

# Town of Milton Board of Adjustment

Minutes of October 27, 2020 Public Hearing/Appeal Hearing

**Purpose of Meeting:** The Applicant, James Welu, is appealing the Town's Code Enforcement decision of August 24, 2020, that the property located at 202 Chestnut Street, further identified by Sussex County Tax Map Parcel #235-20.07-92.00, is not Code compliant or a nonconforming use as two parcels. The Applicant and the Town will present evidence as directed by the Board Chairman.

Attendees: Board Members: Steve Crawford - Chairman  
Allen Sangree - Secretary  
Walter Tydings  
Applicant: James Welu  
Town Officials: Thomas Quass - Project Coordinator  
Seth Thompson - Town Attorney  
Others: Stephani J. Ballard, Esq.,- Counsel to the Board

Executive session began at 5:00pm and the public meeting began at 5:30 pm, Grace Church. Member Janet Turner not present and member John Collier recused. Several members of the public were in attendance for the public portion.

## **Executive Session called to order at 5:00pm on 10/27/2020**

### **Motion to go into executive session**

Mr. Sangree made a motion to go into executive session  
Mr. Tydings seconded  
All in favor 3/0

### **Motion to come out of executive session**

Mr. Tyding's motion to come out of executive session  
Second by Mr. Sangree  
All in favor 3/0

### **Opening of meeting**

Steve Crawford opened the public meeting at 5:30pm October 27, 2020. The Chairperson identified the application and number, the general nature of the proceeding (appeal) and the party who filed the same.

### **No additions or corrections to agenda**

### **Review and approval of minutes of 9/29/2020**

No minutes of 9/29/2020 to approve at this time.

## **THE INFORMATION BELOW IS A SUMMARY OF THE PROCEEDINGS AND PRESENTATIONS MADE AT THIS HEARING. PLEASE REFER TO THE VERBATIM TRANSCRIPT FOR FURTHER DETAILS.**

### **INTRODUCTION**

Ms. Ballard addressed both parties commenting that, if ok, we were going to have a fluid presentation. She introduced the general nature of the proceeding as follows;

- Mr. Welu needs to show evidence as to why he believes this property can operate as a two dwelling unit.
  - The Town is arguing that the non-conforming use ceased at some point or is not operative.
- It is the Town's burden to prove that point.

## **SWEARING IN**

Steve Crawford had everyone who was going to address the board stand and be sworn in.

## **APPLICANT'S EVIDENCE**

Mr. Welu presented a lengthy case with much documentation as to why he believes the property in question has in the past and presently can continue to operate as a two-family dwelling. Mr. Welu has never asserted he ever intended to use this property as a single family home. No adverse effect on neighborhood. Possibly originally built as two-family dwelling back in the 1800s. Double solid brick wall separating house with no current way of passing between the two units without having to first go outside. Two mailboxes, two independent cooking, living, sanitary, and sleeping facilities, two electric meters, two sewer lines, and two separate entrances. Much historical evidence to suggest was always used as two-unit dwelling.

Mr. Welu presented the history and chain of ownership with approximate dates.

Ms. Ballard noted that the addressing issue (Chestnut St./Mill St.) is something controlled by the jurisdiction the property is in and is not dispositive of whether the property is an ongoing nonconforming use or not.

Throughout Mr. Welu's presentation board members asked many clarifying questions.

Written statements in support from the public were held till later in the meeting.

## **TOWN'S EVIDENCE**

Mr. Thompson questioned Mr. Welu at length regarding several issues from his presentation and then proceeded to present the Town's evidence. Mr. Thompson ran through a number of exhibits: property deed for 202 Chestnut Street, Sussex County tax map, several pictures of the house, property record card, County records and permit details, Google maps, real estate multi list, deed from 1958, inventory of Samuel Goslee, observations of Mr. Welu's house diagram drawings, re-assessment paper work.

The important question is, what house design existed in the 1980's when the county zoning code went into effect, not what existed previously. Mr. Thompson stated, If we operate under the assumption that what was there and lawful in 1987, then that controls. In 1982 Sussex county zoning took effect while the Town of Milton's ordinance took effect in 1987. If the property was already grandfathered into Sussex County and the use didn't change from the date of the county zoning and the Town's zoning, the grandfathering continues. Whatever the property was in 1982 when the county started zoning, was grandfathered and if the use didn't change in 1987 the grandfathering would continue under the Town's new zoning.

**Hellen Camenisch** longtime resident and close neighbor made some comments about when the Town installed the public sewer system. Most likely the sewer was installed in the 1960s sometime.

## **10 MINUTE BREAK**

**Mr. Thompson continued:** Final exhibit, rental application. Applied to the Town for a license for 1 family, 5-bedroom rental with two leases. Mr. Thompson argued this shows intent to use property as single family dwelling.

**Ms. Ballard** -Licensing is a separate matter from its status, is it non-conforming or has it lost that status. A town can't make a property lose its non-conforming status by the licenses it chooses to grant.

**Mr. Thompson continued:** Structure vs use. It's the Town's burden to prove when and if the dwellings use was abandoned from two units to one unit. 108 missing physical stove, although all hookups were there.

## **TOWN'S WITNESSES**

**John Collier-** Sworn in by Chairman Crawford. Past Project Coordinator for the Town of Milton and close neighbor to 202 Chestnut Street.

-Mr. Collier testified Mr. Bennett and Clare Bennett and various family members were the only ones to his knowledge to occupy the dwelling since he's been in the neighborhood. To his knowledge after May of 2016 no one lived there on a permanent basis but he would occasionally see Bennett Jr. coming and going, sometimes removing items.

-Mr. Collier saw a mailbox installed and started to look into the zoning issue. He asked Mr. Thompson to write an opinion on the matter of Town code violations 220-71 and 220-72.

- Mr. Welu could have, but was not required to apply for a Certificate of occupancy (220-71-F) which is optional. No one from the town informed Mr. Welu of this option.

-No 911 address assigned to 108 Mill Street

-Mr. Collier stated his opinion on the 1 year nonconforming use issue was, once the house is completely unoccupied that starts the clock for a discontinuance of a nonconforming use.

Ms. Ballard-stated that, by case law, abandonment is more than a temporary cessation of a nonconforming use. It requires some evidence of intent on the part of the property owner to abandon the nonconforming use.

**Thomas Quass**-Present Project Coordinator for the Town of Milton since January 2020.

Job description includes Code compliance. After taking over the job of Town Project Coordinator, Mr. Quass was asked to make a determination on this issue. Determined property was not Code compliant after reviewing all past property records, files, County information from internet, deeds, and reviewed correspondence from past Code Enforcement Officer and a response letter from dated 7/25/2019 from Mr. Welu.

Mr. Quass references a response letter dated 7/25/2019 where Mr. Welu refers to 202 Chestnut Street property as a one family, 5 bedroom structure as evidence he abandoned the use as a two family structure.

Mr. Quass explained the difference between use (daily use) and structure. (how building is built)

#### **MR. WELU'S WITNESSES**

Mr. Welu did not call any witnesses but read several letters, which were placed into the record.

1. Erin Ann Beebe, real estate agent for Mr. Welu.
2. Karen Bierman, 104 Mill Street. Neighbor with no concerns.
3. Robert Gingrich, 206 Chestnut Street no concerns or difficulties.
4. Betsy Smith, past owner of 104 Mill Street. Spoke about Henry Bennet Jr. not abandoning home from 2016 to 2018. Knew it was a two unit home and had no problems.

#### **10 Minute break**

5. Ms. Ballard read one e-mail forwarded to the Town from Bernard Miller, Lewes DE addressed to Mr. Welu. Mr. Miller resided on the Mill Street side of the property for approximately 10 years. House was a duplex and both sides were totally independent of each other with no adjoining doors. Used the address 108 Mill Street. Stated it was two family dwelling before they moved there and two family after they left sometime in 1979. Had correspondence from Cape Henlopen School District mailing report cards to 108 Mill Street. A copy of this email will be placed into the record.

#### **PUBLIC COMMENTS**

1. P. D. Camenisch, 302 Chestnut Street has lived there for 40 plus years. Confirmed Mr. Bernard Miller's letter was correct and stated that to his knowledge no one has rented house till Mr. Welu purchased. Steps entrance steps for 108 were in a very bad state of repair. Questions were raised as to ownership and standing. After Bernard Miller moved Mr. Bennett's family moved in and took over entire house. Concerned this might set precedence. Building unoccupied for two years 10/16 to 2/18 based upon his observations.

#### **CLOSING ARGUMENTS**

**Town's attorney Mr. Thompson went first.** Boils down to the issue of whether the owner of the property can use the structure as a two family dwelling. No structure issue, its use is what is in question. Can Mr. Welu rent out two separate units in this one structure? It's the Town's position when after looking over all the documents and you weigh those documents there are more documents that indicate that it was a single-family residence verses two dwelling units approved at any point in time. 1987 important date. 220-71 & 220-72. Mr. Welu switched over to a conforming use and he cannot now go back to a nonconforming use. It's the Town's position, when the use has been discontinued for one year it shall be deemed abandoned. Intent is not mentioned in Milton's Town Code.

**Mr. Welu presented his closing arguments.** Mr. Welu believes the physical evidence is clear, the property was built as two separate units and has remained the same. Property has always been used as two complete totally separate units. Property was never abandoned even if not lived in, it was always available for the Bennett family's use. Property was never abandoned and use was never discontinued.

Mr. Welu thought the Code must be taken as a whole to avoid absurd results. He believes designating the dwelling as single family would result in an absurd result. He would have to make major structural changes to make this possible. A few clarifying questions from the Board followed Mr. Welu's closing.

**CLOSE PUBLIC HEARING**

Mr. Tyding's made a motion to close the public hearing  
Second by Allen Sangree  
All in favor 3/0

**DISCUSSION, DELIBERATIONS, AND POSSIBLE VOTE ON THE APPLICATION**

The Board began discussions and deliberations on the application and had many questions. The Board determined that given the volume of information presented, we need more time to consider the facts to make an informed decision. The Board would like to get a transcript of the proceedings to review all testimony. Due to the scope and amount of information covered Mr. Sangree asked for a concise statement as to the exact question the Board needs to answer. (Ms. Ballard will be e-mailing board a list of issues and questions that need to be addressed.)

**MOTION TO SCHEDULE CONTINUANCE OF MEETING**

Mr. Sangree made a motion to schedule new meeting after transcripts provided and time for board members to consider. The new date set for next meeting is tentatively November 17<sup>th</sup> 2020.  
Second by Walt Tydings  
All in favor 3/0

**MOTION TO ADJOURN MEETING**

Mr. Tydings - motion to adjourn meeting around 10:00pm  
Mr. Crawford second  
All in favor 3/0

**These minutes approved at the 16 November 2020 meeting.**