

DRAFT

ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, JULY 15, 2003
(Continued from Tuesday, July 8, 2003)
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 PM

MEMBERS PRESENT: Ted McNitt, Vice Chair; Jay Gooze, Robin Rousseau, John de Campi, Linn Bogle, Alternate

MEMBERS ABSENT: Henry Smith, Chair

OTHERS PRESENT: Tom Johnson, Code Enforcement Officer; Interested Members of the Public, Karen Edwards, Administrative Assistant (sitting in as recording secretary)

MINUTES PREPARED BY: Jennie Berry, Administrative Assistant

Vice Chair McNitt called the meeting to order at 7:00 PM and designated Linn Bogle a full voting member due to the absence of Henry Smith. Vice Chair McNitt introduced the remaining members of the Board and explained the procedures of the meeting for the benefit of the public.

I. Approval of Agenda

*Jay Gooze **MOVED** to postpone agenda item number III until the next meeting at Mr. Paul Mackin's request. John de Campi **SECONDED** the motion and it **PASSED** unanimously.*

II. **PUBLIC HEARING** on a petition submitted by Gale S. Teeri, Durham, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a June 11, 2003, decision of Zoning Administrator, Thomas Johnson, that the dwelling is in violation of Article I, Section 175-6 relating to occupancy. The property involved is shown on Tax Map 11, Lot 28-1, is located at 66 Piscataqua Road, and is in the RC, Residence C Zoning District.

*Vice Chair McNitt **OPENED** the public hearing.*

Attorney Simone Masse, representing Ms. Teeri, stated there were three reasons why she felt the Zoning Officer's decision was incorrect. First, she believes that the Zoning Ordinance, as presently written, will show that there is no violation of Section 175-6. Second, the use that is currently in the dwelling has been grandfathered and was grandfathered under prior zoning ordinances. Third, she believes that Ms. Teeri has been given representation at different times upon which she can rely that the use she is presently making of the property is valid and legal under the Zoning Ordinance.

Attorney Masse referred Board members to Section 175-6 of the Zoning Ordinance, which is the definitional section of the ordinance. She explained that within that section there is a definition of "accessory apartments" and "dwellings". She also noted that this section contains a chart, which outlines how many individuals can live in a dwelling, depending upon the type of dwelling. Further, the ordinance states that no more than three unrelated individuals may occupy a dwelling within the RC zone. Attorney Masse stated that the Zoning Ordinance does not say, however, that this would include the occupation of accessory apartments; it simply identifies it as a single-family dwelling. She stated that Section 175-27 of the Zoning Ordinance defines what is permitted in the RC zone. Paragraph (C)(1) lists single detached dwellings [maximum of three (3) unrelated individuals], and paragraph (C)(2) allows accessory apartments. She said it does not group those two categories together. Attorney Masse said if the Town only allows three unrelated people in a single-family residence, that it is fine, but there has to be a recognition that individuals are also allowed in the accessory apartments. If the Town says that in a single dwelling there will be no more than three unrelated individuals it negates the Town's ability to have an accessory apartment if three individuals happen to be living in a single-family residence. Therefore, she did not believe the court would agree with the Board's interpretation of the Zoning Ordinance that an accessory apartment cannot be used in a single-family dwelling if there are three unrelated persons.

Attorney Masse stated that if the Board chooses to find that a reading of the present ordinance would disallow the use of the accessory apartment, then this particular use has been grandfathered. She said the house at 66 Piscataqua Road was originally built in 1964 and she obtained a copy of the building permit. She said there was also an application on April 18, 1977 to add a one-room apartment in the basement, which was 440 square feet, and her reading of that application was that it would allow two persons. Attorney Masse said under the definition contained within the 1977 Zoning Ordinance that was in effect at the time the building permit was obtained for this apartment, it met the zoning requirements.

Attorney Masse indicated that at the time her client purchased this property (February 2000) she specifically asked the realtor and the Town what use could be made of this dwelling. Her client was advised that there was no problem with her intended use of the five individuals living in the apartment. Attorney Masse indicated this was not in writing and had been made by the prior Code Enforcement Officer.

However, Ms. Teeri had relied upon that information. She also noted that the listing agreement that advertised the home at the time indicated there was an income apartment included with this property. Attorney Masse said that the tax card on this property reflects it not as a single-family dwelling with an accessory apartment, but as a two-family dwelling. She said she knew from attending the July 8th ZBA meeting that the Board does not look favorably upon what the Tax Assessor's office has done relating to properties. She felt that the court would have a difficult time believing that one part of the Town (its taxing authority) considers the property as a two-family dwelling, while another part of the Town (the Zoning Board) believes the property not to be a two-family dwelling. Attorney Masse concluded by asking that the decision of the Zoning Officer contained in his letter dated June 11, 2003 be reconsidered, that his decision be revoked, and that her client be allowed to continue to have the five unrelated persons in the dwelling.

Linn Bogle said if Attorney Masse's interpretation of the Zoning Ordinance was correct, then the Town would have no defense against people packing students into houses and accessory apartments. Attorney Masse replied that if the Town has single-family dwellings where accessory apartments are allowed and it has a valid existing accessory apartment, she believed Mr. Bogle's comment was true.

Mr. Bogle said he interpreted the application as there would be a family in the house, which could be six or eight people, but all related. If they want an accessory apartment they can have two additional unrelated people in that accessory apartment. Attorney Masse replied that the Town's ordinance does not require the dwelling to be owner-occupied, which is what Mr. Bogle was suggesting.

Jay Gooze stated that the key point in the definition of "accessory apartment" in the Zoning Ordinance is that it always includes subordination to the main use of the house, which is the purpose of a single-family dwelling with an accessory apartment. Once there are renters on all sides, there is no longer subordination of one side versus the other. The entire structure would then be considered a single family dwelling used as a rental limiting the number of unrelated to 3. This is different than a duplex that allows a maximum of 3 unrelated in each unit.

In relation to the grandfathering of this property, Vice Chair McNitt asked if prior to Mrs. Teeri's purchase of the property, whether it was used as a rental for five unrelated people or was a family living in it that used it as an accessory apartment. Attorney Masse replied she did not know if there were five unrelated people. However, she did know it was rented and that at one point in time there was a family who lived in the house who rented. She did not know if that history extended back to 1977.

John de Campi said he did not find the three unrelated as applying only to the house and excluding the apartment as a persuasive argument. However, he could be persuaded by the grandfathering issue of 1977 depending on facts of the matter and the reading of the 1977 Zoning Ordinance.

Robin Rousseau was uncertain why this application, which is an apartment located in the basement on the same lot, would be different from subordinate to the principle use of the land or building and located on the same lot with such principle use as defined by "accessory use".

Donna Brown, 34 Edgewood Road, said she was not specifically speaking to this particular application. She encouraged the Board to make a distinction between residential homes with attached apartments and what essentially become boarding houses. She said if homes and apartments become strictly rental properties for students, she believed it then becomes a type of boarding house. She felt these type of properties affect the character of a neighborhood and are probably not consistent with the Master Plan or portions of the existing Zoning Ordinance.

Responding to Ms. Brown's concerns, Attorney Masse indicated that Ms. Teeri's property is located in a more rural area, and having students in that area would not have the same affect as it would in an area closer to town.

In response to a question raised by John de Campi, Attorney Masse explained that there are currently three students living upstairs and two students living downstairs in the basement.

Annmarie Harris, 56 Oyster River Road, felt this was a precedent-setting concern and asked the Board to vote against the request.

Vice Chair McNitt CLOSED the public hearing.

Jay Gooze stated the Board needed to understand what was happening at the time the Town's three unrelated person Zoning Ordinance was adopted. Every house used as a rental before then with more than 3 unrelated occupants had to be grandfathered for this greater number of unrelated people living in the house or the term "grandfathered" made no sense. He said he believed that at the time the ordinance was passed in 1986, the Town notified people that if they had renters, they were to let the Town know so it could make a rational judgment about whether or not to grandfather a property.

Vice Chair McNitt asked Ms. Teeri if she had ever lived at the property. Ms. Teeri responded that she had not. She said that her real estate agent informed her that she could have three people upstairs and three people downstairs.

Robin Rousseau said her interpretation of “grandfathering” in these situations is that once an ordinance changes, it would go from lease to lease. For example, if an existing tenant or occupant with a lease was in the home in 1999 and the ordinance changed, that lease or arrangement would then be grandfathered. However, once those occupants leave and the owner has another arrangement, the grandfathering would no longer be valid and the owner would need to be in compliance with the Town’s new occupancy requirements. She also noted that real estate broker representations have no legal relevance and are not legitimate supportable evidence when applicants come before the Zoning Board, even if the applicant has a document in writing.

John de Campi said he was uncomfortable with grandfathering without reading the applicable Zoning Ordinance of 1977 in its entirety. He agreed with Robin Rousseau and Jay Gooze that the grandfathering has to be perfected by some means.

In response to a question from Vice Chair McNitt, Ms. Teeri said the house was unoccupied at the time she purchased the property. She was uncertain how long it had been unoccupied, but said the previous Zoning Officer, William Edney, had told her she was legitimate with having three people upstairs and two people downstairs.

Robin Rousseau read one of the Town Council’s goal statements: “continue efforts toward effective enforcement of 3 unrelated ordinance.” She also stated that page 1.25 of the Master Plan contains very strong language to continue the enforcement of three unrelated. Therefore, she said any cases coming before the Zoning Board have to be extremely strong in order for the Board to grant a variance on this type of issue because the Board does not consider these matters lightly.

Jay Gooze noted that for a long time in Durham an accessory apartment was labeled on Durham’s tax cards as “two-family” because that was the only zoning category that existed. This “two family” classification was used for a duplex and also for a single family house with accessory apartment. He also said that in his view grandfathering depends on “continuous and uninterrupted use” of a property and that in this case he has not heard any proof of continuous and uninterrupted use.

Mr. Tom Johnson stated that the state considers 1 year of different use the amount of time needed to change a classification of usage.

Linn Bogle said that unlike a number of other cases the Board has decided on, this case lacks persuasive documentation to support the argument. He said that in other cases the Board has taken a restrictive view and felt that is what the Board should do in this case.

Robin Rousseau MOVED to DENY the petition submitted by Gale S. Teeri, Durham, New Hampshire for an appeal of administrative decision from a June 11, 2003, decision of Zoning Administrator, Thomas Johnson, that the dwelling is in violation of Article I, Section 175-6 relating to occupancy. The property involved is shown on Tax Map 11, Lot 28-1, is located at 66 Piscataqua Road, and is in the RC, Residence C Zoning District. The motion was SECONDED by Jay Gooze and PASSED unanimously.

- III. **PUBLIC HEARING** on a petition submitted by Paul F. Mackin, Bedford, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** from a June 16, 2003, decision of Zoning Administrator, Thomas Johnson, that the dwelling is in violation of Article I, Section 175-6 relating to occupancy. The property involved is shown on Tax Map 1, Lot 13-22, is located at 96 Madbury Road, and is in the RA, Residence A Zoning District.

This item was postponed until the next meeting of the Zoning Board at the request of the applicant.

- IV. **PUBLIC HEARING** on a petition submitted by Chris and Wendy Brooks, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article IV, Section 175-25(B) and Section 175-25(C) and Article III, Section 175-16(A) to build two accessory apartments on a nonconforming lot. The property involved is shown on Tax Map 1, Lot 20-12, is located at 78 Madbury Road, and is in the RA, Residence A Zoning District

Vice Chair McNitt OPENED the public hearing.

William Schoonmaker, Schoonmaker Architects, spoke on behalf of the applicants. He explained that the lot is undersized (15,000 square feet) and nonconforming by 5,000 square feet. He stated that the applicants wish to put an addition on the house because they desire to have Wendy's mother live with them and be able to have a space of her own.

Mr. Schoonmaker explained there is also a small apartment (under 300 square feet) in the basement, which was not in use at the time the Brooks bought the house. He said they desire to convert that space into a one-person accessory apartment. Therefore, they are requesting approval for two accessory apartments. One apartment would be

in the basement suitable for one person for additional income and the other accessory apartment would be through the addition on the house for Wendy's mother to be able to live with the Brooks family.

Mr. Schoonmaker stated that if the basement apartment is rented, there would be one unrelated individual in the household. Otherwise, the use would be in essence an extended family.

Mr. Schoonmaker said there is also a garage on the north side of the house, which has less than a ten feet setback. The Brooks are asking for a variance to allow them to continue using the existing garage.

Jay Gooze asked Zoning Officer Tom Johnson if this was an illegal basement apartment. Mr. Johnson responded that in his discussion with the Brooks, they claim it has been abandoned for nine years. Mr. Gooze asked if the basement apartment would suffice for the mother-in-law. Mr. Schoonmaker replied that it would really be too small.

Jay Gooze said he had a problem with two apartments on the property and felt it would be setting a bad precedent. He asked Mr. Johnson if anyone could put two accessory apartments in a house on a conforming lot. Mr. Johnson replied that his interpretation of the ordinance would be one accessory apartment in a single-family home.

John de Campi said he had a problem approving this property with three kitchens because he felt the third kitchen would survive the use of the mother-in-law.

Linn Bogle felt parking should be addressed. He did not believe there was enough room for additional parking at this property. Mr. Brooks replied that his mother-in-law would park in his driveway and that no parking spots would be provided for a renter since the property is close to campus and a renter could walk or ride a bike.

Jim Long, 10 Woodside Drive, stated that the Brooks' house had ten students renting it in the mid-1980s. He said his concern would be if the Brooks ever move out that ten students could move into the house. He felt approval of this request would diminish his property value and was not a benefit to the public.

Judy Coburn, 85 Madbury Road, said she has rented apartments without kitchens to students for 35 years, and that this has never hindered her from being able to rent to students.

John Caulfield, 8 Woodside Drive, said he was concerned about how many unrelated people could end up living in the home. He felt that if the property were to turnover and a number of undergraduate students rented the home, it could potentially adversely affect the property value of the residential neighborhood.

William Schoonmaker said the Brooks are sensitive to the issue with regard to student rentals. He said to deny their request based upon what could happen in the future does not seem fair and asked that the Board keep in mind that no matter how many apartments or kitchens there are at this location, they can only have three unrelated individuals in the house.

Chris Brooks said their intent is to stay in the house for many years. He understood the concerns that had been expressed by abutters. He said because it is a large house, it is not the type of house someone would buy as an investment.

Vice Chair McNitt CLOSED the public hearing.

Jay Gooze asked as long as there are no more than three unrelated people in a house, could someone rent a room without the Town's permission. Tom Johnson read the definition for "dwelling unit" and said his interpretation of the ordinance is if someone has a single-family home and wants to rent out part of their home, they will rent out as an accessory apartment.

Jay Gooze restated his position that he is not in support of having two kitchens in addition to the main house.

Linn Bogle said he had difficulty with granting two accessory apartments in a house. He was also concerned that the proposed addition with kitchen and bathroom facilities might become a duplex. He also expressed concern that parking would not be adequately addressed.

Jay Gooze felt the application, as proposed, did not meet any of the five criteria.

John de Campi agreed with Jay Gooze. He said if the request had come in just as a two-room addition on to the house, he felt the Board would look favorably on it. However, the kitchen makes it definitively a third apartment in this unit, which he is concerned about.

Vice Chair McNitt shared the concerns of John de Campi about the unit having two accessory apartments.

Robin Rousseau said she understood this was a community and that people have personal circumstances they must deal with. However, the Zoning Board needs to look at this request from a legal perspective. She said the Board is being asked to re-characterize the legal description of a property. She said the Board cannot take mothers-in-law and children into consideration when making its decision. She felt the Brooks would have reasonable use of the property if they, for instance, wanted to bring the basement apartment up to code or came to the Board for a variance on an addition without the kitchen. Ms. Rousseau said she also had an issue with the application for variance because of the abutters being strongly opposed to the addition. She felt it would impose on the abutters for the Board to grant the variance as presented.

Robin Rousseau MOVED to DENY the petition submitted by Chris and Wendy Brooks, Durham, New Hampshire for an application for variances from Article IV, Section 175-25(B) and Section 175-25(C) and Article III, Section 175-16(A) to build two accessory apartments on a nonconforming lot. The property involved is shown on Tax Map 1, Lot 20-12, is located at 78 Madbury Road, and is in the RA, Residence A Zoning District. The motion was SECONDED by John de Campi and PASSED unanimously.

Vice Chair McNitt declared a 5-minute recess at 8:35 PM.

Vice Chair McNitt called the meeting back to order at 8:40 PM.

V. Approval of Minutes

May 13, 2003

Page 2, 5th paragraph, 2nd line, add the word “ordinance”

Page 3, 3rd paragraph, should read “quid pro quo”

Page 3, 4th paragraph, 2nd line, add “at Lundy Lane” after the words “current House” and add “it” after the word “place”

Page 4, top of the page, change vote to read “4-1-0” and the word “granted” with the word “done”

Page 6, last paragraph, last paragraph, “Tom Johnson stated”. Same spelling for both.

Page 7, 3rd paragraph, change the word “state” to “stated”. Add comma after “stated”

Page 8, 2nd paragraph, 2nd line, Add the word “it” after the words “She also stated”

Page 12, just below the middle of the page, change the word “whom” to “who”

Page 14, 2nd paragraph, correct spelling of Attorney Waugh to be “H.

Bernard Waugh”

Linn Bogle MOVED to approve the minutes of May 13, 2003, as amended. The motion was SECONDED by John de Campi and PASSED on a vote of 4-0-1. Robin Rousseau abstained, as she was not a present at that meeting.

May 20, 2003

Under “Members Present”, put John de Campi before Linn Bogle

Page 3, 2nd paragraph, make the word “footprints” singular

Page 5, Change spelling of Chris Bolt to “Boldt”

Fix page numbering at the top of the pages

Page 6, 1st line, insert the words “the existing” before the word “house”

Page 7, 2nd paragraph, change spelling of “criteria” to “criterion”

Jay Gooze MOVED to approve the minutes of May 20, 2003, as amended. The motion was SECONDED by John de Campi and PASSED on a vote of 4-0-1. Robin Rousseau abstained, as she was not a present at that meeting.

June 10, 2003

Page 2, paragraph 6, “structure” instead of “property” Make change in “Boldt”

Fix page numbering at the top of the pages

Page 3, “in response to a question from Ted McNitt”. Square footage for new structure should be over 2000 square feet

Page 4, “Mr. Boldt stated “if” the board approved”

Page 5, paragraph 3, “Jay Gooze instead of John” “bring the grade up”

Page 5, paragraph 5, comma after Durham

Page 5, 4th paragraph from bottom, “can build using the existing foundation” not “off the existing foundation.”

Page 7, 3rd paragraph, change “building” to read “build”

Page 9 2nd paragraph, 2nd sentence, change “wall if” to “wall is”

Page 9, 6th paragraph, “the Board is allowed to impose conditions” not “grant”

Page 9, 2nd paragraph, “the wall will need a 1 hour rating” “no windows are allowed to be changed to openings.”

Page 10, 2nd paragraph, “Zoning Ordinance requirement is” “Ted McNitt agreed with Jay but is concerned” “decisions the owner made”

Page 10, last paragraph “Chair Smith stated that the intent of the ordinance is to prevent packing of..”

Page 11, “A precedent”

John de Campi MOVED to approve the minutes of May 20, 2003, as amended. The motion was SECONDED by Jay Gooze and PASSED on a vote of 4-0-1. Robin Rousseau abstained, as she was not a present at that meeting.

VI. Other Business

There was no other business to come before the Board.

VII. Adjournment

John de Campi MOVED to adjourn. The motion was SECONDED by Linn Bogle and PASSED unanimously.

Vice Chair McNitt adjourned the meeting at 9:00 PM.

Jay Gooze, Secretary