

SOMERSWORTH ZONING BOARD OF ADJUSTMENTS
MINUTES OF MEETING
August 5, 2020

MEMBERS PRESENT: Brad Fredette, Coty Donohue, Matt Keiser Chair, Glenn Garvin-Alternate

MEMBERS ABESENT: Ken Vincent-Alternate, Keith Perkins-Alternate, and Richard Brooks

STAFF PRESENT: Carol Ogilvie, Interim-Planner, and Dana Crossley Planning Secretary

The meeting was called to order at 7:15PM.

Ogilvie stated due to the COVID-19/Coronavirus crisis and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, this Board is authorized to meet electronically. The public has access to watch to this meeting through the Local Government Cable Access Ch. 22 (Comcast), and streamed live through the City's website at www.somersworth.com. Although this is a public meeting, the public is encouraged not to attend and instead leave comments or concerns at the following phone number # 1-603-841-2936, by emailing ZBA@somersworth.com or by sending written comment to Zoning Board of Adjustment, 1 Government Way, Somersworth NH 03878. Comments must be received no later than 4pm the day of the meeting. The public can access the meeting and listen live by telephone and then adding the webinar I.D.

Roll call attendance was taken. Keiser was in attendance in City Council Chambers. Donohue, Fredette and Garvin were in attendance remotely and alone. Also in Council Chambers was Interim Planner Carol Ogilvie and Planning Secretary Dana Crossley. The applicant, Daniel Vincent, was also in attendance in Council Chambers.

Chairman Keiser appointed Garvin as a full voting member for the meeting. He stated the Board is a four member board for the meeting.

1) Approval of the minutes:

Fredette **MOVED** to accept the minutes of June 3, 2020.

Donohue seconded the motion.

The **MOTION CARRIED** by a 4-0- roll call vote.

2) OLD BUSINESS

- A) Any old business that may come before the Board.
 - i. No other business.

3) NEW BUSINESS

- A) **Daniel Vincent, is seeking an Appeal from an Administrative Decision for a property located at 21 Linden Street in the Residential Single Family/A with Historic Overlay (R1AH) District, Assessor's Map 11 Lot 118, ZBA#05-2020 PUBLIC HEARING**

Keiser opened the public hearing at 7:19PM

Daniel Vincent was in attendance in Council Chambers to represent the application.

Keiser stated the Board is a 4 member board for this meeting. He stated 3 affirmative votes are required to reach a positive decision. He asked if the applicant wished to move forward with the 4 member board.

Vincent stated yes.

Ogilvie stated the Board has received a copy of the staff report. She stated that included the applicable ordinance that triggered the denial of the building permit. She stated the opinion of staff is that this expansion of a nonconforming use is no longer allowed by the zoning ordinance. She stated the building permit application was reviewed by staff and determined it did not comply with 19.6.C.1.a and the permit was denied. The applicant has appealed that denial.

Vincent stated he is before the Board because of the denial he received from the Planner. He stated he is going to review the State Laws, Supreme Court rulings and other decisions that were reached in similar instances. He stated his property is pre-existing meaning it was pre-zoning ordinances in the City of Somersworth. He stated his house, barn and other buildings were built between 1840 and 1850. He stated because the use has not changed from residential, that a natural expansion of an existing nonconforming use is what the ordinance speaks about, and by the four prong test the Superior Court speaks about, he qualifies for the building permit.

Vincent reviewed the documents submitted with his application. He stated he received correspondence from City Staff and that the documents reference incorrectly that he is listed as having a multifamily dwelling on his property. He stated it is also incorrectly stated that he needs a ZBA variance. He stated a memo from the Building Inspector states there are 3 living units on the property, he stated that is incorrect there are 2 living units, 2 separate dwelling units. He referenced the site plan provided in the packet that showed the layout of the 2 dwellings.

Vincent stated the proposed addition of an attached garage is expanding the use of a pre-existing nonconforming use of a second unit by constructing additional residential square footage. He stated garages are accepted by accessory use in the R1A district. He stated the existing building is 20' x 36' and the proposed addition is shown on pg. 37 of the submittal. He stated he cannot expand a nonconforming use and that is considered a nonconforming use if he built it to live in. He stated the items and purpose of the ordinance are significant in his property. He stated it does not interfere with anyone's use, there are no problems with light and ventilation, no problems from fire and is the same if it was a garage or residential living space. He stated in a garage he could have a full bath but because the ordinance does not allow for expansion of a nonconforming use, which he thinks is incorrect, limits his residential use. He stated by permit only he could put a garage in the same space and footprint and keep in compliance with the purpose of the ordinance.

Vincent referenced page 15 of the submitted documents in regards to a building inspector denying a permit for an addition. He stated this reference is similar to what is happening here, a building inspector denies a permit for an addition and the owner appeals the decision to find the house is pre-existing non-conforming because it was built before the Town was incorporated. He stated the question here proposed in the presentation to the NH Municipal Association (NHMA) is if the Building Inspector can use the 4 prong New London test to determine the expansion is okay. He stated his question is upon receipt of the building permit application, what is the process to determine if it is approvable or not. He stated it is up to the person who reviews the application to determine if it is grandfathered or not and how to proceed. He stated his question is if the reviewer of the plan reaches the decision that the property is grandfathered, what would be the next course of action. It would not be for a variance request there would have to be something that is looked into besides grandfathered vested rights. He stated if he was to come before the ZBA and they find that he has vested rights and is grandfathered and he can meet the four prong test of the Simplex decision, something should have been done before he got to the point of the ZBA. He stated that is part of why he is appealing the decision because it was determined by not full review of the application.

Vincent stated there are some State law, *"just in terms of state law, in my view nothing prevents the 4-part New London test for changes/expansion of nonconforming uses from being applied, either originally by a building inspector, or later by the ZBA if someone files an administrative appeal (which he is here) of the building inspector's decision..."* (pg. 15 of submittal). He stated he does not like the idea of a building inspector applying 4-prong Supreme Court analysis and deciding whether or not to apply the zoning ordinance.

Vincent stated his property is within the R1A zone which is for single family dwellings. He stated that zone is surrounded by the Business, Historic Moderate Density, which he shares a driveway with, Recreation, R/B, R2 and R1. He stated special consideration should be given to those uses that are provided in those zones because he borders these zones and it should have consideration to what he can do on his property. He reviewed the map submitted as page 19 of the packet. He stated 19 properties about his property and they have existed for many years being subdivided in the 1940s. He stated available in his submittal is the tax cards of the abutting properties to his. He stated they are all residential use, 5 duplexes, several 6 or more units and 7 single family homes. He stated due to the size of his land, the red addition shown on the survey plan provided, goes into the existing driveway. He stated his property has enough land to support this addition and the addition would not overdevelop his land. He stated the existing structure has been there for 20 years and exists as and will continue to be 1 kitchen, 1 bedroom and 1 bathroom.

Vincent stated the intent of the addition is to allow for handicap access to the building. He stated he has a vested right because at the time of the adoption of the ordinance the amount of money he had invested in the project. He stated if he sought a detached garage he would be able to get an approved permit for that but denied putting a residential addition on part of his home. He stated the proposed addition is in line with the purpose of the zoning ordinance. He stated the only definition that fits his property is to describe it as a 1 unit single family as described in the R1A. He stated based on the minimum lot size requirements he has enough acreage on his lot for 4 dwelling units. He stated this addition will allow for himself and his wife to utilize the structure as their retirement home and be able to size down.

Vincent stated the addition meets the setbacks required in the R1A District. He stated his lot neighbors the HMD which allows more uses than his lot within the R1A. He stated his lot is the largest in the area.

Vincent stated he has provided the background of Bernard Waugh Jr. who wrote 'Grandfathered- The Law of Nonconforming Uses and Vested Rights'. He stated he has been an attorney for NHMA and noted in NH Superior Court cases. He stated the discussion of this meeting is his vested rights, his nonconforming use and grandfathering of his property. He stated one of the considerations is the rights of others. He stated *'In this State, the common-law rule is that an owner, who, relying in good faith on the absence of any regulation which would prohibit his proposed project, has made substantial construction on the property or has incurred substantial liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the subsequent adoption of an ordinance prohibiting the same.'* (pg. 58 of submittal) and this exactly defines the situation that he is in. He stated his structure was built in good faith and he could not foresee in 12-15 years into the future how the ordinance would change. He stated to determine his vested rights he would fall into this paragraph and he is covered with vested rights.

Vincent stated *'The State Constitution provides that all persons have the right of acquiring, possessing and protecting property. N.H. Const. pt. I, arts. 2, 12. These provisions also apply to nonconforming uses... As a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a nonconforming use.'* (pg 58 of submittal) and to be clear the vested rights apply to this project, which is an important feature the State sees as protecting the Constitutional rights and was brought to light in Loundsbury v. City of Keene as referenced above. He stated the State provides that all permits have a right to expand if it is not unreasonable. He stated he is asking for a 900 SF addition to his existing home that meets all setbacks, does not interfere with anyone's lives for the 20 years it has existed, will remain the same 1 bed, bath and kitchen. He stated there is no expansion of use, no more vehicles than what has been there for 20 years.

Vincent stated the heart of the 'Grandfathered- The Law of Nonconforming Uses and Vested Rights' doctrine is the investment backed expansion. He stated he has an excess of \$75,000 into this project and would be recognized as having a justified investment backed expectation which is part of his vested rights in this project. He stated his expectations for this project as he as discussed is that it is a retirement home for himself and his wife.

Vincent stated the use of land, at the time a restriction came on, the restriction that is applied to his land has not come into effect until after this use was constructed and then the new ordinance came into place that prohibits him from expanding a nonconforming use. He stated as you can see in the vested rights and grandfathering there are some additional considerations that should be used in this situation. He stated he has a vested right, it has not been discontinued, it has been used as residential in 1840. He stated it can continue indefinitely as long as it is not a nuisance, which it is not, harmful, which it is not and cannot be changed or substantially expanded without being brought into compliance. He stated there are no issues that he has to deal with to bring this into compliance. He stated he read the purpose of the ordinance and is in compliance with all of these articles that the zoning ordinance proposes is the basis of the ordinance. He stated whatever language is here he is in compliance with it. He stated *'What you need to know is what was happening on the property when the zoning restriction was first enacted. That's the only relevant time.'* (pg 60 of submittal). He stated what was going on when the ordinance came into place is they said nonconforming uses cannot be expanded, but this document provided states nonconforming uses can be expanded if they meet the 4-prong test of the New London land case. He stated through the Supreme Court they established a new 4-point criteria to whether or not an expansion of a nonconforming use would be permitted. He stated the nonconforming laws in place go back to 1958 within the NH Supreme Court who says *'since zoning by its very nature restricts and regulates the use of land and buildings to specified uses, provisions which permit the expansion, extension and enlargement of nonconforming uses are generally strictly construed'* (pg. 62 of submittal).

Vincent stated *'As recently as 1988, the Court said that provisions allowing continuation of nonconforming uses are also "strictly construed"...as you might expect from the words "strictly construed" the Court has said the burden of proof is on the landowner who claims a "grandfathered" use, to prove all the necessary elements establishing that right...or to show that an expansion of use is "not a new and impermissible one".'* (pg. 62 of submittal) and his intent is to show it is not a new use and is the same use for the last 160 years, has money invested which confirms his vested right, burden of proof is on him and he is trying to prove it is permissible. He stated it is not a new use, is an existing use, use remains residential and changed in 2000 from R3 District to R1A District.

Vincent stated pg. 63 of his submittal explains that grandfathered rights are protected by also RSA 674:19. He stated 674 does not apply to his structure or use but shall apply to any alteration of building for use, purpose or in a manner that is substantially different than use before alternation. He stated he is bringing this out to make aware that 674:19 cannot but used in this process as if it was done under 674:16 because through this the Court has again provided 4 criteria that will be shown and permit expansion of nonconforming use. He stated *'another recent court trend is to refuse to consider constitutional issues in court unless the party first raises them at the local level.'* (pg 63 of submittal) and is presuming if he does not talk about it here he won't be able to talk about it somewhere else. He stated in order to be grandfathered it talks to when the ordinance comes in place. He stated his project was approved and being lived in when the ordinance changed. He stated the ordinance change was in 2000 and that is the relevant time to look at and prior to that being 1840 before zoning ordinances were written.

Vincent stated the use is residential at adoption of the ordinance and will remain residential. He stated a use in violation of the ordinance which is repealed by another ordinance that does not apply to this case, just saying one means you're okay and if it gets appealed there is a different ordinance that makes it ok. He stated you are not entitled to the legal ordinance for the nonconforming use to come under a new ordinance. He stated *'the law is well established that a nonconforming use is permissible only where it legally exists at the date of the adoption of the zoning ordinance'* (pg. 64 of submittal) again, going back to when it was grandfathered and vested is the particular date the ordinance came into effect and what the land was being used for. He stated at that time the land was being used as residential use and will continue as such.

Vincent reviewed vesting and how much investment takes to be vested. He stated *'(the relevant thing) is ...the amount of money spent on improvements to change the use of the land in a tangible way which if substantial enough and done in good faith will create a vested right which cannot be affected by the enactment of a restrictive ordinance.'* (pg. 70 of submittal) and thinks that sentence there is contrary to what his attempts are. He stated his points certainly favor an approval

from this Board to continue with those kind of comments made on the side of vested rights. He stated *'the Court emphasized that the rationale for vested rights is that a developer has spent money in good faith reliance on the absence of restrictions'* (pg. 71 of submittal) and that can be read to mean there were no ordinances at that time printed or submitted that the developer had to be concerned with and in result proceeded in good faith. He stated which is now considered a good faith investment backed expectations, which even more so secures vested rights. He stated *'the correct standard for "substantial construction" vesting considers not only construction measured against the entire plan, but also whether the amount of completed construction is per se substantial in amount, value or worth'* (pg. 71 of submittal) and if looking at that number back then was \$75,000 and in today's money could be greater than \$100,000. He introduced the New London Land Use Case and feels it provides the best examples from NH Supreme Court for legal rules for when a nonconforming uses can be changed or expanded. He stated he is here to expand and use his nonconforming use. He stated it tells us nonconforming uses can be expanded where the expansion is a natural activity, they are sizing down, under social pressure to maintain their health in a situation that is healthy for them and when talking about natural activity it is a social activity as well. He stated he feels they also comply with the natural expansion of this activity which is *'closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance...'* (pg. 72 of submittal) he stated the use then was residential and remains residential after the expansion. He stated *'however, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate...'* (pg. 72 of submittal) he stated shown on the survey map, the 1.4 acres, scale wise the property is as long as a football field, with 100' of frontage and easy to say the addition won't cause any hard times for anyone surrounding his property.

Vincent stated his entire neighborhood is residential use and certainly this is not a different manner of trying to apply some other use to this project, strictly residential. He read from pg. 73 of the submittal to explain what a nonconforming use is. He stated the relevant question is at the time of the adoption of the ordinance what did the owner have in invested backed expectation and the answer is he wants to add on 900 SF. He stated the point is what the use of the land was at the time of the enactment, which in this case was residential and it will remain as such. He stated the Summary of New London Considerations for Legality of Changes in Nonconforming Uses describes the 4-part test, that if in compliance with this a permit should be granted for the expansion of the nonconforming use. He stated A of the 4-part test states *'Does the proposed change arise "naturally" (through evolution, such as new and better technology) out of the "grandfathered" use'* (pg. 73 of submittal) and added that in other documents that discuss the same topic, society and social events are part of this proposal. He stated the proposed change arises naturally because they are socially older in age, socially in need of health care and better living conditions for themselves, wider doors, no trip bathrooms, no fall in tubs, wider kitchen and it reflects the nature and purpose to the prevailing nonconforming use. He stated he would qualify for that portion of the 4-part test.

Vincent stated section B states *'is it required for the purpose of making the existing use more available to the owner;...'* which would be his wife and self, and certainly does because it accessible by allowing them to partake in their home in a better way. He stated it is not a different manner, and does not constitute a use in different nature and kind and feels that he complies with section B. He stated section C. states *'will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of this ordinance...'* this is especially true in the test for dimensional conformity. He stated as shown on the site survey there is enough land for the addition and does not make the land proportionally less adequate. He stated section D states *'Will the change or expansion have a substantially different effect impact on abutting property or the neighborhood'* and would say absolutely not. He stated this house has been there and occupied for 20 years, no increase in traffic and will remain 1 kitchen, bath and bed. He stated this is for more living 'get around' space. He stated the test for changes and expansions of non-conforming uses are not to gauge the community impact, meaning every case is different. He stated the Court has said *'the ultimate purpose of zoning regulations contemplates that nonconforming uses should be reduced to conformity as completely and rapidly as possible.'* (pg. 74 of submittal) he stated except they should be protected because it is within vested rights, investment backed reliance, the language relied on by the constitution and represented by what existed before the ordinance took effect. He stated looking at the preexisting use as a whole and not just portion violating the ordinance. He stated nothing has changed on the

property and will be the same use. He stated it does not matter if the impact is better or worse it is just the impact and better or worse is just how people feel about it.

Vincent read from pg. 75 of the submitted documents regarding new and better technology allowed and the New London Case which permits the nonconforming use to expand with technology. He stated in this case provided in the submitted documents references a case that a campground changed from tents to RVs and the courts found this permissible because the use was the same. He stated it says that would not have a significant change to the neighborhood. He stated if his property has the 900 SF addition on a 45,000 SF piece of land could look at it in the same frame because it will be a 1 bedroom to 1 bedroom. He stated the amenities he is looking for are those amenities for handicap accessibility. He stated he does not want the Board to forget that even without the handicap requirements his property and project meet the requirements for compliance to be approved.

Vincent stated that page 81 of the submitted packet speaks to special exceptions, where grandfathered rights fit in with special exceptions. He pointed out in the ordinance under permitted uses there is no special exception provided for such kind of use. He stated therefore nonconforming aspects in the use cannot be used to satisfy special exception standards because there is none. He stated the owner must 'fish or cut bait' and insubstantial change, which he believes his proposal is, within the vested right, which his is, the nonconforming use test, which they've gone over, the right exists without the special exception to continue with this project. He stated he thinks the Board has some flexibility where the Court recognizes the special exception, needless to say the ordinance does not recognize a special exception.

Vincent referenced page 82 Zoning Clauses which regulate nonconforming uses- tells us that the City has a more restrictive law that the common law should be followed. He stated Court preference for construing local clause consistent with the New London Test (pg. 82 of submittal) speaks to putting some language in the ordinance for handicap accessibility and uses. He stated on page 83 of the submittal addresses that nonconforming uses and variances are legal animals born of the same mother, namely the constitutional protection on property rights and to speak to vested rights and uses of property. He stated he qualifies to investment backed expectations and the document explains variances provide by zoning to avoid any court action to resolve any confusion that might have occurred in the ordinance or presentation with the Zoning Board. He stated *'since two types of rights are legally the same...'* (pg. 83 of submittal) meaning the rights discussed, both of the uses, and if he has a grandfathered property he does not need a variance because in essence he already has one. He stated he has to ask the question when the plans examiner required him to come before the Board for a variance, he would like the Board to take this into consideration that he already has a variance, there will be more language that supports an additional variance is not required.

Vincent stated in regards to approval of the permit as described on page 84 of the submittal, the language talks about if an owner wishes to expand or change a nonconforming use, he can argue that the expansion is a natural expansion, which does not change the nature of the use, does not make the property proportionally less adequate and doesn't have a substantially different impact on the neighborhood. He stated if this is true no variance is required for the expansion and feels that is a key point. He stated this argument presented has repeatedly told them of the land, expansion and how it will not change the nature of the use and does not make the property less adequate. He stated if he complies with this language the final of this is that no variance is required for this expansion. He stated *'in short the owner cannot have it both ways. If he cannot do what he wants to do within the confines of allowable "evolution" of the nonconforming use, then he must qualify for a variance the same way as if there were no nonconforming use.'* (pg. 84 of submittal) he stated he is adding this to the testimony for clear understanding of what is stated at the top of pg. 84 under A. He stated his argument seems to be satisfactory to indicate no variance is required for the use or expansion of this project. He stated if it fails their approval it means he needs a variance.

Vincent read from page 85 of the submitted documents regarding Simplex. He stated this is what would be needed to be used if in fact a variance is searched out for by the Board. He stated the expansion of rights

vested and grandfathered is self-explanatory and should get an approval. He referenced page 89 of the submitted documents that went back to his first question if the Board used the wrong standards for a variance. He stated what went wrong is the ZBA should have first applied the test for a natural expansion of a nonconforming use to see if Harry needed a variance. He explained the case described in 'The Problem of add-ons to nonconforming structures' as written on page 89 of the submitted documents. He stated in that case the house was built before there was an ordinance in that town the Courts found that he was allowed to enclose the front porch even though it was within the setbacks. He stated that the example proposal did not enlarge the footprint or make the lot size less proportional. He stated his request is not doing that it is certainly adequate and the reconstruction they are doing is with the means of an ordinary and reasonable adaptation to a property. He stated people put on additions all the time and theirs is for a family room and kitchen. He stated they need to rebuild the bathroom and relocate the kitchen. He stated the current size is not appropriate to make the changes needed.

Vincent stated the conversion of this structure is sizing down from the larger home they have. He stated it will be user friendly, health wise better for them, walking, standing and moving. He stated they will have room for wheel chairs and be able to walk by. He stated as shown on pg. 95 of his submittal, the New London case provides criteria. He stated the New London test only protects those uses or structures which must nevertheless be allowed because they are part of a justified investment backed expectation pre-dating the ordinance. He stated even though from a different writer it is the same gesture to compliance, although section b. in this narrative discusses changes of society. He stated when he reads that, sees bathroom fixtures and all doors made for residential housing that is available to them those are the technologies available they are working towards. He stated as far as the bathroom fixtures and that compliance for disabilities is the society side of the discussion. He stated the expansion will not change the property proportionally and it will not have a significant impact on the neighborhood. He stated the plans have been shared with the Historic District Commission and they were complementary of the historic features. He stated the re-creation of those historic features keeps in line with the 1840 main home.

Vincent stated he has provided language on 'Recognizing Conflicts Between Your Zoning Ordinance and the Americans with Disabilities Act' on pg. 100 of submittal. He stated this document covers that in order to qualify for a reasonable modification of the zoning ordinance under the ADA, an applicant need not meet the requirements for a variance, rather applicable test is whether a person needs it, is disabled or if modifications fundamentally hurt the neighborhood. He stated that would be the Board to prove that point. He stated the first two he could comply and the last would be for the Board to determine. He stated the strict requirement to grant a variance may be eliminated when accommodations are necessary for a person with disabilities to reside in a regularly used premises. He stated he hopes he does not have to move forward with a variance. He stated he has provided definitions of society, social issues and those social issues are what come before the Federal, State and Local government. He stated those cultural things are what are spoken of for society and expansion of natural resources.

Vincent stated he has provided the ZBA hand book produced by OSI. He stated it tells us a Zoning Ordinance under RSA 674:16 applies to alteration of a building for the use of a purpose or manner is substantially different, and he is not asking for anything different asking for the same use. He stated he does not know if they are telling them don't look at RSA 674:16 or for the Board to not look at it, it is under RSA 674:19. He stated it says a nonconforming use is one that is lawfully established before the passage of the provision in the zoning ordinance that now does not permit the use, which is his case and they do not want him to continue to use his nonconforming use even though it is a natural expansion of the use. He stated nonconforming uses enjoy constitutional protection under State law that allows them to expand to a certain degree. He stated in a particular case a nonconforming use may have the right to expand that may otherwise require a variance. He stated his goal here is to acquire the permit without the variance. He stated despite the fact that nonconforming uses violate the letter and spirit of zoning laws they have evolved to protect property rights. He stated in this State the common law rule is that an owner in the absence of regulations that would prohibit the project make substantial construction or liabilities on the property requires a vested right to

complete the project. He stated that covers his situation since when he built the structure he did not know the ordinance would change in the future to require him to build something different. He stated he complies that as an owner he complies and because of his grandfathered and vested rights, the doctrines that regulate nonconforming uses. He stated the State Constitution provides that all persons have the right for acquiring and protecting property. He stated NH Constitution articles 2-12 apply to nonconforming provisions. He stated past use of land hold for vested rights which he falls under because his land is residential. He stated it discusses to future use, you have to look back to when his vested rights began, the use was residential and it is remaining to be residential. He stated the town cannot unreasonably require the discontinuance of a nonconforming use. He stated if the City or Town kept implying you need a variance one could eventually discontinue a lot of things that should be appropriate that aren't. He stated the administrative officer denied his permit and it states that that decision can be appealed which is what he is doing.

Vincent stated an applicant cannot bootstrap their way to a variance. He stated he wishes to expand, he is not changing a nonconforming use. He stated he can argue the expansion is a natural expansion and the use is not being changed just a different manner of using the same use. He stated it doesn't make the property proportionally less adequate, doesn't have a substantially different impact on the neighborhood and complies with all of those. He stated technology and society regulate that it is a natural expansion. He stated the nature of the use is residential still. He stated it will be residential within a single family residential unit and does not make the property proportionally less adequate. He stated the legal test for expansion of nonconforming uses as provided by the Court cases New London Land Use Association. He stated the following factors of test, the nonconforming use is residential and remains residential, and there is only the natural change through evolution of technology. He stated the proposal is for the same residential use, no different impact to the neighborhood, house is hidden away from the abutters, his lot is larger than the surrounding neighbors, does not make it proportionally less adequate and does not make a new use remains residential use. He stated it will remain a neighborhood just as it has for the 30 years he has lived there. He stated on page 119 of the submittal II. Explains how the Board can make a decision on an appeal of administrative decisions.

Keiser stated there were no public comments received via mail, email or phone message.

Fredette stated in review of the tax card it appears there are two separate structures on the property. He clarified there was a more traditional house in the front and another in the back.

Vincent stated yes that is correct.

Fredette clarified the applicant is requesting to add onto the building in the back.

Vincent stated yes.

Fredette asked for more information about the house and if he lives there.

Vincent stated the house is going to remain a house, it is classified as two independent dwellings on one lot.

Fredette clarified the applicant does not live in the main house he is going to live in the smaller back house.

Vincent stated no he lives in the main house.

Fredette inquired if the applicant is moving out of the main house into the smaller house.

Vincent stated yes and that has always been their plan.

Fredette stated for the hardship portion there was discussion about a \$75,000 investment. Has he started the expansion project, where is the \$75,000 he stands to lose coming from.

Vincent stated the \$75,000 guaranteed his vested rights in his property.

Fredette clarified the vested right is the applicants right to use the \$75,000 that he has spent, his understanding is the applicant has a usable 1 bed, 1 bath, 1 kitchen structure right now, is it usable, is it rented or just a framed shell.

Vincent stated it is rented.

Fredette stated there was discussion about utilizing the pre-existing nonconforming, the argument was made that they don't want the applicant to continue to use the property. He stated he did not see that in the City's argument.

Vincent stated that was not what he was saying. The house he lives in right now, they are moving out of, is a 14 room house, his wife and self are disabled, the house in the back looking to make user friendly for their disabilities. He stated his vested rights started the day the City changed the ordinance.

Keiser clarified when speaking to the \$75,000 what was that for.

Vincent stated it was to build the building 20 years ago.

Keiser stated he has not started construction on the addition.

Vincent stated correct.

Fredette stated the City is not denying the applicant the right to continue to use the existing footprint.

Vincent clarified that because of the nonconforming use and zoning ordinances, there is caution from the State Supreme Court has taken that will not allow the City enforcing a zoning ordinance to eliminate the use.

Fredette stated the City is not telling him he cannot continue to use it as a rental unit.

Vincent stated he is relaying what the State Supreme Court is saying the City cannot use, is not implying the City is doing that. He stated this is also a situation that they are changing the kitchen, bathroom, size of doors, the floors for no steps, this is a structure they are rebuilding to allow them to rebuild and die there without moving into a retirement home. The law says he has the right to do that because he is grandfathered, vested and has the right to expand his nonconforming use and all of the documents he has provided prove that.

Donohue asked for information on the difficulties to make the main house on the street ADA accessible.

Vincent stated the bathrooms doors are not wide enough to enter with a wheel chair. He stated they would not be able to get upstairs to the bedroom being a two story home. He stated if they were using a wheel chair they would not be able to get into the house because of the stairs. He stated they would not be able to get around the kitchen between cabinets with a wheel chair. He stated they would likely not be able to get through any of the doorways since the house was built in 1840. He stated it has been their plan for years to move into the other house and is part of their vested rights, which permits them by law to complete the project.

Donohue asked if the existing footprint of the back house could be made ADA compliant/accessible.

Vincent stated it would be if, on the existing home they could but it is not big enough. He stated it is not big enough to put in ADA compliant kitchen or bathroom. He stated it has been their plan since they purchased the property 30 years ago. He stated they could have developed it into 13 dwelling units if they had wanted to. He stated they chose to follow the Master Plan and conserve the land on the hill. He stated he was a member of the Historic District Commission for many years. He stated he has always favored the preservation of land and structures. He stated his home has maintained the architectural features from 1840 including the additions being proposed, along with ones built. He stated there is no way to succeed at their goal by trying to make the 20' x 36' structure livable for handicap use. He stated even prior to that and the handicap use into play, he feels certain they are permitted expansion of a nonconforming use by the laws and regulations of the State of NH, the Supreme Court and documents discussed tonight.

Garvin stated along the same lines, the request is for about 900 SF addition, are there plans drawn up for the interior layout of new addition.

Vincent stated yes.

Garvin asked if the applicant could explain the layout, what will be in the new built section.

Vincent stated there was a footprint drawn out as part of the submittal (pg. 37). He stated looking at that, the existing 20' x 36', wants the Board to understand this makes the entire addition and going through the ordinance process unreasonable, he wants to put an addition on his legal, grandfathered, vested,

nonconforming use and is protected by the NH Supreme Court to move forward with this. He stated the existing structure contains 1 bedroom, bathroom, kitchen and living room. He stated the door into the bathroom is less than 2ft wide, the space between the kitchen cabinet and the refrigerator and stove is about 30" wide and to try to use that as handicap space there is not enough room. He stated if they move the walls around there will not be enough space for the bedroom. He stated to move walls then they would not have room for the living room. He stated they are required to have 25 Sf to move a wheelchair around. He stated looking at the new addition, he could call it a garage and receive a permit to build the garage. He stated he cannot get a permit to put a house there because it is an expansion of a nonconforming use. He stated he is permitted by the ordinance to put in a garage but cannot live in it and thinks it is unreasonable. He stated it will still contain 1 bed, bath and kitchen and the addition will allow more space do have those features with handicap accessibility. He stated there is no way to make the main house 14 rooms handicap accessible or want to live in such a large house, to heat and maintain.

Garvin stated if you need to make the structure ADA compliant and in result of that a little extra space is required, that is what he is trying to figure out. He asked how much additional space he needs to be ADA compliant. He stated it sounds like what he is doing is adding some more space and reconfigure everything with the same amount of rooms just to have larger rooms.

Vincent stated no. He stated he is trying to construct a home they can live in. He stated it is not about more space it is about letting them die in a comfortable spot in their own home and not go to a nursing home. He stated regardless of how much space he needs is not relevant to the Board. He stated what relevant to the Board is the language that already says it does not make the lot less proportional and thinks that is the concern the Board should have. He stated that is what the law says, the law does not talk about how he uses the space but if it is proportional to the land and it is.

Keiser reminded the Board that the only issue they are dealing with is the administrative decision. He stated right now they are discussing the administrative decision and questions related to whether the administrator made the correct decision or not.

Fredette stated his questions for the administrative decision side have been decided. He stated he is coming to the conclusion that this would require a variance.

Vincent stated it is well established in the guidelines for non-conforming uses that a variance is not required. He stated it also says the ZBA should not be involved in this decision because it does not make the standard to come before because there is no change under RSA 674. He stated he should not be here and is being judged and commented that he may need a variance. He inquired how he can protect himself with the language supplied is State Law and Superior Court and his presentation is not understood by a comment from a Board member thinking he needs a variance when it is clear he does not.

Keiser stated the law is interpreted differently by all.

Vincent asked for the Board to re-examine the requirements for variance and determine if he needs a variance according to the law. He stated if he meets the 4-prong test he does not need a variance and the Board has not asked him if he meets it.

Keiser closed the public hearing at 8:57 PM.

Donohue stated the applicant brought up several good arguments. He stated the applicant outlines how case law says this is contrary to our zoning ordinance and expansions of non-conforming use are allowed if it is a natural expansion. He stated the applicant has provided a thorough argument to how this is a natural expansion. He stated he thinks the need for the ADA compliance accessibility house rather than just an addition for another unit. He stated he is expanding the use to allow them to be able to use it in a way that is

functional and enjoyable for day to day enjoyment and movement. He stated he thinks it is a natural expansion of non-conforming use. He stated he does think City Staff made the right decision in denying it but with the full hearing thinks it is a natural expansion. He stated the ordinance, the footprint or area of a nonconforming use shall not be expanded but case law allows for some expansion. He stated upon appeal he feels they can approve the request.

Fredette stated he recalls a couple of cases they have heard in the past that are relevant to this appeal. He stated the problem is the ordinance is clear and the Court has not stricken down our ordinance. He stated he is not saying he is opposed to this project but feels the path for this project is a variance. He stated the applicant is trying to do what the ordinance does not allow. He stated he would want to know what the ADA compliant addition looks like in this case and how the layout will change for the interior. He stated 900 sf. is the size of some apartments. He stated for him to meet the burden of an appeal he would want to see more detailed plans. He stated he does not feel the applicants vested rights are being violated because he is not being told he cannot continue to use what he has as it was built. He stated most homes are limited by what the zoning ordinance allows and there are changes to zoning those properties have to follow.

Garvin stated his thoughts come down to the natural expansion and how it is defined. He stated if the amount of expansion was explained he could see the argument better. But just to say he wants 900 sf. added to his house because he has a house, he finds trouble and is leaning towards that a variance is the right area. He stated he believes it is more than a natural expansion. He stated he does not have enough information to justify it as a natural expansion.

Keiser stated the issue before them is if the administration made the correct decision in denying the building permit to require a variance. He stated based on *'no such non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than was occupied at the effective date of adoption or amendment of this ordinance'*. He stated the New London case is primarily focused around use. He stated a nonconforming use, in this case the non-conforming use is multiple dwellings on one property, and it is allowed to have the structure on the property based on the fact that at the time of the ordinance change it was previously allowed. He stated looking at the criteria of the New London case are pretty much met except that the Court has repeatedly stated, as provided in the documents by the applicant, it is very clear that even though that there can be a natural expansion of the use not of the physical property for example a new car dealer to used car dealer. He stated that is what they mean by natural expansion. He stated Court has repeatedly stated you cannot expand the physical layout of the property by adding additional building. If you want to expand the physical size or add a building to a property that is a nonconforming use it requires a variance. He stated it is shown on page 75 of the applicant's submittal and page 90. He stated the home owner has the vested right to continue to use the property as it exists right now forever, but not the right to expand without a variance. He stated in this case he feels the administration has made the right decision in denying the building permit and requiring a variance to build the expansion.

Garvin stated he agrees with Keiser's statement.

Fredette stated Keiser made a well-polished statement and is in agreement.

MOTION: Donohue stated After review of the application, the file and all the information presented to the Board, I feel that the appeal should be denied because City Staff made the correct decision in determining that this is an expansion of non-conforming use that does not meet the criteria of natural expansion and I move that the request of Daniel Vincent for an appeal of the Director of Development Services' interpretation of Section 19.6.C.1.a and denial of building permit be DENIED.

Fredette questioned if the motion language was too specific.

Ogilvie stated it is generally fine and could be clarified that they have found in their opinion this does not meet the standard of natural but limited expansion as discussed.

Donohue stated that is an adequate clarification.

The MOTION is SECONDED by Fredette.

The MOTION CARRIES by a 3-1 roll call vote. (Donohue voting in the negative)

Keiser called for a recess at 9:16PM

The session was called back into order at 9:19PM

B) Daniel Vincent is seeking a variance from 19.6.C.1.a to expand a non-conforming use (residential two-unit dwelling) by constructing a 916sf addition to a detached, carriage-house apartment on a property located at 21 Linden Street, in the Residential Single Family/A with Historic Overlay (R1AH) District, Assessor's Map 11 Lot 118, ZBA#06-2020 PUBLIC HEARING

Keiser opened the public hearing at 9:19PM.

Keiser stated the applicant has stated they do not wish to move forward with this application.

Vincent stated he requests to withdraw his application for a variance.

There was a brief discussion between withdrawing the application or tabling the application.

The issue of a full 5 member board was brought to attention.

Vincent stated rather than withdraw the application; he requests a full 5 member board to hear the application.

Fredette requested the applicant provide information on the interior layout of the addition for the next hearing.

The application has been tabled to the September 2, 2020 ZBA meeting in order to have a full 5 member board review the application at the request of the applicant.

Donohue **MOVED** to **ADJOURN** the meeting. Garvin seconded the Motion. The **MOTION CARRIED** 4-0 by a roll call vote and the meeting **ADJOURNED** at 9:24PM.

Respectfully Submitted,

Dana Crossley, Planning Secretary