

**ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811**

**Public Hearing Meeting Town Hall
Wednesday, June 10 2009**

Present: Frank Polito, Chairman; Hank Riehl, Vice Chairman; Sandy Carter; William Friel
(8:00 pm)

Alternates: Glenn Saba

Mr. Polito called the meeting to order at 7:35 P.M.

Approval of Minutes – May 13 2009

The following corrections/additions were made:

Mr. Carter made a motion to accept the minutes. Mr. Riehl seconded and the motion was approved.

CONTINUATION - PUBLIC HEARING: 7:40 pm

John Mason, Jr. request for Variances from Article IV, Sections 410:8 & 400:4 to allow a sideline setback of 5.2 feet as opposed to required 15 feet for addition to remain and a wetland setback of 30' (70' variance) as opposed to the required 100'. Also request Special Exception for conversion of seasonal use to primary/year round occupancy on property located at 4 Rocky Point Lane, Map 22, Lot 31, RR3 Zone.

Attorney Mason asked that the application be heard out of order to see if another member of the Board would be present. Mr. Carter reiterated the Board's position from the last hearing that there may not be a five member Board this evening. Attorney Mason understood. **There was a consensus of the Board that the order could be changed.**

At 11:00 pm, Mr. Carter made a motion to continue to the next regularly scheduled hearing because of the time. Mr. Riehl seconded the motion and it was unanimously approved.

PUBLIC HEARING: 7:45 pm

Richard and Patricia Haines request for Administrative Appeal of decision by the assessing/building department to characterize applicant's 1,016 SQ FT apartment as "unpermitted," property located at 6 Indian Ridge Rd. Map 5 Lot 54, TR2 Zone and Application for Variance.

Abutters list was read with the following present:

Richard and Patricia Haines; Attorney Troisi representing the Haines

Attorney Troisi explained this matter was before the Board two months ago for an Equitable Waiver. He understood the decision of the Board at that time. They have filed two applications tonight. If the request for the appeal is granted they would withdraw the application for a variance. The property was built in 1992 with the guest suite. There were no regulations in 1992 for in-law apartments. Building plans were submitted when the house was built and everything was sanctioned by the Town at that time. The inspections were carried out by the various inspectors and they were given an occupancy permit in December of 1992. From that time to the present they have enjoyed the use of the apartment until approximately two years ago, when Mrs. Haines parents died. They were always taxed on the apartment and the property assessment cards clearly show there was a guest suite. Mr. Haines has taken ill and they need to sell their home. In early 2008 the house was listed for sale. The Broker checked the property cards and confirmed there was an in-law apartment. The home was taken off the market for a short time and in January another real estate agent went to check the property card and saw that the classification of the in-law had been changed to "unpermitted" in-law. This resulted in a substantial devaluation of the property and has forced them to alter their plans. They are looking for relief. They are willing to conform to all of the conditions of the ordinance with respect to in-laws, except they exceed the dimensional limitations. Attorney Troisi said he contacted the building department to ask how in-laws were treated before 1992 when there was not an ordinance. He asked why it took so long to address this issue. He also asked where the building plans would be and apparently they were lost. Mr. Polito asked if Shirley had acknowledged the plans were lost or was it just his contention. Attorney Troisi believed everybody knew there were four sets of plans and they were given to the building department who would have given them to the fire, plumbing and electrical departments. Even some of the permits refer to plans. Attorney Troisi said they do not have any plans. They looked up the original architect and got a statement from him. Also present at the hearing was the builder, Jim Moors, who worked with the inspectors. Attorney Troisi asked to submit for the record, exhibits. Mr. Polito declined that they be allowed to be entered as part of the record because the Board did not have enough time to go through new material. Everything should have been submitted to the Board prior to the hearing for review. Attorney Troisi was not told this was necessary and said he would go through them in a cursory manner. Mr. Polito said the only thing that can be before the Board for this part of the hearing is a finding of fact on how the administrative decision was improperly made under the RSA's. He asked Attorney Troisi to quickly and narrowly focus on who is the administrative official and what decision he/she made. The Haines discovered in January that there was a change. Attorney Troisi referred to exhibit 41, which is the property assessment card. This card now shows the in-law as "unpermitted in-law". From April of 1993 the property cards have all shown the in-law apartment. Mr. Polito asked what the application is appealing. Attorney Troisi said it was the decision of the Assessing Department and/or the Building Department to reclassify the in-law to unpermitted. Mr. Polito said if it were the Assessor's office, this could not legally be before the ZBA. Mr. Polito said that tax cards are under ownership of the Selectmen and maintained by the Assessor. Mr. Polito asked if they had something that was denied by the building department that could be appealed. Attorney Troisi said he asked the building department to sign off on the denial of the use and Mr. Jones refused to do so. Attorney Troisi also has a letter from the assessing department indicating both departments were responding or addressing the issue. Mr. Polito said if the applicant could show this was the decision of the building inspector they would have standing to be before the Board. Mr. Polito asked the Board if during the previous hearings, during their fact finding, if they determined this in-law was legally permitted. The Board said

they did not find that it was ever legal as an apartment or an in-law. Mr. Saba said the Occupancy stated there was one kitchen/one sink. Mr. Polito said even if they presume the building department made a decision to look at the card and say it did not agree with what was in the file, did that mean they made a decision? Mr. Riehl said there was a Town wide effort in January to coordinate what they thought they knew existed in many properties but had no history of being permitted. The Town wanted to get the assessor's office and building department back in sync. Attorney Troisi said the decision made by the Board for the equitable waiver was based on the fact that the request was for a dimensional requirement and the Board felt that it was the use they would be allowing. Attorney Troisi believed the applicant had uncontroverted evidence that this apartment existed from the beginning, He had spoken with every inspector in the Town that was involved with this building. He wanted an opportunity to present those facts. Mr. Polito said that proving it existed and proving it was legal were two very different things. Just because he can demonstrate it was there does not mean it was legal. Mr. Polito said he needed to show it was legal by providing signed plans and permits showing the Town authorized the construction of the in-law apartment which was not allowed by zoning. Mr. Polito said that was a high hurdle. Mr. Polito said the only thing that can be before the Board is the contention that it has legal standing. Attorney Troisi stated his position was that this was a legally permitted in-law. Mr. Polito asked the Board if they believed that a decision was made by the Building Department. Mr. Friel said this was not a decision by the Building Department, but rather the Assessing Department and the Board does not have authority in this respect. Only the Selectmen is charged with that. Mr. Polito asked the Board if they believed the applicant had legal standing to be before them on an appeal of an administrative decision of the Assessing Department. ***There was a consensus of the Board that the applicants did not have legal standing before the Board. Attorney Troisi wanted his exception noted and believed the Statute was clear. He cited 674:33.***

Mr. Polito said he thought the applicant may be able to appeal to the Selectmen for an error on the tax card. Attorney Troisi noted this is extremely unfair to the citizens because even if this were to be accomplished the Building Department is going to stand on what they have already informed them of. It is now considered an unpermitted apartment/in-law and an illegal use. He also said he felt sorry for any resident having to deal with the Building Department because there is no one there to talk with. There is no liaison and people have to spend thousands of dollars.

The Board reviewed the request for a variance.

Mr. Polito read the list of abutters with the same being present.

Mr. Polito said this would have to address the use and dimensional requirements. Attorney Troisi reincorporated the overview from the prior hearing. He submitted the exhibits and they were accepted into evidence. Attorney Troisi explained the in-law was there from the inception. He reviewed the exhibits with the Board. The in-law is located above the garage. Attorney Troisi presented sworn or notarized affidavits from various people attesting to the existence of the in-law. Mr. Polito reiterated that it was not material to the Board regarding the intention of the applicant to build it or the fact that it exists. It is only pertinent to the Board to prove it was legal. Attorney Troisi contended there were plans, which were lost by the Town, the inspectors knew of it and it was approved from its inception. Mr. Carter said he has not seen any evidence that it

legally existed. Mr. Carter said on one of the exhibits a contractor noted an up charge because the kitchen were not installed at the same time. Mr. Polito said it is incumbent upon the applicant to prove to the Board there is a factual basis to claim they built this in the full light of day and with the approval of the Town. He did not want to spend time demonstrating their intention to build it. Attorney Troisi contended this was built in the light of day with full knowledge of all of the inspectors. Mr. Polito said it would help with the variance if they could prove the Town made a mistake. It does not mean they would get it. Jim Moores the builder, attested that everything which now exists was there from the inception. Everything was included on the plans and was signed off on by all of the inspectors. Mr. Moores said he accompanied the building inspectors throughout the house and they absolutely saw the second kitchen. He also explained the up charge on the invoice was because they were waiting for a sink and the cabinets could not be installed until that came in. It was only a matter of a week or two before the other was completed. Mr. Moores said that plans would have had to be submitted in order to build the house and that they included the in-law. Mr. Carter questioned Mrs. Haines about there being more than one builder, as she alluded to at the last hearing. Mrs. Haines said there was a different builder that completed some of the finish work only. Mr. Haines said Mrs. Haine's parents sold their house in November and moved into the in-law and Mr. Jones signed off on the permit, after walking through the house. Mr. Haines said they lived there for two months under the temporary occupancy permit. Mrs. Haines said that she accompanied Mr. Jones through the house and that he was fully aware of the in-law. Attorney Troisi said throughout eight or nine months of building, Mr. Moores worked with all of the inspectors and they were aware this unit existed. Mr. Friel said Mr. Jones disagreed. Attorney Troisi said he spoke with Jim Miller, Chuck Early, and Dave Weymouth and none of them recall what happened. Mr. Polito said then they don't provide any factual information and should not be brought into the equation. Attorney Troisi suggested if none of them could remember, then how could Mr. Jones. Mr. Polito said all that is before them is that this is not permissible under the zoning and would have required a variance. Even if the building inspector had allowed it, it would have still required a variance. Attorney Troisi said he had other evidence that this was allowed in other properties also. Mr. Polito said it is not pertinent to the Board what other mistakes have been made on other properties. The Board can only deal with this in-law apartment. He contended that even if the building department made the mistake of walking through and saying it was ok, they would have made an error which did not give the applicant the right to have it exist. Mr. Polito wanted Attorney Troisi to give him facts to substantiate the claim that this was done in the light of day and signed off on. Attorney Troisi told Mr. Polito that he was asking for him to show it was conducted in the light of day, yet after testimony from the builder who signed a sworn affidavit attested to that very fact; the Board is still questioning it. Mr. Moores reiterated that the inspectors were present and they all saw the in-law completed. Mr. Friel asked why the CO's indicate it is a single family resident with one kitchen. Attorney Troisi said none of the properties with in-laws built during that time were indicated on the CO's. Mr. Friel said they were only concerned with this property. Attorney Troisi said that Mr. Friel asked the question. Mr. Polito said that fact is in dispute and the Board has to determine which is correct. Attorney Troisi said he had additional evidence. Attorney Troisi claimed this was 17 years ago and thousands of inspections and does not know if Mr. Jones would have recalled this particular property. Mr. Polito asked Mr. Jones and Mr. Jones stated that when an occupancy permit is signed and it says single family dwelling, after it is given to the owners', wouldn't they question it? Mr. Polito asked if he recalled this one way or another. Mr. Jones said if there were an apartment there it would have been on the occupancy,

but he could not say if he remembered this property. Mr. Polito said he interpreted this as Mr. Jones could not remember the details of this case but he is relying on the records of the Town. Mr. Saba asked about the temporary occupancy Certificate issued on October 31, 1992, which stated there was no kitchen sink. Mr. Saba asked if that were one of the three criteria necessary to issue a CO. Mr. Jones said that was true. Mr. Saba asked why a temporary CO was issued without a kitchen sink. Mr. Jones explained that sometime a countertop is ordered and the sink has to be mounted underneath. He contended that is what must have happened. Attorney Troisi claimed it was the second kitchen that was waiting for the sink. Jim Miller, the former electrical inspector said in 1993 he was contracted to complete the wiring on three air conditioning units and one was for the in-law. His records clearly show there was an accessory unit. Mr. Miller said that being an inspector at that time they would have had to inspect all of the wiring and plumbing for the house.

Mr. Friel stepped down from the hearing because of his position as a Selectman and this may have to go before them in the future.

Attorney Troisi wanted to introduce other witnesses to corroborate the existence of the in-law. Mr. Polito stated again that the existence was not in dispute, but the legality of it was. Attorney Troisi said that it was important that these witnesses were corroborating the construction took place all at the same time and if the house was inspected then the inspectors would have to have known and were aware of the in-law. These are eye witnesses. Mr. Polito said the existence of the unit would not have been a violation of zoning until the kitchen was installed. He asked if these eye witnesses were testifying that they saw all of the finished work installed before the CO was issued. Attorney Troisi said the builder testified he put the sink in before the CO was issued. Mr. Moores confirmed everything was in, as were all of the appliances. Attorney Troisi went through various other exhibits which included many individuals. Mr. Polito said it still did not establish that the building inspector signed off on an in-law. Mr. Carter agreed this could not have existed legally and would require some paper record that the Town approved this or had indisputable evidence they knew and this would also be necessary if it were to be granted a variance. Mr. Carter questioned the fact that even though the applicant had the most complete record assembled for this hearing, including every receipt, etc, they did not have a copy of the plans that were supposedly submitted. Attorney Troisi said they searched high and low and also questioned why the Town, who is the best safe keeper of the plans, did not have them. Mr. Carter said there is no burden on the Town. Attorney Troisi said if he had clients documents and he lost them he would be responsible and with all due respect he believed the Town had an obligation. He understood that everybody was human, but that was the best piece of evidence and it was lost. There were four sets of plans filed with the Town. Mr. Polito said since they are not available that have to go with what is before them and that would be the CO and original application, which indicates it was issued for a single family dwelling with one kitchen. Attorney Troisi said that his client's biggest issue is with credibility. They do not want anyone to think they did not operate in good faith back in 1992. There was no conspiracy here to hide any apartment. Mr. Polito asked the builder if he were familiar with Atkinson zoning. He said he did not do a lot of work in Atkinson. Mr. Polito questioned his recollection about certain issues and not others. Mr. Polito asked if the builder thought the building inspector was aware there was going to be a separate living space with occupants. Mr. Moores said there was no way he could not have known. Mr. Riehl said if the kitchen was taken out of the equation, it would just be part

of the living space and would not be a problem, The Board questioned whether Mr. Jones even saw the other kitchen and suggested when he went back to issue the permanent CO that he only saw the original kitchen and not the one in the in-law. He might not have been looking beyond the scope of what he was there for. This area could have been portrayed as a wet bar area.

Attorney Troisi continued with his exhibits. There were delivery slips for appliances, cabinets; flooring, etc. Mr. Polito asked if the in-law was completed in October when the temporary CO was issued and did not think it was based on the time-frame for the delivery of the cabinets. He thought this would be a plausible excuse as to why the building inspector did not see the in-law. Attorney Troisi referred to exhibit 61 and 62 which indicated these were done. Mrs. Haines said her parents moved in at the beginning of November because they sold their house. The final CO was issued in December and all of the other inspectors. Mr. Kirsch claimed Mr. Murphy never inspected the in-law. Attorney Troisi claimed he spoke with them and they did not recall.

Attorney Troisi claimed the septic was adequate and addresses the criteria for a variance.

Attorney Troisi went over the deliveries of various items to establish the time line of when these were delivered and installed. Mr. Polito still claimed there was no proof that Mr., Jones walked through the house when everything was completely finished and was aware there was an in-law. Mr. Polito asked when were the kitchen cabinets installed and if there were a record if it. Mrs. Haines said that Ashland Cabinets, out of Haverhill installed both kitchens at the same time and they were installed before Mr. Jones inspected the premises on October 31st.

The Board reviewed the criteria. Mr. Polito asked what Attorney Troisi what section of the zoning he is seeking an area variance from. Section 510 is a use variance and follows the Boccia criteria. He is not citing any criteria that he is seeking relief from, such as setbacks to setbacks, etc. Mr. Polito suggested he was seeking a variance to change a single family dwelling to a multi family dwelling. Attorney Troisi did not agree. The Board agreed this was a use variance and Attorney Troisi concurred and will define what the use is. The house was constructed from the inception with the in-law and based on the configuration it is not able to be diminished in size without substantial costs and damage to the integrity of the unit. He incorporated by reference, the minutes of the equitable waiver hearing, which referred to the possibility of reducing the size of the unit. Attorney Troisi believed the size was sensible.

1. Base on the discussions the Board agreed this was met.
2. Based on the discussions the Board agreed this was met. Although it doesn't threaten the health, safety or welfare of the public it does violate the zoning. There could be restrictions put on an approval and based on the representations that the applicant would be willing to adhere to the same restrictions necessary for the in-law, it could be met.
3. This is a request for a use variance and fell under the Simplex Criteria
 1. The Board questioned the uniqueness of the property and just because it exists does not make it legal or right.
 2. The size even if considered an Accessory Living Unit violates the zoning. The applicant can still have reasonable use of the property if the second kitchen were to be removed. The Board agreed this was not met

3. Based on the record the Board has found that this floorspace never had legal standing as an apartment or in-law, even if there was an error on behalf of the Building Inspector. The Board agreed this was not met.

4. Base on the discussions the Board agreed this was met.
5. The Board agreed this was not met because of the size. They believed if the appliances were to come out of the kitchen this space would become part of the existing single family dwelling and no longer be an issue. It does not meet the zoning requirements as currently configured.

Mr. Carter made a Motion to deny the request for a Variance for Use, based on criteria 3 and 5 having not been met. Mr. Riehl seconded the motion and it was unanimously approved. Mr. Polito stepped down for this hearing.

PUBLIC HEARING: 11:00 pm

Bruce LaCreta request for Appeal from Administrative Decision of Building Inspector's definition of Accessory Use on a Building Permit Application for a small wind turbine on property located at 40 East Road. Map 15, Lot 4 in the TR2 Zone.

Abutters list was read with the following present: Bruce LaCreta; John Strikman

PUBLIC HEARING: 11:00 pm

John Recesso request for Appeal from Administrative Decision of Building Inspector's definition of Accessory Use on a Building Permit Application for a small wind turbine on property located at 35 East Road. Map 14, Lot 84 in the TR2 Zone.

Abutters list was read with the following present: ohn Recesso

The Board agreed that they would combine these two hearings. Attorney Jackie Frichera Boyd explained that she represented the applicants. She believed the applicants were denied based on the accessory use not being permitted. She argued that it was also not an unpermitted use and there are other items in Atkinson, which are not on the list, but which are permitted, such as solar panels. In doing research there was a 1923 case out of Rockingham County that mentioned a windmill, and described it as incident in use to the property. There is a windmill on a property on Route 121 that probably predates zoning. There is a new RSA coming through, taking effect in one month; RSA 674:62, which allows for small use energy systems. Atkinson does not have any zoning to address this and she claimed the State's RSA would preempt. Attorney Boyd said if they had any questions relative to the windmill itself, they could ask the applicants. Mr. Carter stated that Atkinson's zoning is inclusionary. If it is not permitted in the zoning then it is unpermitted. The new RSA does not take effective for another month and it is enabling legislation which would not be preemptive. There are strong guidelines and model ordinances. They are dealing with what is before the Board tonight and whether or not the Board thinks this fits the definition of the zoning now. Mr. Carter asked the applicants what the height of the structure would be and explained that the restriction in Atkinson is 35'. Mr. LaCreta said his proposed structure was 50' and Mr. Recesso said his was 71'. Mr. Carter said the proposed height did not meet the requirements and that the structure was unpermitted in the zoning. Mr.

LaCreta said the telephone poles in Atkinson were 42' tall and there were many flag poles in Town that were probably at least 35' tall. He asked if they met the requirements of the Town. Mr. Carter said they are interesting points but the Board would have to determine if a structure suitable to handle a small wind turbine was analogical to a telephone pole or flag pole. Attorney Boyd said the applicants had pictures and information on what it would look like. Mr. Carter said the narrow issue was that this did not fit into zoning at this point. Attorney Boyd said there could be a lawful use that isn't necessarily in the zoning. Mr. Carter disagreed and said it is that way. Mr. Friel said the issue before the Board is whether the Building Inspector made a mistake. Attorney Boyd claimed this was not a building, but an accessory use which is incidental to the property. Although Mr. Carter agreed there was new legislation coming next month and he did not disagree with the alternative energy, the Board needed to adhere to the zoning currently in place. Mr. Friel said there are a lot of other factors involved, such as noise, color, etc. Mr. LaCreta said the proposed legislation will allow for these turbines to be within 2 feet of property lines, but they designed the system on their six acre lots around the RSA's. They are well within every parameter contained in the RSA going into effect on July 11, 2009. Mr. Friel said at this point they do not fit into any zoning allowed by the Town. The Board agreed. Mr. Riehl asked the Board if it were just the height issue that the Board was concerned with. Mr. Friel said there were other things, such as flicker and noise. Attorney Boyd questioned the use of solar panels as an incidental use. The applicants claimed the State regulations will allow the wind turbine to be up to 100' tall for residential use. Mr. Carter said that is going to be and is not in effect at the time of this hearing. Mr. Friel said the applicant was asking the Board to write law. The only thing before the Board is an appeal from an administrative decision.

Mr. Friel made a motion to deny the request for appeal based on the finding of fact that the Building Inspector did not make an error. Mr. Saba seconded the motion and it was approved. 3 voted in favor of and one abstained.

PUBLIC HEARING: 11:20 pm

Paul Carideo, TF Moran, request for a Variance from Front Setback for property located at 6 Main Street, Map 5, Lot 47 in the Commercial Zone.

Abutters list was read with the following present: TF Moran representing Kevin Bardon; Mr. White; Mr. Nejalian

Mr. Carideo said they are proposing to convert this to a tea room/coffee shop. They are in front of the Board to ask for a 34' variance. The applicant believed they needed the front parking to meet the parking requirements when they go before the Planning Board. Mr. Carideo showed pictures of surrounding properties. Mr. Polito asked if he had the setbacks for the Post Office and the Real Estate Office. Mr. Carideo said they did not physically survey them. The Post Office was 48' from the property line (building) to the center line, Pignatiello's was 50', Gordon Brown Real Estate was 35', the Scuba Shop was 33', and Steven Lewis's building was 38'. He explained that because his proposed structure was on a full basement they needed to have a staircase which is part of the structure. This makes it closer to the street, although the actual building is further away and 39.4 feet. Mr. Polito asked if he could do this proposal without the front parking. He believed he needed it to meet the parking requirement for the Planning Board. They would not be able to utilize the space inside the building without the proper number of

spaces. They needed to come before this Board and get approval before they could go before the Planning Board. Mr. Polito said that granting a Variance to square off the front is a straight forward procedure. Mr. Polito suggested they bifurcate the application and deal with the squaring of the building. The Board discussed if this should be dealt with as two separate issues or procedures at this time. There was a consensus that the Board proceed with this application and it could be conditioned upon the Planning Board approval. Mr. Polito closed the public hearing and asked the Board to consider a proposal. There are two parts to the variance, the first just squaring off the building, but the second to have a condition that the variances receive Planning Board approval during site plan review. The Board agreed.

The applicant reviewed the criteria and his application. The Board discussed the issues.

1. The Board agreed this was met based on discussions.
2. The Board agreed this was met based on discussions. This was consistent with other properties in the zone.
3. The Board agreed this was met based on discussions. This is an area variance. The building is just being squared off and there are no new violations. The second one needed Planning Board approval.
4. The Board agreed this was met based on discussions. Denying it does not serve any purpose.
5. The Board agreed this was met based on discussions.

r. Friel made a motion to approve the request for a variance to allow the squaring off of the jog in the existing building, without conditions, based on all of the criteria having been met and the second variance granted to extend closer to the road from the existing structure a distance of 34.2' +/- per plan which is a variance of 41' +/- corresponding to the deck and vestibule as shown on the plan. This portion of the variance to be conditioned upon approval of the Planning Board for the proposed use of a Tea Room/Coffee House and that the parking area facing Main Street is a necessary requirement. Mr. Carter seconded the motion and it was unanimously approved.

Motion to adjourn was made and seconded. Mr. Carter adjourned the hearing at 12:10 P.M.

Respectfully Submitted
Minutes transcribed from tape

Rebecca Russo

Approval of Minutes – 7/28/09

The Board reviewed the Minutes and the following corrections were made:

Page 3, first paragraph 5th line from bottom – change word ‘is’ to ‘are’.

Page 5, seventh line from bottom – remove coma after word problem and replace with period.

Page 9, tenth line from bottom – add word ‘living’ between word ‘accessory & unit’.

Page 11, 18th line from bottom – correct spelling of ‘analogous to analogous’.

Mr. Carter made a motion to approve the minutes of June 10, 2009 as amended , seconded by Mr. Saba, and unanimously approved.