

PLANNING AND COMMUNITY DEVELOPMENT

PLANNING • CODE ENFORCEMENT • BUILDING INSPECTIONS • CENTRAL PERMITTING



MINUTES

Pender County Board of Adjustment

September 16, 2009

9:00 a.m.

**Pender County Public Meeting Room
805 S. Walker Street, Burgaw, North Carolina**

Call to Order: Chairman Erwin Kane

Prayer: Donald Luther

Roll Call: Chairman Erwin Kane

Pender County Board of Adjustment Members:

Kane: X Thompson: X Ferrante: X Loughlin: X Pullen: X James: Luther: X

Approval of Minutes: August 19, 2009

Motion to approve: Mr. Ferrante; **seconded** by: Mr. Luther; **Vote:** 5-0

Member Luther: Requested to make comment regarding last meeting.

Attorney Thurman: Determined decision up to board chairman, however he suggested comments be held for the end of meeting during discussion (Item 3).

Swearing in of witnesses by the County Attorney, Trey Thurman, for both cases to be heard.

Public Hearing

1. **Administrative Appeal Presented by Planner, Ben Andrea** - Frederick Jones, applicant, on behalf of Nora Enriquez and Celia Simpson, is requesting an appeal of administrative review, as prescribed under Sections 3.5C and 6.2C of the Pender County Zoning Ordinance. The applicant is appealing a decision made by the zoning administrator in regards to the exemption of two proposed subdivisions as described in the definition of *Subdivision* in the Pender County Zoning Ordinance. The properties are located on Stoney Road and may be identified as PINs 3236-16-3524-0000 and 3236-16-6543-0000.

Mr. Andrea introduced himself as a member of the planning staff and first time presenter and explained that the projector was down, however the TV was intact and if anyone had any questions, please feel free to express them.

Chairman Kane agreed to allow Mr. Luther to be excused due to his relationship with one of the witnesses.

Mr. Andrea began a background and description of an appeal as described in the submission of same in the Board of Adjustment staff report (AAR 09-09-16-03 Simpson/Enriquez).

Clarification was requested by Mr. Green to understand if this was a matter of an exemption. Mr. Thurman explained this was an appeal to technically determine if the staff decision was in error and whether or not the staff correctly applied the ordinance. He further explained this was not a case where there is a variance sought and the board had a determination of a criteria of hardship in an attempt to allow equity. Attorney Thurman advised that the facts should be reviewed along with the ordinance and a determination be made if the staff interpreted the ordinance correctly. Mr. Luther requested to be shown where an error had been made in the documentation. Mr. Thurman explained that task was for the applicant to identify.

Mr. Fred Jones, the surveyor of the property, came forward to explain these lots are smaller than two acres and therefore, the owners can do what they want as long as they meet the county regulations of zoning for R-20 setbacks. In addition, he explained this is an Estate division (Will submitted with records requesting a division of land between all the children – two have not received their share of the land) which should be complied with in accordance to exemption # 5. Mr. Pullen requested the location in the ordinance where it described the exemption of lots smaller than 2 acres and was directed by Mr. Jones to Page 11.35 under “Subdivisions.”

Mr. Pullen questioned why the 5.93 acres in the diagram are different than the two remaining parts depicted on the plat. Mr. Pullen observed six lots on the plat; from his understanding there were four existing lots and now it looks like two of the four have been subdivided and are now less than 2 acres. Mr. Jones clarified because there are six heirs involved; the original division for the family was for three lots and a remnant created in 2007. Mr. Andrea interjected that this division should not have been approved for the same reasons further divisions are being denied currently; the three parcels to the east do not meet the access regulations. Mr. Andrea agreed with Mr. Jones the subdivision in question today meets the R-20 zoning district for less than two acres, however, it does not meet the access requirements.

Mr. Pullen addressed Mr. Thurman to query how does the board differentiate between an existing nonconforming use that is now going to be further non-conforming. Attorney Thurman responded saying the general rule was that you do not expand a non-conforming action. If something is non-conforming it is allowed to continue, however, it is not allowed to expand. Mr. Thurman gave an example that if building setbacks were 5’ too far into the property line or increased the area of the business or changed the footprint, etc. any further action could not be taken. There is an exemption for an Estate development for division, but it cannot be for building or development use.

Mr. Thurman stressed the question of access. Mr. Jones said there was access from Stoney Road, which may not be legal; however, he was fairly sure access by prescription could be obtained. Mr. Thurman identified there was currently no legal access. Mr. Jones offered the access was on state property via the railroad. Mr. Pullen questioned if there was any direction to check with the Department of Railroads. Mr. Andrea disagreed with Mr. Jones describing the plat as depicted is an oversight and incorrectly drawn. The center line of the railroad corridor is actually the eastern boundary and therefore Stoney Road is on private property, not on state property.

Ms. Celia Simpson came forward to speak as a family member requesting the division be approved to satisfy the Will as her mother wished. She added that she was not looking for something to be built on it, but just trying to see the land distributed between all the heirs. Ms. Mary Hayes then came forward to say her dad lived in the area and confirmed that Stoney Road is on private property. Ms. Hayes further stated that Stoney Road was an “ease way” which was the only way to obtain egress/ingress from their homes and it was on private property.

Chairman Kane asked for a motion.

Motion was made by Mr. Pullen to uphold the ruling of the county planning staff.

Motion was seconded by Mr. Luther

Motion carried unanimously 5-0 including Mr. Kane (Mr. Thompson recused)

Mr. Thompson was asked to rejoin the board.

2. **Variance – Side Yard Setback Requirements** – Anne Hayler, applicant, on behalf of James F. Lankford, owner, is requesting a variance from the Pender County Zoning Ordinance, §9.2, Accessory Building, Setbacks and Separation Requirements. The applicant is requesting an 8.8 ft. variance from the 10 ft. minimum setback requirement for an accessory structure less than 600 square feet in area. The property is zoned R-20C, Residential Conventional Housing District, and is located at 861 Corcus Ferry Road in Hampstead, NC.

County Attorney, Trey Thurman asked all to come forward in regards to this case, however, only Staff member, Ken Vafier, was present. Mr. Vafier suggested that they may not be present since another notice was not sent out; however, according to Roberts Rules of Order, the county is not required to re-advertise or notify the owner. Mr. Thurman recalled the applicant specifically requested at the hearing held in August that their appeal be continued to the next meeting (please reference jpBOA8-19-09 fin). Mr. Luther inquired if the board was being asked to make a motion to uphold or deny the variance. Mr. Thurman explained that in this case, there is a violation of the ordinance and the board is required to review the findings according to the ordinance and uphold the ordinance as written based upon the facts presented. He further explained that variances are sometimes allowed due to undue hardship, or the board may find the generator can be moved into a location where it would be conforming to the ordinance. In addition, he explained the expense of moving the accessory structure does not suffice as a hardship. The Chair again asked if anyone was in the room representing the Haylor appeal. Mr. Thurman suggested that the case be reviewed by the staff in attendance for the board.

Mr. Vafier recounted on 3/21/07 how the Board of Adjustment unanimously denied an initial appeal for a variance of 8.8' from the 10' minimum setback requirement for an accessory structure less than 600 sq. ft. The decision was subsequently appealed to the Pender County District Court where it was remanded back to the local jurisdiction for a re-hearing based on insufficient fact finding by the Board of Adjustment at that time. The staff sent the transcripts and provided a template to the board for findings of the facts that staff intends to use for this and all similar cases.

Mr. Vafier explained the property is in R-20C at 861 Corcus Ferry Road in Hampstead on a 2-acre lot. A detached accessory structure of 11.4' x 8.5' was constructed to house an emergency generator 2 years ago. Mr. Ralph Kays, Code Enforcement Office, visited the site after receiving inquiry to find the structure non-compliant with the 10' setback requirement and 1.2' from the northwest property line verified by a physical survey. Therefore, the applicant requested a variance of 8.8' from the side yard setback in order for the structure to remain as placed initially. Mr. Vafier offered to entertain any questions.

Mr. Kane asked if there was any new information in the case. Mr. Vafier replied not to staff's knowledge. Mr. Vafier also referred the board to the letter from the applicant stating their reasons for placement of the generator, as well as their reasons for the variance.

Mr. Kays offered a survey indicating the non-compliant placement of the structure from March, 2007. Ms. Loughlin recognized the survey as the same in her packet.

Mr. Vafier reminded the board that all the material presented today was in the initial packet presented to them back in March, 2007.

Mr. Vafier stated that staff sent a letter to the applicant and adjacent property owners notifying them of the hearing, and also placed a sign at the site notifying all.

Mr. Ferrante divulged that he had been contacted by one of the parties, but denied discussion regarding the matter and advised caller to wait until the hearing.

Mr. Thurman advised the board that a decision should be based on the evidence/transcript and anything heard today, as opposed to any conversations heard outside of the court or this hearing. He stated it was no different than court proceedings where a juror at a trial had received publicity; however, he was only to consider the information presented in the court room.

Mr. Pullen said he could not identify anything in the transcript that staff had done wrong and therefore, made a motion to uphold the staff decision.

A second by the Chair was requested, however, Mr. Ferrante asked for a discussion to talk about the various reasons that led to the denial for the request for the variance.

After Mr. Thurman advised how to move forward with legal proceedings, Mr. Pullen withdrew his motion.

Mr. Pullen motioned that the six items be reviewed by the board, with Mr. Luther offering a second. The motion carried unanimously 5-0.

Mr. Thurman advised the board to refer to the facts that they could find that the applicant presented no case for hardship except the cost of moving the generator, which is not a sufficient hardship or given that the applicant has a 2-acre lot, there is nothing to prevent them from moving the structure to an area of compliance. He also stated he believed that specific findings were what the court was looking to hear.

Mr. Thomson clarified his understanding that they would review each item and vote yea or nay and then justify the board's decision.

Mr. Kane affirmed and read the first item. He then asked if the board was in agreement to deny the appeal based on the first item regarding hardship. Mr. Thompson agreed there was no hardship. There was no dissent.

Mr. Kane addressed the second item concerning special privilege. Mr. Pullen asserted granting the variance would give special privilege to the applicant.

Mr. Thurman interjected to advise the board that every factor did not have to be failed, nor the majority, to deny the appeal stating if one factor failed than it was sufficient to uphold the original findings of failure. If there is an item which a board member takes issue with, a written order can be submitted for that particular issue to be reviewed by the court.

Mr. Ferrante stated there was no hardship based on shape or size and based on all the facts read, this was the cheapest place to put it. It could be relocated deep within the property but it would cost some money.

Mr. Ferrante did not see that as a reason to change the previous findings and made a motion to uphold the previous findings based on the facts there is no hardship in relocating the generator on the property according to the ordinance, other than the expenditure by the applicant, who chose the cheapest area to place the structure.

Mr. Thompson seconded the motion with the qualification that the “cheapest” part be retracted. Mr. Ferrate amended his motion and it was seconded. Motion passed unanimously 5-0.

3. Items for Discussion - Mr. Kane asked if there was anything else. Mr. Green said on reviewing his notes from last meeting, he was surprised by the board’s decision. He stated he had read the statement of the Code Enforcement Officer, the animal control supervisor, two former employees, three neighbors, including Mr. Green where all testified that over several months and sometimes years, there was no activity at that location. He wanted to make sure the board did a proper job to the county and the neighbors and while he understands there was much diversion in the testimony, he concluded that may have been how the decision was determined.

Mr. Kane asked if there were any other comments. No other comments mentioned.

4. Adjournment - Mr. Kane entertained a motion to adjourn. Motion was made by Mr. Thompson to adjourn. Motion was seconded by Mr. Pullen with all assenting. Motion passed unanimously 5-0.

Board Action September 16, 2009 Minutes:

Motion: _____ Seconded: _____

Approved: _____ Denied: _____ Unanimous: _____

Kane _____ Thompson _____ Ferrante _____ Loughlin _____ Pullen _____ James _____ Luther _____