

MINUTES OF THE BOARD OF ADJUSTMENT

Foxfire Village, North Carolina

Special Meeting
October 31, 2019

Members Present
Brian Manley, Chairman
Neil Tighe
John Hunter
Dennis Micallef
Jon Bachelder, Secretary

Members Absent
None

**Petition # 2019-02: Appeal to Decision of Zoning Administrator
Lots 40-45, Bridle Path and Saddle Lane
DGH Management, LLC, Appellant**

DGH Management appealed to the Board to reverse the decision of Zoning Administrator Lisa Kivett on September 23, 2019 to deny building permits on lots abutting Bridle Path and Saddle Lane. Chairman Manley called the meeting to order and all potential witnesses were duly sworn.

Testimony Offered. Attorney Chris Kremer, appearing on behalf of Appellant, conceded that the building permits being sought were for residences to be constructed on lots abutting unpaved streets. He contended, however, that the Village had accepted the streets in question when it approved a plat of the area in 1980 and that, because the plat envisioned paved streets, the Village was required by state statute (Art. 3A Sec. 136-66.1) to pave and maintain those streets. Accordingly, he argued, the Village cannot fairly or legally enforce an ordinance, later adopted, that prohibits building on lots abutting streets it has failed to pave.

William Brock then offered into evidence a letter from Robert C. Bryant, the current owner of the lots in question, who has agreed to sell those lots to DGH Management. Mr. Bryant, in his letter, stated that it was “his understanding” that the Village would pave the streets whenever it was requested and that, as a long-standing taxpayer he was entitled to that action.

Attorney Robert Hornik, appearing on behalf of the Village, responded that Village Ordinance 6.13 clearly states that “no building, residential or non-residential, shall be erected on a lot within the corporate limits of the Foxfire Village which does not abut a paved street.” He noted that the state statute relied upon by the Appellant refers only to streets that have been accepted by a municipality and stated that Foxfire Village had never accepted or dedicated the streets in question. Accordingly, the statute does not apply. But, even if the statute does apply, he argued, it only grants the Village the power – but not the duty – to pave its streets.

Village Clerk and Zoning Administrator Lisa Kivett then testified that she had completed a thorough review of Village records applicable to the subdivision and streets in question and could find no indication that Foxfire Village had ever accepted or dedicated those streets. The streets, she noted, do not appear on the Powell Bill map for which the Village may seek state support for dedicated street improvements. Further, she testified that dedication requires an offer from the developer or owner of the right-of-way and formal action by the Village Council, which action would have been included in the Council minutes.

Attorney Kremer, in response, indicated the Appellant was not demanding that the Village pave the streets, but only that it be granted permission to build on the unpaved streets.

Findings of Fact.

1. The Board found that there was no dispute that Lots 40, 41 and 44 abut only unpaved streets, Bridle Place and Saddle Lane.
2. The Board found, further, that those streets had never been accepted or dedicated by the Village.
3. The Board found that the language of the current Foxfire Village Zoning Ordinance Sec. 6.13 specifically prohibits the erection of any building which does not abut a dedicated paved street.

Decision. In view of the above findings, Mr. Manley called for a vote on the Petition:

Deny: Tighe, Micallef, Bachelder, Hunter, Manley

Grant: None

Failing to gain the required votes for granting the Petition, it was **denied**, and the decision of the Zoning Administrator **affirmed**.

**Petition # 2019-03: Appeal to Decision of Zoning Administrator
Water Tap Fees for Lots 18 and 20, Foxfire Villas
DGH Management, LLC, Appellant**

DGH Management appealed to the Board to reverse the decision of Zoning Administrator Lisa Kivett in January 2018 requiring the payment of additional water tap fees as a condition of issuing certificates of zoning compliance on the referenced lots. All potential witnesses were duly sworn.

Testimony Offered. **Attorney Chris Kremer**, appearing on behalf of Appellant, presented evidence that water service lines and water meters (“taps”) had been installed on Lots 18 and 20 in 2007 and remained in place there in 2018. The water tap fees in effect in 2007 had then been paid, as required, and a Certificate of Zoning Compliance issued. He testified that, in February 2018, Zoning Administrator Lisa Kivett had required payment of additional fees equal to the difference between those paid in 2007 and those in effect in 2018 as a condition of issuing a new Certificate of Zoning Compliance. He presented evidence that Appellant had paid the additional fees under protest on February 16, 2018 and argued that the Zoning Administrator had acted outside the scope of her authority in demanding their payment.

Zoning Administrator Lisa Kivett testified that the original Certificate of Zoning Compliance had been issued in 2007, at which time water taps had been installed and the then applicable fees paid. She noted, however, that this certificate had expired two years later pursuant to Zoning Ordinance Sec. 6.7 when no construction had commenced on the lots. The water meters were removed at that time. They were reinstalled in 2018 and a new Certificate of Zoning Compliance was requested in January 2018. At that time, Ms. Kivett treated the application as a new project and charged Appellant the then applicable water tap fees, but credited Appellant for the fees previously paid in 2007.

Attorney Robert Hornik, representing the Village, conceded that the additional fees had been demanded and collected, as represented by Appellant, in February 2018. He contended, however, that the time for appealing the assessment of those fees had passed, noting that Sec. 11.1 C of the Village Zoning Ordinance requires that an appeal from any decision, order or requirement of the Zoning Administrator be filed within thirty (30) days of notice to the owner or applicant. He argued that the time for appeal commenced when Appellant was charged the additional fees and paid them in February 2018. And, as the appeal was not filed until September 30, 2019, it failed to satisfy the referenced limitations period of the ordinance.

Findings of Fact.

1. The Board found that Village Zoning Administrator Lisa Kivett decided in January 2018 to assess Appellant additional water tap fees on Lots 18 and 20 of Foxfire Villas as a condition of issuing a new Certificate of Zoning Compliance.
2. The Board found further that Appellant had notice of this decision not later than February 2018 and that it acknowledged such notice when it paid the disputed fees by check dated February 16, 2018.
3. The Board found that Sec. 11.1 C of the Village Zoning Ordinance requires that an appeal from any decision, order or requirement of the Zoning Administrator be filed within thirty (30) days of notice to the owner or applicant.
4. The Board found that the Petition for Appeal or Interpretation in this matter was filed on September 30, 2019, some nineteen months after the decision at issue.

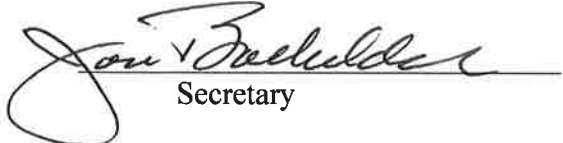
Decision. In view of the above findings, Mr. Manley called for a vote on the Petition:

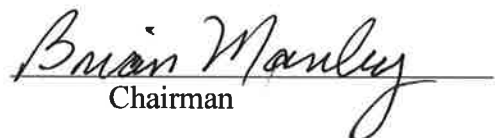
Deny: Tighe, Micallef, Bachelder, Hunter, Manley

Grant: None

Failing to gain the required votes for granting the Petition, it was **denied**, and the decision of the Zoning Administrator **affirmed**.

Adjournment. There being no further business, the meeting was adjourned.


Secretary


Chairman