested for expanded occupancy limits. This is in the context of student housing, so there would be 7 students in a house. Based on these factors, he was inclined to not approve this variance.

Mr. Morehead agreed with most of the comments made by Mr. Hudson. The nature of the zone for which the property lies is mostly residential, however, the majority is student housing. The character of the immediate vicinity would likely not change in any great degree with one more house being dedicated to dense student population. Whether the restriction would seriously affect the neighboring properties and its uses, this again would not largely change the neighboring student housing.

Mr. Morehead continued, whether if the restriction creates an unnecessary hardship or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements to the property for the permitted use of the property. He did not believe this would be an exceptional practical difficulty because the applicant purchased the property while recognizing that this would be another student housing property. It was his opinion that applying for rezoning would be more appropriate given the neighboring properties and their use. The efforts to describe this as a duplex when it is a single-family structure caused him to believe the request should be for a different type of variance. Therefore, he was inclined to not approve this application.

Mr. Rogers agreed with much of what his fellow board members had stated. However, he was conflicted that this is clearly a student rental area close to Main Street. This is where the City desires student rentals to be, not sprawled out into other areas. With all the factors in consideration, he believed they had not met this exceptional practical difficulty. They were aware of what the property consisted of and its limitations. It is not quite the same as the comparison they provided with a lot that was too narrow. He believed it is not an exceptional practical difficulty as the property owner knew the limitation of renters and purchased the property anyway.

Mr. Rogers believed Council made a conscious decision not to designate this as an area in the Comprehensive Plan that would be more in keeping with higher-density student housing.

Mr. Fortner stated they wanted it to remain more single family. They expressed they did not want to see it be redeveloped into garden apartment higher density uses.

Mr. Bergstrom stated as a practical matter, what is going to come of the structure. If they rent it to three students, it will become a Code Enforcement issue. However, the Board has a standard to uphold. While exceptional practical difficulty can be economic, he did not believe they received the testimony needed to prove they cannot rent it as a single-family home which is the use it is designated for. However, the applicant could also apply for a use variance to have it designated as a duplex. He does not want bad things to happen to good structures, however he was inclined to agree with his colleagues that this one does not pass the criteria.

Mr. Hudson understood the difficulty is that there is too much space, which is not a difficulty that requires a variance. If that is the case, perhaps the property is not suited for a rental permit, and it is not the Boards job to make it suited.

Mr. Cloonan stated he thinks the proposed number of students is appropriate, but the variance that should be requested is to make it a duplex because the applicant has stated the intention is to run it as such. This changes the regulations which are applicable to the property. If the property is a duplex, no occupancy variance would be required for the number of students they are seeking per unit. He believes there is precedent for a duplex request, and it would be simpler because it is a pre-existing duplex.

Mr. Bergstrom stated the Board's hands are tied at this point. The type of variance requested cannot be changed during the hearing due to public notice requirements.

Mr. Bilodeau stated that if the application tonight is denied, it does not prevent the applicant from applying for a different variance. There has been talk with the Planning Staff about allowing duplexes which is also a possibility.

Mr. Hudson stated if there is a change that needs to be made in this case, it needs to be legislative.

MOTION BY HUDSON, SECONDED BY MR. CLOONAN: THE BOARD OF ADJUSTMENT APPROVE THE VARIANCES REQUESTED.

MOTION DEFEATED. VOTE: 0 to 5.

Aye: 0

Nay: Bergstrom, Rogers, Hudson Cloonan, Morehead.

Absent: 0

MOTION BY MR. HUDSON, SECONDED BY MR. MOREHEAD: TO ADJOURN.

The meeting adjourned at 8:38 pm.

Jordan Herring
Administrative Professional I

Diana Reed
Deputy City Secretary

/jh & djr