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

Public Hearing Meeting Town Hall
Wednesday June 9, 2010

Present: Hank Riehl, Vice-Chairman; Sandy Carter; Sue Miner; Glen Saba

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

Incoming
1) Home Business Renewal Applications:
Norma Smith Bridal Alterations
Dorothy Menzie, Sadhana Center
John Sinclair Tractor Sales

Outgoing:
1)5/20/10 Decision Letter to Nancy Raczka
2)5/17/10 Decision Letter to Carl Bohne
3)5/20/10 Decision Letter to Coppetas
4)5/20/10 Decision Letter to Dufresne/Gallant

Outgoing

PUBLIC HEARINGS: 7:3O P.M.

Abutters list was read with the following present:
Attorney Troisi; Matthew Paquin; Richard & Patricia Haines; Mr. Paris

Mr. Riehl stated that this application looks substantially similar to a Variance request that the Board had ruled on last summer. Mr. Riehl said that before the Board accepted the application he wanted Attorney Troisi to explain how this application differed from the previous one under Fisher v. Dover. Attorney Troisi suggested to the Board that this application is materially different than the last one. In Fisher v. Dover there was a request to allow a conversion of a 32 room house into multifamily apartments. The point was that the request in 1976 was denied. Two months later the same Variance request was reinitiated by the applicant. The Chairman in that case did not inquire if there were any

material changes. When it went to the Superior Court, both the applicant and the Chairman admitted in Court that the applications were never compared. It is a solid case. Attorney Troisi directed the Board to the Morgenstern v. Rye case, which is the latest case from 2002. The important fact of this case was that the Board determined that the application was not different, The Supreme Court determined that even though the applications were the same on its face, the applicant had submitted evidence regarding a concern that the Board had on the original application regarding the Wetlands and determined this in itself to be a material change in the circumstances. Attorney Troisi and the applicants felt strongly that their application had a lot of similarities. This case has a tortured history. The applicant has previously submitted an application for an Equitable Waiver in March 2009. The application was denied because the Board's consensus was that this was a use issue whereas the equitable waiver deals with area and dimensions. Attorney Troisi quoted some statements from the March 2009 minutes. His claim was that the Board directed them to the Board of Selectmen. Mr. Riehl believed Attorney Troisi was quoting from discussions the Board had. Attorney Troisi said there was a site walk and contended Mr. Riehl indicated in the minutes that based on the site walk it would be brutal and very difficult to be compliant with the ordinance based on the layout and construction of the unit. Mr. Carter believed the record was much more complex than that. The record stands as the record was. Attorney Troisi asked that any minutes he referred to be incorporated into the record. Attorney Troisi filed an appeal of an administrative hearing as well as a variance request in June 2009. The applicant appealed the decision of the building department as well as the assessing department reclassifying the accessory unit to be "unpermitted". Mr. Riehl wanted to clarify that his recollection was the Board never voted on this, but it was discussed. Attorney Troisi read from the minutes and stated that Mr. Polito said it was not a decision by the building department but rather by the assessing department and the Board did not have authority in this respect, but the Selectmen did. There was a consensus of the Board that the applicant did not have legal standing to be before them. There was a reference and a suggestion that the applicant ought to go before the Board of Selectmen. The Board then addressed the Variance request. Attorney Troisi claimed this was important because in the Variance application (of last year) the request was under Article V, Section 510 and it was to allow the guest suite to exist as an independent apartment. Tonight's request is very focused and specific under Article IV, Section 460:1. This is a different ordinance that they are proceeding under. They are asking for relief for one of the terms or conditions of the Special Exception, which is relief of the 750 square foot requirement. They are asking for relief of 196 square feet, which is the size of a lot of large closets in some of the houses in Atkinson. Last year it was treated by the Board as a use variance and not an area variance. Attorney Troisi quoted from page 6 of the minutes of June, 2009. They are asking for relaxation of the area requirement, which he claims is a materially different application. Ms. Miner disagreed with the applicant and did not recollect that the Board would have ever talked about having a two-family home because they are not allowed in Atkinson. She thought the Board had always considered this as an accessory unit. Ms. Miner asked that since the Town had exclusionary zoning, if it is not included, it is excluded. Attorney Troisi agreed and stated that is why they were asking for a variance. Attorney Troisi referred to page seven (7) of the minutes, which stated that the Board determined that the applicants request for a variance required a use variance and not an area variance. The variance would be to allow a two-family dwelling in a zone restricted from two family

dwellings. The Board could not follow the minutes because the approved minutes did not correspond to what Attorney Troisi had. Mr. Carter thought the Board was getting off track and rehashing all of the prior proceedings, but wanted to know what, if any, were the substantial differences between the applications. Attorney Troisi stated he gave the Board a different applicant, the fact that the law has changed, it was previously considered a use variance for a multi-family dwelling, where this request is for an area variance for an accessory unit. This is a different petition. Ms. Miner thought the Board never considered this to be a multi family unit that had any chance of being permitted. The minutes reflect discussions the Board had regarding the issues and what would have been construed with the approval. Mr. Carter thought the Town approved the ordinance for the 750 square foot ordinance under the Special Exception umbrella so that that it was clear that the conditions were either met and could be approved or did not and would be denied. The Board did not have discretion. He thought if they were to attempt by other means to bury the criteria that constitutes the special exception the Board would be making the law and not administering the law. Ms. Miner just wanted to be clear that they never considered this to be a request for a multi family unit, but that it was always considered to be an accessory use and the issue was with the size. Mr. Riehl agreed and at the time of the original application the Board used the use criteria as the best vehicle to get to a variance hearing. Attorney Troisi reiterated that the application last year was for relief under Article V. The application today focuses on Article IV. Mr. Saba asked the Board if this were 750 square feet would it meet the criteria and the board agreed it would. Mr. Saba questioned whether the Board could act because as Mr. Carter pointed out earlier this would be making law instead of enforcing it. Mr. Paquin asked if that was not the reason for requesting a variance and what is the purpose of one if it is not to give relief. Attorney Troisi was concerned that the minutes approved were so condensed and did not contain some of the discussions that were apparently in the draft. Attorney Troisi reiterated that under the umbrella of the discussions at the original hearing, the application was treated as a use request. The consensus was that if the Board considered that they would be creating a multi family unit in a single family zone. The applicant had volunteered to restrict the unit to in-laws if it were approved. They also did not have a buyer for the property at that time and there was no one living in the accessory unit. They now have a buyer with parents who will occupy the unit. Mr. Carter asked why the square footage had changed. Attorney Troisi stated the original measurements were not inside wall to inside wall. Attorney Troisi said they went before the Board of Selectmen in July 2009 at the suggestion of the ZBA and the Board of Selectmen stated they would need to go before the ZBA for a variance on the size and then request a Special Exception. (Board of Selectmen minutes incorporated by reference). These were statements made by Mr. Friel who was also on the ZBA at that time. Mr. Riehl stated that he saw four rationale for the differences in the application. They are applying against different ordinances, there is a change in square footage, the Selectmen directed them to follow this procedure and there are different applicants. The whole issue before the board is whether this application is a material change in circumstances to what the Board heard last year. He had posed the question to Attorney Sumner Kalman and Land Plan on whether the change in law (variance criteria) was grounds in itself to a change in circumstances. There was no consensus there. Mr. Riehl thought it was material that in the way the law changed they codified the Simplex tests, but Simplex was used in last year's hearing. Mr. Riehl thought the new applicants were not material. Mr. Carter agreed and thought it was not relative to

any of the issues the Board was concerned with. The crux of the issue from day one has been the reconciliation of the square footage that was greater than 750 square feet. He thought this was a different approach in trying to bless this, but not necessarily in the circumstances. Mr. Saba stated that the Board is trying to determine whether to hear the application based on the purported changes. He believed the circumstances have changed because when the Haines applied they could not ask for an extended family accessory unit because they were selling their home and there was no one occupying this space. The buyers are now before the Board and the parents are going to live there. Captain Paquin explained that with his job he is gone quite frequently and that his parents will be living there to support his wife in his absence and because of his father's illness. This is the perfect living situation for his family. Mr. Saba thought the Haines were in front of the Board in essence to get a "two-family" blessed, the Paquins' are before the Board to discuss how they can get this 976 square foot unit to fit into an accessory living unit and be legal. Ms. Miner had a concern with this because the Haines still owned the property and the Paquins were potential buyers. Attorney Troisi stated there was a signed purchase and sale agreement slated to close at the end of the month. She did not believe this was a material change; however the fact that there are different Articles under which the applications were brought forward is a material change. She did not believe the difference in square footage was material, but did think the fact the Selectmen advised them to come before the Board for this process was a material change. Mr. Riehl was unpersuaded by the new applicant claim. He agreed the difference under the Articles is persuasive. He agreed the square footage was not material and the directive from the Board he was not sure of, but he would favor hearing the application.

Ms. Miner made a motion that the Board agreed to accept the application for a Variance request as stated and agreed to hear it. Mr. Saba seconded the motion and it was unanimous.

Abutters list was read with the following present:

Attorney Troisi; Matthew Paquin; Richard & Patricia Haines; Mr. Paris

A five minute recess was called.

Attorney Troisi said that this application was very specifically stated through Article V, Section 462 and particularly subsection H, to permit an extended accessory living unit to be occupied in a space that contains 946 square feet where ordinarily 750 square feet is permitted.

Attorney Troisi read the application (incorporated by reference).

This has always been taxed from its inception as a guest suite. This limited specific request, which is accompanied by a Special Exception Application, fulfils the purpose of 460:1 (which was read). Attorney Troisi said this is a small request of 196 square feet, which is not that much space. A lot of in-laws today have a kitchen, bedroom, living area and maybe a computer room. This is limited to one bedroom. Attorney Troisi presented photos of the interior of the home. The proposed use is an extended family living unit. The harm to the applicant would far outweigh the benefit to the public and Attorney

Troisi referred to the minutes where Mr. Riehl said it would be brutal and difficult to renovate. This unit was placed in good faith by his clients. He referred to a letter from Rosemary Scolara, a real estate broker, which speaks to the decrease in market value should the use not be allowed. The lot is oversized by being 2.63 acres and has greater depth than almost all of the lots in that area. The dwelling unit has been in existence since 1992 and was used in good faith by the Haines' parents who are now deceased. This application meets the requirements and the intended purpose of the ordinance except for this small amount of extra space. There is no harm to the public. Last year there were several abutters who spoke in favor of the application and did not believe there were any objections from anybody. He asked for consideration on the application.

Mr. Saba asked if there were any way to rearrange this to meet the criteria. Attorney Troisi stated it would be expensive and would destroy the integrity of the home. This was borne out by not only the building inspector, but a couple of builders and an architect that the Haines had asked to review the layout. Anything can be done at a cost, but that cost is always a part of the hardship argument. Mrs. Haines said there were a couple of suggestion that were very costly because of the layout of the unit and where cabinets in the kitchen were located. Ms. Miner asked about removing a wall to make it common space. She did not want to try and construct the way it would be laid out but was having a hard time with this situation because she believed the ordinance was enacted to avoid getting these huge monstrous and potential "apartments" added on to houses. By making it small, compact and accessible to the house, it could not be made into an apartment. She questioned what would happen to all the other homes out there and the potential impact of whether this would set a precedent. Mr. Riehl suggested they leave that for the deliberations. Mr. Saba asked if the Board could grant a variance on this. Mr. Riehl said the Board could. They have the authority to issue variances to waive Town ordinances. But he was not sure they have the legal authority to waive a criteria of the special exception. Mr. Carter believed a variance was a method to waive a requirement of the special exception. Mr. Carter had not seen any case law regarding this. Ms. Miner said the ordinance was originally for a lesser square footage and was changed by a Town vote to allow the 750 square feet. There might come a time when this is put back before the voters to increase the size based on the fact that homes are getting larger. Mr. Riehl did not believe this would be changing the law, but might be setting a precedent for others to seek similar relief. Mr. Saba made the argument was that the intent of the 750 square foot requirement was to preserve the intent of single family housing. Whether this is 750 or 946, this is a single family dwelling. Most members went on the site walk and could attest that you would never know this existed unless you were inside the home. There are circumstances in that this has been in existence since 1992 and has been taxed as such by the Town. Mr. Paquin said this proposal is in complete compliance with the intent of the ordinance, which he believed was very important. He did not believe the Board would be setting precedence and that each case would be decided on its own merits and on a case by case basis. This variance would be for these specific set of circumstances. The Board has the authority to grant this variance. Attorney Troisi said the statute of 674:33 was very clear and gave the Board the authority to grant variances in order to relax requirements of an ordinance. Attorney Troisi said the Town had complete control of this variance and as a condition of the special exception the parents would have to record a deed addendum to be the occupants. If the home was sold in the future, the new owners

would have to reapply and would not be granted the same rights unless approved. Ms. Miner stated the Variance runs with the land so that would still be in effect.

The Board did look at the layout and discussed some potential options for changes or whether this whole thing could just be considered a part of the house. They determined that they needed to act on the application before them as it was and not what it could have been. Ms. Miner thought it was important to note that it was one thing to give a variance in this particular situation in that it is already built out and/or due to ignorance of the law, but this request is so much more than that. Attorney Troisi said there is much case law that goes to self created hardship and ignorance of the law. Troisi said, if you acted on good faith it should not be held against you.

Attorney Troisi looked for the case law. An abutter spoke in favor of the applicant and stated that if another applicant came before the Board it would most likely be for something that did not exist yet and the Board would have control. This had been in existence since 1992 that there may have been some oversight on the Town's part as far as the in-law and as a result there should be some relief given to the Haines. Mr. Paris (abutter) thought this application stood on its own merits because of the overwhelming evidence of the existence of the unit. Any other applicant would have to come before the Board and would be evaluated on their own set of circumstances. Rosemary Scolera said the home is impeccably maintained and that the Haines have been taxed for 18 years on an accessory unit. They are coming before the Board in good faith to ask for the Town's blessing to continue using the dwelling as it has been continuously used for all of these years. Ms. Miner reiterated that the building permit and occupancy permit said it was a single family home. The assessor is not an inspector and although the assessor clearly knew there was an accessory unit, the Town did not.

Attorney Troisi found the case law in the 2010 handbook and sited Hill v. the Town of Chester. (incorporated by reference). This spoke to self created hardship and purposes of the zoning regulations. Ms. Miner asked if it were really up to the building inspector to know if this was being built. Mr. Saba said an inspector would notice plumbing and electrical and it would be up to him as a licensed builder to know what the building codes were for each particular Town.

Mr. Saba reiterated that the ordinance has intent and this agrees with the intent. He believed that 750 square feet was too small but did not know where you would draw the line. What was before them was a beautiful home that any neighbor would love to live next to. It was built in 1992 and the Town knows it exists. Based on the application and the fact the future owners are here and this will meet every criterion except for the square footage he thought this should be granted. Riehl said he was stuck on the 18 year history of being unpermitted and worried about the affect of an approval. He agreed on all of the other points. Mr. Saba said he asked Mr. Jones why there was only one kitchen on the application and permit, and Mr. Jones did not remember. He did not remember if it was plumbed for a second kitchen. Attorney Troisi said any future applicant would have to go through the same tough scrutiny that they have and determine on a case by case basis. Mr. Paquin (father) said they went to 30 towns in MA and NH and were blown away by this house. They were told up front about the potential problem with the square footage. His

experience in being a realtor is before a home is given a certificate of occupancy the building inspector has to do a final inspection. This is done in stages and he had to believe that the building department knew what was being built. Their intent is to use it in the spirit of the ordinance. The deed addendum protects the Town if the house is sold in the future. Ms. Scolera questioned the Board's reference that this was unpermitted for 18 years when the tax field card clearly indicated it was there and the applicants paid taxes on it. Ms. Miner thought the Town was much more in tune to these types of units and would probably agree that this would not open the floodgates of these requests coming forward.

Mr. Riehl ended public input.

The Board reviewed the criteria and incorporated all of the discussions.

1. Ms. Miner asked if the applicant would have paid more taxes based on having this "guest suite". The Board agreed they did. Mr. Saba thought the application stood on its own in this respect. Met as discussed
2. Met as discussed
3. Met as discussed
4. Met as discussed
5. a.) Miner did not think the lot was that oversized but it definitely was large and the appearance was of a single family residence. Mr. Riehl thought that the requirement of 750 square feet may not be adequate and should be a percentage of the main home but that would be an issue for the Planning Board to figure out. Mr. Riehl believed the case law was compelling regarding the hardship issue. It is persuasive that the provisions in the case law speak to this very issue and that it is unlike the equitable waiver. Met as discussed
   b.) met as discussed.

Mr. Riehl made a motion to approve the request for a variance as requested to the size of the accessory living unit to be approximately 946 square feet as opposed to the 750 square foot allowed and further designate it as an acceptable accessory living unit under the Town of Atkinson's Town Ordinances based on all of the criteria having been met. Ms. Miner seconded and it was unanimously approved.

The Board reviewed the conditions for a Special Exception.

a) Met

b) Met

c) Will be met

d) Met

e) Met

f) Met

g) Met

h) Met (due to prior Variance Approval)

i) Met

j) Met

k) Met – The parents of the applicants are Collette and Richard Paquin and they will be the occupants of the accessory unit.

Mr. Carter made a motion to grant the request for a Special Exception under the provisions of 460:2 based on all of the conditions having been met or will be met and contingent upon the Paquins becoming the new owners. Richard and Colette Paquin will become the occupants of the accessory unit and a deed addendum will be recorded. Ms. Miner seconded the motion and it was unanimously approved.

Approval of minutes of May 12, 2010 - Approved
Approval of Minutes of April- Approved

Motion to adjourn was made and seconded. Mr. Riehl adjourned the hearing at 10:00 P.M.

Respectfully Submitted

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Minutes transcribed from tape ***Rebecca Russo***