

BOARD OF ZONING APPEALS

Agenda

April 29, 2010

4:00 P.M.

- 1. Call to Order; Roll Call**
- 2. Invocation and Pledge of Allegiance**
- 3. Public Comments**
- 4. Consent Agenda**
 - A. Approval of Agenda Format
 - B. Approval of Minutes of March 31, 2009
- 5. Old Business**
 - A. Continuation of Tabled Variance Application – 607 Pine Street – New Home Plan with Porch encroachment into the rear yard setback.
- 6. Adjourn**



DRAFT
Board of Zoning Appeals
Regular Meeting
Town Hall
March 31, 2010
4:00 p.m.

At approximately 4:00 p.m. in the Town Hall, Chairman Roger Munz called to order the Board of Zoning Appeals Public Hearing and Meeting. In attendance were board members Pete Baumann, Julia Parr and Jay Wiegner. Board member Steve Hairfield was not in attendance. Also present were Town Planner Tom Bonadeo and Town Clerk Libby Hume as well as the applicants, George and Nancy Proto. There were no other members of the public in attendance.

Roger Munz stated that the purpose of this meeting was to hear public comments and review the variance application for a new home plan with a porch encroachment into the rear yard setback at 607 Pine Street.

PUBLIC COMMENTS

There were no comments to be heard.

Tom Bonadeo read two emails from Susan Durlak, owner of parcel 83A1-2-11-5, and Lori Costa, owner of parcel 83A1-2-11-6, expressing their concerns regarding this variance request and stating that they were not in favor of granting the variance as requested. (See attached)

Tom Bonadeo added that he received a phone call from another neighbor, Helen Books, who just had questions regarding the variance request. Ms. Books did not give any positive or negative feedback regarding this issue.

CONSENT AGENDA

The agenda format was approved by unanimous consent.

The Board reviewed the minutes from the June 8, 2009 meeting.

Motion made by Jay Wiegner, seconded by Julia Parr, to approve the minutes from the June 8, 2009 meeting as presented. The motion was unanimously approved.

NEW BUSINESS

Variance Application – 607 Pine Street – New Home Plan with Porch Encroachment into the Rear Yard Setback

Roger Munz stated that he would like Tom Bonadeo to give his staff report regarding the application, and then allow time for the applicants to speak.

Tom Bonadeo explained that this lot was in the Sea Cottage Addition of Cape Charles and was not a standard lot shape but was angular in shape and was 83' across the front, 87' on one side and 74' on the other side and referred the Board to a diagram showing the lot and its dimensions, the original building footprint, the area covered by the first variance, and the area to be discussed for this variance application. In 2000, there were no other homes built within the blocks from Pine Street to Bay Avenue and Washington Street to Jefferson Avenue. The applicants asked for and were granted four (4) variances as follows: i) The side yard setback was reduced by 5'; ii) The rear yard setback was reduced by 5'; iii) The front setback was reduced by 6'; and iv) The porch was allowed to be 50% of the front of the house. The original building footprint was 1,336 SQFT and

these variances added 667 SQFT for a total building area of 2,003 SQFT. Per the ordinance, if the variance is not acted upon within one (1) year, the variance is no longer valid. Since that time, a home was built on Pine Street and Madison Avenue which aligned with a house on the next block as allowed by the ordinance creating a 13' front yard setback and is now the standard for the block on Pine Street between Jefferson and Washington Avenues. This lot is approximately 6,640 SQFT, which is 1,040 SQFT more than a standard R-1 conforming lot, currently with a possible building footprint of 2,210 SQFT.

Tom Bonadeo continued to review the variance criteria with the Board (§2.6.2.B of the Zoning Ordinance) which requires that the following three (3) conditions must exist in order for a variance to be granted: i) That the strict application of the ordinance would produce undue hardship; ii) That such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and iii) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.

Tom Bonadeo went on to state that he had been working with the applicants to determine the buildable area since the 2000 variance had expired and the ordinance had changed. The lot was purchased prior to December 2000 and the current house plans have just been created. The following items should be considered in meeting all three (3) criteria: i) The current building area is larger than the original building area in 2000 and larger than the area allowed by the variance in 2000 due to changes in the ordinance and neighborhood; ii) The depth of the lot is less than 140' but is no shorter than many other lots in the general vicinity. The lots directly across Pine Street are shallower than this one and many other lots are shallower and the ordinance makes an exception only for lots less than 40' deep; iii) The variance may not be a substantial detriment to the neighborhood. It would put the rear porch closer to the alley than other houses in the neighborhood. If this variance were granted, all other lots could make the same request for the same reason; iv) The Supreme Court of Virginia has ruled that an "undue hardship" means that one could not use the property at all. A house can be built on this property.

Tom Bonadeo showed the Board the current house plans. The Board members questioned the requirement in the zoning ordinance which states that a front porch be at least 80% of the building façade's width. Tom Bonadeo explained that the plans for the new house had been reviewed by the Historic District Review Board (HDRB) at their last meeting. The HDRB members agreed that the porch was compatible with others in the neighborhood so the 80% ruling did not apply.

Mr. Proto explained that he purchased the lot only because it allowed a view of the Bay but with its odd size, it is very shallow on the Washington Avenue side and added that the original variance was sought prior to their purchasing the lot. The lots adjacent to their property are larger and allow more flexibility in house design. Mr. Proto added that even though the Cape Charles Zoning Ordinance states that a variance expires after one (1) year if not acted upon, the State of Virginia does not have a timeframe. Which prevails? Mr. Proto went on adding that he feels the shape of the lot and the ordinance unreasonably restricts the ability to build in the back.

Mrs. Proto stated that ten (10) years ago, they purchased this lot because it was the only one that gave a good view of the Bay and they applied for a variance so they could build a house of reasonable size. There was some confusion regarding the property line. At that time, they wrote a letter to Cela Burge, Town Planner at the time, and Ms. Burge's response intimated that they had more buildable space than what was asked for so there was no reason to question the issue any further. Recently, when they started plans for their house and talked to Tom Bonadeo, they found out that the original variance had expired and they had to try to fit their house on a much smaller buildable area. Mrs. Proto stated that they had to make various sacrifices along the way and had no other option but to ask for a variance for the porch which will be in a small area that shouldn't bother anyone.

Mr. Proto stated that there were no objections to the original variance. Since there was no problem then, he did not understand why there is a problem now. Mrs. Proto added that the two (2) neighbors that wrote in against the variance possibly did not realize that the area in question was just a small portion and not the entire length of the house. Mr. Proto stated that their lot has a unique lot shape and that there was more latitude in granting a variance due to the relaxing of the State Code.

Roger Munz referred back to the original variance which reduced the front yard setback by 6' to 24' and because of the Zoning Ordinance changes, the Protos now have an additional 11' x 52' area. Jay Wiegner added that with the 24' front setback allowed by the original variance, the current house plans would not have fit on the lot at that time. Mrs. Proto explained that they did not have definite house plans at that time and what they were looking at back then would not be big enough for them and added that they designed their house to fit the new footprint but could not get the porch in with the angle in the back.

Tom Bonadeo stated that the State Code changes may override the Town's Ordinance regarding the expiration of the original variance. By law, a decision needs to be made within 60 days of the application. Since the State Code changes have not been verified, Tom Bonadeo stated that he needed to check with legal counsel and this decision could be made at a later date after hearing back from counsel. Tom Bonadeo added that Mr. Proto informed him about the possible Code changes within minutes of this meeting. Jay Wiegner agreed that the Board would need this information prior to making a decision and as it stands, he could not see where the first two (2) criteria items are met and added that other lots in this block have the same irregular lines with similar lot sizes. Julia Parr agreed that the Board needed to check on the Code changes. Tom Bonadeo explained that the Board has to deal with the town's Ordinance and recommended seeking clarification from legal counsel. The Board members agreed that without the opinion of legal counsel, a decision could not be made. Pete Baumann suggested that the actual statute amendment could be provided so the Board could see the actual text changes.

Motion made by Jay Wiegner, seconded by Pete Baumann and unanimously approved to table this decision until a judicial ruling could be obtained.

Motion made by Jay Wiegner, seconded by Pete Baumann and unanimously approved to recess the meeting of the Board of Zoning Appeals until after receipt of information from legal counsel clarifying the various issues as discussed.

Chairman Roger Munz

Town Clerk

From: Susan Durlak [susan.durlak@partners.mcd.com]

Sent: Thursday, March 25, 2010 4:43 PM

To: planner@capecharles.org

Subject: Response to Variance Request

Dear Mr. Bonadeo,

My name is Susan Durlak, I am the owner of lot #83A1-2-11-5, and I am responding in regards to request for variance for the rear yard setback of lot #83A-1-2-11-4 (also known as 607 Pine Street). I would like to make it known that I am not in favor of this seven foot encroachment being granted. When I purchased my lot, the setback was determined and I do not support a change being made. A variance would change my purchase agreement, and is contrary to my interests. The setback was a known factor at the time of my purchase, and I assume that the purchaser of the lot in question had the same knowledge. Allowing the variance does not benefit me in any way, and it seems like it would fall under a special privilege to the other property owner if it were granted.

Sincerely,

Susan Durlak

DRAFT

From: Lori Costa [lacosta219@hotmail.com]
Sent: Thursday, March 25, 2010 4:41 PM
To: planner@capecharles.org
Subject: Response to Variance Request

Dear Mr. Bonadeo,

My name is Lori Costa, I am the owner of lot #83A1-2-11-6, and I am responding in regards to request for variance for the rear yard setback of lot #83A-1-2-11-4 (also known as 607 Pine Street). I would like to make it known that I am not in favor of this seven foot encroachment being granted. When I purchased my lot, the setback was determined and I do not support a change being made. A variance would change my purchase agreement, and is contrary to my interests. The setback was a known factor at the time of my purchase, and I assume that the purchaser of the lot in question had the same knowledge. Allowing the variance does not benefit me in any way, and it seems like it would fall under a special privilege to the other property owner if it were granted.

Sincerely,
Lori Costa

Board of Zoning Appeals Staff Report

From: Tom Bonadeo
Date: April 29, 2010
Item: 5A – Tabled Variance Application – 607 Pine Street – Mr. and Mrs. Proto
Attachments: None

Background

During the BZA Public Hearing on March 31, 2010 it was noted that there may be some conflict between the Cape Charles Zoning Ordinance and the Code of Virginia, specifically with regards to a time limit on Variances. The Board tabled the application at the last meeting pending review of the ordinance by legal counsel.

A Memorandum from legal counsel is attached.

Application Specifics

The lot was purchased several years ago and a setback variance was granted in the fall of 2000. There were four variances granted. At the time of this variance no other houses existed on the block.

1. The side yard setback was reduced by five feet (95 sq. ft.).
2. The rear yard setback was reduced by five feet (260 sq. ft.).
3. The front setback was reduced by six feet (312 sq. ft.).
4. The porch was allowed to be 50% of the front of the house.
5. The original building footprint was 1336 sq. ft. These variances added 667 sq. ft. for a total building area of 2003 sq. ft.

This lot is in the Sea Cottage Addition of Cape Charles and is not a standard lot shape of 40 x 140 (5600) square feet with possible building footprint of 2550 square feet. The lot in question is 83 feet across the front, 87 feet on one side and 74 feet on the other side (approx. 6640 square feet) with a possible building footprint today of 2210 square feet.

The Cape Charles Zoning Ordinance states that variances become null and void if not acted on or put in place within one year of being granted. The State Code neither upholds nor denies this. The Code does state that upon the issuance of a variance has the effect of making the property conforming and no time frame is stated.

Legal Council has reviewed the ordinance and the attached memo was received. The conservative position is to allow the original 2000 variance to stand. These new setbacks are shown in drawing A.

A home was built on Pine and Madison and the house was aligned with a house on the next block south as allowed by the ordinance creating a 13' front yard setback along the 600 block of Pine Street. This is now the standard for the block.

The corner side yard setback in the R-1 Zone was also changed from 30' to meet the neighborhood requirement. When the setback is aligned with the home across Pine Street the side yard setback measures 26'. This change and the new building area can be seen on Drawing A.

Variance Criteria

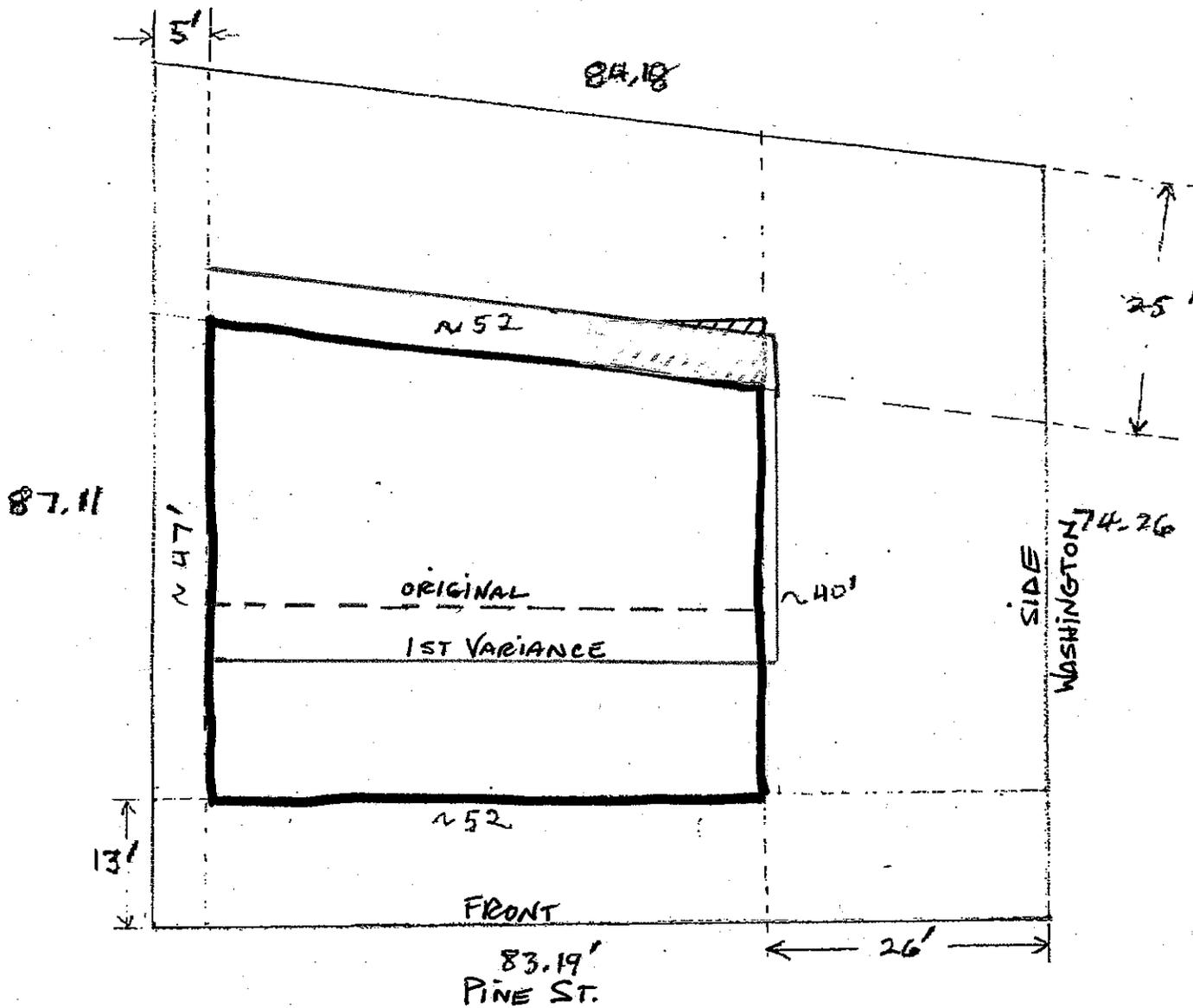
None is required as the applicant has withdrawn the variance request pending upholding the original variance.

Recommendations

1. Review the legal memo and allow the original variance to stand per the Code of Virginia, making the lot conforming.
2. Acknowledge the withdrawal of the current application and adjourn the meeting.

PINE ST LOT BUILDABLE AREA

DRAWING A



1. SET BACKS SHOWN AS ----
2. SET BACKS ARE TO FRONT OF HOUSE, NOT TO PORCH
3. UTILIZE BUILDINGS (INCLUDING DECKED SPACES) 5' FROM ANY PROPERTY LINE & 15' FROM HOUSE. SET BACK NOT SHOWN

1/16" = 1'

6/5/09
GRP

MEMORANDUM

To: Tom Bonadeo, Town of Cape Charles Planner
Heather Arcos, Town of Cape Charles Manager
From: Paul Watson
Re: Variance
Date: 4/28/2010

I understand that the Board of Zoning Appeals granted a variance with the condition that construction be completed within a certain amount of time. Further, I understand that this time period has run without the construction being completed and the grantee of the variance has now requested a slightly different variance.

Virginia Code § 15.2-2309 provides for the conditions that can be imposed with the granting of a variance as follows:

In authorizing a variance the board may impose such conditions regarding **the location, character and other features of the proposed structure or use** as it may deem necessary in the public interest, and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with.

Once the variance is granted this code section provides as follows with regard to the permanency of the variance:

Notwithstanding any other provision of law, **the property upon which a property owner has been granted a variance shall be treated as conforming for all purposes under state law and local ordinance;** however, the structure permitted by the variance may not be expanded unless the expansion is within an area of the site or part of the structure for which no variance is required under the ordinance. Where the expansion is proposed within an area of the site or part of the structure for which a variance is required, the approval of an additional variance shall be required.

The two problems I see are that this code section does not explicitly provide for any time limitation being attached to a variance and this code section implies that the variance is permanent as it states that the property "shall be treated as conforming". There is no case law interpreting this code section.

The original variance could be voided because of the time limitation, or the time limitation could be removed. If the variance is voided, it may result in a lawsuit from the grantee. On the other hand, removing the time limitation may upset neighbors who did not challenge the variance based on this limitation (unlikely, but possible). It seems prudent that if the time limitation is removed, the neighbors entitled to notice of the variance in the first place be given notice of such removal.

Since this statute does not give a clear answer, I consulted the Virginia Local Government Lawyers Association. A few very qualified local government lawyers confirmed my analysis and the lack of clear guidance from the statute or case law.