

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

June 18, 2009

**09-BA-7
22 North St/White Clay Vista**

**09-BA-8
416 Paper Mill Road**

**09-BA-9
411 Radcliffe Drive**

**09-BA-10
226 West Main Street**

Those present at 7:30 p.m.:

Presiding: Clayton Foster

Members Present: Jeffrey Bergstrom
Michael Harmer
Kevin Hudson
Linda Shopland

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

1. APPROVAL OF MINUTES FROM MEETING HELD MAY 21, 2009

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

2. THE APPEAL OF J. TODD LADUTKO FOR THE PROPERTY AT 22 NORTH STREET, FOR THE FOLLOWING VARIANCE:

CH. 32 SECT. 32-11 (c) (5) (c) – REQUIRES A MINIMUM SETBACK OF 25 FT. FROM AN EXTERIOR LOT LINE. PLAN SHOWS AN ENCLOSED STAIRWAY ON THE EAST AND WEST SIDE OF THE BUILDING. THE PROPOSED STAIRWAY ON THE WEST SIDE INTRUDES INTO THIS SETBACK BY 2.2' +/-.

(Tabled 5/21/09)

MOTION BY MR. BERGSTROM, SECONDED BY MR. HARMER: TO REMOVE THE ABOVE ITEM FROM THE TABLE.

MOTION PASSED UNANIMOUSLY

Mr. Ladutko, who was sworn in at the last meeting, advised that his engineer was present to confirm the unique shape of the lot and the presence of a swale on the property.

Mr. Harmer stated he believed that further testimony wasn't necessary due to the fact that the Board's only issue was in regard to hardship. Mr. Harmer believed that Mr. Ladutko had satisfactorily proven the building could not be moved back due to stormwater management issues and the existence of the swale.

The Chair opened the discussion to the public. There being no comments, the discussion was returned to the table.

Mr. Bergstrom reviewed the Kwik Checks. The nature of the zone where the property is located would not change. The character of the immediate vicinity of the subject property and uses of the property is residential and that is appropriate for this project. If the restriction were removed, the removal would seriously affect neighboring properties and uses. Mr. Bergstrom believed the size of the variance, which is minimal, indicated that it was not a significant impact on the neighboring properties. If the variance were not granted, the restriction would create an unnecessary hardship and/or exceptional practical difficulty for the owner in relation to his efforts to make normal improvements. Also, the irregular lot contributed to the owner's efforts to make reasonable improvements.

MOTION BY MR. BERGSTROM, SECONDED BY MR. HARMER: TO APPROVE THE VARIANCE AS REQUESTED.

**MOTION PASSED: 4-0
ABSTAINED: SHOPLAND**

(Ms. Shopland was not present at the previous meeting for the initial discussion)

- 3. THE APPEAL OF CLAIRE & SCOTT LAWING, FOR THE PROPERTY AT 416 PAPER MILL ROAD, FOR THE INTERPRETATION OF "CUSTOMARY HOME OCCUPATION" AS DEFINED IN THE ZONING CODE SEC. 32-4 (A) (55). APPLICANTS WANT TO ASSEMBLE "PICKUPS" FOR ELECTRIC GUITARS; SAID ACTIVITY NOT PERMITTED IN RESIDENTIAL ZONES.**

Ms. Schiano read the above appeal, stated that it was advertised in the *Newark Post*, and direct notices were mailed. No letters were received in objection. At this time, Mr. Sisk provided a petition in support from the neighbors.

Mr. Akin confirmed the request was not for an area or dimensional variance, but for the interpretation of a provision in the Zoning Code. On February 10, 2009, Mr. Lopata responded to Mr. & Mrs. Lawing's request to operate a guitar "pickup" assembly

business in their home. Mr. Lopata stated under the property's current RH (single-family, detached) zoning, the type of business was not a permitted use with or without a special use permit. Mr. Akin, in his capacity as City Solicitor, responded to this inquiry as well. His findings detailed in a memorandum to Mr. Lopata dated March 11, 2009 indicated he concurred with Mr. Lopata. The property owners disagreed with staff's interpretation of the relevant provision in the Zoning Code, and decided to appeal to the Board of Adjustment for interpretation of the Code.

Ms. Shopland asked Mr. Akin what would be considered a "customary home occupation." Mr. Akin stated case law indicated such occupations as crafting; or making creative artistic items that could be sold typically at such events as Community Day or a church bazaar. He further stated the Board had the ultimate authority to interpret the provision in the Code and the Board was free to disagree with Mr. Akin's opinion.

Mr. Akin suggested the Board had the authority to permit Mr. Sisk to have a copy of the memorandum to Mr. Lopata from Mr. Akin that addressed "customary home occupation."

MOTION BY MS. SHOPLAND, SECONDED BY MR. HUDSON: TO PERMIT MR. SISK TO REVIEW MR. AKIN'S MEMORANDUM ADDRESSING THE ISSUE OF "CUSTOMARY HOME OCCUPATION."

MOTION PASSED UNANIMOUSLY

Mr. Akin further stated he viewed the business as a commercial production of a product that would be offered broadly for sale. Therefore, he did not view the use as a customary home occupation. In addition, case law indicated caring for children, a modest office use which would be ancillary to a commercial use conducted outside the home, etc., were all examples of a customary home occupation.

Ms. Shopland suggested when the Zoning Code determined the definition of "customary home occupation," the occupation the applicants wished to pursue probably did not exist. She further stated she was aware of a licensed massage therapist and a Tarot Card reader that resided within the City limits that conducted business from their home. She further suggested that the Zoning Code might be a bit behind in its definition of reasonable and customary home occupations.

Ms. Shopland asked what violated the customary home occupation. Was it the item that was being produced, or the fact that it was going to be mass produced and transported out of the City? Mr. Sisk responded by saying he believed there was nothing about the proposed occupation that violated the definition of a customary home occupation.

Mr. Sisk stated the guitar picks would not be massed produced as they were a

custom item. He added that there would not be traffic going to his client's home for product pickups and the majority of sales would be through word of mouth and internet sales.

Mr. Sisk stated once the Board ruled on the interpretation, the matter would be forwarded to City Council for a special use permit. At that time, City Council had the prerogative to place certain conditions and/or restrictions they deemed appropriate. Mr. Sisk believed the responsibility of the Board was primarily a legal one as a special use permit was required and the Lawing's would be required to go before Council to obtain the permit. Therefore, he believed the Board should be concerned about a precedential value on this particular case. Mr. Sisk further stated a customary home occupation was defined in the Code as a use carried on by the inhabitants of a residence.

Andrew Scott Lawing, 416 Paper Mill Road, was sworn in. Mr. Lawing stated the production of the custom guitar picks would consist totally of work by hand. The components were made elsewhere. It would consist of assembling the final product. Mr. Lawing further stated this endeavor was in the start-up stages and they had no intention of continuing long-term from their home if the business was successful. If and when their business reached that point, they would secure another location better suited for the continuation of their business.

Mr. Akin's concern was this case could set precedence for future appeals to the Board, and approval would invite further applications.

Mr. Hudson stated he would not vote in favor because he believed the Code needed to be re-written and he would be in contact with his Councilman to address that issue. He further stated this occupation was beyond the interpretation of the Code as currently written.

The Chair opened the discussion to the public. There being no further comments, the discussion was returned to the table.

The Board needed clarification on what they were voting for and in response Mr. Akin stated the Board's role was to define whether the activity that has been described to the Board constituted a customary home occupation.

MOTION BY MS. SHOPLAND, SECONDED BY MIKE HARMER: THAT THE ASSEMBLY OF CUSTOM GUITAR "PICKUPS" FALLS UNDER THE ZONING CODE SEC. 32-4 (A) DEFINITION OF "CUSTOMARY HOME OCCUPATION."

MOTION PASSED: 4-1

Aye: Bergstrom, Foster, Harmer, Shopland
Nay: Hudson

4. **THE APPEAL OF DALE JOHNSON FOR THE PROPERTY AT 411 RADCLIFFE DRIVE, FOR THE FOLLOWING VARIANCE:**

CH. 32, SEC. 32-9 (c) (2) – AREA REGULATIONS – MAXIMUM LOT COVERAGE – LIMITS THE AMOUNT OF COVERAGE TO TWENTY (20%) PERCENT MAXIMUM. PROPOSED ENCLOSURE OF EXISTING DECK RAISES TOTAL LOT COVERAGE TO 21.1%.

Ms. Schiano read the above appeal, stated that it was advertised in the *Newark Post*, and direct notices were mailed. No letters were received in objection.

Mr. Dale Johnson, 411 Radcliffe Drive, Newark, DE was sworn in. He provided a petition from his neighbors in support. He explained that they wanted to convert an existing deck to a three or four season porch/sunroom. The addition of a roof created a 1.1% overage of the 20% allowable maximum. Mr. Johnson stated the hardship was the extremely irregularly shaped lot.

Ms. Shopland asked what was the square footage of the lot and what would a 1.1% addition equate to? Mr. Johnson stated the lot size was 9,416 square feet, therefore a 1.1% addition would equate to approximately 94 square feet. The existing deck is 14x16; the proposed room was 14x12.

Mr. Foster asked Mr. Sciulli if the Building Department had anything to add. Mr. Sciulli stated the Board should note there would be no added construction; therefore no additional run-off would result. The only change was the addition of a roof on the structure.

Mr. Johnson stated they would like to add the room because they had a growing family and it would permit them to have a place for everyone to gather together. A deck could only be used when the weather permits. The lot was irregularly shaped so any alteration to the property may prove difficult to stay within the confines of the Code.

The Chair opened the discussion to the public. There being no comments, the discussion was returned to the table.

Mr. Bergstrom addressed the Kwik Check factors:

- the nature of zone (residential) would remain the same. The character of the immediate vicinity of the subject property was entirely residential.
- If the relevant restriction were removed, such removal would seriously affect

the neighboring properties and uses. It would not be the case and the effected neighbors were in support of the Johnson's addition.

- If the restriction were not removed, it would create unnecessary hardship or exceptional practical difficulty for the owner in relation to making normal improvements in the character or use of the property. Mr. Bergstrom stated there was testimony this was one of the smaller lots in the area, and the deck in its current state was relatively useless.

MOTION BY MR. BERGSTROM, SECONDED BY MS SHOPLAND: THAT THE 1.1% VARIANCE TO ENCLOSE THE EXISTING DECK AREA BE GRANTED.

MOTION PASSED UNANIMOUSLY.

5. THE APPEAL OF MICHAEL GREENBERG AND YISRAELA MYERS, FOR THE PROPERTY AT 226 WEST MAIN STREET, FOR THE FOLLOWING VARIANCES:

A) CH. 32, SEC. 9 (c) (7) – SIDE YARDS IN RS ZONING REQUIRE A MINIMUM OF 10 FEET WITH A MINIMUM AGGREGATE WIDTH OF 25 FEET. PLANS SHOWS THE SIDE YARDS AS 4.12' AND 5.9' WITH AN AGGREGATE OF 12 FEET.

B) CH. 32, SEC. 51 (A) – EXISTING CUBICAL CONTENT OF THE NEW CONSTRUCTION TOTALS 53%. THE ZONING CODE PERMITS 20%.

C) CH. 32 SEC. 32-48 (B) - REQUIRES REAR YARD ACCESSORY STRUCTURE TO BE A MINIMUM OF 3 FEET FROM PROPERTY LINE. PROPOSED SHED IS ONE (1) FOOT FROM THE LOT LINE.

Ms. Schiano read the above appeal, stated that it was advertised in the *Newark Post*, and direct notices were mailed. No letters were received in objection.

Mr. Sciulli stated the reason for the variance requests was due to the lot being atypical in that it was long and narrow. It was also a non-conforming lot; therefore, it would never meet side yard and aggregate yard requirements. The variance for cubical content looked significant. The owner would testify there were a number of different additions they were proposing, none of which alone would constitute the 53% cubical content. Mr. Sciulli also suggested if the applicant were to relocate the proposed shed a few feet, the third variance requested would not be necessary. He further stated the dimensions of the lot were approximately 37 feet wide by over 200 feet long, and as indicated by the dimensions, the lot was one of the older smaller lots.

Ms. Yisraela Myers, 226 West Main Street, was sworn in.

Mr. Bergstrom asked Ms. Myers if the shed was existing or proposed? Ms. Myers confirmed there was currently an 8'x8' shed. However, it was located on the northeast corner of the property. The shed was used as storage in the absence of a garage. Therefore, the addition of a larger shed would aid in the storage of items they currently have stored under the deck.

Mr. Foster asked Mr. Sciulli if the increase in cubical content included the new shed. Mr. Sciulli stated he wasn't certain and deferred to Ms. Myers as she was the individual who did the calculations. Mr. Sciulli stated there were some questions whether the dimensions of the shed should be included in the cubical content since it would be considered an accessory structure. He believed it should not be included, but the applicant had included it in her calculations.

The figures were re-calculated to exclude the shed and the actual variance requested decreased from 53% to 44% cubical content.

Mr. Foster asked Ms. Myers to offer details of the proposed addition. Ms. Myers stated they hoped to add a bedroom with a full bath with added storage. The current kitchen was very small and the plan was to extend it 2 ½ feet.

Mr. Foster asked Ms. Myers to address her hardship. She stated the house was over 100 years old, needed new siding, was lacking proper insulation, the windows were single-pane and the front porch was in dire need of repair. With all these renovations needed, Ms. Myers and Mr. Greenberg believed this was the ideal opportunity to add the room. Ms. Myers also stated they would be using green energy sources such as a metal roof and energy efficient siding and windows. The heating expenses in the winter were significant, and with the changes they hoped to decrease these expenses. Mr. Bergstrom asked why they needed an increase in the volume. Ms. Myers stated that with six visiting grown children and seven grandchildren space was very tight during visits to accommodate everyone. In addition, they had only one bath to accommodate everyone. She further stated their number one concern was financial with the high heating costs during the winter months.

Ms. Myers further stated if they were unable to complete the renovations, they would have to sell the house. Ms. Myers said her neighbor to the west, Dr. Ronald Martin, was present and supported the renovations. The neighbors to the east rent to college students and were not present.

Dr. Ronald Martin, 234 West Main Street, was sworn in. Dr. Martin stated that if the renovations were permitted, it would alleviate for a period of time the

property being sold and turned into student housing. He further stated to have the property improved would also have a positive effect on his property values and the value of the community. He further stated his lot was a double lot and in between his house and the Myer/Greenberg property is an open lot which has evergreens, and the appearance was appealing, so the houses will not be close to one another as it would appear.

Mr. Bergstrom asked Ms. Myers why the shed could not be moved several feet. She stated there was a tree that could not be relocated and a cement pond that was located on the property that cannot be moved as well.

Mr. Harmer addressed the Kwik Checks.

- The nature of the zone is residential and will not be affected. The character of the immediate vicinity of the subject property is entirely residential and will remain so.
- The proposed addition would not adversely affect the neighbors in a negative manner. The application included green construction which would be positive.
- If not removed the restriction would create 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. Mr. Harmer stated the relocation of the shed is not possible due to the cement pond and the presence of a tree. He further stated there are hardships due to the fact that the Myers/Greenberg family cannot enjoy the full benefits of their home due to space issues.

MOTION BY MR. HUDSON, SECONDED BY MS. SHOPLAND: TO APPROVE THE SIDE YARD VARIANCE AS READ.

MOTION PASSED UNANIMOUSLY.

MOTION BY MR. HUDSON, SECONDED BY MR. BERGSTROM: TO APPROVE THE TOTAL LOT COVERAGE TO APPROXIMATELY 44% WITH THE CONDITION THAT CONSTRUCTION COMMENCE WITHIN SIX MONTHS.

MOTION PASSED UNANIMOUSLY.

MOTION BY MR. HARMER, SECONDED BY MR. HARMER: TO APPROVE THE VARIANCE ALLOWING THE PROPOSED SHED TO BE ONE (1) FOOT FROM THE LOT LINE.

6. Meeting adjourned at 9:23 p.m.