MINUTES

Regular Meeting
Wake County Board of Adjustment
Tuesday, April 11, 2017
9:00 a.m., Room 2700
Wake County Justice Center
300 S. Salisbury St.
Raleigh, North Carolina

Members Present: (8) Mr. Brenton McConkey (Chair), Mr. Don Mial (Vice-Chair), Mr. Terence Morrison, Mr. Brian Foxx, Mr. Waheed Haq, Ms. Sheree Vodicka, Mr. DeAntony Collins, and Mr. John Barker

Members Not Present: (1) Mr. Will Barker

County Staff Present: (7) Mr. Steven Finn (Land Development Administrator), Mr. Tim Maloney (Planning, Development, and Inspections Director), Ms. Celena Everette (Planner II), Mr. Chris Record (Planner I), Mr. Charlie Johnson (Deputy Fire Services Director), Mr. Keith Lankford (Planner III), and Mr. Russ O'Melia (Clerk to the Board)

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

Item 1, Call to Order: Mr. McConkey called the meeting to order at 9:00 a.m. with 8 members present.

IN RE MINUTES

Item 2, Oaths of Office for Mr. Brian Foxx, Mr. Waheed Haq, Ms. Sheree Vodicka, and Mr. DeAntony Collins: Mr. O'Melia administered the oaths of office for new board members Mr. Foxx, Mr. Haq, Ms. Vodicka, and Mr. Collins.

Item 3, Election of Chair and Vice-Chair of the Board of Adjustment

Mr. Murphy opened the floor for nominations for chair. Mr. Mial nominated Mr. McConkey. There were no other nominations. Mr. McConkey was elected chair by unanimous consent.

Mr. McConkey opened the floor for nominations for vice-chair. Mr. Morrison nominated Mr. Mial. There were no other nominations. Mr. Mial was elected chair by unanimous consent.

Item 4, Approval of Minutes of the March 14, 2017 Meeting

Mr. McConkey made a motion to approve the March 14th meeting minutes, and Mr. Mial seconded. The motion carried unanimously.

Item 5, Approval of Written Decision Granting the Variance in the matter of BA V-2246-17

Mr. Mial made a motion to approve the written decision granting variance in the matter of BA-V-2246-17, and Mr. John Barker seconded. The motion carried unanimously.

Before the case was heard, Wake County staff members Mr. Record and Ms. Everette were duly sworn.

Item 6, BA V-2248-17

Voting Members: Mr. McConkey, Mr. Mial, Mr. Morrison, Mr. Foxx, and Mr. Haq

Landowner: Robert and Deborah Fuller
Petitioner: Robert Fuller
PIN#: 0788-85-9547

Size: 0.95 acres
Location: The property is located at 10328 Baileywick Road.
Zoned: Residential-40 Watershed (R-40W)
Land Use Classification: Non-Urban Area/Water Supply Watershed (NUA/WSW)

This is a request for a variance from Article 5-11-1, Residential Watershed Districts, which requires buildings in Residential-40 Watershed zoning to be setback at least 15 feet from any side lot line. The applicant is requesting a variance to allow the existing residential home to encroach 2.2 feet into the required side setback. The request would allow the home to have a 12.8 foot side setback.

TESTIMONY AND EVIDENCE PRESENTED

Documentary Evidence: Staff report, PowerPoint presentation, site plans, application, video, aerial map, relevant sections of the Unified Development Ordinance were shown and/or available.

Testimony:

Mr. Record, Planner I, entered the staff report and PowerPoint presentation for BA V-2248-17 into the record. Mr. McConkey accepted the staff report and PowerPoint slides. Mr. Record stated the petitioner's name, zoning classification, background and history of the petition. The subject property has had several owners. The residence was constructed in 1978. At the time, the property was zoned Residential-40, which would have required the same 15 foot side setback as the property's current zoning of Residential-40 Watershed. All properties surrounding the subject parcel are residential and zoned Residential-40 watershed. A 2012 survey of the property showed that the house was 12.8 feet from the eastern side property line, meaning that the building encroaches 2.2 feet into the side setback. Notification letters to adjoining property owners were mailed on March 23, 2017. A public hearing placard was placed on the site on March 23, 2017.

Mr. McConkey asked how the issue came to the county's attention. Mr. Record answered that the petitioner was looking to do an addition to the home that would increase the home's footprint. He said that the variance is for the house which encroaches into the setback, not the sunroom.

Mr. Morrison asked if a survey was required when the house was built. Mr. Record said that a survey would have been done when the house was built in 1978, but no survey was required when the house was sold since then.

Sworn witness in favor of the petition:
Robert Fuller, 10328 Baileywick Road, Raleigh, NC 27613

Mr. Fuller said that a survey was not required when they purchased the home. They did not know that the house encroached into the setback. He said that he would like to fix the existing deck, but he cannot obtain a permit without a variance. He said that he is not trying to add anything to the house; he is trying to fix what is already there.

Mr. McConkey asked about how the lot narrows as you go north from Baileywick Road. Mr. Fuller said that the front of the house is 17.9 feet from the property line, and the back of the house is 12.8 feet from the property line. Mr. McConkey commented that the narrowing of the lot creates the issue with the encroachment.

There was no one else who wished to speak in favor of or in opposition to the request. Mr. McConkey closed the public hearing.

Mr. Morrison asked whether there were setback requirements in 1978. Mr. McConkey re-opened the public hearing.

Mr. Record said that the setback requirements in 1978 were 15 feet.

Mr. McConkey closed the public hearing.

BOARD DISCUSSION

The board discussed the four required findings.

(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;

Mr. John Barker said that the owners would not be able to sell the house without the variance, and they would not be able to reconstruct the deck. Mr. McConkey said that the house would not have been grandfathered in since it has never been in compliance. Part of the house would need to be demolished without a variance.

(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance;

Mr. McConkey said that the property narrows from the front to the back, and the narrowing of the eastern property line creates the encroachment on the northeast corner of the house. Mr. Foxx said that the shape of the lot would create problems wherever the house was situated.

(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship;

Mr. Haq said that the petitioner did not know about the encroachment when the house was purchased. Mr. McConkey noted that there have been several owners of the property with the encroachment in place.

(4) 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.

Mr. Morrison said that the owner does not intend to expand the property. Mr. McConkey noted that there was no opposition to the petition.

MOTION

Mr. Mial made a motion in the matter of BA V 2248-17 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 the encroachment of an existing building into the eastern side setback, reducing the eastern side setback for this lot from the required 15 feet to 12.8 feet, with the recommended staff condition. Mr. Morrison seconded the motion. By a vote of 5-0, the motion passed, and the variance was granted. So ordered.

FINDINGS OF FACT

(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property. The owners would not be able to sell the house without the variance, and they would not be able to reconstruct the deck. The house would not have been grandfathered in since it has never been in compliance. Part of the house would need to be demolished without a variance.

(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. The property narrows from the front to the back, and the narrowing of the eastern property line creates the encroachment on

the northeast corner of the house. The shape of the lot would create problems wherever the house was situated.

(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship. The petitioner did not know about the encroachment when the house was purchased. There have been several owners of the property with the encroachment in place.

(4) 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.

The owner does not intend to expand the property. There was no opposition to the petition.

CONCLUSIONS OF LAW

Unnecessary hardship would result from the strict application of the ordinance. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. The hardship did not result from actions taken by the applicant or the property owner. 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.

IT IS THEREFORE ORDERED:

The petitioner/landowner must record the notarized form pertaining to the order of the Board in the Wake County Register of Deeds and return a copy to Planning, Development and Inspections Division of Community Services.

Before the next case was heard, Wake County staff member Mr. Lankford was duly sworn.

Item 7, BA V-2240-16

Voting Members: Mr. McConkey, Mr. Mial, Mr. Morrison, Mr. Foxx, and Mr. Haq

Landowner: Luke Daniel Wilkins and Mary Ellen Taft
Petitioner: Benjamin R. Kuhn, Ragsdale Liggett, PLLC
PIN#: 1800-38-8086
Size: 0.94 acre (40,946 square feet)
Location: The property is located at 6704 Virgil Drive, just off of Six Forks Road in the Falls Lake area.
Zoned: Residential-80 Watershed (R-80W)
Land Use Classification: Non-Urban Area/Water Supply Watershed (NUA/WSW)

This is a request for a variance from the standard setback provision as established by Sec. 5-11-1, *Residential Watershed Districts*, of the Wake County Unified Development Ordinance (UDO) which requires principal structures, and attachments thereto, in the Residential-80 Watershed zoning district to be set back at least 30 feet from the rear lot line.

The petitioner is requesting an 8.8-foot variance for a proposed sunroom addition and a 12.9-foot variance for a proposed deck addition to the existing house. The requested variance would be to allow the stated encroachments into the required 30-foot rear yard setback in order to provide a “safer and more convenient” access for the owners who “are advancing in age”.

TESTIMONY AND EVIDENCE PRESENTED

Documentary Evidence: Staff report, PowerPoint presentation, site plans, aerial map, relevant sections of the

Unified Development Ordinance were shown and/or available, the application which includes the following exhibits:
Exhibit A: 1981 deed to the subject property
Exhibit B: Plat of Property (Book of Maps 1970, Page 187)
Exhibit C: 1988 deed to 10-foot strip at rear of subject property
Exhibit D: plat showing 30' setback area from rear of property based on 1970 plat
Exhibit E: Topo Map and site pictures
Other Maps: aerial view from GIS, site zoning, and existing conditions

Testimony:

Mr. Lankford, Planner III, entered the staff report and PowerPoint presentation for BA V-2240-16 into the record. Mr. McConkey accepted the staff report and PowerPoint slides. Mr. Lankford stated the petitioner's name, zoning classification, background and history of the petition. The lot (lot 32) has septic soils at the front; the house was placed in the rear half of the lot due to the septic soils and topography. The owners acquired a 10-foot strip of land, by deed, from the lot to the rear (lot 33) of this lot in 1988. The strip of land was not (and cannot be) recombined by plat with this lot; therefore, it cannot be considered to be part of the lot or used to meet setbacks. The existing house has access via a 15-foot tall flight of stairs in the front which is becoming unsafe for the owners. The variance would allow an at-grade, or nearly at-grade, entrance to the rear of the house. Letters were mailed to adjacent property owners on March 31st. A public hearing sign was posted on the property on March 30th.

Mr. McConkey asked about the 10-foot strip of land. Mr. Lankford said that the property owners have title by deed, but it has not been recombined with the subject lot. He said that the 10-foot strip of land cannot be used when calculating setbacks.

Ms. Vodicka asked if the proposed sunroom and deck are there now. Mr. Lankford answered that they are not there now.

Mr. Benjamin R. Kuhn, 2840 Plaza Place, Suite 400, Raleigh, NC 27612, came forward to address the board representing the property owners, Luke Daniel Wilkins and Mary Ellen Taft, as their attorney.

Sworn witnesses in favor of the petition:
Mary Ellen Taft, 6704 Virgil Drive, Raleigh, NC 27614
Luke Daniel Wilkins, 6704 Virgil Drive, Raleigh, NC 27614

Mr. Kuhn submitted a binder of exhibits into the record, including the application, a PowerPoint presentation, a septic permit & survey, and plans for the sunroom and deck. Mr. McConkey accepted the exhibits into the record. An affidavit from neighbors was not accepted into the record. Mr. Kuhn said that the property slopes from the rear to the front. He said that Mr. Wilkins & Ms. Taft purchased the 10-foot strip of land in 1988 from their mother for the purpose to add on to the back of the house. They could not add on to the front of the house due to the septic lines and repair areas. Mr. Kuhn said that they would be able to recombine the lot with the 10-foot strip if the zoning was still R-40, but the zoning changed to R-80W. The proposed sunroom would be 31.2 feet to the end of the 10-foot strip; this would not need a variance under R-40 zoning. The proposed deck will be 27.1 feet to the end of the 10-foot strip; under R-40 zoning this would have required a 2.9 foot variance. Mr. Kuhn said that the property rises 32-35 feet from Virgil Drive to the rear property line. Mr. Kuhn said that due to the topography, the location of the home on the lot, the existing septic field, and reservation of a repair septic area to the front of the home, and due to the non-conforming nature of the lot and inability to recombine the 10' strip with their existing lot, the property owners face practical difficulties and unnecessary hardship in complying with the terms of the Wake County UDO in connection with their proposed sunroom and deck additions. Additionally, with the mature vegetation and tree cover providing ample screening, as well as the existing 10' strip that is owned by Mr. Wilkins and Ms. Taft, the proposed request is consistent with the spirit, purpose, and intent of the UDO to separate existing residential uses in a manner that protects neighboring property owners. Mr. Kuhn said that the situation was not created by the property owners; he said that the property was rezoned to R-80W by the county.

Mr. McConkey asked if the 10-foot strip of land could be sold to someone other than the owner of lot 33. Mr. Kuhn said that the owners will deed the 10-foot strip to the purchasers of their property if they ever sell it. He said that the homeowners would be agreeable to a condition that conveyance of the 10-foot strip of land should happen with the rest of lot 32 if the board desired such a condition.

Ms. Vodicka asked what impact there is on lot 33 from it losing the 10-foot strip of land. Mr. Kuhn said that all of the lots in the neighborhood are legal nonconforming lots due to the original R-40 zoning being changed to R-80W. He said that there is nothing that is nonconforming about lot 33 due to the 10-foot strip.

Mr. Foxx asked if the deck and sunroom are the only ways to satisfy the hardship issue involving climbing the steps. Mr. Kuhn said that entering and exiting the home via the basement is not practical. Mr. Foxx asked if a smaller deck would satisfy the issue. Mr. Kuhn said that they could probably reduce the size of the deck by three feet so it would be thirty feet from the property line with the neighboring property owner.

Mr. Wilkins and Ms. Taft said that they are trying to age in place safely with as few steps as possible. They said that there are quite a few steps from the basement to the living area.

Mr. McConkey asked if there is another way to have an at grade access to the rear of the house. Mr. Kuhn said that the proposed locations for the sunroom and deck are the only places they can go based on the layout of the lot and location of the septic area. Mr. Wilkins said that they can make the deck smaller.

Mr. John Barker asked about the setbacks when the property was zoned R-40. Mr. Lankford said that the setbacks would have been 30 feet, and they were in full compliance when the house was built.

Mr. McConkey asked the property owners if it would be acceptable to them to add a condition to reduce the deck to be 30 feet from their property line in order to make one of the required findings. Ms. Taft said that such a condition would be fine.

There was no one else who wished to speak in favor of or in opposition to the request. Mr. McConkey closed the public hearing.

BOARD DISCUSSION

Mr. Foxx said that the first finding involving an unnecessary hardship will be the most difficult one to make. He said that building a ramp from the driveway to the house could solve some of the challenges.

Mr. Haq said that the property owners have been trying to comply with the regulations since they purchased the property, but the regulations have been getting stricter with the subsequent rezonings. He said that he is comfortable making the finding of an unnecessary hardship.

Mr. Morrison said that the spirit of what they are trying to achieve is a 30-foot separation from an adjacent property owner. He said that they could get the 30-foot separation if the deck was scaled back about three feet. He expressed concern that a variance would stick to the property in perpetuity. Based on the timeline of the project, Mr. Morrison said that he would be comfortable approving the variance with the scaled back deck to achieve an effective 30-foot setback. He noted that the adjacent property owners did not testify in opposition.

Mr. Haq said that approving the variance would eliminate the uncertainty of the 10-foot strip, and the 10-foot strip can help meet the fourth required finding that the variance would be consistent with the spirit and intent of the ordinance.

Mr. McConkey re-opened the public hearing.

Mr. Foxx asked how much time and money was has been invested in the project.

Ms. Taft estimated that they have spent around $10,000 on the project.

Mr. McConkey closed the public hearing.

The board discussed the four required findings.

(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property;

Mr. McConkey said that the topography creates a hardship and an access problem. The location of the utilities on the back of the home creates the step out portion of the proposed deck. Mr. Foxx said that any design for the deck to avoid the utilities would create an encroachment of some kind.

(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance;

Mr. Haq said that the topography is the major culprit in the situation. Mr. John Barker said that the location of the septic area and the septic tank creates a situation wherein they cannot utilize the front or the other side of the house.

(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship;

Mr. McConkey said that the location of the house was pushed back because of the topography and the location of the septic field. Mr. John Barker noted that the zoning has changed several times since they purchased the property. Mr. Mial said that the property owners tried to comply with the regulations, but the changes to the ordinance presented challenges that were not their fault.

(4) 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.

Mr. Morrison said that if the deck was scaled back by three feet, it would create an effective 30-foot setback which would meet the spirit and intent of the ordinance. Mr. Mial believed that the variance would be consistent with the spirit of the ordinance, and he did not think the deck needed to be scaled back to make this finding. Mr. Morrison said that scaling back the deck by three feet would be needed in order to make this finding.

MOTION

Mr. Morrison made a motion in the matter of BA-V-2240-16 that the Board find and conclude that the petition meets 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 the proposed sunroom and deck additions to the existing single-family home to encroach into the required 30-foot rear setback, with the recommended staff condition as well as a condition that the proposed deck be reduced by three feet to create an effective setback of thirty feet. Mr. Mial seconded the motion. By a vote of 5-0, the motion passed, and the variance was granted. So ordered.

FINDINGS OF FACT

(1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property. The topography and setup of the property create a hardship and an access problem. The location of the utilities on

the back of the home creates a situation where any design for a deck to avoid the utilities would create an encroachment of some kind. There is no way to have an at-grade access to the rear of the home without some encroachment into the setback.

(2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. The topography of the property is peculiar, and the required location of the septic tank and septic fields make most of the property unusable. The location of the utilities contributes to the encroachment.

(3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship. The zoning of the property changed since the property was purchased.

(4) 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. Having a 30-foot effective setback from the adjacent property owner meets the spirit and intent of the ordinance.

CONCLUSIONS OF LAW

Unnecessary hardship would result from the strict application of the ordinance. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. The hardship did not result from actions taken by the applicant or the property owner. 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.

IT IS THEREFORE ORDERED:

The petitioner or land owner must record the notarized form pertaining to the order of the Board in the Wake County Register of Deeds and return a copy to the Planning, Development and Inspections Division of Community Services.

Item 8: New Business – There was no new business.

Item 9: Old Business – There was no old business.

Item 10: Adjournment

Hearing no additional business, the meeting was adjourned at 10:37 a.m.

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REGULAR MEETING
WAKE COUNTY BOARD OF ADJUSTMENT
April 11, 2017

All petitions complete, Brenton McConkey declared the regular meeting of the Wake County Board of Adjustment for Tuesday, April 11, 2017 adjourned at 10:37 a.m.

Respectfully Submitted:

5/9/17

Brenton McConkey
Wake County Board of Adjustment

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