

# Code Enforcement Questions/Answers Related to Accessory Dwellings (ADs)

3/11/08 – Final Version

*The following questions were discussed in a 3/5/08 meeting with Susan Bell, Code Enforcement staff, Housing staff, members of the Housing Services subcommittee of the Housing Commission, and members of the Civic Federation.*

## Preamble

It's important to note the following as you read the questions and answers below:

- Occupancy violations may violate the State Building Code—for example, too many people for the house or people sleeping in bedrooms without required egress).
- Occupancy violations may violate the Arlington Zoning Ordinance—for example, more than 4 unrelated people in a single-family home.
- Illegal ADs violate the Arlington Zoning Ordinance.
- Some ADs were legal when first built and became legal but non-conforming when the zoning changed. *So there are some legal ADs in Arlington.*
  - Some were built before 1930 when the Zoning Ordinance was first adopted; others were built before 1964 when the single-dwelling rules went into effect; others were built by gaining a variance from the BZA.
  - If any of these non-conforming units are not used for 2 years + 1 day, they lose their “grandfathering” and can no longer be used.
  - There is no list of legal ADs. Establishing that a unit is legal is handled on a case-by-case basis. Legal are not identified in the Real Estate database.
- Compliance with the State Building Code and the by-right zoning is handled by Code Enforcement. Compliance with site plans is handled by Zoning
- Violations of the Building Code are Class 1 criminal misdemeanors. Violations of the Zoning Ordinance are unclassified criminal misdemeanors.
- The Code Inspector must gain access to gather evidence of a violation.
  - If the resident or owner does not allow entry for an inspection, the Code Inspector may go to a magistrate to ask for a search warrant.

However, staff indicated that they have never been able to secure a warrant to inspect for occupancy or illegal unit violations because the evidence standard for the warrant is “beyond a reasonable doubt” which is very difficult to meet without gaining entry — and because magistrates do not see occupancy and/or zoning violations as criminal acts.

- If the Code Inspector gains access and finds evidence of a violation, the inspector prepares a Notice of Violation. The owner has 30 days to correct the violation, but staff may give an extension.
  - Arlington staff does not levy fines for violations. Staff is not authorized to levy fees; however, the courts may fine the violators with fines not to exceed \$2500.00.
  - If the owner is not making progress to resolve the violation, staff will take the owner to the Circuit Court. This is a lengthy process, as there will likely be continuances.
  - Unlike many parts of the US, Arlington residents have the means to hire an attorney to fight the violation or defend the violator in Circuit Court.
- If the County wins in the Circuit Court, the violator may be fined — but judges usually do not impose a fine. In addition, there is no vehicle for injunctive relief, so if the violator does the same thing again, the process begins again from the start.
- When resident of Arlington calls Code Enforcement to make a complaint — or uses the online form on the website — Code Enforcement is not allowed to release their name. Thus, the person making the complaint can be anonymous.
- A resident of Arlington may go to a magistrate directly to make a complaint, but will be subject to the same “beyond a reasonable doubt” evidence standard.

## Questions and Answers

(1) With regard to the complaints your department has gotten about illegal units and/or occupancy violations:

- How many illegal apartments and occupancy violation complaints have you received in the last three years? It would be helpful to know if the number is growing, declining, or remaining steady.
  - **Staff presented data for complaints and for cases. A case has at least 1 code violation, but may have others violations as well.**

Staff said that, on average, it takes about 4.5 months to resolve an illegal occupancy or illegal AD case.

- Staff said they reviewed data for 2004, 2005, and 2006. During this 3-year period staff had 10,500 complaints of which 158 were “overcrowding” complaints that involved too many occupants and/or an illegal AD. (Thus overcrowding represents only about 1.5% of their complaints.)
  - Of the 158 cases, 144 were based on complaints from neighbors and 14 were raised by staff proactively (for example things they observed when inspecting other violations).
- The number of overcrowding complaints grew somewhat over the 3-year period: Of the 158: 28 were in 2004, 63 were in 2005, and 67 were in 2006.
- *Staff has data about the specific location of each of the violations. They have been asked to release information about the general location of these violations.*
- How often have you been able to gain access needed to respond to the complaint?
  - Staff says they can gain access to inspect about 80% of the time. They must identify themselves and be let in by the owner or resident. They cannot use false pretenses to gain access, such as pretending to be a renter.
- If you cannot gain access to inspect, what do you do?
  - Staff says that they try to generate dialogue with the property owner and/or resident that will identify and/or resolve violations.
- We have been told that it's difficult to get a warrant. How often have you sought warrants? How often have you succeeded?
  - Staff will not seek a warrant unless they have evidence that meets the “beyond a reasonable doubt” standard. It's difficult to get this kind of evidence without gaining access because:
    - Evidence must be gathered by a Code Enforcement Officer so the officer can testify to it.
    - Indicators that neighbors believe are obvious signs of illegal overcrowding — such as two mailboxes or many cars parked on the site — do not meet the evidence standard.

- **In the last 3 years, staff has succeeded in getting warrant zero times. (They did not indicate how often they tried.)**
- We have also heard that videos and digital pictures cannot be used as evidence in Virginia. Is this true?
  - **As relates to occupancy or illegal unit violations: Videos and pictures gathered by the Code Enforcement Officer can be used as evidence. Videos and pictures taken by a third party cannot be used as evidence – either to get a warrant or in subsequent proceedings.**
- Going back to the complaints, please give us a breakdown of how they have been resolved.
  - **Of the 158 overcrowding complaints in 2004-2006, 63 (or 40%) became overcrowding cases.**
    - **Of the 63 overcrowding cases: 26 involved illegal units and 37 involved overcrowding violations.**
    - **All 26 cases involving illegal units were successfully closed: 4 in 2004, 7 in 2005, and 15 in 2006.**
    - ***88% of the 37 overcrowding cases were successfully closed.***

(2) We recently were told that the Code Inspectors are required to pass a Virginia test by the end of their first year on the job. Is this true? We were also told that some people have failed the test and lost their jobs — true?

- **Yes. Code Inspectors must pass a state test within 18 months. Some have not passed and have been reassigned.**

(3) A County Board member told me that Arlington is hiring 9 more Code Inspectors. Do these reflect an increase in staffing or are you filling existing positions?

- **The additional inspectors the County Board Member was referring to are for inspections of new buildings under a new fee structure and enterprise fund established last year.**
- **Code Enforcement has 10 people (8 inspectors and 2 team leaders) that can handle occupancy or illegal AD complaints and cases. One team leader left his position recently, resulting in one vacancy.**
  - **When asked if this staffing was adequate, we were told that in 2006, the American Association of Code Enforcement suggested that there be 1 Building**

**Code/Property Maintenance Code Inspector for each 10,000 population. This would suggest that Arlington should have at least 20 Code Inspectors, not including those inspecting for Zoning Ordinance violations.**

(4) How do the Building Inspectors and Zoning Inspectors work together on illegal ADs and occupancy violations?

- **The Code Inspection staff investigates both violations of the State Building Code Inspections and the Arlington Zoning Ordinance.**
- **Inspectors that inspect new constructions handle potential illegal AD's. A building permit is not issued when the proposed alteration to a single-family indicate separate and independent dwelling arrangement. Under the building code, an AD consisting of independent living, cooking and bathing facility will constitute a change of use and requires separate building permit and certificate of occupancy. The certificate of occupancy cannot be issued unless compliance with both the building code and zoning ordinance is established.**

(5) Do your Inspectors drive around and look for violations? There seem to be some obvious illegal ADs in many places. Is it County policy or practice that if no one is complaining then you are not going to proactively try to identify illegal ADs? (I ask this because the Housing Commission AD Report estimated that there are more than 1,000 illegal ADs in Arlington.)

- **Staff estimated that 2-3% of the Code Inspection activity is related to occupancy or illegal AD violations. They do not cruise streets looking for such violations. However, they may see them and subsequently investigate when they investigate an adjacent property, or if they get a referral from another Arlington department, such as the Police or Human Services.**

(6) When you find that more than 4 people live in a dwelling, how do your inspectors determine if they are related?

- **The interview people. They cannot check IDs. They have no way to determine if people are not related by blood or marriage if they say they are.**
- **It appears that a Manassas court case may result in the repeal any zoning restrictions involving people being related by blood or marriage. However, a cap on the number of people in a dwelling can still be limited by the State Building Code and, it is**

**believed, that the Zoning Ordinance can also impose limits on the number of people.**

(7) What role do the police play, if any, in getting access to properties that have an occupancy complaint?

- Are people calling the police about occupancy violations? We have heard that the police have not been able to get an effective hand-off to Code Enforcement when they find violations.
- **The only role that the Police have in Code Enforcement is to enforce the noise limits during the hours that Code Inspectors are not on duty.**
- **Police may refer possible violations to Code Enforcement, however police officers cannot provide evidence.**
- **Police cannot act as Code Enforcement Inspectors, as State law does not allow a criminal search to be used for administrative purposes. (Thus a Police Officer could not provide evidence about the existence of an illegal AD.)**

(8) What are your thoughts on whether ADs will be required to comply with the latest building code? Where would you be more/less likely to give exceptions? I'd like to find out the major areas where people will find it difficult to comply (for example basement apartments in older houses). I'd also like to know if you plan to develop some rules that you are going to share with people soon. My impression is that people are overly optimistic about their ability to conform to the Building Code.

**If an AD Zoning Ordinance is passed:**

- **ADs will be required to meet the current State Building Code. In most cases the AD will be built to higher (safer) standards than the current structure.**
- **Staff will develop a packet explaining what the rules are – including what Building Code rules will apply.**
- **Some older homes will find it too difficult or expensive to meet the requirements. For example:**
  - **For interior or semi-detached ADs, there must be a fire-rated ceiling (basement AD) or wall (semi-detached AD).**
  - **A bedroom in a basement apartment must have a window opening that is at least 5.7 square feet. (This requirement**

might be able to be modified if the basement apartment has a sprinkler system.)

- **Basement ceiling clearance should be at least 7 feet. Pipes or vents can hang down 6", providing 6'-6" clearance.**