

**Members:**

George Quigley, Chair  
Oscar L. Davis, III, Vice-Chair  
Steve Parsons  
Melree Hubbard Tart  
Joseph Dykes



**Alternates:**

Martin J. Locklear  
John Swanson  
Horace Humphrey  
Carrie Tyson-Autry  
William Lockett Tally

*Cumberland County Board of Adjustment*

130 Gillespie Street  
Fayetteville, NC 28301  
(910) 678-7603

MINUTES  
AUGUST 20, 2009  
7:00 P.M.

**Members Present**

George Quigley, Chair  
Oscar Davis, III, Vice-Chair  
Melree Hubbard Tart  
John Swanson  
Joseph Dykes  
Steve Parsons

**Absent Members**

**Staff/Others Present**

Patricia Speicher  
Laverne Howard  
Angela Perrier  
Pier Varner  
Harvey Raynor, Interim  
County Attorney

Chair Quigley called the meeting to order at 7:00 p.m. in Public Hearing Room # 3 of the Historic Courthouse.

1. ROLL CALL

Ms. Speicher called the roll and a quorum was present.

2. APPROVAL OF AGENDA

A motion was made by Vice-Chair Davis and seconded by Mrs. Tart to approve the Final Agenda as written. The motion passed unanimously.

3. APPROVAL OF THE MAY 21, 2009 MINUTES

A motion was made by Vice-Chair Davis and seconded by Mr. Dykes approving the minutes as written. The motion passed unanimously.

4. ELECTION OF OFFICERS

Chair Quigley stated that the officers to be elected would be Chairman, Vice-Chairman, and Secretary. Ms. Speicher requested to remain as acting Secretary until a permanent Secretary was in place.

Vice-Chair Davis made a motion to nominate Chair Quigley as Chairman of the Board, seconded by Mr. Dykes. The motion passed unanimously.

Vice-Chair Davis nominated Mr. Swanson as Vice-Chairman if qualified, seconded by Mr. Parsons. The motion passed unanimously.

5. ABSTENTIONS BY BOARD MEMBERS

There were no abstentions by Board Members

6. PUBLIC HEARING DEFERRALS

There were no public hearing deferrals.

7. BOARD MEMBER DISCLOSURE

There were no Board Member disclosures

8. POLICY STATEMENTS REGARDING APPEAL PROCESS READ

Ms. Speicher read the Board's policy regarding the appeal process to the audience.

9. BOARD HEARING WITHDRAWAL – APPLICANT REQUESTED

- **P09-04-C:** CONSIDERATION OF AN ADMINISTRATIVE REVIEW FROM THE ZONING OFFICER'S DECISION REGARDING THE COUNTY ZONING ORDINANCE, SECTION 1102 YARD REGULATION, SUB-SECTION G, BUFFER REQUIREMENTS, CONCERNING THE APPLICATION OF THE BUFFER PROVISIONS FOR A DAY CARE FACILITY IN AN A1 AGRICULTURAL & RR RURAL RESIDENTIAL DISTRICTS ON 6.33+/- ACRES, LOCATED AT 2514 & 2530 SAND HILL ROAD, SUBMITTED BY RICHARD LEWIS - LEWIS, DEESE & NANCE ATTORNEYS; OWNED BY DAVIS FOUR FAMILY LIMITED PARTNERSHIP.

Ms. Speicher explained that the withdrawal for Case P09-04-C was requested because the Board of Commissioners' approved the buffer amendment which did not require the applicant to need a variance for the buffer provisions. Essentially what it did was take out the retroactive provision that was put in the Zoning Ordinance in 2005 regarding buffers and only made non-residential uses with open storage subject to the retroactive provision.

Vice-Chair Davis made a motion to allow the withdrawal, seconded by Mr. Dykes. The motion passed unanimously.

10. PUBLIC HEARING

**Opened Public Hearing**

- **P09-06-C:** CONSIDERATION OF A REQUEST FOR A VARIANCE FROM THE COUNTY ZONING ORDINANCE, SECTION 927, SUB-SECTION C.1, TO ALLOW SIDE YARD SETBACKS OF UP TO 48 FEET WHERE 267.43 FEET IS REQUIRED FOR A 267.43 FOOT TOWER IN AN A1 AGRICULTURAL DISTRICT ON 74.69+/- ACRES; LOCATED AT 3926 WADE-STEDMAN ROAD; SUBMITTED BY RONALD L. ROYAL, OWNED BY ALICE E. ROYAL.

Ms. Speicher introduced Harvey Raynor as the Acting County Attorney. Ms. Speicher presented the zoning, land use and photos of the site to the Board.

MS. SPEICHER: The Board will be addressing Section 927 of the County Zoning Ordinance, Subsection C, which was adopted by Cumberland County in January 1996. Records of permits go back six years and there is no record of a permit for this site. The County Tax office also had no records of the tower; however, based on statements from the applicant which is the property owner's son, the tower was built in the 1980's. Because of that Ms. Speicher made a correction to the site profile to state that this is a legal nonconforming use and due to the setback from the southwest property line, approximately 158'. Where there is no record of permits we typically go under the assumption that it had to be properly done with the rules that were in place at the time the structure went up.

VICE-CHAIR DAVIS: So the lot was put in after the tower went up.

MS. SPEICHER: No sir, the tower was in, the lot is not in yet. The lot is a proposed subdivision. It's reverse of what you're used to. This is an existing tower and they want a new property line. When the survey came in for the property line staff picked up on the tower location and advised the applicant and the surveyor that they were making the tower more nonconforming.

VICE-CHAIR DAVIS: So we're not talking about the lot, we're talking about the tower, but the lot is the issue.

MS. SPEICHER: Exactly, this Board does not have jurisdiction over the Subdivision Ordinance, that's the Planning Board jurisdiction, and the lots being proposed, lots 2 and 4, on each side of the tower are both in excess of 10 acres. Under State law 10 acres or greater tracts are exempt from subdivision regulation. We only saw this because of Lot 1A and 3. Staff has been told that this is a family division, just wanting to get the property issues straightened out and the actual property line is where they insist on the property line being located. This is why we had them file the application for the variance. The tower is a lattice type tower, located on a .23 acre lease area, has an access easement out to Wade Stedman Road. The setback measurement is 48' which requires a 219.43 foot variance. (Ms. Speicher showed where the location of the new line would be located). This portion is a 93' setback which would require a 174.43' variance and on the west side is an existing property line that we decided to address all at the same time. It's legal nonconforming setback with the tower having a 158' setback, which would require 109.43' variance to cure the non conformity.

CHAIR QUIGLEY: What is the impact of a denial of this?

MS. SPEICHER: They actually have the option of moving the proposed property line to a different location. The southwest side would still be a legal nonconforming. The other two would have to be worked out.

VICE-CHAIR DAVIS: If we were to approve the variance and the subdivision goes in and they build a house, and the tower falls and hits the house, what kind of problem do we have?

MS. SPEICHER: I don't know the legal answer to that. But you could put the County in the position of at least having some minimum liability for that tower.

MR. SWANSON: In Section 927 Subparagraph B, the setback that is enumerated in the ordinance, what is the purpose of that setback?

MS. SPEICHER: I was actually part of the staff that worked on drafting the tower provisions, and our reasoning was to make sure that it did not fall on another structure.

MRS. TART: If the property was developed and houses built, would the prospective owners be made aware of the tower being issued a variance?

MS. SPEICHER: Logistically it's almost impossible for staff to ensure that anything is included on a deed, without standing over at the Register of Deeds and reviewing everything that comes in. We could try our best as staff to require that, we just can't guarantee that would happen.

MRS. TART: The person who was selling the property to someone, then they would have a liability?

MS. SPEICHER: If they did not put the public on notice.

MR. DYKES: If the County were to approve this would this Board be liable to a certain extent?

MS. SPEICHER: It very well could.

MR. DYKES: I was wondering if they signed a waiver releasing the County from liability if that would make the County exempt from any liability.

MS. SPEICHER: I can't answer that, I'm not an attorney.

CHAIR QUIGLEY: Asked Mr. Raynor for his opinion.

MR. RAYNOR: If this Board acts within the scope of its authority then it will not create a liability situation for the County, but it will create a potential liability situation for someone.

MR. SWANSON: Would it be fair to say that if the property lines, for purposes of record, describing moving the property line to the north, it may move for what I'm looking at Lot 2 may move those northern portions of the property line beyond the required setback of 267' but in reality there will always be a problem with the southern boundary, it will always be expanding legal nonconforming use.

MS. SPEICHER: It will not be expanding it; it would just remain legal nonconforming. That's an existing lot line, it is not a part of this review.

VICE-CHAIR DAVIS: How did that lot line get put in there?

MS. SPEICHER: That was an existing tract of land and Mr. Royal who was the property owner got the subdivision approved, yes staff did miss the tower, because quite often on subdivision

you're focused on just that property. This case did make us more aware and as staff we were more diligent about looking at what's around it. I spoke to Mr. Royal about Lot #11, because it looks like it has no building area, none of the three lots that fall within the radius of the tower setback are developed at this time. Permits have not been issued, according to Mr. Royal they will not perk. He does have a potential buyer who owns Lot #9 that is interested in purchasing the property. I have made him aware and he has agreed and will make any buyer aware. I have also put the Inspections Department on notice that we would have to approve the plot plans on those three lots before any permits are issued. That was a mistake on staff's part and we have done everything we could to make sure it doesn't get worse.

CHAIR QUIGLEY: Mr. Ronald Royal please come to the podium. (Swore in Mr. Royal)

MR. ROYAL: My mother is the owner of the land that we are dividing. The tower was put there in 1986. It was a short tower then, they came out and extended the tower sometime around 1994 or 1995 they made it a lot taller. This was the first tower in Cumberland County. My mother wishes to have the property divided up. My two brothers and sister and I got together and we wanted to divide it. It's all farmland, I do all the farming and the majority of it is hayfields. I buy land and develop it also. The adjacent lots are part of the McLamb farm that backed up to our property and I bought that about three years ago and developed that into the lots that are on Wade Stedman Road. I basically wanted to keep the lot lines straight. I said let's try and work it out and we are all agreeable. That's when the tower became an issue. There is a ditch that runs along the back of that property; it's probably about 4 or 5 feet deep for drainage for that area. That ditch wraps around and comes behind the wooded area. We were using the ditch as a dividing line. That's why we moved the line in closer to the tower. Basically, my brother is inheriting the land where the tower is located and I'm getting the land next to him, which I already live on. That's how we came up with the lot line, to work it out to where we would keep a fairly straight line without going way over into the land that I already previously owned. We plan on keeping it for farmland, as long as we're alive. We don't plan on developing it.

MR. PARSONS: Asked Mr. Royal to identify which property he was referring to about getting title to that he owned.

MR. ROYAL: Indicated on the map which property he was referring to.

MR. SWANSON: What is the tower used for?

MR. ROYAL: Cell phones.

MR. PARSONS: If the tower wasn't there we wouldn't have a problem.

MR. ROYAL: It's not a real big issue. My brother and I are not so dead set that we can't move the line. It's just that we thought we're going to keep it in the family and farm it. As long as we own it it's going to stay agriculture. Our agreement between the brothers and me is that if one sells that I have the right to buy his first.

CHAIR QUIGLEY: Our only concern is that once we attach the variance to the property, it stays there.

MR. ROYAL: I understand that. My thinking is that if somebody came back later to the Board with a proposal to build, they would have to go to the Planning Board. We just assumed that we would be protecting it to a certain extent because any kind of house plan would have to go before the County to be approved.

MR. SWANSON: Is the tower a lease and when is the lease up?

MR. ROYAL: The tower was leased by Alltell, and I don't really know all of the details about the lease.

MS. SPEICHER: When I made the reference to the lease that was the lease area of the land that I was referring to.

MR. PARSONS: Do we have two nonconforming uses, the one with the tower subdivision interface but also is there one with the land that was previously cut out in the 1990's that's inside the circle?

MS. SPEICHER: Technically yes, however, this recombination would cure that because there will be no property line for it to be setback from and there is no structure there, on that portion of the preexisting lot.

MR. PARSONS: I understand, but if we don't approve the variance, do we then maintain two situations, one of which is clearly legally nonconforming. The other one is questionable.

MS. SPEICHER: Yes

MR. SWANSON: Has this plat been recorded in public record?

MS. SPEICHER: This plat has not been approved yet. We had the subdivision on hold. We have the preliminary and the preliminary review of that on hold until we see the outcome of this hearing.

VICE-CHAIR DAVIS: Do we need to address each as a separate variance?

MS. SPEICHER: You can do the variance for up to 48' as it was advertised which would cover the radius all the way around or you could do them individually.

**Public Hearing closed.**

MR. PARSONS: I obviously have problems with case fact #2 and case fact #5, particularly dealing with the commercial nature of the nonconforming use. It would be hard to justify that this doesn't grant a special privilege without a commercial benefit to having the tower there. Once you have the presence of something that generates income, granting the variance is obviously granting a privilege that would not be afforded to others. Also, I have a problem with the fact that we have a nonconforming use now, but we're making it worse if we approve it, which is due to the action of the applicant. So if you take a literal interpretation of case fact #5, I just don't see how we can find any other way other than it's the actions of the applicant that are causing the nonconforming use.

CHAIR QUIGLEY: Not granting the variance is not going to relieve the non-compliance.

MR. PARSONS: It will not cure the other two nonconforming uses, one of which is legally nonconforming and the other one is questionable. But it would not create the opportunity to make it worse, which is obviously caused by the actions of the applicant.

CHAIR QUIGLEY: The significant implication would be they would not be able to develop the lots that are impacted by that offset.

MR. PARSONS: I would just suggest they find another way to accomplish what they're objective is without subdividing the land.

VICE-CHAIR DAVIS: Or change the line of the subdivision.

MR. PARSONS: I don't really have a problem with the other findings; we certainly have some interesting and extraordinary conditions with regard to the topography with the ditches and the presence of the tower and the already approved subdivision. I don't see how we can get by case #2 or case fact #5. All it takes is one case fact that we can't find and we can't approve.

A motion was made by Mr. Parsons, seconded by Mrs. Tart to deny the consideration of variance to the County Zoning Ordinance Section 929 Subsection C-1 to allow a side yard setback of up to 48' where 267.43 feet is required. Case Facts #2 and #5 support the conclusion that we cannot approve this request because the approval of this request would result in granting the applicant special privileges that would be denied other citizens of the area without like circumstances. In the case of Case Fact #5 that the conditions requiring 48' variance do not currently exist but would be created by the approval of the division of land, which requires this variance. It's the actions of the applicant that would create the need for this variance. Based on that I move that we deny the request for this variance.

VICE-CHAIR DAVIS: Does this impact the existing planned subdivision to the southwest?

MS. SPEICHER: No sir.

**Quigley: Yes**

**Davis: Yes**

**Tart: Yes**

**Dykes: Yes**

**Swanson: Yes**

**Parsons: Yes**

**The motion was denied unanimously.**

## 11. DISCUSSION

### A. ALTERNATE BOARD MEMBER RECOMMENDATION TO BOARD OF COMMISSIONERS

- A. JOHNSON CHESTNUTT
- ED DONALDSON
- DONALD W. GAMBILL
- WINTON G. McHENRY

- RANDY A. NEWSOME

After discussion the Board couldn't make a recommendation because all of the applicants looked well qualified to serve on the Board and decided to leave it up to the judgment of the Board of Commissioners.

## 12. UPDATES

- A. NOTICE OF VIOLATION – **VIOLATION CASE# WS02-02 & WS00-01:**  
INVERNESS ON ANDREWS HOMEOWNERS ASSOCIATION, INC.  
3534 ROSEBANK DRIVE  
FAYETTEVILLE, NC 28311

Ms. Speicher advised the Board that the President of the Homeowners Association approached the Commissioners requesting money for the owners association to finalize the repairs and maintenance on the ponds. The Commissioners sent that to committee, so there is some resolution in the works.

- B. **P09-03-C:** CONSIDERATION OF AN APPEAL FROM THE ZONING OFFICER'S DECISION REGARDING THE ILLEGAL OPERATION OF A MOTOR VEHICLE WRECKING YARD AND JUNKYARD IN AN A1 AGRICULTURAL DISTRICT ON 11.5+/- ACRES, LOCATED AT 950 MIDDLE ROAD, SUBMITTED AND OWNED BY ISAAC R. AND HELEN WILLIAMS.

**BOARD DECISION:** The Board of Adjustment met on March 19, 2009 and denied the appeal requested for the above noted case with the stipulation that any and all fines be suspended for six months to allow the applicant time to clean the subject property. The County will forego all fines if the County Code Enforcement Officer determines reasonable progress of clean up is continuous; otherwise, all fines will be reinstated.

Ms. Speicher updated the Board on the progress that has been made at the subject property. A few of the junk cars have been removed, but it doesn't look like they will make the six month deadline in September.

Angela Perrier, Code Enforcement Officer, stated that if they are not in compliance by the six month deadline they will be fined \$500 per day when it reaches \$4000 they will be taken to Environmental Court. The County will clean it up and put a lien on the property. The whole process will take about 3 or 4 months.

## 8. ADJOURNMENT

There being no further business, the meeting adjourned at 8:00 p.m.