

BOARD OF ZONING APPEALS

July 10, 2014

Mr. David Otey, Jr. called the meeting to order at 7:00 p.m.

A. Roll Call

Present:

Mr. Marvin Rhodes
Mr. David Otey, Jr.
Mr. Stephen Rodgers
Mr. Ron Campana, Jr.
Mr. William Geib

Others Present:

Mr. Jason Purse, Zoning Administrator
Mrs. Christy Parrish, Proffer Administrator

Mr. Otey gave information on the purpose of the Board of Zoning Appeals.

B. New Business

ZA-0002-2014, 2 Joy's Circle – Hunter Creek

Mr. Purse presented his staff report:

Mr. Howard Jones is appealing the Zoning Administrator's interpretation and decision regarding section 24-233 (a) of the Zoning Ordinance in terms of re-designating an existing recreation lot to a single-family residential lot for the construction of a single-family home in the Hunter's Creek Subdivision. This property is currently zoned R-1, Limited Residential and is .531 acres

The recreation lot was created as part of Phase II of the Hunter's Creek subdivision which was approved on July 28, 1987. The total density of the subdivision is 1.415 dwelling units an acre. When the subdivision was created the use category in the R-1 district was "Single-family residential" without any density requirements.

On May 25, 1999, the Zoning Ordinance was amended and the "Single-family residential" use was changed to "Single-family detached dwellings with a maximum gross density of one dwelling unit per acre in accordance with section 24-233(a)." Section 24-233(a) states that, "All subdivisions shall have a maximum gross density of one unit per acre, except for minor subdivisions as defined in the county's subdivision ordinance." This ordinance amendment made the Hunter's Creek subdivision legally non-conforming, since the overall gross density was more than one dwelling unit an acre. The existing single-family residential lots in the subdivision have a vested right under the old ordinance; however, since the recreation lot designation never permitted a single-family residence, there is no past right to be grandfathered. The conversion of the recreation lot into a single-family residence would make Hunter's Creek more non-conforming, and therefore would not be permitted.

Whereas variance applications rely on criteria such as a hardship for the owner, or whether or not there are impacts to adjacent property owners, appeals of a Zoning Administrator's determinations are based exclusively on the language in the Zoning Ordinance. The applicant cannot appeal a determination and be approved for a relaxation of standards based on variance criteria. In this instance, a variance is not approvable for overall density of a subdivision. The Board of Zoning Appeals is being asked whether or not the interpretation of section 24-233(a) was correct in terms of density calculations for the Hunter's Creek Subdivision.

Staff recommends that the Board of Zoning Appeals uphold the Zoning Administrator's interpretation as outlined in the memo and the determination letter dated April 14, 2014.

Mr. Rhodes asked if the lot in question met all the requirements for a single-family residence in July 1989 and if the lot meets the current zoning requirements for a single-family residence.

Mr. Purse replied yes.

Mr. Otey asked if staff knew why this lot was designated a recreation lot and not a single-family lot.

Mr. Purse stated the subdivision plat was required to be reviewed by the James City County Subdivision Review Committee and they requested a recreation lot be a part of the subdivision.

Mr. Geib asked if the recreation lot was required as a term of approval.

Mr. Purse explained that the developer of Hunter's Creek must have agreed to include the recreation lot because it was not required by the Zoning Ordinance at that time.

Mr. Otey asked if the lot was ever used as a recreation lot and if there was an active homeowner's association.

Mr. Purse replied no to both questions.

Mr. Otey asked if the Board of Zoning Appeals had the power to re-designate the lot to allow the home.

Mr. Purse explained that should the Board of Zoning Appeals overturn his decision, the applicant would also have to submit a request to the Board of Supervisors to vacate a portion of the plat and re-designate the lot from a recreation to a single-family.

Mr. Rhodes asked why this application did not go to the Board of Supervisors first.

Mr. Purse replied that the Zoning Administrator's interpretation that the re-designation of the lot would make the subdivision more non-conforming conflicted with the Zoning Ordinance.

Mr. Rhodes replied that 24-19 of the Zoning Ordinance allows an aggrieved zoning applicant petition the Board of Supervisors directly.

Mr. Purse stated that Section 24-19 refers to proffered condition appeals associated with development plans.

Mr. Otey commented that should an applicant not agree with the Board of Zoning Appeals' decision they may appeal to the Circuit Court.

Mr. Purse replied yes.

Mr. Otey asked if the required notice to adjacent property owners had been sent in this case and if the appeal was submitted in a timely manner.

Mr. Purse replied yes.

Mr. Otey confirmed that the subdivision is what is non-conforming and not the individual lots within it.

Mr. Purse replied that the individual lots that make up the subdivision create the non-conforming situation. He also stated that if an existing lot within the subdivision that met all the requirements for subdivision would not be permitted to subdivide because it would also increase the overall density making the subdivision more non-conforming.

Mr. Rodgers asked if there were other recreation lots, similar to this one, that have yet to be developed, and whether they are common in other subdivisions.

Mr. Purse replied that there are other similar lots in the County but they are mostly found in subdivisions with inactive homeowner's associations.

Mr. Otey asked if staff knew if the restrictive covenants give the property owners in Hunter's Creek the right to use the lot.

Mr. Purse replied that staff did not know.

— Mr. Rogers asked if the adjacent property owners of the recreation lot could absorb the lot into their existing lot.

Mr. Purse replied that a boundary line adjustment would be possible as long as another house was not constructed.

Mr. Rhodes asked who has and was maintaining the lot.

Mr. Purse replied that the applicant may wish to address that question though he has not owned it very long.

Mr. Rhodes asked how the density was calculated.

Mr. Purse replied that the overall acreage was divided by the number of lots. He also noted that Phase I of Hunter's Creek's density is over one unit per acre.

Hearing no further questions, Mr. Otey opened the public hearing.

Ms. Robin Rattley, 2909 Jefferson Avenue Newport News, VA stated she represented Mr. Jones and she was a senior veteran of the Newport News Board of Zoning Appeals.

Ms. Rattley stated she considered this request for a variance. She stated they would concede that the interpretation of the ordinance is correct as it now stands; however, her understanding was that the Board of Zoning Appeals has discretion to grant variances under certain circumstances.

Ms. Rattley stated that the subdivision was created by the Turlington family, operating under the Foundation Development Corporation, in 1987 or so. That corporation went bankrupt and then Atlantic Homes took it over. She stated she has a copy of the restrictions and covenants and they make no mention of the recreation lot. The deed of the first non-corporate owner of the recreation lot, Mr. Miles, was from Foundation Development. However, in speaking to Mr. Miles, he stated that the lot was actually seized by the County because the taxes were delinquent and he purchased it at an auction. In speaking with some original property owners, there has never been any provision made on how or who would develop this lot. She also stated that there is a tap for water and sewer for this lot and utilities are in place. After Mr. Miles purchased the lot, he also applied for a permit in 2002. Staff at that time directed Mr. Miles to obtain approval from all the property owners in Hunter's Creek and then request the Board of Supervisors to vacate the plat. She stated she was unsure that her client, Mr. Jones, was told the proper procedure to follow.

Ms. Rattley explained that after Mr. Miles was denied, Mr. Gray, the adjoining property owner, acquired the property. When Mr. Gray moved, he offered the property to the adjacent property owners for a reasonable amount and neither of them was interested in purchasing the property at that time. Afterwards, Mr. Jones purchased the property.

Ms. Rattley stated that their position was that this lot was represented to the County in 1987 as a recreation lot and that something was going to be done to the property. She continued that declaration and restrictions were filed but the developer did not live up to whatever he promised to do at the time this development was created.

Ms. Rattley stated that this lot was probably larger than the majority of the other lots in the subdivision. For a number of years, the lot was assessed at \$51,300 and taxes were paid based on this assessment. After Mr. Gray found out that he could not develop the lot, he went through a procedure to have the assessment reduced to \$1,100. She stated that their position is that this lot in its current state is not benefiting the County or the neighborhood. If Mr. Jones were allowed to develop the property and live there, the tax assessment would increase.

Ms. Rattley showed the Board a picture of the proposed dwelling. She stated the lot was mainly wooded and did not have a lot of grass to be maintained. She discussed concerns of a child getting hurt on the property or could be used by someone lurking around the neighborhood if the

lot were not developed. She stated she knew the County encouraged more infill development and they would argue that this too is an infill project.

Ms. Rattley explained that Mr. Jones had lived in Williamsburg before but currently resides in New Kent County. He owns a business and wants to bring that business to the County. She concluded that they cannot identify any harm or lack of benefit to the neighborhood or to the County and stated that the Board of Zoning Appeals has the discretion to grant variances and go against the Zoning Ordinance when there is a hardship.

Mr. Howard Jones, 6545 Ware Road, New Kent, stated his interest in this lot is to move back to Williamsburg with his family and bring his plumbing business back as well. He explained that he lived in Williamsburg in 2000 but had to reluctantly sell and move to New Kent County when the economy turned. He feels that his family and business would be an asset to the community and this request will give him an opportunity to come back to Williamsburg.

Mr. Otey stated that the Board is prepared to address an appeal question but not variance questions. Mr. Otey asked Ms. Rattley how she analyzed this request as a variance request rather than an appeal of the Zoning Administrator's interpretation and from what part of the Zoning Ordinance was she requesting a variance.

Mr. Purse stated that he thought the question at hand would be more appropriate for him to answer. He explained that the Zoning Ordinance defines the term variance, and a variance is only authorized for height, area and size of a structure or size of yards and open spaces. He added that density is not something for which they could receive a variance. He also stated that this appeal is not for what a variance is but rather of his interpretation that the density is too high. Since density is not one of the items specifically listed in the definition of variance, it does not qualify for a variance.

Ms. Rattley stated she would argue that it is a variance with reference to the size of yard and open spaces. Her understanding is that the issue is not the fact that it was originally designated as a recreation area but that it is not an acre and because it was not originally a residential lot it was not grandfathered.

Mr. Purse stated that was not the issue and if Mr. Jones wanted to challenge his interpretation that he was not allowed to receive a variance that is a different application. He also clarified that definition of yard is the open space on a lot and not the density of a lot.

Ms. Rattley stated she was not involved when the application was made, however, she referred to a letter from the County Attorney in 2002 regarding the process and there was no mention of a variance or zoning. The letter simply says that if all the homeowners agree then it could be approved.

Mr. Purse pointed out that the 2002 letter was a conceptual plan letter and not from the County Attorney but from a planner, Mr. Dave Anderson. He explained that the Zoning Administrator makes legal decisions for the County. A conceptual plan review application is a preliminary review of a development proposal and is not a legal binding document. The Zoning

Administrator did not make an interpretation at that time.

Mr. Otey stated that the request this evening is regarding the density and whether this lot would make a non-conforming neighborhood more non-conforming. For the purposes of the Board's analysis, they have to treat this case as a ruling by the Zoning Administrator

Ms. Rattley stated Mr. Jones came to staff, asked for direction and he did what he was told which was to appeal the decision and pay \$500.00. After she got involved, she was not sure this was the correct procedure. She also stated that she thought this request was for a variance until she received Mr. Purse's report. She stated that she conceded his interpretation may be correct but what they were looking for was the discretion of the Board to grant a variance.

Mr. Campana asked Mr. Purse if a variance request would be a separate application.

Mr. Purse stated that the applicant could challenge his interpretation of a variance.

Mr. Carl Walters of 1 Joy's Circle expressed concerns about watershed and it appears that this lot would require considerable contouring. He stated that he understood that storm water is to be maintained and changes to the watershed could cause damage to other lots.

Mr. Rodgers asked how long Mr. Walters lived in Hunter's Creek and if he knew this lot was a recreation lot.

Mr. Walters replied since 1998 and yes, he was told it was to be a recreation lot.

Mr. Geib asked if there was an active homeowners association.

Mr. Walters stated no.

Mr. Jones stated he had no plans to alter the contours of the lot and the watershed issues would be corrected and improved.

Seeing no further speakers, Mr. Otey closed the public hearing

Mr. Otey stated that the Board has only the power the Code gives them. They do not have the power to address drainage issues or address the County's tax base. He believes the Board needs to decide whether the decision comports with the language in the Zoning Ordinance. He continued that he believes that the Board hopes something works out for Mr. Jones to be in the neighborhood and community, but the Board does not have the power to address any issue other than the decision of whether or not Mr. Purse's decision was appropriate under the language of the Zoning Ordinance.

Mr. Rhodes requested the public hearing be open again to ask a question to Mr. Purse.

Mr. Otey reopened the public hearing.

Mr. Rhodes stated that it was his understanding that the County considered this a developable lot because taxes were collected for a number of years. He inquired if taxes would be owed if a Homeowner's Association owned the lot.

Mr. Purse replied that there were taxes owed on the property when it was owned by Atlantic Homes but he cannot speak to the specific tax history of the property.

Mr. Rhodes stated that it seemed that if the County were taxing the property it would be recognized as being developable property.

Mr. Purse stated that Zoning does not set the tax rate.

Mr. Geib stated that in his community, there is common property owned by the HOA and there is reserved property that the developer pays taxes on even though in essence it is common to the community. There are situations where property is taxed that are not defined as developable.

Mr. Rodgers stated every owner could appeal their tax assessment.

Mr. Rhodes stated that there was a case that came before the Supreme Court some years ago in South Carolina where a governing body set restrictions so tight on a piece of property, the only use of the property was that the owner could take a lawn chair out and sit on it. The Supreme Court ruled that was a taking and it appears this case could be considered a taking also.

Seeing no further speakers, Mr. Otey reclosed the public hearing.

Mr. Otey stated the lot is owned by a private individual and the tax value is appealable by the property owner. The lot is being taxed at a nominal amount on the basis that it cannot be used for residential purposes.

Mr. Geib stated he did not have any further questions or comments.

Mr. Rhodes stated he was conflicted and could see both sides of the issue.

Mr. Otey stated he felt the Board would like to find a way to make it work, however, the math speaks for itself. He continued that Ms. Rattley conceded that the interpretation of the ordinance was not inaccurate.

Mr. Rhodes questioned why the subdivision was not grandfathered when the gross density requirement change was added.

Mr. Rodgers replied that the subdivision was grandfathered as it existed but this lot was not designated for a dwelling at that time.

Mr. Otey stated that the fact the subdivision was grandfathered as it stood on that day, does not mean that property owners can subdivide their lot and increase the density. Any non-conforming use may be maintained but not expanded.

Mr. Rhodes stated that this would enlarge it by 0.013 acres.

Mr. Campana stated he agreed that he would like to see Mr. Jones be able to do something with the lot, however, that issue is not what this Board can decide.

Mr. Geib moved that the Board support the Zoning Administrator's position that this application is not in conformance with 24-233 as it would increase the density of the community.

Mr. Rodgers seconded the motion.

Mr. Otey asked if there was any other discussion. Hearing none, he asked staff to call the roll.

Mr. Purse called the roll, the motion was approved 4-1.
(Aye- Rogers, Campana, Geib, Otey; No- Rhodes)

Mr. Otey stated to the applicant that they have the right to appeal to the Circuit Court.

C. Minutes -January 9, 2014

Mr. Otey asked if there were corrections to the minutes. The following corrections were made:

- 1- Page 4, 11th paragraph – change build to built
- 2- Page 5, 8th paragraph – delete the second now
- 3- Page 5, 9th paragraph – change Geid to Geib
- 4- Page 5, 10th paragraph – change to to the
- 5- Page 5, 12th paragraph – change weather to whether
- 6- Page 7, 2nd paragraph – change sated to stated
- 7- Page 7, 6th paragraph – change suites to suits

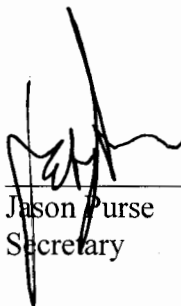
Mr. Geib moved to approve the minutes as amended. On a voice vote, the minutes were unanimously approved.

D. Adjournment

There being no further business, the meeting was adjourned at 8:06 PM.



David Otey
Chairman



Jason Purse
Secretary