

**TOWN OF OLD ORCHARD BEACH
ZONING BOARD OF APPEALS MEETING MINUTES March 29, 2010**

Call to Order at 7:05 pm	Call to Order
Pledge to the Flag	
<p>Roll Call: Present: Chairman Ray DeLeo, Ms. Tianna Higgins, Mr. Philip Denison, Mr. Robert Quinn, and Mr. Philip Weyenberg. Staff: Mike Nugent, Code Enforcement Officer. Tori Geaumont, ZBA Clerk.</p>	
<p><u>ITEM 1: Administrative Appeal:</u> Jeffrey Wu & Janet Chao, owners of 42 West Old Orchard Avenue, MBL 312-8-6 in the R2 Zone, to review the determination that the structure is not legally a two unit building. James B. Maguire, Esq. is representing the owner.</p>	<p style="text-align: center;"><u>ITEM 1:</u> <u>Administrative</u> <u>Appeal: Jeffrey</u> <u>Wu & Janet</u> <u>Chao, MBL 312-</u> <u>8-6</u></p>
<p>James B. Maguire, Esp. gave the background regarding how the property was licensed as a 2-unit for many years and due to that he felt the appeal should be granted. He wished to redirect the board’s attention to the variance criteria and stated he found it met all four of the criteria. He then went over the responses for each of the criteria and stated the hardships the owners would have to bear, as far as mortgage payments, etc. He explained the property is unique as a two-family, as it is on a corner lot therefore, Mr. Wu cannot purchase property to expand the density. He then pointed out that the Zoning Board of Appeals can overrule what the code officer has ruled. He conceded that the abutters are concerned with the maintenance of the property, and Mr. Wu is taking steps to resolve this. He offered copies of the new tenant policy and asked to pass that to the board.</p>	<p style="text-align: center;">PUBLIC HEARING</p>

PET POLICY

42 W. Old Orchard Ave., Old Orchard Beach, ME 04064

ABSOLUTELY NO DOGS ALLOWED. NO EXOTIC PETS SUCH AS REPTILES, BIRDS, FERRETS, BUNNIES, VIETNAMESE POT BELLIED PIGS. NO VISITING PETS OF ANY KIND. NO PET SITTING FOR ANY LENGTH OF TIME ALLOWED.

IF THE LESSEE DOES HAVE A CAT, THE FOLLOWING PROVISIONS WILL APPLY:

The Lessee may have no more than two (2) cats. The Lessee agrees that only the cat(s) described and named below and which has been approved by the manager can occupy the premises. No additional or different cat is authorized under this agreement.

1. The Lessee agrees that cat will be kept inside apartment at all times except when on a leash and accompanied by the Lessee.
2. Cat will not cause: damage, nuisance, noise, health hazard, or soil the apartment, premises, grounds, common areas, walks, parking areas, or landscaping.
3. The Lessee agrees to pay the Lessor a NON-REFUNDABLE PET FEE in the amount of \$300.00 per pet and a monthly rental premium of TEN AND NO/100 (\$10.00) DOLLARS PER PET. THE FEE AND THE PREMIUM WILL NOT APPLY TOWARD DAMAGES CREATED BY SAID PET(S).
4. **In the case of a visiting pet, defined as a pet owned by someone other than the Lessee, a pet fee will be required.**
5. Lessee agrees to register the cat(s) in accordance with local laws and requirements. Lessee agrees to immunize the cat(s) in accordance with local laws and requirements.
6. Lessee warrants that the cat is housebroken. Lessee warrants that the cat has no history of causing physical harm to persons or property, such as biting, scratching, chewing, etc., and further warrants that the pet has no vicious history or tendencies.
7. WEIGHT MAXIMUM AT MATURITY MAY NOT EXCEED 20 POUNDS.

IN THE EVENT THE LESSEE DOES HAVE A CAT UPON MOVING IN, THE FOLLOWING PROVISIONS WILL APPLY:

Should the Lessee desire to have an acceptable pet reside on the premises, simultaneous with the pet acquisition, notification to the Lessor will be required for the approval of such cat. Such a cat will be allowed providing all conditions of the above are met.

IF A PET IS FOUND THAT IS NOT REGISTERED AND A FEE HAS NOT BEEN PAID, then the Lessee understands that the pet fee will be **double the current pet fee and double the current monthly premium in effect at the time, plus any accrued damages. The total fee will be due immediately upon demand.** Failure to meet this demand shall result in default of the lease, at which time the remedies in the lease, specifically in the Default paragraph will be pursued. **IN THE EVENT THE LESSEE VACATES THE PREMISES, AND EVIDENCE OF A PET IS FOUND IN THE LEASED PREMISES, THE LESSEE WILL BE CHARGED AN AMOUNT TWO TIMES THE PET FEE IN EFFECT AT THE TIME, AND IN ADDITION, REASONABLE COSTS OF REPAIRING ANY DAMAGES OR REPLACEMENT OF ANY FURNISHINGS.**

This policy is made effective as of March 28, 2010.



42 W. Old Orchard Ave., Old Orchard Beach, ME 04064
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Mr. Maguire then asked the board to possibly consider changing the old variance. He also pointed out that if this variance is not granted there could be legal actions towards the representing realtors.

Chairman DeLeo asked if there was anyone here to speak for the variance.

Tim Bryant, attorney representing the Reali Realtors, gave history on the fact that the building has been a licensed 2 family for many years. He then explained the legal proceedings if the variance would not be approved tonight. He pointed out that the town will need to sue the Wu's and encouraged the board to grant the variance.

Chairman DeLeo asked for anyone speaking against the variance.

Erica Cushna, Esq., 46 West Old Orchard Avenue. Ms. Cushna explained she is a representative for the neighbors. She stated there are too many people in the building, and the density is too much for the property. She stated profit is not a

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reasonable argument for hardship, as the hardship criteria is not a monetary hardship. There is more land available for Mr. Wu to purchase, and this could increase the density. She pointed on the language on the deed which was registered in the registry of deeds that states specifically the property is to remain a single-family home. She pointed out the licensing issue is not for the ZBA to deal with. She asked for the board to not allow the variance because the 4 criteria of hardship have not been met.

Chairman DeLeo then asked if the lawyer from the town's attorney should be read into the minutes.

Mr. Nugent read the letter:

BERNSTEIN SHUR
COUNSELORS AT LAW

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February 1, 2010

Michael J. Nugent
Code Enforcement Officer
Town of Old Orchard Beach
1 Portland Avenue
Old Orchard Beach, Maine 04064-2245

Re: 42 West Old Orchard Avenue

Dear Mike:

I am writing in response to your e-mail dated January 26, 2010, in which you inquire whether the Town's issuance of business licenses for two units at 42 West Old Orchard Avenue make the units "legal" or creates an obligation for the Town to "legalize" them. My advice is that the issuance of licenses under the Town's Licensing Ordinance is not relevant to the Board of Appeals review of the Code Enforcement Officer's zoning determination.

Under section 78-92 of the Zoning Ordinance, the Board of Appeals is authorized to hear and decide administrative appeals "where it is alleged that there is an error in any order, decision or determination made by the Code Enforcement Officer in writing." The Board of Appeals makes its determination on an administrative appeal by applying the provisions of the Zoning Ordinance. It appears that the business licenses issued by the Town for this property may have been issued in error. That is not an error which the Board of Appeals can correct. The Board of Appeals has no jurisdiction over business licenses.

There is a legal doctrine called "equitable estoppel," which can be asserted when a person, without fault of his own, has reasonably relied to his detriment on erroneous information provided by a municipality. But the Board of Appeals does not have jurisdiction to make a determination concerning equitable estoppel. Tarason v. Town of South Berwick, 2005 ME 30, ¶ 13, 868 A.2d 230, 233. Equitable estoppel can only be raised as a defense to an enforcement action brought in court by the municipality. Buker v. Town of Sweden, 644 A.2d 1042, 1044 (Me.1994).

Therefore, the primary question for the Board of Appeals in this case is the effect of the October 15, 1990 variance with the condition "to remain a single-family home." I have looked back at the Old Orchard Beach Zoning Ordinance in effect at that time, and the

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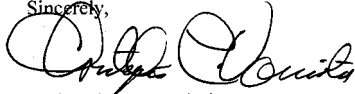
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Michael Nugent, Code Enforcement Officer
February 1, 2010
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Board of Appeals was authorized then (as it is now) to impose conditions on a variance approval. The variance certificate was timely recorded in the York County Registry of Deeds, putting all future prospective buyers on notice of the existence of the condition. And a variance approval and any conditions included in the approval run with the land, meaning they are binding on subsequent purchasers.

I hope this proves helpful to the Board of Appeals. If you have any additional questions, feel free to give me a call.

Sincerely,



Christopher L. Vaniotis

CLV/lc

Mr. Nugent pointed out that the town's attorney made it clear that the license does not have bearing on zoning. He then gave history of the original variance and stated that since that time, permits have not been taken out to change the structure from a single family dwelling to a 2 unit property, as well as no sewer impact fees were every paid. He stated if the board does not go forward there will be issues involved, but that is not the purview of the board.

Chairman DeLeo felt that if they passed this it would set precedent for future issues.

Mr. Nugent stated that the board is not a precedent-setting board and unless something comes in front of the board that is exactly the same situation that would not be an issue. He reminded the board that the hardship criteria do not include monetary hardship.

Mr. Maguire stated he wished to make a technical point considering "yielding a

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<p>reasonable return” and the valuable use of the property in essence is the same thing.</p> <p>Donald Hamilton, 46 West Old Orchard Avenue. Mr. Hamilton stated that there are negative effects on the neighbors, and it is not “common sense” to change what the prior variance had clearly stated. Common sense is for a buyer/realtor to do their due diligence.</p> <p>Mr. Denison asked if there was a title search done.</p> <p>Mr. Maguire stated yes, but the Wu’s did not see it. It was found after buying the property.</p> <p>Chairman DeLeo requested clarification that the title search stated it.</p> <p>Mr. Maguire replied that Mr. Wu did not read it, and just assumed.</p> <p>Ms. Cushna felt that a real estate profession from another state, buying a property, would most likely hire an attorney to represent them in the purchase, but the Wu’s did not.</p> <p>Mr. Maguire then stated that in Maine that is not done routinely.</p> <p>Mr. Bryant addressed the board and stated that the prior owners did a title searched which did not show the limitations. He then pointed out the boundary survey which shows it as a 2-family. He sated they looked at deeds as well.</p> <p>Mr. Quinn felt that if they had they would have seen the condition.</p> <p>Mr. Denison stated that there is nothing on the survey about a single family.</p> <p>Mr. Bryant stated he wanted the board to know that someone did look for it, but didn’t see it.</p> <p>Ms. Cushna explained that they were looking at a boundary survey which is completely different from a title. It is not proof that the property is a legal multi-family. She reiterated that there is no legal reason for the variance to be granted.</p> <p><i>PUBLIC HEARING CLOSED at 7:55 p.m.</i></p> <p>Chairman DeLeo asked Mr. Nugent if these two items should be together or separate.</p> <p>Mr. Nugent felt they should be separate.</p> <p>Chairman DeLeo asked if he should read the entire administrative appeal.</p> <p>Mr. Nugent responded the board can just deliberate and come to a conclusion.</p> <p>Mr. Weyenberg stated the building is not a legal 2-unit.</p> <p>Mr. Quinn stated that he agrees, but this is a very distressing vote to him, as the town has been an error and treated this building as a 2-family.</p> <p>Ms. Higgins agreed, but felt it was the board’s responsibility to stop the errors that have occurred.</p> <p>Mr. Quinn felt the same, but was having a hard time because it should never have happened in the first place.</p> <p>Ms. Higgins moved to determine the structure at 42 West Old Orchard Avenue is not a legal two-family.</p> <p>Mr. Weyenberg seconded.</p> <p><i>Motion passes unanimously</i></p>	<p style="text-align: center;">Motion</p> <p style="text-align: center;">Vote</p>
<p><u>ITEM 2: Miscellaneous Appeal:</u> Jeffrey Wu & Janet Chao, owners of 42 West Old Orchard Avenue, MBL 312-8-6 in the R2 Zone, to permit the adjustment of the density standard and minimum requirement for off-street parking to allow the structure to remain a two-family home. James B. Maguire, Esq. is representing the owner.</p> <p>Ms. Higgins asked if this was lot 6 or lot 8.</p> <p>Mr. Nugent replied it is both; one for each unit.</p> <p>Chairman DeLeo read the criteria for number one.</p> <p>With regards to part A. The land in question cannot yield a reasonable return unless the variance is granted the appellant stated the property was purchased in</p>	<p style="text-align: center;"><u>Item 2:</u> <u>Miscellaneous</u> <u>Appeal: Jeffrey Wu</u> <u>& Janet Chao, MBL</u> <u>312-8-6</u></p>

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good faith as a two-unit. If both units cannot be rented, the return yielded will not be enough to pay regular monthly mortgage payment, let alone other costs. This could be the financial ruin of the owners.

Mr. Quinn stated that he thought possibly the entire home as a single-family could be rented out for roughly the same money.

Chairman DeLeo asked how many people would be allowed to live in the home and if the amount of people and impact would be close.

Mr. Nugent replied that there is a large density in the code, and the maximum impact may be the same.

Mr. Quinn disagreed.

Mr. Weyenberg disagreed.

Ms. Higgins disagreed.

Mr. Denison disagreed.

Chairman DeLeo disagreed.

With regards to part B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood the appellant stated the unique circumstances of the property is that for at least ten years, use as a two-family has been tolerated by the town. At least two prior owners of the property used it as a two-family building. The records of the Code Enforcement Office contained at least five references to such use, all of them dated before Mr. Wu and Ms. Chao bought the property. Copies are attached. Even the current assessor's card states that it is a two-family building. A copy is attached. Substantial justice should be done by granting the variance request. In addition, the property is on a corner lot abutting two streets and other developed parcels, meaning there is no change for acquiring adjacent land to solve the current problem.

Mr. Denison disagreed.

Ms. Higgins disagreed.

Mr. Weyenberg disagreed.

Mr. Quinn disagreed.

Chairman DeLeo agreed.

With regards to part C. The granting of a variance will not alter the essential character of the locality the appellant stated two-family buildings are a permitted use in the zone where the property is located, which includes many residential structures. Continuing such use will not alter the essentially residential character of the locality. Nor will continuing use as a two-family pose a health or safety problem. The records of the Code Enforcement Office reflect no substantial ongoing problem of that nature.

Mr. Quinn asked a questions concerning egress in the second floor.

Mr. Nugent explained egress and thinks it is not an issue.

Mr. Weyenberg agreed.

Mr. Quinn agreed.

Mr. Denison agreed.

Ms. Higgins agreed.

Chairman DeLeo agreed.

With regards to part D. The hardship is not the result of action taken by the appellant or a prior owner the appellant stated the owners believed in absolute good faith that they were purchasing a legal two-family building. When they bought it in November 2006, they were in California, where they reside, and they relied entirely on their local real estate broker, who assured them in writing that

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<p>the use was legal. A copy of his email is attached. There is no evidence that a prior owner added the second unit. It could have been done by a tenant or a relative of an owner or anyone who might benefit therefore it would not be correct to conclude that the present hardship is the result of action by a prior owner. Even if there were records showing a prior owner did it, he may have believed what he did was legal because the town did not interfere.</p> <p>Ms. Higgins agreed. Mr. Denison agreed. Mr. Weyenberg agreed. Mr. Quinn agreed. Chairman DeLeo agreed.</p> <p>Ms. Higgins moved to deny the variance of Jeffrey Wu and Janet Chao, 42 West Old Orchard Street. Mr. Denison seconded. <i>Motion passed unanimously.</i></p>	
<p>Ms. Higgins motioned to table the minutes from February 22, 2010. Mr. Weyenberg seconded. <i>Motion passes unanimously.</i></p>	<p>Motion</p> <p>Vote</p>
<p><u>GOOD & WELARE</u> Mr. Nugent pointed out that the next steps would be to consult with the abutters of 42 West Old Orchard Ave as far as enforcement goes. There are significant challenges because of the mistakes that were made by the town. It will be our job to bring this forward to the Town Council to get approval. Chairman DeLeo asked if steps have been taken so that this does not happen in the future. Mr. Nugent stated that staff was not trained adequately regarding licensing and the interconnection with zoning. Staff discovered this and are now checking all properties. Mr. Weyenberg asked if staff could go through all existing licenses and make sure they were all good. Mr. Nugent stated this would take a lot of man power and hours that staff does not have.</p>	
<p>Ms. Higgins moved to adjourn. Mr. Weyenberg seconded. <i>Motion passed unanimously.</i></p>	<p>Motion</p> <p>Vote</p>
<p>Meeting adjourned 8:20 pm</p>	<p>Adjournment</p>

I, Tori Geaumont, Secretary to the Zoning Board of Appeals of the Town of Old Orchard Beach, do hereby certify that the foregoing document consisting of eight (8) pages is a true copy of the original minutes of the Zoning Board of Appeals Meeting on February 22, 2010