

BOARD OF ADJUSTMENT MINUTES

The Brevard County Board of Adjustment met in regular session at 1:30 p.m. on Wednesday, October 16, 2019, in the Commission Room, Building C, Brevard County Government Center, 2725 Judge Fran Jamieson Way, Viera, Florida, with Vice Chairman Dale Rhodes presiding, to consider the following requests:

Board members present were: Dale Rhodes, Vice Chairman, District 3; Jack Higgins, District 1; Michael Hartman, District 2; and Dale Young, District 5.

Staff members present were: Justin Caron, Assistant County Attorney; Paul Body, Planner II; and Jennifer Jones, Office Assistant II.

The Vice Chairman, Dale Rhodes, called the meeting to order at 1:30 p.m.

Paul Body explained the function of the Board of Adjustment; Jack Higgins explained the definition of a hardship; and George Bovell explained the procedures of the Board of Adjustment.

All speakers were sworn in by the Vice Chairman at the beginning of each item.

Approval of September 18, 2019, Minutes

Motion by Dale Rhodes, seconded by Jack Higgins, to approve the August 21, 2019, minutes. The motion passed unanimously.

All applicants and speakers were sworn in by the Chairman prior to providing testimony.

1. (19PZ00114) Okee Boy, LLC

A variance of Chapter 62, Article VI, Brevard County Code, Section 62-1371(5)(c)(1), to permit a variance of 2.5 feet from the required 25-foot front setback for a principal structure in an RU-2-6 (Low Density Multi-Family Residential) zoning classification, on 1.55 acres, located on the east side of Highway A1A, across from Seaview Street. (3055 Highway A1A, Melbourne Beach) (District 3)

Mel Scott, 7175 Murrell Road, Viera, distributed a warranty deed and maps to the board and staff (the exhibits can be found in file 19PZ00114, located in the Planning and Development Department). Mr. Scott stated the requested 2.5 feet from the front setback falls within the Administrative Approval authority of the Zoning Official; however, with that 10% Administrative Approval he would have sought approval from neighbors, and if he received their approval, the request could be approved administratively, but he has chosen to appear before the Board of Adjustment. He stated the variance request is not to get any closer to the existing residences to the north or south, nor is it a request to get closer to the ocean; it is a request to get closer to A1A by 2.5 feet. He noted the subject property is within the coastal construction control line confines and the coastal control setback line confines. He said there are hundreds of thousands of properties that have the RU-2-6 zoning classification, and a very small percentage of them get to "enjoy" double frontage, but this property does, it fronts A1A and the ocean, which qualifies it as double frontage, with two front setbacks and no rear setback. He stated an even smaller percentage get to "enjoy" the coastal setback line that was put on the subject property in addition to the coastal control line, so it is an even smaller percentage of properties in the County that have these characteristics. He stated there is an even smaller percentage of that subset that voluntarily gave an additional 18 feet of their property to FDOT (Florida Department of Transportation) in the mid 1970's. He explained from 1972 to 1975 FDOT started to make its way down this segment of A1A from Melbourne Beach to Sebastian Inlet, and it sought to convert its maintenance map and sought to claim a right-of-way, and knew it could claim a prescriptive right, that right-of-way it had been maintaining for over four years. At that point, property owners had the opportunity to see FDOT to take the prescriptive right 38 feet from the centerline, or if the property

owners chose, they could give FDOT the full 50 feet from centerline. He said the warranty deed shows that the subject property gave FDOT its desired full 50 feet from centerline, making it a 100-foot right-of-way, and that explains the jog in the road on the map. Other property owners accepted FDOT's prescriptive take of 38 feet from the centerline. He stated the hardship is that the property owner in the 1970's decided to give FDOT the full 50 feet. If they had done what the owners to the north and south did, he would not need to apply for the variance because he would have an additional 18 feet. He closed by saying the subject property is within the confines of the envelope, and what will come after this approval will be something within the confines of today's code, including the 10% increase of the front setback of 2.5 feet to A1A and will in no way prohibit FDOT from doing future projects on A1A.

Public Comment:

Attorney Frank Rugeri, 6767 North Wickham Road, Suite 401H, Melbourne, stated he is speaking on behalf of the homeowners of L'ecume De Mer, which abuts the subject property. He stated while he appreciates the applicant's position on the Administrative Approval, it is a very specific provision of the Code that does not apply to this situation. He said there is a process in the Code that allows an applicant to get an administrative approval when there are abutting property owners that have no objection, but that is not the case, as the request is subject to the typical variance provisions of Brevard County Code. He stated the first condition is that special conditions and circumstances exist which are not applicable to other lands, structures, or buildings in the applicable zoning classification. He said he appreciates Mr. Scott's statements with respect to the condition of the subject property and the additional 18 feet, and he's not sure what is in the record other than the deed, and he's not sure if there are surveys of adjacent properties for the board to evaluate whether this is truly a special condition. He said it is a self-created condition, not a special condition, and by definition, a special condition circumstance for purposes of a variance like this is one that is not self-imposed. According to Mr. Scott, this is something that was done in the 1970's and was present when they purchased the property. A very small percentage of multi-family zoned parcels are subject to the coastal setback line, but that doesn't create a special condition or circumstance. Coastal properties are subject to the coastal setback line in Brevard County, and that's not a special condition or circumstance. Condition 2 is that special conditions or circumstances do not result from the actions of the applicant, but the conditions were present at the time they purchased this property and they were aware of that and the setback requirements. Condition 3 is that the granting of the variance will not confer on the applicant any special privilege that is denied by the provisions of the chapter to other lands, buildings, or structures. He stated granting the variance would confer a privilege upon this particular property that adjacent properties do not enjoy and would likewise have to come before the board and request a variance. Condition 4 is that the literal interpretation of the provisions of the chapter would deprive the applicant of rights commonly enjoyed by other properties in the identical zoning classification under the provisions of the Code and will not constitute unnecessary and undue hardship on the applicant. He explained that they would only be deprived of the rights that other properties outside of the zoning classification don't enjoy, and it's not something that satisfies that requirement and they would not be deprived of anything that other properties in the zoning classification enjoy. Condition 5 is that the variance granted is the minimum variance that will make possible the reasonable use of the land. The highest and best use of the land is not what is guaranteed by Code, it's not the obligation of the County to guarantee the highest and best use of one's property, it is a reasonable use. He said he's certain that reasonable use could be made of this property without an additional 2.5 feet. Condition 6 is that the granting of the variance will be in harmony with the general intent and purpose of the

chapter and will not be injurious to the area involved or otherwise detrimental to the public welfare. He stated one issue is that there needs to be a clearer picture of what's going to happen with the property; there are legitimate concerns with respect to the beach access easement being proposed, and with respect to the facilities that are there and the properties across the street that may or may not take advantage of that access easement and facilities. He closed by asking for consideration regarding the structural coverage of the lot area based on what appears to be a questionable calculation of what's going to constitute total structural coverage when built versus the overall acreage of the lot.

Dale Rhodes asked how the condition is self-imposed, since the owner gave 50 feet to FDOT instead of 38 feet. Mr. Rugeri replied Mr. Scott indicated that the prior property owner, not the applicant, had conceded to the 50 feet voluntarily when he could have insisted on 38 feet. He said he feels that is a self-imposed condition created by the previous property owner. If that condition existed at the time the property was acquired by the applicant, it cannot be relied upon as a special condition.

Dale Rhodes agreed it cannot be relied upon, but at the same time it would not be self-imposed because the current owner is not the one who granted the right-of-way. If the previous property owner was before the board asking for a variance, that would be self-imposed. Mr. Rugeri stated his position is that they are successor in title.

Mr. Rhodes stated the property to the north is at 38 feet rather than 50 feet, and asked how this request creates a special circumstance for getting 2.5 feet if the properties to the north have 18 more feet that they can utilize. Mr. Rugeri stated it is a condition that existed on the property before they acquired it, and if the County wanted to treat that parcel differently, then there would have been provisions in the Code for that, where it would have been addressed in the chain of title to this property in some other way. Mr. Rhodes stated that for him to say he's giving them special conditions that do not apply to anybody else, he would assume everybody else it at 50 feet and not 38 feet.

Mr. Rugeri stated he has not had an opportunity to look at the adjacent properties to see how many of them have that same condition. Mr. Rhodes stated the Code allows for property owners to apply for a variance because there might be special conditions. Mr. Rugeri stated the variance and requirements to grant the variance go back to the self-imposed condition.

Russ Rhodes, 3045 Highway A1A, Unit 501, Melbourne Beach, stated he lives in the seven-unit condo to the north. He said he talked to Dan Winkler, and clearly the intent is to put that easement in for the project across the street. It's obvious they have a piece of property with constraints and they cannot build what they want, but they can build something else within the property lines, so he's not sure why a variance is needed. He said his concern is the large easement area next to his condo's property line that has a gazebo, shower, and bathroom, and it's intended for use by not just these four condos, but also the 140 units on the west side of A1A. He said he doesn't see how the variance can be granted without a clear understanding of the total projected usage and its impact. He noted the applicant is also proposing a crosswalk at the property line of his condo's driveway, and the actual path is along the property line, but there is no parking provided for that access, so there will be cars parked on the street, in the grass, and on their property.

Mr. Dale Rhodes stated Mr. Russ Rhodes enjoys a deeper frontage to A1A, and asked how granting the subject property 2.5 feet is going to harm him. Mr. Russ Rhodes stated he can't separate the 2.5 feet if he doesn't understand the total proposed usage of the lot. If the board grants the 2.5 feet and

only the people on that property are going to use the easement, no problem, but if they are saying they need the 2.5 feet variance for four homes and larger easement area so the people across the street can use the property, then that has a direct impact. Mr. Dale Rhodes stated he understands the concern, but he's struggling with how 2.5 feet is going to be harmful to what they are enjoying next door.

Mr. Higgins stated he thinks the main concern is the footprint and usage, and that wasn't explained by the applicant. Mr. Russ Rhodes stated he is concerned about what the 2.5 feet accomplishes.

Mr. Hartman asked if the applicant could establish the beach access easement even if he didn't build the four buildings. Mr. Body replied yes. Mr. Hartman asked if the applicant could build the building on the north side because it's not in any of the restricted area, even if he didn't build the four houses. Mr. Body replied he would have to have a site plan and go through the DEP process, but no variances would be needed.

Mr. Young stated Mr. Russ Rhodes says the 30 inches is what bothers him, but he sees that his property, the seven units, is half over the construction control line on the beach, and with three hurricanes a year this gets to be a problem because they get closer and closer to the construction control line, and the applicant is outside that, on the coastal setback. He asked staff how the coastal setback line is set, and if it is static. Mr. Body replied it's set off of monuments in survey books and it stays the same. Everybody has to show that line on their surveys when they apply for anything on the ocean, and then Natural Resources has a setback from that line.

Julia Trenker, 3037 Highway A1A, Melbourne Beach, stated across from Versailles initially was a 250-unit apartment complex, and the entrance was directly across from the Versailles front entrance. The request is for 2.5 feet closer to A1A, but the original building that was on that property was two homes, not four. She stated prior owners used to throw parties at the property, and they parked cars at Publix down the road, they parked on the east side on the easement of A1A, they parked cars on the easement in front of Le'cume De Mer, and Versailles. She said the problem they had with that besides being inconvenienced, is that they were told by the Sheriff's Office that they could not park on that easement. She asked, if there isn't adequate parking for the new buildings, then why do they need the extra 2.5 feet.

Anthony Ilacqua, 3045 Highway A1A, Unit 301, asked why the applicant needs to build forward to A1A when they have land available in the north and south directions. He said the problem is that the applicant wants beach access. He stated surrounding property owners have not received any information about the access, but he knows Mr. Winkler has been trying to convince the other owners who have beach access that he has some claim to that. He said the area is zoned residential, and asked how that fits into a residential classification.

Mr. Body stated that will be addressed at the site plan stage, and they will have to meet all of the codes for something like that. If they're combining with the parcel that is on the west side of A1A they still have to go through the site planning to meet all of the site planning codes.

Mr. Ilacqua stated the applicant is going to build and sell four houses. He said what it's going to do is make 143 houses across the street get a bigger return on their money because they are going to have beach access, and asked what impact that has on that particular area of beach. He stated Mr. Winkler told everybody that bought that piece of property specifically to provide beach access.

Mr. Dale Rhodes stated the board is not dealing with the beach access, they're dealing with the 2.5 feet being requested on A1A. He said he understands the concerns about the beach access, but that's not why they are there today. Mr. Ilecqua stated it's relative because if there was no beach access they could create enough in the north and south directions.

Cynthia Nejame, 3045 Highway A1A, Unit 201, stated her concern is with the layout of the land and the variance. She said if the 2.5 feet is going to be granted for houses and there is not going to be an easement, then she'd agree to it. She said the board has to consider the fact that Mr. Winkler knew what he was getting into, he knew the outlay of the property and if the board is going to grant a variance to him, then they need to consider granting variances up and down A1A also.

Mel Scott stated he'd like to establish himself as an expert witness, as he's been a member of the American Institute of Certified Planners for several decades. He stated he would be happy to talk about the things that are not germane to the 2.5 feet and the unique special qualities of this property, but Mr. Rugeri stated he did not have an opportunity to review the properties to the north, south, and the general neighborhood, and he doesn't think the property owners here should be punished with that. He said he disagrees that the provision of the 10% waiver is not applicable, when in fact it is, it is a fact of the zoning code. He stated he is in front of the board by virtue of deciding not to approach the Zoning Official with a 10% waiver to a setback, which the Code contemplates, and actually allows it to be a neighborhood poll without criteria. He said he's chosen to be in front of the board because of the unique characteristics of the history, dating back to the Department of Transportation and things that happened in a way that was applied to the subject property very differently than the properties to the north, and those properties to the north that have a nonconforming condo which puts them extremely closer to the dune. He said he also believes it's within the harmony of the neighborhood to decide not to take advantage of the full bundle of rights that this property possesses in RU-2-6 with its acreage, which would be eight units, so what they're trying to do is four units, half of what they would be allowed with the bundle of rights that the acreage and zoning classification bestow upon this property. He added that this is not a conversation of receiving highest and best use, it's about making this project work with a little bit of relief along A1A to a property that has a very confined building envelope. Highest and best use would be eight units, highest and best use would be a structure as high as those to the north, but that's not what is being proposed.

Mr. Dale Rhodes asked if there is a way to get to 2.5 feet by going wider instead of longer, or is it the distance between the buildings keeping him from being able to do that. Mr. Scott replied the buildings are as close together as they can be.

Mr. Higgins asked if beach access is planned. Mr. Scott replied yes, and is part of the board's package.

Mr. Hartman stated the lanais on proposed buildings look like they are 18 feet west of the coastal construction control line, and asked if they can go 2.5 feet farther east. Mr. Body replied those setbacks are from Natural Resources, and he doesn't know how much of the lanai they would allow into the control line. Mr. Hartman stated the farthest most eastern part of the building is the lanai, and asked if the coastal construction control line is where the landscape timber is. Mr. Body replied yes, the dashed line that runs north and south, and then there is a 25-foot setback off of that, and it does appear there are corners of the lanai in the line. Mr. Scott stated when there is elevated porch on the second floor you can go a couple of feet into that setback. Mr. Hartman asked if Mr. Scott is saying

the County line is at the back of the buildings and they cannot be moved any farther. Mr. Scott replied that is correct.

Mr. Young asked if it destroys the project to change it to three units. Mr. Scott replied yes.

Motion by Michael Hartman, seconded by Jack Higgins, to approve the variance as depicted on the survey provided by the applicant. The motion passed unanimously.

2. (19PZ00115) JP Morgan Chase Bank, NA (Mark Gottlieb)

Variances of Chapter 62, Article IX, Brevard County Code, as follows: 1.) Section 62-3316(b)(1), to permit a variance of 71.3 feet from the 200-foot road frontage requirement to obtain a second sign; 2.) Section 62-3316(a), to permit a variance of 30 square feet over the 230 square-foot signage limit for total signage, in a PUD (Planned Unit Development) zoning classification, on 1.19 acres, located on portion of property on the northwest corner of Stadium Parkway and Viera Boulevard. (5390 Stadium Parkway. (portion of), Viera) (District 4)

Eric Juliano, Bowman Consulting, 4450 West Eau Gallie Boulevard, Suite 232, Melbourne, stated the requested sign variances are for a Starbucks. He explained one variance is for 30 square feet over the allowable 230 square-foot signage limit; the code states the calculation for a maximum surface area, a total sign surface area of two square feet per each linear foot of building frontage facing a public street or parking lot shall be allowed on each parcel or tract of land located in a PUD. He said Viera Boulevard is a public street, there is a parking lot at Publix to the west, and there is a proposed parking lot to the east. Also, there's a significant private street to the north. He said when he calculates the three sides of the building, he ends up with a total allowable signage area of 379 square feet, so he's not sure why there is a need for that variance.

Paul Body explained those are access roads, not for parking.

Mr. Juliano stated the other variance is for an additional monument sign. The code reads, "One freestanding sign for each minimum parcel of land on a public street frontage shall be permitted. Where the parcel is located on more than one street frontage, one freestanding sign shall be permitted on each street frontage if the parcel has street frontage in excess of 200 feet, one additional freestanding sign shall be permitted." He stated they're allowed the proposed monument sign on Viera Boulevard, and what they're requesting is an additional sign on the street to the north. The reason for the sign is because of visibility restrictions with Chase Bank located directly in front of the building, so they want a sign so people can safely get in and out of the site.

No public comment.

Motion by Jack Higgins, seconded by Michael Hartman, to approve the variances as depicted on the sign exhibit submitted by the applicant. The motion passed unanimously.

3. (19PZ00085) Edmond L. and Barbara P. Lohman

Variances of Chapter 62, Article VI, Brevard County Code, as follows: 1.) Section 62-2100.5(1)(d), to permit a variance of 362.5 square feet over the 748.54 square feet (50% of the living area of the principal structure) allowed for an accessory structure; 2.) Section 62-1342(5)(b), to permit a variance of 0.5 feet from the required 5-foot rear setback for an accessory structure, in an RU-1-7 (Single-

Family Residential) zoning classification. The property is 0.35 acres, located on the south side of 12th Street, approximately 425 feet west of Central Avenue. (3815 12th Street, Micco) (District 3)

Dale Rhodes stated one of the issues discussed at the August meeting was that the applicants built a loft, and asked staff if that has been clarified. Paul Body replied, yes, Code Enforcement went to the site and measured it and said the loft is six feet at the point peak, and came down less than three feet on the sides, so it is not over the seven feet and would not be included as extra square footage.

Mr. Rhodes asked who did the original survey that did not show the shed. One survey did not show the shed, but the second survey that was used to finalize the permit shows the shed in the corner, and asked if the applicants asked the surveyor to omit the shed.

Edmond Lohman, 3815 12th street, Micco, replied no, and in the photographs of the property, the shed is there. Mr. Rhodes stated on the survey used to get the permit, the shed is missing, and in the second survey the shed appears. Mr. Body stated the survey that was submitted for the permit does not show the shed was done by the same surveyor that did the as-built survey.

Mr. Rhodes asked if that creates an issue with the permit. Mr. Body replied he's allowed two accessory structures, so if he had those separated, he would have to get rid of the small utility shed. The applicant is looking for a variance over the square footage, so he's still allowed two sheds, but all of them cannot add up to the total square footage of the house.

Mr. Lohman stated there is a large patio on the back and a large garage that was not counted towards the square footage, but if adding all that square footage together, they would have more than enough to have the little building.

Public comment:

Barry Southard, 3825 12th Street, Micco, stated he presented information to the board at the August meeting regarding this project. He's opposed to it because it's not done to what the regulations state, and also because it was built the way he wanted to build it rather than the permit. He stated at the last meeting there was discussion about flat work between the buildings if there wasn't space between the buildings, and through research he found there's a difference between flat work and a foundation. He stated Mr. Lohman built the foundation for the buildings in one piece; there is no flat work between; there are not footings in flat work, but there's footings in a foundation. He said it's a metal building and metal buildings have engineering specifications. He concluded by saying he doesn't think there is a hardship to grant a variance.

Valerie Gallo, 3825 12th Street, Micco, asked what has been decided where the swale and water issue is concerned. Mr. Rhodes stated the board is only addressing the square footage of the structure and allowing him or not allowing him to have the extra square footage. Ms. Gallo asked who she can speak to regarding the issue. Mr. Body replied she can contact the Building Department, because that is the department that has lot drainage in its code and they review that in the field.

Mr. Rhodes stated at the last meeting, Mr. Lohman mentioned that the distance between the two buildings did not make sense, and he knew the permit required that five-foot separation. Mr. Lohman stated he did separate it by five feet. Mr. Rhodes pointed out the roofs are adjoined, so there is no separation. He said he believes Mr. Lohman thought that because he separated the columns that

hold the structure, that that was the five feet he needed and didn't think about the roof joining making it one building.

Mr. Rhodes asked, knowing that he was supposed to leave a five-foot separation, did he intentionally put the roof on anyway because it didn't make sense to be separated. Ms. Lohman replied no, Carports Anywhere said they wouldn't do it without one long roof line. Mr. Rhodes asked if he has anything in writing. Ms. Lohman replied it was a phone conversation. Mr. Lohman stated the plan was submitted as one roof from the County, and he built it as one roof.

Mr. Rhodes asked staff if the roof was separated on the permit. Mr. Body replied he only looked at the survey where he separated it and he was told he had to keep the two buildings at least five feet apart.

Mr. Rhodes stated Mr. Lohman knew the roof should have been separated. Mr. Lohman said that was the way it was supposed to be originally. Mr. Rhodes asked, if he knew they were supposed to be separated, why did he not leave them separated. Mr. Lohman replied because of Carports Anywhere.

Mr. Rhodes said his concern is he intentionally did this knowing he wasn't supposed to and now he wants a variance after the fact, because if so, that's an issue, but if it was done unknowingly, then that's another issue. Mr. Lohman replied the County accepted the plans as submitted.

Mr. Hartman stated the are stamped 'approved for construction', and the second page shows a continuous roof line on the building, partially with the building enclosed and partially with the building open, and it shows one continuous roof line. The plans with one continuous roof line were approved by the County, so the building was built to what was approved by the County.

Mr. Young stated on the page previous to that it shows a continuous slab with only an expansion separation. He said there is a separation of the building, but it is not five feet.

Motion by Michael Hartman, seconded by Jack Higgins, to approve the variances as depicted on the survey provided by the applicant.

Mr. Rhodes stated his whole concern is that Mr. Lohman did it intentionally, knowing it was against code, and did so with the thought that he would ask for forgiveness later, and if that was the case, he would have issues with granting this. He noted he's also taking into consideration that Mr. Lohman got approvals from the vast majority of the neighbors. He said in looking at the permits, showing it was approved as one continuous line, someone missed something along the way and I can't fault Mr. Lohman for that.

Dale Rhodes called for a vote on the motion as stated, and it passed unanimously.

Upon consensus, the meeting adjourned at 3:27 p.m.