



APPROVED

**TOWN OF DUCK
BOARD OF ADJUSTMENT MEETING
MONDAY, APRIL 4, 2022
MINUTES**

The Board of Adjustment for the Town of Duck convened at the Paul F. Keller Meeting Hall at 3:00 p.m. on Monday, April 4, 2022.

BOARD OF ADJUSTMENT MEMBERS PRESENT: Chair Olin Finch, Tom O'Brien, Carol Powell, Ed Sadler, Robert Wetzel, Alternate David Flowers, and Alternate John Pucciano. **Staff present:** Planning Consultant Donna Creef, Attorney Robert Hobbs, Board of Adjustment Clerk Sandy Cross, and Deputy Town Clerk Kay Nickens.

MEMBERS ABSENT: None.

OTHERS PRESENT: John Repogle, property owner at 1170 Duck Road, Jordan Daneker of Evolve Design + Build, Clint Ogburn of Ward and Smith PA, Bob Webb, property owner at 1166 Duck Road, Clark Twiddy, the President of Twiddy and Company.

CALL TO ORDER

Chair Finch called the meeting to order at 3:00 p.m.

OVERVIEW OF VARIANCE DECISION- MAKING PROCESS

Attorney Robert Hobbs was recognized to speak. Attorney noted that the public hearing is a quasi-judicial one which is sort of like a court, but with lesser rules of evidence. He reminded the Board that they will be acting on the competent sworn testimony that has to be shown to meet the standards of a variance to enact it. Attorney Hobbs called for a motion from any Board member who needs to recuse themselves from the hearing. No members recused themselves. Attorney Hobbs called for any Board member to disclose any communication they had in regard to this matter. No Board members had any communication.

Town Clerk Lori Ackerman proceeded to swear in the applicants and staff for the public hearing.

Attorney Hobbs called for staff to proceed with evidence.

Planning Consultant Creef stated that there are three sections of the zoning ordinance that are applicable to this application:

- *Section 156.030 (D) (5) RS-1* setback requires a rear yard setback of 25 feet.
- *Section 156.073 (F) Non-Conforming Structures* states that if an existing accessory use, such as a swimming pool, does not conform to the minimum setbacks requirements, the pool may remain in its location or be repaired in its original location. This section also references a threshold of 50% of the replacement value of the structure.
- *Section 156.167 Variances* establishes the criteria for a variance to be granted.

She stated that the property is identified on the tax records as lot 125, Four Seasons Subdivision. A 2019 survey by Seaboard Surveying indicates the lot area by coordinate to be 12,615 square feet. She noted that the pool was constructed at the same time as the house. There is a 50-wide vegetated buffer along the front of all the sound front lots of the Four Seasons Subdivision. This required vegetated buffer results in a dwelling location of 55 feet from the front property line, well in excess of the RS-1 front yard setback of 25 feet.

The applicant is seeking a variance from Section 156.030 (D) (c) (5) the rear yard setback of the RS-1 zoning district of 25 feet. Due to erosion over the years, the lot area and the normal water line has changed significantly. The improvements on the lot are in the same location as originally constructed in 2008. The applicant was issued a building permit in September 2021 (B21-000232) for the replacement of the pool surround, reconstruction of open decking, stormwater improvements, retaining walls and vegetation areas consistent with the Order granting Special Exception Permit SE 2020-005. In January 2022, they received a permit for pool repairs. The intent was to add pilings below the existing pool and to replace the pool barrier. The permits were in response to the severe erosion and settling that has occurred on the property. The permitted work was considered repair and maintenance and authorized as allowed for a non-conforming use under Section 156.073 (F) of the Duck Zoning Ordinance. Subsequent to the issuance of that permit, the pool was removed in its entirety, and it was indicated in this application that the pool was unsafe.

Planning Consultant Creef noted that there are four conditions for granting a variance. Section 156.167 of the Duck town code establishes procedures and criteria for granting variances when unnecessary hardships will result the strict application of the code if the Board of Adjustment determine the variance is consistent with criteria set forth in the code as follows:

- 1. Section 156.167 (A) (1) – Unnecessary hardships 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 existing location of the pool is 5.86 feet from the rear property line/bulkhead of the lot and encroaches into the rear yard setback. Erosion of the property since 2001, when the Four Seasons Subdivision plat was originally recorded, has resulted in loss of land area. The bulkhead on the property now serves as the rear property line for the calculation of rear yard setbacks.*
 - Nonconforming regulations in the zoning ordinance require the reconstruction of any nonconforming structure to be done so in conformance with the applicable setbacks.*
 - The applicant is seeking a variance to reconstruct the pool and hot tub in the 2008 original location. Erosion of the property has made compliance with the 25' rear yard setback infeasible since the land area is no longer there. Reconstruction is typically considered to be 100% replacement work instead of repair and maintenance work, which is typically 50% or less of the replacement cost of the improvements.*
 - It is the staff's opinion that it is an unnecessary hardship for the property owner to comply with the rear yard setback of the RS-1 district as it would result in the loss of the swimming pool.*

2. **Section 156.167 (A) (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 existing dwelling and improvements on the lot were built in compliance with the RS-1 setbacks at the time of construction in 2008.*
 - *Erosion of the property has resulted in the loss of a substantial amount of land area relative to the normal water line that is used to calculate rear yard setback. This renders the lot non-conforming in terms of compliance with the rear yard setback and the lot size requirement of 15,000 square feet of the RS-1 district. Aerial photographs of the property from 2012 and from 2020 are included as Exhibit F.*
 - *The Four Seasons Subdivision establishes a 50' wide vegetative buffer along the front of this lot. The buffer area results in the structural improvements on the lot being located a distance of 55 feet from the front property line. This distance exceeds the RS-1 minimum front yard setback of 25 feet. At the time of construction in 2008, the improvements were sited on the property to accommodate the vegetated buffer and located as far back on the property as possible in compliance with the rear yard setback of 25 feet. This vegetative buffer is a unique characteristic of the property.*
 - *It is staff's opinion that the significant erosion and the vegetative buffer are peculiar circumstances contributing to a hardship for the property owner and prevent compliance with the rear yard setback of 25 feet.*
3. **Section 156.167 (A) (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing the property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.**
- *The property owners purchased the property in 2012. The erosion of the property has increased since their purchase of the property. Several storm events have occurred resulting in the loss of significant land area and linear distance to the normal water line. The repair work authorized in Exhibit E was in response to the erosion and intended to address the continued safety of the sound front improvements.*
 - *Repairs to stabilize the pool structure were permitted on January 24, 2022. However, the entire pool and hot tub were removed instead of simply being repaired. Replacement of the improvements in their former location is requested by the applicant. This decision to remove the pool and hot tub was made without consultation of the Duck Department of Community Development staff.*
 - *The application indicates the pool was to be repaired due to leaking, decay and erosion of the land area.*

- *It is staff's opinion that the current property owners have been acting in good faith to make repairs to their property and could not have anticipated the extent of the severe erosion that has occurred at the property since their purchase of the home.*
4. *The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.*
- *Section 156.073 (F) of the Non-conforming section of the Duck Zoning Ordinance addresses the repair of accessory structures. Repairs to the pool were authorized in January 2022 in conjunction with repairs to the surrounding decking. The threshold for repairs is 50% of the replacement value of the structure. This is a universal threshold in land use planning. This section of the ordinance anticipates potential issues with existing accessory structures and compliance with setbacks.*
 - *The applicant is not seeking to expand the size of the pool and has noted in the application that the pool was leaking and decaying due to its age and was structurally unsound due to changes in the topography.*
 - *A CAMA permit for the work has been secured.*
 - *The replacement of the pool and hot tub at a reduced setback does not negatively impact public safety. In fact, the application indicates the old pool that was demolished was in severe disrepair and unsafe.*
 - *The replacement of the pool and hot tub in their former location does not negatively impact the adjoining properties.*
 - *It is the staff's opinion that the replacement of the pool and hot tub is in the spirit and intent of the ordinance. The language in Section 156.073 establishes an intent to allow for the repair of damaged accessory structures in circumstances where setbacks cannot be achieved. Although the replacement of the pool improvements may be viewed as exceeding the scope of repair work, when viewed in conjunction with the overall scope of the work approved by permits B21-000232 and B22-000029, the pool replacement seems reasonable and justified.*

Planning Consultant Creef stated that it is the staff's opinion that the request for a decreased rear yard setback and replacement of a swimming pool and hot tub in their previous location as depicted on Exhibit E has satisfied the criteria for a variance. A variance from the rear yard setback of the RS-1 zoning district is recommended and a finding that the replacement of the swimming pool and hot tub in their former location is consistent with Section 156.073 (F) of the Duck Zoning Ordinance.

Chair Finch called for any questions for Planning Consultant Creef. There were none. Attorney Hobbs called for questions for Planning Consultant Creef as well. There were none.

Member Sadler questioned when the barrier wall was built. Planning Consultant Creef noted that she assumed that it was established at the time of construction in 2008. Chair Finch clarified that the applicant would be able to clarify that during their presentation.

Client Attorney Clint Ogburn of Ward and Smith PA stated that he was present on behalf of Evolve Design and Build LLC as well as the property owners John and Kristin Replogle. He noted that Mr.

Replogle would speak to the property and provide information; Mr. Danaker would provide a timeline of events; and Clark Twiddy, the President of Twiddy and Company, would provide testimony to the negative impacts to the rental value and rates if the variance is not granted.

Attorney Ogburn stated that the client is seeking a 19.14-foot variance in the rear setback requirement which would allow for the pool replacement. Attorney Hobbs questioned if the binder was being used as testimony. Attorney Ogburn stated that it would be submitted as evidence at the end of testimony.

Attorney Ogburn pointed out aerial imagery from 2012, 2016, and 2021 that illustrates the progression of erosion and the loss of the setback.

John Replogle stated that he is the owner of 1170 Duck Road and has been a property owner for 36 years. He noted that the primary use of the home is for rental purposes and clarified that the original bulkhead was installed by Four Seasons Development prior to the development of any lot. Mr. Replogle explained that over the last 27 months they have worked with the Town to remedy significant issues such as rainwater and soil erosion. He explained that in January 2020 they hired House Engineering to do soil testing, examine the bulkhead, create different backyard designs to repair the backyard and remediate the extensive rainwater issues. Mr. Replogle noted that they wanted to address the long-term issues not only for the property and the safety of rental guests, but to also remediate extensive runoff. He stated that this was their third time presenting to the Town to make a case for why a variance is the right thing for the property and he reminded the Board that they have taken Board input, changed designs and plans, resubmitted the application and ultimately had it approved in February 2021.

Member Whetzel questioned which Board Mr. Replogle was referring to when he was making his statements. Senior Planner Cross clarified that presentations were made to both Planning Board and Town Council and that Town Council granted the special exception.

Mr. Replogle continued by stating that they were not approved by CAMA but did work with CAMA for six months to reach a settlement. He stated that the project started in October 2021 but the builder backed out of the project so they engaged Mr. Danaker to start work in January 2022. Mr. Replogle stated that when the demolition and pool renovation work began, the pool began to fall apart.

Attorney Hobbs called for any questions from the Board. There were none.

Jordan Danaker stated that Waterworks was the original pool contractor and that Evolve was hired to do the hardscaping on the property whereas Waterworks was hired to refurbish the pool. He noted that Evolve is a hardscape contractor that can perform pool installations, so when Waterworks backed out of the project, Evolve took over the rehabilitation of the pool. Mr. Danaker stated that they were going to remove the pool floor and add pilings to support the structure so it would not erode downhill, but when he started the demolition of the pool, the pool crumbled apart. There are codes that NC uses to regulate swimming pools but it does not regulate requirements for pool rebar. Upon starting the pool repair, it was discovered that the incorrect rebar was used and there was not enough rebar to hold the structure together thus creating a safety hazard and a risk for electrocution. They made the decision to remove the pool and ask for a variance to reinstall the pool safely and correctly as safety was the main priority. The homeowners have been working on the project to accommodate requests

from the Town to make sure it is done properly and compliant with regulations. There were no follow up questions from the Board members.

Attorney Ogburn reminded the Board that the binder would be submitted at the end of testimony and provided an overview of the contents.

Clark Twiddy stated that he would explain what is known about value in the market and what is thought about value in the market. He pointed out an attachment which detailed the market reaction to a loss of a benefit or of a feature in a home. Mr. Twiddy explained that part of his job is to help homeowners optimize revenue and the loss of a pool is enormously important in value and future outcome. He explained that the loss of a pool is about 10% of the value of the home which is calculated in two ways: as annually recurring revenue that a home generates on annual basis as well as resale price what a home will sell for in future. Mr. Twiddy stated that the price of a home is very close to 10-times the annually recurring revenue and in this real estate market, that number is bigger. He noted that the loss of a pool decreases market demand and desire for what people would pay for home not only on an annual basis by at least 10%, but also ten- times that of a potential sale. Mr. Twiddy pointed out NC Generate Statute 42A, the Vacation Rental Act, which states that in the event a home's material condition is altered, any professional manager has the responsibility to contact anyone who has made travel arrangements to the home and notify them of the change. This law also stipulates that a pool is considered a material fact which means any guest can request a full refund, causing the homeowners to lose that reservation and though they can put the house back on the rental market, they might not be able to get it booked. Attorney Hobbs requested for Mr. Twiddy to state his credentials. Mr. Twiddy stated that he is President of Twiddy and Company, Chairman of the NC Vacation Rental Management Association, and Chairman of the Outer Banks Community Foundation. Attorney Hobbs called for any questions. There were none.

Attorney Ogburn noted that the applicant meets all the standards required for granting a variance. He explained the standards required and how the variance request meets each of the four required standards and reminded the Board that the property owners have attempted to repair the pool before replacing the structure; requesting a variance was a last resort. The pool is being proposed in the same footprint and same location and there will be no negative impact to the surrounding community. Attorney Ogburn moved to submit into evidence attachments 1 through 8 that were included in the binder provided to the Board.

Member Powell commented that the presentation was very clear and commended the applicant on their patience. She asked if a smaller pool had been considered by the applicant. Attorney Ogburn stated that the issue with the pool was not the size but with the rebar used. He explained that the proposed new pool will be safe and meet code requirements. He pointed out that the client should not be required to build a smaller pool. Member Powell asked if a smaller pool would change the setback requirement. Attorney Ogburn stated that potentially, but it would be a minor difference, and they would still be asking for a variance regardless of the pool size.

Chairman Finch asked about the current pool dimensions. Mr. Danaker stated that the pool is 14 feet by 22 feet and reminded the Board that the important thing to recognize is that the stormwater plan was drafted on current conditions, so changing the pool size would then change the scope of the stormwater plan. He recommended staying with the same concept that is being proposed as the stormwater plan is consistent with Town standards.

Attorney Hobbs called for other witnesses.

Bob Webb of 9315 Navaho Dr in Brentwood, Tennessee stated that he owns 1166 Duck Road. He stated that he was in favor of the variance and explained that he removed their pool and purchased the lot in between 1166 and 1162 Duck Road to place the pool outside of the CAMA zone and out of the setback. Mr. Webb stated that the Board needs to realize that what is being approved by the Board is also going to apply to 1168 Duck Road and 1162 Duck Road and their pools as they potentially have the same circumstance. He stated that if the Board grants 1170 Duck Road a variance, then they need to proactively reach out to other property owners. He noted that this variance decision cannot be made independently of other decisions that may come before the Board. Mr. Webb stated that he had questions about the Staff Report.

Attorney Hobbs called for any questions for Mr. Webb. There were none.

Mr. Webb continued by stating that the Staff Report states that there are no similarly situated homes to 1170 Duck Road but the client's attorney made the point that there are other homes where the pool is too close to the sound with a higher elevation. He stated that they would not have purchased the lot to build a pool and explained that they applied for a permit but then were advised that they could not build the pool where they wanted. Mr. Webb also noted that the property was purchased in 2012 but in reviewing the property records, it was purchased in 2008 and moved into an LLC in 2012. Mr. Webb stated that while he is a member of the Four Seasons Board, he was not representing the Board at the meeting, and he was representing himself. He explained that the Four Seasons Board can grant permission to use the vegetation buffer and pointed out that the Four Seasons Board has done so with a house so he would assume that they would make the same decision with a pool.

Planning Consultant Creef stated that his questions were not evident but when she looked at the tax records, she did not catch that it was put into an LLC. Mr. Webb stated that the property went from being owned by the applicants and then into an LLC, so no taxes were paid, and if no taxes were paid then it is not a real estate transaction. Planning Consultant Creef pointed out that she is not involved in the permitting process but if Four Seasons grants the use of the vegetative buffer, that is a separate action than what is currently before the Board and has no bearing on where a pool can go. Mr. Webb stated that he is of the opinion that it does have a bearing and he reminded the Board that he is in favor of the variance being granted. Planning Consultant Creef stated that she agrees with Mr. Webb in that neighboring lots will have similar issues, but a variance should not be a precedence. She explained that there are peculiar circumstances that go back to the construction of the pool and the applicants obtained a CAMA permit. Mr. Webb stated that his process was a four-year process, and he thinks that variances set precedents, such as this decision. Attorney Hobbs asked if Mr. Webb had any more testimony. He had none. Attorney Hobbs called for questions from the staff. There were none.

Attorney Ogburn stated that he appreciated Mr. Webb's support and explained that in terms of this variance being a domino effect, the status of those other pools is unknown. If the pools do fail and have similar circumstances, they can and likely will submit variances. Attorney Ogburn stated that the Board should not consider other properties, and they should only consider the property in question and only consider the facts that pertain to this specific property.

Attorney Hobbs called for any other questions or testimony. There was none. Attorney Hobbs closed the public hearing and stated that there are two alternates who would not participate in the discussion. He stated that a 4/5 majority vote is required to approve the variance. He pointed out that staff has proposed a draft order as provided in the package and advised that the Board can make a motion to adopt the findings and conclusions as an action of the Board or they can deliberate each individual finding that is set forth in the draft order.

Chairman Finch asked the Board if they wanted to deliberate and discuss or accept the order as drafted. Attorney Hobbs reminded the Board that by adopting the findings and conclusions in the order, all four findings as listed must be met. Chairman Finch reminded the Board that the Board is reviewing a variance request not a text amendment and they cannot change Town Code. Attorney Hobbs stated that they Board has not been presented with substantial and competent evidence for any other property besides 1170 Duck Road and as the Board's attorney, he advised not to consider other properties outside of the property in question.

Member Sadler commented that the property has lost 43% of their land since the original survey. He stated that this variance is a reasonable request and supporting the pool with pilings won't do any damage to the rest of the property. He proposed that they accept the variance request.

Member Powell stated that this request meets all the criteria needed for a variance. She added that this variance is needed and should be approved.

Chairman Finch called for a motion. Member Sadler made a motion to adopt the findings and facts set forth in points one through four of the proposed order. Chairman Finch stated that a motion has been made to approve the draft order as written and adopt the findings of facts and conclusions. Member O'Brien seconds the motion. Chairman Finch called for a vote. All members voted in favor.

Motion carries 5-0.

APPROVAL OF MINUTES

Chair Finch opened the approval of minutes from the November 22, 2021 meeting

Member Powell moved to approve the minutes as presented. Member O'Brien seconded.

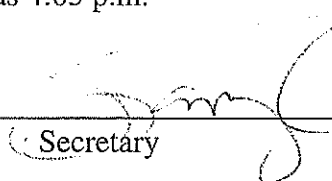
Motion carried 5-0.

ADJOURNMENT

Member Finch adjourned the meeting. Member Powell seconded the motion. All members voted in favor to adjourn.

The time was 4:05 p.m.

Approved: _____

 1055
Secretary