

Town of Sullivan's Island
BOARD OF ZONING APPEALS
Thursday, February 7, 2019

A Board of Zoning Appeals Meeting was held on the above date at 6:00 p.m., all requirements of the Freedom of Information Act having been satisfied.

Present were: Babak Bryan, Board Member
Summer Eudy, Board Member
Peter Koepke, Board Member
Michael Koon, Board Member
Jody Latham, Board Member
Kevin Pennington, Board Member
Joe Henderson, Director of Planning/Zoning Administrator
Courtney Liles, Town Clerk

A. Freedom of Information Act Requirements

Michael Koon called the meeting to order at 6:00 p.m. and stated the press and public had been notified in accordance with State Law. There were approximately twenty (20) members of the public present and no members of the media present.

Chairman Elizabeth Tezza was absent from the meeting; therefore, Michael Koon presided as Acting Chairman.

B. Approval of Minutes from January 10, 2019

Approval was deferred until the March 14, 2019 Meeting.

C. Applicant and Participant Oath

Members of the audience who spoke during the meeting: Bruce Berlinsky, Esq., Paul Boehm, Graham Maiden, Esq., David Parrish, Esq., Alice Paylor, Esq. and Dean Schmelter.

D. Administrative Appeal

1. 2624 I'On Avenue: Bruce Berlinsky, applicant, requests an appeal of an administrative decision relating to the residential use of 2624 I'On Avenue and application of Zoning Ordinance Section §21-20 B. (4), *Lots containing two occupied dwellings* (TMS# 529-10-00-026)

Director of Planning/Zoning Administrator, Joe Henderson, presented this application on behalf of the Town. Mr. Henderson stated that during the January 10, 2019 hearing, the applicant requested a continuance to present documentation referenced from the September 8, 2016 hearing. During the September 8, 2016 hearing, the BZA upheld Town staff's decision to deny the applicant's request for a business license to rent a second nonconforming dwelling unit at the subject property. Based upon the testimony and supporting materials made part of Mr. Berlinsky's application, the Board did not find that Town staff erred in interpreting the Zoning Ordinance and upheld staff's denial of the business license to occupy and rent a second dwelling unit.

Deliberations took place between the Board, Mr. Henderson and the Applicants.

Mr. Koon stated that Section §21-20 B. (4) provides the criteria for allowing two dwellings on a single residential lot and all three requirements must be met. Reading those three requirements together, he does not believe the applicant has sustained their burden of proving compliance with Section §21-20 B. (4). While evidence has been presented showing anecdotal knowledge shown by property owners, tenants and service providers, he has not seen anything indicating that the Town was ever aware that the two units may have existed on this parcel. None of the documents that he has seen submitted to, or issued by the Town, establish that the Town understood there were two units on the parcel. At no time prior to 2015 was there a business license granted for the rental of a second unit on the property. The applicant has acknowledged that no lease or other rental agreement has been on file with the Town which is one of the statutes expressed requirements. He also noted that he reviewed the Baker case that was relied upon by the applicant and does not believe it establishes the proposition the applicant contributes to it. The applicant has suggested that the case stands for the proposition that a C.O. is largely irrelevant or at least non-determinative for purposes of concluding the issue of conforming use on a property. In Baker, the Town's argument was that the absence of a C.O. resulted in an evidentiary presumption becoming conclusive. The court rejected that argument. In the current case, we have several C.O.'s. The applicant wishes to characterize the C.O.'s in one way, while the Town believes that they mean something else. Mr. Koon is persuaded that the C.O.'s mean what they say: that the property was understood by the Town at all times to be a single-family residence. The applicant was informed during the due-diligence period prior to purchasing the property that the Town took the position that a second dwelling unit would be illegal. The applicant went forward with the purchase of the property with this knowledge but now suggests that the Town's consistent application of that determination is unfair.

Mr. Pennington stated that he saw the Charleston County tax records indicating that it was multi-family dwelling. Also, the testimony of residents, owners, occupiers and renters that have attested makes it hard for him to look away on this island of neighbors. He stated that the property was obviously used as a two-family home and he would rather side with the citizen.

Mr. Henderson commented that the question before the Board is whether Town staff applied the requirements of Section §21-20 B. (4) of the regulations and correctly referenced the documentation available and the Town records. Also identify that since August of 1977 were both dwellings continually occupied by either a family member or a long-term rental agreement and that did not exist. Mr. Henderson reiterated that the Town does have a C.O. from 1978 that states that it is a single-family residence, which informed his decision of the case.

Mr. Bryan commented that the property might have been occupied as multi-family but that does not mean it was legally occupied as multi-family. He stated that the documentation from the County dated in the mid 80's was after the known renovation which substantially changed the house and some of the questions arising are to what degree was that a permitted and legal change.

Mr. Henderson added that the County very rarely verifies with the local jurisdiction whether a property maintains the correct number of units and the County typically does not set local land use compliance.

Mr. Koepke asked if the property has paid taxes as a single-family residence or as a multi-family dwelling according to the county tax records.

Mr. Henderson answered he believes the applicant demonstrated that they were paying at 6% tax rate which indicates a multi-family dwelling.

Mr. Koon stated the records were not consistent throughout, showing both 4% and 6% as tax rates.

Ms. Eudy stated that the county tax records denote that there are two units on the property.

Mr. Berlinsky added that the apartment was taxed at 6% and the main house was taxed at 4%, which are in the records.

Ms. Latham commented that taxation does not equate to legality. She added she has a hard time using the tax records alone as documentation that this was a legal rental.

Ms. Eudy stated that she doesn't think the Board should use the tax records alone or the C.O. alone to make a decision. She added that there are C.O.'s for multi-family units that are listed as single-family residence. She agrees with Mr. Pennington that the evidence is convincing and does not think using only what the Town has on file is enough.

Mr. Maiden commented that according to correspondence from the Town, business license records are destroyed after three (3) years (Exhibit 1).

End of deliberation.

The following Exhibits were made part of the record:

- I. Email correspondence between Town Staff and Paul Boehm dated May 9, 2018 (Exhibit 1)
- II. Certificate of Occupancy for 2668 I'On Avenue dated November 28, 2018 (Exhibit 2)
- III. Certificate of Occupancy for 2304 Middle Street dated December 7, 2018 (Exhibit 3)

Motion was made by Babak Bryan, seconded by Jody Latham, that the Board of Zoning Appeals deny the appeal of the administrative decision relating to the residential use of 2624 I'On Avenue because the owner has not shown sufficient evidence of subsections (a), (b) and (c) and that the entire application does not convince the Board that it complies with Zoning Ordinance Section §21-20 B. (4), *Lots containing two occupied dwellings.*

This motion failed by a tie vote of 3-3, with Summer Eudy, Peter Koepke and Kevin Pennington opposed.

E. Variance Request

1. 3217 Middle Street: Dean Schmelter, applicant, requests a dimensional variance to Zoning Ordinance section §21-22 E. *Minimum rear yard setback.* (TMS# 529-12-00-020)

Board Member Babak Bryan recused himself from this application.

Director of Planning/Zoning Administrator, Joe Henderson, presented this application on behalf of the Town. Mr. Henderson explained the background of this property. Mr. Schmelter received two previously granted BZA variances to allow the pool and decking to encroach into the 25' rear setback. The first variance was granted on August 9, 2012 for a 9'3" encroachment (allowing the pool deck to be 14'9" from the property line). The second variance was granted on November 8, 2012 for a 13'3" encroachment (allowing the pool deck to be 11'9" from the property line). On November 26, 2012, staff issued a Building Permit to Aqua Blue Pools to construct the pool and deck according to the November 8, 2012 variance. A survey from January 11, 2019 discovered the pool was built 9" closer than allowed. The applicant is requesting a (post-work) variance of an additional 9" to render the pool wall compliant. According to *Municipal Association of South Carolina's Comprehensive Planning Guide* for granting approvals of variances, "an owner is not entitled to relief from a self-created or self-inflicted hardship. A claim of unnecessary hardship cannot be based on conditions created by the owner nor can on who purchases property after the enactment of a zoning regulation complain that the nonconforming use would work a hardship upon him".

Deliberations between the Board, Mr. Henderson and the Applicants:

Ms. Eudy asked if Aqua Blue Pools constructed the pool and also the deck.

Mr. Henderson answered that Aqua Blue Pools received the permit so either Aqua Blue Pools or a sub-contractor working for them would have been charged with meeting compliance.

Ms. Latham commented that the application states "A mistake was made by the contractors. The contractor who built the deck is no longer in business."

Ms. Paylor added that members of Aqua Blue Pools were in the audience and sub-contractors completed the deck work.

Ms. Latham asked how wide the decking is from the edge of the pool and the edge of the deck.

Mr. Schmelter answered roughly a foot and a half.

End of deliberation.

Ms. Paylor presented on behalf of the applicant. She gave a brief background of the property. The Schmelters' no longer live at 3217 Middle Street and the house has a pending contract contingent on the approval of tonight's variance. There used to be lots between their property and the beach. Due to erosion, there is no longer any lots or buildable land between the two. In 2012 and prior, the BZA granted variances for similar lots on this block as long as the pool was within 10' of the rear setback. The homeowners then hired Aqua Blue Pools to build the pool in accordance with the November 8, 2012 variance. Both the homeowners and the Town believed that the work conformed to the variance. In early 2019, the potential buyers obtained a survey which showed the pool was built 9" closer than allowed. The applicants are requesting a variance nunc pro tunc (English translation: "now for then") in order to correct the situation.

Mr. Parrish presented on behalf of Aqua Blue Pools. He introduced Walter Blue, Clint Fore and John Ragland of Aqua Blue Pools. Aqua Blue Pools is a small, family owned company. The company is still trying to figure out how the mistake happened. The foundation work was completed by sub-contractors. Aqua Blue Pools takes full responsibility for the mistake that was made and asked for forgiveness.

Mr. Boehm commented that he lives two doors down from the applicant and was one of the properties that received a variance for his pool and deck. He explained the pool building process and stated it was an honest mistake.

Ms. Eudy stated she thinks the request is very reasonable. She added it is clear from the testimonies that were provided the homeowners did not intentionally make the mistake. Ms. Eudy proposes granting the variance up to the 10' line with the condition that there can be no modification to extend the deck.

Ms. Latham agreed with Ms. Eudy but noted that it is a self-imposed hardship and this occurred due to a problem with the contractor.

The following exhibits were made part of the record:

- I. Lot survey for 3217 Middle Street dated August 23, 2011 and revised February 5, 2019 (Exhibit 4)
- II. Letter from Alice Paylor (Exhibit 5)
- III. Two aerial photos from Google Maps (Exhibit 6 and 7)
- IV. Subdivision of Marshall Reservation map dated June, 1951 (Exhibit 8)
- V. Lot survey for 3204 Marshall Boulevard dated November 17, 2004 (Exhibit 9)
- VI. Document from adjacent property owners dated January 15, 2019 (Exhibit 10)
- VII. Board of Zoning Appeals Minutes dated August 9, 2012 (Exhibit 11)

VIII. Board of Zoning Appeals Minutes dated November 8, 2012 (Exhibit 12)

Motion was made by Summer Eudy, seconded by Peter Koepke, that the Board of Zoning Appeals grant the variance request at 3217 Middle Street for a 15' encroachment into the 25' setback allowing the pool to come within 10' of the rear property line with the condition that the existing pool including the deck and structure is not extended. This motion is based on motions of this Board from August 9, 2012 and November 8, 2012 and adopt the logic and elements stated in those motions specifically noting that there are extraordinary conditions pertaining to 3217 Middle Street and all of the other lots on this block have built pools within 10' of the rear setback. This variance will not be of substantial detriment to adjacent property or to the public nor will it harm the character of the district.

Michael Koon amends the motion to add that the survey provided by the applicant should define the outer limits of the current deck and that there would be absolutely no expansion or change in the configuration of the deck if this variance is approved. Summer Eudy accepts the amendment. Kevin Pennington seconded this motion.

This motion passed unanimously.

F. Public Input

G. Adjourn

Motion was made by Jody Latham, seconded by Summer Eudy, to adjourn at 7:03 p.m. This motion passed unanimously.

Respectfully submitted,



Courtney Liles