

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday October 13, 2010

Present: Hank Riehl, Chairman; Glenn Saba; Robert Waldron, Sue Miner, Sam Zannini, Alternate

Mr. Riehl called the meeting to order at 7:30 p.m.

Correspondence

Incoming

- 1) Budget/Expenditures through 9/30/2010
- 2) Home Business Renewal Griffin Tax Preparation 3 Sunset. *The Board reviewed the criteria and based on the application as presented and no changes noted, the Board voted to approve the request for renewal.*
- 3) September 20, 2010 e-mail from Town Administrator re: e-911 Emergency Response Ordinance
- 4) September issue Town and City
- 5) September 9, 2010 copy of letter from Code Enforcement to Delaney, 85 Maple.

Outgoing:

- 1) Decision letter to Donovans, 9 Deer Run.

Approval of Minutes of September 8, 2010.

PUBLIC HEARINGS: 7:30 P.M.

David Royce, request for Special Exception as specified in Zoning Ordinance Article IV, Section 460:1 and 2 to permit Accessory Family Living Unit in residence at 4 Sawmill Road, Map 8 Lot 64 in the TR2 Zone.

List of Abutters was read with the following present:

Mr. Royce

Mr. Royce explained that he bought the house from his father. The house is a split level style and the area that was completed for the in-law was already a finished space. It did not have a kitchen or bathroom. He did complete it as an in-law without the benefit of permits. His parents are living in the space currently. Mr. Royce did provide a floor plan of the dwelling. The unit is approximately 600 square feet. The Board reviewed the plan. Mr. Riehl asked if any of the plumbing, electrical, etc., had been inspected and Mr. Royce said it had not. Mr. Riehl said that may be a problem. The Board discussed the

entranceways and where they led to. Ms. Miner asked how many bedrooms were in the house. Mr. Royce said it was a three bedroom and this made it a four bedroom house. Ms. Miner asked about the septic and what it could accommodate. Mr. Royce gave the Board plans for a septic system capacity upgrade, which was approved by the State, but Mr. Royce had just realized that the State had only given a 90 day approval period, in which this was to be completed. He indicated he would need to follow up on that because this system was supposed to be a backup in case something happened to the existing system. He was not planning on installing a new or upgraded system at this time and would prefer not to. Mr. Zannini said he should not have to install a new one if the current one was in working order. He said the Board usually does not require new systems to be installed unless there was a problem with the current one. Mr. Royce said the existing system was tested. Ms. Miner reviewed the plan and it was reviewed and approved by the Health Officer. Mr. Saba asked how many people live in the house. Mr. Royce stated there were 7 including his parents but that his parents go to Florida in the winter.

Code Enforcement Officer Mr. Kirsch asked if it would be advised to make any approval conditioned upon approval of life safety issues and/or inspections. Mr. Riehl believed they were separate actions. Mr. Kirsch's concern was that the proper inspections would not have to be completed unless they were contingencies. Mr. Riehl thought they were not empowered to take that specific action.

The Board reviewed the Accessory Family Living Unit Special Exception criteria

- a. Met
- b. Met
- c. Met
- d. Will be met
- e. Met
- f. Met
- g. Met
- h. Met
- i. This is not met as it has not been inspected by the inspectors for the Town of Atkinson. Mr. Saba stated that issues of egress will need to be addressed as well as plumbing and electrical codes. Mr. Riehl stated they could not certify or state that this is built in accordance with the building standards. The Board agreed they could not approve this without the proper certifications for the inspectors.
- j. Need clarification on the septic system and proof that the current system is sufficient to be used for home and accessory unit.
- k. Met, applicant Royce stipulated that Mother and Father, John & Jackie Royce will be the tenants in the Accessory Living Unit.

Mr. Kirsch stated that the applicants have been very cooperative and are willing to do what it takes to get this approved correctly.

The Board also discussed the septic design and whether this needed to be installed. Mr. Zannini said the Board's position has always been that as long as the current system is in working order the replacement system does not have to be installed. This is a backup plan

in case of failure. He stated that all Towns do the same thing. Mr. Riehl agreed that the Board has done that in the past. Ms. Miner believed they needed clarification for the septic system. Mr. Saba believed the septic system plan approved was to add a tank immediately to accommodate the accessory unit. It is not a backup design, it is an upgrade design intended for immediate installation. The Board agreed they needed clarification.

The Board agreed that this matter should be continued to let applicant address the issues regarding proper inspections; obtain a Certificate of Compliance and clarification regarding the septic system. The Board needs to know why the State approved the septic system with a 90 day approval period. If the septic plan is intended as a replacement design for future use in the event the current system fails, then the Board will require certification that the current system is in working order and can accommodate the dwelling and the accessory unit.

Mr. Royce agreed to the continuance.

Motion to continue to the November 10th, 2010 meeting was made by Ms. Miner, seconded by Mr. Saba and unanimously approved.

REHEARING:

Matthew R. Paquin, submission of an Application for a Variance from Atkinson Zoning Ordinance Article IV Section 460:2 to allow an extended family living unit in a space containing 946 square feet where ordinarily 750 square feet is permitted; and an Application for a Special Exception under Article IV, Section 460:2 to allow the use of an extended family accessory living unit at property located at 6 Indian Ridge Road, Map 5 Lot 54 in the TR2 Zone.

List of Abutters was read with the following present:

Mr. Paquin, Mr. Paquin, Town of Atkinson by Mr. Friel

Mr. Riehl recapped the proceedings over the past year. The Board approved a variance to one of the requirements of a Special Exception and then granted the Special Exception for an accessory living unit. The Board of Selectmen appealed and requested a rehearing. The decision was challenged on two criteria. One was whether the Board could hear this because the Board had similar hearings with prior owners before this application. The Board spent a considerable amount of time discussing this matter as reflected in the minutes and determined there were sufficient new and different circumstances from prior hearings that allowed them to hear the applications. They Board did not agree with the Board of Selectmen that this issue had merit.

The second challenge by the Selectmen was that an error of law had been made by the granting of a variance for a special exception, which in essence waived one of the criteria for the special exception. After discussion on that issue the Board had agreed there was enough question on the legality of their prior actions for them to grant the rehearing request; bringing them to this evening's rehearing.

Mr. Paquin said the whole question was the legality of issuing a variance on a special

exception. They did a lot of research in which they said they found nothing in the RSA's that a variance cannot be issued to a special exception. Hence, it is their belief that the Board has the power do so. Mr. Riehl stated that he did a fair amount of research too. He found nothing in the RSA's that was explicit but found several cases and the essence of them all cited a 1938 decision in the case Stone vs Cray, which stated that a Zoning Board does not have the authority to waive or alter a special exception criteria. That would put the Board, as a quasi judicial entity, in the realm of a legislative body. They cannot make law as opposed to interpreting law. The special exception criteria was passed by the voters and is explicit in what its requirements are. Special exceptions are very binary; an applicant either meets them or does not. There are several cases; Mudge vs Precinct of Haverhill; Tidd vs Town of Alton; Stone vs Cray and New London Land Uses Association vs. New London Board of Adjustment. The ruling in all of these cases was explicit in the decisions that the Boards do not have the authority to alter or waive a special exception criteria by variance or any other actions.

Mr. Zannini stated that he had voted in favor of a rehearing, but after some research he found there have been other communities that have granted variances to special exception criteria. He posed a question that if the Town can only grant a special exception and not a variance then what if there were a handicapped person that requires larger doorways and modifications to accommodate, how would that be achieved and still be able to stay within the 750 square foot requirement. Mr. Saba stated you would make more of it common area. He concurred that this is a gray area. He believed if the doorway to the Paquin's accessory living unit was opened up it would make that space common and then the accessory unit would meet the space requirement. What distinguishes the accessory area is what is not open freely to the common area. Mr. Riehl said the question posed by Mr. Zannini was hypothetical and if necessary you would have to find a way to fit it into the 700 square foot requirement. Mr. Riehl said that in his research he found two other Towns that approved variances to special exceptions, one in Rye and in Danville, but they were never tested in the Courts. Mr. Zannini said it has also occurred in Salem. Today as it stands the only way to approve an accessory living unit is through a special exception.

Mr. Saba said the RSA is crystal clear and on page 481 under Section 3; Paragraph 30 of a special exception it is stated that the conditions may not be varied. Under the Power of the Board under section 32 it is stated that the special exception cannot be waived.

Mr. Paquin stated that there have been other towns that have given variances to special exceptions and they have not been tested in Court. He believed that they were following State law and State Law empowers Zoning Boards to give variances to ordinances and the special exception falls under an ordinance. Mr. Riehl felt that a special exception was a specific type of an ordinance under which the Board has no wiggle room. There is a set of criteria that one either meets or doesn't. The Board is a finder of facts and does not have the authority to make law.

Mr. Paquin asked if at this point they could submit a plan that will make revisions to the space and meet the 750 square foot requirement. Mr. Riehl thought they needed to deal with the rehearing first to make it clean. They have two approvals, one for a variance and one for a special exception. There has been a rehearing and he feels this will need to be

dispensed with first. The Board agreed. Mr. Kirsch asked if these were not new applicants as well. Mr. Riehl said the Paquins were the applicants before. Mr. Paquin disagreed and indicated the Haines were the applicants and based on that approval they purchased the home. The P&S was contingent upon the accessory living unit being approved. Ms. Miner stated that the Haines owned the house but the previous applicants were the Paquins' and she cited prior meeting minutes to support this.

The Board discussed how to proceed with this action.

Ms. Miner made a motion to deny the request for a variance as stated because under RSA 674:33, Section III, Subsection 30 (2) the ZBA does not have the authority to grant variances to a special exception. The Board cannot waive or alter a special exception criterion. Mr. Saba seconded and it was unanimously approved.

Next the Board will deal with the Special Exception. Mr. Paquin would like to submit a revised plan to make part of the existing accessory unit common area thereby meeting the 750 square foot requirement. They would like the Board to approve it conditionally, obtaining necessary building inspections, etc.

The Board reviewed the revised plan. The Board agreed this plan appeared to meet the requirement and would review the criteria.

The Board reviewed the criteria:

- A. Met
- B. Met
- C. Met
- D. Met
- E. Met
- F. Met
- G. Met
- H. Met
- I. The applicant needs to have the appropriate inspectors approve and issue a Certificate of Compliance for the accessory unit.
- J. Met
- K. Met

Ms. Miner made a motion to continue the hearing to November 10, 2010 so the applicant can get the proper approvals from the inspectors regarding electrical, building codes, plumbing, etc. Mr. Saba seconded the motion and it was unanimously approved.

Mr. Paquin was concerned that they might not be able to get everything done by next month. Mr. Riehl explained to Mr. Paquin that if he could not get it done by next month he could ask for another month's continuance. He would only have to notify Ms. Killam

in the town's Planning Office.

Motion to adjourn was made and seconded. Mr. Riehl adjourned the hearing at 9:10 PM

Respectfully Submitted

Minutes transcribed from tape

Rebecca Russo