

MINUTES OF THE HENDERSON COUNTY  
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its regular July meeting, Wednesday, July 30, 2008, at 4:00 p.m. in the King Street Meeting Room, 100 N. King Street, Hendersonville, North Carolina. Those present were: Dean Bonessi, Chairman, Jim Phelps, Vice-chairman, Tony Engel, Jim Crafton, Ann Pouch, Alternate Board Member Eric Goodman, Zoning Administrator Toby Linville, Associate County Attorney Sarah Zambon, and Secretary to the Board Karen Ann Antonucci.

Chairman Bonessi called the meeting to order at 4:01 PM.

Chairman Bonessi introduced the Board members to the parties present.

Chairman Bonessi asked if there were any changes or corrections to the June 25, 2008 minutes. There being none, he asked for a motion to accept the minutes as written. Jim Crafton moved to accept as presented. Tony Engel seconded. All board members were in favor of accepting the minutes as presented.

Order A-08-03, Donald and Lynn Burnett

Chairman Bonessi asked for a motion to accept Order A-08-03 as written.

JPhelps: Motioned.

APouch: Seconded.

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

Order A-08-04, Larry Holbert and Ronnie Gray

Chairman Bonessi asked for a motion to accept Order A-08-04 as written.

JPhelps: Motioned.

TEngel: Seconded.

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

Order V-08-08, Lois Schweinler

Chairman Bonessi asked for a motion to accept Order V-08-08 as written.

TEngel: Motioned.

JPhelps: Seconded.

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

Order SUP-08-10, Harold Pace

Chairman Bonessi asked for a motion to accept Order SUP-08-10 as written.

JCrafton: Motioned.

APouch: Seconded.

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

Order SUP-08-13, Larry Holbert and Ronnie Gray

Chairman Bonessi asked for a motion to accept Order SUP-08-13 as written.

JPhelps: Motioned.

JCrafton: Seconded.

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

OLD BUSINESS:

**Case A-08-05, Gene A. Wilkie, Trustee**, appeal of Compliance Order Notice of Violation LDC 200A-62. Under the Land Development Code, Community Commercial zones may not be used for automobile sales and service business without a valid Special Use Permit. (PIN 9651519293)

Associate County Attorney SZambon: Mr. Chairman at this time I would like to recommend to the board some adjustments to the agenda. First of all the OLD BUSINESS, the Wilkie appeal, as you may have seen in the note from Karen Ann, he has removed his request for appeal. That doesn't need to be heard by this board today. And I'd like to add to under NEW BUSINESS, after the Ethics Code, I had given this board last time, I believe a copy of the Noise Ordinance because it had come up at a previous hearing. And I just wanted to give the board a chance to ask me any questions about the Noise Ordinance. We don't have to go into it in any detail because again, it's not anything this board will see for the most part. But just in case this board has any questions.

Chairman Bonessi: I guess my question with the whole business with the Wilkie case – are we not hearing it this time?

Zoning Administrator TLinville: That was part of the large rezoning that occurred on Route 25 so they don't need a special use permit. That's what the appeal was for so it won't come back up.

Chairman Bonessi: That's what I just wanted to make sure. I remember something about rezoning and everything. So we're just not going to hear it, period.

Associate County Attorney SZambon: You're not going to hear it. It has become mute.

Chairman Bonessi asked for a motion to adjust the agenda.

JPhelps: So moved.

All board members were in favor of adjusting the agenda.

NEW BUSINESS:

Chairman Bonessi read the quasi-judicial proceedings to those present.

**Case V-08-14, Janet & Walter Bennie**, requesting a variance for a 10 foot reduction of side setbacks. Zoned R40. Location: 250 Sugar Hollow Road, Hendersonville, on 0.84 acres, (PIN 9557446814)

**Witnesses for the case:**

**Ray and Janet Bennie – applicants**

**Jim and Anita Stackhouse – adjoining property owners**

**Barry Walker – witness for Mr. and Mrs. Stackhouse.**

Chairman Bonessi: I'd like to call anybody that intends to speak to be sworn in and then we'll decide if they are a party before we start the case. If everyone who's planning on speaking tonight or testifying tonight will come to the podium, Karen Ann will swear you in. Please state your name and address.

-My name is Ray Bennie. I reside at 250 Sugar Hollow Road in Hendersonville.

-My name is Anita Stackhouse and I reside at 252 Sugar Hollow Road.

-I'm James Stackhouse. I reside at 252 Sugar Hollow Road, Hendersonville and not only do we have a common situation we have two lots that are affected by this transaction.

Chairman Bonessi: We'll decide whether you have standing in a minute. Right now we're going to get everyone sworn in. So just state your name and address and Karen Ann will swear you in.

-I'm Janet Bennie. I live at 250 Sugar Hollow Road.

-I'm Barry Walker. I live at 3013 Hickory Nut Trail.

All who were planning on providing testimony as a party or witness were sworn in by Zoning Board of Adjustment Secretary, Karen Ann Antonucci.

Chairman Bonessi: For the folks that would like to speak, other than the applicant, can you come forward? At this time I'd like for the board to decide whether or not you have standing. Mr. and Mrs. Stackhouse your address is 252 Sugar Hollow Road. I'm assuming that is right next to the property in question.

AStackhouse: Yes.

Chairman Bonessi: At this time I would like the board to – does the board have any questions if they would have standing or not? (There were no questions on standing from the board). At this time I'd like a motion to say that the Stackhouse's, Anita and Jim Stackhouse have standing in this case.

JCrafton: So moved.

JPhelps: Seconded.

All board members were in favor of recognizing the Stackhouse's as having standing in the case.

Chairman Bonessi: Mr. Walker, could you come forward and explain to us how you would have standing in this case. Would you be affected? Where do you live?

BWalker: I'm the president of the Sugar Hollow Farms Homeowners Association. Just wanted to present into evidence a letter and our covenant restrictions which we've given to all the parties here.

Chairman Bonessi: You're the president of the Homeowners Association?

BWalker: Yes.

JStackhouse: I requested that he be here.

Associate County Attorney SZambon: Mr. Chairman, depending on how the board would like to act, Mr. Walker could always be called by the Stackhouses as a witness.

JCrafton: I think that's more appropriate.

Chairman Bonessi: I think that's more appropriate as well. Do you understand that?

BWalker: Yes, I do.

Chairman Bonessi: Mr. and Mrs. Bennie. Jan and Ray Bennie.

Associate County Attorney SZambon: They're the applicant.

Chairman Bonessi: I'm sorry.

Chairman Bonessi: George Martin.

GMartin: I'm sorry. I thought that was just a sign-up sheet.

Chairman Bonessi: You're not going to speak?

GMartin: No.

Chairman Bonessi: Ok. I think we have our parties recognized.

Chairman Bonessi: At this time I'd like to ask for a motion to open the hearing for case V-08-14, Janet and Walter Bennie, requesting a variance for a 10 foot reduction of side yard setbacks.

TEngel: Motion to go into public hearing on stated case.

JPhelps: Seconded.

All board members were in favor of going into public hearing on case V-08-14.

Zoning Administrator TLinville: If it pleases the board I'll read the packet into the minutes. You'll see the variance application at the beginning of this packet, with the property owners' names and information. Then their answers to the questions about practical difficulties. The next page is an aerial photograph of the lot showing the home. And as you see it sits towards the rear of the property. The next sheet is their site plan. It shows that the addition will require a 10 foot variance. Bringing that corner 25 feet from the rear property line. Then there are some photographs included. The first two are from their driveway facing south. That's looking past the home towards the back of the lot. And the next photo is from the end of the driveway looking back at the home. And the next two are from the other corner property line from Sugar Hollow Road across from Hickory Nut Trail, looking back at the home towards the back yard. Let me know if you have any questions.

JCrafton: On the site plan, what's the orientation? What is north?

Zoning Administrator TLinville: Up.

JCrafton: Straight up? Ok.

JPhelps: Toby, does this go before the committee or is there any recommendation?

Zoning Administrator TLinville: No. The TRC had not been reviewing variances so it hasn't been reviewed. We didn't do a coversheet for this. I guess staff would recommend approval due to the placement of the home in the rear of the lot. Due to the topography and the fact that they have a large septic system up front, that's why the house was built towards the rear.

APouch: Did you say that you would recommend?

TEngel: He did.

APouch: There's not a picture of the back of the house.

Zoning Administrator TLinville: I'm just showing the side where the addition's going to be built.

JPhelps: I noticed too, there's no picture of the porch. That seems to be a big part of this and the porch is too small to be used and we have no picture of that. And the question arises as why would you build a porch too small that you can't use. Is that just an opinion, or a fact?

Zoning Administrator TLinville: That's just my mistake for not taking that photograph. The Bennie's weren't home and I didn't trespass too much into their property.

RBennie: Would it be appropriate for me to speak because we do have pictures?

Zoning Administrator TLinville: You'll be given a chance in just a moment.

Chairman Bonessi: Just a second.

JCrafton: I think we need to hear from the applicant.

Chairman Bonessi: That's fine if we don't have any more questions for Toby we'll ask the applicant to come forward.

RBennie: I've never been to one of these things before so I appreciate the board allowing me, us to state our case. And I also appreciate so many of my neighbors showing up. We live in a truly wonderful subdivision and we also have truly wonderful neighbors. The older I get the more difficult it seems to be to keep my thoughts in line and so if the board would indulge me and allow me to speak from notes, I would really appreciate it. If there is no objection to that.

Mr. Bennie entered into evidence:

1-original survey

2- aerial photograph showing relation of their home to neighbors' homes

3 & 4 - aerials in black and white showing drawing of addition and existing screened porch

5- existing sun porch

6- base plan from builder

JPhelps: Is this the roof of the porch?

RBennie: This is the existing home. I've actually taken some correction tape and marked in where exactly this addition or reconstruction would be. This is already the rear of our home. This is our living room. The front of the home, the garage is here. So I've just taken the liberty of using correction tape so it illustrates as if it were already built you would see the extension. On one of those I've just sketched in a red pen the impact of our reconstruction the screened porch into a sunroom would be. If you see a drawing with a red pen marked on it, that would identify that. Thirdly, we brought some photographs that show our existing screened porch, that we're hoping with approval to improve and convert into a sunroom. These are taken from several different view points. From the back of the lot to the front and from the front of the lot forward. As you can see the screened porch is a wooden structure right now, but it is integral with the roof structure of the home. It is not an addition at all. It was built with the home. It just happens to be an unusual shape as I'm sure you'll notice. The base plan from the builder shows the footprint of the home and our requested reconstruction, conversion of our screen porch into a sunroom. As you'll see where I've indicated in red on the aerial photographs, the additional space would not be intrusive at all on the other properties, we believe. Even though it does move beyond the proposed setback line, also the proposed or existing covenants of our Sugar Hollow Subdivision.

Chairman Bonessi: So what you're saying in this photo is the stakes represent the...

RBennie: That is our screened porch as it is.

Chairman Bonessi: But the stakes in the ground represent...

RBennie: Yes, the side of the house would come out integral with the house.

Associate County Attorney SZambon: Mr. Bennie, are these all the documents you're going to hand out?

RBennie: I'm sorry, which?

Associate County Attorney SZambon: Do you have any more documents?

RBennie: No.

Associate County Attorney SZambon: Can you just say that you are entering them all into evidence?

RBennie: I would like to enter all of the documents that I've presented into evidence, please.

Chairman Bonessi: Does anyone have any questions for Mr. Bennie, at this time?

JCrafton: I do. Is he through presenting his thing?

Chairman Bonessi: Do you have anything else to present to us?

RBennie: Not regarding evidence. I do have some further statements to which I'll try and be as brief as I can. To that point regarding covenants and setbacks, we are very sensitive to the needs for these covenants in the community. The protective covenants on Sugar Hollow Farm govern variances within the development include section 6 of the Sugar Hollow Farm covenants, which states, and I quote, a 35 foot setback will be in place from each side and from the rear of the property line, end quote. As with all covenants they are in place to provide for the best use of the lot and for the maintenance of the development in its highest possible condition. With that in mind it seems that this small addition we are requesting to an already existing structure would fall under section 19 of the Sugar Hollow covenants. Which allows, and just to quote a portion, the right to grant a variance in setback lines in individual cases where this may be justified because of the topography of the ground or for other valid reasons, end quotation. Due to the pie shape of our lot, this minor variance is needed in order to afford the best possible façade for the house. It is our intention only to improve the appearance of our residence with the addition of this sun porch. The additional space involved for this existing structure would impact only one corner, where the sun porch would encroach on the setback due to the unusual shape of the lot. The alteration would in fact be a vast improvement over the appearance of the current screen porch now in use. Additionally, the site line of the sun porch for our neighbor is completely obscured by a large line of trees that were planted on their property by our neighbors, Mr. and Mrs. Stackhouse, our good friends. Their home is situated at a considerable distance from our home as you probably saw from the aerial photographs. We are understanding and supportive of the general provisions provided by the development that assure the beauty and esthetics of Sugar Hollow. Clearly, the proposed sun room does not in any way detract from these things, but rather adds value to the property and therefore enhances the neighborhood overall. As a side note, we believe other variances have been allowed throughout the subdivision, and indicates an overall willingness of neighbors to work with other neighbors in an effort to afford the highest quality of living space available to us all. We are asking only for an increase in square footage to the existing screen porch, and in doing so converting it into a sun room. We are not asking for any addition that would be added in opposition of covenant 3, which provides that no outbuildings should be erected that would or could detract from the overall esthetics of Sugar Hollow. If there was an egregious encroachments onto adjoining lots we could appreciate any objections. However by requesting this change we believe we are not burdening our neighbors in any way nor altering their site line, property lines or infringing on their personal property. We sincerely hope that this issue can be amicably resolved in our favor. We appreciate your cooperation and approval in allowing us to complete this alteration as planned by allowing this variance. Thank you very much for your time and indulgence.

Associate County Attorney SZambon: Mr. Bennie, the board might have some questions for you.

JCrafton: I have a comment and a question. The comment would be, I don't believe it's the role of our board to mediate any issues that the property owner has within his own homeowners association and their covenants. Only we're here, I would think, to address his compliance with county zoning ordinance and the variance from the setback requirement. And you have spoken to your covenant issues and that's not our role to rule in that for you.

RBennie: I understand.

JCrafton: My question for you: In your application, was that the house is where is because the county required you to set it back in order that you could put the appropriate septic system in?

RBennie: That is correct.

JCrafton: Could you tell me why that was required?

RBennie: From a technical point of view I probably couldn't. But our builder in association with, I think it's the health department that works out where the septic system is supposed to be. They were the people that determined that the house had to be that far back on the lot. Not being an expert in that field, I had to accept that that was where the house had to be positioned.

JCrafton: And then when you built the house and constructed it and put its limits in order that it would comply with the ordinance of your required setbacks at that time.

RBennie: Yes. That is correct.

JCrafton: Now today you're asking us to exceed that.

RBennie: Correct.

JCrafton: Ok.

EGoodman: On the septic system, I do know they now make you have a 100% repair area in addition to your existing drain field. So you do have to have a much larger area whereas years ago they didn't require a 100% repair area incase your drain field failed. You just step over to a separate drain field.

JCrafton: To your knowledge, is your property and its perking ability different than your adjoining neighbors?

RBennie: No. not to my knowledge it would not be. Again, I have to beg ignorance on the septic systems. I know they have a leaching field and certain distances required to leach correctly, but I'm afraid I probably couldn't speak with any sort of intelligence to that point, but I don't believe so.

JCrafton: That's all the questions I have for the applicant.

Chairman Bonessi: So you actually had the house constructed yourself?

RBennie: Yes we did. We've been there four years.

EGoodman: I'd say it being only four years old they're required to have 100% repair area for the drain field which means you'd basically have to have a second drain field set aside. So that's why you'd have to have such a large septic area. That's required any more.

TEngel: By the newer subdivisions.

EGoodman: That's right.

Associate County Attorney SZambon: Mr. Goodman, because of the way the statute is written only five members of the board are allowed to ask questions and participate in discussion. And since all the regular members are here you're not allowed to comment. I didn't make the law.

EGoodman: Ok.

Zoning Administrator TLinville: I was going to add that the way that lot slopes towards the road that's the highest point. So if they had put the house closer to the road they would have had to pump for their septic system if the back yard would have perked. I don't know but that's why the septic system's up front and the home's in the rear, because it not they would have had to pump to a septic system which isn't the best system.

Chairman Bonessi: I guess – let me ask Toby this question. How large are the lots in this subdivision? I know this one is short of the R-40. According to this application here his lot is .84 acres, under the 40,000 square feet required in R-40, if I'm not mistaken.

TEngel: An acre is 43,000. He might make it.

Zoning Administrator TLinville: I didn't check to see what the adjoining lots were, but there are lots that are less than the R-40 minimum. This is again – I don't know how old the subdivision is but it may have been one of those that was platted before it was R-40. We've run into that before.

Chairman Bonessi: Yeah, I know we have. That's why I asked the question. About 4,000 square feet shy of... Ok, does anyone else have any questions for Mr. Bennie from the board? At this time, Mr. Stackhouse, this is time for you to ask Mr. Bennie any questions or talk about, with regards to what he has said. You'll get your opportunity to come up here and speak but this is your time to question Mr. Bennie.

JStackhouse: Did you originally plan a back porch on this house?

RBennie: Yes. We did.

JStackhouse: Do you know how far you are coming into our property if the drawing you gave us is accurate?

RBennie: A maximum we would be reducing the setback by 10 feet. At a very maximum, but as I mentioned earlier, the builder said he didn't really think he would need the 10 feet. But he said we may as well request it anyway.

JStackhouse: Have you ever seen the Hendersonville septic permit request?

RBennie: I may have done when the house was being built. It looks somewhat familiar, but as I say I'm not technically...

JStackhouse: This doesn't show a porch on the back. It shows a porch on the front.

RBennie: That is the front access porch.

JStackhouse: It doesn't show any porches on the back.

RBennie: It also doesn't show the configuration of the house in any way. It shows it as a rectangle and a garage.

JStackhouse: That's right. But it does show a porch in the front and none in the back.

RBennie: I agree, but according to that it doesn't even show a living room.

JStackhouse: Shall I pass these around?

Associate County Attorney SZambon: Yes you can as rebuttal evidence on cross exam. Remember, now is your time to cross examine Mr. Bennie and not present evidence. You'll have that in like two minutes.

JStackhouse: My wife has brought up that the 100% repair area is considerably almost twice the size of the septic area. And there's no stipulation in this septic thing how far back it has to be from the road. It says it comes out in angle 27 feet and there's about a 70 x 10 area for it. Then there's about twice that area still left available for a septic.

JCrafton: Point of order. Is he presenting evidence or cross examining the applicant?

JStackhouse: I don't know which I'm doing.

Associate County Attorney SZambon: He's supposed to be cross examining the applicant right now. Do you have any more questions for Mr. Bennie at this time? And then you'll have...

JStackhouse: Does he want to make any changes in the affidavit which you filed three pages of with the people here?

RBennie: No.

Associate County Attorney SZambon: Is that all the questions you have for Mr. Bennie?

JStackhouse: I might make some statements, but...

Associate County Attorney SZambon: No. you'll have time to make whatever statements and present whatever evidence you want. This is just your time to just ask him questions.

JStackhouse: I'll present my part. Then he can ask me questions.

Associate County Attorney SZambon: Ok. So Mr. Bennie, you can sit down now.

Chairman Bonessi: Unless the board has any other questions.

Associate County Attorney SZambon: Yes, unless the board has any other questions.

JStackhouse: One other question.

Associate County Attorney SZambon: Is this a question for Mr. Bennie?

JStackhouse: Yes. You showed the proposed house on one of the handouts you gave them.

RBennie: Would the proposed porch change the sunroom, Jim?

JStackhouse: No.

JStackhouse: The drawing showing the proposed house location. One angle or one space is 48 feet and some.

RBennie: Yes.

JStackhouse: That did not show any porches on the back either.

RBennie: I cannot answer to that. I know the house was...

JStackhouse: In part of my testimony I'll tell you why there weren't any porches on the back. Is that alright with you?

RBennie: Yeah, you state your case, Jim.

Chairman Bonessi: Anything else for Mr. Bennie? Thank you, Mr. Bennie.

RBennie: Thank you.

JBennie: Could I just say one thing before Mr. and Mrs. Stackhouse speak?

Associate County Attorney SZambon: She is the applicant.

Chairman Bonessi: She is the applicant, so I don't...

Associate County Attorney SZambon: Please come to the microphone and state your name.

JBennie: I'm Janet Bennie. I'd just like to say one thing. We wanted to have the house much further on the lot. When you look at the pictures and you see how far back it is we have a huge front yard and a very small back yard. I asked the builder many, many times about moving the house further forward and he said it was just not possible – that the county dictated to him where the septic system had to go. And his hands were tied and there was only this one spot that they could put the house. That's all I wanted to say.

AStackhouse: Good afternoon. Good evening. I'd like to also thank all of you for being here and for listening to us. And trying to find a solution to what we consider an injustice. First of all you said you did not have the authority to override the restrictive covenants of this piece of property. Is that correct?

Associate County Attorney SZambon: Ma'am, what it is, is not to override it or enforce it. This board is only charged with the enforcement of county ordinances. We can't enforce either way. So it's not that they are making any kind of judgment on the restrictive covenants. They are ignoring them altogether.

AStackhouse: I wondered, it also says the property was recorded by the register of deeds to these covenants in November 26, 1986, in book 688, page 751. So this has been in existence, this development for quite a piece of time now. We have lived there and built the home 14 years ago. And we had no problem with anything. This is the first time I have ever addressed a board on anything in this nature. My husband and I are concerned about the future use, whether it be our use or the saleability of our property if these infringements are granted from 35 feet to 25 feet. We also feel it might be precedented or precedent in this situation. If this were allowed to be, anybody could come along and ask for these kinds of variances. And it was my understanding that in my deed it also states that there is a 35 foot setback. My husband has done most of the research. He's the technical one in the family. I'm a global thinker. So I will ask you to please bear with us and he will give you further information on what he has found. Thank you.

JStackhouse: May I ask that our association president may come forth and speak about the covenants? Mr. Barry Walker.

BWalker: I would just like to point out and offer as requested, evidence of our protective covenants are on file with the county.

Chairman Bonessi: I guess one thing I'm going to interject here is we don't base our decisions on the covenants. We base our decision on the county code. Covenants are something that are enforced by the homeowners association privately.

BWalker: My statement then is the fact that I have presented the letter to all the property owners alerting them to the existence of our protective covenants. And they were all provided a copy of this.

JPhelps: Sarah, question. I understand the difference between covenants and homeowners association in what we are talking about, however my question is: Would the covenants of the association override any decision here? We're saying if it's ok with the county but it's not ok by the homeowners association, it still couldn't be done. Is that correct?

Associate County Attorney SZambon: It depends on the process set forth in the homeowners association by laws. You can think of it like this - technically a homeowners association could require setbacks that are greater than the county has requested in any zone. So somebody can come in here and get a variance and I think we've had that case before where somebody has wanted a variance from this board prior to asking their homeowners association. The homeowners' association restrictive covenants – that will be a private right of action. That will be for them to enforce. So my answer is I don't know. It depends on whether or not those are enforceable because there have been restrictive covenants that haven't been upheld.

JPhelps: So logically it would appear to be the process to get approval from your homeowners association, for a deviation before coming here because you could present that, that you had...



Associate County Attorney SZambon: Not necessarily. Some people will come here before they go to their homeowners association.

JPhelps: Even if we approved it they would still have to go to their homeowners association for approval before they could actually construct this?

Associate County Attorney SZambon: It's different remedies based on violation. For the county if there was no variance and the applicant put on an addition or whatever they wanted a variance for without getting a variance first from this board, we can do a stop work order and prevent any further thing from going on. And we can also institute – technically we could do criminal penalties although we haven't in a zoning case anytime recently, and civil penalties. For violation of a homeowners association covenant that'll be a private law suit either different homeowners or the homeowners association vs. the person. They can get an injunction which would have the same affect as a stop work order, but that is more process. And then they'd have to go through with a civil law suit and prove damages and it's not as laid out for the most part as this process. Again, speaking generally because I don't know what these restrictive covenants say or what their bylaws say but there's usually a process in them for appeals or exceptions or whatever. You have to go through that and then you can appeal that and then a law suit. My legal advice to this board would be that you just focus solely on whether or not the variance is appropriate based on the factors that you have for what a variance is: unique circumstances to the land, any kind of practical hardship, protect public safety and welfare, substantial justice, spirit and intent of the law. You are not in charge of enforcing the covenants. To a certain extent I tend to think, and it could be because I represent the county, that our penalties are more severe than anything a homeowners association could do. So the only place for this discussion about restrictive covenants or homeowners association rules is if you put it into one of those factors. If you find that it's not doing substantial justice to enforce this thing, then that's one thing. I don't want this board to get in a practice of enforcing anybody else's restrictive covenants. I don't know if that answered that question. That might be the long answer. I don't think it matters which one you do first. I think the penalties are different and I think our penalties are more severe with a stop work order.

APouch: After the Carriage Park thing - that we would not get into that anymore about their rules. Is this totally different?

Associate County Attorney SZambon: No.

Zoning Administrator TLinville: No. Carriage Park is under a special use permit. That's why they have specific rules. That's why we're not hearing anymore of their variance cases. Because they design their own lots.

Associate County Attorney SZambon: They are a planned unit development which means they are under an order from the county. But in terms of enforcing their homeowners' association stuff or restrictive covenants that they have, outside of the order, we don't do that.

JCrafton: I would submit that we should totally ignore that fact that there is any homeowners' covenant whatsoever since we don't have any place in ruling one way or the other. And we're only here to administer the county zoning ordinance, which is what we're addressing. So whatever the covenants say should have no relevance to our discussion or considerations.

JPhelps: Should not the homeowners or their representative have standing, have the right?

JCrafton: Only in regards to the county's ordinance, would be my thought.

JPhelps: That's true, but I'm saying this does that. This is the county ordinance.

JCrafton: It seems to me, he's only submitted to us what their homeowners covenant is and whether he's in compliance or not with the covenant.

JPhelps: And he doesn't have to state that. All he has to say is from the homeowners association's point of view what they feel about any variance from the county.

JCrafton: I agree. He could say that if he will.

JPhelps: But still testify to it.

JCrafton: He need not address the covenant.

JPhelps: Right. Not say anything about it, just what their view point is. So if you wanted to present it from that perspective, I think we could hear it.

BWalker: Let me be very specific. Our homeowners association has made no judgment or no ruling on this. We are here strictly to represent both parties and to present the covenant restrictions as they exist

right now. We only found out about this last week. We haven't as a board had time to meet and have no legal right to act or to rule on this until we are approached by either party officially.

Chairman Bonessi: If we don't have any other questions for him shall we have the Bennie's cross examine him now?

Associate County Attorney SZambon: Yes.

Chairman Bonessi: Mr. and Mrs. Bennie, do you have any questions?

RBennie: I'm really not sure whether I have any questions, but as Barry said, and Barry is a friend of mine, lives just across the street. As a neighborhood we are as neighbors designed to work together in harmony and help each other out. And the reason for these, I hate to come back to covenants, because I know we're talking about county statutes here, but the reason in my mind we have covenants is to preserve the general pristine area that we are all living in. It's to prevent people from doing anything egregious to anybody else's property or viewpoint or putting buildings in there that would not be – that would not look presentable at all. In other words, we all want to keep our own area to look nice and Sugar Hollow is a wonderful, wonderful subdivision. So to Barry's point we do certainly have covenants and I support covenants. In our instance here though...

Chairman Bonessi: Is this a question?

RBennie: No. It really isn't. It's a statement. I'm sorry.

BWalker: This is R-40. Correct?

Chairman Bonessi: Correct.

BWalker: Is it a 30 foot or 35 foot setback?

Zoning Administrator TLinville: 35 foot in the rear and side.

BWalker: Ok. I just wanted to confirm that because that's the setback on our covenant restrictions so we are the same in regard to that.

RBennie: So just to sum up, I should address it to the board and not take up your time, as far as covenants go.

Associate County Attorney SZambon: On the covenant issue, that is correct. And if you don't have any questions for Mr. Walker we can move on.

RBennie: Ok. Thank you.

JStackhouse: May I ask Mr. Walker a question?

Associate County Attorney SZambon: Yes.

JStackhouse: Is Mr. Bennie a member of the association in the five years he's been here?

BWalker: I believe so. Yes. Mr. Martin used to be the secretary and treasure, so he knew that. (conferring with Mr. Martin). So the answer is yes.

RBennie: And I do have my check stubs.

Chairman Bonessi: Mr. and Mrs. Stackhouse do you have any...

JStackhouse: I have again, like Ray, made some notes. Otherwise I might forget them once I get started. At the time the house was built and dried in they did not have a back porch on it. One evening I came out and looked. They had started to frame the back porch and I noticed that there was a line for the porch much closer to our lot line than previous part of the house. And so I went and got a tape measure and measured it and it's considerably less than 30 feet. So I called Mr. Jim Ayers who was the builder and he's built several other houses in the community, and asked him if he was set back properly. And I said, "I think you're less than 30 feet". And he said, "You're not a certified surveyor and if I call my surveyor I have to pay him \$200 to come out here". He said, "Are you willing to pay the \$200 if the surveyor backs me up that this is within the line?" I said, "Fine, bring him on". Next morning, Jim Ayers, the surveyor and I met where the back porch had been started. The surveyor looked at it and said, "You never had a porch on this when you gave me the property to survey and lay out the back porch at all". And he said, "Of course it's too close, because you're adding this back porch". So then I presume - and I didn't have to pay \$200, and I don't know whether he really had to pay \$200, that's not the point - but at that time there was a number of options open to them, the Bennies. They could put the sunroom they want in the center of the V part where the two sides of the community, or the land come together. And have a porch that's about 21 x 17, which is bigger than what he's now asking for. And he could have made instead of a window a door in there to walk

through. So I presume Mr. Bennie, who has been in there for five years chose to have the porch put on that is presently there. And for one reason or another, they now want to change it. Our house is not way forward as he said in these drawings. All of our setbacks exceed the standard set up by the R-40 or the builder. I went this morning to the public health department to see if I could get a copy of the septic system. And I passed this around. Does anyone want another copy of it?

Associate County Attorney SZambon: Did you want to enter this into evidence?

JStackhouse: I want to add that to the group, yeah. And I also would like a copy of the drawing that Mr. Bennie submitted. I hadn't seen it before, but where it says proposed house, also the surveyor called a week ago to Jim Ayers to try to get his input on this and he has not returned my call. I tried calling him again today and both times I left messages for him to call me back and he will not call me back because I told him I wanted to discuss the Bennie porch. And I think that this is the present house location and I don't know if these two lines are parallel but if they are, what I have done is I have taken the two angles and made a triangle out of it. And then by trigonometry I've determined that those two angles, the difference between them is 21 degrees, 44 seconds and 40 minutes - or minutes and seconds, I'm sorry. And that would be about what the setbacks they are asking for is. It may be a little bit one way or another. Again, we didn't have any drawings as to where the house is in relationship to the porch. Actually, I also made another drawing just about on their drawing showing where these lines converge and the yellow is the area they could use for a sunroom and another four inches of the deck without infringing on any of the area. Mr. Bennie told my, he did not want me designing his porch. Well I'm showing areas not designing his porch. He could make it with glass sides. He can make it with screening or whatever he wants. There is more room there than he is asking for where it has to invade our setback requirement of 35 feet. This on the triangle I gave you, the 25 feet is back of the - length he wants for the side porch, that's at 9 degrees, 0 minutes west and the other line which is actually small B is angle of the 12 degrees, 40 minutes and 44 seconds east. North 12 degrees, I'm sorry. And that's how I arrived at the amount of infringement there is. It could be wrong but it could be more and it could be less. What I was saying is could I get, before we leave tonight get a copy of this sheet?

Zoning Board of Adjustment KAAntonucci: Can I put that in the mail to you, sir? I can copy that for you tomorrow and put that in the mail. Will that be acceptable?

JStackhouse: That's fine. And again, did I pass around to you the septic thing, showing all the extra room down in here? He's got almost twice the area for a back up septic as needed and again this does not show any porch there. On the submission that Jan made she says this variance is in harmony with the general purpose and intent of the Land Development Code. It's not in harmony. I don't know why she went on to fill that in. Do they have any questions of me? Or do you?

Chairman Bonessi: Are you finished with your statement?

JStackhouse: Yeah.

Chairman Bonessi: Ok.

TEngel: I can say one thing about the health department. They set up the parameters on there. And part of the reason for setting it back further is there is a ditch in the front and they require it to be held off a certain amount. They're the ones that set up the areas that they require. It's not as if just because it's bigger. They quite often set it up a little larger.

JStackhouse: That's alright. There's no figures on there that show how far back or where the house is located.

TEngel: They do show the locations. When they come out they actually stake it out and they say, "Here is where it goes". So that's the reason the house is set back as far as it is because even though it doesn't show all that in there. Also the porch in the back, it's not required to be on the sketch.

JStackhouse: But it's also on this proposed...

TEngel: That's only an approximate area for the house. That's all it is. It doesn't, it's not binding or anything. So then when they go for their permit then they have to set their parameters up.

JStackhouse: I haven't seen, like this one drawing which I asked for that shows the location of the house. All I've seen is the triangles of the house line and then a small house drawn in.

Chairman Bonessi: Does anyone else have anything for Mr. Stackhouse?

There were no further questions from the board.

Chairman Bonessi: Mr. Bennie, Mrs. Bennie this is your time to cross examine Mr. Stackhouse and ask him any questions that you might have. If you do, again come forward and ask questions so we can get them into the microphone.

RBennie: I don't believe I do. I would just like to thank the board's indulgence in the case. I don't believe I have any questions of Jim or Anita.

Chairman Bonessi: Ok. Thank you. Mr. Stackhouse if that's it...

AStackhouse: I do not want to be redundant but one of our primary if not the most important thing that is of concern to me is the resale-ability of this piece of property if we were to need to sell it. Or our restrictions that might be created if we wish to build on this piece of property. They might be encroaching upon what we would want to do with this adjoining property to the one we have now. And I think that's a very valid concern.

Chairman Bonessi: A variance given on somebody else's property would have no affect on anything that you own as far as restrictions that you couldn't do.

AStackhouse: If we went to sell it and a person was informed that on this particular line they were allowed 25 foot setback only, there might be a problem with that person wanting to want 35. And it no longer becomes as desirable with a 25 foot setback as it would have been with a 35 foot setback.

TEngel: 'Course it can have an affect with the way it looks too.

AStackhouse: The way it looks, yes.

TEngel: I mean it might look better with the 25 foot setback in the design than it might look with a 35 foot setback if they have to make lots of juts in it. So there again appearance could go either way.

AStackhouse: Well, there at the Bennie's back porch would be closer to them than they wish to have it, the next people. Even though the lot is vacant now, the next people who build on it including ourselves might not want to have to view the porch that closely or hear the noise from the porch that closely and would have preferred to have it a 35 foot setback as in our community covenants. And I too thank you very much for your indulgence.

Chairman Bonessi: Thank you. We don't have anybody else to speak with regards to this matter?

JCrafton: Do we need rebuttals? Are we going to allow rebuttals?

Chairman Bonessi: I think we have already given everyone the opportunity to rebut anybody else's...

Associate County Attorney SZambon: You can have rebuttals if Mr. Bennie has anything else to say.

Chairman Bonessi: Mr. Bennie, is there any further rebuttal before we close this?

RBennie: No. I have none. Thank you.

Chairman Bonessi: If we have no further questions of any of the witnesses or the applicant I would like to close this hearing from public input and discuss this matter as a board.

JPhelps: I move we close the hearing.

TEngel: I second.

All board members were in favor of closing the hearing.

JCrafton: Based on the information that has been presented to us, aside from any covenants that exist, I'm of the opinion that the request for variance should be denied. He had full knowledge of what he could build at the time, given the constraints of the septic tank situation at the time, and he built a home with a porch. It now appears he would like to have a larger porch and turn it into a sunroom which would violate the requirements of the zoning ordinance for R-40. And if you look at the factors to consider I don't think Mr. Bennie has presented practical difficulties or unnecessary hardships into the use of his property. When you look at the other issues: Is it in harmony with the spirit and intent of the law? – Not really. He wants to go past the setback in order to have a nicer porch. Just based on what I've heard and his reason for asking for the variance, I don't find cause to grant that variance. That's my opinion.

TEngel: Because of the septic system the house did have to be set back quite far, and there is very little room in the rear, and I could see from the pictures, maybe they thought the porch would be large enough when they originally put it on, but it is very small. And because of the unusual shape of the land and the septic system I think that this piece of land has created a hardship for him and I feel that it should be approved. I don't think it's going to have any affect on the neighbors as far as values of land

because it's hardly going to be perceivable that it is that 10 foot closer. And it doesn't set a precedence because each lot is on its own merit. So it doesn't mean that everyone's going to have approval of a 10 foot setback. So, as I say I feel that it would not create any great hardship in the neighborhood because of the difficulties of the lot itself and the house as it presently exists. I feel that there should be an approval on it. That's it.

JPhelps: I tend to agree with Jim. I think looking at the requirements here that the applicant could not secure *reasonable return* or make a reasonable use of the property prior to doing that now. So that does not change. *Hardship* has not resulted because of applicants own action, well actually the design of the house may be the cause of that. So that may be his own action. *Unique circumstances*, but there again the design of the house and the locating of it all was done initially with the rules in existence. The way they are now, it would just seem as Jim says, "Hey, I've decided now I'd like to enlarge it and screen it". I don't think that is in and of itself sufficient reason to override the ordinances.

APouch: I feel that when they built this house, and it was only five years ago, that it was put to the max where it could be. And this is what the county said they could build then. I don't see any sense in changing it now. So I'd say, no.

Chairman Bonessi: I still struggle with the whole R-40 thing just from the fact that we've got a lot of lots out there that don't conform.

APouch: There are odd shapes and that is an awful problem.

Chairman Bonessi: But as far as if you look at and drill down into the requirements for a variance and your *reasonable return* is the one that I've been always kind of a fan of, I want to make a reasonable return on my property, I don't know that granting this would change their ability to make a return. If it was denied I'd think they'd still be able to make the same return on their investment. So I guess all that being said, does anyone want to make a motion?

JCrafton: Well, I move in regard to application V-08-14 that the Zoning Board find and conclude that the variance application does not comply with the necessary provisions of Henderson County Zoning Ordinance. And the stated reasons would be: It doesn't meet the requirements of finding approval for a variance and therefore move that we deny the application for variance.

Chairman Bonessi: I have a second?

JPhelps: I'll second.

Chairman Bonessi: All in favor of denying the application raise your hand.

JCrafton: deny

Chairman Bonessi: deny

JPhelps: deny

APouch: deny

Chairman Bonessi: All opposed.

TEngel: grant

Chairman Bonessi: I'm sorry Mr. and Mrs. Bennie. Your application has been denied. We need a motion to go out of public hearing. At this time I'd like a motion to go out of public hearing.

JPhelps: So moved.

TEngel: Seconded.

Chairman Bonessi: All in favor.

All board members were in favor of going out of public hearing.

Chairman Bonessi: Right now we have a review of the Ethics Code and the Noise Ordinance.

Associate County Attorney SZambon: Pointed out that some changes may be made to the Ethics Code and asked for any questions about the Ethics Code as written now. She noted that what the board had before them was approved, but the changes would be amendments to the approved Ethics Code.

Associate County Attorney SZambon: She provided the Noise Ordinance to the board because questions had come up in previous case that touched on the noise ordinance. She pointed out that

some of the points of the Noise Ordinance were complicated to understand. She noted the exemptions were not reader friendly and there were subjective factors and some complaints may come down to neighborhood squabbling.

Chairman Bonessi: What is on the agenda for next month, because I'm going to be out?

Zoning Administrator TLinville: You're going to rehear a variance on Scoggins where you gave a variance on Courtland Blvd., where you approved a front yard variance. What I failed to recognize because it's not typically something I have to approve, but it doesn't meet the minimum lot size. So she has to request a variance for lot size. Anthony Starr the planning director will be presenting a staff recommendation.

There was a brief discussion to review in what capacity Alternate board members may serve at the meetings. Miss Zambon reminded the board that anything that is not quasi judicial can be voted on by an Alternate board member. Only if one or more of the five regular board members are not present may an Alternate member vote on quasi judicial matters. Comments and questions may not be asked or stated by an Alternate board member if all five regular board members are present in quasi judicial matters.

There being no further business, Chairman Bonessi asked for a motion to adjourn the meeting. EGoodman: Motioned. JPhelps: Seconded. All Board members were in favor of adjourning the meeting at 5:34 PM.

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Dean Bonessi, Chairman

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Karen Ann Antonucci, Secretary