

**BOARD OF ZONING APPEALS**  
Minutes for the meeting of September 2, 1999

**A. ROLL CALL**

PRESENT:

ABSENT:

Mr. Feigley  
Mr. Giedd  
Mr. Nice  
Ms. Wallace

Mr. Fischer

OTHERS PRESENT:

Scott Denny, Code Compliance Officer  
John Patton, Code Compliance Officer  
Jim Breitbeil, Development Management Technician  
Andy Herrick, Assistant County Attorney

**B. MINUTES**

The minutes of the August 5, 1999 meeting were approved as submitted.

**C. OLD BUSINESS**

None

**D. NEW BUSINESS**

**Case No. ZA-5-99                      3920 Pine Bluff Court**

Mr. Scott Denny presented the staff report stating that Mr. and Ms. Ferster, property owners, have applied for a variance to Section 24-258 (b) of the James City County Zoning Ordinance to permit the construction of a proposed deck. The deck, if constructed as proposed, would be located at the rear of the existing structure and would encroach six point six feet (6.6') into the rear thirty-five foot (35') setback. The distance between the deck and the rear property line would then be twenty-eight point four feet (28.4'). This property is located at 3920 Pine Bluff Court and is further identified as Parcel No. (09-0-0065) on the James City County Tax Map No. (31-1). This property is located in the R-2, General Residential, zoning district.

Section 24-258(b) of the James City County Zoning Ordinance establishes the rear setback in the R-2, General Residential, zoning district at thirty-five feet (35'). Currently, the existing structure is located thirty six point four feet (36.4') from the rear property line. The building permit for the house, 98-1775-B, was

issued on June 23, 1998. The original site plan and permit application identified one hundred and forty four (144) square foot deck. However, after the permit was approved and issued, a revision was submitted that converted the approved deck area into an enclosed portion of the house. This revision was submitted on July 9, 1998.

Staff has received no complaints to date from the neighbors regarding the proposed deck. The only comment we have received is the enclosed letter from an adjacent property owner supporting the construction of the deck. Staff also acknowledges that the construction of this deck would not be of substantial detriment to adjacent property given that the property immediately to the rear of the Ferster's is a conservation easement and no future development of this property is permitted. However, the strict application of the ordinance would not produce an undue hardship. Therefore staff cannot support this application.

Mr. Giedd asked what is the purpose of the conservation easement.

Mr. Denny stated it grants buffering and provides natural open space.

Mr. Feigley asked if the easement would permanently be there.

Mr. Denny stated that the easement can only be altered with the consent of the County Engineer, but the policy is not to do so.

Mr. Feigley opened the public hearing.

Mr. Ken Ferster, property owner, stated he would like to provide justification for the deck. He stated he is on a cul-de-sac and no one would see the deck from the cul-de-sac and that there is, as mentioned, a conservation easement directly behind the home. There is also a six-foot embankment in the back yard. The deck would sit below this level, therefore not visible to any property owners in the rear of the property. At the end of the conservation area, which is about eighty feet wide, there is a seven-foot wooden fence along the property owned by Atlantic Homes. No one on the other side of the fence would be able to see to deck. Any neighbor to side would have to walk to the edge of their property line to get a look at the deck. He stated his neighbors to the left and to the right of him support the deck being built. Due to the steep incline of the lot, the builder had to build the house further back toward the setback than he typically did in the neighborhood limiting the amount of room for a deck. He feels the deck is appropriate for the house and fits it aesthetically. The reason for extending the deck to the rear of the house is due to a sunroom window extending beyond the house, the location of the garage and air conditioning unit. He received a letter from the Longhill Station Home Owner Association stating the architecture review committee has approved the application for a deck. Mr. Ferster then explained a set of pictures he provided to the Board that shows the rear of the home from different angles and the embankment directly behind the home. He asked that

the Board approve his request. He does understand why the County has an ordinance and supports its purpose, but believes he is not encroaching on any other property owner or diminishing property values.

Mr. Feigley asked Mr. Ferster to briefly describe the deck.

Mr. Ferster stated it is a flat deck, one and one-half feet off the ground. It is a square deck with a three-foot railing with a flat board on top.

Mr. Feigley asked what is the hardship without having a deck.

Mr. Ferster stated he would not be able to enjoy the back yard or cookout like he and his wife would like to.

Mr. Feigley asked if the deck is a necessity.

Mr. Ferster stated it is not a necessity, but it is important in obtaining full enjoyment of the property.

Mr. Feigley closed the public hearing.

Mr. Giedd stated the land to the rear of the property makes all the difference in this case. There is thirty-five feet of property that is very private and doesn't have any effect on adjacent property owners. The spirit of the ordinance is to keep property owners from encroaching on other property owners. He stated he would support this variance request since there are no neighbors to the rear that would be adversely effected by the deck and it would not decrease the value of any adjoining property.

Mr. Feigley stated he agrees with Mr. Giedd. He then stated that decks seem to be an essential part of a piece of property for homeowners and would grant this variance due to the circumstances regarding the rear of the lot.

Mr. Nice stated he believes a hardship exists for Mr. Ferster if he cannot enjoy the easement to the rear of his property and therefore would be in favor of granting the variance.

Mr. Feigley made a motion to establish the rear setback at 28 feet for the construction of a deck.

Mr. Nice seconded the motion.

The motion was granted unanimously (4-0).

Mr. Patton presented the staff report stating that Mr. Repp is requesting 15-foot variance to the rear yard setback for an existing above ground swimming pool. The property is located at 3721 Cherry Walk in the R-2, General Residential, zoning district. There is a 24-foot diameter, 4-foot deep aboveground pool adjacent to the deck at the rear of the home. The pool extends approximately fifteen feet into the 35-foot rear yard setback. Access to the pool is through a locked gate on the deck. Above ground pools, other than "kiddie" wading pools, are considered structures under the zoning code and must meet the required setbacks and require building permits to insure they meet the building code for safety.

Mr. Repp contracted with Best Pools and Spas to install the pool. He was unaware that a building permit was required. No building permit has been issued for the pool. In reviewing an "after-the-fact" building permit application Mr. Patton noted that the pool encroached into the rear yard setback and denied approval of the building permit. Since Mr. Repp did not want to move the pool, a variance was his only option.

There is nothing unique about the lot's size, shape or terrain that distinguishes it from other like zoned properties in the neighborhood. There are other areas on the property where the pool could be located and meet current zoning restrictions.

Staff finds no undue hardship in this case. Had a building permit been sought before the pool was installed this situation could have been avoided. Staff recommends that the variance be denied.

Mr. Nice asked who submitted the building permit after the pool was constructed, the homeowner or the contractor.

Mr. Patton stated that the homeowner submitted the building permit application.

Mr. Nice asked who erected the pool.

Mr. Patton stated he understands the contractor erected the pool.

Mr. Nice asked who could, before the fact, apply for the permit.

Mr. Patton stated the homeowner or a licensed contractor could obtain the building permit.

Mr. Nice asked since the contractor erected the pool, if there was any distinction of who is responsible for obtaining the permit.

Mr. Patton stated that the property owner is ultimately responsible.

Mr. Feigley asked who typically obtains the permit.

Mr. Patton stated the County prefers that the licensed contractor pull the permit and take responsibility for all inspections. If the homeowner pulls the permit, he is responsible for the inspections.

Mr. Feigley quoted section 15 of the James City County Code stating that a pool requires a fence around it and a locked gate.

Mr. Patton stated the building code allows a lockable gate or set of steps that can rotate down to permit entry if the pool is four feet high. All aboveground pools do not require a fence. They do, however, require a way to keep people from entering it – typically a fold-up set of steps that can be locked.

Mr. Feigley asked if a pool that is at least four feet off the ground is considered in itself a barrier that does not require a fence.

Mr. Patton stated that is correct. If the pool, for instance, were only three feet high, it would require a four-foot fence.

Mr. Feigley asked if the pool is considered a structure or an accessory structure.

Mr. Patton stated any structure within ten feet of the main structure is considered part of the main structure; beyond ten feet is considered an accessory structure. He then stated the deck, the home and the pool are all considered part of the main structure in this case since the deck is within ten feet of the home and the pool is within ten feet of the deck.

Mr. Giedd asked if the deck were not there and the pool is where it is currently, would the pool be considered an accessory structure.

Mr. Patton stated that the pool, in that scenario, would be considered an accessory structure. The pool becomes an accessory structure when it is at least ten feet away from the house and no deck in between.

Mr. Feigley opened the public hearing.

Mr. Daniel Hall, an adjoining property owner to the southwest of the property in question, stated he is here to object to the variance requested by Mr. Repp. He stated his objection stems from unsettled environmental effects that exist in the Meadows subdivision. Drainage problems exist with improper runoff and a pool filled with water on land that has drainage problems on to other properties is what he is objecting to. The builder's coverage of the surface with yellow clay subsoil and no topsoil or any turf is the problem. This substance is not fertile and reacts

badly to water. It allows grass seed to runoff on to adjacent properties. Since the developer improperly failed to construct runoff, it will have to be remedied by the property owners. He requested that no variance be granted until the surface runoff problem has been corrected. The Environmental Division of James City County is currently trying to resolve the problem.

Mr. Giedd asked Mr. Hall if the pool were fifteen feet closer to his house, would it make any difference on anything you are saying.

Mr. Hall stated no.

Mr. Giedd stated that the applicant could do this and that would not require the public hearing. He then stated that Mr. Hall is talking to the wrong people about his issues. The Board of Zoning Appeals deals with where the structure is located. If the pool were fifteen feet closer to his house, we would not have this meeting.

Mr. Repp, property owner, stated the building permit came after the fact because he is new to the area and did not need a permit to erect a pool in his past residence, but that was not in Virginia. He does have a letter from another neighbor that supports the variance request. He stated his hardship is that if he had to move the pool, it would cost in excess of \$2000. He initially constructed the deck so that the pool would be connected to the deck and it would have a locked gate that secured entrance to the pool. He stated that the Meadows and their Homeowner's Association allow pools and that is why he purchased a home there. He would have to tear down trees if the pool were to be moved back and it would then be ten feet closer to the neighbors to the rear of him. The neighbors in the back have a six-foot high wooden fence and cannot see the pool and the neighbor to the left has submitted a letter in approval of the variance.

Mr. Giedd asked if Mr. Repp contacted the contractor about this.

Mr. Repp stated he contracted with Best Pools and nothing was ever mentioned about a building permit and the pool was constructed on May 26 and on June 6 he received a letter from the County. He then went to Code Compliance. His permit was not approved because the pool was in the rear setback fifteen feet. At that time he was unaware that the pool was considered part of the home.

Mr. Giedd asked where Best Pools is located.

Mr. Repp stated York County.

Mr. Giedd asked if Mr. Repp contacted Best Pools to let them know they need to get a permit in James City County and they should move your pool for nothing.

Mr. Repp stated that he has not been able to get in contact with the owners. He stated he has called but has not been able to speak to the owners.

Ms. Wallace asked if Mr. Repp has dealt with this company prior to this venture.

Mr. Repp stated no. He is not from here and just moved to the area.

Mr. Nice asked if the deck was constructed before the pool.

Mr. Repp stated the deck was already there. He had the builder extend the deck 15'x7'. To move the pool takes away from the effect he wanted in the first place. That is to have access to the pool from the deck. The ladder goes from the pool to the deck and the locked gate secures it.

Mr. Nice asked Mr. Patton if steps are considered part of the structure as far as setbacks are concerned.

Mr. Patton stated that falls under the definition of a building line and it allows for things like steps to extend three feet into the building setback.

Mr. Feigley asked Mr. Repp if the deck was constructed at the current size and height prior to the construction of the pool.

Mr. Repp stated that the deck was constructed before the pool.

Mr. Feigley asked if he had a pool in mind when the deck was constructed.

Mr. Repp stated yes. The additional part of the deck was constructed for the purpose of the pool. The whole deck was constructed at the same time. The 15'x7' addition was a change in the original plans.

Mr. Feigley asked how long Mr. Repp has been in James City County and what type of business he is in.

Mr. Repp stated he has lived in Virginia since last July and works as a systems analyst for the Army Base at Fort Eustis.

Mr. Feigley asked why he thought he did not need a building permit.

Mr. Repp stated that he did not need one when he constructed his first house and pool which was not in the state of Virginia and that he wasn't aware that he was required to have a building permit. He stated that he spoke to the site manager for the Meadows about the pool and there was no mention of the need to acquire a permit.

Mr. Feigley asked who was the site manager.

Mr. Repp stated Butch Boykins.

Mr. Feigley asked if Mr. Boykins advised Mr. Repp that he should get a building permit.

Mr. Repp stated no.

Mr. Feigley stated that his pool could not fit on to the lot, attached to the deck, without a variance.

Mr. Repp stated that it would have to be separated from the deck. He stated that separating the pool from the deck would go against what he wants – to be able to enter the pool from the deck.

Mr. Giedd asked if he had a contract to have the house built and if so, who took care of getting permits.

Mr. Repp stated he did have a contract for the construction of the house and that the contractor took care of all the permits.

Mr. Giedd asked if Mr. Repp if he left it in the pool contractor's hands to keep him legal and take care of acquiring any permits.

Mr. Repp stated yes and that the thought never crossed his mind.

Mr. Giedd stated that if he hired a local contractor he would expect that the contractor do everything necessary to do the job right.

Mr. Giedd asked what Mr. Repp would do if the contractor did apply for the permit and informed him that he could not put the pool against the deck.

Mr. Repp stated that he would have to go away from the deck ten feet, which he really does not want to do, or reposition the pool somewhere else and knock down trees.

Mr. Feigley closed the public hearing.

Mr. Feigley stated that Mr. Giedd hit on an important issue – that the contractor constructed the pool and did not get a building permit. He then stated a problem he has always had is using ignorance of the law as an excuse. For example, not knowing if a permit is required for certain types of construction and then getting into trouble.



Mr. Nice stated he would agree with that if the homeowner were taking on the risk himself. On the other hand, a consumer has every right to expect that a professional contractor is knowledgeable and can be held accountable.

Mr. Feigley stated that he feels any problem Mr. Repp has should refer back to the contractor of the pool.

Mr. Giedd stated, for the sake of the neighbors, that the only reason the BZA is hearing this case is because the pool extends across the rear setback line by fifteen feet. It could actually be moved closer to the rear property and conform to the ordinance as an accessory structure. This case does not have anything to do with what the neighbors look at or the drainage. Every owner has every right to do what he or she wants to do within the required setbacks. If the pool were more than ten feet away from the house, Mr. Repp could place the pool five feet away from the rear property line and be legal. He stated that since there was a contractor involved, Mr. Repp should get a lawyer and have the contractor pay for moving the pool or buy it back. The contractor does not have much to stand on in this case. He then stated he would deny the variance and make the contracted company make it right.

Mr. Nice stated that he agrees with Mr. Giedd, but this case is not different than any other case when a contractor does something wrong and the Board does not make an owner move. If denying the variance would change the visual impact or lessen the adjacent owner's suffering, he would deny it. In this case, not granting the variance does not change the fact of a pool being there and does not help the neighbors. He went to the site and stated that he personally feels it is unsightly – the pool equipment and everything else about it was done poorly. The pool equipment is in view and nothing was done to try to minimize the view from adjacent neighbors. He stated that is his opinion and would not begin to impose that on the property owner. The property owner has every right to do anything he wants on his own property if it is legal. Mr. Nice stated that making Mr. Repp move the pool does not change the impact on the neighbors.

Mr. Giedd stated he would agree with Mr. Nice if the contractor were not from the area. He stated he would like to back this up to the person who is responsible. It would not make a difference to the neighbors. Moving it back to five feet from the property line would actually be worse for the neighbors. He stated that he does not wish grief upon the homeowner, but if you get a chance to back something up on the person who is responsible and you don't take advantage of that, you are guaranteeing that it will happen again in the future.

Mr. Feigley stated that he agrees with some of the things Mr. Nice has said. He stated that he couldn't conceive of James City County not having some requirement for aboveground pools that would lessen the impact on surrounding neighbors. He stated the pool is an eyesore sitting out there in a field all by itself. A pump sits there on the ground with a hose out of the side of it. Nothing would

be different if a building permit would have been granted. By granting a variance in this case, the Board would violate one of the things that says, by granting a variance you should not have an impact on the aesthetics of the community. He asked why should they grant a variance for this thing that sits out there sticking out like a sore thumb in the community. Granting a variance would have an impact on the aesthetics of the community.

Mr. Nice stated that he feels if the property owner likes it, it is fine with him. It is the homeowner's property, and if it is legal, then there is nothing we can do.

Mr. Feigley stated he is disappointed with James City County and the building code requirements not having any protection for the community when it comes to aboveground pools.

An attendee at the public hearing asked if the Board could do something about fencing to apply to cases like this one so it won't happen again.

Mr. Feigley stated that something could not be passed now and apply to something before the fact. He stated that he had real problem with the building code on aboveground pools.

Mr. Herrick reminded the Board that the public hearing has been closed.

Mr. Feigley stated he is flexible in permitting comments from the audience if it helps the Board in making a decision. It may not be in accordance to strict ruling, but in this case he is allowing people to say things.

Mr. Repp stated that he agrees with the thought of putting the responsibility back on to Best Pools, but reiterated his desire to have the pool connected to the deck and that is the reason he is here.

Mr. Feigley asked Mr. Herrick if the Board could place conditions on the variance to include that there be some aesthetic improvements made to the area around the pool.

Mr. Herrick stated that if a variance were to be granted it would have to be for what was advertised for and the conditions should address the issue of the position of the structure in relation to the setback line.

Mr. Feigley stated he is reluctant to granting this variance without cleaning up the aesthetic problem.

Ms. Wallace stated that when she visited the site she did not like it at all and was not impressed. The pool did not seem to add much to the house, but the owner does not seem to have that problem. Mr. Repp did not say he is displeased with the pool. She stated she could side with neighbors who have problems with it

even though there are fences. She too feels that it is eyesore and that something should be done, but it seems that there is nothing that this Board could do.

Mr. Giedd stated that the Meadows community establishes its standards of what is allowable on those properties and this is allowable. There is no covenant against a backyard pool.

Mr. Nice stated that he is now thinking of taking a different approach. After listening to the other Board members, this is unlike a garage or something physical that has been built which is really hard to move. He stated he wants to go back to the opinion that this pool can be drained. It would be a stretch for this Board to consider it an undue hardship for access to the pool when the owner can meet the zoning ordinance. Although it may have to be moved back ten feet, there are lots of options that can be explored and still have proper access to the pool. He stated he thinks that is a stretch to think that it is an undue hardship, coupled with the concerns of the neighbors and that will have to come after the fact because they are still going to have those concerns. The smaller portion of the deck could be rearranged and there are lots of options of ways to facilitate the enjoyment of the pool without the Board having to make a stretch in this case. He stated that this is a harsher tone than he usually takes. But because of his fellow colleagues' concerns over the appearance of it, the neighbors concerns of it, and the fact that it is a local and legitimate contractor that should be made accountable, then he will change his mind.

Mr. Repp stated he hears what the Board is saying. He then stated that if the pool comes down, then it could not be located anywhere else on the deck. The intent would then be gone. He reiterated that he wanted the pool to be attached to the deck. He stated he cannot take it down and have it moved to another portion of the deck and still have it attached to the deck.

Mr. Patton stated that it appears that it could go on to the right and to the rear of the house.

Mr. Nice asked if the applicant could construct steps and a walkway to connect the deck to the pool.

Mr. Patton stated that the walkway would have to go down to grade.

Mr. Feigley asked Mr. Patton if the variance is denied, could the homeowner come back to the County and apply for a permit for this pool.

Mr. Patton stated he could not say for this pool -- he would need a drawing-to-scale to determine if the existing pool would fit. It appears that a smaller pool would fit on either side of the house and be considered part of the main structure with redesigning the deck. There appears to be enough room to make use of a

twenty-four foot pool, but it would be right on the limits. The pool would have to be moved from its present location, but there are options.

Mr. Giedd asked if they could defer ruling on this so the applicant could explore options. Given some time, the owner might be able to get it within one or two feet of the setback. The hardship would be that he owns the pool and it is of no use to him. He stated that scenario would make a difference to him.

Mr. Patton stated it would be a whole new case and have to be re-advertised.

Mr. Giedd stated he was trying to help out the homeowner without having to come back and look at other options.

Mr. Feigley stated that he is ready to make a motion of not granting the variance for the following reasons; because by granting the variance he believes he would be creating a severe impact on the aesthetics of the community and that the problem could have been solved if a building permit had been obtained.

Mr. Feigley made a motion to deny the requested variance.

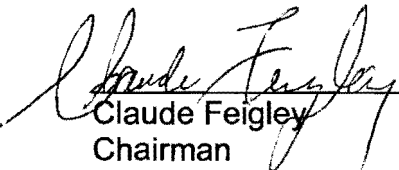
Ms. Wallace seconded the motion.


The motion was approved unanimously (4-0), the variance was not granted.

Mr. Feigley stated that he hopes Mr. Repp could find a solution.

## **F. ADJOURNMENT**

The meeting was adjourned at approximately 9:15 p.m.

  
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Claude Feigley  
Chairman

  
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Allen J. Murphy  
Secretary