

**Minutes of the Regular meeting of the
Board of Adjustment**

**Tuesday, August 27, 2013
1:00 p.m.**

Chairman Webber called the meeting to order at 1:01 p.m.

ROLL CALL

Present: Stephen Webber, Chairman
Michael Gray, Seated Alternate
John Kilby
Patricia Maringer
Melvin Owensby, Seated Alternate
Bob Cameron, Council Liaison

Also Present: Clint Calhoun, Environmental Management Officer
Mike Egan, Community Development Attorney
Michelle Jolley, Recording Secretary
Sheila Spicer, Zoning Administrator

Absent: Lance Johnson, Alternate

APPROVAL OF THE AGENDA

Chairman Webber moved item (5) New Business on the agenda to become item (4) and moved the hearings on the agenda down to become item (5).

Mr. Owensby made a motion to approve the agenda as amended. Mr. Gray seconded the motion and all were in favor.

APPROVAL OF THE MINUTES

Chairman Webber requested a few corrections be made to the draft minutes from the July 23, 2013 meeting. He mentioned Vicki Smith and Betty Johnson should not be listed as absent since they resigned. He also pointed out some needed corrections in the first paragraph, the third paragraph on page three, and the second paragraph on page eleven.

Mr. Owensby made a motion seconded by Ms. Maringer to approve the minutes of the July 23, 2013 meeting as amended. The motion passed unanimously.

NEW BUSINESS

Regarding the changes to Board of Adjustment procedures recently made in the North Carolina General Statutes, Chairman Webber asked Mr. Egan if the super majority vote requirements will apply to appeal ZA-2013001. He pointed out that Section 92.186 of the Zoning Regulations regarding conflict of other laws indicates the state requirements would apply in reference to the voting requirement for appeals. Mr. Egan responded the new state requirements do not take affect until October 1, 2013.

HEARINGS

(A) VROP-2013011, a vacation rental operating permit request from Teri Lindeberg to operate a residential vacation rental at 335 North Shore Drive, Lake Lure, North Carolina (Tax PIN 1623813)

Ms. Spicer and William McKay, Resident Reservationist for Lake Country Vacation Rentals, were sworn in.

Ms. Maringer noted she spoke with Linda Ward, Customer Service Supervisor, and Ms. Spicer regarding commercial licensing, but stated she did not discuss this particular case. There were no ex parte communications or conflicts of interest reported. Mr. McKay did not wish to challenge any of the Board members seated.

Ms. Spicer presented an overview of the case. She stated Ms. Lindeberg is requesting a vacation rental operating permit (VROP) to operate a 3-bedroom residential vacation rental at 335 North Shore Drive. She stated the information in the Board's packet includes the Town's application form, parking plan, standard rental agreement from Lake Country Vacation Rentals, agent authorization letter authorizing either Carole McKay or William McKay to act as Ms. Lindeberg's agent, and verification from the Rutherford County Tourism Development Authority that Lake Country Vacation Rentals has added this property to their list of registered rentals. She pointed out Ms. Lindeberg is offering boat use with the rental and has included four Lake Commercial License Applications. She also mentioned Ms. Lindeberg has applied for the Commercial Licenses but has not been approved yet since Commercial Licenses are only approved once a year by the Marina Commission. Ms. Spicer stated there is also in the packet verification from Charlie Sims, a licensed plumber, confirming the connection to the Town's sewer system is operational and free of detectable leaks.

Ms. Spicer stated the Development Review Committee reviewed this application on August 15, 2013, and the minutes from that meeting are included in the packet. There were no changes to the appearance of the building or premises, so Zoning and Planning

Board review was not required. She mentioned there were no responses from adjacent property owners.

Chairman Webber pointed out that the Town of Lake Lure Contract Addendum was not included with the application. Ms. Spicer answered she believes Lake Country Vacation Rentals incorporates it into their standard rental agreement and suggested the Board confirm this with Mr. McKay. Mr. McKay assured the Board that the Contract Addendum is provided with the rental agreement.

Mr. Gray pointed out, according to the Rutherford County Property Card, the house is listed as only having 600 square feet and wanted to know how three bedrooms could fit within that small of a space. Ms. Spicer answered that the Rutherford County Tax Property Information Card, which was included in the packet, indicates the house has two stories with an area sector of 586 but a total square footage of 1,089. Chairman Webber mentioned the Property Card only lists the house as having two bedrooms. Mr. McKay stated he has been inside the home and assured the Board there are three bedrooms.

There was no further testimony, so Chairman Webber closed the hearing.

During deliberations, Ms. Maringer mentioned there is a boathouse on the property with a covered building on it. She asked if this would be a non-conforming structure. Chairman Webber answered this does not need to be considered for the approval or denial of the VROP, but it would be a lake structure issue and Mr. Calhoun would have to address that issue with the property owners.

With regard to application number VROP-2013011 for a vacation rental operating permit to operate a residential vacation rental in the R-1 zoning district Mr. Kilby moved the Board to find that the application is complete and that the proposed use, if operated according to the application and any conditions attached hereto, meets the following standards: (1) it will not materially endanger the public health or safety; (2) it will not substantially injure the value of adjoining or abutting property; (3) it will meet all standards and requirements specified in the regulations of the Town; (4) it will be in harmony with the neighborhood character and in general conformity with applicable elements of the Comprehensive Plan; and (5) satisfactory provision and arrangement has been made for those matters specified in §92.046(D) of the Zoning Regulations of the Town of Lake Lure.

Accordingly, he further moved the Board to grant the requested vacation rental operating permit in accordance with and only to the extent represented in the application and plans. Mr. Owensby seconded the motion.

Chairman Webber noted that he feels a condition should be added specifying that granting the permit does not in any way imply nor approve the applications for commercial licenses. Brief discussion was held regarding whether this issue would be within the authority of the Board.

Mr. Kilby moved to propose a condition that the approval of the permit does not convey approval of the motorized commercial license applications that were included in the application. Mr. Owensby seconded and all were in favor.

Chairman Webber, Mr. Kilby, Ms. Maringer, and Mr. Owensby voted in favor of the original motion as amended to grant the request. Mr. Gray was opposed.

(B) VROP-2013012, a vacation rental operating permit request from Dutch Beukema, agent for Frank & Mara Butera, to operate a residential vacation rental at 131 Neighborly Drive, Lake Lure, North Carolina (Tax PIN 228848)

Ms. Spicer and Mr. Beukema were sworn in.

There were no ex parte communications or conflicts of interest reported. Mr. Beukema did not wish to challenge any of the Board members for cause.

Ms. Spicer presented an overview of the case. She stated Ms. Butera is requesting a vacation rental operating permit (VROP) to operate a 3-bedroom residential vacation rental at 131 Neighborly Drive. She stated the application in the packet includes an agent authorization letter authorizing Mr. Beukema to act as her agent, a standard rental agreement, parking plan, verification from the TDA that the property has been added to Mr. Beukema's list of rentals, and verification from Charlie Sims, a licensed plumber, that the connection to the Town sewer system is operational and free of detectable leaks.

Ms. Spicer stated the Development Review Committee reviewed this application on August 15, 2013, and minutes from that meeting are included in the packet. She mentioned she raised a concern during that meeting that the certification from the plumber had not been received yet, but Mr. Beukema provided it that same day. There were no proposed changes to the appearance of the building or premises, so Zoning and Planning Board review was not required. She stated she received no responses from adjacent property owners.

Mr. Beukema presented his case. Mr. Gray questioned how three bedrooms could fit inside a 672 square foot structure. Mr. Kilby answered that, according to his experience using the Rutherford County GIS tax documents, they do not list structures as having two stories in the drawing on their website. He advised you have to refer to the Property Card to find out if there are two stories. Mr. Kilby and Chairman Webber indicated they both observed during their site visits that the house has two stories.

Chairman Webber pointed out there is a door on the upper floor located on the left side of the house that does not lead anywhere and appears to be a safety issue. He noted there is no porch nor is there a bar on the outside to keep someone from opening the door. Mr. Beukema stated the door is nailed shut and will remain so until a deck is built at a future date. He mentioned there are no warning signs posted inside the house regarding the door, but he can add one for safety purposes.

There was no further testimony, so Chairman Webber closed the hearing.

After brief deliberation, Ms. Maringer made the following motion:

With regard to application number VROP-2013012 for a vacation rental operating permit to operate a residential vacation rental in the R-1 zoning district Ms. Maringer moved the Board to find that the application is complete and that the proposed use, if operated according to the application and any conditions attached hereto, meets the following standards: (1) it will not materially endanger the public health or safety; (2) it will not substantially injure the value of adjoining or abutting property; (3) it will meet all standards and requirements specified in the regulations of the Town; (4) it will be in harmony with the neighborhood character and in general conformity with applicable elements of the Comprehensive Plan; and (5) satisfactory provision and arrangement has been made for those matters specified in §92.046(D) of the Zoning Regulations of the Town of Lake Lure.

Accordingly, she further moved the Board to grant the requested vacation rental operating permit in accordance with and only to the extent represented in the application and plans. Mr. Owensby seconded and all were in favor.

(C)ZA-2013001, a petition for appeal of administrative determination from Michael & Kathleen Boff regarding the Zoning Administrator's interpretation of Section 93.062 and Section 92.203 (C) of the Town of Lake Lure Zoning Regulations.

Ms. Spicer, Kathleen Boff, Michael Boff, and Mark Hensch, neighboring property owner at 230 Snug Harbor Circle, were sworn in.

There were no ex parte communications or financial or personal conflicts of interest reported. Chairman Webber disclosed that he spoke with Ms. Spicer prior to the meeting after studying the packet, to see if there were other relevant documents in the file for the certificate of zoning compliance number ZP-2011016 issued when the retaining wall in question was originally constructed. He noted Ms. Spicer produced the file for him to review. Mr. and Ms. Boff did not wish to challenge any Board members seated for cause.

Ms. Spicer pointed out when she was sending out notifications for the hearing that she spoke with Mr. Egan beforehand and he advised Ms. Spicer to also send out a letter to the adjacent property owner since the retaining wall is located on their property. Ms. Spicer stated the Rutherford County Tax Records indicated Mr. Boff is the owner of 230 and 238 Snug Harbor Circle, so she assumed he had just purchased the neighboring property and therefore did not send a letter to Mr. Hensch. She mentioned the only notification letter of the hearing she sent was to Mr. Boff.

Mr. Egan asked Ms. Spicer what the date was for the decision that is being appealed, because the applicant only has 30 days to file an appeal or the Board has no jurisdiction to hear the case. Ms. Spicer answered she emailed Mr. Boff her original decision on June

28, 2013. Mr. Egan pointed out that this appears to be 39 days. Ms. Spicer stated Mr. Boff emailed her as late as July 10, 2013 asking her to reconsider. She noted on Tuesday, July 9, 2013, she emailed Mr. Boff stating, "*Section 92.068 of the Zoning Regulations states, 'Any order, requirement, decision, or determination made by the Zoning Administrator may be appealed to the Board of Adjustment pursuant to the procedure found in §92.086.' I have attached a zoning appeal application to this email. I will assist you in any way possible should you decide to appeal my decision to the Board of Adjustment. The deadline to submit for the August 27, 2013 Board of Adjustment meeting is Tuesday, August 6, 2013. Please do not hesitate to contact me if you have any questions regarding the appeal process.*" Ms. Spicer noted while it is more than 30 days from her initial determination, her email indicated he had until August 6, 2013. Mr. Gray asked Mr. Egan if the Board has the right to waive the 30 day limit for appeal and Mr. Egan answered it could not be waived. Mr. Egan stated this is a jurisdictional matter and the Zoning Regulations states, "*No appeal shall be heard by the Board unless notice thereof is filed within 30 days after the party or interested parties receive a decision or determination by the Zoning Administrator.*" Mr. Egan questioned Ms. Spicer concerning the timeline leading up to the filing of the appeal. In light of Ms. Spicer's testimony that the Boffs provided additional information and requested reconsideration of her decision, Mr. Egan concluded the Board could hear the case because the appeal was timely filed. The Chair requested a copy of the email stating Mr. Boff had until August 6, 2013 to file an appeal. This was entered as *Board Exhibit 1*.

Ms. Spicer presented an overview of the case. She stated this first came about when Jerry Nelon, a local contractor, contacted her on May 28, 2013 and stated a portion of the wall on the property had fallen and in order to repair it he wanted to know if he would need a permit. Ms. Spicer stated she told him he would need a permit at which time he asked if the same engineered drawings that were used for the original wall could be used to rebuild the portion that fell. She stated Mr. Nelon told her the wall had not been properly built and that he planned to rebuild the wall according to the original specifications. Ms. Spicer testified she explained to him the county building inspection department requires the engineered drawings, not the Town, so he would need to talk to them about whether or not the original specifications could be used to rebuild the fallen portion. However, she explained to him the Town has other regulations concerning mountain and hillside development, so there would be some other information she would need to look over before giving Mr. Nelon an official decision on what would be required before the town could issue a certificate of zoning compliance. She stated she called Mr. Nelon on May 29, 2013, and told him that the average slope of the property in the area of where the wall is located is approximately 60%; therefore, the Mountain and Hillside Development provisions in the Zoning Regulations apply and a geotechnical engineer analysis would be required.

Ms. Spicer testified that Mr. Boff met with the Town Manager, Chris Braund, on May 29, 2013, and that Mr. Braund sent her an email outlining the assessment of his meeting with Mr. Boff that had five key points, which were:

1. Mr. Boff wants to move quickly to assess and stabilize the wall.

2. Mr. Boff needs to engage a geotechnical engineer in this assessment. Ms. Spicer will be sending Mr. Boff a couple to contact...including one that is working on a similar wall failure issue on the lake. Mr. Braund will reach out to them as well to assure a quick turnaround.
3. Look to the geotechnical engineer's judgment of whether the existing wall and plan is satisfactory, given the slope challenge, and simply needs to be repaired or whether a different engineering approach is necessary.
4. In the meantime, we'll support any temporary stabilization work that is prescribed by the contractor that will protect against further damage.
5. Mr. Braund would like Mr. Calhoun to visit the site and provide his assessment as well.

Ms. Spicer read over several emails to the Board. She testified that she and Mr. Calhoun met with Mr. Boff to discuss the determination that a new permit and a geotechnical engineer analysis would be required. Ms. Spicer noted that Mr. Boff asserted it was a repair and therefore the vested rights per Section 92.203 (C) should apply. Ms. Spicer said she told him it is reconstruction and definitely needs a permit, but she would research the sections he had quoted and get him a final determination in writing so he could either act on it or appeal to the Board. Ms. Spicer stated she emailed her decision to Mr. Boff on June 28, 2013, which is included in the packet. Ms. Spicer noted that Mr. Boff replied to her email on July 8, 2013 and mentioned he received her interpretation and further outlined his argument why he felt the proposed work did not require a new permit and therefore a geotechnical engineer analysis and asked Ms. Spicer if she would reconsider. Ms. Spicer stated she emailed him back on July 9, 2013 and told him he could appeal her decision if he chose to. She stated there were further email exchanges and she pointed out to Mr. Boff on July 10, 2013 that he could appeal the decision and mentioned to him she met with Shane Dotson with Rutherford County Building Inspections on that same date who stated he went by the property and determined the work would also require a county building permit. Ms. Spicer testified that on July 10, 2013, Mr. Boff emailed her maintaining that, because she had approved the permit for construction of the wall in 2011, and the designing engineer was stating the wall was not built to his specifications, that the wall should be allowed to be rebuilt under the old permit to the original engineer's specifications. Ms. Spicer stated when she emailed him back on July 10, 2013 she pointed out that her original approval was not for the engineered design of the wall, but was simply for the site plan outlining the location of the wall and the drawings indicating the height of the wall, which are the standards regulated by the Town. Ms. Spicer noted that was her last contact with Mr. Boff until an email he sent to her in August stating he was going to appeal.

Mr. Gray asked Ms. Spicer if the regulations that require a geotechnical engineer analysis for the wall had changed since the 2011 permit was issued. Ms. Spicer answered they had not. He then asked why the geotechnical engineer analysis was not required with the original permit. Ms. Spicer answered it was an oversight on her part and mentioned the regulations are very complex, and she is continually learning something new which carries forward in how she interprets the regulations. She pointed out that the Mountain and Hillside Development regulations starting in Section 92.200 first states applicability

will be made using the Town's GIS. In 2011 when she received the initial application to build the wall, Ms. Spicer stated she did a slope analysis using the contours of the entire lot as shown in the Town's GIS, which indicated the average slope of the entire parcel was less than 30%. She stated she made the determination at that time a geotechnical engineer analysis was not required because the Mountain and Hillside Development Regulations did not apply based on that slope analysis. However, Ms. Spicer testified that the regulations also state in Section 92.200 (A) (5) that the slope analysis should be done within the delineated area of land disturbance. She noted that Mr. Hench had submitted a topographic survey of the property when construction of his house was originally permitted, and William Price, the original contractor that built the wall, copied a portion of that topographic survey to submit the site plan for the wall in 2011. She testified that when she went back and looked at the 2011 plan, the average slope of the delineated area of disturbance, where the wall was built, is approximately 60%. Ms. Spicer stated, based on her interpretation of the regulations, her initial determination in 2011 should have been made using the slope within the delineated area of the land disturbance instead of the slope of the entire lot.

Mr. Kilby asked whose name the original application was in. Ms. Spicer answered the applicant's name on the original application is William Price, Price Landscaping, and the owners listed are Mark and Denise Hench. Chairman Webber clarified this is because the actual wall is on Mr. Hench's property, but Mr. and Ms. Boff have an easement to use the driveway and share in any associated costs.

Ms. Maringer asked Ms. Spicer if Mr. Dotson looked at the wall as a brand new wall and not a repair. Ms. Spicer answered she only asked Mr. Dotson to visit the site, look at the wall, and make a decision on whether a building permit would be required to rebuild the fallen section. She noted he did not give her any clarification on whether the county building inspections department considers the work a repair or not, he only stated it was his determination that the work would require a building permit. Ms. Spicer stated Mr. Nelson and Mr. Boff had both mentioned to her that, in order to restore the wall to a safe condition, the fallen portion of the wall will have to be completely removed and rebuilt. Ms. Spicer added that Mr. Boff has provided a letter from his engineer indicating the wall was not properly built.

Mr. Boff stated he would like to know when the regulations relating to slope came into effect. He pointed out there was an amendment to the regulations after the original permit was submitted. He pointed out that, regardless of whether or not the Town made the determination based on GIS or original documentation that was submitted, a copy of the topographical survey was given to the Town along with the location of where the wall was to be built. Mr. Boff presented an extensive overview of his case. During his presentation, he introduced Mr. Hench as his neighbor at 230 Snug Harbor Circle and confirmed the retaining wall is actually on Mr. Hench's property. Mr. Boff testified he does not plan on taking the wall down to the foundation. Ms. Spicer stated that is not what she had been led to believe. Chairman Webber asked Mr. Boff if it would be fair to say that the fallen portion has to be completely taken down to the foundation and rebuilt.

Mr. Boff answered the engineer would have to give him a determination of what work would be required to restore the wall.

Chairman Webber referred to the key points Mr. Boff outlined in his application as his basis for appeal. He pointed out number two of these points states the wall was not built to the engineer's specifications, and stated he does not believe Ms. Spicer's determination was in contradiction of that. Chairman Webber asked Ms. Spicer if she has the engineer's specifications from the original permit. Ms. Spicer answered she made all Board members a copy of the 2011 permit which includes the engineer's specifications. Chairman Webber accepted the copy ZP-2011016 as *Board Exhibit 3*. She noted that it is in the form of a letter from the engineer instead of actual engineered drawings.

Chairman Webber then referred to item one under the basis for appeal which reads, "*The wall was built in April 2011. The permit (number 2011009) when issued, approved compliance with the regulations in force at that time. Statutory protection exists for regulations in place at the time of permit. (Section 92.203(c) and Final Inspection Certificate attached)*" Mr. Egan stated the first two sentences in that paragraph were what Ms. Spicer was referring to when she stated she made an error. Chairman Webber asked Mr. Boff what statutory protection he was referring to in the last sentence of that paragraph. Mr. Boff answered the permit was issued to build the wall to the width, height, and specifications that were submitted with the application. He stated once that approval was granted, there are statutory rights at that point to be able to make the repairs that are necessary. Chairman Webber read a portion of NC General Statutes Section 160A-385.1 regarding Vested Rights which states, "*The ability of a landowner to obtain a vested right after city approval of a site specific development plan or a phased development plan will preserve the prerogatives and authority of local elected officials with respect to land-use matters.*" He pointed out there are no definitions for vested rights or site specific development plan in the Town's ordinances. He further read the portion of the state statute explaining what establishment of vested right means, which states, "*A vested right shall be deemed established with respect to any property upon the valid approval, or conditional approval, of a site specific development plan or a phased development plan, following notice and public hearing by the city with jurisdiction over the property. Such vested right shall confer upon the landowner the right to undertake and complete the development and use of said property under the terms and conditions of the site specific development plan or the phased development plan including any amendments thereto.*" Chairman Webber explained an application for a zoning permit does not necessarily give him vested status. A discussion was held regarding vested rights.

Mr. Boff stated Ms. Spicer determined a new permit is required because the repairs to the wall would be considered structural alteration. Mr. Boff submitted a copy of an email Ms. Spicer had sent him with portions he had highlighted. Chairman Webber accepted the document as Applicant's Exhibit 1. Mr. Boff testified the question at hand is whether the work required to restore the wall is considered a repair, which should not require a permit, or a reconstruction, which would require a permit. Mr. Boff argued that since the

wall was never built to the engineer's specifications, the 2011 permit should not have been closed out, thereby allowing the wall to be rebuilt to the original specifications.

Mr. Gray asked, since it has been presented that the wall does not meet the engineer's specifications, if the portion of the wall that is still standing will also have to be rebuilt or repaired. Mr. Boff answered he will have to rely on an engineer to let him know what repairs will have to be made.

Mr. Kilby asked Mr. Boff who originally constructed the wall. Mr. Boff answered William Price was the contractor that built the wall in 2011. Mr. Kilby asked if Mr. Price is accepting the responsibility for the fact that the work was not done correctly. Mr. Boff answered no and stated he does not feel he has any recourse to approach Mr. Price because the Town has stated the wall was built substantially in accordance with the approved plans.

Ms. Spicer reviewed the Zoning Administrator's responsibilities in reviewing applications for a certificate of zoning compliance to build a retaining wall. She stated her review is limited to determining whether the plans demonstrate compliance with the Town's Zoning Regulations which state retaining walls necessary to prevent erosion are allowed in all required yards and have no height requirements. Ms. Spicer said the Town does not review the engineer's design and specifications for compliance with the North Carolina Building Code, nor does the Town inspect to ensure the wall has been built to those specifications, as that is the county building inspector's responsibility. She stated she only requests a copy of the engineered design to assist in determining that the wall is in fact a retaining wall and therefore exempt from setback and height requirements.

Mr. Boff handed out copies of photographs he took of the fallen wall which Chairman Webber accepted as *Applicant's Exhibit 2*. Mr. Boff described each photo and pointed out that the blue tarp was placed on the fallen portion of the wall on June 1, 2013. Referencing a meeting with him, Ms. Spicer, and Mr. Calhoun in Ms. Spicer's office on June 18, 2013, Mr. Boff stated they called Shane Dotson on speakerphone to enquire whether or not a building permit would be required. Ms. Spicer corrected that the phone conversation on that date was with Jason Ruff, not Shane Dotson. Mr. Boff explained, therefore, if Mr. Dotson came to look at the wall, he would not have been able to see very much because the tarp was covering it. Ms. Spicer read an email she received that day from Mr. Dotson that stated, *"Good morning. This is in reference to the retaining wall located at 230/238 Snug Harbor Way. The retaining wall will need a permit and will also need to be engineer designed. From what I could see when I visited the site that a good portion of the wall had fallen and will require an engineer design to repair the wall. Please contact our office if you have any questions."* Ms. Spicer stated Mr. Dotson did not specify the date he visited the site. She mentioned she originally asked him to look at the wall June 19, 2013. She stated she then saw him in the field on July 10, 2013 and asked if he had gone by the property, at which time he stated he had. Therefore, she testified Mr. Dotson must have visited the site sometime between June 19, 2013 and July 10, 2013. Mr. Kilby asked Mr. Boff what date he removed the tarp from the wall to take the pictures. Mr. Boff stated the only time the tarp was taken off was during the time he

took the pictures to send to the engineer. Mr. Boff answered he did not know the date he removed the tarp and would have to go back and look at the time stamp on the pictures he took. Mr. Kilby then asked if the tarp was on from June until after July 10. Mr. Boff answered that the tarp has been on since June 1, 2013. He reiterated it has never been moved except to take the 27 pictures for the engineer.

Mr. Kilby asked if the county building inspector has to make a report when an inspection is done. Ms. Spicer answered it is her understanding that anytime they do an inspection there is a report and they also issue a final certificate. She noted she does not know what specific inspections may have been done for this project. She mentioned she could contact Rutherford County Building Inspections and ask them if they have that information and could send it.

Ms. Maringer asked how much land disturbance will be necessary to repair the wall. Mr. Boff answered, based upon the definition of land disturbance in the Town's regulations, there will be no disturbance to the land. He noted the disturbance took place at the time the original permit was issued, and there would be no additional disturbance to the land that wasn't already permitted. Ms. Spicer stated land disturbance, according to the zoning regulations, is defined as, *"Any use of the land by any person in residential, industrial, educational, institutional, or commercial development, highway and road construction and maintenance or other construction or maintenance activity, including chemical applications or other techniques, that results in a change in the natural cover or topography and that may cause or contribute to sedimentation."*

Chairman Webber designated all of the emails provided earlier in the meeting by Ms. Spicer *Board Exhibit 2*. These are in chronological order starting with the earliest date.

Mr. Kilby stated he would like to know Mr. Egan's standpoint on this issue, if it would be appropriate. Mr. Egan answered he can provide some analysis on the legal issues. In reference to the amendments to the Zoning Regulations dated August 9, 2011, Mr. Egan noted they did not deal at all with the factual situation that the Boffs had raised. He explained the regulations provide that a geotechnical engineer (geotech), when called in, works under the professional engineer, and it is the professional engineer's responsibility to oversee and supervise the work. He noted the only change made to the original regulations was that the applicant would no longer have to hire a geotech and keep them on sight to oversee the whole project. Mr. Egan then spoke on the question raised about statutory vested right. He explained it is clear from a legal perspective there is no statutory vested right in the Boff's case. He mentioned there may be common law vested right but stated that may be more of an issue before the courts rather than this Board. Mr. Egan noted the issue remaining is whether this would be a repair or a reconstruction. He explained there is language in the regulations that references repair, but no definition is included. Ms. Spicer stated there is a definition for development in the zoning regulations, which states, *"Development is the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any structure."* Ms. Spicer noted the zoning regulations do not specify a difference between repair and reconstruction. Chairman Webber stated, based on the evidence so far, a permit was issued to build a

retaining wall at a specific location to a specific height that also had engineered specifications. He then asked, knowing that the structure was built per the approved location and height but not built to the engineer's specifications, which is information that came out in testimony, does this now make the wall a nonconforming structure. Ms. Spicer answered no it does not according to the Town's regulations. She stated the Town's zoning regulations do not have a requirement for engineered designs for retaining walls outside of the requirements for mountain and hillside development. She explained it is a state building code requirement that is enforced by Rutherford County Building Inspections. Further discussion was held on whether the structure would be considered a nonconforming structure and whether it would be a repair or reconstruction. Chairman Webber asked Ms. Spicer if there is precedent for reopening a permit that has been closed. Ms. Spicer stated not that she is aware of.

Mr. Kilby asked Mr. Boff if he could take some of the large rocks that had fallen and simply replace them where they fell from. Mr. Boff answered that he could, but the structure would more than likely fail again, and he cannot afford to keep rebuilding the wall. Mr. Boff explained that it appears the structure failed because there was no drainage behind the wall and the soil, which is heavy soil, filled up with water and pushed out the center portion of the wall causing it to fall.

Mr. Kilby then asked Mr. Boff what the financial impact would be resulting from the final determination that would be made. Mr. Boff answered it will be a difference of at least \$10,000 to him. He stated he will have to get a geotechnical study and all the evaluations that are required. Mr. Boff pointed out he had a geotechnical engineer come out and look at the wall and has a proposal in that amount. Ms. Maringer asked if the engineer stated whether or not there might be a danger of the rest of the wall falling because there is no drainage. Mr. Boff answered the engineer does not know that and that he wants to come to the property to drill holes and make a number of determinations. Mr. Boff testified there are no guarantees by anyone that the rest of the wall will not fall. However, he stated the opinion of both the engineer that originally designed it and Mr. Nelon, was that the wall would be ok. Mr. Kilby asked if Mr. Boff could reuse a majority of the material that is already there. Mr. Boff answered he could reuse some of it, but Mr. Nelon told him it is hard to stack round rocks versus flat rocks, so he felt it would be important to bring in some flatter rocks. Mr. Boff pointed out he is going to have some expense but does not want to double his expense by being required to hire a geotechnical engineer. Ms. Maringer asked if Mr. Nelon stated whether or not he would place gravel behind the wall. Mr. Boff stated yes and that would be a requirement that he would make. He then stated this is why he wants to go back to the original permit and design because that is what needs to be there as opposed to what was built.

Ms. Spicer testified she thought she had heard Mr. Boff previously state that he does not know exactly what repairs are going to have to be made because the engineer has not made that determination yet. She asked if this means there will be a new engineered design. Mr. Boff answered he is going to have an engineer come out to look at the entire wall and stated it is possible there may be substantial changes that need to be made to

keep it from falling in the future. He mentioned that he does not know what the engineer will suggest.

In closing, Mr. Boff pointed out there was a failed portion of the wall, a failed permitting process, a failed construction process, and a failed inspection process which all contributed to the wall falling. Mr. Boff mentioned he just wants the wall to be repaired to the original plans and specifications.

Ms. Boff approached the podium to testify. Chairman Webber confirmed that she had been sworn in. Ms. Boff testified, *"There was discussion about repair, and we were referencing in our application the definition of land disturbing activity, and it does not include activities that include repairs and maintenance, so there was some question about whether we were requesting a repair or not and whether we had an exemption, and I do want to draw attention to that. That's all; thank you."* Chairman Webber asked if Ms. Spicer had any response, to which she stated the definition for land disturbing activity is, *"Any grading of land, any clearing of vegetation, and any construction or rebuilding of a building or structure."* Chairman Webber asked her to read the second portion of the definition. Ms. Spicer replied, *"This term shall not include activities such as ordinary maintenance and landscaping operations, individual home gardens, the upkeep of yard and grounds, repairs, and cutting of firewood for personal use."* Chairman Webber asked Ms. Boff if that was what she was talking about. Ms. Boff replied, *"Yes, thank you."*

Chairman Webber asked Mr. Hench if he felt that he was adequately represented by Mr. and Ms. Boff, to which Mr. Hench answered yes.

In closing, Ms. Spicer reiterated the Town does not approve engineered designs and it is not the Town's responsibility to perform inspections to determine whether the wall was or was not built to the engineer's specifications. Ms. Spicer pointed out a Certificate of Occupancy was issued after completion of the wall which states, *"The development, as built, substantially complies with the plans and specifications previously approved by the Town of Lake Lure."* Ms. Spicer stated the Town approved a site plan which indicated the general location of the wall and a drawing that indicated the height of the wall. Ms. Spicer commented on the question regarding the difference between a repair and a reconstruction. She explained when someone calls and asks her about a repair, she always ask questions to get more information from them to make a determination. She stated she asked questions in this case, and what was conveyed to her was in order to make the repairs that were being described at least a portion of the wall had to be completely removed and reconstructed. She then noted it was also going to be reconstructed to a specification that was different than what was originally built, which is structural alteration. Ms. Spicer pointed out that Mr. Boff had testified he does not know exactly what work will be required because his engineer has not issued a determination on what needs to be done to the wall to ensure it won't fall again in the future. She then mentioned the Town's regulations state that, if the average slope of the property in the area of the disturbance is more than 30%, the qualified licensed professional is supposed to use a geotechnical engineer analysis to design a wall that is specific for that slope and

that will stay on that slope. Ms. Spicer noted that the slope, in this case, is 60%, and there is no geotechnical engineer analysis or an analysis from an engineer stating what they think needs to be done. She pointed out the only thing that has been submitted is a letter from an engineer stating the wall was not built to the original specifications based upon his review of photographs.

As a final closing, Mr. Boff pointed out that he submitted what was required of him by the Town, which included engineer plans. He reiterated that, had the structure been built correctly, he would not have to be incurring the expenses he will have to incur and would not have to be going through this process.

Chairman Webber asked Mr. Boff if he would agree that the site where the wall has fallen is greater than a 30% slope. Mr. Boff answered he could not find in the zoning regulations where you start calculating the slope and where you end calculating the slope. He stated that, using the original topography, it appears to be really close to being about a 30% slope and noted what was built is greater than 30%. Mr. Boff pointed out there was a retaining wall previously on the property where the current wall is now. According to Mr. Boff, the original retaining wall was replaced for improvements. Ms. Spicer mentioned when she did a slope analysis using the entire lot on GIS it was just under a 30% slope. However, she stated if you do a slope analysis just using the area where the wall is the slope is closer to 60%. Chairman Webber asked Mr. Boff if he was referring to a 30% slope of the entire lot or site specific, and Mr. Boff answered site specific.

Ms. Maringer asked Mr. Calhoun if he would like to state an opinion on this matter. Mr. Calhoun pointed out his opinion had already been stated in prior testimony by Ms. Spicer and Mr. Boff. He noted that he does feel a geotechnical engineer analysis is needed.

There were no further questions from the Board members and no further statements from any of the parties, so Chairman Webber closed the hearing.

During deliberations, Chairman Webber mentioned it is correct to say the wall was built in April, 2011. He further mentioned the permit number ZP-2011009, when issued, approved compliance with the regulations enforced at that time, according to Mr. Boff. Chairman Webber pointed out however that, based upon testimony, the original permit did not certify compliance with the regulations due to an error made by the Zoning Administrator. He stated that, while statutory protection exists for regulations in place at the time a permit is issued, the August 9, 2011 amendments to the regulations did not substantially change the regulations in effect at the time of the original permit. Therefore, he noted what Ms. Spicer was citing in her determination was not based on any change in the regulations. He stated he does not feel there is a vested right due to the fact that the original permit for the retaining wall was not based on a site specific development plan nor a phased development plan in accordance with NC General Statute 160(A) – 385.1. He noted there was no public hearing for this permit; therefore, it could not give rise to a vested right.

Chairman Webber pointed out he is more concerned than anything about the fact that the wall was not built to engineered specifications. He noted the opening statement in Section 92.200 of the Zoning Regulations reads, *"In order to protect the public health, safety, and welfare, the regulations contained in this article apply to mountain and hillside development."* Chairman Webber noted the engineer that designed the wall sent a letter stating it was not built according to his specifications and he did not oversee the construction of the wall. He then mentioned he cannot dispute the statement that it was not built to engineered specifications and is concerned with the safety aspect and if the remaining portions of the wall will fail, knowing it has faults. He stated the wall should have required a geotechnical analysis back in 2011; Ms. Spicer admitted the fault in that and she interpreted the slope in a particular manner by using GIS. He noted land disturbing activity distinguishes between repairs and rebuilding of a structure. He further noted the retaining wall is a structure based on the Town's definitions. He stated it has to be fixed, whether it's called a repair or a rebuild and will need to be fixed in accordance with the required regulations.

Chairman Webber stated the Town's permit was not in accordance with the regulations based on testimony from the Zoning Administrator because she improperly determined the slope and whether or not a geotechnical analysis was required at that time. However, he mentioned the inspection process by the Zoning Administrator was proper based on testimony and Applicant Exhibit 1, which states, *"The plans approved by the Town with ZP-2011016 were a site plan indicating the general location of the wall as well as a drawing showing the proposed height of the wall."* Chairman Webber further stated it is not the Town's job to determine whether or not the engineer's specifications are correct, or if the construction is done according to that engineer's specifications. To conclude, Chairman Webber stated he would determine Ms. Spicer did make the appropriate determination based on the current regulations in saying that this reconstruction or this repair, which requires a building permit according to the Rutherford County Building Inspections Department, does require a new permit from the Town.

Ms. Maringer stated in her opinion the letter dated August 29, 2013 included in the appeal application from Richard E. Weaver, the designing engineer should be disregarded because he states in the letter it's difficult to tell if the material was properly placed, he did not observe the construction so he was unable to attest whether or not it was done properly, and he stated most importantly he is basing the letter solely on photography because he has not been to the site. Chairman Webber pointed out, based on testimony and written documents, the applicant's own statement was that it was not built according to engineer specifications.

Mr. Kilby stated he believes Ms. Spicer made the correct decision in requiring the applicant to obtain a new permit. He pointed out Ms. Spicer admitted she made an error but he does not know that it would have made a difference if she had determined it required a geotechnical engineer analysis. Mr. Gray mentioned if the analysis had been required as it should have been, he would have had to incur the extra expenses anyway.

Chairman Webber noted there was no discussion about whether a County permit was involved during the initial construction of the wall. Mr. Gray stated it falls back on the engineer to inspect it, which he did not. Chairman Webber replied the engineer could have provided this information but was not hired to do the job. He further mentioned in the documents it shows Mr. Price with Price Landscaping did the work and Mr. Weaver provided the engineer specifications. Mr. Gray noted it is ultimately the owner's responsibility to make sure the wall was built according to the specifications.

Chairman Webber mentioned he does not think this would qualify as a repair because there will have to be substantial work done to fix the wall. He stated the boulders cannot simply be restacked, and there would need to be site preparation to fix it.

Mr. Egan suggested a motion, which stated:

I move this Board to overturn the decision of the Zoning Administrator.

Mr. Egan noted if it does not get four votes, it fails and the Zoning Administrator's determination will stand. He stated four votes are required to overturn the Zoning Administrator's decision.

In reference to ZA-2013001 Chairman Webber moved that the Board grant the appeal as submitted. Mr. Gray seconded the motion.

To clarify, Chairman Webber explained if a Board member wishes to grant the appeal, based on all the discussion in the testimony, to vote 'yes.' He stated if a Board member disagrees and feels the appeal should be denied and the Zoning Administrator's decision should be upheld to vote 'no.'

In reference to the motion made by Chairman Webber and seconded by Mr. Gray, Ms. Maringer, Mr. Gray, Mr. Kilby, Mr. Owensby, and Chairman Webber all voted no.

Mr. Boff's appeal was denied. Chairman Webber explained to Mr. Boff that he has the right to appeal the Board's decision to Superior Court within 30 days from the time of receiving the Board's official order.

Chairman Webber went over what each Board Exhibit and Applicant Exhibit was labeled.

OLD BUSINESS

(A) Proposed amendment to the Board of Adjustment Bylaws

Chairman Webber gave an overview of the proposed amendment and noted this was discussed at the June, 2013 meeting. Mr. Egan pointed out the comma on line 2 of the proposed amendment, which was included in the packet, is not required.

Mr. Gray made a motion to accept the change to the bylaws as presented. Mr. Owensby seconded and all were in favor.

(B) BOA Information Paper

Chairman Webber noted this was discussed during training a couple months back. He stated Mr. Egan created a draft called 'Quasi-Judicial Decisions' which was given out to all Board members last month to review. The Board members did not suggest any changes or have any comments.

(C) Discussion regarding absenteeism vs. bylaws

Chairman Webber explained that the current bylaws state if a Board member is absent three times or more in a 12 month period they will be given a verbal warning, and if they are absent six times or more in a 12 month period the Board member will be asked to resign. Chairman Webber stated this was put on the agenda because there have been two Board members which have six or more absences in a 12 month period. He stated he asked both members to resign. He mentioned one member, Vicki Smith, did resign due to work conflicts, but the other member, Mr. Owensby, does not wish to resign. Chairman Webber mentioned Mr. Owensby brought up whether or not there could be certain exceptions that could constitute excused absences. The current bylaws do not allow for any excuses of any type. Mr. Kilby asked Mr. Egan what he has experienced with other boards he has worked with. Mr. Egan answered it would depend on how hard it is to find members willing to serve on the BOA. He stated the Board can ask a member to resign but cannot make them resign. Ms. Spicer pointed out the Zoning & Planning bylaws state, *"Faithful attendance at meetings of the Board in conscientious performance of the duties required of the members of the Board shall be considered a prerequisite to continue membership on the Board."*

During further discussion, Mr. Gray brought up an issue about the time the meetings are held. He mentioned it may be hard for some members to make it to the meetings at 1:00 p.m. because of their jobs and he feels that this should be considered. Chairman Webber moved to add to next month's agenda under Old Business to continue the discussion regarding a cap on the number of cases on the agenda and meeting times.

Mr. Kilby asked that only the necessary forms to be considered in making decisions on cases be included in the packet. He noted he was referring to Ms. Lindeberg's case on the agenda in which she was requesting a vacation rental operating permit and wanted to include boat use. He noted she did not have an approved Town commercial boat license for commercial use. Ms. Spicer commented, according to Section 92.042 (D) (7) Contents of Application of the zoning regulations, the ordinance states:

The application for a vacation rental operating permit shall contain...If the residential vacation rental includes the use of a boat on Lake Lure, proof of a valid Town commercial boat license.

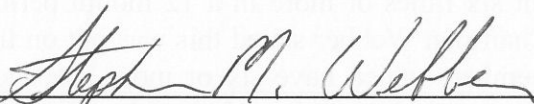
After discussion, it was noted that Ms. Spicer should have deemed Ms. Lindeberg's application incomplete because she did not provide a valid Town commercial boat license with her application.

ADJOURNMENT

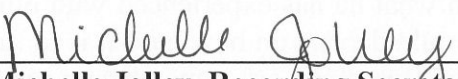
Mr. Gray made a motion seconded by Ms. Maringer to adjourn the meeting. All were in favor.

The meeting was adjourned at 4:37 p.m. The next regular meeting is scheduled for Tuesday, September 24, 2013 at 1:00 p.m.

ATTEST:



Stephen M. Webber, Chairman



Michelle Jolley, Recording Secretary