

## BOARD OF ADJUSTMENT

### MINUTES

**Tuesday May 26, 2009**

The Blowing Rock Board of Adjustment met on Tuesday, May 26, 2009 at 7:00 p.m. Members present were Chairman Ron Oberle, Vice-Chairman Mark Klein, Jerry Starnes, Annie Whatley and Dr. Charles Davant. Staff present was Planning Director Kevin Rothrock, Building Inspector Jesse Horner and Administrative Assistant Sherrie Pitts.

Chairman Ron Oberle called the meeting to order at 7:00 p.m.

#### **APPROVE MINUTES:**

*Mr. Klein made a motion to approve the minutes from September 28, 2006. Mr. Starnes seconded the motion. All were in favor of the motion.*

New board members Dr. Charles Davant, Mr. Tim Ford, Mr. David Harwood were sworn in to office.

*Dr. Davant motioned to retain current officers. Ms. Whatley seconded the motion. All members voted in favor of nominations.*

Kevin Rothrock, Jesse Horner, Ms. Barbara Bertolami were sworn in for testimony to the Board.

Mr. Rothrock gave the staff report to the board in reference to Variance #2009-01:

Ms. Barbara Bertolami is requesting a setback variance to allow the enclosure of a bathroom addition within the footprint of an existing porch. The applicants are requesting a variance to encroach 14.5 feet into the 40-foot street setback on Greenhill Woods. The property is located at 260 Greenhill Woods and is zoned R-15, Single-family.

On August 17, 2005 Scott and Sandy Benfield received a building permit (No. 05145) for interior renovations. On August 23, 2005 Ed Spivey received a building permit (No. 05151) and zoning permit (Z-05-61) to construct a single-car garage for Ms. Bertolami. The street setback was reduced to 33.4 feet based on the topography as allowed by Section 16-184 (H). The garage was constructed according to the reduced setback inspected and approved. After November 1, 2007 the Benfield's took over the garage project, according to Ed Spivey.

In January 2009 Ben Frantzen became the general contractor for both building permits. The interior permit for the house (05145) was finalized and closed on February 12, 2009.

Also on February 12, 2009, Building Inspector Jesse Horner inspected the garage project and realized the east side of the existing front porch had been enclosed. His inspection report noted that the addition on the front porch had never been permitted. Mr. Horner confirmed with Mr. Rothrock that zoning permits had not been applied for or approved. The enclosed porch did not meet the 33.4 reduced street setback approved for the garage addition. Although the enclosure was constructed on an existing porch, Section 16-124 (E) of the Land Use Code does not allow the creation of new nonconformities or modify the nature of an existing structure. Therefore, the applicant is requesting a variance of 14.5 feet to allow the enclosed space for a bathroom addition.

Mr. Rothrock stated that each finding of fact must be voted on separately. To approve a variance, the board must affirm by a 4/5<sup>th</sup> majority each finding of fact. If all findings are affirmed in favor of the applicant, the board shall make a final motion to approve the variance. If two or more members deny any findings of fact, the variance must be denied.

Dr. Davant asked if this was a request for approval of another bathroom. Mr. Rothrock answered that it was not at this time. He commented that it is only framed inside the only way in to it is climbing in through a window inside the house.

Ms. Whatley questioned if the current house did meet setback requirements at the time of construction.

Mr. Rothrock commented that he could not advise when the house was built or the setbacks at the time of construction.

Mr. Starnes remarked it was not understandable with 3 contractors and the homeowner that could have come in to apply for correct permits and request a variance if needed.

Chairman Oberle said there were so many question not answered with 3 contractors and a homeowner living in space, but not getting correct permits. What are the penalties for building without permits?

Jesse Horner, Building Inspector, advised someone would first have to obtain a permit, fines could be imposed, but to obtain a building permit they would first have to apply for a zoning permit. If zoning was applied for they would have to come before this board to request a variance.

Mr. Horner stated that at some time within the dates provided in the board packet the enclosure was done. He commented that he could not testify as to which contractor did the work.

Dr. Davant asked if all three contractors were licensed in Blowing Rock. Mr. Horner stated that they were at the time they were working. Dr. Davant wanted to know if the State of North Carolina or the Town of Blowing Rock enforced the NC building code. Mr. Horner advised that the Town would enforce the code.

Chairman Oberle questioned if the applicant was able to provide information as to when and who had built the enclosure. Mr. Horner commented he believed they could. Chairman Oberle said that can be addressed when the applicant gives testimony.

Chairman Oberle asked the inspector if October 12 was the first time he was aware of the construction. Mr. Horner stated that was correct, when the garage permit was issued a construction plan for the job went with the permit. When the inspection was done Mr. Horner noticed the enclosure and asked about it, it was not on the plans.

Mr. Klein said he had looked at the site and looked in the window of the enclosure it did not appear anything was inside basically it was just framed. Is that how it looked when you inspected or was it actively being constructed? Mr. Horner stated that was how it looked, as Mr. Rothrock stated to get into the enclosure you have to go into the existing bathroom and climb through a window.

Chairman Oberle asked what the typical timeframe was to build a garage. Mr. Horner commented that on average six months to a year, but it is not untypical that it could be longer.

Chairman Oberle inquired if other inspections had been done. Mr. Horner responded yes and advised that the permits had been issued prior to his employment. The first inspection he recalled doing was for temporary power on the garage and kitchen renovation. The contractors at the time were the Benfield's. They were the only contractors he dealt with until Mr. Frantzen started working.

With no other questions of staff the floor was opened to the applicant.

Mr. Tony di Santi, attorney for Ms. Barbara Bertolami, passed out photo exhibits and a letter signed by neighbors to the board members. Mr. di Santi commented that they do not disagree with the facts that Mr. Rothrock has stated. He advised that the construction had taken place during the permitted garage and interior construction. The Benfield's did the enclosure construction. The Benfield's had suggested extending the bathroom Ms. Bertolami liked the idea. That is how the enclosure came about to match the dining room side of the house. The enclosure has been in place approximately two years. Mr. di Santi quoted ordinance 16-124(A) and said his interpretation differs from the staffs. He does not believe there is an increase in nonconforming space. Ms. Bertolami enclosed the porch space to increase the bathroom and balance the look of the house. The total nonconforming square footage has not changed, granted it was porch space and the heated space would be increased, but not total space.

If the variance would be granted Ms. Bertolami would apply for the correct permits to comply and complete the project.

Ms. Whatley asked in Mr. di Santi's opinion of 16-124(A) did Ms. Bertolami need a variance. Mr. di Santi stated he did not believe she needed one.

Mr. di Santi explained the exhibits he had presented to the board.

Mr. di Santi briefly went through the Findings of Fact requirements for granting variances. This will not create any violation of Article 8, we are not initiating a nonconforming use as seen in exhibits 5 and 6 as well as the town's diagram. It is the same footprint before as well as after construction.

In closing we request the Board grant the variance and Ms. Bertolami would proceed to get the proper building permits through the Town.

Dr. Davant asked if Mr. di Santi was suggesting that something built without permits was not nonconforming at face value. Mr. di Santi answered that construction without permits would not necessarily be a nonconforming use; however it would be a violation of the NC building code.

Mr. Klein addressed the exhibits and commented he appreciated the before and after photos and the addition was attractive. Mr. Klein wanted to know if harsh fines or the variance was not approved would Ms. Bertolami have any recourse against the builders.

Mr. di Santi responded that he did not believe the Board could impose fines, but if the variance was not granted she may have recourse against the builders. He thought there may be a statute of limitation on this issue.

There was discussion about when the house was built and when Ms. Bertolami bought the property.

Ms. Whatley asked if Ms. Bertolami had any reason to believe that permits had not been issued. Ms. Bertolami responded that she did not know a permit had not been obtained.

Mr. Starnes discussed the permit survey in the packet and commented that the garage did conform to the reduced setback required even though the original foundation did not meet setback requirements.

Mr. Klein requested that Mr. Rothrock speak with Town Council about interpretation. Mr. Rothrock stated that Town Council had discussed at length nonconformity and the changes that were made to the code. Mr. Rothrock talked about the change in the ordinance in 2004 that addressed nonconforming structures. He believes it adds to nonconformity to extend a structure to heated space.

Ms. Whatley commented on 16-124(E) she was not clear on it, as she reads and interprets the code she does not believe it applies. Mr. Rothrock stated that if the entire section is applied he believes it changes to a greater nonconformity.

With no other questions or comments of the applicant of staff.

*Mr. Klein motioned to close the public hearing. Mr. Starnes seconded the motion. All members were in favor.*

Chairman Oberle talked about the variance options.

Ms. Whatley stated that she did not believe a variance was required in the situation.

Mr. Klein advised he did not believe a variance should be granted.

The Board voted on the Findings of Fact found in Section 16-92 of the Land Use Ordinance.

1. If the applicant complies strictly with the provisions of the ordinance, he can make no reasonable use of his property. **Members Ms. Whatley voted "True". Chairman Oberle, Mr. Klein, Dr. Davant and Mr. Starnes voted "False".**

Chairman Oberle advised the variance was denied.

There was discussion and disagreement on the variance and the Board decided they would like an interpretation from the Town Attorney.

Mr. Klein and Dr. Davant asked why the Town Attorney was not present. Mr. Rothrock advised that he had not been requested to be at the meeting.

Mr. Starnes asked the decision be tabled until an interpretation from the Town Attorney or Town Council could be given.

Ms. Whatley questioned if the variance was denied, with Mr. di Santi as Ms. Bertolami's attorney would their next step be to go to the courts for an interpretation?

Mr. Rothrock advised the request was for a variance, an appeal of the decision on the variance could be requested, only the record from tonight would be admitted in Superior Court. If an interpretation is requested then an application for that should be made.

Mr. di Santi stated that can be done in the procedure. He suggested to the board to table the proceeding until the next meeting at which time the Towns Attorney could be present for his opinion, but it would simply be his opinion and the Board would still need to make a decision on the matter.

*Mr. Klein made a motion to table the proceeding and have Town Council and the Town Attorney to review and return an interpretation of Section 16-124(E) and 16-124(A) for the next Board of Adjustment meeting.*

Chairman Oberle requested to continue the meeting to next month and have the Town Attorney present for the next meeting.

Mr. Rothrock stated that next month's meeting would not be a public hearing and would not need public notice since it is a continuation of tonight's meeting.

Mr. di Santi advised he had a conflict with the next meeting date. The Board tentatively changed the date from Thursday June 25 to Tuesday June 23 2009.

*Dr. Davant seconded the motion. All members were in favor of the motion.*

**Adjourn**

With no further business, the Board adjourned at 8:46 p.m.

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Ron Oberle, Chairman

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Sherrie Pitts, Administrative Assistant