

## **ATKINSON ZONING BOARD OF ADJUSTMENT**

**21 Academy Avenue**

**Atkinson, New Hampshire 03811**

**Public Hearing Meeting Town Hall**

**Wednesday, July 12, 2023**

### **Members Present**

Glenn Saba, Chair (present)  
Bob Connors, Vice Chair (present)  
Arthur Leondires  
Kevin Wade (present)  
Scott Sullivan (present)  
Guy Wetherbee, Alternate (present)

### **Others Present**

Karen Wemmelmann, Recorder  
Noreen Mercier

### **Workshop 7:00 PM**

#### **Approval of Minutes:**

**Member Sullivan made a motion to approve the minutes of the June 14, 2023 meeting as amended. The motion was seconded by Member Wade. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0. The vote is unanimous.**

**Correspondence:** none

**Call to Order:** Chair Glenn Saba called the meeting to order at 7:30 PM.

Member Sullivan will be keeper of the records.

### **Public Hearing – 7:30 P.M.**

Chair Saba opened the public hearings at 7:30 PM, July 12, 2023 and introduced the members of the Board. All members will be voting. There is one application.

- 1. Application for Variances submitted Noreen Mercier from Atkinson Building Code Ordinance Section 650:1 on property located at 23 Hemlock Shore Dr, Map 22 Lot 76 in the RR3 zone. Ordinance section 650:1 requires minimum ground floor area outside measurement of 800 sq ft and the structure at 23 Hemlock Shore Dr is 780 sq ft; applicant is seeking a 20 sq ft variance. Additionally, the ground level is entirely garage space so applicant is seeking a variance to allow the ground level to be entirely garage only with living area on the upper level.**

#### **Abutters:**

John J. and Michelle J. Bourque, Gill, Audrey F. Rev. Trust, Audrey F. Gill, TTE, Mercier, Noreen Rev. Trust, Noreen Mercier (present), TTE, Robert P. and Sheila AB Schaefer, Raymond Fisher, c/o Evelyn Fisher, Gary C. and Erika B. Escher, Karen and Lacey Bluemel, Robert Anthony Kinsinger

## Discussion:

Ms. Mercier appeared before the Board. Chair Saba read a memo from the Inspection Office, "Denial of Building Permit Application", into the record.

Your building permit application has been denied for the following reasons:

Section 650:1 of the Building Code Ordinance in Atkinson Zoning Ordinances states that every building to be used as a residence shall have a minimum ground floor area of 800 square feet for outside measurement and a floor area exclusive of cellar of 600 square feet for each additional story. Your application shows a structure of 780 square feet with zero area of living space on the ground floor area. The Zoning Board approved the special exception of expansion of nonconforming use to allow the issuance of a building permit to convert an existing two car garage to a one bedroom, single family dwelling with deck on June 14, 2023. My interpretation of the ordinance is the ground floor area should be living space. This structure was originally built as a standalone garage. The ZBA voted to allow the structure to be converted to a single family home. The current ground floor area is 780 square feet with zero living space to be used as a residence. I believe the intent and past practice shows the ground floor of the residence is used as living space, therefore, I believe the application requires a variance in order for me to issue a building permit.

Chair Saba requested everyone to turn to page BC 182 of Atkinson Zoning Ordinances and read Section 650:1 into the record. Vice Chair Connors remarked that the memo is pretty vague and asked if the Board was given anything else regarding the spirit of the ordinance. Chair Saba agreed that the ordinance is not very clear and stated that the ordinance needs to be discussed by the Board in order to decide what it means.

### **SECTION 650 FLOOR AREA**

**650:1** Every building to be used as a residence shall have a minimum ground floor area of eight hundred (800) square feet outside measurement, and a floor area, exclusive of cellar, of six hundred (600) square feet for each additional story.

Chair Saba asked the Board members to discuss whether the ordinance was talking about living space or if it was referring to a basement. The ordinance also talks about floor area exclusive of cellar of 600 square feet for each additional story. He believes the Building Inspector is stating that the ground floor can have a garage, but it needs living space. Chair Saba does not agree. There are many residences in Atkinson with a garage under and a basement in which the homeowner can walk up the stairs to the living space.

Vice Chair Connor asked if these residences have only a garage under or if there is living space or finished basement. Chair Saba stated that there was basement separated from the garage, not living space. The basement does not have to be finished.

Alternate Wetherbee remarked that his main entrance is a french door that used to be a garage in a '50's ranch. It is unfinished basement with stairs up to the living space. There is no living space in the basement. Section 650:1 does not say "living space". In his architectural experience, the Board is talking about the ground floor area, not living space. That is how he interprets it. It just needs a basement. Member Sullivan agreed.

All Board members agreed that the foundation must be a minimum of 800 square feet based on Section 650:1.

Vice Chair Connors stated that the Building Inspector added that he felt that the ground floor should be living space. The ordinance does not have that language in it. Chair Saba asked the Board to look at the Ordinance again, interpret that, then look at the memo from the Building Inspector and make a decision.

Vice Chair Connors and Chair Saba discussed that all or many residences have lower levels that are unfinished basements and they are not considered living space. Chair Saba again requested to return to the ordinance.

Member Sullivan stated that he works with the New Hampshire adopted building code. He read the ordinance and the word “cellar” is no longer defined in the code book. It is not even in the Planning and Zoning book. He believes Atkinson Zoning Ordinance Section 650:1 was written in a time that was not modern and does not represent conditions today. Many dwellings today have a cellar that is a garage under with no access to the living space. If you google the word “cellar” it is for wine or coal storage. He believes that the ordinance is not current.

Chair Saba agreed that the ordinance is not current and requested the Board to continue to interpret it, then go to the memo.

Member Sullivan informed the Board that he also googled “ground floor”. According to the code book, the ground floor is the first floor and it shows the basement is below grade. Chair Saba asked if he believes the first floor of a residence needs to be 800 square feet.

Member Sullivan believes that the writers of the ordinance were trying to determine the size of the foundation. Chair Saba agreed and asked if Member Sullivan was now stating that the ground floor is the first floor of the residence.

Member Sullivan stated that the first floor is the 600 square foot requirement so you cannot include the basement. Chair Saba stated that the ordinance is saying that first floor is also the ground floor and if that is the case, then the ground floor needs to be 800 square feet. Member Sullivan agreed and stated that maybe the living floor has to be 800 square feet, which is the first floor, not the basement.

Alternate Wetherbee stated that the ordinance is ambiguously worded.

Chair Saba agreed and stated that it is the duty of the Board to define it. The Board does not know the intent. He agrees with Member Sullivan that it is probably old.

Alternate Wetherbee stated that the language in Section 650:1 should specify floors. Chair Saba stated that the Board cannot rewrite the ordinance and reread it.

Vice Chair Connors stated that the cellar is not at ground level, it is below ground. Chair Saba asked what was meant by “exclusive of cellar”. Member Sullivan stated that today’s foundation designs are completely different. Chair Saba asked if the structure was built on a slab with a

garage and if it has to be a combined 800 square feet minimum and the second story has to be 600 square feet minimum.

Alternate Wetherbee stated that where it is stating “a minimum ground floor area of” architecturally they are talking about the first floor, not the basement, not a cellar.

Chair Saba asked Alternate Wetherbee if it means it is possible to have a garrison where the foundation is actually less than 800 square feet and the first floor is 800 square feet and that will be allowed. Alternate Wetherbee agreed. The Board agreed.

Chair Saba stated that now the Board is not talking about the foundation size at 800 square feet, it is discussing the first floor. That first floor does not mean the closest floor to the ground. If you have a basement and have access, for example, with a garage under, it is not the ground floor. The ground floor is the first floor residence above the foundation, rim joist, floor joist, ground floor.

Vice Chair Connors stated that he believes that the ground floor is the first level. The cellar, basement, is below that. The ground floor has to be 800 square feet.

Chair Saba stated that when the Board began its discussion, it believed that the foundation had to be 800 square feet. Now, after discussion, the Board does not care about the foundation, it is concerned with the first floor of living space. Vice Chair Connors agreed the Board is discussing the first floor above ground.

Member Wade stated that it takes him six steps to get to the first floor from his garage. He has the option of going up six steps to his living area or down six steps into the basement from the garage. Chair Saba clarified that the garage is not the ground floor, his basement is not the ground floor, he goes up six steps to his ground floor.

Member Sullivan stated that the code books state the ground floor is the story above grade plane which is ground level, first story and is defined as more than six feet above grade plane.

The Board discussed how to interpret Section 650:1. Member Sullivan stated that the ground floor is the first floor above grade plane at least six feet above grade. That is helpful to identify the primary living floor. Chair Saba asked what if it were a slab, a slab would not be 6 feet above grade plane. Member Sullivan stated that a slab on grade would still be above grade plane. Chair Saba stated it would not be six feet above.

The Board is stating that ground floor is the first floor at or above grade plane and is exclusive of a basement or a cellar. It needs to be a minimum of 800 square feet. Every floor additional to that needs to be a minimum of 600 square feet.

Chair Saba reread the second part of the denial letter from the Building Inspector which states in part “Your application shows a structure of 780 square feet with zero area of living space on the ground floor area”.

Chair Saba asked if the Board members agreed that it is incorrect.

Alternate Wetherbee stated that the Building Inspector is misinterpreting the term “ground floor”. Chair Saba agreed. Member Sullivan agreed, he is in a different jurisdiction and some

of the definitions in the ordinance do not exist. He stated the Board is doing its best to understand what the ordinance is trying to accomplish in order to define minimum dwelling sizes. He feels it was written to prevent building really small houses while allowing people to build a dwelling unit to live in.

Chair Saba returned to the denial letter. The Board is saying that the ground floor area that the letter is referring to is actually the garage and basement and does not need to have any living space or there is no restriction on size. The living space above is the issue.

Chair Saba asked the applicant if the space that the applicant received a special exception for is one to one on top of the foundation and 780 square feet. Ms. Mercier replied that it is 780 square feet. That is where the living area will be, on the ground floor.

Alternate Wetherbee stated that is looking at the photographs and he can see how the Building Inspector is looking at it. He is not seeing a basement because it is a house on a slab and a garage. The slab is the foundation of the existing structure, so the Board is talking about the second floor. Alternate Wetherbee asked if the applicant wanted to convert the garage bay into a foundation.

Ms. Mercier stated that she wants to leave the garage as is and finish off only the space above.

Alternate Wetherbee stated that architecturally, without knowing what is in the walls where the windows are, interrupting them and making a four foot frost wall, making it a casement, having a garage on slab with a room above could be interpreted either way. He also pointed out that if she leaves it as a garage, then she may have to raise the structure to add fire wall protection between the garage space and living space.

Ms. Mercier stated that the garage is very tall, the garage doors are oversized because the former owner stored construction vehicles inside. Alternate Wetherbee stated that this is good news, if there are tall enough joists to install fire protection, it would not be a problem, but the Building Inspector will have to look at it.

Alternate Wetherbee asked about the interior of the garage. Ms. Mercier stated that the garage walls are cinderblock construction. Entry to the proposed living space is in the back where the entrance to the upstairs is, and there are six to eight steps up, so the back part is covered with dirt. Alternate Wetherbee asked if the cinderblocks go to the ceiling and Ms. Mercier replied that they go above grade. Alternate Wetherbee stated that in his interpretation, the garage functions as a basement. Chair Saba agreed because the grade slopes up and the garage floor is below grade for the most part.

The Board reviewed the drawings. Chair Saba asked if the sketch shows what exists and Ms. Mercier confirmed. Vice Chair Connors agreed that it looks like a basement.

The Board has determined that the ground floor is above grade plane, exclusive of basement or cellar. The Board agreed after discussion, the garage would be the basement and the ground floor is the floor above.

Member Sullivan asked if the access/egress door is through the deck in the back on the first floor, directly from the outside, not through the garage. Ms. Mercier said yes and that she did not want to put stairs in the garage and take up floor space. Member Sullivan stated that as long as it aligns with an egress door to access the primary living area from the outside, in his opinion that supports the living area proposed is the ground floor. Ms. Mercier stated that there is no access from the garage to the living space.

Chair Saba returned to the denial letter. There are two things in front of them: First, the letter states that the living space is on the ground floor and the ground floor area is not 800 square feet. The Board has determined that the ground floor is the floor above grade, it is the space being finished for living space. It is not the concrete floor, it is the frame floor above. Second, if the applicant is stating that space is 780 square feet, then the applicant is requesting a variance of 20 square feet. All agreed.

Member Sullivan reviewed the drawings submitted by the applicant and asked if they were done by an architect. Ms. Mercier replied that they were, but she did some cutting and pasting. He stated that the drawing shows the living area measured on the outside wall is 26 x 30 feet. Ms. Mercier stated that it could be the inside measurement but the measurements are from the architect, so she would say those are the outside measurements. All agreed that 780 square feet is the outside measurement.

The Board has determined that the ground floor is not the garage, it is the floor above. Chair Saba stated that the Board needs to overrule the interpretation by the Building Inspector and requested a motion.

Member Sullivan stated that with very close measurements, it is important that they are well documented. The applicant informed the Board that an architect drew the plans, but there is no stamp on it. Alternate Wetherbee stated that the way the measurements read, they could be interior because he is calling out measurements to the bathroom. The foundation is 27x31.

Chair Saba again requested a motion to overrule the Building Inspector's interpretation of living space, that the ground floor is the basement floor.

**Vice Chair Connors made a motion to overrule the Building Inspector's finding that the application shows a structure of 780 square feet with zero area of living space on the ground floor area. It is the Boards interpretation that the ground floor area is above grade and it is not the garage area. Member Wade seconded the motion. All in favor. Vote: 5/0/0. Unanimous.**

Chair Saba requested to return to the request for variance for square footage. Chair Saba requested the applicant address the request for variance for square footage. The applicant needs 800 square feet and the building is 780 square feet. A 20 foot variance is required.

Ms. Mercier explained that she wanted to stay with the existing structure, she did not want any bump outs. It is a very small piece of property on a 0.211 acre lot. It is an area of very small properties. It is across the street from the lake so she did not want to increase impervious surfaces.

Chair Saba stated that the applicant is not expanding the space, she is finishing the existing floor above. She has received a special exception to finish the floor above. The applicant stated that the size of the lot is comparable to other lots in the neighborhood. The applicant is seeking to finish the space above the garage and because it is not 800 square feet the applicant needs relief for 20 square feet.

There were no further questions from the Board. Chair Saba opened the hearing to the public.

Mr. Michael Hawkins, 38 Hemlock Shore Drive, spoke supporting Ms. Mercier's application. Chair Saba asked Mr. Hawkins if he thought the proposed application would impact the neighborhood in any way. Mr. Hawkins stated not at all, and in fact, the applicant has improved the neighborhood by installing a septic system.

Ms. Kathryn Rochford, 5 Hemlock Heights Road, agrees with Mr. Hawkins. There were no further comments from the public.

Chair Saba closed the hearing to the public. The Board had no further questions.

#### **Findings of Fact:**

- The Board reviewed the letter from the Building Inspector for opinion.
- The Board reviewed Section 650:1.
- The Board identified definitions regarding grade plane and ground floor.
- The Board agreed to best describe ground floor and first living floor as above grade plane.
- Garage size is adequate for a car and utility use.
- Garage is set on a foundation, block and of today's construction.
- Living area is above the grade plan and is the only floor.
- Primary egress door is shown to enter the living area from outside.
- The ground floor area is shown on the plan.
- Architectural measurements should support this.
- Owner wants to work with the existing structure layout and not expand.
- Neighbor testimony supports improvement to the site with a disposal system and site conditions.

Chair Saba requested to go through the criteria.

1. Granting the variance would not be contrary to the public interest because:

It does not diminish the value of the surrounding properties. Having a finished off dwelling will make the neighborhood look better.

Discussion: Chair Saba stated that it is an existing structure, the applicant is not expanding it, it has been there for many years, the applicant will improve it in order to get an occupancy permit.

**Vote: 5/0/0. Unanimous. Criteria 1 is approved.**

2. The spirit of the ordinance is observed because:

Several houses already in the neighborhood do not meet minimum 800 square foot outside measurement. The structure exists, it is not too small and it does not stand out from the neighborhood.

Discussion: Chair Saba stated that he drove by the property and believes that it does not stand out. The only thing would be that there are no windows above and that is because it was a garage. When it is improved, the applicant may need to add something for the living space. Chair Saba believes that having a small house with a garage under goes along with the character of the neighborhood. Vice Chair Connors asked why the ordinance states it must be at least 800 square feet. There are other houses that probably have less than 800 square feet. He asked how 20 square feet would make a difference. Chair Saba stated that is why he talked about the character of the neighborhood. The Board discussed the spirit of the ordinance and decided they do not know the intent. Vice Chair Connors stated in his opinion, it was so no one could build a tiny house. Member Sullivan stated that 780 square feet is well over the minimum standard for today's building code.

**Vote: 5/0/0. Unanimous. Criteria 2 is approved.**

3. Granting the variance would do substantial justice because:

There is an existing structure in place.

Discussion: Chair Saba asked what the gain would be to the general public if the variance were denied. Chair Saba stated that the applicant has improved the property by adding a septic system and a well, so he does not see a gain to the public by denying it.

**Vote: 5/0/0. Unanimous. Criteria 3 is approved.**

4. For the following reasons, the values of surrounding properties will not be diminished:

Improving the existing structure will be an improvement to the neighborhood, it will be a finished piece of property. A standalone garage does not fit in with the neighborhood.

Discussion: Chair Saba stated that there was no one present to object. ZBA members may draw upon their own knowledge of the area involved to reach a decision. He drove by and feels that improving the structure and making it a residential dwelling rather than a garage would be an improvement. He does not know of any other freestanding garages in the general vicinity. He would say it is an improvement.

**Vote: 5/0/0. Unanimous. Criteria 4 is approved.**

5. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

- 5a. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of the provision to the property because:



The property is an area of 3 acre zoning and the lot is 0.22 acres. There is not an adequate amount of land to expand the structure and comply with zoning. She does not want to increase impermeable surface area.

Discussion: Chair Saba stated that the structure exists, it is being improved, it is being turned into a home instead of just a garage. Provisions have been made as discussed. To deny it based on a 20 square foot variance would not make sense. The improvement would outweigh the benefit of denial. Vice Chair Connors agrees.

**Vote: 5/0/0. Unanimous. Criteria 5a is approved.**

5b. The proposed use is a reasonable one because:

Not increasing impermeable surfaces and making best use of the existing structure.

Discussion: Chair Saba stated that the proposed use is as a residence. You could argue that its use as a garage was not in character with the neighborhood, but now turning it into a one bedroom residence is more in line with the neighborhood so the proposed use is a reasonable one.

**Vote: 5/0/0. Unanimous. Criteria 5b is approved.**

**Vice Chair Connors made a motion to approve the Application for Variance submitted by Noreen Mercier from Atkinson Building Code Ordinance Section 650:1 on property located at 23 Hemlock Shore Dr, Map 22 Lot 76 in the RR3 zone. Ordinance section 650:1 requires minimum ground floor area outside measurement of 800 sq ft and the structure at 23 Hemlock Shore Dr is 780 sq ft; applicant is seeking a 20 sq ft variance. Member Sullivan seconded the motion. Vote: 5/0/0. All in favor. Unanimous.**

Chair Saba reminded the applicant that there is a 30 day appeal period and any development during that period will be done at the applicant's risk. To sum up, the Board has granted 20 square feet of relief of the 800 square foot requirement. The Board has determined that the proposed living space is actually the ground floor; the basement area with concrete and garage is just that foundation, garage and basement.

**Vice Chair Connors made a motion to close the public hearing. Member Wade seconded the motion. Vote: 5/0/0. All in favor.**

**Member Wade made a motion to adjourn. Member Sullivan seconded the motion. Vote: 5/0/0. All in favor.**

**The meeting was adjourned at 8:20 PM.**

The next meeting of the Atkinson Zoning Board of Adjustment will be August 9, 2023.