

DRAFT

DURHAM ZONING BOARD OF ADJUSTMENT MEETING MINUTES TUESDAY, AUGUST 10, 2004 DURHAM TOWN HALL – COUNCIL CHAMBERS 7:00 P.M.

MEMBERS PRESENT: Chair Henry Smith, Jay Gooze, Ted McNitt, John deCampi, Linn Bogle, Myleta Eng

MEMBERS ABSENT: Sally Craft

OTHERS PRESENT: Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

Chair Smith called the meeting to order. He noted that there would be five voting members, and designated Sally Craft as a full voting member for the meeting.

I. Approval of Agenda

Ted McNitt MOVED to approve the agenda as submitted. The motion was SECONDED by Jay Gooze, and it PASSED unanimously.

II. Public Hearings

- A. PUBLIC HEARING** on a petition submitted by Elizabeth Barnhorst, Durham, New Hampshire, for an **APPEAL of ADMINISTRATIVE DECISION** from May 18, 2004 and June 29, 2004 letters from Zoning Administrator Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. The property involved is shown on Tax Map 1, Lot 12-13, is located at 1 Emerson Road, and is in the RA, Residence A Zoning District.

Chair Smith opened the public hearing.

Beth Barnhorst explained the reasons why she had filed her appeal of administrative decision. She said it was her understanding that she could rent to three persons, noting that in her original building permit application, she had clearly checked residential, one family, had described one apartment over the garage, and had indicated that there were 3 bedrooms. She said she had spoken with then Code Enforcement Officer Bill Edney about her plans, and specifically asked him how many bedrooms and how many tenants were allowed.

In her letter to the Town, she said the apartment exceeded the 600 square feet requirement for three tenants, noted the attached house was owner occupied, and said the lease for tenants insured that she and her neighbors would be protected from anything

that could prevent peaceful enjoyment of their properties. She also noted that all surrounding properties had shown a significant increase in value since the addition of the apartment in 2000.

She said she understood the need to crack down on those who had exceeded occupancy limitations, and that there were people all over Town who rented to more than three, and did not have adequate square footage. She said that in no way had she intended to violate the Town's Zoning Ordinance, but said there may have been a different interpretation by the prior administration concerning the provisions of the Zoning Ordinance concerning renting to three unrelated persons. Ms. Barnhorst asked that her property be grandfathered in order to allow her to rent to three unrelated persons.

Chair Smith noted there was nothing in writing about this, and asked who had told Ms. Barnhorst that she could rent to three people. Ms. Barnhorst indicated that it was Mr. Edney.

Board members discussed details of the building permit for the apartment, including where it said there would be three bedrooms. Zoning Administrator Johnson noted, in answer to a question, that the permit number could be found on the original building permit in Town records.

Ms. Barnhorst explained that denial of her appeal would cause unnecessary hardship, noting she had signed a lease in May, 2004 for one year with three unrelated tenants. She said rentals were a good portion of her income, and provided details of the economic loss she would suffer if she were only allowed to rent to two persons. She said this was one of the reasons she believed she should be grandfathered.

Lorraine Eastman, an abutter, said Ms. Barnhorst's property had always looked nice and said there were no noise problems with the property. She said she had no problems with the current situation.

Chair Smith asked if anyone else wished to speak for or against the application. Hearing no one, he closed the hearing.

Sally Craft said that even if the building permit were granted for three bedrooms, this didn't have anything to do with the rule of having unrelated renters, because one of her sons could have occupied one of the bedrooms. She said she wasn't sure how the two issues related to one another. She also asked how Mr. Johnson learned about the situation. Mr. Johnson said a neighbor had complained to the Town that there was a three bedroom apartment for rent, and asked him to see if it complied with the three unrelated rule.

Mr. McNitt said this was a tough situation to interpret, noting that the architectural drawing of the planned apartment showed two beds, intending two bedrooms. He also said there were a number of occasions when it was right to have 3 bedrooms in an accessory apartment with three bedrooms. He said the question for the building department was, did this meet the structural requirements, not the occupancy requirements, which came down the road later. He said although not knowing the details

of what happened with the request for the building permit, he could conceive of a situation where the Code Enforcement officer of the time would approve a three-bedroom accessory apartment, although not without some kind of warning.

Chair Smith said it was regrettable that there was nothing in writing from Mr. Edney.

Mr. deCampi said unfortunately there was nothing in Ms. Barnhorst's presentation that verified what Mr. Edney said or didn't say, but said he doubted Mr. Edney would have said it was all right to rent to three people. He said all they had to go one was a permit with 3 bedrooms filled in, and a drawing with two bedrooms. He said he didn't feel that the applicant had met the burden of proof in showing that there was a grandfathered application, and said he wished the applicant had applied for a variance, so the Board could consider the merits of the issue. He said in this case they could only consider the facts before them.

Mr. Gooze said he had wrestled with these provisions in general, noting that the reason for the three unrelated provisions was to control the density, etc. of renters. He read through definitions in the Zoning Ordinance, related to this situation, and said the accessory apartment was a dwelling unit according to the definition of dwelling unit. He said the key point was that the accessory use was subordinate to the main use of the building. He said when part of a house was rented, it became a subordinate use, and said that to him, this meant there were no more than three unrelated allowed per dwelling unit, not for the entire house.

He said he therefore saw that if someone had a house big enough to support a three bedroom apartment, or more, by current zoning, if the apartment was used for a subordinate purpose, three unrelated people could live there. He said he didn't want to be strict about whether the owner was living in the house, but wanted to focus on the word subordinate. He said once the person was renting the entire structure, it couldn't be called subordinate, and reverted back to a single family home, and there the rule said no more than three renters were allowed per dwelling unit, so the whole house was now one single dwelling unit.

He said he needed to be convinced otherwise about this, and said the way the provisions were currently written, he couldn't see how this could be interpreted a different way. He said adding wording to the Ordinance that a single family home with an accessory apartment was considered one dwelling unit would solve the problem.

There was discussion of the definition of dwelling unit, and the definition of household.

Chair Smith said he disagreed with Mr. Gooze, and said he tended to look at the situation as a structure/ house as one dwelling unit with an accessory apartment, but noted the wording could be interpreted a different way.

Mr. deCampi said he had always been under the impression that the three unrelated persons provision referred to the whole house with the apartment. He said the wording didn't sound like it was intended to meet the description of a separate dwelling unit, but he agreed this was open to interpretation. He said the Board had been reading the

provision as though the three unrelated rule referred to the house and the apartment together.

There was discussion as to whether this kind of situation had come before the Board before.

Mr. deCampi said it was important to look at the provisions of the old Ordinance and new Ordinance in more detail.

Ms. Barnhorst said the provisions were unclear, and noted she was only asking that the Board grandfather what was originally granted to her. She also clarified that the drawings for the apartment were not done by an architect, and said the omission of the third bed was not meant to signify there were only two bedrooms. She said the application clearly said three bedrooms were planned. She also said she had never tried to hide the fact that she was renting to three people, and invited anyone to come look at how well maintained her property was.

Mr. Gooze asked Mr. Johnson to respond to his (Mr. Gooze's) interpretation of the Ordinance. Mr. Johnson said he would need to spend some time with this, noting that he had struggled with the accessory apartment concept because it was a dwelling unit within a dwelling unit. He said this was a duplex in his mind, and said if he were there in 2000, he would have considered Ms. Barnhorst's property to be a duplex, which was permitted in that zone, and would have advised the applicant to consider it one as well.

Mr. McNitt referred to wording page 119 of the new Zoning Ordinance, and Board members each said it reinforced the different positions they had taken and discussed this in more detail.

Mr. deCampi said this could be read either way. He said if Mr. Gooze's interpretation was correct, then Mr. Johnson's conclusion was incorrect, and vice versa. He said it was critical in order to make a decision on the application that it be continued to the next month, so Board members and Mr. Johnson could study the ordinance in more detail.

Board members agreed that other opinions on this should be solicited, including from the Town Attorney.

Chair Smith asked Mr. Johnson where this situation left Ms. Barnhorst.

Mr. Johnson said this application was still in the court system, so there was no enforcement action necessary yet.

Mr. Gooze agreed it was very important to talk to the Town Attorney on this matter.

Mr. Johnson asked if the Board would consider the approach of determining that the original application was filled out incompletely, and the addition was not an accessory apartment, but a separate dwelling unit, and should be considered a duplex. He noted that the information on the application was conflicting, and said a duplex was allowed in that zone.

Board members agreed it would be better for a number of reasons not to go down the road Mr. Johnson had described

Chair Smith asked if anyone had a problem with continuing this application to the September meeting, and Board members agreed this was the way to proceed.

John deCampi MOVED to continue the APPEAL of ADMINISTRATIVE DECISION from May 18, 2004 and June 29, 2004 letters from Zoning Administrator Thomas Johnson Thomas Johnson regarding the occupancy of the Single Family Home with Accessory Apartment. Mr. McNitt SECONDED the motion.

Ms. Barnhorst said she had no problem applying for a variance, but asked that when they talked to the Town Attorney, they consider that if the wording in the Ordinance was so unclear, her decision should be grandfathered. She noted she had a signed lease for the next year, with three tenants planning to move in.

Ms. Eastman said that when the three unrelated provisions were developed, a citizen who lived in a large house came forward at the meeting and received clarification that he would only be able to rent to three unrelated persons. She said it was very clear at the time that one could rent to three unrelated persons.

The motion PASSED unanimously.

III. Board Correspondence and/or discussion

Code Administrator Johnson spoke to Board members about the Board's decision on the Appeal Of Administrative Decision concerning 66 Main Street. He asked that the following email, sent to Board members, be read into the record.

Dear Board Members,

I have reviewed the tape Monday night of the meeting of last Tuesday 7/20. I am considering filing an Appeal of your Decision; but would rather a Board member that was present and voting request a reconsideration of the vote. These are my concerns that if I had not been in Maryland, would have expressed at the meeting.

The applicant has withdrawn their application for Site Plan Review before the Planning Board this Wednesday night as per a call I received from their attorney on Monday 7/26 based on the ZBA's approval of last week. They may or may not submit a new plan and may or may not do some landscaping...there is no order or condition to do that now!

I had expected the ZBA to deny their appeal of my letter; and to acknowledge that the error was their's in not providing an accurate site plan for total parking on the site back during their original boundary line adjustment with the bank. Our Zoning Ordinance in 175-16.F. grants authority for site plan review to the Planning Board, not the Zoning Board. During the Planning Board's case for the boundary line adjustment the site plan showing all parking on site was their required condition of approval. The PB may have looked at the driveway parking or not. There may have been access issues for emergency vehicles that

prohibited parking along that front access driveway; or any other number of discussions that I and the ZBA were not a party to.

Part of the frustration of the ZBA, and in my office's enforcement efforts in the past have been a lack of accurate records and procedures in the past for a number of properties here in town. Then here in 2004 we have a property that wanted to sell some land with commercial parking on it. That reduction in lot area and parking for one property (the fraternity) became an increase in property and parking for another (the bank). That Planning Board process involved comments from staff members, a public hearing and an opportunity for applicant's documentation of grandfathering facts/parking, etc. They provided an engineered site plan of their parking. That plan was approved by the PB and became part of the "new" permanent record for the new smaller property. That process effects any grandfathering and created an excellent piece of documentation (the applicant's engineered site plan) for future reference. However, we now have a decision that clouds that site plan and circumvents the PB Site review process, and in a couple years someone will look at the "Approved Site Plan" and wonder how the driveway parking got approved!

Four of the voting members stated on the record that the Zoning Administrator made the right decision with the information he had., then added...but the parking is grandfathered and allowed, then voted to uphold the appeal. I believe the outcome should have been...the ZA made the right decision, appeal denied, but your parking rights are "probably" grandfathered; but you need to go back to the PB for an approval on a revised site plan originally submitted in error by you the applicant, the ZBA does not do site plan review on expansions! I agree that the parking is probably grandfathered, we just need a revised PB site plan review approval to correct the one they did wrong originally.

That's my opinion, what do you think?

Board members agreed to have a rehearing on the application.

Ted McNitt MOVED to rehear the issue. John deCampi SECONDED the motion. The motion PASSED, with Chair Smith and Ms. Craft abstaining because of their absence from the meeting in question.

Mr. Gooze asked to see the Planning Board minutes on the application.

Mr. Johnson said he would also provide the Conditions of Approval and the approved plan.

There was discussion on the Meyer case, and some Board members said they would try to attend the next hearing on the case with Mr. Johnson in September.

IV. Approval of Minutes

Minutes of April 27, 2004

Need Page #'s.

Page 2, 1st full paragraph, should read "...value of surrounding properties."

Same page, 6th paragraph from bottom should read "...and said the land was subdivided in 1955.

Page 3, 5th paragraph, should read "...would be creating a viewing loft above the garage."

Page 6, 4th paragraph from bottom, should read "...was very hard to see, and the shed..."

Also page 6, 2nd paragraph from bottom should read "...had put up a nice shed on ..."

Page 7, top paragraph, should read "...and denial of the variance would lower the value of his home; cause the bathroom to become unusable; cause mold growth to become a health hazard; and create liability problems..."

Page 10, 6th paragraph, should read "...it unnecessarily crowded the rural open space..."

Also, 7th paragraph, page 10, should read "...the house was small and ..." Al

Also, 8th paragraph, page 10, should read "...there was no substantial relationship..."

Page 11, top paragraph, should read "...said they also wished to concur with..."

Also, page 11, 2nd paragraph should read "...from the Town Attorney..."

Page 12, strike the capitalized sentence "*THEY WERE NOT MOVED AND SECONDED*"

Ted McNitt MOVED to approve the April 27, 2004 minutes, as amended. The motion was SECONDED by Jay Gooze, and PASSED unanimously.

Minutes for June 8, 2004

Page 1, bottom paragraph, should read "Maria Millett said she lived..."

Page 4, 2nd paragraph, should read "...that Ms. Millett not increase the number of dogs she had, and that the dogs get along with the neighbors."

Page 7, Motion should read "...on the second floor be removed....and is also in the RA Residence A Zoning District. Linn Bogle..."

Page 8, 2nd full paragraph, should read "...would take place on the side of the house away from her property."

Page 12, the motion should read "...that the ZBA find this to be....., and add the additional condition..."

Page 13, 5th paragraph, should read "...about the proposed garage, and said he would..."

Also on page 13, the Agenda Item concerning Laurel Milos at the bottom of the page should be labeled as Item G.

Page 14, 9th paragraph, should read "...variance criteria, it was within the Board's purview to grant ..."

Also page 14, the motion should read as follows:

John deCampi MOVED to approve the APPLICATION FOR VARIANCES, as outlined in Agenda Item G. The motion was SECONDED by Jay Gooze, and PASSED unanimously.

Also page 14, Agenda Item concerning Cutts Realty Trust at bottom of the page should be labeled as Item F.

Page 15, The name of the gentleman "**Mr. Smith**", who spoke for the applicant, Melanie Rose, should be bolded, to distinguish it from Chair Smith's name.

Page 16, the motion should read as follows:

Ted McNitt MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION

Also page 16, under Agenda Item H, the 2nd paragraph should read “This application was not heard, and was rescheduled for the July 20, 2004 meeting.”

Page 17, first paragraph, should read “This application was not heard, and was rescheduled for the July 20, 2004 meeting.”

Also page 17, 7th paragraph from bottom should read “...because of this wasn’t noted...”

Ted McNitt MOVED to approve the June 8, 2004 minutes, as amended. The motion was SECONDED by John deCampi, and PASSED unanimously.