

NEW BERN BOARD OF ADJUSTMENT MINUTES
Special Called Meeting

June 3, 2013

The New Bern Board of Adjustment held a special called meeting on Monday, June 3, 2013 at 6:30 pm in the City Hall Courtroom, 2nd floor, 300 Pollock Street.

Members Present: Ms. Beth Walker, Acting Chairman
Mr. Kenneth Brown
Mr. Benjamin Beasley
Mr. Barry Evans
Mr. David Herndon
Ms. Lois Jamison
Mr. Jeffrey Midgette
Ms. Renee Murphy
Mr. P.J. Walker

Members Excused: Ms. Sarah Afflerbach
Mr. Willie Newkirk, Sr.

Members Absent: None

Staff Present: Mr. Bernard George, Planning Division Manager

Acting Chairman Beth Walker called the meeting to order.

Staff Bernard George opened with a prayer.

Roll call was taken and a quorum declared.

Acting Chairman Beth Walker gave a brief summary of the Board of Adjustment's purpose and responsibilities. After introducing the two cases for the board's consideration, she advised there is a request to revise the agenda. Attorney John Marshall, representing the applicant, requested agenda item #2, a request for a variance, be continued to a later meeting pending resolution of agenda item #1 (Appeal).

Mr. Kenneth Brown made a motion to continue the variance request to the regularly scheduled meeting on June 24th. Motion seconded by Ms. Renee Murphy. Motion passed unanimously.

Minutes: Reading of the minutes from the May 20th, 2013 meeting was waived by unanimous consent. Minutes were unanimously approved with a motion by Mr. Evans and

second by Mr. Herndon.

New Business:

A. Continuation of consideration of an appeal of the decision of the Historic Preservation Commission to grant a Certificate of Appropriateness for 313 East Front Street. (Ward 1)

Counsel for the Board of Adjustment Comments: Mr. Dave Neil, attorney with Smith Moore Leatherwood in Raleigh, spoke as counsel to the Board of Adjustment. Mr. Neil advised the Board that the hearing will include arguments from attorneys representing the Board, the Appellant and Appellee. An official record has been prepared by staff and provided to the board members and attorneys. The Appellant's arguments will be first, with the Appellee arguments following. Mr. Neil advised the Board members on their responsibilities and proper procedures in decision making on the agenda topic. Board members will hear arguments but not testimony.

He noted at the last session of the Board of Adjustment, a staff report on the history of how this case came before the Board was presented and is acceptable. To the extent the staff report moved into testimony, evidence or legal argument was not appropriate. The argument must be left to the attorneys and the evidence must be found in the official record. Mr. Neil reiterated that he is the counsel for the Board of Adjustment and not the City, or either of the parties.

Staff Comments: Mr. Bernard George reiterated the reasons for the special meeting, reciting the agenda item, and covering the legal representation present for each party.

Mr. George noted the appellants' claim the Historic Preservation Commission (HPC) erred in its decision to grant a Certificate of Appropriateness (COA) for the demolition of an existing building and the redevelopment of four attached single family residences located at 313 E. Front Street. The HPC erred by not following guidelines, not establishing findings of fact, failure to follow the New Bern Land Use Ordinance and HPC Rules of Procedure, and the North Carolina General Statutes. The appellants also claim the HPC violated due process rights and made an arbitrary and capricious decision due to incomplete and non-substantive information.

Mr. George continued that the HPC feels it complied with the North Carolina General Statutes, including its own rules and procedures in reviewing and granting a COA for 313 E. Front St. The Commission believes there is ample evidence in the record to support its decision. Mr. George reminded all in attendance this is an appeal, not a re-hearing and no new evidence may be presented. The Board of Adjustment cannot base its decision on evidence that is not part of the record.

Acting Chair Ms. Walker verified that each Board member has the record, and has reviewed and can refer to it as necessary. Ms. Walker noted there was an objection at the previous meeting. The objection was related to standing. The Appellee's attorney advised that his client would like to withdraw the objection of standing and proceed with the matter as scheduled.

Counsel for Appellants Comments: Attorney Ms. Robin Currin advised she represents the Appellants. She provided a brief overview of the process this case has taken from inception to date. She advised her clients feel the HPC erred in its decision, as well as the applicant did not make a clear case that the proposed development was congruous with the historic overlay district. Attorney Currin provided an outline of items to each Board member for review during her discussion. She went over a Standard of Review that will be instructive for the Board during their decision making process, which includes the following questions:

1. Whether the process violated the Appellants constitutional rights, including due process.
2. Whether the HPC acted in excess of its statutory authority or any other applicable rules and regulations, which includes the Land Use Ordinance, HPC Rules of Procedure, General Statutes and Historic District Guidelines.
3. Whether there was an error of law.

Attorney Currin advised there are three broad categories, with the first involving procedural issues. They do not contend the facts of the record. So the question is if the record is correct, was there an error that required a remand back to the HPC? A procedural error would reverse the issuance of the COA and would require another hearing where the HPC would go back and fix procedural errors made. If errors were made in the issuance of the COA, a reversal of the COA would be required with no new hearing.

Procedural errors the appellants contend:

1. Inadequate notice of the December 12, 2012 HPC meeting. There was a meeting in November that was continued. The rules of procedure state the City is required to notify owners within 100 feet of boundary line with a letter of notice postmarked no later than seven (7) calendar days prior to the scheduled meeting. If this is not met, then nothing at the December 12 meeting can be considered valid. Ms. Currin referenced the December meeting, noting one resident during the meeting stated her letter was post marked 6 days prior to the meeting which made the meeting invalid. During the December meeting, after the objection was made the commission voted on the demolition of the existing structure at 313 E. Front Street, accepted new evidence on the proposed new construction, and referenced acknowledgement made by staff of the post mark date issue. A special meeting was called to be held January 9, 2013, due to the comments.

Ms. Currin noted during the January 9th meeting, the commission proceeded to pick up where they left off from the December 12 meeting, rather than return to discussion on issuing a COA for demolition of the existing structure. The HPC members carried on as if the decision for demolition made on December 12th was valid, when in fact, it should not have been. She pointed out a decision to issue a COA for new construction should not have been made without the issuance of a COA for

demolition.

Due to this information, Ms. Currin advised the remedy would be to have a new hearing on the demolition and the COA, with a meeting that has been properly noticed.

Discussion between Attorney Currin and Board members ensued regarding the fact the building previously on 313 E. Front Street has already been demolished. Ms. Currin noted in their opinion the building has been illegally torn down and a hearing should be held to properly obtain demolition approval.

2. Inadequate notice of the January 9, 2013 HPC meeting. Ms. Currin noted one resident within 100 feet of this project did not receive notice of this meeting, nor of the November and December meetings. City staff members rely on the Craven County tax records for individuals within the required contact area. This particular resident was not properly listed on previous tax records due to a change of ownership, and therefore was not properly notified.
3. Incomplete application. The appellant contends the application for COA is still not complete, nor was it complete at the time of the January 9, 2013 meeting. Ms. Currin also advised there is a time limit for the submission of all materials in the application. Yet at the January 9, 2013 meeting, multiple documents were submitted after the deadline. All of this is in violation of the Rules of Procedure. Items the appellant contends were incomplete include:
 - a. Brick samples had not been provided as of the January 9, 2013 meeting
 - b. No dimensions with respect to doors and windows. Acting Chair Beth Walker asked if based on the guidelines, it was required the applicant to provide dimensions, or that the dimensions be proportionately correct on the plans. Ms. Currin advised the materials must be congruous. She further noted if the dimensions were unknown, how could the commission determine if the bricks were proportionately correct?

Ms. Walker advised based on the elevations and drawings information she reviewed, she got a feeling of proportionality of the building, including the windows and doors.

Member Brown questioned material he had read regarding brick, window and lighting fixtures. It was determined by Board Attorney Dave Neil that the information Mr. Brown was referencing was from a staff report and was inadmissible as recorded fact. Therefore he should abstain from making a decision based on the information found in that report.

Ms. Walker asked Ms. Currin for clarification of point that there were materials that were not available prior to the meeting for review, but were

presented at the meeting. Ms. Currin advised some materials were provided for the first time at the meeting and therefore did not meet the 4-day requirement.

Ms. Currin advised there was no information presented regarding driveway and roof materials. The dimensions and materials for the rooftop gazebo have not been provided. She also contended there were missing or untimely submitted landscaping/planting information.

4. Land Use Ordinance Violations.

- a. Zoning: Ms. Currin advised that as of the January 9th meeting there was still no zoning compliance letter, nor was there at the following meeting. No application should be considered by the HPC without proper zoning approval.
- b. Setback Requirement: Ms. Currin advised the appellants believe the front yard setback requirements are being violated, not only from a zoning standpoint, but also from the guidelines of the Historic District. She stated her belief that the smallest setback should not be used, but the average of the smallest and the largest setback. She further advised that the State Historic Preservation Officer is not authorized to interpret local zoning ordinances.
- c. Height Requirement: The height requirement is not specifically noted in the guidelines, but the height requirement is 35 feet. The proposed development is 35', not including the proposed rooftop gazebo which is living space. According to Attorney Currin, a rooftop appurtenance, by definition under the ordinance, does not include a gazebo. When including the height of the gazebo, the building will be over the 35' height requirement.
- d. Townhouse Definition: The definition of a townhouse under the zoning ordinance is a multi-family use which requires living space on the ground floor and a separate ground floor entrance. Based on the development plan, these townhomes will not have living space on the ground floor.
- e. Lot Sizes: Lot sizes for townhomes are required to be a minimum of 3,000 square feet, which this lot is not.

5. Congruity. Ms. Currin advised it is the position of the appellants that the project is incongruous with the special character of the Historic District. Ms. Currin advised under the rules of procedure the HPC is required to make findings of fact. They must appear in the minutes per the Land Use Ordinance. When the Commission purported to make the new construction decision in January 2013, there are no findings of fact actually made. There was no determination of conflicting information.

Ms. Currin showed Commission members photographs showing surrounding properties as well as existing building heights that were used in previous HPC meetings to reiterate their position for incongruity. Ms. Currin advised that the proposed building's setback and height were incongruous with other developments on the block.

6. Form and Rhythm. Ms. Currin stated it is the position of the appellants that the proposed development will not conform to nor compliment the form and rhythm of the existing area, citing major differences in size, shape, material and overall look.

Member Brown referenced the scorecards for new structures the HPC used to “grade” the proposal. He questioned why one person had all zeros. Ms. Currin advised these scorecards are aides for the board members to assist them in making a decision based on the evidence. These cards are not findings of fact, and therefore cannot be included as they are not official in the record. The scorecards do not have anything to do with the violations she discussed or the reasons they are appealing the decision made by the HPC.

A short recess was taken, at which time additional information was provided to the Board members by the Appellees to view as they present their argument. Attorney David Neil advised the binder provided included excerpts from the record the Board members already had as well as bullet points of the appellees arguments.

Counsel for Appellees Comments: Mr. John Marshall, attorney with White & Allen in Kinston stated he represents the Appellees in this case. He advised they commend the decision made by the HPC and request the Board affirm and uphold the decision made by the HPC.

Mr. Marshall advised he would respond to the argument points made by the Appellants attorney.

- 1 & 2. Improper Notice. Mr. Marshall advised it is their position that the November 28, 2012 meeting was properly noticed and the HPC discussion in the meeting was valid. He noted as stated in November’s meeting minutes that this matter under consideration was continued to the December meeting, and then continued to the January meeting. Due to the continuations, no new or additional notices were required even though City staff provided them.

Chairman Walker noted that all notice requirements were met for the November meeting according to the minutes.

3. Incomplete application. Mr. Marshall advised some of the items addressed by the Appellants’ counsel, including brick color, door and window dimension, and gazebo material were discussed as noted in the record or were not required by statute or law at the time of the HPC decision. He further stated that all materials needed by the HPC to make an educated decision had been provided at the time of the approval. Mr. Marshall added had there been additional information that the HPC board would have needed in order to make an informed decision, the members would have requested a continuation until such time as they had all necessary information.
4. Land Use Ordinance Violations.
 - a. Zoning: Mr. Marshall noted that the HPC is not a Zoning Board. Therefore the expectation of the Appellants for the HPC to make additional

determinations regarding zoning is beyond the scope of the guidelines the HPC Board follows. Zoning decisions are staff decisions.

- b. Setback Requirement: Interpretation of the setback is a staff requirement and a legal question. Their position is the City did an adequate job defending their decision.
- c. Height Requirement: The height requirement is measured from finish grade up to 35'. The building fully meets that requirement and the appurtenance trellis is not included in that calculation. It is the position of the Appellees that they have met the height requirement.
- d. Townhouse Definition: Living space must be on the first habitable floor. One can't build habitable space below the flood plain elevation. To say one can't have any space beneath the first habitable floor would seemingly imply that all homes must be built on a slab, not a crawl space. The space as proposed is unheated garage space and not habitable. The lowest habitable space has been properly noted as the first floor and is above the flood plain. Therefore Mr. Marshall advised the requirements have been met.

5. Congruity. Mr. Marshall advised it is his position that what the Appellants' counsel is asking the Board of Adjustment to do is to substitute their judgment over the judgment of the HPC. Based upon instruction by Attorney Neil as well as the law, that is not what this meeting is about. The congruity issue has been substantiated with evidence, as noted in the record.

In reference to the issues pertaining to the setback on the property, he noted in the New Bern Land Use Ordinance language, setback is referred to as a zone within the maximum and minimum existing building setbacks and not an average. Mr. Marshall corroborated this opinion with an excerpt from an email from John Wood, State Historic Preservation Officer. He further stated the decision making has been solid and reasonable in making a determination on congruity and placement of the proposed building within a defined zone.

Mr. Marshall reminded the board that its role tonight is not to provide a substitute of judgment, but to review the evidence presented in the record, which shows reasonable and rational judgment on behalf of the HPC. The board also must determine if the decision of the HPC was based on competent and substantial evidence, whether the evidence was applied within the law, and if a legally proper decision was reached.

Board member Peter Walker noted previous counsel mentioned notification errors being postmarked 6 days instead of 7 days, and questioned if Mr. Marshall disagreed that the notification requirements were met. Mr. Marshall advised the November meeting notifications were properly met, but counsel for the Appellants was referring to the December meeting. According to Mr. Marshall, no additional notifications were legally required for the December and January continuation meetings, even though City staff chose to do so.

Counsel for Appellant Rebuttal:

1. Improper notice. Attorney Currin advised there was a packet for the November 28, meeting but there is no letter or postmark that shows the meeting was properly noticed. At the December 12 meeting, she noted it was affirmatively acknowledged the notice for that meeting was defective.
2. Habitable space definition. The ordinance specifically states that the habitable space must be on the ground floor. The habitable space proposed is on the second floor.
3. Findings of Fact. Attorney Currin remained firm that there are no Findings of Fact in this case. This refers to a resolution of disputed evidence. She noted the purported Findings of Fact from the January meeting does not support the HPC met these requirements.
4. Congruity. A rendering of the development was shown, while Ms. Currin pointed out the height and other features that from her position do not fit in with the surrounding area. Noting the rooftop space, open balconies, and proximity to the sidewalk, she said no other neighboring homes or businesses share those features.
5. Setback Requirements. Ms. Currin noted this area does fall under the expectation of the HPC to determine a decision. She read the definition, advising the requirements are clear.

Member Brown pointed out to Ms. Currin that on the copy of the January 9, 2013 minutes, the last page has the Statement of Reason, as well as acknowledgment and approval of the Commission. Ms. Currin acknowledged they approved it, but is requesting this Board to review and reconsider their decision.

Board Deliberations:

Improper Notice: Ms. Walker asked of Board Attorney Dave Neil, since there was no written documentation of proper notice given for the November 2012 meeting, if they could request staff to provide a good faith effort. Attorney Neil advised the Board is limited to what they can find in the record. He continued saying in his opinion, as their counsel, that he didn't notice a statement one way or another with regard to the November meeting. In a principal of law, it is presumed administrative agencies act properly. He also pointed out in the record, it was noted that staff acknowledged an error in the later notice and the Board might have to weigh the issues.

Chair Walker asked the Board to discuss if proper notice was given for the meetings.

Mr. Herndon stated that unless something can be pointed out in the record that notice was adequate, it is assumed the HPC notice for the November meeting did not meet the requirements.

Member Barry Evans pointed out the board acted in the belief everyone was notified, and only one person was discussed who may have not received the proper notification. The Board then acted on their decisions based on the belief all notification requirements were met.

Mr. Herndon stated there was no evidence adequate notice was given for the November meeting, but for the December meeting there is evidence that states improper notice was given.

Member Ms. Murphy questioned if this would require no decision from the Board of Adjustment other than to refer this back to the HPC for determination.

Member Ms. Jamison stated the area was fairly gray, with no actual wording or proof in the minutes that notice was sent out. According to the rule, the Board has no choice.

Mr. Herndon asked Board Attorney David Neil, if based on what the Appellants' attorney advised on notice procedure and no evidence can be found otherwise, are they required to remand back to the HPC? Attorney Neil advised if the Board were to find improper notice and the person improperly notified did not attend the meeting, then they would have to remand the case back to the HPC to conduct a meeting with proper notice to ensure requirements are met. But if the person improperly noticed, attended the meeting but did not object, the decisions stand.

Mr. Brown believes both sides erred, based on what he read and heard.

Discussion ensued with board members regarding the absence of post marked evidence of the mailing of November's meeting notice, statements showing the December meeting was improperly noticed and therefore was continued to January.

Ms. Walker advised the process started in November. The Appellants did not question the notice requirements of the November meeting. The appellants are asking the Board to appeal based on improper notice for the December meeting.

Member Midgett stated the continuation to December would null and void that meeting because there was no documentation of the November meeting.

Attorney Neil advised there is a purported letter in their packets dated November 21, 2012 with addresses that are addressed to property owners, but there is neither envelope nor postmark included.

Ms. Murphy asked if the letter was postmarked. Attorney Neil advised it is not postmarked.

The additional letters are included, but no postmarked material is included. The postmark in the record pertains to the December meeting.

Member Midgett noted the appellee advised the December meeting was a continuation of the November meeting and therefore did not require additional notification. His question is if the November meeting was properly noticed. There is no evidence supporting or negating proper notice.

Attorney Neil advised it is settled law that if a meeting is properly noticed, it may be continued to a date certain without additional notice. Attorney Currin objected to this, noting it is not a special meeting and can only be continued to another regularly scheduled meeting.

Ms. Walker noted the January meeting was a specially called meeting, and the December meeting was a regular meeting. This verifies that the December meeting could have been held with no additional notification, as it was a regularly scheduled meeting. Being held to the specially called January meeting, additional notice would have been required, which was correctly noticed in the record.

Mr. Neill advised the evidence shown in the record supports that the November meeting was held without incident of concern for improper notice.

The Board decided that the appellants did not bring forward this evening in their arguments that there was any improper notice for the November meeting. This would mean the December meeting did not require additional notice and therefore was a properly noticed meeting.

Chair Walker asked the Board if they were comfortable with making a decision that the notice requirements were met. The Board agreed.

Land Use Ordinance Violations:

Setback requirements: Board members agreed there is a difference in interpretation of setbacks which were approved by the City Zoning Officer. Ms. Walker noted in the record, there is photographic evidence showing the different setbacks on the block in question. Ms. Walker does not feel the setback issue is a problem, as it is nothing extravagant. Based on the documents, the narrowest area is along Front Street and appears to be 4'4".

Chair Walker advised the Board needed to determine that the HPC was neither outside of law nor an arbitrary decision. Based on the discussion in the record, Ms. Walker advised she did not feel it was an arbitrary decision, and in fact the appellee returned to another meeting having changed the setback to be more congruous with the area.

Mr. Evans noted the Zoning Officer reviewed the issue and found no problems, and the HPC discussed it, found no issues and determined they accepted it.

The Board agreed there is enough information provided to understand how the HPC approved the setbacks as presented.

Height Requirement: Member Midgette questioned what would be considered the ground floor, considering the infill, open space and the first habitable floor. He noted the Appellant's attorney stated the ground floor must be habitable space.

Ms. Murphy noted the space is not heated and there is no additional parking on the street. Ms. Walker advised if this was a home being built, the home would have to be built up based on the flood plain requirements. She believes the 'ground floor' interpretation to be the first habitable floor, and the other board members agreed with this interpretation.

All Board members agree the building plan was in accordance with the ordinance and not a violation.

Regarding the roof height and appurtenance, Ms. Walker and Mr. Evans both advised the gazebo atop the townhomes should be considered an appurtenance. Ms. Walker noted the elevations defined in the packets each board member received is 33-35' to the top of the building with the rooftop appurtenance on top. The building next door is a three story structure with a covered widow's walk.

It was agreed among the Board that the appurtenance is an add-on. Ms. Walker advised the Board examples of appurtenances are chimneys, widow walks, rooftop dining, which the downtown does have. The question then remains is this to be included in the structure height or in addition to the height.

Mr. Herndon cited Land Use Ordinance Section 15-189, which states "The height of the building shall be at the vertical distance measured from the mean elevation of the finished grade at the front of the building to the highest point of the building not to include chimney's antenna or other rooftop appurtenances."

Mr. Walker advised he felt the HPC erred in not considering this. However, he feels a gazebo is an historic form of appurtenance.

The Board determined that since the structure is within the height requirements and the Board agrees this is an appurtenance, the height violation concern is not an issue.

Lot Size Requirements: Chairman Walker advised she found no issue in the record that conflict with lot size requirements. Board members agreed.

Congruity: Ms. Walker advised after reading minutes from three separate meetings, the words in question 'arbitrary and capricious' do not come to her mind. She feels there was plenty of evidence presented to the HPC from both sides. The Board members agreed.

Attorney Neil advised based on the decision the Board makes, it could affect whether the applicant receives a COA. He reminded the Board the toughest issue presented to them for consideration this evening was notice. Mr. Neill advised the Board on the proper motion formats that the Board may choose to make in its decision making process.

Chairman Walker advised that Board discussion on this topic concluded that there was proper notice in November, therefore whether notice was properly provided in December is a moot point.

Ms. Walker questioned if one motion for all is sufficient, or if a motion must be made for each item. Mr. Neil advised it was up to the Board.

Member Barry Evans made a motion to affirm the decision of the HPC based on the evidence provided and the Board discussion during this meeting. Member PJ Walker seconded the motion. Mr. Neil clarified that the motion should be based on all arguments brought before them

tonight by the appellant. Mr. Evans agreed. Mr. Neil suggested Mr. Evans rephrase his motion to include that verbiage.

Member Barry Evans, based on all the arguments heard tonight, made a motion to affirm the decision of the HPC. Member PJ Walker seconded the rephrasing.

Acting Chair requested Mr. George take an individual roll call. **Motion unanimously passed with a vote of nine (9) Yes's, and zero (0) No's.**

Attorney Neil advised the attorneys will bring back to the Board a proposed Order for adoption at the next regularly scheduled Board of Adjustment meeting.

Other Business:

Mr. George advised the Board needed to elect a nominating committee to elect new officers for the upcoming year. Chairman Walker asked if any of the Board members would like to volunteer to be on the committee. Mr. Barry Evans, Mr. David Herndon and Ms. Beth Walker agreed to be on this committee.

With no further discussion, meeting adjourned.

Barry Evans, Vice Chairman

Bernard George, AICP, Secretary