

RALEIGH BOARD OF ADJUSTMENT MINUTES

The Raleigh Board of Adjustment met in regular session on Monday, March 10, 2014 at 1:00 p.m. in the City Council Chamber, Room 201 of the Raleigh Municipal Building, Avery C. Upchurch Government Complex, 222 W. Hargett Street, Raleigh, North Carolina with the following present:

Board

Staff

Charles Coble, Chairman, (City)
J. Carr McLamb, Jr., Vice-Chairman (City)
Tommy Jeffreys, Secretary (County)
Timothy Figgins (City)
Ted Shear (City)
Brian Williams (City Alternate)

John Silverstein, Attorney to the Board
Assistant Planning Director Travis Crane
Ralph Puccini, Assistant Deputy Clerk

Absent

Karen Kemerait (City Alternate)

These are summary minutes unless otherwise indicated:

Chairman Coble called the meeting to order, introduced members of the Board and staff present at today’s meeting, read the rules of procedure and stated the purpose of today’s meeting was to approve the minutes from the February 10, 2014 meeting and to discuss a motion filed regarding this matter.

The following items were discussed with actions taken as shown:

A-4-14 – 03/10/14

DECISION: Denied

WHEREAS, Louis Cherry and Marsha Gordon, property owners, file a motion to alter or amend judgment regarding A-89-13, which was an appeal of a Raleigh Historic Development Commission approval for the property located at 516 Euclid Street.

Chairman Coble indicated a motion was filed by the property owners Louis Cherry and Marsha Gordon with regard to the findings of fact in Board of Adjustment Case A-89-13.

Mr. Silverstein explained the motion was filed based on the petitioner’s belief that the Board of Adjustment made an error as to whether the Raleigh City Code or the City’s Unified Development Ordinance (UDO) prevailed during the discussion and vote taken at the previous meeting. He stated this motion is pre-empted by North Carolina State Statute section 160A-

400.9 which prescribes a review by certiorari from a Historic District Commission to a Board of Adjustment, and asserted this standard applies in this case. He pointed out under the Raleigh City Code (RCC) a super majority (4 votes) was required to overturn a Raleigh Historic Development Commission (RHDC) decision, but that the UDO requires a simple majority vote. He stated North Carolina General Statute 160A-388(e)(1) required a revision of the UDO to reflect the simple majority requirement. He expressed his opinion that both the City Code and UDO are superseded by the State statute with regard to the vote required upon a review by certiorari after October 1, 2013.

Attorney Nick Fountain, Young Moore Henderson PA, representing the petitioners, Mr. Cherry and Ms. Gordon, stated he agreed with Mr. Silverstein's statements; however, he does not agree with Mr. Silverstein's conclusion. He outlined the history of the RHDC's Certificate of Appropriateness case and pointed out the initial case was filed in August of 2013. He stated he reviewed the minutes from the January 13 and February 10 meetings when the case was discussed as well as watched videos of both meetings. He also expressed his opinion which State statutes applied in the matter.

Mr. Fountain noted North Carolina General Statute 160A-390 asserts that the more stringent standards should apply in this case and also asserted that the Raleigh City Code Part 10 applies as the original historic development commission case was filed in August of 2013.

Discussion took place regarding the disparity between the State Statutes and the Raleigh City Codes and whether any municipal code can override the State Statute.

Mr. Silverstein noted the Historic Development Commission case was filed prior to September of 2013; however, the Board of Adjustment case was filed after October 1, 2013, with Mr. Fountain responding that the original case started in August of 2013. Mr. Silverstein pointed out the voting requirement applies to Board of Adjustment matters filed after October of 2013.

Much discussion took place regarding State statutes versus City Code jurisdictions and how they apply in this case.

Mr. Fountain submitted a memorandum of law and discussed its contents.

Mr. Shear questioned whether a Certificate of Appropriateness application is a permit or a subdivision as outlined in the City's UDO Section 17 with Mr. Silverstein responding the application would be more of a building permit or a grading permit and not a certificate of appropriateness.

Attorney Andy Petesch, representing petitioner Gail Wisner in A-89-13, stated he expressed his client's agreement with Mr. Silverstein's statement and conclusion. He noted his client filed her case in November of 2013 and went on to talk about the North Carolina State Statute 160A-390 and also cited Court Case State verses Williams (1973) wherein the court stated general law is established over local ordinances. He asserted the Board of Adjustment does not have

jurisdiction to hear this motion and stated a motion for rehearing should have been filed within 10 days after the vote was taken at the February meeting.

Mr. Fountain pointed out he filed his motion within the 10 day time frame and the purpose for the filing is the application of North Carolina General Statute 160A-390.

Request for Notification

None

Motion

Chairman Coble moved to deny the petitioners' motion to alter the February 10, 2014 minutes with regards to the Findings of Fact and Conclusions of Law. His motion was seconded by Mr. Shear and received the following vote. Ayes – 5 (Coble, Shear, McLamb, Jeffreys, Figgins); Noes – none. Chairman Coble ruled the motion adopted and the petitioners' motion is denied.

MINUTES – FEBRUARY 10, 2014 BOARD OF ADJUSTMENT MEETING - APPROVED AS AMENDED

Chairman Coble noted the Board of Adjustment received two motions with regard to the February 10, 2014 minutes, findings of fact and conclusions of law. He stated the Board will not entertain arguments on the merits of the discussion. He stated if the petitioners wish to appeal the matter to superior court that is their option. He stated questions will be limited to the Findings of Fact and Conclusions of Law.

Mr. Silverstein talked about the motion filed by the City Attorney's office and talked about how the Board addressed each item cited in the motion.

Deputy City Attorney Dorothy Leapley, stated she is here to address procedural issues and used a PowerPoint presentation in support of the City's argument, the outline of which follows:

Chairman Coble reiterated the purpose of today's meeting is to approve the minutes from February meeting with Attorney Leapley pointing out the issue of standing and that the Board's action failed to address standing and that the findings should have addressed that issue before the vote took place; therefore it is her opinion the Board's actions were erroneous. Ms. Leapley went on to assert that State statues cited in the findings of fact and conclusions of law were also erroneous with regard to incongruity with the Oakwood Historic District and stated the decision should have considered all properties within the Oakwood Historic District.

Discussion took place regarding the clarifications of the Board's reversal of the Historic Development Commission's decision as to whether it is final or another application could be filed with Deputy City Attorney Leapley urging the Board to clarify its decision.

Chairman Coble noted the Board's procedure was merely an evidentiary review with Mr. Silverstein pointing out the applicants can file a different Certificate of Appropriateness case with the development commission. He went on to state that with the Board of Adjustment's denial the case is now reversed.

Attorney Nick Fountain stated he shared Deputy City Attorney Leapley's concern with regard to the procedural process. He stated with the Board of Adjustment's action the only recourse is the civil court. He stated litigation is best avoided whenever possible and asserted the Board of Adjustment substituted its own opinion for the Raleigh Historic Development Commission, with Chairman Coble responding that is a matter for the Superior Court to decide.

Mr. Silverstein talked about the Historic Development Commission procedures and questioned if the petitioners make changes to their application could they apply for a new Certificate of Appropriateness with Mr. Fountain responding that is a possibility and went on to assert the RHDC should have been given deference in the Board of Adjustment decision.

Attorney Petesch asserted the Board of Adjustment in its findings of fact can address the history of the appeal and which parties appeared and participated in the case. He also asserted that State Statute 160A-20 addresses the Certificate of Appropriateness level and it is not necessary to include in the Board of Adjustment findings. He went on to talk about Mr. Silverstein's view regarding the case being heard based on matters of certiorari and whether that standard applied in this case. Mr. Silverstein stated State Statute, Section 160A-393(k) deals with appealing rulings of the Board of Adjustment and not appeals from the RHDC to the Board of Adjustment. He expressed his opinion that the Board should not, for example, address constitutional arguments.

Attorney Petesch asserted that the issue was addressed in his client's brief from January and questioned what other Board of Adjustment decisions were questioned by the City.

Attorney Fountain noted in the video of the January and February meeting his clients were not given a chance to participate in the discussion of the meetings. Chairman Coble closed the hearing and the matter brought back to the table for further discussion.

Chairman Coble went on to review the minutes from the February 10 meeting and made a couple of corrections with regard to Case A-89-13 noting a typo in Findings of Fact #6, December should be September, and that in several areas the word "applicant's" should be "applicants" in findings of fact 18 and conclusions of law 1 and 2. He went on to question whether the City's issues with regard to the issue of standing should be addressed with Mr. Silverstein responding that proceeding with the review was tantamount to a finding regarding standing.

Chairman Coble expressed his opinion that the Board of Adjustment addressed all of the city's concerns that the Board's decision options were clear; and that is whether to reverse or uphold the decision of the Raleigh Historic Development Commission.

Mr. Shear expressed his opinion the Board weighed all of its options before reaching a decision. He stated he would be opened to Attorney Petesch's suggestions with regard to the conclusions of law; however he is okay leaving it as it is.

Following brief discussion, Chairman Coble moved to approve the minutes of the February 10, 2014 meeting with regard to Board of Adjustment Case A-89-13. His motion was seconded by Mr. Jeffreys and received the following vote: Ayes – 5 (Coble, Jeffreys, McLamb, Figgins, Shear); Noes – none. Chairman Coble ruled the motion adopted.

Chairman Coble moved to approve the remainder of the Minutes from the February 10 Board of Adjustment meeting. His motion was seconded by Vice Chairman McLamb and received the following vote: ayes – 5 (Coble, McLamb, Jeffreys, Figgins, Shear); Noes – none.

REPORT OF THE BOARD'S ATTORNEY

Brief discussion took place regarding the Board of Adjustment's process with regarding the hearing of appeals from the Historic Development Commission.

Assistant Deputy Clerk Puccini noted the City Clerk's office received notice that the Hansen Quarry Board of Adjustment Case from 2002 has settled. Mr. Silverstein went on to talk briefly about the history of the case and its appeal through the courts.

WAKE COUNTY – BOARD OF ADJUSTMENT REVIEW – DATE SET

Assistant Planning Director Travis Crane stated a joint meeting with the City and County Board of Adjustment will take place at 9:00 a.m. at the Wake County Justice Center on March 18 and stated all members of the Board are invited to the meeting.

ADJOURNMENT

There being no further business, the meeting adjourned at 3:15 p.m.

Ralph Puccini
Assistant Deputy City Clerk
Clerk to the Board of Adjustment

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