

TOWN OF SAN ANSELMO
Minutes of the Special Town Council Meeting of January 15, 2002

Present: Breen, Chignell, Hodgens, Kilkus, Kroot
Absent: None

8:00 p.m.

- Call to order.

Mayor Hodgens announced that no action was taken in closed session.

1. CONTINUATION OF PUBLIC HEARING REGARDING PUBLIC NUISANCE: MODIFICATION OF AN ACCESSORY STRUCTURE TO SERVE AS A TWO-UNIT RESIDENTIAL UNIT WITHOUT A PERMIT IN VIOLATION OF THE SAN ANSELMO MUNICIPAL CODE; 125 REDWOOD ROAD, A/P 007-083-03.

Town Attorney Roth said the respondent has submitted a response to the Town's brief. Their comments are basically on the evidence presented. Regarding the question on cooking facilities, it is a red herring. Ms Johnstone has refused permission to inspect the premises, so we don't know if there are cooking facilities at all. Regardless of which definition you use, she and her companion have been living there for 16 years and taking their meals there.

Kilkus asked about the comment on reliance on Town officials. Roth said misrepresentation by a public official is not binding. The only representation that was made was that they could sleep there. All meals were to be taken in one location. Former Town Administrator Garvey said they could use it for sleeping. Regarding the definition of second units, the new law took effect shortly after this event, and we gave them time to comply.

Chignell confirmed that Roth's position is that it doesn't matter if we use the old rule or the new rule. Roth said he would say that there should be a determination that there is a public nuisance. Inspection should be permitted and the property should be brought up to code. The zoning violation is the illegal modification of a structure to create three separate living units without a use permit for a second unit.

Kroot confirmed that the basic issue is whether they've been using this as a single housekeeping unit, including taking their meals there. Roth said if they are living there but not taking any meals, there is no violation. If the Town is satisfied that cooking facilities have been removed, they are no longer in violation. She is still in violation of dishonoring the inspection warrant.

Breen asked why we would dance around the zoning issue? He quoted Garvey's statement about using the unit as an extended bedroom. Doesn't it change things since Rae Johnstone is deceased? Roth said you could argue that, but if you take the legal definition of R-1, it doesn't mean you all have to live under the same roof. If they were all eating in the same main kitchen, it wouldn't be a violation.

Chignell said this still gets back to the cooking facilities issue. He asked about the inspection warrant. Roth said an inspection warrant is a civil matter, not criminal. You can't just break in. If the person refuses, you can go back to the judge and ask to have the door broken down. Ms Johnstone broke several appointments with Mr. Angerman. Roth said he could have gone back to the judge to authorize breaking down the door, which he didn't want to do. He could have filed a civil suit, but it didn't seem to be the proper course. Entry was refused.

Leonard Rifkind, Attorney for Pat Johnstone, said he hasn't completed presenting his evidence yet. What is different about the latest response is that it is a response to Hadden Roth's latest brief. This brief sets forth that the 1986 definition of second unit applies and summarizes documents that support that statement. Johnstone and her neighbors did not receive notice of this hearing and it is a special rather than regular meeting. They are

concerned that there may not be proper notice.

Town Attorney Roth said this date was set at the December 11, 2001, hearing.

Rifkind noted for the record that he sat patiently while Town Attorney Roth spoke; it's not fair if Roth is allowed to interrupt.

Leonard Rifkind, Attorney for Pat Johnstone, said he has two witnesses that he'd like to call. The first is Mr. Gabe Parque.

Gabriel Parque, 80 Rocca Drive, Fairfax, said he has known Johnstone and Smith for 15 years. He has been to their property 15-20 times in the last 15 years. He has been in the accessory structure 10 - 15 times, the most recent being last Saturday. It has one floor that he has been on. It has furniture and improvements, bedroom, bath, sitting area, but he did not see any cooking facilities, like an oven or stove. There were kitchen cabinets and a sink. There was no area where an appliance had been removed.

In response to questions from Town Attorney Roth, Parque said he is a carpenter, working for John Boitavich. He visits Ralph Smith, who he met at Center Market many years ago when he worked. He saw one floor and one entrance in the structure.

Mr. Parque said he observed a dispute between Ms. Johnstone and Jacqueline Ryan during a visit. He said he and a friend were helping them move furniture and Ms Ryan came running down shouting. Johnstone didn't do anything back. She just walked up the steps.

Rifkind called Allen Michaels. Allen Michaels, 2280 Green St., San Francisco, said he has known Smith and Johnstone since 1987 when they owned Center Market during his high school years. He has been to their property 20-40 times over the past 10 -11 years. He was there last Saturday afternoon. He has been in the accessory structure 20-40 times. He thinks it has two floors - he has been on both floors. He saw a bedroom, living room, bathroom, but no cooking facilities, like an oven, stove, or appliances for the heating of food, but there are kitchen cabinets and a sink. They ate a meal that was either brought in from the deli or cooked in the main house. In the lower story he didn't see cooking facilities. He believes it's mainly storage. He observed the same incident with Jacqueline Ryan. He didn't know if the police were called. He was surprised at what Ms Ryan said that day. She seemed erratic and unstable.

At Town Attorney Roth's questioning, Mr. Michaels said he does property management for independent property owners. He does maintenance, management, grounds and landscaping work, and collecting rents. On Saturday he was visiting Smith and Johnstone. A friend was here from out of town and they all came to visit Ralph. They phoned that morning from the city and stayed about an hour and a half. They talked to Ralph during the visit, in the upper floor of the accessory structure. When he went inside, he saw a living room, and a sink area. The living room has a couch, chair, another couch, and a window. There's a coffee table. The room was about 12' x 12'. But first you see an area with a window with a linoleum or ceramic type floor and wood cabinets. It has plates and water; if you were going to have a kitchen it would be there. But there's no heating facilities. There are cabinets, solid wood, about 6 of them, 3 to 4 feet in length, all right next to each other. Below them there is a sort of counter area with some stools, sink, with a window over. There's some art work, but no chairs or tables. Below the counter are some drawers. He doesn't know about electrical outlets, but probably yes. There's a water faucet. To the left there is a bathroom with a toilet, sink, and shower. There's a light in the bathroom. There's also an adjoining room which is a bedroom, partitioned off. There's a bed, bureau, and a closet for clothing. There's a display case with pictures, a lot of which are antique type. He can't recall if there are any family photos. When shown exhibit 5, he said the photo looks familiar to him; he thinks it's the bathroom. He stayed in that particular area for the whole visit. He had orange juice when he was there; he thinks he brought it with him. There may be a refrigerator. He didn't go anywhere else that day. He was on the lower floor other years when he was helping out Pat and Ralph move furniture. He moved couches and a bed into the accessory structure. He met Pat and Ralph in 1986 or 1987 when they had Center Market and he was a customer. He became more than a customer no later than 1995, no earlier

than 1993. They became friends because they are good-natured people. They were friends before a work relationship took place, then he helped them move antiques. He was in the lower floor for the first time in approximately 1995. He saw a storage area; he was putting furniture in there for storage. It's not paved like some basements; it could serve as either function. He was only in the lower area about 5 times. The last time he was in there was September a year ago. It was the same as the earlier time. He didn't study it to see if it was a living area. He looked at Exhibit 2, a picture. He has seen it before. He doesn't recall if there was a time that that a door wasn't there. He ate there probably 5 times. They ate deli sandwiches, cold liquids. He doesn't recall anything else.

Leonard Rifkind said all the property owner has to go on is the notice of this hearing. All the notice says is about using the two units in violation of the San Anselmo Municipal Code. A lot of evidence has come up on a lot of topics that are away from the focus of the second unit question. Until Mr. Michaels testimony, the Council hadn't heard what was in the unit. The tenants of the main house say there are no cooking facilities in the accessory structure, an express provision of their lease. How do we determine what is a second unit? Look at the Municipal Code. In 1986 there was one definition, where the operative words were "separate cooking facilities." It doesn't define cooking facilities. That's probably why the definition was refined in 1996. There is substantial evidence that there are no appliances to heat food in the accessory structure. The Town is trying to have the 1996 definition apply, but there's a lot of documentation from Town officials saying that the 1986 definition applies. It is clear from tonight's testimony that there is no means to heat food in the structure. On March 16, 1987, the Building Inspector wrote Rae Johnstone about a final inspection not being done. He'd been in and out of the structure, noticed a sink, etc. and still asked about a final inspection. Plans approved by Rabi Elias show various things about the accessory structure, but no cooking facilities. He would like to add to the administrative record all the records; the Planning and Building files should be made part of it.

Town Attorney Roth said as far as the hearing is concerned, what has been presented is in the administrative record.

Rifkind said he has had access to review the records, but he hasn't had access to all of them in his office. He'd like those files to be part of the administrative record, including the plans dated June 6, 1985, approved by Rabi Elias, and the plans dated October 17, 1985, showing amended plans with changes to lower story. Those plus energy calculations should be part of the record. The Johnstones made every effort to put in a legal structure and they have followed the definition of cooking facilities. The bottom line is that Ms. Johnstone has lived here since 1985. It would be egregious for them to be evicted from their own space where they've lived for 16 years. The Council should focus on whether or not there is a legal second unit, not nuisance abatement. Mr. Michaels described the inside of the unit. They would be open to a further inspection, but only on the proviso that if other code violations are found, Ms Johnstone would be given time to fix the violations. What we don't have is a major health and safety issue. It makes sense to give her a reasonable amount of time to fix any code violations. Regarding the inspection warrant he notes for the record that no one gave Ms Johnstone notice that Mr. Roth was going to court to get an inspection warrant. They don't feel the warrant was ever actually served. Why didn't the Town Council know about the inspection warrant? There is a reasonable solution: use the 1986 code and the evidence shows that there are no cooking facilities.

Town Attorney Roth said Council approved the inspection warrant and Johnstone was warned about it. Regarding the administrative record the Council can officially notice those files in making their decision and they can be made part of the record. Briefs should be part of the record and the drawings too. It appears they are willing to allow an inspection of the property, not a cramped inspection, with reasonable time to correct code violations, and provide an opportunity for monitoring. Definition changed because it is so easy to get a hot plate which can be removed easily for inspection. If they would agree to a monitoring program, then that would be a solution. It is an insult to the Town Council to not allow staff into the house. Ms Johnstone refuses to testify, in court that would never be allowed.

Hodgens said we'll allow the plans and briefs to be part of the record.

Rifkind said he wants to add the San Anselmo police records to the administrative record.

M/s, Kilkus/Breen, to invoke the three-minute limit per speaker. Ayes: All

Hodgens asked that speakers speak about the facts, not personalities. She asked that there be no inappropriate behavior from the audience.

Kathryn Donnery, Savannah, said she cares most that whatever action the Council takes that it should apply to the next owners of the property at 125 Redwood.

Suzanne Lindelli, Tunstead Avenue, asked how much would it cost for the Town Attorney to take this to court, when we have a reasonable attorney who is willing to settle it tonight? Town Attorney Roth said the cost depends on how much resistance there is.

Alan Mooers, Savannah, read a letter into the record. The major issue in the neighbor's minds is that the building is illegal; it is a two-story duplex. They want it to be a single-family neighborhood. The structure was to be a storage unit. Leaving the building as is is a detriment to the neighborhood. If sold it would become a two-unit rental. This is a zoning issue and nothing else. This illegal structure has been occupied from the beginning. The applicant won't allow a final inspection; the burden of proof lies with the owner. The inspection warrant process should be used. To legitimize the structure tells people that lawlessness pays. Don't be afraid of going to court. The property is listed on the assessor's record as a two-unit property. A deed restriction should be invoked. Other agreements are now void. Letting the structure remain as it is would amount to defacto spot zoning. If she can't afford to live here, she should sell and move to a less expensive area, like anyone else. It is a stretch to have meal preparation in the main house. Where they cook is irrelevant, it's an illegal structure. The neighborhood is unhappy, but that's not the issue. This is about zoning and precedent. The most important issue is that those who choose to disregard the law should not be allowed to unjustly benefit. Enforce the zoning regulations and vote to bring the structure into compliance with original approvals.

Louise Mathews, Foothill Road, at what meeting did Roth get the authority to do an inspection warrant? The public was assured the Council would hold public hearing. It was not agendized at a public meeting. What proof was given to Judge Taylor as to the need for an inspection warrant. There are seven criteria for a nuisance; are they part of Roth's reasons? Is this a public hearing or an administrative legal process? It is difficult to know.

Town Attorney Roth said the inspection warrant was authorized by the Council in a closed session. Johnstone was repeatedly warned and did not comply. The procedure was carefully followed. The seven criteria she's referring to are for administrative penalties. The law in the first page of his response is the law to be applied.

Hodgens advised Rifkind that he wouldn't be allowed to speak again to Mooers letter.

Town Attorney Roth said the Council should make a determination of whether there is a public nuisance. It has been proposed that an inspection be allowed, with an opportunity to correct code violations. What is tricky is how the accessory structure should end up. The law is that a single housekeeping unit is where they take their meals in a single kitchen. Family doesn't have to be biological or friends. If the house were simply brought up to code, two floors allowed to exist, and they live there, you would still have two units there. The question of how to deal with that is tough.

Rifkind said the issue is if and when an inspection occurs, how do you determine which law to apply. No one is objecting to Ms. Johnstone living in the building. The sole issue is whether there are cooking facilities.

Roth said he believes the neighbors want this to go back to a storage facility. Assuming you find a public nuisance, what are you going to insist that the structure be? Let them live there, or make it go back to a storage facility. This just doesn't look like a single

housekeeping structure.

Rifkind said that there are probably many homes where someone rents out a bedroom, or cottages on the grounds that are rented out.

Roth said if there are different structures, but they are all part of the same unit, the whole complex is used as one. This is two separate units.

Rifkind said the utilities are shared between the main house and the accessory structure, which goes to the concept of single housekeeping unit.

Kroot said the critical thing is that Johnstone is going to allow an inspection. Before we try to figure out other things, we need to have the inspection and have staff get back to us. Gross illegal things would have to be brought up to code. He would support allowing time for that to happen. A second unit is defined by Town code. There is enough evidence of a public nuisance

Kilkus said he would vote to declare this a public nuisance. Clearly the second unit situation is manipulative.

Chignell said based on the facts there is a preponderance of evidence that this is a public nuisance and we should declare it so. The motion should include suggestions for the attorney for inspection in due course, with code violations pursued. This will be an evolutionary process. Today it is a nuisance, it needs to be abated, we should do the inspection, bring forward code violations, and determine how it relates to subsequent issues.

Breen said this has been ongoing for five years, working hard just to achieve the inspection that we're going to now do. He is concerned that the process not go on for another five years. The accessory structure agreement between Rae Johnstone and the Town has significantly changed. He believes this is a public nuisance and the Town needs to apply the energy to this that the family has put forth to get around the Town in the last many years. He agrees with his colleagues, to bring issue back in looking at our whole zoning issue.

Hodgens concurs with colleagues about the public nuisance. She is concerned about being specific after the inspection as to how the accessory structure would need to be modified to make it through the permitting process. There are a lot of red tags in the file. Specifically, she would like clarity on the steps the applicant will have to go through to make this a legal structure. She is concerned that this issue was dealt with in 1997 and at the time the accessory structure was being used by Johnstone and her mother was in the primary residence. The primary residence now is rented out to a number of unrelated parties. It feels as if there has been a history of some level of misrepresentation. They would like a report back after the inspection is completed.

Roth recommends that the Council move to declare a public nuisance, and direct the Town Attorney to prepare a resolution with the effective date today, that the Council order the premises inspected, with a report back to be made on the 12th of February. This would be an interim order with further orders after the inspection.

Rifkind said they would be amenable if they were not going to abate right away and throw her out of the place. They want a reasonable amount of time to resolve any issues. They'll consent to an inspection but with an opportunity to resolve.

Town Attorney Roth said he would recommend the Council not make that accommodation.

M/s, Chignell/Breen, to declare a public nuisance, directing that inspection of the premises take place, with code violations reported to Council at the meeting of February 12 and if there were a lack of compliance the Council would proceed. The Town Attorney would bring a resolution back to the Council covering these points at the meeting of January 22, 2002. The resolution would be effective as of January 15, 2002.

Rifkind said he would be unable to attend the February 12 meeting. It was the consensus

of Council to have the hearing on February 26, 2002, but to have the inspection happen as soon as possible.

It was the consensus of Council to amend the motion to have the hearing on February 26, 2002. Vote on amended motion: Ayes: All.

Town Attorney Roth suggested the report could be sent to them before the meeting and heard on February 26th.

Hodgens said what is not legally permitted is a code violation.

Breen the issue is what code are you using. We should declare publicly on the record what code the inspection will take place under.

2. APPEAL OF PLANNING COMMISSION'S APPROVAL OF USE PERMIT AND PARKING VARIANCE FOR A RESTAURANT TO SERVE BEER AND WINE WITH TWO ON-SITE PARKING SPACES; 647 SAN ANSELMO AVENUE, A/P 7-212-22, APPLICANT: PRONPIMOL SUWONSUPAR. APPELLANT: PEGGY THONGNOPNEUA. (Continued from the meeting of January 8, 2002)

Mayor Hodgins announced that the appellant has withdrawn her appeal. There are a number of people here, however, who wish to speak to the Council relative to the downtown community. Perhaps we will have to invite them to come to the next regularly scheduled meeting to speak at open time.

Peggy Thongnopneua said she withdrew her appeal because she was told there was nothing she could do. But they want to talk to the Council.

Town Attorney Roth said you can only hear at a special meeting what is agendaized. It could be on a regular agenda as open time or as a special item.

Hodgens invited the people who want to speak on this issue to come back to open time at the meeting of January 22, 2002.

3. APPEAL OF PLANNING COMMISSION APPROVAL OF DESIGN REVIEW OF A NEW 2,777 SQUARE FOOT TWO-STORY SINGLE FAMILY DWELLING AND A SETBACK VARIANCE FOR A PEDESTRIAN BRIDGE TO BE WITHIN 0 FEET OF THE FRONT PROPERTY LINE, ON PROPERTY LOCATED WITHIN THE R-1 ZONING DISTRICT ABOVE 150 FOOT MSL. 24 KNOLL ROAD, A/P 6-115-05, APPLICANT: STEVEN ATWATER. APPELLANTS: HERMAN AND LUIZA MEHLING. CONTINUED TO THE MEETING OF FEBRUARY 12, 2002.

Debra Stutsman