D-R-A-F-T

DURHAM ZONING BOARD OF ADJUSTMENT MINUTES
TUESDAY, NOVEMBER 16, 2004
(Continued Meeting of November 9, 2004)
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT:	Chair Henry Smith, Ted McNitt, Myleta Eng, John deCampi Linn Bogle, Jay Gooze
MEMBERS ABSENT:	Sally Craft
OTHERS PRESENT:	Thomas Johnson, Zoning Administrator; Interested Members of the Public
MINUTES PREPARED BY:	Victoria Parmele

Chair Smith noted that this meeting was a continuation of the November 9, 2004 ZBA meeting.

I. Approval of Agenda

II. Public Hearings

A. **PUBLIC HEARING** on a petition submitted by Anthony A. McManus, P.A. Dover, New Hampshire on behalf of Jonathan Chorlian, Dover, New Hampshire, for an **APPEAL OF ADMINISTRATIVE DECISION** from July 22, 2002, October 8, 2004, October 15, 2004 and October 26, 2004, letters from Zoning Administrator, Thomas Johnson, regarding occupancy. The property involved is shown on Tax Map 6, Lot 2-41, is located at 9 Stevens Way, and is in the Residential B Zoning District.

Chair Smith opened the public hearing. He noted two letters that had been received from abutters, as well as documents that had been received from Attorney Christopher Bolt.

Attorney Bolt spoke before the Board, noting he had been asked to take over the case from Attorney McManus. He said the applicant, Mr. Chorlian, was also present. He said it was a rare event when Code Administrator Johnson was wrong, but said this was such a time. He provided detailed background information on the reason for the Appeal of Administrative Decision, and said he planned to go through the various documents that had been provided to the Board that evening.

Chair Smith asked Attorney Bolt to provide a concise summary of this information.

Attorney Bolt said Exhibit A reflected that the building in question was a two dwelling unit structure, as originally built in 1982-83. He said it was built with one dwelling unit on the

first floor, and an accessory apartment in the basement. He said the flip side of Exhibit A showed the lot configuration, totaling 1350-1400 sq ft., and noted that the property met the setback requirements.
Attorney Bolt said that Exhibit B was a letter from Fire Captain Cody in 1983, reflecting that as built, the building, including the separation of the apartment down below, met the fire code in existence at the time. He said the building was viewed as having two dwelling units at that time.

He said that Exhibit C was the current appraisal, reflecting the property size of 0.99 acres, and the current designation of the building as a single-family house with an accessory apartment.

He said Exhibit D was the floor plan, noting it was an open concept floor plan. He said because there was no dead space of hallway, there was actually more livable space than the 70%. He also noted, concerning Exhibit D, that it contained the original drawing for the apartment down below, which showed that nothing had changed since the building was built in the 1980's.

Attorney Bolt explained that Exhibit E contained previous letters from Code Administrator Johnson. He noted that one of these letters referred to work done by LaBrie and Sons, and said the applicant had a letter from this company saying that this was repair work, for which a permit was not required.

He said that Exhibit F, which contained Mr. Johnson's Oct 8th, 2004 letter, was the real reason why the applicant was before the Board. He said both units of the property, with three tenants on the top floor and two tenants on the bottom, would be allowed under the two dwelling unit format, under the Ordinance.

Attorney Bolt said Mr. Johnson's concern was that there were five tenants in what was a single-family dwelling. He said what was apparently forgotten about was that there was a second dwelling unit, and explained that the unit was originally built that way and nothing had been changed. He said the applicant's concern was that the Town was asking him to bring the building up to conform to a different code, when this was a preexisting use, and conformed at the time the building was built.

Attorney Bolt said that Exhibit G was important because the file confirmed that there was the second dwelling unit. He said the issue was raised at the time that there was no change of use permit, and said it seemed to have been determined that one was not needed because this had been a long term two dwelling unit situation, and was not a change of use in the sense that no remodeling had occurred. He said the property was not made into a new duplex for the first time, or changed from a commercial structure into a residential and commercial structure. He noted that Chapter 38 of the Zoning Ordinance dealt with building construction, and was the context under which a change of use was usually brought. He noted the phrase was not in the Zoning Ordinance, and provided other details on this.

He said Exhibit G, noted that former Code Officer William Edney wrote essentially the same letter to the applicant that Mr. Johnson wrote. He said the applicant addressed the issues with

Mr. Edney, noting his client had always had two dwelling units there, and he and Mr. Edney agreed this was ok at that time.

Attorney Bolt said Exhibits H, I, and J were included to show that the Town did not have a definition early on in its Zoning Ordinance that it had now, of accessory apartment. He said when this building was built, the Town was dealing only with an accessory building definition. He said the Town did however, in classes of dwelling units, have categories indicating allowed per person square footage, and he provided details on this. He noted that the Ordinance did not define duplex per se, except in the definition of dwelling, where it said two households. He said because there were two kitchens in separate living areas, this was a two household format from the beginning. He said the definition of apartment was for three or more households, which the applicant did not have.

Attorney Bolt said page 13 of Exhibit H defined duplexes as having each dwelling unit provided with at least 600 sq. ft. of floor space, which this property complied with. He said Exhibit I, the 1973 Ordinance, had a similar scenario, and said this was limited to not more than 5 occupants for unrelated households. He said that was technically the definition the property in question was built under. He said two households were in play here, but said the applicant was not asking for this, but were asking to stay within the 300 sq. ft. requirement for the top and bottom floors.

He said the 1999 Ordinance, Exhibit J, was the first Zoning Ordinance update to come in with the definition of accessory apartment that the Board was using. He also noted that more recently in 2003-2004, a provision had been added which said if a property was originally used as a single-family house with an accessory apartment, and the family moved out, the property could be rented to three people total. He said this was the first time this had been written into the Zoning Ordinance.

Attorney Bolt quoted from Zoning Ordinance provisions 674:19 and 674: 28, and explained that 674:19 said a change to the ordinance did not apply to an existing use, but would apply to an alteration of the building…". He said there had been no alteration to the building, and said the occupancy of one class of individuals was not substantially different from the occupancy of a different class of individuals. He said regarding 674:28, even if there was an interim zoning ordinance in play that would not apply to any nonconforming property in active use, and in fact continued that active use indefinitely.

Mr. Bolt said that what this situation represented was a preexisting use, and a property right. He said that by seeking to impose the new ordinances upon the applicant, the Town was taking an interest in his property. He said Mr. Chorlian was entitled to the two dwelling units, and to the three persons on the top floor and two persons on the bottom floor, based on the square footage that was there. He said the fact that the tenants were students was irrelevant, and said that by upholding this use, the Board would be showing that it was not being discriminatory to the students in the Town. He said this situation was different than those seen the previous week before the Board.

He said the property had an open floor plan, and said Mr. Johnson's comment about the possibility of someone sleeping in the study was beyond the purview of the Ordinance and

health and safety codes. He said this was an existing structure, and an existing use, and said it had been rented by the applicant, usually without leases, and there was no problem whatsoever with the neighbors.
He noted that someone who did not live on Stevens Way made one of the comments received about the property. He also said that one of the issues was the septic system that had been built, and he provided details on the fact that it could easily accommodate 5 persons.

Mr. Gooze asked if the applicant acknowledged he had received the letter from Mr. Johnson in July, 2002. He also asked why, if it was received, it wasn't appealed at that time. Attorney Bolt said it was his understanding that this was resolved.

There was discussion about this, and whether Mr. Johnson had been contacted/responded to previously. Chair Smith noted there was nothing in writing to that effect.

Attorney Bolt said he did not know, but noted that the letter would have been and illegitimate request, based on the Ordinance in effect at that time.

Chair Smith asked how many people were living in the house when Mr. Chorlian lived there. Mr. Chorlian said there was a mother, father, and two children living downstairs, and he lived upstairs.

Mr. Bogle noted that the floor plan didn't show a bedroom, and asked how a family of four could have lived there.

Attorney Bolt described how one of the walls extended out, creating a space that was a bedroom. There was discussion about this wall.

Mr. Bogle noted that Attorney Bolt had described the ordinances in effect in 1973 and 1999, while the ordinance in effect when the house was built in 1982 was not quoted. There was discussion about this, and it was clarified that the 1973 was appropriate to use.

Ms. Eng asked if Mr. Chorlian could answer the question as to why there had been no response to Mr. Johnson's July 22, 2002 letter.

After some discussion, it was clarified that the Mr. Chorlian believed the matter was resolved with former Code Officer Edney. Mr. Chorlian said he did not recall anything after this time.

Chair Smith said there was no record of this, and there was discussion about the incompleteness of the records concerning this.

Mr. McNitt asked if Mr. Chorlian built the house, and if he had occupied it continuously since that time. Attorney Bolt said Mr. Chorlian had occupied the upstairs portion, while the downstairs had been continually rented since the house was built. He also said the upstairs portion had been continually rented since Mr. Chorlian vacated the property in the mid 1990s.

Mr. Gooze asked why the permit wasn't applied for as a duplex, noting that in the Zoning Ordinance in effect at the time the house was built, duplex described what the applicant said the house was. He said accessory apartments in Durham, and most other towns, had always been considered incidental to the use of the main building, which sounded like what Mr. Chorlian had thought when he built the building. He noted there was a definite decision to ask for a permit for a single-family house with an accessory apartment, and not a duplex.

Mr. Chorlian said this was the first and only house he had ever built, and said he had acted as the general contractor for the construction. He said he had checked with the Town during this process, noting that things were more informal at that time than today.

Mr. Gooze asked if the plan was to build and rent out the apartment, and if Mr. Chorlian did not apply for a permit for a duplex because he planned to live in it and rent out the apartment. Mr. Chorlian said yes, because he needed the income.

Mr. Gooze said the applicant didn't ask for a permit for a duplex because he planned to live in it and use the apartment in an incidental manner.

Attorney Bolt asked what the difference was between building a duplex with "x" amount of square footage and building both dwelling units with the same square footage. He said one would rent out one or both, regardless, and the plans for the property would change as one's life changed.

Mr. Gooze said he just wanted to clarify what was asked for when the house was built. He said an accessory apartment was definitely asked for and granted.

Mr. deCampi noted that the building permit was for an accessory apartment.

Chair Smith asked if any members of the public wished to speak for or against the Appeal of Administrative Decision.

Elizabeth Nordgren, 6 Ryan Way, said the request for an extra person being able to live there was irrelevant, because no matter what happened, the property would be full. She said she walked her dogs in that area a lot, and said 9-10 cars were generally parked there.

Joan Hart, 8 Stevens Way, said that during her seven years of living in this area, she had experienced disturbances from residents and guests at this address. She said the problems included loud voices, music, honking horns, litter, unleashed barking dogs, destruction of property, and violations of the winter parking ban. She said the tenants were not supervised, or held accountable, and said she was opposed to the appeal of administrative decision.

Walter Hart, 8 Stevens Way, said there was ongoing over-occupancy of the property, with the same kind of nuisances described at the previous ZBA meeting. He said he never saw less than 4-7 people living there, although he noted that Mr. Chorlian insisted that this was not the case.

Joel Bostrom, 10 Stevens Way, said the occupants of the building changed frequently. He said he agreed with the Harts about the noise, parties, and cars coming and going. He said one got the feeling that the landlord didn't often visit the property. He also said there were septic odors some time back that perhaps came from this property, and said he wondered if the capacity of the system was appropriate

Eric Scheuer, 7 Stevens Way, said 8-10 cars were pretty normal at this property. He said people were always coming and going, and noted that two truckloads of furniture left this last weekend.

Chair Smith asked if there was any rebuttal by the applicants to what had been said by the neighbors.

Attorney Bolt said it sounded like many of the complaints from neighbors had been addressed, noting that the problems had generally fluctuated over time. He said that the police had responded to complaints, and said that was the proper response as compared to taking the applicant's property rights away. He also said that other than the Harts, who were clear as to when they moved in, it was his client's understanding that the other complainants had moved into the situation. He agreed that the overabundance of cars could be a problem, and said this could be addressed.

He said that concerning the moving van recently seen at the property, this occurred because one of the tenants had moved out because he was told he was there illegally. He said the applicant was upset about this, because it affected his property interest, when this issue was in the process of being appealed. He said that corrective measures could be taken without impinging on property rights.

Two of the neighbors who had testified said they had lived in the neighborhood since 1996-1997, and said the situation had gotten worse and worse since that time. One of these neighbors noted that there was a couple living upstairs, and two students living downstairs, in the mid 1990s.

Chair Smith closed the public hearing.

Mr. Bogle said there seemed to be a basic question about the status of the house. He said that apparently when the house was built, it was approved as single-family house with an accessory apartment, and said the question was whether it somehow became merely a single-family residence at a later date.

Mr. Johnson said the record showed that the building was built as a single-family house with a small studio apartment in the basement. He said the testimony indicated that the owner originally used the property as a two family home, but he noted that the septic system was only for a three-bedroom design. He said the records from 1982 indicated it contained 1200 sq ft, so it seemed that there were many more than the permitted number of occupants, even when owner lived there. Mr. Johnson said it looked like there was a history of noncompliance with ordinances in place, then and at present.

Mr. deCampi asked when the limit on more than three unrelated came in, and Mr. Gooze said this was in 1986 or 1988. Mr. deCampi said the property classically had been a single-family

residence with an accessory apartment, through the Chorlian occupancy. He said the property's effective use became that of a duplex or a large-scale rental in 1995, or perhaps a bit later, based on the neighbor's testimony that there was a family upstairs and two unrelated persons downstairs in the mid 1990s's.

He said he was not sure there was enough evidence to evaluate the sq. footage, in order to see if the square footage argument was persuasive. He said he had difficulty with the appeal as presented, because he thought there had been a change of use. He said the property was a classic single-family house with an accessory apartment, which would have met the three unrelated provisions as late as 1995-96. He said he didn't think the use of the property had been the same from beginning to end. He said he didn't believe property rights were violated by this administrative decision.

Mr. Gooze noted that despite the comments from neighbors, noise, etc issues could not play a part in the Board's decision. He said the Board simply needed to determine if Mr. Johnson made a right call. He said he had looked at ordinances of surrounding towns concerning accessory apartments, and said they all said the use was subordinate and incidental to the use of the single-family residence. He said the 1974 Durham Ordinance contained definitions of single detached dwelling, duplex, and accessory lodging, but there was no definition of accessory apartment.

But Mr. Gooze said but he would take the more restrictive approach, and based on the fact that other zoning ordinances said an accessory apartment was incidental to the main use of the house. He said this did not mean renting out both sides. He said that if someone in Durham in the 1970s wanted to rent out both sides of a house, the person got a permit for a duplex. He said that if one wanted to live in a house and rent part of that house for income, the property was considered a single-family house with an accessory apartment. He read the definition of accessory lodging use in existence at that time, and said once the applicant changed to renting the entire structure, the accessory apartment use went away.

Mr. Gooze said the property could be a single-family house with two kitchens. He said the property was essentially used as a duplex, but there was no permit for this. He said ea permit for a duplex should have been asked for, or it reverted back to a single-family residence. He said he believed an accessory apartment was a subset of a single-family house, not a subset of a duplex. He said this was an important distinction, and was one that had always been made by the ZBA, because otherwise, every single accessory apartment in Durham built before a certain time would essentially be a duplex.

Mr. Gooze said everyone had the option until recently to get a permit for a duplex, if a property had two dwelling units, and he noted this was not done for the property in question. He also said the change of use occurred after the three unrelated provision was added to the Zoning Ordinance. He said he thought that this property fell under the three unrelated provisions, since the house was entirely a rental property.

Mr. Gooze said his second point was that an explicit letter was sent to the applicant in 2002, which was not appealed at that time. He said the present appeal of several administrative decisions acknowledged those previous administrative decisions, yet there had been no

appeal of them. He noted that there was a time limit during which an appeal could be made, and said this was exceeded. He said this was another reason why the current appeal should not be allowed.

Ms. Eng said she agreed with Mr. Bogle about the property being a single-family residence with an accessory apartment. She said she didn't see the property as a duplex, and said she didn't see how the Board could not uphold Mr. Johnson decision that no more than three unrelated persons could live at the house. Ms. Eng also requested that if a decision was made regarding the letter from Mr. Johnson, that something from Mr. Johnson should be written saying what the final decision was, so there would be documentation down the road that this matter was taken care of.

Mr. McNitt said there were some contradictions in what the Board had been told that evening. He said the information in the files, including the building permit, drawings, etc. indicated that this was a single-family house with an accessory apartment. He noted that this was a well known design when the house was built, and said the usage and the definition had been essentially the same since he was on the Board.

He said it appeared the house was operated as a single-family house with an accessory apartment until the mid 1990s, and said there was no record that any steps were taken after that time to legalize the use as a duplex. He also said there was no appeal in 2002 to Mr. Johnson's questions. He said he found it exceedingly difficult to feel that Mr. Johnson had made a mistake. He said the record was consistent that the property initially was legally a single-family house with an accessory apartment, and in recent years had been a single structure housing people.

Chair Smith said he thought it was rather clear that there had been a substantive change of use of the property over time, going from a single-family home with an accessory apartment to use as a duplex, although without a permit for this change o fuse. He said it was for this reason that he was against granting the appeal of Administrative Decision.

Attorney Bolt noted that Mr. Johnson had said the area of both units was 1200 sq. ft. He said that was physically impossible, when the footprint was 32 x 42, which was 1380 sq ft. He said 1350-1400 was what he said earlier, but said that was for one floor. He said there was also between 600-800 sq. ft in the apartment downstairs.

Mr. McNitt said he did not think the size issue was relevant to this situation.

Mr. Gooze said this house was permitted as a single-family house with an accessory apartment, which was incidental to the use of the house, and when the applicant rented the whole house, the apartment was no longer a use that was incidental to the main use. He said the use therefore fell back to being a single-family house, where the whole building was considered one dwelling unit. He said the Board might need to consider whether, when it reverted back, it became a single-family or a duplex, but he said the more restrictive view was that it became a single-family house because that was the intention when the house was built.

John deCampi MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION from July 22, 2002, October 8, 2004, October 15, 2004 and October 26, 2004, letters from Zoning Administrator, Thomas Johnson, regarding occupancy. The motion was SECONDED by Jay Gooze, and PASSED unanimously 5-0.

III. Approval of Minutes

October 12, 2004

Page 1 Motion on age should read "..and PASSED unanimously 5-0.
Same page, under Approval of Minutes, should read, under Page, 7, "..was what led Mr. Gooze to believe it was oversized…"
Page 2, under Approval of Minutes, under Page 11 – remove bolded wording "NEED TO CHECK WITH KAREN ON NAMES"
Same page, under Approval of Minutes, under Page 13, should read, "…who would have an effect."
Page 4, last paragraph, should read "… a rational decision."
Page 5, first paragraph, should read "Ms. Sparks said she didn't want the facility to be called a hotel."
Page 7, 4th paragraph, should read "…said it therefore made sense to allow the Inn….which most small hotels provide."
Same page, 5th paragraph, should read "..which would limit what can go on there."
Page 8, 3rd full paragraph, should read "…the only variance criterion in question.."
Page 9, 5th paragraph, should read "…and said the only question concerned visibility across the road."
Same page, the motion should read "….as a stable for horses be approved, with the condition that…"
Page 10, to of page, should read "…would then see more of the same."
Page 11, 3rd paragraph, should read "…should be allowed so landlords could keep…"
Page 12, 5th paragraph, should read "He said he totally disagreed with this…"
Same page, 7th paragraph, should read "…of the issue so that if the case went to court…"
Page 14, 4th paragraph, should read "…as the criterion as to whether…"
Same page, 7th paragraph motion should read ***"…regarding the definition of an accessory shed, …"***
Same page, 8th paragraph should read "…and Ms. Woodburn talked about whether the variance request would still have to be heard, and it was decided that it would not."
Same page, motion at bottom of page, top of page 15, should read ***"Ted McNitt MOVED that the Zoning Board of Adjustment approve the petition submitted by Great Bay Rowing, Durham, New Hampshire on behalf of the Town of Durham, for an APPEAL OF ADMINISTRATIVE DECISION from a June 16, 2004 memo from Zoning Administrator Thomas Johnson, regarding the definition of an accessory shed……. The motion was SECONDED by Jay Gooze."***
Adjournment time of meeting should say 10:45 pm.

John deCampi MOVED to approve the minutes as corrected. The motion was SECONDED by Ted McNitt, and PASSED unanimously 5-0.

IV. Other Business

Mr. Gooze said he had sent an email out to other Board members on the three unrelated problem for accessory apartments, and had suggested an improvement to the existing language.

Mr. deCampi said the problem they were trying to solve was that the ordinance presently said an accessory apartment was a dwelling unit, and that sounded like the structure was a duplex. He said he had no problem with Mr. Gooze's recommended language, but said he would like to see the word dwelling unit removed from the Ordinance before the Town got challenged on it.

Mr. McNitt explained why "living space" made more sense than dwelling unit. Board members discussed whether using the term "living space" would be sufficient.

There was detailed discussion about the best way to proceed. It was agreed that Mr. Gooze's wording should be included, in the Zoning rewrite.

Jay Gooze MOVED to adjourn the meeting. The motion was SECONDED by John deCampi, and PASSED unanimously 5-0.

Meeting adjourned at 9:00 pm

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John deCampi, Secretary