

BOARD OF ADJUSTMENT

MINUTES

Tuesday June 23, 2009

The Blowing Rock Board of Adjustment met on Tuesday, June 23, 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, Town Attorney Allen Moseley and Administrative Assistant Sherrie Pitts.

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

APPROVE MINUTES:

Dr. Davant made a motion to approve the minutes. Ms. Whatley seconded the motion. All were in favor of the motion.

Mr. Lee Dunston was sworn in for testimony to the Board. Mr. Kevin Rothrock, Mr. Jesse Horner and Ms. Barbara Bertolami were advised they were still under oath.

Mr. Rothrock stated to the board the meeting was a continuation of variance #2009-01 that was tabled at the last meeting.

Chairman Oberle advised there were two items for discussion first item in variance #2009-01 the second item is appeal #2009-02.

Mr. Rothrock requested that the public hearing be re-opened since Mr. di Santi had further evidence for presentation.

Mr. di Santi commented that he had further evidence that would be applicable to either item.

Mr. Moseley suggested re-open the public hearing that there may be further evidence and testimony and commented that Mr. Rothrock may also have further testimony.

Dr. Davant commented that after reviewing the ordinance he agreed with Ms. Whatley and did not believe a variance was required. He understood what Town Council was trying to do when they wrote the ordinance he did not believe what was written would be applicable in this case.

Dr. Davant stated after reviewing Ordinance 16-124 he did not believe a variance was required. *Dr Davant made a motion to dismiss the variance request. Ms. Whatley seconded the motion.*

Mr. Moseley advised before voting on the case that the Board should hear the presentation.

Mr. Rothrock gave the staff report to the Board in reference to Appeal #2009-02.

Staff Report as follows:

Ms. Barbara Bertolami has filed an application to appeal a decision by the Planning Director that requires the removal of a porch enclosure that violates the applicable 40-foot street setback. The property is located at 260 Greenhill Woods and is zoned R-15, Single-family. The application for appeal was submitted on Wednesday, June 5, 2009, which was within the 30-day appeal period. All property owners entitled to notice of the hearing have received proper notification, and the property has been posted.

The Board was reminded that Ms. Bertolami requested a setback variance to allow the enclosed porch to remain. This case was heard by the Board of Adjustment on May 26, 2009. At the time this report was drafted a final decision had not been reached regarding that variance request.

Following the May BOA hearing, the Town Attorney recommended that the Planning Staff provide a decision regarding the enclosed porch. A Notice of Violation was issued on June 2, 2009. This Notice required the removal of the enclosure on the east side of the front porch. The existing porch was a nonconforming situation as it encroached into the 40-foot street setback. It is the Planning Staff's opinion that enclosure of the nonconforming porch is a violation of Section 16-124 (E) which prohibits creation of new nonconformities. Changing from a porch to an enclosed structure increases the nonconformity.

Ms. Bertolami filed an appeal to the Notice of Violation on June 5, 2009

The nonconforming language of the ordinance was revised in 2004 to prohibit new nonconformities. The intent of the ordinance amendment was to prohibit construction of a second story where the existing first story of a structure was in violation of the setback. The intent was also to prohibit changes to the type of structure if the structure was nonconforming.

Prior to 2004, a structure used for single-family purposes could be enlarged even if it violated setbacks. In the summer of 2004 the Planning Board proposed an ordinance amendment that would allow only a 20% increase in the dimensional nonconformity. After review Town Council ultimately adopted an ordinance that allowed no new nonconformity and no expansions of existing nonconformities. This rule has been enforced consistently since the adoption of the ordinance amendment on September 14, 2004. No new nonconformities have been approved since the adoption of the ordinance amendment.

Chairman Oberle asked why Section 16-124(E) was referenced. Mr. Rothrock stated that was the code language that is being addressed.

Dr. Davant commented that he agreed with the intent of the ordinance but does not believe that is the way it reads.

Chairman Oberle asked if adding walls changes the structure. Mr. Rothrock stated that it did.

Chairman Oberle said that as written one thing may have been the intent, but the way it is written it is read and interpreted differently.

Mr. Starnes spoke about Section 16-124 in (A) and (E) in both “increase the extent” is used. He questioned if taking a porch and enclosing it to heated space increases the extent in this case?

Dr. Davant and Ms. Whatley agreed that in defining “extent of nonconformity” the best definition is in (A) which states, an “increase in the total amount of space” or “greater nonconformity” with respect to dimensional space restrictions.

There was some Board discussion in regard to the text and definitions of this section.

With no other questions or comments the floor was opened to the applicant.

Mr. Tony di Santi informed the Board that he had additional evidence for the record. He discussed the prior allowable line of nonconformity and commented that no new nonconforming situations have been approved by staff. He then presented exhibit #7, inspection reports for the Bertolami permit # 05145, and exhibit #8, Bertolami permit # 05151. Twenty-five inspections were done by Mr. Horner while prior inspections were done by a previous inspector.

Mr. di Santi read excerpts from the BOA meetings; exhibit #9 March 2001 deck encroachment, exhibit #10 August 2001 garage encroachment, exhibit #11 September 2001 house addition encroachment, exhibit #12 January 2002 the BOA granted a CO on the project regardless that the garage was 11/2 feet from the boundary line, exhibit #13 September 2006 requested to enclose a deck to extend a bathroom. All of these were variances approved by the Board of Adjustment. According to Mr. di Santi, these items are being presented as they set historical precedence by the Board.

Mr. di Santi advised that next document is a memorandum prepared with information regarding Section 16-124. He believes this section is not relevant that the structure has not been replaced but altered. According to surveys, the porch is setback either 25.5 feet or 26 feet from the street. Mr. di Santi quoted several state cases regarding encroachment. He discussed Section 16-124 (A) and 16-124 (E) and how it reads as opposed to the intent that the Council may have meant it to be. There has been no dimensional increase in the porch footprint; therefore he does not believe that Ms. Bertolami requires a variance to enclose and make use of her enclosed space.

Mr. di Santi requested exhibits 7-14 be put into evidence.

Dr. Davant stated that the Board has reviewed the situation at 260 Greenhill Woods and finds there was no extension or enlargement of a nonconforming situation as defined in the ordinance, therefore a variance was not required.

Mr. Moseley advised the motion needs to affirm or reverse the zoning administrator’s decision and state a basis for the decision.

Dr. Davant made a motion to amend his prior motion and reverse the decision of the administrator in that Section 16-124 (A) and (E) are not applicable since there was no extension or enlargement of a nonconforming situation as defined in the ordinance. Ms. Whatley seconded the motion.

Mr. Klein requested that the verbiage of the ordinance be defined and clarified. Mr. Klein also asked about the construction of the structure without permits and how it would be addressed.

There was some discussion of the board on the verbiage of the ordinance.

Mr. di Santi stated that depending on the board's decision, if granted the applicant would apply for the proper permits to complete the job.

Mr. Moseley requested the motion be restated.

Dr. Davant motioned to amend his prior motion and reverse the decision of the administrator in that Section 16-124 (A) and (E) are not applicable since there was no extension or enlargement of a nonconforming situation as defined in the ordinance. Ms. Whatley seconded the motion.

Mr. Moseley commented that his understanding of the motion is to reverse Mr. Rothrock's decision in interpretation that is contained in his notice of violation dated June 2, 2009.

All members voted in favor of the motion.

Mr. di Santi stated that Ms. Bertolami recalls her request for a variance.

Adjourn

With no further business, the Board adjourned at 8:31 p.m.

Ron Oberle, Chairman

Sherrie Pitts, Administrative Assistant