BOARD OF ADJUSTMENT MINUTES

DATE: April 23, 2007

1ST FLOOR
NORTH CONFERENCE ROOM
CITY HALL

Type of Meeting: PUBLIC HEARING

Chairman Paul Smith called a regular meeting of the Board of Adjustment to order at 2:00 p.m. Mr. Smith read the opening statement explaining the functions of the Board of Adjustment. Everyone giving testimony regarding a case before the Board was duly sworn. Notice was previously mailed to all required parties.

BOARD MEMBERS PRESENT:

Chair - Paul Smith.....X
Tom Muncy.....X
Beverly Robinson..... X
Richard Fort .....ABSENT
Robert Middlemas..... ABSENT
Lee McElrath....Alternate.....X
Janet Whitworth...Alternate.....X

CASE	STAFF PRESENTING CASE	GRANTED/DENIED/ CONTINUED
1. 95 Lakewood Dr.	Stuart Rohrbaugh	Granted
2. 621 Brevard Rd.	Christine Logan	Granted
3. 10 Brook St.	Nathan Pennington	Granted
4. 42 Haw Creek Circle	Bob Oast	City Interpretation Upheld
5.		
6.		
7.		
8.		

Additional Information

STAFF PRESENT: Beverly Williams, Stuart Rohrbaugh, Martha McGlohon, Ken Putman, Shannon Tuch, Nathan Pennington, Bob Oast

CASE # 1

ADDRESS: 95 Lakewood Dr.
PETITIONER: R.W. Griffin
PIN # 9648.16-93-1623

REQUEST: Petitioner is requesting a variance of Section 7-8-4(f)(5) of the Unified Development Ordinance in order to construct a two story addition to the rear of an existing single-family residence and connect said addition to an existing detached accessory building (garage) on the above referenced property.

Variances:

1. Petitioner is requesting a side setback variance of three feet from right side setback in lieu of the minimum required side setback of six feet. This request would allow the proposed addition to be three feet from the right side property boundary.
2. Petitioner is requesting rear setback variance of six feet from the rear property boundary line in lieu of the minimum required rear setback of fifteen feet (15'). This request would allow the proposed addition to be nine feet from the rear property boundary line.

Background: The home and the garage were constructed sometime in the 1920's. Portions of the home and the garage already encroach within the required side setback and are considered non-conforming structures. A Development Application for the proposed addition was submitted and disapproved last month (#07-1017). The proposed addition connects the two existing buildings. The proposed addition encroaches within the minimum required side setback. A more restrictive rear setback requirement will apply as the addition connects the buildings to become one structure. The petitioner supplied Site Plan shows the proposed addition expands the footprint in the same building line to "square" the building in the same line as the existing structures. No portion of the existing garage structure will extend any closer to the side property line or the alleyway. Petitioner submitted this variance application to seek relief from the above referenced minimum setback requirements.

DISCUSSION: Stuart Rohrbaugh presented the case to the Board and stated the property is zoned RS-8. Further he stated that portions of both existing structures already encroach with the required setback. The proposed addition will connect the existing principle dwelling to the existing detached accessory structure. Staff recommends approval of the request.

Mr. Griffin the petitioner addressed the Board and stated that the proposed addition will be a two story structure which will attach the house to the garage. There being no further discussion the Chairman closed the public hearing for discussion and the vote.

Opened Public Hearing: 2:06 p.m.
Closed Public Hearing: 2:10 p.m.

Motion: Beverly Robinson moved to grant the variance as requested.	2nd By: Tom Muncy	VOTE: 5 – 0
Paul Smith		Aye
Tom Muncy		Aye
Robert Middlemas		Absent
Beverly Robinson		Aye
Richard Fort		Absent
Lee McElrath		Aye
Janet Whitworth		Aye
The variance was granted		

CASE # _2_

ADDRESS: 621 Brevard Road
PETITIONER: Robert E. Lewis
PIN # 9627.16-94-0143

REQUEST: Applicant is requesting a variance of Section 7-13-4(2) (c) of the Unified Development Ordinance in order to install a 3rd wall sign that exceeds the number allowance for a single tenant building.

Variance:
Petitioner is requesting a third sign to be mounted on the front elevation of their building. Code allows for only two signs not to exceed 125 square feet of face. The three signs together are a total of 84.06 square feet of face which is less than what code allows.

DISCUSSION: Christine Logan presented the case to the Board and stated this building will house Deal Auto. The dealership represents three different care manufacturers. If granted the

three signs total square footage will be less than the amount the code allows. Staff recommends the variance be approved.

Opened Public Hearing: 2:11 p.m.
Closed Public Hearing: 2:15 p.m.

Motion: Lee MeElrath moved to approve the variance request.	2nd By: Tom Muncy	VOTE: 5 – 0
Paul Smith		Aye
Tom Muncy		Aye
Robert Middlemas		Absent
Beverly Robinson		Aye
Richard Fort		Absent
Janet Whitworth		Aye
Lee McElrath		Aye
The variance request was granted.		

CASE # _3_

ADDRESS: 10 Brook Street
PETITIONER: Historic Biltmore Village, LLC., Agent Joe Tanneberger
PIN # 9648.19-70-0106; 1010; 9648.19-60-9151; 9647.07-79-1994

REQUEST: The petitioner, Joseph Tanneberger, is requesting a variance to Section 7-11-1(b)(4) of the UDO in order to decrease the amount of channelized automobile storage. The UDO requires that parking lots with 50 – 250 spaces provide 45 feet of channelized automobile storage measured from the property line to the terminus of the parking lot entrance. The petitioner is requesting a five foot variance that would allow for channelized automobile storage of 40 feet.

Project Description:

The project site consists of five parcels comprising approximately 1.78 acres according to Buncombe County tax records and the submitted site plan. The site is zoned CB-II and is located within the Biltmore Village Historic District Overlay. The project proposes construction of a 77,536 square foot office/retail building consisting of seven retail and eight office units. Parking is being provided on the sub-ground level and to the rear of the structure with the main entrance to the site along Brook Street. Additionally, the project will provide an improved streetscape with street trees, sidewalks and a covered porch area along Brook Street.

This project was reviewed and approved by the Technical Review Committee (TRC) on February 19, 2007. The Historic Resources Committee (HRC) approved this project at their February 14, 2007 meeting. The project is in keeping with the Biltmore Village guidelines for full block development and pedestrian oriented design. Furthermore, the project is located in a FEMA Special Flood Hazard Area (SFHA) that requires habitable floor area to be elevated above base flood elevation. Compliance with full block development and pedestrian oriented design makes it difficult to meet the requirements for channelized automobile storage.

DISCUSSION: Nathan Pennington presented the case to the Board referenced the Staff Report prepared for the case.

The Board Chairman questioned the safety issued related to channelized auto storage.

Ken Putman, Traffic Engineer for the City of Asheville addressed the Board and stated that channelized automobile storage also is addressed when a project is located in downtown Asheville. Staff is presently working to get the criteria for channelized automobile storage placed in the Engineering standards manual. Mr. Putman information the Board that there is no safety issues involved in this case.

Opened Public Hearing: 2:16 p.m.
Closed Public Hearing: 2:23 p.m.

Motion: Tom Muncy moved to grant the variance.	2nd By: Lee McElrath	VOTE: 5 – 0
Paul Smith		Aye
Tom Muncy		Aye
Robert Middlemas		Absent
Beverly Robinson		Aye
Richard Fort		Absent
Janet Whitworth		Aye
Lee McElrath		Aye
The variance was granted.		

CASE # 4

ADDRESS: 42 Haw Creek Circle
PETITIONER: Jenny & James Haaksma
PIN # 9659.08-88-4029

REQUEST: The petitioner is appealing a staff interpretation that the proposed conversion of an existing single family home into an accessory apartment would required that the structure meet the standards for both accessory apartments and accessory structures found in the City's Use By Right, Subject to Special Requirements (USSR) Sec. 7-11-1 (see attached).

The applicant contends that they are only required to meet the standards necessary for accessory apartments and are not required to meet the standards for accessory structures. Staff's position is that the city's development standards for single family residential districts, as well as the definitions for single family dwelling units and single family residential developments specify that only one single family home is allowed on a single lot. The provisions in Article 16 allow for the flexibility and opportunity for citizens to add an accessory apartment as a use-by-right but if this apartment is in a separate detached structure then it must be considered an accessory structure as well.

The staff position is that the conversion of the existing single family home into an accessory apartment may be considered provided:

1. There is a larger single family structure proposed that would become the principal single family dwelling (replacing the existing small cottage home as the "principal" single family home).
2. The accessory unit can meet the standards outlined in 7-16-1 (c)(1) for Accessory apartments.
3. The detached accessory unit can meet the standards outlined in 7-16-1 (c)(2) for Accessory structures.

The development proposal supplied by the applicant demonstrates that it meets #1 and #2 above, however it fails to meet all of the standards for #3. Specifically, the footprint of the structure exceeds the maximum allowance of 1200 square feet; and exemption noted in 7-16-1(c)(2)(b) applies only to those accessory apartments that are attached to the principal structure (such as an apartment that is located in a day lighted basement). As this is a separate detached structure, this exemption does not apply. Additionally, the proposal fails to meet the standard described in 7-16-1(c)(2)(d) that requires that all accessory structures be located in a side or rear yard. The location of the proposed accessory dwelling unit is in the front yard of the proposed single family residence.

Subject Site Description: The subject property is located at 42 Haw Creek Circle, in the Haw Creek neighborhood. The 1.42 acre lot is zoned RS-4 and is conforming to the zoning districts standards for lot size; however, the lot is non-conforming to the city's access standards, with no frontage on a publicly maintained road. The property currently supports a 1300 square foot cottage home, two accessory structures, and a non-conforming mobile home. The two accessory structures and the mobile home are proposed to be removed.

Other Items to Note: There are several other development options available for this property:

1. Remove existing single family cottage home and build new larger home.
2. Improve the existing gravel road to City standards to allow for a proper subdivision of this property (property cannot be subdivided in its current form due to its lack of road infrastructure and non-public maintenance).
3. Pursue a family subdivision (this would allow the property to be subdivided and the new second home to be built but it also encumbers the properties if there is a desire to sell to a non-family member).

Ron Sneed was the Attorney for the Board of Adjustment
The following is a summary of the case.

DISCUSSION:

Attorney Bob Oast represented the City of Asheville.

Attorney Lyman Gregory represented the petitioners (Jenny & James Haaksma)

Bob Oast made a brief statement to the Board and questioned Stuart Rohrbaugh regarding a letter he sent the petitioner regarding an application for a Zoning Permit. Mr. Oast then postponed the questioning regarding the letter and asked Mr. Rohrbaugh about a document presented to him. Mr. Rohrbaugh explained that the document appeared to be a portion of a survey that shows the property boundary lines, a proposed site plan for a proposed new structure and as site plan that locates the existing structures on the parcel.

Mr. Oast then referred to the letter Mr. Rohrbaugh composed on March 15, 2007, specifically the second paragraph of the letter.

Mr. Oast: Mr. Rohrbaugh, explain what the decision was that's being appealed from.

Mr. Rohrbaugh; The petitioners were proposing to make modifications to an existing single family home in a way that the existing single family home would be considered an accessory apartment. Then proposing a new structure (5,200) square feet in size behind that existing structure.

Mr. Oast: What was your view of that proposal?

Mr. Rohrbaugh: The proposed 5,200 sq. ft. structure would then be considered a principal structure and the existing smaller structure would be considered an accessory structure or an accessory apartment. I have referred in the March 15th letter as such that the accessory structure

could not be located in front of the principal because it is located in the front yard in front of the principal dwelling. The letter further states that accessory structures can only be located in the side or rear yard and not in front of the principal structure.
Mr. Oast: Reference 7-16-1 of the Unified Development Ordinance. Mr. Oast furnished the Board with Certified Copies of the section.

Mr. Oast: Mr. Rohrbaugh, are you familiar with that section of the UDO.

Mr. Rohrbaugh: Yes Sir.

Mr. Oast: Are accessory apartments permitted in residential areas.

Mr. Rohrbaugh: In all residential zoning districts.

Mr. Oast: Are they permitted without restrictions.

Mr. Rohrbaugh: They are permitted as a section commonly known as USSR (Uses By Right Subject To Special Requirements)

Mr. Oast: USSR stands for Uses By Right Subject To Special Requirements.

Mr. Rohrbaugh: Yes Sir.

Mr. Oast: With respect to accessory apartments. (Mr. Oast gave the Board a certified copy of the definition for accessory apartments. Mr. Rohrbaugh do accessory apartments have to be part of the principal structure.

Mr. Rohrbaugh: No, you could have an accessory apartment as part of the principal structure or you could have an accessory apartment detached.

Mr. Oast: If they are detached are they subject to the location requirements applicable to accessory structures.

Mr. Rohrbaugh: They would be.

Mr. Oast: What are those requirements?

Mr. Rohrbaugh: I'm going to reference the portion of the UDO, Section 7-16-2

Mr. Oast: Are accessory structures permitted to be located in front of the principal structure.

Mr. Rohrbaugh: No sir, except for detached garages.

Mr. Oast: Would it make any difference in your estimation if the accessory structure in question were an accessory apartment.

Mr. Rohrbaugh: Yes. If it were an accessory apartment, it would not be permitted in front of the principal structure.

Mr. Oast: With respect to the requirement that accessory structures may not be located in front of the principal structure does it make any difference to you whether the accessory structure in question is an accessory apartment.

Mr. Rohrbaugh: No.

Mr. Oast: Just to compare this to other situations that come up from time to time where the UDO is implicated, are you familiar with Home Occupations.

Mr. Rohrbaugh: Yes Sir.

Mr. Oast: Are those usually permitted in the principal structure or in detached structures.

Mr. Rohrbaugh: the Home Occupation Use permit is also a Use Subject To Special Requirements in residential areas. Home Occupations are treated similar if they are an accessory structure.

Mr. Oast: Is this the first time you have issued a ruling with respect to whether an accessory structure can be located in a front yard.

Mr. Rohrbaugh: In front of the Board of Adjustment, yes sir.

Mr. Oast: In your career?

Mr. Rohrbaugh: Oh, no sir.

Mr. Oast: Have you ever issued a permit for an accessory structure to be located in a front yard.

Mr. Rohrbaugh: Only the detached accessory garage, but not an accessory apartment. There is a provision under Section D that allows for a detached garage to be placed somewhere other than the side or rear yard.

Mr. Oast then asked Mr. Rohrbaugh to identify a document presented to him.

Mr. Rohrbaugh: This document is an email from Bob Oast, dated October 23, 2006, titled Accessory Apartments.

Mr. Oast: Did you respond to this email.

Mr. Rohrbaugh: I did.

Mr. Oast: Were there subsequent discussions or meetings subject to this email.

Mr. Rohrbaugh: Yes Sir:

Mr. Oast: Did those discussions cause your position on accessory apartments to change.

Mr. Rohrbaugh: Somewhat. It clarified that accessory structure – accessory apartment is considered an accessory structure.

Mr. Oast: That position of yours is reflected in your ruling of March 15, 2007.

Mr. Rohrbaugh: On this particular application, yes sir.

Mr. Oast: Mr. Chairman I would like for the items I have introduced and distributed copies of to be introduced into evidence.

Lyman Gregory (Attorney for the petitioner's addressed the Board)

Mr. Gregory: Under testimony you testified that accessory apartments are allowed in all residential zones. Isn't it true that just on the accessory apartments rules this application would meet all those rules, correct?

Mr. Rohrbaugh: I believe my letter outlines the reasons it did not meet those rules.

Mr. Gregory: Do you recognize the document I've handed you.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: What is it?

Mr. Rohrbaugh: It is a staff report from Shannon Tuch and Bob Oast.

Mr. Gregory: That's been submitted to the Board of Adjustment as the Departments position on this application, correct?

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: Do you see toward the center of the page a summary of what the staff's position is of what's required for this application and "it states that it must meet the rules for accessory apartments."

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: It goes on to state "it must also meet the rules for accessory structures."

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: With regards to accessory apartments it states "those requirements are fully met by this application." Correct.

Mr. Rohrbaugh: I don't read that, you will have to point that out to me please.

Mr. Gregory: Do you see three bulleted points that says this application must meet---

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: Bullet point number two says "it must all the rules for accessory apartments and there is a UDO section reference."

Mr. Rohrbaugh: Yes sir, it reads "the accessory unit can meet the standards outlined in 7-16-1(c) (1) for accessory apartments.

Mr. Gregory: the sentence following that says "this application meets requirements one and two above.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: This application meets all the rules for accessory apartments.

Mr. Rohrbaugh: I'm not the author of the report so – it reads that the – it says "the development proposal supplied by the applicant demonstrates that it meets one and two above, however, it fails to meet all the standards for number three."

Mr. Gregory: I think you just answered my question, but the report reads that this meets all the requirements for accessory apartments.

Mr. Rohrbaugh: I'm sorry----I'm still not reading those words.

Mr. Gregory: You've been handed a portion of the code, Section 7-2-5 Definitions.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: I'd like to draw your attention to that part of the code that says "accessory apartments.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: It says there, that the apartment is a dwelling unit, correct?

Mr. Rohrbaugh: A separate and complete dwelling unit.

Mr. Gregory: Ok -- and you are familiar with apartment rental uses in apartment rental situations.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: In an apartment rental situation the tenant would be in possession of the unit, correct?

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: The landlord would not be entering that unit without the tenant's permission.

Mr. Rohrbaugh: Normal and customary, yes sir.

Mr. Gregory: Normal and customary, the landlord would not be using that space or occupying it on a regular basis.

Mr. Rohrbaugh: I'll agree with that, yes sir.

Mr. Gregory: This definition, it doesn't say anywhere in it that accessory apartments are also accessory structures, does it?

Mr. Rohrbaugh: No sir.

Mr. Gregory: I want to draw your attention to the definition of accessory structure. It doesn't say that accessory apartments are accessory structures, does it?

Mr. Rohrbaugh: No sir.

Mr. Gregory: There are a number of elements or subparts of that definition, correct?

Mr. Rohrbaugh: Yes sir

Mr. Gregory: One of those is that an accessory structure services a principal building or use.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: I believe we talked about garages as accessory structures -- that is one of the examples you used, right.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: A garage would serve the principal building, correct?

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: Would a utility shed be an accessory structure.

Mr. Rohrbaugh: Yes sir.
Mr. Gregory: That would be serving the principal use by having storage space.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: How about a stand alone gazebo or grill or something like that, would that be an accessory structure.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: I would like to draw your attention to 7-16-1 portion of the code. Specifically to 7-16-1(c)(1) regarding accessory apartments.

It doesn't say in there anywhere that accessory apartments also meet the rules of accessory structures.

Mr. Rohrbaugh: Correct.

Mr. Gregory: I would like to draw your attention to 7 16-1 (c)(2) related to accessory structures. Now that section doesn't say anywhere that accessory apartments must also met the requirements of this section, accessory structures.

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: Do you see a section of the code, a flush line paragraph immediately following the lot size chart.

Mr. Rohrbaugh: yes sir.

Mr. Gregory: Please read out loud the last sentence of that text language.

Mr. Rohrbaugh: Accessory apartments shall meet the requirements established by Section 7-16-1 of this chapter.

Mr. Gregory: There is a separate section for accessory apartments under 7-16-1, correct?

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: That sentence doesn't say "and it also has to meet the rules of this requirement on accessory structures.

Mr. Rohrbaugh: Correct.

Mr. Gregory: I'm now showing you a document marked for identification purposes as petitioners Exhibit A. What is the title of the document?

Mr. Rohrbaugh: Accessory apartment – Technical Design Guide.

Mr. Gregory: The Planning Department maintains an interpretations notebook, doesn't it?

Mr. Rohrbaugh: Yes sir.

Mr. Gregory: Isn't it true this document is in that interpretations notebook.

Mr. Rohrbaugh: I do not know the answer to that.

Mr. Gregory: I'll ask if the City will stipulate that this document is in that notebook.

Mr. Oast: So stipulated.

Mr. Gregory: That notebook is for when there are questions about code interpretation and the department wants to memorialize an interpretation, do those get put in that notebook, is that correct.

Mr. Rohrbaugh: To my understanding, yes sir.

Mr. Gregory: There is a section entitled Planning and Zoning and then there's a roman numeral 1 – Unified Development Code Requirements. There is nowhere in that requirement that says accessory apartment must meet the rules for accessory structure. Is that correct?

Mr. Rohrbaugh: I don't see any reference as such.

Mr. Gregory: Is this document also posted on the City's website.

Mr. Rohrbaugh: I know --- we just changed websites but it was on the old website.

Mr. Gregory continued to question Mr. Rohrbaugh concerning accessory apartments meeting the rules of accessory structures.

Mr. Oast then question Shannon Tuch, Assistant Director for the Planning and Development Department regarding the following topics: the area where the property is located; paragraph A of Section 7-16-1; compatible development in the area; comparable situations in other parts of the city; letter of March 15, 2007; general administrator of the code;

Mr. Gregory then questioned Ms. Tuch.

Mr. Gregory: You testified that some of the material presented, i.e. Mr. Oast email; technical design guide, -------- you testified they are in the interpretation notebook but they are there just as reference material.

Ms. Tuch: That's correct.

Mr. Gregory: They are not labeled that way in the notebook, are they?

Ms. Tuch: No, our formal interpretations follow a format and those don't follow that format.

Mr. Gregory: The notebook meets the requirements of being a public document, correct?

Ms. Tuch: As for as I understand.

Mr. Gregory: Anybody who came into the Planning Department and said I want to see the interpretation notebook, you would show them.

Ms. Tuch: Yes. I'll add that those items were loose in the notebook. They weren't punched/ bound.

Mr. Gregory: I'm going to show you a portion of a staff report we've already referred to. That document is the staff report, correct?

Ms. Tuch: Corrected.

Mr. Gregory: And you're the author of that document.

Ms. Tuch: Yes I am.

Mr. Gregory: On the very last page of that report -- I think that's a portion of some UDO provisions with your annotations on them. Is that what that is?

Ms. Tuch: That's right:

Mr. Gregory: I want to draw your attention to the part where you are presenting the accessory structure definition. There is some highlighted language after the definition.

Ms. Tuch: Yes.

Mr. Gregory: Part of the definition says, "An accessory structure serves the primary structure, is that correct?

Ms. Tuch: Yes.

Mr. Gregory: In your explanation in that report, you don't explain how and accessory apartment meets that part of the definition, is that correct.

Ms. Tuch: That's correct.

Mr. Gregory called Ms. Jennie Haaksma to testify.

Mr. Gregory then asked that the Zoning Application and the Appeal Application be made a part of the record.

Mr. Gregory: Ms. Haaksma, are you the application for this proposal and do you live on the property?

Ms. Haaksma: Yes.

Mr. Gregory: Please tell the Board what your development proposal is.

Ms. Haaksma: Currently I have a home and a mobile home on the lot and I want to remove the mobile home, the carport and the shed and build a new house in this part of the lot.

Mr. Gregory: What is the size of the existing home?

Ms. Haaksma: The survey measured it at 1294 sq. ft.

Mr. Gregory: Have you done any other size analysis on the home.

Ms. Haaksma: I pulled out my old appraisal and I confirmed the measurements. When I bought it, it was 951 sq. ft.

Mr. Gregory: There are specific ways of measuring homes, correct?

Ms. Haaksma: Yes.

Mr. Gregory: What exactly do you measure for listing the home?

Ms. Haaksma: It needs to be heated square footage. The ceiling has to be above 7 ft. and it has to be finished.

Mr. Gregory: Have you applied those standards to this home.

Ms. Haaksma: Yes.

Mr. Gregory: What is the heated square footage of your existing home?

Ms. Haaksma: It also says to use caution when there are additions or remodeling that's being done. --- If the current heating system can accommodate the additional square footage. It says use caution in including that. If I use that rule then I would have to say 951 sq. ft. The back porch is definitely unheated and its 101 sq. ft. The portion of the home that is a porch is finished but has no heat ducts.

Mr. Gregory: Would you say 951 sq. ft. is the lower range of what you would list.

Ms. Haaksma: Yes.

Mr. Gregory: On This map where are you proposing the new structure.

Ms. Haaksma: (Ms. Haaksma pointed the area out).

Mr. Gregory: What is the size you are proposing for that structure?

Ms. Haaksma: It would have to be 5200 gross living. It would be on a basement.

Mr. Gregory: I believe you testified there is a trailer on this property.

Ms. Haaksma: Yes.

Mr. Gregory: How have you been using that?

Ms. Haaksma: It's been rented.

Mr. Gregory: How long has the trailer been on the property?

Ms. Haaksma: Nineteen sixty four.

Mr. Gregory: Does that trailer access this property on the same road way that you do?

Ms. Haaksma: Yes.

Mr. Gregory: Did you hear some testimony earlier about character of the neighborhood?

Ms. Haaksma: Yes.

Mr. Gregory: Could you please tell us what you observed as the character of this neighborhood in terms of the appropriateness of the use you are proposing?

Ms. Haaksma: As far as the size of the structure and that there are two dwellings on the lot. I would say a couple of things. (1) There are neighborhoods within 400 ft. – Silverstone is one of them that is within 400 ft. of my house. The houses go from 550 up to probably 8 or 9 hundred. I would also say that there were a number of homes on Haw Creek Circle that were allowed subdivision that had two existing homes. There was also one that was subdivided and another home was added. But they had road frontage and I don't. The lots are lot smaller. There is also a home across from where there is a pond and I believe they have an accessory apartment.

Mr. Gregory: You are preparing for this application, did you do some investigation of code requirements.

Ms. Haaksma: Yes.

Mr. Gregory: So you're aware of the zoning classification for your property?

Ms. Haaksma: Yes.

Mr. Gregory: And what density that would allow for the size of your lot?

Ms. Haaksma: Yes.

Mr. Gregory: What is the size of your lot?

Ms. Haaksma: One point four two acres.

Mr. Gregory: Absent any other code requirements, how many units do you think you could potentially fit on your lot?

Ms. Haaksma: Five.

Mr. Gregory: Your proposal is for how many units?

Ms. Haaksma: Two.

Mr. Gregory: Those are all my questions.

Mr. Smith: (Asked Ms. Tuch to clarify the testimony Ms. Haaksma gave before the Board.) The petitioner has stated that she can have five houses on this property. What would you have to do –subdivide the property five time's.

Ms. Tuch: The petitioner was referring to how big the lot is and how many units allowed. The property is zoned single family, so in order to comply with the single family development districts you have to subdivide he property and you can have only one principal structure on a lot and theirs is a minimum amount of road frontage which would be 70 ft. in the RS-4 District. The application doesn't have any road frontage but if subdivided it would allow two lots.

Mr. Smith: Basically that statement she made is not all together correct?

Ms. Haaksma: I was talking about the size of the lot for the zoning. I brought it up because I wanted you to know that it's not going to standout and look unusual in my neighborhood. It's not going to look like they are right on top of each other.

Mr. Oast: Ms. Haaksma, what road does the existing structure front on?

Ms. Haaksma: None of them are called roads. They are right-of-ways. Actually I don't have a front door either.

Mr. Oast: You said the other existing homes in the area are all subdivided.

Ms. Haaksma: I think there is one on the other side, there's a pond. There is one with a pond that I believe has another structure.

Mr. Oast: But you don't know.

Ms. Haaksma: No sir.

Mr. Oast: You indicated that you access your property by coming into the driveway. What do you consider the front door of your property?

Ms. Haaksma: I don't have a front door. I only have one door and when I purchased the home it was my back door. Now it's my only door.

Mr. Muncy: Is that because you added porches?

Ms. Haaksma: It's because we closed in a porch.

Mr. Oast: Before you put the porch on, did it have a door to the exterior?

Ms. Haaksma: Yes sir.

Mr. Oast: Where was that door?

Ms. Haaksma: (Ms. Haaksma pointed out the door on the map).

Mr. Oast: So it faced that right-of-way that you were referring to?

Ms. Haaksma: Actually the door faced this way. (Pointed out on the map).

Mr. Oast: If you had been given the option of subdividing this property in a number of ways, which I think you said you had been ----

Ms. Haaksma: All extremely cost prohibitive, yes. Actually, there isn't a 30 foot right of way and that was the requirement. There is nothing to improve that fit that -- If I was to make the improvements to the road.

CLOSING STATEMENTS:

Mr. Oast: I do want to point out Mr. Chairman that they do have the burden of proof. The case we've tried to make is that accessory apartments are uses. They are not buildings like a structure is. Like any other kind of accessory use it is ---like a home occupation they can occur in residential areas but only subject to certain requirements. When they occur in detached structures as is proposed here, we've got an unusual situation because what you are going to do is to convert what is now a principal structure into an accessory structure by building something bigger behind it. The existing principal structure becomes an accessory structure. Some codes do not allow it. We do allow it here but only subject to certain requirements. Those

requirements are applicable to all accessory structures. One of those requirements is that an accessory structure may not be located in front of the principal structure. Mr. Rohrbaugh testified that in his tenure with the city that has been the practice of the Planning and Development Department and they've never deviated from it. North Carolina law provides that deference needs to be given to the interpretation of the official who are charged with administering the code. North Carolina law would also provide that you construe applicable sections of the code so that they effectuate the intent of the code. Our code cannot possibly address every situation that the mind of man can come up with. This is one situation where it is a little bit unclear, but if you look at the practice of our Planning and Development Department, I think you will find that this particular interpretation is one that's been consistent down the line. Every time we've had the chance to make this call, we've made in the position of requiring the accessory structure to be located behind the principal structure --- no matter how it came into existence. When an accessory apartment is a detached structure – it has to meet the same requirements as any detached structure which could include a home occupation, a studio, or an office, etc. They all have to be located behind the principal structure.

Mr. Gregory's position would be that because it isn't specially provided otherwise in the code that an accessory apartment is subject to know development standards other than what is listed in Section 7-16 (c) (1) --- in order words you can building it right up to the property line – it would be subject to know other requirements. I suggest to you that it not the result intended by the code. You hear Ms. Tuch testify and Ms. Haaksma also testified that where these situations do exist elsewhere in Haw Creek –that you've had subdivisions. The only impediment to them doing what they want to do is the expenditure of more money to do it. This is a situation that created by the petitioners own unwillingness to spend the money necessary to get it done. We have not denied them the use of their property, but they are not willing to do the other things they can do to get there. I would suggest that staff's interpretation is correct.

Finally, with respect to my email, that email was sent six months ago to the day and date of this hearing. There have been a lot of discussions going on since then. The final position of the Planning Department was what was represented by Mr. Rohrbaugh to Ms. Haaksma. Our position is that you support the staff in this and give deference to their interpretation because it has been consistent with the interpretations that they have issued in these situations.

Mr. Gregory: Thank you members of the Board for hearing this appeal. I think you have grasped the issued very clearly. The petitioners are asking you to rule that – stand alone accessory apartments have to meet the requirements of where the code says this is what a stand alone accessory apartment has to do. I agree mostly with Mr. Oast recitation of some of the guiding law that governs your decision -- I'm going to add a little bit to that. In terms of effectuating the intent of the code – that the first place you look at that is the plain language of the code. The plain language here does not say anywhere and in any interpretative material that the department has – that accessory apartments are also accessory structures and have to meet all of those rules. You've got to strictly read the code the way it's written – also when the code is plain in its language, that supersedes any deference you might give to a staff interpretation.

Just to bring o the Board attention – on case where a similar situation arose, the town argued that they had interpreted their ordinance two hundred times exactly the same way. This was a court

decision rather than a Board of Adjustment decision. The Court said, "we don't care that you did it two hundred times the same way, the code says do it this way and you were wrong all those times, -- the time it went to court and the two hundred previous times. The other rule of interpretation that guides you is that when there is ambiguity or a lack of clarity in a code, you are suppose to absolve that ambiguity in favor of the property owner, in favor of the free use of the property. If the code is going to restrict the use of property, it's got to do it very specifically. If it's vague about that, you resolve the doubt in favor of the free use of the property.

You did hear from the city's testimony that this application meets all of the requirements of the accessory apartment portion of the code --- and you also heard testimony from Ms. Haaksma consistent with the pattern of development in her neighborhood – in similar locations of the surround area – and that this is not a change that's having any additional burden to the infrastructure. There has been a grandfathered use there already. The plain language of the code says that this meets the requirements and I ask you to rule that way.

The Chairman then closed the public hearing for board discussion.

Opened Public Hearing: 2:23 p.m.
Closed Public Hearing: 3:36 p.m.

Motion: Beverly Robinson moved to uphold the City's interpretation and deny the appeal.	2nd By: Tom Muncy	VOTE: 4 – 1
Paul Smith		Aye
Tom Muncy		Aye
Robert Middlemas		Absent
Beverly Robinson		Aye
Richard Fort		Absent
Janet Whitworth		
Lee McElrath		
The City of Asheville's interpretation was upheld.		

Additional Information
OTHER BUSINESS: The Minutes from the March 26, 2007 meeting were approved unanimously. Tom Muncy moved to accept as written and Beverly Robinson seconded the motion.

MEETING:
ADJOURNED: 3:40 p.m.

Read, approved and adopted this 25 day of June, 2007.

Planning Technician

Chairman