

KURE BEACH BOARD OF ADJUSTMENT
APRIL 6, 2006
7:30 p.m.

CALL TO ORDER

Acting Chairman Elizabeth Swann opened the meeting stating that an immediate recess would have to be called in order to contact a member of the Board that is not present. She noted that 5 members have to be present to hear a case. (Secretary went to member's home and upon her return reported to Elizabeth Swann that the member would be there shortly). (Therefore starting time of the meeting was delayed).

Upon arrival of the member, Chair Elizabeth Swann called the meeting to order stating that we now have a quorum. It was noted that Mark Galizio, Alternate Member, would be filling in as a member due to the vacancies on the Board.

MEMBERS

Elizabeth Swann
John Gordon
Norman Collins
Harry Humphries
Mark Galizio

APPROVAL OF MINUTES: January 24 and February 28, 2006

John Gordon motioned for approval of the minutes and Mark Galizio seconded. Minutes approved.

CASE 01-06—Emilie F. Swearingen regarding Subdivision of Sea Filly, Myrtle Avenue & Trout Lane

Chair Elizabeth Swann noted that the case to be heard is an Appeal filed on the 1st day of March 2006, by Emilie Swearingen regarding development of Sea Filly located on the corner of Myrtle Avenue and Trout Lane. Ms. Swearingen stated in her appeal: First, that the Town has allowed construction to proceed on Lot 6B; second, the required approval from P & Z was not finalized; third, the size of Lot 6A is 4,978 square feet and the required lot size should be 5,000; fourth, lots in this subdivision require a mean width of 50 feet and not all meet the requirement.

All Witnesses to speak sworn in—by Chair Elizabeth Swann

Emilie Swearingen, Building Inspector Dixon Ivey, Attorney Chris Chleborowicz (representing Sea Filly) Gary Duncan—owner of Sea Filly. Attorney John Wessell

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(representing Emilie Swearingen) Charles Allo (P & Z Chairman at the time Sea Filly development came before P & Z).

Attorney John Wessell (representing Ms. Swearingen) submitted a packet of information as part of this record. He directed attention to three subdivision maps recorded in the New Hanover County Register of Deeds. He stated that we are interested in two lots—lots 6A and 6B. Ms. Swearingen owns the property immediately adjacent to Lot 6B. Attorney Wessell referenced Section 15-7 noting that each individual subdivision plat of land shall be approved by the Town Council on recommendation of the Planning & Zoning Commission. Sect. 15-51 (a) No subdivision plat of land within the Town's jurisdiction shall be filed or recorded until it has been submitted and approved pursuant to Sect. 15-103. Sect. 15-103 (4) Certificate of approval for recording. Sect. 15-104 outlines the procedures to be followed by Planning & Zoning. It requires them to review it and give some kind of recommendation to the Town Council. Attorney Wessell noted that the property in question is zoned RA-2—minimum lot area of 5,000 square feet is required and also says that the minimum required mean-lot width shall be 50 feet.

Attorney Wessell referenced maps recorded in New Hanover County Register of Deeds. The first map showing lot 6 before being divided—dated January 29, 2004. The next map dated April of 2004 has Lot 6 divided into two parcels, 6A and 6B. Lot 6B contains 6,066 square feet. Lot 6A has 4,978 square feet. The last map was recorded in August of 2005—Lot 6A has 5,016 and Lot 6B 6,027 square feet.

Planning & Zoning minutes from November 8, 2004 contained a letter from P & Z Chairman Charles Allo to the owner of the subdivision saying that the subdivision map that was presented to P & Z was turned down and listed the reasons for it. One of the reasons given was that one lot was smaller than the requirements. Ms. Swearingen talked with members of the Town Council beginning in January of '04 regarding her concerns about this subdivision. Attorney Wessell referred to another map recorded in August of 2005 with Lot 6A and 6B each showing more than 5,000 square feet.

Discussion followed regarding how the **mean-width** is calculated using different mathematical measurements.

In closing, Attorney Wessell stated that we do not believe that the requirements for approval were met on these three maps, and that is consideration by P & Z and approval by the Town Council. The latest map of 2005, does not meet the requirement of the 50 foot mean width. They are basically asking that the property owner be required to go back through the process and that the process to determine mean lot width be defined.

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Building Inspector Dixon Ivey

Building Inspector Dixon Ivey noted that when the property was originally subdivided the first time, it should have gone through Planning & Zoning. It did not, but was recorded. When the property owner came in to subdivide Lot 6 into two lots, Mr. Ivey noted that if you are dealing with less than three lots, it does not have to go to P & Z. (Sect. 15-1(4) on page 909. Town Council minutes of January 18, 2004 stated that "Attorney Canoutas mentioned that basically what has been discovered is that the access of ingress/egress was established during the 50's to the property in the rear so it was dedicated as a street. Therefore, he(Attorney Canoutas) has contacted the appropriate parties and suggested that they bring that substandard lot into conformity and that will end the whole situation." Building Inspector Ivey stated that was the last correspondence that he had on this property and they proceeded then to re-subdivide the lot so that it met the 5,000 square foot requirement. Mr. Ivey stated that two lots are not required to go to Planning & Zoning. He noted that if there is not a definition in the code book, Webster's Dictionary is used, (mean width) and it says to take the measurement from the middle and where the middle is at, is open but the main part of the lots is 50 feet wide.

Mark Galizio asked "where did you view the middle?"

Mr. Ivey demonstrated that it is a line across from here to here and any point along both of those lots is 50 feet.

Harry Humphries asked how many lots are in the subdivision?

Mr. Ivey replied seven.

Harry Humphries stated that we are talking about a subdivision of seven lots and not just a subdivision of two lots.

Mr. Ivey commented that in the beginning it was subdivided into six lots. There were six lots and that should have gone to P & Z. He noted that he was new at the job and spoke to the former building inspector who was still working part-time, and was advised that it did not need to go to P & Z.

Chair Elizabeth Swann asked property owner Mr. Duncan if he had more to add.

Mr. Duncan stated that he had purchased the land after Lot 6 had been subdivided.

Mr. Charles Allo explained that when we (P & Z) received a request to review the development, it has already been approved. Lots 6A and 6B had been recorded, we really had nothing to approve. He stated that every lot that is divided, and one lot is made

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into two lots, it has to go through P & Z and Council. It is a requirement for platting the lot. He continued that anytime we had lots that were shorter in front and larger in back, you take your front, your minor measurement, and your rear,(major measurement) and you take the mid-point between those two. That gives you a mean of 50 feet.

Harry Humphries asked “who did the approval?”

Mr. Allo noted that it was done on the maps. Planning & Zoning never approved any of these maps.

Ms. Swann asked, “so the letter that you wrote in October of 2004 to Mr. Duncan listing all of the things that were needed was after these were approved and you finally got notified?”

Mr. Allo stated yes, but it was not a question of approval, the only thing that we could point out was what we felt were discrepancies.

John Gordon noted that on page 918, Sect. 15-72 (Ordinance Book) for an abbreviated procedure a sketch plan is to be submitted to Planning & Zoning.

Mr. Allo stated that this is correct. Where you are just talking about separating a lot, which should be relatively simple, you go the abbreviated way.

Attorney Chris Chleborowicz began by saying “good evening to the members of the Board and noted that he appreciated their time”. He stated that he wanted to make sure that you all are focused on what this appeal is about. This appeal is about lots 6A and 6B. This appeal is saying that we did not follow the proper procedure. The first procedure is whether or not when you have a lot that is less than two acres and divide it into less than three lots, the administrator has the ability to act on his own. The definition of subdivision specifically excludes two acres or less and less than three lots being subdivided that does not deal with a roadway or anything like that. If the definition of subdivision excludes that, then the process for subdividing which Mr. Allo set out of going through Planning & Zoning and going to the Town Council does not have to be followed. He continued that the real issue here is that there was a non-conforming lot and you have to decide whether, when you are in a situation with a non-conforming lot, you have to go through this whole procedure. Attorney Chleborowicz reviewed the process of the request to divide Lot 6 into A and B. The request was presented to Planning & Zoning, there was a motion to disapprove the request and give their reasons to the Town Council for review and consideration.

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The Town Council through their attorney, Mr. Canoutas, made a recommendation as to how to fix the non-conformity. The non-conformity was fixed and you have got 6A and 6B approved, stamped and filed on record. On the first issue of whether or not this process was followed, the appeal should be denied because the evidence shows that the process was followed. Secondly, we would say that this was not a subdivision under the definition of the ordinance.

Harry Humphries asked, “when Mr. Duncan purchased Sea Filly, which lots did he purchase?”

Attorney Chleborowicz replied Lots 2, 3, 4, 5, 6A and 6B.

In continuing Attorney Chleborowicz, stated that Section 15-1 says, “Subdivision shall mean all divisions of tracts or parcels of land into two or more lots, building sites or other divisions for the purpose of sale,”.....the last sentence says, “The following is not included within this definition and is not subject to any regulations enacted pursuant to this chapter.” He continued that the focus should be on Lots 6A and 6B, not the entire subdivision. Attorney Chleborowicz noted that this is less than two acres and it is less than three lots. It is exempt from the definitions in this chapter and it is not subject to any of the regulations. He also questioned the method to calculate mean width.

Mark Galizio stated that there was a question in his mind “did the Town Council see the revised lot and approve it or was that necessary”? Also whether the resolution that you presented to us is the resolution that was approved by the Town Council.

Attorney Chleborowicz replied that in their reasons for disapproval, P & Z noted that one lot is smaller than the requirement of 5,000 square feet. The Town Council stated to bring the substandard lot into conformity and that will end the whole situation.

John Gordon asked Attorney Chleborowicz that your contention is that the lot was made 5,000 square feet and that took care of it.

Attorney Chleborowicz stated “Yes, sir”.

John Gordon replied “Your contention is that it does not have to go through P & Z and it does not have to go through the Town Council, etc., I have trouble with that. It may say that by itself but if we take it in context with a lot of the other ordinances, I am not totally sure that that is what it means and if it doesn’t mean that, then I do not know why a lot of stuff goes through P & Z because it is going to exempt a lot of the property. If it is going to be liberally interpreted the way you want it to be, then I guess all that anybody has to

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do is go see the Building Inspector and P & Z and everything else is largely irrelevant. You have to put it in context with the entire regulation.

Attorney Chleborowicz noted that it went to P & Z and Town Council.

Attorney John Wessell commented that a vote was not taken by the Town Council. There was a conversation with Attorney Canoutas.

Chair Elizabeth Swann asked if anyone else had anything to add? There was no response.

Chair Elizabeth Swann continued that the Board of Adjustment will now consider the case and will look at Lots 6A and 6B in consideration of the 5,000 square feet and the 50 foot mean width. We have four maps that are involved, was the process followed. We will consider all of the witnesses testimony.

Attorney Chleborowicz presented another map and stated that it was recently filed. The date on it is March 2006.

Recess

Short recess was taken.

After recess, Chair Elizabeth Swann called the meeting back to order.

John Gordon commented that the lots had to be 5,000 square feet and there had to be a 50 foot width, and because it did not meet that originally when they divided the lots into 6A and 6B, it should have gone through P & Z and it should have gone to the Town Council for approval. Therefore, I think it should now be required to go through that process on this final plat map, and let P & Z decide whether it meets the requirements or not.

Mark Galizio stated that he pretty much agreed with the things that John Gordon said. But he has some concerns about how mean width ought to be defined and what the intent of the Town and the Zoning Board is.

Harry Humphries commented that he believed lots 6A and 6B are a subdivision. Every lot in it is part of a subdivision and it must go through the process and if Planning & Zoning approves it, it would then go to Council. He is of the opinion that it should go through the process, Planning & Zoning and Town Council.

Norm Collins agreed that P & Z should be involved in the final decision.

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Elizabeth Swann commented that she too was in agreement. She expressed concern about the different methods used for figuring mean-width.

Mark Galizio suggested that P & Z clarify it. The mean-width is very meaningful for a symmetric lot. It is not very meaningful for an asymmetric lot.

Discussion among Board continued. During discussion, Mark Galizio commented that we have basically three points for facts. One is that the complaint is valid and the Sea Filly is a subdivision and, therefore, approval from P & Z and the Town Council is required. This lot was changed several times in efforts to bring it into compliance and it was approved by the Building Inspector, but not by P & Z and the Town Council. Harry Humphries noted that mean width needs to be defined.

Finding of Fact as stated by Mark Galizio: (1) There is substantial evidence in the record to show the following facts: The complaint is valid and Sea Filly is a subdivision; therefore, approval of Planning & Zoning and Town Council for further subdivision is required. This lot was changed several times in efforts to bring it into compliance and these were approved by the Building Inspector but not by P & Z or Town Council. (2) The resolution of this case depends solely on interpretation of the ordinance language without regard to the particular facts of this case; therefore, it is the Board's conclusion that the following sections or provisions of the ordinance shall in this case and hereafter be interpreted as follows: Henceforth, Section 15-1 Subsection (4) is only applicable when the resultant lots are clearly in accordance with the standards of the Town including the lot size, the mean width and the setbacks. Therefore, it is ordered that the decision of the Zoning Enforcement Officer is hereby reversed. In addition, it is further ordered that the following action be taken: That the subdivision be reviewed by Planning & Zoning and the Town Council before further construction and the Town Council shall establish a standard methodology to determine the mean lot width.

Mark Galizio stated that this is a motion. Harry Humphries seconded the motion. Motion approved unanimously.

Adjournment

Chair Elizabeth Swann adjourned the meeting.
(11:06 p.m.)

Minutes by I. Jones