



BOARD OF ADJUSTMENT
VARIANCE HEARING ♦ NOVEMBER 28, 2006

MINUTES

A variance hearing of the Kure Beach Board of Adjustment was held November 28, 2006 beginning at 7:30pm at Kure Beach Town Hall, located at 117 Settlers Lane, Kure Beach, NC. A quorum was present.

MEMBERS IN ATTENDANCE:

Betty Swann, Chair
Anne Brodsky
John Gordon
Norm Collins
Mark Galizio

MEMBERS ABSENT

Harry Humphries, Vice Chair
Charles Allo, alternate, recused himself from hearing

STAFF IN ATTENDANCE:

Town Clerk Nancy Avery
Building Inspector John Batson
Town Attorney A. A. Canoutas
Secretary Aimee Zimmerman

Court reporter services provided by Tammy Violette of Overby Court Reporting.

CALL TO ORDER

Chair Swann called the meeting to order at 7:35 pm.

APPROVAL OF MINUTES

Town Clerk Avery indicates a change in the times listed on September 21st minutes. They should reflect that the meeting to begin at 7:30 p.m.; that Chair Swann opened the hearing at 7:35 p.m.

Member Brodsky MADE THE MOTION to approve the minutes from the September 21, 2006 meeting with changes in times. Members Gordon and Collins seconded the motion. THE VOTE OF APPROVAL WAS UNANIMOUS.

Member Brodsky MADE THE MOTION to approve the minutes of the 11/2/06 meeting. Member Collins seconded the motion. THE VOTE OF APPROVAL WAS UNANIMOUS.

OPENING OF HEARING/POLL OF MEMBERS

Chair Swann opened the hearing at 7:35 pm. Chair Swann explained to all present that the Board of Adjustment is a quasi-judicial administrative body, that members may only consider substantial, competent and material evidence for factual determination, that hearsay and opinion testimony may not be considered in findings of fact, that applicant must prove that ordinance standards have been met and called for a poll of members regarding conflict of interest.

Anne Brodsky – no conflict
John Gordon – no conflict
Betty Swann – no conflict
Mark Galizio – no conflict
Norman Collins – no conflict

ADMINISTRATION OF OATH

Chair Swann administered the oath to the following signed in to testify:

John Batson, Building Inspector
Gary Shipman, Attorney for applicants
Candice Alexander
Nathan Sanders, applicant
Charles Allo
Mike Robertson
Jerry Hamill
Tom Humphries

TESTIMONY, FINDINGS OF FACT AND BOARD DECISION

A transcript of the testimony, cross examination, findings of fact and Board decision is herein incorporated as part of these minutes as attachment A.

Building Inspector John Batson testified. He testified that the original application was received on April 18, 2005. The Building Inspector at that time denied the application. The applicants then came before the Board due to the hardship in CAMA requirements for setbacks on the property. As the hardship results from the setbacks imposed by CAMA, Building Inspector Batson believed that the request for a variance would be more appropriately made to CAMA.

Gary Shipman, attorney for applicants, testified. Mr. Shipman argued that 30% of the properties in the B-1 district are residential properties. His clients believed a residential structure could be constructed as long as it complied with the regulations pertaining to RA-1A. The issue is currently before the Court of Appeals. He indicated that granting a variance at this time would resolve the pending litigation and permit the Board to decide

on a case by case basis. (This petition applies to these lots only). He further indicated that Article IV of the Kure Beach Ordinances regarding “Supplemental District Regulations” is applied to all zoning districts. Section 323.5 states that residences shall be allowed in all districts. With the current CAMA setbacks, this districting will require double the setback amounts. He indicated that the current properties do not comply as they were “grandfathered” in. He indicated again that 14 of the 41 properties in the B-1 district are used for residential purposes and that allowing this to become a residential property will not upset anything. If the variance is not granted, due to the setbacks required by both the Town of Kure Beach and CAMA, it results in only 37 feet of property that can be utilized and therefore creates a hardship. He stated that there is no economic viability if the use is restricted to commercial. His clients wish to build four homes of less than 5000 square feet. Only lots of their size and location make the literal provisions of the ordinance a hardship. His clients cannot use the property as a hotel. This property was obtained through a bankruptcy. He believes it is a hardship because no practical use of the property can be made if it were to remain B-1. He believes the harmony requirement is met because his clients are promoting a betterment of the community which would lessen congestion and overcrowding of land and it also encourages continued use of the land. Additionally there is no economic sustenance. He further stated that public safety, welfare and substantial justice are served because his clients can promote the welfare of the citizens by assuring an economically viable use is being made of the property. Mr. Shipman showed a PowerPoint presentation to the Board and provided a hard copy of the same.

Member Gordon states that he cannot differentiate tonight from the previous case (currently pending before the Court of Appeals). He indicates that residences were allowed due to grandfathering and that other commercial possibilities may be viable. Also indicates that a CAMA permit will be needed in any event and will the property stay subject to the 120 foot setbacks.

Mr. Shipman indicated that this is in a different posture procedurally. Initially the case asked the Building Inspector to interpret B-1. Tonight’s issue assumes that the interpretation is correct and asks the Board to grant relief in the form of a variance. He agreed that a CAMA permit will ultimately be required however with the four homes, there would only be a 60 foot setback due to their size. With the 120 foot setback, the only thing his clients could do is build a structure that is 37 feet wide and 250 feet long which is not feasible. He indicated that they are asking for a variance because the requirements are unfair and unjust and that is what they intended to prove.

Member Gordon indicated that they could place five stores there and feels that the applicants did not make their case; only stated the property could be only residential. Mr. Shipman responded saying that the area must be economically viable. Although the stores would be physically possible they are not economically feasible and that a vacant building, such as in existence now, does not do anything for the community.

Mike Robertson testified. He clarified that Mr. Sanders bought the property from the Maynards who bought the property through the bankruptcy. He indicated that the

applicants knew what they were getting into and feels the Board should rule on the issue now.

Charles Allo testified that the original intent of 323.5 was that the Supreme Court earlier gave a ruling that a person cannot take a property with zoning so that they cannot use it. Zoning was established in Kure Beach in 1977 and those involved were pushed into it with little or no training. He indicated that every district within the town has single family residences but B-1 is the only one not denoting it. The ordinance was in place when the zoning board was created. As to the safety issue, motels don't have the number of outlets (driveways) that residences do. In 1998 the Town Council changed RA-1A in order to increase seasonal use. However, 323.5 was strictly residential. B-2 didn't initially allow residential structures but later was amended to allow them. All zones in 1986 has single family residences except for the B-1 district. However, item number eight allows a residence but it must be in conjunction with a business. The whole thing was to prevent the mass taking of land. He recommends that if the Board goes by 323.5, they should make a recommendation to the Planning and Zoning Board to reflect time limits as to vested rights.

Mr. Shipman objects. Believes Mr. Allo's statements constitute hearsay. Mr. Allo ends his testimony.

No others, previously sworn, testify.

Mr. Shipman is recalled to clarify that he does not represent the applicants in the action currently before the Court of Appeals. He also indicates that the applicants are still awaiting a decision from the Court of Appeals and that said decision could be made anytime between next year and two years from now. He further indicates that if the variance is granted, the applicants will notify the Court of Appeals which will end that action.

Member Galizio brings forth Candice Alexander for questioning. He asks whether alternative business uses were ever discussed. Ms. Alexander indicates that she has met with other members of the B-1 district about every 3-4 months and has asked for direct information from Town Council as to what was happening. She also reminded the Board that anything that is constructed will be limited by the 35 foot height limitation. She indicated that she has received no direction as to what a viable use would be and that turning the property into separate shops would, in no way, offset the \$2.4 million her clients spent to purchase the property.

Testimony was then closed by Chair Swann.

RECESS CALLED AT 8:45 P.M.

HEARING RESUMED AT 8:56 P.M.

General discussion is held between the members of the Board. Town Attorney Canoutas is questioned regarding question number 1 as it pertains to the ordinances. Mr. Canoutas indicates that the applicants needed only to follow Chapter 19 and that they did, in fact, do so.

After further discussion among the members of the Board, Chair Swann calls for a vote on the five questions.

FINDINGS OF FACT

As to Question No. 1: Did applicant follow ordinance requirements of Chapter 19 (Zoning)?

A unanimous vote of “aye” is received.

As to Question No. 2: Does the evidence indicate that the hardship of which the applicant complains results from unique circumstances related to the applicant’s land and is it the result of the applicant’s own actions? (Board members could not answer this question with one answer and therefore split the question into two parts).

As to the first part a unanimous vote of “aye” is received
As to the second part, a unanimous vote of “nay” is received.

As to Question No. 3: Does granting a variance preserve the spirit and keep harmony with the general purpose and intent of the ordinance?

A vote of “aye” was received from Members Gordon, Swann, Galizio and Collins.
A vote of “nay” was received from Member Brodsky.

As to Question No. 4: In granting a variance, is the public safety and welfare assured?

A unanimous vote of “aye” is received.

As to Question No. 5: In granting a variance, will substantial justice be done?

A unanimous vote of “aye” is received.

DECISION/VOTE OF THE BOARD:

IT IS THE DECISION OF THE BOARD, UNANIMOUSLY, TO GRANT A VARIANCE FROM THE LITERAL PROVISIONS OF THE B-1 SECTION OF THE KURE BEACH ZONING ORDINANCE FOR LOTS 2, 3 4 AND 5 OF BLOCK 10, 105 ATLANTIC AVENUE, KURE BEACH.

ADJOURNMENT:

Member Brodsky MADE THE MOTION to adjourn the hearing at 10:02 pm. Member Collins seconded the motion. THE VOTE OF APPROVAL WAS UNANIMOUS.

Betty Swann, Chair

ATTEST: _____
Aimee Zimmerman, Secretary