

NEW BERN BOARD OF ADJUSTMENT MINUTES

June 29, 2009

The New Bern Board of Adjustment held a regular meeting on Monday, June 29, 2009 at 6:30 p.m. in the Planning Department Conference Room, third floor, Dunn Building, 248 Craven Street.

Members present: Mr. Dean Knight, Chairman
Mr. Gerald Stallings
Mr. John Reichenbach
Mr. Harry Gormley
Mr. Edward Risty
Mr. Jerry Walker
Mr. Thomas Hardin
Mrs. Doris Foy (Excused from Variance Hearing)
Mr. Willie Newkirk, Jr. (Excused from Variance Hearing)
Mr. Bill Franklin (Excused from Appeal Hearing)
Mr. David Herndon (Excused from Appeal Hearing)
Mr. John Paul Andrews (Excused from Appeal Hearing)

Members Excused: Mr. Richard Scoppe

Members Absent: None

Staff present: Mr. Bernard George, Land and Community Development Administrator
Mr. Greg McCoy, Zoning Enforcement Officer
Mrs. Lorraine DiBella, Administrative Assistant

Minutes: Reading of the minutes from the regular meeting of May 18, 2009 was waived by unanimous consent. Minutes were approved with motion by Mr. Risty, second by Mr. Reichenbach and unanimous vote of the Board.

A prayer for guidance was given by Mr. George. Sworn oaths were taken by four individuals including Patrick Jacobs, Greg McCoy and Mrs. J. C. Williams.

New Business:

- (A) **Consideration of a variance application for relief of 1'11" from the minimum 20' side yard setback at 155 Hillmont Road.** (Due to the number of board members in attendance exceeded ten, Mr. Newkirk and Mrs. Foy were excused from hearing this case.)

Staff, Mr. McCoy, described the application, saying Dynasty Homes of Kinston, on behalf of property

owners Lawrence and Ursula Harrell, is requesting a variance for relief of 1'11" from the required 20' side yard setback at 155 Hillmont Road. The property is located in the R- 20 Residential District and the required building setbacks are 35' front, 20' sides, and 20' rear. Mr. McCoy referred the Board to the property survey and explained in detail the location of the setback encroachment created by the inaccurate placement of the manufactured home. Staff further stated that the property was posted and adjacent property owners within 100' were notified as required. Based on the relatively small encroachment area of the building into the side setback and the location of the 28' wide driveway on the adjacent property, staff has no objection to the variance request. Staff has not received any calls in opposition to the variance request.

Applicant Comments: Patrick Jacobs of Dynasty Homes discussed the possible causes for the inaccurate placement of the home including surveyor error and site clearing or grading miscalculations. Mr. Jacobs said that uprooting and moving the home for such a small encroachment would compromise its structural integrity and would be exceptionally costly.

Public Comments: Mrs. J. C. Williams stated she lives across the road. She asked how this would affect her property. She said she does not object to the variance. Mr. McCoy responded that the variance, should it be granted, would not affect her property.

Board Discussion: In response to Board questions, the adjoining properties were discussed. The home is complete and the owner is being denied a certificate of occupancy due to the setback encroachment. The site was originally wooded before clearing began for the house. The cost of relocating the home would be a great burden to the homeowner and Dynasty Homes. The error is no fault of either. The encroachment poses no safety risk or violation of neighbors' space. Chairman Knight noted that the lot is large so there is no reason to suspect that the applicant was attempting to squeeze onto the property. The situation is just an honest mistake.

Motion by Mr. Gormley, second by Mr. Reichenbach and approved with a unanimous vote of the Board that if the applicant complies with the literal terms of the ordinance, he cannot secure a reasonable return from or make reasonable use of his property. This conclusion is based on the following **FINDINGS OF FACT**:

The home is on a permanent foundation and complete in its entirety, but the owner has been denied a certificate of occupancy due to a minor setback encroachment. Relocating the modular home would damage its integrity and be cost-prohibitive to the applicant and/or owner.

Motion by Mr. Walker, second by Mr. Reichenbach and approved with a unanimous vote of the Board that, if granted, the variance will be in harmony with the general purpose and intent of the ordinance and will preserve its spirit. This conclusion is based on all of the **FINDINGS OF FACT** listed above, as well as the following: The variance will allow the home to be only 1'11" into the side setback. Furthermore, the adjacent 28" wide driveway on the adjoining property will serve as an additional visual setback.

Motion by Mr. Reichenbach, second by Mr. Hardin and approved with a unanimous vote of the Board that, if granted, the variance will secure the public safety and welfare and will do substantial justice. This conclusion is based on all of the **FINDINGS OF FACT** listed above as well as the following: The encroachment location adjacent to a drainage easement and driveway does not jeopardize public safety or

welfare. There is more than adequate setback area to provide emergency equipment and vehicle access to the residence and adjoining areas.

Motion by Mr. Risty, second by Mr. Stallings and unanimous vote of the Board of Adjustment to grant the variance for relief of 1'11" from the minimum 20' side yard setback at 155 Hillmont Road.

(B) Approval of amended Board of Adjustment decision regarding 612 Craven Street appeal.

NOTE: The nine members who participated in the original March 29 appeal hearing also participated in tonight's decision, specifically, Foy, Gormley, Hardin, Knight, Newkirk, Reichenbach, Risty, Stallings and Walker. Scoppe, the tenth member, was absent and excused from tonight's meeting.

Staff, Mr. George, discussed the necessity for the Board to revisit this appeal. He said City Attorney Scott Davis desires the City to have a more complete record of the Board's March 29, 2009 decision in this matter. Upon Davis' examination of the transcript from the appeal hearing, additional findings of fact were noted and these need to become a part of the record. The Board is asked to vote on the additional findings of fact tonight.

Board Discussion: In the several cases below, Board members closely reviewed and discussed in detail the transcript of the meeting, minutes, appeal documents, and findings of fact prior to voting.

Motion: Mr. Gormley moved that the appeal of the decision of the Historic Preservation Commission to issue a Certificate of Appropriateness for the construction of a garage at 612 Craven Street on June 20, 2007, came for hearing before the Board of Adjustment on March 30, 2009. Mr. Reichenbach seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Gormley moved that by letters sent to the City's Planning Department dated February 7, 2008, appellants Bertha B. Harvey and Madeleine and Dixon Smith complained of the construction of a garage at 612 Craven Street. Mr. Risty seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Gormley moved that prior to the June 20, 2007 meeting of the Historic Preservation Commission to consider the request for a COA for the proposed construction of a garage at 612 Craven Street, written notice was sent to no less than fourteen (14) property owners located within one hundred feet of the property upon which the garage was to be constructed. The written notice sent to such property owners provided in part as follows: "The New Bern Historic Preservation Commission wishes to inform you that a formal request has been made to the Commission for a Certificate of Appropriateness for 612 Craven Street, for addition of a garage." Mr. Hardin seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Risty moved that the aforementioned written notice reasonably described the proposed project. Mr. Gormley seconded. Eight members voted yea, one nay (Reichenbach) and the motion carried.

Motion: Mr. Risty moved that on January 18, 2008, appellant Denise Willey contacted the City's

planning department to inquire about the construction of a garage at 612 Craven Street when she “saw workmen throwing up a second story which was above my next door neighbor’s one-story garage building.” Mr. Gormley seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Risty moved that conflicting evidence was presented as to whether petitioners Bertha B. Harvey and Madeleine and Dixon Smith were sent written notice of the meeting at which the Historic Preservation Commission was to consider the request for a COA for the proposed garage to be constructed at 612 Craven Street. Regardless of whether appellants Bertha B. Harvey and Madeleine and Dixon Smith received such written notice, appellants Bertha B. Harvey and Madeleine and Dixon Smith had constructive notice of the proposed garage no later than January 18, 2008, when appellant Denise Willey confirmed that “workmen were throwing up a second story on the garage at 612 Craven Street which was above her next door neighbor’s one-story garage building.” Mr. Gormley seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Risty moved that assuming that allegations that City Planning Department employee Leigh Ann Friesen made statements to appellants Denise Willey and Jean R. Arnold as outlined in their respective affidavits filed in this matter are true, and that statements made to appellant Bertha B. Harvey as outlined in her affidavit filed in this matter are true, such statements do not rise to the level to prevent the city from raising timeliness as a defense to the appellants’ appeal of the decision of the Historic Preservation Commission to issue a Certificate of Appropriateness for the construction of a garage at 612 Craven Street on June 20, 2007. Mr. Hardin seconded. Seven members voted yea and two nay (Reichenbach and Stallings). The motion carried.

Motion: Mr. Risty moved that the Application for a Certificate of Appropriateness submitted by the applicant for the proposed construction of a garage at 612 Craven Street contained scaled drawings of the proposed garage, as well as a site plan. Large, color poster-size scaled exhibits of the proposed garage, as well as a site plan were also provided to the Commission for its consideration. Mr. Walker seconded and the Board voted unanimously in favor of the motion.

Motion: Mr. Risty moved that the Historic Preservation Commission applied the Historic District Guidelines to the application for a Certificate of Appropriateness for the construction of the garage at 612 Craven Street as evidenced by the Certificate of Appropriateness findings made by the Commission during its June 20, 2007 meeting. Additionally, the Commission placed no conditions on the COA. Mrs. Foy seconded. Seven members voted yea and two nay (Gormley and Newkirk). The motion carried.

Motion: Mr. Gormley moved that the amended decision of the Board of Adjustment conclude that the decision of the Historic Preservation Commission is affirmed and the appeal in this matter is denied. Mr. Stallings seconded and the Board voted unanimously in favor of the motion.

There was no further business and the meeting adjourned.

Chairman Dean Knight

Bernard George, Secretary