



Planning, Development & Inspections

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MINUTES OF REGULAR MEETING TUESDAY, DECEMBER 10, 2019 (9:00 a.m.)

Wake County Board of Adjustment

Wake County Justice Center
300 S. Salisbury St., Room 2700
Raleigh, North Carolina

Members Present: (6) Mr. Brenton McConkey (Chair), Mr. Don Mial (Vice Chair), Mr. Waheed Haq, Mr. DeAntony Collins, Mr. Dustin Engelken, Mr. Jeffrey Goebel

Members Absent: (3) Mr. Will Barker, Ms. Sheree Vodicka, Mr. John Barker

County Staff Present: (7) Ms. Celena Everette (Planner), Mr. Steven Finn (Land Development Administrator), Mr. Tim Maloney (Planning Development & Inspections Director), Ms. Beth Simmons (Community Services Operations Supervisor), Ms. Loretta Alston (Clerk to the Board), Mr. David Parks (Planner), Mr. Geoffrey Pearson (Code Enforcement)

County Attorney Present: (1) Mr. Ken Murphy (Senior Assistant County Attorney)

- 1. Meeting called to order:** Mr. McConkey called the meeting to order at 9:03 a.m.
- 2. Approval of Minutes of the November 12, 2019 Meeting:** Mr. McConkey made a motion to approve the November 12, 2019 meeting minutes as presented. The motion was seconded by Mr. Mial and the minutes were approved unanimously.
- 3. Approval of Written Decision Regarding PLG-SU-001691-2019:** Mr. McConkey noted that four of the five original voting members present were Mr. McConkey, Mr. Mial, Mr. Haq, and Mr. Engelken. Mr. McConkey made a motion to approve the written decision as drafted. The motion was seconded by Mr. Haq. By a vote of 4-0, the written decision was adopted.
- 4. Approval of Written Decision Regarding PLG-A-001836-2019:** Mr. McConkey noted that all five original voting members present were Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Goebel, and Mr. Engelken. Mr. Engelken made a motion to approve the written decision as drafted. The motion was seconded by Mr. Mial. By a vote of 5-0, the written decision was adopted.
- 5. PLG-ZV-001751-2019 – Request for an Exception to extend operating hours for a neighborhood/convenience-oriented retail use from the required 7:00 a.m. to 9:00 p.m. limit to 24 hours per day.**

Before the case was heard, Mr. Ken Murphy reminded the Board that in order to grant the exception, evidence is to be heard and only one finding needs to be met. Mr. Murphy stated that the conclusion to be made is whether the extension of the operating hours that the applicant is requesting would not be injurious to the public health and safety of the surrounding area by reason

of noise, congestion, lighting or other aspects of operations. Mr. Murphy further stated that a three-fifths majority vote is required to approve the Exception.

Voting Members (5)

The voting members were identified as: Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Engelken, and Mr. Collins.

Documentary Evidence

Staff Report, PowerPoint presentation, Petitioner's Application with supporting documents

Testimony of Staff

Wake County Planning staff member, Mr. Steven Finn, was duly sworn. Mr. Finn began by introducing himself and the title of the case before the board. Mr. Finn asked that the staff report (Appendix 1) and the PowerPoint presentation (Appendix 2), and the petitioner's application be accepted as evidence into the record.

Mr. Finn stated that the petitioner is requesting an Exception to extend operating hours for a neighborhood/convenience-oriented retail use from the required 7:00am to 9:00pm limit to 24 hours per day. The petitioner is Toby Coleman of Smith Anderson and the landowner is Lena B Stevens, Heirs.

Mr. Finn stated that the property is located at 0 Benson Rd. at the intersection of Benson Road and Cleveland School Road in the southeastern portion of Wake County. The property consists of 7.44 acres and is split-zoned General Business and Highway District. All properties immediately adjacent to the site are zoned Highway District and are either residentially developed or vacant. Both zones allow for neighborhood/convenience-oriented retail uses by-right, meaning the findings of fact required for a Special Use Permit do not apply to the proposed use.

Mr. Finn presented an aerial site location photograph and a video of the subject site. Mr. Finn also presented a site plan from the applicant for Board consideration, as an illustration of what development on the site may look like once constructed. Mr. Finn pointed out that, since this exhibit was submitted as an illustration and not as a formal application for commercial plan review, Staff has not reviewed the exhibit for compliance with the zoning standards of the Unified Development Ordinance.

Mr. Finn stated that notification letters to adjoining property owners were mailed on November 27, 2019. A public hearing placard was placed along both road frontages on the site on November 26, 2019.

Mr. Finn stated that staff recommends that, if the Board of Adjustment reaches a positive conclusion on a required finding, that it approve the exception request subject to the conditions identified in the staff report.

Mr. McConkey reminded the Board that the proposed development can be built by-right on this plot and that the Board is only looking at whether they can operate after 9:00pm and before 7:00am and what effect those hours of operations would have on the surrounding community and public health.

Testimony of the Petitioner

Before the case was presented by the Petitioner, the following individuals were duly sworn:

1. Andy Priolo, Development Manager for Circle K Stores, 124 Harvey Ivy Way, Holly Springs, NC
2. Rick Baker, PE, Timmons Group engineer
3. Cliff Lawson, PE, Timmons Group traffic engineer

Mr. Toby Coleman, of Smith Anderson Law, (150 Fayetteville St, Raleigh, NC) represented the petitioner and. Mr. Coleman began by stating that the owners of the Subject Property are seeking authorization for a convenience store to operate 24 hours per day. The property owners are currently under contract to sell the property to Circle K Stores, and they have indicated that the purchase is contingent on whether they are able to operate the store 24 hours per day. Mr. Coleman stated that the Subject Property is close to the planned route for the extension of Interstate 540. The Subject Property is approximately ¼ mile south of where the future Interstate 540-NC Highway 50 interchange will be constructed.

Mr. Coleman stated that Circle K desires to operate a 24 hour per day store is that the customer has expectations that, in a major urban area like Raleigh, a convenience store will provide service at all hours of the day. Additionally, he stated that Circle K will take several security measures designed to limit crime during the overnight hours at the convenience store it intends to construct on the Subject Property, including providing a well-lit store with shielded lighting in the parking lot which is a code requirement that no more than one foot-candle of light from the convenience store can bleed over across the property line. Circle K will also limit the use of outdoor speakers on the Subject Property to minimize noise impacts.

Mr. Andy Priolo, spoke in favor of the petition and began by stressing that public/customer and employee safety is very important to Circle K Stores which they demonstrate by having a minimum of 2 employees work together at night; installing security cameras; keeping no more than \$50 in the cash register drawer, with a safe on site to place cash in excess of \$50; encouraging law enforcement officers to stop at the store at night by providing them free coffee; and discouraging loitering on the Subject Property. Mr. Priolo further stated that these more modern stores have lower crime rate than the older stores.

Mr. Cliff Lawson, Professional Engineer, spoke as a qualified traffic engineer and his expertise was recognized by the Board. Mr. Lawson began by stating that a traffic study was performed and concluded that extending the convenience store's operating hours to 24 hours per day would have no appreciable impact on traffic in the Subject Property's vicinity. Only 17% of the traffic generated by the convenience store would occur during the extended hours of 9:00 p.m. – 7:00 a.m. Traffic in the Subject Property's vicinity will increase somewhat when Interstate 540 is constructed, regardless of the convenience store's proposed extended hours of operation.

Mr. McConkey asked Mr. Rick Baker about lighting after 9:00pm when a business is open or closed. Mr. Baker stated that the code addresses these requirements and given that two sides of the property are bordered by a right-of-way and the third side is buffered by the proposed stormwater pond (the property is triangular), the light will be minimal passed the property line. Mr. Finn verified that the UDO does allow an allowance of light to extend passed the property line for security purposes. Mr. Finn further stated that they have not had specific light complaints in recent memory.

Public Hearing

The following individuals spoke in opposition to the petition:

1. Lacy Slayton (3550 Parrish Farm Road, Garner, NC)
2. Nikki Thompson (540 Lula Place, Raleigh, NC)
3. Donald Maynard (7025 Cleveland School Road, Garner, NC)
4. Mary Ellington (117 Easy Wind Lane, Garner, NC)
5. Paulette Slayton (3550 Parrish Farm Road, Garner, NC)

Mr. Priolo, in response to requests to only extend hours to 12:00am, stated that the Circle K Regional Vice President was not interested in any operational hours other than 24 hours, due to the overnight/early morning hours being a great opportunity for employees to get the store cleaned, restocked, and ready for busier hours, and due to the public expectation for a major urban area convenience store to be open at all hours.

With no additional attendees wishing to speak in favor or in opposition of the petition, Mr. McConkey closed the public hearing portion of the meeting at 10:10am.

Board Discussion and Findings of Fact

Mr. McConkey reminded the Board that in order for the board to approve this petition, it will need to determine that the operation of the store for 24 hours per day would not be injurious to the public health and safety of the surrounding area by reason of noise, congestion, lighting or other aspects of the operation. Mr. McConkey reiterated that the Board has heard testimony from the petitioner in relation to security measures they have taken, from a licensed professional traffic engineer that the hours extension would not have noticeable traffic impact, from an engineer discussing lighting and buffers on the property, and from concerned neighbors.

Mr. Goebel asked counsel to distinguish between what it means to be injurious versus impactful. Mr. Murphy stated that the board will need to make that distinction, given that something could have an impact without being injurious.

Mr. Haq stated that he feels that traffic will be increasing in the area of the gas station regardless, due to the construction of Interstate 540, and that having operations 24 hours per day will deter crime in the area due to lighting and customer/employee presence. He also stated that lighting will be in place at the gas station regardless of hours of operation as well.

Mr. Collins stated that he sympathized with the concerned neighbors but feels that the petitioner has addressed the fact that traffic, lighting, and noise will be within normal limits. Mr. McConkey agreed and stated that the petitioner has proven by evidence presented and expert testimony that they have met standards in regard to potentially injurious outcomes to extended hours.

Mr. McConkey stated that if the request is approved by this board, the neighbors can bring any concerns with lighting and noise that does not conform with the UDO to the attention of county staff.

There being no further discussions regarding this determination, Mr. McConkey asked for a motion.

Motion and Conclusions of Law:

In the matter of PLG-ZV-01751-2019, Mr. Engelken made a motion that the Board find and conclude that the petition does meet the requirements of Article 4-50-3(C) of the Wake County Unified Development Ordinance and that the requested exception be granted to extend operating hours for the neighborhood/convenience-oriented retail use to 24 hours per day, with the recommended conditions. The motion to approve is based on the following findings of fact:

- 1) An extension of operating hours to 24 hours per day for the proposed neighborhood/convenience-oriented retail use would not be injurious to the public health and safety of the surrounding area by reason of noise, congestion, lighting, or other aspects of the operation.

The motion was seconded by Mr. Mial. The zoning variance was granted with a unanimous vote (5-0).

6. PLG-ZV-001752-2019 – Variance request to reduce the required corner side yard building setback for an existing single-family dwelling

Voting Members (5)

The voting members were identified as: Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Engelken, and Mr. Goebel

Documentary Evidence

Staff Report, PowerPoint presentation, Petitioner's Application with supporting documents

Testimony of Staff

Before the case was heard, Wake County Planning staff member, Mr. David Parks, Planner, was duly sworn. Mr. Parks began by introducing himself and the title of the case before the board. Mr. Parks asked that the staff report (attached here as Appendix 3) and the PowerPoint presentation (attached here as Appendix 4), and the petitioner's application be accepted as evidence in the record. Mr. McConkey accepted the evidence into record.

This item is a request for a zoning hardship variance to reduce the required corner side yard building setback of 30' for a garage within the R-30 zoning district. The petitioner is Mr. Jeb Zarzour, and the subject site is on the southeastern corner of Banks Road and Shield Circle and contains approximately 0.689 acres. Mr. Parks presented several aerial maps and a video of the site location and presented a survey that showed the current location of the two detached accessory structures in relation to the property lines.

Mr. Parks stated that the lot contains a 1,318 square foot single family home and an existing detached garage which currently sits 18 feet from the corner side yard property line. The applicant is proposing to attach the garage to the main house which will require the garage to meet the 30 feet setback requirement from Shield Circle. The applicant was granted a variance by the Board of Adjustment in August for the existing garage, however, that variance was from the 50-foot setback requirement from the street for an accessory structure. Mr. Parks stated that the Board did not grant the previous variance for the metal structure, but if this variance is granted the metal accessory building would now be considered part of the main building and would comply with the UDO.

Mr. Parks stated that notification letters were sent to adjoining property owners on November 21, 2019, and the public hearing notice was placed on the site on November 25, 2019. Mr. Parks recommended that, if the Board of Adjustment reaches positive conclusions on all of the required findings, that it approve the variance subject to the conditions identified in the staff report.

Testimony of the Petitioner

Mr. Andrew Petesch of Petesch Law, LLP (127 W. Hargett St, Raleigh, NC), represented and introduced the petitioner, Mr. Jeb Zarzour. Before testimony was given, Mr. Zarzour was duly

sworn. Mr. Petesch began by having Mr. Zarzour provide testimony regarding the background of his request. The Applicant's previous August 2019 variance request included a request to allow the detached metal building to encroach approximately 18 feet into the 50-foot accessory structure setback along the Subject Property's western property line, which borders Shield Circle, required by UDO Section 4-70-1. However, the Board of Adjustment denied that variance request for the detached metal building; consequently, the detached metal building could not legally stay on the Subject Property and was to be removed. Mr. Zarzour now wishes to attach the detached garage to the single-family residence on the Subject Property by constructing a breezeway that would connect the detached garage and the single-family residence. This would result in the detached garage no longer being detached, but rather it would be classified as part of the single-family residence, which would reduce the required corner side yard building setback that the garage would have to meet along the Subject Property's western property line, which borders Shield Circle, from the 50 feet required by UDO Section 4-70-1 to 30 feet pursuant to UDO Section 5-11-2.

Mr. Zarzour is requesting a variance to allow the garage, once it is attached to the single-family residence via construction of a connecting breezeway, to encroach 12 feet into the 30-foot corner side yard building setback along the Subject Property's western property line, which borders Shield Circle, required by UDO Section 5-11-2. This variance request would allow the existing garage, once it is attached to and becomes classified as a part of the single-family residence, to be set back 18 feet from the Subject Property's western property line, rather than the 30 feet required by UDO Section 5-11-2.

Mr. Zarzour states that he is prepared to add any landscaping and/or buffering that county staff recommends.

Mr. Petesch presented three letters of support from the petitioner's neighbors and requested that they be accepted into evidence. Recognizing that the neighbors were not at the hearing to give testimony, Mr. McConkey asked if there was any objection to accepting the letters into the record. Finding no objections, the letters were accepted into the record.

Mr. McConkey asked Mr. Zarzour to elaborate on his interest in constructing a breezeway to connect the garage with the main dwelling. Mr. Zarzour stated that he would like a breezeway constructed for personal benefit during rain/inclement weather and gaining access to his vehicles.

Mr. Engelken asked Mr. Zarzour to elaborate on the foreseen hardships that would occur if the variance is not granted. Mr. Petesch stated that the hardship is the expense of removing the metal building. The hardship was not created by Mr. Zarzour, although he built the structure without a permit, but rather was created in the fact that the property is a corner lot that restricts setbacks and due to the location of the septic system. Mr. Petesch also mentioned that deconstruction of the metal building would create factors such as noise, dust, and landfill waste, that are contrary to public interest and health.

Having no other attendees speaking in favor or opposed to the petition, Mr. McConkey closed the public hearing portion of the meeting at 10:54am.

Board Discussion

Mr. McConkey stated that unnecessary hardship would result from strict application of the ordinance, in that the breezeway would not be allowed to be permitted if this variance is not approved.

Mr. Mial stated that the hardship would result from conditions that are peculiar to the property, specifically because the property is a corner lot. If the buildings were on a lot that only had two sides in considering setbacks, they would comply with the UDO.

Mr. McConkey stated that he believes the hardship was not caused by the applicant in that the garage was permitted more than 10 years ago and the inability to construct the breezeway is due to where the garage was permitted and built at that time, not by fault of Mr. Zarzour. Mr. Engelken expressed concern that the hardship may be a result of actions taken by Mr. Zarzour, but Mr. McConkey and Mr. Mial clarified that the breezeway is allowed outside of the fact that the permit for the garage was possibly issued in error.

Mr. Mial stated that the requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved. There is enough buffer for the neighboring property, and no one presented any testimony or documentary evidence opposing the current application.

There being no further discussions, Mr. McConkey asked for a motion.

Motion and Conclusions: In the matter of PLG-ZV-001752-2019, Mr. Mial moved that the Board find and conclude that the petition does meet the requirements of Article 19-26 of the Wake County Unified Development Ordinance and North Carolina General Statute Section 160A-388(d), and that the requested variance be granted to allow a 12-foot reduction in the corner side yard setback requirement, with the recommended condition. The motion to approve is based on the following conclusions and findings of fact:

1. Unnecessary hardship would result from the strict application of the ordinance, in that the breezeway would not be allowed to be permitted and constructed.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. The hardship results from conditions that are peculiar to the property, specifically because the property is a corner lot and the location of the septic system.
3. The hardship did not result from actions taken by the applicant or the property owner. The inability to construct the breezeway is due to where the garage was permitted and built 10 years ago.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance. There was not testimony given in opposition to the variance request.

The motion was seconded by Mr. Haq. The zoning variance was granted with a unanimous vote (5-0).

7. **PLG-A-001818-2019 - The petitioner is appealing the determination of planning staff, as allowed by Article 19-41 *Appeals of Administrative Decisions*, that the allowed encroachment into the 25-foot tree and vegetation protection zone was not approved in error.**

Voting Members (5)

The voting members were identified as: Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Engelken, and Mr. Collins.

Documentary Evidence

Staff Report, PowerPoint presentation, Petitioner's Application with supporting documents

Testimony of Staff

Wake County Code Enforcement staff member, Mr. Geoffrey Pearson, was duly sworn. Mr. Pearson began by introducing himself and the title of the case before the board. Mr. Pearson asked that the staff report (Appendix 5) and the PowerPoint presentation (Appendix 6), and the petitioner's application be accepted as evidence into the record.

Mr. Pearson stated that the petitioner is appealing the zoning staff's decision to grant an encroachment into the 25-foot tree and vegetation protection zone. The appellant is Mr. Jay Osborne. Mr. Pearson presented an aerial photo of the subject site as Lots 34 and 35 of Phase 2 of the Olde Mill Trace Subdivision. The lots are addressed as 2716 and 2720 Flume Gate Drive, consist of .69 and .72 acres respectively, and are zoned Residential-40 Watershed. The properties are also located in the Swift Creek Non-Urban Rural Water Supply Watershed. Mr. Pearson stated that the surrounding properties are residentially zoned and developed, except for Phase 2 of Olde Mill Trace Subdivision which is currently under construction.

Mr. Pearson provided a brief background of the case. In June 2019, Stanley Martin Homes, a residential building contractor, applied for two building permits to construct single-family homes on lots 34 & 35 of Olde Mill Trace Subdivision. On August 6 and August 14, 2019, the Environmental Services Department issued two wastewater permits for these two lots. The approved septic system layout showed both systems encroaching into the required 25-foot Tree and Vegetation Protection Zone (TPZ), as allowed under Section 16-12-6(A) of the Wake County Unified Development Ordinance. On August 28, 2019, adjoining property owner Mr. Jay Osborne emailed County Staff with concerns that trees and vegetation were being removed from the TPZ. After further discussions and review of county records with Mr. Osborne, he alleges that the encroachment into the TPZ was unnecessary, and that the two wastewater permits were issued in error. Mr. Osborne filed the Zoning Appeal Application on October 3, 2019. A public hearing sign was posted on the property on October 30, 2019.

Mr. Pearson presented an illustration of the approved subdivision plan for Phase 2 of the Olde Mill Trace Subdivision. Mr. Pearson stated that Section 16-12 of the UDO sets standards for the preservation of trees and other significant vegetation along the outer perimeter of development sites. The standard for new subdivisions is a 25-foot permanent tree and vegetation protection zone on the outer perimeter of the parent tract and is indicated on the approved subdivision plan for Lots 34 and 35. These lots adjoin the appellant's property, which is located at 1304 Charland Court, Raleigh, NC, in the Greenbrook Farms Subdivision.

Mr. Pearson further stated that the standards of Section 16-12 of the Wake County UDO (Section 16-12-2(B)) generally requires that the tree and vegetation protection zone remain undisturbed and that trees and vegetation within the zone be preserved. However, this section also allows for exceptions to this rule, as the Planning Director (under Section 16-12-2(B)) may permit land disturbance and tree/vegetation removal within the protection zone when it is deemed necessary to allow for reasonable use and development of property. Mr. Pearson stated that one such exception is for wastewater or septic systems. Mr. Pearson presented Section 16-12-6(A) Allowed Encroachments as stating, "...Septic fields must be allowed to encroach into the tree and vegetation protection zone if a qualified soil scientist determines that such location is the only feasible and safe alternative."

Mr. Pearson presented illustrations of approved septic permits for Lot 34 and Lot 35, both designed by Central Carolina Soil Consulting, which is a licensed NC Soil Scientist Firm. Mr. Pearson also

presented illustrations of approved building permits for Lot 34 and Lot 35, both approved by Wake County Environmental Services Department, authorizing the construction of the septic system. Mr. Pearson stated that Wake County Staff relied on these designs as being the only feasible and safe alternative for the development of the lots. Mr. Pearson also presented several photographs of both Lot 34 and Lot 35.

Mr. Pearson stated that Mr. Osborne is appealing Staff's decision that the allowed encroachments into the 25-foot Tree and Vegetation Protection Zone for the purpose of establishing two septic systems was granted appropriately and that the two wastewater permits were issued in error, and therefore that the encroachments were not necessary.

Mr. Pearson's determination is that the onsite wastewater permits were not issued in error, and that the requirements of Section 16-12-6(A) of the UDO were met. In justifying this determination, Mr. Pearson stated that a Qualified Soil Scientist provided a necessary soil report and site layout per the UDO, and staff relied on these documents to issue the permits; septic systems are allowed to encroach into the 25-foot Tree and Vegetation Protection Zone; and a septic system is a reasonable use/development of residential property.

Mr. McConkey clarified that the Planning Director could have deemed it necessary and approved the septic systems to encroach into Tree Protection Zone's, the soil scientist determined that it was then only feasible and safe location. Mr. Pearson stated that was correct.

Mr. Mial asked Mr. Pearson if an alternative location for the septic system was identified. Mr. Pearson stated that once the soil scientist provides the layout, staff must rely on that as the only feasible and safe location.

Testimony of the Petitioner

Before the case was presented by the Appellant, Mr. Jay Osborne (1304 Charland Court, Raleigh, NC) was duly sworn. 2:39 Mr. Osborne began by stating the two issues that the petitioner believes are in violation of the Wake County Unified Development Ordinance; 1) that there is not sufficient evidence on record to support the need for the encroachment into the TPZ on both Lots 34 and 35, and 2) that in relation to Lot 34, 'reasonable use' is not clearly defined.

Mr. Osborne gave background on the events that have led to this case. On Labor Day weekend 2019, Mr. Osborne made a public records request and found that all lots had requested and been authorized to encroach into the TPZ. Mr. Osborne stated that the fact that all requests were allowed, reduces the confidence that citizens have in the process and in the standards of 'feasible and safe alternative' cited in staff's presentation and made under determination of a soil scientist.

Mr. Osborne presented into evidence an aerial map of Phase 2 of Olde Mill Trace and detailed the placement of the lots in question (Exhibit 1). Mr. Osborne's lot was labeled Lot 25 and witness, Cheryl Reiss' lot was labeled Lot 27. Lot 27 straddles both Lots 34 and 35, with a large expanse of Lot 34 on the border of Lot 27. Mr. McConkey accepted the evidence into the record.

Mr. Osborne presented into evidence a series of photographs (Exhibit 2), taken around Labor Day weekend 2019, from behind Lot 27 showing where a bulldozer had cleared Lot 34 and Lot 35. Mr. Osborne reminded the Board of photos shown by Mr. Pearson from Lot 34 that gave a clear view through to Lots 25 and 27. Mr. Osborne also presented an email from Mr. Pearson (Exhibit 2),

dated August 30, 2019, that stated that all disturbing activity was suspended until a meeting occurred and an inspection completed. Mr. McConkey accepted the photographs and email into the record.

Mr. Osborne presented documents (Exhibits 3-5) into the record that resulted from a public records request on September 5, 2019, all which Mr. McConkey accepted into the record. Mr. Osborne also presented a copy of the improvement permit for Lot 34 with supporting attachments and pointed out that the site classification states 'provisionally suitable.' Mr. Osborne noted that he believes that the law requires that the soil be more than 'provisionally suitable' but that it must be the only safe and suitable place to install a septic system. Mr. Osborne presented a house location plot plan for Lot 34 showing the encroachment into the tree and vegetation zone in the back-left corner of the lot. Mr. Osborne referenced a 'Frequently Asked Questions' section from the Wake County Government website in relation to general distances/setbacks from structures and noted that the required setback from a deck is 5 feet. Mr. Osborne pointed out that the setback on the plot plan is 44.58 feet and questioned why the setback wasn't moved forward 15 feet, which would allow the septic system, have setbacks met and the TPZ would have been protected. Mr. Osborne referenced an additional document labeled '4-bedroom septic layout' for Lot 34 and noted that the reason the setback was 44.58 feet was because the intention was to install a pool on Lot 34.

Mr. Osborne cited Article 16-12-6 of the UDO, that authorizes the Wake County Planning Director to approved encroachment in limited circumstances necessary for reasonable use and development, such as allowable necessary encroachments for utilities, driveways, sidewalks, entrances and supplemental landscaping. Mr. Osborne stated that the appellants interpretation is that these exceptions are limited to encroachments that are necessary for use and entry into the property, or further enhancement of trees/vegetation. Mr. Osborne further stated that the UDO clearly states that the tree and vegetation protection zone is intended as an area where removal is prohibited or strictly limited. Mr. Osborne stated that the installation of a pool does not fall under the 'necessary for use and entry into the property' and to allow it sets a precedence for future new development by interpreting the exceptions too broadly.

Mr. Osborne presented an Improvement Permit, House Location Plot Plan, and Construction Authorization Permit for Lot 35 (Exhibit 6), which Mr. McConkey accepted into the record. Mr. Osborne pointed out that the site classification states 'provisionally suitable.' Mr. Osborne noted that he believes that the law requires that the soil be more than 'provisionally suitable' but that it must be the only safe and suitable place to install a septic system. Mr. Osborne presented a house location plot plan for Lot 34 showing the encroachment into the tree and vegetation zone in the back-left corner of the lot and that the setback from the deck is 24.5 feet, when only 5 feet is required. Mr. Osborne summarized that the septic system could have been moved forward about 15 feet, but instead it encroaches into the protection zone as provisionally suitable, which he stated does not meet the standards and requirements of the ordinance as the only feasible and safe alternative.

Mr. Osborne presented a 4-bedroom septic layout for Lot 37 (Exhibit 7) which was provided by a public information request, to show other evidence of encroachment in Olde Mill Trace Subdivision. The drawing shows that the setback of the septic system from the structure is 72 feet and that it encroaches 100% into the tree and vegetation protection zone. Mr. McConkey accepted the exhibit into the record.

Mr. Osborne presented an email from Geoffrey Pearson regarding the continuance of this case and photographs of septic box installations on Lots 34 and 35 (Exhibit 8), both of which Mr. McConkey

accepted into record. Mr. Osborne stated that, although allowed, the septic systems were installed after the builders were aware of this appeal.

Mr. Haq asked for clarification regarding the appellants objection regarding this case. Mr. Osborne stated that the objection is that the septic systems are placed in the tree and vegetation protection zones unlawfully and that the vegetation needs to be planted in a manner that the ordinance requires.

Ms. Cheryl Reiss (2525 Whippletree Drive, Raleigh, NC) was duly sworn and spoke in favor of the appellant's case. Ms. Reiss is the landowner behind Lot 34 and has lived there for three years. Ms. Reiss stated that in the initial stages of the development of the Lots, the builder gave the community updates that there would be a 25-foot vegetation buffer on the Lots. As construction began, Ms. Reiss noticed that Lot 34 became clearer and clearer of vegetation in that she could see the roadway behind the new neighborhood, the streetlights, and every car that passes. Ms. Reiss stated that the builder sales associate informed her that the landowner had paid extra to clear out the lot in order to build a pool.

Mr. McConkey asked whether there were other feasible and safe alternative locations for the placement of the septic systems. Mr. Jason Hall of Central Carolina Soil Consultants (1900 S. Main Street, Wake Forest, NC) was duly sworn and briefly spoke about septic systems and the criteria for provisionally suitable soil, which refers to a soil depth requirement of at least 48 inches. Mr. Hall provided the following information in relation to Lots 34 and 35:

- Lot 34: In order to meet the linear feet requirement for the system and backup field, and to meet the 15-foot setback for a pool from a septic field the septic field had to be pushed back to the locations on the septic layout. Mr. Hall stated that the septic system was designed upfront to allow for a pool so the homeowner would not incur the cost of redesigning a system later.
- Lot 35: In order to design the homeowner a gravity flow system, and to meet the setback requirements and Wake County Environmental Health standards, was required to be drawn as three 100-foot lines and two 50-foot lines.

Mr. McConkey asked Mr. Hall if, in his professional opinion, these locations were the only feasible and safe alternative for these systems, and Mr. Hall confirmed that they were.

Mr. Haq asked the process by which a licensed soil scientist tests soil and Mr. Hall gave the Board an overview of the process of checking soil suitability depth with hand augers to make sure the soil meets the suitable criteria in a plot design. Mr. Haq asked if the septic lines are drawn by the Soil Consulting Firm under the supervision of a licensed soil scientist and Mr. Hall confirmed that they are.

Mr. Haq asked Mr. Hall to about the location of the septic repair field on Lot 35. Mr. Hall stated the lot was designed with the contour of the land in mind and to get four equal lines to the pump system, per Wake County Environmental Health criteria. He stated that these plans are easier for staff to permit without the design of a consultant.

Mr. Haq asked Mr. Hall if he was aware of the plans for a pool when designing the plans for Lot 34 and Mr. Hall confirmed that the lines were drawn to accommodate a pool and so that the drilling fields would not need to be moved or redesigned. Mr. Hall stated there was no way to adjust the lines and to accommodate a pool unless a subsurface drip system was installed at a cost of

approximately \$40,000 and those systems are used primarily in soils seen in the western part of North Carolina.

Mr. Collins asked Mr. Hall to clarify the meaning of 'provisionally suitable' regarding site classification. Mr. Hall stated that term to mean that the site has a suitable soil depth requirement as classified on the improvement permit.

Mr. Osborne asked Mr. Hall if Stanley Martin directed him to design a septic system to allow for a pool on Lot 34 and that the location designated on the plan was the only place to the system could go to allow that and Mr. Hall confirmed that to be the case. Mr. Osborne inquired about the need for the setback of 25-feet from the deck on the plan for Lot 35. Mr. Hall stated that foundation drains must be 15-feet from the back corner of the home to the septic tank and a 100-foot line could not be installed there to install a gravity septic system. Mr. Osborne asked Mr. Hall if he verified whether a pump septic system could be used, and Mr. Hall stated that he was hired by Stanley Martin to design the lot to have a gravity septic system. Mr. Osborne stated that if there were a pump septic system planned, there may not have been the need to encroach into the tree protection zone. Mr. Hall pointed out that the part of the gravity septic system that encroaches into the zone is the repair field, in which there is nothing installed. Mr. Osborne referred the Board to the photographs showing where the repair field was cleared of vegetation. Mr. Hall further stated that every client requests a gravity septic system because it saves about \$3,500, and that it is standard operating professional practice by septic designers to plan for a gravity septic system. Mr. Osborne further stated that although the Tree and Vegetation Protection Zone is intended to be an area in which vegetation removal is prohibit or otherwise strictly limited, a pump septic system was not considered for Lot 35. Mr. Hall confirmed that he was not given direction to design the lot for a pump septic system.

Mr. McConkey inquired of Planning staff, when the Planning Director can approve/deny encroachments deemed necessary to issue permits, to clarify what would constitute an unreasonable use in making this determination. Mr. Pearson used a recent example of a homeowner applying to build a playhouse that was drawn to encroach into the 25-foot tree protection zone. Mr. Pearson stated that the determination was that the playhouse was not a reasonable use because, although it was an accessory dwelling, there was still areas on the property that the playhouse could be placed. Mr. Pearson stated that in this case with Lot 34, the plan showed that the pool was not going to impact the tree protection zone. If there was no other location for the pool and it would be encroaching into the tree protection zone, it possibly would not have been approved.

Mr. Mial asked Mr. Osborne for clarification that the basis for his case is that if the builders were not installing a pool, then they would not be encroaching into the tree protection zone. Mr. Osborne confirmed that was correct, in the case of Lot 34.

Mr. Haq asked staff if there were any restrictions on what can be removed in the tree protection zone. Mr. Pearson stated that there is a mitigation plan to reduce the impact of the vegetation removal when there is an allowed encroachment. Permits would be placed on hold until appropriate vegetation could be replaced on the property. Mr. Haq asked Mr. Pearson if Wake County consults an additional soil scientist or someone on staff to reevaluate a septic system placement. Mr. Pearson said that they do not per a new state law that a licensed professional takes responsibility for the design.

Mr. McConkey asked Mr. Pearson, knowing that vegetation does not need to be immediately cleared for the septic repair zone but only available to be clear if needed in the future, was the removal of vegetation in this case within the scope of the encroachment granted by the County. Mr. Pearson

stated that there should be a minimal level of encroachment into the zone and that the County does not want the tree protection zone unnecessarily impacted.

In closing, Mr. Osborne stated that he believes that if an ordinance has clear language to require a location to be the only feasible and safe alternative, then a plan that says that should be submitted in order to provide the appropriate checks to ensure that the tree protection zone is maintained. Mr. Osborne stated that he feels without those checks' communities do not have the ability to rely on the safeguards in the ordinance.

Having no other attendees speaking in favor or opposed to the appeal, Mr. McConkey closed the public hearing portion of the meeting at 12:39pm.

Board Discussion

Mr. McConkey reiterated that under the ordinance, the septic field must be allowed to encroach into the tree and vegetation protection zone, if a qualified soil scientist determines that such a location is the only feasible and safe alternative. Mr. McConkey agrees that reasonable questions have been raised about the type of septic designs that could have been used, but that Mr. Hall has given his professional opinion that the type and location in the plans are the only feasible ones and believes the Board does not have the expertise to question Mr. Hall's professional opinion.

Mr. McConkey further stated that the ordinance does give broad discretion to the planning director to approved encroachments that he/she deems necessary to permit reasonable use in development. Mr. McConkey stated that there is not a clear line that can be drawn between what can or cannot be approved to encroach, and that he thinks that both septic systems and placement of pools to allow for septic systems is a reasonable use, and further stated that it is within the director discretion to approve.

Mr. Mial, Mr. Haq and Mr. Engelken all expressed agreement that Mr. Hall's professional opinion as a soil scientist and information that staff had when approving lot plans, reiterates that the encroachment is allowed as the only feasible and safe location for the systems.

Motions and Conclusions: Based on the applicable Wake County Unified Development Ordinance provisions, and on the evidence submitted in the matter of PLG-A-001818-2019, Mr. Mial moved that the Board find and conclude that the Planning staff's determination should be upheld, and the issuance of the wastewater permits is affirmed. The motion to affirm is based on the following findings of fact and conclusions of law related to evidence that the onsite wastewater permits were not issued in error, and the subject property is in compliance with the Wake County UDO, per previous board discussion.

The motion was seconded by Mr. Engelken. The Planning staff's determination was upheld with a unanimous vote (5-0).

8. Planning, Development & Inspections Report

Mr. Steven Finn reported on the following items in terms of recent trends and constructed UDO:

- Development applications remain consistent both with land development application and board related cases.
- Administrative maintenance of the Unified Development Ordinance has been outsourced to an independent third-party vendor, Municode. The site is searchable with hyperlinks and is more user-friendly to the benefit of staff and customers.

Mr. Tim Maloney reported on the following items:

- Due to the recent trend of complaints and issues related to the Tree Protection Zone ordinance, staff has formed an internal team to evaluate the language and standards to bring before the Planning Board, leading to a possible text amendment.
- Board members eligible for reappointment are reminded to respond to the request from the BOC Clerk's office.

9. Adjournment

Mr. McConkey adjourned the meeting at 12:51pm.

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REGULAR MEETING
WAKE COUNTY BOARD OF ADJUSTMENT
December 10, 2019

All petitions complete, Brenton McConkey declared the regular meeting
of the Wake County Board of Adjustment for
Tuesday, December 10, 2019 adjourned at 12:51 p.m.

Respectfully Submitted:

A handwritten signature in black ink, appearing to read 'Brenton McConkey', with a long horizontal flourish extending to the right.

Brenton McConkey
Wake County Board of Adjustment

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