

CONTINUANCE OF REGULAR MEETING
TOWN OF WAYNESVILLE
BOARD OF ADJUSTMENT
APRIL 18, 2006
TUESDAY - 5:30 P. M.
TOWN HALL

The Board of Adjustment held a continuance of its April 4, 2006 regular meeting Tuesday, April 18, 2006. Members present were Gail Cross, Mack Noland, Mike Erwin, Neal Ensley and Garnell Day. Also present at the meeting were Land Development Administrator Byron Hickox and Deputy Town Clerk Freida Rhinehart. Chairperson Mike Erwin called the meeting to order at 5:30 p.m.

Continuance - Variance - Haywood Habitat for Humanity, Inc. - 290 Meadow Street

Byron Hickox asked if all persons sworn before are still sworn. Mike Erwin replied that they are.

Mr. Hickox stated that he had spoken with Town Attorney Woodrow Griffin. It was the Town Attorney's conclusion that the Board of Adjustment must make a decision to grant or deny the variance based on the findings of fact and the merits of this case alone regardless of any concerns about liability. Any party can always appeal a decision or file a lawsuit.

Mack Noland asked if any negotiations have taken place between Habitat for Humanity and Mr. Nichols. Mr. Hickox responded that he has not spoken with either party and is not aware of any negotiations.

Marnette Colborne said that when Habitat was here last, they spoke with Mr. Nichols and Ms. Woody. They said they would contact them when they came up with a number regarding the cost of purchasing additional property from them. She never received a phone call from them.

Ms. Woody said that she did not remember that. Ms. Colborne replied that she had given Ms. Woody her card with her number. Ms. Woody said they were waiting to hear from the Town after Mr. Hickox had spoken with the Town Attorney. Byron Hickox responded that nothing regarding a selling price had to go through the Town. Ms. Woody said that since the Town made an error she thought the Town might be liable in some way.

Mr. Nichols stated that he could not understand why the building was built so close to the line without a variance before construction began. Mr. Nichols asked why construction on the house was allowed to proceed before a variance was granted even after Mr. Nichols, Ms. Woody and Mr. Young had contacted the Town. A variance should have been obtained before anything was built. Mr. Nichols asked Mr. Young who had told him that construction would be stopped. Mr. Young replied that it was Mr. Benson. The house only had a foundation at that time.

Mr. Hickox responded that Habitat for Humanity was in his office within 24 hours after being informed that they would need a variance. They were told then that they could either stop construction or continue working at their own risk. The other work has been done since they were notified there was a problem.

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Mr. Nichols stated that he did not feel it was his job to tell them to stop construction. He thought they already had a variance. Mr. Nichols continued that Mr. Van Daam came to the Town a year or two ago to get a variance and was told he could build on the lot as long as he met the setback requirements. If he could not meet setbacks, he could not build. Now, the Town is letting someone else build on the lot without meeting the setback requirements.

Mack Noland asked if the variance were granted did Mr. Nichols feel it would affect the value of his property. Mr. Nichols said that he felt it would with the closeness to the property line and the potential for water runoff from the eaves of the house. He would not want to buy the property himself.

Neal Ensley asked if property could be acquired from Mr. Nichols near the line which would allow the Habitat house to become in compliance with the setback. Mr. Nichols said that he would sell them 7 feet for the same price that they had paid for the rest of their property.

Ms. Colborne said that they have found that it is too large a sum of money for them to be able to pass along to their homeowner. This is already the most expensive piece of property they have ever purchased.

Garnell Day asked Ms. Colborne if there is no way there will be a settlement between Habitat and Mr. Nichols. Mr. Quevedo said not at that price. Ms. Woody went back to her point that she thought the Town should be liable for the purchase because of the incorrect building permit that was issued.

Byron Hickox informed the Board that the Town is not liable. Liability should not be entering our train of thought in making this decision.

Neal Ensley asked about the training he had received for becoming a member of the Board of Adjustment. He said that in the training they were instructed that if a person cannot afford what needs to be done, that is not a reason for granting a variance. It seems to Mr. Ensley that money is an issue in this case.

Mr. Hickox pointed out that this is not one of the six criteria that Habitat has to meet to obtain a variance. He referred to the findings of fact presented at the last meeting. These are the only issue to be considered.

Mr. Nichols said that past practice should be considered on the same piece of land. On the same piece of land it was handled one way previously and is being handled differently now. Ms. Colborne said that they were following the standards given to them on their certificate of compliance which said they have a 0 side setback.

Mr. Quevedo said that their homes are usually appraised at the market value. This home appraised at about \$150,000. It will be sold to the homeowner at cost. The other homes in the neighborhood

are not appraised at that value, so he does not feel that the value of Mr. Nichols' land will be jeopardized. It will actually increase the value of his land.

Gail Cross stated that Mr. Nichols is not concerned about the quality of the home but the devaluation of the lot because the house located so close to his property line.

Mr. Nichols said that another concern that he has is that when Habitat found out that there was a setback requirement, they should have come to him and asked if something could be done to rectify the problem. Ms. Colborne called him before the last meeting wanting to purchase some additional property. This was the first he had heard from Habitat.

Ms. Woody said that Byron had called and offered \$1000 to buy the property. Mr. Hickox replied that he jokingly said that Mr. Nichols could sell Habitat the property for \$1000, value it at \$5000 and write off the rest from his taxes. He did not offer anything. Ms. Woody said that was a strange conversation.

Ms. Woody said she didn't know where they will go from here. She doesn't know if Mr. Nichols wants to get an attorney and sue or what since nobody is admitting liability. Until somebody admits liability she does not know how it can be solved.

Gail Cross reminded them that obtaining an attorney would not be cost effective. Ms. Cross asked if Mr. Griffin said that the fact that this house was built thinking that Habitat was following the Ordinances and were in compliance and that they have written information confirming that should have nothing to do with the Board of Adjustment's decision. Byron replied that the fact they were given the wrong information should be considered but not whether the Town is going to be sued if this decision or that decision is made. The whole discussion of liability and making a decision based on the Town's least amount of liability should not play into the Board's decision. The facts of the case and the facts alone are all that should be considered. Mr. Griffin said that the Board has to make a decision based on the merits of the case and let the chips fall where they may.

Ms. Woody asked if Town Boards could just do what they want to and allow people just to build right on top of each other and are not going to be liable for any decisions made. She said it seems very unfair to her that the Town can just use your property as they see fit.

Mike Erwin reminded Mrs. Woody that is not really the case. He asked her to keep in mind that the Board of Adjustment is not an elected board. They are community volunteers and are not policy makers. She replied that she was talking about the Town itself. Mr. Erwin stated that he did not think Town Attorney is saying that the Town does not have liability but he is saying that it should not affect the Board of Adjustment's decision. Byron Hickox agreed and said that there is certainly potential for liability either way.

Luis Quevedo added that Habitat sells the houses to the homeowner for whatever the cost is. If the scenario is that Habitat has to pay additional money, the one who gets hurt is the homeowner who has no money to start with but is trying to provide a home for her daughter. The homeowner will have to pay for the mistake that was made and he does not feel that is fair either.

Neal Ensley asked if the Findings of Fact distributed at the last meeting were the only things that the Board of Adjustment could consider. Byron responded that is correct – the merits of the case. Those are the criteria for variances to be granted in Section 154.084.

Mike Erwin asked if these findings would be different if the house not already started. Had the house not started at all, Mr. Hickox felt the basic findings would be the same. He thought a variance might have been granted for not as severe a setback change. Mr. Hickox continued that there are other properties around town that could make a good case for a variance being granted. This property is barely over 4000 sq. ft. in a district that requires a lot be 7000 sq. ft. The lot is pretty small, the requirements are fairly restrictive and would require a small home to fit within the setbacks. He feels that we will see variance requests in the future for lots of similar to this that were already lots of record at the time that current standards were adopted. There are lots half the size required by that district and it becomes very restrictive. The requirements of the setbacks may require building of a house so small it will be out of character with the neighborhood. If the house had not been started, the variance would have been granted without such a severe setback. Mr. Hickox distributed a copy of a map of the neighborhood indicating how small this particular lot really is.

Mike Erwin said if the house had been centered on the lot, they would have had sufficient setbacks. Since the house has already been started, it creates difficulty in granting the variance. Gail Cross added that it might have helped if construction had been discontinued at the time it was discovered there was a problem.

Ms. Colborne said they were actually 2 ½ months into construction when Habitat was notified. The house was well under way. The footings, foundation and floor system were in place. They were actually putting the roof on the day Mr. Hickox called to say there was a problem.

Mr. Nichols asked Mr. Young how far along the house was when he was told it was going to be stopped. Mr. Young responded that the foundation was up to the floor level ready to put the walls up. The walls were put up, the roof trusses and roof have been put on, the windows and doors have been installed and some vinyl siding has been put on since Mr. Benson told him it would be stopped.

During the time between when Mr. Young spoke with Mr. Benson and Habitat was notified, the walls had gone up. Mr. Young said he contacted Mr. Benson on Friday and was told that Habitat would be contacted on Monday morning.

Gail Cross had a question regarding closeness to property lines. She asked if there are other homes close to property lines. Mr. Hickox replied that there are since the town did not have setback

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requirements until a generation or two ago. Ms. Colborne said that in that neighborhood, some of the homes do not meet setback requirements. Previously, Ms. Cross said that permission was sought from neighbors to build closer to the property lines. Mr. Nichols was aware of this practice in the past as well. Mr. Quevedo said he is aware of properties in the area that do not meet setback requirements too.

Mr. Nichols asked Troy Muse, a builder in the area if he is aware of any areas that have 0 setbacks. Mr. Muse told him that there are none except for businesses.

Ms. Woody asked if Mr. Nichols sold his lot and someone wanted to build, could their eave come across the property line toward the Habitat house or would that person be required to build within the setbacks. Mr. Hickox responded that they would be required to build within the setback unless they could show that they have a good case for a variance. This is all based on a mistake and everybody knows that. The implication that this is somehow an “under the table deal” is insulting.

Mr. Nichols asked Mr. Hickox if he called him. Mr. Hickox replied that he did and asked Mr. Nichols if he would be willing to negotiate. Mr. Nichols replied to Mr. Hickox that he did not think he could. Mr. Hickox told Mr. Nichols that if Habitat were granted a variance, Mr. Nichols would have nothing to show for it. Mr. Hickox told Mr. Nichols that he could just as easily right now say, “I’ll give it to you for \$1000.” He further told Mr. Nichols that he could take the \$1000, put it in the bank and everyone would be happy. Mr. Hickox said he was just trying to make Mr. Nichols aware if the variance were granted that his recourse would be through. Mr. Hickox further told Mr. Nichols he could take \$1 or \$1000 or stick to the \$4200 figure he originally offered to sell for and take his chances. That is where the \$1000 was mentioned. Mr. Hickox explained that he had no authority to offer anyone money on behalf of the Town.

Neal Ensley questioned whether the variance is the minimum necessary to afford relief since there is a house there. Gail Cross said that she did not think that the Board could consider that there is a house there since the Board of Adjustment does not have that authority. Gail said she felt that the Board has to make a decision as if the house were not there. Byron Hickox instructed the Board that they must make a decision based on the facts of the case and one of the facts of the case is that there is a house there.

Ms. Colborne reminded the Board that Habitat was not notified that there was a problem with the setbacks until the house was already there.

Neal Ensley said that the problem with making a decision is that the Board is either going to have to penalize the neighborhood or penalize Habitat.

Mike Erwin stated that his personal opinion is that the Town needs to resolve the situation. Mr. Hickox reminded him that the Board of Adjustment is how the Town resolves this issue. Mr. Hickox said it is a hard decision to make but it must be made. If the Board of Adjustment does not take

action tonight, the decision is “no”. The Board cannot walk out of the room tonight without having

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made a decision unless there were some criteria to table it. The issue is before the Board of Adjustment and the Board has to make a decision on it.

Mike Erwin stated that there is no more information to be presented. The matter has already been delayed for two weeks to allow for resolution which has not taken place.

Mack Noland asked if the variance were denied, would additional property have to be purchased or the house be moved. Mr. Erwin responded that something would have to be resolved in the matter. Mr. Erwin is just concerned that others might go out and start a house and become qualified for a variance. Habitat did so in good faith because they did it on the basis of a building permit but it really comes back to the Town as far as approval is concerned.

Gail Cross said she is not in favor of granting a variance even though it is an error on the part of the Town because the variance would have to be granted for the full amount of the setback. Ms. Cross also fears that others might attempt the same approach just to avoid compliance. Mr. Hickox responded that the only way this could occur is if a mistake is made again. If anyone starts building without a permit, Town Staff would go out that day with police and stop the construction and if they were building too close, they would have to leave. Mr. Hickox expressed his deep regret for the mistake but said there should never be a case where anyone could begin construction without proper permits.

Mack Noland moved, seconded by Garnell Day, to deny the application for a variance for Case 06-09 to Haywood Habitat for Humanity Inc. located at 290 Meadow Street, Waynesville, finding the requested variance to be in violation of Sec. 154.119(B)(3) side setback requirements for the Main Street Neighborhood District (MS-ND) and not in harmony with the specific requirements of Sec. 154.084(2)(a). The motion carried unanimously.

Mr. Noland expressed his hope that the matter could be negotiated among property owners. Luis Quevedo stated that the Board had placed Habitat for Humanity in a very bad position because he does not feel that the homeowner can afford to purchase additional property.

Ms. Woody repeated that their intent was not to hurt Habitat or the homeowner. She still feels that the Town should be liable. Mr. Quevedo replied that the homeowner is the one who will be affected adversely.

Ms. Colborne asked if denial of the variance meant that building should cease immediately. Mr. Hickox explained that the denial could be appealed.

Mr. Quevedo stated that they do wish to appeal and asked about the procedure. Mr. Hickox explained that the matter must go to the Court of Appeals and he is not sure about the procedure or deadlines. Ms Colborne said they will contact them.

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Ms. Colborne asked again if they should stop construction. Mr. Hickox stated that this is a unique situation. He will speak with Mr. Benson tomorrow and let them know immediately.

Mr. Nichols then proposed that if Habitat would pay him \$1500 for his time and trouble and keep the water off his lot, he would allow them to be able to keep the house where it is. Mr. Noland said if they would do this he would withdraw his motion. Mr. Quevedo asked if Habitat would be purchasing the property for this amount. Mr. Nichols said he would still own the property but would

allow them to leave the house there without going to the Court of Appeals. Mr. Hickox told them that this would not be legal because what the Board of Adjustment just said is that Habitat cannot build the house this close to the property line. Right now, moving the property line is the only recourse unless the Board of Adjustment retracted its decision.

Mr. Hickox explained to Mr. Nichols that he did not have the authority to allow his neighbor to build closer than the Town allows. The Board of Adjustment and the Court of Appeals are the only bodies that have the authority to allow someone to build closer to the property line than the Town allows in the Land Development Standards. Mr. Nichols could offer verbal support but that is all.

Adjournment

With no further business Mack Noland moved, seconded by Neal Ensley, that the meeting be adjourned at 6:20 p.m.

Mike Erwin
Chairperson

Freida F. Rhinehart
Secretary