

August 27, 2008
4:00 PM

MINUTES OF THE HENDERSON COUNTY
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its regular August meeting, Wednesday, August 27, 2008, at 4:00 p.m. in the King Street Meeting Room, 100 N. King Street, Hendersonville, North Carolina. Those present were: Jim Phelps, Vice-chairman, Tony Engel, Jim Crafton, Ann Pouch, Alternate Board Member Brandon Yelverton, Zoning Administrator Toby Linville, Associate County Attorney Sarah Zambon, and Secretary to the Board Karen Ann Antonucci. Dean Bonessi, Chairman was not present. Planning Director Anthony Starr and Senior Planner Autumn Radcliff were also present.

Vice Chairman Phelps called the meeting to order at 4:03 PM. He noted that he would be filling in for Chairman Dean Bonessi in his absence.

Vice Chairman Phelps introduced the Board members to the parties present. He also introduced JoAnne Telker as the new Alternate board member.

Vice Chairman Phelps asked if there were any comments, corrections or additions to the July 30, 2008 minutes. There being none, he asked for a motion to accept the minutes as written. Ann Pouch moved to accept as written. All board members were in favor of accepting the minutes as presented.

Order V-08-14, Janet and Ray Bennie

Vice Chairman Phelps asked for a motion to accept Order V-08-14 as written.

JCrafton: I move that the Order denying variance V-08-14 does in fact represent our comments and the conclusion we drew at the last meeting.

TEngel: I second.

APouch: Seconded also.

All board members were in favor of accepting the order as written.

NEW BUSINESS:

Case V-08-15, Patricia L. Scoggins, requesting a variance for reduction of 10 feet for front yard setback and reduction of maximum density from maximum 2 dwellings per ½ acre to allow 2 dwellings on 0.37 acres. Zoned Local Commercial. Location: 389 Courtland Blvd., Mountain Home, on approximately 0.37 acres. **(PIN 9650890098).**

Witnesses for the case:

Patricia Scoggins – applicants

John E. Tate – attorney for applicant

VChairman Phelps. I'll need a motion that we open our hearing.

APouch: I so move that we open our hearing.

TEngel: Seconded.

All members were in favor of opening the hearing.

VChairman Phelps: Does Toby want to start?

Zoning Administrator TLinville: I'll explain what's in your packet and then Anthony Starr or Autumn will give their presentation. If it pleases the board I'll read the agenda into the record.

JCrafton: Point of order – do we not need to swear people in?

Associate County Attorney SZambon: Yes. We have to swear everybody in.

VChairman Phelps: Ok, everyone who is prepared to speak before the committee today would you please come forward and come up to the podium and be sworn in.

All those prepared to speak at the hearing were sworn in by Secretary to the Board, Karen Ann Antonucci.

Associate County Attorney SZambon: Anybody who is not either staff or the applicant.

VChairman Phelps: That's all we have. We have the applicant and her attorney. And we have other staff members. Anyone else? No, so all have standing.

Zoning Administrator TLinville: You will remember this case from a couple of months ago. And you all approved the variance for a front yard setback. And what I failed to acknowledge because it's not something that I approve is the subdivision. And this parcel of land which is less than 4/10th of an acre doesn't meet the minimum density for this local commercial district. So planning would not approve the subdivision without a variance. So that's why you are hearing it again. In your packets you'll see the language describing the property, the LDC language explaining what a variance is. Next is the variance application. Then we have a zoning report showing the aerial. Next is a copy of the site plan. And there are some photos of the property included in your packet. I'll pass these around. These are some further photos of the property as I did a walk around from Wisteria Drive, around the back. Back around the front to Courtland.

VChairman Phelps: And you want those submitted into evidence.

Zoning Administrator TLinville: Please. And I'll entertain any questions.

VChairman Phelps: You said it doesn't meet the requirements of the zoning subdivision.

Zoning Administrator TLinville: That's correct.

VChairman Phelps: But this predated that subdivision zoning did it not?

Zoning Administrator TLinville: Well, when it was, I don't remember, the exact date of the recombination but this falls under the new rules now.

VChairman Phelps: But the structures predated and at one time they were two separate lots.

Zoning Administrator TLinville: Right.

VChairman Phelps: And as I understand it, it was combined after the present owner had previously sold it.

Zoning Administrator TLinville: Correct. She has sold the property twice as separate lots and one of the owners before it was foreclosed had it recombined.

VChairman Phelps: Other questions of Toby.

JCrafton: Does staff have a recommendation?

Zoning Administrator TLinville: From a zoning standpoint I recommended approval in the cover letter, because this had previously been separate and these structures predate zoning in the county.

JCrafton: How is this request different from the request we heard a couple of months ago?

Zoning Administrator TLinville: Before you were looking at a variance for the front yard setbacks. You did not consider, at least not officially, the lot size. That's what you're considering today. This does not meet the minimum density of the local commercial district even if you grant that variance.

Associate County Attorney SZambon: Mr. Chairman, at this time I'd like to move that you enter staff's memorandum and the photographs and the variance application into evidence. Unless there are any objections from the parties.

VChairman Phelps: If there be no objections from this board or anyone else we'll accept that as evidence. Any other questions for Toby?

Planning Department Director AStarr: Thank you Mr. Chairman, members of the board. For the record, my name is Anthony Starr. I'm the planning director. As Toby outlined the parcel, the homes were, contains two structures. Constructed around 1935 and were used for both a bed and breakfast and a single family home. The total area is about .37 acres which is a little over 16,000 square feet. That was originally in two separate parcels of .23 acres and .13 acres. It appears at some point in time the lots were combined into one lot. The current owner, Patricia Scoggins regained ownership of the subject area as our understanding it in August of 2007. The local commercial zoning district has the standard density as 4 units per 1 acre or 10,890 square feet with a maximum density of 16 units per 1 acre for multi-family projects proposing more than 5 dwellings. The owner is requesting a variance from these minimum density standards in order to subdivide the two lots into what was previously, what is now one

lot into two lots, as it previously was subdivided. The planning department has reviewed the request and has recommended that the Zoning Board of Adjustment deny the variance request based upon the following: The Land Development Code states that the purpose of a variance is intended to provide limited relief from the requirements of the Land Development Code where the requirements will result in an unnecessary hardship. If you follow your check list in the variance in the Land Development Code you have limited parameters for which you are supposed to issue variances. The applicant has indicated that she would like to sell the property as two individual tracts or she would be forced to sell the property as one tract or rent out the accessory structure. A financial gain or hardship does not constitute an unnecessary hardship or warrant the granting of a variance in and of itself. The applicant regained ownership of the property, with or without knowledge, that the subject area was recombined into one parcel. Now there are the standards outlined in the Land Development Code for variance request and it says that a Zoning Board of Adjustment shall not grant a variance, the effect of which will be to extend physically a non-conforming use of land. These are non-conforming lots, or the previous two lots would have been non-conforming lots. The LDC states also that no variance shall be granted or considered where the fact that the property could be used more profitably is the reason for the request of the variance. Granting the variance would allow the property owner to sell each dwelling unit separately instead of one parcel.

The following written findings must be made in order for the zoning board to grant a variance: - there are practical difficulties or unnecessary hardships in carrying out the strict letter of this chapter as demonstrated by 1- *The fact that, if the applicant complies with the literal terms of this chapter, he or she cannot secure a reasonable return from, or make a reasonable use of, the property.* Under the current situation the applicant can secure a reasonable return and make a reasonable use of the property by selling the property as one tract, continuing to operate the bed and breakfast, using the structures as single family homes, renting one or both structures or converting the structures to a commercial use, as permitted in a local commercial zoning district which it is currently zoned. So that point there staff believes it does not meet that criteria. Number 2- *the hardship of which the applicant complains results from unique circumstances related to the applicant's land.* The applicant did not recombine the original parcels, but did regain ownership of the subject area as one tract of land as stated in the deed. There are numerous examples in the county where there are two houses on one parcel. So there's not necessarily a particularly unique circumstance related to this property either. Number 3 – *the hardship is not the result of the applicant's own action.* It's unclear as to whether or not the applicant had recourse, other recourse to remedy the recombination or not, being that she was the note-holder, as I understand but I'm not entirely sure that's relevant for your proceedings here because if she did that would have separate recourse in the courts to address that if something was done without her permission, that should have required her permission. B – another requirement is that- *The variance is in harmony with the general purpose and intent of this chapter and will preserve its spirit.* The local commercial zoning district requires a minimum density of 4 units per acre. The subject area currently complies with the standard density requirements, because it has a single family house and what we would consider an accessory structure, an accessory dwelling. Which is allowed under the Land Development Code. But would not comply if the variance is granted allowing the subject area to be subdivided into two non-conforming lots. The variance request is not in harmony with the intent of the land Development Code and will not preserve its spirit. There are a number of examples where people had two lots, combined them and at one point, the zoning changed and they wanted to come back and re-divide it and they are not allowed to. That is, I wouldn't say a common occurrence but it's not a rare occurrence either. I would contend that probably the fact that two homes exist is probably not relevant because we're talking about the subdivision of land and the density and the zoning of it. There may have been two lots in the past but the property owners, her predecessors chose to recombine them on their own accord. With that I will like to submit the planning staff's memo as part of the record and I'll be glad to answer any questions you have.

VChairman Phelps: Questions of Tony?

Planning Director AStarr: One other comment I'd add is the reason why planning staff has taken this position is we're concerned about the precedence this would set. If we start allowing lots that once were to be re-divided just because they used to exist at some point in time, then we will undermine the

whole concept of the zoning density in the Land Development Code. So that is a concern of the planning department with any decision that you make and the precedent that you would set with that.

VChairman Phelps: Let me ask: When it was originally – when it was combined, there was no official action other than the owners just doing it and getting a new deed.

Planning Director AStarr: They can do that without any involvement.

VChairman Phelps: No county involvement or anything?

Planning Director AStarr: Right. There is no county approval required.

VChairman Phelps: But you couldn't do it the other way. You couldn't split it without coming...

Planning Director AStarr: Correct.

VChairman Phelps: But you can combine them?

Planning Director AStarr: Yes.

VChairman Phelps: Do I have a recommendation then that we accept his documentation as evidence?

JCrafton: So moved.

TEngel: Second.

VChairman Phelps: All in favor?

All board members were in favor of accepting the documentation as evidence.

VChairman Phelps: Ok. It's accepted.

JCrafton: Mr. Chairman before we have the applicant, I'd like to get a clarification of what the variance request is. If I look at the memorandum it says, the applicant seeks a variance on her property for reduction of 10 feet for front yard setback and reduction of maximum density from maximum 2 dwellings per ½ acre to allow 2 dwellings on 0.37 acres. It doesn't say anything about dividing the property into two pieces. What is actually being asked for in this variance request?

Associate County Attorney SZambon: You are just being asked in this variance to approve a variance as to lot size. Right now I don't even think combined it the meets the zoning.

Planning Director AStarr: It does. 4 units per acre, which is a quarter acre.

Associate County Attorney SZambon: It does – what zoning district is it? Is it a R-3? Or R-1?

Planning Director AStarr: It's local commercial.

Associate County Attorney SZambon: Oh, it's LC, local commercial. So, you are not being asked to subdivide this property. What happened in the process is that if you approve this variance the applicant can go to the planning department. The planning department will review it based on the Land Development Code, part of which being our subdivision ordinance, and will determine if they meet all the other aspects of the subdivision ordinance. Which can include things not specific to this project, but you know, road standards, setbacks, that kind of stuff. So all you're being asked to deal with at this particular time, I believe, and Toby will correct me if I'm wrong, is just the density.

JCrafton: But the piece of property exists and it's .37 acres and it has two structures that have been there since 1935.

Associate County Attorney SZambon: Yes

JCrafton: Or thereabouts. What is varying over what they have been dealing with all this time? I still don't understand what is a variable?

Zoning Administrator TLinville: Now the ordinance will not allow that piece of property to be subdivided, because it's too small.

JCrafton: But we're not being asked to subdivide it.

Associate County Attorney SZambon: But you are the crucial piece in it being able to be subdivided. The variable I guess, since this property goes back a long time is first of all, first it was one piece, then it was subdivided and met all the subdivision requirements – or no, I'm sorry, I reverse that – first it was two parcels then it was recombined which as Mr. Phelps says requires no input by the county. Now they want to subdivide it but the variable from when it was two parcels predates zoning. So there were not density or lot requirements or anything like that. Then when it was put together it doesn't matter. And now we have a new Land Development Code which is a density based zoning Land Development Code vs. a lot size. And because it has been recombined it does not fall under our grandfathering clause.

JCrafton: So then in essence we're being asked to say that a .37 acre piece of land with two structures on it is equivalent to a half acre lot with those two structures which would then make it comply with the code.

Planning Director AStarr: Yes. If I may, what we do in the subdivision approval, which is what they're ultimately seeking is to divide it, we check to make sure the property meets the zoning requirements from a density standpoint. If they don't have enough acreage there to meet those zoning requirements from a density standpoint we will not allow the subdivision of the property as per the subdivision regulations of the Land Development Code. So what you would be waiving is that density requirement. You'd be lowering that threshold from a half acre down to her existing acreage which is .37.

TEngel: Ok. And how would that set precedence?

Planning Director AStarr: Because in other instances where we have lots that might have been in existence 5 years ago, 20 years ago, 30 years ago, they were together, they are now separate; they could come and ask for the same thing. And there would be no justification for saying, Ok what's the difference .37 and .04 or .25? There's no – there would be no real meaningful difference between the scenarios.

Associate County Attorney SZambon: And this board deals with that a lot. You see a lot of setbacks and stuff. What's the difference between granting a reduction of three feet vs. seven feet? I do want you to keep in mind that there is some concern about precedent because you should be relatively consistent across all of your decisions. But each instance is based on whatever evidence is presented before you.

TEngel: So every one is different.

Associate County Attorney SZambon: Well every one is individual.

TEngel: Because of different lots.

Associate County Attorney SZambon: But again, if you got the exact same fact pattern – exact same lot size, exact same whatever...

TEngel: It can't be because it wouldn't be the same location.

Associate County Attorney SZambon: Yes, and that's for this board to decide in terms of making your findings in fact and conclusions of law. Mr. Starr's concern is valid. I personally wouldn't want to see this board going completely opposite ways on basically the same issue but again you've addressed that problem before in the past.

TEngel: We've done this many times before.

Associate County Attorney SZambon: But you've mainly done it with setbacks, with reductions in setbacks, is mainly where this board has seen variances before. I don't think this board has seen has there been a...

BYelverton: There was one on Kanuga the last time I was here, the exact same thing. But they denied it, where the man, Jimmy Edney was here.

Associate County Attorney SZambon: Yes. Was that a density issue?

TEngel: Lot size issue.

Associate County Attorney SZambon: Again, this is a density thing not a lot size.

BYelverton: Ok.

Associate County Attorney SZambon: We don't have required lot sizes in Henderson County. We have required density.

JCrafton: I just want to be sure we understood, I understood what's being asked of us.

Associate County Attorney SZambon: Did I clarify it a little bit?

JCrafton: We're being asked to say that some that's non-conforming today is in fact conforming.

TEngel: No. No.

Associate County Attorney SZambon: You are being requested today to say that even though it is non-conforming, this board has reviewed it and for the reasons in the variance, it meets unique circumstances, reasonable hardship, reasonable return, all that stuff. That even though it doesn't meet the requirements today you think that there are other reasons that would override that concern. And therefore you'll request a variance so that the applicant could go forward and try to get it subdivided. Now there might be other issues. I mean you shouldn't be worried necessarily about whether or not the applicant will be able to subdivide it. There may be other issues in the subdivision ordinance which are

not before you today. You are only concerned with – if this parcel of land is .37 or whatever Mr. Starr said it was, whether or not it meets the requirements for a variance. Does that make sense everyone?

VChairman JPhelps: But part of our instructions too, is I've been reading this thing, is that prior rulings of this board are not the overriding thing.

Associate County Attorney SZambon: No. and again...

VChairman JPhelps: We consider each one on its own merit.

Associate County Attorney SZambon: You do. They are each individual quasi judicial hearings. It's just that, you know, in terms of a board, and you know, some level of consistency is always good. But each one is individual. Mr. Starr might want to say something again, though.

Planning Director AStarr: On the issue of consistency, if you are rendering decisions that are inconsistent with similar circumstances then that goes to the 14th Amendment – Equal Protection. And that would potentially limit your ability to deny something in the future because someone could have that overturned by the courts because they say, "you're not equally applying the law". And that is where consistency is most important.

Associate County Attorney SZambon: And again, I mean for 14th Amendment kinds of stuff facts have to be fairly congruous, similar or more than similar. And just in terms of how it looks to the public and everything. If you're giving somebody a five foot setback variance and you're not, you know, just for the credibility of this board.

VChairman JPhelps: But aren't we also, the difference here, we're talking about existing structures that have not changed, not asking for any change, no additions, deletions or modifications so, I mean most of the cases we would deal with are where people would want to add something or relocate something.

Associate County Attorney SZambon: Maybe Mr. Chairman, if I might recommend maybe you want to have the applicant come up and then...

VChairman JPhelps: Trying to get all this general discussion first, Mr. Tate, before we did that. Any other question or anything? If not we'll be happy to hear you at this time.

JTate: Thank you. My name is Jack Tate. I am attorney for the applicant and I'm going to have her speak in a minute but I do want to try to not re - go back over all the information. I think most of you remember a lot of it. I've also tried to organize my document presentation a little better than I did. I think Ms. Pouch indicated I confused her, because I threw so many papers at you. One thing I would like to offer into evidence is the old order granting the variance last time and the finding of fact if you would deem that appropriate. Because I think a lot of that information is useful here. First of all the order granting the variance in matter V-08-09, which was a matter that was hear on, I believe, June the, was it the 24th? June the 4th. So that would be the first piece of evidence I would offer.

APouch: Could you speak up just a little?

JTate: Ok. I couldn't tell how loud I was coming through. I'm offering into evidence V-08-09 which was the matter heard before this board on June the 4th of this year, granting the variance as to the setback matters.

JCrafton: Do you have a copy of that to put before us?

JTate: I actually do have one which I can hand out.

BYelverton: Do you need a motion to accept this into evidence?

Associate County Attorney SZambon: If the board would prefer you could do just one motion at the end of Mr. Tate's presentation and enter all his evidence in at one time.

VChairman JPhelps: Yeah, let's do that.

JTate: Alright. The next item I believe I had indicated the last time that I had done considerable, but not a complete title search on the matter and have come up with some documentary evidence that I'd like to present. The first thing that I offered last time which I would offer again is what I have marked as exhibit #1. I have obtained from the county records a copy of the tax map, old tax map and showing this property and showing that it divided as you know. And again, some of what I'm telling you, I apologize, is things that you already know both from your reports and from the previous hearing but I want to make the matter as record. Exhibit #1 shows the property was previously divided as Ms. Scoggins intends to do and, before the recombination. I'll give you a minute to look at that. That is – I obtained from an official in the land records department. I offered this and this was admitted into

evidence last time. I'm going to hand out together copies of what I have marked as exhibits 2 and 3. Those represent deeds in to a Robert C. Marriott and wife Donna Marriott. You may recall that I made a little bit light of the fact that this is a bed and breakfast and was at one time owned by Mr. and Ms. Marriott. These are dated in July of 1994. And Mr. Marriott acquired them as separate parcels of real estate. The .14 acre parcel and the .23 acre parcel as they were up until this millennium.

Associate County Attorney SZambon: Mr. Starr, have you seen this stuff? And do you want to?

Planning Director AStarr: I don't think there's anything at this point that I feel it necessary to see.

JTate: Next I have exhibit 4 which is the deed by which Ms. Scoggins acquired the property, the two parcels as separate parcels, from Mr. and Ms. Marriott in July of 1996. The next document I have is exhibit 5 which is dated January 30 of 1998 and it is a deed from Ms. Scoggins to Mr. and Ms. Hockspiel. I think I pronounced that right. Ms. Scoggins' testimony last time indicated this is the first couple to whom she sold the property for the purposes of them operating it as a bed and breakfast. You will note that the descriptions at this time indicate again that this is two parcels of land. Next I have exhibit 6 which is the deed by which Mr. and Ms. Hockspiel deeded the property back to Ms. Scoggins in 2002. Again, the testimony from last time indicated that Ms. Scoggins took this property back by this deed was in lieu of a foreclosure because the Hockspiels were not conforming with their obligations under the mortgage. And this also shows, indicates that it was in consideration of that, release of that or in lieu of foreclosure. And also indicates two pieces of property. And for some reason the last several sections of this are not, copies of this deed are not stapled. I apologize for that. Alright and then exhibit 7 is the deed by which Ms. Scoggins attempted to sell the property the last time to McDermott Manor. This was October 15 of 2002. You will note the description of that property which is the second page is the .37 acres. And as indicated in the testimony last time it is at this point that the recombination occurred. I'm going to hand out with that a second item which is a plat that was recorded at the same time, which is exhibit 8, which is plat slide, I believe 4323 which shows the recombination into the .37 acre parcel. And you'll see the dotted line between the two buildings that was the apparent location of the original property line dividing the two parcels.

Associate County Attorney SZambon: Mr. Tate, can I ask you a question?

JTate: Yes ma'am.

Associate County Attorney SZambon: You said that, just for my clarification and the board's hopefully, you said that the parcel was recombined with the deed to Scoggins to McDermott?

JTate: The deed from Scoggins to McDermott Manor has a legal description for the .37 acres. Yes ma'am. This is the same deed that was offered into evidence last time. I think the testimony was that deed was done and prepared for the grantee McDermott Manor. And Ms. Scoggins testified that she just simply signed that without any knowledge of recombination or anything. Just intending to sell the property. And it would appear that the instrument was prepared by Marc Rudow of Roberts & Stephens. And to the best of my knowledge, based upon her testimony before, he did not represent Ms. Scoggins in that transaction. He was representing the McDermott Manor, LLC.

Associate County Attorney SZambon: Ok. Thank you.

JTate: Is that correct, Ms. Scoggins?

PScoggins: I didn't know when it got transferred.

JTate: You just signed what your lawyer told you.

PScoggins: Yes.

JTate: That's consistent with her testimony.

APouch: When Ms. Scoggins first got the property back, it's been twice. The first time was returned as one piece or two?

JTate: That was returned as two pieces. That is the deed from Mr. and Mrs. Hockspiel to her.

Associate County Attorney SZambon: That would be exhibit 6

JTate: Yes ma'am. Yes ma'am.

Associate County Attorney SZambon: You have many copies of everything before you. (to Mrs. Pouch).

JTate: I tried to go a little more slowly this time and get them all copied with the numbers on them and everything so that I wouldn't throw them quite so quickly at you 'cause it's a lot to absorb. One of those

somewhere – I had one lady in my office out today with a migraine so the other one was running back and forth from the phone to the copier to the whatever, front desk. She got a little harried there I think and missed a few staples or got a few extra copies in there which is understandable. Now the next thing I think I referred to earlier, and we had testimony about last time, was there was a foreclosure that as Mr. Starr has eluded to - there was a foreclosure in which the property was deeded back from Margie Mann, an attorney in Asheville who was the trustee and conducted the foreclosure to Ms. Scoggins. And that is exhibit 9 and that, which is very typical for a - foreclosure would be the norm. They simply foreclosed on the property as was described in the deed of trust which was also consistent with the deed from Ms. Scoggins to McDermott Manor. I know of no way to have separated that in the course of that foreclosure into two parcels because – nor would anyone think to or expect anyone to do that. But there would not be anything, any way of doing that into foreclosure into separate parcels other than coming back and going through the same process we are now, but doing it in the process of the foreclosure, while she was taking back the property. So Ms. Scoggins got back in the foreclosure not necessarily willingly. The property that she deeded out as it was and deeded out pursuant to a description that was prepared by the buyer's attorney. So that is exhibit 9.

VChairman JPhelps: Mr. Tate, just for my - to follow this thing – now if I'm reading this right, it's exhibit 6 -the deed there - the 26th day of August, 2002, it was still two parcels.

JTate: Yes, sir.

VChairman JPhelps: And then less than two months later, the 15th day of October, 2002, just one.

JTate: Um-hu.

VChairman JPhelps: I'm just trying to get the timeframe.

JTate: That is correct. Yes, sir. That is based upon a survey that was done. Plat slide 4323 which I actually have the larger copy of, was done, and I think I pointed out last time, was done by Laughter, Austin and Associates. And it says, 'map of survey made for owner, McDermott Manor Bed and Breakfast'. This plat and survey was done for, and again, as she testified, was done for the buyers McDermott Manor. And that is the, when the so called recombination occurred. It was not done at Ms. Scoggins' request or for any purpose that she had. She was simply selling the property. The description was then, as I think I indicated last time it was my expectation because attorneys do get from time to time concerned about what we call gaps or gores in legal descriptions between two lots that are supposed to be adjoining when you're buying more than one. Sometimes they get a little overly concerned about someone coming up and claiming there's a little no-man's-land in there and that's why they might have done that. That was all she wanted to do was sell her property. And that is the larger plat slide of which I have given you copies of. I believe it's exhibit 8. The portion that I could - that is exhibit 8, yes.

JTate: Ms. Scoggins, if you would come, let me ask you a few questions. You testified earlier that you had operated this as a bed and breakfast yourself for a number of years.

PScoggins: Yes.

JTate: When did you start operating as a bed and breakfast? Was that sometime about 1996?

PScoggins: Yes. That's right.

JTate: And when did you cease to operate the property as a bed and breakfast?

PScoggins: When I sold it to Mike and then the first time.

JTate: To the Hockspiels. And why did you choose to do so?

PScoggins: My family left and they moved back and I couldn't run it by myself.

JTate: So I think you testified last time, you had a sister or brother-in-law that was assisting you. And they no longer...

PScoggins: Yes.

JCrafton: Could you ask her to speak into the mic?

JTate: Yes. Speak into the microphone so they can hear you. Your sister and brother-in-law left and moved back somewhere else.

PScoggins: Back to Texas and left me to operate it. And I couldn't handle it by myself so I got a buyer and they took it.

JTate: Ok. Describe how you ended up getting the property back from Mr. and Ms. Hockspiel.

PScoggins: Well his health was bad and they eventually just signed it back to me about 10 or 11 payments behind. And a few months after that is when I sold it again.

JTate: You did not ask them to deed that back to you at that time, did you? The Hockspiels' as far as wanting the property back, you just weren't getting paid.

PScoggins: I wasn't getting paid and they were willing to come in and sign it back rather than foreclose.

JTate: OK. And then tell us about how you ended up selling the property to McDermott Manor.

PScoggins: He came through one of the B&B agencies. They moved from out west somewhere and wanted to run a B&B and they ran it couple, three years, something like that. Then things went sour for them and they didn't pay me for about a year and a half and I started closing and he started bankrupt and it go into a nightmare and here I am.

JTate: Ok. Alright and when Mr. and Ms. McDermott bought the property you did not have any knowledge the property was being recombined in any manner, did you?

PScoggins: No. Because he was offered a survey when we were having a closing and he says, "No, later".

JTate: Ok. And did you employ Mr. Rudow or did he?

PScoggins: I don't know the person he hired and I didn't pay for it either.

JTate: Ok. Alright, so you just went to some lawyer's office and signed the deed?

PScoggins: It must have been part of the closing because...

JTate: So you went somewhere to sign the deed. Would that have been an office here in town?

PScoggins: Yes, I do remember it being in Hendersonville.

JTate: I noticed that it was notarized by Mary D'Angelo who worked for Prince,Youngblood and Massagee for years. Is that where you went, maybe?

PScoggins: Yes.

JTate: And she just simply notarized that deed and it was sent up to Asheville.

PScoggins: Right.

JTate: And then tell us about how the foreclosure came about. You said there was a bankruptcy filed by McDermott.

PScoggins: Yes.

JTate: Alright. The property was ultimately allowed by the bankruptcy judge – it allowed you to foreclose. Is that right?

PScoggins: Yes.

JTate: And then when you foreclosed you just, was there anybody else who bid in at the foreclosure sale?

PScoggins: Nobody.

JTate: Nobody was willing to pay.

PScoggins: We had that auction or whatever it is...

JTate: On the courthouse steps.

PScoggins: I made an offer.

JTate: You were the only one there so you had no other choice but to purchase the property yourself.

PScoggins: (indicated yes)

JTate: You are physically unable to operate it as a bed and breakfast now.

PScoggins: I have no intentions of it. It's too much.

JTate: I believe you told us, and you didn't hit me, you're too old now.

PScoggins: Too old.

JTate: You didn't hit me when I asked you.

PScoggins: You're not very nice.

JTate: Ok. I didn't mean that. I meant that with all due respect. You intend then to sell this as separate parcels because you haven't been successful in selling it together. Is that right?

PScoggins: Right.

JTate: One of the homes is a bed and breakfast and the other is a residence.

PScoggins: It used to be. It's a private home.

JTate: That's what I mean, yeah. Your only other alternative would be to either try to sell it again as one, and perhaps unsuccessfully or rent it out. Is that right?

PScoggins: Yes.

JTate: I believe you've indicated in your testimony last time that you had discussed it with the neighbors and they have indicated a desire that you sell it rather than rent it and perhaps have tenants who might not be as good neighbors.

PScoggins: Right.

JTate: Ya'll have any questions of me or Ms. Scoggins?

JCrafton: I have a question. Was Mrs. Scoggins represented by an attorney when she sold it to the McDermotts?

PScoggins: Yes. Each time. Margaret Mann from Asheville handled it both times.

JTate: You're talking about with the foreclosure, right?

PScoggins: But she also helped me sell it to the McDermotts.

JTate: Were you aware that it was being recombined?

PScoggins: No.

JCrafton: But she was represented by an attorney?

PScoggins: Yes.

JTate: Did Ms. Mann do... Ok. Go ahead. That's all. Any other questions of her?

VChairman JPhelps: Any more? Tony do you have any questions?

Planning Director AStarr: Just I wasn't clear because I did not have all the documents. When was the last time that she took possession of the property and has had it consistently since? When did that occur?

PScoggins: August, wasn't it?

JTate: August, 2007.

JTate: Ok. August of 2007?

Planning Director AStarr: Yes.

JTate: That's when the foreclosure was.

JCrafton: I have one other question. And Anthony may have to answer it but if you can, if you would, Mr. Tate, You've given us the dates of the transfer of deeds, and I believe you said the last transfer of the deed where Ms. Scoggins sold it to the McDermotts as one piece.

JTate: Yes, sir.

JCrafton: Unknowing to her as she testified and sold it as one piece. That was 2002?

JTate: That would be, yes, sir, that would be the deed from Ms. Scoggins to McDermott Manor in October of 2002.

JCrafton: October of 2002.

JTate: Yes, sir.

JCrafton: And when was the Land – what I'm leading up to – and when was the Land Development Code, current Land Development Code adopted?

Associate County Attorney SZambon: The Land Development Code was adopted September 19th, I always want to say 20th – 19th 2007.

JTate: 2007, so...

Associate County Attorney SZambon: Almost a year ago. Almost a year old.

JCrafton: Ok. But five years after this recombination.

JTate: And actually after she acquired the property by the trustees' deed in the foreclosure which was August 29th of 2007. Although the actual - that was when the deed was dated the actual recording was September 12 of 2007. One week before the Land Development Code. I think you said...

Associate County Attorney SZambon: Did you say it was recorded September 12?

JTate: Yes ma'am. I think you said it was approved. The Land Development Code was approved September 19?

Associate County Attorney SZambon: Yes.

JTate: Ok.

Associate County Attorney SZambon: I just want to make sure...

APouch: And when was it combined?

JTate: It was combined in 2002.

APouch: So it was combined for five years before...

JTate: Um-hm. Any other questions? If I may just briefly – the facts are really in terms of what Ms. Scoggins was attempting to accomplish are no different than when we were here before on June the 4th. We're certainly sensitive to precedence and those types of things. As has been stated every case stands on its own merits. In this particular case we're not talking about someone who recombined it and then changed their mind, someone who bought it back voluntarily. She was forced to protect her investment at the foreclosure sale. In a foreclosure that took place based upon a transaction that occurred well before the Land Development Code, as it now stands. So she has basically involuntarily ended up with this property. Simply needs to dispose of it for the same reasons as we indicated before and has sought to do the same thing. Unfortunately when we went through this process before we came away, and I think this board came away, with the expectation that she would then be able to go and submit the subdivision plat and have that approved at that time and recorded. And that's the basis on which she went through that process. Due to circumstances that are no one's fault there was um - no one had determined that it didn't comply with these minimum density requirements at the time. And frankly Ms. Scoggins was quite disturbed by that process. Not at anybody in particular but just that it occurred that way. And is now in a delay, which again is nobody's fault, but hopes to accomplish to what we sought to accomplish in June by asking this board to grant the variance that we've sought, today. I would submit to you respectfully that all of the conclusions that were made and the findings of fact in addition to other findings of fact that were made in the last order are applicable here. And that this is both a distinct and a sympathetic situation in that she was forced to take this property back into foreclosure and has suffered as you can well appreciate substantial loss. The land is unique in that it was built – I've heard stories anywhere from 1935, the buildings to the 1960s. But in all cases, I think the evidence is clear, before there was any zoning. Nothing has changed except that the road in front of it I think has become state maintained. And that the property has stayed in its same existing situation. That was not non-conforming when it was constructed. It was not non-conforming up until 2002 through circumstances beyond her control. Does it affect the official boundaries of the zoning map? Mrs. Scoggins' efforts to simply dispose of the property and recoup her investment in the property have met with frustration through no fault of her own. And the hardship that's occurred is not of her own doing nor even was it of her own knowledge or intention. So I submit that this is a compelling situation. And will both, not only protect the public safety and welfare and having no effect on the neighborhood but actually is to the best- in the best interest of that neighborhood. At least that is perceived by the neighbors who are in the best position to do so. Most of all is this says the variance will do substantial justice by putting the parcel back as it was. This case, legitimizing the previous division, which this refers to front setback in the early order. This is an extremely compelling case I think and is distinct from many others if for no other reason because of the deed in lieu of foreclosure and then the ultimate foreclosure which is the process by which it ended up recombined. So if you are looking for equal protections and distinctions there's certainly one there. She did not choose, again as I indicated before, to be in this position. And doesn't desire to be in this position and simply desires to sell this property and do what's – and go on with the rest of her life. And I ask this board to find in her favor. Thank you for your time.

Assistant County Attorney SZambon: Mr. Chairman we would ask to see if staff has any rebuttal.

JTate: May I just formally, excuse me I'm sorry. You're right. I just realized – may I formally move the admission of all of the documents I handed up please? Thank you, I'm sorry to interrupt but I didn't want to get to the closing.

VChairman JPhelps: All in favor of accepting documents as evidence?

All board members indicated they were in favor of accepting all documents into evidence.

JTate: Thank you.

VChairman JPhelps: Thank you.

VChairman JPhelps: Rebuttal?

Planning Director AStarr: I'd just like to make a couple points and then leave it at that. One is that according to the evidence you've heard tonight is that the lot's been combined for several years as one lot. That she last had an opportunity to re-divide the lots in August of 2007 prior to the Land Development Code being adopted September 19th. At that point in time when she took ownership she could have remedied the situation, at that point in time. Subdivision plat of that nature is reviewed within one or two days typically. Regarding the rental property I believe that is not relevant because the sellers of the property can turn around, the buyers of the property, excuse me, even if it's two different lots could turn around and rent the property. So I think whether it's rented or not and what the neighbors' concerns are is not relevant. And I think it also it would set a precedent as to – not only would you - be a situation that I've not had occur before in my career is that you go from a lot that is other wise conforming because you could count one lot as the principle structure and the other – I mean one lot is the principle house and the other structure as an accessory dwelling unit, which is allowed currently under the current regulations and you would in affect be creating a non-conforming lot. And I'm not sure I've ever experienced that having happened before – creating a non-conforming lot. There is also the situation that then you would not be reaching a threshold as far as having no reasonable return of the property. So not only then would that precedent apply to this particular case it could apply to other cases where you say, "We're not going to approve this because you didn't prove there's no reasonable return for the property". When in fact I don't – what is demonstrated by what the uses could be here in the staff report. There are reasonable returns on the property without dividing it. So that would apply to other cases potentially. That may have nothing to do with lot sizes or even setbacks. Be glad to answer any questions you have.

VChairman JPhelps: You said the zoning was, again?

Planning Director AStarr: The zoning is local commercial now it was C2P prior to the adoption.

VChairman JPhelps: Now in a local commercial what types of activities would be permitted?

Planning Director AStarr: Any number of retail uses, offices uses. I can give you a summary of the list, I've got it handy but there are a number of any uses, retail uses, office uses.

VChairman JPhelps: Small shops?

Planning Director AStarr: Any kind of small shop or office would be allowed as well as some other ancillary type businesses.

TEngel: Is the whole neighborhood now residential?

Planning Director AStarr: The whole neighborhood is local commercial now

TEngel: No. I'm talking as far as the use.

Planning Director AStarr: I believe it's a mix, and that was the reason why it was originally zoned C2P which was a kind of a commercial preservation. Which is a mix between residential and commercial so there's some businesses operated out of what used to be homes in the neighborhood.

Associate County Attorney SZambon: Mr. Chairman if you want to know specific things that are allowed in the local commercial, I have the table in front of me. And I can read some of them.

VChairman JPhelps: I just wanted some examples of things.

Associate County Attorney SZambon: Assisted living residence, bed and breakfast, child care facility, fuel pumps, adult care, atm(s), automobile and equipment services, broadcast and communication facility, extermination / pest control, office: business, professional and public, school, theatre, drive-in, urgent care, cinema complex, convenience store, produce stand. These are all the ones that are permitted by right not – I'm trying to stay away from the ones that require a special use permit.

VChairman JPhelps: That's a - ok how many just to give an idea – because that's a real mix in a residential area.

Associate County Attorney SZambon: And Mr. Chairman before the board gets much further in the hearing and in its discussion I did want to remind the board that while Mrs. Scoggins is the current land owner and may have a very sympathetic story, a variance travels with the land. So from these lots going forward, unless something else changed, would be non-conforming. And not just, you know now you have one conforming lot then you would have two non-conforming lots in a local commercial. So I do want you to remember it's not an instance where you should look at the property not necessarily the applicant.

VChairman JPhelps: Jim, do you want to close the public hearing?

JCrafton: Yes.

VChairman JPhelps: I'd like a motion to go out of...

Associate County Attorney SZambon: Mr. Tate do you have any rebuttal?

JTate: No. Nothing further.

JCrafton: There being no further evidence to be given I move we close the public hearing.

(at the same time) VChariman JPhelps: Second. APouch: I second.

VChariman JPhelps: All in favor? Unanimous. Ok. We've now closed the hearing and it's now open for discussion here by the board.

APouch: Alright, last time we gave them a variance, right?

VChairman JPhelps: Yes, V-08-09.

APouch: And now they want a larger variance.

JCrafton: It's a different kind of variance.

APouch: A different kind.

JCrafton: He wanted a setback.

APouch: Ok.

VChairman JPhelps: Between the two residences, the setback.

Zoning Administrator TLinville: It was a front yard setback. It was too close to the street, or to the right-of-way.

VChairman JPhelps: So the distances between the two residences were not a part of that at all? Seem like we discussed that.

APouch: I think we did.

JCrafton: But right now they are asking us to waive the fact that it's a non-conforming lot.

VChairman JPhelps: Due to the total acreage involved.

JCrafton: It's a different request before us, I believe. And I was thinking too, when we approved it before, the question of it being non-conforming by lot size in regard to our Land Development Code was not a question at that time. That's why it's coming back. Because it wasn't a question, and should have been. But that was not the issue before us and we didn't consider that, I believe, as I recall.

APouch: And it was considered one lot for five years before the new zoning ordinance, is that correct?

VChairman JPhelps: Yes.

TEngel: We have the ability to reduce the density? We can do that? Or sounds unusual.

Associate County Attorney SZambon: I looked it up before and I couldn't find any specific case law on it. This board is allowed to – in terms of variances – you can do a variance for things like setbacks and buffers and stuff like that. But you can't do a variance for use so it depends on if you consider density an aspect of the property kind of requirement thing versus a use thing. Does that make sense?

TEngel: Seems to be skirting it a little.

Associate County Attorney SZambon: Well, I did look it up. There's no case law on it. Anthony, Toby and I had discussed it. I didn't think there was a problem for it coming to you to have a hearing. But I mean, I can't, I don't make decisions. So Anthony as he stated has never seen this happen before, where you would make something a non-conforming lot. It's tricky. If it was a lot size thing to a certain sense that makes more sense to me just because it's a square feet kind of thing. So that it would make sense numerically just because you could reduce the setback you could reduce a lot size. But because this is density based it's more gray. So it's really up to this board.

Zoning Administrator TLinville: If you want to think about it from a minimum lot size standard because that's what traditional zoning has been and what we're used to. The minimum lot size would be a quarter of an acre and the home that was the bed and breakfast will be less than a quarter of an acre. It will be .24 instead of .25 and the other home will be .13 instead of .25.

TEngel: And it's not considered non-conforming now so we would be creating a non-conforming.

Associate County Attorney SZambon: You would be creating two non-conforming lots. You would take one like Anthony said, you would be taking one conforming lot because it does meet the acreage and there's one single family home on it and the bed and breakfast is considered an accessory use. You're

allowed to have an accessory use on the property. However if you grant the variance then it will be two non-conforming lots. One, like Toby said, which is almost half the size of what it should be.

TEngel: And that's something we've never done before.

Associate County Attorney SZambon: I have not seen this board do it before.

Zoning Administrator TLinville: Well, you know, density, minimum density is new. It's about a year old.

Associate County Attorney SZambon: It's new with the new Land Development Code. And there's reasons that we're density based instead of lot size based.

VChairman JPhelps: So that's just two – so that is a good point, that we would be creating, taking a conforming lot and creating two non-conforming lots.

TEngel: Two non-conforming. We've never done that.

VChairman JPhelps: No, but that's a density thing. Whereas before we had a setback that's really creating a non-conforming condition too. It's not a density or lot size.

TEngel: But the lot's still conforming basically.

VChairman JPhelps: But the setback is not.

TEngel: Or a legal non-conforming.

Associate County Attorney SZambon: I don't know what a legal non-conforming is.

VChairman JPhelps: Well, I mean this is quite unusual for us.

JCrafton: Mr. Chairman, let me go ahead and give you my thoughts. There are many parcels of land in our county that have been affected from the owner's perspective adversely by the Land Development Code because it restricts some uses over what they may have chosen to do with it prior to having the Land Development Code. But never the less we have a Land Development Code now. And I don't think it's in the best interest of the community for us to then to erode the intent of the code which was to – density was a feature of establishing lot sizes. Much of the evidence presented to us today has been to portrait the fact that these were two parcels for a long period of time. And only within the last five or six years became combined and that Mrs. Scoggins was not knowledgeable about that. The only problem that I have with that is she was represented by an attorney who would have had the expertise to have seen that such an event was occurring and had thought it not to be to her detriment at the time. So it's not as if she did that on her own unadvised. She did say that she had the services of an attorney when she made that step. The fact that's reported to us that the neighbors seem to think the separate unit would be best if it were owned rather than rented is really irrelevant, because that's hearsay evidence and we're not allowed to consider anything that's hearsay. There was no direct evidence given to us from a neighbor saying that today. So I don't think we can consider what the neighbors may or may not like to have happen in their neighborhood. As I mentioned earlier in responding to Ann the first time we looked at this application to us it was for a setback. And the issue in question of density in non-conforming lots – that whole question was not put before us therefore was not a consideration. And then we approved that other application. We were approving something entirely different than what we're being asked to do today. And when you look at the criteria that we have to go by on a variance application on the yellow sheet that's in most of our notebooks, I believe. It says you can't grant a variance if it's for a use that's not allowed in general use district. And we would in effect be creating two non-conforming lots. It would seem that we can't create a variance that would allow for that. Neither can we extend physically a non-conforming use. Well, depending on how you look at it, if it's got two structures on .37 acres, it's non-conforming. It has a major structure and an accessory, it apparently is conforming. So that's a gray issue. In the fourth item there we can't grant a variance if the reason for the request is property could be more profitable. I don't think the evidence has indicated that there is no return available on the property. Rather it is certainly a greater return could it be split and sold as two pieces. But I think the overriding fact is we would be allowing the creation of two non-conforming lots where technically there is not a non-conforming lot. And while it would be nice to help Ms. Scoggins out I think our role is to rule in terms of what do the regulations call for and what under the criteria allows for a reasonable variance. I don't find any evidence supports granting a variance. That's just how I feel.

VChairman JPhelps: Other comments? Brandon, do you have any?

BYelverton: One thing about it, I do think it's a difficult case due to the fact that part of her hardships are that she didn't want to take the land back. It was two pieces of property, separate when she sold it.

And it's been returned to her as one piece of property and she just wants it back to where it was, which I understand.

JCrafton: Excuse me. It was returned as two. She sold it as one.

BYelverton: Correct. She did not do the splitting herself. She may have been represented by an attorney but that attorney in my understanding crafted her deed. I don't think her attorney was at the closing table with her. I don't think that any attorney pointed out to her it's being returned to her or sold as split. I think that's too bad. It is a tough situation right here saying no variance extended physically a non-conforming use. That's tough to get around. I think it's tough on the board. We are here to grant exceptions but we have to follow the rules.

VChairman JPhelps: Tony?

APouch: You know I know you can combine two pieces of property into one and it saves you a lot on your tax bill. And I don't know if that was the purpose. Maybe that was a consideration. But that's not for us to consider anyway, I don't think.

VChairman JPhelps: Sarah, is there any way – I know I read all the time where you have new hearings or the County Commissioners meet to change the zoning or change anything – is there any provision in a case like this that the County Commissioners could address?

Associate County Attorney SZambon: Is there any residential or zoning district that would allow this property to be split?

Zoning Administrator TLinville: No.

Associate County Attorney SZambon: Normally, a lot of times we would say is, go to a rezoning request. And that's mainly when people want to, you know, commercial properties that are zoned R-40, or something. But because the parcel is so small I don't think and Planning confirmed what I thought that there is any zoning district that this would be conforming in.

Zoning Administrator TLinville: Local commercial is the most dense, has the most dense residential district.

VChairman JPhelps: Well if I look at exhibit 1, this plat map of the thing, there are other very small lots in that area.

Associate County Attorney SZambon: Yes. And those would all been grandfathered in because they've probably been that way since the property, whenever it was – early 1900s, 1920s, 1930s.

VChairman JPhelps: One of them looks to be as narrow as 33 feet. So my point there is it wouldn't be out of line from other lots in the area, if it's two.

Associate County Attorney SZambon: Well do remember you shouldn't consider non-conforming uses and again it depends on whether or not you're going to consider this a use or not a use in the neighborhood or other district. So you shouldn't really consider what other areas look like.

TEngel: So when you say use, or we're not considering use, what do you exactly mean by that?

Associate County Attorney SZambon: The language for the variance thing is, and it's on your sheet, it says do not consider non-conforming uses in neighborhoods or other districts. So it depends again on if you want to consider density a use or if it's not a use.

TEngel: Density doesn't sound like it would be a use as it's defined.

Associate County Attorney SZambon: It doesn't really sound like, yeah, no, I mean it's just kind of a gray area. Well to me it's a gray area and it might not be a gray area to anybody else. But just because most other things are 15 foot setbacks and 16,000 foot lot size, mainly because it's not numerical I get confused on the density issue. So I might not be the best one. That might be more of a planning, zoning issue than a legal issue because again I couldn't find any case law on it. So you might want to ask Toby or Anthony or Mr. Tate. But you'd have to open the hearing back up to ask.

BYelverton: So it's a gray area whether or not it is extending physically a non-conforming – we are extending physically a non-conforming use? Because really we're not.

Associate County Attorney SZambon: Yeah because uses are, typically when you think of uses you think of restaurant, drive-in, you know, those kinds of things. Anthony and Autumn are furiously looking in their LDC so they might come up with something better than what I've come up with. But again is density a use? I don't know. No.

JCrafton: Isn't the question really and I think this is what you're alluding to is if we take this neighborhood right here, and if we were to look and find there's another very small lot that's only 1 ½ acres and that's far below a conforming use. That in itself is not justification for this board to say, "Well this lot can be too". We have to judge this request based on what the ordinance says. And our judgment on the, what we want to grant compared to what the ordinance has intended irregardless of what the lot down the street was able to do three years ago. I think that's the answer to that question. We can't use that as a justification for this action.

Associate County Attorney SZambon: And the same thing is true about setbacks and buffers and that kind of stuff. Just because the neighbors have all gotten a setback doesn't necessarily mean that every applicant before us is entitled to a setback. What I would urge you to do in terms of working through this issue and in terms of directing me or figuring out how you want to vote or directing me to write the order is to work through the cheat sheets for the findings of fact. You know, what, if any are the practical difficulties or unnecessary hardships? Can there be a reasonable use or reasonable return on this property? What are the unique circumstances? That kind of stuff. And that might help you better and might help me draft a clear more cogent order.

TEngel: Otherwise to every single variance that we have...

VChairman JPhelps: Do you want to let's go down. Will that help in the final decision if we go through these things? Everybody has the yellow sheet. The first one is under Factors to Consider (Findings of Fact): *Are there practical difficulties or unnecessary hardships in meeting the letter of the law?*

JCrafton: Well she's meeting it now. She's asking us to grant an allowance where she would not meet it. In that case...

VChairman JPhelps: The answer would be no.

JCrafton: Right.

TEngel: Let's go down the rest of them.

VChairman JPhelps: Let's go down the rest. *Can a reasonable return or reasonable use be gotten from the property if applicant complies with literal terms of law?*

BYelverton: She's not been able to sell it.

VChairman JPhelps: She's not able to sell it. Use could be made, I mean it was...

TEngel: It's forcing two one family houses to be tied together.

BYelverton: It's definitely hurting the value.

TEngel: It wouldn't help the value in the neighborhood either. They'd be better off with two one family houses. Ok. Let's go to the next one.

VChairman JPhelps: *Were there unique circumstances related to the land?*

TEngel: Yes.

APouch: We all agree on that one.

TEngel: Yeah, we do.

VChairman JPhelps: *Is the hardship the applicant's fault?*

TEngel: No. I'd say it's not.

JCrafton: I'd say that to me that's a gray area. She didn't do it intentionally but I still contend that she was – I think Mr. Tate suggested that the buyer's attorney drew up the deed which combined the lots. She was represented by her own attorney in the action, she indicated. So it was not the attorney, it was my understanding it was not the attorney who drew it up who represented her.

TEngel: If she had had any knowledge that it would join the lots together and she wouldn't be able to sell it separately I'm sure she wouldn't have done it.

BYelverton: That's what she said when she testified at the close of the sale. Normally a seller has a lawyer do the deed for the buyer. So I'm sure her lawyers did her deed for her, except for that deed. Then you have to look at what was going on at the closing.

TEngel: Perhaps wasn't even aware of what was going on with the new regulations going into effect.

VChairman JPhelps: According to this deed she was granting it to McDermott Manor and that was the point in time when it was combined. That was October 2002. She was a party of it obviously and must of had knowledge of what was occurring.

TEngel: No. She probably didn't have knowledge of what was happening with that occurrence because it would have been easy to set up the deed the other way.

JTate: Can I make a point here? I know you're in closed hearing.

VChairman JPhelps: Yes. We're in closed hearing.

Associate County Attorney SZambon: You can open it up and let the applicant make a point and let Mr. Starr make a point if he wants.

VChairman JPhelps: We'll open the hearing.

JTate: Thank you. And again I don't want to belabor this but I want to point out was with all due respect to what Mr. Crafton has said, the actual recombination took place in 2002. The Land Development Code was passed in September 19, 2007. She actually reacquired this property seven days before. That's when the deed was recorded. In the first place with all due respect to the promptness of Mr. Starr's staff had she even been aware of at the time or been concerned with the fact of this need to do this I don't even know that you could have gotten a final printed copy of the Land Development Code in seven days. But that was – she would have had to have done that and gotten a surveyor to draw something in that time. But the reality of it is when the actual recombination occurred whether she was represented by counsel or not, that was in 2002. The Commissioners didn't know what they were going to approve, much less the rest of the public, and had been talking about changing the Land Development Code since the 1990s. So to have expected even the most foresighted attorney to have advised her, first of all they would have had to assume she would have foreclosed and taken the property back. Secondly they would have had to assume that Henderson County would go from minimum lot sizes to density requirements. And I don't even know what the code said then, I don't know and no one remembers. But that would expect too much not only of, not even of Ms. Scoggins but her attorney. Secondly we're not asking in terms of this extending physically a non-conforming use. I would with respect to your opinion, I don't think density has anything to do with use. I think density is what she, you know, the normal – I mean I think use as the normal utilization of the word in the case law says in all of these ordinances you utilize what is the normal and ordinary meaning of use. And that is what you are doing with your property not its density. So if she were to – if she were using the property for something now or had been using it for something that was not conforming with the permitted uses then that would be a different situation. In this case the property has been used for, sounds like there's a whole hodge-podge of uses that are permitted under this particular – and that's – we're not trying to change any of that. In fact it's all used as residence now which is - so none of that is what we're requesting. So again I don't want to belabor this but I felt like I needed to at least try to give my opinion on that matter. Ok.

VChairman JPhelps: Thank you. Tony, have you found anything else while we're open? Would you like to make any additional comment?

Planning Director AStarr: In the code there, I think, just to reiterate the purposes of variances are intended to provide limited relief from the requirements of the chapter. And those cases where the strict applications to the provisions of this chapter would result in unnecessary hardship. And then you go down under Standards of Review, it says no variance shall be granted or considered where the fact of the property could be used for more profitably is the reason for the request of the variance. That fact alone I believe is not met and therefore a variance would not be warranted because they clearly can make use of the property in its existing conditions. And then I won't – the other conditions there – you've already covered some of those, so...

VChairman JPhelps: Thank you. Do you have any follow up Mr. Tate?

JTate: No.

VChairman JPhelps: Shall we close the hearing again?

JCrafton: (nodded in agreement)

VChairman JPhelps: All in favor?

All board members were in favor of closing the hearing again from public input.

VChairman JPhelps: Unanimous. We're closed, if there's no objection. There being none... You know looking down – and this is probably what I think Tony was addressing, is the variance in harmony with the spirit and intent of the law? Apparently the coding is the density requirement.

JCrafton: I agree.

VChairman JPhelps: Will the variance protect public safety and welfare? I see no difference there one way or the other. And then, will the variance do substantial justice?

TEngel: You could possibly say yes on that.

VChairman JPhelps: Yeah, I would say probably you could say it enhances from what we've heard.

And do not consider non-conforming uses in the neighborhood or other districts – they are not a reason for a variance. So having been through all this the question is, does it meet the requirements for granting a variance?

Associate County Attorney SZambon: Mr. Chairman I did just want to comment real quick on the 'reasonable return, reasonable use'. I mean it is subjective to a certain degree what 'reasonable return' is but I did want to remind the board that just because a property would be more profitable one way is not a reason to you know... and clearly that's within reason. If granting some kind of variance would make the property at all a reasonable return based on market values or whatever then that's up to this board.

VChairman JPhelps: Well it says specifically no variance if reason for request is property could be more profitable. So that's a no-no to begin.

BYelverton: It might not be sellable at all if it's not combined. It's not whether it's profitable it's whether she can sell it like she intended to do in the first place.

VChairman JPhelps: Has not been able to so far.

BYelverton: She's tried to sell it and she hasn't been able to.

JCrafton: But we don't know at what price.

BYelverton: Sure don't. It's up to us to determine if it's a reasonable return.

JCrafton: Are you ready for a motion?

VChairman JPhelps: Do you want to make a motion Jim unless...

JCrafton: I'll make one, you know then we'll see which way the board goes or whatever.

JCrafton: I move that the, in regard to variance request V-08-15, the applicant being a Patricia Scoggins that the board deny the request based on number 1: It would allow the creation of two non-conforming lots, advancing a non-conforming use. Evidence has not been indicated that a reasonable return cannot be attained. She sold it twice. The other parties just defaulted. And we don't know what the asking price has been this time and her ability to sell it, only that she hasn't. I don't think the factors to consider to justify the variance, the evidence supports the justification for the variance. And is the variance in harmony with the spirit and intent of the law? Well clearly it is not. The intent of the law is to set density requirements for that particular zoning district and this would in fact go in opposite direction from that by allowing the ultimate establishment of a little over a (.1) acres size lot. Where the density clearly requires at least a quarter of an acre. So that would be my motion to deny.

VChairman JPhelps: Is there a second? Then I'll second so that we can discuss the motion. Pros, cons?

TEngel: Ok. Well when you mention the spirit not being – that we would be creating something - two non-comformings, whenever we approve any type of variance we are not – we are going against the intended law or regulations. So that sort of doesn't hold up completely. That's my opinion.

VChairman JPhelps: I agree.

TEngel: Otherwise there'd be no variances.

APouch: I think every decision we make is individual decision and I don't feel we're setting a precedent. I think this is a unique situation.

VChairman JPhelps: So are we ready to vote? Do you want to call the previous question? All in favor then of the motion to basically to deny the variance request please raise your right hand.

Jim Crafton: (raised his right hand to deny)

Vice Chairman Jim Phelps: (raised his right hand to deny)

VChairman JPhelps: Those opposed, like sign.

Brandon Yelverton: (raised his right hand to oppose)

Tony Engel: (raised his right hand to oppose)

Ann Pouch: (raised her right hand to oppose)

VChairman JPhelps: There are two votes to support the motion which would deny and three votes against. Where do we stand, Sarah?

Associate County Attorney SZambon: You can make another motion.

VChairman JPhelps: You have to have a vote of four to do it either way.

Associate County Attorney SZambon: You need a vote of four for her to get the variance.

VChairman JPhelps: So Brandon, Tony, Ann would you like to make a...

BYelverton: I'd like to make a motion to approve the variance of V-08-15.

TEngel: I'll second.

VChairman JPhelps: And we're going to say based on – looking on the fact don't we have to say what finding of facts?

Associate County Attorney SZambon: It would be helpful to me to draft it, to go over some of it.

VChairman JPhelps: Just some of it.

TEngel: We've reversed the whole thing now.

APouch: A reasonable return, I would suggest there are unique circumstances.

TEngel: Tremendously unique.

APouch: The hardship is not the applicants fault. Is the variance in harmony in spirit and intent of the law?

TEngel: I would say it is.

APouch: I think we have to help people, protect people. Look, I mean...

TEngel: Your piece of property, they were two. Each one was a one family, legal one family piece of property for all those years. All of a sudden for it to be illegal as a one family, anything else?

VChairman JPhelps: Do you have some points Sarah?

Associate County Attorney SZambon: I got some stuff, yeah.

VChairman JPhelps: So we have – Brandon made the motion and Tony you second it, is that correct?

TEngel: Correct.

VChairman JPhelps: Discussion then on the motion.

JCrafton: Ok. The only question I would raise to the board is to consider from our understanding, why is the applicant asking us for a variance today. I think the reason is so that by subdividing she can more easily sell the property and realize a better return from trying to sell it. She obviously does not want to operate it. So it's not a question of living in it or using it or operating it or doing anything with it. She wants to be able to sell it in a more advantageous position.

TEngel: As a one family house.

JCrafton: Irregardless, she wants to be able to sell the two properties in a more advantageous position than she feels she's able to do today with two structures being on the lot. That's why she's asking us for the variance. And so to me in granting the variance and we're granting it to her to give her the opportunity get a greater return on the sale of the property. It doesn't have anything to do with her living ability or where she lives or how she uses the property. Only that she can get a greater return. That's my understanding for her reason, for her desire for the variance. So that's why I supported the denial and will vote against the measure to approve. But in discussion that's just a point I wanted to bring up.

VChairman JPhelps: I think that's a good point. I also, you know struggle with this because I feel empathy with the situation which she finds herself in but the overriding here is if reason for request is property could be more profitable. And that seems to be the full basis, primary basis at least for this request. And again I don't know how we define reasonable but a reasonable use can be gotten from the property as it exists, certainly some return could be had, it would appear.

TEngel: But you can say that about every variance.

VChairman JPhelps: Exactly. That's why I said I was struggling because there are issues here. But there's overriding – could it be more profitable? Most of the one's are not dealing with profitability.

BYelverton: It's a good point.

TEngel: 'Course she hasn't been able to sell it. It might not be the demand for two family houses versus one family.

VChairman JPhelps: Seeing the ups and downs in real estate I've learned long ago that nothing is worth more than what you can get for it when you have to sell it, you know. We've all faced that.

JCrafton: Of course we have. We're in an extremely depressed real estate market anyway.

VChairman JPhelps: Yes. We are. But this county has had like a 14% decline in property values in the last year. But that's beside the point.

APouch: So where does it stand now, Sarah?

Associate County Attorney SZambon: You haven't called the question on the last vote.

VChairman JPhelps: Yeah, we're still discussing it. The other issue I had but only this one was, is the requirement. And we do have a code now. And apparently it's very specific in this case. So we intend to point it out. It would certainly be creating a non-conforming, two non-conforming lots. The part that bothers me is that they had previously been that way for how many years? Fifty years?

TEngel: And no matter what you do to it it's not going to change it's appearance in the neighborhood.

VChairman JPhelps: Exactly. I mean it has no alteration if you would in the neighborhood in any way. That's just part of my dilemma. Personally I see some things, and for obvious reasons for not approving it and some good reasons for why perhaps it should be. But that's just a personal quandary I have.

TEngel: I think we all have that quandary.

JCrafton: Call for the question?

VChairman JPhelps: Ok. The previous question has been called. Those in favor of granting the variance please raise your right hand.

Brandon Yelverton: (raised his right hand to grant)

Tony Engel: (raised his right hand to grant)

Ann Pouch: (raised her right hand to grant)

VChairman JPhelps: Opposed, no.

Jim Crafton: (raised his right hand to deny)

Vice Chairman Jim Phelps: (raised his right hand to deny)

VChairman JPhelps: We have three in favor and two opposed.

Associate County Attorney SZambon: Then we don't -there is no variance.

VChairman JPhelps: But we can't grant it without a full vote.

Associate County Attorney SZambon: You need four (4) votes. So since you've done it both ways there's no variance.

TEngel: So it's been disapproved, basically.

Associate County Attorney SZambon: It has not been approved.

TEngel: Ok.

Associate County Attorney SZambon: Hasn't been disa... it's not denied. Just has not been approved because state law requires 4/5s. It's kind of how like if you're not guilty it doesn't mean you're innocent. It just means you're not guilty.

VChairman JPhelps: So at this point in time what we're saying is it has not been approved.

Associate County Attorney SZambon: Yes. There is no variance.

VChairman JPhelps: Granted.

Associate County Attorney SZambon: Granted.

VChairman JPhelps: Ok. Mr. Tate you've heard the board's vote here and we're sorry for your not gaining your variance. It would take four votes and we only had three. Thank you.

JTate: Thank you for your time.

VChairman JPhelps: Alright, you'll return to the agenda.

Associate County Attorney SZambon: You have to close the hearing. Close the public hearing. You just closed it to public comment you didn't close the whole hearing.

VChairman JPhelps: Do I have a motion to close the public hearing?

JCrafton: So moved.

TEngel: Second.

VChairman JPhelps: All in favor.

All board members were in favor of closing the hearing.

VChairman JPhelps: Ok. So we closed the public comment part so now we've closed the entire hearing. Is there any other new business to come before the board at this time?

Associate County Attorney SZambon: Not that I have.

Zoning Administrator TLinville: I just want to let you know that the items that were here at your seat are the workbooks from the School of Government. One is the duties of the Board of Adjustment. Then there are two surveys, one about what different areas for special use permits and one for variances. This is the cure for insomnia, so when you get home you can read over that. That's all I have.

VChairman JPhelps: Thank you.

There being no further business, Vice Chairman Phelps asked for a motion to adjourn the meeting.

APouch: Motioned. All Board members were in favor of adjourning the meeting at 5:47 PM.

Dean Bonessi, Chairman

Karen Ann Antonucci, Secretary