

**TOWN OF ELSMERE
BOARD OF ADJUSTMENT
MEETING MINUTES
February 28, 2023
6:30 P.M.**

PLEDGE OF ALLEGIANCE:

CALL TO ORDER:

ROLL CALL:

CHAIRMAN	JAMES PERSONTI	PRESENT
BOARD MEMBER	JOHN ACTON	PRESENT
BOARD MEMBER	PATRICIA BOYD	PRESENT
BOARD MEMBER	RON RUSSO	ABSENT
BOARD MEMBER	JOHN SMITH	PRESENT

Code Enforcement Officer, Nicole Facciolo – Present
Code Enforcement Officer, Scott Allen - Present

PUBLIC COMMENT: None

APPROVAL OF MINUTES:

Minutes from the January 24, 2023, Board of Adjustment Meeting

ACTION: Board Member Acton made a motion to approve the minutes from the January 24, 2023, Board of Adjustment meeting with no corrections. Board Member Smith seconded the motion.

VOTE: All in favor Motion carried

OLD BUSINESS: None

OPENING STATEMENT:

Administrative Assistant for the Code Department Denise Lardani read the opening statement.

NEW BUSINESS:

Review Petition 23-01 Tax Parcel # 19-00500-104

The applicant seeks to appeal citation V2300336 issued by the Code Enforcement Department. The Board of Adjustment will review and render a decision regarding this appeal.

Alex Argain, representing the owner of the Property, spoke as the Appellant, Elsmere Code Enforcement Officer Scott Allen and Code Enforcement Officer Nicole Facciolo represented the Town as Appellee. Prior to hearing any testimony, all witnesses who are expected to testify were sworn in by Chairman James Personti.

Mr. Argain stated he is working for Dominos again since October 2022. He is currently making changes to the staff and procedures. He does not dispute the legitimacy of all the citations that were received, especially being provided the pictures. His request is to reduce the cost of the last fine and re-establish a good working relationship with the Town of Elsmere.

Mr. Argain does feel the one thing that he saw repeatedly was a standard practice for them. The managers were to open the boxes for the daily supply and place them outside the back door and taken to the dumpster eventually. He has now since changed the procedure to open the boxes inside so they will not be piling up outside the back door, then break the boxes down and take to the dumpster directly from inside the building so they should not be piling up outside anymore. He wasn't sure about the citation that had water jugs strewn through the back but does not dispute the legitimacy of the citations.

Mr. Argain feels with his new management team and new procedures, this should not be a problem anymore. He has given his contact information to the Code Enforcement Officers so to have a positive communication with the Town. He is hoping to have a reduction of the cost of the fine.

Board Member Boyd asked when the new procedure was issued because there has been a new violation in December for the same thing.

Mr. Argain stated that his new General Manager had not been placed at the point of the new procedure.

Board Member Boyd asked if Mr. Argain knew if all fines have been paid except the large one for the appeal. He responded in talking with Mr. Taylor (the owner) yes they have.

Chairman Personti asked the Code Enforcement Department if there was previous invoice of \$1,000.00 that was paid?

Code Enforcement Officer Allen stated yes it has been paid and spoke about previous citations that have fallen off of the 12 month rolling citation criteria. It has been an issue for several years.

Board Member Boyd asked has it been the same issue for the citations, as in the boxes and trash throughout the property. Code Enforcement Officer Allen responded yes.

Code Enforcement Officer Allen stated he believes the Town has met the burden of proof beyond a doubt with Chapter 145 and the amount of citations that were either complaint

driven or by patrolling the area. The Code Enforcement Officers have gone inside to talk to the employees, managers, supervisors, or whomever is the highest employee at the time. They seemed like they just did not care. The property does meet the definition of repeated public nuisance.

Chairman Personti asked Code Enforcement Officer Allen do you see an improvement to the property?

Code Enforcement Officer Allen stated yes there has not been a complaint during or after hours since he had a conversation with Mr. Argain about the issues and how to apply for the appeal process.

ACTION: Board Member Smith made a motion to approve Petition 22-10 and reduce the \$2,000.00 repeated public nuisance fine to \$1,000.00, with a stipulation if another citation happens within a 6-month period the \$1,000.00 reduction of the fee will need to be paid as well as the new fine. Board Member Boyd seconded the motion.

VOTE: 3 in favor and 1 opposed, 1 Absent Motion carried

Boyd – Yes, Russo – Absent, Acton – No, Smith – Yes, Personti – Yes

Review Petition 22-10, Tax Parcel number 19-00800-381.

The applicant seeks approval to construct basement unit apartments (these basements were apartment units previously roughly 30 years ago) in Apartment Building 1511 Maple Avenue. The Board of Adjustment will review and render a decision regarding this petition.

Sam Moskowitz, spoke on his own behalf as the Petitioner, Elsmere Code Enforcement Officer Scott Allen represented the Town as Appellee. Prior to hearing any testimony, all witnesses who are expected to testify were sworn in by Chairman James Personti.

Mr. Moskowitz thanked the Town of Elsmere, all Board Members, Code Enforcement Officers for the job they have done and for allowing him to appear before the Board.

Mr. Moskowitz stated his petition tonight is to seek approval or variance to allow him to construct a one-bedroom apartment where they were before the Town Code was approved to not allow an apartment in the “cellar”.

Petitioner Sam Moskowitz provided an exhibit of his own labeled Petitioner Exhibit 1 with a summary of points from the Planning Commission meeting held on February 7, 2023. Number one was the confusion in the FEMA map, number two the parking and whether there is enough parking for the additional proposed new units, all of the spots associated with the building were counted and there are 164 spots in the back, 180 spots

in the front for a total of 344 spots. Considering this approval is for one building 1511 Maple Avenue, there is sufficient parking. Number three information on what is considered a “cellar” in the Town Code. Number four the issues that came up from the neighbor (dogs, drugs, parking, and basements being vandalized).

Mr. Moskowitz presented new FEMA maps on several different dates to determine that the FEMA maps have not changed any time that they have been printed.

Mr. Moskowitz has provided a letter dated February 8, 2023, from the National Flood Experts regarding his buildings and flood zone. The letter stated that originally all 9 of his structures were reclassified from Zone AE (in the flood zone) to Zone X (not in the flood zone) back on March 13, 2019. However, the flood map and its latest revision from January 22, 2020, buildings 6, 8 and 9 were placed back in Zone AE which is in the flood hazard area. Essentially stating that buildings 1-5 and 7 are not in the flood zone per LOMA document, Case No. 20-03-1613A dated September 23, 2020, approved by FEMA. Which supersedes the FEMA map as it appears today.

Mr. Moskowitz summarized point one, the units were habitable back in the day but have not been occupied for many years due to the Town Code that was enforced of not allowing the apartments in a “cellar”. Point two, there is sufficient parking for the one unit requested, 1511 Maple Avenue. Point three the neighboring issues have been not so factual and last night Chief Giles testified on the behalf of Maple Walk Apartments there is no real issues that were referred to in the previous Planning Commission meeting. The final issue was the flood issue of which have been clarified with the supplied documentations from FEMA. The current building the petition is for 1511 Maple Avenue is no longer in the flood zone.

Mr. Moskowitz stated after the flood check valve has been installed by the County in the main sewer line to avoid the back flow of sewage. He has also installed for each location flood check valves as well, due to the change in Artesian Water rules.

Board Member Boyd asked how many basement units are you looking to put into each building.

Mr. Moskowitz stated that one unit per address. There is existing rough plumbing and electrical meters of which have been brought up to code.

Board Member Smith asked if there are any walls, or apartments units currently.

Mr. Moskowitz response is no, there is not. If approved, the unit will be built to code. He has already met with the Fire Marshall to confirm that he could build them and about the sprinkler system. It was confirmed that he does not need the sprinkler system since it is not a four-story building. He knows he needs to build Egress windows as well. He will be installing new central air units and central heat.

Mr. Moskowitz talked about how years ago when there was a basement unit the back of the building had an entrance. If the construction was approved, he would entertain opening up the back entrance again. He also thinks that would encourage tenants to park in the rear parking lots.

Board Member Boyd stated I realize you are not from FEMA but are very educated with the process, do you know how often they update the FEMA maps?

Mr. Moskowitz responded that it does not appear to be a particular system in place. The maps were updated in 2001, 2003, 2007, 2019 and then 2020.

Code Enforcement Officer Allen stated he very recently found out that FEMA stated they update them every five years roughly.

Board Member Boyd asked if in five years could your buildings be reevaluated per the FEMA map and placed back into the flood zone?

Mr. Moskowitz stated even with all of the LOMA's (Letter of Map Amendment) the six buildings have not been placed in the flood zone. Only buildings 6,8 and 9 have been deemed out of the flood zone and then placed back in it.

Code Enforcement Officer Allen stated that after the two Planning Commission meetings and his research with an affiliate from DNREC and DEMA, it has been proven in fact, his six buildings are not in the flood zone. The other three buildings 6,8 and 9 are in the flood zone. There is still a variance request for the habitable spaces in cellars per Town Code. The variance for tonight is for 1511 Maple Avenue, if approved the Petitioner will be seeking approval on the rest of the buildings that are not in the flood zone. There will be a significant change to the complex and neighborhood.

Code Enforcement Officer Allen stated it would be a detrimental decision for the potential residents, the surrounding neighborhood but that decision is for the Board to vote on. If the variance is granted, it will be a variance to 225-18 (d)(2)(b)(4) and the applicant would be required to submit documentation from an engineer that the basement floor would be elevated to or above the flood elevation plus twelve inches. Plus permits would be required to be submitted with in one year if approved.

Board Member Smith asked to confirm this approval is for one building 1511 Maple Avenue and would the Town Code need to be changed before any work is performed.

Code Enforcement Officer stated no it is a variance request.

Mr. Moskowitz stated that he has about a thousand units throughout the area that are basement units and he has never had one that has flooded.

Code Enforcement Officer Allen asked have you ever had a complex flood three times? Just for the record I am asking this. I have a basement that I use for storage this is going to be peoples' homes.

Mr. Moskowitz said no I have not. There has been no water retention since he has been here for six years.

Board Member Boyd asked does the Town follow the FEMA Code or do we have our own regulations as well.

Code Enforcement Officer Allen stated we generally follow the FEMA Code but the regulation, the basement floor would be elevated to or above the flood elevation plus twelve inches is a Town Code as well.

Board Member Boyd asked the question if these units in the basement had never been flooded do you theoretically believe they would still be basement units today?

Code Enforcement Officer Allen stated that he believes they would.

Code Enforcement Officer Allen stated he found a letter from the Town Manager from 1990, stating the basement units were condemned by the Town shortly after the July 5, 1989 flood. The units cannot be re-occupied without approval from the Town in the form of a Certificate of Occupancy with the enactment of Ordinance 247, which amended the Town's Zoning Code. The occupation of dwelling units which more than 50% of the habitable floor space is subject to flooding is prohibited. Since these basement apartments are subject to flooding, application for Certificate of Occupancy for the use of dwelling units will be denied. Obviously with the new LOMA this is not the case.

Board Member Smith stated he was here in the Town when the flood happened in 1989. He stated the ditch that led back to the railroad was widened back then to help with the flooding. He also stated the tunnel underneath had nothing done with it. He believes with widening the ditch it will allow for more water runoff.

Board Member Smith stated that back in the 1980's these apartments were not called basement apartments they were called Garden Apartments. He believes that was a way of getting around the Town Code back then.

Board Member Acton asked Code Enforcement Officer Allen if the Town Code that refers to the cellar apartments refers to whether or not the building is in a flood plain?

Code Enforcement Officer Allen said no it just states that no apartment shall be permitted in a cellar. There is nothing specific to the flood plain.

Board Member Boyd as Mr. Moskowitz is your variance request because the property is not in the flood zone anymore and the hardship is that you cannot use the property fully after the change to the property and the flood zone?

Mr. Moskowitz said that is correct.

Chairman Personti asked if there was Public Comment.

Patricia Allen, 1330 Sycamore Avenue. Mrs. Allen owned the property during the flood in 1989. She said her first husband was a teenager in the apartments when it flooded and everyone had to evacuate the basement apartments and the flooding was up to the second level.

Patricia Allen said her basement is still wet and there is water than runs underneath her property. She has cracks from the water in her foundation. She also stated that parking is a big issue in the area. For the most part, she can never park in front of her own house. She would like the Town of Elsmere to obtain an Engineer for the flooding issues in the Town.

ACTION: Board Member Boyd made a motion to grant a variance for 225-18 (d)(2)(b)(4) to allow for an apartment to be constructed with in a cellar since the FEMA maps have been updated. This approval is for 1511 Maple Avenue only. The petitioner needs to supply Engineering reports and certification the apartment must be elevated to or above the Base Flood Elevation plus 12 inches. Board Member Smith seconded the motion with the condition that the apartment is a one bedroom, and the use of the other room is not to be used as another bedroom.

VOTE: 3 in favor and 1 opposed, 1 Absent Motion carried

Boyd – Yes, Russo – Absent, Acton – No, Smith – Yes, Personti – Yes

ITEMS SUBMITTED BY CHAIRMAN AND BOARD MEMBERS: None

PUBLIC COMMENT: None

ADJOURNMENT:

ACTION: Board Member Smith made a motion to adjourn. Board Member Boyd seconded the motion.

VOTE: 4 In favor, 1 absent Motion carried

These minutes summarize the agenda items and other issues discussed at the February 28, 2023, Board of Adjustment meeting. Votes are recorded accurately. The audio tape(s) of this meeting will be available at Town Hall for a period of two years from the date these minutes are approved. The audio tape(s) may be reviewed at Town Hall by appointment and in accordance with the Freedom of Information Act.



JAMES PERSONTI, CHAIRMAN



PATTY BOYD, SECRETARY