

**Town of Epsom
Zoning Board of Adjustment
3/17/10**

In Attendance: Glenn Horner, Chairman; George Carlson; Alan Quimby; Mark Riedel (Alternate); Pam Hoyt-Denison (Alternate); John Dodge, Planning Board Liaison; Darlene Phelps Recording Secretary

Not in Attendance: Rick Belanger, Vice Chairman

Also in Attendance: Jeff & Rachel Eames; Priscilla Poitras; Robert Sampson; Dara Lehans; David Copson; Atty. Steven Shadallah ; Everett Jabour; Douglas Osborne; Constance Riedel; Dale Gregory

7:00 PM Glenn opened the meeting & introduced the members of the board. He explained the procedure of the meeting. Pam will be sitting in for Rick in his absence. The minutes of 1/20/10 were reviewed. Alan made a motion to approve the minutes as amended. John Dodge seconded the motion. All in favor. John didn't vote as he was not in attendance at the Jan 20 meeting.

Case 2010-02 (Jeffrey and Rachel Eames) CONTINUED Jeffrey and Rachel Eames have applied for a variance to Article III, section G [Residential Single and Multi-Family Residences requirements], Subsection 2 [Two family Residence] for the conversion of a single family residence to a two-family residence on a lot with 3.48 acres (4 acres required). The property is located on Deer Lane within the Agricultural/residential Zoning District and is identified on Epsom Tax Map U-10 as Lot 10-7.

Mark Riedel recused himself as he is a neighbor to the property.

Glenn asked Rachel if they were able to contact their abutters to try to obtain additional property in order to meet the minimum property requirements. The owner to the left of the Eames property lives down south & has not responded to any of her requests. The property to the right is in foreclosure & they are not able to do anything until the foreclosure is complete. Cam Hebert, an abutter offered to sell them the required property (.52 acres) from his backland at a price of \$30K, which Rachel states is easily 5-6 times the market value. Rachel said they offered to pay all costs associated with the lot line adjustment, and Mr. Hebert was firm at \$30K. In regard to the septic system; Rachel said she has contacted the State of NH and has not received a response.

Rachel said she contacted the title company who handled the sale – and upon further research, was unable to find anything in the title search for the prior 2 purchasers (before her) that listed a contingency on the property by the town. Glenn stated it is the applicant's responsibility to record the plan at the MCRD – and it was not always followed up on very well in the past – now the town is better about keeping track of that. Rachel wanted to be sure to note that she is not the previous applicant and she has done everything that has been asked/required of her. Jeff stated that they have done due diligence to research this property. The property card at the Town Office states that it is a 2 family residence. Rachel, being in the real estate business, stated that two very valuable resources were used – the tax card and the title search – and neither one stated that there were any contingencies on the property.

Upon Glenn's question – Jay stated that if a prospective owner had asked about this property, he would have pulled the property file and provided them a copy of the previous ZBA decision, which states the conditions on the property.

Rachel asked each board member to answer to themselves, whether when they bought their last property, did they go to the Town Office and pull the full property file.

Glenn asked if there any members of the public in attendance, who would like to speak in favor of the variance. Priscilla Poitras, is the tenant, and stated that she would very much like to stay in her apartment.

Glenn then asked if any members of the public who are not in favor of the variance would like to comment. Connie Riedel read a prepared statement, (see attached Exhibit 1).

Glenn noted that if the applicant had been able to obtain the additional acreage, then all the issues with a 2-family home would be moot points.

Rachel responded to Connie's statement by saying that it implies that Rachel had the knowledge of the property and she did not. She also echoed Glenn's comment. She also asked that the reference of her as a "real estate professional", to please stop, as she did the due diligence as a townspeople.

She also stated that if the plan for the property had been recorded a year ago, then she would have been aware of the conditions before the purchase.

Nancy Sampson presented a petition that requests to "Deny single-family homes to be converted to two-family homes in a single family residential neighborhood". This has been signed by many taxpayers in Epsom. Glenn stated that variances for multi-family residences are sometimes granted, and usually expire when the family moves out. Rachel said she was under the impression that each case is heard on its own merits, and if the ZBA is going to use this as consideration, then she would ask for a continuance so she could bring in a petition stating that there are as many people in town who would be in favor of allowing this.

Mark Riedel stated that in the original ZBA decision, the board erred when it did not require a complete inspection to be sure the apartment meets all codes. According to the State Fire Marshall, all rental units need to be inspected in order to ensure they are safe.

Bob Sampson stated that the home was built to NFPA code for a SF home, and by making it a two-family home, the criteria changes. This is a state law. This puts the Town at risk if something happens to a tenant. He said he spoke to the Fire Chief & was told that an inspection has never been done on that property. He also spoke to Bill Bernard who was a Code Inspector for 32 years, and was told that the codes for multi-family homes are very different than SF homes. Bob said no permits have been issued by the town for any improvements.

Alan asked Rachel if a fire inspection has been done since the original hearing. Rachel said no, it was not requested of her. Rachel also responded that it is not required to have a fire inspection when you rent an apartment. She did say that an electrical inspection was done on the home before she purchased it.

Nancy Sampson said she has a concern that though the current tenant is a good tenant, a future tenant might not be as desirable – holding loud parties, etc., as in the past.

Dave Copson stated that multi-family homes should not be in SF home areas. He said this will change the entire neighborhood, and could set a precedent and other people in his neighborhood might decide to put in multi-family homes. He said he'd be in favor of allowing this tenant to stay, but when they are gone, and then there would be no more renting. He said many people in this area have spent \$400K - \$500K on a home and don't want multi-family homes in their area. Glenn stated that there are plenty of properties in that neighborhood that are large enough to sustain a multi-family home.

Dale Gregory said when she bought her property her deed had many covenants which required the property be only SF homes, regulating the height of fences, etc. A show of hands indicated that 7 members of the public were aware of the covenants. Rachel said she is aware of covenants, but they do not preclude a two family home.

Dale Gregory asked if the home is currently rented to two families & Rachel said yes. She said there are several homes in the area that up for foreclosure, and she's concerned that any future owner would ask to convert any one of them into a multi-family homes, and Glenn said anyone can apply for that.

Glenn asked if Rachel has any more comment, and she declined.

Jay stated that variances only began to be recorded 4-5 years ago, and whether or not they were recorded, they are still legal. The Blodgett's did not follow through with previous conditions. The previous condition had stated that after 12 months of non-use the variance would expire, it is estimated that the variance expired in 2006. On December 7, 2009 Jay was made aware of the rental unit & contacted Rachel to discuss with her, and make her aware of the zoning violation. Jay said Rachel responded very quickly.

George made a motion to close the public hearing. Pam seconded the motion. All in favor.

8:25 – 8:30 PM – Break

Glenn read a list of prepared considerations (see attached Exhibit 2).

John said he feels that both sides have presented their cases very well, but he would have to deny based on there not being any hardship.

Pam said her thoughts do not lie in what the applicant should have known. She feels that we need to deal with the case at hand – it is currently a two family home – and if the prior owner had never come before the town, and had just built the apartment, then this might never be before this board. She also stated her opinion that she doesn't agree that family members as tenants are somehow more desirable than non-family members. She feels it's compelling that the tax card shows it as a 2-family. She said she has not heard any testimony that the Eames or the tenants are bad landlords/tenants.

Alan stated that there needs to be a procedure in place to ensure that variances are recorded, and also if someone comes to the office to inquire about a property, then they should be given all the information that is available. He also echoed that one member of the public stated he would not be opposed to allowing this tenant to stay and have the variance expire when this current tenant leaves. If we deny this variance, then this tenant needs to find a new home. He also said that he doesn't agree with the insinuation that Rachel should have known better because she is a Real Estate Agent – she came to the office as a private citizen.

George asked if this property were 4 acres, what would be required. Glenn stated that they would have to go to Jay and get an Occupancy Permit; no variance would be required. Jay said a permit would be needed for each unit, an Occupancy Permit & a Fire Department inspection. This would not be a zoning issue.

The checklist was reviewed:

Question 1 - Glenn, George, John, and Alan answered no. Pam answered yes.

Question 2 - Glenn, John answered no. Pam, Alan, George answered yes.

Question 3 - Glenn, Alan, John, and George answered no. Pam answered yes.

Question 4 - Glenn, George, John, Alan, and Pam answered yes.

Question 5 - Glenn, John, Alan answered no. Pam, George answered yes.

Question 6 - Glenn, John, George, and Alan answered no. Pam answered yes.

Glenn read a prepared decision for denial.

John made a motion to deny the variance because:

1. Granting of the variance would not be in the public interest for the following reasons:

- a. Conditions placed by the Epsom Zoning Board on the approval of Case 2004-7 involving the same property and ordinance in 2004 provided assurances that the public interest would be maintained. No circumstance**

has been found or evidence submitted that these conditions are not still necessary to satisfy the zoning criteria of public interest for this appeal. This is particularly true with regard to condition number 1 which restricted the occupants of the multifamily dwelling to parents of the owner only.

- b. It would create a multifamily rental property which would be out of character with the surrounding neighborhood which contains single family residences on other large lots that do not meet the minimum 4 acre requirement.
2. The properties in the surrounding neighborhood are all single family residential sites on large lots with less than 4 acres and no special conditions can be found with regard to the applicant's property making it uniquely qualified for multifamily use. In addition, the inability to expand the use of this property for the sole purpose of increasing rental income does not rise to the level of unnecessary hardship in order to meet the requirements for a variance to this zoning ordinance.

Alan seconded the motion. John, Glenn & Alan voted yes. Pam & George voted no. Motion carries.

Glenn stated that an appeal can be filed within 30 days.

Rachel asked what the time frame is that their tenant has to leave. Glenn advised her that she'll have to consult with the Zoning Compliance Officer.

9:20 PM A motion for rehearing of the following case has been received:

Case 2010-01 (Everett and Sue Jabour) Everett and Sue Jabour have applied for a variance to Article III, section B [Pre-Existing, Non-Conforming Uses], Subsection 4 [Change and Expansion of Use] to expand the use of a seasonal dwelling to year round residency on a lot containing .141 acres (2 acres required) on a private road (200' of public road frontage required). The property is located on Lake Road within the Agricultural/Residential Zoning District and is identified on Epsom Tax Map U-01 as Lot 33.

Glenn reminded the Board that the variance criteria had changed and that a new variance checklist had been developed and approved for use by the Board at a previous meeting. The new variance criteria eliminated the distinction between a Use and Area variance and the new checklist reflected this change. Glenn said that, according to a publication from the local government center, this new checklist was to be used for applications received after January 1, 2010. The Jabour's application was received and accepted on December 1, 2009, so the old checklist was used as a part of the decision in this case. Glenn feels that the Board was correct in using the old checklist despite the claim by Attorney Shadallah that the new criteria should be used as stated in his motion. He also noted that the old variance criteria might be considered less restrictive than the new due to the elimination of the distinctions between variances. Finally Glenn stated that he could find nothing in Attorney Shadallah's motion that contained new evidence which would warrant a rehearing.

Attorney Shadallah stated that he feels the ZBA acted properly in using the old checklist, and also that a rehearing can only be granted if there is new evidence, or if the board erred in its decision.

Based on a review of the motion for rehearing, the other Board members agreed that they could not find any new evidence or errors made that would warrant a rehearing.

After some discussion, Alan made a motion to deny the request for a rehearing based on the Board's opinion that there was no administrative or factual error in the original decision, and that no new evidence was contained in the motion for a rehearing. George seconded the motion. All in favor.

9:45 PM Alan made a motion to adjourn. Mark seconded the motion. All in favor.

(Exhibit 1)
Facts Supporting Denial of Case 2010-02
14 Deer Lane U10-10-7

We respectfully submit and challenge the request for a variance in Case # 2010-02 and argue that the applicant has failed to make any statements in the application and public hearing that would warrant a positive action from the Epsom Board of Adjustment. While the applicant stated that they were not aware that the property was not a two family home when purchasing the property and relied on the tax card, it is not the town's error. In the eyes of the law, ignorance is no excuse. The applicant claimed she is a qualified professional in the real estate business and should, therefore, be held to a higher standard in her area of business. This applicant/real estate professional knew or should have known the full facts regarding the property at the time of purchase and their failure to perform their due diligence, again is not the town's error. By reviewing the town's files and viewing the property itself, they should have been knowledgeable that this was a single family home.

We feel that the applicant violated the town of Epsom Zoning Regulations without a variance from the Zoning Board of Adjustment (ZBA) because they knew or should have known the requirements for a two-family residence. The lot size failed to meet those requirements. In checking records, they would have found that the original in-law apartment was granted for family use and to be discontinued if vacated by the family for a 12 month period as stated in the record of decision dated June 3, 2004, ZBA case # 2004-07. As we know, that time period expired.

We feel the applicant has put the town and renters in jeopardy by renting an illegal apartment. This is not only unfair to the town, but also to the renters who have been harmed by this total disregard to the rules in an effort to generate profit. Prior to occupancy, inspections were not obtained putting all inhabitants' safety, as well as the town employees at risk. The applicant failed to upgrade state fire and safety codes in accordance with Life Safety Code® 2003 Edition for one and two-family dwellings (NFPA-110 state fire codes and NFPA-70 electrical codes). They failed to have an inspection for septic, they failed to have a safety review by the Epsom Fire Department and failed to have an electrical inspection to ensure safety for tenants and town departments. We know that the tenants, on at least two occasions, requested help from Epsom Police and Fire Department while living at the residence. This resulted in safety issues for our town's departments and the use of town resources with no visible benefit for the town. Although the applicant claims there are 2 egresses from the downstairs apartment, there is only one egress in accordance with code as this one door was formerly a walk out basement door to the home. The only other egress is going upstairs and exiting through the main part of the residence, which would not be appropriate means of egress if renting as a two-family residence. The lower apartment is also down over a hill with no sidewalk for access and a huge danger for our town's resources if having to respond to a call.

While the applicant stated that up grades were made to the residence after they purchased it, there is nothing in the town files to reflect this. They may have cleaned and cleared property of garbage, but that does not constitute an up grade of the property. We appreciate that they claim to maintain the property and hope they continue these actions, however as long as renters are paying their rent, they have rights to which the landowner is unable to control.

In response to the five criteria for which the Epsom ZBA will need to base your decision, we respectfully submit the following:

1. The proposed use would not diminish surrounding property values.

As stated by the applicant and abutters, there would be conflicting evidence and dueling experts on this point. Testimony from abutters stated that their quality of life from having renters has already been a nuisance and absentee landlords have a direct affect on the neighborhood and the enjoyment of these properties. Keep in mind that the burden is on the applicant to convince the board that it is more likely than not that this proposed use would not decrease or diminish surrounding property values. We pray that you will take into account the testimony from the abutters that their homes were purchased in good faith in a neighborhood that was one of single family homes providing a close knit community to rear our children and have a safe place to live. Please remember that the applicant stated the property was in a state of disarray from the previous renters.

2. Granting the variance would be a benefit to the public interest.

As abutters we see no benefit, only adverse effects from the added burden on traffic, fire, police, schools, septic, noise and vandalism. As owners of property in this community we are part of the public and we pray that you consider our interests in not granting this variance as it is in no one's interest except the applicant's resulting only in a greater profit from this second rental property. Although we acknowledge there is nothing wrong with someone making a profit, it should not be at the expense of the town and disregard of the neighborhood's quality of life.

3. Denial of the variance would result in unnecessary hardship to the owner.

Absolutely not. The owners of this property have claimed negligence and blame the title company. After the fact that they were found to be renting an illegal apartment, they have now come to this board to request this variance. They had brought with them the renter of the illegal apartment for the sympathy value, which we found was unconscionable. The applicant is claiming a larger lot as special circumstances of the property that distinguishes it from other properties similarly zoned.

On the contrary this home was built as a single family home among other single family homes and can still be used as such without any change of residence or alterations in the property. If maintained and marketed properly, it could bring a nice profit to the owner. No hardship exists as all properties were meant to be for single families.

4. Granting the variance would do substantial justice.

The applicant did not comply with the current regulations, which states that this is a single family home, and failed to inquire about the in-law apartment. The injustice is to the town and owners of the abutting properties who have maintained their properties as single family homes. We believe the applicant/real estate professional knew, or should have known, and in doing so, rented an illegal apartment to an innocent tenant and has dealt an injustice not only to the tenant, but to the community and town. To determine substantial justice, the gains to the town and neighborhood benefits would have to be more than the applicant's gains of benefits. We found none of these and believe that by not granting a variance substantial justice would be accomplished.

5. The use is not contrary to the spirit of the ordinance.

Allowing the use of a single family to change to a two-family on a sub standard lot violates the spirit of the ordinance by not maintaining criteria of rural atmosphere with over crowding of lots. The applicant claims that the lot is only ½ acre short of the requirement and claims that other variances have been given for properties that are ¼ to ½ acres less than the required amount of acreage. As this Board has judiciously reiterated, variances are not based on other decisions. We ask that the variance not be granted as it is contrary to the spirit of the ordinance and there is no other reason that is justified for the change other than

the profitability of an additional unit for rent. We also point out that the acreage is 3.48, which is **more** than ½ acre short of the minimum required acreage of 4 acres.

In summarizing, we feel the applicant's negligence and failure to perform their due diligence in confirming that this property was a single-family residence should not be the burden of the Town of Epsom. It is not the responsibility of the town to make whole the damages to rectify the title company's mistakes, as claimed by the applicant. If the applicant, who is a real estate investor, believes that the mistake is due to the title company, they should deliberate with the title company to rectify and make whole any damages they feel they may have.

In accordance with the New Hampshire Planning and Land Use Regulation, Title LXIV, Planning and Zoning: Under Section 674:17 "Purposes of Zoning Ordinances, ...Zoning ordinances shall be designed: (a) To lessen congestion in the streets; (b) To secure safety from fires, panic and other dangers; (c) To promote health and the general welfare; ... (e) To prevent the overcrowding of land; and (f) To avoid undue concentration of population".

Every zoning ordinance shall be made with reasonable consideration to, among other things, the character of the area involved and its peculiar suitability for particular uses, as well as with a view to conserving the value of the buildings and encouraging the most appropriate use of land throughout the municipality.

A single-family restriction is a valid zoning regulation since it bears substantial relation to public safety and general welfare in that a regulation designed to decrease number of families in one house may reasonably be thought to diminish the risk of fire. *Sullivan v. Anglo-American Investment Trust* (1937).

Because the general policy of zoning law is to carefully limit the extension and enlargement of nonconforming uses, we respectfully and strongly request that the Epsom Zoning Board of Adjustment deny this request for a variance as we believe that we have justifiably proven that the applicant does not meet any of the documented criteria as outlined above. We pray that you will consider our request as being in the best interest of the town and quality of our neighborhood, while guarding the safety for the citizens in the town of Epsom.

Thank you.