

September 29, 2004  
4:00 PM

MINUTES OF THE HENDERSON COUNTY  
ZONING BOARD OF ADJUSTMENT

The Henderson County Zoning Board of Adjustment held its regularly scheduled September meeting, on Wednesday, September 29, 2004, at 4:00 p.m. in the Meeting Room of the Henderson County Land Development Building, 101 East Allen Street, Hendersonville, North Carolina. Those present were: Chairman Robert Fleming, Dean Bonessi, Anthony Engel, Ann Pouch, Zoning Administrator Brad Burton, Assistant Zoning Administrator Autumn Radcliff, and Secretary to the Board Joyce Karpowski.

Chairman Fleming called the meeting to order at 4:07 PM and introduced the members of the Board. He presented the minutes of the meeting from August 25, 2004. There were no corrections or changes. Chairman Fleming moved to approve the minutes, Mrs. Pouch seconded, and all members voted to approve the minutes as presented.

Chairman Fleming explained that a 4/5ths vote was necessary to approve any applications and gave the applicants the option to continue their cases to the next meeting because only 4 members of the Board were present today. All the applicants chose to have their applications heard today.

Chairman Fleming called forward anyone wishing to testify today to be sworn in. Sworn in were: Zoning Administrator Brad Burton, Diane Grant, Tom Grant, Richard King, Matthew Smith, David White, and Gary Saltz.

**Case V-04-23, – Thomas and Diane Grant, petitioners**

Chairman Fleming called Case V-04-23, Thomas and Diane Grant.

Chairman Fleming asked Mr. Burton to give a summary of the issues. Mr. Burton said the petitioners are requesting a Variance of thirteen feet from a west side yard setback for a garage addition at 1707 Bluebird Drive. The parcel is zoned R-20, with a side-yard setback requirement of 25 feet. The proposed garage addition is 32' x 15'. If allowed, the garage addition shall encroach the setback area by thirteen feet. Mr. Burton reviewed the exhibits in the Board's packets. He described the photographs in exhibit 1-6. There were no questions.

Chairman Fleming called the applicant forward. Diane and Tom Grant came forward. Mrs. Grant presented a letter from the adjoining property owners to the west, Mr. and Mrs. Francis McCarthy. She said these are the only neighbors affected by the variance. Chairman Fleming asked if there was a house to the east. Mrs. Grant said no, it was vacant. The owners had no objection, verbally, but she had nothing in writing from them. Chairman Fleming moved that the letter on behalf of Mr. and Mrs. Grant be evidence in this case and Mr. Engel seconded the motion. All members voted in favor.

Mrs. Grant cited exhibit 1-6 and said the neighbor's house adjoining the garage of their house has a built-in indoor swimming pool, so the whole length of the house is a solid brick wall. There are no windows or view. There is also heavy vegetation between the two homes. Mrs. Grant said all the vegetation would be left except the hedgerow, which would be taken out and landscaped. She said the area is flat. A one-car garage would be added on the same level as the existing garage. There would be a small retaining wall with enough room to walk to the back yard.

Mrs. Pouch asked if the garage addition would be one or two story. Mrs. Grant said it would be one story and drop down enough to be aesthetically pleasing from the original garage level. She said it would be one level and one car garage. She said they need the additional garage area on the upper level. Mrs. Grant said that children have come home and have more cars than space for. She said that Mr. Grant's knees are a problem going up and down the steps and it would be a better scenario for them to park on the upper level. Chairman Fleming asked what was behind them. Mrs. Grant said it was their yard and heavily landscaped so that another house was not visible.

Mr. Engel asked if the existing garage was a one or two car garage. Mrs. Grant said that it is a two-car garage but they can only fit one car in. Two very small cars could fit. Mr. Engel asked what the property was behind the house. Mrs. Grant said the property directly behind the house is Charlestown Place and there is heavy vegetation and trees between their backyard and that property, so it is not visible. There were no further questions.

Chairman Fleming said, if there were no questions, he would close the public hearing. He asked for discussion from the Board members.

Mr. Engel said there was no objection from the next-door neighbor. He said it was a one-story addition so it would be low and fit in. Chairman Fleming said it would fit in with the rest of the subdivision.

Mrs. Pouch said if the applicant complies with the literal terms of the district, he cannot secure a reasonable return from or make a reasonable use of his property. Chairman Fleming said that they obviously need the additional space at the high level for medical reasons. He said it complies with the R-20 zoning per se as far as being harmonious with the rest of the subdivision. Mrs. Pouch continued that the hardship which the applicant complains results from unique circumstances related to the applicant's land. Mrs. Pouch said the garage at the other end of the house would be too steep to climb to the house. Chairman Fleming said there were situations with the location of the septic tank. Mrs. Pouch said the hardship is not the result of the applicant's own action. Mrs. Pouch said she was sure he didn't mean to hurt his knee, making it difficult to get in and out of the house. Mrs. Pouch said the variance is in harmony with the general purpose and intent of the ordinance and will preserve its spirit. Mr. Engel said that it aesthetically fits in with the other homes in the area and will not have any affect on the values of the other homes. Chairman Fleming said there was plenty of landscaping involved. Mrs. Pouch said that the neighbors do not object. Mrs. Pouch said the variance will secure the public safety and welfare and will do substantial justice. Chairman Fleming said the variance doesn't hurt anyone and will help Mr. Grant's situation with his knees. Mr. Engel said that it would also get more cars off the road.

Mrs. Pouch said with regard to the application of Thomas and Diane Grant, V-04-23, for a variance from the minimum front yard requirements, I move the Board to make the following findings of facts: 1) strict enforcement of the regulations would result in practical difficulties or unnecessary hardship to the applicant; 2) the variance is in harmony with the general purpose and intent of the ordinance and will preserve its spirit; and 3) in the granting of the variance the public safety and welfare have been secured and substantial justice has been done. Accordingly, I further move the Board to grant the requested variance in accordance with and only to the extent represented in the application. Mr. Engel seconded the motion.

Chairman Fleming asked for a vote by a show of hands:

Mr. Bonessi	-	Yes
Mr. Fleming	-	Yes
Mrs. Pouch	-	Yes
Mr. Engel	-	Yes

Chairman Fleming said the variance has been granted.

## **Case V-04-25, Richard King, petitioner**

Chairman Fleming called Case V-04-25, Richard King. Mr. Burton said that the case was advertised as CU-04-25 and is actually V-04-25. In the advertisements it is stated repeatedly that it is a variance, so the misnomer of CU would not be applicable for any legal ramifications.

Mr. Burton gave a summary of the issues. The petitioner requests a Variance of twenty-seven and one half feet on both sides of a proposed property boundary to be created by a proposed subdivision of land that will effect an existing house and a proposed residence. The parcel is located at 62 Bear Butte Farm Lane and is zoned R-40. The parcel is zoned R-40, with a side-yard setback requirement of 35 feet. The applicant proposes to subdivide the parcel so that he might construct a residence at a location north of the proposed boundary line. Mr. Burton cited exhibit 2-6, if the Board wants to refer to the site plan. There is already a residence on the property, occupied by the applicant's father, south of the subdivision boundary line proposed by the petitioner. The applicant wishes to locate the proposed boundary line between the existing house and the proposed house, with the houses fifteen feet apart (i.e., each structure set back 7½ feet from the proposed boundary line). The applicant is essentially requesting two side-yard setback Variances, each of twenty-seven and one half feet from a proposed boundary line. The applicant has stated to the Zoning Administrator that his long-term plans are to raze the existing residence (currently occupied by his father) when it is no longer needed, and then recombine the two parcels into one. The Board may consider putting a sunshine time on the variance of a number of years. Mr. Burton described the exhibits presented in the Board's packets. Mr. Burton said that exhibit 2-7 is an amended site plan showing what Mr. King is applying for with the proposed boundary lines. He said there are some issues with topography that are illustrated by his grade information and photographs. Mr. Burton said that his photographs were not included and he will get them while Mr. King is testifying.

Chairman Fleming asked if there was information about the septic layout and wells and new house dimensions. Mr. Burton said that he did not have that information. Mrs. Pouch asked if the property had already been divided. Mr. Burton said no. And he made Mr. King aware that Henderson County has a Subdivision Ordinance, part of which is compliance with current zoning regulations. There were no further questions for Mr. Burton and he left to get the photographs.

Chairman Fleming called Mr. King forward. Mr. King said that he is just starting and wanted to get the variance before going through the expense of subdividing the property. Mr. King said the proposed lot is more than 1 acre. Mr. King said if the house were placed according to the zoning ordinance, the back of the house would be 37-foot grade level at the bottom floor. He said he wanted to move the new house closer to the present house, which was built by his grandfather and his father is presently living there. Mr. King said they will demolish the house when his father passes away. Mr. King described the pictures he brought, showing the steep grade. Mr. King said most of the property on the grade was in apple trees at one time. Mr. King said that, if he was granted the variance, his next step would be to get a perc test done. He said he didn't want to spend the money if they couldn't do it.

Mrs. Pouch asked if there was any other way to divide the property. Mr. King said no. Mrs. Pouch said they would be going from 70 feet to 15 feet. Mr. King said, if he moved the house further back, he would be building in a hole. Mr. King described the part of the property as a hollow. Mrs. Pouch asked if he could divide the property behind his father's house and build behind the house. Mr. King said from the back of the house to the start of the decline is about 35 feet and twice as steep, going down toward the stream. He said that his father is getting older and needs some assistance, so that is why they want to build now. Mrs. Pouch said that, when the Board gives a hardship, it has to be to the property, not to a person. Chairman Fleming said the Board gives a variance for a hardship and the view, as in the application, would not be a hardship. Chairman Fleming said cost would also not be a hardship. Mr. King said, if he built down further, there would be water running

through. Mr. King said he didn't think the land would perc further down and close to the stream. Mr. King pointed out a natural spring, which provides 2 houses now.

Mr. Engel asked if both pieces of property are in the same name. Mr. King said they are in his name and his sister's name now. Mr. Engel asked if one property would be sold off. Mr. King said no. He said they are asking for the variance and if they get the variance, they will do the perc test. Then he will do the survey of this and both pieces will be in his name – his sister's name will come off. Mr. Engel asked if Mr. King minded that the variance said that both pieces would be recombined and not sold off separately. Mr. King said they had no intention of selling. All he wants to do is put the piece back together and take the house down. Mrs. Pouch said it was not suitable to be divided. Chairman Fleming asked the total acreage of the property. Mr. King said it was right at 4 acres (3.99). Chairman Fleming asked the size of the parcel for the new house. Mr. King said 1 acre. The parcel is zoned R-40. Mr. Burton said an acre is 43,560 sq. ft.

Mr. Bonessi asked the size of the house. Mr. King said it was 2500 sq. ft., 50' x 40', and be one level with a garage.

Mr. Burton said the main reason Mr. King had to subdivide is the Zoning Ordinance in R-40 only allows on principle structure per lot. He read Section 200-43 of the Henderson County Zoning Ordinance. Mr. Burton asked Mr. King if he addressed the carport. Mr. King said no. Mr. Burton said he was under the impression that Mr. King was going to dismantle the carport, and the Board may want to make a condition of this. Mr. Engel asked where the carport was. Mr. Burton said it was on the north side of the existing house. Mr. Bonessi asked if the property line would go under the carport. Mr. Burton said not necessarily. Mr. King said they had discussed removing the carport. Mr. Burton said the carport had to be considered for the setback, so Mr. King said he would remove it so the property line could be where he wanted it. So the Board may want to consider the removal of the carport as a condition.

Chairman Fleming asked Mr. Burton if there had been a situation like this before. Mr. Burton cited several cases. Mrs. Pouch questioned why Mr. King couldn't move the house with all the property there. Mr. Engel showed where the property dropped down. Mr. King said the property is very steep. Mr. Burton said it was very steep also. Mrs. Pouch asked if there was anyplace to build at the bottom. Mr. King said no. Mrs. Pouch asked how he gets to the barn at the bottom. Mr. King said you have to drive uphill and downhill only. Mrs. Pouch asked if the barn was on flat land. Mr. King said no, it was not quite as steep, but a 10/12-pitch roof like. He said there is a roadbed above the barn that was cut out of the bank. The barn was also cut out of the bank about 6 – 8 feet for stalls. Mr. Bonessi asked about the visibility from Berea Church Road. Mr. King showed a photograph, which he described, and the house can't be seen. Maybe you could see the front door of the house.

Mrs. Pouch asked if the property was all in Mr. King's name. Mr. King said it is in his and his sister's name at the present and her name will be coming off. Mrs. Pouch asked, if it was divided, if he would still own both. Mr. King said yes.

Chairman Fleming asked Mr. Burton, as Zoning Administrator, Mr. King talks about a ranch house, lay of the land, subdividing the property which he understands, but distant views and cost of a basement or not, how do we decide. Mr. Burton said that is not for him to say, that is for the Board to decide. Mr. King has presented his plan and indicated a steep topography where he plans to locate the house.

Mr. King said he plans to have a basement and with the basement he still will be 17 feet below grade. He will have to come up 17 ½ feet to get the floor level with grade and then divert the water to keep it from running straight down onto the house.

Gary Saltz came forward. He said he owns adjoining property that was bought from the original tract before they owned it. Mr. Saltz said he has no objection to Mr. King doing his plan. He said he is well familiar with the property and what Mr. King is proposing is the most sensible thing to do. If Mr. King builds in the hollow, there will be watershed drainage problems to deal with and there might be a problem with the land percing. Mr. Saltz said he did not have a problem with Mr. King doing it and in his opinion, where he proposes to build it, is the best place.

There were no more questions or comments and Chairman Fleming closed the public hearing.

Mr. Engel said it was a large piece of property with only two houses on it and he is also willing to not divide them as far as ownership goes. So there would be no sale of either and eventually tearing down the one, so eventually, there would only be one house. It seems reasonable to him. It is set in from the road.

Mrs. Pouch asked what restrictions the Board could legally put on the property. Mr. Burton said they could put a sunshine clause, such as Mr. King said – when his father passes away to knock down the old house and rejoining the property. He said the Board could say the variance is good for 5 or 10 years or only with this applicant. Mr. Engel questioned if something happened to Mr. King. Mr. Burton said the applicant or his heirs and assigns. Mrs. Pouch said he owns the property with his sister. Mr. Engel said he is going to change that. Mr. Burton said that could be a condition. Mr. Bonessi said he would be opposed to it without any conditions at all. As long as it stays in his name is one, along with some other ones such as couldn't be used as a rental house or if it was damaged beyond a certain percentage, that it couldn't be built back. Mrs. Pouch asked if they could say when they no longer need the house it will be torn down. Chairman Fleming said as long as it remains in the family, he wouldn't have a problem with it. Mr. Burton suggested the house currently occupied by Mr. King's father, when vacated and no longer in use, is to be – he said he wasn't sure, but the Board can get to where they need to be. If the Board wants to say the house eventually needs to be razed and the property recombined, which is the plan Mr. King has, and there is no objection by him, the Board can state something along those lines. Mrs. Pouch said this would be a very generous variance. Mr. Burton said the Board could say this extremely generous variance on both sides of the boundary line is contingent on the razing and destruction of the current house, currently occupied by the applicant's father, upon its vacancy and the parcels recombined. Chairman Fleming said the variance is only applicable to the applicant and his heirs and assigns. Mr. Engel and Mr. Bonessi said they were comfortable with the conditions. Mrs. Pouch agreed. Mr. Bonessi asked who follows up on the restrictions. Mr. Burton said he would. The Board discussed where variances showed up and could be accessed.

Mrs. Pouch said she wondered if the property were suitable to be subdivided. Mr. Engel said it was certainly large enough and with the restrictions it would not have an adverse effect on the surrounding area. Mr. Bonessi said that it would encumber the property in a way that it could not be sold off. Mr. Engel said that it is unique to the property because of the slope; otherwise he wouldn't have come before the Board.

Mrs. Karpowski questioned Mr. Bonessi about his condition if the building were damaged beyond repair, that it not be repaired. Mr. Bonessi said that he suggested that if it was damaged beyond a certain point, that it not be reconstructed. Mrs. Pouch said that if it is damaged, he has a right to reconstruct it. Mr. Burton said if the variance is granted, the house becomes a legal non-conforming use and, if something happens, it can be reconstructed on the same footprint in the same spot. Mr. Fleming then said can the Board make him tear the house down. Mr. Burton said if the applicant accepts the condition, the Board could negate all the previous and say within 15 years from today's date the building is to be torn down and the property is to be recombined. That way the variance is real clean. Mr. Burton said, if Mr. King's father still needs it as a domicile 15 years from now, Mr. King can come back and request the Board to amend the variance. Chairman Fleming agreed with that. Mr. Engel asked if the hearing could be reopened to speak to the

applicant. Mr. Burton said the hearing could be reopened. Mrs. Pouch said could the Board say when the house is no longer in use or to replace it, it has to conform to the zoning. Mr. Burton said that the cleanest way to handle this is a sunshine or time restriction on the variance, which ZBA Attorney Fritschner discussed when he was here at last month's meeting.

Chairman Fleming reopened the public hearing. Mr. King said that his father is 88 years old and it is not feasible to rebuild the one bedroom house. Mr. Engel asked if 15 years was okay. Mr. King said anything that he could get – that would make his father 100+. Mr. Engel said the Board wants him to be comfortable. Mr. King said that would be wonderful. Chairman Fleming closed the public hearing.

Mr. Engel wanted to make sure that the secretary had the new condition. The secretary read "the variance will be in force for 15 years at which time the house will be razed and the property recombined". Mr. Engel said the "existing" house. Mr. Burton suggested the "existing house occupied by the applicant's father". The secretary read "the variance will be in force for 15 years at which time the existing house occupied by the applicant's father will be razed and the property recombined". The Board agreed. The secretary asked if the Board wanted something in the decision about the applicant approving the condition. Mr. Burton said it would be in the minutes.

Mr. Bonessi said if the applicant complies with the literal terms of the district, he cannot secure a reasonable return from or make a reasonable use of his property. Chairman Fleming said that there was a problem with the slope of the property; it is R-40 zoning and a hardship to relocate the house. Mr. Engel said there was plenty of land for 2 houses. Mr. Bonessi continued that the hardship which the applicant complains results from unique circumstances related to the applicant's land. Mr. Bonessi said that is the topography. Mr. Bonessi said the hardship is not the result of the applicant's own action. Mr. Engel said the topography is creating the problem otherwise there would be plenty of room to locate the house. It is not his fault the land is sloping. Mr. Bonessi said the variance is in harmony with the general purpose and intent of the ordinance and will preserve its spirit. Chairman Fleming said an adjoining property owner has no objection and it is a large parcel of land with just 2 dwellings on it. Mr. Bonessi said the variance will secure the public safety and welfare and will do substantial justice. Mr. Engel said it is not creating any traffic problems or any other problems relating to the surrounding homes.

Mr. Bonessi said with regard to the application of Richard King, V-04-25, for a variance from the minimum yard setback, I move the Board to make the following findings of facts: 1) strict enforcement of the regulations would result in practical difficulties or unnecessary hardship to the applicant; 2) the variance is in harmony with the general purpose and intent of the ordinance and will preserve its spirit; and 3) in the granting of the variance the public safety and welfare have been secured and substantial justice has been done. Accordingly, I further move the Board to grant the requested variance in accordance with and only to the extent represented in the application and with the following condition: (read by the secretary) "the variance will be in force for 15 years at which time the existing house occupied by the applicant's father will be razed and the property recombined". Mr. Burton suggested adding, "at which time the house will comply with R-40 zoning". The Board discussed setbacks. Mr. Engel seconded the motion.

Chairman Fleming asked for a vote by a show of hands:

Mr. Bonessi	-	Yes
Mr. Fleming	-	Yes
Mrs. Pouch	-	Yes
Mr. Engel	-	Yes

Chairman Fleming said the variance has been granted with the condition.

The Board took a short break.

## **Case TU-04-26, Western Carolina Community Action, petitioner**

Chairman Fleming called Case TU-04-26, Western Carolina Community Action.

Mr. Burton gave a summary of the issues. He said the petitioners are Western Carolina Community Action presented by Mr. David White and Mr. Matthew Smith. The location is at Atkinson Elementary School. Mr. Burton said that this is going on now. The applicant requests a Temporary Use Permit to operate a HeadStart classroom at Atkinson Elementary School at 2510 Old Kanuga Road. The parcel is zoned R-40. A "school" is defined by the Henderson County Zoning Ordinance as:

SCHOOL -- Any elementary or secondary school, whether public or private, established under Chapter 115C of the North Carolina General Statutes, and any community college established under the provisions of Chapter 115D of the North Carolina General Statutes. [Added 5-16-2001]

Schools are a use allowed by right in the R-40 zoning District. The applicant is currently operating a HeadStart program from room 301 at Atkinson Elementary School. Mr. Burton said he understands that prior to the applicant acquiring the HeadStart program, it was run by the Henderson County Public School System. When the school system elected to stop running the program, there was a bid process and Western Carolina Community Action bid and received a grant to continue the program. The HeadStart program, does utilize an established curriculum, but it is not a "school" as per the definition above, nor is the program established under Chapter 115C of the North Carolina General Statutes. The HeadStart program, when examined closely, is, in the Zoning Administrator's opinion, probably more analogous to a daycare facility—a use not allowed by right per se in the R-40 zoning district. The Zoning Administrator has received no complaints concerning the HeadStart program at Atkinson Elementary and is of the impression that this use is temporary, as there are plans to relocate this operation elsewhere. He said that for a federal grant the applicant had to fill out paperwork about zoning and ended up here today. He said he understands they are constructing a new facility to house the whole program. So they are here for a temporary permit until the new facility is built and they can vacate Atkinson School. Mr. Burton explained paperwork in the packets and described the photographs.

Mrs. Pouch asked if Mr. Burton was concerned that this would set a precedent for another big group to come in and do the same thing. Mr. Burton said he didn't think the Board would set a precedent because each case before the Board is supposed to be judged on its own merit and the Board can deny any permit based upon just cause. He said the Board has the ability to question the applicability, nature, location, and use of any program. He said he didn't think they would be setting a precedent.

Chairman Fleming called the petitioner forward and Mr. Matthew Smith came forward. Mr. Smith said he is the director of several HeadStart centers in the community under Western Carolina Community Action. He is requesting to operate the HeadStart program in Room 301 at Atkinson Elementary School, a room which has housed 4 year olds under a previous program. WCCA has taken over since the school ran into curriculum and logistical problems. He described the HeadStart program. Mr. Smith said they are here today to ask for a Temporary Use Permit.

Chairman Fleming asked if Mr. Smith had a specific timeline in which he is trying to relocate. Mr. Smith said they think 16 months would give them enough time to complete the facility they are building in King's Creek. Chairman Fleming said there is the option to come back to the Board if necessary. Mrs. Pouch asked if the school had objections. Mr. Smith said absolutely none, that almost 90% of HeadStart programs are housed in elementary schools and churches. Chairman Fleming asked if there was a contract with the school system. David White, Executive Director of Western Carolina Community Action, said they have an agreement that was passed by the school

board in 1999 – 2000 in providing space for HeadStart children in public schools. There were no more questions.

Chairman Fleming closed the public hearing and asked for discussion from the Board. Mrs. Pouch wanted the limit put on the permit. Mr. Bonessi said Mr. Burton was concerned about setting a precedent but they are already there and they took it over from the school. Chairman Fleming said the Board needs to make sure each case has its own identity and certain situations.

Chairman Fleming said with regard to application TU-04-26 for a Temporary Use Permit, I move the Board to make the following findings of facts: that a satisfactory expiration date has been decided which will allow the applicant sufficient time in which to accomplish their goals. This would be 16 months. Accordingly, I further move the Board to grant the requested Temporary Use Permit in accordance with and only to the extent represented in the application. Mrs. Pouch seconded the motion.

Chairman Fleming asked for a vote by a show of hands:

Mr. Bonessi	-	Yes
Mr. Fleming	-	Yes
Mrs. Pouch	-	Yes
Mr. Engel	-	Yes

Chairman Fleming said the temporary use permit has been granted.

#### COMMITTEE AND STAFF REPORTS:

OLD BUSINESS: None

NEW BUSINESS: Mr. Burton said that October 8 would be his last day. He will be going to the City of Brevard as the Zoning Administrator. Mr. Burton said he was sorry to leave and the Board said they congratulated him and wished him well. Mr. Burton said he would continue to help here if needed.

There being no further business, Chairman Fleming made a motion to adjourn, Mrs. Pouch seconded the motion, and all members voted in favor. The meeting was adjourned at 5:43 PM.

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Robert Fleming, Chairman

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Joyce Karpowski, Secretary