

CAROLINA BEACH

Board of Adjustment Meeting

Tuesday, December 5, 2023 - 6:00 PM

Council Chambers, 1121 N. Lake Park Boulevard, Carolina Beach, NC



MINUTES

CALL TO ORDER

Chairman Hartsell called the meeting to order at 6:00 PM.

PRESENT

Chairman Wayne Hartsell

Vice Chairman Patrick Boykin

Board Member Jullena Shelley

Board Member Paul Levy

Board Member Ken Thompson

ABSENT

Board Member Tim Howard

Board Member David Marshall

ALSO PRESENT

Planning Director Jeremy Hardison

Senior Planner Gloria Abbotts

Board Attorney Matt Nichols

APPROVAL OF MINUTES

1. July 17, 2023 – BOA Minutes

ACTION: Motion to approve the minutes

Motion made by Board Member Shelley, seconded by Board Member Levy

Voting Yea: Chairman Hartsell, Vice Chairman Boykin, Board Member Shelley, Board Member Levy, Board Member Thompson

Motion passed 5-0

PUBLIC HEARING

2. Variance to the Required 25-Foot Front Yard Setback for 311 Spencer Farlow Drive
Deck: 24.56 Feet
Pool: 21 Feet
Applicant: Lary and Cory Ellis

Applicants Lary and Cory Ellis are requesting a variance of up to 4 feet from Sec. 40-74. -Dimensional standards for lots and principal structures and Sec. 40-75. – Dimensional standards for accessory structures that require a 25-foot front yard setback. The property is located at 311 Spencer Farlow

Drive and is in the R-2 zoning district. The property consists of a 0.171-acre lot, Lot 3B, Block 3, Harbour Point. Two permits were applied for at the property, one for a single-family home and a second for a pool. The contractor scheduled a final inspection of the swimming pool and home. A final survey is required for the final zoning inspection. The final survey depicted the front deck and swimming pool encroaching on the minimum 25-foot front setback.

DECK

The first site plan submitted with the permit application for new construction depicted the incorrect front setback. Staff notified the applicant that the minimum front setback in R-2 is 25 feet and not 20 feet. An updated site plan was submitted to the permit application, and the project was approved. The zoning ordinance requires that a foundation survey be submitted prior to the sheathing inspection. A foundation survey was submitted and approved, but the front deck was not shown and had not yet been built. Upon review of the final survey and during the final zoning inspection, the three front deck pilings were shown encroaching into the minimum front setback. The three pilings for the front deck were built with setbacks of 24.68 feet, 24.70 feet, and 24.56 feet from the front property line along Spencer Farlow Drive.

POOL

In October 2022, the owner applied for a permit for a pool, but it was never approved. The site plan submitted showed the pool meeting the 25-foot front setback. The permit application expired in April 2023. A new permit for the pool was applied for in April 2023, and the site plan showed the pool from the original site plan submittal with the incorrect 20-foot minimum front setback. The front corner of the pool was built with a setback of 21 feet. Pool setbacks are measured to the edge of the water.

To resolve the situation, the applicant requests up to a 4-foot variance to the required 25-foot front yard setback. The home meets the minimum required side (7.5 feet), corner side (12.5 feet), and rear (10 feet) yard setbacks. To come into compliance with the ordinance, the front deck and pool would have to be rebuilt.

REQUIRED FINDINGS

When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the Board shall vary any of the provisions of the ordinance upon a showing of all the following:

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured and substantial justice is achieved.

If the Board supports the findings, staff recommends the following condition for the variance: The variance is granted for the existing house and pool only, and any new structures on the property shall conform to the setback requirements.

Individuals planning to speak on the matter were sworn in.

Ms. Abbotts presented the details. She reviewed photos of the property, site plans, and the required findings.

Attorney Sam Potter, representing the applicants, said the Ellises were surprised that after receiving the final permit from New Hanover County approving the house as constructed, they received word from Town staff that they could not get a certificate of occupancy because the pool and a portion of the deck had encroached into the setback. He said the pool was built in accordance with the permit issued, and everybody missed the incorrect setbacks. Mr. Potter said the applicants never intended for this to happen, and demolition and rebuilding don't make sense because nobody is hurt by the encroachments.

Chairman Hartsell asked if two different contractors made two different mistakes. Mr. Potter said yes.

Mr. Ellis said he and his wife are trying to complete their retirement homeownership journey and hired Cory Thompson of Thompson Design Build and Doug Hill of Outdoor & More as contractors. He said his family, including four pets, has had to find a place to rent until the issues are resolved, and the delays have resulted in the need to pay the property's mortgage in addition to rent. Mr. Ellis said they would like to move into their new home in time of the holidays.

Board Member Thompson asked if the builder is compensating the applicants for their hardships. Mr. Ellis said no.

Mr. Thompson, the builder, said he is responsible for the three pilings going into the front setback. He said to the best of his knowledge, the issue was related to the building footprint the surveyor provided.

Chairman Hartsell asked Mr. Thompson if he personally staked off the house. Mr. Thompson said no, he never stakes a house and instead leaves it to the surveyor. He said Derek Danford was the surveyor, and there have never been any previous issues with his work. Mr. Thompson said he doesn't understand why the foundation survey came back different from the final survey. He said it's possible someone kicked over or otherwise moved one of the stakes because building sites sit unprotected for weeks before work starts.

Mr. Hill said he requested the survey and drew the pool he was asked to build on the survey. He said he turned in all the information for permitting, it was reviewed and approved, and his team built the pool.

Mrs. Ellis said they hired licensed professionals and entrusted them with this project, which is their first time building from the ground up. She said this is their dream home, and it's also a necessity to provide space for them to care for relatives who are ill and aging. Mrs. Ellis said one of their pets became so

sick and stressed during this process that the animal had to be put down. She said the situation is not her family's fault in any way.

Mr. Potter reviewed the required findings and said his clients meet all four. He said rebuilding would cause unnecessary hardship and waste, the hardship is peculiar to the property because the edge of the pavement sits farther back than the property line, the situation is not the action of the property owner/applicant, and substantial justice would be served by allowing them to move into their house. Mr. Potter said the pilings are inches into the setback, and the pool was issued pursuant to a permit allowing it to be constructed exactly where it is.

Chairman Hartsell opened the public hearing.

Marcus Max Gunkel of 312 Spencer Farlow Drive said there was not proper notice for this proceeding. He said there was a sign on the property, but the dates were not visible so he had to go to Town Hall to get information. Mr. Gunkel said representatives from the N.C. Wildlife Resources Commission and the U.S. Army Corps of Engineers should be present and part of the discussion because of their interest in property near the home. He said this is not a long-term hardship to the Ellises because the mistake was not theirs and they have recourse against the builder and surveyor, who have insurance for such situations. Mr. Gunkel said the situation is not peculiar to the property because everyone in that area has a 25-foot setback. He said he believes the curved design of the pool and the replacement of a spiral staircase with a larger staircase indicates the applicants knew something was amiss. Mr. Gunkel said it defies logic that no one noticed the setback issues. He said the pool could pose a public safety issue, and he believes there are plans for a firepit with a copper gas line to also be within the setback, which he also considers a safety concern. Mr. Gunkel said the variance requests do not address compensation for the Town for a situation that is "like reverse eminent domain" with a private property owner taking something from the public.

Sharon Luehs of Spencer Farlow Drive asked the Board to consider language that the Ellises, if granted the variances, will not contest having the street widened. She said a sidewalk in the area, where large boats on trailers frequently travel, is necessary so people can walk safely to the boat ramp without having to step into private yards.

Chairman Hartsell closed the public hearing and asked for rebuttals.

Mr. Hardison said notice given by the Town of this proceeding meets legal requirements.

Chairman Hartsell asked if there are protocols in place to avoid these types of situations. Mr. Hardison said yes, prior to the final survey a foundation survey is required once pilings are set, but in this instance the pilings were set for the house but not the deck at the time of the foundation survey.

Mr. Potter disputed Mr. Gunkel's claim that the applicants knew they were constructing within the setback. He said they both testified they had no idea about the situation, the builder took responsibility for the issues with the posts, and the pool contractor relayed how the mistake was made with respect to the location of the pool. Mr. Potter said for Mr. Gunkel's argument to be correct, all

four people had to be lying under oath. Mr. Potter also said Mr. Gunkel's testimony was based on suspicion and not fact.

Board Member Shelley asked about the inspection process. Ms. Abbotts said the applicants had all the proper building inspections, but the Town reviewed the project when they came in with the permit for the zoning portion. Mr. Potter said the County makes final building approval, and this would not have been granted if what the plans required was not actually there. He said the County currently handles the Town's permitting. Ms. Abbotts said the Town still reviews zoning, stormwater, and utilities, but the County handles the building inspection and building code portion.

Board Member Levy asked if there are any issues with the fence and concrete deck around the pool being outside of any permitted area. Ms. Abbotts said the fence height is in compliance with the zoning ordinance, which also allows anything under 30 inches to be within the setback area, so that would include the concrete and driveway.

Board Member Levy asked if a sidewalk or multi-use path is ever approved on Spencer Farlow Drive whether the fence would be within the area that the sidewalk or path would go. Ms. Abbotts said no, that would be in the right-of-way, and currently the fence is completely on the applicants' property.

Chairman Hartsell summarized the variance requests and said the Board will address each request separately.

Board Members went through each required finding for the deck variance request.

Regarding finding 1, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 1 passed 5-0.

Regarding finding 2, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, and Board Member Shelley. The following disagreed: Board Member Thompson. Therefore, finding 2 passed 4-1.

Regarding finding 3, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 3 passed 5-0.

Regarding finding 4, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 4 passed 5-0.

ACTION: Motion to grant the variance

Motion made by Board Member Shelley, seconded by Vice Chairman Boykin

Voting Yea: Chairman Hartsell, Vice Chairman Boykin, Board Member Shelley, Board Member Levy, Board Member Thompson

Motion passed 5-0

Board Members went through each required finding for the pool variance request.

Regarding finding 1, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 1 passed 5-0.

Regarding finding 2, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, and Board Member Shelley. The following disagreed: Board Member Thompson. Therefore, finding 2 passed 4-1.

Regarding finding 3, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 3 passed 5-0.

Regarding finding 4, the following agreed: Chairman Hartsell, Vice Chairman Boykin, Board Member Levy, Board Member Shelley, and Board Member Thompson. Therefore, finding 4 passed 5-0.

ACTION: Motion to approve the requested variance for the pool and fencing

Motion made by Vice Chairman Boykin, seconded by Chairman Hartsell

Voting Yea: Chairman Hartsell, Vice Chairman Boykin, Board Member Shelley, Board Member Levy, Board Member Thompson

Motion passed 5-0

Chairman Hartsell said Board Members understand the hardships people face and try to make fair decisions. He said he wanted to amend the last motion to include stipulations from Mr. Hardison. Vice Chairman Boykin said the idea is to prevent this situation from happening in the future. Mr. Hardison said the variance is only for the pool and deck and cannot include anything else. Vice Chairman Boykin said there should be checks and balances so this doesn't keep occurring. Mr. Hardison said staff can review this and bring back options for discussion. Board Member Thompson said there should be a better process. Chairman Hartsell said he wants to make sure it gets into the minutes that the Board recommends that staff examine procedures for granting permits. Mr. Hardison said tonight's actions do not apply to any future requests. Mr. Nichols said it is not necessary to reopen the motion to add the suggestion for procedural improvements.

NON-AGENDA ITEMS

None

ADJOURNMENT

ACTION: Motion to adjourn

Motion made by Board Member Thompson

Voting Yea: Chairman Hartsell, Vice Chairman Boykin, Board Member Shelley, Board Member Levy, Board Member Thompson

Motion passed 5-0

The meeting adjourned at 7:20 PM.