

BOARD OF ADJUSTMENT
MEETING MINUTES ♦ March 26, 2013

MINUTES

A meeting of the Kure Beach Board of Adjustment was held March 26, 2013, at Kure Beach Town Hall, located at 117 Settlers Lane, Kure Beach, NC for the purpose of meeting and Hearing Case #13-01. A quorum was present.

MEMBERS IN ATTENDANCE:

Peter Boulter, Chairman
Harry Humphries
Tony Garibay
Sandra Whaley
Bryant Bass – Alternate

MEMBERS ABSENT:

Dolores Coe (excused)
Gail Carelli (alternate)

STAFF ATTENDANCE:

John Batson, Building Inspector/Code Enforcement Officer
Josie Fitzgerald, Secretary

Attorney Holt Moore was requested to attend (BOA Council)
Attorney Andrew Canoutas was requested to attend (Town Council)

CALL TO ORDER:

Chairman Boulter called the meeting to Order at 7:00 pm

APPROVAL OF THE MINUTES (Meeting January 22, 2013):

MOTION: Member Bass
SECOND: Member Garibay
VOTE: Unanimous

OPENING OF HEARING CASE #13-01:

Hearing requested by Richard and Ann Lawing

Instructions to Board of Adjustment Members:

- Board of Adjustment is a “quasi-judicial” administrative body that operates on a level between enforcement officers and the courts
- Members may only consider substantial, competent and material evidence for factual determination
- Everyone who wishes to speak must be signed in. Hearsay and opinion testimony may not be considered in findings of fact.
- Applicant must prove that ordinance standards have been met
- Zoning Officer must present sufficient contradictory evidence
- Each member will vote based upon his or her determination with regard to which party presents the greater weight of credible evidence
- Concurring vote of four-fifths of the Members is required to reverse any order, requirement, decision, or determination of the Building Inspector/Enforcement Officer.
- Findings of Board are limited to, as to each issue:
 - Order upholding decision of Zoning Officer
 - Order overturning the decision of the Zoning Officer

Poll of Board Members:

Chair Peter Boulter – no conflict
Member Humphries- no conflict
Member Garibay - no conflict
Member Whaley - no conflict
Member Bass – no conflict

Administration of Oath to all testifying

John Batson, Building Inspector/Enforcement Officer
Richard Lawing, Applicant
Ann Lawing, Applicant
Ruggles Pope
Ken Beasley
Mayor Dean Lambeth
Diana Cebrick

TESTIMONY AND CROSS EXAMINATION:

1. John Batson, Building Inspector/Enforcement Officer

- My name is John Batson. I am the Building Inspector, Fire Inspector, Code Enforcement Officer, Beach Renourishment Coordinator and Zoning Officer for the Town of Kure Beach. The appeal before you is for my interpretation of Town Ordinances and NC Building Code. 242 N. Third Ave is a brand new house built by the Lawings and is located in a B-2 Zoning District.

- In November, I was asked to complete a final inspection. The final inspection failed because I did not have a final as-built survey on the property and the landscaping was not installed. At that time, the Lawings asked me to turn on the power so they could install landscaping and water with an irrigation well. I obliged on a condition that I receive the as-built survey.
- On November 6, I received the as-built survey and turned on the electricity. Normally, I would have required a thousand dollar bond prior to doing this since the final inspection failed. I did not in this case. After review of the as-built survey, I noticed that the well house was located inside the side setback and the fireplace was hanging two (2) feet into the side setback also. This is a corner lot and the side setback is ten (10) feet. I also noticed multiple real estate signs, a cedar tree and stakes in the Town right-of-way.
- The issues that I described are all in the Town Ordinances.
- The well house covering the irrigation well – Town ordinance specifically says that the only structure that can be located in the setback is a fence or beach crossover. Sec. 19-320. Control of setbacks.
- The fireplace hanging into the side setback – The Town ordinance does not provide for any cantilevers into the setback area. The building plans did show a fireplace on them, but the plot plan did not and neither did the final as-built survey. The purpose of plot plans and survey are to show me that impervious surface restrictions are being met and the setbacks are being maintained. Anything covered by a roof, concrete or anything in the setback area should be noted on the survey.
- Any structure requiring a building permit shall not be permitted in the setback area with the exception of fences and beach walkovers that are at least ten (10) feet to the rear of the building and meet the 1996 Hurricane Replacement Standards.
- The Code does allow some things to extend eighteen (18”) inches into the setback. Those can be found in Sec. 19-329, Modification of required yards. A fireplace is not on that list.
- Real estate signs and the cedar tree – Per Town Ordinance, real estate signs shall not be located in the Town right-of-way. You can find that in Sec. 19-373, Subsection 4. The cedar tree was located in the Town right-of-way and was addressed because it has the potential to grow very large and creating a visual difficulty at the intersection. You can find this in Sec. 14-7. Failure to remove obstructions from a right-of-way. I am not withholding the CO because of this tree.
- Other issues are from North Carolina State Building Code and cannot be ruled by Board of Adjustment. I will go through each of these issues since they were introduced as part of the appeal.
- Windows – The Board is aware of the issue with the window which I broke during the inspection in July. As part of my inspection I check the windows to make sure the right windows are being used. The difference between impact glass and a regular window is like

hitting a brick wall then hitting a wooden wall. When I hit the top sash, it shattered. The Lawings said another window had come in broken and it had to be replaced.

- On November 6, the Lawings call called the Mayor and informed him that I broke the window and the Mayor forwarded the information to my commissioner, and Ms. Swearingen told the Lawings that the Town would pay for the window. The Town paid for the window on February 1. My request for a receipt to show the windows were bought and installed was purely for my protection and the Town. Although the windows appear to be correct, the window that broke should not have broken and it was a similar request that I have made numerous times to other contractors.
- Irrigation well– I have had inquiries as to whether the new irrigation well was installed legally. The governing body for well installation is the NC Division of Water Quality. I have requested a letter from them stating the well was legally installed.
- Furniture inside the house – North Carolina Building Code and Administrative Policies state that a Certificate of Occupancy must be issued prior to the building being occupied. Furniture within the building implies occupancy.

Discussion:

Member Garibay – How much of fireplace is overhanging?

Inspector Batson – According to the as-built survey provided, it appears to be two (2) feet. When I asked to have the survey redone to include the fireplace, the Lawings did not provide one.

Member Bass – Is the house actually sitting on the setback?

Inspector Batson – It appears to be.

Member Bass- So the cantilever is overhanging?

Inspector Batson – yes.

Chairman Boulter – Was there any answer from the Division of Water Quality?

Inspector Batson – I have heard nothing from them.

Member Garibay – Tell us about the \$1000 bond.

Inspector Batson – Normally I require that on every job and have several checks I am holding for temporary turn ons.

Member Bass– Is there a reason why you did it this time?

Inspector Batson – I did not anticipate any issue.

Member Bass - Do you have a copy of the survey as built?

Inspector Batson - Yes. (submitted a copy to the BOA)

Member Garibay- Was there a warranty for the window that was broken. Understand it was impact and was not supposed to break. Would the manufacturer warranty that, was the manufacturer notified?

Inspector Batson – I do not know about that. The bottom was supposed to be impact resistant on the inside; on the top sash, the impact is on the outside. That is the way it is engineered. I do not know if the manufacturer was notified. I am not privy to that.

Attorney Holt Moore – The Building Inspector has submitted the as-built survey and should be part of the record since the Board is reviewing it.

Member Humphries – Was the fireplace on the survey?

Inspector Batson – No, the fireplace was not on the survey.

Member Whaley – Did anything that you have, have the fireplace on it?

Inspector Batson – The original building plan had the fireplace, but the plot plan did not.

Chairman Boulter – The plan says “well” but not show the well house.

Inspector Batson – That is correct. That was another request, a plot plan to show the well house.

Member Garibay – The well house is small and removable?

Inspector Batson - Yes.

Member Garibay- Do we have a letter stating that the well meets all the proper codes?

Inspector Batson – No sir, I never received a letter.

Member Whaley - Was there a survey done before the building plans?

Inspector Batson – I do not have a survey, I just have a plot plan.

2. Ann Lawing: (Applicant)

(Submitted a copy of the statement she will be making)

- My name is Ann Lawing and my husband is a building contractor and has built for a number of years. I am speaking because he has a hearing problem, wears hearing aids and is difficult for him to hear sometimes.
- When John Batson came for the framing inspection on June 29, 2012, he was mad because I had called five days straight to get him to inspect. I left messages and called Town Hall to see if he was on vacation. I left messages several mornings when he was supposed to be in.
- Finally, I called the Mayor to find out what to do.
- When John came, he said he forgot the inspection. At the inspection, he locked himself out on the third level porch and had to call the fire department.
- While inspecting, he banged on the window with his hand to test for impact glass. The inside shattered. Inside glass is not impact. The impact glass is written on the window. Impact glass is on the outside.
- I told John about another cracked window in another part of the house.
- The windows are standard and not special order. Ms. Swearingen said they were put in backwards.
- We had power since November 7, 2012 and we did not know we were not signed off. We would have moved in if our current house had sold. We had no clue we did not have a final inspection.
- We called for a final inspection in late October. We did not ask for any favor to turn on the power, just for the final inspection.
- John went through the house and the yard and said everything looked good.

- He (inspector) asked for a plot plan and we called Stuart Jones, Professional Land Surveyor, who we used for many years and he did the plot plan and height elevation which we gave to John and he said everything was okay and he would call in a final for power.
- If there was anything wrong, he (John) should have said so then.
- He (John) asked about grass and we told him we were putting out sod and waiting until we had power to irrigate. We had temporary power and could have hooked up irrigation. He said he trusted us to put the sod out.
- The yard was completely ready with irrigation system and palm trees were there. The only thing missing was the sod. If he asked for the \$1,000, we would have asked about the inspection.
- John didn't say anything was wrong with the building permit or anything was wrong.
- The stickers were on the windows at the framing inspection and still there at the final inspection and once we got power we cleaned up the house.
- The cantilevered fireplace was shown on the plans and the truss system plans and if there was a problem, John should have said there was a problem. We told him we cantilevered the fireplace.
- The plot plan we submitted, it showed the foundation plan, it showed the lot and where the house was sitting. If it didn't show the cantilever, John should have figured that out.
- The lot was 50 feet, the house was 35 feet, 5 foot setback on one side and 10 feet on the other side, that equals 50 feet. Why couldn't he figure it out? He kept the plans several days.
- We used 2x6 outside walls which means you need space for the firebox without it being next to the wood and our plans called for two feet and it showed the 2x6 inch walls and was shown on the plan that we gave to John.
- Applicant refers to Sec. 19-329 concerning setback and says balconies and similar features can extend 18 inches into the setback along with other structures, most of which go to the ground. It eliminates carports and porches, but does not say you cannot cantilever.
- There are cantilevers all over Kure Beach and I have pictures to show you.
- The surveyor did not put anything that did not go all the way to the ground on a plot plan. The cantilever is on the second level, about five feet wide and goes to the third level. It does not go to the ground, it is just an overhang. It is on the side of the house that has the ten (10) foot setback. (photos submitted)
- If they had known, they could have done something before house was finished.

Attorney Canoutas – I would like to see the photographs because I may be objecting to them being introduced. (Review of the photos) These photographs show cantilevers but they do not show measurements or distances to property lines and in his opinion it is inconclusive by viewing the pictures that there are violations. He would allow Board to review the photos.

Inspector Batson stated that one of the photographs showed a property that was approved by the Planning and Zoning Commission.

- An old well was there and should have been grandfathered. A new well was put in June, 2012.
- John didn't say anything about the well or that there was a problem until February, 2013.
- It is an irrigation well and not for the house and is removable
- The well house is three (3) feet.

- I don't know what the Division of Water Quality is or how to get in touch with them.
- Our well house does not require a building permit according to the code.
- There are other showers, gas tanks and air conditioners in the setbacks.
- The well house is only a few inches in the setback.
(Submitted photos of well house- reviewed by Attorney Canoutas and submitted to BOA)
- The signs and small stakes do not have anything to do with passing inspection.
- There are signs all over the town on the right-of-way. (photographs were offered, Chairman Boulter declined to have the BOA review them)
- The cedar was there when we bought the property. There are other trees, palms in the right-of-way. We don't mind or care if people put trees or signs out to see.
- There is one sign in front and one on the side.
- The string was put out to protect the sod. It is out to the right-of-way to look nice for the town so people won't walk on it or walk their dogs there.
- John cost us the sale of our house because he spoke with a potential buyer.

Attorney Canoutas – There is no proof of a potential buyer.

Chairman Boulter – You can only give us facts.

- John has a vendetta because he is mad because the town had to pay for the window he broke.
- John told someone that he was going to make it hard on us. (that person is here to testify)
- We were being charge \$30 for a reinspection for a final inspection.
- We were told we did not pick up a CO. Richard has built for 40 years and built over 200 houses and we never picked up a CO.
- We got permanent power from Progress Energy and we considered it final. Progress says bank considers final when power is turned on.
- We tried to resolve the issue with meeting with John and Mrs. Swearingen.
- It is a beautiful house and we have never had a problem with inspections in the past. No one has ever asked for a CO, no homeowner asked for a CO.

Discussion:

Member Garibay- How many houses have you built at KB

Lawing - May about 12 to 15-- over 200 in New Hanover and Pender.

Member Garibay- When was the last time you built in Kure Beach?

Lawing – About ten (10) yrs ago.

Member Garibay – The houses you built in New Hanover County, were they beach areas or inland?

Lawing – Inland

Member Garibay – The houses you built in the last ten (10) years.?

Lawing – It's about ten years at the beach--none since.

Member Garibay – You said the well was grandfathered.

Lawing – I felt it was grandfathered because it was already there. You don't get a permit for an irrigation well only if it is for the house.

Member Garibay- Did any code official or well inspector say the well was legal or illegal?

Lawing – The question did not come up before.

Member Garibay - Is it possible to change piping so the well house is within the set back?

Lawing – I don't know, can't say. Someone is here to talk about it.

Chairman Boulter – There are a number of issues some of which are ordinances and others are relating to Inspector Batson's performance. What are you hoping to get out of this hearing?

Lawing - To find out what we did so bad to be fine in November and then to find out we are not fine. Hoping that you will approve the cantilever. We were not told we had to stay within the setback.

Member Whaley - Was there a well house before?

Lawing - When the lot was cleared, they tore everything down and I am not sure, doesn't remember.

Member Humphries - Does the survey show the fireplace cantilever?

Lawing – It does not, the surveyor says doesn't put it on survey.

Member Humphries – So how would John know there was going to be a cantilever.

Lawing – He saw the plan showing a lot 50 feet wide, a house 35 feet with the setback and we couldn't put the fireplace inside the house.

Attorney Holt Moore – During the course of the testimony, each side will have the right to ask questions.

3. Ruggles Pope

- My name is Ruggles Pope and I have been a landscaper for 35 years.
- I have known Richard Lawing for 30 years and have done a lot of landscaping for him. I don't know of any time when he built ever having this much trouble. He builds like it is going to be his own house.
- When we first looked at the lot, there was a lot of debris, trash, cinder blocks, wood sticking up, debris from post office. We cleaned it up so we could put the irrigation in.
- The reason for the stakes and string is just temporary to keep people from walking on the grass before it roots.
- Once a well is there, it is there and a permanent fixture. We keep ten (10) feet of the house to put a well in. If one is already there, you can put it in the same place. It is grandfathered. We put the rocks over them all the time without a problem.
- Richard builds a good house.

Discussion:

Member Bass – Are you a licensed well driller?

Pope – No

Member Bass – Are you a licensed irrigation contractor?

Pope – I am a licensed landscaper.

Member Garibay – The numbers that you stated, do you have any information we can see?
Pope – I do, but not with me.

4. Ken Beasley

- My name is Ken Beasley and I have been selling building materials for 30 plus years for Lowes, Contractors Yard
- I am familiar with the windows, they are impact glass.
- Mr. Batson mentioned the top sash is impact on the outside layer and the inside layer is insulated and the bottom is just the opposite.
- He received a call regarding the house meeting the code and he didn't know there was any problem and the caller said he heard there were issues with this home and do not meet the code.
- He has known the Lawings for a number of years and they have been reputable builders and build a quality house.

No further Discussion:

5. Mayor Dean Lambeth

- I received a call from Ms. Lawing and she said that she requested an inspection five (5) different times.
- When I called John in, he got upset and said I should tend to the business of Mayor and not business of inspection.
- She called again when they had the problem with the window and I assumed that John thought they would let the window go. John said he would make it hard on them in more ways than one for paying for the window.

Attorney Canoutas – John's position is Building Inspector and Code Enforcement Officer, and do you expect him to carry out the letter of the law.

Lambeth – Yes

Attorney Canoutas – He took an oath of office to do that.

Lambeth - Yes, he did.

Attorney Canoutas – Can you tell us which law he violated in the inspection of that house?

Lambeth – I would say it would be, Mr. Lawing is an old cantankerous...

Attorney Canoutas – I didn't ask that. What law has he violated?

Lambeth – I don't know what law or any law.

Attorney Canoutas – So, he has carried out his duty that he was sworn to do?

Lambeth – Yes.

6. Diana Cebrick

- I am a homeowner.
- I just ask that you look at the Statute.
- Before the lot was terrible to look at. There was debris all over the place.
- This lot was turned into something beautiful

Discussion:

Lawing – Directed at Ken Beasley

Have you ever heard of another inspector tapping a window a breaking it?

Beasley – There is a time if you pick up the bottom sash, it will break. There is a rating

Lawing – Is the rating posted?

Beasley – Yes

Attorney Canoutas- The fact that you have not heard of this testing doesn't mean that is isn't going on? The tapping on windows by other building inspectors?

Beasley – I am not aware of anyone testing.

Attorney Canouts – But that isn't your specialty?

Beasley – No

Member Whaley – The bottom of the window, the inside is the impact side?

Beasley – The bottom is impact on the inside. The top is the impact is on the outside. Some manufacturers may have impact on both sides.

Member Whaley – Were there any faults with these windows?

Beasley – He did not have any problem before.

Member Bass – Is the bottom sash removable?

Beasley – It can easily come out. The top sash does not.

Lawing directed at Pope – We were required to put sod, how much sod did we put down?

Pope – You actually put more than required.

Member Garibay – Was it required?

Pope – No. It is just what they wanted. We put it around the catch basin.

Member Bass – Do you have to stabilize the soil before a CO is issued?

Pope – No

Member Bass – Are you sure?

Pope – I have seen many CO's given.

Attorney Canoutas – You do realize that John was not arguing about the well, he was talking about the well house. Do you still contend there is no problem with the well house?

Pope – The house is sitting on dirt.

Close of Testimony

Attorney Canoutas - Note to the Board. The window issue is a good portion of the appeal and is not before this BOA, that is a building code issue. There was a lot of hearsay, "the surveyor said," and without people being present.

FINDINGS OF FACTS AND DISCUSSION- BOARD OF ADJUSTMENT

Chairman Boulter – There are different issues of ordinance and some are not and need to be separated.

Member Garibay – What license does Mr. Lawing hold ?
Lawing – A Limited license.

Member Humhries - The window is not in our authority, the signs are not, the tree is not, the furniture is not. The only things that we can actually deal with are the setback of the fireplace and setback of the irrigation well house. Those are the only two issues.

We cannot deal with trees, or signs or issues with the building code.

Chairman Boulter – We cannot vote on the performance of the inspector, that is not in our jurisdiction.

All we can deal with is the set back of the fireplace and the setback of the well house.

All members concur.

Attorney Moore – Chairman, you may want to make a motion about certain issues and that you do not have jurisdiction over them.

Discussion and Opinions

Member Garibay – The window is resolved and is no longer an issue.

MOTION: Chairman Boulter moved that the issues of the windows, installation of the irrigation well, the furniture, the signs and the tree are under the authority of the Building Code and not within the jurisdiction of the Board of Adjustment.

SECOND: Member Garibay

VOTE: Unanimous 5/5

No vote will be taken by the BOA regarding those items

MOTION: Member Humphries moved that the issue of the well house in the setback being a violation is within the jurisdiction of the Board and a vote can be taken to uphold or not uphold the decision of the Building Inspector.

SECOND: Member Garibay

VOTE: Unanimous 5/5

Discussion:

- The well house is not in the ground it is just over the pipe.
- It is three (3) feet tall
- The house sits on top of the well
- The issue is that the well house is sitting in the setback
- The well house can be moved easily
- It would be very simple to move the well house.

Applicant was asked if they were willing to move the well house.

There was discussion on simply moving the well pipe if necessary and moving well house. It does not require any strapping, just moving the well house over.

- The well house is in violation and needs to be moved.
- We have rules about not putting things in the setback
- The well is definitely in the setback

The question before the Board is whether the decision of the Building Inspector's interpretation of the zoning ordinance was correct regarding the well house setback?

MOTION: Member Humphries moved that the issue of the well house in the setback being a violation is within the jurisdiction of the Board and the decision of the Building Inspector is upheld

SECOND: Member Garibay

VOTE: Unanimous 5/5

The decision of the Building Inspector is upheld.

The second issue is whether the fireplace is in violation

MOTION: Member Humphries moved that the issue of the fireplace cantilever in the setback being is under the authority of the Zoning Ordinance and within the jurisdiction of the Board and a vote can be taken to uphold or not uphold the decision of the Building Inspector.

SECOND: Member Garibay

VOTE: Unanimous 5/5

Discussion:

- The fireplace is within the setback
- Because the contractor has not built on the beach for ten (10) years, there are some things you have to be aware of.
- There is something new that comes up every day.
- There are rules that contractors have to know
- Because you build for 40 years doesn't give you a free pass
- Ordinances change all the time
- You have to stay on top and ask questions

- It is ultimately the general contractor's responsibility and to make sure the house is built to code and town ordinances.
- The surveyor says he doesn't put the cantilever fireplace on because it doesn't go to the ground, is it common?
- It is not the surveyor's responsibility, it is the contractor's responsibility to make sure the house is built right.
- The surveyor should be asked to put everything on the survey
- If you do an elevation certificate, you have to have everything on the elevation certificate.
- The applicant was asked if they had an elevation certificate.
- The plans did show the cantilever
- The applicant contends the cantilever was on the plan and John didn't catch it.
- Member stated if the Inspector doesn't catch something does that mean you get a pass on it?
- The contractor needs to know the limits, it is not up to the inspector or surveyor.
- It is the contractor's responsibility, the code official makes sure you are doing everything correct, but it is the contractor's responsibility to build the house right.
- Even if the code official doesn't catch something, it is still the contractor's responsibility.
- The Building Inspector has the eyes of the Town
- If there is a crack in a stud and there is a structural failure, it is not the Building Inspector's responsibility.
- The fireplace is not a total loss of the house, it may be put inside the house.
- The cost of changing the fireplace cantilever is irrelevant and is the contractor's responsibility
- Even a law enforcement officer cannot be held culpable for everything that accidentally he may overlook. The Building Inspector should not be held accountable for something he may overlook in his busy schedule. He caught it, and as was said, he is doing his job.
- Even though there may be other violations in the Town but we can only take case by case basis when brought to our attention.
- This cantilever is the issue we are discussing and no other issue at this time.
- If it is in the setback, it is in the setback and has to comply.

The question is whether the fireplace that sits in the setback is in violation.

MOTION: Member Humphries moved that based on the evidence presented, the fireplace is in the setback and does violate the ordinance and the decision of the Inspector is correct.

SECOND: Member Garibay

VOTE: Unanimous 5/5 to uphold the action by the Inspector

The decision of the Building Inspector is upheld

CASE CLOSED:

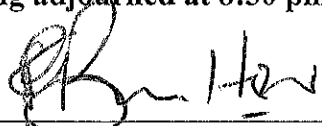
Adjournment:

MOTION: Chairman Boulter moved to adjourn

SECOND: Member Garibay

VOTE: Unanimous

Meeting adjourned at 8:30 pm



PETER BOULTER, Chair

ATTEST.


Josie Fitzgerald, Secretary