

**Town of Nags Head
Board of Adjustment**

February 8, 2024

The Board of Adjustment of the Town of Nags Head met in regular session Thursday, February 8, 2024 in the Board Room, Nags Head Municipal Complex, Nags Head, North Carolina.

Members Present Margaret Suppler, Bobby Gentry, Alice Coffey, Tina Adderholdt

Others Present Kelly Wyatt, Jay Wheless, Johny Hallow, Andy Garman, Lily Nieberding, Chris Trembly

Call to Order Chair Margaret Suppler called the meeting to order at 9:00 a.m. as a quorum was present.

 Board Attorney Jay Wheless gave additional information related to the Appeal Process.

 Chair Suppler stated that there was one item being brought before the Board this morning:

Appeal of an Administrative Decision submitted by Bryan Harvey with regard to issuance of a Notice of Violation for utilizing a detached accessory structure as an unpermitted second dwelling unit/accessory dwelling unit. The property is located at 309 W. Soundside Road, Nags Head.

 Chair Suppler provided an overview of the Board of Adjustment; Ms. Suppler then swore in all witnesses.

 Board Attorney Jay Wheless addressed the Board and discussed the process for granting or denying an appeal.

Evidence Presented by the Town With respect to the appeal submitted by Mr. Bryan Harvey, Staff would request the Board's consideration of the following:

 1. In late 2014, Mr. Bryan Harvey submitted a Development Permit Application for the construction of a 476 square foot heated office studio with an observation tower, full bath and bar sink. This application is attached for the Board of Adjustment's review and includes a survey of the proposed structure, Dare County Environmental Health Department (DCHD) Approval (#22847), and DCHD stamped elevations. (Attachment A)

Note that the scope of work in the development permit application did not reference a bedroom or permit the use of the property as a rental. The elevations did not show sleeping quarters, and the Dare County Environmental Health Department Approval did not contemplate an additional bedroom beyond the four (4) existing bedrooms approved

within the principal structure.

2. The Zoning Permit (ZN2014-0446) for this scope of work was issued on October 14, 2024, and signed by Mr. Bryan Harvey on November 12, 2014. The Building Permit (RE2014-1743) for this scope of work was issued on November 12, 2014, and signed by Mr. Bryan Harvey on November 12, 2014. The Certificate of Compliance for the scope of work was issued on April 13, 2016. These documents are attached for the Board of Adjustment's review. (Attachment B)

Note that ZN2014-0446 specifically states that the approved accessory structure shall not be used as a dwelling. Definitions of various relevant terms from the Unified Development Ordinance (UDO) have been provided in a separate attachment for convenience. (Attachment C)

3. On or around September 21, 2023, the Town's Code Enforcement Officer received a complaint about the rental property located at 309 W. Soundside Road. After verifying that the accessory structure was being rented as a dwelling through Airbnb, a Notice of Violation was issued. Documentation of the complaint (Attachment D) and evidence of this accessory structure being utilized as an accessory dwelling unit (Attachment E) is included for the Board of Adjustments review.

4. Notice of Violation No. 2208 was issued by Code Enforcement Officer Ed Snyder on September 26, 2023, and is attached for reference. (Attachment F). Note that Accessory Dwelling Unit (ADU) is not a permitted use within any of the zoning designations within the Town of Nags Head.

5. On October 3rd, 2023, Code Enforcement Officer, Ed Snyder received an email from Mr. Bryan Harvey stating that he had removed the listing from Airbnb in an effort to comply with the Notice of Violation.

6. In late October 2023, Mr. Harvey began reaching out to Planning Director, Kelly Wyatt, with interest in submitting an appeal of the Notice of Violation. Mr. Harvey filed an Appeal of the issuance of Notice of Violation No. 2208 on October 26, 2023. This submittal met the time limit for appeal as noted in Section 3.9.2 of the UDO, Appeal of Administrative Decisions. This is included in this packet as "Original Appeal Submittal 10.26.23"

7. On January 30th, 2024, Mr. Harvey provided staff with revised materials for his appeal application. This is included in this packet as "Revised Appeal Submittal 1.30.24". Mr. Harvey and Planning Director, Kelly Wyatt, exchanged several emails over the months of December 2023 and early January 2024. Mr. Harvey has included those correspondences as attachments in his revised appeal submittal. Staff will not provide these email communications again, however, the information contained within each is relevant.

Mr. Harvey has included an email from former Planning Director, Michael Zehner, in his appeal submittal. This email is pertaining to Mr. Harvey's Short Term Rental Registration (STR) filed in 2021 for 309 W. Soundside Road. Staff would note that the Town no longer has a short-term rental registration program, however, when it did the Town only allowed "whole house" and "partial house" short term rentals. What was occurring within the subject accessory structure was neither "partial" nor "whole" house short term rental by definition. On the contrary, Mr. Harvey's practice involved the rental of an accessory structure as an accessory dwelling unit, in violation of Section 6.6 of the UDO, Table of Uses and Activities. Note that by definition, a partial house short term rental must be resident occupied and subordinate and incidental to the principal residential use of the dwelling. Mr. Harvey's detached accessory structure being utilized and accessory dwelling unit, was not resident occupied nor incidental to the principal residential use.

By definition, a whole house short term rental means the rental of entire single-family dwelling to a group operating as one housekeeping unit. Mr. Harvey rented the entirety of the accessory structure to a completely separate and independent housekeeping unit from that of the principal residential structure.

Planning staff would request that the Board of Adjustment uphold the issuance of Notice of Violation No. 2208. Staff will be available at the Board of Adjustments February 8th, 2024 meeting for continued discussion and testimony.

Ms. Wyatt passed out a hard copy of the Town's previous Short-Term Rental Registration (STR) Ordinance (No longer active) as well as Mr. Harvey's STR application, both of which were admitted into evidence.

Use was not considered with an accessory structure definition.

Kelly Wyatt confirmed for Judy Burnette that the STR application showed that it was a 4-bedroom house, and the applicant was renting out 1 of the 4 bedrooms in the principal structure.

Kelly Wyatt replied to Judy Burnette that she is not sure if the applicant has sufficient parking for another bedroom. The applicant states he does but is not sure if they are to code.

In the R-2 Zoning District, a 20,000 SF lot is required for 1 Single Family Dwelling – 30,000SF lot is required for 2-family, duplex dwelling unit (Duplex) Mr. Harvey's lot is a nonconforming lot of record. The Ordinance allows it to have a one single-family dwelling and an accessory unit.

Jay Wheless confirmed the definition of accessory structure. Ms. Wyatt provided the definition and stated that it is what Mr. Harvey originally applied for, an accessory structure. It was then permitted as

such and subsequently CO'd. It was a request for a studio for the comfort, convenience, and use of the property owner, not as a separate dwelling unit for rental to another household unit.

Ms. Wyatt confirmed for Town Attorney Johnny Hallow that the initial permit was for an office/studio. It is not being used as such, instead it's being used/advertised as a dwelling with living space, kitchen, etc.

Ms. Wyatt confirmed for Mr. Hallow that "Accessory Dwelling Unit" is not allowed by the ordinance in any Zoning district

Ms. Wyatt confirmed for Mr. Harvey that the former STR program did allow whole and partial house rentals but did not speak to detached structures. She also confirmed that in a scenario involving a lower-level enclosure it would count as a partial house rental because it's connected to the house.

Mr. Harvey noted that in a scenario where there is a partial house short-term rental, where the house was owner occupied – it would seem like it was creating an exemption to the one household per unit rule.

Ms. Wyatt stated that it wasn't a general exemption but rather specific to short-term rentals as allowed by the ordinance.

Ms. Wyatt confirmed for Chair Margaret Suppler that the violation is because the use of the accessory dwelling changed from what was permitted.

Code Compliance Officer Ed Snyder addressed the Board. Mr. Snyder received a complaint from someone who stayed at Mr. Harvey's property. They were complaining that the structure was not ADA compliant and that they had learned that accessory dwelling units were not allowed by the Town. Mr. Snyder issued a Notice of Violation (NOV) and Mr. Harvey removed the STR listing.

Evidence Presented by
the Applicant

Applicant Bryan Harvey addressed the Board. He is the property owner and resident of 309 Soundside Rd. Mr. Harvey built the house with his wife in 2001, and he resides in the house with his wife and daughter.

Mr. Harvey noted that he had a difficult time securing a land use rights attorney. He was finally able to speak with one out of Raleigh and has since revised his appeal (Page 2-4, pg. 8 & exhibits K & L).

Mr. Harvey acknowledges the change of use occurred from the time that the accessory structure was permitted, however he contends that the accessory structure does not meet the definition of Accessory Dwelling Unit. Mr. Harvey would content that the Short-term rental use is different from a long-term rental dwelling unit. Short-term stays are for transient guests and are less impactful.

Mr. Harvey considers the accessory structure part of the principal dwelling, and it should therefore meet the partial house definition. The

STR application did not allow him to note that it was the accessory structure.

Mr. Harvey believes that the use change was allowed by the enactment of the STR Ordinance.

Mr. Harvey confirmed for Mr. Gentry that although listed as a four bedroom, he does not consider his house as a four bedroom. He does not use two of the bedrooms in the house and considers the studio as a bedroom. Mr. Harvey stated that he did not feel like he had falsified the application as the online applications were limited to only certain information.

Mr. Harvey confirmed for Chair Margaret Supler that he did not request a change of use from the Town and contends that the Short-Term Rental ordinance allowed the change of use.

Kelly Wyatt confirmed for Jay Wheless that the Board of Commissioners' intent in developing the STR Ordinance was to allow for whole house and partial house rentals, not accessory structures.

Chair Margaret Supler closed the public hearing. Attorney Jay Wheless reviewed all the evidence including the items submitted at the meeting (STR Ordinance, STR registration, applicant's amended application).

Mr. Wheless noted that the charge of the Board of Adjustment was to uphold or reverse the Town's Notice of Violation.

Alice Coffey stated that the applicant acknowledged that he changed the permitted use and that would be evidence in whole to uphold the Notice of Violation.

Bobby Gentry stated that Code Enforcement Officer, Mr. Snyder, acted appropriately in issuing the Notice of Violation.

Mr. Wheless stated that the current use is not consistent with the ordinance. The STR Ordinance talks about a partial house rental but does not discuss accessory structures or detached accessory dwellings.

It was consensus of the Board of Adjustment that staff should look into amending the ordinance and the definition of accessory use/accessory dwelling to provide more clarity.

Motion

Tina Adderholdt moved to uphold the issuance of the Notice of Violation in whole. Judy Burnette seconded, and the motion passed unanimously.

Order

The Board of Adjustment (the "Board") for the Town of Nags Head, North Carolina (the "Town"), pursuant to notice as required by the Unified Development Ordinance (the "UDO"), having held a public hearing on February 8, 2024, attended by a quorum of members of the Board, to consider an appeal filed by Mr. Bryan Harvey concerning the issuance of a Notice of Violation for utilizing a detached accessory structure as an unpermitted second dwelling unit/accessory dwelling unit at 309 W. Soundside Road, Nags Head (the "Property"). Having heard the testimony of the Director of Planning & Development, the Code Compliance Officer, the Deputy Planning Director, the Appellant, and all of the arguments presented at the hearing, the Board makes the following FINDINGS OF FACT:

There was substantial evidence in the record to show the following:

A. The meeting of the Board was duly noticed, as required by law. The Notice of Violation (No. 2208) (the "Notice of Violation") subject to the appeal was duly served upon Mr. Bryan Harvey, the property owner.

B. Mr. Bryan Harvey represented himself in accordance with the law.

C. In 2014, Mr. Harvey submitted a Development Permit Application for the construction of a 476-square-foot heated office studio with an observation tower, full bath, and bar sink. The application did not reference a bedroom, nor did it permit the use of the structure as a rental or dwelling unit. The zoning permit and subsequent Certificate of Compliance stated explicitly that the structure shall not be used as a dwelling.

D. On or around September 21, 2023, the Town's Code Enforcement Officer received a complaint about the rental of Mr. Harvey's accessory structure on Airbnb. Following verification that the structure was being utilized as an accessory dwelling unit, the Town issued on the Notice of Violation on September 26, 2023.

E. The Notice of Violation cited violations of Section 6.6 of the UDO, which prohibits accessory dwelling units in all zoning districts in the Town.

F. Mr. Harvey acknowledged receiving the Notice of Violation and removed the Airbnb listing for the accessory structure on October 3, 2023. He subsequently filed an appeal of the Notice of Violation on October 26, 2023, within the time limit set forth in Section 3.9.2 of the UDO.

G. Mr. Harvey's appeal contended that:

1. The accessory structure did not meet the definition of an Accessory Dwelling Unit.

2. The short-term rental use of the structure should be considered

different from a long-term rental dwelling unit.

3. The Short-Term Rental Ordinance enacted by the Town allowed for the change of use.

4. The accessory structure should be considered part of the principal dwelling and qualify as a partial house rental under the former Short Term Rental Ordinance.

H. Planning Director Kelly Wyatt provided testimony and evidence showing that the accessory structure was permitted and constructed as an office studio, not as a dwelling unit. The use as a separate rental dwelling was not permitted under the UDO. The Short-Term Rental Ordinance did not allow the use of detached accessory structures for rental purposes.

I. The Town's Code Compliance Officer, Ed Snyder, testified that the accessory structure was advertised and used as a rental unit, which constituted a change of use inconsistent with the original permits and the UDO.

J. Mr. Harvey acknowledged that the use of the structure had changed from its original permitted purpose and contended that the Short-Term Rental Ordinance allowed for this change. He also testified that he considered the structure part of the principal dwelling, and that the online Short Term Rental registration process did not provide sufficient flexibility to note that the rental involved the accessory structure.

K. As a result of the foregoing, the issuance of the Notice of Violation was consistent with the UDO and the accessory structure's use as a rental dwelling was in violation of the UDO.

Based on the above Findings of Fact, the Board makes the following **CONCLUSIONS:**

1. All parties are properly before the Board, and the Board has the jurisdiction to consider and render a decision on the appeal of the Notice of Violation.

2. The Notice of Violation was properly issued as Mr. Harvey's use of the accessory structure as a rental dwelling unit is not permitted under the UDO.

3. The accessory structure does not meet the definition of a partial house rental or whole house rental as defined by the former Short Term Rental Ordinance, and its use as a rental dwelling is inconsistent with the conditions of its original permits.

4. The change of use from an office studio to a rental dwelling unit was not authorized by any permit or ordinance.

5. The Notice of Violation issued by the Code Compliance Officer is affirmed in whole based on the substantial, competent and material evidence submitted into the record.

WHEREFORE, based on the foregoing FINDINGS OF FACT and CONCLUSIONS, it is hereby ordered that the accessory structure located on the Property shall be used solely as an accessory structure and not as an accessory dwelling unit.

Ordered this 8th day of February 2024.

Approval of Minutes

None

Adjourn

There being no further business to discuss, the meeting adjourned at 10:45 AM.

Respectfully Submitted,

Lily Campos Nieberding

