

**CITY OF CONCORD, NH
ZONING BOARD OF ADJUSTMENT
OCTOBER 12, 2022 MEETING
MINUTES**

Attendees: Chairman Christopher Carley, Nicholas Wallner, Andrew Winters, and Tedd Evans.

Absent: James Monahan, Laura Spector-Morgan

Staff: Tracey Hutton, Zoning Administrator
David Hall, Code Administrator
Rose Fife, Clerk

Meeting commenced at 7:00 pm.

Carley announced that this evening there was only a 4 member board. He asked if anyone would prefer to hold off until a 5 member board were present. None answered. Moving forward with a 4 member board the applicants need to be aware that if their request was denied, having a 4 member board is not grounds for a rehearing.

PUBLIC MEETING

46-22 [135 North State Street](#): *RN-Neighborhood Residential District; by 135NSS LLC, Owner (Request for Rehearing)*:

Applicant seeks a Rehearing of the review of Administrators Decision regarding the current uses of 135 North State Street in comparison to the permitted uses and current zoning relief for the property. Variances were granted for the principal use of F1 with 3-4 Live/Work units. During a recent review of the property and website, it was determined that the Carriage House is being used in a different classification than general professional business and was classified as Commercial Indoor recreational Facility, use C3.

Chairman Carley explained that the Board does not take testimony while reviewing a Request for Rehearing. The Board needs to determine if there is an error in law or procedure or any new information provided.

Winters read the detailed memo. What raises a question for him is the estoppel issue, which was touched upon at the last meeting, but not raised in that context as it is in the memo provided. He doesn't believe they ever faced a municipal estoppel issue before. Does the Board have the authority to rule on this? The appellant claims that they relied upon representation from town authorities. He doesn't believe that the board has the ability to vet that claim. He is not inclined to grant a rehearing.

Evans was not on the board for the original case. He did read the material in detail. Two things may be new; Mr. Walker's statement and the statement from Mr. Durfee both seem to be new. He'd be inclined to say if that is new information he is inclined to grant a rehearing.

Wallner believes Evans is correct.

Carley does as well. Mr. Walker's affidavit is definitely germane and, had that information been available at the time of the case, it may have had a different outcome. He'd be inclined to grant the rehearing.

A motion to grant the rehearing was made by Wallner, seconded by Evans and passed by a 3-1 vote with Winters in the minority.

Carley asked to have this rescheduled for November meeting.

REHEARING

44-22 179 Pembroke Road: OFP-Office Park Performance District: by Jeremy Eggleton, Esq. for Proverbs 16:3 LLC, Owner:

Applicant seeks review of Administrators Decision interpreting permissible uses under the ordinance. Code Administrator letter dated June 1, 2022 determined that the complex of 62 monolithic domes to be used for short and long-term rentals is not an allowed use in districts zoned OFP without zoning relief.

Testified: Attorney Eggleton of Orr & Reno. Also available to testify: Casey DeStefano, property owner.

Attorney Eggleton testified that he wouldn't reiterate what he put before the board at the prior hearing. The new information will be discussed. As they mentioned at the hearing there are long term stay hotels in Concord that have kitchen facilities in each individual unit. Residence Inn at 91 Hall Street has those. It advertises itself as a long term stay facility. It's categorized as a hotel. The hotel is similar as every single one of the 92 units has a kitchen in it. That seems to be the distinguishing factor they feel the Board had an issue with. They are proposing nothing different than this. Most of the rooms at Residence Inn have an oven/stove top, a table, dinner ware, silver ware, glasses, sinks etc. A lot of units have a baking oven in it. The stays vary in length substantially from a few days to months or even years in some cases. That is what they envisioned. It could be used for traveling nurses, or people staying while they look for their own home. He appreciated the Board's enthusiasm for this project. The City already recognizes these facilities as hotels and they believe this should be recognized as a hotel as well. Permits for 91 Hall Street, Residence Inn, were issued in 2009. Decisions by the Zoning Board are not setting precedent. He believes categorizing the Residence Inn as a hotel was the right call. This is now an enforcement matter for the Code Administration office. He guesses it's used on a regular basis for housing on the short term. He and his client are not here to argue that the Residence Inn should be held to account. They believe that's a great use for that facility, but believe they should also have the same opportunity. Under the land use section/use code there is a definition of hotels.

Winters asked what Code 3000 is that he is referring to. Attorney Eggleton couldn't find what it meant. He believes it's an Assessment Code, not a zoning code.

In favor: none.

In opposition: Attorney Mark Puffer of Preti-Flaherty representing Mark LaRosa and Hattie LaRosa. Attorney Dan Luker was present at the last hearing to represent the LaRosas, but Attorney Puffer is taking over. Attorney Puffer has a letter he'd like to submit summarizing the details. The LaRosas live at 175 Pembroke Road, adjacent and westerly of the applicant's property. The LaRosa's position is that the Board should uphold the Code Administrator's decision. They believe that the proposed use is not a hotel/motel. Accordingly, the board should do what it previously did and deny the applicant's appeal. What is being proposed is not a hotel, not a large building with 62 units. It's 62 separate dwelling units. Each unit meets the definition of a dwelling unit. What is being proposed does not meet hotel/motel or lodging facilities criteria, as set forth in the ordinance. First it is not a building, or an establishment, or a facility containing multiple dwelling units. A hotel is a large building with units in it; 62 separate units is a subdivision. You don't need to have a division of the land by lots. RSA 672:14 - subdivision is broad. It is a lot, tract or parcel of land divided into 2 or more lots. For sale/rent/lease/condo lease - that is a subdivision definition. Take into consideration what they propose is 62 sites on 4.6 acres of land. That calculates to 3200 s.f. for each of the 62 sites or dwelling units proposed. If you add the driveway and office area and divide it, it comes to 2000 or 2500 sf. per site. They are trying to circumvent subdivision laws and regulations and lot sizes and setbacks of the ordinance. #2 is that it does not meet the definition of lodging facility. They are proposing cooking facilities, so it is not a hotel or motel. Each of the 62 buildings will have cooking facilities.

Attorney Eggleton discussed Residence Inn, which is commonly thought of as a hotel and it is true that it has individual cooking facilities in each unit, i.e. a stove or stove top or microwave. The Residence Inn probably

doesn't meet the definition of a hotel/motel. In 2009, when it was built, they should have gotten a variance. Whether the Residence Inn is a hotel, has no bearing on what the applicant is proposing. Residence Inn may not technically be a hotel/motel. This applicant is proposing 62 separate units, which is not a hotel. This would probably be tourist cabins perhaps. The development is similar to 1950's or 60's travel cottages. This is not a grandfathered proposal. The zoning ordinance does not permit travel cottages. Concord has a permissive zoning ordinance; the uses to be allowed must be accessory to a use that is permitted or expressly permitted. Tourist cabins are not expressly permitted, so it is prohibited. A variance or a change in the zoning ordinance may be warranted. At the August 3, 2022 meeting, a Board member stated that the project was "innovative and cool". It is creative. It may address a public policy. Near the end of August 3, 2022 meeting, board member Winters stated he was disappointed at the consensus of the Board. The City should have something to support this type of project and maybe the City Council will have something to address this type of project. It is the City Council that must address this not the zoning board. OFP Zone is not one that it should be located in and perhaps the City Council will address that as well. At the August 3, 2022 meeting, the Board was correct when they denied the appeal and they request they do so again.

Winters asked Attorney Puffer if his analysis is that they are dwelling units. Attorney Puffer stated that was correct. Winters stated that the size of these units is very small. He asked if there are any comparable units in the city that are 300 s.f. The units do not have a foundation. Attorney Puffer doesn't know if there are others of this size, but the zoning ordinance doesn't make a distinction based on size. A foundation; that's not part of the definition of a dwelling unit. What they are proposing precisely meets that definition.

Dr. Hutton stated that she had received an email from Jean Fenderson who owns 183-185 Pembroke Road. She is not in favor.

Code: David Hall spoke. A lot of the statements made by Attorney Puffer are ones he would have made. These units are not on a foundation but are legal IRC pads such like manufactured homes. They do qualify as residential units based on the IRC code. It fell more into that category, more than any other definition they have. As long as it meets code, it is a dwelling unit.

Winters asked if there were any zoning or building rule that has a minimum size. David hall stated that there is something in the IRC code as well as egress.

David Hall noted that the applicant implied we have multiple long term hotels and Concord only has the one. He cannot speak to what happened in 2009. The Residence Inn is an enforcement matter not a precedent.

Rebuttal: Attorney Eggleton and Casey DeStefano. Attorney Eggleton clarified that they are not proposing a subdivision. Characterizing it as such is a 'red herring'. They are not trying to create units they could market and sell. They are not creating condominiums. This design and set up does what the Residence Inn does or any long term stay hotel. Maybe there is only one in the City. The units being broken up into multiple smaller buildings has no relation to the definition of a hotel. The lodging facility definition refers to a building or part thereof. If the IRC building code was being used, why isn't the assessing code being looked into? The assessing code characterizes it as a hotel. Characterization being used is that this use is most like a single family dwelling, which is not allowed in the OFP zone, nor is it permitted in the opportunity corridor.

DECISION: The public portion of the hearing was closed at 7:39 pm. Carley reviewed the testimony as given.

Wallner felt that the argument of their having a kitchen is similar to the Residence Inn is persuasive, but the detached unit doesn't fit the definition of lodging facility and he's not sure he's persuaded.

Evans doesn't see the equivalency of the two facilities they are discussing. Because there are kitchens in each of the 62 units and in each of the hotel units, that doesn't make it equivalent. The opponent's argument is much more persuasive.

FM ZBA 10.12.22

Winters thought they were well presented arguments by both parties. The emphasis at the original hearing was put on the fact that there were kitchens in the proposed units. Detached, separate units, don't fall within a hotel or a dwelling unit. They are so small and they are not being resold or rented on long term leases. It doesn't fit neatly in either. It's closer to dwelling units. He agreed to the rehearing because the kitchen was important. It's not in one building and it's more like a motor lodge. He thinks the City should take that up.

Carley noted that the new information presented was information regarding the Residence Inn information.

Carley noted that the kitchens did figure into his decision. One hotel in Concord with kitchens doesn't convince him that this request represents a hotel. He agrees with Code Administration. This is a different type of use. He agrees with Winters that perhaps there should be an area of the Ordinance that addresses this type of use. He is inclined to agree that the Board should not overturn the Code Administrator's decision.

A motion to uphold the Code Administrator's decision was made by Winters for the reasons stated above, seconded by Evans and passed by a unanimous 4-0 vote.

PUBLIC HEARINGS

Public Hearings commenced at 7:45 pm.

55-22 28 White Street: *RN-Neighborhood Residential District; Karen and Joseph Carew, Owners:*

Owner wishes to replace a 3-bay garage with a 2-story garage/carriage house, expand the second floor of the existing single-family dwelling and replace existing stairs with a 6-foot by 15-foot porch. This activity would require the following variance;

1. Article 28-4-1(h), Table of Dimensional Regulations to allow the single-family dwelling to become more non-conforming with respect to the front setback and to allow for additional floor area of the single-family dwelling and garage to be on the side and rear setbacks.

Testified: Joseph and Karen Carew. Mrs. Carew explained that the existing buildings have been there a long time. They want to improve the property with the challenges that exist. The zoning ordinances were put in place after these buildings were built.

Carley asked what the hardship was with the land. Mrs. Carew explained that they have a carriage house in the back. There is no way to improve that building with the existing variances that are now in place. They are trying to maintain the building.

Carley asked about the site plan they submitted. There are 2 site plans there. Mrs. Carew met with the City to put the application together. The map that was shrunk down did not retain the scale. So, she brought in a better one that kept the scale. Carley asked what the proposal looks like. Mr. Carew explained that it is the same footprint, except the porch on the front. Mrs. Carew penciled in the front porch on the map submitted. She would like to make home more accessible as it's raised above the ground. She would like to drop the porch down part way and make it more accessible.

Wallner asked if the porch will extend toward the street more than the existing stairs. Mrs. Carew answered that it will not, but it will be longer. It's significantly set back from the side walk vs. others in the neighborhood. Mr. Carew noted that there is a picture in the packet showing the porch.

Carley asked if the new garage building would be a 2 story building. Mrs. Carew said it would be 2 stories. Wallner asked what was on the 2nd floor. Mrs. Carew explained that would be their office and a bathroom as they both work from home.

In favor: none.

In opposition: none.

Code: Dr. Hutton noted that the change in the garage is substantial. They are changing it from 1 story to 2 stories, which is why they gave the photographs for perspective of elevation.

Carley asked if they needed the variances because they are expanding towards the front by adding the porch and the garage? Dr. Hutton answered that they needed variances for side and rear setback relief. It doesn't meet setbacks currently. David Hall explained that because they are voluntarily demolishing the garage, it will require a variance.

Mrs. Carew noted that the roof line is the same.

DECISION: The public portion of the hearing was closed at 7:53 pm. Carley reviewed the testimony as given.

Winters noted that historically the board has tended to approve rebuilding on a similar footprint, especially in the old zones with properties that predate the zoning ordinance. He had concerns with the two story garage and the porch. The porch seems reasonable. Having two stories on the garage is a little concerning. Is it a reasonable use?

Evans agree on the porch expansion, especially because they are not increasing the footprint past the existing stairs. He would have liked to see improvement on the garage but it is reasonable and fitting in the neighborhood to expand vertically. He is in favor.

Wallner noted that there is no additional encroachment for the porch. They are replacing like footprint with like footprint.

Carley agrees with his colleagues. The uses are reasonable and in keeping with the intent of the ordinance.

A motion to approve the request was made by Evans, seconded by Wallner and passed by a 4-0 vote.

56-22 128 Horse Hill Road: RO-Open Space Residential District; Black Water Loop LLC, Owner:

Owner wishes to construct a single-family dwelling along with a detached garage containing single family living space above. This activity would require the following variances;

1. Article 28-2-4(h), to allow two principle uses (single family detached dwelling) on one lot.

Testified: Tim Bernier of TF Bernier Corp. Angela Raymond property owner. Tim Bernier testified. They are applying for a second principal use on one property. They would like to build an ADU for Jeff Raymond's mother. This will allow the Raymonds to continue to take care of her. They would like to create the unit over the detached garage. They are in the process of building their home now. An ADU is permitted by special exception in an RO zone. The unit meets all the criteria for a special exception except for it being detached. It doesn't share a common wall or interior doorway. He has been told that this board has granted this type of variance in the past. Carley looked at the August 2022 site plan that was in the package. It shows a detail of the proposed house and garage.

The property is going to be about 40 acres and there is one lot down on Horse Hill Road they are trying to subdivide. They have about 3,500 feet of frontage. The property has a great deal of steep slopes. Steep slopes create some spectacular south facing views. The one area they were able to build is still relatively steep. Mr. Bernier showed the site plan and how everything was organized on the lot, i.e. house, ADU, garage, etc. The house location is 133 feet above Blackwater Road and Horse Hill Road. They are building in the middle of 40 acres. The house is a log home. The Raymonds purchased the property last year in June. Because of the views they felt a log home was perfect. It's a few hundred feet shy of being in Webster. They purchased the house in April and it is still being manufactured. It hasn't been delivered yet. With the ledge and other restrictions there wasn't any way to attach the garage to the house directly. They ended up with home and detached garage. The garage has an automatic second floor when they come around to the other level. They showed plans. The garage doors accessed on first floor and then if you drive around the building there is access to the second floor. They showed the house plans as well. The regulations for an ADU state that they need to share an interior wall or a common wall and an interior door. The second floor of the garage is in the middle of the garage to mimic the house. There is no way to create a connection between the two structures.

Carley asked if the ADU complies with size requirements of an ADU (Attached Dwelling Unit)? Mr. Bernier said it did.

Mr. Bernier reviewed the criteria for a variance. It is not contrary to the public interest as it would allow an in-law apartment over the garage and the Raymond's can take care of their mother. The garage is an integral part of the house and not physically connected. They are putting the garage as close as they could get it to the house. Granting a variance would allow for the Raymond's mother to help provide care for the Raymond's children. It will not obstruct public interest as the

proposal is over 1000 feet from any abutting property and 900 feet from any abutting house. It is not visible from either street. There will only be 16 feet between the house and the garage. It is consistent with observing the spirit of the ordinance: It only fails with 1 of the requirements for an ADU, which only requires a special exception. He believes the criteria was set by those that wrote the ordinance to not allow change to the character of the neighborhood. Nothing will change with the appearance of the structure whether an ADU is there or not. The zoning dimensional requirements would allow 1 unit per every 2 acres. The resulting parcel is 40 acres, which would calculate out to be 20 units. As far as the density goes, they are under the criteria. Substantial justice is done because the proposal will have no effect on any public members. The design of the house fits in the neighborhood. The Raymonds will build their house regardless. There is no benefit in denying variance. The request complies with Article 28-5-52, which is the special exception criteria for an ADU minus the common wall and interior door. Property values will not be diminished for surrounding properties as they are 1000 feet from the street and 900 feet from the closest abutter. Literal enforcement of the ordinance will result in unnecessary hardship because this is a reasonable request. It is not unique to Concord and has been granted by this board before. Hardship is also inherent in the land. ADU requirements were not about life safety issues or building code issues, but mostly due to established neighborhoods and older neighborhoods. This is not an established neighborhood. The land, based on location, size and character has its own hardship.

Winters asked for an explanation as to why they cannot connect the house and the garage. Is it because of the view and the log cabin? Mr. Bernier explained they could connect it with a walkway. Winters asked why the garage cannot be attached. Mr. Bernier explained that there isn't a way to do that with a log home and the grade. It is difficult to do with a log home.

In favor: none.

In opposition: none.

Code: Dr. Hutton noted that both a special exception and a variance were discussed. This request is a variance which runs with the property and will establish whether a 2nd unit can be there in perpetuity. Carley thought it was based on the plan submitted. Dr. Hutton answered that it depended on their motion. She explained. Carley noted that a motion would need to be made saying "according to plan so and so". Dr. Hutton said that was correct. Carley reiterated that a variance would be granted for the specific plan before the Board. Dr. Hutton noted that it would be based on the condition that was placed on the motion.

Evans was confused by the language being used. They were discussing an ADU. Dr. Hutton explained that an ADU needs to be attached to the dwelling unit. This is a second dwelling unit on the lot. Evans understands the arguments the applicant was making but justifying a second dwelling unit because of an in law unit and if they make a condition on it that it needs to be an owner occupied situation. Carley stated the board cannot condition who lives there.

Winters knows it's not an ADU. One of the conditions of an ADU is that the primary unit must be owner occupied. But if granted, as stated, then theoretically that would not be true and both units could be rented.

Dr. Hutton explained that they would be allowing a single-family dwelling with a second kitchen.

DECISION: The public portion of the hearing was closed at 8:22 pm. Carley reviewed the testimony as given.

This request is for an ADU that is not directly attached to a single-family home. Architecture precludes their attaching it in the way the ordinance asks for. Carley asked about if it would be allowed if it were connected by a breezeway. An enclosed breezeway is part of the house is it a common wall. David Hall explained that wouldn't work as a common wall is a shared wall connecting 2 rooms.

Evans asked if the breezeway were on the first floor and this unit is on the second floor, it is not a common wall, correct? Carley thinks they could make that argument but he doesn't see it that way. Wallner interjected that the board has had ADUs on the second floor of a garage. They wouldn't need a special exception if a variance were granted.

Winters noted that this is not an ADU. The board would be granting 2 dwelling units on 1 property. This is a self-created hardship. Building a log cabin is discretionary. It is intriguing that it is a huge lot and a small second unit that is going to have minimal impact. He wondered if they could limit who lives there to minimize impact.

Evans is reluctant to okay the second use. It opens up too many headaches as a result.

Wallner talked about the architecture not making it feasible to connect the two to make it a true ADU, as they are proposing. So, they have 2 dwellings. He doesn't know how to limit the use of the second dwelling.

Carley spoke regarding the criteria for a variance. There was no doubt in his mind that the proposed use as an ADU is not inconsistent with the intent or spirit of the ordinance. It doesn't pose problems for the fabric of the neighborhood. They do have the power to grant this with the condition that what is on the plan is what they do and the that building otherwise conforms to ADU requirements.

Winters asked if they could impose a condition that the primary home be owner occupied. David Hall believes so. Winters noted that the past Zoning Administrator Craig Walker used to say no. The owner-occupied thing is important. In an RO zone, people don't want density and rentals there. The plan does indicate another dwelling unit on the lot. And they could do more if they wanted.

Winters would be inclined to add a condition that the primary home be owner/occupied. Carley noted that condition is consistent with the function of an ADU. Other than a common wall, all other ADU criteria would be met.

Carley has issues with hardship. Hardship is the problem. It is not created specifically by the land or the situation of the land. It's created by the decision of the appellant by having a certain kind of architecture for their home. Carley's architect mind says there is nothing wrong with this; go do it. The problem is that what causes the issue is not the land or the situation of the house. Do they waive that requirement? He's not sure how they can do that. If there were an attachment between the two dwellings that would be different. He doesn't see the hardship.

Winters agrees. They are starting from scratch. Everything they want to do makes sense, but there are tradeoffs. They could have chosen a different architecture that would have suited the property well and allow for a real ADU to be attached to the house somehow. Carley felt the hardship was self-created. Generally, the Board has found when it is self-created it is not a hardship.

A motion to deny the request was made by Winters, seconded by Evans and passed by a unanimous vote.

Minutes: A motion to approve the September minutes was made by Evans, seconded by Winters and passed by a unanimous vote with Chairman Carley abstaining as he wasn't at that meeting.

A motion to adjourn the meeting at 8:39 pm was made by Evans, seconded by Winters and passed by a unanimous vote.

*Respectfully submitted by
Rose Fife, Clerk*