Board of Adjustment
Agenda Packet

April 11, 2019

Call to Order - 7:00 PM

A) Oath of Office - Steven Craddock & Lynn Hicks

B) Announce Quorum Being Met

C) Approval of Agenda

D) Approval of Minutes for January 10, 2019

E) Ask for Disqualifications

Old Business

New Business

A) **BOA 19-02 Hampton Lodge Campground:** Williams Mullen is appealing a Letter of Interpretation dated January 7, 2019 on behalf of property owner 85' and Sunny, LLC for a non-conforming campground located at 1631 Waterlily Road, Coinjock.

Announcements

Adjournment

CURRITUCK COUNTY
NORTH CAROLINA

January 10, 2019
Minutes – Regular Meeting of the Board of Adjustment

CALL TO ORDER

The Board of Adjustment Attorney, Ben Gallop, called the meeting to order at 7:00 PM. The regular meeting of the Board of Adjustment was held in the boardroom at the Currituck County Historic Courthouse - 153 Courthouse Road, Currituck, North Carolina.

Attendee Name	Title	Status	Arrived
Matthew Battey	Board Member	Absent	
Cathy Bontemps	Board Member	Present	
Troy Breathwaite	Board Member	Present	
Gregory Hammer	Board Member	Present	
Thom Roddy	Board Member	Present	
Cheri Elliott	Clerk to the Board	Present	
Ben Gallop	Board of Adjustment Attorney	Present	

A Announce Quorum Being Met

Mr. Gallop announced a quorum being met with four regular members present. There were no alternates present at the meeting.

B Swearing In of New Members

Oaths of Office were completed prior to the meeting in the boardroom. Notary, Cheri C. Elliott, swore in two new board members: Cathy Bontemps (term ends December 31, 2020) appointed by the Board of Commissioners on August 6, 2018 and Thomas Roddy (filled an unexpired term with ending date December 31, 2019) appointed by the Board of Commissioners on March 5, 2018.

C Election of Chairs

Mr. Hammer nominated Troy Breathwaite for Chairman. There were no other nominations. Mr. Hammer motioned for approval. Ms. Bontemps seconded the motion and the motion carried unanimously.

Chairman Breathwaite asked for nominations for Vice-Chairman.

Ms. Bontemps nominated Greg Hammer for Vice-Chairman. There were no other nominations. Mr. Hammer motioned for approval. Mr. Roddy seconded the motion and the motion carried unanimously.

Mr. Gallop congratulated the new Chairman, Troy Breathwaite, and the new Vice-Chairman, Greg Hammer.

D. Approval of Agenda

Vice-Chairman Hammer motioned to approve the Agenda for tonight's meeting. Ms. Bontemps seconded the motion and the motion carried unanimously.

RESULT:	**APPROVED [UNANIMOUS]**
AYES:	Cathy Bontemps, Board Member, Troy Breathwaite, Board Member, Gregory Hammer, Board Member, Thom Roddy, Board Member
ABSENT:	Matthew Battey, Board Member

APPROVAL OF MINUTES FOR NOVEMBER 9, 2017

Vice-Chairman Hammer motioned to approve the meeting minutes for November 9, 2017. Ms. Bontemps seconded the motion and the motion carried unanimously.

RESULT:	**APPROVED [UNANIMOUS]**
AYES:	Cathy Bontemps, Board Member, Troy Breathwaite, Board Member, Gregory Hammer, Board Member, Thom Roddy, Board Member
ABSENT:	Matthew Battey, Board Member

E. Board of Adjustment Minutes for November 9, 2017

OLD BUSINESS

Mr. Gallop informed the board he will resign as their attorney with tonight being his last meeting.

Mr. Gallop briefed the board on the pending lawsuit, Currituck County v. Currituck County Board of Adjustment and Davis Street Holdings, LLC and asked to go into a closed session to advise them.

Mr. Roddy motioned for a closed session with the Board of Adjustment Attorney to preserve the Attorney-Client Privilege in Matters Entitled Currituck County v. Currituck County Board of Adjustment and Davis Street Holdings, LLC, pursuant to G.S. 143-318.11(a)(3). Ms. Bontemps seconded the motion and the motion carried unanimously.

The closed session began at 7:10 PM in the in the conference room with Mr. Gallop taking the minutes. The clerk to the board did not attend and remained in the boardroom during the closed session. The board returned to the boardroom at 7:25 PM.

NEW BUSINESS

Mr. Gallop started the training session discussing variances and appeals. Some of the items explained were appeals from an enforcement action and a variance being an exceptional remedy from a hardship. Mr. Gallop also discussed the four items necessary to have a founded hardship and stressed the importance of the applicant having the burden of the proof. Voting necessary was also explained: Variance 4/5 vote and simple majority for an appeal. Known conflicts were explained: Having a fixed opinion, undisclosed ex parte communications and a close relationship or financial relationship. Mr. Gallop gave reasons for the existence of the

Board of Adjustment; he said they have the added benefit of being appointed and not elected so it helps to remove political misconceptions of their decisions. Evidence was explained with the importance of expert testimony versus neighbor's opinions. Decisions must be made on facts. Due process was explained with the difference between parities and public to limit the public comment and remind them they are under oath. The public does not have the right to question; only the parties are allowed to question the parties. Mr. Gallop also explained the benefit of attorney's opening statements and said this will be a benefit to the board.

Chairman Breathwaite and Ms. Bontemps asked about the dialog amongst the board and whether their discussion is held in front of the parties and the public. Mr. Gallop said board members do openly discuss during the meeting and a closed session is rare.

Mr. Gallop further explained the procedures of the meeting: Letting the defendant present his case first, procedures of getting the evidence and closing the evidentiary session. Also, the board can vote to reopen the public hearing if necessary.

Mr. Gallop concluded his training session and wished the board luck. He said he may see them again while representing a client at a future meeting.

ANNOUNCEMENTS

There were no announcements made.

ADJOURNMENT

Vice-Chairman Hammer motioned to adjourn the meeting. Ms. Bontemps seconded the motion and the motion carried unanimously with the adjournment at 8:12 PM.

Currituck County
Agenda Item Summary Sheet

Agenda ID Number – (ID # 2436)

Agenda Item Title

BOA 19-02 Hampton Lodge Campground:

Brief Description of Agenda Item:

Williams Mullen is appealing a Letter of Interpretation dated January 7, 2019 on behalf of property owner 85' and Sunny, LLC for a non-conforming campground located at 1631 Waterlily Road, Coinjock.

Board Action Requested

Action

Person Submitting Agenda Item

Cheri Elliott, Assistant

Presenter of Agenda Item

Laurie LoCicero

Currituck County
Planning and Community Development Department
Planning and Zoning Division
153 Courthouse Road, Suite 110
Currituck, North Carolina 27929
252-232-3055 FAX 252-232-3026

To: Board of Adjustment

From: Planning Staff

Date: April 3, 2019

Subject: BOA 19-02 Hampton Lodge Campground

Hampton Lodge Campground owner, 85° and Sunny, LLC is appealing the Planning and Community Development Director's January 7, 2019 Letter of Determination. In August 2018, 85° and Sunny, LLC applied for a letter of interpretation for the four properties associated with the Hampton Lodge Campground located at 1631 Waterlily Road (PINs 007900000010000, 07900000020000, 07900000030000, and 00790000004000; the "Subject Properties"). The Unified Development Ordinance that became effective in January 2013 removed "campgrounds" as a permitted use in any zoning district in the county and all exisitng campgrounds became non-conforming uses.

In the letter of determination application, the property owner inquired about two specific issues:

1. What were the number of campsites that existed at Hampton Lodge Campground ("Hampton Lodge") in January 1, 2013, per Section 8.2.6B (1) of the Currituck County Unified Development ("UDO")? Applicant requests a determination that the number of campsites that existed on January 1, 2013 were at least the number of campsites that are shown on the Application's Major Site Plan Application (the "Site Plan") submitted for review by Currituck County on June 29, 2018.
2. Are the modifications to Hampton Lodge shown on the Applicant's Site Plan permitted? Applicant requests a determination that the modification shown on the Site Plan are permitted under Section 8.2.6A(5) of the UDO and do not increase the nonconformity of Hampton Lodge with respect to the number of campsites that existed on January 1, 2013.

The January 7, 2019 Letter of Determination established 234 campsites (recreational vehicle or camper trailer sites) existing on January 1, 2013. This is based on County documentation and records since 1967, including septic permits, building permits, land development approvals, certain temporary use permits. Electrical and septic permits have been issued for 190 campsites since 1967. The number of tent sites for the campground was unable to be determined because the historical documents concerning the subject property only illustrated large areas designated for tent camping. No individual tent sites were delineated on historical records. The January 2019 letter also states that "some of the modifications illustrated on the Applicant's proposed site plan are permitted." No new structures or amenities can be constructed, only modifications to existing structures shall be allowed.

The applicant is specifically appealing the following:

1. December 19, 2018 email notice from Laurie B. LoCicero to Warren Eadus (Quible & Associates, engineer to the Property Owner) regarding "Hampton Lodge CAMA submittal".
    a. Grounds for Appeal" The Planning Director determined that "structure 8" on "sheet 5", which is an existing pier on the Property that the Owner wished to replace, could not be replaced on the grounds that the replacement would not be "modification of an acceptable non-conforming existing structure." The Planning Directors determination was erroneous as a matter of law. The Property is presently a private campground, which is non-conforming use under Section 8.2.6 of the UDO. As provided in Section 8.2.6.A(5) of the UDO, existing campgrounds may be modified "provided the changes do not increase the non-conformity with respect to the number of campsites that existed on January 1, 2013. The pier in questions is not a campsite, and its existence construction, reconstruction, and/or replacement would not increase the number of campsites on the Property. The replacement of the pier in questions would also not expand the campground to cover additional land area. The pier itself is not a non-conforming structure, but is rather a permitted and conforming accessory structure under Section 4.3.2.C(1)(a) of the UDO. As the replacement of the pier does not increase the number of campsites on the Property, its replacement should be permitted as a matter of law.

2. January 7, 2019 letter from Laurie B. LoCicero to Owner (c/o Williams Mullen attorney to Owner).
    a. Grounds for Appeal: New bathroom facilities, swimming pool, pool house and other additional structures are allowed pursuant to Section 8.2.6A(5) since these "changes do not increase the non-conformity with respect to the number of campsites that existed on January 1, 2013. As further provided in the Applicant's previously submitted Memorandum in Support of Application for Interpretation.

3. January 7, 2019 letter from Laurie B. LoCicero to Owner (c/o Williams Mullen, attorney to Owner).
    a. Grounds for Appeal: Number of campsites. More than 234 campsites existed as of January 1, 2013 as further provided in Applicant's previously submitted Memorandum in Support of Application for Interpretation.

Unified Development Ordinance

The following sections of the UDO are applicable to this case:

- Section 8.1.1 Purpose and Intent
    - In the provisions established by this Ordinance, there exist uses of land, structures, lots of record, signs, and site features (e.g., off-street parking, landscaping, etc.) that were lawfully established before this Ordinance was adopted or amended, that now do not conform to its terms and requirements. The purpose and intent of this chapter is to regulate and limit the continued existence of those uses, structures, lots of record, signs, and site features that do not conform to the provisions of this Ordinance, or any subsequent amendments.
- Section 8.1.2 Authority to Continue
    - Nonconformities are allowed to continue, and are encouraged to receive routine maintenance in accordance with the requirements of this chapter as a means of preserving safety and appearance
- Section 8.1.5 Increase in Nonconformity
    - Except as authorized by this chapter, no person shall engage in activity that increases a nonconformity that lands rezoned to a PD district are subject to the approved master plan and terms and conditions. (See Attachments 4B)

- Section 8.1.6 Minor Repairs and Maintenance
    - Minor repairs and normal maintenance that are required to keep nonconforming uses, structures, lots of record, site features, and signs in a safe condition are permitted, provided the minor repair or maintenance does not extend, expand, or enlarge the nonconforming aspect. For the purposes of this section, "minor repairs and maintenance" shall mean:
        - Maintenance of Safe Condition – Repairs that are necessary to maintain a nonconforming use, structure, lot of record, site feature, or sign in a safe condition
        - Maintenance of Land for Safety – Maintenance of land areas and site aspects to protect against health hazards and promote safety of surrounding uses.
- Section 8.2.6 Nonconforming Campgrounds
    - Private campgrounds are not allowed as a principal use in Currituck County. All existing campgrounds and campground subdivisions are nonconforming uses subject to the following standards:
        - General Standards
            - Camping is an allowed use of land only in existing campgrounds and campground subdivisions
            - Campers may not be modified in any manner that would render the unit non-transportable
            - No tent or camper may be located on a campsite or campground subdivision for more than 90 days
            - Additions to campers are not permitted
            - Modifications to existing campgrounds are permitted provided those changes do not increase the nonconformity with respect to the number of campsites that existed on January 1, 2013.
        - Existing Campgrounds
            - Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed January 1, 2013.
            - Campers may not be placed on a permanent foundation.
            - Campsites may have a wooden platform not to exceed 100 square feet. Platforms must be 12 inches or less in height from existing grade. Handicap ramps are not subject to the maximum height requirement and square footage provided the ramp does not exceed five feet in width.
            - Campgrounds shall not include permanent residence, excluding one dwelling unit to be occupied by the park caretaker.

Background

Hampton Lodge Campground has existed at least since May 1967. Currituck County has record of septic permits for a bath house for this property dated May 2, 1967. The county did not regulate the use of property through zoning in 1967. On October 7, 1971 county-wide zoning was adopted. Under the 1971 Zoning Ordinance and Official Zoning Map, campgrounds were permitted in the Recreational Residential (RR) Zoning District with the following requirements:

- A preliminary plat submitted to the Planning Board with each camp application for tent sites and camping trailers
- Minimum 6 acres of land
- 3,000 square feet for each tent and camping trailer space

- 200’ setback for buildings, tent spaces or trailer spaces from any property line maintained as a natural buffer
- Maximum 400’ distance for drinking water, toilet facilities
- Maximum 1500’ distance to washhouses; does not apply where community water and sewer connections are provided
- Campgrounds allowed in Flood Plain district with a conditional use permit with the same regulations as above

Hampton Lodge was zoned RR under the 1971 Zoning Map. No documentation was found showing that Hampton Lodge submitted an application or received approval of a preliminary plat for the tent sites and camping trailers at Hampton Lodge. No action was taken by the property owner to ensure the campground had compliance with the 1971 standards; the property became a non-conforming use and has continued as such.

Minutes from the March 20, 1973 meeting of the Currituck County Board of Commissioners show that the Board of Commissioners discussed a request by Action Development, Inc. for a “sub-division plat” for Hampton Lodge. Based on unrecorded draft plats found in the county’s archives, it appears that Action Development, Inc. was seeking to create a camper subdivision that required installation of certain infrastructure. At the March 20, 1973 Board of Commissioners’ meeting, the board determined that the camper subdivision plat would not be approved until posting of a required bond and compliance with all other requirements and procedures of the Currituck County Subdivision and Zoning Ordinances. Action Development, Inc. did not complete the process required for approval of a camper subdivision and no further action was taken on the Action Development, Inc. camper subdivision application. During 1972, septic permits applications were submitted for camper spaces numbered up to 124.

With an effective date of January 1, 1975, the Currituck County Board of Commissioners enacted the 1975 Zoning Ordinance and Official Zoning Map. Under the 1975 Zoning Ordinance, camping was a permitted use of property only in recreation campgrounds located in the Recreational Residential (RR) Zoning District with a conditional use permit. The 1975 Zoning Ordinance required the following conditions for issuance of a conditional use permit allowing camping as a use in the RR Zoning District:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

On October 29, 1975 a conditional use permit was issued for Hampton Lodge in a Currituck County Board of Adjustment case (BOA 75-8). The Board of Adjustment case was instituted as an appeal of the Currituck County Code Enforcement Officer’s determination prohibiting the upgrade of twelve waterfront camp sites. The minutes from the October 29, 1975 Board of Adjustment meeting relay that the applicant wanted “to upgrade the twelve waterfront lots by addition of septic tank systems to provide sewage disposal for those sites” at Hampton Lodge. The Board of Adjustment granted a conditional use permit to upgrade the twelve waterfront lots by addition of septic tanks systems, provided that:

- A plat of the twelve sites be submitted to the Code Enforcement officer.
- That the twelve sites be in conformity with the Zoning Ordinance.
- That the septic tank systems be installed in accordance with the regulations of the Health Department.

A copy of a site plan showing camper sites 23-35 with the additional sewage is included in the record of the case. Some of the camp sites shown on the plan do not appear to be a minimum of 3000 square feet required by the 1975 Zoning Ordinance. These lots could have predated the 1971 Zoning Ordinance. The site plan also recognized waterfront camper sites 23-101.

With an effective date of November 15, 1982, the 1982 Zoning Ordinance and Official Zoning Map was enacted by the Currituck County Board of Commissioners. Under the 1982 Zoning Ordinance, the RR-30 Residential/Recreational Zoning District was created. The RR-30 Zoning District was described as containing "some existing camp grounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended that this district be expanded." Recreation campgrounds were still permitted uses in the RR-30 district with a conditional use permit meeting the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

There is no evidence in county archives that Hampton Lodge applied for or received a conditional use permit under the 1982 Zoning Ordinance. Building permits and septic permits were applied for during the effective time of this Ordinance.

With effective date of April 2, 1989, the Currituck County Board of Commissioners enacted a Unified Development Ordinance (UDO) and Official Zoning Map. A Residential Recreation (RR) Zoning District was designated in the UDO and described as "designed to provide for some existing campgrounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended to be expanded." On May 18, 1992, the purpose for the RR Zoning District was amended to provide that the RR Zoning District was "not intended to be expanded except in cases where: a) and existing property containing an RR designation is split by zoning lines; b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c) the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 4.5 unit (included campers and motel room) and beds (included group sleeping quarters) per acre." A use permit was required with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

There is no evidence in county archives that Hampton Lodge applied for or received a use permit under the 1989 UDO.

With an effective date of November 16, 1992, a revised Unified Development Ordinance, (the "1992 UDO"), was enacted by the Currituck County Board of Commissioners. The Residential Recreation (RR) Zoning District was a designated zoning district created for the purpose "to provide for some existing campgrounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended to be expanded except in cases where: a) an existing property containing an RR designation is split by zoning lines; b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c) the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 5.5 units (includes campers and motel rooms) and beds (includes group sleeping quarters) per

acre." Private campgrounds were a permitted use in the RR Zoning District with a special use permit with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

The 1992 UDO, as amended, was the in effect from November 16, 1992 to September 4, 2007. Hampton Lodge Campground did not acquire a special use permit during this time.

On April 24, 1996 the Currituck County Board of Commissioners issued Hampton Lodge a conditional use permit for an outdoor concert special event. The Board of Commissioners action on the outdoor concert special event use permit was the first consideration of a land development request, other than building and septic permits for this property, since 1975. The conditional use permit applicant, John E. Pappas, included a site plan in support for the special event conditional use permit. That site plan **illustrated 234 campsites**. A zoning permit was also required for the special event and the plan associated with the zoning permit application illustrated 90 vehicular parking spaces for the event on a grassed area on the west side of the gravel road.

The following year, Hampton Lodge again applied for a special event conditional use permit for an outdoor bluegrass concert and craft show. In support of the application, Hampton Lodge submitted a site plan **illustrating 234 campsites.** The Currituck County Board of Commissioners issued a special event conditional use permit to Hampton Lodge on March 26, 1997.

On January 28, 1998, the Board of Adjustment issued its decision on an appeal of an administrative decision regarding the Hampton Lodge property. The Code Enforcement Officer had determined numerous additions were made to campers in violation of Section 804(5) of the effective UDO; the property owner appealed that decision. In the record of the case, staff found a list of 32 campsites that obtained permits for screened in porches. Due to state record retention laws, only an index listing could be found of the *camper owner*, permit type and date issued. The actual permits are not available as the county was not required to keep the actual permit for that time interval. No property verification could be made regarding the location of the campers. The decision of the Board of Adjustment was to allow for the additions to remain that obtained building permits but those additions that did not obtain building permits were required to be removed. Septic permits were issued for 16 camper spaces during this time.

With effective date of December 4, 2007, the Currituck County Board of Commissioners enacted the 2007 Unified Development Ordinance, (the "2007 UDO") and Official Zoning Map. The Residential Recreation (RR) Zoning District was a designated zoning district that was described as "not intended to be expanded except in cases where: a) an existing property containing an RR designation is split by zoning lines; and b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c)the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 5.5 units (includes campers and motel rooms) and beds (includes group sleeping quarters) per acre." Private campgrounds were permitted in the RR Zoning District with a special use permit and with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space

- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation
- Maximum camper size and platform requirements

The 2007 UDO also included language governing *platted camper lots* for existing camper subdivisions. During the time governed by the 2007 UDO, Hampton Lodge did not make application for any land development permits and there is no evidence that septic or building permits were issued.

On January 1, 2013, the current UDO became effective and removed private campgrounds as a principal. Hampton Lodge Campground continued to be a non-conforming use as it has since the first County-wide Zoning Ordinance was enacted in 1971.

Attachments

The county submits the following attachments for the Board's consideration:

- Attachment 1: January 7, 2019 Letter of Determination
- Attachment 2: Applicant submittal dated August 2018
- Attachment 3: Minutes from March 20, 1973 Board of Commissioners' Meeting
- Attachment 4: October 29, 1975 Board of Adjustment documentation
- Attachment 5: 1996/97 Site Plan for Temporary Special Use Permit
- Attachment 6: Applicant Appeal Application for January 7, 2019 Letter of Determination

COUNTY OF CURRITUCK
Planning and Community Development Department
Planning and Zoning Division
153 Courthouse Road, Suite 110
Currituck, North Carolina 27929
Telephone (252) 232-3055 / Fax (252) 232-3026

January 7, 2019

LETTER OF DETERMINATION

85' and Sunny, LLC
c/o Mr. Thomas H. Johnson, Jr.
Williams Mullen
301 Fayetteville St.
Suite 1700
Raleigh, NC 27601
PO Box 1000
Raleigh, NC 27602

RE: Application for Interpretation; 85' and Sunny, LLC;
Hampton Lodge Campground; 1631 Waterlily Road, Coinjock, NC 27923

Dear Mr. Johnson:

This Letter of Determination is in response to your August 30, 2018 Application for Interpretation requesting on behalf of 85' and Sunny, LLC, (the "Applicant"), a determination of (1) the number of campsites that existed at Hampton Lodge Campground ("Hampton Lodge") on January 1, 2013, and (2) whether modifications to Hampton Lodge shown on the applicant's site plan are permitted. The Application for Interpretation also references a site plan submitted by Quible and Associates on behalf of the Applicant that shows 314 campsites for recreational vehicles and 78 campsites for tents.

The Unified Development Ordinance ("the UDO") that went into effect January 1, 2013 removed private or recreational campgrounds as an allowed use in the Single Family Mainland ("SFM") Zoning District. When the 2013 UDO was enacted, the use of Hampton Lodge as a campground became a non-conforming use. Prior to the current UDO, private or recreational campgrounds were allowed in the Recreational Residential Zoning District with a special or conditional use permit. The 2013 UDO changed the nomenclature of several zoning districts, but essentially the Recreational Residential Zoning District became the Single Family Mainland Zoning District.

Once private or recreational campgrounds were removed as an allowed use and became completely non-conforming, *Chapter 8 Nonconformities* became the guide for regulating existing campgrounds. The purpose and intent of *Chapter 8 Nonconformities* of the 2013 UDO "is to *regulate and limit the continued existence of those uses*, structures, lots of record, signs and site features that do not conform to the provisions of this Ordinance of and subsequent amendments." (See UDO §8.1.1) Once uses are established as nonconforming, they are "generally incompatible with the permitted uses in the district in which they are located" (See UDO § 8.2.1). Furthermore, a nonconforming use shall not be enlarged, expanded in area or intensified, be extended to additional structures or land outside the original structure and open air uses shall not be extended to occupy more land area than that in use when the open air use became nonconforming. (See UDO §8.2.3) There is an expectation that nonconformities will eventually become compliant with land use regulations over time due to natural decline; that they will either convert to a permitted use or cease to exist.

To determine the number of campsites existing at Hampton Lodge on January 1, 2013, I have reviewed permits and approvals issued to Hampton Lodge since 1967. The reviewed permits and approvals include those issued by Albemarle Regional Health Services and Currituck County. Albemarle Regional Health Services reviews and issues septic permits and is not a department of Currituck County government. Albemarle Regional Health Services permits do not grant zoning approval nor do they establish vested rights to develop property. I have also reviewed the 1971, 1975, 1982 Zoning Ordinances for Currituck County; the 1989, 1992, 2007 and 2013 UDO's for Currituck County; official Currituck County Zoning Maps; and minutes from the Currituck County Board of Adjustment, Currituck County Board of Commissioners and Currituck County Planning Board relevant to Hampton Lodge.

Prior to the effective date of zoning for Hampton Lodge the following permits were issued to Hampton Lodge:

- May 2, 1967: Septic permit application (#551) for bath house
- June 29, 1967: Septic permit application (#562) for a trailer
- August 29, 1969: Septic permit application (#744) for 6 camper spaces (spaces 1-6)

On October 7, 1971, county-wide zoning was adopted that included the Hampton Lodge property. Under the 1971 Zoning Ordinance and Official Zoning Map, campgrounds were permitted in the Recreational Residential (RR) Zoning District with the following requirements:

- A preliminary plat submitted to the Planning Board with each camp application for tent sites and camping trailers
- Minimum 6 acres of land
- 3,000 square feet for each tent and camping trailer space
- 200' setback for buildings, tent spaces or trailer spaces from any property line maintained as a natural buffer

- Maximum 400' distance for drinking water, toilet facilities
- Maximum 1500' distance to washhouses; does not apply where community water and sewer connections are provided
- Campgrounds allowed in Flood Plain district with a conditional use permit with the same regulations as above

Hampton Lodge was zoned RR under the 1971 Zoning Map. No documentation was found showing that Hampton Lodge submitted an application or received approval of a preliminary plat for the tent sites and camping trailers at Hampton Lodge.

Minutes from the March 20, 1973 meeting of the Currituck County Board of Commissioners show that the Board of Commissioners discussed a request by Action Development, Inc. for a "sub-division plat" for Hampton Lodge. Based on unrecorded draft plats found in the county's archives, it appears that Action Development, Inc. was seeking to create a camper subdivision that required installation of certain infrastructure. At the March 20, 1973 Board of Commissioners' meeting, the board determined that the camper subdivision plat would not be approved until posting of a required bond and compliance with all other requirements and procedures of the Currituck County Subdivision and Zoning Ordinances. Action Development, Inc. did not complete the process required for approval of a camper subdivision and no further action was taken on the Action Development, Inc. camper subdivision application.

For the time period governed by the 1971 Currituck County Zoning Ordinance and Official Map, documents show health department issuance of the following septic permits:

- April 26, 1972: Septic permit application (#1436) for 6 camper spaces (spaces 1-6)
- July 9, 1972: Septic permit application (#1220) 6 camper spaces (spaces 1-6)
- July 11, 1972: Septic permit application (#1551) for 6 camper spaces (spaces 1-6)
  Septic permit application (#1552) for 6 camper spaces (spaces 1-6)
- August 14, 1972: Septic permit application (#1598) for 6 camper spaces (spaces 97-102)
  Septic permit application (#1599) for 6 camper spaces (spaces 103-108)
  Septic permit application (#1600) for 6 camper spaces (spaces 109-114)
  Septic permit application (#1601) for 6 camper spaces (spaces 115-120)
  Septic permit application (#1602) for 4 camper spaces (spaces 121-124)

- May 7, 1973: Septic permit application (#1831) for 4 camper spaces (spaces 1-4)

With an effective date of January 1, 1975, the Currituck County Board of Commissioners enacted the 1975 Zoning Ordinance and Official Zoning Map. Under the 1975 Zoning Ordinance, camping was a permitted use of property only in recreation campgrounds located in the Recreational Residential (RR) Zoning District with a conditional use permit. The 1975 Zoning Ordinance required the following conditions for issuance of a conditional use permit allowing camping as a use in the RR Zoning District:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

On October 29, 1975 a conditional use permit was issued for Hampton Lodge in a Currituck County Board of Adjustment case (BOA 75-8). The Board of Adjustment case was instituted as an appeal of the Currituck County Code Enforcement Officer's determination prohibiting the upgrade of twelve waterfront camp sites. The minutes from the October 29, 1975 Board of Adjustment meeting record that the applicant wanted "to upgrade the twelve waterfront lots by addition of septic tank systems to provide sewage disposal for those sites" at Hampton Lodge. The Board of Adjustment made the following Findings of Fact:

- That Hampton Lodge Campground is a recreational campground;
- That twelve existing campsites are to be upgraded by the addition of sewage disposal;
- That no plat of the sites exist but they do and will conform to the ordinance requirements;
- That the Health Department indicate the land is suitable for septic tanks;
- That property value will be improved by the addition.

A condition of the Board of Adjustment's decision required submission of a plat for the twelve camp sites to the Currituck County Code Enforcement Officer and the twelve sites must be in conformity with the 1975 Zoning Ordinance. A copy of a site plan showing camper sites 23-35 with the additional sewage is included in the record of the case. Some of the camp sites shown on the plan do not appear to be a minimum of 3000 square feet required by the 1975 Zoning Ordinance. These lots could have predated the 1971 Zoning Ordinance. The site plan also recognized waterfront camper sites 23-101.

For the time period governed by the 1975 Zoning Ordinance and Official Zoning Map, documents show issuance of the following building and septic permits:

- September 29, 1978: Septic permit application (#3471) for a modular home
- March 30, 1981: Building permit (#4296) for electrical service to 14 campsites

With an effective date of November 15, 1982, the 1982 Zoning Ordinance and Official Zoning Map was enacted by the Currituck County Board of Commissioners. Under the 1982 Zoning Ordinance, the RR-30 Residential/Recreational Zoning Distsrict was created. The RR-30 Zoning District was described as containing "some existing camp grounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended that this district be expanded." Recreation campgrounds were still permitted uses in the RR-30 district with a conditional use permit meeting the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

There is no evidence in county archives that Hampton Lodge applied for or received a conditional use permit under the 1982 Zoning Ordinance. For the time period governed by the 1982 Zoning Regulations, there are records of the following building and septic permits:

- September 20, 1983: Building permit (#5625) rewire *existing* campsites
- March 5, 1984: Building permit (#0122) new 200 amp service and rewire for 18 *existing* campsites
- June 26, 1984: Building permit (#0362) new service at *existing* campsites rewire 26 *existing* campsites
- December 28, 1986: Building permit (#1981) electrical upgrade to 200 amp waterfront

With effective date of April 2, 1989, the Currituck County Board of Commissioners enacted a Unified Development Ordinance (UDO) and Official Zoning Map. A Residential Recreation (RR) Zoning District was designated in the UDO and described as "designed to provide for some existing campgrounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended to be expanded." On May 18, 1992, the purpose for the RR Zoning District was amended to provide that the RR Zoning District was "not intended to be expanded except in cases where: a) and existing property containing an RR designation is split by zoning lines; b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c) the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 4.5 unit (included campers and motel room) and beds (included group sleeping quarters) per acre." A use permit was required with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

There is no evidence in county archives that Hampton Lodge applied for or received a use permit under the 1989 UDO. For the time period governed by the 1989 UDO there are records showing issuance of the following building permit:

- February 23, 1990: Building permit (#6630) 200 amp electrical service on A lots – camping

With an effective date of November 16, 1992, a revised Unified Development Ordinance, (the "1992 UDO"), was enacted by the Currituck County Board of Commissioners. The Residential Recreation (RR) Zoning District was a designated zoning district created for the purpose "to provide for some existing campgrounds and camper subdivisions and is retained for the purposes of regulating these existing uses. It is not intended to be expanded except in cases where: a) an existing property containing an RR designation is split by zoning lines; b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c) the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 5.5 units (includes campers and motel rooms) and beds (includes group sleeping quarters) per acre." Private campgrounds were a permitted use in the RR Zoning District with a special use permit with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation

The 1992 UDO, as amended, was the in effect from November 16, 1992 to September 4, 2007.

On April 24, 1996 the Currituck County Board of Commissioners issued Hampton Lodge a conditional use permit for an outdoor concert special event. The Board of Commissioners action on the outdoor concert special event use permit was the first consideration of a land development request, other than building and septic permits for this property, since 1975. The conditional use permit applicant, John E. Pappas, included a site plan in support for the special event conditional use permit. That site plan illustrated 234 campsites. A zoning permit was also required for the special event and the plan associated with the zoning permit application illustrated 90 vehicular parking spaces for the event on a grassed area on the west side of the gravel road.

The following year, Hampton Lodge again applied for a special event conditional use permit for an outdoor bluegrass concert and craft show. In support of the

application, Hampton Lodge submitted a site plan illustrating 234 campsites. The Currituck County Board of Commissioners issued a special event conditional use permit to Hampton Lodge on March 26, 1997.

On January 28, 1998, the Board of Adjustment issued a decision on an appeal of an administrative decision regarding the property. The Code Enforcement Officer had determined numerous additions were made to campers in violation of Section 804(5) of the effective UDO; the property owner appealed that decision. In the record of the case, staff found a list of 32 campsites that obtained permits for screened in porches. Due to state record retention laws, only an index listing could be found of the *camper owner*, permit type and date issued. The actual permits are not available as the county was not required to keep the actual permit for that time interval. No property verification could be made regarding the location of the campers. The decision of the Board of Adjustment was to allow for the additions to remain that obtained building permits but those additions that did not obtain building permits were required to be removed.

For the time period governed by the 1992 UDO, as amended, the following septic permits were issued to Hampton Lodge:

- January 10, 1995: Septic repair permit (#3615I) for 4 camper spaces (spaces 13-16)
  Septic repair permit (#3614I) for 4 camper spaces (spaces 9-12)
  Septic repair permit (#3613I) for 4 camper spaces (spaces 5-8)
  Septic repair permit (#3612I) for 4 camper spaces (spaces 1-4)

With effective date of December 4, 2007, the Currituck County Board of Commissioners enacted the 2007 Unified Development Ordinance, (the "2007 UDO") and Official Zoning Map. The Residential Recreation (RR) Zoning District was a designated zoning district that was described as "not intended to be expanded except in cases where: a) an existing property containing an RR designation is split by zoning lines; and b) the expansion only occurs within lot boundaries as such boundaries existed as of April 2, 1989; and, c)the campground/camper subdivision shall meet all criteria established in Article 14 (Conditional and Special Uses) in addition to not exceeding an overall maximum density of 5.5 units (includes campers and motel rooms) and beds (includes group sleeping quarters) per acre." Private campgrounds were permitted in the RR Zoning District with a special use permit and with the following conditions:

- Minimum 10 acres under single ownership
- 3000 square feet per camper space
- 8% of total acreage be devoted to recreational area; 50% of that acreage be active recreation
- Maximum camper size and platform requirements

The 2007 UDO also included language governing *platted camper lots* for existing camper subdivisions. During the time governed by the 2007 UDO, Hampton Lodge did not make application for any land development permits and there is no evidence that septic or building permits were issued.

With an effective date of January 1, 2013, the Currituck County Board of Commissioners enacted a new Unified Development Ordinance, (the "2013 UDO") and Official Zoning Map. Under the 2013 UDO, private campgrounds were removed as a permitted use and the Residential Recreation (RR) Zoning District was eliminated. All existing private campgrounds became non-conforming uses and subject to regulation under Chapter 8 of the 2013 UDO. As a private campground, Hampton Lodge is a legal non-conforming land use subject to the general and specific standards of Chapter 8 of the 2013 UDO. In addition to the standards provided under 2013 UDO §§8.2.1, 8.2.2, and 8.2.3 the nonconforming use at Hampton Lodge is further required to meet the standards contained in 2013 UDO §8.2.6 that provides:

> *Private campgrounds are not allowed as a principle use in Currituck County. All existing campgrounds and campground subdivisions are nonconforming uses subject to the following standards:*
>
> *A. General Standards*
>
> *(1) Camping is an allowed use of land only in existing campgrounds and campground subdivisions.*
> *(2) Campers may not be modified in any manner that would render the unit non-transportable.*
> *(3) No tent or camper may be located on a campsite or campground subdivision for more than 90 days.*
> *(4) Additions to campers are not permitted.*
> *(5) Modification to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to number of campsites that existed on January 1, 2013.*
>
> *B. Existing Campgrounds*
>
> *(1) Existing campgrounds may not be expanded to cover additional land area or exceed the total number of campsites that existed January 1, 2013.*
> *(2) Campers may not be placed on permanent foundation.*
> *(3) Campsites may have a wooden platform not to exceed 100 square feet. Platforms must be 12 inches or less in height from existing grade. Handicap ramps are not subject to the maximum height requirement and square footage provided the ramp does not exceed five feet in width*

(4) Campgrounds shall not include permanent residences, excluding one dwelling unto to be occupied by the park caretaker or manager.

The application also cites *Stokes County v. Pack*, 91 N.C. App. 616, 372 S.E.2d 726 (1988) as law allowing full use of property comprising Hampton Lodge that, from time to time in the past, has been used in a variety of ways to support camping and recreation of campers. *Stokes* is distinguishable from the Hampton Lodge situation in that *Stokes* allowed for the completion of a nonconforming use but prohibited expansion of a nonconforming use. Hampton Lodge's position that because at times camping may have occurred on certain areas of the property it is entitled to as many campsites as it desires is tantamount to the expansion of a nonconforming use. The more applicable case is *Kirkpatrick v. Village of Pinehurst,* 138 N.C. App. 79, 530 S.E.2d 338 (2000), where the court precluded expansion of a campground beyond the acreage originally occupied and precluded renovations that would add more campsites to a nonconforming campground. The applicant is proposing a greater number of campsites than the County has on record and to add more amenities to the site, making it a more attractive destination and prolonging the life of a nonconforming use. *Malloy v. Zoning Board of Adjustment* 155 N.C. App. 628, 632, 573, S.E. 2d 760, 763 (2002) is also pertinent to this situation. The court upheld that a nonconforming welding and gas supply business could not replace an existing storage tank with a new, larger tank, in part, because it would allow additional and faster service to their customers. This is akin to having additional amenities for visitors at Hampton Lodge Campground.

Based on the forgoing, I conclude that in 1975, the county issued a conditional use permit for Hampton Lodge. In the record of the 1975 case, documentation was submitted that established 101 existing campsites. Other than building permits and septic permits, no other land use approvals were sought that required action by a Currituck County board. In 1996 and 1997 a conditional use permit was issued for a special event, an outdoor concert, to be held on the property. With the applications for the special event conditional use permits, site plans were submitted that illustrated 234 camp sites. None of the plans showed any designated tent campsites; just areas available for tent camping. Taking into account all of the county's records and documentation, and submittals by Hampton Lodge, it is my determination that 234 campsites have received some form of approval between 1971 and 1997 and 234 campsites existed on January 1, 2013.

Based on the foregoing, I make the following conclusion regarding the number of tent campsites at Hampton Lodge. Because the 2013 UDO does not define "campsite" I have, pursuant to 2013 UDO §10.1.12, reviewed *A Planner's Dictionary (2004)* published by the American Planning Association. This publication defines "campsite" as "any plot, parcel, tract or portion thereof, intended for the exclusive occupancy by a camping unit" and "camping unit" is defined as "any tent, trailer, lean-to, recreation vehicle or similar structure established or maintained and operated in a campground as temporary living quarters for recreation, education or vacation purposes." I cannot verify, and therefore do not conclude, that 78 tent campsites were established prior to January 1, 2013. County documentation and historic submissions by Hampton Lodge

only show an area where tent camping has been allowed. Tent campsites would need to be calculated based on the historical tent area divided by the minimum campsite size (3000 square feet) required by all zoning regulations before the 2013 UDO.

As to modifications proposed for Hampton Lodge and specifically illustrated on the site plan submitted with the Hampton Lodge application for this determination, I conclude the following: It is my determination that **some** of the modifications illustrated on the Applicant's proposed site plan are permitted. The 2013 UDO provides specific and general rules governing non-conforming uses and nonconforming campgrounds. 2013 UDO §8.2.6.A(5) provides that "modifications" can be made to existing campgrounds so long as the number of campsites do not increase. Because the 2013 UDO does not define "modification", I have, pursuant to 2013 UDO §10.1.12, reviewed the definition for the term "modification" from accepted sources. In its application for this determination, the Applicant suggests citation *Black's Law Dictionary* (10th ed. 2014) for the definition of "modification" as "[a] change to something; an alteration or amendment." I have also considered the Applicant's definition for "modification" found in *Merriam-Webster's (2018)* that defines "modification" as "the making of a limited change in something".

Applying these definitions, it is my determination that something needs to exist before a change, alteration or amendment can be made. Considering the fact that the county has not allowed the expansion of the Recreational Residential Zoning District in applicable years and in 2013 completely eliminated campgrounds as a permitted use in Currituck County, *only changes to existing buildings and structures are permitted.* Existing facilities are those facilities illustrated in plans submitted in 1996 and 1997 with the special events conditional use permit applications. Those facilities are restroom facilities, piers, docks, bulkheads, camp store, and other recreation facilities. The **new** facilities listed in the application for, such as the new bathroom facilities, swimming pool, pool house and the like, are not permitted. In the affidavits of Delores Myers and Jacqueline Myers, appended to the application, it was noted that construction of an inground swimming pool was started in the early 1970's, was never completed and was ultimately filled. Furthermore, the new bathroom facilities, swimming pool, pool house and other additional structures illustrated on the proposed site plan are not limited changes but are substantial and an impermissible expansion, enlargement and intensification of a nonconforming use.

If you or an aggrieved party believes this determination represents an error in the application of the 2013 UDO, an appeal may be filed with the Currituck County Board of Adjustment. The appeal must be filed with our office within 30 days of the date of this determination. A copy of the appeal application is available upon request or can be found on the Currituck County website http://co.currituck.nc.us/wp-content/uploads/2017/12/appeal.pdf .

Sincerely,

Laurie B. LoCicero

Laurie LoCicero, AICP
Planning and Community Development Director

Cc: Ike McRee, County Attorney
Donna Voliva, Planning and Community Development Assistant Director

Interpretation
Application

OFFICIAL USE ONLY:
Case Number: 19-02
Date Filed: 8/31/18
Gate Keeper: C. Cano
Amount Paid: $500.00

Contact Information

APPLICANT: 85' and Sunny, LLC
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Raleigh, NC 27601
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Request

Zoning District Map Boundaries

Property Address or Parcel Identification Number(s): 007900000010000, 07900000020000 007900000030000 & 00790000040000

Location of Questioned Boundary: N/A

Unspecified Use

Proposed Use: Campground

Narrative of Proposed Use (please submit additional information if desired):
Existing non-conforming use under Section 8.2.6 of the Currituck County UDO

Text Provision

Unified Development Ordinance Section: 8.2.6.A.(5)

Condition of Approval on Zoning or Use Permit:

Other:

Narrative: See attached Memorandum and associated documents/exhibits and additional Affidavits not referenced in Memorandum.

Appellant/Applicant 8/30/18 Date

STATE OF NORTH CAROLINA

CURRITUCK COUNTY

BEFORE THE
PLANNING DIRECTOR

IN RE HAMPTON
LODGE CAMPGROUND

MEMORANDUM IN SUPPORT
OF APPLICATION FOR
INTERPRETATION

NOW COMES **85' AND SUNNY, LLC**, a North Carolina limited liability company (the "Applicant"), and in support of its Application for Interpretation shows the Planning Director as follows:

I. ISSUES PRESENTED

a. What were the number of campsites that existed at Hampton Lodge Campground ("Hampton Lodge") on January 1, 2013, per Section 8.2.6B(1) of the Currituck County Unified Development Ordinance (the "UDO")? Applicant requests a determination that the number of campsites that existed at Hampton Lodge on January 1, 2013, were at least the number of campsites that are shown on the Applicant's Major Site Plan Application (the "Site Plan") submitted for review by Currituck County on June 29, 2018.

b. Are the modifications to Hampton Lodge shown on the Applicant's Site Plan permitted? Applicant requests a determination that the modifications shown on the Site Plan are permitted under Section 8.2.6A(5) of the UDO and do not increase the nonconformity of Hampton Lodge with respect to the number of campsites that existed on January 1, 2013.

II. STATEMENT OF FACTS

By deed dated June 26, 2018, the Applicant became the owner of the property known as Hampton Lodge, located at 1631 Waterlily Road in Coinjock, Currituck County, North Carolina 27923. Since at least 1974, Hampton Lodge has been in continuous use as a private campground for owners of recreational vehicles, campers, travel trailers, and motor homes (as those terms are used in the UDO; for purposes of this Application, the term "recreational vehicle" shall be include any of these terms) as well as by vacationers engaged in ordinary tent camping. See Affidavit of John E. Pappas (Exhibit 1). At its creation and to date, Hampton Lodge has not been required by Currituck County (the "County") or the UDO to present or record any kind of plat or survey establishing the number of sites or campsites for camping at Hampton Lodge. *Id.*

Hampton Lodge has always been available for use by patrons on a first come, first served basis, across its entire acreage. See Affidavit of John E. Pappas and Affidavit of Ann Slade (Exhibit 2). This includes use of Hampton Lodge by recreational vehicles for what is known in the industry as "dry camping" or "boondocking", which is recreational vehicle camping without the use of electricity or water and sewer hookups. *Id.* At peak times during the history of Hampton Lodge, the number of campsites in use has exceeded four hundred (400) in total. See Affidavit of Ann Slade. For many years, a group known as the Back Bay Amateur Astronomers have dry camped in the area of Hampton Lodge known as The Cedars for its semi-annual "East Coast Star Party"; the last such event was held

at Hampton Lodge on May 10 through May 13, 2018. See https://nightsky.jpl.nasa.gov/event-view.cfm?Event_ID=91265; see also Affidavit of S. Kent Blackwell (Exhibit 3). The Applicant's Site Plan shows 314 campsites for recreational vehicle use, and 78 sites for ordinary tent camping, consistent with the number of sites that have continuously existed over the history of Hampton Lodge, including on January 1, 2013. See Site Plan.

During its over 40 years of existence, Hampton Lodge has offered a variety of amenities to vacationers. See Affidavit of John E. Pappas and Affidavit of Ann Slade. These have included bath houses with restroom facilities, a swimming pool, a basketball court, a volleyball court, a baseball/softball diamond, shuffle board, and a recreation center with laundry and cooking facilities available for use. *Id.* There is also a camp store on site where vacationers can purchase toiletries, dry and canned goods, and other sundries. *Id.* The Applicant seeks to update and modernize the amenities available at Hampton Lodge, while not increasing the total number of campsites, as allowed by Section 8.2.6A(5) of the UDO. In particular, Applicant seeks to refurbish the existing recreation center, add a swimming pool and pool house, and construct two new restroom facilities on site for guest use. See Site Plan (Exhibits 4 & 5).

As of January 1, 2013, with the passage of Section 8.2.6 of the UDO, Hampton Lodge as a private campground became a non-conforming principal use in the County. Of relevance to this Application is Section 8.2.6A(5) which states, "Modifications to existing campgrounds are permitted provided the changes do not increase the nonconformity with respect to the number of campsites that existed on January 1, 2013." To the Applicant's knowledge, other than the current non-conforming principal use, there are no structures, site elements or uses at Hampton Lodge that are otherwise non-conforming.

III. ARGUMENT

A. Legal Principles

It is a well-established principle of land use and zoning law that uncertainties regarding the interpretation of a zoning ordinance should be resolved in favor of the free use of property. *Land v. Vill. of Wesley Chapel*, 206 N.C. App. 123, 131, 697 S.E.2d 458, 463 (2010) (Exhibit 6) (quoting *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (Exhibit 7)). Further, when construing zoning ordinances, statutory rules of construction are applied. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001) (Exhibit 8). When an ordinance sets forth both general and specific provisions, the specific provisions control. *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (Exhibit 9). Accordingly, "the specially treated situation is regarded as an exception to the general provision." *Id.*

Also, when construing an undefined term used in an ordinance, the term "should be assigned its plain and ordinary meaning" that is consistent with "the intent of the legislative body." *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994) (Exhibit 10). When assigning a meaning, "interpretations that create absurd or illogical results" should be avoided. *Id.*

B. Number of Campsites

The Applicant requests a determination that on January 1, 2013 Hampton Lodge had at least 314 available campsites for recreational vehicle use and 78 available campsites for ordinary tent camping. There is not, and has never been, a definitive site plan or drawing fixing the total number of available campsites (a term that is not defined in the UDO[1]) at Hampton Lodge on or before January 1, 2013. The total number requested in this Application and shown on the Site Plan are fewer than the total number of campsites that have been utilized at Hampton Lodge at peak times during the campground's history. If the full amount of cleared and available acreage of Hampton Lodge were to be utilized for camping, the Applicant estimates that total campsites would exceed 700[2].

Approval of the Applicant's request would not result in the establishment of new campsites, and would not increase the extent of the non-conformity under either Section 8.2.6A(5) or 8.2.6B(1) of the UDO. The Applicant is not requesting to clear any new areas of land to accommodate campsites, and the siting of the campsites shown on the Applicant's Site Plan will not cover any new land area that did not already exist at Hampton Lodge on January 1, 2013.

The case of *Stokes County v. Pack*, 91 N.C. App. 616, 372 S.E.2d (N.C. Ct. App. 1988) (Exhibit 11) is applicable and instructive. In *Stokes*, the landowner ran a salvage yard that was rendered non-conforming by a 1983 amendment to the Stokes County zoning ordinance. After the zoning ordinance was adopted, the landowner continued operation of his salvage yard, including adding new salvaged vehicles, which the County sought to block. The Court of Appeals ruled that the area of land that the landowner had cleared for use as a salvage yard (five acres out of a ten-acre tract) as of the adoption of the 1983 amendment could continue to be used for that purpose, and that the addition of new salvaged vehicles in excess of those in place when the amendment to the ordinance was adopted was not an enlargement or extension of the nonconformity.

Similar to the property in *Stokes*, Hampton Lodge was developed and cleared for use as a campground, and in particular for recreational vehicle camping and ordinary tent camping, prior to January 1, 2013. The number of campsites shown on the Applicant's Site Plan is in fact fewer than the Applicant's potential use of the full breadth and width of the campground property as supported by the holding in *Stokes*. For this reason, the Applicant's Site Plan and the campsites shown thereon are entirely reasonable and do not increase the number of campsites that existed on January 1, 2013. Therefore, the Applicant's Site Plan showing 314 recreational vehicle campsites and 78 ordinary tent camping campsites must be approved.

C. Modifications to Hampton Lodge

The Applicant seeks to add two new restroom facilities to the Hampton Lodge site, as well as a new swimming pool and pool house (See Exhibit 14 for photographic examples), along with miscellaneous improvements to the various on-site septic systems to accommodate these on-site modifications. The Applicant also proposes creating two dog park recreation areas, some playground improvements, and the demolition of the existing residence and barn at the southern end of the

[1] "Campsite" does not appear as a defined term in Section 10.5 of the UDO. Section 4.3.3.D of the UDO establishes "Public Campground" as a permitted accessory use in some instances, and establishes dimensional and setback standards for campsites in this context. There are no similar provisions regarding campsites appearing in Section 8.2.6 applicable to non-conforming private campgrounds.

[2] As shown on the Woodall Subdivision Plat, it appears that the original owners contemplated a campground subdivision that would have resulted in well over 400 internal recreational vehicle campsites. When combined with the waterfront and near waterfront campsites shown on the Site Plan, as well as the ordinary tent camping campsites, the total number of campsites would exceed 700 (See Exhibit 12).

property. As none of these modifications or changes increase the number of campsites at Hampton Lodge, they are all allowable under UDO § 8.2.6A(5) as permitted modifications or changes to an existing campground.

Section 8.2.6A(5) of the UDO states, "**Modifications** to existing campgrounds are permitted provided the **changes** do not increase the nonconformity with respect to number of campsites that existed on January 1, 2013." (emphasis supplied). The terms "modification" and "changes" are left undefined within the UDO, with the only limitation that the modifications or changes not increase the "number of campsites that existed on January 1, 2013". However, the UDO contains several provisions which offer guidance on how to construe the terms used. Section 10.1.1 instructs that terms should be construed in accordance with the purposes set forth in the code. Section 10.1.7 explains that "[w]ords and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases that may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." The interpretation guidance in the UDO is therefore generally consistent with the rules of construction established by North Carolina courts.

For Hampton Lodge, the intent of the County Commissioners is apparent from the plain language of Section 8.2.6A(5). Campgrounds are one of the few non-conforming uses of property that the Commissioners saw fit to provide special and specific exceptions to the general provisions of Section 8.2 of the UDO. If the Commissioners intended that no additional structures be added to a non-conforming private campground, the language of Section 8.2.3, which prohibits additional structures, would have sufficed and the language of Section 8.2.6A(5) would not have been necessary. Instead, Section 8.2.6A(5) was included in the UDO, and creates a special exception for private campgrounds outside of the general restrictions that appear earlier in Section 8.2.

Applicant's requested modifications are merely amenity enhancements for the patrons of Hampton Lodge and simply accessory structures to the legal, non-conforming principal use of Hampton Lodge as a private campground. If it were the Commissioners' intent to prevent the construction of precisely the type of accessory structures that Applicant seeks now, they could have easily done so with the blanket prohibition contained in Section 8.2.3. They did not, and it is a reasonable and sensible conclusion that Applicant's requests fall within the type of permitted modifications contemplated for existing campgrounds.

Since "modification" and "change" are not defined by the UDO, the "plain and ordinary meaning" of the terms should be ascertained. *Ayers*, 113 N.C. App. at 531, 439 S.E.2d at 201. *Black's Law Dictionary* defines "modification" as, "[a] change to something; an alteration or amendment." *Modification*, *Black's Law Dictionary* (10th ed. 2014). Merriam Webster defines "modification" as, "the making of a limited change in something." *Modification*, *Merriam-Webster* (2018) (emphasis added). "Change" is not defined by *Black's Law Dictionary*; however, Merriam-Webster defines "change" as "the act, process or result of changing" and notes that an "alteration," "transformation," or "substitution" are examples of a "change." *Change*, *Merriam-Webster* (2018).[3] Since Section 8.2.6A(5) sets forth explicit words of limitation ("provided the changes do not increase the nonconformity with respect to number of campsites"), "modification" and "change" must be

[3] Although Section 10.1.12 of the UDO points to *A Planner's Dictionary*, *A Glossary of Zoning, Development, and Planning Terms*, and *A Survey of Zoning Definitions*, published by the American Planning Association, *A Planner's Dictionary*, which is a "revised and updated edition" of *A Glossary of Zoning, Development, and Planning Terms* does not define either "modification" or "change." As of the date of this Application we have not been able to obtain a copy of *A Survey of Zoning Definitions*.

interpreted in the context in which they are used. Thus, the addition of restroom facilities and a pool and other recreational amenities is consistent with the "plain and ordinary meaning" of both "modification" and "change" as used in Section 8.2.6A(5).

IV. CONCLUSION

Based on the foregoing, as well as the contents of Applicant's Major Site Plan Application and the affidavits included with this Application, Applicant respectfully requests the Planner determine as follows:

1. On January 1, 2013, there were at least 392 campsites at Hampton Lodge, consisting of 314 recreational vehicle campsites and 78 ordinary tent campsites as allowed by Section 8.2.6B(1); and,

2. Subject to other development requirements of the County, the restroom facilities, swimming pool, and other miscellaneous construction and demolition activities shown in Applicant's Major Site Plan Application are allowable and permitted modifications/changes under Section 8.2.6A(5) of the UDO.

Respectfully submitted this the 3rd day of August, 2018.

WILLIAMS MULLEN

By: _____

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Exhibit List
Hampton Lodge Zoning Ordinance Interpretation Application

1. Affidavit of John E. Pappas
2. Affidavit of Ann Slade
3. Affidavit of S. Kent Blackwell
4. Overall Existing Site Plan by Quible & Associates, dated 6/28/18
5. Existing Conditions Site Plan by Quible & Associates, dated 6/28/18
6. *Land v. Vill. of Wesley Chapel*, 206 N.C. App. 123, 131, 697 S.E.2d 458, 463 (2010)
7. *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966)
8. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 303, 554 S.E.2d 634, 638 (2001)
9. *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969)
10. *Ayers v. Bd. of Adjustment for Town of Robersonville*, 113 N.C. App. 528, 531, 439 S.E.2d 199, 201 (1994)
11. *Stokes County v. Pack*, 91 N.C. App. 616, 372 S.E.2d (N.C. Ct. App. 1988)
12. Additional Site Sketch Maps of Woodall Plat
13. Additional Affidavits
14. Site Improvement Example Photos

NORTH CAROLINA
CURRITUCK COUNTY

AFFIDAVIT OF JOHN E. PAPPAS

The undersigned, JOHN E. PAPPAS, being first duly sworn, deposes and says:

1. I have personal knowledge of the facts set forth in this Affidavit and could testify competently to them. I am over the age of eighteen (18) years and competent to make this Affidavit.

2. I am a retired, licensed attorney in the Commonwealth of Virginia.

3. Since 1974 I have been either a managing partner or managing member of a successor limited liability company which held title to real property in Currituck County operated under the name of Hampton Lodge Campground. Said property was purchased in three transactions and identified by Currituck County property identification numbers: 0079-000-0001-0000, 0079-000-0002-0000, 0079-000-0003-0000 and 0079-000-0004-0000 and consist of four parcels containing 536.47 acres with a mailing address of 1631 Waterlily Road, Coinjock, North Carolina 27923.

4. At the time of my acquisitions, together with other partners, this real property was not subject to any zoning restrictions imposed by Currituck County.

5. Since our acquisition, the property has been continuously operated as a campground for the public in return for a fee for access to campsites and amenities.

6. The campsites have been occupied with tents, camper trailers, and recreational vehicles (RVs).

7. Campers have been free to utilize the entire premises for campsites on a first come, first serve basis.

8. There has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites.

9. Occupancy increases in the warm weather months of late spring through the early fall; however, the campground has been used by campers every operational day since our ownership.

10. There have never been platted, assigned lots.

11. The property has been continously listed with the Currituck County Tax Office as a "campground." Improvements made to the property include adding two restrooms to the recreation center, adding an entrance gate and improvements made to the unpaved roadways. "H" row was added with sixteen (16) pull-thru sites. The past assistant manager's on-site residential trailer has been removed and replaced with a double-wide

trailer. The former manager's residence was a part of the campground and was purchased from his estate upon his passing.

12. During the course of any given year, hundreds of campsites have been selected and used by for-pay customers throughout the entire acreage.

This the 22nd day of August, 2018.

JOHN E. PAPPAS

STATE OF VIRGINIA
CITY OF PORTSMOUTH

Sworn to and subscribed before me this 22nd day of August, 2018.

Pamela T. Beylor
Notary Public

SEAL

PAMELA T. BEYLOR
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
COMM. EXPIRES: JULY 31, 20
REGISTRATION NO. 217347

My commission expires: 7-31-2020

STATE OF NORTH CAROLINA
CURRITUCK COUNTY

AFFIDAVIT OF ANN SLADE

ANN SLADE, after being first duly sworn, does hereby depose and state as follows:

1. I have personal knowledge of the facts set forth in this Affidavit and could testify competently to them. I am over the age of eighteen (18) years and competent to make this Affidavit.

2. I reside at 972 Waterlily Road, Coinjock, North Carolina 27923.

3. I am employed at Hampton Lodge Campground ("Hampton Lodge") and have been continuously employed there since 1984. I began my employment part time, became full time Assistant Manager in 1986 and then full time Co-Manager with my husband, Jim Slade, beginning in 1998.

4. I lived on the site of Hampton Lodge for approximately 25 years and then moved about 7 or 8 years ago go a home on Waterlily Road approximately 3 miles from the campground.

5. The entire time I have been employed by Hampton Lodge, we have always used the entire campground as needed for tents, trailers and recreational vehicles. In addition to the sites with permanent water, sewer and electrical connections, campers would use the campsites in the cedar trees, known as The Cedars, as well as the open space in the middle of the campground. When campers used the open field and The Cedars for camping they would use electric generators for power or, for those sites in the open field near the camp store, campers would run electric cords from the camp store for power.

6. During the three years from 1995-1997, Hampton Lodge hosted a Bluegrass Festival twice a year. These festivals were among the busiest times for Hampton Lodge when approximately 400 sites were in use, including the numbered campsites, The Cedars and the open field.

7. There have been numerous recreational facilities on site or planned over the years. There was a metal swimming pool on site at one time. In addition, there have been continuously available a basketball court, volleyball, a baseball/softball diamond, shuffleboard, fishing and other activities. At one time there were plans for a miniature golf course and a more permanent swimming pool. A recreation center is on site and has been in place since before I began employment in 1984. Within the past year, the recreation center has been improved including a new exterior, new roof and new insulation.

8. There are currently two sets of bathhouses on site.

9. County water was extended to Hampton Lodge in the late 1980's. Before that, water was provided by on-site wells. We have not had any issues with water pressure from the County water line.

This the 24 day of August, 2018.

Ann Slade

STATE OF NORTH CAROLINA
County of Currituck

Sworn to and subscribed before me this 24th day of August, 2018.

Notary Public
My commission expires: 1-29-2022

SEAL

CHRISTINE A. BOYLE
NOTARY PUBLIC
Dare County
North Carolina
My Commission Expires January 29, 2022

STATE OF VIRGINIA
CITY OF VIRGINIA BEACH

AFFIDAVIT OF S. KENT BLACKWELL

1. I am S. Kent Blackwell residing at 1169 Old Kempsville Road, Virginia Beach, Virginia and all information given hereunder is based upon personal knowledge.

2. I am an amateur astronomer who has been studying celestial objects from observation points at Hampton Lodge Campground for approximately forty (40) years.

3. I lead groups consisting of forty to fifty people packing equipment for celestial viewing.

4. We arrive at the Campground on Thursday and stay until Sunday.

5. We park our trailers and set up our tents in the open field in an area populated with cedar trees. This particular area has never been serviced with electrical or water hookups. It is only for rough camping.

6. The entire campground has always (for 40+ years) been available to us to set up our trailers and tents; however, the density of the cedar trees in this area prevents any light intrusion which is needed for our observations and study.

7. There has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites.

8. From my initial visit, the property has been continuously operated as an open space campground with amenities including sites with electrical and water hookups available to the public in return for a fee.

This the 15 day of October, 2017.

S. KENT BLACKWELL

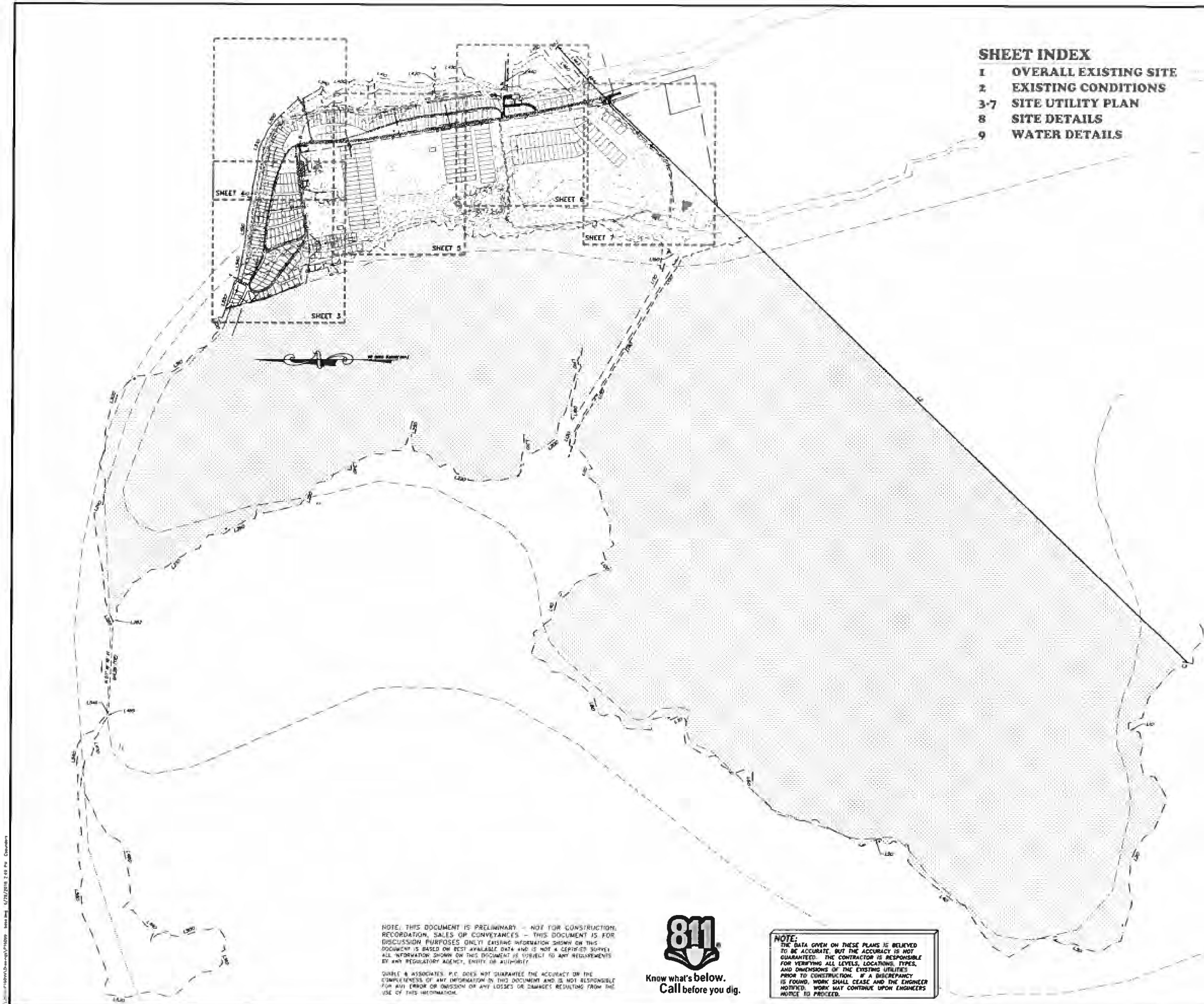
STATE OF VIRGINIA
CITY OF VIRGINIA BEACH

Sworn to and subscribed before me this 5th day of October, 2017.

Notary Public

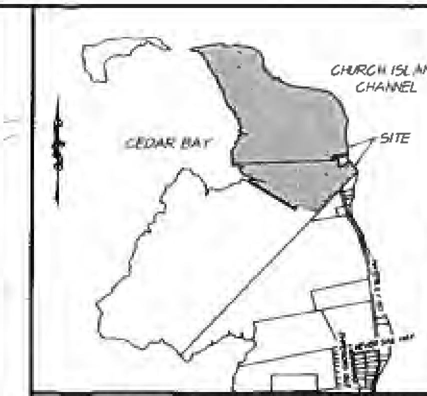
My commission expires: 7-31-2020

PAMELA T. BEYLOR
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
COMM. EXPIRES: JULY 31, 2020
REGISTRATION NO. 217347



SHEET INDEX

1 OVERALL EXISTING SITE
2 EXISTING CONDITIONS
3-7 SITE UTILITY PLAN
8 SITE DETAILS
9 WATER DETAILS



VICINITY MAP (POPLAR BRANCH)
N.T.S.

LEGEND

EXISTING ASPHALT PAVEMENT; EXISTING CONCRETE; EX. IRON ROD, EIR; EX. TELEPHONE PEDESTAL; EX. CABLE TV PED; EX. ELECTRICAL PEDESTAL; EX. SEWER CLEAN-OUT; EX. BASKETBALL GOAL; EX. TV DISH; EX. WATER SERVICE; EX. LIGHT POST; EX. UTILITY POLE; EX. OVERHEAD UTILITY LINE; EX. FENCE; EX. DITCH; EXISTING CAMPSITE; WETLANDS BOUNDARY; PROPOSED GRAVEL; PROPOSED CONCRETE; PROPOSED BEDDING MATERIAL; PROPOSED ASPHALT MILLINGS; PROPOSED GRAVEL CONSTRUCTION ENTRANCE/EXIT; PROPOSED SILT FENCE; PROPOSED LIMITS OF DISTURBANCE; EX. WELL; PROPOSED WELL

NOTES

1. OWNER/APPLICANT: RV AND SUNNY, LLC, 9919 STEPHEN DECATUR HIGHWAY, OCEAN CITY, MD 21842
2. ENGINEER: QUIBLE & ASSOCIATES, P.C., P.O. DRAWER 870, KITTY HAWK, NC, TEL: (252) 491-8147
3. PROPERTY INFO: 1631 WATERLILY ROAD, PID: 00790000000010000, PIN: 9898-98-4817, PARCEL AREA 137.66 ACRES (GIS)
   1568 WATERLILY ROAD, PID: 00790000000040000, PIN: 9908-14-8224
   1366 WATERLILY RD, PID: 00790000000030000, PIN: 9908-46-9314
   WATERLILY ROAD, PID: 00790000000020000, PIN: 9908-46-7463
4. PARCEL AREA = 20,510,844 SF / 470.86 AC (AREAS BY COORDINATE METHOD.)
5. RECORDED REFERENCE: DB 176, PG 841; DB 1130, PG 14.
6. ZONE: SINGLE FAMILY MAINLAND (SFM)
7. BOUNDARY INFORMATION BASED ON QUIBLE & ASSOCIATES FIELD SURVEY DATED 01/22/18 - 07/07/18 AND ALTA SURVEY DATED 6/27/18. EXISTING CAMPSITES SHOWN PER "HAMPTON LODGE FAMILY CAMPGROUND SECTION ONE, PART ONE" SUBDIVISION PLAT AS COMPILED BY JOHN E. SPRING AND ASSOCIATES SURVEYORS AND ENGINEERS (1972) AND "HAMPTON LODGE CAMPING RESORT" DATED 1/16/17 COMPILED BY MPL SITE DESIGN.
8. FLOOD ZONE: "AE", "SHADED X" AND "VE" WITHIN THE PROPERTY BOUNDARY (SUBJECT TO CHANGE BY F.E.M.A.) FIRM PANEL 3720990000J DATED 12/16/05. SHOWN PER COUNTY GIS.
9. THIS PLAN SUBJECT TO ANY FACTS, INCLUDING BUILDING SETBACK RESTRICTIONS, EASEMENTS, COVENANTS, ETC., THAT MAY BE REVEALED BY A FULL AND ACCURATE TITLE SEARCH.
10. THE CONTRACTOR SHALL TAKE ALL NECESSARY PRECAUTIONS TO MAINTAIN AND PROTECT ALL UNDERGROUND & ABOVE GROUND UTILITIES, EXISTING PAVEMENT SURFACES, EXISTING CULVERTS AND EXISTING PROPERTY MONUMENTS DURING CONSTRUCTION. DISTURBED OR REMOVED PROPERTY MONUMENTS SHALL BE REPLACED BY A NORTH CAROLINA LICENSED PROFESSIONAL LAND SURVEYOR.
11. ALL WORK SHALL BE PERFORMED IN ACCORDANCE WITH THESE DRAWINGS, APPLICABLE CURRITUCK COUNTY CODES AND ORDINANCES, AND NCDEQ DIVISION OF ENERGY, MINERAL AND LAND RESOURCES REGULATIONS.
12. THE LOCATION, DIMENSIONS, AND ELEVATION OF EXISTING UTILITIES SHOWN ARE BASED ON THE BEST AVAILABLE DATA. THE CONTRACTOR SHALL VERIFY ALL DATA IN THE FIELD PRIOR TO CONSTRUCTION TO HIS/HER OWN SATISFACTION. THE CONTRACTOR SHALL PERFORM ANY TEST PIT WORK OR PROVIDE LOCATION SERVICES AS REQUIRED TO AVOID CONFLICTS WITH EXISTING UTILITIES. CONTACT NORTH CAROLINA ONE-CALL AT TELEPHONE NO. 1-800-632-4949, 48 HOURS PRIOR TO PERFORMING ANY EXCAVATION TO HAVE UTILITIES MARKED.
13. REMOVE TREES, GRASSES, SHRUBS AND OTHER VEGETATION, IMPROVEMENTS OR OBSTRUCTIONS INTERFERING WITH INSTALLATION OF NEW CONSTRUCTION UNLESS NOTED OTHERWISE.

NOTE: THIS DOCUMENT IS PRELIMINARY - NOT FOR CONSTRUCTION, RECORDATION, SALES OR CONVEYANCES - THIS DOCUMENT IS FOR DISCUSSION PURPOSES ONLY! EXISTING INFORMATION SHOWN ON THIS DOCUMENT IS BASED ON BEST AVAILABLE DATA AND IS NOT A CERTIFIED SURVEY. ALL INFORMATION SHOWN ON THIS DOCUMENT IS SUBJECT TO ANY REQUIREMENTS BY ANY REGULATORY AGENCY, ENTITY OR AUTHORITY.

QUIBLE & ASSOCIATES, P.C. DOES NOT GUARANTEE THE ACCURACY OR THE COMPLETENESS OF ANY INFORMATION IN THIS DOCUMENT AND IS NOT RESPONSIBLE FOR ANY ERROR OR OMISSION OR ANY LOSSES OR DAMAGES RESULTING FROM THE USE OF THIS INFORMATION.

811 Know what's below. Call before you dig.

NOTE: THE DATA GIVEN ON THESE PLANS IS BELIEVED TO BE ACCURATE, BUT THE ACCURACY IS NOT GUARANTEED. THE CONTRACTOR IS RESPONSIBLE FOR VERIFYING ALL LEVELS, LOCATIONS, TYPES, AND DIMENSIONS OF THE EXISTING UTILITIES PRIOR TO CONSTRUCTION. IF A DISCREPANCY IS FOUND, WORK SHALL CEASE AND THE ENGINEER NOTIFIED. WORK MAY CONTINUE UPON ENGINEERS NOTICE TO PROCEED.

GRAPHIC SCALE
200 0 100 200 400
(IN FEET)
1 inch = 200 ft.

Quible & Associates, P.C. SINCE 1959
ENGINEERING • CONSULTING • PLANNING
ENVIRONMENTAL SCIENCES • SURVEYING
NC License#: C-0208

CERTIFICATION

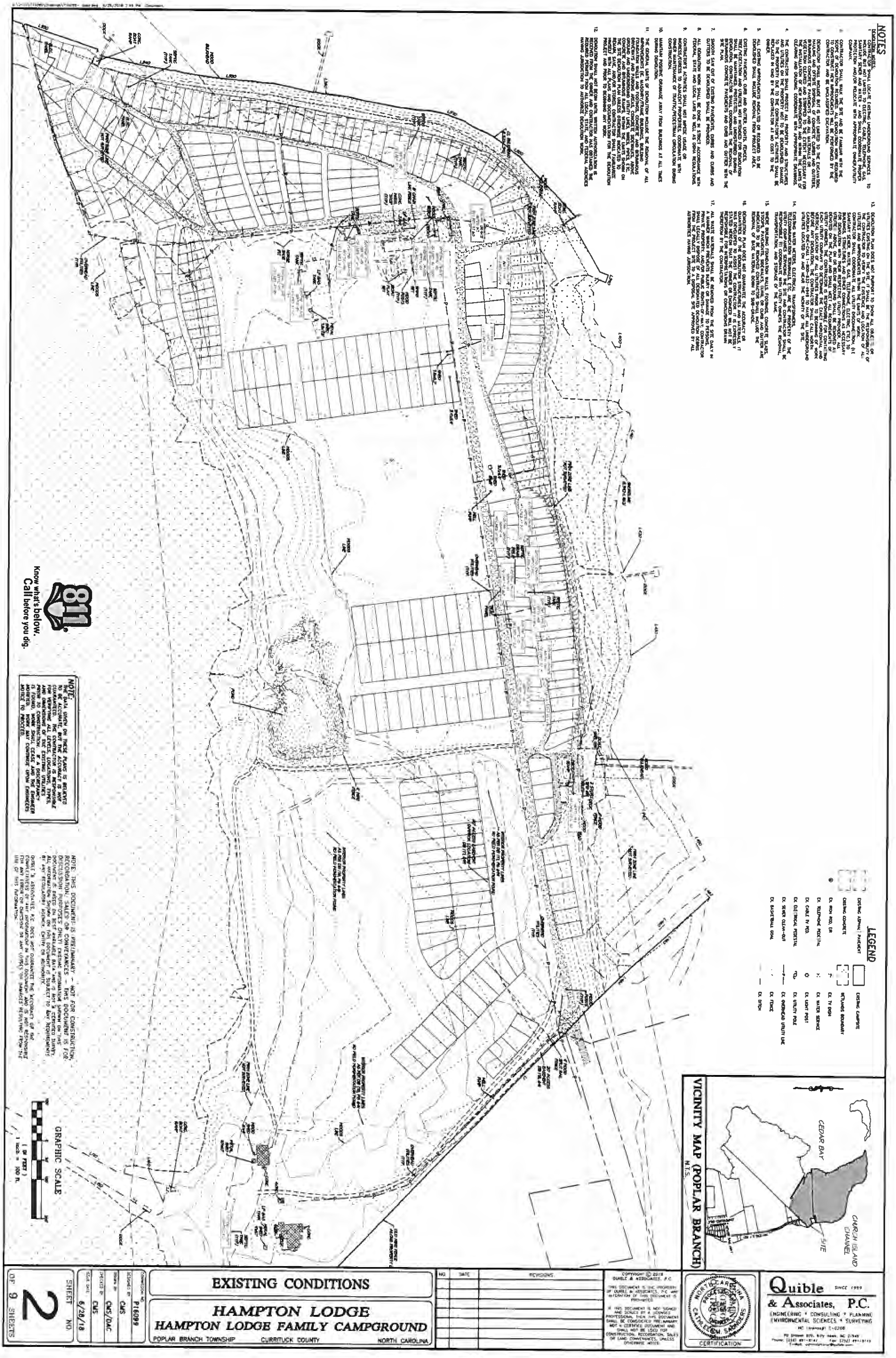
NO.	DATE	REVISIONS

OVERALL EXISTING SITE

HAMPTON LODGE
HAMPTON LODGE FAMILY CAMPGROUND
POPLAR BRANCH TOWNSHIP — CURRITUCK COUNTY — NORTH CAROLINA

COMMISSION NO.	P16099
DESIGNED BY	CMS
DRAWN BY	CMS/DAC
CHECKED BY	CMS
ISSUE DATE	6/28/18

SHEET NO. 1 OF 9 SHEETS



5

Attachment: Attachment_2 re-scan Williams Mullen Submittal (BOA 19-02 Hampton Lodge Campground)

3.A.c

KeyCite Yellow Flag - Negative Treatment
Distinguished by Byrd v. Franklin County, N.C.App., November 18, 2014

206 N.C.App. 123
Court of Appeals of North Carolina.

Michael R. LAND, Petitioner,
v.
The VILLAGE OF WESLEY CHAPEL and the Board of Adjustment of the Village of Wesley Chapel, Respondents.

No. COA09–1465.
|
Aug. 3, 2010.

Synopsis

Background: Landowner filed petition for writ of certiorari after village board of adjustment entered order upholding zoning administrator's cease-and-desist order which prohibited landowner from using a shooting range on his private property. The Superior Court, Union County, W. Erwin Spainhour, J., reversed, and village appealed.

Holdings: The Court of Appeals, Robert N. Hunter, Jr., J., held that:

[1] landowner was not required to obtain a special use permit in absence of clear zoning ordinance regulating shooting range, and

[2] village could not maintain contention that alterations to shooting range constituted a "material alteration" absent replacement cost evidence.

Affirmed.

Beasley, J., concurred separately with opinion.

West Headnotes (7)

[1] **Certiorari**
Appeal or Other Proceedings for Review

When reviewing an appeal from a petition for writ of certiorari in superior court, the scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review, and, if so, (2) determine whether the superior court correctly applied the standard. West's N.C.G.S.A. § 7A–27(b).

1 Cases that cite this headnote

[2] **Administrative Law and Procedure**
Arbitrary, unreasonable or capricious action; illegality

Administrative Law and Procedure
Determination supported by evidence in general

Administrative Law and Procedure
Law questions in general

If a petitioner appeals an administrative decision on the basis of an error of law, the superior court applies de novo review; if the petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test.

1 Cases that cite this headnote

[3] **Administrative Law and Procedure**
Scope of Review in General

Administrative Law and Procedure
Trial De Novo

The superior court may properly employ both de novo review and the whole record test in a specific case; however, the standards are to be applied separately to discrete issues, and the reviewing superior court must identify which standards it applied to which issues.

1 Cases that cite this headnote

[4] **Zoning and Planning**
Decisions of boards or officers in general

Zoning and Planning
Decisions of boards or officers in general

Zoning and Planning
Substantial evidence in general

When examining zoning decisions of a municipality, the court should determine: (1) whether the Board committed any errors in law, (2) whether the Board followed the procedures specified by law in both statute and ordinance, (3) whether the appropriate due process rights of the petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents, (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious.

Cases that cite this headnote

[5] **Administrative Law and Procedure**
Trial De Novo

Under a de novo review, the superior court considers the matter anew and freely substitutes its own judgment for the agency's judgment.

Cases that cite this headnote

[6] **Zoning and Planning**
Entertainment and recreation;theaters and clubs

Landowner was not required to obtain a special use permit to operate shooting range in absence of clear zoning ordinance regulating shooting ranges; zoning ordinance presumed that all land uses not specifically listed or capable of being categorized were "prohibited" and provided that listed uses were to be interpreted liberally to include other uses with similar impacts to the listed uses, but did not place the public on notice as how a particular use was to be classified absent an explicit mention.

2 Cases that cite this headnote

[7] **Zoning and Planning**
Particular cases involving continuance or change of use

Village could not maintain contention that landowner's alterations to nonconforming shooting range constituted a "material alteration" to the property under nonconforming use ordinance, which defined such an alteration as a change "of more that fifty percent (50%) of the replacement cost at the time of said alteration," absent replacement cost evidence which included the value associated with the cost of the land at the time of the replacement.

Cases that cite this headnote

**459 Appeal by respondents from order entered 30 July 2009 by Judge W. Erwin Spainhour in Union County Superior Court. Heard in the Court of Appeals 12 April 2010.

Attorneys and Law Firms

The Helms Law Firm, PLLC, Monroe, by W. Tate Helms, for petitioner appellee.

Hamilton Moon Stephens Steele & Martin, PLLC, Charlotte, by Keith J. Merritt and Rebecca K. Cheney, for the Village of Wesley Chapel respondent appellants.

Shumaker, Loop & Kendrick, LLP, Charlotte, by William H. Sturges, for The Board of Adjustment of the Village of Wesley Chapel respondent appellants.

Opinion

HUNTER, JR., ROBERT N., Judge.

*124 The Village of Wesley Chapel and its Board of Adjustment (collectively the "Village"), appeal an order reversing the Village's decision to prohibit Dr. Michael R. Land ("Dr. Land") from using a shooting range on his private property. The Village contends that Dr. Land's use of the shooting range has been and continues to be unlawful because the shooting range was unauthorized by zoning laws existent at the time the shooting range was established, and because "material alterations" have been made to the range thereafter in violation of the Village's current Land Use Ordinance.

The trial court concluded that the Union County Land Use Ordinance of 1988 (the "1988 Ordinance"), the Land Use Ordinance in place at the time Dr. Land bought the land in issue, did not bar shooting ranges; and assuming *arguendo* that there was a violation of the 1988 Ordinance, the Village was barred by *laches* from enforcing the 1988 Ordinance. The trial court also concluded that Dr. Land did not make any material alterations to the shooting range.

The Village appeals the trial court's order and argues that the trial court erred in concluding that: (1) Dr. Land's use of the property was in compliance with the 1988 Ordinance; (2) Dr. Land did not materially alter the shooting range in 2007 and 2008; and (3) the doctrine of *laches* bars the Village from enforcing its current Land Use Ordinance against Dr. Land. Dr. Land also cross-assigns as error the trial court's failure to conclude that the Sport Shooting Range Protection Act of 1997, N.C. Gen.Stat. § 14–409.45, *et seq.*, protects his use of the range.

We agree with the trial court that Dr. Land's use of the property did not violate the 1988 Ordinance and that Dr. Land did not materially alter the shooting range under the Village's Land Use Ordinance. Since our decision on these issues disposes of this appeal ***125** , we accordingly decline to address the application of the doctrine of *laches* and Dr. Land's cross-assignment of error regarding the Sport Shooting Range Protection Act of 1997.

**460 I. FACTUAL BACKGROUND

In July 1991, Dr. Land purchased 5.68 acres of unincorporated land ("the property") in Union County. His acquisition cost was over $80,000. Dr. Land is the father of four sons, and the family's hobbies include shooting, hunting, fishing, and riding four-wheeled ATVs. Shortly after the purchase, Dr. Land established a shooting range on the back two-thirds of the property with 144 railroad ties and fill dirt at a cost of $2,000. Between 1996 and 2003, Dr. Land and his family lived on the property.

Dr. Land collects guns, including some semi-automatic and fully automatic guns, which he shoots on the range. The property is fenced and posted with no trespassing signs. Dr. Land personally supervises firing on the range and limits its use to Dr. Land's family and guests. While about ninety percent of the shooting on the range is exercised with a .22 caliber rifle, Dr. Land does sometimes shoot the semi-automatic and fully automatic weapons at the range. These weapons can fire up to 900 rounds per minute.

In 1999, in response to a new residential development being built adjacent to the property, Dr. Land spent $1,000 to rotate the range and the line of fire approximately 110 degrees. Between 2007 and 2008, Dr. Land spent $15,000 in improvements to heighten the backstop by five feet, deepen the backstop by 20 feet, and widen the backstop by 40 feet. These improvements required 1,200 tons of dirt. [1]

Wesley Chapel incorporated on 15 July 1998, and Dr. Land voluntarily annexed the property into the Village on 23 June 1999. The Village enacted its first Land Use Ordinance on 22 August 2000. Dr. Land continued to use the land for a shooting range after the Village's Land Use Ordinance was enacted.

II. PROCEDURAL HISTORY

On 9 January 2007, Mr. Krieg, then Wesley Chapel's Planning and Zoning Administrator, wrote a letter to Dr. Land informing him that the Village's Land Use Ordinance did not permit gun ranges in residential districts. On 11 January 2007, Dr. Land replied by letter claiming ***126** that the Sports Shooting Range Protection Act of 1997 shielded his use of the property from municipal regulation. The Village zoning authorities took no further action after Dr. Land's first letter.

On 10 September 2008, Wesley Chapel's new Zoning Administrator, Mr. Langen, issued a cease-and-desist order prohibiting Dr. Land from using the property as a target shooting range. Mr. Langen claimed that the shooting range was not an allowable use "as of right" in any zoning district without a conditional use permit.

In his letter, Mr. Langen stated that the property was subject to the 1988 Ordinance when the property was purchased and the range was established. Under Mr. Langen's interpretation, the 1988 Ordinance was a "unified" land use ordinance, and Mr. Langen contended that Dr. Land's use of the land as a shooting range most closely fit with the category "privately-owned outdoor

recreational facility." In order to operate this type of "facility" under the 1988 Ordinance, Dr. Land would have been required to obtain a special use permit. Since no special use permit was on record, Mr. Langen claimed that the target range was not permitted under the 1988 Ordinance, and therefore the range did not qualify as a prior non-conforming use of the property which could be grandfathered in under the provisions of the subsequent Village Land Use Ordinance. [2]

**461 The lack of a special use permit aside, Mr. Langen's letter also asserted that even if the property had been considered a "non-conforming use" and was grandfathered in under the 1988 Ordinance, the range and property had undergone a "material alteration" in 2007 and 2008. The letter quotes Section 7.3.2 of the Village Land Use Ordinance, which addresses nonconforming uses of land and states:

> If said land use is ... materially altered, the land use shall be considered discontinued and shall not be reestablished unless the use is in conformance with the regulations of the district in which *127 it is located. Material alteration for the purpose of this subsection is defined as change to size, contour, etc. to an extent of more than fifty percent (50%) of the replacement cost at the time of said alteration.

Based on this language, Mr. Langen concluded:

> Therefore, as you have made improvements to the shooting range, including removal of wooden targets and installation of earthern berms, the improvements to the use would be in violation of any non-conforming use status. Specifically, the wooden targets were of very poor quality with negligible replacement value and installation of earthen berms is considered to be a material alteration to an extent of more than fifty percent of the replacement cost of the wooden targets. Therefore, any potential nonconforming land use status of the shooting range would have to be considered to be discontinued and the use in violation of the Zoning Ordinance.

Dr. Land appealed the Administrator's decision to the Board of Adjustment on 25 September 2008, and the Board held hearings on 30 October 2008 and 12 November 2008. On 12 December 2008, the Board entered an order upholding Mr. Langen's decision.

Dr. Land filed a petition for writ of certiorari of the Board's decision to the superior court on 11 January 2009, and on 8 June 2009, the superior court reversed the decision of the Board of Adjustment. In its order, the superior court held that: (1) no special use permit was required under the 1988 Ordinance; (2) *laches* barred the Village's enforcement actions; and (3) there was no material alteration of the use of the land by Dr. Land. The Village thereafter filed a timely notice of appeal.

III. JURISDICTION AND STANDARD OF REVIEW

[1] Appellate review in this case is proper under N.C. Gen.Stat. § 7A–27(b) (2009), because the order of the superior court is a final order disposing of all issues in the trial court. "When reviewing an appeal from a petition for writ of certiorari in superior court, this Court's scope of review is two-fold: (1) examine whether the superior court applied the appropriate standard of review; and, if so, (2) determine whether the superior court correctly applied the standard." *Cole v. Faulkner,* 155 N.C.App. 592, 596, 573 S.E.2d 614, 617 (2002).

[2] [3] If a petitioner appeals an administrative decision "on the basis of an error of law, the [superior] court applies *de novo* review; if the *128 petitioner alleges the decision was arbitrary and capricious, or challenges the sufficiency of the evidence, the trial court applies the whole record test." *Blue Ridge Co., L.L.C. v. Town of Pineville,* 188 N.C.App. 466, 469, 655 S.E.2d 843, 845–46, *disc. review denied,* 362 N.C. 679, 669 S.E.2d 742 (2008). The superior court " 'may properly employ both standards of review in a specific case[,]' [h]owever, 'the standards are to be applied separately to discrete issues,' and the reviewing superior court must identify which standard(s) it applied to which issues[.]" *Mann Media, Inc. v. Randolph Cty. Planning Bd.,* 356 N.C. 1, 15, 565 S.E.2d 9, 18 (2002) (citations omitted).

IV. ANALYSIS

A. Was the proper standard of review applied by the superior court?

[4] In his order, Judge Spainhour cited the following language from *CG & T Corp. v. Bd. of Adjustment of Wilmington,* as the proper scope of review for superior courts in examining zoning decisions of a municipality:

> ****462** The superior court should determine the following: (1) whether the Board committed any errors in law; (2) whether the Board followed the procedures specified by law in both statute and ordinance; (3) whether the appropriate due process rights of the petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents; (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious.

105 N.C.App. 32, 36, 411 S.E.2d 655, 658 (1992).

[5] In specifying the standard of review for errors of law, Judge Spainhour properly stated and applied the *de novo* standard of review as follows: " 'Under a *de novo* review, the superior court "consider[s] the matter anew [ ] and freely substitut[es] its own judgment for the agency's judgment." ' " *Welter v. Rowan Cty. Bd. of Comm'rs,* 160 N.C.App. 358, 361, 585 S.E.2d 472, 475–76 (2003).

Given that the superior court identified the correct standard of review, we now examine the record to determine whether this standard was correctly applied.

*129 B. Was Dr. Land in compliance with the 1988 Union County Zoning Ordinance?

[6] The Village argues that the trial court erred in ruling that Dr. Land was in compliance with the 1988 Ordinance, because the 1988 Ordinance regulated "every conceivable use of property ... whether or not the use [wa]s specifically mentioned." The Village contends that since every use of real property was regulated by the county when Dr. Land bought the property in 1991, then Dr. Land was required to obtain a special use permit in order to establish his shooting range. We disagree.

The Village's argument rests on section 149 of the 1988 Ordinance:

> (a) The presumption established by this ordinance is that all legitimate uses of land are permissible within at least one zoning district with the county. Therefore, because the list of permissible uses set forth in Section 146 (Table of Permissible Uses) cannot be all-inclusive, those uses that are listed shall be interpreted liberally to include other uses that have similar impacts to the listed uses.
>
> (b) All uses that are not listed in Section 146 and that do not have impacts that are similar to those of the listed uses are prohibited. Nor shall Section 146 be interpreted to allow a use in one zoning district when the use in question is more closely related to another specified use that is permissible only in other zoning districts.

Both parties agree that section 146 does not mention shooting ranges. Thus, because subsection (a) requires that every use of land fit into a category listed in section 146, the Village contends that the most similar use, under the liberal application urged by subsection (a), is "privately-owned outdoor recreational facility." This particular category in section 146 necessitates a special use permit in residential zoning districts, and because Dr. Land never acquired a special use permit, the Village urges this Court to hold that Dr. Land was not compliant with the 1988 Ordinance. If Dr. Land was not compliant with the 1988 Ordinance, then the shooting range cannot be sanctioned by the subsequent Land Use Ordinance enacted by the Village.

The critical part of section 149 of the 1988 Ordinance is the presumption that all land uses not specifically listed or capable of being categorized are "prohibited." The superior court specifically rejected this presumption:

*130 The 1988 County Ordinance does not expressly prohibit sports shooting ranges. In fact, the 1988 Ordinance does not mention shooting ranges or firing ranges at all. Respondents urge the construction that all uses not expressly permitted are impliedly prohibited. However, such a construction would prohibit any number of uses that have not been specifically enumerated in the 1988 Ordinance. As such, the Court expressly rejects this over-broad interpretation of the 1988 Ordinance. Therefore, Petitioner's use of the subject property as a shooting range is a prior nonconforming use which is "grandfathered" under the relevant ordinances.

**463 * Respondents would have the Court classify Petitioner's sports shooting range as a "Privately owned outdoor recreational facility such as a golf and country club, etc. (but not including campgrounds), not constructed pursuant to a permit authorizing the construction for some residential development" under § 6.210 of the 1988 Ordinance. However, the Court concludes that Petitioner's sports shooting range, which has never been open to the public and which was established appurtenant to a preexisting residential structure, is not properly classified under § 6.210.

* It was not until the passage of the Union County Land Use Ordinance of 2001 that Union County first regulated the use of an "outdoor firing range." ...

* The terms of the 1988 County Ordinance are not ambiguous. However, even if they were, the Court would be compelled to interpret these ambiguities in Petitioner's favor. Unless an ordinance clearly prohibits a particular land use, that land use is allowed. This includes shooting ranges. This mandate for strict construction in favor of the landowner arises from a long line of cases, including *Yancey v. Heafner,* 268 N.C. 263, 150 S.E.2d 440 (1966) ("well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property"); *Sanford v. Dandy Signs, Inc.*, 62 N.C.App. 568, 303 S.E.2d 228 (1983) ("[e]verything not clearly within the scope of the language used shall be excluded from the operation of the ordinances, taking the words in their natural and ordinary meaning"); and *Capricorn Equity Corp. v. Chapel Hill,* 334 N.C. 132, 431 S.E.2d 183 (1993) ("restrictions on usage [must be] construed in favor of the landowner").

*131 Like the trial court, we similarly reject the Village's interpretation of the 1988 Ordinance and the presumption established by section 149.

The text of the 1988 Ordinance clearly incorporates the following philosophy: everything is proscribed except that which is allowed. The problem with this philosophy, however, is that it fails to clearly place the public on notice as how a particular use is to be classified absent an explicit mention in the Land Use Ordinance. While the presumptive language may be useful in applying an ordinance with a comprehensive schedule of categories, it is of little value when no similar use is listed in any category.

In *Yancey v. Heafner,* the legislative philosophy apparent in the 1988 Ordinance was clearly rejected:

> "Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * **Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms.** It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property."

268 N.C. at 266, 150 S.E.2d at 443 (quoting Yokley, *Zoning Law and Practice,* Second Edition (1962 supplement), Vol. 1, Section 184) (emphasis added).

The common law principle of the "free use of property" is clearly the antithesis of subsection (b) of section 149 of the 1988 Ordinance—the theory now advanced by the Village —and has been upheld in numerous cases other than those cited by the superior court. *See, e.g., In re Application*

of Rea Construction Co., 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) ("A zoning ordinance, however, is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use."); *In re Couch*, 258 N.C. 345, 346, 128 S.E.2d 409, 411 (1962) (" 'Zoning ordinances are in derogation of the right of private ****464** property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner.' ") (quoting ***132** *In re Appeal of W. P. Rose Builders' Supply Co.*, 202 N.C. 496, 163 S.E. 462 (1932)); *Coleman v. Town of Hillsborough*, 173 N.C.App. 560, 564, 619 S.E.2d 555, 559 (2005) ("Zoning regulation is in derogation of common law property rights and therefore must be strictly construed to limit such derogation to that intended by the regulation.").

In its brief, the Village does not address the trial court's cited authority or attempt to distinguish this body of North Carolina case law. Were we to follow the logic of the 1988 Ordinance, a citizen seeking to use his land for otherwise legal purposes would have to speculate as to which governmentally permitted use was "similar to" a nebulous category in the county's Land Use Ordinance and then conform his conduct thereto. This approach leaves the landowner exposed to the arbitrary and capricious whims of zoning authorities who may disagree with a landowner's decision concerning "similarity of use." The law of this State does not favor this approach. Accordingly, we hold that the superior court correctly applied the *de novo* standard of review to reach its conclusion that, absent a clear Land Use Ordinance regulating shooting ranges, Dr. Land was not required to obtain a special use permit. Since the property was therefore being used for a prior non-conforming use, the superior court was also correct in concluding that the property was grandfathered under the Village's Land Use Ordinance.

The Village also argues that the Board of Adjustment properly concluded that Dr. Land's shooting range was a "privately owned outdoor recreational facility," and in support, the Village cites *Willow Wood Rifle & Pistol Club, Inc. v. Town of Carmel Zoning Bd. Of Appeals*, 115 A.D.2d 742, 496 N.Y.S.2d 548 (N.Y.App.Div.2d Dep't 1985) (shooting range within zoning category named "annual membership clubs, including country, golf, swim and tennis clubs") and *Evergreen State Builders, Inc. v. Pierce County*, 9 Wash.App. 973, 516 P.2d 775 (1973) (firing range properly classified as "privately operated recreational center" within the zoning ordinance). In light of the above-cited precedential authority from North Carolina, we can give no weight to these out-of-state authorities. Such theories, even if employed elsewhere, do not comport with statutory construction rules with which courts in this State must construe ambiguities in zoning ordinances. This assignment of error is overruled.

C. Did Dr. Land "materially alter" his property, making it subject to the Village's Land Use Ordinance?

[7] The Village also contends that Dr. Land's alterations to the shooting range between 2007 and 2008 constituted a material alteration to ***133** the property. The Village claims that since the property underwent a material alteration, the shooting range would have lost its grandfather status as a legal non-conforming use of the property under the 1988 Ordinance and cannot be allowed under the Village's Land Use Ordinance. We disagree.

The Village's Land Use Ordinance provides in part:

> **Section 7.3** ***Nonconforming Uses of Land***
>
> Nonconforming uses of land, which may include structures incidental and accessory to the use of the land, such as but not limited to, storage yards for various materials, or areas used for recreational purposes, shall not be used for other nonconforming purposes, once the nonconforming use has been abandoned.
>
> **7.3.1** No such nonconforming use of land shall be enlarged, increased or extended to occupy a greater area of land than was occupied at the effective date of initial adoption of this Ordinance.
>
> **7.3.2** If said land use is abandoned for 180 days or more, or materially altered, the land use shall be considered discontinued and shall not be reestablished unless the use is in conformance with the regulations of the district in which it is located. *Material alteration for the purpose of this subsection is defined as change to size, contour, etc. to an* ****465** *extent of more than fifty percent (50%) of the replacement cost at the time of said alteration.*

> 7.3.3 A nonconforming use of land shall not be changed to another nonconforming use of land.

(Emphasis added.)

In examining this portion of the Village's Land Use Ordinance to determine whether Dr. Land had made a "material alteration" to the "land use," the superior court stated:

> In his cease-and-desist order of September 2008, the Zoning Administrator maintains that Petitioner's improvements to the property constitute a material alteration to the use—that is, a change to an extent of more than fifty percent of the replacement cost at the time of the alteration. The uncontroverted evidence in the record reveals otherwise, Petitioner spent approximately *134 $2,000 in 1991; $1,000 in 1998; and $15,000 in 2008. In 1991, the land value alone of the subject property (excluding the house) was over $80,000 (in 1991 dollars). In 2008, the land value alone was $219,000 (in 2008 dollars). Two thirds of the property is used for the sports shooting range, which includes the firing area, the target area/backstop, and the buffer zone around the firing area.
>
> Two thirds of $80,000 is $53,333. Two thirds of $219,000 is $146,000. These are the land values attributable to the shooting range in 1991 and 2008, respectively. As evidenced by these figures, Petitioner's expenditures have in no way approached the fifty percent level necessary to trigger the "material alteration" threshold. In addition, the frequency and duration of Petitioner's use of the subject property as a shooting range have not increased. Nor has the net size of the shooting range been expanded.

(Citations omitted.)

We agree with the superior court that Dr. Land did not materially alter his land. Mr. Langen, in his letter, offered no competent evidence of "replacement costs at the time of said alteration" as section 7.3.2 of the Village Land Use Ordinance requires. Village of Wesley Chapel Zoning Ordinance § 7.3.2 (Sept. 9, 2002). Instead, the record shows that Mr. Langen made the following general averments:

> Therefore, as you have made improvements to the shooting range, including removal of wooden targets and installation of earthen berms, the improvements to the use would be in violation of any non-conforming use status. Specifically, the wooden targets were of very poor quality with negligible replacement value and installation of earthen berms is considered to be a material alteration to an extent of more that fifty percent of the replacement cost of the wooden targets.

During the hearing before the Board of Adjustment, the Village made this same assertion that Dr. Land had made a "material alteration" to his use of the property. However, in order to meet the percentage threshold under the Land Use Ordinance, the Village ignored the value of the real property constituting the shooting range to make its computation.

Mr. Langen's letter and the Village's corollary arguments before the Board of Adjustment fail to provide any competent evidence of a *135 violation of the Village's Land Use Ordinance as written, which was the Village's burden of proof. *City of Winston–Salem v. Hoots Concrete Co.*, 47 N.C.App. 405, 414, 267 S.E.2d 569, 575 (1980) ("The city had the burden of proving the existence of an operation in violation of its zoning ordinance."). In order to make a proper percentage calculation under section 7.3.2 of the Village's Land Use Ordinance, competent evidence would need to be provided of: (1) the costs which were expended by Dr. Land, which would provide the numerator for a percentage equation; and (2) the costs of replacing the private shooting range at the time of the alterations in 2007 and 2008, which would provide the denominator for the equation.

As to the denominator, the Village's Land Use Ordinance does not define "replacement cost"; however, the term's general meaning is: "The cost of a substitute asset that is equivalent to an asset currently held." *Black's Law Dictionary* 372 (8th ed. 2004). Applying this definition to section 7.3.2, the replacement cost of the shooting range must **466 include not only the attachments to the land, but also the properly measured value of a substitute parcel of real property to which a new range could be attached. As the superior court points out, the calculations presented by the Village ignore in its computation of replacement costs any value associated with the cost of the

land at the time of the replacement. Therefore, lacking any competent evidence of the denominator, which was the Village's burden, the replacement cost calculation cannot be made.

Given that no competent evidence shows that Dr. Land made any material alterations to the shooting range as defined specifically by the Village's Land Use Ordinance, we affirm the superior court in its conclusion that there was no material alteration of Dr. Land's property in 2007 and 2008. This assignment of error is overruled.

III. CONCLUSION

Because Dr. Land was in compliance with the 1998 Ordinance, his use of the property was grandfathered under the Village's Land Use Ordinance. Since the Village has failed to carry its burden in showing that a "material alteration" has been made to Dr. Land's use of the property as defined by the Village's current Land Use Ordinance, Dr. Land's continued use of the shooting range is lawful. Based on our disposition of these issues in this case, we need not address the Village's remaining assignments of error or Dr. Land's remaining cross-assignment of error. Accordingly, the order of the superior court is

*136 Affirmed.

Chief Judge MARTIN concurs.

Judge BEASLEY concurs with separate opinion.

BEASLEY, Judge, concurring with separate opinion.
I write separately only to point out that the costs of replacing the private shooting range (i.e. the denominator in the "material alteration" equation laid out by the majority) must include not only the land value at the time of the replacement but also the cost of replacing the *use* of the land. In concluding that Dr. Land's changes to his shooting range did not constitute a material alteration under § 7.3.2 of the Village Land Use Ordinance, the trial court compared the cost of the improvements to only the value of the land area used for the range. The trial court, however, was unable to perform the calculation contemplated by the ordinance because it did not have at its disposal any numbers associated with the replacement cost of the land use.

The Village contended that Dr. Land's firing range lost its grandfathered status when in November 2007 through March 2008 he spent approximately $15,000 on improvements thereto. As support for its determination, the Village argued that Dr. Land had spent $3,000 constructing the range—roughly $2,000 in 1991 when it was first erected and $1,000 to rotate the direction of fire and replace some railroad ties in 1999—and that the $15,000 spent after the ordinance was adopted equaled 500% of the replacement cost. The $3,000 figure, however, represents the cost of the initial improvement as of 1999, not the replacement cost of the use "at the time of said alteration" between 2007 and 2008. Thus, not only did the Village ignore in its computation of replacement costs any value associated with the land but also failed to present any evidence of the replacement cost of the use at the relevant time under the ordinance. As such, I would qualify the majority's conclusion—that the Village failed to meet its burden of showing material alteration because it ignored the land value—by emphasizing that the Village Land Use Ordinance also requires consideration of the land use and that the Village likewise neglected to present competent evidence of the cost of replacing said use at the time of the alteration at issue.

All Citations

206 N.C.App. 123, 697 S.E.2d 458

Footnotes

1 At the Board of Adjustment hearing, the parties stipulated that Dr. Land's safe use of property as a firing range was not an issue.

2 Village Ordinance Section 7.1 reads as follows:

> Nonconforming uses, which are uses of structure or of land existing at the Effective Date of initial adoption of this Ordinance, which do not comply with the provisions of this Ordinance, are declared by this Ordinance to be incompatible with permitted uses in the various districts. The intent of this Article is to permit the continued use of a structure, or portion thereof, or of the use of land legally existing prior to the Effective Date of this Ordinance, until such

uses are removed, but not to encourage their survival. Such nonconforming uses shall not be expanded, extended or changed in any manner except as specifically provided for in this Article. Creation of additional nonconforming uses are not to be encouraged nor shall be permitted.

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3.A.c

KeyCite Yellow Flag - Negative Treatment
Distinguished by Nash-Rocky Mount Bd. of Educ. v. Rocky Mount Bd. of Adjustment, N.C.App., April 5, 2005

268 N.C. 263
Supreme Court of North Carolina.

W. Harrelson YANCEY, John C. Bodansky, Roy E. Craft, Maxie Brunnemer, Betty F. Herman, Heber K. Brunnemer, Bertha P. Parker, Leslie O. McCollum, Otis L. Peach, Charles P. Lytton and John R. Falls, Petitioners,
v.
Ronald M. HEAFNER, Chief Building Inspector, and W. R. Huskins, W. D. LawsonIII, Dan Craig, C. P. Falls and C. P. Nanney, Members of the Board ofAdjustment for the City of Gastonia, Respondents.

No. 204.
|
Oct. 12, 1966.

Synopsis

Petition for review of action of board of adjustment which had affirmed building inspector's issuance of permit for construction of stadium. The Superior Court, Gaston County, J. W. Jackson, J., affirmed and appeal was taken. The Supreme Court, Pless, J., held that issuance of permit to construct a 4,000 seat, concrete, lighted athletic stadium as an ancillary athletic playing field of high school in R-12 single family residential zone which schools and colleges were permitted was not error.

Affirmed.

West Headnotes (3)

[1] **Evidence**
Particular facts

It is common knowledge that high school student body almost unanimously attends athletic events where its teams are participating and that parents too become interested.

1 Cases that cite this headnote

[2] **Zoning and Planning**
Schools and education

Issuance of permit to construct a 4,000 seat, concrete, lighted athletic stadium as an ancillary athletic playing field of high school in R-12 single family residential zone in which schools and colleges were permitted, was not error.

12 Cases that cite this headnote

[3] **Zoning and Planning**
Legislative, administrative, judicial, or quasi-judicial power

Board of adjustment when sitting as body to review decision of building inspector is vested with judicial or quasi-judicial and discretionary powers.

5 Cases that cite this headnote

*263 **441 In 1961 the Hunter Huss High School was constructed upon a 54.51-acre tract of land owned by the Gaston County Board of Education. The land on which the school is situated lies almost in the center of a modern residential subdivision, known as Wesley Park. This subdivision contains numerous residences in the $25,000 to $45,000 class. Both the school and the subdivision are located in an R-12 Single Family Residential Zone which permits schools and colleges, kindergartens and day nurseries, municipal, county, state and federal uses not involving the outdoor storage of equipment or materials.

On 1 March, 1966, the County Board of Education made application with the Building Inspector for the City of Gastonia to construct a 4,000-seat, concrete, lighted athletic stadium, as an ancillary athletic playing field at Hunter Huss High School.

The petitioners, residents of Wesley Park whose residences almost 'ring' the proposed stadium, protested to the Building Inspector and a hearing was held. After hearing the evidence the Building Inspector issued a permit for the construction of the stadium and from his order the aggrieved property owners appealed to the Board of Adjustment of the city.

On 7 April, 1966, the Board of Adjustment, after a public hearing, unanimously affirmed the Building Inspector.

Subsequently the petitioners filed a petition in the Gaston Superior *264 Court for review by writ of Certiorari. This writ was granted on 22 April, 1966.

On 20 July, 1966, the matter came on for review before Judge Jackson. After reviewing the record and hearing arguments of counsel, his Honor signed a judgment on that day affirming the action of the Board of Adjustment.

The petitioners excepted to the signing of the judgment and appealed to the Supreme Court.

Attorneys and Law Firms

Frank P. Cooke, Gastonia, for petitioners appellants.

Garland & Alala, by James B. Garland, Gastonia, Gaston, Smith & Gaston, by Willis C. Smith, Belmont, for respondents appellees.

Opinion

PLESS, Justice.

The plaintiffs concede that education not only includes improvement of the mind but also improvement of physical faculties of students. The use of an athletic playing field in our modern day educational system has become an integral part of the school curriculum. In fact, we can find no authority which holds that athletic facilities, including stadia, are forbidden in zones where schools are permitted.

'The proposed condemnation of certain land to provide an athletic field for a high school was held not to violate the provisions of the zoning ordinance under which institutions of an educational character were permitted in a residential district on the ground that education was not a matter confined to the improvement of the mind, but might involve the development of a person's physical faculties, the grounds used for such purpose in connection with an educational institution becoming a part of the institution itself. Commissioners of Dist. of Columbia v. Shannon & L. Constr. Co. (1927) 57 App.D.C. 67, 17 F.2d 219.' 36 A.L.R.2d 664.

**442 'The ordinance provides that this zone where the stadium (high school) is located may be used for high schools, and this should, we believe, be interpreted to mean any part of a high school, whether its gymnasium, class room building, athletic stadium or library. In the absence of a clause in the ordinance specifically rejecting high school stadia from this zone, we consider it proper to include them as logical parts of the high schools that have been specifically approved for this district by the terms of the ordinance. In the light of all these circumstances, the court is unable to discern any unlawful thing * * * in the operation of this stadium for night, high school football games.' Board of Education of Louisville v. Klein et al., 303 Ky. 234, 197 S.W.2d 427.

[1] [2] The 'little red school house' is a thing of the past, and today's modern schools have cafeterias, gymnasiums, laboratories, and other *265 facilities that were unheard of until recent times. Now, they are regarded as usual and necessary, and it is naturally to be expected that land appurtenant to a school building not now in use would be made serviceable in some manner. To establish extra baseball and football fields, tennis courts, etc., for a student body of 1,200 on its 54 acres would not be unexpected nor a violation of the zoning ordinances under consideration here. A grandstand to seat the spectators of a football game or baseball game is a natural adjunct to the ball field itself, and we do not interpret the plaintiffs' position as being of the opinion that the above acts and developments would be illegal. It then resolves itself into a question, as stated in the plaintiffs' brief, as to whether or not a stadium that would seat 4,000 people and which is lighted and the use of which may depreciate property values of the plaintiffs is a violation of the ordinance. It is a matter of common knowledge that a student body almost unanimously attends the athletic events where their teams are participating, and that their parents, too, become interested. With a student body of 1,200 and many of the parents attending, it would require almost 4,000 seats to take care of them, and if the public generally and students of the opposing schools and their parents are to be seated, the capacity of 4,000 seats could not be held to be excessive. It is a rare thing when a football game or baseball game between high schools is played in the daytime. Practically all of them are played at night and, necessarily, lights are used. While the noise from the crowds and the lights will be disturbing to the people living close by, it must be recognized that when they purchased their property that a school, together with its attendant and necessary adjuncts, was permitted within the zoning ordinance. They can take some comfort from the fact that athletic seasons are short, contests will not be held every night, and most games will be completed by the ordinary

hour for retiring. Considering the above, we cannot hold that the Board of Adjustment nor the lower court was in error in granting the permit.

We have found no North Carolina case that is applicable, but in Property Owners Assn. of Garden City Estates, Inc. v. Board of Zoning App., 2 Misc.2d 309, 123 N.Y.S.2d 716, it was held that a Zoning Board should have granted a permit to erect permanent stands in connection with an athletic field without limitation on the number of seats. From it we quote: 'It is customary, whenever space is available, for colleges, and schools generally, to use a portion of their property for athletic contests, commencement exercises and other activities of like nature. The parties to these proceedings do not question the right of Adelphi (College) to make such use of its property but the property owner-petitioners and the Board seek to deny to ***266** Adelphi that which public schools concededly may do without permission-provide seats as an accessory use.'

Also in State ex rel. Tacoma School District No. 10 v. Stojack, 53 Wash.2d 55, 330 P.2d 567, 71 A.L.R.2d 1064, it was held that in the selection of a site for a senior high ****443** school the directors have authority to determine the area of land reasonably necessary to accommodate suitable buildings, playgrounds, student and related activities to establish an adequate school in accordance with present day educational requirements. 47 Am.Jur. Schools, Sec. 75, cites the above case, and also says: 'The power of school authorities to provide gymnasiums and athletic fields and playgrounds has been sustained in a number of places.'

'Zoning ordinances should be given a fair and reasonable construction, in the light of their terminology, the objects sought to be attained, the natural import of the words used in common and accepted usage, the setting in which they are employed, and the general structure of the Ordinance as a whole. * * * Zoning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property.' Yokley, Zoning Law and Practice, Second Edition (1962 supplement), Vol. 1, Section 184.

[3] This Court has held in several cases that a Board of Adjustment when sitting as a body to review a decision of the Building Inspector is vested with judicial or quasi-judicial and discretionary powers.

'The decisions of the Board of Adjustment are final, subject to the right of courts on Certiorari 'to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority.' In re Pine Hill Cemeteries, Inc., 219 N.C. 735, 738, 15 S.E.2d 1, 3; Chambers v. Zoning Board of Adjustment, 250 N.C. 194, 199, 108 S.E.2d 211, 74 A.L.R.2d 412; In re Appeal of Hasting, 252 N.C. 327, 329, 113 S.E.2d 433; Jarrell v. Board of Adjustment, 258 N.C. 476, 479, 128 S.E.2d 879. The cited cases refer to an identical provision (G.S. 160-178) in the enabling act applicable to 'cities and incorporated towns'.' Durham County v. Addison, 262 N.C. 280, 136 S.E.2d 600.

The court found no error in the decision of the Board of Adjustment, and we agree with its action. The decision is

Affirmed.

All Citations

268 N.C. 263, 150 S.E.2d 440

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3.A.c

KeyCite Yellow Flag - Negative Treatment
Distinguished by FC Summers Walk, LLC v. Town of Davidson, W.D.N.C., January 20, 2010

354 N.C. 298
Supreme Court of North Carolina.

WESTMINSTER HOMES, INC.; John and Susan Evans; Bakulesh and Vadana Naik, Petitioners,
v.
TOWN OF CARY ZONING BOARD OF ADJUSTMENT, Respondent,
and
Jeff and Leigh Thorne, Intervenor/Respondents.

No. 499PA00.
|
Nov. 9, 2001.

Synopsis

Homeowners appealed from Board of Adjustment finding that they had violated conditional use permit. Neighboring residents intervened. The Superior Court, Wake County, Cashwell, J., overturned Board's ruling. Intervenors appealed. The Court of Appeals, 140 N.C.App. 99, 535 S.E.2d 415, reversed and remanded. On discretionary review, the Supreme Court, Lake, C.J., held that conditional use zoning permit prohibited residents from installing individual access gates to access portion of their lots in buffer zone.

Court of Appeals affirmed.

Orr, J., dissented and filed opinion in which Butterfield, J., joined.

West Headnotes (15)

[1] **Zoning and Planning**
Construction and Operation

Conditional use zoning permit prohibited residents from installing individual access gates in fence to access portion of their lots in buffer zone, where permit required that buffer be left in undisturbed state, permit mentioned only one gate, which would allow city access to easement for maintenance of sewer, drawing of fence accompanying plans did not include fence, permit provided that fence be same architecturally as two existing fences, which did not have gates, and permit provided that purpose of fence was to provide optical and acoustical screening between neighbors.

Cases that cite this headnote

[2] **Zoning and Planning**
Contracts for amendments;conditions

Conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning.

3 Cases that cite this headnote

[3] **Zoning and Planning**
Contracts for amendments;conditions

The practice of conditional use zoning is an approved practice in North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest.

2 Cases that cite this headnote

[4] **Zoning and Planning**
Contracts for amendments;conditions

The only use which can be made of the land which is conditionally rezoned is that which is specified in the conditional use permit.

3 Cases that cite this headnote

[5] **Zoning and Planning**
Conditions attached to permission in general

A conditional use zoning permit is a specialized form of a municipal ordinance, and the same rules of construction apply to both.

3 Cases that cite this headnote

[6] **Zoning and Planning**

Applicability of general statutory construction principles

Courts apply the same rules of construction when construing both statutes and municipal zoning ordinances.

5 Cases that cite this headnote

[7] **Zoning and Planning**

Intention and purpose of enacting body

The basic rule of construction of zoning ordinances is to ascertain and effectuate the intention of the municipal legislative body.

6 Cases that cite this headnote

[8] **Statutes**

General and specific terms and provisions;ejusdem generis

A section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application.

3 Cases that cite this headnote

[9] **Statutes**

Giving effect to statute or language; construction as written

If the words of a statute are plain and unambiguous, the court need look no further.

5 Cases that cite this headnote

[10] **Statutes**

In general;factors considered

If the language of a statute is unclear, judicial construction may be required.

Cases that cite this headnote

[11] **Zoning and Planning**

Conditions attached to permission in general

Definitions found in conditional use zoning permits can be different from those found for the same terms in general ordinances because conditional use permits are necessarily more specific in application and restriction than general provisions.

Cases that cite this headnote

[12] **Zoning and Planning**

Ambiguity

Ambiguous zoning statutes should be interpreted to permit the free use of land.

3 Cases that cite this headnote

[13] **Eminent Domain**

Presentation and reservation in lower court of grounds of review

Homeowners' failure to raise claim in trial that conditional use permit prohibiting installation of gates in fence around buffer zone was unconstitutional taking precluded Court of Appeals from considering claim on appeal.

35 Cases that cite this headnote

[14] **Zoning and Planning**

Fences and hedges

Conditional use permit, which prohibited homeowners in subdivision from installing gates in fence along buffer zone on their lots, did not constitute unconstitutional taking, where Board of Adjustment did not impose new conditions on homeowners' use, but merely applied already-existing conditions, permit was not imposed by legislative or regulatory body, but was requested and negotiated by parties, and developer voluntarily assumed restrictions as compromise that allowed it to request higher density residential zoning. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

[15] **Constitutional Law**

Reliance on statute or availment of statutory benefits

One who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.

Cases that cite this headnote

****635** ***299** On discretionary review pursuant to N.C.G.S. § 7A–31 of a unanimous decision of the Court of Appeals, 140 N.C.App. 99, 535 S.E.2d 415 (2000), reversing and remanding an order signed 24 March 1999 by Cashwell, J., in Superior Court, Wake County. Heard in the Supreme Court 15 May 2001.

Attorneys and Law Firms

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****636** Charles M. Putterman, Durham, for intervenor/respondent-appellees.

The Brough Law Firm, by William C. Morgan, Jr., Chapel Hill, on behalf of the Town of Cary, amicus curiae.

Opinion

LAKE, Chief Justice.

The question presented for review in this case is whether a conditional use municipal zoning permit may be construed to allow residents of a subdivision within the municipality to install gates in a fence that serves as part of a buffer area between the subdivision and an adjoining neighborhood, in order to allow the residents access to portions of their property located within the buffer. The Court of Appeals held that such gates are not permitted. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C.App. 99, 106, 535 S.E.2d 415, 419 (2000). For the reasons hereinafter set forth, we affirm.

In 1992, petitioner Westminster Homes, Inc., a residential housing developer, petitioned the Town of Cary to rezone various properties surrounding the Harmony Hill Lane neighborhood to allow for higher density residential subdivisions. Part of this property, designated Tract 3 on Wake County Tax Map 543, later became Westminster's Sherborne subdivision. Homeowners in the Harmony Hill neighborhood filed protest petitions against Westminster's request. After negotiations, which resulted in a formal legal agreement, Harmony Hill residents withdrew their protests, and Westminster agreed to certain developmental restrictions on Tract 3.

Westminster petitioned the Town to rezone its property in accordance with the agreement made with the residents of Harmony Hill. In February 1993, the Cary Town Council approved some of these restrictions as conditional use zoning permit Z–664–92–PUD. This permit provides, in part, as follows:

> 1. There shall be a 50 foot undisturbed buffer along the northern boundary of Tract 3.... A seven-foot treated wood fence shall be constructed and maintained by the developer along the length of the undisturbed buffer where it adjoins Parcels 19, 20, 21, and 22, Wake County Tax Map 515. The fence shall be the same architecturally and of the same materials as the fence currently ***301** existing between Preston Woods and the McLaurin Tract. The fence shall be located 45 feet off the property line ... and it shall be connected to the existing gate over the sewer easement. The fence shall be installed with the minimum of disturbance to the buffer environment. The fence shall be connected at each end to the fences to be constructed under the respective agreements with Hester and McLaurin in order to preserve continuity and integrity. The fence will always be 45 feet from the boundary line or any property corner, and shall intersect at right angles. This fence will be constructed at the time that a grading permit is issued by the Town of Cary and be completed prior to recording any final plats. The integrity and maintenance of this fence will be the responsibility of the developer of Tract 3 or new owner. A deed disclosure and recorded plat shall be made by the developer so as to inform all new residents of the placement, integrity and maintenance of the new fence. Furthermore, a disclosure as to maintenance responsibility shall be part of the recorded plat and be subject to approval of the Town Council of the Town of Cary.
>
> 2. There shall be no utility crossings, sewer lines, or greenways in the 50 foot buffer, except where the

> Town of Cary may require street or utility connections to Parcel 14, Wake County Tax Map 515. The buffer otherwise will remain in its present natural and undisturbed condition, except fencing and plantings.
>
> 3. ... Fast growing and evergreen trees such as Leyland Cypress shall be planted in a type "A" buffer standard to provide both optical and acoustical screening in front of the fence.

Thus, the permit requires, *inter alia,* that a "50 foot undisturbed buffer" be maintained between the Harmony Hill neighborhood and Tract 3, and that this buffer include a seven-foot high wooden fence offset forty-five feet from the rear property line of Tract 3, which abuts Harmony Hill. The "developer of Tract 3 or new owner" is responsible for the "integrity ****637** and maintenance" of the fence, and all new residents are to be made aware of the fence restriction through a deed disclosure and the recorded plat.

With the parties having settled their preliminary differences, plans for the Sherborne development proceeded. On 18 November 1993, the Town of Cary approved a plan for the Sherborne subdivision. In October 1996, intervenor/respondents Jeff and Leigh Thorne moved into the adjacent Harmony Hill neighborhood. On 5 February ***302** 1997, Westminster filed the final subdivision plat for the Sherborne subdivision with the Register of Deeds. Both the plan approved in 1993 and the plat filed in 1997 showed that all the land in Tract 3, including the buffer zone, would be subdivided. [1]

In December 1997, petitioners John and Susan Evans and Bakulesh and Vadana Naik purchased lots and homes from Westminster in the Sherborne subdivision. Petitioners' lots abutted the intervenor/respondents' lot in the Harmony Hill neighborhood. Thus, the buffer zone runs along the back of and through petitioners' properties. Approximately one-half of the Evanses' lot and one-quarter of the Naiks' lot are part of the designated buffer area. Even so, these lots, excluding those portions which are in the buffer, are larger than many others in the Sherborne development. [2]

After the individual petitioners occupied their lots, they desired to access the portions of their respective lots located behind the fence in the buffer zone. In December 1997, petitioner Westminster, the developer of Sherborne, built a gate in the fence for the Naiks. On 13 January 1998, the Town staff with the Division of Planning and Zoning advised Westminster that gates were not permitted in the fence. In June 1998, the Evanses installed a gate in that portion of the fence in their backyard.

On 24 June 1998, a zoning enforcement officer for the Town of Cary sent letters to petitioners informing them that they were in violation of conditional use zoning permit Z–664–92–PUD because they had installed gates in the fence. Petitioners filed an appeal to the Town of Cary Zoning Board of Adjustment. On 10 August 1998, the Board of Adjustment held a hearing and heard evidence regarding the appeal, and residents of the Harmony Hill neighborhood, including intervenor/respondents, urged the Board not to allow gates in the fence. Ultimately, the Board upheld the zoning enforcement officer's ***303** interpretation of the conditional use permit and the determination that petitioners were in violation of the permit.

Petitioners appealed to Superior Court, Wake County. At this point, the Thornes formally intervened. After a hearing, the court overturned the Board's ruling and ordered that the Sherborne homeowners were permitted to install gates in the fence in order to access that portion of their property located beyond the fence in the buffer area. Intervenor/respondents appealed. The Court of Appeals reversed the trial court, holding that petitioners are prohibited from installing gates in the fence. *Westminster Homes,* 140 N.C.App. at 106, 535 S.E.2d at 419.

The only issue before this Court is whether petitioners, as residents of the Sherborne subdivision, may install individual access gates in the fence required under the conditional use zoning permit. Petitioners contend that the Board and the Court of Appeals erred in holding that such gates are prohibited under a proper construction of the conditional use zoning permit. We disagree.

****638** [1] [2] [3] [4] "[C]onditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his property to a particular use or to subject his tract to certain restrictions as a precondition to any rezoning." *Chrismon v. Guilford County,* 322 N.C. 611, 618, 370 S.E.2d 579, 583 (1988). "[T]he practice of conditional use zoning is an approved practice in

North Carolina, so long as the action of the local zoning authority in accomplishing the zoning is reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Id.* at 617, 370 S.E.2d at 583; *see also* N.C.G.S. §§ 160A–381, 160A–382 (1999). "[T]he only use which can be made of the land which is conditionally rezoned is that which is specified in the conditional use permit." *Hall v. City of Durham,* 323 N.C. 293, 300, 372 S.E.2d 564, 569 (1988).

[5] [6] [7] Thus, a conditional use zoning permit is a specialized form of a municipal ordinance, and it follows that the same rules of construction apply to both. Courts apply the same rules of construction when construing both statutes and municipal zoning ordinances. *Cogdell v. Taylor,* 264 N.C. 424, 428, 142 S.E.2d 36, 39 (1965) ("The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances."); *accord Coastal Ready–Mix Concrete Co. v. Board of Comm'rs of Town of Nags Head,* 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980); *George v. Town of Edenton,* 294 N.C. 679, 684, 242 S.E.2d 877, 880 (1978). "The basic rule is to ascertain ***304** and effectuate the intention of the municipal legislative body." *George,* 294 N.C. at 684, 242 S.E.2d at 880.

> Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance. [*Coastal Ready–Mix Concrete Co.,* 299 N.C. at 629, 265 S.E.2d at 385.] Since zoning ordinances are in derogation of common-law property rights, limitations and restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof. *Yancey v. Heafner,* 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust., 334 N.C. 132, 138–39, 431 S.E.2d 183, 188 (1993).

[8] [9] [10] We also are mindful of several other principles of general statutory construction as we examine the issue before us. First, "[i]t is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.,* 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969); *accord Three Guys Real Estate v. Harnett County,* 345 N.C. 468, 474, 480 S.E.2d 681, 684 (1997); *Trustees of Rowan Technical Coll. v. J. Hyatt Hammond Assocs.,* 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985). Second, if the words of a statute are plain and unambiguous, the court need look no further. *Walker v. Board of Trustees of N.C. Local Governmental Employees' Ret. Sys.,* 348 N.C. 63, 65–66, 499 S.E.2d 429, 430–31 (1998); *In re Banks,* 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978). Finally, if the language is unclear, judicial construction may be required. *Banks,* 295 N.C. at 239, 244 S.E.2d at 388–89.

Petitioners present a number of arguments to support their position that individual access gates should be allowed in the fence required under the conditional use permit. Petitioners first argue that the Board and the Court of Appeals erred by failing to interpret the term "fence" consistently throughout the permit and with the Town of Cary Unified Development Ordinance. They contend that terms should be interpreted consistently throughout all zoning authorities and that the ordinance should provide a context for the conditional use permit, which would favor allowing individual access gates in all fences. Under the circumstances of this case, we do not agree.

***305** The term "fence" is defined in the Cary Unified Development Ordinance as "[a] structure used to delineate a boundary or as *a barrier or means of protection, confinement, or screening.*" Cary, N.C., Unified ****639** Development Ordinance § 2.1.4 (1992) (emphasis added). The term "fence" is not expressly defined in permit Z–664–92–PUD. Neither the ordinance nor the permit defines the term "gate." The ordinance does contain, however, language which is instructive in this case. The ordinance states, under the heading "General Rules of Construction," that "[i]n the event of any conflict between the limitations, requirements, or standards contained in different provisions of this Ordinance and applying to an individual use or structure, the more restrictive provision shall apply." Unified Development Ordinance § 2.1.1(b).

We are unable to discover any provision in the Cary Unified Development Ordinance requiring terms to be

defined in the exact same manner in both the ordinance and conditional use permits. Moreover, the more specific terms of the conditional use permit, by design, are meant to place additional restrictions on land use and control when applicable. *Id.; see also Chrismon,* 322 N.C. at 618, 370 S.E.2d at 583–84. Thus, the permit may provide for a fence without gates, even if the ordinance was clear that gates are usually part of a fence. Such is not the case here, as "gates" are not mentioned in the ordinance. The conditional use permit, relating to specific uses and conditions, does not necessarily have to be interpreted consistently with the more general ordinance.

Even if we assume, *arguendo,* that terms must be defined in the same manner throughout all zoning authorities, the ordinance is not specific in this case and thus does not control our understanding of the term "fence." The term "fence" as defined in the ordinance does not specifically provide for gates, and the term "gate" is not defined in either the ordinance or the permit itself.

[11] Petitioners claim that, under this interpretation, there are possible challenges to countless conditional use rezoning permits. We do not agree. Our interpretation of the conditional use permit as specifically applied here and in relation to the ordinance in this regard will not apply more broadly to produce uncertainty and inconsistencies at the local level. Definitions found in conditional use zoning permits can be different from those found for the same terms in general ordinances because conditional use permits are necessarily more specific in application and restriction than general provisions. Conditional ***306** use permit "inconsistencies" with more general ordinances are normally contemplated as an acceptable means to require more restrictive uses in a given specific area or location.

Petitioners further contend that, based on the plain language of the conditional use permit, gates are permitted in the fence at issue. They believe that nothing in the conditional use permit suggests that this fence was intended to block an owner's access to his property. As evidence in support of their interpretation, petitioners point to the fact that the Town approved the subdivision and sale of the buffer to homeowners. They contend that it is illogical to suggest that the Town intended to block access to this portion of their land. They argue that with a gate already allowed for the sewer easement, it is inconsistent to say that the continuity and integrity of the fence would be damaged by other gates. However, we believe a close reading of the entire permit suggests that its clear intention was to preclude all gates not expressly provided for in the document.

Thus, we do not agree with petitioners' understanding of the plain language of the permit. Only one gate is expressly mentioned in the permit. This gate was placed in the fence to allow access to an easement for maintenance of the sewer by the Town. The permit does not suggest a reason for any other gates in the fence. Westminster could have easily specified or bargained for additional individual access gates if it had originally so desired. It did not do so.

In addition, all other requirements in the permit support our interpretation that additional gates are not permitted. The permit states that the fence is to be the "same architecturally" as two existing fences, neither of which has a gate. The fence, together with "[f]ast growing and evergreen trees," is to provide "both optical and acoustical screening" between the neighbors. The fence also is connected to other existing fences "in order to preserve continuity and integrity." The language that "[t]he buffer ****640** otherwise will remain in its present natural and undisturbed condition, except fencing and plantings," likewise does not suggest the permission of residential access and use; rather, it implies the opposite. It is true that in 1993 the Town did approve Westminster's preliminary plan for Sherborne, which included the subdivision of the buffer area by extension of lateral boundary lines of lots to be sold into the buffer to the adjacent boundary with Harmony Hill. This fact, however, is not a persuasive indication of the intended extent of the permit to include individual access gates. When examined in context, the language of the conditional ***307** use permit itself describes a desire for complete separation and privacy for the Harmony Hill neighborhood. Taken together, these requirements do not lead to or support petitioners' conclusion. The careful use of terms and language in the permit conveys a clear desire for privacy through a wide, comprehensive buffer which includes an architecturally compatible fence restricting residential access and use.

Several other facts support our interpretation of the zoning requirements. The drawing of the fence which accompanied the plans submitted to the Town for the Sherborne subdivision did not include gates or an illustration of a gate. The permit also required the fence to be set forty-five feet off the property line and the buffer

itself to be left in an "undisturbed" state. The requirement of an "undisturbed" buffer strongly suggests that gates are not permitted. Easy access through such gates may ultimately lead to a change in the fundamental nature of the buffer area. For example, it is undisputed that the five feet of buffer zone on the inside, or petitioners' side, of the fence has not remained in the intended natural state and has gradually become part of petitioners' lawns. Allowing additional gates may, however unintentionally, lead to a gradual degradation of the environment specified in the permit. Taken together, these requirements appear entirely contrary to a desire to provide easy access for Sherborne residents. They do suggest, however, that additional gates are not to be installed in the fence and, perhaps, that the buffer was originally inadvertently subdivided as indicated above.

We also note that the fence, as originally built, contained only the one gate for the sewer easement. This fact is a strong indication of the intent and understanding of the nature of both the fence and the buffer area on the part of the Town and Westminster. *See Preyer v. Parker,* 257 N.C. 440, 446, 125 S.E.2d 916, 920 (1962) (stating that the conduct of the parties indicating the manner in which they themselves construe the agreement will be given weight in the interpretation of the instrument by the courts). It is quite unusual to build a fence with no gates if such gates were originally contemplated, so that one would have to return and, wastefully, tear the fence apart to later install gates. Even after Westminster had subdivided the lots, it did not include gates for the anticipated homeowners until asked by the individual petitioners. These facts, taken together with the plain language of the permit, are a strong indication that the parties themselves originally understood the permit to exclude individual access gates in the fence.

***308** Petitioners further assert that a non-access interpretation will lead to absurd or illogical results. They argue that they will own inaccessible property for which they maintain tax and tort liability. However, without access petitioners will hardly be inviting or allowing other people to make use of the buffer area, and only trespassers would likely gain access to this undisturbed area. We thus conclude that under the circumstances here, there would be no reasonable basis for tort liability absent some willful action. *See Nelson v. Freeland,* 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). With regard to tax liability, the lack of access could potentially reduce petitioners' tax liabilities, in that the residential area of their lots is reduced in value.

[12] Next, petitioners contend that the proper interpretation of the conditional use permit, and zoning ordinances in general, should favor the free use of property. *See Yancey,* 268 N.C. at 266, 150 S.E.2d at 443. Petitioners thus assert that zoning ordinances should be strictly construed in favor of the landowner and that courts should not presume intent to impose property restrictions beyond those clearly set forth in the permit. While ambiguous zoning statutes ****641** should be interpreted to permit the free use of land, as discussed above, no such ambiguity exists here. Even though the buffer and the fence restrict the use of part of these lots, this limitation is permitted under the circumstances. The permit is clear in its restrictions as to use of the buffer area. It is to be "undisturbed."

The permit is a result of a compromise bargain, an agreement for higher density development by Westminster in exchange for additional privacy protection for Harmony Hill. Westminster could not have subdivided the property for the Sherborne subdivision without this bargain, which removed respondents' protests to Westminster's proposed rezoning. As the property has now been subdivided and developed, Harmony Hill residents would be left with substantially less than the privacy for which they bargained if gates were permitted under the permit, after giving the full benefit of greater development to Westminster and petitioners.

Furthermore, clear notice of the buffer area and fence was given in petitioners' deeds and the recorded plat. Westminster's sale of the buffer area, not the Board's interpretation of the ordinance, resulted in the contended claim which petitioners now assert. Under the circumstances, the expressed intentions of the permit for an extensive, composite privacy buffer must control. Like the Board, we interpret the zoning ordinance as not permitting additional gates in the fence, ***309** even if it restricts the use of land in the Sherborne subdivision in this case.

[13] **[14]** **[15]** Petitioners finally assert that if gates are not permitted, this amounts to an unconstitutional taking of their land by the Board. Petitioners raise this issue for the first time on appeal to this Court. This Court has long held that issues and theories of a case not raised below will

not be considered on appeal, *see, e.g., Smith v. Bonney*, 215 N.C. 183, 184–85, 1 S.E.2d 371, 371–72 (1939); *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934), and this issue is not properly before this Court. In any event, we do not consider the Board's interpretation of this permit to be an unconstitutional "taking" of petitioners' private property since there was no imposition of new conditions on petitioners' use in this case, in that the Board merely applied already-existing conditions. Further, this permit was not imposed by a legislative or regulatory body, but was requested and negotiated by the parties. Here, Westminster voluntarily assumed these restrictions as a compromise that allowed it to request a higher density residential zoning. " '[O]ne who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.' " *Bailey v. State*, 348 N.C. 130, 147, 500 S.E.2d 54, 64 (1998) (quoting *Convent of Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956)).

We conclude that the additional, individual access gates sought by petitioners are not permitted under conditional use zoning permit Z–664–92–PUD. The Board has interpreted the existing conditions of the permit consistently over time,[3] and we hold that its interpretation is reasonable in light of all the circumstances of this case. From the language of the permit, as well as the surrounding facts and circumstances, it is clear that gates, other than the one specified for the sewer easement, are not permitted in the fence. In this case, we are compelled to agree with intervenor/respondents that "[g]ood fences make good neighbors." Robert Frost, *Mending Wall, in* The Poetry of Robert Frost 33, 33–34 (Edward Connery Lathem ed., Holt, Rinehart and Winston 1969) (1914). Thus, for the reasons discussed above, the decision of the Court of Appeals is

***310** AFFIRMED.

Justice ORR dissenting.

The bottom line of the majority opinion is, in effect, to totally deprive a property owner ****642** of access to a portion of that owner's land despite the fact that the owner continues to pay taxes on and be liable for that property. In order to reach this result, the majority concludes that a clearly ambiguous ordinance is not ambiguous and that it is permissible for a term to have different meanings and application within the same ordinance without the ordinance ever specifying that such is the case. I conclude for the reasons set forth below that the Cary ordinance in question does not prohibit the petitioners from putting a gate in the fence. Furthermore, even though the constitutionality of this action by the Town of Cary was not raised below, I disagree with the majority that it is "not an unconstitutional taking." I therefore respectfully dissent from this unwarranted disregard for private property rights.

The majority holds that the term "fence" in the conditional use ordinance has a meaning different from the meaning in the Cary ordinance and in the language of Z–664–92–PUD itself. However, such reasoning is contrary to an established canon of statutory interpretation, which also applies to the interpretation of municipal ordinances. *See Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980). The rules of statutory interpretation require statutes to be "construed as a whole, and not by the wording of any particular section or part." *McLeod v. Board of Comm'rs of Carthage*, 148 N.C. 77, 85, 61 S.E. 605, 607 (1908). Thus, words that carry a specific definition in one part of a statute are presumed to carry that same definition in all other parts. As the intervenor concedes, the conditional use permit is part of the Cary ordinance. Therefore, unless the language expressly states otherwise, we must presume that the application of the definition of "fence" in the conditional use ordinance is consistent with its definition in the Cary ordinance. If you can have a gate in your fence under the Cary ordinance in other situations, then you can have one under these facts unless something to the contrary specifically states otherwise.

Following this canon of statutory interpretation, the term "fence" in the ordinance must include gates. The term "fence" as used throughout the Cary ordinance indicates the Town's intent to allow gates. For example, the ordinance requires solid fences around play areas at day-care homes. Cary, N.C., Unified Development Ordinance ***311** §§ 13.1.7, 13.1.8 (1992). These sections do not mention gates. However, gates must be included in the term " fence"; otherwise, children would have to be dropped over the fence in order to access the playground.

Language included in the Cary ordinance after Z–664–92–PUD was passed also provides insight on the definition of

fence. The ordinance now provides that "[n]o sign or logo shall be permitted to be located on a fence." Cary, N.C., Unified Development Ordinance § 13.1.10(d) (1992). This language does not specifically prohibit signs and logos on gates, but the drafters clearly intended to do so. Any other interpretation would result in allowing signs and logos on gates but not on fences. The language of these two sections indicates that the term fence in the Cary ordinance includes gates installed within a fence. Because we must construe statutes as a whole and because the conditional use permit is part of the Cary ordinance, we must assume that the term "fence" as used in Z–664–92–PUD is defined consistent with that term's usage throughout the general zoning ordinance.

Aside from this established canon of statutory interpretation, the language of the conditional use ordinance itself indicates Cary's specific intent to define terms in the conditional use ordinance consistently with the zoning ordinance. The conditional use ordinance refers to at least one definition in the Cary ordinance, providing that trees in the undisturbed buffer area should be of the "type 'A' buffer standard." Reference to a "type 'A' buffer standard" is hopelessly unclear unless it was meant to carry the same meaning as those terms in the town ordinance. Thus, since Cary meant to use that term consistently, it follows that, absent language to the contrary, Cary intended to use "fence" consistently as well.

The assumption that terms carry the same meaning in the Cary ordinance and the conditional use ordinance can, however, be overcome by a clear indication that the terms ****643** were meant to have different meanings. That simply was not done in this case. The intervenors argue that the language of Z–664–92–PUD clearly indicates an intent to use a definition of fence that does not include gates. I disagree. The intervenors contend that because the land is an "undisturbed buffer," it should not be accessible. However, the text of Z–664–92–PUD indicates that the Town anticipated access to the buffer zone. Z–664–92–PUD requires the fence to be maintained and trees to be planted and replaced if necessary. Planting trees and maintaining a fence require people to walk in the buffer zone, thus showing that the Town anticipated some access to the buffer zone.

***312** Furthermore, after Z–664–92–PUD was passed, Cary defined " undisturbed buffer" as a "unit of land containing sufficient quality and quantity of vegetation to meet the requirements of Chapter 14, Part 1 of this Ordinance. Such buffer shall not be graded, nor shall any development occur within such buffer." Cary, N.C., Unified Development Ordinance § 2.1.4 (1992). Therefore, "undisturbed buffer" means that the land may not be graded, or developed, but it does not mean that access to the land is prohibited.

The intervenors contend that the conditional use ordinance requires the fence to preserve "continuity" and that a fence with gates is not continuous. However, "continuity" refers to the requirement that the fence connect at each end to already existing fences. They also argue that the fence must be the "same architecturally" as the Preston Woods fence and that because the Preston Woods fence has no gates, neither may the petitioners' fence. However, the installation of gates does not prevent a fence from being the same architecturally. In fact, the gates at issue in this case are made of the same materials, are the same size, and are thus identical architecturally to the rest of the fence.

The intervenors further contend that since Z–664–92–PUD specifies one gate, additional gates are excluded. They argue the canon of *expressio unius est exclusio alterius*—"to express or include one thing implies the exclusion of the other," Black's Law Dictionary 602 (7th ed.1999)—but this canon applies only when the thing mentioned and the thing excluded are sufficiently similar to warrant the inference. The gate mentioned in the ordinance is for city sewer access and was required, while the gates at issue here are for private use and are optional. The gates at issue in this case differ too much from the sewer gates to apply the canon of *expressio unius est exclusio alterius.* Instead of prohibiting other gates, I believe specifying one gate indicates that gates are permissible. Had the Town intended to prohibit other gates, it could have easily done so by providing the appropriate language.

Finally, this Court has held that " '[z]oning regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms.' " *Yancey v. Heafner,* 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966) (quoting 1 E.C. Yokley, *Zoning Law and Practice* § 184 (2d. ed. Supp.1962)). Because Z–664–92–PUD does not expressly

prohibit gates, we cannot imply such a restriction, nor can we guess at what was intended.

*313 While the majority quotes Robert Frost that "[g]ood fences make good neighbors," I fail to see how a solid, seven-foot tall, wooden fence with no gates or other means of access to the owner's property on the other side (short of pole-vaulting over the fence) is very neighborly. Perhaps the property owners from Sherborne subdivision can drive around to Harmony Hill subdivision, stop in front of their neighbors' homes and gaze longingly at the fifty-foot strip of their property to which they have no access. Maybe even on a good day, they will be invited to walk across their neighbor's backyard to actually stand on the property they own. Under the majority's view, that is their only hope.

Justice BUTTERFIELD joins in this dissenting opinion.

All Citations

354 N.C. 298, 554 S.E.2d 634

Footnotes

1 The Cary Zoning Ordinance now states that "[n]o buffer in a residential subdivision shall be wholly owned (in fee simple absolute) by the owner of an individual residential building lot zoned for single family uses. The buffers shall be owned by or be under the control of a homeowner's association or be owned outright or under an easement by a third party or the property rights shall be otherwise divided so that the property owner does not directly own the right to remove, modify or damage the buffer." Cary, N.C., Unified Development Ordinance § 14.1.5(*o*) (1995). This requirement was not in effect at the time conditional use permit Z–664–92–PUD was approved.

2 Of the eighteen lots that do not contain a portion of the buffer, eight are equal in size or smaller than the Evanses' lot discounting the buffer, and sixteen are equal in size or smaller than the Naiks' lot discounting the buffer.

3 In May 1997, a gate was added to the fence between the Harmony Hills neighborhood and the Providence Commons subdivision. The Town determined that, under the Z–664–92–PUD conditions, additional gates were not permitted. Providence Commons residents did not appeal this determination. Instead, an application to amend the zoning conditions was submitted to the Cary Town Council. The application was later withdrawn.

End of Document

3.A.c

275 N.C. 250
Supreme Court of North Carolina.

STATE of North Carolina ex rel. UTILITIES COMMISSION, and Carolina Power & Light Company and Acme Electric Corporation and Acme Electric Corporation of Lumberton, North Carolina, Appellees,
v.
LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION, Appellant.

No. 17.
|
April 9, 1969.

Synopsis

Nonprofit electric membership corporation filed complaint against public utility corporation. The Utilities Commission dismissed complaint, and plaintiff appealed. The Court of Appeals, 3 N.C.App. 318, 164 S.E.2d 895, affirmed and plaintiff appealed. The Supreme Court, Lake, J., held that where location of customer's premises was not wholly within 300 feet of any line of any electric supplier and was not partially within 300 feet of lines of two or more electric suppliers, customer had right to choose public utility corporation as its supplier rather than nonprofit electric membership corporation which had previously had a single-phase power line within 300 feet of a portion of the premises that required three-phase line though membership corporation could reach plant by extension of lines substantially shorter than could public utility.

Affirmed.

West Headnotes (14)

[1] **Electricity**
Service Areas;Competition

Public Utilities
Certificates, permits, and franchises

Absent valid grant of such right by statute or by an administrative order issued pursuant to statutory authority and absent valid contract with its competitor or with person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly or other right to prevent its competitor from serving anyone who desires the competitor to do so.

3 Cases that cite this headnote

[2] **Electricity**
Cooperatives and associations

Except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in rural areas of the state notwithstanding fact that such competition may result in substantial duplication of electric power lines and other facilities. G.S. §§ 62–110.2(b) (5), 117–1 et seq.

2 Cases that cite this headnote

[3] **Public Utilities**
Constitutional and statutory provisions

Police power of state is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from utilities commission a certificate that public convenience and necessity requires proposed extension of its distribution facilities.

Cases that cite this headnote

[4] **Electricity**
Regulation in general;statutes and ordinances

Utilities commission is a creature of Legislature and has no authority to restrict competition between suppliers of electricity, except in so far as that authority has been conferred upon it by statute.

Cases that cite this headnote

[5] **Public Utilities**
Orders

Utilities commission may not, by rule or order, forbid exercise of a right expressly conferred by statute.

Cases that cite this headnote

[6] **States**

Police power

Legislative body is under no compulsion to exercise police power of state to its fullest extent or to exercise it in a manner which the courts or an administrative agency may deem wise or best suited to public welfare.

1 Cases that cite this headnote

[7] **Constitutional Law**

Public utilities

It is for Legislature and not for court or utilities commission to determine whether policy of free competition between suppliers of electric power or policy of territorial monopoly or an intermediate policy is in the public interest.

2 Cases that cite this headnote

[8] **Electricity**

Service Areas;Competition

If the Legislature has enacted a statute declaring right of a supplier of electricity to serve, notwithstanding availability of service of another supplier closer to customer, neither court nor utilities commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines.

5 Cases that cite this headnote

[9] **Electricity**

Service Areas;Competition

It is plant of customer and not tract on which plant is located that constitutes "premises" within meaning of statute giving every electric supplier the right to serve all premises being served by it. G.S. § 62–110.2(a) (1), (b) (1, 3–5).

2 Cases that cite this headnote

[10] **Electricity**

Cooperatives and associations

Where location of customer's premises was not wholly within 300 feet of any line of any electric supplier and was not partially within 300 feet of lines of two or more electric suppliers, customer had right to choose public utility corporation as its supplier rather than nonprofit electric membership corporation which had previously had a single-phase power line within 300 feet of a portion of the premises that required three-phase line though membership corporation could reach plant by extension of lines substantially shorter than could public utility. G.S. §§ 62–110.2(a) (1), (b) (1, 3–5), (c), 117–1 et seq.

1 Cases that cite this headnote

[11] **Statutes**

General and specific statutes

Statutes

Earlier and later statutes

A section of a statute dealing with a specific situation controls with respect to that situation other sections which are general in their application and specially treated situation is regarded as an exception to general provision, especially where specific provision is the later enactment.

29 Cases that cite this headnote

[12] **Statutes**

Giving effect to statute or language; construction as written

When section dealing with a specific matter is clear and understandable on its face it requires no construction and court is without power to interpolate or superimpose conditions and limitations.

31 Cases that cite this headnote

[13] **Constitutional Law**

Public utilities

It is for Legislature and not court or utilities commission to determine whether a special provision should be made for regulation of competition between electric membership corporations and public utility companies rendering electric service.

1 Cases that cite this headnote

[14] **Electricity**

Cooperatives and associations

Where Legislature had made determination as to regulation of competition between electric membership corporations and public utility companies rendering electric service, it was unnecessary for utilities commission to inquire into or determine general economic or aesthetic effect and advisability of duplication of electric membership corporation's line.

1 Cases that cite this headnote

***252** ****665** Lumbee River Electric Membership Corporation, hereinafter called Lumbee, instituted this proceeding in the North Carolina Utilities Commission by filing in a single document a complaint against Carolina Power & Light Company, hereinafter called CP&L, and an application for an assignment to Lumbee of a described area in Robeson County as its electric service area. The Utilities Commission entered its order separating the two into independent proceedings and setting the complaint against CP&L for hearing. Lumbee did not except to that order, and all subsequent proceedings, including the present appeal, have been and are upon the theory that nothing but the complaint against CP&L is involved. CP&L filed its answer thereto. Acme Electric Company, hereinafter called Acme, was permitted by the Utilities Commission to intervene and filed its answer in support of the position taken by CP&L.

The Utilities Commission heard no evidence, but, upon facts ***253** stipulated by the parties and admissions in the pleadings, dismissed the complaint, Commissioners Eller and McDevitt dissenting. Lumbee appealed to the Court of Appeals which affirmed the order of the commission, its opinion being reported in 3 N.C.App. 318, 164 S.E.2d 895, Brock, J., dissenting.

The material facts, summarized, are these:

Lumbee, a non-profit electric membership corporation, organized pursuant to Ch. 117 of the General Statutes, supplies electric power to its members in Robeson County and nearby areas. CP&L, a public utility corporation, carries on for profit in Robeson County, and elsewhere in North Carolina, the business of supplying electric power to the public. Lumbee purchases substantially all of its power at wholesale rates from CP&L and so is a CP&L rate payer. Acme is a manufacturer of electrical equipment. The Utilities Commission has not made any assignment of territories in Robeson County to CP&L or to Lumbee or to other suppliers as service areas pursuant to G.S. s 62—110.2(c).

Acme, after negotiations with CP&L, acquired a tract of 36 acres in Robeson County on the east side of Highway I—95 and the north side of U.S. Highway 74. At the time of Acme's acquisition of this site, Lumbee owned and operated a three-phase power line running along U.S. Highway 74 and thence along and near to the west boundary of Highway I—95, across from the site so acquired by Acme, and also a single-phase line running therefrom, across the highway right-of-way into and upon the western portion of the land so ****666** acquired by Acme. The purpose and use of the single-phase line was to supply electric power to a tenant house and two signs all then located upon the site but subsequently removed in the construction of Acme's plant. The single-phase line was then removed by Lumbee at Acme's request, without prejudice to any right of Lumbee to supply electricity to the plant.

Acme conveyed a portion of the tract to its wholly owned subsidiary. The subsidiary built thereon a large building, which it then leased to Acme for the operation therein by Acme of its manufacturing business. The larger part of this building lies within 300 feet of the former location of Lumbee's single-phase line, but a portion of it is more than 300 feet from the former location of that line and all of it is more than 300 feet from Lumbee's three-phase line west of Highway I—95, that along U.S. Highway 74 being more distant.

Acme contracted with CP&L to take all of its electric power at this plant from CP&L. Acme requires three-phase electric service. ***254** To serve Acme it was

necessary for CP&L to construct 3.63 miles of new three-phase line and to convert 0.6 miles of single-phase line to three-phase line. Substantially all of this CP&L line runs along U.S. Highway 74, just across the highway from Lumbee's three-phase line. For Lumbee to serve the Acme plant would require a relatively short extension of its existing three-phase line across Highway I—95. The point of connection of the CP&L line, so extended, with the Acme plant is more than 300 feet from the former location of Lumbee's single-phase line.

In its letter to Lumbee requesting the removal of the single-phase line and advising Lumbee of Acme's contract with CP&L, Acme stated that its reasons for desiring service by CP&L were that it desired to be served by a regulated public utility and that CP&L had been of assistance to Acme in locating and selecting this site for its plant. In its answer Acme alleged CP&L was better qualified by experience and facilities to supply an industrial plant such as Acme's than was Lumbee.

The complaint alleged, in substance, such of the above facts as had occurred at the time it was filed. It also alleged Lumbee was ready, able and willing to supply adequately all the needs of the Acme plant for electric service, that CP&L had begun the construction of its above mentioned line and that it would be an unnecessary and economically wasteful and unsightly construction. Lumbee prayed the Utilities Commission to restrain CP&L from further construction of such facilities and from rendering service to the Acme plant and to require CP& L to remove the facilities which had then been constructed for that purpose.

Lumbee moved for a temporary restraining order, which was denied by the commission. The construction of the line was completed by CP&L and it supplied electric service over these facilities to the contractor constructing the Acme plant. CP&L and Acme then moved to dismiss the complaint as a matter of law upon the stipulated facts and the pleadings. The commission first denied this motion and then, upon reconsideration, allowed it.

The commission found as a fact: 'Lumbee does not allege, and counsel for Lumbee conceded that it does not propose to show, that CP&L will not make a profit or earn a return on the facilities constructed by it to furnish electric service to the Acme premises.' While this is not a fact stipulated, it is true that the complaint does not contain any allegation with reference to this matter.

The commission concluded: 'There is no question but that, under G.S. s 62—110.2(b)(5), CP&L has the right to provide electric service to the Acme plant or 'premises' in this case. * * * (W)hether *255 or not there may be duplication, is not an issue in this proceeding, * * * (E)ven if duplication should exist it would not deprive the consumer of its statutory right to choose **667 its electric supplier or deprive CP&L of its statutory right to serve.'

Attorneys and Law Firms

Crisp, Twiggs & Wells, Raleigh, for appellant.

Edward B. Hipp, Commission Atty., and Larry G. Ford, Associate Commission Atty., Raleigh, for North Carolina Utilities Commission, appellee.

Sherwood H. Smith, Jr., Charles F. Rouse and W. Reid Thompson, Raleigh, for Carolina Power & Light Co., appellee.

McLean & Stacy, Lumberton, for intervenor appellee.

Opinion

LAKE, Justice.

Acme desires to purchase from CP&L the electric power it requires for the operation of its manufacturing plant. CP&L desires to sell that power to Acme. They have entered into a contract for such purchase and sale. We are not required to determine whether Acme could compel an unwilling CP&L to serve it.

Lumbee is a customer of CP&L. We are not, however, presently required to determine whether, as such customer, it may bring a proceeding before the Utilities Commission to prevent CP&L from constructing an extension of CP& L's facilities on the theory that such extension will be unprofitable and, therefore, may, at some future date, make it necessary for CP&L to charge Lumbee rates higher than CP&L would otherwise need in order to earn a fair return on the fair value of CP&L's total plant. Lumbee does not proceed here upon that theory. While it does not stipulate that CP&L will derive from its service to Acme a fair return upon that portion of its total rate base attributable to such service, Lumbee does not allege the contrary. It proceeds here upon the theory that it, as a supplier of electric power, has the exclusive right to serve Acme though Acme prefers another supplier.

Again, we do not presently have before us the question of Lumbee's right to have the Utilities Commission assign to Lumbee, as its exclusive service area, any territory pursuant to G.S. s 62—110.2(c). That statute confers upon the commission the authority, and imposes upon it the duty, to make such assignments to electric membership corporations, such as Lumbee, and to electric utility companies, such as CP&L, of all territory outside the corporate limits of municipalities and more than 300 feet from the lines of any such supplier. It provides that 'in order to avoid unnecessary duplication ***256** of electric facilities,' the commission shall, 'as soon as practicable after January 1, 1966,' so assign all such territory 'in accordance with public convenience and necessity.' The record before us shows that, despite the passage of three years, there has been no such division of such territory in Robeson County, either by agreement of the suppliers or by order of the commission. Originally, in this proceeding Lumbee combined its prayer for a restraining order against CP&L with its application for an order so assigning to Lumbee the territory which includes the Acme plant. However, Lumbee did not except to the order of the commission which separated its application for such assignment of territory from its complaint against CP&L. Only the latter was heard by the commission and it alone is now before us.

Thus, the question before us is whether Lumbee, as a competitor of CP&L, has a right, in the absence of such assignment of territory by the commission and in the absence of any contract between Lumbee and CP&L or between Lumbee and Acme, to an order by the Utilities Commission forbidding CP&L to serve Acme in accordance with Acme's request. Lumbee asserts that it is entitled to the entry of such order solely because, at the time Acme's initial need for service arose, Lumbee had in operation a single-phase power line within 300 feet of a portion of Acme's plant, and a three-phase line a short distance further therefrom, whereas CP&L had to build approximately four miles of line, substantially paralleling and duplicating Lumbee's line, in order to reach the Acme plant.

****668** **[1]** **[2]** In the absence of a valid grant of such right by statute, or by an administrative order issued pursuant to statutory authority, and in the absence of a valid contract with its competitor or with the person to be served, a supplier of electric power, or other public utility service, has no territorial monopoly, or other right to prevent its competitor from serving anyone who desires the competitor to do so. In Blue Ridge Electric Membership Corp. v. Duke Power Co., 258 N.C. 278, 128 S.E.2d 405, this Court said, 'Unless compelled by some cogent reason, one seeking electric service should not be denied the right to choose between vendors.' In Pitt & Greene Electric Membership Corp. v. Carolina Power & Light Co., 255 N.C. 258, 120 S.E.2d 749, and in Carolina Power and Light Co. v. Johnston County Electric Membership Corp., 211 N.C. 717, 192 S.E. 105, this Court recognized that, except as restricted by contract, electric membership corporations and public utility companies supplying electricity are free to compete in the rural areas of this State, notwithstanding the fact that such competition may result in substantial dupulication of electric power lines and other facilities.

***257** **[3]** **[4]** It is well settled, that the police power of the State is broad enough to include a statute providing that a public utility company, desiring to serve a new area, must obtain from the Utilities Commission a certificate that public convenience and necessity requires the proposed extension of its distribution facilities. It is, however, equally well settled that the Utilities Commission is a creature of the Legislature and has no authority to restrict competition between suppliers of electricity, except insofar as that authority has been conferred upon it by statute. State of North Carolina ex rel. Utilities Comm. v. Thurston Motor Lines, 240 N.C. 166, 81 S.E.2d 404; North Carolina Utilities Comm. v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909.

[5] **[6]** **[7]** **[8]** Obviously, the commission may not, by its rule or order, forbid the exercise of a right expressly conferred by statute. See North Carolina Utilities Comm. v. Atlantic Coast Line R.R. Co., 224 N.C. 283, 29 S.E.2d 912. The legislative body is under no compulsion to exercise the police power of the State to its fullest extent, or to exercise it in a manner which the courts, or an administrative agency, may deem wise or best suited to the public welfare. Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325; In re Markham, 259 N.C. 566, 131 S.E.2d 329. It is for the Legislature, not for this Court or the Utilities Commission, to determine whether the policy of free competition between suppliers of electric power or the policy of territorial monopoly or an intermediate policy is in the public interest. If the Legislature has enacted a statute declaring the right of a supplier of electricity to serve, notwithstanding the availability of the service of another supplier closer to the

customer, neither this Court nor the Utilities Commission may forbid service by such supplier merely because it will necessitate an uneconomic or unsightly duplication of transmission or distribution lines. In such event, it is immaterial whether the Legislature has imposed upon such supplier a correlative duty to serve.

In the light of these principles, we turn, to G.S. s 62—110.2, enacted in 1965, prior to which time there was no restraint upon competition in rural areas between electric membership corporations and public utility suppliers of electric power except as established by contract. Pitt & Greene Electric Membership Corp. v. Carolina Power & Light Co., supra.

The former absence of statutory provisions restricting competition between electric membership corporations and public utility suppliers of electric power gave rise to many contracts between these two types of suppliers designed to fix their respective territorial rights, which contracts, in turn, gave rise to much litigation. **669 See Blue Ridge Electric Membership Corp. v. Duke Power Co., supra. In the hope of putting an *258 end to or reducing this turmoil, the 1965 Legislature enacted G.S. s 62—110.2, the language of which was the result of collaboration and agreement between the two types of suppliers.

Subsequent (c) of this statute provides for the assignment of territory by the commission above mentioned. Subsection (b) of this statute sets forth in ten numbered paragraphs specific rules governing the right of suppliers to serve in situations there described. Provisions pertinent to this appeal are as follows:
'(b) In areas outside of municipalities, electric suppliers shall have rights and be subject to restrictions as follows:

'(1) Every electric supplier shall have the right to serve all premises being served by it, or to which any of its facilities for service are attached, on April 20, 1965.

'(2) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are locate wholly within 300 feet of such electric supplier's lines as such lines exist on April 20, 1965, except premises which, on said date, are being served by another electric supplier or to which any of another electric supplier's facilities for service are attached.

'(3) Every electric supplier shall have the right, subject to subdivision (4) of this subsection, to serve all premises initially requiring electric service after April 20, 1965 which are located wholly within 300 feet of lines that such electric supplier constructs after April 20, 1965 to serve consumers that it has the right to serve, except premises located wholly within a service area assigned to another electric supplier pursuant to subsection (c) hereof.

'(4) Any premises initially requiring electric service after April 20, 1965, which are located wholly or partially within 300 feet of the lines of one electric supplier and also wholly or partially within 300 feet of the lines of another electric supplier, as each of such supplier's lines exist on April 20, 1965, or as extended to serve consumers that the supplier has the right to serve, may be served by such one of said electric suppliers which the consumer chooses, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

'(5) Any premises initially requiring electric service after April 20, 1965 which are not located wholly within 300 *259 feet of the lines of any electric supplier and are not located partially within 300 feet of the lines of two or more electric suppliers may be served by any electric supplier which the consumer chooses, unless such premises are located wholly or partially within an area assigned to an electric supplier pursuant to subsection (c) hereof, and any electric supplier not so chosen by the consumer shall not thereafter furnish service to such premises.

'(10) No electric supplier shall furnish electric service to any premises in this State outside the limits of any incorporated city or town except as permitted by this section * * *.'

[9] Subsection (a)(1) of this statute defines 'premises' to mean 'the building, structure, or facility to which electricity is being or is to be furnished,' subject to a proviso not presently material. Consequently, it is the plant of Acme, and not the tract upon which it is located, which constitutes the 'premises' here involved, as that term is used in subsection (b). Thus, paragraph (1) of subsection (b), **670 above quoted, does not confer upon Lumbee the right to serve the Acme plant by reason of Lumbee's former service to the residence and the electric signs previously located on this tract. For the same reason, the 'premises' here involved are located partially but not

wholly within 300 feet of where Lumbee's single-phase line was when Acme's initial need for electric service arose. Consequently, the right of CP&L to construct its line here in question and to serve the Acme plant is governed by paragraphs (3), (4) and (5), above quoted.

CP&L's right, if any, under paragraphs (3) and (4) of subsection (b), to serve Acme arises by reason of its extension of its lines after April 20, 1965, for the purpose of serving Acme and, therefore, depends upon the right of CP&L to extend its lines for that purpose. Thus, the controlling provision of the statute is paragraph (5).

[10] At the time this proceeding was commenced, and prior thereto, the location of the Acme plant was not wholly within 300 feet of any line of any electric supplier, nor was it partially within 300 feet of the lines of two or more electric suppliers. As of that time, paragraph (5) of subsection (b) of the statute plainly and unequivocally established the right of Acme to choose CP&L as its supplier and the right of CP&L to serve this plant if Acme so chose it. Acme did so choose. Thus, the line constructed to the plant by CP&L ***260** after April 20, 1965 was constructed to serve a consumer CP&L had the right to serve. This brought paragraphs (3) and (4) of subsection (b) of the statute into operation. Since the statute expressly conferred upon CP&L the right to serve this plant, the Utilities Commission was not authorized to forbid CP&L to do so merely because Lumbee desired to perform the service and could reach the plant by an extension of its lines substantially shorter than the lines requires to be built by CP&L.

We express no opinion as to the authority of the Utilities Commission, on its own motion or upon complaint, to forbid construction by a public utility company for the purpose of serving a customer located similarly to Acme upon an allegation and a showing that such construction would be so wasteful of that supplier's own financial resources as to endanger its future capacity to serve adequately at reasonable rates. Lumbee does not allege such a situation.

[11] **[12]** Lumbee contends that since the Act of 1965 inserted G.S. s 62—110.2 into the chapter of the General Statutes relating to the regulation of public utility companies, this statute must be read in connection with other provisions of that chapter and, consequently, the powers conferred upon the commission by those other sections apply also to the specific situations dealt with in G.S. s 62—110.2. It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application. State ex rel. Utilities Commission v. Carolina Coach Co., 236 N.C. 583, 73 S.E.2d 562. In such situation the specially treated situation is regarded as an exception to the general provision. Young v. Davis, 182 N.C. 200, 108 S.E. 630. This rule of construction is especially applicable where the specific provision is the later enactment. National Food Stores v. North Carolina Board of Alcoholic Control, 268 N.C. 624, 151 S.E.2d 582. It is true, as contended by Lumbee, that when statutes 'deal with the same subject matter, they must be construed in Pari materia and harmonized to give effect to each.' Becker County Sand & Gravel Co. v. Taylor, 269 N.C. 617, 153 S.E.2d 19. When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction. State Highway Commission v. Hemphill, 269 N.C. 535, 153 S.E.2d 22; Davis v. North Carolina Granite Corporation, 259 N.C. 672, 131 S.E.2d 335; State ex rel. Long v. Smitherman, 251 N.C. 682, 111 S.E.2d 834. In such case, 'the Court is ****671** without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain.' North Carolina Board of Architecture v. Lee, 264 N.C. 602, 142 S.E.2d 643.

***261** **[13]** **[14]** It is for the Legislature, not the Court or the Utilities Commission, to determine whether a special provision should be made for the regulation of competition between electric membership corporations and public utility companies rendering electric service. Here, the Legislature has made that determination in clear, unequivocal terms. Consequently, it was unnecessary for the Utilities Commission to inquire into or determine the general economic or esthetic effect and advisability of the duplication of Lumbee's line by CP& L. In view of the policy expressly declared by the Legislature, such determination by the commission would have been immaterial. Consequently, the commission properly dismissed the complaint without making such inquiry.

Affirmed.

All Citations

275 N.C. 250, 166 S.E.2d 663

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113 N.C.App. 528
Court of Appeals of North Carolina.

Donald E. AYERS, D/B/
A Ayers Wood Yard, Petitioner,
v.
BOARD OF ADJUSTMENT FOR the TOWN
OF ROBERSONVILLE THROUGH Its
Chairperson Thelma ROBERSON, Respondent.

No. 932SC123.
|
Feb. 1, 1994.

Synopsis
Business owner, who used leased property to receive, weigh, grade, temporarily store and ship timber, appealed determination by municipal board of adjustment that his use of property was in violation of zoning ordinance, which manifested intent that district was to be free from nonagricultural commercial operations. The Superior Court, Martin County, Cy A. Grant, Jr., J., concluded that owner's use of property was "forestry" permitted under ordinance. Board of Adjustment appealed. The Court of Appeals, Martin, J., held that "forestry" included agricultural activities, not ancillary timber industry activities, such as those in which owner engaged.

Reversed.

West Headnotes (7)

[1] **Zoning and Planning**
Certiorari

Zoning and Planning
Decisions of boards or officers in general

Zoning and Planning
Determination supported by evidence

For purposes of superior court review of decision of municipal board of adjustment, which review is in nature of certiorari, superior court sits as appellate court and may review both sufficiency of evidence presented to respondent and whether record reveals error of law. G.S. § 160A-388(e).

Cases that cite this headnote

[2] **Zoning and Planning**
De novo review in general

In reviewing decision of municipal board of adjustment for errors of law in application and interpretation of zoning ordinance, superior court applies de novo standard of review and can freely substitute its judgment for that of the board.

16 Cases that cite this headnote

[3] **Zoning and Planning**
De novo review

In reviewing decision of superior court which reviewed decision of municipal board of adjustment with regard to questions of law involving application and interpretation of zoning ordinance, Court of Appeals applies de novo standard of review and can freely substitute its judgment for that of superior court.

12 Cases that cite this headnote

[4] **Zoning and Planning**
Intention and purpose of enacting body

In determining meaning of zoning ordinance, Court of Appeals attempts to ascertain and effectuate intent of legislative body.

3 Cases that cite this headnote

[5] **Zoning and Planning**
Meaning of Language

Unless term is defined specifically within zoning ordinance in which it is referenced, it should be assigned its plain and ordinary meaning.

6 Cases that cite this headnote

[6] **Zoning and Planning**
Construction, Operation, and Effect

10

When determining meaning of zoning ordinance, interpretations that create absurd or illogical results should be avoided.

6 Cases that cite this headnote

[7] **Zoning and Planning**

Agricultural uses, woodlands and rural zoning

"Forestry," as used in municipal zoning ordinance that manifested intent that district be free from nonagricultural commercial operations, included development, management and harvesting of forest or growing timber and did not include ancillary timber industry activities that were industrial in origin, including transportation of timber to point at which wood was converted to some type of useable product.

Cases that cite this headnote

**199 *528 In January of 1992, petitioner, Donald Ayers began operating a business known as Ayers Wood Yard on a leased two acre parcel of land located within the extraterritorial zoning jurisdiction of the Town of Robersonville. The business serves as a temporary destination for truckloads of cut timber. Upon arrival on petitioner's property, the timber is unloaded, weighed, and graded. The timber is thereafter reloaded onto trucks for shipment to other locations.

**200 The property where petitioner operates his business is zoned RA-20 Residential Agricultural District pursuant to Article III, Section 4 of the Town of Robersonville Extraterritorial Zoning Ordinance (hereinafter "the ordinance"). The ordinance provides that the Residential Agricultural District was

> established as a district in which the principal use of the land is for low density residential and agricultural purposes. This district is intended to insure that residential development outside the corporate limits and not having access to public water service and dependent upon septic tanks for sewerage disposal will occur at a low density in order to provide a healthful environment.

*529 Among the property uses permitted in the Residential Agricultural District are:

1. Single family dwellings
2. Two family dwellings
3. Schools, colleges, kindergartens and day care centers
4. Farming, truck, gardening and nurseries
5. Forestry
6. Kennels
7. Wayside stands for the sale of agricultural products on the same parcel where offered for sale
8. Churches
9. Home occupations
10. Single mobile homes
11. Uses and buildings customarily accessory to the above permitted uses
12. Public utility transmission lines, pipes, poles, towers
13. Small profession or announcement signs
14. Renting of one (1) room provided no external evidence of such is created.

Shortly after petitioner began operation of his business, a residential homeowner whose property adjoins petitioner's property complained to the Zoning Enforcement Officer about petitioner's use of the property. Following this complaint, the Zoning Enforcement Officer notified petitioner that his use of the property was in violation of the ordinance. Petitioner appealed this determination to respondent Board of Adjustment, contending that his use of the property is within the definition of "forestry", a use permitted by the ordinance. Following a hearing, the Board of Adjustment affirmed the decision of the Zoning Enforcement Officer. In its order, respondent interpreted the word "forestry" to mean "[t]he developing, caring for and management

of forest: The management and harvesting of growing timber."

Petitioner filed a petition for a writ of certiorari in superior court seeking review of the decision of the Board of Adjustment. *530 After reviewing the record and hearing the arguments of counsel, the superior court entered an order finding *inter alia* that " 'forestry' includes the harvesting and transportation of timber to the first point of processing; that is, the point at which the wood is actually converted to some type of useable product." Based on this finding, the superior court concluded that petitioner's use of the subject property is "forestry", permitted under the zoning ordinance, and entered an order reversing the decision of the Board of Adjustment. The Board of Adjustment appealed.

Attorneys and Law Firms

Bowen & Batchelor by J. Melvin Bowen and James R. Batchelor, Jr., Williamston, for respondent-appellant.

Colombo, Kitchen & Johnson by Thomas H. Johnson, Jr., Greenville, for petitioner-appellee.

Opinion

MARTIN, Judge.

[1] G.S. § 160A-388(e) (Supp.1992) provides that every decision of a municipal board of adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." In proceedings of this nature, the superior court sits as an appellate court and may review both the sufficiency of the evidence presented to respondent and whether the record reveals an error of law. *Concrete Co. v. Board of Commissioners,* 299 N.C. 620, 265 S.E.2d 379, *reh'g denied,* 300 N.C. 562, 270 S.E.2d 106 (1980).

**201 In the present case, the questions before the superior court were (1) what property uses are included within the definition of "forestry" as used in the ordinance and (2) whether petitioner's use of the subject property falls within that definition? It is undisputed that petitioner uses the subject property to receive, weigh, grade, temporarily store and ship cut timber. Thus, the only issue we must decide, is whether the superior court committed an error of law in interpreting and applying the ordinance.

[2] [3] In reviewing a decision of the Board of Adjustment for errors of law in the application and interpretation of a zoning ordinance, the superior court applies a *de novo* standard of review and can freely substitute its judgment for that of the board. *Capricorn Equity Corp. v. Town of Chapel Hill,* 334 N.C. 132, 431 S.E.2d 183 (1993). Similarly, in reviewing the judgment of the superior court, this Court applies a *de novo* standard of review in determining whether an error of law exists and we may freely substitute *531 our judgment for that of the superior court. *Id.* Questions involving the interpretation of ordinances are questions of law. *Id.* Applying a *de novo* standard of review, we conclude that the decision of the superior court is incorrect and that the decision of respondent must be reinstated.

[4] [5] [6] In determining the meaning of a zoning ordinance, we attempt to ascertain and effectuate the intent of the legislative body. *Concrete Co.,* 299 N.C. at 629, 265 S.E.2d at 385. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. *Rice Associates v. Town of Weaverville Bd. of Adjust.,* 108 N.C.App. 346, 423 S.E.2d 519 (1992). In addition, we avoid interpretations that create absurd or illogical results. *Pritchard v. Elizabeth City,* 81 N.C.App. 543, 344 S.E.2d 821, *disc. review denied,* 318 N.C. 417, 349 S.E.2d 598 (1986).

[7] With these principles in mind, we first turn to the language of the ordinance at issue. The ordinance specifically provides that its purpose is to establish "a district in which the principal use of the land is for low density residential and agricultural purposes." The enumerated uses which are permitted within the district, though not exclusively residential and agricultural, are uniformly non-industrial. On the whole, the language of the ordinance, the title of the district it creates, and the uses which it permits, manifest an intent that the district be free from non-agricultural commercial operations.

Respondent's definition of the term "forestry", which limits the activities included thereunder to the development, management and harvesting of forest or growing timber, is not inconsistent with the zone's established residential and agricultural purposes. Rather, this definition of "forestry" limits timber associated activities to those which are strictly agricultural in nature. It does not include ancillary timber industry activities

which are industrial in origin and which would detract from the district's residential and agricultural purpose and character.

Conversely, the expansive definition of "forestry" adopted by the superior court which includes the transportation of timber to the "point at which the wood is actually converted to some type of useable product" would permit uses which are clearly incompatible with the residential and agricultural purposes of the district. For example, under such a definition, industrial operations performing ***532** intermediate, but not final processing of timber, would not be prohibited. Likewise, rail and truck depots, larger than petitioner's, which receive, weigh, grade, store and ship cut timber would be permitted to operate in the Residential Agricultural District. Clearly, a definition which would permit such operations does not effectuate the manifest intent of the ordinance and would create an illogical result.

We are also persuaded that the meaning respondent assigned to the term "forestry" is its plain and ordinary meaning. The American Heritage Dictionary defines "forestry" as "(1) the science and art of cultivating, maintaining and developing forest, (2) the management of a forest land, and (3) a forest land." Webster's Third International Dictionary defines the term as "a science of developing, caring for and cultivating forest: The ****202** management of growing timber." Another source relied upon by respondent in arriving at its definition of "forestry" is *The Terminology of Forest Science and Technology, Practice and Products,* which defines "forestry" as "a profession embracing the science, business and art of creating, conserving and managing forest lands for the continuing use of their resources...."

None of these ordinary definitions of "forestry" include the transportation of cut timber to the "point at which the wood is actually converted to some type of useable product." The only such definition of "forestry" with which respondent was provided came from the testimony of petitioner's expert witness. That an expert was required to provide this meaning to the term, belies any contention that this definition constitutes the term's plain and ordinary meaning.

Based on the foregoing analysis, we conclude that respondent's definition of "forestry" is correct because it (1) effectuates the intent of the ordinance to establish a district of residential and agricultural uses, (2) is consistent with the term's plain and ordinary meaning, and (3) avoids the illogical result of allowing intermediate timber processing operations and transportation depots in a district intended for low density residential and agricultural purposes. Therefore, we hold that the superior court erred as a matter of law by reversing the Board of Adjustment's conclusion that petitioner's business is in violation of the ordinance because it is not engaged in the development, management, harvesting, or care of growing timber.

***533** For the foregoing reasons, the order of the superior court is reversed and this case is remanded for reinstatement of the decision of the Board of Adjustment.

Reversed.

JOHNSON and McCRODDEN, JJ., concur.

All Citations

113 N.C.App. 528, 439 S.E.2d 199

End of Document

3.A.c

KeyCite Yellow Flag - Negative Treatment
Distinguished by Whitehurst v. Alexander County, N.C.App., February 2, 2016

91 N.C.App. 616
Court of Appeals of North Carolina.

STOKES COUNTY, Applicant,
v.
Donald H. PACK and Wife Jewel M. Pack; William H. Johnson; Stephen Jessup; Don Lester; James Harris; Peggy Nichols, Respondents.
In re Donald and Jewel PACK, Petitioners.

No. 8817SC13.
|
Oct. 18, 1988.

Synopsis
Parties sought judicial review of decision of county zoning board of adjustment that storage of any additional vehicles on property owners' land would "enlarge" or "extend" nonconforming use contrary to zoning ordinance. The Superior Court, Stokes County, Joseph R. John, J., affirmed decision of Board, and parties appealed. The Court of Appeals, Hedrick, C.J., held that: (1) storage of additional vehicles on land which property owners had already cleared for use in automobile salvage operation before zoning ordinance was adopted was not "enlargement" or "extension" of nonconforming use contrary to ordinance's grandfather provisions, but (2) property owners could not clear any additional land and use it in salvage operation without impermissibly "enlarging" or "extending" nonconforming use.

Reversed.

West Headnotes (2)

[1] **Zoning and Planning**
Increase in amount or intensity of use

Storage of additional vehicles on land which property owners had already cleared for use in automobile salvage operation before zoning ordinance was adopted was not "enlargement" or "extension" of "nonconforming use" contrary to ordinance's grandfather provisions.

2 Cases that cite this headnote

[2] **Zoning and Planning**
Area of use

Property owners who had already cleared land for use in automobile salvage operation before zoning ordinance was adopted could use such land in business, but could not clear any additional land and use it in salvage operation, without "enlarging" or "extending""nonconforming use" contrary to ordinance's grandfather provisions.

1 Cases that cite this headnote

****727** ***616** The record before us discloses the following: In 1979, petitioners bought a ten-acre tract of land located in Stokes County. At that time, petitioners inquired of county officials as to the zoning laws, and they were told there were none in Stokes County. In 1980, petitioners began clearing part of the tract for a garage and salvage business. In 1982, petitioners began construction of a metal building to be used for automobile repair. Petitioners started using the building at the end of 1982. On 16 August 1982, the Stokes County Board of Commissioners adopted an ordinance providing for the zoning of Stokes County to become effective on ***617** 1 March 1983. This ordinance placed petitioners' property in a district which was zoned as residential and agricultural and did not allow for the operation of a garage and salvage business. As of 1 March 1983, petitioners' garage was in operation, and several cars which were to be used for spare parts were already in place.

After the zoning ordinance was adopted, petitioners continued with the operation of their business. On 28 August 1985, the Zoning Administrator of Stokes County, C.T. Lasley, sent petitioners the following letter:
August 28, 1985

Mr. Donald Pack

4206 Garden Street

11.

Winston Salem, North Carolina

Dear Mr. Pack:

At the August 5, 1985 meeting of the Stokes County Board of Commissioners your request to rezone five (5) acres from R-A (Residential Agricultural) to M-2 (Heavy Manufacturing) was denied.

Therefore, the salvage yard that you have begun on your property is in violation of the Stokes County Zoning Ordinance. This violation must be corrected with thirty (30) days from the date of this letter or further legal steps will be taken to correct this situation.

If I can be of further assistance to you, please do not hesitate to contact my office.

Sincerely,

s/C.T. Lasley

C.T. Lasley

Zoning Administrator

CTL/kdw

On 6 December 1985, C.T. Lasley obtained a criminal summons against petitioner, Donald Pack, for the violation of the Stokes County Ordinance and G.S. 14-4. This case came before District Court Judge Jerry Cash Martin on 9 January 1986, and petitioner was found "not guilty not solely because the State of North Carolina failed to prove that the alleged violation was *618 willful but the finding of Not Guilty was based on other factors, including but not limited to the Stokes County Zoning Ordinance provision concerning the 'Grandfather Clause.' "

On 18 July 1986, petitioner Donald Pack filed an application with the Stokes County Zoning Board of Adjustment appealing the Zoning Administrator's decision of 28 August 1985. After a hearing on the matter, the Board of Adjustment entered an order on 31 July 1986 which provided in pertinent part:

6. *Decision of Zoning Enforcement Officer is:*

( ) AFFIRMED

( ) REVERSED

(X) MODIFIED AS FOLLOWS: (1) No more than twelve vehicles or parts **728 thereof shall be stored on the property as a non-conforming use (section 70.1, Stokes County Zoning Ordinance), and these vehicles and/or parts thereof must be contained in an area of no more than 2400 square feet as defined by the perimeter of all vehicles or parts thereof. (2) This area shall be located in the open field south of garage as signified by letter D on Zoning Enforcement Officer Exhibit III (Blue Print Map) no closer than fifty (50) feet from the garage.

Both parties petitioned the superior court for a writ of certiorari. These petitions were both allowed. On 30 October 1987, an order was entered by Superior Court Judge Joseph R. John affirming the decision of the Stokes County Zoning Board of Adjustment. Petitioners appealed, and respondent Stokes County cross-appealed.

Attorneys and Law Firms

Stover, Dellinger & Cromer by James L. Dellinger, Jr., and Anderson D. Cromer, King, for petitioners.

Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., Winston-Salem, for respondents.

Opinion

HEDRICK, Chief Judge.

Article VII of the Zoning Ordinance of Stokes County states in pertinent part:

*619 *General Provisions*

Any use of a building or land which does not conform to the use regulations, either at the effective date of this ordinance, or as a result of subsequent amendments is a non-conforming use. Non-conforming uses may be continued, provided they conform to the provisions of Article VII, Section 70.

Section 70. Continuing the Use of Non-Conforming Land

70.1 *Extensions of Use.* Non-Conforming uses of land shall not hereafter be enlarged or extended in any way.

In the case of *In Re Tadlock*, 261 N.C. 120, 134 S.E.2d 177 (1964), the appellants purchased a ten-acre tract of land in 1957 and immediately began construction of a trailer park. They planned to complete the development in three stages, with each stage to encompass 25 units. At the time that the Charlotte City Council passed a zoning ordinance making the applicants' trailer park a nonconforming use, actual construction was confined to Area 1 of the development. There were 14 units in place, and steps had been taken toward the installation of 11 more sites. Areas 2 and 3 had not been constructed, and these areas were still in the planning stage of development. The Board of Adjustment for the Charlotte Zoning Area ruled that appellants could not "extend a non-conforming use of land" by placing 11 additional units in Area 1 and developing Areas 2 and 3. The superior court affirmed the Board's action. Both the Board and the court based their decision on a zoning ordinance which provided: "A non-conforming open use of land shall not be enlarged to cover more land than was occupied by that use when it became non-conforming." Our Supreme Court held that under the evidence and the applicable rules of law, the appellants were entitled to complete the installation of the 11 additional units in Area 1. "(T)he criterion is whether the nature of the incipient nonconforming use, in the light of its character and adaptability to the use of the entire parcel, manifestly implies an appropriation of the entirety to such use prior to the adoption of the restrictive ordinance." *Id.* at 124, 134 S.E.2d at 180, *citing* C.J.S., Vol. 101, "Zoning," Sec. 192, p. 954. The Court further held that "by planning the development in three stages and confining actual construction to Area 1 only, the applicants as to Areas 2 and 3 fall ***620** within the rule that planning a development alone is insufficient to enlarge a nonconforming use." *Id.* at 125, 134 S.E.2d at 181.

[1] In the present case, the record discloses that at the time that the zoning ordinance went into effect on 1 March 1983, petitioners had cleared approximately five acres of their tract. They were also operating a garage and had several salvage vehicles in place. Since 1 March 1983, petitioners have continued to bring vehicles to their property in order to operate the salvage yard. We hold that under the evidence petitioners were certainly entitled to complete their salvage yard on the five acres by adding the additional vehicles. ****729** The addition of salvage vehicles in excess of the number in place on 1 March 1983 was not an enlargement or extension of a nonconforming use of land as is prohibited by Section 70 of the Zoning Ordinance of Stokes County, but rather it was the mere completion of a project which was partially finished when the zoning regulations became effective.

[2] We further hold that the other five acres in petitioners' ten-acre tract that were not cleared and partially in use as of 1 March 1983 may not be utilized by petitioners in their garage and salvage business. This would be a nonconforming use and as such would violate Section 70 of the Zoning Ordinance of Stokes County. Such an enlargement lies within the discretion of the Stokes County Board of Adjustment.

On cross-appeal, respondent Stokes County contends the "Trial Court erred in denying Stokes County's Motion to Dismiss the appeal of Mr. and Mrs. Pack to the Zoning Board of Adjustment since the appeal was not timely filed." In its brief, respondent has failed to set out the exception on which its argument is based, thereby subjecting their appeal to dismissal. Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure, in pertinent part, states:

> Immediately following each question shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal, or the transcript of proceedings if one is filed pursuant to Rule 9(c)(2). Exceptions not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.

***621** Respondent's exceptions to the trial court's ruling are deemed abandoned.

REVERSED.

ARNOLD and COZORT, JJ., concur.

All Citations

91 N.C.App. 616, 372 S.E.2d 726

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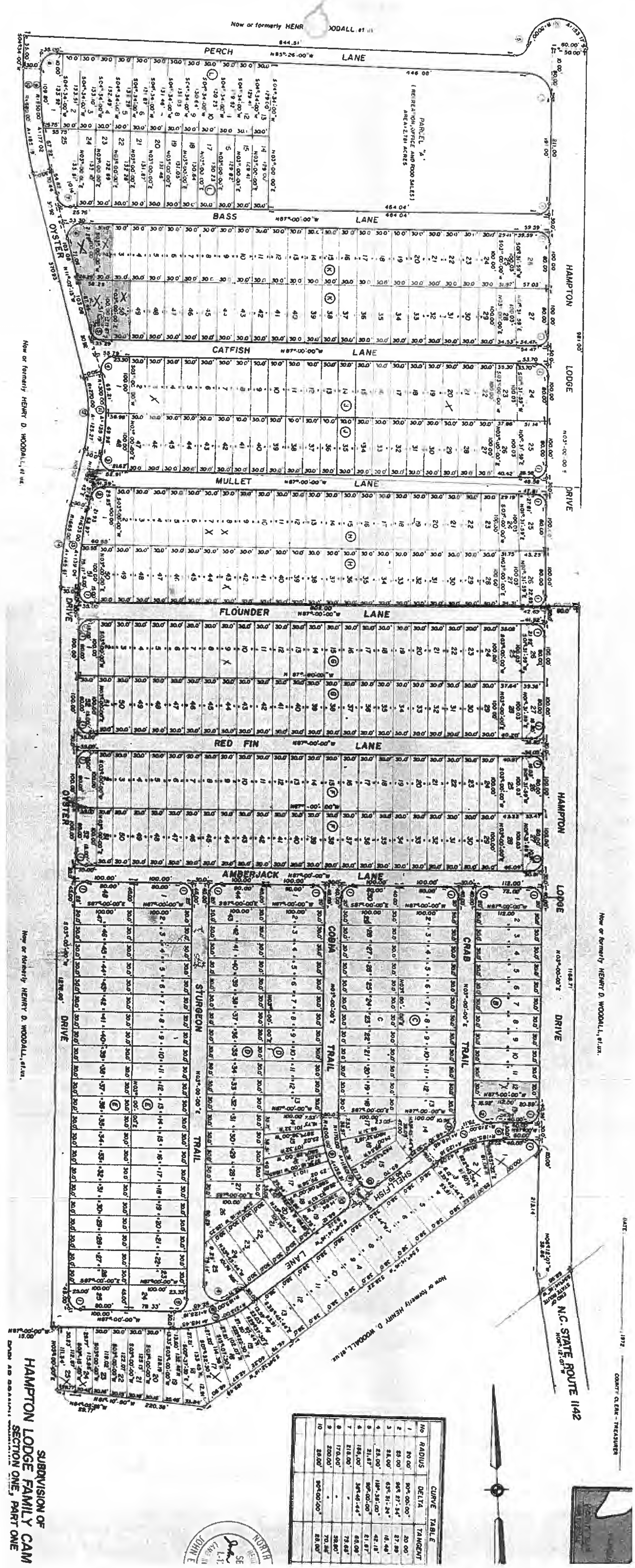


Attachment: Attachment_2 re-scan Williams Mullen Submittal (BOA 19-02 Hampton Lodge Campground)

Camp Sites

Label	Count	Utilities
0	12	W/E
A	12	W/E
B	14	W/E
C	16	W/E
D	18	W/E
E	26	W/E-20a
F	18	W/E
G	14	W/S/E
H	16	W/S/E
WF	104	W/S/E
	250	**SITES WITH UTILITIES**
I	16	---
J	11	---
T	24	---
X	37	---
	88	**BOONDOCK SITES**
PLAT	439	—
E	-11	—
	428	**SITES FROM ORIGINAL PLAT**
TOTAL	**766 SITES**	

POSSIBLE EXISTING FORMAL AND INFORMAL CAMP SITES, TRAILS, & ROADS BASED ON AERIAL RECONNAISSANCE AND OTHER SOURCES

HAMPTON LODGE CAMPING RESORT

COINJOCK, NORTH CAROLINA

WPL | LANDSCAPE ARCHITECTS | LAND SURVEYORS | CIVIL ENGINEERS

NORTH

0 50 100 ft 200

215-0374

JANUARY 18, 2017

12 b

NORTH CAROLINA
CURRITUCK COUNTY

AFFIDAVIT OF S. EARL GRIFFIN

The undersigned being first duly sworn, deposes and says:

1. I am S. Earl Griffin and all information given hereunder is based upon my personal knowledge.

2. I am a licensed practicing attorney in the Commonwealth of Virginia.

3. Since 1974 I have been either a managing partner or managing member of a successor L.L.C. which held title to real property in Currituck County operated under the name of Hampton Lodge Campground. Said property was purchased in three transactions and identified by Currituck County property identification numbers: 0079-000-0001-0000, 0079-000-0002-0000, 0079-000-0003-0000 and 0079-000-0004-0000 and consist of four parcels containing 536.47 acres with a mailing address of 1631 Waterlily Road, Coinjock, North Carolina 27923.

4. At the time of my acquisitions, together with other partners, this real property was not subject to any zoning restrictions imposed by Currituck County.

5. Since our acquisition, the property has been continuously operated as a campground for the public in return for a fee for access to campsites and amenities.

6. The campsites have been occupied with tents, trailers, and recreational vehicles (RVs).
7. Campers have been free to utilize the entire premises for their campsite on a first come, first serve basis for any such use.
8. There has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites.
9. Occupancy increases in the warm weather months of late spring through the early fall; however, the campground has been used by campers every operational day since our ownership.
10. There has never been platted, assigned lots.
11. The property has been continously listed with the Currituck County Tax Office as a "campground." Improvements made to the property include adding two restrooms to the rec center, adding an entrance gate and improvements made to the unpaved roadways. "H" row was added with sixteen (16) pull-thru sites. Past assistant managers' on-site residential trailer has been removed and replaced with a double-wide trailer. The former manager's residence was a part of the campground and was purchased from his estate upon his passing.

12. During the course of any given year, hundreds of campsites have been selected and used by for-pay customers throughout the entire acreage.

This the 31st day of October, 2017.

S. Earl Griffin
S. EARL GRIFFIN

STATE OF VIRGINIA
CITY OF PORTSMOUTH

Sworn to and subscribed before me this 31st day of October, 2017.

Pamela T. Beylor
NOTARY PUBLIC

My commission expires: 7-31-2020

PAMELA T. BEYLOR
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
COMM. EXPIRES: JULY 31, 20 20
REGISTRATION NO. 217347

STATE OF VIRGINIA
COUNTY OF Lunenburg, to-wit:

AFFIDAVIT OF LEWIS W. BRIDGFORTH

The undersigned being first duly sworn, disposes and says:

1. I am Lewis W. Bridgforth and all information given hereunder is based upon my personal knowledge.

2. I am a retired physician having maintained a general practice in the Commonwealth of Virginia.

3. Since 1974 I have been either a managing partner or managing member of a successor L.L.C. which held title to real property in Currituck County operated under the name of Hampton Lodge Campground. Said property was purchased in three transactions and identified by Currituck County property identification numbers: 0079-000-0001-0000, 0079-000-0002-0000, 0079-000-0003-0000 and 0079-000-0004-0000 and consist of four parcels containing 536.47 acres with a mailing address of 1631 Waterlily Road, Coinjock, North Carolina 27923.

4. At the time of my acquisitions, together with other partners, this real property was not subject to any zoning restrictions imposed by Currituck County.

5. Since our acquisition, the property has been continuously operated as a campground for the public in return for a fee for access to campsites and amenities.
6. The campsites have been occupied with tents, trailers, and recreational vehicles (RVs).
7. Campers have been free to utilize the entire premises for their campsite on a first come, first serve basis for any such use.
8. There has never been a limitation imposed on the number of the sites, the location of the sites, nor occupancy by vehicles of any kind, or tents, or simply sleeping bags and campfire sites.
9. Occupancy increases in the warm weather months of late spring through the early fall; however, the campground has been used by campers every operational day since our ownership.
10. There has never been platted, assigned lots.
11. The property has been continuously listed with the Currituck County Tax Office as a "campground." Improvements made to the property include adding two restrooms to the rec center, adding an entrance gate and improvements made to the unpaved roadways. "H" row was added with sixteen (16) pull-thru sites. Past assistant managers' on-site residential trailer has been removed and replaced with a double-wide trailer. The

former manager's residence was a part of the campground and was purchased from his estate upon his passing.

12. During the course of any given year, hundreds of campsites have been selected and used by for-pay customers throughout the entire acreage.

This the 11th day of October, 2017.

Lewis W Bridgforth
LEWIS W. BRIDGFORTH

STATE OF VIRGINIA
COUNTY OF Lunenburg

Sworn to and subscribed before me this 11th day of October, 2017.

Sherlene A Vaughan
NOTARY PUBLIC

My commission expires: 04-30-2020

SHERLENE A. VAUGHAN
NOTARY PUBLIC
Commonwealth of Virginia
Registration No. 229461
My Commission Expires 4-30-2020

STATE OF VIRGINIA
CITY OF CHESAPEAKE

AFFIDAVIT OF JOANN GAY

1. I am JoAnn Gay, residing at 521 Gerry Drive, Chesapeake, Virginia and all information given hereunder is based upon personal knowledge.

2. I have been a patron of Hampton Lodge Campground for 38 years.

3. During these past 38 years, Hampton Lodge Campground has continuously operated as an open space campground with rough camping allowing for tent sites and trailers to be scattered throughout the campground along with numbered hook-up sites.

4. The entire property has always been used as a campground and associated camping activities, including the parking of trailers, cars, trucks, boats, jet skis and recreational vehicles.

This the 6th day of October, 2017.

JoAnn Gay
JOANN GAY

STATE OF VIRGINIA
CITY OF CHESAPEAKE

Sworn to and subscribed before me this 6th day of October, 2017.

Pamela J. Taylor
Notary Public

My commission expires: 7-31-20.

PAMELA T. BEYLOR
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
COMM. EXPIRES: JULY 31, 2020
REGISTRATION NO. 217347

NORTH CAROLINA
CURRITUCK COUNTY

AFFIDAVIT OF DELORES MYERS

1. I am Delores Myers and all information given hereunder is based upon my personal knowledge.
2. I have resided at 1552 Waterlily Road, Church's Island, Currituck County, North Carolina which is located just outside the entrance gate of Hampton Lodge Campground for forty-nine (49) years.
3. During the past forty-nine (49) years, Hampton Lodge Campground has continuously operated as an open space campground with rough camping allowing for tent sites and numbered hook-up sites for trailers.
4. Mr. Woodall's home and barn were located at the southwest corner of the campground near the inlet to the Inland Waterway. In 1970, Mr. Woodall dug a small pond on the Southeast corner of Hampton Lodge, adjacent to my property but no camping was never permitted beyond the boathouse of the Jamerson property.
5. The property has always been used as a campground with associated camping activities, including the parking of trailers, cars, trucks, boats, jet skis and recreational vehicles at camping sites and storage areas.
6. On special holidays and occasions if occupancy demand exceeded the available sites a no vacancy sign was placed at the gate and camp store.
7. Over the years, there have been horseshoe pits, basketball goals, a softball field, a shuffleboard court and a playground for outdoor youth activities. Other activities were enjoyed throughout the campground especially on holiday weekends. In between 1970-1974, the process of an inground pool was started and later filled in and the bulkhead and piers were built for swimming and water activities.
8. Recently, the cedar tree area, as you enter the gate has been utilized in the last twenty (20) years for holiday activities such as a Halloween Haunted Forest. In the last 6-10 years, Hampton Lodge has used the Cedar Tree area for rough tent camping and twice a year for the Star Gazing group for astronomy studies and rough trailer and tent camping.

This the 24th day of August, 2018.

Delores Myers

DELORES MYERS

NORTH CAROLINA
CURRITUCK COUNTY

Sworn to and subscribed before me this 24 day of August, 2018.

NOTARY PUBLIC

My commission expires: 1-29-2022

CHRISTINE A. BOYLE
NOTARY PUBLIC
Dare County
North Carolina
My Commission Expires January 29, 2022

NORTH CAROLINA
CURRITUCK COUNTY

AFFIDAVIT OF JACQUELINE MYERS

1. I am Jacqueline Myers and all information given hereunder is based upon my personal knowledge.
2. I am the daughter of Delores Myers.
3. My address is 1548 Waterlily Road, Church's Island, Currituck County, North Carolina which is located just outside the entrance gate of Hampton Lodge Campground.
4. Between 1552 and 1548 Waterlily Road properties, I have lived outside of the Hampton Lodge Campground for thirty-nine (39) years.
5. Living so close to the entrance of Hampton Lodge enabled me to be a visitor to the campground almost daily when I was a child.
6. At the time we moved to 1552 Waterlily Road location, the property now known as Hampton Lodge Campground was owned by Mr. Henry Woodall (previous owner to Mr. John Pappas and partners). I would visit Mr. Woodall and his wife whose house was located at the southwest corner of the campground near the inlet to the Inland Waterway.
7. For many years, I was practically an every day visitor to the campground because the management allowed my family the use of activity resources.
8. Since the time of my earliest memories, the entire property has been continuously operated as an open space campground with rough camping for tent sites along with numbered hook-up sites for trailers.
9. Since Mr. Woodall opened Hampton Lodge around 1970, it has been used as a campground with camping activities, including the parking of trailers, cars, trucks, boats, jet skis and recreational vehicles at individual sites as well as a storage area.
10. On special holidays and occasions if occupancy demand exceeded the available sites, a no vacancy sign was placed at the gate and camp store.
11. Over the years, there have been horseshoe pits, basketball goals, a softball field, a shuffleboard court and a playground for outdoor youth activities. Other activities were enjoyed throughout the campground especially on holiday weekends. Between 1970-1974 Hampton Lodge began the process of an inground pool but was later filled in. They chose to bulkhead and build piers for swimming areas.

This the 24 day of August, 2018.

JACQUELINE MYERS

NORTH CAROLINA
CURRITUCK COUNTY

Sworn to and subscribed before me this 24th day of August, 2018.

NOTARY PUBLIC

My commission expires: 1-29-2022

CHRISTINE A. BOYLE
NOTARY PUBLIC
Dare County
North Carolina
My Commission Expires January 29, 2022

Currituck, N. C.
March 20, 1973

The Board of County Commissioners met in special session March 20 1973 at 7:30 p.m. at the Courthouse with the following members present: H. D. Newbern, Jr., Chairman; H. O. Capps; R. H. Ferrel James M. Voliva; and Marvin Snowden. Also present were members of the Planning Board: Jerry Hardesty, Chairman; James H.Ferebee Jr.; and R. E. Ferrell.

Meeting Called to Order. — The meeting was called to order.

Forestry Program for the County. — Larry Lawrence, State Forestry; John Lively, from the State Water shed; and Reginald Gregory, Forest Ranger, appeared before the Board at their request and informed the Board that if the County elects to come under the Forestry program it will cost them $9426 for the first year and approximately $7402 the second year. The total Budget for 1973-74 is $31,420 - the County's part is $9426; State's part is $21,994. It was explained that the County will b included in the State's Budget if they want to come under the program. Also, it was explained to the Board that the Commission ers will recommend a minimum of three or more men for the Ranger' job and the selection of one of the men will be made by the State for the Ranger's job in the County.

Action Development, Inc. - Hampton Lodge. — The Board discussed the previous request of Action Development, Inc. sub-division plat. The Board decided that there would be no approval until the necessary bond has been posted and all other requirements and procedures of the sub-division and zoning ordinances have been complied with.

Amendments to the Zoning Ordinance. — The Board of Commissioners previously held a public hearing on the 14th day of March, 1973 on the following:

1. Amending the zoning ordinance:
   a. to include standards for planned unit developments
   b. to include the criteria for designation of historic districts.
2. Considering a petition by Coastland Corp. for rezoning of certain properties owned by them.

After a lengthy discussion by the Board, the County Attorney raised some question as to discretionary authority of the Board to grant or deny special use permits. R. H. Ferrell moved that the present zoning ordinance be amended to include standards for planned unit development, plus other new sections to the ordinance and changes to some of the existing sections and that the zoning map and ordinance book be updated. James M. Voliva seconded the motion. Four of the five voted for amendments to the zoning ordinance and the Chairman did not vote.

Water & Sewer Feasibility Study.

Ellis Spake, Engineer from Moore-Gardner & Associates, who is under contract with the County of Currituck for a water and sewer cost estimate and projected income feasibility study, presented the feasibility study to handle the Ocean Sands project which could be expanded up the Beach in the future. This report shows that the project is self-sufficient and that it will be financed by the developer, plus a $2800 acreage fee paid to the County to provide distribution and collection. The acreage fee will amount to $560,000.00 according to the study made. This money is to be used for the installation of water supply and the collection and treatment of sewage. The distribution system within the project will be responsibility and the expense of the developers for the installation. This distribution system will be turned over to the County for maintenance and operations. On file is a copy of the study.

* * * * *

Charlie Shaw, Attorney for Coastland Corp., requested that Coastland property be rezoned from RA-20 to RA-8S with the exception of Sections A,B, and C, which have been sold; and that approval of SectionsD,E,F, & G of the revised sub-division plats of Ocean Sands be approved, subject to the granting of a special use permit by the Commissioners. Joe Porter, a consultant for Ocean Sands, presented briefly the development plat and concept of Ocean Sands development.

* * * * * *

Herbert Mullen, Attorney for Kabler-Riggs of Whalehead Club Sub-Division, opposed the approval of the new revised plats of Ocean Sands at this time until such time a suitable right-of-way can be worked out for all property; and it was his understanding that the County when plans were made for development that all adjoining sub-division plats would align as to right-of-way; and requested that no action be taken by the Board until this has been done.

* * * * * *

Gardner Gidley, Representative of Pine Island property, stated that they have negotiated a temporary right-of-way with Ocean Sands provided that the County accepted the revised plan of development of Ocean Sands and that they have made the same offer to other developers, providing their plan of development is approved by the County; and it was their understanding that the County wanted orderly development,

whereas, the beauty, esthetic and open space were preserved.

Rezoning of Coastland Corp. Property was Approved.

Commissioner Snowden left the meeting due to an early morning departure. After a discussion concerning the request to approve the rezoning of Coastland Corp. property, R. H. Ferrell moved that the Board approve the rezoning of Coastland Corp. property from RA-20 to RA-8S, with the exception of Sections A, B, and C, which have already been sold. H. O. Capps seconded the motion; James M. Voliva voted "No". Marvin Snowden was absent. The Chairman did not vote. The motion was carried.

Special Use Permit Granted to Coastland Corp.

After a discussion on the request for a special use permit for Coastland Corp., R. H. Ferrell moved that the County grant a special use permit to Coastland Corp. to allow cluster deverlopment. H. O. Capps seconded the motion. Marvin Snowden was absent; James M. Voliva voted "No". The Chairman did not vote. The motion was carried.

Revised Plat of Ocean Sands Sub-Div. Sections D, E, F, & G Approved.

The Board discussed the request of Coastland Corp. for approval the revised sub-division plat of Ocean Sands Sections D, E, F, & G. R. H. Ferrell moved that the Board approved the revised plat of Ocean Sands Sub-Division Sections D, E, F, & G and that a 100 ft. right-of-way be indicated on the plat and align with adjoining property; and instructed that same be recorded in the Office of the Register of Deeds. H. O. Capps seconded the motion. Marvin Snowden was absent; James M. Voliva voted "No". The Chairman did not vote. The motion was carried.

Endorsement of H.B. #585 & 416 - Farmland Use Bill.

R. H. Ferrell moved that the Board go on record endorsing H.B. #585 and 416, which deal with the Farmland Use Tax Bill, preferential tax treatment for farmland. James M.Voliva seconded the motion and it was unanimously approved.
The meeting was adjourned.

Attest: W. C. Dozier
Clerk

H. D. Newberry
Chairman

H. O. Capps

James M. Voliva

MINUTES

BOARD OF ADJUSTMENT

COUNTY OF CURRITUCK
NORTH CAROLINA

The Board of Adjustment met at a regular and duly advertised meeting at 8:00 P.M. in the courthouse on October 29, 1975, with the following members present: John Barnes, Robert Byrne, Robert Ballance, Tillie Powell, Paul Spry and Melvin Phillips, alternate.

The Chairman called the meeting to order and announced a quorum. The Secretary read the minutes of the previous meeting which were approved without change. The Chairman declared the public hearing open.

75-7 W. C. Staples, Peachtree Beach

The Secretary read a letter from Mr. E. C. Staples requesting a rehearing for presentat: of additional evidence. The Code Enforcement Officer stated that the hearing had been properly advertised and presented a schematic to scale of the block on Georgia Bell Street on which the Staples' property is located.

Mr. E. C. Staples stated that he thought he would lose the lumber; that he considered the porch part of the house; that his mother was paying for the house and the porch addition; that she planned to be a full time resident, and in response to questions; that he could not build a porch on the side which contained the living room as this would violate the side setback restrictions; that placing the porch on the other side would not violate the ordinance, but would require entry through the bedrooms.

Mr. E. M. Sheffield stated he was a resident of Peachtree Beach; that Mr. Staples had started the house in good faith; that he personally didn't know anything about the zoning ordinance.

75-8 Hampton Lodge Campground

The Code Enforcement Officer stated that this was a request for a conditional use permit properly submitted to the Board of Adjustment.

Mr. Harvey Jamerson, resident manager, represented the Campground. He stated that he wanted to upgrade twelve waterfront sites by the addition of septic tank systems to provide sewage disposal for those sites; that the sites already have water and electrical connections; that Mr. Brown of the Health Department had examined the site and felt there would be no problem; that this addition would enhance the quality of the campground and increase its tax value.

Mr. John Flora, Engineer discussed the systems to be installed and stated that he did not have a scale drawing with him, but that the lots to be upgraded conform in size to the requirements of the ordinance.

No neighbors appeared to speak in support of or in opposition to the request.

There being no other persons present desiring to speak before the Board, the Chairman declared the public hearing closed and the Board proceeded at 9:00 P.M. to deliberate the cases previously heard.

75-7 W. C. Staples, FINDINGS OF FACT AND DECISION

After careful consideration of the record and the evidence before it, the Board made the following findings of fact:

a. The only new evidence submitted was the scale drawing submitted by the Code Enforcement Officer which showed the building locations on Georgia Bell Street.

After discussion, Robert Byrne made a motion that in view of the fact that no pertinent evidence had been submitted to justify a variance, that the Board again deny the variance. Tillie Powell seconded. Paul Spry, Robert Ballance and John Barnes voted aye. Vriance denied.

75-8 Hampton Lodge Campground, FINDINGS OF FACT AND DECISION

After careful consideration of the record and the evidence before it, the Board made the following findings of fact:

a. That Hampton Lodge Campground is a recreational campground.
b. That twelve existing campsites are to be upgraded by the addition of sewage disposal.
c. That no plat of the sites exist but they do and will conform to the ordinance requirements.
d. That the Health Department indicates the land is suitable for septic tanks.
e. That property value will be improved by the addition.

After discussion, Tillie Powell made a motion to grant a conditional use permit to upgrade the twelve waterfront lots by addition of septic tank systems for sewage disposal, provided that:

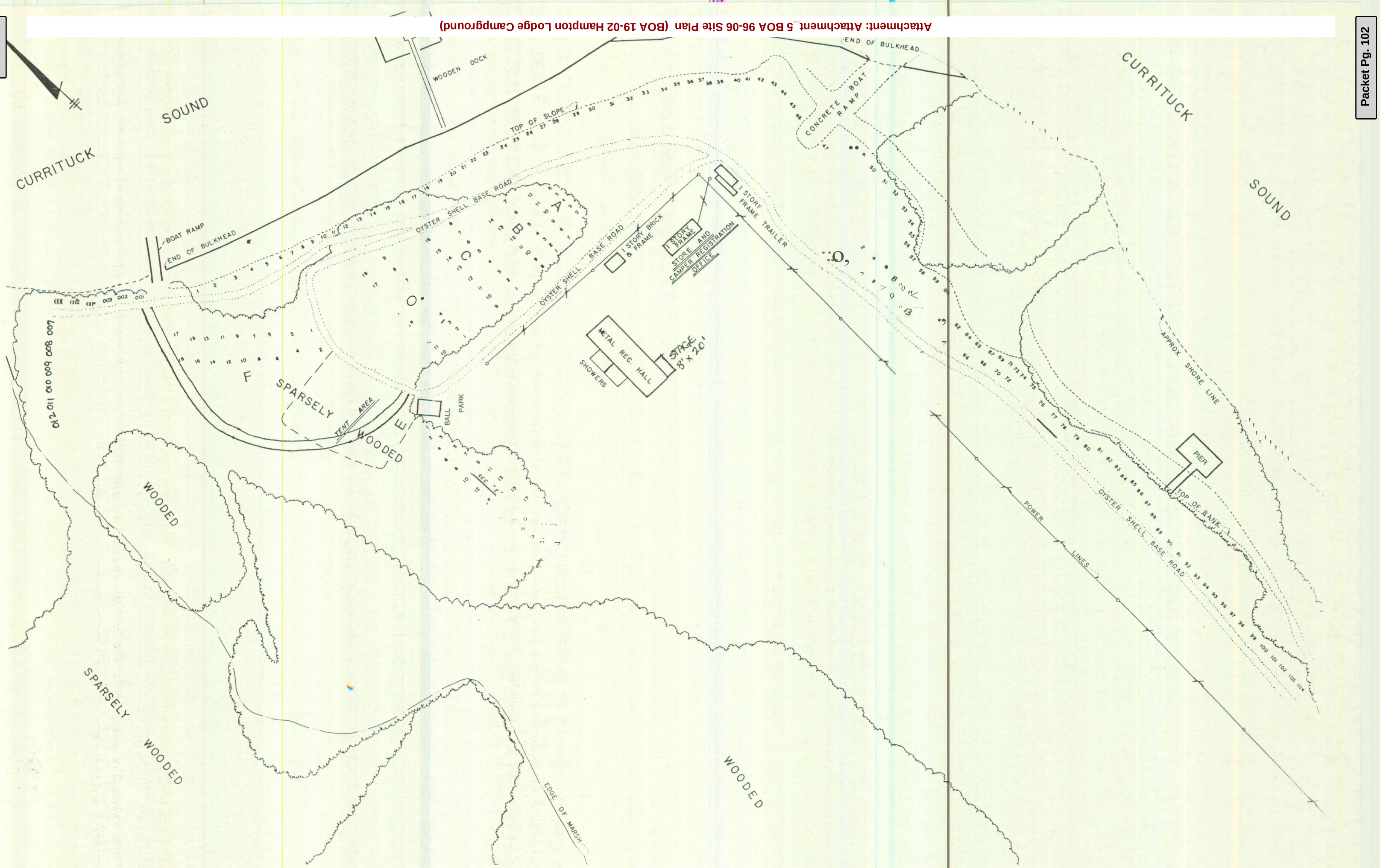
a. A plat of the twelve sites be submitted to the Code Enforcement Officer.
b. That the twelve sites be in conformity with the Zoning Ordinance.
c. That the septic tank systems be installed in accordance with the regulations of the Health Department.

Paul Spry seconded. John Barnes, Robert Byrne and Robert Ballance voted aye. Conditional use permit granted.

The Board reopened at 9:25. After discussion of member notification procedures, on a motion of Tillie Powell, seconded by Robert Byrne and concurred by all, the Board adjourned at 9:35 P.M.

Secretary to the Board

Chairman


SOUND
CURRITUCK
WOODEN DOCK
END OF BULKHEAD
CONCRETE BOAT RAMP
TOP OF SLOPE
OYSTER SHELL BASE ROAD
BOAT RAMP
END OF BULKHEAD
1 STORY B FRAME
1 STORY FRAME STORE AND CAMPER REGISTRATION OFFICE
1 STORY FRAME TRAILER
METAL REC. HALL
SHOWERS
STAGE 8' X 20'
BALL PARK
SPARSELY WOODED
TENT AREA
WOODED
SPARSELY WOODED
WOODED
EDGE OF MARSH
APPROX. SHORE LINE
PIER
TOP OF BANK
POWER LINES
OYSTER SHELL BASE ROAD

Appeal
Application

OFFICIAL USE ONLY:
Case Number: _____
Date Filed: _____
Gate Keeper: _____
Amount Paid: _____

Contact Information

APPLICANT:
Name: Williams Mullen - Tom Johnson
Address: 301 Fayetteville Street, Suite 1700
Raleigh, NC 27601
Telephone: 919-981-4006
E-Mail Address: tjohnson@williamsmullen.com

PROPERTY OWNER:
Name: 85' and Sunny, LLC
Address: 9919 Stephen Decatur Highway
Ocean City, MD 21842
Telephone: 410-213-1900
E-Mail Address: _____

LEGAL RELATIONSHIP OF APPLICANT TO PROPERTY OWNER: Attorney

Property Information

Physical Street Address: 1631 Waterlily Road, Coinjock, NC 27923

Location: Hampton Lodge Campground

Parcel Identification Number(s): 00790000010000, 07900000020000, 07900000030000 & 007900000040000

Statement of Error, or Improper Decision or Interpretation

I wish to appeal a: ☒ Decision or Interpretation ☐ Notice of Violation

The determination being dated 01/07/2019.

Grounds for appeal

State the facts you are prepared to prove to the Board of Adjustment that should lead the board to conclude that the decision of the administrator was made in error.

Please see attached.

Please include all related support materials with the application.

I, the undersigned, do certify that all of the information presented in this application is accurate to the best of my knowledge, information, and belief. All information submitted and required as part of this application process shall become public record.

1/17/19
Appellant/Applicant Date

CURRITUCK COUNTY APPEAL – Hampton Lodge Campground

1. December 19, 2018 email notice from Laurie B. LoCicero to Warren Eadus (Quible & Associates, engineer to the Property Owner) regarding the "Hampton Lodge CAMA submittal".

   Grounds for Appeal: ***The Planning Director determined that "structure 8" on "sheet 5", which is an existing pier on the Property that the Owner wishes to replace, could not be replaced on the grounds that the replacement would not be "modification of an acceptable non-conforming existing structure." The Planning Director's determination was erroneous as a matter of law. The Property is presently a private campground, which is a non-conforming use under Section 8.2.6 of the Unified Development Ordinance (UDO). As provided in Section 8.2.6.A(5) of the UDO, existing campgrounds may be modified "provided the changes do not increase the non-conformity with respect to the number of campsites that existed on January 1, 2013." The pier in question is not a campsite, and its existence, construction, reconstruction, and/or replacement would not increase the number of campsites on the Property. The replacement of the pier in question would also not expand the campground to cover additional land area. The pier itself is not a non-conforming structure, but is rather a permitted and conforming accessory structure under Section 4.3.2.C(1)(a) of the UDO. As the replacement of the pier does not increase the number of campsites on the Property, its replacement should be permitted as a matter of law.***

2. January 7, 2019 letter from Laurie B. LoCicero to Owner (c/o Williams Mullen, attorney to Owner).

   Grounds for Appeal: ***New bathroom facilities, swimming pool, pool house and other additional structures are allowed pursuant to Section 8.2.6A(5) since these "changes do not increase the non-conformity with respect to the number of campsites that existed on January 1, 2013," as further provided in Applicant's previously submitted Memorandum in Support of Application for Interpretation.***

3. January 7, 2019 letter from Laurie B. LoCicero to Owner (c/o Williams Mullen, attorney to Owner).

   Grounds for Appeal: ***Number of campsites. More than 234 campsites existed as of January 1, 2013 as further provided in Applicant's previously submitted Memorandum in Support of Application for Interpretation.***

Appeal Submittal Checklist

Staff will use the following checklist to determine the completeness of your application. Only complete applications will be accepted.

Appeal
Submittal Checklist

Date Received: 01/07/2019 BOA Date: _____

Project Name: Hampton Lodge Campground

Applicant/Property Owner: 85' and Sunny, LLC

Appeal Submittal Checklist		
1	Complete Appeal application	✓
2	Application fee ($500)	✓
3	All related support materials/evidence.	✓
4	2 hard copies of ALL documents	✓
5	1 PDF digital copy of all plans AND documents (ex. Compact Disk – e-mail not acceptable)	✓

For Staff Only

Pre-application Conference (optional)
Pre-application Conference was held on _____ and the following people were present:

_____

_____

Comments

_____

_____

_____

Owner Verification

If the person who is requesting the Board of Adjustment to take action on a particular piece of property is not the owner of the property, or under contract to purchase, then the actual owner of the land must complete this section. If the owner is the appellant/application please do not complete this section.

Dear Sir or Madame:

I am the owner of the property located at 1631 Waterlily Road, Coinjock, NC 27923.

I hereby authorize Williams Mullen - Thomas H. Johnson Jr. & Wyatt Booth to appear with my consent before the Board of Adjustment in order to request an appeal or interpretation at the above location. I authorize you to advertise and present this matter in my name as the owner of the property.

Further, I hereby authorize county officials to enter my property for purposes of determining zoning compliance.

If you have any questions, you may contact me at the following at the address, phone number, or email address listed on this application.

Respectfully yours,

Owner Date

Sworn to and subscribed before me, this the ___ day of January, 2019.

Samantha L. Pielstick
Notary Public
My commission expires: 2-13-2022

SAMANTHA L PIELSTICK
NOTARY PUBLIC
My Commission Expires
02-13-2022
WORCESTER COUNTY, MD