

MINUTES
CHARLOTTE COUNTY BOARD OF ZONING APPEALS
Wednesday, June 10, 2009 - 9 a.m. – Room 119
Charlotte County Administration Center
18500 Murdock Circle
Port Charlotte, FL 33948-1094

(These minutes are not official until they have been approved by the Charlotte County Board of Zoning Appeals)

Members Present

Tom Thornberry, *Chairman*
Audrey Seay, *Vice-Chair*
Ed Hittson, *Secretary*
Bob Stout
Bill Truex

Staff Present

Derek Rooney, *Assistant County Attorney*
Nicole C. E. Dozier, *Zoning Official*
Ken Quillen, *AICP, Planner III*
Diane Clim, *Recorder*

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- I. Call to Order**
- Chairman Thornberry* called the June 10, 2009 meeting of the Board of Zoning Appeals to order at 9:00 a.m.
- II. Pledge of Allegiance**
- Chairman Thornberry* led the members and the audience in reciting the Pledge of Allegiance.
- III. Roll Call**
- Roll call was taken; a quorum was present.
- IV. Swearing In of Those Giving Testimony**
- Diane Clim* swore in all persons who wished to provide testimony.
- V. Approval of Minutes**
- ACTION: A motion was presented by Audrey Seay and seconded by Ed Hittson to approve the minutes of the May 13, 2009 meeting of the Board of Zoning Appeals as written. Motion carried unanimously.***
- VI. Disclosure Statements**
- Ex-parte forms indicating site visits concerning the petitions being presented before the June 10, 2009 Board of Zoning Appeals meeting were submitted.
- VII. Introduction of Staff/Comments**
- Chairman Thornberry* introduced staff. *Nicole Dozier, Zoning Official, Attorney Derek Rooney and Chair Thornberry* made introductory remarks regarding the types of requests that the Board of Zoning Appeals would be reviewing and the standards which must be met, the notification process and how the Board of Zoning Appeals makes its decision.

VIII. New Business

The following petitions were advertised on May 26, 2009: ADM-APP-09-03, SE-09-01, SE-06-22(TE), SE-06-23(TE), SE-09-10, SE-09-11 and SE-09-12 (Petitions SE-09-10, SE-09-12 and SE-09-01 were continued before the hearing by the applicants)

Petition #ADM-APP-09-03

Warren Ross is requesting an appeal of the Zoning Official's determination that a rear yard setback along a waterway must be measured from the sea-wall and not the property line in the waterway, located in the Mobile Home Conventional (MHC) zoning district. The subject property is addressed as 4180 Nettle Road, El Jobean, Florida and is described as Lot 694 and part of Lots 538 and 539, Ward 1, El Jobean Subdivision, located in Section 28, Township 40 South, Range 21 East. The property contains +/- 8,100 square feet. A complete legal description and additional information are on file.

Nicole Dozier said this is an Administrative Appeal. They are appealing the way setback from waterfront properties are measured. Please refer to the variance application letter dated April 11, 2009. This appeal stems from the variance application request in which the applicant does not agree with how the requested setback needed for their variance is measured. The boundary survey shows the existing seawall in relation to the platted property lines which is the subject of this appeal. Section 3-9-98 of the Charlotte County Code, waterfront property, sub-paragraph 3(c) states "no building shall be constructed or located less than 20 feet from the mean high waterline or setback calculation point which ever is the greater". Section 3-9-2 the definition section of the County Code also states that the definition of mean high water line, in part as "existing bulkhead line on waterfront property having such line or survey", which is attached in your Exhibit #4. The section also defines bulkhead line as the mean high water line on waterfront property defined by an existing seawall or survey. This means that it is basically understood that all properties have seawalls. In some instances, you will have to use the survey to determine where the mean high water line is on that particular property. The applicant has submitted a narrative as it relates to this particular request. She also wants to point out that the County Code in the definition section also defines waterfront property as property that physically abuts any body of water including creeks, canals, rivers, lakes or other bodies of water, natural or artificial. Our Code is very definitive talking about waterfront property, where it is located and what a mean high water line is, and what that is considered according to the County Code.

In considering this appeal, the Board is directed to consider three (3) issues. The first is whether or not the appeal is of nature brought to them for discussion or whether or not it is an established procedure for handling the request, other than an appeal process. There is no other standard procedure for handling this request. Second, is the intent of the

regulation. As stated in Section 3-9-98, waterfront property, setbacks are measured from the seawall. The intent is to preserve waterfront properties, to preserve water quality, control filtering and run off before it gets to the main water body, preserve public access and view of the waterways. Third, the affect the ruling will have when applied generally to zoning regulations allowing the waterfront rear yard setbacks to be based on the location of the rear property line could be detrimental to the waterfront preservation. Water quality will deteriorate. Water access and view will then be limited. Water navigation can also be impeded by projecting structures in the waterway. In addition, animals, aquatic life, plants and species can also be negatively impacted by having said structures in the water. One of the main features that this county has is pristine water front access. It provides to our economic base and enhancing our tourism promotions. By allowing this change, it may have a negative on our waterfronts promotion within the county.

Mr. Hittson asked Ms. Dozier, you are the Zoning Administrator?

Ms. Dozier replied yes sir.

Mr. Hittson said and you are a qualified expert witness?

Ms. Dozier replied yes sir.

Mr. Hittson said and you have testified in the capacity as an expert witness previously?

Ms. Dozier replied yes sir.

Mr. Hittson said as he recalls, there was a suit filed in the Circuit Court, the last time this was brought. He asked if she or Mr. Rooney could bring this Board up to date on the status of that suit.

Mr. Rooney said that suit, while we are still talking about the same subject matter property here, he is not really certain that the determination here will have any bearing on that, the status of that suit. Mr. Ross can comment on that further.

Warren Ross said we are here today on a narrow issue and that lawsuit had to do with a variance denial from 2 years ago and that is currently not before this Board today in any fashion.

Mr. Hittson asked are we considering just one issue here today?

Ms. Dozier replied yes. The issue before you is whether or not the County is accurately measuring waterfront setbacks. The County Code specifically defines what is waterfront property and where waterfront property begins and where the measurements take place. Within the County, waterfront property typically have a rear setback of 20 feet. It is consistent in all of the zoning categories with the exception of maybe one or two within the entire County that a 20 foot setback is required from the

county waterways.

Applicant Presentation

Warren Ross said he is here on behalf the Reddins. Mr. Reddin will pass out some material. They have one witness. That is Mr. Jeff Slater who did the survey in your package. **Mr. Ross** said he has been practicing law in this county for over 20 years and he is an expert witness. He said they believe the way the County Code is written, indicates that the distance you measure backwards from is the rear boundary line in this case and not from the seawall. He wants to make this clear they are not here for the variance, is a) because obviously he does not want this Board, regardless of what happens today, to prejudge the application that is coming down the road a month or two from now, and b) specifically because he thinks some of the comments made at the end of the staff report really go for things that might be more relevant toward the variance and not this which is straight forward either way interpretation of language in the code.

Mr. Ross said he has a copy of a Hayward canal MSBU map that was received by his client from the County MSBU department. He also has copies of the County GIS map. The county staff report quotes 3-9-98, and as Mr. Ross reads, requires that if you are going to imply its provisions to any property, the property be within 1200 feet of the Myakka River. He said you will hear this property is definitely not within 1200 feet of the Myakka River. He said that does not solve the whole issue, but the Board has to consider this as part of their consideration today. He called Mr. Slater up for testimony.

Jeffrey Slater answered questions for Mr. Ross.

Mr. Ross asked Mr. Slater what documents he reviewed or information gathered to carry out this survey work.

Mr. Slater said this is a typical boundary survey according to the Florida Statutes. The record plat was done prior to the dedicated waterway that was eventually done years down the road. The plat depicts the lots along Nettle Road all at 100 feet and contiguous to a 12 foot alley way. Mathematically then you would take $\frac{1}{2}$ of the Sheryl Waterway being 25 foot and you would subtract the 25 feet from the 106 foot to give you a calculated lot depth of 81 feet.

Mr. Ross asked can you state for the record how far the platted rear property line is from the seawall?

Mr. Slater said the platted rear property line from the seawall would be 19 feet. (from the original platted property line).

Mr. Ross asked is that still the rear property line for that parcel?

Mr. Slater said it is not the rear property line to that parcel any longer. There has been a 50 foot dedication to the Cheryl Waterway.

Mr. Ross asked how far would the rear property line currently be from the seawall?

Mr. Slater said the rear property from the seawall would be 6 feet.

Mr. Ross said so the rear lot line for the property is 6 feet from the seawall?

Mr. Slater said the rear property line is a calculated line from halfway from the Cheryl Waterway. He said on my survey, he shows a distance of 13.9 feet and 8.8 feet.

Mr. Ross said so your conclusion is the rear property line is somewhere underwater, is that correct?

Mr. Slater said oh absolutely.

Mr. Ross said he was wondering if you can tell the Board how many feet from the seawall that rear property line is approximately.

Mr. Slater said 5 feet plus or minus a few inches.

Mr. Ross said for the record he misperceived where the rear property line was based on the survey and what Mr. Slater just said, so that would affect somewhat the measurement we are requesting the Board adopt. To the extent that that testimony affects the need for this application, I would ask for a brief 5 minute recess. I would like to discuss this with my client and Mr. Slater. It may shorten the rest of the hearing.

Mr. Quillen asked the Board to enter for the record, that his exhibit for the survey that he referred to is the same survey that is in the staff report labeled Exhibit 2.

Mr. Thornberry said yes.

A 5 minute recess took place.

Mr. Ross thanked the Board for the recess. He asked Mr. Slater if his survey reflects the existing structures on the property. Based on where the rear property line is that you've determined, how far is the rear most line for the back of the structure on the property.

Mr. Slater said the rear most line would be 13.1 feet from the calculated property line.

Mr. Ross asked how far is the rear of that structure from the seawall?

Mr. Slater said the rear of that structure to the seawall is 8.8 feet.

Mr. Ross said if a setback is required for 20 feet from the rear property

line, how far would that setback have to be?

Mr. Slater said he does not determine the setbacks, the County would have to determine the setbacks.

Mr. Ross said how much of a variance would be needed if the measurement of the setback was from the rear property line that you determined.

Mr. Slater said if the setback was to be 20 feet, it would be the difference of 13.1 feet from 20 feet. We're looking at approximately 6.9 feet.

Mr. Ross asked have you based your review not only the Reddin property, but the other documents, including the El Jobean plat? Do you have an opinion as to whether this property is 1200 feet from the Myakka River?

Mr. Slater said based off a visual from the aerial, it definitely exceeds 1200 feet.

Mr. Hittson asked Mr. Slater, the rear property line, when originally measured was dry land, the canal was not in, is that correct?

Mr. Slater said that is correct.

Mr. Ross said he has no further questions for this witness.

Ken Quillen asked the calculated rear lot line is in the waterway, can you monument that?

Mr. Slater said no we cannot. In a situation like that, as my survey shows, a point on line is established at the face of the seawall on top.

Mr. Quillen asked and where do you typically monument reference to this line in relation to the other lot lines?

Mr. Slater said well, as the survey shows, the 81 feet with the abbreviated c beside it is a calculated distance. Obviously, we cannot jump into the water and set an iron rod into water. The distance beside it on both the side property lines represents 76.65 feet, that is to a drill hole placed on top of the seawall. That represents nothing more than a point on that line. Homeowners need to know where the property lines are and they have to have an idea. It is monuments but it doesn't represent a boundary.

Mr. Truex asked if Mr. Slater could run back through how you calculated this line. I thought I heard you say it's calculated from midpoint to the center of the canal?

Mr. Slater said if you look at the original recorded plat, it will give you an indication. That plat was done in 1924 maybe 1926. There was no canal

at that point. They are 100 foot lots. On one side of the block, 100 foot lots, on the other side, a 12 foot alley way in there. It is standard practice when vacated lands are approved, they are evenly split throughout the block. A shared waterway is a 50 foot right of way. That means 25 feet is going to go to each side of the block. If you have a 100 foot lot and then you have a 12 foot alley way (6 feet to the center) and you take 106 feet and you subtract 25 feet, you come up with a calculated distance of 81 feet. If you look at the tax maps and books, which are not legit, record documents to determine land, they all state 81 feet.

Mr. Ross said for clarification, Mr. Slater, you said the rear property line you determined here is approximately 4 feet into the water from the seawall.

Mr. Slater said yes, between 4 and 5 feet.

Mr. Ross said the sections to do with the handout has the code sections he wants to talk about today. Whether it's measured 6.2 or 6.9, it is still going to be a figure less than what the County derived. He believes the correct sections to use is Section 3.9.37. In fact, the real property line abuts a vacated alley. Going forward through the remaining Sections 3.9.2, it has the definition for setback where it refers you to minimum yard. Under minimum yard it talks about the horizontal distance between the rear lot line of the building. From the rear lot line to the line of the building. Rear lot line is the next definition section and this is where the County and I differs in how we read this. I believe where it talks about rear lot line, and this is going to be key to no matter what the setback is, it says either the rear lot line is determined from that property line, which is what Mr. Slater just testified about, or on waterfront property, the bulkhead line or shoreline. The definition of waterfront specifically uses the word abuts. Low and behold, there is actually a definition of abut, which is the final definition I have included. It is my contention that the way that is worded, to physically touch a border upon or share a common property line, indicates that the County Code was written where waterfront property is defined where the boundary line of the property runs up to but does not go underneath the water. It does not include a situation where the property is in part underwater, as we have here. Mr. Rooney says in the beginning of the BZA meeting, you cannot change the way the code reads. Our case in terms of why any of the codes sections that pertain to waterfront does not apply here, is because waterfront is defined as where the boundary ends outside of the water the way we read the definition of abut. I think this Boards jurisdiction begins and ends with taking the Code as its written and interpreting what the English language contained within its covers says. I'm sure the Board has had other attorney's tell you this. The courts have found Zoning Ordinances should be interpreted in favor of property owners because they are in derogation of private rights of ownership. This may seem like a very narrow reading of just one section of the Code, but when the Code actually defines abut in a way that says the property line runs up to and does not go into the water, I think that's the definition that the Board is stuck with. Further, we included a full copy of 3.9.98 which is referenced

in the staff report. Much is made in the staff report to protect waterfront property. I think the Board needs to take note of 3.9.98 (a) which specifically where the County Commission specifically said "marine business and waterfront industrial uses are permitted to build up to the seawall, bulkhead or bulkhead line of any creek, canal or any body of water, natural or otherwise" so obviously the County Commission when amending this code section, wasn't saying that protecting our waterways is absolutely as important as the staff report makes it out to be. I think to the extend this Board will take into account, those issues raised by the staff, it is important to note that in other zoning districts, you can build right up to the seawall.

Mr. Rooney asked, you said something here earlier, the definition of abutting, your surveyor earlier said this was an alleyway and was vacated. Are you testifying that it was in fact vacated?

Mr. Ross said he has a County Resolution to that effect, yes. Touching on the 3 criteria that the Board needs to consider in regard to an appeal, I think the staff and the appellants are in agreement under criteria one (1), this is the procedure to handle this particular issue. Number two (2) the intent of the regulation in question, we obviously disagree that 3.9.98 is the correct section since this property is 1200 feet from the Myakka River, but the intent of the regulation in question is reflected in language the County Commission used. In defining waterfront, it talks about waterfront property that abuts a body of water. He thinks it excludes property that is actually covered in part by water. So for zoning purposes, the way the section is written, this is not governed by any portion of Chapter 3-9 that refers to waterfront property. In fact, since we're talking 5 feet, give or take, it is important for the Board to keep in mind, that under criteria 3, the effect the ruling will have when applied generally to zoning regulations, you are not talking necessarily about that much difference for whatever number of properties in the County that have part of their boundaries (rear lot line) under water. The effect is going to be minimal.

Mr. Hittson asked 3.9.98 references Charlotte Harbor, Lemon Bay, Gasparilla Sound, Placida Harbor, Red Fish Cove, the Myakka River, the Peace River or Coral Creek. Are you saying this canal is not part of any of these waterways?

Mr. Ross said it is not. Mr. Reddin can tell you when he takes his boat out, that it empties directly into the Myakka River. The map shows Tippicanoe Bay is sort of a precursor to the Myakka River. The Myakka River is not in this Cheryl Waterway.

Mr. Thornberry asked in our packet, we've been asked by our Zoning Official to consider this appeal, based on 3 issues. Do you think that this is the proper venue for this Board to be addressing?

Mr. Ross said he thought it might be an issue for the variance process, and this Board can in their power, deter this to the variance process.

Obviously if you are not going to grant the variance, it doesn't matter how many feet this is, but I would respectfully suggest this is one of your options and you can take this up with the variance application.

Chairman Thornberry opened the meeting to Public Hearing.

Grace Amodeo, spoke against this request. She asked if all of this has been permitted. Also, if the person on the other side of the canal, came out into the middle of the canal to use that as a boundary line, and has a boat dock and lift, there will not be any canal left for anyone to use.

There being no further requests to speak for or against the petition, the Public Hearing was closed. Mrs. Seay moved to close the public hearing, seconded by Mr. Hittson, with a unanimous vote.

Ms. Dozier said there is no conclusion as it relates to this presentation. The Board is given the information as it relates to the findings and the issue at hand is where waterfront property setbacks is measured from. Both parties gave their presentation. The Board needs to have a discussion and decide what their decision is as it related to this particular appeal.

Board Member Comments and Questions

Mrs. Seay asked in the past handling of measurements back to the waterfront, in previous decisions, you start at the seawall or at the edge of the water, is that correct?

Ms. Dozier replied yes.

Mrs. Seay asked then why is this different?

Ms. Dozier said it's not. This measurement has not been different from any other application.

Mr. Rooney said Mr. Ross' testimony suggest that 3.9.98 does not apply. Do you feel it does apply?

Ms. Dozier said she feels it does apply because of the fact that we are talking about waterfront property and we have a setback provision that is consistently used by the County as it relates to setback. The issue is the property line appears to be submerged, and in that instance, that is where there is a dispute between the applicant and myself.

Mr. Rooney said abutting a waterway 20 feet? So why does it matter?

Ms. Dozier said it actually does not matter. You can use the MHC zoning classification rear setback from waterway as the main emphases of your determining factor as it related to this case. Once again, it does say that the setback is 20 feet. There is no difference between one or the other in terms of the distance.

Mr. Ross said even if Mr. Rooney just referenced the Board to that part of 3.9.37 that says butting waterway, you are stuck with that definition of abut, read it. There is no way around that. It clearly says where the

property line ends at the water. So that is not going to apply. You have to look at what the word about means in your Code.

Mr. Thornberry said he thinks the Board needs to discuss this and determine if this is the proper place for this Board to determine this decision.

Mr. Rooney said they do believe this Board is qualified to make this decision.

Mrs. Seay asked regarding the vacation of the alley. While it's an alley, half goes to the property owner. After it becomes a canal, it is not the property owners any more, it becomes common property.

Mr. Rooney said Mr. Ross testified the alley was vacated, and upon a vacation, the property reverts to the abutting property owners. Whether or not a canal after it was created it was deeded or implied or become by descriptive easement public right of way, there has been no testimony either way on that.

Mr. Ross said the alley that was vacated was on the other side of the rear boundary line Mr. Slater testified to. The rear boundary line is not within the legal description of the alley way that was vacated how ever many years ago. We looked through title. There is nothing in County records or other easements by prior property owners, transferred, deemed or conveyed by that property owner to the County or community.

Mr. Truex asked, when this canal was put in, we have the vacation of the easement, and then we have the canal put in, I'm going to assume the Army Corp had something to do with this, but is there not somewhere in the chain of title, information that gives some type of description for this property and at what point in time did it change from being a 100 foot lot to a 76 or 81? As things change in time, there is documentation that brings this forward.

Mr. Ross said he should have brought those records. He said this Board may want to deter this decision and make this part of the variance process.

Mr. Rooney said if that canal becomes a public right of way, that will change this entire determination regarding the set back. It would be my recommendation be presented at the time of the variance, but now the substance is on whether or not 3.9.37 or 3.9.98 waterfront setback is determined from seawall or property line. If it is indeed submerged. That would be a completely different issue if we found out that there may have been a property line.

Mr. Truex said he has a question about 3.9.98 waterfront. 1200 feet from one of these bodies we discussed. Do we have a measurement from any where to actually submit as evidence as to where this is from that body of water?

Mr. Quillan said that was not an issue to us, because it is on a canal.

Mr. Rooney said the initial letter and appeal was brought based on Section 3-9-98 and the conclusions. Mr. Ross brought a very good point that Section 3-9-37 also applies. When making your determination as to Code provision you should make that determination based on both of