

43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87

New Business:

A. Consideration of a special use permit application to construct a forty-eight unit elderly apartment development at 2825 Amhurst Boulevard. (Ward 6)

Staff Comments: Mr. George provided an overview of this project. A site plan of the development was provided on the overhead projector. The site is located in the C-3 Commercial District on a 6.8 acre undeveloped lot adjacent to an existing elderly residential community. The developer will utilize 4 acres for the proposed apartment development. The owner will retain the remaining 2.8 acres for future development. Plans for the proposed development were reviewed and approved by the City of New Bern’s Department Site Plan Review Committee. Amenities of the development were discussed. According to Section 15-147 of the Land Use Ordinance, developments that exceed 2 acres or multi-family developments with five (5) or more units require a special use permit. According to Mr. George, staff found the permit application to be complete and within the jurisdiction of the Board of Adjustment.

Applicant Comments: Mr. John Thomas with Thomas Engineering spoke as a representative of Eastern Carolina Community Development. Mr. Thomas stated the name of the proposed development is Millberne Apartments. On the overhead projector he provided visual aids depicting aerial views of the development site, the adjacent elderly community of Berne Village, and the street system surrounding the proposed development. Zoning was discussed utilizing a map of the area. The apartment units and parking were discussed in detail, as well as the stormwater pond and other site amenities. Mr. Thomas advised there are some wetlands on this site. He further stated the Corps of Engineers have visited the site and signed the necessary required approvals.

Renderings of the project were provided and discussed including interior floor plans of each of the two types of 1 bedroom and 2 bedroom units.

Mr. Thomas discussed the traffic concerns surrounding this development, noting the intersection of Amhurst and South Glenburnie Road as the major concern. Mr. Thomas provided an overview of alternative routes of safely and easily getting onto South Glenburnie Road. He noted utilizing the adjacent “No Name Road” is the easier alternative, routing drivers to a controlled intersection that safely provides access to South Glenburnie Road. Additional suggestions on traffic pattern changes were discussed. Mr. Thomas stated the developer was willing to install a sign directing development traffic to utilize the “No Name Road” route.

Chairman Afflerbach questioned if there would be direct access between this proposed development and the existing adjacent elderly development. Mr. Thomas said there will not be direct access provided.

Chairman Afflerbach advised that the public discussion would be broken down into the six

88 individual findings to determine if the special use permit requirements are met. Following the
89 public comment segment, the board will discuss each finding individually and vote on the
90 individual findings.

91
92 **Item 1: Is the requested permit within its jurisdiction according to the Table**
93 **of Permissible Uses.**

94
95 **Staff Discussion:** Mr. George advised according to the table of permissible uses,
96 section 15-147, a special use permit is required for multi-family development and is
97 allowed in the C-3 zoning district.

98
99 **Public Comment:** None

100
101 **Board Comment:** Mr. Brown questioned the understanding of the tax dollars for this
102 project; how it is determined which project gets tax dollars.

103
104 Mr. Mark McCloskey with East Carolina Community Development clarified that a tax
105 credit comes from Federal tax credits through the North Carolina Housing Finance
106 Agency that has jurisdiction to award and allocate tax credits on a competitive basis.

107
108 **Item 2: Is the application complete.**

109
110 **Staff Discussion:** Mr. George advised the application is complete.

111
112 **Public Comment:** None

113
114 **Board Comment:** None

115
116 **Item 3: If completed as proposed in the application, the development will**
117 **comply with all requirements of this ordinance.**

118
119 **Staff Comment:** Mr. George advised the City Site Plan Department review did
120 review plans and found them to be in compliance with all requirements.

121
122 **Public Comment:** None

123
124 **Board Comment:** Ms. Walker questioned the C-3 zoning to ensure this type of
125 development is allowable in the area.

126
127 Chairman Afflerbach noted the similarities to a recently considered special use permit on
128 a similar project. She advised considerations taken into account were sidewalks,
129 entrance, etc.

130
131 Mr. Thomas pointed out the covered main entrance as well as the sidewalks surrounding
132 the project were fully compliant.

133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177

Ms. Murphy questioned the security of access to the building. Mr. McCloskey advised all visitors must come through the front entrance, which is a controlled access point. There is a security panel that requires a code, as well as security cameras. During daytime hours there will be an on-site manager and maintenance supervisor there, with emergency contact information available for after hours and weekends.

Mr. Brown questioned the screening process for residents. Mr. McCloskey advised each applicant will undergo careful scrutiny including background checks, rental history, and credit history checks.

Ms. Jamison questioned additional entrance/exit doors to the building. Mr. McCloskey advised there will be 4 points of entry/exit. Ms. Jamison asked about the security at these doors. Mr. McCloskey advised each door will be secured and will also have security cameras monitoring these areas. Ms. Murphy questioned the accessibility of these additional doors, specifically were they accessible from the outside. Mr. McCloskey advised these are fire doors and only accessible from the inside of the building.

Mr. Brown questioned the handicap accessibility. Mr. McCloskey advised this facility is highly accessible to wheelchair bound individuals as well as the amenities.

Item 4: The use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved.

Chair Afflerbach noted previous questions pertained more to this questions.

Public Comment: None

Board Comment: Mr. Herndon, referencing the site plan, pointed out only one fire hydrant on the property, and questioned how the fire department would access the hydrant and building. Mr. Thomas advised the design of the building allows for fireboxes within the building with access to the fire department. The alternative would be to provide a fire lane around the building, but that is not in the plans.

Mr. George provided additional information stating the fire department and fire marshall have approved the site plans and will further review building permit plans prior to construction.

Mr. Thomas read specific details pertaining to interior access for the fire department's use.

Item 5: The use will not substantially reduce the value of adjoining or abutting property, or the use is a public necessity.

178 **Public Comment:** Ms. Marylou Infinito questioned if this development, as a senior
179 residential facility falls into the low income housing/fixed-income for seniors, or if it falls
180 into the open market as a private pay. Mr. McCloskey advised this facility is for
181 individuals 55 years of age and over, and marketed to those tenants that meet income
182 guidelines at 40%, 50%, 60% of local area median income. There are guidelines for
183 affordability.
184

185 Ms. Nancy Weeks questioned why the starting age of this property is 55 years, when
186 retirement age is 65 in order to draw Medicare. She wondered if the starting age could or
187 should be 60 years. Mr. McCloskey advised there is no maximum age number, but in
188 accordance with the North Carolina Finance Housing Agency, 55 years is the lowest age
189 limit. Ms. Weeks verified the lowest age to be considered is 55.
190

191 Mr. Joe Weeks voiced concern that with the approval of this new development, there may
192 be too many elderly homes in this area. He brought up a previous discussion pertaining
193 to the number of facilities that can be approved for funding in one calendar year, noting
194 that another development could be considered in the next year for the area. He
195 complimented the designs of both proposed projects, and stated he could support one
196 development, but not multiple developments in this area.
197

198 Chairman Afflerbach questioned how likely this scenario could occur. Mr. McCloskey
199 advised it is possible. He cited three developments in the last six years in this area, with
200 an award made last year for a family complex in Craven County, which construction has
201 not yet begun. Typically he advised the state will alternate between multifamily
202 developments and elderly developments to limit the type of development built in a
203 jurisdiction.
204

205 Ms. Deborah Galindo asked if the income guidelines could be provided again as many
206 attendees seated in the back could not hear. She also voiced concern about eligibility
207 criteria for residents, as her experience is that many elderly individuals allow their
208 children to live in their homes as well. Mr. McCloskey advised that the age limit is for
209 all occupants. Therefore no one under the age of 55 is allowed to live in the facility. He
210 advised the only exception could be if the need for a live-in aid is required to assist an
211 occupant with daily needs. Mr. McCloskey reiterated the income guidelines again.
212

213 **Board Comment:** None
214

215 **Item 6:** **The location and character of the use, if developed according to the**
216 **plan submitted and approved will be in harmony with the area in**
217 **which it is to be located and in general conformity with the plan of the**
218 **development of the City.**
219

220 **Public Comment:** None
221

222 **Board Discussion:** None

223
224 **Staff Discussion:** Mr. George reiterated that the elderly development will be located
225 in the C-3 Commercial District where it is an allowed use and is in harmony with the
226 area. Ms. Walker noted that another elderly facility has already been recently approved
227 across the street from this development; therefore it seems to fit in well with the area.
228

229 Verifying no additional public comments, Chairman Afflerbach requested a motion be made to
230 close the public comment segment.

231 **Motion** made by Ms. Jamison to close public comment segment. Motion was seconded.
232 Motion unanimously passed by the Board.
233

234 Chairman Afflerbach advised she would go through each item and discuss possible findings of
235 fact.
236

237 Item 1; the requested permit is within its jurisdiction according to the Table of Permissible Uses.
238 Chairman Afflerbach cited Mr. George has attested the permit is within its jurisdiction.
239

240 Item 2; is the application complete. Chairman Afflerbach noted the board has reviewed the
241 application and Mr. George has attested it is complete.
242

243 Item 3; if completed as proposed in the application, the development will comply with all
244 requirements of the ordinance. Chairman Afflerbach cited the City's Departmental Site Plan
245 Review Committee approval and the site's C-3 zoning.
246

247 Item 4; whether it will materially endanger the public health or safety if located where proposed
248 and developed according to the plan as submitted and approved. Chairman Afflerbach advised
249 the previous conclusion pertaining to roadways was a bit out of their control but could be
250 addressed with signage. Ms. Walker noted she appreciated Mr. Thomas' willingness to add
251 signage to the property advising a safe traffic route.
252

253 Item 5; the use will not substantially reduce the value of adjoining or abutting property, or the
254 use is a public necessity. Chairman Afflerbach cited the fact they will maintain the use for 30
255 years means it will maintain its character and value for at least that period of time.
256

257 Item 6; the location and character of the use, if developed according to the plan submitted and
258 approved will be in harmony with the area in which it is to be located and in general conformity
259 with the plan of the development of the City. Chairman Afflerbach cited Mr. George's previous
260 notation of zoning (C-3) and Ms. Walker's observation of similar use of the adjacent property.
261

262 Chairman Afflerbach asked the Board to consider item 1; if the requested permit is within its
263 jurisdiction according to the Table of Permissible Uses.

264 **Motion** made by Mr. Brown that the requested permit is within the board's jurisdiction
265 according to the Table of Permissible Uses, noting the City has approved all the measures
266 necessary to meet the requirements. Motion was seconded by Ms. Jamison. Chair
267 Afflerbach requested Mr. George take an individual roll call.

268 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
269 **and zero (0) No's.**

270
271 Chairman Afflerbach asked the Board to consider item 2; is the application complete.

272 **Motion** made by Mr. Herndon to accept the requested application as complete. Motion
273 was seconded by Mr. Newkirk. Chairman Afflerbach requested Mr. George take an
274 individual roll call.

275 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
276 **and zero (0) No's.**

277
278 Chairman Afflerbach asked the Board to consider item 3; if completed as proposed in the
279 application, the development will comply with all requirements of this ordinance.

280 **Motion** made by Mr. Midgette that the development as proposed will comply with all
281 requirements of the ordinance. Motion was seconded by Mr. Brown. Chairman
282 Afflerbach requested Mr. George take an individual roll call.

283 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
284 **and zero (0) No's.**

285
286 Chairman Afflerbach asked the Board to consider item 4; the use will not materially endanger
287 the public health or safety if located where proposed and developed according to the plan as
288 submitted and approved.

289 **Motion** made by Ms. Walker that its use will not materially endanger the public health or
290 safety if located where proposed and developed according to the plan as submitted and
291 approved. Motion was seconded by Ms. Jamison. Chairman Afflerbach requested Mr.
292 George take an individual roll call.

293 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
294 **and zero (0) No's.**

295
296 Chairman Afflerbach asked the Board to consider item 5; the use will not substantially reduce
297 the value of adjoining or abutting property, or the use is a public necessity.

298 **Motion** made by Ms. Jamison that its use will not substantially reduce the value of
299 adjoining or abutting property. Motion was seconded by Mr. Newkirk. Chairman
300 Afflerbach requested Mr. George take an individual roll call.

301 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
302 **and zero (0) No's.**

303
304 Chairman Afflerbach asked the Board to consider item 6; the location and character of the use, if
305 developed according to the plan submitted and approved will be in harmony with the area in
306 which it is to be located and in general conformity with the plan of the development of the City.

307 **Motion** made by Mr. Midgette that the location and character of the use will be in
308 harmony with the area in which it is to be located and in general conformity with the plan
309 of the development of the City. Motion was seconded by Ms. Jamison. Chairman
310 Afflerbach requested Mr. George take an individual roll call.

311 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
312 **and zero (0) No's.**

313
314 Chairman Afflerbach asked the Board to consider constructing a motion to approve the special
315 use permit.

316 **Motion** made by Mr. Brown to approve the special use permit. Motion was seconded by
317 Ms. Murphy. Chairman Afflerbach requested Mr. George take an individual roll call.
318 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
319 **and zero (0) No's.**

320
321
322 **B. Continuation of an appeal of the decision of the Historic Preservation Commission**
323 **to grant a Certificate of Appropriateness for 313 East Front Street. (Ward 1)**

324
325 Chairman Afflerbach disclosed she has a conflict of interest as she is the architect on record for
326 this project. Given this conflict she asked that the board make a motion to excuse her from
327 voting on this item. **Motion** to excuse Chairman Afflerbach from voting on this item was made
328 by Ms. Jamison. Motion was seconded by Mr. Newkirk and unanimously approved by the
329 board. **Motion** made by Mr. Brown to appoint Ms. Beth Walker to serve as acting chairman in
330 place of Ms. Afflerbach for this item. Motion was seconded by Mr. Newkirk and unanimously
331 approved.

332
333 Acting Chairman Walker requested that individuals speaking on this item come forward to be
334 sworn in. Mr. George clarified to those seeking to speak that the appeal hearing is not a public
335 hearing, but a public meeting for the Board of Adjustment to review the record of the Historic
336 Preservation Commission (HPC) for errors. No new testimony will be accepted. All testimony
337 has to be directly related to the written record in order for the board to examine the record for
338 errors of law and to ensure the HPC followed the law. He further stated the only testimony the
339 board will accept will pertain specifically to individual discrepancies related to the law and rules
340 of procedure corroborated by the written record.

341
342 Chairman Walker swore in the individuals seeking to speak.

343
344 **Staff Comments:** Mr. George gave an overview of the appeal process and the Board
345 of Adjustment responsibilities from information provided by the UNC School of
346 Government. According to Mr. George, no additional facts will be discussed during this
347 process; only those facts that are in the written record. The scope of review for the board
348 includes five factors that are required to be addressed: 1. Review for errors in law; 2.
349 Ensure proper procedures in both statute and ordinance were followed; 3. Ensure due
350 process rights were secured including rights to offer evidence, cross-examine witnesses,
351 and inspect documents; 4. Ensure competent material and substantive evidence supported
352 the decision; and 5. Ensure the decision was not arbitrary or capricious.

353
354 Mr. George stated the HPC Administrator will follow with a staff report on the HPC's
355 actions in issuing the Certificate of Appropriateness.

356
357 Mr. Kevin Robinson reiterated the five factors in question. He advised the opinion of

358 staff is that the HPC acted in a fair, well informed and thorough fashion and based its
359 decision on factual information obtained throughout the process. He discussed a
360 timeline of the process of events leading up to the issuance of the COA.
361

362 Mr. Robinson cited the alleged errors the appellants claim are cause for their appeal. The
363 appellants cite errors in procedural law, claim the HPC went outside its powers in
364 interpreting the law, accepted administrators work as substitute, no posting of the Special
365 Called Meeting in the local newspaper, the application did not meet zoning requirements
366 and the hearing did not follow the order of business for considering a COA.
367

368 Mr. Robinson stated his support of the decision of the HPC, advising the committee went
369 above expectations to ensure sufficient information was provided to base their decision.
370 He noted the minutes reflect ample evidence the Commission members sought outside
371 evidence to assist them in making an informed decision. The Commission accepted
372 recommendations of HPC staff, except where zoning compliance was required and
373 provided by the zoning enforcement officer. The HPC followed all procedures specified
374 in the Guidelines in identifying the facts to assist in its decision. HPC evidence of
375 findings of fact is apparent in the record of the January meeting. Over the course of three
376 public hearings all parties seeking to present testimony were provided the opportunity to
377 do so. Mr. Robinson addressed additional appellant concerns pertaining to design
378 elements, which he stated were appropriately discussed and determined during the HPC
379 public hearing process. He further stated the Certificate of Appropriateness applicant
380 provided all requested documentation and evidence needed by the HPC. Mr. Robinson
381 concluded his staff report to the Board of Adjustment with a recommendation to deny the
382 appeal.
383

384 **Appellant Comments:** Ms. Walker requested the appellant supply only facts from the
385 case that they feel prove the HPC did not act appropriately and failed to follow the law.
386

387 Attorney John Marshall interjected, noting he is speaking on behalf of the applicant. He
388 stated that prior to hearing the appellant's comments, the board should delve into and
389 resolve a preliminary standing issue, on whether certain appellants have standing to assert
390 an appeal. He could, at the appropriate time, provide a memorandum on this issue when
391 necessary. The concern is within the appellants, six of them based on their proximity to
392 the property, may not have standing as defined under North Carolina law. Mr. Marshall
393 provided copies of his prepared memorandum to the board members for review.
394

395 Ms. Walker reiterated Mr. Marshall's assertion that only the petitioner who lives adjacent
396 to the property is appropriately the aggrieved party. Following receipt of the document,
397 Ms. Walker requested 5 minutes for the board to review the memorandum.
398

399 Ms. Lorelei Schaffhausen, one of the appellants, requested the document to review which
400 Mr. Marshall provided.
401

402 Ms. Walker noted the allotted time to read and understand the standing document was not

403 sufficient and requested that Attorney Marshall explain in laymen's terms the contents of
404 the document. Ms. Nancy Hollows objected because the appellants did not have legal
405 representation present. She explained this is the type of information that would come
406 before a court of law, not a public quasi-judicial body. Ms. Walker agreed, but noted she
407 is not asking to try the issue in a court of law, rather that the attorney explain to everyone
408 what the document means.

409
410 Mr. Marshall advised that the key language to focus on is located on page 3 of the
411 document. He referenced Exhibit A, where the appellants provided their name and
412 addresses, with verbiage noting the petitioners own properties in a locally designated
413 historic district. He explained the appellant must be an aggrieved party that has a legal
414 interest, or in the case of a nearby property owner, the appellant must show some special
415 damage to which there has been no allegation regarding special damages in the appeal.
416 Mr. Marshall further stated Ms. Johnson is an adjoining land owner and falls within these
417 guidelines, but the other property owners who filed this appeal have not alleged the
418 special damage necessary because their properties are not affected as such.

419
420 Ms. Hollows, one of the appellants, advised that each of them previously cited they may
421 have special damages due to their homeownership within the historic district. Therefore
422 the character of the district is affected, which encompasses them as well. She referenced
423 a 2010 court case, Mangum versus the City of Raleigh. She requested the appeal hearing
424 be tabled, to allow the appellants the opportunity to have the attorney's memorandum
425 examined by their attorney.

426
427 Ms. Walker voiced her opinion that the job of the Board of Adjustment was to determine
428 any error in the application of the law by HPC in making their decision, not to determine
429 if their decision was valuable to downtown. The board's responsibility is only to ensure
430 procedures were properly followed. However, she agreed a motion is in order to
431 postpone the appeal hearing at this time for all parties involved to review the document
432 and address it at a future meeting.

433
434 Applicant Sarah Afflerbach stated the appellants have had ample opportunity to obtain
435 legal counsel to represent them. Their appeal was filed January 18, 2013 and they have
436 chosen not to bring an attorney at this point.

437
438 Ms. Hollows objected, stating one legal opinion was not acceptable. Ms. Walker
439 reiterated Ms. Hollows request to dismiss and bring back again with proper counsel. Ms.
440 Hollows advised she meant to request to have this issue postponed, not dismissed.

441
442 Attorney Marshall commented the standing that the appellants are trying to assert does
443 not qualify under the law for this matter. Ms. Walker stated her understanding and
444 appreciation of his comments. She reiterated the purpose of the Board of Adjustment was
445 to decide if required procedures were not followed by the HPC. Therefore, based on
446 comments from all parties, she did not feel comfortable proceeding on legal issues.

447

448 **Board Comments:** Mr. Brown agreed with Ms. Walker that a decision by the board
449 would not be prudent at this time given unresolved legal questions and made a motion to
450 adjourn the meeting.

451
452 Ms. Walker requested the board hear from Ms. Johnson, one of the appellants. Ms.
453 Hollows advised that would be improper as it would seemingly concede the point
454 Attorney Marshall was trying to make that Ms. Johnson is the only appellant with
455 standing. She reminded the board of the involvement in this project by the City Attorney
456 and that the process has been postponed a number of times.

457
458 Mr. Marshall advised that his client, in the interest of not having any further delays, is
459 willing to waive his objection and move forward with the hearing. Ms. Hollows advised
460 they would prefer the meeting be postponed until they have counsel. She further stated,
461 due to the initial objection on standing, the meeting has been tainted.

462
463 Appellant Ms. Mandy Johnson, the adjacent property owner stated she is not comfortable
464 moving forward with the appeal tonight, considering that she now may be considered the
465 only appellant with standing.

466
467 **Motion** was made by Ms. Jamison to adjourn the meeting until such time the board can
468 have counsel and have clarification of what the Board can do. Motion was seconded
469 followed by discussion on the need for board legal counsel.

470
471 Clarification was provided by acting Chairman Walker and a **substitute motion** was
472 made by Ms. Murphy for the appeal to be tabled until the next Board of Adjustment
473 regularly scheduled meeting on May 20, 2013. Motion was seconded by Mr. Brown.
474 Mr. George took a roll call. **Motion unanimously passed with a vote of nine (9) Yes's,**
475 **and zero (0) No's.**

476
477 Ms. Stevie Bennett requested to make an announcement that past Board of Adjustment
478 Chairman Ed Risty passed away the previous day following an illness. She provided
479 information on the upcoming services for Mr. Risty.

480
481 Ms. Walker advised the courtroom the next scheduled Board of Adjustment meeting is
482 May 20th, 2013.

483
484
485
486 With no further discussion, meeting adjourned.

487
488
489
490
491
492

Sarah Afflerbach, Chairman

Bernard George, AICP, Secretary