

**TOWN OF DUCK
BOARD OF ADJUSTMENT MINUTES
FRIDAY, FEBRUARY 22, 2008**

The Board of Adjustment for the Town of Duck convened at the Duck Municipal Offices at 2:00 p.m. on Friday, February 22, 2008.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chairman Sam Taylor, Members Olin Finch, Patty Wander, Eileen Neren, and Alternate Ken Yarbrough. Staff present: Director of Community Development Andy Garman, and Board of Adjustment Clerk Sandy Cady.

Chairman Taylor stated that a quorum was present and that Alternate Ken Yarbrough would be participating in Allan Starr's absence. He noted that Ken Benton was also absent.

OTHERS PRESENT: Mark Martin of Sandmark Construction and Real Estate, Inc.

The meeting was called to order by Chairman Taylor, at 2:03 p.m.

QUASI-JUDICIAL HEARINGS (Regular Members to Participate)

SE 2008-001 A special exception application, submitted by Sandmark Construction and Real Estate, Inc. on behalf of Melissa S. and William J. Magowan, property owners at 131 S. Snow Geese Drive, also known as Lot 20, Snow Geese South, in Duck, North Carolina. Pursuant to Zoning Ordinance Section 156.054, this special exception request is to allow the reconstruction of a non-conforming deck on the south side of the property which encroaches into the rear yard setback approximately 3.8 feet. The deck is 21.2 feet from the rear yard property line where 25 feet is required in the RS-1 zoning district. The original house was sited in its current location on the property in 1984, after zoning was adopted in Duck. The house was approved to be constructed in its current location. Staff has determined that the rear yard setback at the time of construction was 25 feet.

Chairman Taylor asked if any Board Members wished to disclose any information and recuse themselves. There being no one, Chairman Taylor swore in Mark Martin of Sandmark Construction and Real Estate, Inc. and Director of Community Development Andy Garman.

Based upon the application received, proper notice having been provided and all witnesses having been sworn in, Chairman Taylor called on Director of Community Development Andy Garman to present his report.

Director Garman provided a brief overview of the circumstances as detailed and submitted in his staff report. He noted that a portion of the deck encroached on the setback approximately 3.8 feet into the rear yard. He stated that the rear yard setback was 25 feet. He stated that the permit was issued by Dare County staff in 1984. He stated that staff was assuming there was an error made at the time as the setback was 25 feet when Dare County staff issued the permit. He added that it was hard to determine from the survey where the setback was. He stated that the way staff considers the issue was based on whether the permit was issued in the past was contrary to the ordinance or if it was constructed the way the permit authorized. He stated that staff would consider the structure lawful

and nonconforming. He stated that staff was treating this issue as a nonconformity rather than as an illegal structure. He stated that staff received the application for the project and since the applicants wanted to reconstruct the entire nonconforming portion of the deck in its current location, Staff reviewed the nonconforming provisions of the ordinance. He added that removal of the structure would be considered destruction as per the ordinance, which was how staff determined a special exception was needed.

Director Garman stated that ordinance provisions are in place to allow special exceptions to modify the yard requirements for properties on a case by case basis in order to determine the specific impacts and circumstances of each case. He stated that staff evaluated the impacts from the request and noted that the rear yard abuts a right-of-way (rather than an adjacent property). He stated that until the entire house comes into conformity, it would not make sense to require replacement of the deck to meet the setbacks since the house encroaches the same amount as the deck and is located closer to adjacent property. He stated that the requisite findings were included in the Board's packet and he was recommending approval of the special exception.

Member Olin Finch stated that it looked like that when the structure was originally built that Dare County used 20% of the total depth of the rear property as the setback. Director Garman stated that the homeowners association noted that it was their rear yard setback, which was different from the Town's requirement. Member Finch stated he wasn't sure if Dare County still allots 20% of yard depth for the setback. He thought that when the covenants were written, the homeowners association was following Dare County's rules regarding setbacks. He stated that the old survey showed 20 feet, which was what the homeowner originally intended to build. Director Garman agreed. He stated that he researched other homes constructed in the same subdivision and noted that a lot of them were constructed at the same time with the majority showing a 25 foot rear yard setback. He stated that nevertheless, staff was considering it as a nonconforming issue.

Member Finch didn't think there was anything wrong with a homeowner wanting to maintain their house, even if it was nonconforming. He didn't think the Town should ask the owner to rebuild it to the new standards. He wondered what could be done about the fact that setbacks change. Director Garman stated that the only time a homeowner would have to bring a whole development into compliance would be if the house was destroyed by more than 50% of its value. He stated it would not apply to a remodel or addition.

Chairman Taylor asked if the Town considered the deck as an extension of the house rather than something simpler. Director Garman stated that the language read that it would be considered a nonconforming portion of the structure. He stated that staff was considering the deck to be a separate nonconforming structure. Member Finch pointed out that the house was not being removed. He thought the covenants (ordinance) stated that if the house wasn't being removed, then no part of the house should need to be built back to the current standards. Director Garman stated that it did not speak to a house but to a structure. Member Finch wondered if the Board should make a standard that states if part of a deck was removed, it would be allowed to be put back in an area where it shouldn't be by current standards.

Chairman Taylor noted that at the last meeting, an exception was granted on the basis that if the deck were removed and rebuilt, that it would have to be brought into conformity. He wondered if this case

was considered a hardship. Member Wander agreed and pointed out that the nonconformity did not encroach upon another property. Member Neren asked if the exception were allowed, it would exist for the property. Director Garman stated she was correct.

Mark Martin was recognized to speak. Mr. Martin stated that the initial call he received was mainly for some curb appeal. He stated that in the course of working through it, they discussed installing a bathroom as well as a few other things. He added that by time they received the survey back, they were shocked that the structure was sitting in the setback as other houses on the street were also sitting in the setback.

Member Finch felt the Board was setting a policy for future decisions. Chairman Taylor disagreed. He stated that policies are not set with exceptions. He stated that there aren't precedents as the Board did not want to treat people differently. He wondered how the Board protected the Town and people from future things that may not be as simple as this exception. He stated he wasn't sure how to do it. Member Finch didn't think it was a mistake. He thought it was straight forward and the owners built the deck the way it was supposed to be done. Chairman Taylor stated that it was mistake. Member Wander pointed out it was built to Town code. Member Finch stated that there wasn't a Town code in place at the time. Chairman Taylor stated it was built to Dare County's code. Mark Martin stated it met the homeowner association requirements, which was done through Dare County. Director Garman stated that staff believed the setback was 25 feet at the time, but there wasn't any hard evidence to prove it. He stated that research showed that the majority of the homes on the street had 25 foot rear yard setbacks.

Member Finch stated that the Town could not go by setbacks marked on a survey. He added that they were just the opinion of the surveyor. Director Garman agreed. Member Finch stated that the Sandy Ridge subdivision setbacks changed from 20 to 25 feet as did the Schooner Ridge subdivision. Director Garman stated that there were still districts in Town with 20% rear yard lot depth. He added that there were nonconforming lots in the North Snow Geese subdivision, which gave them a decreased setback based on when the subdivision was created. Member Finch thought there should be a priority list of reasons as to why the Town grants exceptions. He wondered if the deck could be repaired instead of being totally removed. Mark Martin stated that it could be repaired but it wouldn't last.

Member Neren pointed out that a deck was different than a house as it needs to be replaced more often. Member Finch stated it was a total replacement. Member Neren stated it was not changing from the way it was. She stated that it was a type of repair. Member Finch stated he would be fine with that. He stated that he was trying to add logic so it could be followed in other cases.

Member Yarbrough asked if the deck wasn't a mistake, it would be like a setback changing. Director Garman stated it wouldn't matter what happened as far as the standards that were in effect at the time. He thought the Board would be looking at the same issue if the standard was 20% at the time it was built since it is being treated as nonconformity. Member Yarbrough clarified that it wouldn't matter if it were a mistake or if it was done in compliance with the ordinance at the time. Director Garman stated he was correct. Member Finch didn't think it should matter if it were a mistake as it could be argued extensively. He reiterated that the Board was setting a standard.

Director Garman thought the special exception was created to be different from a variance, as a variance looks at specific hardships. He stated that the special exception recognized that existing structures built prior to a certain date have errors that need to be dealt with so people can make improvements to their structures. He added that it is done on a case by case basis. Chairman Taylor thought it would be helpful to look at the draft order to grant the special exception to see what it stated and if it made sense.

Member Finch stated that if he was asked to make a case to allow the special exception, he would only do it if the house was not being removed and the deck would be rebuilt into the setback. He stated that the Board could make a case that the deck could be allowed to be rebuilt in the setback with a stipulation that if the house was ever removed, the deck would have to become conforming.

Chairman Taylor felt the preferable thing to do was to reconstruct the deck with the provision that reconstruction of the entire structure would need to meet the setbacks. The Board went on to review the draft order of the special exception.

Member Finch didn't think the special exception should be categorized as aesthetic and not doing any harm. Chairman Taylor didn't think there was anything in the exception that talked to aesthetics. Member Finch agreed and thought that the builders didn't do anything wrong when the house was constructed. Chairman Taylor agreed. He added that it was not up to the Board to determine whether it was a mistake or not. Member Finch agreed and stated that the Board's findings should not be based on whether it was a mistake. Director Garman didn't think there was anything in the staff report or findings of fact that indicated it was a mistake. Member Finch stated that the exception implied it was a mistake. Chairman Taylor disagreed.

Member Neren asked what was being guarded against in the special exception. Member Finch stated that if a structure was destroyed by more than 50%, it would be required to be put back into the current setback. Chairman Taylor didn't think it was the case as the Board was drawing a fine line between repair and reconstruction, recognizing that there was a fine line between repair and reconstruction. He stated that, technically, reconstruction was the proper thing to do. Member Wander stated it was to the benefit of the community to have the decks properly installed. Member Neren suggested adding something in the special exception that it would only continue through the duration of the life of the house. Director Garman stated that it was at the end of the findings of fact. Chairman Taylor stated it was consistent with the Board's previous practices.

Chairman Taylor wondered if it would make sense for the Board to be able to grant the exception on the basis that it would be a technical reconstruction as opposed to a repair with the caveat that indicated that if the structure needed to be replaced, it would be replaced in full. Member Wander felt that the rules set in place by the Town have to be protected. She thought the caveat would cover the Board as well as protecting the rules.

Member Yarbrough asked if a variance would apply if a homeowner was just doing repairs. Director Garman stated that if they were just doing repairs, it could be done administratively. Member Yarbrough thought that in a sense, the homeowner was being penalized since they reconstructing the structure to be safer than by simply repairing the structure. Chairman Taylor stated that if they were doing it right, there wouldn't be a penalty.

Member Finch moved that the Board adopt the draft order granting the special exception based upon the findings of fact. Member Wander seconded.

Motion carried 5-0.

APPROVAL OF MINUTES FROM DECEMBER 14, 2007 (Only Board Members acting on that date shall vote on the approval)

Member Yarbrough moved to approve the minutes of December 14, 2007 as presented.

Member Wander seconded the motion.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

None.

BOARD COMMENTS

Chairman Taylor stated that he noticed that the Planning Board would be considering the application for Vincenza George, which the Board of Adjustment originally approved. He stated that he was curious as to why it was going to the Planning Board this time. Board of Adjustment Clerk Sandy Cady was recognized to speak. Board Clerk Cady stated that a zoning ordinance review was achieved in 2004 where the Planning Board and Council reviewed the entire ordinance and felt that that type of exception should go before the Town Council. She stated that it would act like a Conditional Use Permit. Director Garman stated that it would have to be re-authorized every 2 years. He stated it was authorized by the Board of Adjustment in 2004, re-authorized by Council in 2006 and will be back in front of Council. Chairman Taylor clarified that it was an ordinance amendment. Director Garman stated he was correct.

Member Yarbrough stated that he knew the Board was not setting a precedent with regard to the case they just heard, but wondered if the bias should be toward the common sense side of things. He wondered if the applicant could do it administratively, it would be a heavy factor in the Board's discussion. Member Finch stated that Mark Martin was very straightforward in what was considered a repair or reconstruction. He added that the case was a reconstruction. Director Garman noted that there was a technical line with regard to thresholds for nonconformities.

ADJOURNMENT

Chairman Taylor made a motion to adjourn the meeting.

Motion carried 5-0.

The time was 2:55 p.m.

Approved: _____
Secretary