BOARD OF ADJUSTMENT MEETING
CITY OF REHOBOTH BEACH

November 25, 2013

The Board of Adjustment Meeting of the City of Rehoboth Beach was called to order at 7:03 p.m. by Chairman Thomas Evans on Monday, November 25, 2013 in the Commissioners Room in City Hall, 229 Rehoboth Avenue, Rehoboth Beach, DE.

ROLL CALL

Present: Mr. Clifton Hilderley
Mr. Robert Wilson
Mr. Thomas Evans
Ms. Myrna Kelley
Mr. Doug Popham

Also in attendance: Mr. Craig Karsnitz, Esq., Board of Adjustment Solicitor

Mr. Robert Wilson was welcomed as a new member to the Board.

A quorum was present.

Case No. 0813-07. A MOTION FOR RE-ARGUMENT OF THE DECISION OF THE BOARD OF ADJUSTMENT of the City of Rehoboth Beach reached at its meeting on October 28, 2013. The Decision of the Board was in connection with a Request for Variance in regard to Section 270-26 of the Municipal Code of Rehoboth Beach to allow construction of a new porch with a setback of 10.5 feet from the easterly property line and 10.25 feet from the westerly property line. The property at 32 Virginia Avenue is located in the R-2 Zoning District on Lot No. 32 and a portion of Lot No. 30. There is a two-family dwelling on the property. The Request for Variance is to allow an encroachment on the westerly side of 9.75 feet (20 feet less 10.25 feet). The total 20 feet aggregate is required because the existing structure encroaches the entire east side setback area. The Variance is being requested by S. Robert Boardman, owner of the property.

A letter dated November 25, 2013 from Mr. David C. Hutt, Esq. of the law firm Morris James Wilson Halbook & Bayard LLP on behalf of Mr. S. Robert Boardman, owner of the property, was received requesting that this case be withdrawn.

CORRESPONDENCE

There was none.

APPROVAL OF MINUTES

Minutes of the September 23, 2013 and October 28, 2013 Board of Adjustment Meetings were distributed prior to the meeting.

Ms. Myrna Kelley made a motion, seconded by Mr. Doug Popham, to approve the minutes of September 23, 2013 meeting as written. (Hilderley – for, Wilson - abstained, Evans – for, Kelley – for, Popham – for.) Motion carried.

Mr. Popham made a motion, seconded by Ms. Kelley, to approve the minutes of October 28, 2013 meeting as written. (Hilderley – for, Wilson - abstained, Evans – for, Kelley – for, Popham – for.) Motion carried.

OLD BUSINESS

There was none.

NEW BUSINESS

Case No. 0513-04. Continuance of a Public Hearing on an APPEAL OF THE DECISION OF THE BUILDING INSPECTOR in regard to Section 270-84 of the Municipal Code of Rehoboth Beach to not issue a building permit for certain construction plans and an APPEAL OF THE DECISION OF THE BUILDING INSPECTOR to not issue a business license, or in the alternative a REQUEST FOR VARIANCE in regard to Section 270-23 of the Municipal Code of Rehoboth Beach to allow a second dwelling unit and a REQUEST FOR VARIANCE to allow a business license for the second dwelling unit. The property is located in the C-3 Zoning

District on Lot No. 49 at 49A Lake Avenue. The Appeals of the Decision of the Building Inspector or Variances are being request by John W. Paradee, Esq. of the law firm Prickett, Jones & Elliott on behalf of Frank A. Perna, Jr., owner of the property. Chairman Evans read the reasons for granting a Variance from Section 270-74(C) of the Zoning Code and noted the Public Hearing procedures for the following cases.

Chief Building Inspector Terri Sullivan gave her report with exhibits. The owner is requesting an Appeal of the Decision of the Building Inspector to deny the Appellant's request for a building permit to make improvements to the second structure unless and until certain non-code compliant improvements are removed, or in the alternative, grant a Variance so that the improvements can be made. When Ms. Patty McDaniel of Boardwalk Builders Inc. came to speak with Ms. Sullivan regarding renovating an existing garage apartment, it was discovered that the previous building permits and approval information in the file did not match what existed on the property. The owners would need to make the rest of the structure match the approved documents in order to make the proposed modifications. Certain first floor repairs could be made without the need to bring the rest of the structure into conformity with the prior approvals in the City's files. On March 21, 2013, Ms. McDaniel applied for a building permit to remodel the existing first floor living area only and to replace fence panels, decking and valve at an existing outside shower along with a number of various other improvements. In 2011, a permit was issued and an agreement was signed by the owner at the time ensuring that construction at the property would not create a code-prohibited second dwelling unit. Under the permit and agreement: 1. The third floor cannot be used for habitation in any manner other than for storage. 2. The stairs to the third floor, already constructed, shall be removed, and the only access to the third floor shall be pursuant to the City's building code requirements for attics. 3. The proposed second floor shall be used solely for the owner's children with bedroom and bathroom facilities allowed to be constructed, but no kitchen facilities shall be built there; nor shall kitchen facilities be built on any floor of the garage. 4. The first floor shall be solely used as an office or other non-dwelling use. 5. The garage will not be used in whole or in part as a dwelling unit as defined in Section 270-4 and neither the whole or any part of the garage can be rented as a dwelling. The current layout of the second floor includes a kitchen, and the third floor has a bedroom with a full set of steps leading to it. The property was not allowed to have a second dwelling unit because in 2001 the Zoning Code required 5,000 square feet of lot for every single-family dwelling and 3,300 square feet of lot for every apartment. Since the lot is not 8,300 square feet, there cannot be a second dwelling unit. The permit fee was based on the square footage of the addition to the garage which was figured at 360 square feet. No third floor was figured. The plumbing permit issued on July 11, 2002 described the work as installing a lavatory and water closet on the first floor and installing a lavatory, water closet and shower on the second floor. No plumbing was permitted on the third floor. No kitchen facilities of any type were to be installed on any level. The fee was paid for two water closets, two lavatories and one shower. A rough-in inspection and final inspection of the plumbing occurred. The City incorrectly issued two rental licenses. The first rental license was for one house with three bedrooms over two, and a second rental license was for one apartment. Since the property should not have been given a rental license for the rear structure, Ms. Sullivan informed the owner that it would not be renewed in July. A note was made in the licensing program on April 11, 2013 stating that the rental license cannot be renewed per the previous agreement in the file. On April 29, 2013, City Solicitor Glenn Mandalas sent a letter to Mr. David Cooter, Eq., the owner's representative, stating the reasons for the denial of the building permit as well as not renewing the rental license. In the later submissions by Mr. John Paradee, Esq. of the law firm Prickett, Jones & Elliott, there are two letters from Ms. Susan Frederick regarding a review of zoning issues at 49 Lake Avenue. Ms. Frederick stated that there were many issues with the issuance of the Certificate of Occupancy as well as the rental license. Ms. Sullivan did not know how it is that the rental license was issued for about seven years when it appears that it should not have been; if the floor for the third floor built for storage only was consistent with the 2001 agreement making it substandard for livable area or if it was built to standards suitable for livable area; if there was an egress window installed in the third floor bedroom; if a smoke detector was installed in the bedroom on the third floor and in the hallway outside the bedroom; and if the kitchen was installed with proper venting, electrical outlets, etc. She had not asked anyone to answer those questions. In summary, the property did not meet the minimum standard to be allowed to have a second dwelling unit at the time it was built. While the existing structure can be repaired, no changes can be made unless it is brought into compliance. Based on the plans submitted and the documentation from the permits, no kitchen facilities were in place at the time of the Certificate of Occupancy, and no rooms were on the third floor. Ms. Sullivan acknowledged that she would have continued to issue rental licenses for this property had not there been this issue with the water leak.

City Solicitor Glenn Mandalas provided testimony and his view on equitable estoppel. Equitable estoppel is an issue for a court, not a quasi-judicial body. It is proper for Attorney Paradee to preserve that argument at this level. City Solicitor Mandalas did not think that the Board of Adjustment has jurisdiction in this case. At

the time when all this was happening, there was a change out of building officials. He did not know if that had anything to do with two Certificates of Occupancy getting issued. When the rental license was applied for at the time the property was put on the market, everyone understood that this property was not to have a rental license. When Mr. Gamuciello, a previous owner, conveyed the property, he made it clear to the new owner that there was to be no rental license. The City is unaware of how this happened with the issuance of two rental licenses. The current owners are victims of circumstance.

Mr. John Paradee, Esq. of law firm Prickett, Jones & Elliott, representative of Frank & Melanie Perna, owners of the property, provided testimony in support of the Appeal/Variance. Ms. Susan Frederick was the building inspector up to 2001. She had issued the building permit for the main house on this property. She was not the building inspector at the time the guest cottage was constructed. The Pernas are innocent, bonefied purchasers. They had no knowledge about the history prior to 2006. The only thing they knew was what the Mittens told them. An affidavit was signed by the Mittens, attesting that they were the owners of the property from September 29, 2004 to August 10, 2006. At all times during their ownership of the property, it was improved by a 2.5 story garage structure located to the rear, and the second floor of the structure was improved with kitchen facilities and a staircase leading to the third floor. On August 10, 2006, the City issued a rental license for the structure which authorized them to rent the structure as a two-bedroom garage apartment. At no time during the Mittens' ownership of the property did the City ever require and to remove the kitchen or the staircase. Attorney Paradee provided the history of this case. Exhibits submitted as part of the record are:

1. Notebook containing exhibits, submitted September 23, 2013
    A. Tab 1. Case Summary Memorandum
    B. Tab 2. Timeline of Events
    C. Tab 3. Report of Susan Frederick
    D. Tab 4. Newspaper Advertisement and Realtor Listing Documents
    E. Tab 5. Petition and Letters in Support of Appeal and Application
    F. Tab 6. Deed Records for Subject Project
    G. Tab 7. Miscellaneous Correspondence
2. Letter dated November 4, 2013 from Attorney Paradee which includes a supplemental letter dated October 13, 2013 from Ms. Frederick as well as the memorandum written by Attorney Paradee with regard to the equitable estoppel issue.

Attorney Paradee highlighted Ms. Frederick's second letter. The building permit for the guest cottage and the Certificate of Occupancy that were issued in 2002 made reference to residential uses. The Certificate of Occupancy was issued pursuant to the requirements of Section 103.9 of the Standard Building Code certifying that at the time of issuance, this structure was in compliance with the various ordinances of the City regarding building construction or use. If there was a violation of the minimum lot area requirements, it happened when the garage was first built and before the Pernas bought the property. The cottage is a remodeling from the original garage structure that was there. Section 103.9 of the Standard Building Code that is cited on the Certificate of Occupancy says that a certificate of occupancy shall not be issued until all required electrical, gas, mechanical, plumbing and fire protection systems have been inspected for compliance with the technical codes and other applicable law and ordinances and released by the building official.

Mr. Frank Perna, owner of the property provided testimony in support of the Appeal/Variance. He verified that the timeline of events is accurate. When Mr. Perna bought the property in Augusts 2006, he required substantiation that the auxiliary structure was a licensed rental unit. He had been told by his real estate agent that it was. The cottage at that time was used for residential purposes. Mr. Perna provided a brief history of what precipitated the need for repairs. In January 2013, the icemaker water line broke and was leaking over a period of time. The first floor is uninhabitable due to mold. A contractor was hired to remove the mold. Mr. Perna cannot get a building permit to fix the damage that was done on the first floor. He provided a summary of the modifications he would like to make to the cottage.

Mr. Michael Bocker of Jack Lingo Realty provided testimony in support of the Appeal/Variance. He represented that the Perna's guest cottage could be rented. The sellers produced a rental license as part of the agreement. Mr. Henry McKay was the listing agent at the time.

Attorney Paradee said that the Perna's argument is two-fold: 1. The Perna's were innocent, bona fide purchasers without knowledge of the regulatory history of the case. 2. The City issued a rental license to the Mittens which allowed the guest cottage to be rented out as a separate dwelling unit. The Pernas were not involved in that process. The doctrine of equitable estoppel precludes the City from denying the Pernas the right to utilize the guest cottage as a separate dwelling unit. The decision of building inspector should be

reversed. Failing that, the Pernas were requesting an area variance. The Pernas satisfy the standard for a variance. The requested dimensional change is minimal. The guest cottage is located at the rear of the property and is barely visible from the street or neighboring properties. The harm of the Pernas if the variance is denied would be tremendous. It would be greater than the probable effect on neighboring properties if the granted. This property has existed as it has for 12 years, and no one has had a problem with it. It is not causing any problems in the neighborhood. The difficulties presented are exceptional and practical rather than routine or theoretical because if the variance is denied, the Pernas will lose a valuable property right for which they pay a premium. The zoning in which the property lies is C-3 which permits any number of uses which would be much more intensive and potentially offensive to neighbors than allowing the continued utilization of a guest cottage as a separate dwelling unit. Allowing utilization of the guest cottage as a separate dwelling unit to continue is consistent with the character of the immediate vicinity and uses contained therein. Granting the variance would not seriously affect neighboring properties and uses, but denying the variance would create exceptional practical difficulties for the Pernas.

Attorney Karsnitz noted that the Board of Adjustment has no jurisdiction to apply equitable estoppel.

Correspondence:

1. Petition signed by 32 individuals – in support of.
2. Gary Trosclair, 22 Lake Avenue – in support of.

Public Comment:

1. Gloria Walls, 34 Lake Avenue – in support of.
2. Drexel Davison, 45 Lake Avenue – in support of.
3. Gene Lawson, 12 Hickman Street – in support of.
4. Adam Pesachowitz, 51 Lake Avenue – in support of.

Mr. Clifton Hilderley made a motion, seconded Ms. Kelley, to grant the request for Variance made permitting the renovations requested initially as a result of the water leaks without removing the stairs and the kitchen and to allow the City to grant a rental license.

Mr. Hilderley said that it is a commercial property. If it were not for the water leak, there would be no reason for the City to stop granting the rental license. The Pernas had no reason to believe or question the City granting the license. There was no notice of any kind. There was no burden on the Pernas to go to the files to see what was going on. A citizen has some opportunity to think that the City did the right thing.

(Hilderley – for, for the comments he previously made. Wilson – for. He did not think that the equitable estoppel argument is going to work in this particular venue. Kelley – for, for the preceding stated reasons. Popham – for. A comedy of errors has been made, but he did not think at this point it is the Board of Adjustment's responsibility to correct it. Evans – for.) Motion carried unanimously.

Chairman Evans called for a recess in the meeting at 8:42 p.m. The meeting reconvened at 8:48 p.m.

Case No. 0913-09. An APPEAL OF THE DECISION OF THE BUILDING INSPECTOR in regard to Section 270-4 of the Municipal Code of Rehoboth Beach that the lots have been merged per the definition of "lot". The property is located in the R-1 Zoning District on Lot Nos. 63 & 65 at 89 Columbia Avenue. The Appeal of the Decision of the Building Inspector is being requested by Bruce Geyer of Columbia Avenue Exchange LLC, owner of the property.

Chief Building Inspector Terri Sullivan gave her report with exhibits. The owner is requesting an Appeal of the Decision of the Building Inspector that the lots have been merged by structure. The property is located on the corner of Columbia Avenue and Third Street. In 1959, a permit was issued to erect a 100 foot long fence for Lot Nos. 63 & 65 with a lot size called out of 100 feet x 100 feet. In 1990, a permit was issued to install pickets on rails. In 2007, a permit was issued to install a handicap access ramp and a new screened door. Per the survey, the ramp crosses the line between Lot Nos. 63 & 65. The only parking for the dwelling is on Lot No. 63. The house is 5.7 feet from the line between Lot Nos. 63 & 65, and the City tax card calls out the property as one parcel. The Applicant has applied for a demolition permit for the property. The demolition may commence on December 6, 2013. Once the demolition occurs, there is no residual effect of the lots ever being merged.

Mr. Rob Gibbs, Esq of the law firm Morris James Wilson Halbrook & Bayard LLP, representative of

Mr. Bruce Geyer, owner of the property, provided testimony in support of the Appeal. Attorney Gibb had submitted a package today which was intended as a mechanism by which he would make a presentation this evening. The lots were purchased in 1955 and 1959 by Ms. Irene Simpler. Through a series of deeds, the lots have been conveyed to Mr. Geyer. Each lot is 50 feet x 100 feet. There is an application, post purchase, to demolish the improvements on the property and to apply separate building permits to building separate residences on the property. The issue before the Board of Adjustment is whether or not the building inspector's decision that these lots had merged by use by the placement of a structure which is a handicap ramp across the lot line, had created a merger under the statute. If it does not create a merger, then that would be an erroneous decision of the building inspector. A letter dated August 22, 2013 from Mr. Greg Ferrese, had confirmed the decision of the building inspector that the status of the property in response to Judge Young's request was that subject lots had merged for zoning purposes. The City's assessment cards revealed that Ms. Irene Simpler received one tax bill. Lot Nos. 63 & 65 were in common ownership and were used as a single lot. To subdivide the lot, approval is needed from the Planning Commission. There are two grounds: 1. There has not been a merger by the placement of a structure on the lot. There is no statute of what it takes to merge lots legally. The City's statute is deficient that one lot is created by use or by placement of a structure. The definition of a structure requires permanent location to ground or attachment to something having a permanent location to ground. This definition does not include a handicap ramp. The ramp is a temporary structure because there is no footer and no foundation. 2. If the decision is not overturned, then there is hardship created. There are grounds for a variance as a secondary backup argument.

There was no correspondence.

Public Comment

1. Walter Brittingham 123 Henlopen Avenue – in support of.
2. Gene Lawson, 12 Hickman Street – in support of. Merger has not been upheld by the Board of Adjustment.

Ms. Kelley made a motion, seconded by Mr. Popham, to grant the Appeal of the Decision of the Building Inspector to allow two lots instead of one. (Hilderley – for. He saw no fundamental, substantial evidence that a merger has been made by use of a structure. Wilson – for. Kelley – for. It is a relatively easy decision. The lots are contiguous and meet the dimensional requirements as separate lots. They are not hurting the surrounding community in any way. Popham – for. The two lots are definitely there, and a merger was never achieved. Evans – for. There has never been a merger, and there is no evidence to the fact given the vague reason of the City.) Motion carried.

The next Board of Adjustment Meeting will be held on December 16, 2013 at 7:00 p.m.

There being no further business, Chairman Evans adjourned the meeting at 9:19 p.m.

Respectfully submitted,

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(Ann M. Womack, CMC, City Secretary)

MINUTES APPROVED ON
DECEMBER 16, 2013

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(Thomas A. Evans, Chairman)