NORTH BERWICK PLANNING BOARD

MINUTES OF PLANNING BOARD MAY 27, 2021

Present: Anne Whitten, David Ballard, Scott Strynar, Mark Cahoon

Absent: Chairman Geoffrey Aleva, Jon Morse

Also Present: Stephen Mansfield, Christopher Lee, Joe Phillips, Craig Linscott, Luke Robertson, Andrea Spiegel, Scott (?)

1. Call To Order:

Chairman Geoffrey Aleva and Vice Chairman Jon Morse were both absent tonight. Anne Whitten will be the Acting Chairman for tonight's meeting.

3. Current Business:

3.1 Public Hearing
Stephen Mansfield (Tenant: DBA Oatmeal Acres Antiques, Vintage Furniture and Miscellaneous Items)
34 Elm Street (Map 017 Lot 044)
Request: Applicant is proposing a retail shop with online sales within the 675 sq. feet of space adjacent and within the same building as Serenity Salon. Applicant proposes to be open 7 days a week from 10 am to 7 pm. Pursuant to the Town of North Berwick Zoning Ordinance, Article 4.2 Land Uses (table), a Conditional Use Permit shall be obtained for this type of use in Commercial II Zone

Acting Chairman Whitten opened the Public Hearing at 6:35 pm.
There was no public comment.
Acting Chairman Whitten closed the Public Hearing at 6:36 pm.

Acting Chairman Whitten asked the Board if they had any comments or questions for the applicant. The Board had none.

David Ballard motioned to approve the application for Stephen Mansfield (Tenant: DBA Oatmeal Acres Antiques located at 34 Elm Street Map 017 Lot 044. Scott Strynar seconded the motion. VOTE: 4-0

3.2 Tabled from May 13, 2021
Luke Robertson
52 High Street (Map 022 Lot 016)
Request: Applicant proposes to build a 648 sq. ft. In-Law Apartment attached to an Accessory Shed. Based on the Town of North Berwick Zoning Ordinance, Article 4.2 Land Uses (table), a Conditional Use Permit shall be obtained for this type of use in the Village A Zone.

Acting Chairman Whitten stated that, as discussed at the previous meeting, the Board sent a letter to the town attorney. She asked the applicant if they had received a copy of the letter. Chris Lee who is representing the owners for this project said that he did receive it this afternoon. They have had a chance to read it and briefly discuss it with the property owners. Mark Cahoon stated that he did not receive this letter in his email, so he asked for some clarification. Acting Chairman Whitten stated that the letter from the attorney stated that it is the Planning Board's job to apply the facts presented in any application to the relevant legal standards and requirements imposed by the local ordinance and state statute. She went on to read the letter from the attorney to Dwayne and the Planning Board into the minutes.

Based on conversations and the documents that that you have sent me, it is my understanding that:

- The proposed structure could not be approved as a single-family dwelling on the lot because it fails to meet minimum road frontage requirements;
- The existing primary single-family dwelling contains a large attached accessory structure – a barn – which is not proposed to contain the proposed apartment;
- The accessory structure (a proposed shed) that the applicants wish to attach their in-law accessory apartment to is less than one-tenth of the floor space of that of the proposed apartment structure;
- The proposed apartment would also have an attached deck which would also dwarf the proposed shed structure.

As an initial matter, it is the Planning Board's job to apply the facts presented in any application to the relevant legal standards and requirements imposed by local ordinance and state statute. Ultimately, questions of whether a conditional use permit application do or do not meet the requirements imposed by town ordinance must be resolved by the Planning Board. Therefore, when more than one interpretation of an ordinance is possible, it is up to the Planning Board to decide which interpretation it believes is correct. When interpreting the provisions of ambiguous ordinance language, the Planning board should be guided by general rules of ordinance interpretation including: (1) the Board should try to read any provision so that it is consistent and in harmony with the overall structure and scheme established by the ordinance as a whole; and (2) undefined terms should be given their common and generally accepted meanings.

With this in mind, the four questions posed by the Planning Board for clarification each relate to Zoning Ordinance § 5.2.20 which establishes the standards for "in-law accessory apartments".

In addition to the specific questions asked by the Planning Board, the Board should be mindful that the plain terms of § 5.2.20 state that any structure for which classification as an in-law accessory structure is sought must "be accessory to the use of the premises as a single-family dwelling". Under the Zoning Ordinance, an "accessory structure or use" is defined as "a use or structure that is incidental and subordinate to the principal use or structure". The Board is therefore required to determine whether the proposed structure would be incidental or subordinate to the primary use of the premises as a single-family residence.

Such an inquiry may include whether the proposed structure, when aggregated with the other proposed accessory structures, including a shed, deck, and future above-ground pool and deck ultimately are subordinate and incidental to the existing principal use of the property as a single-family residence. Keep in mind that only one single-family dwelling may be placed on this parcel under current space and bulk requirements. Based on the proposed site plan submitted by the applicant, in my opinion it would be reasonable for the Planning Board to ask whether the proposed in-law apartment, given its size and lay-out relative to both the 8'x10' shed to which it is attached, and relative to the principal residence (which contains a large attached barn/garage) located on the lot, is in reality an in-law accessory apartment within the meaning of § 5.2.20 of the Ordinance, or is instead a second single-family residence located on the lot.

The remaining issues raised by the Planning Board are briefly discussed below.

1. Does Ord. § 5.2.20.3 which states that "The apartment shall be created within or attached to a single-family dwelling or accessory structure" permit the construction of the relevant accessory structure (in this case, a shed) to occur at the same time as the construction of the apartment?

The ordinance language that the apartment "be created within or attached to a single-family dwelling or accessory structure" does not on it face attach any specific temporal language to the provisions of § 5.2.20.3, such as "an existing single-family dwelling or accessory structure" which would more clearly require first the existence of the accessory structure, and then a subsequent attachment to, or construction within, that structure.

The ordinance is therefore susceptible to the interpretation that a structure accessory to the primary residence may be built at the same time as an accessory in-law apartment within or attached to that structure. It is my understanding that similar projects have been approved by the Board – where a garage or similar structure clearly accessory to the principal residence was constructed to include a contained in-law apartment.

That said, this question begs the larger question which the Planning Board will ultimately have to decide, namely, whether the proposed shed is accessory to the existing principal residence, or

rather an accessory to the proposed in-law apartment, itself. The Board must make this determination because the ordinance requires the in-law apartment be within or attached to either the principal residence, or to a structure which is itself accessory to the principal residence. That the shed is proposed to be built simultaneously with the attached apartment may well inform this analysis, as well as an examination of the current storage needs of a single-family residence which already contains a large barn, and the relative sizes of the proposed shed and the attached apartment.

2. What does the language contained in Ord. § 5.2.20.4 that the creation of the apartment "shall not alter the single-family character of the property" mean?

"Character" is not a defined term and is subject to several common dictionary definitions which may be referenced in the Planning Board's ultimate analysis.

Read in conjunction with the rest of § 5.2.20, however, the Planning Board might analyze the standard contained in § 5.2.20.4 as further assurance that a proposed accessory in-law apartment should not essentially allow an end-run around the general requirement that single family dwellings must comply with the general space and bulk standards contained in the ordinance by merely designating a structure an accessory in-law apartment when outward observation would reveal what might be easily otherwise mistaken as two stand-alone single-family dwellings.

3. What is the meaning of "habitable area" as used in Ord. § 5.2.20.6?

"Habitable area" is not a defined term in the Ordinance. A common dictionary definition of "habitable" is "capable of being lived in" or "suitable for habitation".

If such an interpretation is adopted by the Planning Board, then the Planning Board would need to determine whether the proposed structure contains more or less than 650 square feet of floor area capable of being lived in. It must do this by applying the facts of this case to their interpretation of the ordinance. The Planning Board could consider such factors as whether the space contains the things generally considered essential to habitation, such as being enclosed from the elements, possessing plumbing, containing a place to store and prepare food, or other factors which the Planning Board believes would reasonably make a space habitable.

4. Is a deck part of the measured "habitable area" for the purposes of the same ordinance section?

Based on the analysis above, the Planning Board should consider whether the proposed deck is capable of being lived in based on the factors which it determines make a space habitable. Again, however, in the context of the above analysis, the Planning Board may wish to additionally consider – regardless of whether a deck is "habitable" for the purposes of the ordinance – whether the inclusion of a deck accessory to the in-law apartment which dwarfs the

floor area of the proposed accessory shed weighs on the Board's analysis of whether the shed would be accessory to the principal residence, and in turn whether the proposed apartment is intended to be accessory to the principal residence.

Chris Lee thinks that, in reading the opinion from the town attorney, their general feeling was that it did create a path for them to work with the Planning Board to get something like their proposal approved. The attorney brought up concerns that the Planning Board is going to have to make decisions on, but he feels that they can find a way to create something that is acceptable that is defending the Town of North Berwick, defending the abutters, and adhering to the bylaw. He thinks that the first thing that they need to address, which seemed to be the biggest thing for the attorney, was circumventing the bylaw to create a single-family home. He said that if they were attempting to do that, the Planning Board should strike this down right away because the point of the bylaws is not to create additional single-family homes on lots that are not big enough.

Mr. Lee stated that, in this situation, they are most certainly not creating a single-family home on this lot. A single-family home not merely defined by being a stand-alone structure. If you park an RV in a field that is not hooked up to utilities, this is not a single-family home. A key component of a single-family home is that it is on its own legal lot and can be sold separately. It is not a single-family residence unless it is a separate asset which can be traded separately and that is not what this project is going to be. Additionally, it is not adding a 2nd family to this property. It is adding an extended family member to the property to help look after the existing family. Mr. Lee said that this is where he would like to start and see if they are all in agreement or if he can answer any questions about it.

Acting Chairman Whitten stated that she disagrees with Mr. Lee. From what she has read in our ordinance and from what the attorney has written, she believes that the ordinance meant that it would be something that would be a part of your home that you added an addition so that a family member could live in it like in a basement, an enclosed porch or above a garage. The apartment was not a self-standing structure by itself. Scott Strynar added that they could also have it as an addition to the existing building.

Acting Chairman Whitten asked how the Board felt about this situation. Mark Cahoon believes that in-law apartments should be attached to the existing barn or to the garage and not a free-standing structure. He said that if they allow this, then every other person that comes along and has a chicken coop that was 50 feet away from the house, they could attach an accessory and call it an in-law apartment, which it wouldn't be because it is free-standing. Scott Strynar is in agreement with both Acting Chairman Whitten and Mark Cahoon. He said that if it were in the barn or attached to the house as an expansion to the house, he would have no issues with it. However, with it being free-standing out in the yard, it does look like it is 2 homes on 1 lot.

David Ballard agreed with everyone. He asked if there was a barn on the site now. They said that there was a barn there already. Scott Strynar pulled up the site plan to show everyone where

the barn was located on the property. Luke Robertson stated that the barn is not structurally feasible right now. It has a poor foundation. He said that the money that it would cost him to repair the barn so that it would be structurally sound would cost more than the project that they are currently proposing. It is not currently able to support an apartment which he has already investigated. He said that the main reason he bought the house in September was because he had spoken with Roger Frechette, the CEO about it and he didn't seem to think it was going to be a problem.

Mr. Robertson said that regarding the accessory in-law apartment, it is not a single-family home in addition to his home. He said that it is not feasible to attach it to the house because it would change his egress into his basement. He would have to reconstruct the entire house. He stated that this is why they are working with Chris Lee on putting an auxiliary dwelling here that meets all of the criteria, but it just can't be attached to the building. Mr. Lee stated that the barn is a difficult place to do one of these. He said that they have a rambling farmhouse and they have looked at every possibility on how to attach this dwelling. Mr. Lee said that he would like to get back to the question about if it would be a single-family dwelling and circumventing the bylaws.

Acting Chairman Whitten asked the Board members if they felt strongly about what they stated about the project or do they think that there is something that Mr. Lee could say to change their mind. She stated that if the vote is going to be to not accept the proposal, then there is no reason to proceed. Mark Cahoon said that he doesn't feel there is a need to continue. Mr. Lee stated that our zoning bylaw specifically reiterates what he said and that he didn't make that up. The Planning Board's obligation is to use the bylaw as written and offered to read the bylaw to the Board. David Ballard said that he didn't have to do that and asked Acting Chairman Whitten to finish what she was saying. He told Mr. Lee that he appreciated what he was saying but they should let people finish their conversation. He said that what they are trying to discuss is what the Board's opinion is on everything. He said that they have reviewed all of the documents and listened to what Mr. Lee has spoken about as well.

Mr. Ballard said that he is having difficulty regarding the question about size, location, and utilities. He said that it says that the water and sewer is attached to the accessory structures, but it doesn't give a lot of explanation about the whole thing. He asked if it is a stand-alone and will it have its own meter. Is it drawing its own water straight from that or is it coming from the house? These are some questions that he has but said that they should let Acting Chairman Whitten continue with what she was discussing.

Acting Chairman Whitten asked Scott Strynar how he felt. He stated that he does not feel comfortable with this structure as it is currently shown on the plans. He thinks that the shed in proportion to the house, although it is an accessory structure, he doesn't believe that it meets the intent of what the in-law apartment ordinance is intended to be for.

David Ballard said that he has no problem with continuing on because if they do deny it and send it to the Zoning Board of Appeals, he would like to know why they are sending it and get all of the questions answered. However, he is also fine if they decide to not have any more conversation as well.

Acting Chairman Whitten asked Mr. Lee if this was going to be on its own power meter, its own well and its own septic system. Mr. Lee said that it will be connected to the existing utilities because it is a supplemental apartment, not a single-family dwelling. It cannot be resold.

Mr. Lee stated that the attorney brought up a very good point about this trying to circumvent the bylaw to create a single-family dwelling. In the definition in the North Berwick Zoning bylaw, it defines a "dwelling unit" as "any part of the structure which through sale or lease is intended for human habitation including single family, multi-family, housing commons, apartments, condos and timeshare units". This is not what this project is because it is not intended for lease or sale so he doesn't know how it can fit into a single-family dwelling meaning. It doesn't meet the definition in the North Berwick Zoning bylaws, and it has nothing to do with the nature of this structure. The important second piece of it in the Zoning bylaw is that it has to be intended for sale or lease. He stated that this project is clearly a supplemental accessory apartment to the house because it is not for sale or for lease. Mr. Lee said that they do not have a single-family dwelling based on the definition as written in the Zoning bylaw. He said that it is a 2-part definition. It is not just about the stand-alone structure. He said that if they went about doing this and attached it and tried to resell it as a condo, they would be in violation of the bylaw. He said that the bylaws intent in this situation is:

1) The lawyer said it very clearly, that it is to protect the single-family nature of the home, which they are doing because it is not visible from the road. He said that there are 2 abutters that are on this meeting, and they have not voiced any opposition, so he doesn't think that it is impacting them. He said that a huge part of the Planning Board's duty is to protect the abutters.

2) The construction of this is squarely intent with the intention of the accessory apartment rules. They are building this for family to take care of them as they age. The traditional means of building an accessory apartment above a garage does not work for someone aging in place. They cannot age in place on the 2nd floor unless they have the money to put in an elevator, a stair glider, or an escalator. He said that nobody wants to live in a basement. Somebody's mother or father who have been living in a single-family home all of their lives are not going to move into their child's basement. He said that this bylaw was written in a time when this type of apartment was not envisioned. He said when the Planning Board and Dwayne wrote it, it was not envisioned that something like this would be an option. He said that for better or for worse, as the attorney clearly pointed out, it didn't close the door to this and it is leaving it up to the Planning Board and potentially the Zoning Board to determine if what is being proposed is satisfying the purpose of this which is providing housing to an aging family member, of people with a disability or for a child who can't afford to buy a house.

Mr. Lee stated that the second thing that it needs to satisfy is that it does not impact the abutters which it clearly is not doing since we haven't heard anything from any of the abutters saying that it was impacting them. He said that he feels they are taking a leap to say that any of these things are an issue. He said that there is certainly a concern about what happens next if the Board approves this project. Will the flood gates be opened to allow these types of accessory structures? Mr. Lee said that they are putting something forward that is saying that this is possible in North Berwick, but Planning Boards don't set precedents. The lawyer brought up the point that garages have approved accessory apartments above them, and he is betting that the square footage of the garage was similar to the square footage of the apartment. He said that this didn't set precedent. The Planning Board can turn down any of those applications that they want on merit. Every single application that comes before the Planning Board is its own application regardless of what has been approved in the past. He stated that someone like him or an attorney can bring these up as examples of what is approved, but if one of these is presented and it is very clearly impacting an abutter or very clearly impacting the single-family nature of the home, the Planning Board can deny it. He said that these are things that are purposely left vague in order to protect homeowners that have abutting properties and the Board can shut it down. It is not opening the flood gates. Mr. Lee said that this is a single application being presented by this homeowner for this use. He stated that one of the things that they would propose in order to make sure that they are not circumventing the bylaw and to make sure that this is 100% in line with the bylaw, is to put in a deed restriction on this property that says, "This building can never be resold as a single-family dwelling.". He said that they can even stipulate that if it will ever be used for a non-family, the next owner can come back before the Board to review. He said that the Planning Board has the power to do that. He stated that the Board can approve this with conditions and use that if someone ever tries to do this again.

David Ballard stated that the Board understands all of what Mr. Lee is saying and they know what they can and can't do regarding conditions. Mr. Ballard said that he would like to send it back to the Acting Chairman to see if there was any public that would like to comment. He stated that his problem is still with the accessory structure not being attached to the house and being attached to a structure that does not exist yet. He stated that there is very little detail in the diagram as far as what the foundation will be to show how it would be in line with how we would view a normal structure and see if it is truly an accessory structure.

Acting Chairman Whitten stated that it is not a Public Hearing. She stated that they have heard from Mr. Lee, Mr. Robertson and the Board and she feels that it is just time to make a motion. She said that they can make a motion to get more information or a motion to approve where they would vote to either approve it or not. Mark Cahoon asked if they could table it until they do a site walk. Acting Chairman Whitten said that they had previously decided to not do a site walk. Mr. Robertson said that he invited everyone to come over for a site walk but the Board decided against it.

Joe Phillips asked about it not being a Public Hearing and if that meant he couldn't speak. Acting Chairman Whitten said that it was not a Public Hearing, but the Board could allow to

have the public make any comments if they wanted to. Mr. Robertson said that they were told last week that this meeting was going to be a Public Hearing and that is why it had to be a ZOOM call. Acting Chairman Whitten stated that it had to be a ZOOM meeting because the first applicant on the agenda was a Public Hearing. Mr. Robertson stated that he wanted a continuance.

Mr. Lee stated that if nobody on the Planning Board is confident in making a motion, how can anybody be confident to vote. David Ballard said that this was not the problem. He said that no one is confident to approve, and it is just a formality on how the motion should be structured.

David Ballard motioned to deny the application for Luke Robertson at 52 High Street (Map 022 Lot 016) to build an In-Law Apartment attached to an Accessory Shed as written.

Mr. Robertson stated that they are denying it without addressing any of the questions that they had 2 weeks ago, and they are going to deny it without doing a site walk and fully understanding what they are trying to do. He said that they are also denying it without hearing from any of the public. He said that they are not even understanding what they are doing. He said that there is one Board member saying that he doesn't understand what they are trying to do. He stated that they are clearly not stating why they are denying it because they are not comfortable with approving it which means there needs to be further discussion on the topic.

Scott Strynar seconded the motion. VOTE: 4-0

Chris Lee stated that he is very disappointed that they couldn't continue this discussion. The atmosphere of this meeting was so incredibly different than what they had a couple of weeks ago and he is very surprised how quickly it flipped. Acting Chairman Whitten said that she doesn't believe that it flipped. She believes that the Board all had questions that they needed answers from the attorney. Mr. Robertson stated that the Board didn't even go through all of the questions before doing a motion to deny. Acting Chairman Whitten stated that the Board feels that this 2nd building that he is putting on the lot is not an accessory in-law apartment. Mr. Robertson asked for a legal response as to why. Mr. Lee told him that they would bring it before the Zoning Board of Appeals. He said that they are there to interpret in a closer way the opinion of the attorney and perhaps they will have the opportunity to actually discuss the application in its merits against what is actually written in the Zoning bylaw like they did not have the opportunity to do tonight. Acting Chairman Whitten told Mr. Lee that she disagrees with him. She gave him the opportunity to speak to the Board. Mr. Lee said that she didn't let him speak about most of the things in the attorney's opinion. The single-family dwelling was addressed but not the other 3 questions. He said that it is very clear that the Planning Board is not looking at the Zoning bylaw in its entirety as it defines a single-family dwelling. He said that they will talk to the Zoning Board of Appeals to see what they say.

2. Review Previous Minutes:

Mark Cahoon found 1 misspelled word. On page 4, in line 10, the word pluming should be plumbing.

David Ballard motioned to approve the minutes of May 13, 2021 as amended. Mark Cahoon seconded the motion. VOTE: 4-0

4. Other Business:

There was no old business at this time.

5. Adjournment:

Scott Strynar motioned to adjourn the meeting at 7:32 pm. Mark Cahoon seconded the motion. VOTE: 4-0

Dwayne Morin,
Acting Planning Coordinator

Respectively submitted,
Susan Niehoff, Stenographer

Chairman Geoffrey Aleva

Jon Morse

Anne Whitten

David Ballard

Scott Strynar

Mark Cahoon