

**MINUTES
BOARD OF ADJUSTMENT
THURSDAY, MAY 7, 2015
HOOD ROOM, MATTHEWS TOWN HALL**

PRESENT: Chairman Jim Jiles, Members Jim Mortimer and Jerry Meek; Alternate Members Gary Smith and Peter Tuz; Attorney Robert Blythe; Senior Planner Jay Camp, Code Enforcement Officer Carlo McKoy and Zoning Technician/Deputy Town Clerk Betty Lynd

ABSENT: Member Cecil Sumners, Jeanne Moore, Alternate, Thomas Lawing

CALL TO ORDER/INVOCATION:

Chairman Jim Jiles called the meeting to order at 7:05 p.m. Mr. Jim Mortimer delivered the invocation.

APPROVAL OF THE MINUTES:

Mr. Jiles stated that he would like to make an addition to the next to last paragraph on page 5 of the March 18, 2015 minutes. He would like to add "Ms. Irvin stated that the petition would include this plan." as the last sentence of that paragraph.

Mr. Jerry Meek made a motion to approve the March 18, 2015 minutes as amended. Mr. Mortimer seconded the motion, and it carried unanimously.

Mr. Jiles appointed Mr. Tuz and Mr. Smith as regular voting members for tonight's requests.

SWEARING IN:

Senior Planner Jay Camp was sworn in by Mr. Jiles

VARIANCE REQUEST: BA2015-1, SIDEYARD VARIANCE 105 SARDIS MILL DR

STAFF REPORT:

Mr. Camp stated that the applicant originally requested one variance, but as staff reviewed the request, we recommended and the applicant has added variance request B. The request before the board is to allow a detached garage to remain in its current location within the setback next to Sardis Road which is categorized as a major thoroughfare. The garage was constructed by the applicant's husband who is now deceased. The applicant was in the process of selling the home and a potential buyer alerted staff to the violation in February 2015. Staff notified the property owner of the issue and the applicant chose to request a variance. Our Unified Development Ordinance and predecessor Zoning Ordinance have not changed much since the property was originally plotted in 1989. It is a corner lot with a pie-shaped buildable envelope. This lot has a side yard setback next to Sardis Road of 45 feet. The lots adjacent to the rear of this property have a 55 foot rear setback. There have not been drastic changes to the ordinance. While the section numbers have changed, the basic requirements are the same. Section 155.601.11 states that "If the side lot line of a corner lot in any zoning district abuts a thoroughfare, the corner side yard must be at least forty-five feet (45') in a lot used for residential purposes." Section 155.601.20.A states an "Accessory structure shall not be permitted in any required front setback or side yard or within three feet (3') of any exterior property line. If located on a corner lot, the accessory structure shall not be nearer to the side street than the principal structure." This is in place so that if the properties to the rear of this property were front-facing homes, the accessory structure on this lot would not be any closer to the road than the principal structures on the adjacent lots. Surveys provided by the applicant are also included within the packet. The original survey was included as well as the most recent survey. Based on the fit of the house in the building envelope, the builder clearly knew what the building setbacks

and measurements were. The garage is also shown on the survey approximately 7 feet from the property line. Building permits were obtained for the home and garage. As staff reviewed the permits, the County permit has the incorrect setback of 3 feet.

Mr. Mortimer asked if the builder of the home and the builder of the garage was the same person. Mr. Camp stated that Mr. Tillotson was the builder for both the home and the garage.

Mr. Camp stated that the restrictive covenant for the development was also supplied within the packet material. Restrictive covenants are completely independent of Town zoning and have no bearing on the zoning requirements, but this one is included to show that a garage is required on every property within the neighborhood. It is possible to relocate the garage, but it would be difficult to meet the required rear setback without impeding upon the use of the rear yard.

Mr. Camp also stated that example findings of facts were provided for the board to review. The third finding of fact, relating to whether the hardship was created by the applicant is the most difficult because there is a lack of proof either way as to who caused the error.

Mr. Jiles stated that he found minor inconsistencies on the surveys and permits. He also stated that the original permit for the house was not included in the packet. Mr. Camp stated that the applicant had that available at tonight's meeting, should the board want to review the document. Mr. Jiles stated that building permits have had inconsistencies in the past, but on the original application there were no numbers shown for setbacks that he could find. The 3 foot setback was on the approved permit, but he wanted to view the original application as filled out by the builder. Mr. Camp showed the original application filled out by the owner and it showed the 3 foot setback written in. Mr. Camp reminded the board that the number 3 was not entirely incorrect, because it is the typical setback for most accessory structures. Mr. Mortimer asked if that was the original application for the detached garage and Mr. Camp confirmed that.

Mr. Meek asked for confirmation that there is no reason to believe that in applying for the permit, no misleading information was given by the applicant. Could this be a good faith error? Mr. Camp answered that the builder was a developer himself that built the entire neighborhood. It is speculation to say that he would have been fully aware of setbacks and measurements and would not have filled out the application with improper information.

Mr. Jiles stated that the survey done on December 6, 2006 was in line with the time frame that the garage was built within and the garage is shown within the 45 foot setback. There are no dimensions listed on the garage. He stated he was not saying this was an evidence of an intent to deceive, but this is just discussion of evidence presented to the board.

Mr. Tuz asked when the garage was complete in relation to the house being completed. Mr. Camp stated that it is customary to pull separate permits for each structure, but they were built at the same time.

Mr. Blythe advised that if questions were going to be answered by the applicant and Code Enforcement Officer Carlo McKoy, they both needed to be sworn in. Mr. Jiles swore in Mr. McKoy and Judy Tillotson, the daughter of the applicant.

Mr. Jiles stated that he believed the garage and home were built at the same time. Mr. Camp brought up aerial views maintained by Mecklenburg County of the property from around 2007. 2007 showed the home being built. On 2009, the garage is shown on the property.

Mr. Jiles stated the HOA was set up by the builder and filed in the 1990 timeframe. They do require garages with exceptions for how the garage is loaded. He stated he believed it does not show an option to delete garage or not build a garage. While the covenant has no bearing on zoning requirements, but the covenant does have some legality.

Mr. Mortimer asked if Mr. Tillotson built both the house and the garage, as well as developed the neighborhood. Mr. Camp stated that was correct.

Mr. Jiles asked for Mr. Camp to outline the variance requests again. Mr. Camp explained the first variance allows the garage to remain in its current location which is approximately 7.1 feet (7.1') from the property line. It is a variance of +/- 38 feet (38'). The second variance allows the garage to remain closer to the side property line than the principal structure, meaning the existing home. The applicant needs both variances to remain in compliance. Mr. Jiles asked if the distance from the right-of-way line of Sardis Road is 7.1 feet (7.1'). Mr. Camp stated that was correct. Mr. Jiles stated that the survey also shows the corner of the principal structure encroaching on the side yard by 0.6 of a foot. Mr. Camp stated that was accurate but there are allowances in the ordinance for fractional encroachments.

Mr. Tuz asked if the potential for Sardis Road to be widened would have an impact on this property. Mr. Camp stated that while the neighborhood was being developed, an extra 20 foot (20') of right-of-way was dedicated for the eventual widening of Sardis Road. There is about 85 feet (85') of right-of-way in that area. Typically, you would want 100 feet (100') on a major thoroughfare for a 4 or 5 lane. It is hard to know whether the state will get involved with land acquisition, because the state typically tries to stay away from that step.

Mr. Tuz also asked if the purpose of the 45 foot (45') setback was to prevent the home from being closer to Sardis Road than its rear adjacent lots if they were front-facing homes. Mr. Camp stated the main purpose of the 45 foot (45') setback was to create a buffer between the roadway and home. It allows for more landscaping space. Mr. Tuz stated that the homes across the street in Benton Woods seem to be a lot closer to Sardis Road. Mr. Camp stated that the ordinance requires the rear setback to be just as much as the front on through lots. This setback has nothing to do with transitional setbacks.

Mr. Jiles stated he had a question for the applicant about the current use of the garage, whether for parking or vehicles or utility building. Mr. Camp states that the ordinance states that home-based businesses are only allowed within the principal structure.

Mr. Jerry Miller, attorney for the applicant, came forward to speak on the applicant's behalf. He placed into the record copies of the building permit for the principal home and garage. He stated the permits were dated September 1, 2006.

Mr. Meek stated that the prominent issue is whether the hardship is the result of the applicant. He stated there doesn't seem to be evidence to indicate either way what the intent of the applicant was back then. He asked Mr. Miller what evidence he could provide to show the intent of the homeowner when completing the permitting process. Mr. Miller stated that Ms. Tillotson is of retirement age, and this problem did not manifest itself until she tried to sell the home. Mr. Tillotson passed away last year, so many questions of intent will be left unanswered. Mr. Miller stated that the garage is used for vehicle and small item storage.

Mr. Meek asked if Mr. Tillotson built the entire neighborhood. Mr. Miller stated that Mr. Tillotson developed the entire neighborhood as well as Benton Woods across the street. Mr. Meek asked if, when developing this neighborhood, Mr. Tillotson intended on occupying this particular lot. Ms. Judy Tillotson stated that this issue has been quite a surprise. There was intention to defraud anyone. He was very thorough in the process of developing this lot as Mr. Camp stated before because he had to find the right home to fit. This lot and the one directly across the street were the worse two lots in the neighborhood, so Mr. Tillotson kept them. She stated that her father was a good builder and would not be deceitful. Mr. Miller stated that the Unified Development Ordinance Section 155.102.F says "It is not intended that this Title will interfere with any easements, covenants, or other agreements between parties." The CCR mandates that every lot must have a two-car garage. It looks like there is marginal ability to relocate the garage. The cost to demolish and rebuild a two-car garage is estimated at \$50,000. There is quite a bit of money owed on this house. It is being marketed for \$399,000 and a little over \$300,000 is still owed. There are very few foreclosures in the area, and Mr. Miller stated that he would hate for this home to be returned to the bank. Mr. Miller stated that he believed there was plenty of room for any eventual widening of Sardis Road. The CCR is a major problem. The house cannot be sold without a garage. It would have no value because it

does not meet the CCR requirements. Repositioning does not seem to be a viable option. Mr. Miller stated that he submitted with the application the section of the CCR that referenced garages, although he had a copy of the full CCR should the board want to view the document. Mr. Tuz asked to view the entire document, and the document was placed within the record.

Mr. Meek asked other than the testimony of his daughter, what evidence could Mr. Miller present that this hardship was not created by the applicant and instead possibly an error by Mecklenburg County staff. Mr. Miller stated that Esther Tillotson, the applicant, did not have an involvement in the process of building the home and garage. Mr. Tillotson was an experienced builder, but it would be a stretch to impute his actions upon his wife. The family was not aware of a problem with the garage until it was brought to their attention in selling the home. Mr. Tillotson recorded the CCR, so it would be a valid conclusion that he would know the requirements for a garage.

Mr. Jiles said he agreed that the intent was to have all buildable lots with a two car garage. There is nothing in the record to relay intent, only factual information concerning the actual buildings. Mr. Miller stated that someone downtown (Mecklenburg County) was not paying attention because the applications for permits clearly has the dimensions of the garage written down.

Mr. Jiles stated that the building permit placed in the record tonight has the minimum setbacks noted on the permit. He asked Mr. Miller if he believed there was any room for an appeal by an owner to the requirement for a garage within the covenants. Mr. Miller stated that any of the neighbors could file suit against them for not having a garage. The more difficult problem would be that they cannot sell the home without the garage.

Mr. Tuz stated that after glancing at the CCR, he could see where the builder thought he was doing right with the layout. Mr. Miller stated there is no wiggle room in the CCR for not having a garage. There is wiggle room on which way the garage faces, side vs. front loading. Mr. Tuz stated there would be a major agreement needed by neighbors and a standard process to go through like any typical covenants to change anything within the document. Mr. Miller asked if the board was asking if the covenants could be changed. Mr. Tuz stated if they were operating within law, they do have the right to vote to change the covenants. Mr. Mortimer asked if it was a 2/3 vote. Mr. Tuz stated he believed so. Mr. Miller stated he did not believe the house would be saleable without the garage. The value of the home would be significantly impacted without a garage like its surrounding neighbors. That would create a financial impact on Ms. Tillotson. Mr. Tuz asked if any feedback was given by the neighbors. Ms. Judy Tillotson stated that there was no negative feedback given to the family for keeping the garage. The neighborhood value would be lowered by selling the home for less without the garage.

Mr. Miller stated that the UDO states it cannot interfere with CCR documents and easements although the UDO was not established in 2007. Mr. Meek stated if that was the case, then there would be no UDO at all. Mr. Meek stated that there is no direct evidence showing that this was done intentionally by the applicant. We have inferences that because he was a successful and knowledgeable builder that he would have known how to go about the permitting process. If the board had some type of testimony to the character of Mr. Tillotson to state whether or not he would have intentionally deceived Mecklenburg County that would be helpful. Mr. Miller stated he has known the applicants for many years. Mr. Tillotson developed Benton Woods and this neighborhood as well. To his knowledge, he had a good relationship with the downtown people concerning permitting, etc.

Mr. Jiles stated that the board had heard testimony from Ms. Judy Tillotson concerning the character of her father. He explained that the question he still had was with understanding how you can build, plat, build a subdivision such as this, have the surveys done, know the setback requirements, and back yourself into a corner with unbuildable lots such as this. This board is only looking at the variances. The problem lies with a reputable builder with a lifetime career in development and how they can miss something like this. This is why we are looking for facts and evidence. Integrity is not a question at all.

Ms. Judy Tillotson stated that it was also a family concern on how Mr. Tillotson was able to obtain permits to legally build this structure if it was in the wrong place. The bank also reviewed documents and

approved a loan on the house. The house and garage were built between 2006 and 2007. No one in the family was aware of a problem until the house was placed on the market. The family does not believe that Mr. Tillotson knew what he did was wrong or that he had any ill intent. There are also handwritten documents showing where Mr. Tillotson discussed this matter with the county and drew property lines, etc. Mr. Tillotson must have met and discussed this with someone in the county's building permit department. If this garage was so out of line back then, how was Mr. Tillotson able to obtain permits for it?

Mr. Tuz also brought up the point of the garage needing to pass inspection in person. Ms. Judy Tillotson agreed and said that it would have been inspected with the house because it was constructed together. It is a very nice detached garage built with brick and drywall on the inside. Now, this is not an easy fix. The family does not have the funds to fix the problem.

Mr. Miller stated that it was apparent that there were a lot of issues with the Permit and Inspections Department. A law firm and a bank had to also review the documents in order to pass a good title to the Tillotsons.

Mr. Meek asked for clarification of whether or not Mr. Tillotson intended to live on this lot when developing the neighborhood. Mr. Miller stated this is one of the later houses built in the neighborhood. Ms. Judy Tillotson stated this was one of the last two lots developed in the neighborhood. Both lots were offered to the HOA of the neighborhood and they declined them. Mr. Tillotson decided to build on this lot and kept the one vacant lot across the street. When Mr. Tillotson passed, the family sold that lot and a house was built on it.

Mr. Gary Smith stated that the special conditions or circumstances must not result from the applicant or property owner. Is this a case where the applicant didn't create the problem because the applicant is the late wife?

Mr. Carlo McKoy stated that as a builder, this would have been an easy fix to place the garage further behind the home in the beginning before it was built if I knew the correct setbacks. Someone somewhere misunderstood the correct setbacks. Mr. Meek asked if the builder's sophistication would be an argument to who made the error. Mr. McKoy stated that if the builder had known the 45 foot (45') setback, the garage could have been easily placed further away from the road before construction began.

Mr. Meek asked Mr. McKoy to explain further the permitting process. Mr. McKoy stated that the permit applicant would provide the information to the county. General contractors do not always know the rules for each township, especially if they do work in multiple areas. The county makes sure you know the rules and follow the ordinance.

DELIBERATION:

Mr. Mortimer stated that this a developer/builder who built more than one subdivision. There are lots in the front that are less desirable. It appears from the drawings presented that he could have built in the garage in the back, but he chose to build it on the side. How did he not the correct information? Ms. Tillotson had nothing to do with it, but Mr. Mortimer stated that he is bothered by the amount of experience Mr. Tillotson had with development, yet lack of understanding the setbacks. It is true that the county could have make a mistake as well.

Mr. Meek stated that there is no doubt that who created the hardship is a serious problem the board must consider. There is no doubt that there is a hardship. The variances are consistent with the spirit of the UDO. The property is peculiar. The main issue is who created the hardship and whether the error was intentional. Mr. Meek stated that if there is an absence of evidence one way or the other, the board has decided that no, the error was not a result of the applicant. A recent example of this would be the MARA decision back on March 18, 2015. What the board has to go on is, on one hand an experienced builder who should have known better, but on the other hand, testimony that states that if the builder was

knowledgeable of setbacks, this could have been easily remedied before construction. The board has also heard some discussion concerning the character of Mr. Tillotson.

Mr. Jiles stated that he agreed with Mr. Meek's comments and the board must look at the testimony given and the evidence presented. He can sympathize with the experience as a retired engineer of discussing plans and permitting with the county.

Mr. Tuz stated that there is not enough evidence to determine where the hardship originated.

Mr. Mortimer asked who the original owners of the property were. Mr. Tuz stated that it was the Tillotson's property. Mr. Mortimer asked who the borrower on the property was. Ms. Judy Tillotson stated that both Esther and Ben Tillotson were joint owners of the property. Mr. Blythe stated that the building permit application only listed Mr. Ben Tillotson. Ms. Judy Tillotson stated that he was the general contractor of the house. Mr. Jiles stated that the application shows Mr. Tillotson as both the owner and building contractor. Ms. Judy Tillotson stated that Sardis Mill Inc. built and owned the lots and sold off the lots. Mr. Camp stated that both Esther and Ben Tillotson are listed on the tax bill for 2013.

Mr. Jiles asked Mr. Blythe if the board needed to address the variances separately. Mr. Blythe stated that the findings of facts could be done jointly and the action must be separate on each variance.

Mr. Tuz stated that he did not see the purpose of the 45 foot (45') setback. It is basically for aesthetics and the lots across the street also have stuff close to the road. You cannot see the garage when you drive by on Sardis Road.

Finding of Facts

1. There would be unnecessary hardship from strict application of the ordinance. *Mr. Jiles stated that the restricted covenants require a garage. Mr. Meek stated that the removal or moving of the garage would create financial hardship for the applicant.*
2. Hardship results from the conditions that are peculiar to the property, without granting the variance. *Mr. Jiles stated the plot of land is pie-shaped and the 45 foot setback is placed on this property due to its location.*
3. The hardship did not result from actions taken by the applicant or property owner. *Mr. Jiles stated that the board cannot definitely determine the process by which the incorrect permit was issued, therefore there is no evidence to directly implicate the applicant.*
4. The requested variance is consistent with the spirit, purpose, and intent of the title, because public safety is secured and justice is achieved. *Mr. Jiles stated that public safety is intact with this variance.*

Mr. Meek made a motion to grant Variance A to keep the accessory structure in its current location. Mr. Jiles seconded the motion. The motion passed with 4-1 vote, with Mr. Mortimer in opposition.

Mr. Meek made a motion to grant Variance B to keep the accessory structure in its current location. Mr. Smith seconded the motion. The motion passed with a 4-1 vote, with Mr. Mortimer in opposition.

BOARD TRAINING AND MEETING.

Ms. Lynd stated that the board is slated to attend training in Mooresville, NC on June 4th, 2015 which is also the next Board of Adjustment meeting. Changing the meeting date was proposed to the board.

It was the Board's consensus that the meeting date remain on June 4th, 2015.

ADJOURNMENT:

Mr. Tuz made a motion to adjourn the meeting at 8:30 p.m. Mr. Mortimer seconded the motion. The motion passed unanimously.

Respectfully submitted,



Betty Lynd
Zoning Technician/Deputy Town Clerk