

**TOWN OF DUCK
BOARD OF ADJUSTMENT MINUTES
FRIDAY, AUGUST 7, 2009
MEETING**

The Board of Adjustment for the Town of Duck convened at the Duck Municipal Offices at 2:00 p.m. on Friday, August 7, 2009.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chair Patty Wander, Vice Chair Sam Taylor, Allan Starr, and Alternate Ken Benton. Staff present: Director of Community Development Andy Garman and Board of Adjustment Clerk Sandy Cady.

MEMBERS ABSENT: Olin Finch, Eileen Neren and Alternate Carol Powell.

Chair Wander noted that Olin Finch, Eileen Neren and Carol Powell were absent. She stated that proper notices had been advertised and the meeting was duly authorized.

OTHERS PRESENT: Rob Bachman of Finch & Company and Joe Blakaitis.

The following persons were sworn to provide testimony during the hearing: Rob Bachman of Finch & Company and Andy Garman.

The meeting was called to order by Chair Wander at 2:00 p.m. Chair Wander went on to swear in those that would be testifying in the hearing.

QUASI-JUDICIAL HEARINGS (Regular Members to Participate)

Amendment to SE 2008-004, a Special Exception Permit issued on June 18, 2008 to Mr. and Mrs. Ali and Nayereh Rassoulpour, Property Owners at 119 Osprey Ridge Road, to allow Grading and Filling Activity for the Proposed Construction of a New Single-family Dwelling in Excess of Three Feet above Pre-disturbance Lot Elevations and within Five Feet of the Adjacent Property Boundary.

Chair Wander stated that the amendment was asking for relief from a few items. She directed Rob Bachman to present his case.

Rob Bachman of Finch & Company was recognized to speak. Mr. Bachman stated that in 2008, he presented their proposal for building Mr. & Mrs. Rassoulpour's home and needed to sit in front of the Board due to the extreme topography of the lot. He stated that the grade elevations had to change from fourteen (14) feet above sea level as the lowest point all the way to forty-six (46) feet at the highest elevation on the west side of the lot. He stated that due to the topography, there wasn't a feasible way to locate the house on the property, so they requested to grade beyond what the Town would normally allow and fill beyond the three (3) feet. He added that they wanted to grade within the five (5) foot buffer between the property line and side yard, particularly on the south side of the lot so as not to encroach on the neighbor's property. He stated that the request was accepted by the Board with work commencing shortly after.

Rob Bachman stated that the elevation was included at the time that they composed to be the finished elevation of the house pad, but in the process of grading and cutting the lot, it was found that the thirty (30) foot elevation left the property in a hole that was lower than the adjacent lots. He added that the grade elevations had changed slightly on the westward side and there was still an issue. He stated that they wanted to level the lot off but after discussing the issue with Director Garman, they decided to grade the lot down to thirty (30) feet. He stated that they realized after grading that they were doing the Rassoulpour's and the adjacent property owners a disservice. He stated that he was now in front of the Board to ask for flexibility to raise the grade slightly to obtain a manageable slope on the north and south sides of the property.

Chair Wander asked what the elevation was of the middle section of Lot 10. Rob Bachman stated that it was thirty-two (32) feet. Director Garman stated that at the last hearing, the site plan showed the existing grades without any disturbances. He thought there was a thirty-two (32) foot contour on the plan.

Member Starr asked if the proposed change would result in the applicant's property being higher than the adjacent two (2) lots. Rob Bachman stated that it would not. Member Starr asked if the request would result in any negative impact in terms of water flow and stormwater management to the adjacent properties. Rob Bachman stated that it was the primary concern and felt he could contain the water from the house and driveway on the property. Member Starr asked if there was an engineering study that would substantiate that stormwater would not impact the adjacent properties. Rob Bachman stated that he did not have a study of the stormwater effects. He thought an engineer would be reluctant to put too much into determining what was already completed. He thought the question was whether he would be able to manage the stormwater on the site.

Rob Bachman noted that there was a section of the driveway that would be higher than the adjacent property owner. He stated that one of the requests he had made was to install a retaining wall which would allow sloping towards the Rassoulpour's property, however there was a request from one of the property owners not to install it but to fill onto the property in order to achieve the same result. Member Starr clarified that the adjacent property owner did not want a retaining wall between the properties or they were fine with a short wall. Director Garman stated that he spoke with the adjacent property owner and that while he was fundamentally opposed to retaining walls, he would rather have a gentle slope onto his property. Member Starr stated that he did not want to see the adjacent property owner come before the Board next year due to the decision that would be made today.

Chair Wander asked if a swale would be built without the retaining wall. Rob Bachman stated that there would not be a swale. He stated that he would be elevating the driveway to achieve a positive slope toward Mr. Rassoulpour's property. He stated that in order to achieve that, he would grade the elevation and slope it back. Chair Wander clarified that if it was sloped back to the adjacent property owner's lot, it would increase stormwater runoff onto the cul-de-sac. Rob Bachman stated that it would not.

Member Benton stated that he would like to see an engineer's opinion regarding the stormwater runoff. Member Starr stated that if the engineer was comfortable with making a statement regarding the thirty (30) foot elevation, he would like to see the engineer state that he was comfortable with the thirty-two (32) foot elevation. He added that he was uncomfortable making a decision without an

engineer's statement. Member Benton thought Rob Bachman was asking the Board to make a decision on something they didn't know much about.

Vice Chair Taylor thought the Board agreed that there wasn't a problem with the one side of the property. Member Starr stated that he didn't see any issues. Vice Chair Taylor thought the potential problem was on the other side and the cul-de-sac. Rob Bachman stated that he had addressed that issue and how it would be handled.

Vice Chair Taylor clarified that the only concern the property owner had raised was the installation of the retaining wall as well as the length of it. He thought that with proper grading, the runoff could be addressed. He added that he did not see the need for another engineering study. Member Benton asked what the timeframe would be to obtain another engineering report and how much it would cost. Rob Bachman thought it would cost several hundred dollars but wasn't sure about the timeframe.

Vice Chair Taylor asked if Director Garman would be able to obtain a conclusive engineering report that would be different from the original one. Director Garman stated that he had the Town's engineer look at the plan and the engineer felt comfortable that the grading plan could be achieved. He added that the engineer suggested guttering the north side to channel runoff; lay sod several inches below grade of the driveway so the runoff would not channel down the driveway; and install a gravel driveway. He stated that the engineer did not see any stormwater issues. Vice Chair Taylor clarified that the Town engineer had evaluated the situation. Director Garman stated that he was correct.

Member Starr pointed out that in the staff report, the recommendation for approval seemed to be one that included an average bulkhead height of two (2) feet above grade. He added that now he was hearing via email that the bulkhead was off the table and back to grading. He stated that he was uncomfortable having a staff recommendation regarding a bulkhead disappear due to an email. He wondered what the reason was for deleting the bulkhead and use grading instead. He stated that if staff and the Town engineer were comfortable with the change, it should have been brought to the Board's attention as opposed to a recommendation that stated the opposite. Director Garman noted that the staff report was completed the Friday before the Board's meeting. He added that the northern property owner had contacted him the week of the meeting, which was after the staff report had went out, telling his opinion of the issue. He stated that the intent of putting the retaining wall in was to limit any impacts on the neighboring property, but that staff's opinion could change if the neighbor was agreeable to allowing some disturbance to occur.

Member Starr thought it would help the Board if Director Garman would affirmatively state what the recommendation from staff would be in addition to or in lieu of the retaining wall. Director Garman stated that staff would support a grading plan that would install a gentle 3:1 slope back down onto the adjacent property in lieu of a retaining wall.

Vice Chair Taylor clarified that based upon the circumstances and events since the staff report went out, staff had different recommended conditions for approval. Director Garman stated that it wasn't staff's intent to surprise the Board. Member Starr agreed and noted that he wanted the Board to act on something that had staff's approval and blessing. Director Garman believed that the impacts could be managed with a gentle slope versus a retaining wall.

Vice Chair Taylor asked if there needed to be a change in the wording of the recommendation. Director Garman stated that Subsection C should have the very last sentence changed. Member Benton clarified that the retaining wall language would be removed and be replaced with language regarding a gentle slope. Member Starr suggested; "...the grading shall meet the approval of the Director of Community Development or the Town engineer to achieve the stormwater management goals of the Town, working in conjunction with the developer..." Member Benton thought that the Board was trying to do the best that they knew how.

Rob Bachman noted that they had pinned themselves in a corner last time by stating an exact elevation of thirty (30) feet. He thought one of the objectives to come back before the Board was that the finished grade could be approximate rather than a definite number. Vice Chair Taylor stated that he was fine with it. Chair Wander thought it was controlled in that it stated that it was level with or below the neighboring properties.

Director Garman suggested the revised language on Page 2, Subsection 2, section a and c read as follows: "...except for the proposed side slope to be graded at 3:1 or less along the northern edge of the parking area and to which the adjacent property owner to the north of Lot 10 has agreed to, based upon correspondence received to the Town on August 4, 2009, the applicant has proposed to reduce the grade of the property in this area and the same thing, the building improved to be level with or below the neighboring properties..."

Member Benton asked if Subsection 4a with regard to the thirty-one (31) and thirty-three (33) feet elevations was correct. Director Garman stated it was. Chair Wander clarified that if it was thirty-three (33) feet, it would be above the adjacent property on the north side. She thought the number should come out of the exception. It was *consensus* of the Board to remove the number thirty-three (33) from the order. Chair Wander suggested that the numbers come out of Subsection 4a and be replaced with: "...to be level with or below the adjacent properties..."

Director Garman suggested the language read: "...to be level with or below the adjacent properties of approximately thirty-two (32) feet..." He further suggested the following language for Subsection 4 a: "...that is hereby attached to this order, as amended to substitute a side slope graded at 3:1 or less in lieu of the proposed retaining wall along the north side of the driveway..."

Member Starr thought it would make sense to add the guttering language to the exception. Director Garman suggested the following language: "...rooftop rainwater collection system will be placed along the north and south sides of the house to direct stormwater flow to suitable retention areas on the site..."

Member Starr moved to grant Special Exception 2008-004, subject to the change in the added language that was verbally discussed by Director Garman and the Board of Adjustment. Member Benton seconded the motion.

Motion carried 4-0.

OTHER BUSINESS

None.

STAFF COMMENTS

None.

BOARD COMMENTS

Vice Chair Taylor noted that this would be the last exception request that the Board would be hearing. He stated that the Town Council had passed a new ordinance that would allow exception requests to be handled by the Council. He stated that the Board would have nothing else to do since it will be impossible to grant a variance.

Director Garman stated that this ordinance was generated to make some of the procedural requirements for applying for Conditional Use and Special Exception permits more consistent. He added that the notification and procedural requirements for administering these permits was currently very inconsistent. Some go to the Board of Adjustment, some go to the Planning Board, and some go only to the Town Council. Additionally, the notification requirements are different depending on the type of permit, even though legally they are all quasi-judicial and essentially the same. He indicated that many of the special exception permits in the ordinance do not specify the findings that must be made in order to grant the permit. For instance, with regard to the Rassoulpour permit, there was concern by one member of the Board of Adjustment that the findings were not clear in this particular section of the ordinance. He stated that the staff report outlined some things they thought were important to incorporate into the approval and thought that the Board struggled with it since the ordinance did not specifically state it. He stated that the newly adopted ordinance included additional findings of fact for many of the special exception permits to make it easier for the Board to place conditions on the permit.

Director Garman indicated that the Planning Board, in its evaluation of these proposed changes, felt that in order to be consistent, all special exception and conditional use permits should go before the Planning Board and Town Council and variances and appeals should go the Board of Adjustment.

Vice Chair Taylor stated he did not have a problem with the change, but thought it would have been considerate for the Planning Board to consult with the Board of Adjustment for their input. Director Garman stated that, typically, conditional use permits would go to the Council. Vice Chair Taylor didn't think it was unreasonable. Member Starr pointed out that conditional use permits were different than special exception permits.

Vice Chair Taylor stated that the Board of Adjustment meetings were always scheduled for Friday afternoons to make it easier for the non-resident homeowners to attend. He thought that making the non-resident homeowner attend a mid-week, midday Town Council meeting would be inconvenient. He added that no one asked the Board about that and wasn't sure if it was even something that was considered.

Member Benton stated that he wasn't aware of any of the changes and asked if this meant the Board would not be meeting as often. Director Garman stated that the Town does not receive

many variance or appeal cases. Vice Chair Taylor noted that it was almost impossible to grant a variance as no one would request one unless they had a team of attorneys.

Member Benton stated that his opinion of the Board of Adjustment with regard to its ability to grant an exception was zero (0). He pointed out that a case came before the Board for a handicap ramp and it was not granted because it would exceed the lot coverage. He stated that, in his opinion, if the Board could not grant the exception for that case, no exceptions could be granted. He thought today's attitude and discussions showed that the Board had made progress, but now he thought he was wrong.

Member Starr thought things could have been handled differently in terms of deciding to take away functions that were established and were not working poorly for the sake of having Council and the Planning Board sneak it under their broader wing. He agreed with Vice Chair Taylor's comments and thought if the Board knew about the changes, members of the Board may have spoken up about it.

ADJOURNMENT

Member Benton moved to adjourn the meeting.

Motion carried 4-0.

The time was 2:53 p.m.

Approved: _____
/s/ Secretary