

SOMERSWORTH ZONING BOARD OF ADJUSTMENTS
MINUTES OF MEETING
September 16, 2020

MEMBERS PRESENT: Brad Fredette, Coty Donohue, Matt Keiser Chair, Glenn Garvin-Alternate
Ken Vincent-Alternate, Keith Perkins-Alternate

Excused Members: Richard Brooks and Ken Vincent – Alternate

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

The meeting was called to order at 6:04PM.

Keiser 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 to 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**, and **Perkins** were 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.

Chairman Keiser appointed Perkins and Garvin as full voting members for the meeting.

1) NEW BUSINESS

- A) MOTION FOR REHEARING: Daniel Vincent, is seeking a rehearing of the application denied on August 5, 2020 for 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**

Ogilvie stated this request for a rehearing came in from the applicant because of the denial of an appeal of administrative decision that occurred on August 5, 2020. She stated the applicant filed this motion for rehearing within the 30 day appeal time frame. She stated the law allows the Zoning Board to grant a motion for rehearing if they find that the Board made an error in the review process or decision, or the applicant supplies new substantial information. She stated the purpose of this meeting is for the Board to review the application and decide if there are grounds for a rehearing.

Keiser stated the applicant has asked the Board to continue the motion for rehearing to a later meeting to allow them to submit additional information. He stated the applicant is seeking additional information from the City Clerk who has not provided that information yet. He stated in discussion with the Interim Planner Ogilvie, they have determined, which is backed by case law, the applicant has 30 days to submit their motion for rehearing. He stated case law has determined that the submission must be made within 30 days and in the case when an applicant tried to supply an amendment to their request, it was found that only the information that was submitted within the required 30 day appeal period can be considered in the motion for rehearing request. He stated it is in his and the interim Planner's opinion to not entertain the request to table.

Keiser asked for other Board members opinions.

Fredette clarified that the Chair was of the opinion that the Board should make a decision on the motion for rehearing tonight.

Keiser stated yes, they should discuss the motion for rehearing and make a decision.

Fredette stated he is in favor of making a decision on the motion for rehearing request at this meeting. He stated he still feels that the applicant should be applying for a variance. He stated after review of the submittal he feels the applicant is asking the Board to decide that the City Planning Office erred in not granting the building permit as presented without a variance.

Fredette questioned if the four prong New London test was for a variance.

Keiser stated it can also be used to determine if a non-conforming use can be modified without a variance. He stated it is not strictly for a variance test but to see if a non-conforming use can be modified.

Keiser stated they are looking first to resolve the question of the request for continuance.

Fredette stated he does not think they should continue this request.

There were no other comments from the Board members in regards to a continuance.

Keiser stated they would not be continuing the motion for rehearing and would make a decision at this meeting.

Fredette stated there was no new information supplied and none that would compel him to change his thought process. He stated he feels it is a variance issue.

Donohue clarified there would be a rehearing if there was new information or if the Board had erred in the decision making process. He stated reviewing what was submitted for the motion for rehearing, he does not think the Board made mistakes. He stated he thinks everything was considered fully, he stated there were different opinions on the Board but everyone did have an understanding of what was in question. He stated there is nothing supplied that substantiated that the Board made an error. He stated he does not support a motion for rehearing.

Garvin clarified that the applicant does not make a presentation and the Board just reviews the submittal to make the decision on the rehearing.

Keiser stated that is correct.

Garvin stated he agrees with the other Board members in regards to what was provided and the Board's decision at the previous hearing. He believes this is not the type of decision the Planning Office should make in regards to expansion but rather should go through the variance process. He stated that is the purpose of the Zoning Board and does not believe a rehearing is justified at this time.

Fredette clarified it is an A/B test because a rehearing can be granted because the Board made an error or there is compelling new information provided by the applicant.

Keiser stated it could be both.

Keiser stated in review of the submitted motion for rehearing the applicant specified three issues to why the Board should grant a rehearing, those are, natural expansion is permitted, the New London four prong test should have been applied to the request and grandfathered vested rights are being disregarded. He stated in addressing the grandfathered vested rights, at the time of the zoning ordinance change that rezoned this property to R1/A, there were two dwelling units on the property. He stated that is called 'multifamily' by the Zoning Ordinance and that the multifamily use was grandfathered and the Board came to a consensus of this matter. He

stated the existing structures and multifamily use could continue. He stated the applicant's argument claims that due to the fact he was planning to extend the second structure and that he had spent \$75,000 to build it originally he was grandfathered and had vested rights to put an addition on. He stated the Board discussed that issue and disagreed, the use of the existing structure is grandfathered to be used as a dwelling. He stated since for an addition there were no approved plans, no building permit, nothing gone through the Planning Board, neither monetary investment nor construction started on the addition, the applicant was not vested in the addition. He stated there are case law decisions that speak to this issue, it is clear though that what was in play at the time of the zoning change is what is grandfathered. He stated he does not think the Board erred on this issue and was correct in the determination that the addition was not grandfathered, nor did the applicant have a vested right to construct an addition.

Keiser stated the first two issues brought up in the motion for rehearing are both in regards to the New London Land Case. He stated the Board did consider the New London case and talked about natural expansion and what that was. He stated the applicant had an interpretation of natural expansion that he wanted to make the structure ADA compliant and that it was a natural expansion. He stated the New London case is primarily a use case and not a physical change in property and talks about expansion or natural expansion such as pinball arcade to video arcade for technology changes. He stated it does not speak to physical expansion of a property, such as the square footage or footprint of the property. He stated there are several cases that go along with this, Grey Rocks Land Trust v Town of Hebron where the property attempted to add a separate boat building the was denied, Town of Hampton v Brust where an arcade wanted to expand into a second room of an existing building was denied being it was a physical expansion, and Devany v Town of Windham where someone sought an 18' expansion and was denied because it was a physical expansion. He stated the Board did apply the New London test and did not err in the application that it did not meet the New London test. He stated there is a hierarchy in the review, first ask if the property/use is grandfathered, is there a vested right, is the New London case met, and in this case it is no to all, therefore he thinks the Board was correct.

Keiser stated in further review of the write up a reason for a rehearing is that the application of the ordinance to his property is unreasonable due to the size of the lot. He stated the applicant argues that a garage of the same size would be allowed which was the same argument as presented at the hearing. He stated the issue at hand is if a variance is required to physically expand a structure for a legally nonconforming use, not that the addition should be built, therefore the City was correct in denying the building permit. He stated this is an issue that has been brought up by many Board members that this is a variance issue. He stated he reviewed the application for new information and did not find any new or contrary to the Board's decision information. He stated a floor plan was presented and this was discussed at the meeting. He stated to him this level of information is not relevant due to the enlargement of the structure in any way regardless of the floor plan, the expansion request requires a variance. He stated he does not think the Board erred, it was correct in what decision it made and a motion for rehearing should not be granted. He stated if the applicant wishes to build the addition he should seek a variance.

Fredette stated additionally, the ADA was brought up and looking at the original document submitted the applicant is not seeking something such as an elevator; this request is for a considerable expansion to a structure. He stated in regards to the floor plan, the discussion from that meeting was for a floor plan to be submitted with the variance request. He stated he does not see any new information that would compel him to change his opinion.

Garvin stated he agrees with the Chairman's comments. He stated physical expansion could be discussed under a variance request. He referenced the Calef Auto residential structure that won the suit in court to be able to expand.

Keiser stated he also re-reviewed that court decision noting that it did not allow an increase of the square footage and used the word volume. He stated it was an allowed increased volume and the term was used differently than in previous cases, where volume meant intensity of the non-conforming use within the building. He stated there was another case where someone had a porch and were allowed a natural expansion to enclose the porch. He

stated he would agree there is some grey area as in all cases. He stated in the Calef Auto case it was referenced that it was 'only 192 sf increase' which made it known it was a small increase allowed as a natural expansion. He stated in this request it is doubling the size of the building which is considerably more.

Fredette stated in regards to the Calef Auto case, the footprint did not change, but this request is for a considerable change in footprint. He stated currently the applicant (property owner) resides in the main home and rents the small apartment. He stated the applicant is asking to expand the second unit, and would in his opinion change the character of the property because the primary residence would be the secondary dwelling.

Garvin stated the Zoning Ordinance is approved by the City Council.

MOTION: Donohue stated, after review of the request and all the information presented to the Board, I feel that the Board did not err in the decision making process and no new substantial evidence was provided and I move that the request of Daniel Vincent, for a rehearing of ZBA#05-2020 **be DENIED.**

The MOTION is SECONDED by Fredette.

The MOTION CARRIES by a 5-0 roll call vote.

Other Business

No other business before the Board.

Perkins **MOVED** to **ADJOURN** the meeting. Donohue seconded the Motion.

The **MOTION CARRIED** 5-0 by a roll call vote and the meeting **ADJOURNED** at 6:35PM.

Respectfully Submitted,

Dana Crossley, Planning Secretary