

**City of Newburyport
Zoning Board of Appeals
Online Meeting
April 13, 2021
Minutes**

1. Roll Call

Chair Robert Ciampitti called an online meeting of the Newburyport Zoning Board of Appeals to order at 7:00 p.m. In attendance were members Robert Ciampitti, Stephen DeLisle, Mark Moore, Ken Swanton and Bud Chagnon and associate member Gregory Benik. Also in attendance were Planning Director Andy Port, Planner Katelyn Sullivan and Note Taker Gretchen Joy.

2. Request for Extension

a) 7 Plant Street (2018-017)

Tim O’Dea said he is requesting to renew the in-law apartment permit that was granted in June 2018. He said there have been no structural changes to the house or apartment.

Mr. Moore said he would support the application, as the apartment already exists within the footprint of the home, the square footage of the apartment is within the regulations, there is sufficient parking on the site and the apartment is occupied by the applicant’s mother-in law.

Mr. Moore moved to approve the request to Extend the In-law Special Permit for 7 Plant Street for three years. Mr. DeLisle seconded the motion. The motion was approved by a 6-0 vote (Mr. Ciampitti, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, yes; Mr. Benik, yes).

3. Public Hearings

**Caswell Development, LLC c/o Lisa Mead, Mead, Talerman & Costa, LLC
27 Hancock Street**

2021-02 - Special Permit for Non-Conformities

2021-03 - Special Permit

**Caswell Development, LLC c/o Lisa Mead, Mead, Talerman & Costa, LLC
21-25 Hancock Street**

2021-04 - Special Permit

Mr. Ciampitti recused himself from the matter. Adam Costa represented the applicant, who is proposing to develop two adjacent lots. The applicant is seeking a Special Permit for Use for 21-25 Hancock Street. The existing commercial building would be removed and replaced with a two-family dwelling. This property would be fully compliant with the dimensional requirements upon the approval of Leavitt Court as a street.

For 27 Hancock Street, the applicant is seeking a Special Permit for Use and a Special Permit for Non-Conformities. The existing single-family home would be converted to a two-family dwelling. The only non-conformity for this property would be the front-yard setback, which would be improved from 5.7 feet to 11.7 feet. Since the March 9 meeting, the City Solicitor has determined that the plans would result in the demolition of over 25% of the exterior walls of the historic structure and a DCOD Special Permit would be required.

Attorney Costa requested an extension for the Special Permit for Non-Conformities for 27 Hancock Street, as the plans for that property are to be modified. He also requested that the Board issue a Special Permit for Use for both 27 Hancock Street and 21-25 Hancock Street.

City of Newburyport
Zoning Board of Appeals
April 13, 2021

The applicant would like to receive this approval before committing additional resources to the project.

Two-family use is allowed in the R-2 District by Special Permit. Attorney Costa reviewed the findings for a Special Permit for Use. There are other two-family structures in the neighborhood and these two lots are the largest in the neighborhood. He said two single-family homes could be built by right. In conjunction the two-family use, the applicant would be willing to install a brick sidewalk along Hancock Street and add plant materials along the Rail Trail and elsewhere on the property.

It has been suggested that a 6(c) Special Permit might be desirable for the project. This would allow two smaller houses on each lot rather than one large structure. It would also allow the historic structure at 27 Hancock Street to be better preserved. At this time, changes to the 6(c) Special Permit are being considered and the applicant might wish to move forward with his project before these revisions have been completed. He has not yet determined the direction in which he would wish to proceed.

The Planning Board heard the Courts and Lane Special Permit on April 7 but took no action as the plans are to be revised and the stormwater peer review is underway.

The hearing was opened to comments from the public. Mary Anne MacCaulay, 29 Madison Street, said she is concerned about the environmental impact of the construction. She said the property was once the location of a bus depot and the soil should be tested. She asked if water system could handle the additional usage and if the question of affordable housing has been addressed.

Lindsey Dunnigan, 29 Hancock Street, said she is a direct abutter and asked about the timing of the installation of the landscaping and sidewalk.

Chris Zybert, 60 Purchase Street, said he is in support of the plan but still has concerns about drainage. He said a stone wall that supports the parking lot at the church collapsed due to the construction of the Rail Trail.

Rob Jorgenson, 70 Purchase Street, said he wants consideration to be given to the letter from the abutters dated March 23 that is posted on the Planning Board's website. He would like the applicant to reach out to the abutters. He is also concerned that the construction materials are toxic. The public comment period was closed.

Mr. DeLisle said the letter Mr. Jorgenson referenced is not on the list of ZBA documents. He asked about the issue of soil contaminants and toxins. Attorney Costa said the issue is not within the purview of the Board and he has prepared a written response for the Planning Board. Andy Port said the letter was addressed to both Boards and will be posted on the ZBA web page. He said the stormwater management plan is undergoing the peer review process. Water is under the jurisdiction of the DPS and there does not appear to be a capacity issue. Jay Caswell said the soil has been tested and no contaminants were found.

Mr. Swanton asked if the Planning Board has made Leavitt Court a street. Attorney Costa responded that the general consensus of the Planning Board was that the street would be approved, but this has not yet been done. Mr. Swanton asked why the applicant is not seeking approval for the three applications at one time. Attorney Costa said the developer requires approval from multiple boards and would like some commitments before incurring additional expenses. He wants assurances the ZBA is comfortable with two-family use. He is not yet ready to proceed with the application for a Special Permit for Non-Conformities. Mr. Swanton said the

City of Newburyport
Zoning Board of Appeals
April 13, 2021

Board has expressed at previous meetings it does not have an issue with two-family use. Time has been spent at these meetings discussing the issue of scale and massing. He asked why the applicant does not intend to build four single-family homes, which would reduce the scale and massing of the project. Attorney Costa said for 21-25 Hancock Street, scale and massing is not within the purview of the Board. The Board could consider scale and massing for 27 Hancock Street. A 6(c) Special Permit could be an option for the applicant for one or both sites, but this might not be a simple solution and it is not certain that the Planning Board would endorse it.

Mr. Benik asked if the final architectural plans have been submitted for 21-25 Hancock Street. Attorney Costa said permitting plans have been submitted and an architectural review would be under the jurisdiction of the Planning Board. Andy Port said the plans provide enough specificity for the Board to make its decision. Mr. Benik commented that the Board do not yet know what the applicant plans for 27 Hancock Street beyond seeking approval for two-family use. Attorney Costa said the applicant intends to make changes to the plans. Mr. Benik said he does not like the piecemeal approach to the project.

Mr. Moore asked about the timing of installation of the brick sidewalk and about the inclusion of affordable housing. Attorney Costa said the landscaping work would be done at the conclusion of the project. He added drainage information has been submitted to the Planning Board, which has purview over the issue. Andy Port said the project is not large enough to trigger the requirement for affordable units and this would not be within the purview of the Board.

Attorney Costa said the question before the Board at this time is whether two-family use would be appropriate for the two properties. He said what has been proposed would be an improvement over the existing conditions. The project would provide additional benefits to the city and the neighborhood. While the applicant does not have plans for 27 Hancock Street at this time, this would not change the question of the appropriateness of two-family use. The project would meet the nine factors of the Special Permit.

Mr. DeLisle said two-family use appears to be appropriate for both properties. The applicant has addressed the nine findings for a Special Permit for Use. However, he continues to have concerns about massing and size and he is not certain the Board is prepared to vote at this time.

Mr. Swanton said the Board must consider massing for an application that is not on the table at this time but yet is a part of the same project. He does not like the piecemeal approach. He has said during three meetings that he approves of the two-family use, but it would be difficult to vote to approve it while there are standing issues.

Mr. Chagnon said he is also comfortable with the two-family use for both properties but he is not comfortable with the process. He would prefer a more holistic approach but could vote to approve two-family use for both parcels.

Mr. Benik said he would supports two-family use for both parcels and he is also concerned about the piecemeal approach. He said the regulatory requirements have been meet for 21-25 Hancock Street but the decision for 27 Hancock Street should perhaps be withheld until the plans have been received.

Mr. Moore said the proposal contains many positive elements and it would be an improvement over the existing conditions. The Board would have the opportunity to discuss the size and massing of 27 Hancock Street when it reviews the Special Permit for Non-Conformities.

City of Newburyport
Zoning Board of Appeals
April 13, 2021

He said he could move forward with the decision on two-family use for both parcels. He said the Board has been clear about its position on this, but he understands the reticence of its members to approve an application with many moving parts.

Attorney Costa said there appears to be a consensus that the Special Permit for Use could be approved for 21-25 Hancock Street but there does not appear to be sufficient votes for two-family use for 27 Hancock Street at this time. He said his client might wish to ask for a continuance for this application. Jay Caswell said the development of the plans involves a financial commitment and he would like clarity on the direction in which he should be moving. He said a 6(c) Special Permit might be a good option, but might not be viable as the Ordinance is currently written. He said he could build two large, high-end houses by right but he believes four units would be better for the city. With two units, he would not be able to include the brick sidewalk and landscaping in the project.

Mr. DeLisle said for that 21-25 Hancock Street, the nine factors for two-family use have been satisfied. He asked if the two parcels could be considered separately. Mr. Swanton suggested the Board could approve the Special Permit for 21-25 Hancock Street subject to Planning Board approval of Leavitt Court as a street.

Mr. DeLisle moved to continue the Special Permit for Non-Conformities for 27 Hancock Street (2021-02) to the May 11 meeting. Mr. Swanton seconded the motion. The motion was approved by a 5-0 vote (Mr. Benik, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, yes).

Mr. DeLisle moved to continue the Special Permit for Use for 27 Hancock Street (2021-04) to the May 11 meeting. Mr. Swanton seconded the motion. The motion was approved by a 5-0 vote (Mr. Benik, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, yes).

Mr. Chagnon moved to approve the Special Permit for Use for 21-25 Hancock Street (2021-04) subject to Planning Board approval of Leavitt Court as a street. Mr. Benik seconded the motion. The motion was approved by a 5-0 vote (Mr. Benik, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, yes).

Hebbelinck Real Estate, LLC c/o Lisa Mead, Mead, Talerman & Costa, LLC
195 High Street
2021-14 - Appeal

Mr. DeLisle recused himself from the matter. Adam Costa represented the petitioner, who is appealing a decision of the Building Commissioner to issue a building permit for the restoration of a barn without a Special Permit. The lot is pre-existing non-conforming for frontage and side-yard setback. The barn is approximately three feet from the side property line. The barn would be rebuilt on the same footprint and with the same dimensions as the existing conditions. It would be placed on a new foundation and several structural elements would be replaced.

Attorney Costa said the extensive changes being proposed would constitute the alteration of a preexisting non-conforming structure as defined in the Ordinance and would require a Special Permit. He referred to the staff report which included an opinion from Attorney Eichman of KP Law and stated that the Ordinance would not apply to the alteration of pre-existing single or two-family residences that are exempt under Section IX-B.3.A. The exemption

City of Newburyport
Zoning Board of Appeals
April 13, 2021

applies to alterations that do not add, create or intensify an existing non-conformity with regards to side and rear-yard requirements.

Attorney Costa said the issue that is being contested is if the structure subject to second-except clause in MGL Chapter 40A.6.1, which provides for a less-vigorous standard for single- and two-family residential structures. These structures are exempt from the requirements of a special permit. He said he is not arguing that the barn could not be considered a residential structure. His position, which he said has been supported by the courts, is that the barn is not a single- or two family residential structure. He said the barn is a detached accessory structure, not a part of the single or two family residential structure and is not subject to the benefit of the second-except clause. He said two cases support this position. In *Guraino v. Lynds*, a dwelling was defined as a structure that has the capability for living, sleeping, cooking and sanitation and a garage was determined to be an accessory structure to a single-family structure. In *Gottfried v. Betron*, the local bylaw extended the protection of the second-exempt clause to single- and two-family residential structures and their accessory structures, which the Newburyport Ordinance does not do.

Attorney Costa also said the Ordinance applies to alterations that provide for a structure to be used for substantially different purposes or for the same purpose to a substantially greater extent. The barn would be changed from an unimproved storage structure to a structure with a partial bathroom on the first floor and living space on the second floor. This would require a Special Permit for a change in use of a pre-existing, non-conforming structure.

He concluded by saying that is he not arguing that the structure is not entitled to the protection given non-conforming structures under the Ordinance, but rather the proper process has not been followed and that process would have allowed the petitioner to participate in a public hearing and seek conditions or mitigation.

Attorney Eichman said he agrees that the issue at hand is whether the barn should be classified as a single- or two-family residential structure under the Ordinance. He clarified that he did not say that a single- or two-family residential structure would include the barn as a matter of law. He said the term "residential structure" is not defined by the Ordinance and therefore the Board must determine whether or not the term incorporates the barn. He said that based on his review of the Ordinance, it would be reasonable to conclude that the barn constitutes a single- or two-family residential structure. As such, the exemption would apply and the alteration would be allowed by right. He said the Ordinance does not include a definition that requires a single- or two-family residential structure to include dwelling units. He said an accessory use is a part of the use and a structure that is accessory to a residential use would be a part of that residential use. He said it is possible to decide the issue through a review of the Ordinance and it would not be necessary to look to the State statute or case law that interprets other bylaws.

The hearing was opened to comments from the public. Attorney Bill Sheehan, 8 Essex Center Drive, Peabody, who represents the owners of 195 High Street, said the Supreme Judicial Court decided a garage could be considered a single-family residential structure. Based on this precedent set by the highest court, the Zoning Administrator properly interpreted the Ordinance. In addition, the Ordinance distinguishes between principal structures and accessory structures. Section IX-B.3.A pertains to single- and two-family residential structures and uses, while IX-B.3.C refers to principal structures. Section IX-B.3.A supports the position that the barn should be considered a single- or two-family residential structure under the Ordinance and therefore is

City of Newburyport
Zoning Board of Appeals
April 13, 2021

entitled to the exemption. He added that the structure is used for residential purposes and would remain in residential use. The pre-existing non-conformity would not be increased and no new non-conformity would be created. He asked the Board to affirm the decision of the Zoning Administrator.

Tom Kolterjahn, 64 Federal Street, said the Newburyport Preservation Trust believes the appeal should be denied. He said the property owners would be doing a service to the city by restoring the carriage house, which is one of the best examples of a type of structure that is disappearing. He said it is an outstanding example of early architecture. The public comment period was closed.

Mr. Moore asked Attorney Eichman to explain again the logic of his opinion that the Ordinance allows the barn to be called a residential structure. Attorney Eichman said the Ordinance does not provide a definition of residential structure. The determination of the definition is left to the discretion of the Zoning Administrator and then the Board upon appeal. A single- or two-family residential structure would encompass both principal and accessory structures. The definition of accessory building or use would include the barn, provided that it is accessory to a residential use. A structure that is used accessory to a principal use is considered part of that principal use. He said it would not be unreasonable to conclude that when discussing a single- or two-family residential structure, every structure that is accessory to that use is being discussed. It would be possible to interpret the Ordinance in a narrower way that would require the barn to be used as a residence. While this is a possible interpretation, he does not see any support for it in the Ordinance and does not believe this conclusion must be drawn.

Mr. Swanton said Attorney Eichman addressed the issue of the second-exempt clause well. He asked about the issue of change in use. Attorney Eichman said the Board must consider if the proposed use would fit into the category of uses accessory to the principal single- or two-family residential structure. He said this is a discretionary determination for the Board and the Zoning Administrator. Mr. Swanton said the Board in the past has determined the addition of living area to be acceptable, where the addition of a kitchen along with living area would be a change in use. He asked if this would be a valid interpretation of the Ordinance. Attorney Eichman said he believes the interpretation would be at the discretion of the Board. He added that the Ordinance might single out certain accessory uses, such as home occupation, which would take precedent over any interpretation by the Board.

Mr. Chagnon said Attorney Costa has made two compelling arguments. In his opinion, the use would be changed. He said there are many types of accessory buildings in the city and he does not believe they all should be afforded the protections being discussed.

Mr. Benik said that if it is accepted that the barn is considered a single- or two-family residential structure, its use would not be changed with the addition of living space. He said he would be guided by the advice of the City Solicitor.

Mr. Ciampitti asked Attorney Costa if the ZBA could adopt a second-exception clause analysis that is a more restrictive treatment than is afforded under MGL Chapter 40A.6.1. Attorney Costa said that in the interpretation of the provisions of the Ordinance, some deference is given to municipalities. When a term is not defined by an ordinance, MGL Chapter 40A.6.1 provides a floor of protection and municipalities are free to adopt more generous protections. The City Council has the ability to adopt greater protections but has not done so and it is not the role of the Board.

City of Newburyport
Zoning Board of Appeals
April 13, 2021

Mr. Ciampitti asked if it would be within the discretionary power of the Board to provide an interpretation where the Ordinance is silent. Attorney Costa said the Board has the first opportunity to interpret the Ordinance, but should be guided by advice from its council. He added, Attorney Eichman has said the Ordinance could be interpreted such as way as was done by the Zoning Administrator, but said this is not definitive and is not the only interpretation.

Mr. Ciampitti asked Attorney Eichman if the Board could adopt protections under second-exception clause. Attorney Eichman responded that the Ordinance contains sufficient latitude for the Board to reach that conclusion.

Attorney Sheehan added that the Ordinance contains language that is more beneficial than MGL Chapter 40.A.6.1. The drafters of the Ordinance understood the distinction between principal and general structures.

The Board began its deliberations. Mr. Moore said he would follow the guidance of the City Solicitor. If the barn is considered a single- or two-family residential structure and living space for the family is to be added, then the use continues to be residential and has not changed.

Mr. Swanton said the City Solicitor has made a compelling argument and he believes his interpretation of the law is correct. He would not be in favor of the appeal.

Mr. Chagnon said he would approve the appeal. He has difficulty accepting that all accessory buildings should be considered as being a part of a residential structure. The City Solicitor has provided an argument for one interpretation of the Ordinance but has allowed that a different interpretation could be made.

Mr. Benik said he support the opinion of the City Solicitor. The drafters of the Ordinance understood the distinction between principal and accessory structures. The interpretation of the barn as a single- or two-family residential structure would be consistent with the purposes of the Ordinance.

Mr. Ciampitti said the question is if the carriage house is residential structure and he believes it should be defined in that way. It is the customary and incidental accessory use of a principal residential structure, which is consistent with past positions of the Board. He said he arrives at a different conclusion than Attorney Costa and he believes this interpretation is within the purview of the Board under second-exempt clause. He said he supports the conclusion to reject appeal.

Mr. Moore moved to approve the Appeal. Mr. Chagnon seconded the motion. The motion failed by a 1-4 vote (Mr. Benik, no; Mr. Moore, no; Mr. Swanton, no; Mr. Chagnon, yes; Mr. Ciampitti, no).

3. Business Meeting

a) Minutes

Mr. Swanton moved to approve the minutes of the March 23, 2021, meeting. Mr. Moore seconded the motion. The motion was approved by a 5-0 vote (Mr. Ciampitti, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, absent; Mr. Benik, yes).

b) Correspondence

The Annual 40B report from Citizens' Housing and Planning Association (CHAPA) was received.

City of Newburyport
Zoning Board of Appeals
April 13, 2021

c) Other updates from the Chair or Planning Director

A discussion regarding conditions on architectural treatments was tabled to a future meeting.

4. Adjournment

Mr. Swanton moved to adjourn the meeting at 10:22 p.m. Mr. Moore seconded the motion. The motion was approved by a 5-0 vote (Mr. Ciampitti, yes; Mr. Moore, yes; Mr. Swanton, yes; Mr. Chagnon, yes; Mr. DeLisle, absent; Mr. Benik, yes).

Respectfully submitted,
Gretchen Joy
Note Taker