

BOARD OF ZONING APPEALS

JULY 23, 1992

A. ROLL CALL

Mr. Feigley
Mr. Ripley
Mr. Giedd
Mr. Carr
Ms. James

ABSENT:
None

Others Present:

John B. Patton, Code Compliance Officer
Leo Rogers, Assistant County Attorney

B. MINUTES

The minutes of the September 1991, October 1991, April 1992, and May 1992 meetings were presented and approved with minor corrections.

C. OLD BUSINESS

Mr. Feigley deferred the update on University Square litigation by Mr. Rogers until the Special Privilege portion of the meeting so as not to delay those present for the variance hearing.

D. NEW BUSINESS

ZA-6-92, Jerry A. Parker, Homes Inc.

Mr. Feigley gave a brief explanation of the procedures that the Board would follow in hearing the case.

Mr. Patton presented the staff memorandum stating that the dwelling is located at 108 Wetherburn Lane in the Windsor Forest Subdivision and is in the R-2, General Residential Zoning District. The property is further identified as Parcel (26-3) on James City County Real Estate Tax Map (32-3). Mr. Parker, President of Homes Inc. Builders & Developer, applied for and was issued a building permit on March 12, 1992 for a single family dwelling based on a site plan and building plans showing the structure to be located entirely within the required building set back lines for this cluster development. Specifically the rear set back was shown to be 39 feet. Mr. Parker has stated that he hired a surveyor to locate the house on the lot prior to construction to ensure that the house would be within the setbacks. During the construction of the house the adjacent property owners contacted the Code Compliance Office stating concerns that the house appeared to be too close to their property line. This concern was passed to Mr.

Parker. Mr. Parker had the house resurveyed and it was at this time the encroachment into the rear set back was discovered. The house was already under roof and in the final stages of construction and almost ready for its final building inspection when the survey was completed. Based on this new survey Mr. Parker immediately requested a 5.56 foot variance from the rear setback requirements for the residence.

Mr. Patton pointed out that the rear corner of the house actually encroached 6.91 feet into the rear setback. The survey plat showed distances measured perpendicular from the building face of the house rather than from the property lines, this caused the error in the application. If a variance should be granted for the existing structure a seven foot variance, rather than the 5.56 foot variance requested in the application, would be necessary.

Mr. Patton also presented a letter from Dr. Grinkewitz, the adjacent property owner that was sent to the Zoning Administrator the day of the meeting. The letter stated that he did not oppose the variance if the builder provided the vegetative buffer he had verbally agreed to do.

Mr. Feigley asked about the date of preparation of the survey showing the encroachment and inquired as to why the deck was not shown on the survey if the deck had already been built.

Mr. Patton explained that the date of the survey in the packet sent to the Board was the one done in June when the encroachment was discovered. The question of when the deck was constructed could not be precisely determined but the house plans did show a proposed deck.

Mr. Ripley asked for clarification about the mistake in the survey plat showing the amount of encroachment and where the lines were pulled from. He also inquired as to the unique characteristics of a cluster development and whether decks were considered part of the main structure as they were in other districts in the County.

Mr. Patton explained the error in the plat and had the surveyor provide the correct distances to the property line and explained the differences in setbacks in the cluster development. Decks are considered part of the main structure in cluster developments just as they are in all other districts.

The Board discussed amongst themselves the location of the deck in relation to the rear setback.

Mr. Feigley opened the public hearing.

Mr. Herbert V. Kelly, an attorney representing the builder and surveyor, spoke saying that he felt that Mr. Parker was an innocent

victim of a human mistake made by the surveyor. He requested to amend the variance request to seven feet to meet what was actually needed for the house.

The Board discussed the amendment request and decided that it could be done in the final motion if the variance was to be granted. Ms. James stated that even more might be required to allow for the deck. It was decided that this could be discussed when they got to that point of the hearing.

Mr. Kelly went on to explain that the mistake was made by Mr. Donald Davis a certified Civil Engineer and Land Surveyor. The mistake was not discovered until the house was under roof and seventy-five percent complete. Since the mistake was found both Mr. Davis and Mr. Parker have talked with all the adjacent property owners and none of them have objections to the variance with the exception of certain landscaping conditions that Dr. Grinkewitz requested. The letter submitted to the Board indicated some changes to the landscaping request already agreed to by the builder.

Mr. Donald Davis addressed the board identifying himself as a land surveyor and civil engineer licensed in the State of Virginia. He stated he had been hired by Jerry Parker of Homes Inc. March 4, 1992 to prepare a plot plan and to stake the lot corners to get a building permit from James City County. The survey was conducted on March 17 and the lot corners were found and staked and the proposed house corners were staked at that time. He stated that at the time of staking the house corners they must have pulled a wrong dimension because they staked the house ten feet off from where it was planned. He said he was contacted on June 17 by Mr. Parker who requested that he go and check to house location on the lot, specifically the rear setback. He responded that day and found that the lot stakes were correct but that the house was in the wrong location. He made an "as built" survey and immediately contacted the Office of Code Compliance to get an application for a variance. He met with all of the adjacent property owners. He showed the original plot plan and the set backs shown and compared that to the as built plot plan.

Mr. Giedd asked why the deck did not show on the as built plot plan.

Mr. Davis stated that the deck was not built on the day they did the survey.

Mr. Giedd asked if the deck had been built after the problem had been identified.

Mr. Davis said it must have been since he did not remember a deck being there at the time of the second survey.

Members of the Board then discussed that the deck did extend into the setback area and that it probably extended further into the setback than the seven feet that the other corner of the house did. They decided to deal with the deck issue separately.

Mr. Carr asked if Mr. Davis was satisfied that Mr. Parker built the house where Mr. Davis had placed the stakes.

Mr. Davis answered "Yes Sir, there is no question in my mind." He went on to explain that following the re-survey he reviewed the original field notes and found an error in one of the distances.

Mr. Feigley asked for clarification on the property boundary rods location and the responsibility for the location of the house.

Mr. Davis explained that the property rods were correct and never in question. Only the location where he had staked the house to be constructed was in error. It was his total responsibility for having sited the house on the lot incorrectly.

Mr. Feigley asked if Mr. Parker makes any checks to see if the survey was done correctly.

Mr. Parker responded that he does not recheck the surveyor. He hires a professional to preclude these types of mistakes. He has never had an error like this before and has built over four hundred homes.

Mr. Carr asked if there was already a buyer for the house.

Mr. Parker responded that he was the owner of the property and house but he had built it under contract for a Mr. Ryan Fletcher.

Mr. Ryan K. Fletcher spoke to the Board from his seat stating that he was ready to close on the house and the bank had given him an extension on closing pending the outcome of this hearing.

Mr. Ripley asked if the County had issued a Certificate of Occupancy.

Mr. Parker responded that the CO was pending the outcome of the hearing.

Mr. Carr inquired as to who would be responsible for the landscaping buffer and if it was satisfactory to Dr. Grinkewitz.

Mr. Parker and Mr. Fletcher indicated that the plantings were in place and they thought it was satisfactory.

Additional discussion centered around just where the landscaping would be placed and on whose property.

Mr. Ryan K. Fletcher came forward and formally introduced himself to the Board. He explained his position and his perception of the problem emphasizing the visual aspects of the house on the lot and the fence that Dr. Grinkewitz had placed since the house had been built.

Mr. Carr asked if Mr. Fletcher was already living in the house.

Mr. Fletcher said yes, they had moved in the 2nd or 3rd of July.

Mr. Carr then asked if Mr. Fletcher knew when the deck had been built.

Mr. Fletcher responded that he was certain that the deck was on the house prior to the survey conducted on June 17. The deck had always been planned as a part of the construction package.

Mr. Feigley asked for further clarification on the shrubbery and landscaping that had been requested by Dr. Grinkewitz.

Mr. Parker said he had not seen the latest letter but had met with Dr. Grinkewitz and had agreed to plant what was necessary. Mr. Fletcher volunteered that white pines and bayberry bushes had already been planted. Mr. Davis said he had suggested Leland Cypress to the Grinkewitz.

There being no one else wishing to speak Mr. Feigley closed the public hearing at 8:31 pm.

The Board discussed various aspects of this case with Mr. Feigley raising the question of whether or not a surveyor's mistake was a justifiable reason to grant a variance. Each of the Board members expressed dissatisfaction with granting a variance in relation to the deck. Mr. Ripley thought it was an honest mistake and pointed out that the neighbors did not object. Mr. Feigley questioned whether it was an honest mistake stating that it appears to be some negligence involved. Mrs. James agreed with Mr. Feigley and expressed concern as to why the bay window showed on the second survey but not the deck. Mr Carr thought the whole thing had been sloppily handled and wants to discuss with the County how to preclude any more of this type of case coming before the BZA.

Mr. Feigley made a motion to approve a variance to Section 20-505 of the Ordinance and grant a seven (7) foot variance from the rear yard setback for the existing building.

Mr. Giedd seconded the motion.

The voice vote for approval of the amended variance was unanimous.

There being no more new business Mr. Feigley called for a five minute break.

E. MATTERS OF SPECIAL PRIVILEGE

The Board requested that the County Staff prepare a report for the next Board meeting under Old Business on what actions could be taken to preclude similar occurrences in the future. Mr. Ripley suggested Code Compliance contact York County and discuss with them their requirements for delineating the lot boundaries prior to any construction beginning.

Leo Rogers, the Assistant County Attorney discussed with the Board their options on putting conditions on variances and their option of requiring bonds or other restrictions to insure compliance with the conditions imposed. He then provided an update regarding actions pertaining to case ZA-12-91, University Square. He pointed out that the Judge had found the Special Use Permit condition was vague and unenforceable, and based on that, he reversed the BZA's decision. He did not find that the BZA's decision was plainly and clearly wrong or contrary to law, but what he found was that the SUP condition which used the word "future" was vague, void and unenforceable. Mr. Rogers requested and received a thirty day "stay" on the execution of the decision in order to provide time to discuss and decide if the BZA and County wanted to Appeal the decision. We have thirty days from when the order was filed, to file an appeal. Mr. Rogers recommended that the Board appeal the Judges decision.

The Board then discussed the motion at length.
Mr. Feigley made a motion that the BZA appeal the decision; this was seconded by Mr. Ripley.

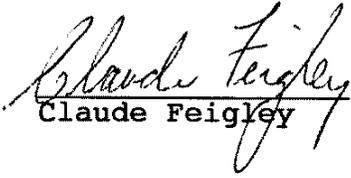
Mr. Feigley reiterated the motion on the floor to appeal the Judge's decision and called for a roll call vote.

Mr. Ripley - Aye
Mrs. James - Aye
Mr. Giedd - No
Mr. Carr - No
Mr. Feigley - Aye

The motion to appeal was passed.

F. ADJOURNMENT

The meeting was adjourned at 9:15 P.M.


Claude Feigley


Bernard M. Farmer, Jr.