

**TOWN OF OLD ORCHARD BEACH
ZONING BOARD OF APPEALS MEETING MINUTES January 25, 2010**

Call to Order at 7:00 pm	Call to Order
Pledge to the Flag	
<p>Roll Call: Present: Chairman Ray DeLeo, Ms. Tianna Higgins, Mr. Philip Weyenberg, and Mr. Quinn. Mr. Philip Denison was excused. Staff: Mike Nugent.</p>	
<p>ITEM 1: Variance: Mario and Gilles Fontaine, owner of 164 East Grand Avenue, MBL 302-7-4, in the BRD Zone to permit the adjustment of the right side setback to permit the construction of a deck. Zoeth Rich is representing the owner.</p>	<p style="text-align: center;">ITEM 1: Variance: Mario and Gilles Fontaine, 164 East Grand Avenue, MBL 302-7-4</p>
<p>Chairman DeLeo read the appeal. Zoeth Rich, Seashore Property Management. Mr. Rich explained that Mr. Fontaine applied for and received a building permit from code enforcement. He began the work, but was found upon inspection to be beyond the original footprint. Mr. Nugent explained the situation. The application reflected that this was what they desired to do, but there was an oversight by the assistant code enforcement officer when the permit was issued. They put a condition on the permit that it must be within the original footprint of the structure. This was a misunderstanding. The owner fully intended on building that, but Mr. Borg did not understand that. Chairman DeLeo asked if the deck was finished, and Mr. Nugent stated it only need guardrails. Chairman DeLeo asked why this could not be a miscellaneous appeal, and Mr. Nugent confirmed because it structure was too close to the property line. Mr. Quinn asked if the replacement of the stairs were included in the 42". Mr. Nugent answered yes they were included in that 42". This was to provide code compliant stairs. Mr. Quinn asked whether they occupied some of that 42", and Mr. Nugent confirmed this. Mr. Weyenberg asked who bears the burden of responsibility of this. Mr. Nugent felt it was the department. He felt that there were adequate plans, but Mr. Borg did not understand. Chairman DeLeo asked if it stated clearly on the permit that there was not to be an expansion of the footprint. Mr. Nugent stated that it was, but it was clearly their intent in the application to go beyond the footprint, and it was not addressed. We should have picked that up. Chairman DeLeo clarified that we approved this, but did not pick it up. Chairman DeLeo called for any abutters or correspondence. PUBLIC HEARING CLOSED. Chairman DeLeo read the criteria for number one. With regards to part A. The land in question cannot yield a reasonable return unless the variance is granted the appellant stated the building plans were submitted and a building permit was issued. Mr. Quinn stated he did not feel that the comment answered the question at all, and Chairman DeLeo agreed. He felt that because of the circumstances that will not be an applicable answer to any of the questions. Mr. Quinn stated that whether it will yield a return, he felt if the stairs needed to be replaced it could be an improvement therefore he agrees. Ms. Higgins agrees from the standpoint to replace stairs, and we missed it.</p>	<p style="text-align: center;">PUBLIC HEARING</p>

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<p>Mr. Weyenberg agreed. It seems to be not quite their fault. Chairman DeLeo agreed. With regards to part B. The need for a variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood the appellant stated the building plans were submitted and a building permit was issued. Mr. Quinn agreed. Ms. Higgins agreed. Mr. Weyenberg agreed. Chairman DeLeo agreed. With regards to part C. The granting of the variance will not alter the essential character of the locality the appellant stated the building plans were submitted and a building permit was issued. Mr. Quinn agreed. Ms. Higgins agreed. Mr. Weyenberg agreed. Chairman DeLeo agreed. With regards to part D. The hardship is not the result of action taken by the appellant or a prior owner the appellant stated the building plans were submitted and a building permit was issued. Mr. Quinn agreed. Ms. Higgins agreed. Mr. Weyenberg agreed. Chairman DeLeo agreed. Ms. Higgins moved to permit the adjustment of the right side setback to permit the construction of a deck. Mr. Quinn seconded. <i>Motion passes unanimously.</i></p>	<p>Motion</p> <p>Vote</p>
<p><u>ITEM 2: Administrative Appeal:</u> Jeffrey Wu & Janet Chao, owners of 42 West Old Orchard Avenue, MBL 312-8-6 in the R2 Zone, to review the determination that the structure is not legally a two unit building. James B. Maguire, Esq. is representing the owner.</p>	<p><u>Item 2:</u> <u>Administrative</u> <u>Appeal. Jeffrey</u> <u>Wu & Janet</u> <u>Chao, 42 West</u> <u>Old Orchard</u> <u>Avenue, MBL</u> <u>312-8-6</u></p>
<p>Chairman DeLeo read the appeal. James Maguire, Esp. representing the owner. He explained that there are two things that relate to the property on the agenda tonight. He handed out additional paperwork to the board regarding the property. Mr. Maguire explained that the owners are looking for two ways to relieve the problems in the form of the Administrative Appeal and the Variance. He asked if the board would vote for the two things at once. Chairman DeLeo asked Mr. Nugent if they could do that. Mr. Nugent stated he did not think they could, as each sets of criteria need to be addressed individually. Mr. Maguire explained the circumstances of the purchase of the building which they believed was a legal two-family home. They had a local broker represent them on the sale and did not see the home. Mr. Wu asked if this was a legal two-family, and he was told it was. He pointed out a copy of an email stating that from the local broker. He verified that it was listed as a legal, two-family. Everyone involved told them the same.</p>	<p>PUBLIC HEARING</p>

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Chairman DeLeo asked who prepared this.

Mr. Maguire stated by the listing broker. And item C was prepared by the seller with the assistance of the listing broke.

Chairman DeLeo asked where they got that information.

Mr. Maguire stated that will be addressed by his colleague, Tim Bryant.

Mr. Quinn asked if the buyers ever seek legal representation.

Mr. Maguire stated not to his knowledge. Mr. Wu and his wife rented the property and were told they needed to get a business license by their property manager. He got the license from the town in 2007. He received a reminder from the town in 2008 to renew his license. Mr. Wu had been previously licensed, but let this lapse. He then applied for a new license, and was found to have an illegal two-family residence upon the inspection. He was required to close one unit. The owners were in a difficult spot. A prior owner had a business license for the property as well. Upon his reviewing the town file on the property, it had been a licensed two-family for quite some time. He shows that the license goes back to 2002 with reference at that time of the building have two units. He then pointed out the assessor's card showing it was a two-family.

Chairman DeLeo asked Mr. Nugent if the building was to stay as a two-unit, have all the necessary code violations been brought up to date.

Mr. Nugent stated he is not sure, as he has not been back for a re-inspection.

Chairman DeLeo asked if a purchaser has legal representation when they buy a property wouldn't this be caught?

Mr. Nugent explained the conditions of a single-family home and how this works. He then stated that he can explain things procedurally. He stated that Mr. Maguire is absolutely correct that the appellant is caught in a change in procedure. He stated that when he came to work in December of 2007, the licensing person did not check the zoning district, but not make sure that it was a legal multi-unit. The code officer did also not check to see if it was conforming. Had they done a zoning check in the files that no permit was ever issued to change the unit from a one unit to a two unit. There is a variance in the file stating it needs to stay a one-unit. Since we now do check the zoning, He is not able to sign off on this. Permit fees and impact fees were never paid for the additional unit. There are notes in the files that indicate the code staff was talking about illegal units in the building. This was not followed through. Zoning and licensing did not work together back then. This ultimately translates into a title problem. Procedurally, he believes that is how it happened. He stated he is handcuffed and cannot sign off on this.

Chairman DeLeo asked if the board had ever handled anything like this before.

Mr. Nugent agreed that they had not, and suggested that it may make sense if the board wishes, to get all this stuff to the town's attorney.

Ms. Higgins asked if Mr. Vandiotis did not see this.

Chairman DeLeo stated he felt like the burden is on the board, and they are between a rock and a hard place. He understands their hardship, but is afraid they may be setting a precedent. He really did not feel comfortable making a decision that maybe they should not be making.

Mr. Nugent stated he felt it may make sense to get this stuff to the town's attorney and give the board some advice on the decision.

Ms. Higgins wanted to know if this was offered to them prior to being on tonight's agenda, and do we know how they are getting taxed.

Mr. Nugent stated that the assessors are going to come in and pick up whatever is on the face of the earth. He tells them it is not due diligence to just take the

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assessor's record and assume this is a legal use. It does not mean that it is legal.

Mr. Weyenberg asked if they had a license for a two-unit.

Mr. Nugent stated the former owner had a license for the two-unit.

Mr. Weyenberg asked if it could be grandfathered.

Mr. Nugent stated he felt that they needed to ask the town attorney. It is not an issue of parking. According to the ZBA back in the 1990's, this was never going to be a legal multi-family. The board can only change this, and there is no evidence of that. It was a staff process which did not get this picked up.

Mr. Weyenberg asked who bears the responsibility.

Mr. Nugent stated he felt that the use changed around 2000. That was before several owners owned it.

Chairman DeLeo wanted to know when it was built and how many people owned it.

Mr. Nugent explained that it was always a single-family home and should have stayed that way.

Mr. Weyenberg asked if the realtor is legally responsible. Someone who told them it was a legal two-unit.

Mr. Nugent stated it could be. There is evidence that Town Hall staff told them it was a legal two-unit. If an employee makes a mistake while they following procedure it is purely a mistake.

Chairman DeLeo stated he would like someone to make a motion to table the item without prejudice.

Ms. Higgins would like to hear the people who came tonight, even though we are not going to vote.

Mr. Maguire stated that his clients did not have legal representation when they purchased the building, and pointed out it would be very unusual for a purchaser to hire a lawyer to purchase a house. Mr. Bryant has something to say if possible.

Tim Bryant, representing Reali Realty. He was called by Mr. Maguire to help with the presentation. Reali Realty was involved in the sale of this building. Jeff and Julie Reali who were owners of the building prior. The property has been used for almost a decade as a two-unit. He stated that the building originally had two kitchens built in the building. Sales in 2003 and 2006 were presented as a two-unit and were sold as such.

Chairman DeLeo asked if before the Wu's bought it if it was a licensed two-unit building.

Mr. Bryant stated yes. Mr. Reali came to the Town Hall to confirm it was a two-unit. The records from the town are consistent with that. Reali Realty sold it in 2006 and went to the town in the same ways as before and got the same response. There was a title search done and typically those were done by lawyers.

Mr. Quinn stated his question was more in line with what was in the packet when it stated this was done by the agent and the seller. These people are motivated to sell the property, and an attorney may have looked at this more objectively.

Chairman DeLeo stated that throughout all the testimony he did not hear if anyone asked if it was a "legal" two unit building, only if it was a two-unit.

Mr. Weyenberg stated that he had asked Mr. Nugent and he stated that the Wu's stated they had asked if it was legal.

Ms. Higgins asked if a buyer was going to come to the Town Hall to check and see if this was a two-unit whom is asked.

Mr. Bryant stated this was asked to code enforcement. He then pointed out some of the papers he brought in to prove his point. He then went over the history of

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prior staff holding up the multi-unit building, as well as real estate listings stated it was a two-unit. He also suggested that they could craft original wording so no one would be able to come back and say they could get this in the same circumstances. **Donald Hamilton, 46 West Old Orchard Road.** He is here on behalf of John Colfer who is a direct abutter and could not be here. There is a statement from Mr. Coffey and go over the photos given.

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Town of Old Orchard Beach, Maine
Zoning Board of Appeals

I wish express my strong opposition to Item 1, a Variance to permit the adjustment of the minimum net lot area per family unit and to allow only one parking space instead of the required four at 42 West Old Orchard Avenue.

I own the abutting property on two sides, 16 Third Street and 44 West Old Orchard Avenue. I have had continual problems caused by too many cars at 42 West Old Orchard Avenue.

They are always parked directly in front of my house and although this is public parking, good neighbors generally park in front of their own house instead of depriving their neighbors of parking spots.

In the winters, snow and debris is continually plowed into my property in order to create parking spaces for 42 West Old Orchard Avenue. The pictures on the following pages document some of the problems that I've had.

42 West Old Orchard Avenue is a single-family residence and I strongly ask the town to enforce this and not allow the variance to be granted.

Sincerely,

John Colfer
68 Monadnock Avenue
Dracut, MA 01826

At this point the tape had technical difficulties and was unable to clearly hear the dialogue.

Ms. Higgins asked if there is a way that you can format your comments to the variance.

Erica E. Cushana, Esq. stated there are two ways to approve this, and also two means to deny it. When her husband and she bought their property here they hired a lawyer because we live in Massachusetts and not Maine. The email dated 04/26/06, I have already verified that it is a legal, two-family. Please let me know about the city multi-unit verification we need. This email is 09/26/06. The attorney stated there is verification, but this second email stated he still needed to get verification from the city. He is in SPC Realty investment and also has an MBA. There is a doctrine in law called caveat emptor, buyer beware. They did not do

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<p>what they should have. They are absent owners and do not take care of the building. It never stated it was a legal two-family; only a two-unit. The seller's attorney is here with a full binder because they would be legally liable for fraud if they sold this knowing it was not a legal two-unit. They are here saying it is not their fault. Do not put this on the neighbors to deal with this. The city does not have liability for the mistake. So where is the liability, the owners have the liability. There has been no evidence of the owners having financial hardship. There is nothing to prove this. They are paying 1250.00. But listed their base rate is 1200.00. There is only one means of egress on the third floor. If there was a fire on the front half of the house, the people living on the third floor would not get out alive. The dates are important. Everything was going on fine until December/January. This was when an abutter called the police and started questioning code enforcement. They never closed the unit after they were told it was an illegal unit. She stated will drive back up to talk about the other issue. There is liability, but it is not on the city. It rests with people who have given false representations.</p> <p>Mr. Bryant stated she can respect why she is frustrated, but cautioned not to misuse statements of law.</p> <p>Mr. Maguire stated that Mr. Wu has been working with the abutters to clean up the debris.</p> <p>Chairman DeLeo asked if Mr. Wu has ever been in the house.</p> <p>Mr. Maguire stated he did not know.</p> <p>Mr. Hamilton commented that Mr. Wu has been able to hire someone to plow the yard so he should be able to have someone clean up the yard as well.</p> <p>Ms. Cushana stated that in terms of the law, she is a lawyer, as well as being the chairperson of the Zoning Board of Appeals in Springfield, Massachusetts so she understands the legality of this case.</p> <p><i>PUBLIC HEARING CLOSED.</i></p> <p>Chairman DeLeo stated he would prefer talking to the town's attorney before moving forward with this.</p> <p>Ms. Higgins moved to table the administrative appeal of 42 West Old Orchard Avenue without prejudice.</p> <p>Mr. Quinn seconded that with discussion.</p> <p>Ms. Higgins stated you cannot discuss something being tabled.</p> <p>Mr. Quinn withdrew his second with discussion.</p> <p>Mr. Weyenberg seconded the motion.</p> <p><i>Motion passes unanimously.</i></p>	<p style="text-align: center;">Motion</p> <p style="text-align: center;">Vote</p>
<p><u>ITEM 3: Variance:</u> Jeffrey Wu & Janet Chao, owners of 42 West Old Orchard Avenue, MBL 312-8-6 in the R2 Zone, to permit the adjustment of the density standard and minimum requirement for off-street parking to allow the structure to remain a two-family home. James B. Maguire, Esq. is representing the owner.</p> <p>Ms. Higgins moved to table the variance of 42 West Old Orchard Avenue without prejudice.</p> <p>Mr. Quinn seconded.</p> <p><i>Motion passes unanimously.</i></p>	<p style="text-align: center;"><u>Item 3: Jeffrey Wu & Janet Chao, 42 West Old Orchard Avenue, MBL 312-8-6</u></p> <p style="text-align: center;">Motion</p> <p style="text-align: center;">Vote</p>

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<p>GOOD & WELFARE Ms. Higgins inquired as to how the board can address an application that is not correctly filled out or does not address the questions. Mr. Nugent explained that the board can reject the application. Also, he stated that normally staff goes over the applications with the appellant, but this owner lives in Canada which made that impossible.</p>	<p>Good & Welfare</p>
<p><u>ITEM 6: Approval of Minutes:</u> December 28, 2009. Ms. Higgins moved to accept the minutes from December 28, 2009. Mr. Quinn abstained. Mr. Weyenberg seconded. <i>Motion passed unanimously</i></p>	<p>Motion</p> <p>Vote</p>
<p>Meeting adjourned pm</p>	<p>Adjournment</p>

I, Tori Geaumont, Secretary to the Zoning Board of Appeals of the Town of Old Orchard Beach, do hereby certify that the foregoing document consisting of seven (7) pages is a true copy of the original minutes of the Zoning Board of Appeals Meeting on January 25, 2010