

Memorandum

To: Waldo Gilpatrick, Code Enforcement Officers, City of Gardiner
From: Erik M. Stumpf, City Solicitor
Date: December 7, 2005
Re: 103 Brunswick Avenue – Historic Use and Conformance Questions
Cc: Jeff Kobrock

This memo is in response to questions raised by Philip Barter regarding potential non-conforming use of property located at 103 Brunswick Avenue in Gardiner. Specifically, the property is located in the High Density Residential District but the first floor of the existing structure apparently consists of five (5) rooms which have been offered for lease to third parties for use as commercial offices. The question presented is whether or not the use of the first floor rooms for commercial office space is permissible as a legally grandfathered non-conforming use of the property or whether that use is in violation of the current Land Use Ordinance.

In preparing this memo, we have relied on records and information concerning past use of the property provided by the City of Gardiner, including code enforcement office and assessing department records. We have not conducted a title search or an independent factual investigation of the property's use history.

This issue has been reviewed by attorney John Canders of our Bangor office with the following conclusions:

I. Historic Use

According to City Tax Assessor's records, the subject property is currently owned by John T. Lawrence, who acquired title by deed dated June 8, 2005. The chain of title maintained as part of the Assessor's records reveals the following prior owners of the property:

- Karen L. Molvig and Jean McWilliams by deed dated April 10, 2002
- Karen L. Molvig by deed dated May 29, 1992
- Christopher R. Denison by deed dated September 18, 1986
- John Douglas Denison and Elizabeth Denison by deed dated October 14, 1959.

The Assessor's records also include a crude property sketch apparently drawn in June 1992 with the following notations:

- "1st Fl. Doc's Office – Disc. & Unused 5RM"
- "2nd Fl. Living qtrs 5Rms+"
- "3rd Floor 5RM No Heat – Unused"

There is no indication in the records concerning whether the 2nd floor space was in fact being used for residential occupation and, if so, by whom. However, as you related to attorney Canders during your telephone call with him on December 5th, Karen Molvig occupied the residential space on the 2nd floor when she acquired the property in 1992.

An informal history of the use of the rooms on the first floor from 1991 to June of 2005 was provided by Jean McWilliams, a former tenant and co-owner. Ms. McWilliams indicated that Dr. Denison used the entire first floor for his medical practice beginning in the 1950s. It is not entirely clear when Dr. Denison discontinued that practice, but it appears from the Assessor's records that he was no longer practicing in June of 1992. According to Ms. McWilliams, the first floor consists of six (6) rooms, which in 1991 were being used by various parties as two (2) two-room "suites" and two (2) one-room "suites". A table representing the use of the rooms according to the McWilliams history is attached for your reference.

II. Discussion

A. Applicable Categories of Use Within the High Density Residential District

i. Home Occupation

Under the Zoning Ordinance of the City of Gardiner, Maine (the "1986 Zoning Ordinance") as in effect from January 1, 1986 until the June 28, 2003 effective date of the Land Use Ordinance of the City of Gardiner, Maine (the "2003 Land Use Ordinance"), a Home Occupation was permitted in the High Density Residential District, but a conditional use permit from the Planning Board was required (see Land Use Table, Item 2.8). The 1986 Zoning Ordinance defined a "Home Occupation" as follows:

An occupation or profession which is carried on in a dwelling unit or in a building...; carried on by a member of the family permanently residing in the dwelling unit; clearly incidental and secondary to the use of the dwelling unit for residential purposes; and which does not change the essential residential character of the dwelling unit or neighborhood.

Similarly, a Home Occupation is permissible in the High Density Residential District under the 2003 Land Use Ordinance, but approval of the Planning Board is required (see District Use Table). The 2003 Land Use Ordinance contains an identical definition of Home Occupation.

As noted above, it is unclear from the factual record whether or not the 2nd and/or 3rd floor of the subject property were occupied by Dr. Denison throughout the period of time that he was a joint owner of the building (October 1959 to September 1986) or during the period of time that Christopher Denison owned the subject property (September 1986 to May 1992). In addition, it is not known whether Dr. Denison continued to conduct his medical practice from the 1st floor when ownership transferred to Christopher Denison.

As a result of the foregoing, there is not sufficient information available to determine with any degree of certainty that the use of the 1st floor of the subject property from October 1959 to May 1992 was, in fact, a Home Occupation. There does not appear to be any record that the Planning Board issued a conditional use permit under the 1986 Zoning Ordinance, but this is not conclusive evidence of use as the ordinance in effect prior to January 1, 1986 may not have required such a permit.¹ However, it appears that beginning in 1992 Karen Molvig occupied some portion of the property as a residence and utilized a portion of the 1st floor space as a professional office, although she did not utilize the entire 1st floor.

ii. Business Offices

Under the 1986 Zoning Ordinance, offices were specifically prohibited in the High Density Residential District (see Land Use Table, Item 3.7), although that term has no specific definition. Likewise, the 2003 Land Use Ordinance does not allow offices of any size within the High Density Residential District (see District Use Table). The 2003 Land Use Ordinance defines “office” as “[a] room or group of rooms used for conducting the affairs of a business, profession, service, industry, or government.” It is not known whether office use was permitted under the provisions of the applicable ordinance in effect prior to January 1, 1986.

As discussed above, it is not clear from the available information whether the use of the 1st floor by Dr. Denison continued after the transfer of his ownership of the subject property. Nor has it been established that his use of the 1st floor as a professional office was not a legal use under any pre-existing zoning ordinance from the time he acquired the property in 1959 that would have been allowed to be continued by subsequent owners, provided that there was no interruption in such use exceeding one year in duration. As a result, it cannot be determined with any certainty that the current use of the 1st floor of the subject property is a non-conforming use.

B. Pre-existing Non-Conforming Use Within the High Density Residential District

With respect to non-conforming use, Section 3201(E) of the 1986 Zoning Ordinance provides, in part, as follows:

1. General
 - a. The use of land, building or structure lawful at the time of adoption or subsequent amendment of this ordinance may continue although such use does not conform to the provisions of this ordinance.
 - b. Non-conforming structures, lots and uses may be transferred and the new owner may continue the non-conforming structure or lot, subject to the provisions of this ordinance.

¹ The applicable ordinance for the period prior to January 1, 1986 was not available and therefore has not been reviewed.

- c. This ordinance allows the normal upkeep and maintenance of non-conforming uses and structures including repairs or renovations which do not involve expansion of non-conforming use or structure.
- 2. Non-Conforming Uses
 - a. A non-conforming use which is discontinued for a period of one year may not be resumed. The uses of land, building or structure shall thereafter conform to the provisions of this ordinance and the non-conforming use may not thereafter be resumed.

Section 4(H) of the 2003 Land Use Ordinance contains identical non-conformance provisions.

As a result of the non-conformance language contained in both the 1986 Zoning Ordinance and the 2003 Land Use Ordinance, any non-conforming use of the subject property that was lawful at the time of the adoption of each ordinance was permitted to continue, provided that such use was not discontinued for more than one year. Here, the factual record lacks sufficient information to provide useful guidance as to the exact classification of the use of the 1st floor of the subject property at the time of the adoption of the 1986 Zoning Ordinance, or whether or not that use was lawful.

C. Possible Classifications of Use of Subject Property as of 1992

Given the gaps in the factual record and the high degree of uncertainty concerning the classification of the use of the 1st floor of the subject property, five possible classifications of use exist, which are discussed below. It must be noted, however, that it is impossible to determine the correct classification without additional research.

i. Continuation of Home Occupation (Portion of 1st Floor Only)

If it is assumed the Dr. Denison occupied the residential portion of the subject property and continued to reside there throughout the period of time that he conducted his medical practice from the 1st floor, and that such use constituted a Home Occupation, then it is possible that Karen Molvig continued that Home Occupation as to the portion of the 1st floor that she utilized for her medical practice. Unless any of the current occupants qualify for classification under Home Occupation, their use would be in violation of both the 1986 Zoning Ordinance and the 2003 Land Use Ordinance.

ii. Conversion of Home Occupation to Non-Conforming Office

If it is assumed that Dr. Denison's and Karen Molvig's use constituted a Home Occupation, then the use of the remainder of the 1st floor by third parties would be considered non-conforming and in violation of both the 1986 Zoning Ordinance and the 2003 Land Use Ordinance.

iii. Continuation of Unlawful Non-Conforming Use

If the use by Dr. Denison was not a Home Occupation, but rather constituted a non-conforming use of the 1st floor as prohibited office space that was not lawful at the time Dr. Denison commenced such use, then any continuation of that use by any party would be in violation of both the 1986 Zoning Ordinance and the 2003 Land Use Ordinance.

iv. Resumption of Discontinued Use

Given that it is not known when Dr. Denison discontinued his medical practice, it is possible that his use of the 1st floor of the subject property, whether lawful or not, was discontinued for more than one year and then resumed by the subsequent occupants of the rooms on the 1st floor. As such, it is possible that such a resumption would be in violation of both the 1986 Zoning Ordinance and the 2003 Land Use Ordinance.

v. Continuation of Lawful Non-Conforming Use

If the use by Dr. Denison after 1986 was not a Home Occupation, but rather constituted the continuation of a lawful non-conforming use, then the use by the subsequent occupants of the rooms on the 1st floor would be permissible so long as the scope of such use was not expanded beyond the confines of the 1st floor and there was no interruption in such use for more than one year. The lack of any record of past enforcement action by the City since adoption of the 1986 Zoning Ordinance provides some inferential support for this possibility.

III. Enforcement Options

In light of the uncertainty concerning the historical use of the 1st floor of the subject property and the legality of such use, the City of Gardiner may not have a compelling basis to treat the current use as non-conforming and in violation of the 2003 Land Use Ordinance. However, the absence of such information to support the current use as lawful would justify issuing a notice of violation if the City prefers to enforce strictly the 2003 Land Use Ordinance.

Such a notice would put the burden of proof on the property owner to present the necessary evidence to establish the complete historical use of the property and substantiate the current use. In addition, issuing a written notice of violation would enable the property owner to make an appeal to the Board of Appeals, which would then be in a position to decide formally whether the existing use is permitted.

Alternatively, the City could defer its decision concerning possible enforcement action pending further factual investigation of the past use of the property for the purpose of determining whether or not current use of the first floor for office purposes constitutes a continuation of a legally grandfathered non-conforming use. Additional sources that might be consulted for this purpose include commercially published city directories for the period concerned, old “yellow pages” telephone directories, commercial fire insurance maps, and City historical society records. A full title examination for the period 1959 forward may also shed some light on the past use of the property.

It should be noted in this context that if the City were to issue a notice of violation and then proceed with a land use enforcement proceeding in District or Superior Court, the City could become liable for payment of the property owner's attorney's fees, if a judgment is entered in favor of the defendant. *See* 30-A M.R.S.A. sec. 4452(3)(D). As a general matter, therefore, it is prudent to have a high level of confidence in the City's factual case prior to initiating enforcement proceedings.

IV. Conclusion

The existing factual record concerning the historical use of the subject property is incomplete and lacks sufficient detail to establish with any degree of certainty how such use would be classified, whether or not it was lawful prior to the enactment of the 1986 Zoning Ordinance, whether any lawful use was discontinued for more than one year, or whether or not the current use is in violation of the 2003 Land Use Ordinance.

As a result, the City of Gardiner could decide that there is not a compelling basis for determining that the current use is a violation of the 2003 Land Use Ordinance.

In the alternative, the City could decide that the lack of such information necessitates a notice of violation so that the property owner would be required to provide sufficient evidence of prior use to substantiate the current use. A notice of violation would also make available to the owner of the property an appeal to the Board of Appeals, which would then make a decision concerning the current use of the property.

As a second alternative, the City could continue its own factual research prior to making a final enforcement decision.

EMS