



# MINUTES

## Board of Adjustment

April 22, 2008 – 6:30 p.m.

❧ Town Chambers ❧

*Whereas*, there was a Regular Meeting scheduled for Tuesday, April 14, 2009, at 7:00 p.m. The following members responded as available to attend this meeting: David Snider, Reta Berman, Carolyn Lawson, Michael Schutrum, and Thomas Snyder. Steve Bomgardner, Ryan Cuomo, Margie Ebner, and Cameron Gardner would not be available.

*Whereas*, given the lack of quorum the matter was rescheduled for the next available time when a seven (7) member board, or more, would be present.

*Whereas*, the case was rescheduled by agreement of the Applicant and Board Members to be held on Wednesday, April 22, 2009, at 6:30 p.m.

**Board Members Present:** Chairman David Snider, Vice Chairman Thomas Snyder, Reta Berman, Steve Bomgardner, Margie Ebner, Carolyn Lawson, and Michael Schutrum.

**Board Members Absent:** Ryan Cuomo and Cameron Gardner.

**Planning Staff Present:** Lisa McCarter, Planner I, Michelle V. Haines, Secretary and Matthew Carter, Planning Technician.

### *Roll Call, Determination of Quorum*

Chairman Snider determined quorum and called the Board of Adjustment hearing to order at 6:33 p.m.

### *Elections*

Thomas Snyder nominated David Snider for Chairman, and Michael Schutrum seconded the nomination. David Snider accepted the nomination. All members (regular and alternate) were allowed to vote according to the Rules, and the vote was unanimous.

Michael Schutrum nominated Thomas Snyder for Vice Chairman, and Margie Ebner seconded the nomination. Thomas Snyder accepted the nomination. All members (regular and alternate) were allowed to vote according to the Rules, and the vote was unanimous.

### *Approval of the Minutes*

Steve Bomgardner moved to approve the Minutes of the October 14, 2008 Regular Meeting, and Michael Schutrum seconded the Motion. The vote carried unanimously.

## *Case #V09-001 Called*

Avis Hampton, hereinafter also referred to as “Applicant”, Karen Hunt, Rob Halleran and Lisa McCarter were sworn in prior to giving testimony concerning the matter of case number V09-01: 12250 Mayes Road, Huntersville, NC 28078. Other audience members were sworn in by the Chairman; however, they did not present testimony in this matter.

### *Planning Staff Testimony*

Lisa McCarter gave her preliminary statement of the case to the Board and entered her facts, findings and conclusions into the record through verbal testimony and written documentation, as follows.

#### **BACKGROUND:**

1. The subject property is zoned Transitional Residential (TR), and is located at 12250 Mayes Road. There is currently a single-family home on the property.
2. The lot was created on or before 1993.
3. The lot has 40’ road frontage on Mayes road. The TR zoning requires an average lot width of at least 100’ but in no case less than 85’ (Article 3.2.2.d.2). Since this lot was created prior to our current Zoning Ordinance it is subject to Article 8.1.1 (referenced above) requiring a private and exclusive recorded easement of at least 15 feet in width connecting said lot to a public street. The 40’ frontage on Mayes Road has a 20’ non-exclusive easement that runs over the eastern edge of the property that serves two adjoining lots that have no road frontage (011-231-16 & 011-231-29). These two lots do not meet the requirements of Article 8.1.1 because they do not each have a 15’ exclusive easement so they are both non-conforming. This leaves the remaining 20’ width of frontage as exclusive easement for the subject property, and since it has greater than 15’ exclusive easement it is currently conforming to Article 8.1.1.
4. On March 10, 2009, the applicants filed for a variance from the 15’ exclusive access easement requirement in order to subdivide an additional parcel out of their property. This would bring the total lots served by the 40’ frontage to 4 lots. The applicant proposes to divide the 40 foot frontage into four 10’ exclusive easements, 3 to serve the existing lots, and 1 to serve the new lot.

#### **STAFF FINDINGS**

Article 11.3.2 f, Standards for Granting a Variance of the Huntersville Zoning Ordinance:

- 1) Before granting a variance, the Board of Adjustment shall have made the following findings:
  - (a) That practical difficulties or unnecessary hardships, as defined in subparagraph 2) below, would result from the strict application of these regulations; and  
*The property is currently in use as a single family home; therefore reasonable use is currently being made of the property without the proposed variance.*
  - (b) That the variance is consistent with the objectives and policies of any adopted plan for the district or area covering the property, any other adopted written policies governing land development, and the construction and improvement of public facilities, and the general intent of these regulations; and  
*The Town intends the property to be used for a single-family residential dwelling and the applicant’s proposal is consistent. The request is not consistent with 15’ exclusive easement required for each lot according to Article 8.1. With the proposed variance the subject property would have less than the 15’ exclusive easement required and an additional lot would be created with less than the 15’ required. Since the two adjoining properties utilizing a 20’ non-exclusive easement are non-conforming, this request would expand a non-conforming situation.*

- (c) That the public safety and welfare have been protected and substantial justice done.  
*The 15' exclusive easement is intended to ensure that emergency vehicles have sufficient access to properties.*
- 2) Only the following three conditions shall constitute a practical difficulty or unnecessary hardship and all must be met:
  - (a) The difficulty or hardship would result only from these regulations and from no other cause, including the actions of the owner or previous owners of the property; and
  - (b) All three lots that use the 40' frontage by ownership or easement were created prior to the current Zoning Ordinance. The subject property was created in 1993. The two adjoining lots that have an easement over the property were created in 1987 and June 1996.
  - (c) The difficulty or hardship is peculiar to the property in question and is not generally shared by other properties classified in the same zoning district and/or used for the same purposes; and There are other properties in the TR zoning district subject to Article 8.1.1 that could not subdivide in accordance with the Zoning Ordinance.
  - (d) The difficulty or hardship resulting from the application of these regulations would prevent the owner from making a reasonable use of the property. The fact that the property could be utilized more profitably or conveniently with the variance than without the variance shall not be considered as grounds for granting the variance.  
*Reasonable use of the property as a single-family residence may be made without subdividing the property and thus needing the variance.*

### **STAFF CONCLUSIONS**

The property is currently being used for a single family residence, and can continue to be used for a single family residence if the variance is not granted. Staff does not support a variance since the request does not meet the findings of fact and would expand a non-conforming situation.

Michael Schutrum questioned the square footage of the current resident in which the Applicants reside. Answering from the audience, Mrs. Hampton stated that they have approximately 1860 square feet of heated space.

Carolyn Lawson commented that with a farmhouse cluster a 10' easement is applicable, and that it accommodates emergency vehicles. She asked if this property could be considered a farmhouse cluster. Staff responded that a minimum of ten (10) acres is required for a farmhouse cluster, and additionally the road must be paved to Town standards. This matter is for an exclusive easement.

David Snider questioned Staff if 40' was enough for a right of way. Staff responded that there is a rural lane option, which has a ditch section on one (1) side. They could conceivably do that option.

### ***Applicant Testimony***

Avis Hampton, Applicant, presented argument in support of her application for a variance from Article 8.1.1, which requires an exclusive easement of at least 15' in with for lots legally established prior to the effective date of the current zoning ordinance. The Applicant(s) and two (2) adjacent property owners currently use a 40' wide access "road" for access. The Applicant requests a variance in order to create another lot and bring the total served by the 40' access "road" to 4 lots and divide the 40' access into four 10' wide exclusive easements to service the 4 lots.

The Applicant described the history of their ownership of the property containing 5.02 acres, and stated that when purchased in 1993 it was their desire to subdivide the property between their two (2) daughters. She stated that they offered to donate the 40' easement to the Town, but was told it would have to be paved before it could be accepted.

She further described a 15' easement granted to a family member of the Halleran's who are adjoining property owners, not realizing repercussions in the future, but wanting to be good neighbors. In talking to the surveyors, it came to light that when that easement was granted it is listed as being overlaid in her parent's 20' easement. The reason they started looking in to this is due to the health conditions of her spouse, Mr. Denver Hampton, and their desire to stay on the property near family and for medical reasons. The Applicant stated that they have a house on the property to which they are using, but consider it a hardship not to be able to use it to the full extent for their family. What they want to do is to build a smaller house for her and her spouse, and sell the current residence to their daughter.

The Chairman asked for questions for the Petitioner.

Steve Bomgardner commented to Mrs. Hampton that the current residence is approximately 1800 square feet, and if they want to build another house on the same property without subdividing the property the Town would allow that as long as the first floor square footage was no more than 50% of the 1<sup>st</sup> floor area of the principle structure (up to 900 square feet). They could build a second floor with another 900 square feet, and could be allowed to build a second home on that same property. The Applicant stated that they are aware of that and discussed it with Staff. However, they do have another daughter and want to be fair to both daughters at the time of their demise. This was the reason behind making the 2 lots; one for each daughter. Steve Bomgardner stated that she could not do that without this easement, to which Mrs. Hampton agreed.

Steve Bomgardner further asked Mrs. Hampton if she has approached the Spencer's (adjoining land owners), or if there was an option to move their line over a little (re-combine the lots) to get another 10 or 15 feet. Mrs. Hampton stated that they have no way to contact the Spencer's. Mr. Spencer is on the property infrequently. Staff indicated that she has heard from Mr. Spencer's attorney, and that Mr. Spencer was concerned that the variance request would cause an easement to encroach on his property. Mrs. Hampton stated that the neighbors on the other side only have about 10' between the Hampton's property line and their paved drive, and felt that they would not grant an easement on their property.

David Snider asked about the Thompson property, and if the Hampton's have talked to all of the property owners. The Applicant questioned how the Thompson's would be able to help since it would not be connecting. David Snider responded that they could give a 15' easement from the street back to the proposed lot, whether a home was built or not.

Karen Hunt, 12240 Mayes Road, Huntersville, North Carolina appeared before the Board and stated that what they (the Applicant) are asking for is the same thing that the Halleran's and their daughter (Liz Poole) have currently, which is a 10' access for each house that is on a 20' easement. No further testimony was given or questions asked from the Board.

Michael Schutrum questioned if anyone has talked to the Kelly family. Mrs. Hampton spoke from the audience and responded that they had the same concern that a road would be on their property.

The Chairman identified from audience Robert Halleran, 12256 Mayes Road, Huntersville, North Carolina, who addressed the Board. He stated that his wife (JoAnne) and daughter (Liz) were in the audience. They own adjoining property, and after they acquired the land they gave a portion of the land to their daughter, Liz. They often see the Hamptons and they share the same driveway. They have no problem in helping the Hampton's stay in the area, and allowing them an additional lot so their daughter can help take care of Mr. Hampton. He further stated that there was plenty of room for expansion for the Hampton's to build another home. The division of the property will not affect them, nor will additional traffic for the additional lot.

David Snider questioned Mr. Halleran as to which property he owns, and asked if there was anyone present by the name of Paradis as shown on the Family Subdivision survey. He further questioned if they have an easement. The response from audience members was inaudible, but the recorder believes that there is another easement for this property.

The Chairman asked for further questions from the members; there being none. There were no persons to present argument against the application. The Chairman asked if the Applicant for any further testimony and evidence. She requested that the Board please approve her request.

### ***Board Conclusions***

The period for public discussion was closed by the Chairman, and the Board publicly discussed the case with further input and clarification from the Applicant and Staff concerning the variance, as follows:

Steve Bomgardner stated that without going into the issue that this will create four non-conforming lots if granted (which the Code prohibits), he was concerned that this Board would be establishing a precedence of allowing a 10' easement for emergency vehicles when there is clearly a requirement for 15' (assuming for safety purposes), and that the easement conveys with the land. At the present time if granted, and everyone is happy with the situation that may not necessarily be the same when the owners change. A 10' easement that is legally allowed to be in existence by the Board's actions and each one will be 5' narrower than required by the Code. Additionally, he stated that there are other viable options available to make use of the property without a variance. They would be able to build another home on the property without a variance.

Margie Ebner questioned if a Quit Claim Deed would be appropriate to be prepared in advance and record later when property is given to the other daughter. The property now would still be conforming, and the parties should contact an attorney for legal advice. Michael Schutrum stated that the Deed is only valid at the time of recordation. David Snider informed the member and the Applicant, that North Carolina is a 'race' state, whereby the first one to record is the valid owner, and that a Quit Claim Deed does not make it conforming.

David Snider further questioned that if there were two (2) residences on the one property; how can it become conforming? Staff responded that the second home would be an accessory dwelling.

Once you subdivide the property it becomes non-conforming. David Snider stated that an option was to have one entity own both homes on one lot. Therefore the sisters would have to own both homes together, or put in an LLC, etc. Mrs. Hampton stated that this scenario may cause family problems in the future between her daughters, and she would not want to take that direction.

Michael Schutrum stated that they have a non-conforming situation already and the Board is being asked to make it worse. Margie Ebner stated that if the property was conveyed they would have a problem if the original sisters want to stay, or if the sister who inherited her half of the property wanted to sell. The property will be non-conforming and this Board would only be delaying the problem instead of correcting it.

Carolyn Lawson wanted to hear discussion about development options, which would take all four 10' non-exclusive easements and combine them together. This would be expensive, but it is an option and could increase the value for all property owners with a paved easement. The division of the property between the two daughters is quite unequal, and will probably be a problem in the future anyway. David Snider stated that the paved street would allow the opportunity to allow more than two homes to be built there, based on the acreage.

David Snider further stated that the other option was to acquire an easement from an adjacent property owner. He asked the Applicant if the Spencer property is undeveloped. She responded that there is a home on the property but thought it would be removed, and there is a garage. Mrs. Hampton, speaking from the audience, began giving hearsay testimony concerning conversations that may or may not have taken place between other individuals not present at this hearing. The Chairman spoke to the Applicant about hearsay testimony, and under the Rules of Evidence it is not allowed to come into the record.

Thomas Snyder stated that the Board is looking at turning two (2) non-conforming lots into four (4) non-conforming lots and feels that the Applicant has several options available. Based on the reasons listed by the Planning Staff, he stated that he can not support the variance. Thomas Snyder made a **Motion to Deny**, and Steve Bomgardner seconded the Motion. The Motion to Deny is based upon the following Findings of Fact:

### **Findings of Fact**

- a) That practical difficulties or unnecessary hardships, as defined in subparagraph 2) below, would result from the strict application of these regulations; and

**The property is currently in use as a single family home; therefore reasonable use is currently being made of the property without the proposed variance.**

- b) That the variance is consistent with the objectives and policies of any adopted plan for the district or area covering the property, any other adopted written policies governing land development, and the construction and improvement of public facilities, and the general intent of these regulations; and

**The Town intends the property to be used for a single-family residential dwelling and the applicant's proposal is consistent. The request is not**

consistent with 15' exclusive easement required for each lot according to Article 8.1. With the proposed variance the subject property would have less than the 15' exclusive easement required and an additional lot would be created with less than the 15' required. Since the two adjoining properties utilizing a 20' non-exclusive easement are non-conforming, this request would expand a non-conforming situation.

c) That the public safety and welfare have been protected and substantial justice done.

**The 15' exclusive easement is intended to ensure that emergency vehicles have sufficient access to properties.**

.2 Only the following three conditions shall constitute a practical difficulty or unnecessary hardship and **all** must be met:

a) The difficulty or hardship would result only from these regulations and from no other cause, including the actions of the owner or previous owners of the property; and

**All three lots that use the 40' frontage by ownership or easement were created prior to the current Zoning Ordinance. The subject property was created in 1993. The two adjoining lots that have an easement over the property were created in 1987 and June 1996.**

b) The difficulty or hardship is peculiar to the property in question and is not generally shared by other properties classified in the same zoning district and/or used for the same purposes; and

**There are other properties in the TR zoning district subject to Article 8.1.1 that could not subdivide in accordance with the Zoning Ordinance.**

c) The difficulty or hardship resulting from the application of these regulations would prevent the owner from making a reasonable use of the property. The fact that the property could be utilized more profitably or conveniently with the variance than without the variance shall not be considered as grounds for granting the variance.

**Reasonable use of the property as a single-family residence may be made without subdividing the property and thus needing the variance.**

The members voted on the **Motion to Deny**. All members with the exception of Carolyn Lawson voted in favor of the **Motion to Deny**. Carolyn Lawson abstained from the vote, which is considered as an affirmative vote.

**Therefore, the request for a variance is DENIED.**

### *Other Business*

The Chairman presented the 2009 Schedule of Regular Meetings for adoption, and the Secretary distributed to the Board Members a copy of the meetings dates and times. The Members discussed the starting times of the meeting to be 6:30 p.m. It was agreed to adopt the 2009 Schedule of Regular Meetings with the new time of 6:30 p.m.

The Chairman discussed a new business item that was not on the Agenda. It was concerning the training seminar recently held in Troutman, North Carolina that was sponsored by the Centralina Council of Governments, and provided by the Town of Huntersville. It provided good and beneficial information for all members of the Board of Adjustment. He encouraged others to participate in the annual seminar, if possible.

Also discussed between was the issue of proper procedures, which included *ex parte* communications, hearsay testimony, and Rules of Procedures for alternate voting procedures. David Snider commented that there is no language for the Alternates to vote and he did not have a solution, but felt there should be a Rule to define those procedures. The Board suggested that the Planning Department Staff research other localities to identify how their alternates voted, and present a recommendation. It was further discussed that all members announce during each case hearing if they have or have not been contacted by applicants so that it is in the record dismissing *ex parte* communications.

The Members were reminded that a Regular Meeting will be held on May 12, 2009 at 6:30 p.m. for two (2) variances filed.

There being no further business, the meeting was adjourned at 7:24 p.m.

Approved this \_\_\_\_ day of May 2009.

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David Snider, Chairman

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Michelle V. Haines, Secretary