BOARD OF ZONING APPEALS

MINUTES

October 27, 1988

A. **ROLL CALL**

Absent

Mr. Bob Ripley
Ms. Nancy James
Ms. Elizabeth Vaiden
Mr. Claude Feigley

Others Present

Mr. Bernard Farmer, Secretary to the Board
Mr. Larry Davis, Assistant County Attorney

B. **MINUTES**

The July 28, 1988 minutes were deferred to the next meeting.

C. **OLD BUSINESS**

None

D. **NEW BUSINESS**

1. ZA-22-88 John Glenn

Mr. Farmer stated that Mr. John Glenn had requested a 5.1 foot variance from the side yard setback requirements of the James City County Zoning Ordinance for a proposed garage expansion. Mr. Farmer further stated that the applicant desires to build the addition to his existing detached garage which is presently 4.9 feet from the side property line. The applicant desires to extend the front of the building 9.5 feet forward, with the side remaining approximately five feet from the property line. Expansions of a nonconforming structure would be permitted, provided that the expansion itself conforms. Sufficient property exists to accommodate alternative designs which would meet ordinance requirements and since no legal hardship has been demonstrated staff recommends denial.

Ms. Vaiden opened the public hearing.

Mr. Glenn stated that he has been living in the house for ten months and knew that the garage was too small for his proposed use when he purchased the house. He purchased the house with the intention to expand the garage ten feet. He also stated that he had no idea when he purchased the house that there would be any problems with the proposed expansion until he had applied for the building permit.

Mr. Feigley asked Mr. Glenn why he needed to expand the garage.

Mr. Glenn stated that he has a twenty foot boat which is presently parked in his front yard.

Ms. Vaiden closed the public hearing.

Mr. Feigley stated that the plat plan shows a driveway/path from the lake to the existing garage and feels that this would be the obvious place for the placement of the boat and motioned to grant the variance request.

Mr. Ripley seconded the motion.

The motion was carried unanimously.

2. ZA-23-88 Prime Associates, Inc.

Mr. Farmer stated Prime Associates, Inc., had requested a 5.9 foot variance from the front setback requirements of the James City County Zoning Ordinance for a newly constructed house. Mr. Farmer further stated that a permit had been issued in March of 1988 to construct a dwelling on this parcel positioned forty two feet from the front property line. Evidently during construction some change in location was made moving the house approximately twelve feet forward on the lot. The lot is situated on a slight curve in the road and according to the applicant was misplaced partly due to their thinking that the road was straight at that point. The structure is completed and a Certificate of Use and Occupancy was issued prior to discovery of the violation. The applicant's variance request has stayed any action to revoke the Certificate of Use and Occupancy pending the Board's determination. No unusual topographic conditions or lot characteristics have been shown which distinguishes the parcel from other like zoned and since no hardship has been demonstrated staff recommends denial.

Ms. Vaiden opened the public hearing.

Mr. Dave Holland, representative for Prime Associates, Inc., stated that the house is occupied and that the builder

measured the location of the house wrong due to the curvature in the road. He further stated that there is no objection by the adjacent property owners and asked that the variance be granted.

Mr. Feigley asked if the garage was a one or two car garage.

Mr. Holland stated that he was not sure but thought it was a two car garage.

Mr. Feigley stated the he was disturbed by the fact that the builder had made such a mistake and asked who the builder was and if the builder had used a surveyor.

Mr. Holland stated that the builder was Mr. D.W. Mitchell and that Mr. Mitchell had not used a surveyor. He further stated that Mr. Mitchell assumed that the concrete ditch was part of the property line.

Mr. Feigley asked about the stakes/pins in the yard.

Mr. Holland stated that the stakes/pins were not discovered until the survey was done for the closing of the house.

Mr. Feigley asked if Mr. Mitchell was present to answer questions.

Mr. Holland stated that Mr. Mitchell was not present.

The Board members looked over the plans and discussed the possibilities of removing four to six feet of the garage and what this action would do to the value of the house.

Mr. Farmer advised the Board that if they were having trouble making a decision on this case that they could defer the case until the builder was present to answer any questions that they may have.

The Board unanimously deferred the case to the next meeting at which time the builder Mr. D.W. Mitchell is to appear before the Board.

The public hearing remains open.

3. ZA-24-88 The Estate of David W. Ware

Mr. Farmer stated Mr. David W. Ware Jr., Mr. Stephen A. Palmer, and Mr. Robert W. Ruark had applied on behalf of the Estate of David W. Ware to appeal the decision of the Zoning Administrator concerning the removal of nonconforming signs.

Mr. Farmer further stated that in March of 1988 renovations on the old Golden Skillet Restaurant were undertaken and that the structure was designated as a "nonconforming" use. As part of the conditions for permitting the renovations, Section 20-401 (a)(5) of the James City County Zoning Ordinance requires all signs be brought into conformance. The owner was notified by certified mail on March 24, 1988 and failed to register an appeal within thirty days as required by Section 20-432 of the ordinance. In July a suit was filed in Circuit Court against the County by the property owners asking the Court to find Section 20-401 unlawful and to prevent the County from voiding the Certificate of Use and Occupancy. The Judge, upon hearing motions, ordered that the Board of Zoning Appeals hear the case. Staff recommends that the Board of Zoning Appeals hold the public hearing as ordered by the Circuit Court, but withhold final action on the matter until legal counsel can be retained and adequate legal advice rendered.

Ms. Vaiden opened the public hearing.

Mr. Cecil Moore, Attorney representing the Ware Estate, stated that Mr. Farmer did the only thing he could do according to the ordinance. Mr. Moore further stated the building, its location, and signs were all within the zoning ordinance requirements and that only a few cosmetic changes were made to the interior of the building to meet the new owners needs. The only exterior change that was being done was to change the face of the sign. Because cosmetic changes were made in this building to meet the new owners needs, it is the position of the Ware Estate that the cosmetic changes were not sufficient in the State of Virginia to have the signs brought down, or in other words, to do away with the signs. It is the Ware Estate position that cosmetic changes are not structural changes. They feel that this is past the point that the legislature of the Commonwealth of Virginia had in mind when they passed the ordinance that deals with nonconforming uses. Generally speaking, it was intended that those uses would be allowed to continue subject to certain conditions. It is the position of the Ware Estate that passing this ordinance means that every business that makes cosmetic changes must remove or bring all existing signs into conformance to the new ordinance. They do not have any arguments with Mr. Farmers findings. Mr. Farmer did what he felt he had to do according to the ordinance. The ordinance says if they make a cosmetic change they must tear the signs down. The Judge did not understand the ordinance and ordered the Board to hear this case and make a decision. They do not intend to destroy these signs.

Mr. Larry Davis, Assistant County Attorney, stated that the ordinance in question states that any alteration to a nonconforming structure requires all existing signs to conform to the ordinance and that there are two or three nonconforming signs associated with the building. The Ware Estate came into the office to get a building permit to do interior renovations to the restaurant. In fact, what they did was to move around walls and gut the inside. The letter sent from Mr. Farmer on March 24, 1988 informed the owners that the structure was designated as a nonconforming use and as part of the conditions for permitting the renovations, Section 20-401 (a)(5) of the James City County Zoning Ordinance requires all signs be brought into conformance. They did not appeal within thirty days, at which time they lost the jurisdiction of the Board of Zoning Appeal. However, had they appealed to the Board of Zoning Appeals you could have granted them relief one of two ways:

1. You could have disagreed with Mr. Farmer's findings that the building was a nonconforming use, which the Ware Estate contends it is not.

2. You could have disagreed with Mr. Farmer's findings that the interior renovations were a reconstruction or structural in nature and, therefore, did comply with the ordinance.

The State code limits the County's abilities to deal with nonconforming structures in Title 15.1-492. Basically the law provides that if a nonconforming use is reconstructed or structurally altered the County can restrict it. He submitted that the basic principle of law is that when you construe an ordinance if it can be construed to be valid then you construe it that way. If you construe Section 20-401 (a)(5) to be valid, and determine that the cosmetic or interior renovations to the building were reconstruction or were in fact structural in nature or were not structural in nature, you could have made a ruling on the case if the applicant had responded within the time limit. It is basically the County's position that you have no jurisdiction even though the Circuit Court has asked/ordered you to hear and decide this case. Based on that the County does not want to ask you to put yourself in an awkward position without the advise of council so it would concur with Mr. Farmers recommendation that you seek counsel to analyze this matter. Certainly the County's position and the position that the County will ask you to take at the next meeting is to make a finding that you could have granted relief under the appropriate circumstances but that you have no jurisdiction because it was not timely filed.

Ms. Vaiden asked if anyone else wished to speak on this case.

Mr. David Ware, Jr., stated that he had been in court when the County had tried to throw this matter out on a technicality instead of arguing the law. Mr. Ware further stated that the Judge ordered the Board to hear this case in thirty days and now you are talking about another thirty days. If a lawyer was needed, the lawyer should have been obtained before now. He asked for a decision tonight. Mr. Zaharopolus, the restaurant owner, has been opened for business since May without a sign and he is the one suffering.

Ms. Vaiden asked if there was anyone else wishing to speak on this matter.

No one else wished to speak.

Mr. Feigley motioned that the case be deferred to the next meeting so that the Board could obtain legal counsel and that the public hearing remain open.

The motion was carried unanimously.

4. ZA-25-88 Anchor Builders, Inc.

Mr. Farmer stated that Anchor Builders, Inc. had requested a variance of 3.9 feet from the rear yard setback requirements of the James City County Zoning Ordinance for a newly constructed house. Mr. Farmer further stated that a permit was issued to construct a dwelling on this property with the proposed location thirty nine feet from the rear property line. Evidently changes were made during construction and the left rear corner of the dwelling encroached into the setback area. It is unclear when the applicant discovered the violation but it appears to be sometime during construction. The Code Compliance Office was unaware of the violation's existence and issued a Certificate of Use and Occupancy on August 29, 1988. It has not been shown that the application of the zoning restrictions has prevented the property from being placed in use and since no legal hardship has been shown staff recommends denial.

Ms. Vaiden opened the public hearing.

Mr. Gill Bartlett, representative for Anchor Builders, Inc., and the property owners Mr. and Mrs. Sutton, stated that a building permit was obtained earlier this year and according to Mr. Dodd there was an error in laying out the

house. The house was to be fifty feet from the front lot line and it turned out to be fifty five feet. The encroachment was not found until the footing was surveyed. It was at this time that Mr. Dodd took the survey to his attorney. Mr. Dodd's attorney advised him that it was not a problem and that he would take care of it. Mr. Bartlett stated he became involved in this matter upon the closing of the house when the final survey was done by Mr. Spearman which showed the encroachment. Mr. Dodd's attorney was confronted on this matter and he stated this was not a problem, and it would be resolved with title insurance. On September 29th, Mr. and Mrs. Sutton made the decision to close on the house if Mr. Bartlett would proceed immediately and file for a variance, which he did. When the application was submitted, a letter was also presented showing that Mr. Dodd's construction attorney had contacted the City of Newport News about obtaining a portion of the adjoining property to correct the rear yard setback. They denied this request due to the environment and reservoir policy regulations. There is no hardship demonstrated here but he asked that the variance be granted since there will be no other construction in this area and because Mr. Dodd acted on the advise of counsel.

The Board members asked to speak to Mr. Dodd.

Mr. Dodd stated that when he had the footing surveyed and the encroachment was found he took this to his attorney and was advised that the problem would be taken care of and to proceed with the construction. Mr. Dodd further stated that he advised Mr. and Mrs. Sutton of the problem and that his attorney advised him that he would take care of this matter. He advised Mr. and Mrs. Sutton to bring this matter up with their closing attorney. Mr. Dodd advised the Board if he had known that this would happen he would never have continued with the construction.

The Board took a few minutes to review the plans of the house.

Mr. Bartlett stated to the Board that Mr. Dodd has never appeared before any Board and has built twenty five homes in the last seven years.

Ms. James asked Mr. Dodd if he knew how his attorney had taken care of the problem.

Mr. Dodd stated that his attorney told him he would obtain title insurance on the construction loan.

Mr. Ripley asked who had actually set the pins to the house.

Mr. Dodd stated his superintendent.

Mr. Ripley asked if a survey had been done prior to the footing.

Mr. Dodd stated that a survey was not done until the footing was completed. Mr. Dodd also stated that the bank requires a survey be done upon completion of the footing if there is a construction loan.

There was a discussion among the Board members concerning the need for surveys prior to these situations occurring and how title insurance could solve encroachments.

Mr. Farmer stated that to his knowledge title insurance is obtained to protect the lender should the house have to be torn down. There was no action taken by the attorney that was a remedy to the law as far as James City County was concerned, it just allowed the financial transaction to continue.

Ms. Vaiden closed the public hearing.

Mr. Ripley motioned to grant the variance based on several reasons:

1. It is adjacent to a piece of property that will never be occupied and although this is neither right or wrong it will protect the ordinances intentions.

2. To restructure the house and tear off a corner of the house would not only be unsightly but costly.

3. The lot is a triangular lot which makes it very difficult to place the house accurately.

Ms. Vaiden seconded the motion.

Ms. James opposed the variance request.

The motion carried three to one.

5. ZA-26-88 David Tuftee

Mr. Farmer stated the Mr. David Tuftee had requested a variance from the rear yard requirements of the James City County Zoning Ordinance for a single family dwelling. Mr.

Farmer further stated that the applicant purchased the property in 1981 and in 1983 constructed a single family dwelling on the parcel. This dwelling encroached onto Newport News property (Little Creek Reservoir buffer) with the deck approximately twenty feet and was located almost entirely within the rear setback. No physical survey was made until late 1986 when the applicant says the violation was discovered. In an attempt to resolve the situation Mr. Tuftee retained an attorney who negotiated a purchase of property from the City of Newport News. However, reliance was made on old setbacks shown incorrectly on the record plat, rather than the current setbacks applicable for a resubdivision. Accordingly, even with the addition of property to which Newport News agreed to sell, the deck still encroaches approximately six feet. Despite mitigating factors and an honest attempt to correct the violation no legal hardship has been demonstrated and staff recommends denial.

Ms. Vaiden opened the public hearing.

Mr. and Mrs. David Tuftee stated that when they purchased the house the realtor pointed out two red flagged stakes. They proceeded to string out the house using these stakes. The house was financed through their company. They measured back thirty six to thirty seven feet and built the house at this point. The house is a log cabin with a full basement. Two years ago they wanted to put more money into the company for expansion and went to a bank to procure a loan. They had a survey done and the encroachment was found. When the encroachment was found they went to Bill Skinner for advise. Mr. Skinner contacted Newport News to see about purchasing some property from them to correct the problem. When the property had been obtained, they thought everything was resolved. They later found out that the survey had been done based on the information given to them by the realtor. Mrs. Tuftee stated that they were told the house would have conformed with the setback requirements had they purchased the property and built the house prior to the area being subdivided.

Ms. Vaiden closed the public hearing.

Mr. Feigley motioned to grant the variance with the added condition that the grape arbor and fence surrounding the flower garden be removed as requested by Newport News.

Ms. James seconded the motion.

The motion was carried unanimously.

At 8:45 p.m., Mr. Feigley motioned the Board to adjourn to an Executive Session to discuss a legal matter pursuant to Section 2.1-344(a)(6) of the Code of Virginia, 1980, as amended.

The motion was carried unanimously.

The Executive Session was adjourned at 8:55.

E. **MATTERS OF SPECIAL PRIVILEGE**

None

F. **ADJOURNMENT**

The meeting was adjourned at 9:00 p.m.

Ms. Elizabeth Vaiden
Vice-Chairman

Bernard M. Farmer, Jr.
Secretary to the Board