

**Newton Planning Board
January 19, 2011**

The regular meeting of the Newton Planning Board was called to order at 7:00 pm on Wednesday, January 19, 2011 by Chairwoman McCabe.

MEMBERS PRESENT: Mrs. Becker, Mr. Russo, Mrs. Le Frois, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Mr. Caffrey, Mr. Hardmeyer, Mrs. McCabe.

SECRETARY: Kathy Citterbart

PROFESSIONALS PRESENT: Mr. David Soloway, Esq., from the firm Vogel, Chait, Collins and Schneider, and Cory Stoner, Board Engineer from the firm Harold E. Pellow & Associates

OTHERS PRESENT: Deputy Town Manager, Debra Millikin

FLAG SALUTE - RULES - OPEN PUBLIC MEETINGS ACT

OATH OF OFFICE was administered to: Marge McCabe, Class IV, Gary Marion, Class IV, William Tharp, Class IV, Kent Hardmeyer, and Alternate. No. 2.

REORGANIZATION

Mr. Russo made a motion to approve Mrs. McCabe as Chairwoman. Mrs. Becker seconded the motion. The floor was open for discussion and closed. Mrs. McCabe was approved by a unanimous "aye" vote.

Mrs. McCabe made a motion to approve Mr. Le Frois as Vice Chairman. Mr. Flaherty seconded the motion. The floor was open for discussion and closed.

AYE: Mrs. Becker, Mr. Russo, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Mr. Caffrey (Alt. 1), Mr. Hardmeyer (Alt. 2), Mrs. McCabe

RECUSED: Mrs. Le Frois

Mr. Russo made a motion to approve Mrs. Citterbart as Board Secretary. Mrs. Le Frois seconded the motion. The floor was open for discussion and closed. Mrs. Citterbart was approved by a unanimous "aye" vote.

PROFESSIONAL APPOINTMENTS FOR 2011

Mr. Russo made a motion to approve Mr. David H. Soloway, Esq., of the firm Vogel, Chait & Schneider as Board Attorney for the year 2011. Mr. Flynn seconded the motion. The floor was open for discussion and closed. Mr. Soloway was approved by a unanimous "aye" vote.

Mr. Russo made a motion to approve the Resolution for Professional Services – Municipal Planning Board Counsel. Mrs. Becker seconded the motion. The floor was open for discussion and closed. The Resolution was approved by a unanimous "aye" vote.

**Newton Planning Board
January 19, 2011**

Mrs. McCabe made a motion to approve Mr. David Simmons of the firm Harold Pellow & Associates as Board Engineer for the year 2011. Mr. Greg Le Frois seconded the motion. The floor was open for discussion and closed. Mr. Simmons was approved by a unanimous "aye" vote.

Mrs. Le Frois made a motion to approve the New Jersey Herald and New Jersey Sunday Herald as Newspapers of Record. Mrs. Becker seconded the motion. The floor was open for discussion and closed. New Jersey Herald and New Jersey Sunday Herald were approved by a unanimous "aye" vote.

Mrs. McCabe made a motion to approve Jessica Caldwell, P.O., A.I.C.P. of the firm Harold Pellow & Associates for the year 2011. Mr. Le Frois seconded the motion. The floor was open for discussion and closed. Mrs. Caldwell was approved by a unanimous "aye"

Chairwoman McCabe opened up this portion of the meeting to get some clarification on the **Technical Review Committee**.

Mr. Tharp asked: I am not sure how this Technical Review Committee will be more efficient for the applicant?

Mr. Russo stated: This works very well in other communities and there are many benefits to the process. Basically the applicant has the opportunity to seat down with town staff and professionals to go over the conceptual diagrams, drawings of the proposed development and discuss it in a more informal setting rather than a Planning Board meeting. So, when the applicant gets to the Planning Board, the application is complete. What I have found during my tenure here is that sometimes these applications will come to the Planning Board and ask questions that are very basic and rudimentary and the applicant hasn't thought of certain aspects whether it be traffic, lighting, signage, etc. These are very basic things and the Technical Review Committee would have already discussed this with the applicant. In the end, it will help to speed up the process and make it easier for the applicant to have their projects reviewed and it gives them a fair representation of what the planning board thinks their deficiencies are in the application.

Mr. Russo continued: I do agree that a deck application isn't really what the purpose of the Technical Review Committee (TRC) is but applications that are bigger in scope that the Zoning Board didn't have experience with but the Planning Board did that is what the purview of the TRC would be for.

Mr. Soloway stated: I understand the concerns in terms of "mom and pop" applications where they need a deck variance or an addition on your house, but they don't have to attend the TRC meeting and as Mr. Russo tried to indicate is it can save the applicant money.

Discussion ensued on the **Technical Review Committee**.

**Newton Planning Board
January 19, 2011**

Chairwoman McCabe made a motion that she will be on the Technical Review Committee with Mr. Hardmeyer and Mrs. Becker as the alternate. Mr. Flaherty seconded the motion. The motion was approved with a unanimous "aye" vote.

APPROVAL OF MEETING DATES FOR 2011

January 19, 2011
February 16, 2011
March 16, 2011
April 20, 2011
May 18, 2011
June 15, 2011
July 20, 2011
August 17, 2011
September 21, 2011
October 19, 2011
November 16, 2011
December 21, 2011
January 18, 2012

Mrs. Becker made a motion to approve the meeting dates for 2011 at 7:00 pm. Mr. Le Frois seconded the motion. The meeting dates were approved by a unanimous "Aye" vote.

NEW BUSINESS

Chairwoman McCabe stated: I felt is it important to have By-Laws in place so all procedures that will go on in the combined board will be very clear to everyone. I don't want there to be any confusion on how the new board should be run.

Mr. Russo made a motion to approve the Planning Board By-Laws. Mrs. Becker seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mrs. Le Frois, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Mr. Caffrey, Mr. Hardmeyer, Chairwoman McCabe

CONSIDERATION OF MINUTES

December 15, 2010

Mr. Russo made a motion to approve the December 15, 2010 minutes. Mr. Le Frois seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mr. Flynn, Mr. Le Frois, Mr. Caffrey, Mrs. McCabe

**Newton Planning Board
January 19, 2011**

December 7, 2010 Zoning Board Meeting

Mr. Marion made a motion to approve the December 7, 2010 minutes. Mr. Tharp seconded the motion.

AYE: Mr. Marion, Mr. Tharp, Mr. Hardmeyer

HISTORIC RESOLUTIONS:

HPC#16-2010

Dr. Sam Kahlam/Northern NJ Endoscopy

Block: 708 Lots: 8 & 9

18 Church Street

To provide new board-on-board fence, make improvements to the existing air conditioning unit and control the sound and approve the current one as it is. The exhaust pipe is to go on outside of building.

SWORN: Yogesh Mistry, Licensed Architect

Mr. Mistry gave an overview. 18 Church Street is an existing two-story building. My client who owns the building is a doctor and is in the process of renovating the ground floor into a surgical and doctor's office. He came to the planning board a while back for parking variances. At the time there was a proposed exterior generator but as the result of the hearing was the generator be moved inside the building, which they did. During the course of designing this phase and in the course of construction the contractor had made changes to the HVAC equipment and this resulted in 3 additional condensing units on the exterior of the building. The Dr. also wanted to have a fence put in along right side of the building and partially on the rear side of the building and because of the generator being put inside the building we had to find a way to let fresh air in and the exhaust out. We met front of the Historic Commission several times and we did get final approval on December 15, 2010. The board-on-board fence is along the right side of the property, diagonally near the front of the building long the side on the doctor's property. This fence came as a result of discussions with the neighbor to help reduce the noise from the additional condensers. The area way in the front of the building will be a masonry window well that allows fresh air to get underground into the basement where the generator is location. They did have concerns about the exhaust and what we agreed to was that we would run the pipe back to end of the area way outside and all the way up to the point of the roof.

Mr. Flynn asked: What did you cap the masonry chambers with or are they open?

Mr. Mistry stated: It is a metal grate so that air can get in and out. Mr. Mistry explained that the generator only operates in case of a power outage during the day. In addition to the generator being on during a power outage it would be on during a maintenance cycling. It has to be left on once a week for 20 minutes.

**Newton Planning Board
January 19, 2011**

Chairwoman McCabe asked: Do you know the hours they agreed on for the maintenance check?

Mr. Mistry stated: I believe during business hours.

Mr. Le Frois asked: Will there be any special sound material that you are putting around the condenser.

Mr. Mistry stated: Yes. We are going to deaden the sound. The fence itself will be 6 feet in height.

Discussion ensued about the appearance of the fence over time.

Chairwoman McCabe recommended the applicant put a sealer on the fence to keep it from graying.

Mr. Flynn stated: He would rather see a cedar fence in lieu of pressure treated wood.

Chairwoman McCabe opened up this portion of the meeting to the public.

With no one stepping forward, the public portion is closed.

Mr. Flaherty made a motion to approve the Resolution with the condition that there be a sealant applied to the natural wood with a preference to cedar. Mr. Becker seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mrs. Le Frois, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Mrs. McCabe

**PB#07-2010
Thorlabs Urban Renewal, LLC
Block 1104, Lot 21.56
Sparta Avenue
Amended Final Site Plan**

Mr. Russo made a motion to approve the Resolution. Mrs. Le Frois seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mr. Flynn, Mr. Le Frois, Mr. Caffrey, Mrs. McCabe

**Newton Planning Board
January 19, 2011**

PB#08-2010
Mariorana Enterprises
Block 1201, Lot 5 and 5.03
100 Sparta Avenue
Final Site Plan of Phase One

Mr. Le Frois stated: On page 5, item 5 of the Resolution, (truck size) should be WB50.

Mrs. Becker made a motion to approve the Resolution. Mr. Russo seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mr. Flynn, Mr. Le Frois, Mr. Caffrey, Mrs. McCabe

OLD BUSINESS

PB#06-2010
Triple M. Realty, L.L.C.
Block 405, Lot 41
48 Water Street
Amendment to Site Plan approval
Carried to February 16, 2011 @ 7pm with no further notice required.

NEW BUSINESS

PB#01-2011
Living Waters Fellowship
Block 716, Lot 17
93 Spring Street
Preliminary & Final Site Plan approval

Mr. Michael Hannifan, PA, Counsel at Law, represented the applicant.

SWORN: Joseph Golden, of the firm Golden and Moran, 21 Main Street

Mr. Golden's qualifications were accepted by the Board.

Mr. Golden testified: The Town's ordinance allows the Board to waive the requirement for site plan as long as there is not disturbance. On Mr. Simmons' letter dated January 13, 2011, item 2A, he states that he deems it complete. In lieu of the site plan I will be referring to **Exhibit A1**. The marked Exhibit A-1 is a copy of an Orthro photo which is a scalable photo where the photography has been modified so that it has been downloaded from the New Jersey information website and I copied it at a 20 scale.

Newton Planning Board
January 19, 2011

Mr. Golden reviewed the photo with the Board. He also talked about the parking. He discussed the measurements of the alter area. The parking is identified by the number of seats inside the church.

Discussion ensued on modifications.

Chairwoman McCabe asked: Were you informed that you have to go to the Historic Commission? The way it works is you have to get approval from the Historic Commission and then come back here because they are advisory to the Planning Board. You will not be able to get final approval on this application tonight. It will have to go the Historic Commission next month and then the month after that you have to come back to the planning board to get approval for the exterior.

Discussion ensued on the parking.

Mr. Soloway stated: I am not sure I agree with your interpretation of the ordinance because you are changing the use and although you are not changing the parking facilities there is a change in the required amount of parking and if we accept the interpretation of the ordinance you could put any permitted use in that building, propose no parking change and take the position that is in compliant.

Mr. Stoner stated: C2 special parking requirement, if they can show they have authority to park then it gets them away from the variance. This is in section 20-8.8.2.

Mr. Golden stated: We will be using the public parking off peak hours on Sunday. We do believe we have adequate parking whether we use the 61 or the 44 spaces.

Mr. Le Frois stated: My question was is the walkway owned and maintained by the owner's of the Cochran Building?

Mr. Golden stated: Yes. There is a shared maintenance issue. I believe the town maintains the lot but the County/Cochran people maintain the walkways. They assured me that it would be maintained.

Mr. Le Frois asked: Is that written in your lease agreement?

Mr. Hannifan stated: We proposed language as per Mr. Simmons' request. We would like guidance on want language you think would be more acceptable for approval. This would help us to finalize our lease agreement.

Chairwoman McCabe asked: Can we base an approval on this application based on the fact there will be free and clear and safe access from the parking lot to the building?

Mr. Soloway stated: When reviewing an application one of your responsibilities is to ensure yourself that there is safe access.

**Newton Planning Board
January 19, 2011**

Chairwoman McCabe asked: Does this board have any say on signage that is outside the property being leased?

Mr. Soloway stated: If it is part of this application, yes, but if it is on another property then the property owner has to consent.

Mr. Golden stated: The reason why I brought the sign up to the Board was to make sure you were not adverse to it.

Mr. Golden stated: I would like to touch on the as-built plan.

Mr. Stoner stated: Relating to the as-building plan we wanted to know what was built and was actually leased. When it is all said and done have to make sure what was built is what is actually on these plans.

Mr. Soloway stated: I would put a note on the plan that the seating is not permanent. It will be removable chairs. Generally the Board's action to extend to what is going on inside but my suggestion would be in the event the Board approves this application and they come back it would be appropriate for them to say, "no more than" how many seats will be in the main area.

Discussion ensued on amount of seating.

Mr. Stoner asked: Where will be the two signs be?

Mr. Hannifan stated: One will be on the time and temp and one in the window.

Mr. Marion asked: The one sign that you have in the back maybe get approval from the Historic Board and Cochran Plaza. Will they be providing funerals here requiring use of the parking lots in the front of the building?

SWORN: Thomas A. Litterer, Reverend of Living Waters Fellowship

Mr. Hannifan asked: Where do you currently worship?

Rev. Litterer stated: Sussex County Community College.

Mr. Hannifan asked: Have you ever considered funerals or weddings?

Rev. Litterer stated: No. We would probably have more weddings than funerals though. If funerals are a problem, let me know, and we can say that they are not a function of the church.

SWORN: Matthew Miglin, General Contractor, member of Living Waters Fellowship and will be assisting in some of the renovation work.

**Newton Planning Board
January 19, 2011**

Mr. Miglin stated: He is a general contractor and one of the members at Living Waters Fellowship and will be assisting in some of the renovation work.

Mr. Hannifan asked: We're you involved with the development of these plans?

Mr. Miglin stated: I helped the architect with this so when we did the surveying of the entrance we did find that the level of the sidewalk and the level of the interior floor was about a 4 to 6 inches difference. So in the entry way there is sufficient room to have an accessible handicap ramp so it will make up the difference between the two doorways.

Chairwoman McCabe asked: Can we give them preliminary approval tonight?

Mr. Soloway stated: It seems to me that there are still some open items. One is how are we going to treat parking? There is a procedure in the ordinance where the applicant if they meet the requirements can get board authorization on parking without the necessity of getting a variance because they do not have the required spaces on site but I don't think the applicant has gone through that procedure or addressed the full ordinance. There are some open items as to access signage. They really are asking for a waiver of site plan approval. What the Board generally does when it grants a waiver of site plan approval is it generally opposes come conditions that you ordinarily get with a site plan. I don't know if we are at the point that we know everything we need to know. I think what the applicant needs to know tonight is what they need to supply you. You don't need to grant the waiver of site plan tonight because I don't think the Board knows all the conditions. If there are any areas that the Board wants address in order to grant the waiver of site plan approval, you should tell the applicant.

Mr. Hannifan stated: We respectively believe the parking issue is addressed by the ordinance and that there is adequate public parking.

Chairwoman McCabe asked: Is the waiver contingent upon them getting some sort of approval or is it because it is public parking which is sort of a moot point?

Mr. Soloway stated: As I read the ordinance, it seems to indicate that before the Board makes a determination whether existing off-street parking facilities can be counted toward the parking requirement consultation must occur with the Parking Authority or the owners/operators of the parking lot where they are proposing to park. The ordinance indicates that the Board should consultation with them.

Mr. Golden stated: I did do that. I visited with Town Hall and the County and determined that there are some spaces on the far end that have been dedicated to the attorney's office. The owner of the builder to verify it was okay.

Mr. Le Frois stated: We were looking for a little more clarity on the walkway and the access to it, the maintenance of it.

Mr. Golden stated: It was designed to access the public parking lot.

**Newton Planning Board
January 19, 2011**

Discussion ensued with parking.

Mr. Russo stated: The Parking Authority will make sure you understand any restrictions, hours of the lot, the uses permitted in the zone. The bulk of your activities will occur on Sundays where the parking is free; on Saturdays the lot is not heavily utilized. I think they might delay the application but you should recognize what goes on on Spring Street. The lot that you are speaking of is the one lot that can handle the capacity.

Discussion ensued should have gone to HPC for external approval and then to this board for change of use.

Mr. Soloway stated: This Board can grant this application tonight for a waiver of site plan subject to getting a written authorization from the Parking Authority that the parking spaces will be made available for their usage, condition on getting their Historic Commission approval on the door and signage and a condition on Mr. Simmons' recommendations.

Mr. Soloway stated: There is nothing this Board can do tonight to expedite the Historic Commission process.

Mr. Soloway stated: The applicant cannot start building until all the conditions of the approval have been satisfied.

Mr. Soloway stated: I thought that is where you were going. I thought you were going to grant a waiver of site plan approval.

Mr. Stoner stated: They still will not be able to get a building permit until all of the conditions are met.

Chairwoman McCabe opened this portion of the meeting up to the public.

With no one stepping forward, this portion of the meeting is closed to the public.

Chairwoman McCabe made a motion to grant a waiver of site plan contingent upon Parking Authority approval, Historic Preservation approval and in compliance with Mr. Simmons' report. Mr. Flaherty seconded the motion.

AYE: Mrs. Becker, Mr. Russo, Mrs. Le Frois, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Chairwoman McCabe

OTHER BUSINESS

**Gordon Newton Associates, L.L.C.
Block 102, Lot 1.02
222 High Street**

Newton Planning Board
January 19, 2011

Informational only – Mrs. Citterbart stated: They are going to take care of the lower rail come early spring due to inclement weather.

PB#02-2011

Katterman/Reinhardt

Block 612 Lot 2 (which includes Lot 9.01)

16 Foster Street

Amended variance and Site Plan Approval (Zoning App.)

Recued: Mrs. Le Frois, Mrs. Becker recued due to a conflict of interest.

Chairwoman McCabe recued herself because her husband Mr. McCabe testified in a previous hearing.

Vice Chairman Le Frois took over this portion of the meeting.

Mr. Soloway gave an overview of this application to the Board. The Board members were given in their meeting packet a copy of the Board of Adjustment Resolution which was adopted on November 2, 2010 and a slightly modified resolution that was adopted on August 3, 2010 from which tonight's application flows.

Mr. Soloway continued: This is all related to a garage that was constructed by the applicant, Mr. Reinhardt on an under sized land lock lot. The applicants applied for and received from the Town permits to build that garage. The applicants' neighbors Marie Nardino and William Radzelovage were aggrieved by this garage for various and complicated reasons and there have been some disputes between these two parties. Ms. Nardino and Mr. Radzelovage wrote letters to the Zoning Officer complaining that the permits to construct this garage never should have been issued and they complained of various other items. Ultimately the Zoning Officer made a determination that they were correct and that the garage should not have been granted permits because it required a Use Variance being that it is a principal use on the lot and a garage is not permitted as a principal use in that zone. The Zoning Officer also determined that a number of bulk variances were required as well. The applicants were directed to either remove the garage or if they made an application to the Board of Adjustments the garage would be permitted to remain pending the outcome of that application. They did make an application to the Board of Adjustments.

Mr. Soloway continued: Initially the applicant who is represented by Mr. Richard Clark appealed the determination of the zoning officer and sought variance relief in the alternative. At the initial hearing, the application acknowledged the Zoning Officer's determination on whether a variance was needed was correct; they proceeded with the variance application. After several hearings the application was granted and the Board of Adjustment separately granted a Use Variance determining that a garage could be on that lot and a number of separate C variances for various bulk violations and a D variance for a floor area ratio violation as well. That determination was memorialized in the resolution and it was adopted last October. Ms. Nardino and Mr. Radzelovage filed suit in the superior court challenging the Board's action. That suit is

Newton Planning Board
January 19, 2011

pending. The resolution was slightly modified in November to delete one of the conditions which tied into one of the causes of action that they asserted in the complaint return for deleting that condition the complaint was amended but essentially the complaint challenging the grant of that approval was still out there and the litigation is pending.

Mr. Soloway continued: In the meantime, there was another dispute between these two parties which is not before this board tonight relating to something on the applicant's land which also resulted in a variance grant. One of the conditions attached to that variance grant was that the applicants provide an as-built survey. After the as-built survey was reviewed it disclosed that the garage in terms of the setbacks did not exactly correspond with certain conditions of the variances that were granted with the Board of Adjustment. Specifically the Board of Adjustment in its resolution allowed a rear yard setback for the garage at 11.07 feet; the survey submitted by the applicant indicated the set back was only 10.81 feet. It also allowed for side yard setbacks of 6.73 and 6.42 feet. The survey indicated it was also noncompliance there again by inches 6.34 and 6.40. Total side yards setbacks were suppose to be 13. 15 and they are actually 12. 74. The Zoning Officer was going to issue a letter notifying the applicants that they were not in compliance and I called Mr. Clark to let him know and he indicated he would make application to the Board of Adjustment at that time so the letter never got issued. The applicants are here to deal with this situation. In my opinion these are C Variances not D Variances because the D was dealt with separately as part of the original resolution. In the resolution that was passed out in the Board members' packets in the factual findings paragraphs 20-22 is essentially where these two variances were discussed.

Mr. Soloway continued: What is before the Board tonight is the side yard and the rear yard only. We are not here to redo the original application. The Board of Adjustments made their decision and that will be sorted out one way or another by the superior court. This Board is not to make any presumption or feel it has any obligation to grant the applicants any relief based upon the fact that the Town issued the permits and that the garage is there. This Board is only to decide the merits of the variance essentially as if it hasn't been built yet.

Marie Nardio, 36 Linwood Avenue stated: I thought there was a condition in the November amended resolution for an as-built survey as well.

Mr. Richard Clark stated: It is in there, condition 6.

Mr. Richard Clark of Laddey, Clark and Ryan representing the applicant.

Mr. Clark stated: The Zoning Board did find the basis for the garage allowing the garage that is there to stay there. We are here tonight to talk about the lot that has the garage on it. **Exhibit A1 the 2010 survey prepared by G.L. Worley & Associates.** You notice the dimensions are slightly different as well as the setbacks but they are very, very minor. The rear yard which the resolution talked about was 11.07 but it is actually 10.81; the side yard setback is 6.73 and 6.42 and the resolution has it at 6.34 and 6.40. On the 2010 survey the total side yard which is another requirement, the resolution says

**Newton Planning Board
January 19, 2011**

13.15 and they are actually they are only 12.74. You currently have a sealed survey and during the prior hearing there was also a sealed survey and that is where the earlier dimension came from so that is the difference. We have two different surveyors with slightly different opinions. 22.80 feet by one surveyor and 24.22 by the 2008 survey so it is not like there was anything misleading, we were basing our findings on a professional survey. I am not sure who is correct. Relief was not granted because the building was there. Relief was granted because we made the case for hardship, that this is a suitable lot for a garage. The only objector is on the other side away from this lot and doesn't touch this lot. Regardless of what this is, where this garage is now that is what we approve so we are trying to catch up the paperwork to the survey that came in. We are trying to say that where this garage is, which is very close by both surveyors' opinions, it can stay where it is. He was going to get cited for it so he came in. On the 2008 survey it doesn't show any overlapping encroachments but on the 2010 survey, this surveyor has a slightly different opinion that there is a foot and a half. That has been there for years and years. Maybe we have a right to it or not. The question is do you really want to disapprove or approve that? I don't think you need to approve that. If you want us to give notice to the adjacent property owner; they may know it already because their survey might show that. I don't know. There is also one on the right which shows a driveway over line 2.1 up at the top. That has been there. Why wouldn't it be there? This lot was created in 1961 and it could have been used that way. But that is not the objectors who come here to object that is someone else's property. It is not their property; they just don't want us to get any approvals. You will also note for all the dimensions just about all the way around the lot even the two surveyors don't agree to the exact size of it. This has happened if any of you have had property's that have been resurveyed. There are differences of opinions. What is important is that there was no misrepresentation. We wanted the survey and so did the Board. Again, there is a newer survey which doesn't make a difference for the relief which is the important part. The garage is where it is and has been for awhile. We just ask that you approve these variances based on the reasons that were granted before nothing else has changed.

Mr. Flynn asked: Were the meets and bounds of both surveys compared? Were those descriptions part of the survey that was submitted?

Mr. Clark stated: That is a good question. All I can tell you is the 2008 survey and the deeds were given to the surveyor who did it in 2010. That is pretty standard practice from my understanding. It is a difference of opinion. I don't know which one is right.

Mr. Flynn stated: In the description you would be able to determine exactly where the discrepancy lie.

Mr. Clark stated: You will notice in the 2008 survey there is a difference of a line there that is shown on the right hand side a dotted line by deed that is where it is shown to be the property when in fact, the 2010 surveyor has the line out further.

Mr. Stoner stated: What Mr. Clark is suggesting about two surveyor's having a different opinions is not an odd thing. On the back lot there is a difference of opinion of where that point was and that changes a lot of different items from there. It also depends on

**Newton Planning Board
January 19, 2011**

how well the first survey was done. We are taking a couple inches and I think that is reasonable.

Mr. Hardmeyer asked: Do you know what instruments they used to make these measurements. How are they dividing a foot into hundreds?

Mr. Clark stated: I don't know that process.

Mr. Hardmeyer asked: They would be using a tape wouldn't they?

Mr. Stoner stated: No, they don't use tapes anymore. They use an electronic distance measurement (EDM). Everything is electronics these days. They do little in tape and especially when you looking at the difference of the surveyors. This is 2008 vs. 2010 technology between the two they are relatively the same. If you were looking at one from 1940 vs. 2010 that would be a lot different.

Mr. Hardmeyer stated: There could be error in reading the instruments.

Mr. Stoner stated: Absolutely. It also depends on who did it. There are times that you can almost tell how good it will be before you even look at it. I am not familiar with the one done in 2008 but the 2010 we have seen his work around; it is pretty good.

Mr. Soloway asked: Why didn't you go back to the same surveyor?

Mr. Clark stated: I don't know.

Mr. Stoner stated: The house lot is very close between the two. It is a difference of opinion on the back lot. Just so you know, this lot 9.01 was subdivided off of what looks like a bowling alley lot. It goes down to Ryerson Avenue. It was subdivided back in 1961 or 1962.

Mr. Le Frois opened this portion of the meeting up to the public.

Mr. Soloway stated: **Exhibit 2 will be the 2008 survey prepared by Ernest W. Hausmann.** I don't have a problem with authenticating it because the Hausmann survey was submitted to and considered by the Board of Adjustments and the more recent survey was ordered by the Board of Adjustments and was submitted as a condition that was opposed by that board. Mr. Clark's purpose tonight is not to determine which survey is correct. That is not uncommon and it is inconsequential.

SWORN: Ms. Marie Nardino, 36 Linwood Avenue.

Marie Nardino stated: Bill Radzelovage will speak to the differences in the survey and why it is consequential and will all due respect to Mr. Stoner and Mr. Clark the dimensions of Lot 9.01 were determined in 1963. The dimensions were before the zoning board. The lot was 340.65 sq. feet. It is in the resolution. The survey that the applicant submitted showed 350.19 sq. feet that is also in the resolution. The Zoning Board made no inquiry as to why there was a difference. In every single deed transfer since 1963,

**Newton Planning Board
January 19, 2011**

when Lot 9.01 was created the dimensions were as they are in the new Worley survey. Mr. Worley correctly surveyed the property. It is in conformance with our survey and it is in conformance with all of the surveys prior to the 1989 Katterman survey which was then copied by the 2008 survey. I strongly disagree with the testimony that surveys are not reliable. They are used for the transfer of property. They are taken from the dimensions of deeds describing the property.

Mr. Stoner stated: The surveys are not based on deeds. They are based on whatever the surveyor determines what the property line dimensions are. There are many deeds that are incorrect.

Ms. Nardino stated: The deeds might be incorrect but these deeds were all correct. Mr. Radzelovage will explain exactly what happened here, our concern and the reason why we are objecting of course. We are in litigation so we are bound to object. This shows that the construction on Lot 9.01 is encroaching on two property owners on the side and because of the approval of the zoning board for this entire Lot 9.01 development. If this Board approves these differences in the garage they are also approving the Lot 9.01 development. They are approving the encroachment on two property owners. Lot 9.01 was developed and approved by the Zoning Board so that the entire lot was developed and now showing that part of the Lot 9.01 is really part of Lot 3 and Lot 11 and they are encroaching on their neighbors' property.

Mr. Soloway stated: The survey prepared by Mr. Worley indicates three encroachments. She is only addressing two. If anybody looked at this closely you would see a third one. There is a driveway which is at the roof of the dispute between these parties that is being used to access the garage. Ms. Nardino and Mr. Radzelovage have taken the position that the applicants do not have the right to use that as access to the garage. A portion of that driveway crosses Mr. Radzelovage and Ms. Nardino's lot. That is the subject of a separate law suit in the Superior Court. The driveway that I am talking about also encroaches beyond the right of way that is shown on this survey and Ms. Nardino is not complaining about that tonight nor did the Board of Adjustment get into that. Not because the Board of Adjustment is not condoning it but because that is an issue for the other lawsuit. What Ms. Nardino is talking about tonight is you will see the driveway as it curves around to the south to access the garage and a corner of the pavement crosses over Lot 11 according to this survey. The other encroachment she is talking about is directly on the other side of the lot where there is a wall that is shown which extends into Lot 3.

Mr. Soloway stated: Before we get to that. I want to stay on that issue. I don't agree with Ms. Nardino that the Board of Adjustment, based on what it did or the planning board based on what it might do tonight, is approving or condoning those two encroachments. I think it would be appropriate for this Board, in the event it approves the application or even if it denies the application, to note specifically in the record that it is not doing that particularly relating to the driveway access that it is not an intention to indicate that in any way is part of any approval that previously has been granted. Mr. Clark has indicated that the applicant would be happy to send some kind of notice to these property owners putting them on alert to what this survey shows in

Newton Planning Board
January 19, 2011

terms of the wall. I really don't know anything about the wall and I don't know if it has any things to do with what was before the Board of Adjustment. I don't know what it is and when it was put there. There is nothing in the records that I recall that talks about that wall.

Mr. Stoner stated: I think one of the reasons it wasn't talked about before was the 2008 survey did not show the encroachment.

Mr. Stoner also stated: That wall is part of the wall that holds up this driveway that goes to the garage. The level where the cars are is almost like a second story portion of the garage and leading down to this garage is a very substantial retaining wall. This little piece that is connected to it is attached to the wall. I think it was part of this project that was done. I do think it has to be addressed on some formal fashion whether it is a notice to the property owners or what not. The zoning board did not approve that.

Ms. Nardino stated: The approval of the walls is part of the resolution and all of the walls are within. There was an issue that was brought up during the hearing about the retaining walls.

Ms. Nardino asked: What do you do about the wall that is on the other property?

Mr. Tharp stated: We heard testimony from Lot 4.

Mr. Stoner stated: But if they don't have approval to leave the wall in that location in addition to their other issues with the property owners they are going to have issues with property owners.

Mr. Tharp stated: One survey says it is encroaching and one says it is not. We need a tie breaker.

Mr. Stoner stated: You go by the current survey.

Mr. Nardio stated: How about Mr. Dragg's survey since we relied on Mr. Dragg in 1963?

Mr. Stoner stated: I would think we go by the current survey. Everybody agrees there is an encroachment. The question is how do you address it?

Mr. Clark stated: I am saying there are two different surveyors and the one in 2008 has a different opinion. I would just leave it alone. My point is who knows what Lot 3 survey shows. It may show that as being there for a long time. It is out of the purview of the Board in this case.

Mr. Soloway stated: It is one thing to say if you have two surveys and there is a discrepancy, it is a very common situation and it is difficult to say that one may be right and one may be wrong but if the second survey which again you submitted indicates in term of the wall that you have a foot and half encroachment and Ms. Nardino's point is when the Board approved the garage it also approved the access subject to

**Newton Planning Board
January 19, 2011**

the reservation of whatever the court might open and there was discussion in the resolution and if the wall is on somebody else's property at least has to consent.

Mr. Clark stated: I will put it on Mr. Reinhardt to testify how long the wall has been there. It is not something he did in the last couple of years when this garage was put up.

Mr. Tharp asked: Doesn't the property owner of Lot 3 have to complain?

Mr. Soloway stated: We don't know of the owner of Lot 3 is even aware of this situation.

Mr. Soloway stated: My concern is typically on a land use application if you are proposing something that is on a property the owner of that property has to consent. There is a condition in the resolution that arguable might require work on the wall, is that not correct?

Mr. Stoner stated: If an engineer comes back and says it is not safe, yes. An engineer certified wall still applies for that whole wall.

Mr. Soloway stated: My recommendation on the other encroachment would be that it is not the intention of the Board to require or approve any portion of the paved driveway being on Lot 11 and perhaps Mr. Clark direct the applicant to send a letter notifying them.

Mr. Le Frois asked: Why wouldn't a similar concept apply to the wall?

Mr. Soloway stated: Because pending the testimony, it is not clear to me whether the wall is necessary to the access. I don't know the answer to that.

SWORN: William Radzelovage, 36 Linwood Avenue

Mr. Radzelovage stated: Twelve days ago we received a letter telling us about this meeting. Five days ago I went to Mrs. Citterbart's office to look at what was submitted. The requests for the changes that are the subject of this meeting were based on the 2010 survey. In the application only the 2008 survey to justify it which didn't require the changes. It was mind boggling that the letter with application said he put in the 2008 survey because the changes were de minimis and a survey is only a surveyor's opinion. That was his reason for not putting the 2010 survey in. I think the reason why they did it was because they were afraid the owners of Lot 3 would show and see the 2010 survey. Mr. Clark made a few comments in his presentation. He was taking about the driveway cutting across the corner of Lot 11 and he said that driveway had been like that forever but it hasn't been paved over Lot 11 forever. It has been paved like for less than 10 years because I live next door. Mr. Clark said he didn't know which survey was valid. The 2010 survey the shortest lot line is 22.80 feet on that survey. Every deed of Lot 9.01 says it is 22.82 feet so we are two hundredths of a foot off. It shows a foot and half of overlap on that wall on the Lot 3 corner. We had a Cattalano Survey done on our

Newton Planning Board
January 19, 2011

property in 2007 and it puts that corner exactly where the 2010 survey puts it and from everything heard nobody in his right mind will challenge a Cattalano Survey and expect to prevail. I think it is indisputably that the 2010 survey is the valid one. No deed comes anywhere near 24. 2 or 3 feet on the short plain. It is all 22.82 including Katterman's deed. He did not include the survey in the application that justified the application. The application was severely flawed and should have been thrown out.

Mr. Clark asked: Did you read my letter to the Board dated November 12, 2010.

Mr. Radzelovage stated: I believe I read it.

Mr. Clark asked: What does the first sentence say?

Mr. Radzelovage stated: We submitted the required survey dated November 1, 2010 in accordance with condition 6 that got amended November 2, 2010 resolution. This was not part of the package that I was given.

Mr. Clark asked: Who is the letter to?

Mr. Radzelovage stated: Mrs. Citterbart, Zoning Board of Adjustment.

Mr. Clark asked: You were here at that November meeting?

Mr. Radzelovage stated: Yes.

Mr. Clark asked: You were very interested in this application, right?

Mr. Radzelovage stated: Yes.

Mr. Clark asked: In fact you were handed a copy of the November 2010 survey and you are now complaining that you didn't know about this?

Mr. Radzelovage stated: That is not what I said, Mr. Clark. I said the application package that Mrs. Citterbart showed me last week Friday did not have that survey in it.

Mr. Clark asked: Because of that did you feel that you didn't have the information we are taking about tonight?

Mr. Radzelovage stated: I am saying that you did not included the survey that required the changes you were asking for and the reason you didn't include was that overlap on Lot 3, I am certain.

Mr. Clark stated: Did I ever tell you that?

Mr. Radzelovage stated: No you did not tell me that. I will let the Board decide that for themselves.

Newton Planning Board
January 19, 2011

Mr. Clark asked: Did you ask to see the zoning board file because that is where the resolution that is being amended is.

Mr. Radzelovage stated: I have that. I don't need to ask to see that.

Mr. Clark stated: I just asked whether you asked or not?

Mr. Radzelovage stated: No, I did not.

Mr. Clark stated: Would it surprise you that the survey of 2010 the very same one you have would be in there?

Mr. Radzelovage stated: That wouldn't surprise me at all.

Mr. Clark stated: That is all I have.

Mr. Radzelovage stated: That is not my point. I will comment as public again. The application we were shown last Friday was certified copies was not complete and the survey presented with it did not justify the application. It is incomplete and should not have been accepted.

Mr. Le Frois stated: Thank you very much for your comments.

Mr. Le Frois closed the public portion of the meeting.

SWORN: Thomas Reinhardt, 16 Foster Street.

Mr. Clark asked: You are familiar with the 2010 survey and what is an encroachment as shown on it.

Mr. Reinhardt stated: I am very familiar with the area.

Mr. Clark asked: Do you live in the house?

Mr. Reinhardt stated: Yes.

Mr. Clark asked: Do you use the garage?

Mr. Reinhardt stated: Yes.

Mr. Clark asked: How long have you live in the house?

Mr. Reinhardt stated: I believe since 1987.

Mr. Clark asked: I am only asking about the overlap of the wall. When you moved in there was there a wall there or not?

Mr. Reinhardt stated: That wall was present at that time.

Newton Planning Board
January 19, 2011

Mr. Clark asked: Did you reconstruct the wall?

Mr. Reinhardt stated: No I did not.

Mr. Clark asked: Has that wall been the same way since 1987 to the best of your recollection?

Mr. Reinhardt stated: Absolutely.

Mr. Clark stated: That is all I have.

Mr. Le Frois stated: We have in front of us a variance that looks to specifically address changes in the rear and side yards measurements that were originally developed from a 2008 survey but have since changed as a result of a 2010 survey. We need to decide what our stance is on the variance. Again, I just want to confirm that the action we take I would like to exclude the encroachment of the driveway into Lot 11 on the North East corner of Lot 9.01, the driveway encroachment further south along the easterly property line of .3 feet and I would also like to exclude the location of the wall and strictly speak to the dimensions that are provided relative to the rear and side yard setbacks. Mr. Soloway is that something that limits our approval sufficiently?

Mr. Soloway stated: When you say excludes, my recommendation is that in any resolution you make clear that you are not approving that. That you are not granting any authorization for any encroachment onto any other land and I would also recommend as to the wall if you want to exclude it you should make a finding that is appropriate that it is not integral to the approval if you grant an approval that you are giving. That would be my recommendation.

Mr. Flynn asked: We are approving the exact dimensions on this 2010 survey?

Mr. Flynn asked: Not to say that if the discrepancy between the wall encroaching over the corner of the lot can't be brought up again by some other let's just say the person who owns Lot 3. We are not making a decision on that? But the decision stands on this survey in front of us now tonight?

Mr. Soloway stated: If that is what you are incline to do. I will note again that Mr. Clark offered to send some kind of notification to the owners of those two lots.

Mr. Le Frois stated: Can we make that a condition of our approval?

Mr. Soloway stated: Certainly.

Mr. Le Frois stated: Approach the owners and let them know that these potential discrepancies have been noted.

Mr. Soloway continued: Let Mr. Clark or his client send a letter, copy provided by the Board, to the particular owner notifying them that a survey was performed in

Newton Planning Board
January 19, 2011

Mr. Soloway continued: Let Mr. Clark or his client send a letter, copy provided by the Board, to the particular owner notifying them that a survey was performed in connection with this application and state what the survey indicated. If the Board is not inclined to require consent then just leave it at that. If they want to complain they will complain.

Mr. Le Frois and Mr. Flynn both agreed we do not need to require consent.

Mr. Flynn stated: The difference between the dimensions on the two surveys are so minimal; I think the discrepancy between the two that in the decision of this application would it be okay to not vote on the detriment that it is causing to the people that have objected tonight? Do you base the decision on the facts that we are talking about tenth of a foot, hundredths of a foot?

Mr. Soloway stated: Neither party has given any testimony tonight relating to a detriment. There has been none on the part of the applicant that there isn't and there has been none on the part of the objectors that there is. The Board of Adjustment when it granted the initial variances made findings on those issues and this Board can if it chooses that the findings made by the Board at that time are equally applicable in terms of the several inch apparent deviations.

Mr. Flaherty stated: I look at this as if there were no garage there at all would I still approve the 6.34 as opposed to 6.4. Would I still approve this and I seem to say that I would based if there was no garage. Is there any great significant difference there?

Mr. Tharp made a motion to approve the application with the new dimensions as stated on the 2010 survey as part of this application and made a condition that Mr. Reinhardt has to send notice to Lot owners of Lot 11 and Lot 3. Mr. Marion seconded the motion.

Mr. Soloway stated: I will also indicate to the Board that when I prepare the resolution in this particular case, I will put in a condition indicating that the applicants are required to comply with all prior conditions relating to this because there some.

Mr. Hardmeyer stated: If it is not a financial burden on the applicants in notifying their neighbors to include a copy of the map with the letter.

Mr. Clark stated: I was going to do that anyway.

Mr. Soloway stated: This motion would be an amendment to the prior resolution.

Mr. Le Frois stated: Specifically to the setbacks?

Mr. Soloway stated: It is technically three variances because of the way it is written. It is rear yard, side yard and total side yard.

AYE: Mr. Russo, Mr. Flaherty, Mr. Flynn, Mr. Le Frois, Mr. Marion, Mr. Tharp, Mr. Caffrey, Mr. Hardmeyer

**Newton Planning Board
January 19, 2011**

PUBLIC PORTION

Chairwoman opened up the public portion of the meeting. With no one coming forward, Chairwoman McCabe closed this portion of the meeting.

ADJOURNMENT

Mr. Le Frois made a motion to adjourn the meeting. Mr. Flynn seconded the motion. The meeting was adjourned with a unanimous "aye" vote. The meeting adjourned at 10:42pm. The next regular scheduled meeting will be held on February 16, 2011 at 7:00 pm in the Council Chambers of the Municipal Building.

Respectfully submitted,



Katherine Citterbart
Board Secretary

**Newton Planning Board
January 19, 2011**

EXHIBITS

Living Waters Fellowship

Exhibit A1, marked as A-1. It is an Ortho photo which is a scalable photo where the photography has been modified so that it has been downloaded from the New Jersey information website and I copied it at a 20 scale.

Reinhardt/Katterman

**Exhibit A1 2010 survey prepared by G.L. Worley & Associates
Exhibit A2 2008 survey prepared by Ernest W. Hausmann**