

August 4, 2004
4:00 PM

MINUTES OF THE HENDERSON COUNTY
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held a continuation of its regularly scheduled July meeting, on Wednesday, August 4, 2004, at 4:00 p.m. in the Meeting Room of the Henderson County Land Development Building, 101 East Allen Street, Hendersonville, North Carolina. Those present were: Chairman Robert Fleming, Dean Bonessi, Anthony Engel, Gary Griffin, Ann Pouch, Board of Adjustment Attorney Samuel Fritschner, Zoning Administrator Brad Burton, Assistant Zoning Administrator Autumn Radcliff, and Secretary to the Board Joyce Karpowski.

Chairman Fleming called the meeting to order at 4:05 PM and introduced the members of the Board. He explained the procedure today and said that 4 affirmative votes are required to overturn the Zoning Administrator's decision.

Chairman Fleming called forward anyone wishing to testify in today's case. Sworn in were Zoning Administrator Brad Burton, Assistant Zoning Administrator Autumn Radcliff, Thomas Key, David Greenwood, and Ann Key.

Case A-04-18: David Greenwood, Case A-04-19: Dwight and Gail Lynch, Case A-04-20: Charles D. Maxwell, Case A-04-21: Robert Merrill, Case A-04-22: Cloyd and Mary Levi

Chairman Fleming called the 5 cases appealing the Zoning Administrator's decision.

Mr. Burton gave a summary of the issues. Mr. Burton said the Board will make a decision on whether he made an appropriate decision in issuing a Zoning Compliance permit to Mr. and Mrs. Key for the construction of a residential home in an R-40 zoned subdivision and also in a WS-IV Watershed Watersupply Protection Area. Thomas P. and Sylvia A. Key were issued Watershed and Zoning Permits by the current Henderson County Zoning Administrator, Brad L. Burton, for the construction of a single family dwelling to be built on one parcel known as Lot 11, such parcel consisting of three tracts (all on the same Deed), and all located on Oxford Valley Drive, in the Lake Rugby Subdivision. The parcel in question concerning this project is located in a WS-IV Balance of Watershed District and is zoned R-40. David J. Greenwood, Dwight and Gail Lynch, Charles D. Maxwell, Robert Merrill, Cloyd and Mary Levi filed an appeal of the Zoning Administrator's decision on 07/09/2004.

Background Information concerning this Parcel: On 02/14/1990, Mr. Vervin Stamey, the previous owner of the parcel before the Keys, applied for an "Existing Lot Application," and this application was signed as received by the then-Henderson County Zoning Administrator Samuel Laughter on 03/16/1990 and assigned Case Number E-5-90. (Exhibit 12 in the packets.) Mr. Laughter prepared the Zoning Administrator's Report for the Henderson County Board of Adjustment's regular March meeting, held on March 28, 1990 at 4:00 pm. This procedure was done as a public hearing and duly advertised in a newspaper. All parties were sworn and testimony was received. At present the Zoning Administrator is delegated this authority, but at that time a public hearing was held. The

Henderson County Zoning Board of Adjustment met on March 28, 1990 at four pm and discussed the application at length. The main point of contention appeared to be what constitutes a “contiguous lot,” and whether the applicant would be required to combine the tracts (one of which is divided by a right-of-way) pursuant to a requirement in the Zoning Ordinance which mandates that two contiguous, non-conforming lots under common ownership must be combined to attempt to comply with the lot area requirements of that zoning district. The Board continued the hearing with instructions to the Zoning Administrator to have the County Attorney provide a legal opinion as to whether he felt the lots in question were contiguous to one another, and would have to be combined. (Exhibit 14 in the packets.) A letter from “property owners in Lake Rugby Subdivision” was entered into evidence at the March 28th meeting citing concerns over Mr. Stamey’s application. Further, speaking at the meeting in opposition to Mr. Stamey’s application were Shirley Maxwell, Marilyn Diehl, Pat McCarson, Gwen Hill, and Jim McCarson. Samuel Laughter made a written request for a legal opinion from Dan Elkins, Esq., at that time the Henderson County Attorney. Don Elkins, Esq. responds to Mr. Laughter’s request and relates his legal opinion that the small triangular tract adjoining Lot 11 should be combined for zoning purposes, but the tract on the other side of the right-of-way, is not considered adjoining and does not have to be combined with the other parcels. Mr. Burton pointed out Lot 11 and the 3 tracts on the site plan (Exhibit 3). Based upon this information, the Zoning Board of Adjustment, at their next regular meeting on April 25, 1990, discussed Counselor Elkins’ legal opinion. A motion was made by Vice-Chair Masters to grant an existing lot application to Mr. Vervin W. Stamey’s for Lot 11. An amended motion was made by Board member Thornburg to place a condition on Mr. Stamey that Lot 11 and the triangular adjoining tract be combined as a single parcel.

The Henderson County Zoning Board of Adjustment on April 25, 1990 granted to Mr. Vervin W. Stamey an “Existing Lot Application,” after having held a public hearing in the matter. The Order made the following findings of fact and drew the following conclusions: It is the Board's conclusion that at the time of adoption of the Ordinance (July 9, 1981) the owner of the lot did not own sufficient land to enable him to conform to minimum area requirements of the Ordinance. This conclusion is based on the following findings of fact: The lot was platted prior to the effective date of the ordinance and is not large enough to conform to R-40 zoning requirements. It is the Board's conclusion that in granting the use as an "existing lot," any decreased dimensional requirements, such as setbacks, will conform as closely as possible to required dimensions, based on the following facts: Lot owner will be required to comply *as closely as possible* to setback requirements when he applies for a building permit. (Exhibit 19 in the packets.)

It is the contention of the current Zoning Administrator that the Order granting Mr. Vervin W. Stamey an “existing lot” status is analogous to a legal Variance. Per the book *The Zoning Board of Adjustment in North Carolina, Second Edition*, by Michael B. Brough and the late Philip Green of the Institute of Government at Chapel Hill, this publication being the literal guidebook for Zoning Boards of Adjustment in the State of North Carolina:

“Basically, a variance is a permit, which the Board may grant in certain situations, enabling a property owner to make use of his property in some way that conflicts with the literal provisions of the ordinance. Sometimes a lot is so small or so peculiarly shaped that the owner would find it very hard to comply with the yard requirements and yet erect a suitable building. Sometimes contours of the terrain create hardships in complying with these requirements. When the Board grants exemptions from harsh provisions, it is ‘granting a variance.’”

North Carolina General Statute Section 153A-345(d), providing the statutory authority for the

Zoning Board of Adjustment to exist, states the following:

(d) When practical difficulties or unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment may, in passing upon appeals, vary or modify any regulation or provision of the ordinance relating to the use, construction, or alteration of buildings or structures or the use of land, so that the spirit of the ordinance is observed, public safety and welfare secured, and substantial justice done.

Mr. Burton said it is *readily apparent* that the Zoning Board of Adjustment in Mr. Stamey's case in 1990 examined all these issues. As a Variance may be recorded with a deed that describes the property, the grantor and grantee, and any consideration offered to acquire the property; it is understood that a Variance is required to run with a chain of title, as a house or other structure that exists legally through a variance cannot lose that status upon the sale of the property to another. In the case of the Stamey matter, this Variance was based upon a site plan submitted by Mr. Stamey on the back of his application E-5-90 (Exhibit 5). This site plan indicates no setback information, and Mr. Laughter, the Zoning Administrator at the time, confirms this and states that the "...sketch that was presented does not show an exact location of the house. The house would have to be located after the application is granted." There is no further information in the minutes in any recorded record as to locating this house with any other information than adhering to setbacks as closely as possible.

When the Keys first inquired about this project on this parcel the Keys stated that the owner, Mr. Stamey, told them that he had a variance on file for this property with the County. The current Zoning Administrator, Brad Burton, initially advised the Keys that they would need to seek a Variance to place a home on the property as Mr. Stamey was mistaken, his Order was the granting of a pre-existing lot permit. Subsequently, the Keys began the Variance application process. This process was terminated and Zoning and Watershed Permits issued after the Zoning Administrator thoroughly researched Mr. Stamey's claim of having a variance already on file.

Mr. Burton said the Keys submitted two site plans, both much more specific as to setback areas than Mr. Stamey's plan. The second plan submitted made great improvements in the setback distance envelope, specifically the proposed house site "footprint" (coupled with the design of the house) moved the house further away from all boundaries on the parcel. Mr. Burton showed the first plan for the Board to compare the setbacks. The second plan was submitted for a zoning compliance permit by the Keys (Exhibit 3). Adhering to the language of the original order: Lot owner will be required to comply *as closely as possible* to setback requirements when he applies for a building permit, the Zoning Administrator deduced the following: By utilizing the tract to the North of Oxford Valley Drive as a utility lot (for the septic system), there were more options on the parcel to locate a house. If Environmental Health is satisfied with the layout of Improvements (not a zoning issue), and the well proximity to all affected areas (not a zoning issue) plus the applicant submitted a plan that was a vast improvement over the first in terms of increasing the setback requirements, it was reasonable to conclude that the proposed house site is complying as closely as possible to the setback requirements, a literally undefined standard.

Mr. Burton said from the standpoint of Watershed Administrator, writing a permit was obviously appropriate per Section 192-6.B of the Henderson County Water Supply Watershed Protection Ordinance: Nonconforming lots of record shall not be subject to the development restrictions of this article if developed for single-family residential purposes. Further affirmed from Section 192-18 of the same Ordinance:

Existing vacant lots are lots for which plats or deeds have been recorded in the office of the Register of Deeds of Henderson County. A lot may be used for any of

the uses allowed in the watershed area in which it is located, provided that where the lot area is less than the minimum specified in this article, the Watershed Administrator is authorized to issue a watersupply watershed use permit.

Mr. Burton said it is the opinion of the Zoning Administrator that the property purchased by the Keys, formally owned by Vervin W. Stamey, enjoys a legal, active variance comprised of extremely vague, non-specific conditions. It is the Zoning Administrator's opinion that based upon the specific site plan submitted, and the Variance as granted by application E-5-90 for the parcel, the requirements for Zoning and Water Supply Watershed compliance are sufficient for the issuance of the appropriate permits for the project as specified.

Chairman Fleming asked if there were any questions. Mrs. Pouch asked about the Watershed Administrator, if he says how close you can build toward the water. Mr. Burton said it is specifically addressed in the Watershed Ordinance in terms to running water – rivers and streams. There is no mention in the Ordinance pertaining to bodies of water. Mr. Burton explained how the Watershed Ordinance worked. Mrs. Pouch asked if there was any objection to the plan. Mr. Burton said he is the Watershed Administrator and he has no objection to it.

Mr. Fritschner clarified procedure. Mr. David Greenwood came forward to ask Mr. Burton questions.

Mr. Greenwood said that his well is within 5 feet of Lot 11. Mr. Greenwood said there was nothing said by Mr. Robinson about whether building a house so close to his well is acceptable. Mr. Burton said that it was not a zoning issue or Watershed Administrator's issue. Mr. Burton said he is concerned with zoning issues and watershed issues. Mr. Greenwood said that the septic field is proposed across the street, which is considered below the dam and above the stream that runs off the dam. If that septic field fails, what is the ... Mr. Burton said then he would definitely have a responsibility as Watershed Administrator if there is a failure of the septic system and it affects water quality in that perennial stream. Mr. Burton said that it is assumed that the Environmental Health people have allowed the septic system in this area. Mr. Greenwood said if the septic field fails, then he [Key] doesn't have anywhere else to go with the septic field.

Judy Greenwood, co-owner of Lot #12, asked if there was an expiration of a variance in 1990 or if it was open-ended. Mr. Burton said that basically a variance runs with the chain of title. Mrs. Greenwood asked if the variance remains even though there was no house built. Mr. Burton said the application predisposes that there is going to be a structure built and the application is granted based upon the site plan submitted by Mr. Stamey.

Mr. Fritschner addressed the Board and said they are hearing a lot of law spoken about and the Board should remember that they have legal counsel and what had been said was a legal argument. It is not legal advice to the Board, nor are you permitted to accept it.

Chairman Fleming asked if there was anyone else to support the Zoning Administrator. Ann Key came forward. She said that she is co-owner of the property. Mrs. Key said that she and her husband had spoken to Mr. Burton prior to purchasing the property. The previous owner, Mr. Stamey, had listed the problems with the property and the Keys had started a paper trail through it. The Keys had made the close of escrow contingent on the all the paperwork being involved and all the conditions being met. They had spoken with Mr. Burton several times and were prepared to get a variance, but Mr. Stamey kept referring to the fact that there already was a variance. They

checked with some of the neighbors who lived there at the time, and they all said it was a variance also, even though the paperwork reads as an “existing lot application”. Mrs. Key said they had combined the lots legally as had been requested of Mr. Stamey. They have applied for their septic and well permits and they have been granted. She said Mr. Burton had checked the minutes of the meeting for the existing lot application. Mr. Burton said then he realized that the requirements for the variance had been met. Mr. Burton said the Keys would not have to go through the variance process. Mrs. Key said they then closed escrow on the property believing that everything had been satisfied. After they closed on the property, the neighbors appealed and they are here today. Mrs. Key said, from their point of view, they have done everything that was required of Mr. Stamey or themselves in order to build on the property and a large investment will be lost if they are not allowed to build.

Chairman Fleming asked for questions for Mrs. Key. Mr. Engel asked if they had all the approvals for their septic system and well. Mrs. Key said yes. Mr. Engel asked if all the distances were good. Mrs. Key said they had met all the requirements that were sought of them.

Chairman Fleming asked for the appellant to come forward. Mr. David Greenwood, owner of Lot #12, came forward. Mr. Greenwood read “the variance is required to run with the chain of title as a house or other structure that exists legally through the variance”. It also says, “in the case of Mr. Stamey’s matter, this variance was based upon a site plan submitted by Mr. Stamey”. Mr. Greenwood said the variance was based on his site plan, not their site plan. There was never a structure built and it doesn’t say that it is carried on to the next owner. It is just a piece of property. Mr. Greenwood said it says as closely as possible. Mr. Greenwood said the site plan submitted is somewhere around 2500 sq. ft. He said the neighborhood will allow a 950 sq. ft. house. He said as closely as possible would be closer to 950 sq. ft. not 2500 sq. ft. The variance exceeds 50% of the setback toward his property – 15 feet from his property line. It exceeds 66% from the road and 46% on the lakeside. He said there is not a house on the lake that has been allowed to do that. Mr. Greenwood said his house is 35 feet from the lake and he thinks he is the closest one. It says that Environmental Health is satisfied with layout of the improvements. He said there is nothing in the packet. Mr. Greenwood said he feels the whole thing is too vague. He said that nobody here can show him Mr. Stamey’s site plan. He may have had a 950 sq. ft. house proposed and there will be now a 2500 sq. ft. house. Mr. Greenwood said he thinks that’s excessive. He said it is extremely unfair.

Mr. Burton said that Mr. Greenwood met with Ms. Radcliff and himself and did he state specifically that he (Mr. Greenwood) placed his well where he did to negate the possibility of anyone building on that lot? Mr. Greenwood said based on what Mr. Robinson said he would do if he had that property, and place his well so no one could build within 50 feet of it. Mrs. Pouch asked if Mr. Greenwood ever tried to buy the property. Mr. Greenwood said he did on several occasions and other people did also. Mrs. Pouch asked the amount. Mr. Greenwood said he didn’t know the amount, it was never offered to them. Mr. Greenwood said Mr. Stamey told him it wasn’t for sale. Mr. Greenwood said before he bought the property he called the office and was assured that no one could build on the property because it was too small a piece of property. Mr. Greenwood said when Mr. Stamey brought other people to look at the property, he called again concerned that he would sell the property. There was a house staked out on the property. He said he was assured again that they would not be able to build on this piece of property. He said when the Keys approached him and said they were negotiating buying the piece of property, he called again and was assured they would not be able to build on the property.

Chairman Fleming asked if anyone would like to speak against the situation.

Mr. Burton said there is a variance issued by a valid governmental authority, the Zoning Board of Adjustment in 1990, based upon a site plan for a proposed house. The variance moves with the change of title and the repropounded site plan is actually improved and more specific than the original. There are no watershed issues related to this lot. There's no specific, intelligible, definable standard that tells him what is meant by "as closely as possible". Mr. Burton said his position is that everything was done with valid governmental approval.

Mr. Griffin asked what happened to the original site plan. Mr. Burton said it was in the packet. Mrs. Karpowski said that she didn't copy the back of the existing lot application to include in the packet. The original was found and copies were made for everyone present.

Mr. Fritschner said to Mr. Greenwood that the problem with this type of hearing is that it is required to be quasi-judicial in nature. It is required to have a certain amount of formality but not too much formality. There is not all the formality of a court proceeding but there is some sort of order. If Mr. Greenwood thinks Mr. Burton's statements were repetitive, they might be, but it probably will not injure him. Mr. Greenwood would have a chance to summarize the argument for his side.

Chairman Fleming asked if he could ask Mr. Fritschner a legal question. Mr. Fritschner said it could be done in open session or not in open session.

Mr. Burton apologized to the Board for the site plan not being in there. Mr. Griffin said the site plan didn't give any distance or anything, just a square house. Mr. Griffin said this is what was approved. There was discussion about what was approved. Mr. Greenwood said they were supposed to be 50 feet from his well. Mr. Bonessi said his well was supposed to be more on... Mr. Greenwood said his well is right where Mr. Robinson told him to put it. Mrs. Key said that they have been issued well and septic permits based on their drawings. Mrs. Key said they were very aware where Mr. Greenwood's well was when they placed their well. Mr. Bonessi said he didn't know where the 50 feet for the well from the house came from. Wells have to be a specific distance from bodies of water and septic but he's not sure how close a structure can come to a well. Mr. Greenwood said his main point of contention is the variance itself. It is required to run with the chain of title as a house or other structure. Mr. Greenwood said he was going to build a proposed house and didn't, and now the variance is continued on to a piece of property with open ends on it. Mr. Greenwood compared plans saying the current plan is not close to the original. Mr. Greenwood was asked how large his house was and answered 2000 sq. ft. on 2 floors. Mrs. Key said their footprint included garage and workshop (unheated) space. Mr. Greenwood said that the minimum building allowed in the subdivision is 950 sq. ft. and that is as closely as possible in his interpretation, not 2500 sq. ft. and not 19 feet from the lake, which nobody else has been allowed to do. Mr. Burton asked what the 950 sq. ft was based on. Mr. Greenwood said it was the subdivision homeowner's covenants minimum size. Mr. Burton said the homeowners covenants are not applicable to zoning.

Mrs. Key said that Mr. Stamey had given her the original plans for his house and the footprint of his house actually was within 1 foot of their total square footage. She said their original house, she thinks, was 55' x 54' and Mr. Stamey's was 55' x 56' or very close to that.

Chairman Fleming asked Mr. Burton when the previous owner came to Mr. Laughter with the dimensions, and then Mr. Laughter issued a zoning permit. Mr. Burton said he didn't know if a zoning permit was ever issued. Chairman Fleming asked if the previous Board granted a variance on

this particular lot. Mr. Burton said it is his opinion that they did – the act of the pre-existing lot application by means of being held through advertised public hearing, published in the newspaper, and procedurally proposed and motions and conditions and findings of fact is analogous to a variance. Chairman Fleming asked where in the minutes it said a variance was approved by the Board. Mr. Burton said the pre-existing lot application is approved by the Board. But not according to any plan. Mr. Burton said that the conditions are the same as in the order, Exhibit 19, which is a photocopy and says “lot owner will be required to comply as closely as possible to setback requirements when he applies for a building permit”.

Mr. Fritschner said that Mr. Greenwood hasn't cross-examined on any issue raised by the Chair, if he would like to ask any questions. Mr. Greenwood asked if the variance granted on Lot 11 was combined with the little piece at the time. Mr. Burton said the variance was granted based upon the following condition: “that Lot 11 and the adjoining Parcel A (both south of Oxford Drive) be combined for zoning purposes under the Ordinance and that the required setbacks be complied with as closely as possible”. Mr. Bonessi said the minutes of that meeting say Mr. Stamey said the house size would be approximately 2000 sq. ft.

Chairman Fleming asked if there was any other public discussion. There was none and he closed the public hearing.

Mr. Fritschner asked Chairman Fleming if he still had a legal question. Chairman Fleming said yes. Mr. Fritschner said that he could either ask him right now or the Board could go into closed session and ask any legal questions. Chairman Fleming asked if a variance is granted if it always goes with the chain of title. Mr. Fritschner said that when he does title opinions he does not check anything having to do with zoning. Mr. Fritschner said that he did not give an opinion and the Chairman did not ask as to whether zoning does run with the land. Mr. Fritschner said that he believes that to be the general practice in Henderson County. Chairman Fleming asked if the variance goes with the title. Mr. Fritschner said he would have to examine the Ordinance itself. He said as the attorney for Hendersonville City Board of Adjustment, a number of variances carry their own sunset provision. Either the order says it will only last for 2 years or the Ordinance says it will only be good for 12 months, etc. Mr. Fritschner said he has looked at the Ordinance and seen no such provision in it. It's the Board's job to interpret the Ordinance. Mr. Fritschner said he sees nothing in the Ordinance that says it expires in any particular period of time.

Mr. Bonessi asked which takes precedent – the present law or the law at the time the variance was given. Mr. Fritschner said the Board's job is to rule under Henderson County Zoning Ordinance Section 200-68 to determine whether to overrule “any action taken by the Zoning Administrator”. The Board's job is to look at what the Zoning Administrator did and determine, in accordance with the Ordinance, whether he should be reversed or not.

Mrs. Pouch said that it appears in 1990 Mr. Laughter did a thorough job in investigating this with meetings and attorneys and she sees no reason to contradict his conclusion. She said she doesn't think anything has changed.

Mr. Bonessi said at the time a lot of things were done this way, he doesn't know if we would do it today, but it doesn't change the opinion of what was done. Mrs. Pouch said Mr. Stamey has paid taxes on the property since 1980 or 1990 and it was a pre-existing non-conforming lot. Mr. Engel said it was totally legal before zoning went into effect. Mr. Griffin said the only question he had

was, this new house is not the same as the original house, but it really doesn't have to be because they said as close as possible. Mr. Bonessi said it was very loosely written at the time.

Chairman Fleming said with all the evidence presented today the Board would now vote. Mr. Fritschner recommended how to phrase the motion.

Mr. Griffin made a motion to reverse the Zoning Administrator's decision to issue a zoning [and watershed] permit on Case # A-04-18, Case # A-04-19, Case # A-04-20, Case # A-04-21, and Case # A-04-22. Mrs. Pouch seconded the motion.

Chairman Fleming asked for a vote by a show of hands:

Mr. Griffin	-	No
Mr. Fleming	-	No
Mrs. Pouch	-	No
Mr. Engel	-	No
Mr. Bonessi	-	No

Chairman Fleming said the decision is that Mr. Burton was correct in issuing the permit.

There being no further business, Chairman Fleming made a motion to adjourn the continuation of the July 28th meeting, Mr. Engel seconded the motion, and all members voted in favor. The meeting was adjourned at 5:10 PM.

Robert Fleming, Chairman

Joyce Karpowski, Secretary