



David Snider, Chairman
Thomas Snyder, Vice Chairman
Reta Berman
Dan Boone
Richard Robinson
Michael Schutrum
Raymond Kudlak, Alternate 1
Ryan Cuomo, Alternate 2
Jonathan Melvin, Alternate 3

Minutes of the Board of Adjustment

Regular Board Members Present: Vice Chairman Thomas Snyder, Reta Berman, Richard Robinson, and Michael Schutrum.

Regular Board Members Absent: Chairman David Snider and Daniel Boone.

Alternate Board Members Present: Raymond Kudlak (Alternate 1), Ryan Cuomo (Alternate 2), and Jonathan Melvin (Alternate 3).

Planning Staff Present: Lisa McCarter, Planner I, and Michelle V. Haines, Secretary.

Roll Call, Determination of Quorum

Thomas Snyder determined quorum and called the Board of Adjustment hearing to order at 6:30 p.m.

Approval of the Minutes

Michael Schutrum made a Motion to Approve the Minutes of October 13, 2009, and Jonathan Melvin seconded the Motion. The vote was unanimous.

Case #V09-06 Called

Thomas Snyder, Chairman, called the case. Eric Conner Fulton, hereinafter also referred to as "Applicant", and Lisa McCarter, Planner I, were sworn in prior to giving testimony.

Planning Staff Testimony

Lisa McCarter gave the preliminary statement of the case to the Board and entered the facts, findings and conclusions into the record through verbal testimony and written documentation (see attached Exhibit "A"), which is incorporated herein by reference, as follows:

BACKGROUND:

1. The subject property is zoned Rural (R), and is located at 6536 Cashion Road. The property is currently being used as a single family home.
2. The property is 8.26 acres.
3. The parcel is located within the Protected Area – 1 Watershed Boundary.
4. The Huntersville Zoning Ordinance requires that the average lot width shall be at least 120', but in no case less than 100'.

5. The applicant currently has 219' of road frontage. Since lot size must average 120', the applicant lacks 21' required to subdivide the property and meet the minimum lot width requirement.
6. The current owners purchased the property on May 8, 2006.
7. A text amendment was approved on May 15, 2006, modifying the R & TR density, open space & other development standards, which included changing the average lot width to the existing requirements of "at least 120 feet, but in no case less than 100 feet" from the previous requirement when the home was purchased that "lot width shall average at least 100 feet, but in no case shall be less than 80 feet wide."
8. On September 9, 2009 the applicant applied for a variance from the minimum lot width in order to subdivide their property into two lots.

STAFF FINDINGS:

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

1. That practical difficulties or unnecessary hardships, as defined below, would result from the strict application of these regulations 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

Staff Findings of Fact:

 1. The property at 6563 Cashion Road is located within the Rural zoning district. That district requires lots to average 120' of street frontage and 1 acre in area.
 2. The owners purchased the property on 5/8/2006. On 5/15/2006 a text amendment was approved which changed the average lot width from 100 feet in the Rural zone to 120'.
 3. The applicant's property has 219' of frontage on Cashion Road and is 8.26 acres in size. The applicant wants to subdivide their property into two lots. The applicant cannot subdivide their property because the lot width has to average at least 120 feet; but in no case less than 100 feet. Given the current lot width on Cashion Road, the proposed subdivision would average 109.5 feet per lot.
 4. There is more than enough land area to subdivide the property into two lots as the ordinance requires lots to average at least 1 acre each and the applicant's proposed subdivision would average 4.13 acres per lot.
 - 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.

Staff Finding of Facts:

 1. There are 462 parcels in the Rural zone that are 8 acres or more. GIS mapping by Mecklenburg County does not identify how much street frontage these lots have. However, there are two properties in the immediate vicinity that have the area required to subdivide but inadequate lot widths.
 - c. The difficulty or hardship resulting from the application of these regulations would prevent the owner from making 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.

Staff Finding of Facts:

1. The property is current being used for a single family residence.
 2. The ordinance would allow an accessory dwelling to be built on the property as long as it meets the requirements in Article 9.1, however it must have the same owner as the principal dwelling.
 3. The property could currently be divided by exempt subdivision if the new lot were a bona fide gift (property gifted to someone and not sold). Exempt subdivisions are not required to meet the zoning ordinance criteria but would require at minimum a 15' exclusive easement for access.
2. 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.

Staff Findings of Facts:

1. Article 3.2.1.d.2.a states in the Rural zoning district the lot size must average 120' and if the property were subdivided the resulting average would be 109.5'.
 2. The proposed use for the requested lots would be single-family, which is in accordance with the Rural zoning district.
3. That the public safety and welfare have been protected and substantial justice done.

Staff Findings of Facts:

1. Staff has not identified anything that would endanger public safety or welfare.

STAFF CONCLUSIONS:

The property owners are seeking a variance from Article 3.2.1.d.2.a which requires the average lot width to be a least 120', but in no case less than 100'. The property currently has 219 feet which is 21 feet less than required to subdivide. The property is currently being used as a single family residence, and can continue to be used as a single family residence if the variance is not granted. The request does not meet all of the findings of fact; therefore staff does not support the variance request. However, staff recognizes that the minimum lot width requirements were changed after the applicant purchased the property which prevents them from being able to subdivide their property.

Jonathan Melvin asked Staff about the frontage average and how many parcels it would apply to in that zoning district. Staff responded that it is for anything new in the Rural District Zone. The older properties were approved under different Ordinance regulations. Jonathan questioned if the property was *cut* and 118' and 101' was allowed would the average of 120' for all the parcels be there. In reading the Staff Report, he asked if it is the average of all the lots in the area that needs to be 120'. Staff responded that it is the average required for the lot being subdivided.

Raymond Kudlak asked if this property was gifted to someone, how long would the receiver of the gift have to retain it before selling it. Staff responded that the Planning Department does not have, or know of a specific time frame. The Planning Department has a Bona Fide Gift letter, and once a

Deed of Gift is recorded, it is asked that the letter be completed and returned to the department. He also asked if the Ordinance pertains to someone who at the time of purchase understood that the Ordinance did not require an average of 240' so that when divided would average 120' each or some combination thereof. Are they held by the new Ordinance or because of their purchase date still covered under the old Ordinance? Staff responded that it would be the Ordinance that is in effect at the time of subdividing, so they would be held to the new Ordinance. Staff does recognize there was a smaller average when they purchased the property.

Michael Schutrum questioned Staff if it was known what the frontage is for the adjacent lots. Lisa McCarter showed the members an aerial map indicating the frontage, and noted that there are other properties in the same situation. Jonathon Melvin noted that there is one lot with a 73' frontage, and Reta Berman noted that lot did not have a building on it.

Richard Robinson questioned Staff if there were any Ordinances that would prevent them from subdividing the property such that it land locks the back lot and then having to grant a right of way or easement. Staff responded that if a minor subdivision was done to sell a piece of the property it has to be in compliance with zoning. If it was an exempt subdivision and the front portion was gifted, they would be able to give a 15' easement to the back lot.

Applicant Testimony

The Chairman called the Applicant. Eric Conner Fulton approached the Board with Exhibits (see Exhibit "Applicant A") and gave testimony as follows. He referred to the lot that has 73' road frontage, and noted that originally that had been a lot with 150' frontage and one-half of it was purchased by the neighbors to the right, and the other half was purchased by the previous owners of the home the applicants bought. This was in order to access the pasture in the back and at that time he combined all of three lots into one. One option that he discussed with the Planning Department was to buy 21' of the adjoining lot to have more road frontage to make the division. It was discussed with the neighbor and they offered a fair amount of money for the 21'. The neighbor was not interested in selling. He explained that he and his wife decided to move to Huntersville while pregnant with their first child. His wife was born and raised in Huntersville and lived one street over from Cashion Road. They lived in Apex in a Victorian home on a lot of .22 acres, and wanted to have more land to build a new house on. They shopped for property in Huntersville, which began in March 2006 with Linda Kidd, Realtor. This property was perfect for them with an easy walk through the woods to her father's house and the property that she grew up on. At the time they understood they could subdivide the land, build a house on the back lot, and cut the existing house off. They would keep that house as rental property or sell it. They could also have it available for their parents if they become in a condition that they needed to be nearby, but not underfoot.

The package he handed out shows a timeline and the story of shopping for the property and ultimately offered to purchase the property on March 23, 2006. At that time, one of the contingencies put in the offer to purchase contract was that the land in the back had to perk, and that they get a permit for a septic system to build a house. There were three separate areas laid out where they thought they could potentially build (see Applicant's Exhibit). The applications were prepared by Linda Kidd and submitted to the County. The property did perk. Appendix C shows the permit and a design of where the septic system and flow lines would be located. He further stated it was not their intent to wait three (3) years before they got to the point of dividing the land and building, but things

happen that are not anticipated (i.e. children, house in disrepair, renovations). When they bought the property they thought it would only take six months to get everything in order, but they still live in the 1,500 square foot house with two (2) children.

As shown on the timeline they bought the house prior to the Town's first public hearing that changed the Ordinance. The process for the septic system was completed on April 26, 2006. The public hearing was on the 17th of April, and the Planning Board heard the issue on the 25th of April. The final decision was made on May 15, 2006. They closed on the house on the 7th or 8th day of May in 2006, and the change was in effect about one week after they bought it. They did not know that until recently when he came to meet with the Town to subdivide the parcel that the rules had changed. Several options were discussed with the Planning Department with this variance process.

He noted that the Staff Report had evaluated the general vicinity around the house and identified a couple of properties that are greater than 8 acres off of Hubbard Drive that had inadequate lot width to subdivide according to the current rules. In his research of those two properties; one is 139' and the other has 191' road frontage, neither of which has a sufficient amount of road frontage to even meet the minimum requirement of the Zoning Ordinance. In their case they have 219' and can meet the minimum required 100', and the other lot would be 118'. He stated he was open to other options in terms of how to divide. Not being able to meet the average of 120' seemed to him that the average is there for someone who is trying to subdivide for a neighborhood. In their case they can meet all of the requirements of the Ordinance except for the average of 120'.

Jonathan Melvin asked the applicant about their plan for the existing house, and Mr. Fulton stated they would subdivide a lot ranging from three-quarter to 1 acre in size for the existing house. Now they are thinking they will rent the property and keep it for an aging parent, or ultimately may choose to sell it. They intend to live in the house until the new house is finalized. His mother recently became ill, and if that illness takes her downhill it would be helpful to have her nearby to take her to the doctors and what-not.

Reta Berman stated that the public hearing was on April 17, 2006, and asked Staff what had been planned. Staff responded that she was not sure how long the amendment had been planned, but it would have been advertised. Sometimes people do not read the legal ads in the newspaper. Staff added that it would have been on the website.

The Chairman acknowledged that Linda Kidd (900 Stephens Road, Huntersville) was in the audience as a witness to this matter. She was sworn in and gave the following testimony and evidence. She stated that she was the Fulton's Realtor for the purchase of the property. She has known Robyn Fulton since she was a child. Linda Kidd owns one of the adjoining tracts and did receive the adjacent property owners' letter for this matter. She pointed out in the staff findings concerning 1a that there is a hardship, and it is a result of zoning regulations. The only reason they can not do what they intended to do when they bought the property is a result of the regulations. Paragraph 1b was compared to 462 tracts in the rural area most which has large tracts. They (staff) did not break down how many would be affected by road frontage. She felt it was unfair to compare. On paragraph 1c she noted that this is a 1,500 square foot house that was built in 1962 and very close to the road on a 1 acre tract along with a lot of the other houses on that street. The previous owner expanded the property. They had a small farm with animals in the back area where Conner and Robyn want to build, and it didn't seem reasonable to her to expect them to live in a small house with the amount of

acreage behind them when they are not going to be farmers. She noted that it was not the highest and best use for the property and it is not what they bought it for. When they bought it they could do what they intended to do. She requested that the Board make an exception. The applicants are an asset to community, and she didn't feel they could sell the property like it is and questioned who would buy 8 acres knowing they could not improve it, unless they wanted to have a small farm.

Reta Berman questioned Linda Kidd if she handled the residential site permit. Ms. Kidd responded affirmatively and that she went to Charlotte to get the permit and was present when they tested the land. Two possible sites were chosen. Reta Berman questioned her about her knowledge of the amendment, and Ms. Kidd responded that she did not know about the amendment proposed at the time, and she was a former member of the Planning Board. That was about the time that a lot of changes were made to the Zoning Ordinance.

Michael Schutrum asked Conner Fulton about the gift concept, and he responded that he had not talked to an attorney and was unclear about it. His property is not paid for and the bank largely owns the property, and did not understand how he is supposed to cut off a piece of the property and gift it to someone when the bank has financed the entire property. He stated that he would need to talk to an attorney and his bank if the variance was not granted in their favor.

Raymond Kudlak asked Staff if construction of an additional dwelling changed the tax base of the property. Staff stated that she could not speak to the taxes, but it would be assumed with another dwelling that the taxes would be higher for that property.

Jonathan Melvin questioned Staff about building a second house, and Thomas Snyder asked how many residences could be on a parcel. Staff responded that there could be a principal dwelling and an accessory dwelling. The accessory dwelling can be 650 square feet or 50% of the first floor of the principal structure, whichever is greater. Thomas Snyder asked if the first floor included garages, and unheated spaces, which staff said could be included. Thomas Snyder gave an example of having a first floor of 3000 square feet in the new structure with the 1500 square feet in the existing accessory structure, and asked if that would fit the category. Staff responded that the accessory dwelling has to be to the rear of the principal dwelling.

The Chairman asked if there were any other questions for Staff or the Petitioner. No further questions were made.

Board Conclusions

The period for public discussion was closed by the Chairman, and the Board publicly discussed the case, as follows:

Jonathan Melvin commented he was struggling with this since the rules are black and white to average 120', and in no case less than 100'.

Michael Schutrum stated that this is an unusual situation where the Applicant has a permit dated prior to change. He understood that with variances the Board must be careful to not to set precedence. To him the variance meets a lot of the criteria given the documents in front of Board that outline the intended use for the property. Variances are difficult to grant.

Reta Berman felt that when they purchased the property they did some research to subdivide. They put in their contract a contingency to make sure that they could perk the property, but they just had to ask more questions or their realtor could have asked more questions about the hearings (for the text amendment). The contract could have said that it was contingent upon being able to subdivide and perk rather than just perk. She understood they spent a lot of money on the house, and that it is sad this happened, but this whole time as Lisa McCarter said it was advertised, on the website, and other places for them to find out.

Raymond Kudlak noted that at the time the contract was entered regardless of the intention it was done with good faith and using information provided to them in good faith. It was his understanding that this Board evaluates each individual situation so as not to establish a precedent but to grant variances with logic. His logic is that this would be a benefit to the community by having the additional dwelling. It would not detract from the present houses facing Cashion Road, nor the parcel behind it. It seemed to him that the logical conclusion is that this is one of those variances.

Jonathan Melvin stated that the Board's function is to uphold the Ordinances unless it causes a hardship to grant the variance. Having to wait, maybe tear down the old house and build a new house is not a hardship. 20-20 vision is always crystal clear. If someone could figure out a way to get around the Ordinance he would support the variance.

Raymond Kudlak noted that there was one other property not explored, and questioned the Applicant about the other neighbor and if they would be willing to sell a strip of land. Mr. Fulton responded that he did not discuss it with them. The husband recently died and the owner has a flower garden there, and suspected that she would not sell.

Thomas Snyder referred to comments made about the Applicant and Realtor's due diligence, and noted that if they would have looked at the Ordinance the day before or date of closing, the Ordinance would have said 100' minimum road frontage. Based on events seen in this Town, and just because there is an application up for consideration does not mean it will get passed. He did not feel that the Applicant failed in due diligence, or anyone else. The question is if a hardship has been created because of the change in the regulations and is this hardship peculiar to this property in question. He was not sure if it is due to the physical nature of this property or to the overall situation and the history of this property.

Raymond Kudlak noted that this is a unique L shaped property. The Ordinance precludes this property from being used as intended in the application. Jonathan Melvin was concerned about setting precedence.

Michael Schutrum stated that if someone has the type of backup data with a permit in hand that was issued in 2006 prior to the ordinance amendment he thought it has to be heard and considered. This is unique to this situation.

Reta Berman reiterated that they did not do their due diligence. If they would have there would have been a contingency in their sales agreement that noted contingent upon financing, contingent upon clear title, contingent upon perking, and contingent upon this Ordinance not passing.

Richard Robinson questioned if the Applicants could ask for a variance to §9.1 to build a larger home for themselves without subdividing and selling a lot. Their variance would ask for relief to have the accessory structure in front of the primary. Michael Schutrum felt this would set a bigger precedence with that variance scenario than staying with this variance.

Jonathan Melvin stated he felt there was due diligence, and it was before the Ordinance was amended.

Ryan Cuomo stated that one of the most viable options is the use of the gift to a family member, and questioned Mr. Fulton about the option. Mr. Fulton responded that they do not have sufficient funds to gift the existing home to their parents, did not feel it made sense, and was not a good scenario.

Richard Robinson commented that they bought the property under existing rules and clearly had intent to comply with those rules at that time, but did not fully execute that plan, and shortly after the rules changed. Now they want to execute the plans. He posed the question that does the intent of what they started get them to the place of receiving the variance based on hardship.

Michael Schutrum stated that it could be argued that it does cause a hardship. The intention was to subdivide the property. Absent with these new regulations, they complied. It is important to keep that in mind. Thomas Snyder added that they are still in compliance with the minimum road frontage under the new Ordinance.

No further discussion was made, and a Motion was called.

Findings of Fact

Michael Schutrum made a **Motion to Grant** the variance based on the following findings of fact and conclusions. Raymond Kudlak seconded the Motion.

1. The hardship is a result of the regulations. The applicants were in compliance with the previous regulations. They submitted for and received a septic improvement permit dated April 26, 2006, which is prior to the change in the ordinance. The only reason they are here is due to the amended ordinance of May 15, 2006. The purchase of the property was clearly with the intention of building a second residence and subdividing, and they have the documentation evidencing their intentions. They met the ordinance at that time, and they meet the minimum road frontage under the current ordinance.
2. The difficulty and/or hardship are peculiar to this property. The property is unique based on the history and timeline of research the applicants did prior to the purchase of the property and that the property was purchased prior to the current frontage regulation.
3. The hardship is that the owners are not able to make reasonable use of the property for the purpose for which they purchased the property. It is clear from the evidence the property was intended to be subdivided.
4. The variance is consistent with the objectives and policies of any adopted plan for the district, or other policies of land development because at the time and prior to the new ordinance it was intended to be residential property, and remains residential property.

5. There is no issue of public safety or welfare.

The vote was unanimous. The variance was granted.

Other Business

Adjourn

There being no further business, the meeting was adjourned.

Approved this _____ day of December 2009.

David H. Snider, Chairman
Thomas Snyder, Vice Chairman

Michelle V. Haines, Secretary

©2009, Town of Huntersville, All Rights Reserved