

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday, March 11, 2009

Present: Hank Riehl, Vice Chairman; Susan Miner; William Friel

Alternates: Margaret Osborn

Mr. Riehl called the meeting to order at 7:50 P.M.

Approval of Minutes – February 19, 2009

The following corrections/additions were made:

Page 2, first paragraph, capitalize "Conservation".

Page 4, in the motion, after "motion to" insert "accept the applicant's request"

Mrs. Osborn made a motion to accept the minutes as corrected. Ms. Miner seconded and the motion was approved.

Correspondence

Incoming

Atkinson Fire Department dated 2/18/09 re: 8 Valcat Lane, Denial of request to install a fire access road in lieu of proposed residential sprinkler system.

Sumner Kalman letter dated 3/2/09 re: Mason – 4 Rocky Point Lane, Violation of Zoning.

Application for Home Business Renewal from February 19, 2009 meeting. Eugene Lagasse, Lagasse Crane Service, 40 Academy Avenue, Map 14, Lot 56.

Based on the application as presented and noting there were no changes from last year's approved application, Mr. Friel made a motion to approve the request for renewal. Ms. Miner seconded and it was unanimously approved.

Outgoing

Attorney John Mason Jr. dated 2/25/09 re: Application withdrawal for Mason, 4 Rocky Point Lane, Map 22, Lot 31.

Zoning Board Budget printout dated 2/28/09.

Giles Gagnon dated 3/4/09 re: 12 Industrial Way, Map 16, Lot 50 –continuance request.

Memo to Selectmen dated 3/5/09 re: ZBA Application fee increase request.

PUBLIC HEARING: - 8:00 P.M. – Continues from February 19th.

Giles Gagnon request for Variance from article IV, Section 410:8 of the zoning Ordinance to permit construction of an addition to existing building 68' from wetland (32' variance) as opposed to the required 1—' on property located at 12 Industrial Way, Map 16, Lot 60, CI Zone.

As requested by the applicant's Attorney, William Mason, Esq., the hearing was continued to April 8th (the next regularly scheduled hearing).

PUBLIC HEARING: - 8:10 P.M.

Richard and Patricia Haines by Attorney Bernard Campbell request for Equitable Waiver from Article IV, Section 420:2 (h) of the Zoning Ordinance to permit an Accessory Living Unit to contain 1,016 sq. ft. as opposed to the required 750 sq. ft. for property located at 6 Indian Ridge Road, Map 5, Lot 54, TR2 Zone.

Mr. Riehl believed the section of zoning this pertained to was actually Section 460 and not Section 420. Attorney Campbell confirmed that they were requesting the Equitable Waiver under Section 460:2 (h).

Abutters list was read with the following present;

Attorney Bernard Campbell; Richard and Patricia Haines; Robert Mace; John Valvanis, Michael Perras

Mrs. Osborn recused herself. Mr. Riehl informed Attorney Campbell that because there was only a three member Board any vote would have to be unanimous and the applicant could choose to continue the hearing to the next month or proceed with the three-member Board. Attorney Campbell said he spoke with his clients and they agreed to proceed with the three-member Board.

Attorney Campbell stated that he was before the Board to seek relief under an Equitable Waiver. The Statute does allow the Board to issue dimensional relief. In January of 2009 there was a notation added to the assessment card that the area above the garage was an "unpermitted in-law apartment". This was the first time they had learned the finished space was considered unauthorized by the Town. The notation has never appeared on previous assessment cards. He included these prior assessments as exhibits to the application. Exhibit C is the assessment card issued less than a year ago in which that notation is not shown. This structure was constructed in 1992 and received an occupancy certificate at that time. The additional living space was constructed at the same time as the house was built. The earliest assessment card, from 1993 indicates there is an in-law apartment. The statute provides that if the violation has existed for ten or more years without any written notice of violation or enforcement action, there is relief. Attorney Campbell provided several pictures showing construction of the house including this additional space. Attorney Campbell pointed out that the entire first floor, including this space has an extensive uniform wood floor. There are no exterior signs that this has an in-law unit and simply looks like a typical single family dwelling.

Attorney Campbell did receive a letter from the Assessing Firm, which indicated the change was made in 2009 by a request from the Town.

This unit is currently vacant and the Haines are trying to clear this matter, because of the possibility they may wish to sell the property. Attorney Campbell believed they had satisfied the requirements under the Ordinance to obtain the relief. Attorney Campbell alleged the house retains a single family design and therefore does not diminish the value of the neighborhood. Attorney Campbell also believed the cost of correction to the applicant would far outweigh any

benefit to the public. There is no feasible way to reduce the size of the unit due to the location of cabinets, appliances, windows and flooring, while still maintaining the integrity of the unit. There is a shared entrance way with a shared laundry room, as well as stairs to the garage. Attorney Campbell knows that a Special Exception for the Unit would have to be obtained by any new owner of the property and would have to meet the criteria. They are looking for an equitable waiver of the size only, because the unit is not occupied. Mr. Riehl believed the challenge was an accessory living unit wasn't really an accessory unit until a Special Exception was given to deem it so. He does not know how the Board can give the unit a status for something that may happen in the future. He believed this request was asking the Board to grant a use, which is not what the Equitable Waiver does. Attorney Campbell said under the current Ordinance relief cannot be granted under 460:2 (h) for the dimension to grant the Special Exception. This application is requesting relief of a dimensional violation and with the granting of this relief; the unit would comply with all of the criteria except there are no identifiable occupants. Mr. Friel said had this been a legally built unit and found out later it was too big, he would agree this would be appropriate. Ms. Miner asked if there was anything in the file because the occupancy permit states it is a single family unit. Mr. Riehl also said it stated there was one kitchen sink. Attorney Campbell said he was unable to find any construction drawings or plans in the file, but asked the Haines to address this. Mrs. Haines said her parents had the house built and their Attorney at the time researched the Town Ordinances and determined there were no requirements for an in-law apartment. The building plans submitted to the Town at the time of construction included the guest suite. Her father served for years on the Conservation Commission and she has lived in Town since 1973. She would have never constructed something not legal and they have paid taxes on it since it was constructed. Mr. Riehl said there were no regulations until 1995, but there is a building permit which stipulates one kitchen sink. In December of 1992 the Building Inspector designated this as a single family home. Mr. Riehl asked Mr. Jones what his recollection was. Mr. Jones stated it was a single family home and there was no finished space over the garage. Mrs. Haines disagreed and presented a number of copies of invoices showing bills for two shower doors, the hardwood flooring, a bill from the granite company indicating there were to be two different kitchens and appliance bills showing a set of appliances being delivered to them and a set of appliances being delivered to their parents. She contended everything was there when Mr. Jones inspected the house. Mr. Friel asked if in 1992 someone could have had two kitchens installed in their home. Mr. Jones said they could have a wet bar only.

Attorney Campbell said the ordinance today allows the unit, just not at this size. In 1992 there was no ordinance, so even if you go from the time the ordinance was enacted in 1995, the unit has been in existence for more than ten years with no notice of violation. They are seeking a dimensional waiver to clear that issue so a permit could be applied for when needed and is necessary before a Special Exception could be granted.

The language on the assessment card indicating this is an unpermitted use raises many issues that may impact the marketability and how it is governed. This still needs to meet the criteria for a Special Exception if need be. Mr. Friel asked if there were a plan showing the floor plan. Attorney Campbell said there were some hand drawn floor plans with the assessment cards and the assessment card from 1995 states there is a guest suite with kitchen and that it was inspected with the owner in 1993. Mr. Riehl asked if the Unit was occupied in 1995 when the regulations went into effect. Mrs. Haines said it was occupied by her parents until 2005 when her parents passed away.

Ms. Miner asked if the Board entertained this, were they permitting the use. Mr. Riehl thought this was a problem and said he asked Town Counsel about this. Attorney Kalman's perspective was that the equitable waiver process was one of areas of dimensions yet implicit in this application is that the Board is blessing the use of the floor space. Attorney Campbell believed the Board would only be giving relief to the size, but would be treated as currently vacant and would be subject to the requirements of the Special Exception. Mr. Riehl asked if the language on the tax card read something like "accessory unit not currently under special exception", would it solve the problem. Attorney Campbell said different language could help in the marketability but asked what would then be the relief for another owner. They would come before the Board and be told the unit was too big and did not meet the criteria for the Special Exception. Mr. Riehl thought they would come before the Board with two applications, one for the Equitable Waiver and the other for the Special Exception. It seems only appropriate to deal with it when it happens under the then current regulations. Mr. Riehl believed the Town tried to get a handle on the unpermitted accessory units this year and they were flagged on the tax cards. He thought this might be an issue for the Board of Selectmen to perhaps look at changing the wording shown on the assessment cards. He thought this was a more appropriate avenue. Attorney Campbell struggled with why he would have to wait for a new owner, if the Board agreed some new owner would have to present two applications. The applicant is not asking for the use to be permitted by way of a Special Exception, but is only seeking

the dimensional relief in anticipation of a future use. By not getting this, it does impact the way a potential buyer would look at this if they needed an accessory unit. They know the Special Exception must be granted if the criteria is met, but by not knowing if the dimensional requirement would be given relief a potential buyer may not want the risk. Attorney Campbell does not understand why the Board could not take action on this issue alone. Mr. Friel said without seeing the dwelling he did not think he could just agree that it would be cost prohibitive to alter the size of the unit. Attorney Campbell suggested the Board conduct a site visit. Mrs. Haines believed the Board would clearly see that the unit was constructed at the same time as the house was built. The Board still struggled with the idea they would be blessing the use if they granted an Equitable Waiver. Attorney Campbell believed the site review would answer the critical questions of whether it would be cost effective to reduce the size and attest to the validity of the age of the unit.

The neighbors all believed this house had the appearance of a single family residence and did not negatively impact the neighborhood and believed the unit had been there since the house was built.

The Board agreed to conduct a site walk and continue this to the next regularly scheduled hearing.

Ms. Miner made a motion to continue to the next regularly scheduled hearing so the Board could conduct a site walk. Mr. Friel seconded the motion and it was approved.

Motion to adjourn was made and seconded. Mr. Riehl adjourned the hearing at 9:05 P.M.

Respectfully Submitted _____

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Minutes transcribed from tape Rebecca Russo

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APPROVED – April 15, 2009

Motion to approve the minutes of March 11, 2009 were made seconded and approved as is.