

Present: John DeLeire, Chairman; Frank Perry, Vice-Chairman; Larry Job, Steve Bryant, Mark Call, Members; Alex Dittami, Patricia Young, Alternate Members; Mark Sikorski, Building Inspector; Susan Ayer, Secretary.

Call to Order: 7:00 PM.

The Chairman noted that as there is a full board in attendance, the two Alternate members will participate in the discussion but will not have a vote.

CONTINUED: CASE #17-01: Application from Terry Anderton for Appeal from an Administrative Decision of the Building Inspector on March 21, 2017 in relation to Article III, Section 4 of the Zoning Ordinance (Article III, Section 7.2.1, Septic System, and issues in such letter) for property located at 51 Depot Road, Map 2, Lot 102.

Applicant Terry Anderton and Attorney Monica Kieser were present. Attorney for the Zoning Board, Mark Beliveau, was also present. J. DeLeire began by reviewing the four separate violations raised in the Building Inspector's letter of March 21, 2017, the administrative decision which the applicant is appealing. He explained that each point will be discussed and voted on separately. The four points in the administrative decision are:

- Septic system design plan was approved to serve a maximum of six bedrooms
- A variance is required for the renting of the function room
- A Conditional Use Permit and Certificate of Occupancy are required for the use of the carriage house as a Detached Accessory Dwelling Unit
- Renting your property [51 Depot Road] to the general public on a short-term basis is not a permitted use within the Agricultural/Residential District

M. Kieser addressed the matter of the septic system relating to the number of bedrooms, and the Building Inspector's order to limit the use of the property to six bedrooms or to seek the required permits from the DES to expand further. M. Kieser said that she did not appeal that determination as the advertisement for the property was remedied to offer a maximum of 6 bedrooms. She mentioned that the original lawyer for the applicant also agreed to limit the bedrooms to six, and she was not withdrawing the appeal as she had never personally appealed the limitation to 6 bedrooms.

J. DeLeire said that in light of the March 21, 2017 letter from the Building Inspector, and so there is no confusion on the status of the four violations, the Board should act on the matter. There was a discussion of options of settling the matter and whether a vote to affirm the decision is procedurally correct. M. Kieser said she would be happy to withdraw that part of the appeal relating to septic capacity if that is necessary. M. Beliveau said that everything that has been filed is still before the Board unless it has been withdrawn. The applicant can state for the record that a specific part of the appeal is being withdrawn, or the Board will vote on it.

At this time, input from the public present was invited.

J. Casey of Depot Road described an incident on November 15, 2016, when there was a large volume of cars traveling up and down Depot Road, as well as people walking in the road. He said he also heard gunshots, and called the police. Four State Police and four Seabrook police cars responded and the trooper who stayed in his driveway told him there were in excess of 200 cars on the road and at the house at 51 Depot Road.

Apart from that weekend in November, J. Casey said that every weekend there are 40 to 50 cars traveling to and from 51 Depot Road. He estimated that meant between 50 and 200 people were using the septic system every weekend.

L. Stan, Meadow Lane, said that every weekend there is an event at the property, causing people to park in the street, trash strewn everywhere and left where it may draw animals. She said she feels the property is being used as a function hall in a residential area, and that there was a UHaul and a caterer present on the past weekend, which is why she is here. She said if the applicant wants to run a bed and breakfast, there are stringent rules to adhere to.

M. Kieser said that she is not appealing anything to do with a function hall, either, that there is no function hall use on the property and that for the record she stated she withdraws all aspects of the appeal related to the function hall, with prejudice.

L. Ruest, Coach Lane, said that the septic issue is related to residential single family homes, and that the main point is that it is a residential area and the residents want to keep it that way.

M. Beliveau advised that if the appeal is to be withdrawn, it should be done “with prejudice” so that it cannot be brought back to the Board at a later time.

M. Kieser stated that with respect to the Building Inspector’s letter dated March 21, 2017, and the assertion that the septic design plan is to service six bedrooms, the applicant accepts that finding and withdraws all aspects of the appeal related to septic capacity, with prejudice.

L. Ruest, Coach Lane, asked whether when speaking about a function hall, it is limited to the carriage house space or relates to a function being held anywhere on the property. M. Kieser said that there is no advertising of a function space and that she has no knowledge of what has taken place in the past.

J. DeLeire said that two of the four items have been withdrawn, and read the portion of the Building Inspector’s letter of March 21 relating to the renting of a function room. He said that the applicant has acknowledged it is not a permitted use, and is not appealing to the board to use it as such. S. Bryant asked how “function room” is different from holding functions. M. Sikorski said that the violation was tied to an online ad for a function room at the property.

J. DeLeire asked the applicant if he had any intention of using the property for functions. T. Anderton answered by explaining that in April 2016 he put the property on the Airbnb website for the first time, that before that his rentals were informal. He said that as he lives at the end of the road on 8 acres he felt that parties were possible, but that 2 or 3 weeks after his ad was placed

he heard from the Building Inspector who told him that this was not allowed. He said that since December 2016 there has been no mention of a function room, and that his listing now states there are to be no weddings and no functions.

Mr. Anderton said that he lives on the property with his two children and rents the house, which has five bedrooms, theoretically accommodating ten people and ten cars, but that he is not running a function establishment. He said that when renters are in the house he stays in the carriage house, or at times in his other house in New Castle. He said he rents the carriage house space to a tenant (mother and daughter) during the nine months of the school year.

Mr. Anderton stated that when people book the house for rental they give a biography and intentions, and that it is often a family who want to get together, and that the indoor pool is a draw. He said that if the renters ask about having a lobster bake or something similar he does not consider that a function. He said that two weddings planned for this summer were canceled, and that no weddings are taking place there to his knowledge. He said that there is more traffic on the road related to people walking dogs, etc., than to visit his property.

Asked if he was aware of the incident in November that got out of control, he said in that case he was staying in the carriage house and woke up and saw the people and police, and had the people removed. He said the renter characterized his stay as a romantic weekend but then sold tickets and had a huge party. T. Anderton said that he has been extremely careful since that time about who he rents to, adding that this is an expensive house and he does not want it destroyed, and is also concerned about the impact on the neighborhood. He said that he generally rents the house once per month, though it is busier in the summertime.

J. DeLeire moved discussion to the third item, that a Conditional Use permit and Certificate of Occupancy are required for the use of the carriage house as an accessory dwelling unit. He said that per the letter of the Building Inspector, no permit was issued in the past, and that based on the records of the Town, use of the carriage house as a two bedroom dwelling is unlawful until a Conditional Use Permit is obtained from the Planning Board and a Certificate of Occupancy is issued by the building inspector.

M. Kieser said that to address this issue, she has laid out the history of the property in her letter to ZBA Chair DeLeire dated June 30, 2017. The information includes that the building permit for the home and barn were filed in 1983 by the former owner. In 1985 NH DES approved a 3-bedroom septic plan. In 1987 a second building permit was granted for a new garage and barn. No Certificates of Occupancy were found in the property file. After these permits were filed, there are no documents in the file until a survey done in 2010 which indicated the property has two structures.

M. Kieser said that in 2011 the Code Enforcement Officer at that time was notified that the septic system at the property was failing and that an apartment had been constructed in the garage/barn without upgrading the septic system. The owners submitted a new septic plan for review which depicted an existing four bedroom house and existing 2 bedroom apartment. In 2012, T. Anderton purchased the property with septic approvals in place. At that time, T. Anderton said he asked Town officials if the apartment was legal and was told it was. He had the new septic

system installed, which has a six bedroom capacity. Exhibits provided to the Board prior to the meeting include the 2010 survey, test pit results and correspondence relating to the septic system approved in 2012, and ZBA meeting minutes.

M. Kieser pointed out that the home was presented as having 4 bedrooms and the carriage house as a two bedroom guest house, throughout the documents relating to the new septic. At that time there was no follow up to determine if the apartment was legal.

M. Kieser provided a copy of the septic plan from 2013 for the Board to view and to add to the case file.

There was some discussion about who had the responsibility to identify the apartment/guest house as unlawful, the Town or the home buyer, but that in any case the issue was not raised at that time. A. Dittami asked about the lack of a Certificate of Occupancy, and where it would have been noticed; M. Sikorski said that the septic system is only one item on the checklist for a Certificate of Occupancy. Asked if it is legal to occupy a property without a Certificate of Occupancy, M. Sikorski said it is not. M. Kieser said she does not know if the Certificate was ever issued, just that it can't be found.

T. Anderton said he asked at the time he purchased the property if the apartment was legal and was told by the Building Inspector that it was. F. Perry asked him if he had checked the regulations and T. Anderton said he did not know why he would do that.

In discussion it was stated that the barn was built in 1987, before the ordinance regarding accessory dwelling units came into effect. M. Sikorski said that on the building permit for the barn, upstairs rooms are not included.

M. Kieser said that the building plan included a shaft for an elevator, as the former owners had planned to use the space for an in-law apartment. She said that this often causes issues when property is sold and the space is no longer used for relatives.

Referring to the various evidence that the apartment was known to the Town, M. Keiser said that given the history of non-enforcement she could see how the applicant felt he could reasonably rely on representations made in the file and by the Building Inspector. T. Anderton said his realtor researched the property.

M. Sikorski said that prior to November 8, 2016 he has no recollection of having a conversation with the applicant. He said that if he had been asked about the legality of the apartment, he would have done extensive research of its existence and seen if all the paperwork was in place.

M. Beliveau noted that, to the extent M. Kieser is arguing municipal estoppel, he has advised the Board that they do not have the authority to grant relief under the doctrine of municipal estoppel according to the New Hampshire Supreme Court. The applicant has the right to take the issue of municipal estoppel directly to the Superior Court. To the extent that the applicant is arguing other theories such as prior lawful non-conforming use, the Board may consider any evidence presented to support such other theories.

M. Call asked how often the apartment has been used since T. Anderton has owned the property; T. Anderton said that this will be the second year of a tenant with a school aged child residing there for the nine months of the school year. Aside from that, he and his own children stay there when the house is rented. If the house is rented while the carriage house is occupied, he stays at his mother's house in New Castle. He asserted that 51 Depot Road is his primary residence, he is there every day, and his children attend school at Berwick Academy.

F. Perry said that he felt the applicant used the new septic system to justify the carriage house apartment. T. Anderton said that the original septic system was not actually failing, to his knowledge, but he bought the house with pre-approved septic plans and followed through. He said he moved in with just himself and two children, but felt the existing system was not adequate.

T. Anderton said he has been in Hampton Falls for five years, and has been disappointed that the neighbors do not talk to him and are here tonight misrepresenting what goes on at his house. He said he has spent a lot of money on the house to mitigate issues such as flooding in the garage, mold issues, and the septic system, and also pays a lot of taxes. J. DeLeire said he feels that the Town has been trying to work with T. Anderton to ameliorate the problems.

M. Kieser said that on behalf of the applicant she is pursuing relief to formalize existence of the carriage house apartment. She said the applicant has no objection to the inspection of the building as safe and appropriate.

F. Perry asked if the Board was being asked to say the Certificate of Occupancy already exists. M. Kieser said that the Town can't take enforcement action against the applicant because he reasonably relied on the representations of the Town. F. Perry asked if there is a reason to not get a Certificate of Occupancy. M. Kieser said she is representing her client and making arguments in his favor for estoppel of enforcement action. She said that reversal of the administrative decision would save the lengthy process of coming to the ZBA for a variance and then to the Planning Board for a Conditional Use Permit for a detached Accessory Dwelling Unit, but that she is prepared to take those steps and in fact has submitted an application for variance for the August meeting of this Board. She said she understood that the municipal estoppel argument is not easy as she would be asking the Board to undermine a Town official.

It was noted that the timing for the various applications is problematic, as the variance will be needed before an application can be made to the Planning Board, and M. Kieser suggested that if the variance could be dealt with first, then the appeal could be withdrawn.

L. Job said that when the prior owner obtained approval for the new septic system it was considered to be for a single family dwelling, but the new owner turned the property into an income-producing property, it changed the definition of the accessory dwelling. M. Kieser said that in her opinion the reason the issue came to the fore is short term use, but the inference is that the carriage house cannot be used at all unless all the (variances and permits) are obtained.

The Chairman invited public comment on the topic of a Conditional Use Permit and Certificate of Occupancy being required for the use of the carriage house as a detached dwelling unit.

L. Smith, Old Stage Road, said he had heard Mr. Anderton say there are 5 bedrooms in the main house, which would make a total of seven bedrooms. He also asked the applicant how he can run an AirBNB during the nine months the carriage house is occupied, as he has to occupy the property. T. Anderton said that the tax card lists the bedrooms as five in the house and one in the carriage house; other records show the numbers as four and two. As to the question of residence, he said he lives at 51 Depot Road but can stay at his mother's house in New Castle when both the main house and carriage house are rented.

T. Anderton added that he is working with the same septic design company that was used for the current system to see if it can be expanded or not. He has engaged them to do a wetlands survey.

J. DeLeire said that he heard four/two bedrooms when the septic variance came before the ZBA in 2012 and wondered if that was inaccurate information. M. Kieser said that she does not know how it came to pass but that two separate residences were clearly depicted.

F. Perry said that one element of the variance for the current septic was that there was no place to put another septic if this one fails; it was placed right on top of the old system. He said that the Board needs to be mindful that any expanded use of the property (such as a second kitchen in the carriage house) could already be overusing the septic system, and that if it fails, there will be no recovery.

T. Anderton said that while the carriage house was built to have two bedrooms he is happy to scale it back to one in order to be compliant.

S. Bryant asked if the property is used for greater than six bedrooms, and T. Anderton said no, that around fifteen people, including children, was the highest number on the premises. He added that his own children are only there with him half the time. S. Bryant noted that the house has been advertised as having up to nine bedrooms, and T. Anderton said it never was booked for nine bedrooms, and advertising as such took place before the Building Inspector contacted him.

F. Perry asked what the applicant suggested for reconciliation with the matter regarding the need for a Certificate of Occupancy and a Conditional Use Permit. M. Kieser said that she is moving toward those things, but can't get the Conditional Use Permit until a variance is granted for the size of the accessory dwelling unit as more than 750 square feet. She said she has submitted an application which will be on the August agenda, and then will move on to the Planning Board. Meanwhile, wetlands mapping is being done with regard to expanding the septic system, and if it cannot be done, a decision will be made about removing a bedroom.

S. Bryant said that this is reasonable, but shows the applicant agreeing with the administrative decision of the Building Inspector. M. Kieser said that she is arguing the administrative decision in case it needs to be remedied in appeal; she is working on a map to go forward on the assumption the variance will be granted, but has to take into consideration that it may not be granted.

L. Smith, Old Stage Road, said he did not see how a variance can be granted for the accessory dwelling unit without resolving the problem of too many bedrooms first. M. Kieser said that because the space is over 750 square feet, it is too large regardless and the variance is needed before going to the Planning Board.

L. Ruest, Coach Lane, said that to review, the original owner built a septic system for a three bedroom home. In 2012 the Town was told there were four bedrooms in the main house and two in the carriage house and approved a septic system for six bedrooms. She questioned why the applicant would go to such expense to put in a six bedroom system when he knew there were seven bedrooms and the system was undersized. T. Anderton answered that one room could be construed as a den, that he did not redo the engineering, and also that he moved in with two children and himself.

M. Kieser said that the short-term rentals did not start until a year ago, and that Mr. Anderton has tried to comply since receiving notice from the Building Inspector. He has advertised only 5 bedrooms, and that he can't accommodate weddings or large parties.

P. Ayles, Depot Road, asked if the septic having been approved for six bedrooms when there are actually seven means that the carriage house is illegal, and there should be a cease and desist order. M. Kieser said that the Building Inspector's letter went out and there was time allowed for the applicant to appeal the decision. The status quo is maintained until a determination is made.

F. Perry said that the simplest way is to accept the citation of the Building Inspector and affirm a cease and desist order on the carriage house use until permits are in place. M. Kieser asked that the matter be tabled until the applicant has the chance to get permits. She requested that the Board hold its notice of decision on estoppel until after the decision on a variance is made, that this could be made contingent.

F. Perry said he felt this case has gone on long enough. M. Kieser said that respectfully, this won't be resolved as she will go to the Supreme Court. She added that per ZBA Counsel, the ZBA can't make a ruling on estoppel.

T. Anderton said that the past two hearings were continued due to reasons not his own, first by the town and then due to having too few board members present. He said he has put a lot into the case and would like the opportunity to carry it forward and see if a variance can be obtained. S. Bryant said the Board is being asked to reject the proper findings of the Building Inspector. M. Kieser said that she is only asking to table the matter until the next meeting, when the applicant will be appearing anyway. If the Board decides to affirm the administrative decision, she will go forward to present the variance request; meanwhile the applicant is pursuing a reasonable and appropriate way forward.

There was a discussion of the current status of the carriage house rentals. M. Sikorski said it is still online as available to rent. T. Anderton said that the description is of the main house only, and that the line about use of the indoor pool has been removed. He said the carriage house is

not currently occupied but he feels the Board is heading to a decision keeping him from using it at all, and he has the long-term rental during the school year set to begin soon.

S. Bryant asked if he would attest that the carriage house will not be used until the school year rental begins, and T. Anderton said he will affirm that right now, that if used it would only be by him.

The Board discussed various ways to affirm the administrative decision but to also give the applicant more time to follow other procedures seeking relief, and stipulate that during that time period no short term rentals of the carriage house shall take place. J. DeLeire said he felt this would cause the need to define too many terms, and also the timing would be problematic if a continuance was necessary.

M. Kieser suggested that if the matter were tabled for one month both cases could be heard together, and that she would offer that the carriage house will not be used as a short-term rental while this case is tabled. She added that if the decision is affirmed, she will have to adhere to a time frame in which to file an appeal.

S. Bryant said that it seems to him that most of the problems are regarding the short term rentals, not the school year rental. He said that he sees that the applicant is trying to work with the Board, but at the same time, M. Sikorski's letter is accurate with regard to the violations.

The Board returned to the decision to affirm, reverse or table the matter. A. Dittami said he felt the Building Inspector and the residents need an answer. S. Bryant said that if the intent of the applicant is to do the right thing he should be given the opportunity.

MOTION: In the case of a Conditional Use Permit and Certificate of Occupancy required for the use of the carriage house as a Detached Accessory Dwelling Unit, motion that the decision process be continued to the meeting of the ZBA on August 24, 2017 at 7:00 PM.

MOTION: F. Perry

SECOND: S. Bryant

IN FAVOR: 4; OPPOSED: 1; PASSES

The Chairman moved to the fourth issue set forth in the Building Inspector's March 21 letter, "Renting property to the general public on a short-term basis is not a permitted use within the Agricultural/Residential District."

M. Kieser said there have been some changes in the law, and also in the way people rent their property. She said there are two or three other places in Hampton Falls listed on AirBNB and VRBO, and about 3,000 such rentals now statewide. She said this is the new way people are renting their property and it can be a thorny issue in municipalities. However, she said, property owners have a constitutional right to use their property in compliance with zoning rules. She said there is no ordinance prohibiting an owner from renting his property at any time. The Constitutional issue is selective enforcement, or enforcing only when a problem is perceived.

M. Kieser outlined recent developments in State law, including the recent passage of a bill that requires AirBNB renters to pay rooms and meals tax. This is not a change to zoning, only to RSA 78-A. Then she said that last month the Governor signed HB654, establishing a commission to study short-term rentals and taxation. One amendment, RSA 48A-1 under Housing Standards establishes that short term or vacation rentals are residential uses, and that a municipality cannot make the homeowner “jump through additional hoops” just because they are renting. T. Anderton said that the amendment reads that no town or committee can prevent anyone from being on AirBNB and has no authority to regulate short term rentals.

M. Kieser said that there have been major problems at 51 Depot Road and that she does not blame anyone for raising concerns, but at the same time does not think the Board has the right to tell one person he can't have short-term rentals. She said it is similar to the Accessory Dwelling Unit law, in that if a resident wants to supplement income, it has to be done in a way to accommodate the neighbors. She added that 51 Depot Road is in a zone where bed and breakfast establishments are permitted, and that she would argue that that is a more intensive use of the property.

S. Bryant said he still has concern about T. Anderton's residence, wondered how he could be on the premises and not realize there are 200 people there. T. Anderton replied that he lives in the house full time, gets his mail there, sleeps there every night unless traveling or visiting his mother. He said it is the residence of record for his children's school.

Questioned about how many nights at a time the house is rented, on average, T. Anderton said two nights, and number of bedrooms rented, five.

A. Dittami read the definitions from Hampton Falls Zoning Ordinance for Hotels and Inns, and T. Anderton said these definitions did not fit the activity at 51 Depot Road. A. Dittami wanted to know how his establishment is different from an Inn, defined as “a building offering lodging for transient boarders with up to 15 sleeping rooms.” M. Kieser said that this is not permitted in the Agricultural/ Residential District. She then read from Section 7.3, Bed and Breakfast Establishments, saying this is more like what T. Anderton is doing, as he is a full time resident. However, M. Kieser said that it is not something he is interested in pursuing, as he would need to be open for guests all the time. T. Anderton said he would need to comply with handicapped access laws and be unable to choose his guests or turn people away, unlike using AirBNB as he does now, which is at his own convenience.

A Dittami noted that neither use would be in compliance with Zoning Ordinance; a permit is necessary. M. Kieser said that this is a constitutional issue, and a property owner has the right to use his property as he sees fit.

The Chairman opened the discussion to public comment.

M. Kenney, Meadow Lane, said that she would not be here to complain if there were occasional rentals of the property. She said the problem is that on many weekends, there are signs pointing to events on Depot Road, and then 40 or 50 cars traveling down and back, which causes

disruption in the Depot Road community. She said that she knew the prior owner rented the property, but now it is “tons of people and cars and garbage.”

J. Casey said that the wedding last weekend entailed a lot of people, and said the bathroom must have been used 300 times. T. Anderton said that both weddings planned were canceled, that this was a family reunion. He also said that he has surveillance cameras, so he knows what is going on. T. Anderton also said that with five bedrooms rented he can see there would be the perception of a lot of cars, but he said the number was five or ten and that all recent renters were nice families. He added that his property is not near the neighbors.

J. Casey, Depot Road, said that if the septic fails the water the community swims in will be affected. He said the cars “fly” up and down the street, and also that he feels T. Anderton is turning Depot Road into a capital venture.

F. Perry asked M. Beliveau to interpret the new laws mentioned by the applicant. M. Beliveau said that the housing statute was amended to define the terms “vacation rental” and “short term rental,” and that generally it allows municipalities to adopt housing standards. A sentence was added that the authority given to municipalities to require people to maintain their property cannot be used to impose additional ordinances or other restrictions on dwellings used as a vacation rental or short-term rental. M. Beliveau concluded that this does not apply to the town’s Zoning and is not in play tonight.

The meaning of the new law was discussed.

M. Kieser said that money made on rentals does not change the use. A. Dittami said the Ordinance needs to be respected, and that there are routes to do what he wants such as the Variance and Special Use permit.

M. Call said he felt the Board needed to be careful with the new phenomena of AirBNB rentals, as they did not exist when the Ordinance was written. He said he felt it would be a mistake to try to pigeonhole short-term rentals as Bed and Breakfasts, Inns or Hotels.

L. Smith, Old Stage Road, said that if a use is not listed in the Ordinance it is not allowed. P. Young asked if the Ordinance says anything about renting out one’s home, and the answer was that it does not.

MOTION: Regarding the matter that renting the property at Map 2, Lot 102 to the general public on a short-term basis is not a permitted use within the Agricultural/Residential District, motion to affirm the administrative decision of the Building Inspector.

MOTION: J. DeLeire

SECOND: L. Job

UNANIMOUS

J. DeLiere reviewed the decisions of the evening, saying that the appeals to the first two administrative decisions were withdrawn with prejudice, the second was continued, and the last affirmed.

REVIEW AND APPROVAL OF PRIOR MEETING MINUTES: June 22, 2017:

MOTION: To approve the minutes of June 22, 2017 as written.

MOTION: F. Perry

SECOND: J. DeLeire

UNANIMOUS

MOTION: To adjourn at 10:36 PM

MOTION: J. DeLeire

MOTION: F. Perry

UNANIMOUS