

ZONING BOARD OF ADJUSTMENT MEETING MINUTES
Thursday, October 29, 2015

CALL TO ORDER:

D. Gravel called the meeting to order at 7:01pm.

ROLL CALL:

The following members were present: D. Gravel D. Day J. Marshall C. Hodges W. Rose

Staff Present: B. Regan, Planning Director
N. Decoteau, Admin Assistant

APPROVAL OF MINUTES:

MOTION: "To approve the minutes of May 5, 2015 as presented."

Motion: D. Day

Seconded: J. Marshall

Discussion: None

Motion Passes: 4 – Yes, 0 – No Abstained: W. Rose

NEW BUSINESS:

D. Gravel agreed to write the annual report for the Zoning Board of Adjustment and will submit a draft to the members for review.

PUBLIC HEARING:

D. Gravel opened the Public Hearing at 7:15pm. The following notice was read into the record:

Public Hearing: Equitable Waiver

Public Hearing to consider the application submitted by property owner Robert H. McDonough Trustee of the B.K.M.M. Realty Trust for an Equitable Waiver from *Article V: Dimensional Requirements* as reflected in the Table of Dimensional Requirements to maintain the preexisting non-conforming multiple use of property identified as Map 6 Lot 2-21 located at 3261 US Rt. 3 in Thornton, NH. Said preexisting non-conforming multiple use includes usual uses in the Industrial II zone on the first floor and two 1-bedroom apartments on the second floor.

R. McDonough provided a brief history of his property.

R. McDonough stated when he purchased the building in 2002 there was a cabinet shop downstairs and two apartments upstairs.

D. Gravel asked if the property was in compliance when R. McDonough purchased it.

R. McDonough stated he did not know for certain.

It was clarified for the record that R. McDonough's deed at Book 2755 Page 253 references 1.05 acres shown as Lot #1 on Plan #6108 at the Grafton County Registry of Deeds in January 1989.

R. McDonough stated the building was built in 1987 and that the apartments have been rented with limited periods of vacancy since he purchased it.

R. McDonough stated that the hardship that exists is related to the fact that limiting the number of apartments to just one would significantly reduce the value of the property and it would require major renovation upstairs to convert the two apartments into a single unit.

R. McDonough stated that it is assessed as a multi-use building and the current assessed value is \$279,800.

R. McDonough stated he has it listed for \$129,900 and has had no interest shown.

R. McDonough stated that the apartments have been vacant since May 2015.

W. Rose asked if R. McDonough had been before the Planning Board.

B. Regan, Planning Director, recounted the recent communication he and the Planning Board have had with the applicant.

B. Regan stated that R. McDonough had contacted him and met with the Planning Board for an informal discussion on August 20, 2015.

B. Regan provided the following documents for the Board members to review:

- a) Letter from R. McDonough dated July 23, 2015 to the Planning Board
- b) Planning Board minutes for August 20, 2015
- c) Letter from B. Regan to R. McDonough dated August 21, 2015
- d) Email from R. McDonough to B. Regan

B. Regan stated that the Planning Board was empathetic with the situation and the general consensus of the Planning Board was that they did not have the jurisdiction to do anything as the Zoning Ordinance requires one acre per dwelling unit even in the Commercial and Industrial Zones.

B. Regan stated that the town records are pretty sparse going back to 1989, but it seemed logical that requesting an equitable waiver from the dimensional requirement of having to have one acre per dwelling unit would be the best approach for R. McDonough.

W. Rose referred Section II of NH RSA 674:33-a Equitable Waiver of Dimensional Requirement which states that *"In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected."*

W. Rose asked if there is any record of an enforcement action regarding the violation during the last ten years.

R. McDonough responded that he is not aware of any.

W. Rose noted that R. McDonough purchased the property in 2002 which is more than 10 years ago.

C. Hodges asked if tenants were currently renting the apartments.

R. McDonough responded that the apartments have been empty since the end of May 2015.

D. Gravel asked if the Board is in agreement that it has been established that the violation has existed for 10 years or more and that no enforcement action has been taken regarding the violation.

W. Rose stated that the burden of proof is on the applicant and asked if R. McDonough had any lease agreements or other documentation that would show the two apartments have existed for ten years.

J. Marshall referred to NH RSA 674:33-a I (a) which states: *"That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;"* and stated that the Board has no documentation regarding whether or not the violation was or was not noticed by any owner or former owner.

C. Hodges referred to the sketch layout of the building submitted by R. McDonough and asked if the first floor had a kitchen.

R. McDonough stated the cabinet shop had a kitchen on the first floor and other cabinets throughout the showroom.

R. McDonough stated the first floor has never been rented as a dwelling unit.

D. Gravel summarized that the options available to R. McDonough were to renovate the second level to have only one apartment or purchase abutting property to acquire the necessary acreage.

R. McDonough stated neither option was viable.

D. Gavel stated that the Zoning Board has to comply with NH RSA 674:33-a.

W. Rose stated that evidence needs to be submitted supporting R. McDonough's claim that the two apartments have existed more than ten years.

C. Hodges suggested checking with the E911 system to see if/when separate addresses for the apartments were established and added that the electrical billing, or phone billing of the two apartments dating back ten years would demonstrate the two apartments were in place ten years ago.

W. Rose stated that if documentation is presented which demonstrates that the two apartments have existed for ten years then RSA 674:34-a I (a) and (b) do not have to be considered because the Board will agree there is no record of any enforcement action against the violation.

The Board indicated their agreement that there is no record of any enforcement action against the violation.

J. Marshall referred to RSA 674:34-a IV. which states: "*Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions.*" and requested clarification on the dimensional requirement under consideration.

W. Rose stated the current uses evidenced in the building: apartments and a commercial space are all allowed uses for the Industrial Zone, but the dimensional requirement of one acre per dwelling still applies.

D. Gravel stated the one acre per dwelling is the dimensional requirement for which relief is being sought.

C. Hodges asked if granting relief would allow the two apartments to remain on the second floor and open the possibility of using the first floor (historically used as commercial space) to be converted to a third apartment.

D. Gravel stated that any decision made by the Zoning Board of Adjustment would be specific as to what is being allowed and that in his opinion, in this case a third apartment would not be allowed.

W. Rose referred to RSA 674:34-a I (c) which states: "*That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property*" and stated that it relates to question #3 on the application submitted by R. McDonough.

After noting none of the abutters were present, the Board briefly discussed the type of properties in the area. Board members concurred that the nonconformity does not constitute a nuisance, diminish the value or interfere with future uses of other property in the area.

W. Rose referred to RSA 674:34-a I (d) which states: "*That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected*" and stated that it relates to question #4 on the application submitted by R. McDonough.

D. Gravel indicated that in his opinion the cost of correction outweighs any public benefit to be gained by requiring the violation to be corrected.

W. Rose asked R. McDonough if he had a written estimate for the cost to renovate the second level to just one apartment instead of two.

R. McDonough did not present a written estimate and stated he estimated it would cost thousands to remove one of the apartments.

C. Hodges referred to the Zoning Ordinance definitions of Dwelling, Dwelling-Two-Family, and Dwelling-Multi-Family.

C. Hodges clarified that the issue is not which definition may or may not be used in describing the property under consideration but rather that the requirement for one acre per dwelling is the dimensional requirement from which the applicant needs relief.

W. Rose stated the Board is authorized to grant relief if and only the criteria laid out in 674:34-a are met. W. Rose reminded the Board that if the assumption that the two apartments have existed for ten years prove to be true then RSA 674:34-a I (a) and (b) do not have to be considered.

W. Rose asked the Board if enough evidence has been presented to make a determination whether the violation does or does not constitute a public or private nuisance, diminish the value of other property in the area, or interfere with or adversely affect any present or permissible future uses of any such property. W. Rose stated the testimony from R. McDonough together with the Board's knowledge and documentation available led to the determination that there are other similar type uses in the immediate area.

Board members acknowledged their agreement that the violation does not constitute a public or private nuisance, diminish the value of other property in the area, or interfere with or adversely affect any present or permissible future uses of any such property.

W. Rose asked the Board if enough evidence has been presented to make a determination whether or not due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

J. Marshall stated she did not see any public benefit to correcting the violation as no abutters are present, and the violation appears to have been in existence for several years.

The Board members acknowledged their agreement that cost of correction far outweighs any public benefit to be gained.

W. Rose noted that Section II of NH RSA 674:33-a Equitable Waiver of Dimensional Requirement states that if an applicant demonstrates that the violation has existed for 10 years or more, and that no enforcement action has been taken then subparagraphs I(a) and (b) are not criteria which have to be considered.

W. Rose asked the Board if enough evidence has been presented to make a determination whether or not the violation has existed for 10 years or more.

W. Rose noted that there is nothing on file to indicate any enforcement action has been taken by the Town.

Board members agreed that enough evidence has not been provided to establish the existence of the two apartments dates back 10 years.

W. Rose summarized that if the applicant can submit documentation which demonstrates that the two apartments have existed for 10 years the Board is in a place where it could grant relief.

D. Day suggested that proof that separate electric meters for each of the two apartments were installed more than 10 years ago would show that they were in existence.

W. Rose added that the applicant could submit any type of evidence that demonstrates the two apartments have been continually and consistently used as apartments over the past 10 year period would be sufficient.

W. Rose added that if there is not enough evidence submitted which demonstrates the apartments have been in existence for more than 10 years then the criteria listed in (a) and (b) of section I of RSA 674:34-a would have to be met.

D. Gravel suggested that an electric bill for each of the three separate units: the lower commercial level, and one for each of the two apartments on the second level for a time period more than 10 years ago would be sufficient.

W. Rose stated that the burden of proof is on the applicant to provide the Zoning Board of Adjustment documentation for the record to show that relief should be granted.

After some discussion it was determined that the Public Hearing should be continued so that any further documentation submitted by the applicant can be considered by the Board.

MOTION: "To continue the Public Hearing to consider the application submitted by property owner Robert H. McDonough Trustee of the B.K.M.M. Realty Trust for an Equitable Waiver from *Article V: Dimensional Requirements* as reflected in the *Table of Dimensional Requirements* to maintain the preexisting non-conforming multiple use of property identified as Map 6 Lot 2-21 located at 3261 US Rt. 3 in Thornton, NH to 7:00PM on Wednesday, November 4, 2015 at the Thornton Town office."

Motion: C. Hodges

Seconded: D. Day

Discussion: The Board agreed that the applicant could submit additional documentation into the record via email or via regular mail. The Board agreed that the applicant would be allowed to call into the meeting if he was not able to be present.

Motion Passes: 4 – Yes, 0 – No

ADJOURNMENT:

The following motion was made at 8:30pm:

MOTION: "To adjourn."

Motion: D. Day

Seconded: J. Marshall

Discussion: None

Motion Passes: 4 – Yes, 0 – No

Respectively Submitted,
Nancy Decoteau