



TOWN OF HUDSON

Zoning Board of Adjustment

Charlie Brackett, Chairman

Marilyn E. McGrath, Selectmen Liaison

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MEETING MINUTES – August 22, 2019 - approved

The Hudson Zoning Board of Adjustment met on August 22, 2019, in the Community Development Paul Buxton Meeting Room in the lower level of Hudson Town Hall.

I. CALL TO ORDER

II. PLEDGE OF ALLEGIANCE

Chairman Brackett called the meeting to order at 6:59 PM and invited everyone to stand for the Pledge of Allegiance. Vice Chair Dearborn read the Preamble into the record, identified as Attachment A of the Board's Bylaws, that included the procedure and process for the meeting, that copies of the Agenda and Application for Rehearing are on the shelf by the door, the importance of the 30-day time period as well as housekeeping items regarding cell phones, smoking and talking. Clerk Davis took the roll call.

Members present were Charlie Brackett (Regular/Chair), Gary Daddario (Regular), Maryellen Davis (Regular/Clerk), Gary Dearborn (Regular/Vice Chair), Brian Etienne (Alternate) and Jim Pacocha (Regular). Also present were Bruce Buttrick, Zoning Administrator, Louise Knee, Recorder and Marilyn McGrath, Selectmen Liaison. For the record, all Regular Members voted.

Ms. McGrath addressed the public and noted that she is a Selectman and the Selectman Liaison to the Zoning Board and that even though she may participate in the discussion, she does not vote.

III. PUBLIC HEARINGS OF SCHEDULED APPLICATIONS BEFORE THE BOARD:

1. Case 208-001 (deferred to 8-22-19): Richard and Robin Sevigny, 161 Bush Hill Road, Hudson, NH requests an Appeal From An Administrative Decision of a Notice of Violation dated May 24, 2019 citing violations of two provisions in the Hudson Zoning Ordinance: §334-15B (2) Parking prohibited and §334-13 Junkyards prohibited; outdoor storage. [Map 208, Lot 001-000; Zoned General-One (G-1); HZO Article III, §334-15B(2) & §334-13].

Clerk Davis read the Case into the record. Mr. Buttrick stated that he received a request to continue the hearing to the September 26th meeting as the Property Owners' attorney is not able to attend this meeting. Mr. Buttrick noted that this Case was deferred from last month's meeting in order for the Board to conduct a Site Walk, which was held on Monday, 7/29/2019 6:00 PM and noted that the Site Walk write-up and pictures were in the supplemental packet.

Public testimony opened at 7:04 PM. No one addressed the Board.

Discussion ensued. Ms. Davis stated that she would be willing to make a motion to continue to next month but with the understanding that the Board would reach a decision and not allow another continuance. Procedure aspects were discussed. Public input already received. Case continued to hold a Site Walk. No one present at this meeting. Public testimony opened. Technically, hearing closed. Is a re-advertisement and a re-notification to abutters of another possible continuation required, especially if the meeting would be opened for input regarding the Site Walk? General consensus: as a precaution, Mr. Buttrick asked to re-notice and re-advertise and that the ZBA would incur the cost to advertise & notice, not the applicant.

Motion made by Ms. Davis, seconded by Mr. Dearborn and unanimously (5:0) voted to defer to the 9/26/2019 meeting for a Re-Hearing with the understanding that the ZBA would render a decision at the 9/26/2019 meeting and that the cost to re-notice and re-advertise come from the ZBA budget and not the applicant.

2. Case 168-012 (8-22-19): Attorney Christopher J. Fischer of Boynton Waldron Doleac Woodman & Scott, P.A., 82 Court St., Portsmouth, NH representing Peter and Kimberly Heilman, 8 Madison Drive, Hudson, NH, requests an Appeal From An Administrative Decision of a Notice of Violation dated June 12, 2019 citing violations of two provisions in the Hudson Zoning Ordinance: §334-16 Building permits and §334-8 Certificate of Occupancy. [Map 168, Lot 012-000; Zoned Residential Two (R-2); HZO Article III, §334-16 & §334-8].

Clerk Davis read the Case into the record. Mr. Buttrick stated that the Case began as a complaint received with the residence being used as an Air BnB being run without proper permits; upon his investigation, the premise was being operated and was lacking the proper Building Permits and Occupancy Permit was issued by the Town for such a use.

Atty. Christopher Fischer of Boynton Waldron Doleac Woodman & Scott, PA, in Portsmouth, NH introduced himself and the property owner, Peter (Logan) Heilman and noted that his wife Kimberly and their infant daughter were in the audience.

Atty. Fischer stated that his clients bought the property in February of this year (2019). Logan Heilman stated that they moved to the area in February from St. Louis, Missouri, that he graduated from college two (2) years ago and recently took a job with MIT Lincoln Labs stationed at Hanson Air Force Base and that he is a cyber forensic and cyber security engineer and manager for various sponsors and DOD (Department of Defense) research. Mr. Heilman stated that he has a direct line and reports to the Colonel and supports the Department of Homeland Security, the Secret Service, the National Security Agency, FBI, FAA and the DOD.

Atty. Fischer stated that, as laid out in the appeal file, they take exception to the two (2) grounds laid out as Land Use violations. Atty. Fischer distributed additional Exhibits that should have been included in their original appeal packet. The documents distributed included: two (2) Notices of Violation dated 11/3/1994 and 8/25/2010; and a 9/15/2010 finding. Mr. Brackett noted that the documents were included in the ZBA Board's meeting packets.

Atty. Fischer stated that the first violation refers to an unlawful Air BnB advertisement rental with a parenthetical reference to operating a Bed & Breakfast and the second reference refers to an unlawful rental unit above the garage. Atty. Fischer stated that with regard to the rental unit, the documents he just distributed demonstrates that the Town of Hudson had known the existence of the dwelling unit as far back as 1994 and acknowledge that he doesn't know what happen to the disposition of the 1994 violation but does know that the 8/25/2010 Notice of Violation citing an accessory dwelling unit that there was a disposition because approximately the Town of Hudson stated that there was no violation, that the space and the use were not in violation. Atty. Fischer stated that it is possible that there were actions not memorialized in the public records but the fact remains that his client relied on these public notices when he purchased the property in February 2019 – that there was an allegation that an unlawful rental unit above the garage existed and that the Town determined that there was no violation. Atty. Fischer stated that “fast forward” to today, his client finds that there is a violation and that he has to mediate it, get a building permit or tear it down etc.

Atty. Fischer stated that municipal estoppel exists, that the Town of Hudson knew of the apartment back in 2010 and stated that it was not in violation and that the Town cannot switch positions especially when it results in a detrimental affect upon one of its citizens.

Atty. Fischer stated that, according to the Zoning Ordinance: a dwelling unit has to have living, cooking, sleeping and sanitation facilities, that duplexes are permissible in this Zone and this unit qualifies as a duplex because the independent living areas are individual units that are attached. The word “transient” is not defined in the Zoning Ordinance and therefore ambiguous

and that is problematic, especially since it does not define the number of days and is subject to interpretation. Rentals are a permitted use in this zone because people are allowed to rent their homes. NH is a title state and technically every home that carries a mortgage declares the bank as the owner and the occupant a renter. The Hudson Zoning Ordinance does not define and there is an enabling act that authorizes Hudson to amend their Zoning Ordinance.

With regard to the Air BnB, Atty. Fischer stated that there is nothing in the Zoning Ordinance that ties occupancy or use of a unit as a dwelling unit relative to time – it could be three days or a one-year tenant – and to construe the Zoning Ordinance to embrace that sort of regulation is stretching the language to an impermissible scope.

Public testimony opened at 7:29 PM. The following individuals addressed the Board:

- (1) William Barry, attorney from Barry & Honorow, PLLC, law firm at 161 Kinsley Street in Nashua, NH, introduced himself as representing the abutters and stated that the occupant of 8 Madison Drive is running a business out of their residence and, according to Town records, this residence is listed as a single-family residence. The applicants wrote a letter to his clients, the abutters, after the complaint was made and in that letter it stated that they are renting two of their extra bedrooms, not that the bedrooms are in a separate space altogether, above their 24'x24' garage that is connected to their home by a breezeway. The sequence of construction was that the prior owner built a detached garage with internal steps to the space above, then constructed a breezeway connecting the garage to the house and then at some point converted the space over the garage into a separate dwelling unit. The letter also states that their guests typically stay one to four (1-4) days per stay. The neighbors have accounted an additional twenty (20) cars over the past two (2) months. Their conclusion is that in the past sixty (60) days, it has been rented out twenty (20) times.

Atty. Barry stated that the R2 Zone does allow duplexes and noted that under Commercial Uses in the Zoning Ordinance, a Bed and Breakfast is specifically a denied use in the R2 Zone. Atty. Barry referenced the Heilman's Air BnB advertisement and noted that an Air BnB is commonly known as a Bed & Breakfast.

Atty. Barry stated that if the building wants to become a duplex, it requires a Building Permit (BP) and once completed, it gets inspected and a Certificate of Occupancy (CO) is issued. Safety is a factor, for the resident, for the public, for First Responders. There is no BP or

CO for the second dwelling unit. Transient lodging can be defined as one to four (1-4) nights.

Atty. Barry referenced the 7/11/2019 letter written by Building Inspector David Hebert to Mr. Heilman citing findings from his 7/10/2019 inspection of the living unit above the garage and noted the following safety violations: no second means of escape; smoke detectors not hardwired; no guardrail on the second floor landing; no handrail on the stairs to the dwelling unit above the garage; no venting to the roof, aka stink pipe; no fire separation between the garage and the dwelling unit; and joists visible. These are recognized serious life safety issues. There is no BP for the dwelling unit, there was no inspection and there is no CO and without a CO, the rooms cannot be used.

Atty. Barry stated that Atty. Fischer made a statement that his clients could have an Air BnB; that the Town has been on notice, that there is Municipal Estoppel; and that in 2010 the Code Enforcement Officer responded that there was no violation. Atty. Barry stated that what was omitted was that the Code Enforcement Officer responded to a complaint of a second dwelling unit on the premise and when he went to investigate discovered only one (1) kitchen, therefore only one (1) dwelling unit and stated there was no violation. Yet there is a second living unit today with its' own kitchen and it is illegal, there is no BP, there have been no inspections and there is no CO. Municipal estoppel does not exist. The Zoning Ordinance allows a two-family / duplex in the R2 Zone. It is common knowledge that a Bed & Breakfast is short-term transient occupancy. A B&B is not permitted in the R2 Zone. A variance would be needed to operate a Bed & Breakfast.

Atty. Barry concluded by stating that there have been twenty (20) people over the past two (2) months; that this is a neighborhood; that B&Bs are allowed in Town (as a Commercial Principal Use), just not in the R2 Zone because it is not suitable; that there is concern for First Responders and the safety of the occupants; and that the Zoning Administrator made the correct call and asked that it be upheld because it is supported by the evidence, the facts, the logic

- (2) Robert Kerouac, 2 Jefferson Drive, stated that he hired Atty. Barry and wanted to note that that twenty (20) rentals does not equate to twenty (20) people, that according to their advertising it is a minimum of two (2) night rental stays that equates to forty (40) nights, added that the people there now are going on three (3) nights and questioned why it has not stopped, why it is still being rented when the Town issued a Cease and Desist Order, that they are running a

business and added that there have been time when he has smelled his leach field and expressed concern for the nearby pond. Mr. Keroucac stated that he would not be opposed to a duplex but he is opposed to transient people in his neighborhood.

Public testimony closed at 7:48 PM

Atty. Fischer responded. There is nothing in the Zoning Ordinance regarding “transient”, it is an ambiguous term. Building Code violations are improper, not warranted and not within the scope or purview of the Zoning Board’s mandate as set forth by the Law and should not factor into the Board’s decision. Atty. Barry referenced stoves and refrigerators and need for individual circuits yet the Ordinance just says “cooking” and raises who actually has jurisdiction of what issues. The ZBA’s purview is the land use and whether Air BnB is okay to use. Atty. Fischer noted that Atty. Barry referenced additional information that he, his client nor his office received and that raises the question of what are the “public facing” records, not the notes in a file that the public cannot access? His client did his due diligence and requested documents regarding his property and all he received were the Notice of Violation and a letter stating that there was no violation upon inspection. The notes from Mr. Buttrick’s predecessor were not provided to his client. That is inherently problematic. The reference that the rentals are a business to pay off his mortgage applies to everyone in Town who rents property.

Public testimony opened at 7:52 PM. Atty. Barry addressed the Board and stated that there is no Building Permit (BP) to make this property a two-family and when a BP is pulled it leads to an inspection and the inspection leads to a Certificate of Occupancy (CO). There is no CO for a second family unit for this property. The Zoning Ordinance identifies a duplex and a Bed n Breakfast. The property owner should have come to the ZBA seeking a Bed n Breakfast, but did not. A determination is proper, the information is correct, the Town’s records are fine and the Zoning Administrator made the correct decision for the property owner, the renters and First Responders.

No one else addressed the Board. Public testimony closed at 7:53 PM

Mr. Pacocha stated that it seems to boil down to past illegality and whether there was or was not an ALU (Accessory Living Unit) at the time it was inspected, there was no kitchen so there was no ALU violation. If a variance for an ALU was required then, it was not sought; however, a Building Permit has always been required and was not pulled for an ALU, neither was an electrical nor plumbing permit. Mr. Buttrick stated that a BP was pulled in 2008 to construct a garage and that he did not find any sub-permits for electrical or plumbing.

Ms. Davis stated that what is before the Board is the Zoning Determination by Mr. Buttrick but began with complaints received for the transient use. The normal course of action is to investigate the complaints and that is when the discovery was made that there is no Building Permit or Certificate of Occupancy for the second living unit. It does not matter who did what or when it was done, the fact is that there is nothing on record to allow the second dwelling unit or that use.

Mr. Brackett stated that some of the testimony received seems to be based on past inspections but the fact remains that both in 1994 and 2010, there was never an application filed for an ALU; therefore it was never approved for an ALU, BnB or short term rental.

Mr. Buttrick stated that there are three (3) elements involved: past owners; past Code Enforcement Officers; and current property owner with current Code Enforcement Officer. Mr. Buttrick stated there is no CO for transient type use, BnB, and neither a BP.

Mr. Dearborn stated that Atty. Barry placed a lot of emphasis on inspectional services regarding the violations. The property does not meet current setbacks for frontage or square footage so it is non-conforming. Mr. Dearborn referenced Elvis Dhima, PE, Town Engineer 7/30/2019 email where he states that they have received complaints relating to strong septic odor and discovered that the Town has no record/plan of the septic system and also questioned whether there is enough parking to accommodate the current use. Mr. Dearborn also noted Brian Groth's 8/5/2019 email where short-term, or transient, rental is not a permitted use and that the property is not a duplex but a single-family residence with an illegally constructed accessory dwelling unit.

Ms. Davis and Mr. Daddario expressed concern regarding testimony received that the property owner continues the business operation (rental) since the Cease & Desist Order was issued. Mr. Heilman addressed the allegation and stated that he and his wife just had a baby and family and friends have been coming and denied allegations that he is still renting or has rented since the Cease & Desist Order was received.

Mr. Brackett stated that what is before the Board is the Appeal to the Zoning Administrator's determination that the second floor of the garage is being used as living quarters in violation of the Zoning Ordinance without a BP or a CO.

Mr. Daddario stated that the use is now a rental unit without a CO. Mr. Buttrick stated that Zoning Ordinance Section 334-20 states that "Any uses not specifically listed in the Table of Permitted Principal or Accessory Uses are hereby expressly prohibited." Ms. Davis stated that if/when a BP and CO are obtained, then a variance would be required to operate a Bed and Breakfast in the R-2 Zone. Mr. Buttrick stated that if the unit above the garage is to be

lived-in, it needs a CO and if the property owner wishes to operate a BnB would suggest that the variance be obtained first as there may be dimensional issues with square footage and lot size as it is a non-conforming existing lot of record. Ms. Davis added that the expansion of use on a non-conforming lot may also need to be addressed.

Mr. Brackett referred to NHMA (NH Municipal Association) paper on Short-term Rentals from their Spring 2019 Conference and noted their reference to RSA 48-A and RSA 78-A that defines short-term rentals as less than 30 consecutive days. Mr. Etienne stated that if a person does not receive mail or have his driver's license identified at the address, that means the person is transient at that address. Mr. Daddario added that it has been advertised as such (short term rental/transient) on their webpage.

Mr. Pacocha referenced the Assessor's and noted that in 2000 it was listed as one-family and from 2001 to 2018 it listed it as two-family and switched back to one-family in 2019 and asked why. Mr. Buttrick stated there are many reasons for a change, that an on-site internal inspection could have been made to cause the change and added that it is essentially a "snap shot in time". Ms. Davis pointed out that the Assessor's records are not the Zoning records which are based on Building Permits. Mr. Buttrick added that BPs can trigger inspections, that there are cyclical inspections performed and sale of property can also invoke an inspection.

Ms. Davis made the motion to uphold the Zoning Administrator's 6/12/2019 decision. Mr. Dearborn seconded the motion. Ms. Davis spoke to her motion stating that there have been multiple code enforcement complaints and abutter complaints, there is nothing in the record to indicate that any of it has been permitted, that the use is not an allowed use in the Zone and agrees with the Zoning Administrator's decision. Mr. Dearborn concurred and added that there are so many violations on the property and liability risks and a business is being operated in a residential neighborhood and the use does not fit into the Zone. Mr. Brackett noted that there has been no BP or CO issued for that living space. Vote was 5:0. Zoning Administrator's decision upheld. Appeal denied.

Board took a break at 8:15 PM while the room cleared. Mr. Brackett called the meeting back to order at 8:19 PM.

IV. PUBLIC HEARING:

2nd Reading of proposed bylaws amendments.

Mr. Brackett opened the Public Hearing at 8:19 PM. Mr. Buttrick noted that this is the second public hearing of the required two that are required to affect a change to the ZBA By-Laws. The proposed changes include: the addition of and definition for a Recorder, the change in duties for the Clerk, the action

required for three consecutive unexcused absences, that additional meetings may be called, the order of business to now include the Pledge of Allegiance and a standardized introduction, the decision process, the 11:00 PM curfew and the 30-day re-hearing note.

Board reviewed the proposed changes. Discussion arose on the 11:00 PM curfew. Consensus reached to add “unless otherwise approved by the Board”. Mr. Buttrick to schedule another public hearing.

Ms. McGrath raised the concern with an applicant submitting evidence in a meeting without having enough copies for everyone at the table and raised tonight as an example of the unfairness. Members agreed. Comment made that if there are not enough copies, the material/information should be rejected. Mr. Buttrick stated that the application form spells out the requirement that twelve (12) copies along with the original are required.

Public Hearing closed at 8:29 PM

V. REQUEST FOR REHEARING:

No requests were presented for Board consideration.

VI. REVIEW OF MINUTES:

1. 07/25/19 Minutes

Board reviewed the edited version presented. Ms. Davis apologized for not providing any edits. Mr. Brackett made one amendment noting that Selectmen McGrath was excused, not absent, from the meeting. Mr. Dearborn made the motion, seconded by Mr. Daddario to approve the 7/25/2019 Minutes as edited and amended. Vote was unanimous at 5:0. Minutes approved.

VII. OTHER:

1. Possible Zoning Ordinance Amendments

Mr. Buttrick referenced the Proposed Zoning Amendments from the 7/11/2019 workshop and noted that the next workshop is scheduled for 8/29/2019. Mr. Brackett asked Members to review and if unable to attend on 8/29, to please forward their comments to Mr. Buttrick beforehand. In response to Ms. McGrath’s question, Mr. Brackett stated that Town Planner Brian Groth is aware of the proposed changes and has not been as involved as last year. Mr. Buttrick stated that Mr. Groth has been focused on the Zoning Map lines as many parcels are split zoned or mis-zoned. Mr. Brackett noted that the Planning Board (PB) is also engaged in proposed Zoning amendments. Mr. Buttrick stated that the two (2) Boards have different perspectives, that the ZBA tends to rely on the number of variances to indicate changes and the PB

tends to take a more global view, and that the desire is to limit the number of Warrant Articles for Town Vote to six (6). Ms. McGrath suggested that Mr. Groth be invited to attend next week's ZBA workshop and that the PB share their proposed amendments with the ZBA.

Ms. McGrath commented on the proposed House Bill committee relative to establishing a Housing Board of Appeal for workforce housing appeals that would seem to circumvent the current procedure. To be discussed at the workshop.

2. Land Use Conference

Mr. Buttrick noted that this year it has been scheduled for Saturday, 10/5/2019. Mr. Brackett asked that any Member interested in attending to contact Mr. Buttrick for registration and added that the Town will pay the fee.

Motion made by Ms. Davis, seconded by Mr. Daddario and unanimously voted to adjourn the meeting. The 8/22/2019 ZBA meeting adjourned at 8:46 PM.

Sincerely,

Charles J. Brackett, Chairman