

MINUTES

ZONING BOARD OF ADJUSTMENT

MAY 9, 2007

Chair Theresa Jarvis called the meeting to order at 7:05 PM.

Roll Call: Theresa Jarvis (Chair), Wendy Anderson (Alternate), Helen Wellman, Michael Hoffman

Excused: Larry Prelli, Bill McGrew Unexcused: Kathy Merrill

Others Present: Arthur Hoover, Rhoda Sue Landers, Karen L. Keefe, Paul Keefe, Ellen Mason, Sam Fisichelli, Sam Hardy

1. Public Hearing on an application submitted by Arthur W Hoover on behalf of Rhoda Sue Landers, P.O Box 1207, Alton, NH 03809 for property located at 184 Ham Road (Tax Map 12A, Lot 1-L) in New Durham. They are requesting an Equitable Waiver for Dimensional Requirements in order to continue using the house at 184 Ham Road as a two family home. The lot does not meet the size requirements of Article IV, Section 1.a.c. for a two family home.

Chair Jarvis noted for the applicant that there were only 4 board members present. The applicant is entitled to a full board of 5 members and needs at least 3 votes for approval. The applicant stated that she wanted to go forward.

Attorney Arthur Hoover presented the case to the Board. Ms. Landers owns Map 12A, Lot 1-L that is a lot created by subdivision in 1978. As far as they can tell a single-family house was built on the property in 1987. At some point around 1990 the building was converted to a 2 family split entry home and has continued as such until the present. A 2 family home is a permitted use in this Zoning District.

Ms. Landers purchased the property in 2000 as a 2 family dwelling. The parcel has a septic system rated for 3 bedrooms. Paul Gelinis, a septic designer has told the applicant that it would be possible to replace the current septic system with a larger one if the current system failed. The property has been inspected by the New Durham tax assessor who at one point identified it as a house with an in-law apartment.

ZONING BOARD OF ADJUSTMENT
DRAFT MINUTES OF MAY 9, 2007

Theresa Jarvis paused the presentation to ask Board members if any had a real or perceived conflict of interest in this case. None did. She asked members of the public who were present if any were aware of any real or perceived conflict of interest. None did.

Attorney Hoover went on to say that no Town official ever objected to the status of the property. The current case arose not because of a complaint but because a tenant on two separate occasions asked the Town for assistance with the rent. The second time the tenant asked for assistance the Town Administrator denied the request on the basis the house was not an approved or legal 2 family home. The owner, Mrs. Landers, was told that since the house was not approved for two families she could not collect rent from two families. This put Ms. Landers in a position where she would have to evict a tenant or allow one to stay rent-free.

David Lindberg, New Durham Code Enforcement Officer, told Ms. Landers that the problem came from the fact that the lot size (Map 12A, Lot 1-L) is insufficient to meet New Durham code requirements for a 2 family home. The New Durham Zoning Ordinance requires that a lot have the same amount of land as for two single-family homes. The Zoning Ordinance bases lot size on the quality of the soil for handling septic systems. Although the lot has about 5 acres, much of the soil is poor quality for septic. A lot of that size would need more if its soil to be good quality for septic in order to meet the Zoning size requirements

Mr. Hoover told the Board that the applicant is requesting what is called an equitable waiver of dimensional requirements which is authorized and controlled by RSA 674:33-a. The two main criteria for granting such a waiver is 1) that there is a violation of code that has existed for 10 years or more, and 2) that the town has taken never before taken enforcement action regarding the issue in question. Another criterion is that the cost of fixing the violation outweighs the public benefit that would come from correcting the violation.

Mr. Hoover introduced sworn testimony from former tenants and others saying the structure had been used since at least 1992 as a 2-family home and perhaps as far back as 1990. No enforcement action was taken until the end of 2006, which is considerably more than 10 years later. He noted that when enforcement was taken it was not because of any complaint or problem with the property but because the issue came to light during the application of a tenant for public assistance. In all other ways the structure and the lot meet all code requirements and have never been cited for any violations.

Mr. Hoover said that another criterion in the statute is that the cost of correcting the violation outweighs the public gain that would come from correcting the violation.

ZONING BOARD OF ADJUSTMENT
DRAFT MINUTES OF MAY 9, 2007

In this case, he said, it is not even possible to correct the violation because there is no way to add more acreage to the lot.

Board members asked a number of questions to clarify details of the situation. In response to one question Mr. Hoover stated that both apartments have two means of exit in case of emergency and meet all other safety requirements. He emphasized that the applicant has been losing income since the code enforcement action was initiated in December.

Chair Jarvis opened the case for public input at 7:45 PM.

Abutters Paul Keefe and Sam Hardy spoke. Mr. and Mrs. Keefe raised concerns about potential problems with the septic system, potential contamination of water supply, and potential impact on property values. Mr. Hardy testified that the waiver would allow multiple occupancy of a rental property which he stated was likely to reduce the value of other property in the neighborhood. He noted that this is pertinent to Sub-Paragraph (c) of Chapter 674, Section 674:33-a, a condition requiring satisfaction in order to allow Equitable Waiver of Dimensional requirements. All agreed that there have not been any problems at the house to date.

Mr. Hoover agreed that the applicant had separated the utilities for the two apartments which had previously been combined. He indicated this was part of the applicant's effort to upgrade the rental quality of the apartments.

Mrs. Keefe asked about every section of RSA 674:33-having to be met as by NH state law.

Terry Jarvis closed the public hearing after all present had an opportunity to express their views. She said in summary that if any one was at fault it seemed it was the Town for not identifying the problem earlier. She said the representations of previous tenants as to the length of time it has been a 2 family structure were notarized and seemed believable. She reread the section of the statute that says the ZBA "shall" grant an equitable variance if the applicant meets the conditions of the law, and she pointed out that in legal terms "shall" means "must" and does not allow any hedging on the part of the ZBA.

Chair Jarvis identified the following findings of fact:

1. In 1978 the applicant's parcel of 5 acres was lawfully subdivided from a larger lot;
2. In 1989 the house was built as a single family dwelling with a 3-bedroom septic system;
3. Around 1990 renovations were made and it became a 2 family structure;

ZONING BOARD OF ADJUSTMENT
DRAFT MINUTES OF MAY 9, 2007

4. From 1990-2006 the structure was used as 2 family house for the majority of time. Any periods when it was not used as such were because of temporary circumstances and did not represent a change of use or of intent on the part of the owners of the house;
5. In November 2000 when she purchased the property the applicant signed a Purchase and Sale agreement which referred to upstairs and downstairs renters. This supports the applicant's contention that the when she purchased the property it was advertised and sold as a 2 family home;
6. In 2006 the Town Administrator filed a complaint with the Code Enforcement Officer after an individual sought town assistance with the rent. The complaint said there was an illegal 2nd apartment on the property;
7. The applicant hired an individual to evaluate the property that was known to be approximately 5 acres bordered by Ham Road and Middleton Road to verify that there was sufficient property to meet the code regulations. The survey showed that there was not sufficient property due to the soil conditions not the acreage;
8. The applicant received a statement from Paul Gelinis who is a licensed septic designer from Gelinis Site Design which says the property has a suitable and adequate location for a septic system designed for a 5 bedroom home if the current system should fail;
9. The property is divided into two apartments. The first floor apartment which has a direct access off the rear of the building is a 2-bedroom apartment. The 2nd floor apartment which also has access off the rear of the building is also a 2-bedroom apartment. Both apartments have flexible means of egress.
10. No one found a building permit from either 1987 or 1990 so it is possible the changes done in 1990 were not done legally. The in-law apartment that was alleged to be there prior to 2003 was not legal because the in-law ordinance did not come into effect until March 2003;
11. RSA 674:33-a.I requires this board to grant the applicant's request if the applicant can demonstrate to the satisfaction of the board that the violation has existed for 10 years or more and no enforcement action has been commenced; and
12. This property did exist as a home with 2 apartments for at least 10 years before the recent code enforcement action.

Mike Hoffman moved that the request of the applicant for an equitable waiver of dimensional requirements for 184 Ham Road (Map 12A, Lot 1-L) to allow the continuation of a 2-family home on the property be approved. Helen Wellman seconded. The Board voted 4-0 to approve the motion.

Ms. Jarvis asked the applicant to be aware of abutter concerns about the septic system and the number of people in the home. She noted to abutters that once a written decision is issued they have a right to ask for a rehearing of the decision within 30

ZONING BOARD OF ADJUSTMENT
DRAFT MINUTES OF MAY 9, 2007

days if they can show error in the process or new information that was not available at this time.

The Board took a 5-minute break at 8:48 PM.

Other Business:

- Wendy Anderson volunteered to learn how to operate the video camera.
- Terry Jarvis said she would work with the Planning Board chair to review the procedures for joint meetings between the two Boards, see if they need any adjusting, and bring a recommended procedure back to the ZBA.
- Mike Hoffman will meet with David Allen to draft a meeting flowchart.
- Terry Jarvis suggested that Wendy Anderson work with Mr. Allen to update the worksheets for various ZBA applications because it would be a good way for her to understand the laws and the case law better.
- Ms. Jarvis also said she would check into the question of waiving rules of procedure to understand under what circumstances the board might want to do that.

The Chair suggested that the Board elect officers at its next meeting when she hopes all members will be present. She noted that Helen Wellman's 3-year term on the ZBA was expiring. Ms. Wellman has been on the board since 1997 and is willing to continue on as an alternate but not a full member. ZBA members agreed to ask the Board of Selectmen to appoint Helen Wellman as an alternate and appoint Wendy Anderson as a full member.

Mike Hoffman moved to approve the minutes of March 21 with minor corrections. Terry Jarvis seconded. Unanimous.

Meeting adjourned at 9:18 PM.

Respectfully submitted,

David Allen
Land Use Administrative Assistant

Minutes approved July 11, 2007