

MINUTES
CITY OF BEAUFORT
ZONING BOARD OF APPEALS
Monday, October 24, 2011 5:30 pm
City Hall Planning Conference Room – 1911 Boundary Street
Beaufort, South Carolina

STATEMENT OF MEDIA NOTIFICATION: In accordance with the South Carolina Code of Laws, 1976, Section 30-4-80(d) as amended, all local media were duly notified of the time, date, place, and agenda of this meeting.

Members Present

Alice Howard, Chairman
Brad Hill, Vice-Chairman
Joan Sedlacek
Rod Mattingly
Eric Powell

Staff Present

Libby Anderson, City of Beaufort Planning Director
Gail Westerfield, Recorder

FREEDOM OF INFORMATION ACT COMPLIANCE

Public notification of the Zoning Board of appeals meeting has been published in compliance with the *Freedom of Information Act* requirements and the *City of Beaufort Unified Development Ordinance* (UDO).

CALL TO ORDER

Chairman Howard called the meeting to order at 5:30 pm and led the Pledge of Allegiance.

REVIEW OF MINUTES OF SEPTEMBER 26, 2011 MEETING

Mr. Powell made a motion, seconded by Mr. Mattingly, to accept the minutes as submitted. The motion passed unanimously. Chairman Howard abstained because she was not present at the meeting.

Chairman Howard explained the ZBOA procedure to take place.

REVIEW OF PROJECTS

1600 Deanne Drive, Lot 84, identified as District 122, Tax Map 29, Parcel 381, Appeal for a Stop Work Order.

Applicant: W. Kyle Dillard of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. for D. R. Horton, Inc. (ZB11-15)

The applicant is appealing the decision of the Building Official to stop work to construct a single family residence.

Ms. Anderson said this order was issued on a lot in The Live Oaks at Battery Creek subdivision because there was no approval letter from the Architecture Review Committee (ARC). The Live Oaks at Battery Creek is a 98-lot planned community. It has a property owners' association that owns and maintains the infrastructure. The subdivision has an association manager and an ARC. No letter was received from the ARC as is required to maintain consistency with the covenants of the development. The permit was issued for this building, but it came to the attention of the zoning administrator, Ms. Anderson, that there had been no approval letter issued or received.

Ms. Anderson reviewed the steps of what had taken place on the city's end. There was a consultation with **Bill Harvey**, the city attorney, and on August 18, Ms. Anderson sent an e-mail saying that future permits would not be issued without an ARC approval letter. There had been no inspections on this lot at that time and no significant work had begun. Since then, DR Horton has sent 10 applications for projects but none of them had ARC approval accompanying them and were therefore returned. Ms. Anderson asked the ZBOA to address the larger question of denying a permit due to the lack of an ARC approval letter as well as the specific case of Lot 84.

Public notice has been made, Ms. Anderson said. The city is asking for the ZBOA to affirm the city's position on the stop work order due to the lack of the ARC approval letter.

Mr. Harvey said Ms. Anderson had sought his advice, and he had had contact with Mr. Shively. He was told that DR Horton didn't think the ARC was legally formed. However, the attorney for Live Oaks, Mr. Williams, said it was a duly constituted ARC. Mr. Harvey said granting a building permit by the city involves many steps: zoning approval, tree removal approvals, etc. When something is within a permitted subdivision, the covenants and restrictions somewhat remove some of these approvals, so the city works with the ARCs to enforce those approvals that must be enforced. This case before the ZBOA is an example, he said, of the reason for this. In this case, the building permit was issued on the belief that an ARC letter would be forthcoming. It was issued in error, so a cease-work order was issued. This is not a sole incident, Mr. Harvey said, but is part of a larger squabble between DR Horton and the ARC.

Ms. Sedlacek asked if the other houses that have gone up in this subdivision have this approval, and Mr. Harvey said they have. Mr. Powell clarified that there is a process and a designated contact person for the ARC. Mr. Harvey said yes, there always has been. Mr. Bundy has been a property manager and a kind of spokesperson for the ARC. Mr. Mattingly asked if Mr. Shively was in the meeting on August 4. Ms. Anderson said as she recalled, yes. Mr. Mattingly said the policy has been in place for ten years and asked if it's documented. Mr. Harvey said it's in the permit application process for everyone applying for a city building permit. Mr. Hill asked if the homes that were permitted and built correctly were DR Horton homes. A member of the public said they were not.

Mike Shetterly, representing DR Horton, said this neighborhood “suffered from the decline in the economy.” The developer built the first five lots but “came on hard times,” leaving a lot of lots and no activity, which is not good for the city or for the neighborhood. DR Horton entered into contracts with the bank to restore the viability of the neighborhood. There were only 5 houses built at that time. DR Horton came in and built two houses.

Though the city wants no part of the dispute, it’s backing the ARC, Mr. Shetterly said, which is taking a position in the dispute. He felt it best not to detail the dispute between the ARC and DR Horton for the ZBOA. Mr. Shetterly said unless the building is a historical district, the city doesn’t really care about the color of trim or door style, as long as it’s built to code. He showed the act cited for refusing the building permit; he said it is a South Carolina statute designed to ensure that the ARC board can enforce zoning ordinances for permitted use. It’s not meant to give the building official or the ARC the right to determine shingle color, etc. He cited a point that the type of structure, type of door, etc. that the ARC wants to restrict DR Horton from doing.

DR Horton has done nothing that violates any permitted use for the lots, Mr. Shetterly said. They want to build a single-family detached structure. It’s not the fault of the ARC that their developer went under, he said. Under the restricted covenants, they have the right to form a board of directors and get the ARC going. DR Horton asked for proof that the proper mechanism was used to lawfully form the ARC or a homeowners' association in general, but he said they got nothing back. Furthermore, there’s no proof there was a quorum, so DR Horton feels the ARC has no authority, but the city is telling DR Horton that whatever the ARC says goes. They have no authority, he reiterated, “for anything they’re saying or doing.” Mr. Shetterly went on to say that “the dispute will be resolved eventually.” DR Horton is asking that the ZBOA let stand the building permit. They will violate no building codes; the other two homes built by DR Horton had no problems.

Mr. Shetterly told Mr. Mattingly that neither the ARC nor the homeowners' association had presented any documentation such as meeting minutes to certify their authority. His firm can only talk to an attorney, not the individuals on the ARC or the homeowners' association. DR Horton asked for proof of their legal existence, but they have received nothing. Mr. Mattingly clarified that two houses have been built by DR Horton, and five houses were built by the original developer. The bank is individually selling to lots to developers in that area, Mr. Shetterly said. He added that he didn’t know if other houses are being built by developers other than DR Horton.

Jim Grimsley has corresponded with Mr. Dillard, DR Horton’s attorney, he said, but has not received return correspondence. He said that the board of directors was appropriately formed, and “the developer is not out of business.” The board of directors is functioning. The developer appointed its members and “is slowly backing out.” The ARC is a vital subcommittee of the board of directors, Mr. Grimsley said. Initial approval was given for the two homes built by DR Horton, but the certificate of compliance on those two homes was not submitted. The purpose

of it is to ensure that the builder has complied with the subdivision's trim, door sizes, etc. when he is finished. This "is for subdivision reasons," Mr. Grimsley said. These matters have been pointed out to the builder, Mr. Grimsley said, but they have not been rectified to date.

Aldridge Swofford is a resident of The Live Oaks at Battery Creek. He explained the history of his building his home and living in the subdivision, where he was appointed as an ARC member. In June 2010, a representative of DR Horton requested a meeting through Mr. Bundy to discuss what DR Horton could build at The Live Oaks at Battery Creek. In October 2010, the ARC got drawings and an application for construction on the two homes DR Horton has constructed in The Live Oaks at Battery Creek. There was guarantee made that the houses would be built in accordance with the submitted drawings, Mr. Swofford said.

DR Horton built the homes but didn't even own the lots in October, a fact that the ARC didn't know. They bought the lots in November, Mr. Swofford said. They paid a compliance fee; if what is built is what was promised, Mr. Swofford said, the builder gets money back, if it is not, they don't. The houses they built meet building code, but they took out trees that weren't approved to be taken out and took out one that was agreed to but left it lying on an adjoining lot. They didn't put trim all around the houses. They submitted doors that they didn't install and changed the colors of the windows from those specified. They still haven't done what Mr. Binder agreed to do in writing, Mr. Swofford said. The ARC has asked for four things - stucco on the foundations, trim on all sides of the houses, not just the front, equivalent diameter trees to those they took down, etc. - and if DR Horton will comply with those four things, they will get their money back, according to the ARC's attorney.

Mr. Hill asked if Mr. Binder was representing DR Horton at that time, and Mr. Swofford said yes. Mr. Hill asked if they had given Mr. Binder a copy of the guidelines, and Mr. Swofford said yes. Mr. Powell clarified that the \$5000 is refundable, and Mr. Swofford said yes, it is.

Ms. Sedlacek asked if there was ever a response given to the list for Lot 84 sent on June 17. Mr. Swofford said the response was that DR Horton came out and cleared the underbrush, and put up a sign that's larger than 2x3' which is the architectural guideline. He feels they are trying to make it look like a DR Horton development. There was no response to the requests for paint chips, stucco finish, etc., Mr. Swofford said, and they have now reduced their requests to four things.

Mr. Harvey said that if the ZBOA were to accept the DR Horton attorney's request, the city would not ever be able to enforce covenants; DR Horton is claiming there are no covenants because they deny the legitimacy of the ARC, he said.

Mr. Shetterly said reiterated that the city attorney had said the city doesn't want to get into the middle of private squabbles. "There is relief to reconcile these differences," he feels, and they can seek that relief through the court system, "where private parties go." The city wants the ARCs to be deputized, he feels, with little or no oversight, whether their requests are

appropriate or not. "This is a private matter between private parties," Mr. Shetterly feels, and "the ZBOA shouldn't deputized the ARCs." They cannot determine whether there's trim and what color it is.

Ms. Sedlacek said there is a board, and they have clearly stated what they've done and want to do. She feels the two parties should be able to negotiate what they want between them. Ms. Sedlacek cited the Sun City property owners' association and said the covenants for what they can and can't do are highly restrictive; "these associations are meant to be strict," she added. DR Horton seems to want to ignore that.

Mr. Mattingly said he accepts the fact that the board is functioning and can make a recommendation. He agreed with Ms. Sedlacek that other homeowners' associations make strict recommendations. He's unclear why they can't come to agreement on the ARC's recommendations. Mr. Hill said he consults and sits on ARCs, and he doesn't understand why DR Horton can't come to agreement on what the ARC is requesting. Whether the Live Oaks at Battery Creek ARC legally exist is not an issue the ZBOA can get involved with. Mr. Binder met with the board, and he seemed to feel they were legal when he met with them. He got the copies of the design guidelines and covenants. Mr. Mattingly said that he feels "this is a simple decision."

Mr. Powell said he's on an ARC and finds them vital to the success of a neighborhood. **Mr. Hill made a motion, seconded by Ms. Sedlacek, to affirm the city building administrator's order to stop work on this project. The motion passed unanimously.**

613 Carteret St, identified as District 121, Tax Map 4, Parcel 633, Lot area, lot width, side yard setback, parking, and impervious surface limit variances.

Applicant: Everett Ballenger, Ballenger Realty (ZB11-16)

The applicant is requesting these variances in order to subdivide the lot.

Ms. Anderson said the property is zoned General Commercial District. The property is 5787 square feet with 63' of frontage on Carteret. The General Commercial district requires a 10' side yard setback. There are two buildings on the parcel. The applicant wants to subdivide the property so each building is on its own lot and can be sold separately. Ms. Anderson showed a diagram of the property. Ms. Anderson said the application says no redevelopment is planned at this time. The buildings have no setback; they adjoin each other 100%.

Parcel A is 3024 square feet, Ms. Anderson said. The building will occupy 2/3 of the site. Parcel B is 2763 square feet in area. That lot "will be about 100% building," Ms. Anderson said. They don't meet the minimum General Commercial standards, so a number of variances will be required. The minimum lot size is 4000 square feet. Additionally, the side yard setback is to be 10', but the buildings sit side by side. Impervious surface isn't met; one building takes up its entire proposed lot, so it doesn't meet the 65% limit. The parking is also not met.

Ms. Anderson compared the property under consideration to other lots in the area on that block. There's a wide variety of lot sizes and widths on Carteret Street, she said. Public notice was made, including the relevant neighborhood association and the Historic Beaufort Foundation. There have been two comments received via e-mail and given to the ZBOA and the applicant.

STAFF FINDINGS

Extraordinary and exceptional conditions: Staff believes the finding can be made; two buildings have been built on one lot with no separation.

Conditions as applied to other property in the vicinity: Most lots on Carteret Street have only one building per lot.

Conditions not a result of the applicant's own actions: The applicant did not develop the property.

Not in conflict with the comprehensive plan: There's no conflict, staff believes, and it promotes redevelopment and reinvestment, though there's no redevelopment planed at this time.

Unreasonable restriction on the utilization of the property: Staff feels this is the point most worthy of discussion, Ms. Anderson said. She asked the ZBOA to consider whether it is unreasonable to prohibit or permit the subdivision of the lots. One building could be made into a condominium and the subdivision avoided altogether. This could be an option for selling one building without going through the subdivision process.

Detriment to adjacent property and the public good: The staff believes the board could make the finding. If the board approved it, after the subdivision, there would be no noticeable change. The most compelling reason not to discourage the applicant from applying for variances, staff felt, was that there will be no change after the subdivision.

Chairman Howard asked for more information about the condominium. Ms. Anderson said an entity would have the property, and there would have to be a homeowners' association. Chairman Howard asked if it were all General Commercial on Carteret Street, and Ms. Anderson said it changes on various blocks and is a variety. Ms. Anderson said they had building officials at the pre-application conference, and there were no concerns that the subdivision would create code issues. Mr. Mattingly said he would assume the smaller building was built later than the original building.

Everett Ballenger said they bought the building in 2003-2004. They remodeled one building. They had planned to rent the other. The larger building is 1000 square feet too large for renting. They had to refinance their mortgage; the bank is willing to take the vacant building in lieu for a year to sell it and reduce their mortgage. They looked into the condominium idea and consulted an attorney, but it would be a minimum of \$3000 to set that up. The bank was "not

over-impressed with that.” Mr. Ballenger said they don’t intend to make any changes after the potential subdivision. It has two solid concrete walls; the larger building was built first in the 1950s. The two buildings are insulated differently and have visible building differences.

Ms. Sedlacek said Mr. Ballenger had mentioned the condominium regime. Mr. Ballenger said he doesn’t really want to do it if he can avoid it. He’d rather sell. He would have to set it up first, and then sell the building. Right now he’d have to sell both, not just one, unless they can subdivide.

Mr. Powell asked for clarification on parking. Ms. Anderson said Parcel B would end up with no parking. When the lots are created, they need to meet the list of standards, and this one would not meet those standards. Even when subdivided, nothing will be built or demolished; there will be two tax parcels with two buildings, each on its own lot, and able to be sold separately. The Parcel B building needs to either subdivide or develop a condominium. The land would stay with A and just the building would be sold.

Mr. Mattingly said since there’s already concern about the impervious surface, he can’t imagine what could be changed on Parcel B if it’s sold. Ms. Anderson said “the building is frozen in place and time” by subdividing. Form-based code will probably change that somewhat. Chairman Howard said the public’s concern was impervious surface. Ms. Sedlacek said Mr. Ballenger seems to be setting up a lot of problems for himself by subdividing. Ms. Anderson said the lots can be split, and if the variances are approved, each building could be sold with its own piece of property. Mr. Mattingly said there’s zero lot line to the south as well, because that building abuts to it, too.

Chairman Howard led discussion of the six points. Ms. Anderson said the property is already being used and is developed, so it’s “tough to deal with” #5. Ms. Anderson said if this were core commercial, it could be approved at the staff level. Ms. Sedlacek asked if the smaller building can be separated from the one it’s attached to. Mr. Ballenger said it could, but he doesn’t know what building could go on there that would meet the setbacks. Mr. Mattingly said the board doesn’t need to be concerned with that to make their decision.

Mr. Mattingly made a motion, second by Ms. Sedlacek, to approve the variance for lot area, lot width, side yard setback, parking, and impervious surface limit. Ms. Anderson said the dimensional variances are in the staff report.

Mr. Powell said he agrees with all of the points but #5; Chairman Howard said she, too, “is struggling with that one.” Mr. Ballenger has considered the condominium option, Chairman Howard said. Mr. Mattingly said if it’s approved, he can sell it as two lots, and the person who buys it has the option to come back to the ZBOA if they want to redevelop it. Mr. Hill said once form-based code is in place, that may not be an issue.

Chairman Howard said dividing it gives Mr. Ballenger the ability to sell. If someone wants to buy it and tear it down, they have to come back to the board. The board would not be creating more impervious surface by their actions. Mr. Mattingly said they need to let the public know they're not causing anything different to happen to make it worse. **The motion passed unanimously.**

NEW BUSINESS

Ms. Anderson said the Sector One Master Plan is going through the approval process; there will be a public hearing November 8. The Master Plan on Sectors 2 and 3 will be forthcoming.

A November meeting is scheduled at this time, Ms. Anderson said, on the five applications that the city returned to DR Horton. It's related to the same issue as was dealt with at this meeting. DR Horton has submitted that sending the applications back was improper because code said the city should have held them for 60 days. Chairman Howard clarified that the applications were returned because they did to have ARC approval. There was general discussion about the DR Horton matter.

ADJOURNMENT

There being no further business, Chairman Howard adjourned the meeting at 7:05 pm.