

REQUEST FOR BOARD ACTION

ITEM NO. 14.

DATE OF MEETING: September 21, 2009

REQUESTED BY: Patrick Davenport, Planning and Community Development Director

SHORT TITLE: Application for Determination of Vested Rights

BACKGROUND: Staff received an application for a Vested Right Determination from Erik Litvak regarding a building side setback issue on a vacant lot located at 102 Inlet Court in Hideaway Shores subdivision, Hampstead.

Subject property: Current land use: Vacant; Zoning: R-20C
Lot size: 32,234 sq. ft. (0.74 acres); Lot dimensions: approx. 95'X 330'

Details of request: On or about August 18, 2004, Mr. Kurt Evers/Land Management Group applied for and received a Zoning Determination for a Septic permit which indicated the building setbacks for the subject property was 10' for both sides (Tab P). The zoning determination/permit has now expired. No other zoning or building permits have been applied for since the aforementioned permit expired.

Applicant Litvak requested a zoning determination (letter dated March 23, 2009) on this issue and staff responded with a letter dated May 18, 2009 which declined to apply the 10' side setbacks as indicated in the August 18, 2004 zoning determination/permit. Staff's letter references the zoning ordinance Section 12.2 in which 10' side setbacks are *possible* for non-conforming lots if the lot's area is below the minimum for the district area, however, the subject lot is above the minimum area for the R-20C district. Staff also determined that setback determinations made by previous administrations/directors which may have allowed for 10' side setbacks on lots not qualifying under Section 12.2 were not accurate would not to be perpetuated.

Applicant's request: Mr. Litvak contends that he relied on this (possible mistakenly issued) permit to purchase the property and should be entitled to the 10' side setbacks under a vested rights doctrine. Mr. Litvak has submitted the attached binder of information in support of his vested rights request.

Pender County Zoning Ordinance citations:

Section § 3.5 Administrative Procedures

A. Public Hearings

Any case involving an appeal or variance requires a public hearing to be held by the Board of Adjustment. Any case involving a change of zoning district classification, **vested rights**, or other zoning ordinance amendments, **requires a public hearing before the Planning Board, which shall make recommendations to the Board of Commissioners.**

Section §12.2 Use of Nonconforming Lots

A. Nonconforming Single Lot of Record on July 5, 1988

A lot of record established prior to the initial effective date of this ordinance which does not conform to the minimum lot requirement of the district in which it is located may be used as a building site for a use permitted within that district provided:

- 1) The lots of record must be a minimum of 5,000 square feet with a minimum of 50 feet building line and side and rear setback as required in R-10 district. Front yard setbacks shall be in accordance with the zoning district or Planned Development in which the property is located. Corner lots shall comply with the side yard setbacks noted in "Section 7.8 GENERAL PROVISIONS, Corner Lots."

Staff Recommendation: Due to the legal nature of the request, staff is not qualified and therefore is not submitting a recommendation of approval or denial regarding this request. Per zoning ordinance Section 3.5A, this application is a public hearing.

SPECIFIC ACTION REQUESTED: To consider the herein described application for vested rights and render a decision to approve or deny the request accordingly.

VOTING AND RESOLUTION:

Planning Board

Motion to deny: Burt Millette **Seconded:** Christopher Smith

Approved: _____ **Denied:** X **(4-1)** Unanimous _____

Reynolds Yes Garrett ___ Marshburn Yes Millette Yes Smith Yes Williams No Boney _____

RESOLUTION: NOW, THEREFORE, BE IT RESOLVED, that on September 21, 2009, the Pender County Board of Commissioners (approved, modified, denied) a vested right determination request for property as described herein and Jimmy T. Tate, Chairman to the Board, is authorized to execute the order implementing this resolution and provide notice to the applicant of the action taken herein.

AMENDMENTS:

MOVED _____ **SECONDED** _____

APPROVED _____ **DENIED** _____ **UNANIMOUS** _____

YEA VOTES: Tate _____ Brown _____ Blanchard _____ Rivenbark _____ Williams _____

Jimmy T. Tate
Chairman

September 21, 2009
Date

North Carolina legislation regarding statutory vested rights:

§ 153A-344.1. Vesting rights.

(a) The General Assembly finds and declares that it is necessary and desirable, as a matter of public policy, to provide for the establishment of certain vested rights in order to ensure reasonable certainty, stability, and fairness in the land-use planning process, secure the reasonable expectations of landowners, and foster cooperation between the public and private sectors in the area of land-use planning. Furthermore, the General Assembly recognizes that county approval of land-use development typically follows significant landowner investment in site evaluation, planning, development costs, consultant fees, and related expenses.

The ability of a landowner to obtain a vested right after county approval of a site specific development plan or a phased development plan will preserve the prerogatives and authority of local elected officials with respect to land-use matters. There will be ample opportunities for public participation and the public interest will be served. These provisions will strike an appropriate balance between private expectations and the public interest, while scrupulously protecting the public health, safety, and welfare.

(b) Definitions.

- (1) "Landowner" means any owner of a legal or equitable interest in real property, including the heirs, devisees, successors, assigns, and personal representative of such owner. The landowner may allow a person holding a valid option to purchase to act as his agent or representative for purposes of submitting a proposed site specific development plan or a phased development plan under this section, in the manner allowed by ordinance.
- (2) "County" shall have the same meaning as set forth in G.S. 153A-1(3).
- (3) "Phased development plan" means a plan which has been submitted to a county by a landowner for phased development which shows the type and intensity of use for a specific parcel or parcels with a lesser degree of certainty than the plan determined by the county to be a site specific development plan.
- (4) "Property" means all real property subject to zoning regulations and restrictions and zone boundaries by a county.
- (5) "Site specific development plan" means a plan which has been submitted to a county by a landowner describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property. Such plan may be in the form of, but not be limited to, any of the following plans or approvals: A planned unit development plan, a subdivision plat, a preliminary or general development plan, a conditional or special use permit, a conditional or special use district zoning plan, or any other land-use approval designation as may be utilized by a county. Unless otherwise expressly provided by the county such a plan shall include the approximate boundaries of the site; significant topographical and other natural features effecting development of the site; the approximate location on the site of the proposed buildings, structures, and other improvements; the approximate dimensions, including height, of the proposed buildings and other structures; and the approximate location of all existing and proposed infrastructure on the site, including water, sewer, roads, and pedestrian walkways. What constitutes a site specific development plan under this section that would trigger a vested right shall be finally determined by the county pursuant to an ordinance, and the document that triggers such vesting shall be so identified at the time of its approval. However, at a minimum, the ordinance to be adopted by the county shall designate a vesting point earlier than the issuance of a building permit. A variance shall not constitute a site specific development plan, and approval of a site specific development plan with the condition that a variance be obtained shall not confer a vested right unless and until the necessary variance is

obtained. Neither a sketch plan nor any other document which fails to describe with reasonable certainty the type and intensity of use for a specified parcel or parcels or property may constitute a site specific development plan.

- (6) "Vested right" means the right to undertake and complete the development and use of property under the terms and conditions of an approved site specific development plan or an approved phased development plan.

(c) Establishment of vested right.

A vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the county with jurisdiction over the property. Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto. A county may approve a site specific development plan or a phased development plan upon such terms and conditions as may reasonably be necessary to protect the public health, safety, and welfare. Such conditional approval shall result in a vested right, although failure to abide by such terms and conditions will result in a forfeiture of vested rights. A county shall not require a landowner to waive his vested rights as a condition of developmental approval. A site specific development plan or a phased development plan shall be deemed approved upon the effective date of the county's action or ordinance relating thereto.

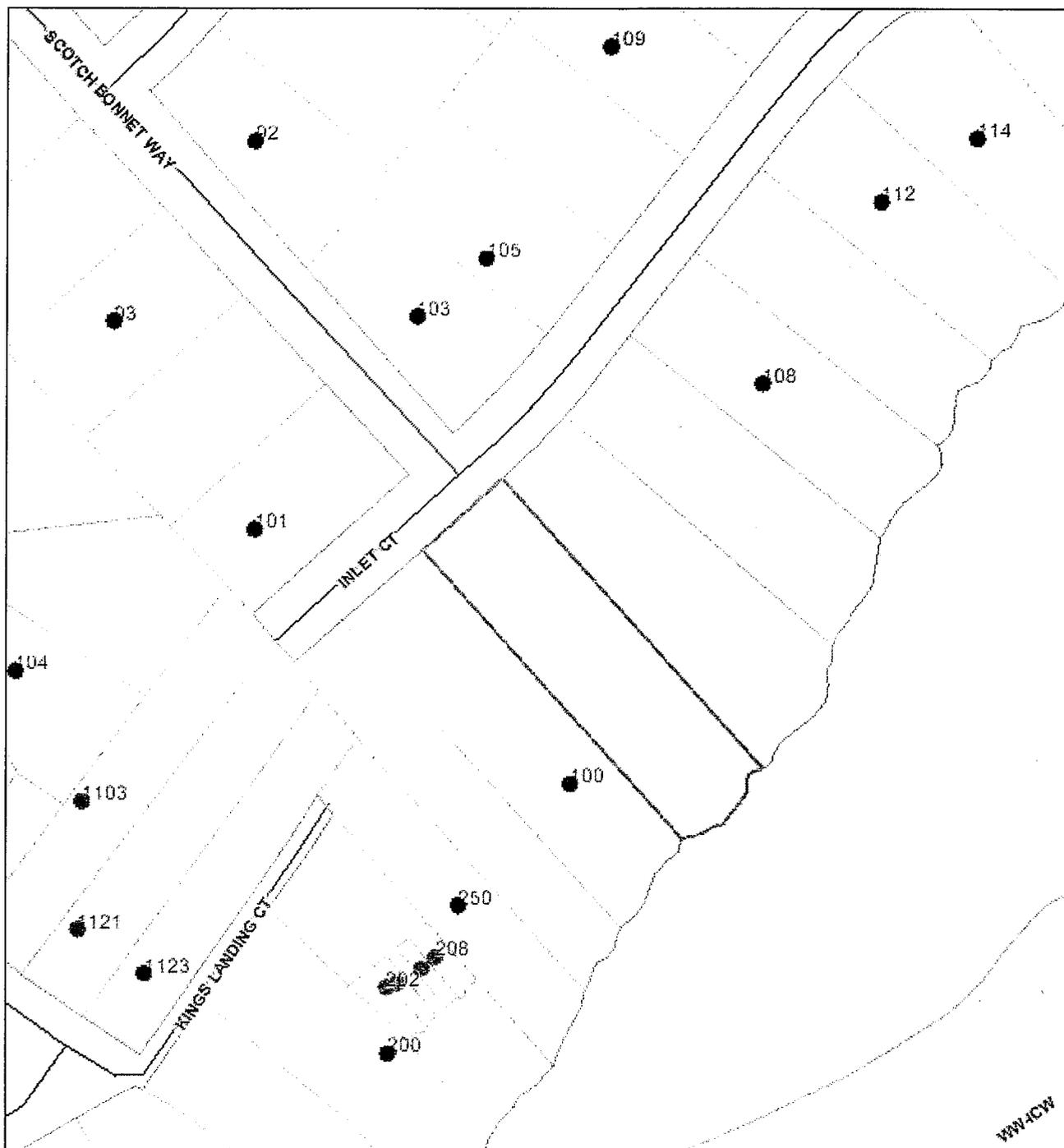
(d) Duration and termination of vested right.

- (1) A right which has been vested as provided for in this section shall remain vested for a period of two years. This vesting shall not be extended by any amendments or modifications to a site specific development plan unless expressly provided by the county.
- (2) Notwithstanding the provisions of subsection (d)(1), a county may provide that rights shall be vested for a period exceeding two years but not exceeding five years where warranted in light of all relevant circumstances, including, but not limited to, the size and phasing of development, the level of investment, the need for the development, economic cycles, and market conditions. These determinations shall be in the sound discretion of the county.
- (3) Notwithstanding the provisions of (d)(1) and (d)(2), the county may provide by ordinance that approval by a county of a phased development plan shall vest the zoning classification or classifications so approved for a period not to exceed five years. The document that triggers such vesting shall be so identified at the time of its approval. The county still may require the landowner to submit a site specific development plan for approval by the county with respect to each phase or phases in order to obtain final approval to develop within the restrictions of the vested zoning classification or classifications. Nothing in this section shall be construed to require a county to adopt an ordinance providing for vesting of rights upon approval of a phased development plan.
- (4) Following approval or conditional approval of a site specific development plan or a phased development plan, nothing in this section shall exempt such a plan from subsequent reviews and approvals by the county to ensure compliance with the terms and conditions of the original approval, provided that such reviews and approvals are not inconsistent with said original approval. Nothing in this section shall prohibit the county from revoking the original approval for failure to comply with applicable terms and conditions of the approval or the zoning ordinance.
- (5) Upon issuance of a building permit, the provisions of G.S. 153A-358 and G.S. 153A-362 shall apply, except that a permit shall not expire or be revoked because of the running of time while a vested right under this section is outstanding.

- (6) A right which has been vested as provided in this section shall terminate at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.
- (e) Subsequent changes prohibited; exceptions.
- (1) A vested right, once established as provided for in this section, precludes any zoning action by a county which would change, alter, impair, prevent, diminish, or otherwise delay the development or use of the property as set forth in an approved site specific development plan or an approved phased development plan, except:
 - a. With the written consent of the affected landowner;
 - b. Upon findings, by ordinance after notice and a public hearing, that natural or man-made hazards on or in the immediate vicinity of the property, if uncorrected, would pose a serious threat to the public health, safety, and welfare if the project were to proceed as contemplated in the site specific development plan or the phased development plan;
 - c. To the extent that the affected landowner receives compensation for all costs, expenses, and other losses incurred by the landowner, including, but not limited to, all fees paid in consideration of financing, and all architectural, planning, marketing, legal, and other consultant's fees incurred after approval by the county, together with interest thereon at the legal rate until paid. Compensation shall not include any diminution in the value of the property which is caused by such action;
 - d. Upon findings, by ordinance after notice and a hearing, that the landowner or his representative intentionally supplied inaccurate information or made material misrepresentations which made a difference in the approval by the county of the site specific development plan or the phased development plan; or
 - e. Upon the enactment or promulgation of a State or federal law or regulation which precludes development as contemplated in the site specific development plan or the phased development plan, in which case the county may modify the affected provisions, upon a finding that the change in State or federal law has a fundamental effect on the plan, by ordinance after notice and a hearing.
 - (2) The establishment of a vested right shall not preclude the application of overlay zoning which imposes additional requirements but does not affect the allowable type or intensity of use, or ordinances or regulations which are general in nature and are applicable to all property subject to land-use regulation by a county, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes. Otherwise applicable new regulations shall become effective with respect to property which is subject to a site specific development plan or a phased development plan upon the expiration or termination of the vesting rights period provided for in this section.
 - (3) Notwithstanding any provision of this section, the establishment of a vested right shall not preclude, change or impair the authority of a county to adopt and enforce zoning ordinance provisions governing nonconforming situations or uses.
- (f) Miscellaneous provisions.
- (1) A vested right obtained under this section is not a personal right, but shall attach to and run with the applicable property. After approval of a site specific development plan or a phased development plan, all successors to the original landowner shall be entitled to exercise such rights.
 - (2) Nothing in this section shall preclude judicial determination, based on common-law principles or other statutory provisions, that a vested right exists in a particular case

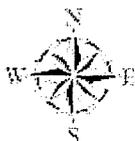
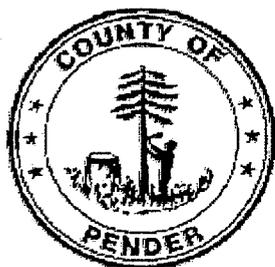
or that a compensable taking has occurred. Except as expressly provided in this section, nothing in this section shall be construed to alter the existing common law.

- (3) In the event a county fails to adopt an ordinance setting forth what constitutes a site specific development plan triggering a vested right, a landowner may establish a vested right with respect to property upon the approval of a zoning permit, or otherwise may seek appropriate relief from the Superior Court Division of the General Court of Justice. (1989 (Reg. Sess., 1990), c. 996, s. 6.)



1:140 feet

Pender County GIS

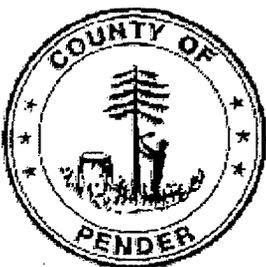


This map is prepared for the inventory of real property found within this jurisdiction, and is compiled from recorded deeds, plats, and other public records and data. Users of this map are hereby notified that the stated information public primary information sources should be consulted for the verification of the information contained on this map. Pender County assumes no legal responsibility for the information contained on this map.

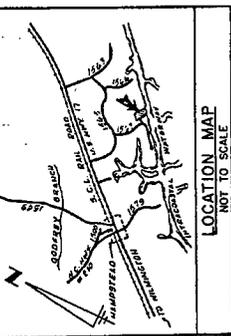
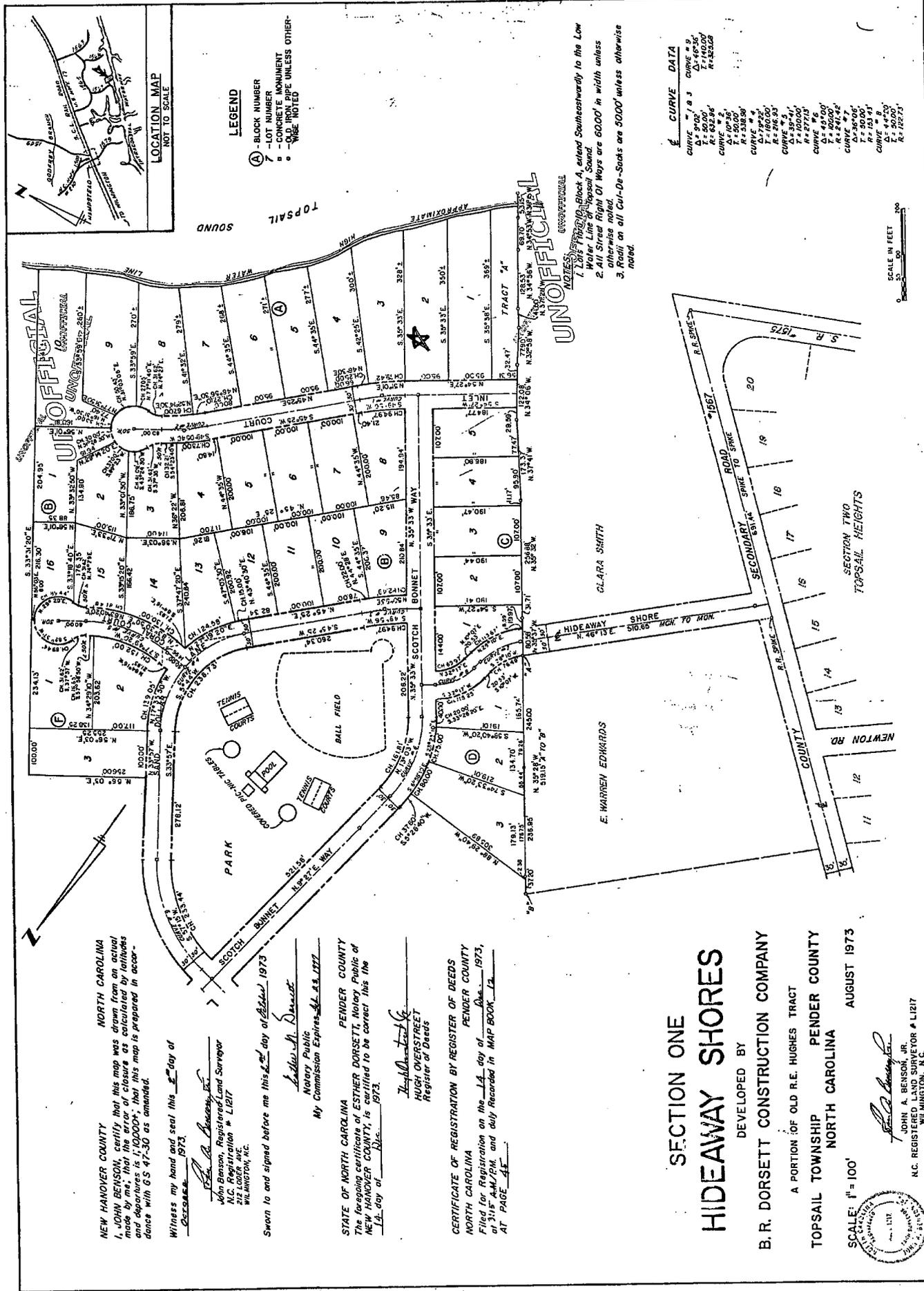


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- LEGEND**
- (A) - BLOCK NUMBER
 - (1) - LOT NUMBER
 - (*) - CONCRETE MONUMENT
 - (o) - OLD IRON PIPE UNLESS OTHERWISE NOTED
 - (-)- WIRE NOTED

CURVE DATA

CURVE # 1	Δ = 90°00'	R = 50.00'
CURVE # 2	Δ = 16°36'	R = 140.00'
CURVE # 3	Δ = 63°24'	R = 82.50'
CURVE # 4	Δ = 10°36'	R = 50.00'
CURVE # 5	Δ = 7°30'	R = 100.00'
CURVE # 6	Δ = 17°30'	R = 100.00'
CURVE # 7	Δ = 39°44'	R = 153.93'
CURVE # 8	Δ = 45°00'	R = 100.00'
CURVE # 9	Δ = 24°12'	R = 241.42'
CURVE # 10	Δ = 36°00'	R = 150.00'
CURVE # 11	Δ = 153°44'	R = 153.93'
CURVE # 12	Δ = 50°00'	R = 100.00'
CURVE # 13	Δ = 127°24'	R = 127.24'

UNOFFICIAL

NOTES:

1. Lot 19, Block A, altered Southeastwardly to the Low Water Line Right of Ways.
2. All Lot Right of Ways are 60.00' in width unless otherwise noted.
3. Radii on all Curves are 5000' unless otherwise noted.



N.B. 13-45

NEW HANOVER COUNTY
NORTH CAROLINA
I, JOHN BENSON, certify that this map was drawn from an actual survey by me, that the error of closure as calculated by latitudes and departures is 1:10000+, that this map is prepared in accordance with G.S. 47-30 as amended.

Witness my hand and seal this 2nd day of October, 1973.

John A. Benson, Jr.
John Benson, Registered Land Surveyor
N.C. Registration # 12117
WILMINGTON, N.C.

Sworn to and signed before me this 2nd day of October 1973

Hugh Overstreet
Hugh Overstreet
Notary Public
My Commission Expires 4-8-1977

STATE OF NORTH CAROLINA
FENDER COUNTY
The foregoing certificate of ESTHER DORSETT, Notary Public of New Hanover County, is certified to be correct this 14th day of August, 1973.

Hugh Overstreet
HUGH OVERSTREET
Register of Deeds

CERTIFICATE OF REGISTRATION BY REGISTER OF DEEDS
NORTH CAROLINA
Filed for Registration on the 14th day of August, 1973,
at 3:15 AM/PM, and duly Recorded in MAP BOOK 1A
AT PAGE 45

SECTION ONE
HIDEAWAY SHORES
DEVELOPED BY
B. R. DORSETT CONSTRUCTION COMPANY
A PORTION OF OLD R.E. HUGHES TRACT
TOPSAIL TOWNSHIP
FENDER COUNTY
NORTH CAROLINA
AUGUST 1973



SCALE: 1" = 100'



MINUTES

Pender County Planning Board Meeting
August 4, 2009
7:00 p.m.

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

Call to Order: Chairman Reynolds

Roll Call: Chairman Reynolds

Pender County Planning Board Members:

Reynolds Garrett Marshburn Millette Smith Williams Boney Newman

1. Approval of Minutes: July 7, 2009

Motion: Burt Millette made the motion to approve the July 7, 2009 Minutes.

Seconded: Hiram Williams seconded the motion to approve.

Vote: The vote was 5-0.

Public Hearings

Planner Kyle Breur presented Zoning Map Amendment case to the board.

- 2. Zoning Map Amendment** – Mike Nadeau, applicant, on behalf of Kenneth Garvey, owner, is requesting to rezone one tract totaling ±1 acre, from R-20, Residential District, to B-1, Business District (Neighborhood). The property is located at 984 NC Hwy 210 W., Hampstead, N.C. and can be identified as PIN # 3283-40-8005-0000.

Mike Nadeau (representative of property) explained that the commercial operation on site currently had been established in 1991. Mr. Nadeau explained that when countywide zoning occurred in 2003 the property was rezoned to an R-20 zoning district. Mr. Nadeau commented that the property owner was unaware that the property had been rezoned and the adjacent properties have B-1 zoning districts.

Hiram Williams commented that due to rezoning in 2003 there are numerous properties within the county that have this type of problem and this needs to be corrected.

Director Patrick Davenport made Mr. Williams aware that he was aware of this problem and once the new Unified Development Order became effective, this should minimize these types of zoning problems.

Burt Millette made the motion to approve request for Zoning Map Amendment and seconded by Hiram Williams. Vote passed 5-0.

Director Patrick Davenport presented Vested Rights Determination case request to board.

- 3. Vested Rights Determination** – Cecilia and Eric Litvak, applicants and owners, are requesting a vested rights determination for a single family home in regards to side-yard setbacks. The property is currently zoned R-20C, Residential District (Conventional) and is located along Inlet Court, Hampstead, NC. The property may be identified as PIN # 4203-70-2440.

Attorney Trey Thurman explained to the Board that he made Mr. Litvak aware that this was not the proper procedure to take regarding this type of request. Attorney Thurman explained that the appropriate manner to proceed with this case would have been to go before the Board of Adjustments and request a variance. Attorney Thurman commented that this case will also be presented on September 21, 2009 at the Board of Commissioner's meeting. Attorney Thurman explained that he will be providing the Board of Commissioner's with the same advisement that he is recommending to this Board.

Chairman Reynolds clarified with Attorney Thurman what the instructions to the Board were.

Attorney Thurman again explained that this request is to send a recommendation of approval or denial to the Board of Commissioner's to determine whether or not the vested rights have been established.

Chairman Reynolds asked Board members if there were any questions for the Mr. Litvak (applicant). Mr. Litvak was not present for questioning.

Chairman Reynolds opened the floor to public comments.

Public comments were given by various citizens that had residents in the area in which Mr. Litvak's property is located.

Mr. Phil Stevens (neighboring property owner) commented that he was opposed because of fire safety issues and water run-off. Mr. Stevens explained that Mr. Litvak had brought in numerous loads of dirt and the water from his property was running onto his.

Mr. Jeffrey Schoolcraft commented that he had just built a home on his property and he had to adhere to the 20' setbacks and felt Mr. Litvak needed to the same. Mr. Schoolcraft commented that before he purchased his lot, he researched what he was purchasing to ensure what he wanted to build was acceptable.

Public comments continued opposing Mr. Litvak's.

Chairman Reynolds questioned whether the applicant had arrived in order to respond to questions or comments.

Attorney Thurman commented that Mr. Litvak (applicant) still was not present.

Chairman Reynolds closed the floor to public comments.

Board members discussed the reasoning for a “grandfathered lot”.

Director Davenport explained that if a lot cannot meet dimensional requirements of the zoning district in which the lot is located then this is considered a “non-conforming lot” and this lot can adhere to the requirements of R-10 zoning setbacks in which the minimum side yard setback is 10’. Director Davenport commented that this is explained in Section 12 of the Pender County Zoning Ordinance.

Burt Millette made the motion to dismiss (forward a recommendation of denial to Board of Commissioners) case and seconded by Christopher Smith.

Hiram Williams questioned whether the zoning regulations had changed which make lots unbuildable or non-conforming. Mr. Williams explained that before he could vote on this he needed to gain a better understanding of what a non-conforming lot is.

Director Davenport commented that this portion of the Zoning Ordinance had not changed.

Hiram Williams commented that there were lots that had been built upon that did have 10’ side yard setbacks.

Director Davenport explained the lots were probably non-conforming; therefore, 10’ side yard setbacks did apply to these lots.

Mr. Litvak interrupted meeting to announce his arrival.

Chairman Reynolds explained that public comments had been closed and no further comments were being accepted. Mr. Reynolds commented that Mr. Litvak would be given the opportunity to speak once the floor was open to public comment during the latter part of the meeting.

Burt Millette made the motion to dismiss (forward a recommendation of denial to Board of Commissioners) case and seconded by Christopher Smith. Vote passed 4-1 with Mr. Williams casting the nay vote.

Planner Kyle Breur presented PD Master Plan case to the board.

4. **PD Master Plan** - Jeffrey Beaudoin, applicant and owner, is requesting approval of a master plan for an Indoor/Outdoor Recreation Establishment, privately operated. The request is to construct a community aquatic lifestyle center with adjunct facilities. The property is located along the west side of Country Club Drive, ±600’ south of Avila Drive, Hampstead, NC. The property is zoned PD, Planned Development, and may be identified as PIN # 4203-36-1126-0000.

Kyle commented that a sedimentation and erosion control permit as well as a landscape and buffer layout would need to be submitted to the Planning Department prior to any issuance of permits.

Kyle explained that after preliminary discussion with the Director of Pender County Utilities, an 8" water line was in the proximity of the potential project, but would not be adequate to accommodate this size facility. Kyle commented that a possible water extension from Hwy 17 would be needed to accommodate this type of facility and no sewer lines were available in this area.

Jeffrey Beaudoin (applicant/owner) commented that this project was conceived approximately seven years ago. Mr. Beaudoin shared with the Board that there was a deficit for a large competition style swimming pool in this area. Mr. Beaudoin explained that much thought had been given as to what would "marry" well with this pool i.e. pottery and kindling classes, basketball courts, dance studio, etc... Mr. Beaudoin compared this potential project to the aquatic facility built in Brunswick County as part of Brunswick Community College. Mr. Beaudoin explained that this type of pool could be utilized by Topsail High School and assist with aquatic therapy for medical patients in the area. Mr. Beaudoin reviewed with the Board the grant that he had obtained from United Way and the impact this grant had on the ability to open the doors for other grants. Mr. Beaudoin continued to address some accommodations this facility may provide and the recreational opportunities that could arise as a result of this type of facility.

Burt Millette questioned whether Mr. Beaudoin intended to deed this to the non-profit and if so, did this take it off the tax books.

Attorney Thurman explained that being non-profit does not automatically qualify for a tax exemption.

Burt Millette addressed the potential for increased traffic and recommended that an acceleration/deceleration lane be requested from the North Carolina Department of Transportation.

Chairman Reynolds addressed "open space" requirements not shown on preliminary plat.

Mr. Beaudoin explained where the "open space" area could be located on plat. Chairman Reynolds commented that without the location identified, this was plat would not be acceptable at this time.

Access to the property was discussed. Mr. Beaudoin explained that there is a 60' foot easement to the property.

Public comments were taken from the floor regarding this agenda item.

Gena Morgan (adjacent property owner), expressed concerns regarding the potential for her well pressure to decrease, if this facility will be serviced by a well. Ms. Morgan shared her concerns obtaining to night time lighting of the facility, septic location and what would happen in the event the non-profit could not sustain itself.

Public comments continued addressing traffic entrance/exit on Country Club Road. A suggestion to route traffic through Transfer Station Road was recommended.

Burt Millette recommended that Mr. Beaudoin respond to these concerns with Planning staff.

Chairman Reynolds closed the floor to public comments.

Burt Millette made the motion to table the request until next Planning Board meeting in 30 days and seconded by Hiram Williams. Vote passed 5-0.

Attorney Thurman clarified that the next meeting would be in 28 days.

Public Comment (Moved up on agenda)

Chairman Reynolds opened the floor to public comments.

Mr. Litvak expressed disapproval of Board commencing forth with his presence or ability to address the Board regarding his case. (See Agenda Item 3)

Chairman Reynolds closed the floor to public comments.

Director Patrick Davenport and Planner Kyle Breuer reviewed the following discussion items with Board.

5. Discussion Items

- **Planning Staff**
 - Update on Comprehensive Plan project and Public Input meetings
 - Project schedule
 - Update on UDO project
 - Table of Uses
 - Project Schedule
- **Planning Board Members:** Board members continued discussion with Director Davenport and Planner Kyle Breuer regarding ongoing projects.
- **Public Comment** (See Public Comment above)

6. Adjournment: Chairman Reynolds adjourned meeting at 10:00 pm.