

BOARD OF ADJUSTMENT
MEETING MINUTES ♦ JANUARY 25, 2011

MINUTES

A meeting of the Kure Beach Board of Adjustment was held January 25, 2011, beginning at 7:30 p.m. at Kure Beach Town Hall, located at 117 Settlers Lane, Kure Beach, NC. A quorum was present.

MEMBERS IN ATTENDANCE:

Harry Humphries, Chair
Charlie Allo
Peter Boulter
Dolores Coe
Tony Garibay

MEMBERS ABSENT:

NONE

STAFF IN ATTENDANCE:

Board of Adjustment Attorney Holt Moore
Building Inspector John Batson
Secretary Josie Fitzgerald

CALL TO ORDER:

Chairman Humphries called the meeting to order at 7:31 p.m.

APPROVAL OF THE MINUTES:

MOTION: MEMBER BOULTER MADE A MOTION TO APPROVE THE MINUTES FROM THE APRIL 27, 2010 MEETING.

SECOND: MEMBER GARIBAY

VOTE: THE MOTION CARRIED UNANIMOUSLY

OATH OF OFFICE – SANDRA WHALEY

Sandra Whaley was sworn in as an alternate member of the Board of Adjustment.

Chairman Humphries stated that the Board will be hearing two cases 11-01 and 11-02. The first case to be heard will be 11-02 since 11-01 may take a little longer.

OPENING OF HEARING Case 11-02 – 828 Fort Fisher Blvd./POLL OF MEMBERS:

Chair Humphries opened the hearing at 7:34 p.m. Chair Humphries 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 the applicant must prove that ordinance standards have been met in the denial of a permit to separate the existing property into three separate condominium parts for the purpose of selling at 828 Fort Fisher Blvd. and call for a poll of members regarding conflict of interest in the case regarding 828 Fort Fisher Blvd.

Charlie Allo – no conflict
Peter Boulter – no conflict
Harry Humphries – no conflict
Dolores Coe – no conflict
Tony Garibay – no conflict

ADMINISTRATION OF OATH:

Chairman Humphries administered the oath to the following signed in to testify:

Bud Dealy - Owner of the property and Celeste Ventures
Tim Hines – Applicant
John Batson – Building Inspector

TESTIMONY, FINDING 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.”

Applicant Tim Hines testified that:

- He is a professional engineer and got involved in the project when Mr. Dealy asked him to look into feasibility of splitting the present facility that currently has three apartments and turn it into separate units that can be sold separately instead of being rented.
- He stated he contacted Building Inspector Batson who advised him that there was a problem with the zoning in that the district only allows one and two family dwellings and there was a parking issue.
- After learning the zoning problem, he filed the appeal and would like to be considered grandfathered since the facility had been a three apartment situation for over ten years, had always been the same.
- He further stated that the owner, Mr. Dealy does not intend to do anything but split the property for financial reasons.
- He stated the building would not change, the footprint would not change, the square footage would not change, occupancy would not change.
- He further stated that the two bedroom apartment upstairs and the two one-bedroom apartments on the first floor would be the same.

- He stated that there was adequate parking spaces and additional room for more parking spaces. He believed the requirement was one space for each bedroom which would be four off-street parking spaces.
- The owner wants to separate the property into separate units so they will be three separate units and be able to sell them.

Chair Humphries asked if this relates to the denial of the permit to separate the unit into three separate condominiums. Mr. Hines indicated that he wasn't sure if it was a formal denial of the application, but it was oral communication with the Building Inspector who told him because of the zoning, they could not split and ultimately become three units.

Chair Humphries asked if they are seeking to separate two of the units so they can be sold off. Mr. Hines indicated that was correct. The intent is to sell the two lower units and maintain the top unit.

Member Allo asked what the size of the land is, the square footage. Mr. Hines stated that the square footage, the parcel is 6,730 sq. ft. Mr. Allo stated that they had three units there and what is needed is 7,500 and more parking spaces would be needed since the requirement is two for each unit. Mr. Hines indicated that he was aware of that since the Building Inspector explained that to him. Mr. Hines was imagining a variance applied to that requirement.

Member Boulter asked is what you are requesting is having a nonconforming use. Mr. Hines stated that the building had been nonconforming for many years and they are requesting to be allowed to continue as a nonconforming. The owner wants to separate the two lower units from the upper unit with firewalls and make it legal to sell and make no other changes.

Chair Humphries asked if all units are rented now. Mr. Hines answered that all three units were being rented.

Member Garibay asked about the impervious area and water runoff. Mr. Hines indicated they had adequate spaces for parking and all were off the adjacent road with small grass areas. If they added parking spaces, it would not back on the main highway. The property is on a corner, but has a Fort Fisher address.

Member Garibay asked how many bedrooms does it have. Mr. Hines answer it had one in each lower unit and two bedrooms in the upper unit. A total of four bedrooms.

Member Coe asked how many utility bills are there. Mr. Hines answered they are all coming in as one. The utilities are included in the lease and has no answer regarding separating the utilities.

Owner Bud Dealy testified that:

- He bought the property as a bed and breakfast in 2001. There are only three buildings on the 13 lot property.

- This building is old, but not sure how old, it was built as three separate apartments, separate entrances, porches, etc. The only thing common is utilities. It is usual practice with condominiums to have common utilities.
- It was built as a rental unit. That was the intended use

Member Coe asked if it was part of the bed and breakfast. Mr. Dealy answered that it was about 300 to 400 feet away and was for extra rooms, but rented separately and lived in as housekeeping condominiums.

Member Coe asked how many water bills do you get. Mr. Dealy answered, one. It has always been that way.

Member Coe asked if he got separate garbage and water bills for the other building. Mr. Dealy answered, yes, one as Ocean Princess and one as Celeste Ventures.

Member Allo asked is it in the RA-1 area correct. Mr. Dealy answered, I'm not sure.

Building Inspector John Batson testified that:

- Records show that the property has 10,372 sf. Mr. Hines believes the 6,370 sf is buildable square feet but did not verify by measurement.
- Building was built in 2000.
- Based on Sec.19-303, the code states one and two family dwellings.
- The property was Princess Place Boarding House and now to separate into three separate units with three separate owners would not conform and that is why the permit was denied.

Member Boulter asked so what you are saying is, it does not qualify. Inspector Batson answered, yes.

Member Boulter asked if the original property was conforming. Inspector Batson answered the original property as Princess Place was conforming, but now that the other building was sold off now it is not conforming.

Member Allo asked in what respect. Inspector Batson answered because it is more than a one or two family dwelling.

Member Allo asked if you have condominiums and townhouses in that district and if they are selling off the units, how are they nonconforming. Inspector Batson answered because the ordinance states only one and two family dwellings are allowed in this district. There is a whole list of things they can do, but as far as single family residential unit, it only allows one and two family homes.

Member Allo asked what about condos. Inspector Batson answered they can have a condo or townhouse.

Member All asked what you are saying is they can have a condo or townhouse, but not a triplex. Inspector Batson answered, that is correct.

Member Allo asked what we would have is a multi-family structure, is that what you are saying. Inspector Batson answered, yes that is right.

Member Boulter asked how would that change things. Inspector Batson answered it would give the property three different owners. It would not change the appearance, it would be three different owners of the property.

Member Boulter would the parking have an impact. Inspector Batson answered, no I don't believe so. At the time this case was submitted, I checked and came to the conclusion that they will be able to supply adequate parking.

Member Allo stated, I see where you are coming from as a multifamily, is that what you are looking at. Inspector Batson answered, yes.

Member Coe asked if this lot were not tied into Princess Place, what would you call this, a duplex. Inspector Batson answered, it is large enough to subdivide this lot into two separate parcels that could maintain two separate duplexes. If the square footage is correct, it could be a duplex and have enough square footage that meet the guidelines to separate it.

Attorney Holt Moore addressed the Board stating, since the issue of a nonconforming came up, under the section of nonconforming uses it mentions if you change the use to be compliant with the district, it needs to be conforming, even if nonconforming now, you might be able to get past that, since it does appear that the use is changing to individual ownership.

Member Allo stated that the owner knows the rules of what each single dwelling would need in a multifamily area is 2,500 sf and as long as he is aware that there is 10,000 sf.

Testimony was closed by Chair Humphries at 8:25 p.m.

DISCUSSION OF THE BOARD:

- Member Allo stated based on the interpretation of the Building Inspector, I don't have any problem with the zoning. We have multifamily in the zoning which is a different category. Multifamily is not listed here. It can be a townhouse or condo, but it would be two units and each unit would have to have at least 2,500 sf. From the denial point of view, I agree with the Building Inspector.
- Member Boulter stated we are not making much changes, it is still three families. We are not making much of a change in use. We have three families now and we will have three families afterwards. You will have a change in utilities, firewall and so forth. It gets complicated because I heard different labels and the owner stated he bought it and turned it into a bed and breakfast. So we definitely would have a change in use from that and the proposed three individually owned apartments. It depends on what is it now.

- Chair Humphries stated if I rent out two rooms in my house, no one is buying them, I still own them and these folks want to sell off the rooms to individual people to own, that does change the use of the property.
- Chair Humphries stated you have a hotel if you are renting out rooms and now if you sell the rooms, you are changing the complexity of the entire building. It is one owner renting out three apartments and they want to change to three different owners and to me that changes what is going on with that particular use.
- Member Boulter asked what is the definition of changing, that is my question.
- Attorney Moore stated it is the purpose for which the land or building is designed, arranged or intended to be used or occupied. You can have three individual units to be lived in full time or they can be rented a week or a day at a time. If you intended it to be rented daily or weekly or yearly and the new purpose is to have individually owned units presumably for full time occupancy you change the purpose.
- Member Coe stated under the definition of hotel it states it is a building designed and intended for lodging for short term transients. The last sentence says that no hotel can be converted or used as a multifamily residential dwelling. So even though it was originally designed to be a hotel, it clearly states it cannot be converted back.
- Member Garibay stated if the owner sells the property today it would be one parcel, but if they do what they want, then it would be sold as three different pieces of property.
- Member Boulter stated I don't understand the difference between a condo and an HOA and separate apartments.
- Member Garibay stated to sell these as separate units, separate utilities would probably be required.
- Inspector Batson stated that water, sewer and trash would have to be separate.
- Chair Humphries stated that there seems to be confusion as to whether or not it is conforming today, and it is not, and that seems to be the issue. It does not conform today to our standards in that district. Do we allow it to remain as nonconforming.
- Member Allo stated if it stays the way it is today, and the units are not sold separately, whether it is nonconforming or not, it stays.
- Chair Humphries stated so it can be grandfathered as long as it stays the way it is now.
- Member Allo stated it is grandfathered. If they sell off the units, then it changes everything.
- Member Allo stated we have another problem. We call a residence a building someone is living in. When you get to its function, its use, you have a separation. If you are renting it out, then it is no longer a residence use, it is now commercial. Whether it is occupied year round or for tourist rental, that is two different things and the impact on the Town is different. Once you sell them individually, the use changes.
- Member Coe asked what type of permit was issued for the property.
- Inspector Batson did not have information regarding the original permit.
- Member Allo stated that the Building Inspector is saying that it can't be done from a standpoint of a multifamily unit. We have in the past differentiated between a condo and a townhouse and multifamily. They have the same density requirement but they have a different title.

- Chair Humphries stated we have to look at today's ordinance and see what can be done. Inspector Batson denied the application based on the ordinance.
- Attorney Moore stated the definition in Sec. 19-303 bars the use. Do you agree or not to let them do what they want to do which prohibited because the one and two family dwelling restriction. If it is basically not allowed, that answers your question.
- Chair Humphries stated that Sec. 19-303 says one and two family dwellings. It doesn't say OR townhouse or condos, or hotels. You can only have one and two family dwellings.
- Member Allo stated there is a category in the ordinance called multifamily which is three or more units together. They have separated them, but this district does not allow multifamily. So it has to be a townhouse or condo. It has to be a two family unit of either one, not multifamily no matter what you call it.
- Chair Humphries read the definition for townhouse from the code and stated that it does not apply in this case. He then read the definition of condo from the code. That would apply.
- Member Allo asked Inspector Batson if they do what they want, what would they have.
- Inspector Batson stated they would have a multifamily dwelling. Some districts allow one and two family and multifamily dwellings, this one does not.
- Chair Humphries stated this would turn into a multifamily and RA-1 does not allow multifamily no matter if called a condo or townhouse. If allowed, this would be a condominium. Second it would be a multifamily unit and this particular district does not allow multifamily, they only allow one and two family dwellings whether it be a condo or townhouse.
- Member Boulter stated if divided into two lots, you could build condominiums on the two lots and it would probably be permitted. I don't see a change in use between this nonconforming situation and the one he is proposing. There are three individual units now leased out and he owns each one of them and in the future he is going to sell them off and they will have the same use.
- Chair Humphries stated that his interpretation is the structure isn't changed, but the way it will be used will be different. One person owns it now and it will be three individual owners. And it is not allowed in RA-1 District.

Chair Humphries stated they close the debate section and take a vote on the finding of facts and render a decision.

FINDINGS OF FACT:

Each member will state their finding of facts and whether they vote to uphold the decision of the Building Inspector or reverse the decision.

Member Allo- The Building Inspector is using the multifamily criteria that has been used in the past and that particular lot is in the RA-1 District so I will support the Building Inspector's interpretation and uphold his decision.

Member Boulter – The structure is not allowed under the zoning ordinance. However, the dwelling is a nonconforming situation and the situation is not changing. I do not uphold the Building Inspector's decision.

Chair Humphries - I find that this particular zoning does not allow a multifamily unit based on the one and two family requirement for the RA-1 District and I vote to support the decision of the Building Inspector.

Member Coe - I support the decision that the building is not a one or two family dwelling and does not conform to the requirements of the district. I uphold the decision of the Building Inspector.

Member Garibay – From the information I have heard today, I support and uphold the decision of the Building Inspector.

Chair Humphries stated we have 4 to uphold the decision of the Building Inspector and one not to support his decision.

ACTION: Member Garibay made a motion to uphold the decision of the Building Inspector denying the permit and separation of the existing property into three condominium units. Member Allo seconded the motion. Motion carried. Therefore, it is the decision of the Board by a 4/5 vote that applicant's request to separate the units at 828 Fort Fisher Blvd. into three separate units for sale does not comply with the zoning and therefore, deny the applicant's appeal.

Chair Humphries – yea

Member Coe – yea

Member Garibay – yea

Member Allo – yea

Member Boulter - nay

Mr. Hines was advised of his right to appeal the decision of the Board and that an appeal could be taken to the Superior Court of New Hanover County within thirty (30) days of receipt of the Board's decision and filed with the Kure Beach Town Clerk.

ACTION: Member Coe made a motion to adjourn the hearing at 8:33 p.m. Member Boulter seconded the motion. The motion was unanimous.

RECESS:

Chair Humphries resumed the meeting at 8:45 p.m.

OPENING OF HEARING Case 11-01 – 313 Atlantic Ave./POLL OF MEMBERS:

Chair Humphries opened the hearing at 8:45 p.m.

This is an appeal of the Building Inspectors decision to issue a permit to build a third story addition to the property at 313 Atlantic Ave., Kure Beach filed by Mr. and Mrs. Lindsay and involved the provisions of the Town of Kure Beach Zoning Ordinance Art. I, Sec. 19-1 Definitions; Art. III District Regulations, Div. 7 RA-3 Residential District, Sec. 19-188

Dimensional requirements; Art. IV Supplemental District Regulations, Sec. 19-321.5; Art. V Sec. 19-357 Nonconforming situation. Owners at this location are building a third story addition to the residence. Mr. and Mrs. Lindsay are adjacent homeowners at 311 Atlantic Ave. and are seeking a reversal to the decision of the Building Inspector allowing a single family residential structure to exceed dimensional requirements; does not meet prerequisite requirements for impervious surfaces; and does not comply with continuance of nonconforming situation.

Chair Humphries 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, hearsay and opinion testimony may not be considered in findings of fact. During the vote four fifths is required to reverse any order and the findings of the Board is submitted either upholding the order of the Building Inspector allowing the third story addition to the residence or an order reversing the decision of the Building Inspector requiring the building permit to be revoked. The applicant must prove that ordinance standards have been met and call for a poll of members regarding conflict of interest in the case regarding 313 Atlantic Ave.

Member Charlie Allo stated that he had contact with the Building Inspector. I thought this was a petition by the person that was looking to build and was being denied. I was zeroed in on the wrong thing and thought the building permit was denied and I didn't see anything in the documents that the permit was denied. So I called Mr. Batson and asked where the denial was and he stated that it wasn't denied, and that the petition is to deny the building that is going on. I am not sure if that discussion disqualifies me.

Chair Harry Humphries asked if that discussion with the Building Inspector influenced him to formulate a decision. Member Allo responded no, it did not.

Member Allo – no conflict
Member Peter Boulter – no conflict
Harry Humphries – no conflict
Dolores Coe – no conflict
Tony Garibay – no conflict

ADMINISTRATION OF OATH:

Humphries administered the oath to the following signed in to testify:

Don Lindsay, Applicant
Audrey Lindsay, Applicant
Greg Lindsay, son of applicant
Mary Lindsay, daughter of applicant
John Batson, Building Inspector/Enforcement Officer

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 "B."

Don Lindsay testified that:

- I am going to make a presentation using the chart and have a handout Exhibit "A."
- My wife and I are owners of 311 Atlantic Ave. which is adjacent to 313 Atlantic Ave.
- We are presenting objections to the Building Inspector issuing a permit to construct a third story and major remodeling project at 313 Atlantic Ave.
- We are not trying to deny our neighbors their legal property rights we only want to protect our property rights as adjacent property owners.
- We have the legal right to challenge his interpretations when we believe they are not accurate and he fails to apply all the applicable zoning code requirements.
- We researched the Kure Beach Zoning Code and found three sections that are directly applicable to this situation. RA-3 Residential District, Sec. 19-188-189 Art. IV Supplemental District Regulations, Sec. 19-321.5 Prerequisite; and Art. V Nonconforming Uses, Sec. 19-357 Continuance of Nonconforming Situations.

♦ Mr. Lindsay reads from Exhibit "A" as referenced above, provided to the Board and incorporated herein as part of these minutes.

- Directing attention to the chart which was obtained from the New Hanover County web site, the property was sold multiple times showing the Code was in existence prior to the time the house was built.

♦ Mr. Lindsay continues to read from Exhibit "A" as referenced above and provided to the Board.

- Directing attention to the display (Map of Survey enclosed in Exhibit "A") points out dimensions of the house at 313 Atlantic Ave. The side yard does not meet the requirement of 5 feet. The back is less than 3 ft. There is no more building space, it is maxed out.

Chair Humphries asked where is your house on this plot. Mr. Lindsay answers, directly behind it.

Chair Humphries asked how do you get to it. Mr. Lindsay says that he owns the adjacent lot and have in a deed two parking spaces and conveyance to the property behind it.

Chair Humphries asked what is the square footage of your lot. Mr. Lindsay answers, not sure but smaller than that one.

♦ Mr. Lindsay continues to read Fact #7 from Exhibit "A" as referenced above and provided to the Board.

- The Building Inspector and I have corresponded since August and this was included in an e-mail as Attachment "F" in Exhibit "A" as referenced above and provided to the Board.
- The term "yard size" is not defined in the Kure Beach zoning code definitions section.

♦ Mr. Lindsay continues to read from Exhibit "A" as referenced above and provided to the Board ending his testimony with his summary of statements.

Chair Humphries asked when the house was built. In 1986 and looking at your sale detail Mary Farriss owned the property. Did they build the house in 1986? Mr. Lindsay directed attention to the tax record in Exhibit "A."

Member Allo asked in 1973, was the house on the lot. Mr. Lindsay answered that the lot was his wife's family property.

Chair Humphries asked if his house sat on part of this lot. When Ms. Warren bought the house was it the entire lot? Mr. Lindsay answered that it was just the property we are talking about.

Greg Lindsay stated that house was demolished and a new house was built in 1986.

Member Garibay stated so we don't know when this house was built when Ms. Warren purchased the lot in 1973. Mr. Lindsay answered that a new house was built in 1986 and multiple owners purchased property after Warren and sometime in 1986 that house was built. The point is, that the dimensions in the code definition were added in 1985, before the house was built and the survey shows there were multiple violations. No definitions were in effect when the house was built as to setbacks and yard size. There are violations on all sides, 3 ft. from rear when it requires 10ft, and 8 ft when it requires 10 ft. The house was built in noncompliance.

Member Coe asked did you challenge the house when it was built in 1985? Mr. Lindsay stated that he did not challenge it.

Member Coe asked so are you asking us to retroactively say no. Mr. Lindsay stated that the violation goes with the property and the current owner is liable. The violation goes with the property, no matter how long.

Chair Humphries asked do we know whether the current owner who bought in 2007, was the violation disclosed to the owner. Real Estate law says they have to be made aware of it. Mr. Lindsay said the property was sold three or four times, he doesn't know.

Member Boulter asked if the house stands the same as it was in 1986. Mr. Lindsay answered as far as I know.

Member Garibay – When was the house on the property we are talking about and your property ever divided at one time. Mr. Lindsay answered that it was divided when Ms. Warren bought it in 1973.

Member Garibay – Was Ms. Warren's house was in the front, was there a house in the back. Mr. Lindsay answered there was a similar house in the back.

Member Garibay asked the house that was torn down, the house behind it, your house today was that the original house or new. Mr. Lindsay answered, no it is a new structure.

Mr. Garibay asked a new structure was built when. Mr. Lindsay answered 2003-4, it was built according to zoning regulations.

Member Garibay asked the two properties 25x100, do you own both properties. Mr. Lindsay answered adjacent to it and it is vacant. It is buildable and is a deeded right away.

Member Allo asked is there another 50'x50' buildable lot. Mr. Lindsay answered they own 307 and 309 which is buildable and is next to 313. The size is 100'x 25'

Member Allo asked are both lots under your control at this time. Mr. Lindsay answered yes. Why is that relevant.

Member Allo asked when was the lot split. Mr. Lindsay stated 313 it was split in 1973 when Warren bought it from wife's aunt. It was split before so it could be sold.

Member Allo asked if they could have sold the whole thing. Mr. Lindsay answered she could have if she wanted to. His wife's aunt bought several properties in 1946 and they were all under her ownership and then under their ownership except for the piece in front to Ms Warren, in 1973 who sold it to Lambert in 1985 who sold it a few months to Farris then it was sold in 2003 to Fletcher then in Nov. 2003 to Barnes then it was sold to Smiths in 2007.

Member Allo asked who owns the easement to the right of shaded area? Mr. Lindsay indicates on the display where the house is and where the lot is.

Chair Humphries asked what the square footage of the house is. Mr. Lindsay answered 3,370 sf.

Chair Humphries asked so it is obviously less than 5,000 sf. Mr. Lindsay answered yes.

Chair Humphries is the dimension of your house behind it, did you say less than half. Mr. Lindsay answered yes, it is 50 ft, the same width and I think it is 33 ft.

Member Boulter asked about the yard size and the definition, not quite clear, what is your point. Mr. Lindsay states that the Inspector is saying that instead of measuring the yard dimension from the ground he is going up to the third story so you can measure the third story level and meet the requirements.

Member Boulter asked is the third story smaller than the first and second level. Mr. Lindsay answered yes, but it should be measured from the ground.

Greg Lindsay testified that:

- If there are any questions by the Board, he would clarify. No questions, no statement.

Audrey Lindsay testified that:

- No comment at this time

Mary Lindsay testified:

- No comment

Building Inspector John Batson testified that:

- The handout that Mr. Lindsay submitted tonight is different than what he submitted with his original application.
- I am not a realtor and have no knowledge regarding real estate comments and do not know in fact if it has any bearing on this matter.
- The property is 313 Atlantic Ave.
- The lot is nonconforming in that it is smaller than minimum 5,000 sf.
- The existing structure is also nonconforming in that it does not meet all the setbacks.
- The owner requested a permit to add a third story on the property.
- After investigation, I came to the conclusion that they could do what they requested.
- The ordinances that I used to base my decision for this permit are as follows:

Sec. 19-357 Continuance of a Nonconforming Situation (Reads from Building Inspector's rebuttal provided to the Board and attached hereto and incorporated in these minutes) Added emphasis to the following paragraphs:

(2) Extension in setback space and wants to focus on definition of yard size and I can understand Mr. Lindsay's statement of measurement starts at the ground and it continues up to Heaven and that is the interpretation that the Town of Kure Beach has upheld since 1947.

(4) Extension in use. Mr. Lindsay uses this and divides it into three parts. "There shall be no extension in a nonconforming use. . ." This is not a nonconforming use. This is a permitted use in this district. (Reads from Building Inspector rebuttal provided to the Board and attached hereto). This is pertinent to every nonconforming use in the Town of Kure Beach.

- The owner requested to construct a third story on an existing nonconforming structure which does not meet setbacks.
- The owner was informed in accordance with Sec. 19-357 that the new third story would be required to meet the setback.
- The application showed that the new third story would meet the minimum required setbacks
- The survey submitted with the application verified that the third story addition does comply.
- Sec. 19-188 does not apply to this case since the house was built in 1986, 24 years ago and does not have a file to indicate if the code was enforced at that time. Records go back seven years.
- All three of the appellant's properties are also nonconforming in relation to yard size and can be enlarged in accordance with Sec. 19-357.
- In regard to Sec. 19-321.5, the owner is not adding any additional impervious coverage.
- Sec. 19-357(4) Continuance of a Nonconforming Situation – Originally enacted in 1973, the rest of the ordinance was codified about three years ago; some additional changes with the latest revision in 2008. I participated in the drafting of the ordinance and can verify as to its intent that the code is being met. The main intent was to provide a means for someone to build a house on their property, no matter how nonconforming.
- The ordinance does not have a definition of "yard size" but it does have one for "yard."

(See Building Inspector's rebuttal provided to the Board and attached hereto)

- The code states clearly that an addition can be added to a nonconforming structure as long as new nonconformities aren't created.

Member Garibay asked if the design has been approved. Inspector Batson answered yes, the third floor is smaller and complies with the setback.

Member Garibay asked how many bedrooms and what type of space. Inspector Batson answered, he believed a living room on the second floor and bedrooms on the third floor, four bedrooms total.

Member Garibay asked if it had parking facilities. Inspector Batson, yes in accordance with the ordinance.

Member Coe stated she saw concrete being taken out from the back, by taking that out does not increase the impervious. Inspector Batson answered, no that increases the pervious. Concrete is probably being taken out for pilings.

Member Allo asked is there 20 ft setback in front. Inspector Batson answered it is 19.71ft.

Member Allo asked is it 4ft. something on each side. Inspector Batson answered, yes that is correct.

Member Allo asked is it approximately 8ft. in back. Inspector Batson answered I think the back actually meets the setback as far as the main structure.

Member Allo asked does that come close to the 65% lot covering. Inspector Batson answered they have enough on the entire lot. The survey that Mr. Lindsay has shows all the dark grey that is the property.

Member Allo asked do you have some minor disagreement as far as not meeting the full extent of side yards, but you do have a 20 ft. setback in front and you are going to have another parking space there. Inspector Batson answered, yes.

Member Boulter asked is it an illegal conforming and a legal nonconforming as Mr. Lindsay refers to a legal nonconforming use and an illegal conforming use. Inspector Batson answered, I believe you are referencing the Real Estate law that Mr. Lindsay presented in his argument. I am not familiar with that, I have my ordinances and that is what I go by. I am not familiar with Real Estate law and I know there was something mentioned before about disclosing that.

Member Boulter asked what the legal comment is on that. Attorney Moore answered I am thinking of where a variance would be required. If it is not illegal to begin with and has been illegal all along, then I can't think of what scenario requires a variance. Legally nonconforming is if it started out illegal and is legal because of the change. If it is illegal then it is

nonconforming. If it never complied I can't think of how you can make it a legal nonconforming.

Member Coe asked if it has been there for 24 years., why today are we changing the story. Many people are looking to build on a nonconforming structure and they are approved as long as they build within the confines of what was there. Why an appeal 24 years later. If it is a nonconforming lot, would that make it out of the 65% rule. Inspector Batson answered, no it would still be held to the 65% rule at the time of the new construction. What they have is what they have had for 24 years.

Member Humphries asked is what you are saying they are not doing anything to the first two stories, they are not widening, not extending it. Inspector Batson answered the only thing they are doing with the existing structure is rebuilding the inside. They are not changing the outside.

Member Humphries asked that does not fit into the setbacks, that is in violation of the yard size. Inspector Batson answered yes.

Member Humphries asked that the third story is going to be within the setbacks as defined by our ordinance. Inspector Batson answered yes, that is correct.

Member Allo asked do we have in the ordinance that if an owner has two lots, that are nonconforming because of size, that they need to bring those two lots into conformity. Inspector Batson answered, I believe so, yes.

Member Allo asked our standard lot in Kure Beach requires 50x10 does it not. Inspector Batson answered I understand that.

Member Garibay asked on the new structure was it engineered for the third floor, will the roof be similar to the roof and the same square footage, will there be additional square footage to the roof. Inspector Batson answered that it should be smaller.

Member Garibay asked I heard Mr. Lindsay speak about runoff so will there be any run off due to impervious. Inspector Batson answered there should be no problem, they are not adding any impervious to the property.

Don Lindsay testified as a rebuttal to Building Inspector's testimony that:

- The Building Inspector stated that supplemental district regulations do not apply because it is for new construction.
- Reads from Exhibit "A" referenced above as provided to the Board and attached hereto. It says that these regulations are prerequisite to construction, demolition, remodeling. The issue is it is a remodeling project.

Audrey Lindsay testified that:

- I want to ask the Building Inspector about the pilings, what is going on with that. Inspector Batson answered the contractor is putting in pilings to support the back end of the structure. They are replacing the existing ones. The footprint is not changing.

- There is a problem with the shed, it is less than three feet from the property line and has to go and for the 20 foot front setback they will have to go inside the building.

Chair Humphries stated you realize the building is beyond the setback and is encroaching in the setback, we understand that.

Testimony was closed by Chair Humphries at 10:05 p.m.

DISCUSSION OF THE BOARD:

- Chair Humphries stated that I don't think our Town Council or Planning and Zoning, when the ordinance changed in 2008, meant to say that a nonconforming property as long as you are not adding to that nonconformity, can go ahead and add onto the property. I believe the intent was that for a nonconforming like this one, for an owner to get benefits they can go up the 35 feet. They can go up another story so long as it doesn't violate the code.
- Member Allo stated that the way we worked it in the past, as long as the work on the property is within the confines of what is acceptable, this property is not nonconforming due to use, but only for structure. So from that standpoint it is nonconforming. Sec. 19-321.5 Prerequisite to construction states no permit shall be issued, etc. Regardless if it is nonconforming, from the standpoint of size and if it cannot be indicated that you have 65% (impervious) of the lot, then no permit should be issued.
- Member Humphries stated it says that no structure in the B-1 District is exempted. I don't see a problem with the third story. Even though Mr. Lindsay says you measure from the ground, the existing structure is there, they don't have to change that. When they add on to it they must be in compliance. However, the 65% may not allow the permit.
- Member Allo stated if the 65% rule isn't met, can't have the permit.
- Member Coe stated we are not changing the lot or yard area.
- Member Garibay stated I heard the Building Inspector say they are improving the pervious and some concrete is being taken out. They are improving the situation from what it was.
- Inspector Batson stated I am not making that part of my testimony. I do not know that for sure. If they add more concrete back, I will not allow it but I do not recall what it says in the plans.
- Member Garibay stated it is our understanding that the impervious will be less.
- Member Coe stated that the use of the property is not changing, it is considered a nonconforming lot. The house has been there since 1986. The lot was sold and divided

which made it a nonconforming lot. I do not see anything here that would prevent it. They are not encroaching on any setbacks in the back of the dwelling.

- Chair Humphries stated that yard goes from the street to the building. We can't have them tear down a wall and move it back because it is an existing structure. I have a problem with the issuance of this permit and I will give my reasons and verify them with facts. If the impervious surface exceeds 65% of the lot, then we can't issue the permit. We don't know when there is no testimony before the Board tonight that they are not going to exceed the 65%. There is testimony that they are in violation of that, most likely.
- Member Boulter stated if it is in excess of 65%, it is already nonconforming there may be a legal issue.
- Chair Humphries feels that the ordinance deals with a residence, nonconforming legal or illegal residence the ordinance does in fact address that and says that as long as they don't violate the setbacks any further, you can build on the residence.
- Member Allo stated as far as the statutes are concerned and the ordinance that covers the Board of Adjustments direct our attention to the statutes and our zoning.
- Member Boulter stated I agree with you but wonder if there is a legal issue.
- Chair Humphries stated there may be a legal issue regarding realty laws, but we already asked our attorney and he says, he didn't know.
- Attorney Moore stated he wants to direct attention to Sec. 356 which describes what a nonconforming situation is. If it doesn't fit that, then Sec. 19-357 doesn't apply. It talks about when the ordinance was passed it does not conform. So when you talk about setback ordinance it did not comply when the ordinance was passed, the answer is no.
- Member Allo stated they used to have for substandard lots a different formula for figuring the side lots and the back. That was when we were dealing with lots that were 25'x100'.
- Attorney Moore stated that it sounds like a crucial question. It has been presented that the same standards that are in place now were in place then.
- Member Allo stated it is a crucial question and it has been. We need background information in our ordinance so when we are dealing with this, we can go back to that date and find out exactly what the procedures were then. I can't say whether these were correct at this point because I don't know what changes were.
- Chair Humphries stated we don't know if a variance was granted back in 1985 or '86.

- Attorney Moore stated that in order to see if Sec. 19-356 applies when you have a nonconforming situation, you need to know what the situation was when the ordinance was passed.
- Chair Humphries stated the ordinance says it uses the effective date of the ordinance and it is the point in time when making the decision.
- Member Allo stated that would be whether it as nonconforming, but when making it an issue and if this is in now about the 65%, you couldn't go ahead because you are creating a nonconforming situation. You can't call the other one nonconforming when you don't know what the situation was back then. Even if it were conforming, by making an addition what we have now, you are taking it and putting it into a nonconforming condition if you fail to pay attention to the 65%.
- Attorney Moore stated what I am saying is if it doesn't meet the Sec. 19-356 which is nonconforming situation, then you don't get into Sec. 19-357 which is continuance of a nonconforming situation.
- Chair Humphries stated I think it does fit nonconforming since it doesn't have the lot size, the setbacks and it is obvious that the property is nonconforming. It may have been grandfathered in 1985, but at this point in time, it is still nonconforming so Sec. 19-357 applies.
- Attorney Moore stated if when the ordinance was passed and it complied and the structure came later and didn't comply, then it doesn't trigger Sec. 19-357.
- Member Allo stated as the ordinance stands now, it has been changed which would reflect on this property today as being nonconforming. Regardless of whether it was nonconforming back then or not. Since it is nonconforming now because of the way the ordinance is written, we have to apply this.
- Chair Humphries stated we have an ordinance in place that was passed a year or so ago saying previous decisions by Council, the Board, Building Inspectors shall not be held as prerequisite to what we take into account.
- Member Allo stated we can only address what we have in front of us today not go back to previous ordinances. This property today is nonconforming. Because it is nonconforming this particular aspect as far as permitting the 65% permeability requirement is fair. It doesn't change anything. Whether it was correct or not in 1986, today it is not.
- Member Garibay stated as to Sec. 19-321 and 321.5 those reference what I feel is less pertinent to the yard as far as impervious. Does it mean that because of the remodeling you are causing 65% or does it mean any remodeling on the property that is already 65%.
- Inspector Batson read from the ordinance: "No permit shall be issued if the total square footage of the buildings and impervious ground covering surface will exceed 65% of the

lot. They are adding on to the property but not to the square footage so that does not apply. In addition to that, Art. IV Sec. 19-357 Continuance of Nonconforming Situation. "The lawful use of a structure, land or use of a structure and land existing at the time of the passage of this ordinance from which this section was derived may be continued although such does not conform with the provision of this chapter to include 321.5 provided they conform to the following provisions. I don't know if it can be any clearer. In addition, the property owner just stated to me that he wants to tear out all the concrete and that was one of his original plans. That is the first time I heard that and I cannot say that is what will happen.

- Member Garibay stated there is always different interpretations of the building codes. You can never write the code where it will apply to every individual in every municipality in every state. That is why the code official is here to make his interpretation and you have to respect the fact that it is the interpretation of the code under the situation. I respect what the Building Inspector has done in the research and you can't go back 20 years and say what were they thinking. We don't know and may never know. We can only look at the facts today and see the information the Building Inspector had when he issued the permit. What I would like to see is that some improvements with the property, regarding storm water runoff it is very important and I support that approach.
- Member Coe stated that I believe this to be a nonconforming property and they are improving the land by taking out the concrete.
- Member Boulter stated he believed it to be a complex issue I have been hung up on the legal issue of the building. We have come to know now that it was illegal to start with, and we have to concede that it continues as a non-conforming property with the third story.
- Member Allo stated as long as it meets the 65% rule then the third story if it stays within confines as far as setbacks, the whole building is nonconforming. I still don't know what the square footage is.
- Attorney Moore stated you need to rule on what you have or decide you need more information and reconvene to get more information.
- Chair Humphries stated we need clarification regarding the 65% impervious. We would need something from the contractor saying that the concrete is being torn up and not replacing it and the Building Inspector needs to see that it does not exceed 65% and bring that to the Board.
- Member Allo stated if you are talking about the driveway, there are two parts that says impervious can't exceed 65% and if the driveway at the property line can't be more than 24 feet wide.

- Inspector Batson stated one more time for the record Sec. 19-357 explicitly says that when a property does not conform with the provisions of this code, Chapter 19, here are the provisions they must conform to and it gives 11 different requirements. Sec. 19-321.5 is for nonconforming properties. The entire chapter is for nonconforming properties and they inserted certain ordinances simply for nonconforming properties.
- Chair Humphries asked the attorney if we continue this hearing, how do we go about that.
- Attorney Moore stated that you continue it to the next regular scheduled meeting and hear more evidence on whatever points you need to make an informed decision and readvertise it, but not sure if that is necessary since interested parties are here tonight.
- Member Allo stated that his opinion has a reasonably decent idea of where he is coming from and we could take a yea or nay whether to issue the permit or not and if it is no, then we already have the information that is a concern without coming back to the Board.
- Member Garibay stated I agree that we need to maximize the impervious surface and eliminate runoff at what percent that would be, but that could be a recommendation as a condition.
- Member Boulter stated I think we should vote either to uphold the Inspector's decision or not.
- Member Humphries stated he was not sure there can be a condition, it has to be yes or no.

DECISION/VOTE OF THE BOARD:

Chair Humphries stated that based on testimony and our discussion and finding of facts, we find that this is a nonconforming structure; we find the ordinance allows for the building and the third story because the third story will meet setbacks; there is a question as to the 65% impervious surface whether that is exceeded and there is no testimony that it has or has not been exceeded; we find that although the property is nonconforming, the third floor will conform to the setbacks required in Sec.19-357 and, therefore, can be continued in a nonconforming situation. However, we also feel that because of the concrete and other structures around the property, it may exceed Sec. 19-321.5 that says no permit shall be issued if the total square footage of the buildings and impervious ground covering surface will exceed 65% of the lot. In finding of the facts we will take a vote to issue an order *upholding* the decision of the Building Inspector allowing the third story addition to the existing dwelling.

Member Allo – no
 Member Boulter - yes
 Chair Humphries – no
 Member Coe - yes
 Member Garibay - yes

We have three yes and two no. The permit stands.

ACTION: MEMBER COE MADE THE MOTION TO UPHOLD THE DECISION OF THE BUILDING INSPECTOR FOR THE ISSUANCE OF A PERMIT ALLOWING THE THIRD STORY ADDITION TO THE EXISTING DWELLING. MEMBER GARIBAY SECONDED THE MOTION. THE MOTION CARRIED BY A VOTE OF 3 TO 2 AS REFERENCED ABOVE.

Mr. and Mrs. Lindsay were advised of their right to appeal the decision of the Board and that an appeal could be taken to the New Hanover County Superior Court within thirty (30) days of the date the decision is filed in the Town.

ACTION: MEMBER COE MADE THE MOTION TO ADJOURN THE HEARING AT 11:30 P.M. MEMBER GARIBAY SECONDED THE MOTION. THE VOTE WAS UNANIMOUS.

REVIEW OF MEMBER TERMS:

Chair Humphries' term expires in May 2011
Member Charlie Allo expires May 2011
Member Peter Boulter expires January 2011
Member Dolores Coe expires April 2013
Member Tony Garibay expires October 2013

MOTION: MEMBER GARIBAY moved to accept the review of member terms
SECOND: Member Coe
VOTE: Unanimous

Those expiring this year need to express an intent to reapply.
Chair Humphries will reapply, Member Allo will reapply, Member Boulter will reapply

ELECTION OF CHAIR AND VICE CHAIR:

Chair Humphries would like to pass after six years. He nominated Member Peter Boulter to the Chair position.

MOTION: Chair Humphries
SECOND: Member Garibay seconded
VOTE: Unanimous

MOTION: Member Garibay nominated Member Charlie Allo as Vice Chair
SECOND: Chair Humphries
VOTE: Unanimous

ANNUAL REPORT:

Chair Humphries read the Annual Report

MOTION: Member Coe moved to accept the Annual Report
SECOND: Member Garibay
VOTE: Unanimous

REVIEW OF RULES OF PROCEDURE:

No changes to Rules of Procedure

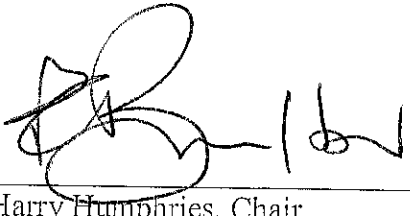
ADJOURNMENT:

MOTION: Member Garibay moved to adjourn

SECOND: Member Coe

VOTE: Unanimous

Meeting adjourned at 11:40 p.m.



Harry Humphries, Chair

↳ Peter Baultes for

ATTEST:



Josie Fitzgerald, Secretary