



**CURRITUCK COUNTY
NORTH CAROLINA**

September 8, 2016
Minutes – Regular Meeting of the Board of Adjustment

CALL TO ORDER

Chairman Palmer called the meeting to order.

Attendee Name	Title	Status	Arrived
Zia Montesi	Board Member	Present	
David Palmer	Chairman	Present	
C. Shay Ballance	Board Member	Absent	
Donna McCloud	Board Member	Present	
Michael Painter	Vice Chairman	Absent	
Vivian Simpson	Board Member	Present	
Cameron Tabor	Board Member	Present	

A) Approval of Agenda

RESULT:	APPROVED [UNANIMOUS]
MOVER:	Cameron Tabor, Board Member
SECONDER:	Donna McCloud, Board Member
AYES:	Zia Montesi, Board Member, David Palmer, Chairman, Donna McCloud, Board Member, Vivian Simpson, Board Member, Cameron Tabor, Board Member
ABSENT:	C. Shay Ballance, Board Member, Michael Painter, Vice Chairman

B Ask for Disqualifications

None of the members disqualified themselves from voting on an item.

C Announce Quorum Being Met

APPROVAL OF MINUTES

Mr. Tabor motioned to approve all of the minutes. Ms. McCloud seconded the motion and the motion passed unanimously.

- Board of Adjustment Minutes January 14, 2016
- Board of Adjustment Minutes January 28, 2016
- Board of Adjustment Minutes February 11, 2016
- Board of Adjustment Minutes February 25, 2016
- BOA 13-09 Michael & Marie Long Transcript March 13, 2014

RESULT:	APPROVED [UNANIMOUS]
MOVER:	Cameron Tabor, Board Member
SECONDER:	Donna McCloud, Board Member
AYES:	Zia Montesi, Board Member, David Palmer, Chairman, Donna McCloud, Board Member, Vivian Simpson, Board Member, Cameron Tabor, Board Member
ABSENT:	C. Shay Ballance, Board Member, Michael Painter, Vice Chairman

- D. Board of Adjustment Minutes January 14, 2016**
- E. Board of Adjustment Minutes January 28, 2016**
- F. Board of Adjustment Minutes February 11, 2016**
- G. Board of Adjustment Minutes February 25, 2016**
- H. BOA 13-09 Michael & Marie Long Transcript March 13, 2014**

NEW BUSINESS

- A. BOA 16-02 University Park, LLC/Norman Bibeau Appeal: Mr. Norman Bibeau is appealing the Planning Director's decision and notice of violation regarding land disturbance activity within a required 25 foot undisturbed buffer on property located at Tax Map 124J, Parcel OSP2, Poplar Branch Township (the "Subject Property").**

Mr. McRee presented a motion to dismiss the cases. He said the applicant set out a basis of appeal in a handout Mr. Nash just gave the board. The proper remedy is an appeal before the Currituck Superior Court to challenge Board of Commissioners' action. The Board of Adjustment has no authority to consider a challenge of a Board of Commissioners' action.

Mr. Nash, Attorney for Mr. Bibeau, said the appeal is of a code violation. He said the issue is code enforcement and not the action of the Board of Commissioners. They are challenging the way the condition got on the permit. The recording of the Board of Commissioners meeting does not include "undisturbed" in the buffer requirement. He said the board has the authority to look at how a matter is enforced. They are asking for an interpretation of the word "undisturbed." Mr. Nash said he included pictures in his response to the motion to dismiss that shows the damage Tropical Storm Hermine caused over this past weekend. He said it is not reasonable to not allow the removal of damaged, dead, or diseased trees.

Mr. Gallop advised the board to deny the motion to dismiss. However, he warned that the Board of Commissioners has no authority to hear a challenge of a Board of Commissioner's condition on a permit.

Mr. McRee said that the Board of Adjustment does not have the authority to decide if a condition is correct or even exist as part of a Board of Commissioners action. He said the Board of Adjustment cannot modify a condition placed upon a permittee by the Board of Commissioners. Only the Board of Commissioners can amend a condition that they placed on a development.

Mr. Gallop said that if the word undisturbed is in the use permit, the board has the authority to interpret the meaning of the word "undisturbed."

Mr. Tabor motioned to deny the county's motion to dismiss the case. Ms. Montesi seconded the motion and the motion passes unanimously.

Ben Woody, Stacey Smith, Rick Godsey, Norm Bibeau, Victor White, Mike Hall, Paul O'Neal, Paul Beaumont, Mike Painter, and a few others were sworn in.

Mr. Woody presented the staff report to the board. He said five approval processes included the 25' undisturbed buffer condition as submitted by the applicant. He explained how the staff interprets words not defined in the UDO by using the common meaning in the dictionary. He also said the UDO addresses maintaining trees and buffers. He said the undisturbed buffer is not a requirement of the UDO. It is a condition of the development approval.

Ms. Montesi asked if a supplemental landscape plan was submitted by Mr. Bibeau after getting the notice of violation.

Mr. Woody said no.

Mr. Palmer asked if a buffer requirement is always undisturbed.

Mr. Woody said generally no unless it is an incompatible use.

Ms. Simpson asked if the buffer was disturbed by the storm or before.

Mr. Woody said the disturbance cited was manmade, well before the storm.

Mr. Nash asked Mr. Woody if he used a dictionary to define undisturbed. He said us. Mr. Nash asked if there was an abnormal arrangement, could the applicant address it. He asked if trees normally fall. Mr. Woody said it is normal for trees to fall in a tropical storm. Mr. Nash asked if a fallen tree that endangered residents could be removed. Mr. Woody said the remedy would be for the applicant to request an amended condition before the Board of Commissioners. Mr. Nash asked if the 15' utility and drainage easement could be used that is within that 25' undisturbed buffer. Mr. Woody said the drainage and utility easement could not be used and that if two conflicting conditions exist, you take the more restrictive of the two conditions.

Stacey Smith, Code Enforcement Officer, presented the board with pictures taken of the property upon a site visit made on April 11, 2016 after she received a complaint that the 25' undisturbed buffer had been disturbed. She said that Norm Bibeau and Todd Coyle walked with her as she visited the property and took pictures. On July 18, 2016 another site visit was made after another complaint of disturbance in the undisturbed buffer.

Mr. Montesi asked if Mr. Bibeau knew why she was inspecting the site. Ms. Smith said she explained the complaint and the reason for the visit.

Mr. Tabor asked if damage caused by an act of nature could be cleaned up. Ms. Smith said not within the undisturbed buffer.

Mr. McRee asked Ms. Smith what Mr. Bibeau said was the reason for clearing the area. She said Mr. Bibeau said he was clearing the underbrush to make it look nicer.

Mr. Nash asked Ms. Smith if she walked in the buffer. She said yes.

Rick Godsey, Building Inspector, appeared before the board. Mr. McRee asked if the pictures accurately reflect what he observed on both visits. Mr. Godsey said yes. He said Mr. Bibeau said he removed dead limbs and underbrush to make the area look nice.

Mr. Nash asked if removal of underbrush and dead limbs was disturbance and a violation. Mr. McRee objected that the building inspector has no authority in determining zoning violations. Mr. Palmer sustained the objection. Mr. Nash asked Mr. Godsey if he walked in the undisturbed buffer. He said yes.

Ms. McCloud said the word reasonable keeps being discussed. She does not see the word reasonable in anything she is reviewing.

Emit McMillan appeared before the board and explained that the undisturbed buffer runs the entire length of his property line. He is a landscaper. Mr. McRee asked Mr. McMillan to describe the buffer prior to April 11, 2016. He said very natural, peaceful, and quite. He said in the summer it is lush. He heard a chainsaw running and saw vegetation being taken down. He said vegetation was removed from his property also. Mr. McRee asked what type of material was being removed. Mr. McMillan said anything not growing straight up. He spoke to Mr. Bibeau, Victor White, and Mr. Newbern about the action and offered to help restore the buffer, offering prices for the work. He said they were back out the next day removing additional material. He has seen removal of vegetation on two occasions after April 11, 2016.

Mr. Nash asked Mr. McMillan if he observed the county officials walking on the undisturbed buffer. Mr. Nash asked if he had seen damage from Hermine. He said yes to both.

Ms. Simpson asked Mr. McMillan if walking through the buffer was disturbance. Mr. McMillan said the undisturbed buffer was a condition the Board of Commissioners placed on the project to appease the residents' concerns during the public hearing.

Mr. Nash asked Mr. McMillan if he had been on the undisturbed buffer. Mr. Nash said he had when they were on better terms. He did not drive the tractor on the property or cut firewood.

Mr. Nash asked Mr. Woody to play the recording of the July 13, 2015 Board of Commissioners meeting.

Mr. McRee objected and said the video of the Board of Commissioners meeting was irrelevant and that the condition was put in writing and not objected to on five separate

approvals. The video is not evidence upon which the Board of Adjustment may act. The minutes from that meeting are the office record and contain the condition.

Mr. Nash said that it is pertinent to see what the Board of Commissioners said.

Mr. Gallop asked if there was a set of minutes.

Mr. McRee said the minutes of the meeting are the official record and can be produced with a brief recess.

Mr. Palmer sustained the object.

Mike Payment, Commissioner, appeared before the board. Mr. Nash asked if Mr. Payment was asked to and visited the site. Mr. Payment said yes and the area was cleared out. Underbrush had been removed and trees were cut by a chain saw. He saw a lot of dirt that looked like the leaves had been raked. Mr. Nash asked if Mr. Payment had further conversation with Mr. Bibeau and if he told him he didn't see anything wrong. Mr. McRee objected to hearsay and to the fact that Mr. Payment did not have the authority to interpret the ordinance. He said he told Mr. Bibeau he would upkeep his property the same way, but if the buffer said undisturbed, it meant undisturbed. Mr. Palmer sustained the objection.

Paul Beaumont, Commissioner, appeared before the board. Mr. Nash asked if Mr. Beaumont had visited the property. He said he had visited Mr. Bibeau's property. Mr. Beaumont said he is an arborist and well qualified to look at the situation. He observed obvious material removal because of chainsaw shavings and marks on trees and shrubbery. Mr. Nash asked if as an arborist, he considered the actions necessary. Mr. Beaumont said there are two different types of vegetative buffers. Ones that cannot be disturbed and those that can be disturbed and maintained. He told Mr. Bibeau that it may be unreasonable to allow safety hazards to continue such as dead trees.

Victor White, engineer for the project, appeared before the board. Mr. Nash asked Mr. White if he visited the site on May 19th and 24th. He said he did and that he saw underbrush had been removed as well as disease trees. Mr. Nash asked if the Styon's plat showed a 15' drainage and utility easement. Mr. White said yes. Mr. Nash asked what it would be used for. Mr. White said for drainage infrastructure and utility lines. Mr. McRee object that Mr. White is not qualified to say what is allowed in an easement and that it was already established that the more restrictive of the two regulations prevails. Mr. Palmer sustained the objection. Mr. Nash asked what is usually placed in such an easement. He said pipes, conduit, swales. Mr. McRee objected. Mr. Galloped suggested that Mr. Nash rephrase the question. Mr. Nash asked Mr. White for education background and experience as an engineer. Mr. White explained his background and said he had worked on hundreds of projects. Mr. Nash asked him if in any of the projects he worked on required the buffer to be undisturbed. Mr. White said no and that maintenance is necessary for a healthy buffer.

Norm Bibeau, owner, appeared before the board. Mr. Nash asked Mr. Bibeau if he had been involved in all aspects of the project and to explain the project. Mr. Bibeau said Phase 1 is the office and warehouse and Phase 2 is 39 townhomes. Mr. Nash asked

Mr. Bibeau to explain the background of the buffer. He said it was brought up at the July 13, 2015 Board of Commissioners meeting. Mr. McRee object to Mr. Bibeau stating what the chairman may have said at a meeting and to relevance. Mr. Palmer sustained the objection. Mr. Bibeau said he agreed to a 25' buffer, not an undisturbed buffer at the Board of Commissioners meeting. He said he had improved the area by cleaning out the underbrush. He said he did not want to see a pig farm and he was removing diseased trees and underbrush to enhance the property. Mr. Bibeau said he had pictures he took in April that showed everything cleared on the property, not just the western property line. He showed other pictures too and pointed out where material had been removed and how the material was filling back in until the storm. Mr. Nash asked if he had removed any healthy trees. Mr. Bibeau said no. He showed pictures taken this past Monday of trees taken down by the storm. He said it is a safety hazard and a liability to leave the damaged trees. Mr. Nash asked Mr. Bibeau if he was liable if someone was hurt on his property. He said yes.

Mr. McCloud said Mr. Bibeau had accepted the undisturbed buffer when he submitted the plans and asked Mr. Bibeau if that was correct. Mr. Bibeau said yes.

Mr. McRee offered a closing statement that the 25' undisturbed was disturbed; thereby, violated. He said the UDO definition does not define undisturbed, so staff had to rely upon the commonly, ordinarily, understood definition as set out in a dictionary. He said the remedy is for the modification or exception of the condition and that the owner can only do that through the Board of Commissioners. He asked that staff's determined be upheld.

Mr. Nash asked that the word reasonable be brought into this decision. The UDO allows for a heritage tree to be removed if dead, naturally fallen, diseased, or poses a threat. A reasonable interpretation of undisturbed allows for the removal of diseased or fallen trees. He said disturbance by a hurricane is not normal and one has the right to remove what has fallen that has created a safety hazard. The plat calls for the 15' drainage and utility easement. He takes issue with Mr. Woody's interpretation that if two things clash, you take the stricter of the two. What was the easement for that was put on the plat if it is supposed to be undisturbed. He said Mr. McRee said the burden is on the developer to go to the Board of Commissioners to seek remedy and that is unnecessary and allows for a safety hazard to continue. He asked that staff's interpretation be overturned.

Mr. Tabor said the board had done its due diligence in hearing the case, but undisturbed means undisturbed. He said the board does not have the authority to re-write the UDO. Mr. Gallop said the board cannot re-write the UDO, but can interpret it.

Ms. McCloud presented other definitions of undisturbed.

Ms. Simpson said landscaping is a good thing and the proper thing would be to go back before the board to allow landscaping of the area. She said there was a violation.

Mr. Tabor motioned to uphold the administrator's decision. Ms. McCloud second the motion and the motion passed unanimously.

Mr. McRee submitted the Motion to Dismiss and the following exhibits to the board:

- Exhibit A - Approved Conditional Zoning Master Plan
- Exhibit B - Approved Conditional Zoning Terms and Conditions Document
- Exhibit C - Approved Revised Master Plan
- Exhibit D - Approved/Stamped Preliminary Plat
- Exhibit E - Preliminary Plat Page from Board of Commissioner's Packet/Presentation
- Exhibit F - Approved Construction Drawings
- Exhibit G - Approved and Recorded Final Plat
- Exhibit H - Violation Pictures

Mr. Nash submitted a Response to Motion to Dismiss following exhibits to the board:
Exhibit 1 - Photographs

RESULT:	QUORUM NOT MET [UNANIMOUS]
MOVER:	Cameron Tabor, Board Member
SECONDER:	Donna McCloud, Board Member
AYES:	Zia Montesi, Board Member, David Palmer, Chairman, Donna McCloud, Board Member, Vivian Simpson, Board Member, Cameron Tabor, Board Member
ABSENT:	C. Shay Ballance, Board Member, Michael Painter, Vice Chairman

B. BOA 16-04 University Park, LLC/Norman Bibeau Appeal: Mr. Norman Bibeau is appealing the Planning Director's decision and notice of violation regarding West Mobile Road being used for ingress/egress located at Tax Map 131, Parcel 97A and Tax Map 124J, Parcel OSP2, Poplar Branch Township (the "Subject Property").

Ben Woody, Stacey Smith, Rick Godsey, Norm Bibeau, and several others were sworn in.

Mr. Gallop said there is a motion to dismiss this case as well. Ms. Simpson made a motion to deny the county's motion to dismiss. Ms. McCloud seconded the motion and the motion passed unanimously.

Mr. Woody presented the staff report to the board.

Mr. Nash said his client accepts the staff report and the plans as accurate.

Mr. Woody summarized the staff report and reviewed the plans. He said the original plan showed a connection to West Mobile Road and that access was removed by the Board of Commissioners during the public hearing. He said the county received complaints in June 2016 that the road was being used. A site inspection confirmed the violation and pictures were shown of vehicles using the access. Mr. Bibeau did place a barrier at the site after the violation notice, so the access is no longer being used. He said the access was never approved on any plan by the Board of Commissioners. He said the Board of Commissioners are the only ones that can approve that connection.

Mr. McRee asked Mr. Woody if the petitioner was in compliance today. Mr. Woody said he still receives complaints that the access is being used, but the Code Enforcement Officer and Building Inspector may be better suited to answer that.

Mr. Nash pointed out a gravel road, recorded as an easement, to the cell tower on site. He said the applicant had roped off that access to the property.

Mr. Tabor asked why the condition was put on the project. Mr. Woody said there was a lot of opposition to the access at the public hearing because of safety. Mr. Nash object to hearsay.

Mr. Godsey, Building Inspector, appeared before the board. Mr. McRee asked Mr. Godsey if he had witnessed traffic using the access. He had witnessed multiple vehicles using the access within a 20 minute period. He said he was also there in the last month and saw the access was roped off and saw no vehicles using the access.

Mr. Nash asked Mr. Godsey if he knew there was an easement off of West Mobile Road onto the property. Mr. Godsey said no. Mr. Nash asked if the vehicles were coming out at that easement. Mr. Godsey said yes.

Tom Watkins, neighboring property owner, appeared before the board. Mr. McRee asked Mr. Watkins if he had seen vehicles using the access on West Mobile Road. He has seen construction traffic using the access. Mr. McRee asked if similar traffic had used the access prior to April. He said he had not seen anyone using the access before construction began. Mr. McRee asked if he had seen traffic using the road after it was roped off. He said no.

Mr. Nash asked if Mr. Watkins had seen traffic use the road prior to construction. Mr. Watkins said never.

Mr. Bibeau appeared before the board. Mr. Nash asked him if there was a cell tower and easement on the property when he purchased it. Mr. Bibeau said yes to both. He no longer owns the tower but there is an easement to access the tower. Mr. Nash asked if Mr. Bibeau had dedicated access from his property to West Mobile Road when he purchased it. He said yes. He said construction traffic was using the gravel road to keep from tearing up the new driveway at his office and for safety reasons. He said the access is used for the tower. It is unsafe to have construction traffic pulling onto the highway during summer traffic. He said the tower is accessed at least once per week.

Mr. McCloud asked Mr. Bibeau if he accepted the master plan as approved. He said he did. He said the gravel road is not Colgate Drive that was removed from the plans. The gravel road was not removed from the recorded plat.

Ms. Simpson asked if the road that was blocked was the same one used by the cell tower employees. Mr. Bibeau said yes. She asked if the cell tower employees had a problem with the easement being blocked. Mr. Bibeau said no, but now they come down his road or he has to go down and let large vehicles in.

Mr. Palmer clarified that the easement is for access to the cell tower and not for construction traffic. Mr. Palmer asked if the gravel road was in the same location as the road that was removed (Colgate). Mr. Bibeau said Colgate Drive does not exist.

Ms. McCloud asked if the non access condition was for any particular road or any access along the property line. Mr. Woody said the condition is for no access to West Mobile Road in the entirety of the property line.

Mr. Palmer asked Mr. Woody if the approval was no access at any point or just for Colgate Road. He said the Board of Commissioners said no ingress/egress from West Mobile Road.

Mr. Bibeau said the last sentence says "unless required by NCDOT." Ms. McCloud asked if NCDOT had required it. Mr. Bibeau said no. He said the condition was only about Colgate Drive.

Mr. McRee offered a closing statement stating that the condition was no ingress/egrees to West Mobile Road. That means the entire length of the petitioner's property along West Mobile Road. The applicant agreed to the condition. The easement was for traffic for the tower and not approved for University Park LLC to use as construction traffic. The remedy is to request the Board of Commissioners amend the condition on the permit to allow a temporary access for construction traffic. There has been a violation of this condition. He asked that staff's determination be affirmed.

Mr. Nash said Mr. McRee put all the burden on the poor developer that abandoned the West Mobile Road access. He said the gravel road had been there for 25 years and used by Mr. Bibeau and not eliminated on the approved final plat. The gravel road is used for safety purpose and preservation of the new road at the office. He said it is not a reasonable interpretation that Mr. Bibeau cannot use an existing gravel road.

Mr. Gallop asked Mr. Nash if the easement is on the approved plans or the existing conditions document. Mr. Gallop pointed out that the gravel road is not shown on the Phase 2 plan.

Mr. Palmer asked if the Board of Commissioners can over-ride the easement to service the cell tower.

Mr. Nash said no. Mr. McRee said that didn't happen. The cell tower employees can still use the easement, but not University Park LLC for construction traffic. Mr. Gallop explained that the applicant had the burden of presenting proof as to who could use the easement and that it was his opinion that the only ones who could use the easement are the cell tower employees.

Mr. Palmer asked if the access to West Mobile Road was in compliance if it is only being used by cell tower employees. Mr. Woody said yes, and that Mr. Bibeau could be cited again if he used the access within the next two years.

Mr. Tabor motioned to affirm the county's decision and that they are now compliant. Ms. McCloud seconded the motion and the motion passed unanimously.

Mr. McRee submitted the Motion to Dismiss and the following exhibits to the board:

Exhibit A - Approved Conditional Zoning Master Plan

Exhibit B - Approved Conditional Zoning Terms and Conditions Document

Exhibit C - Approved Revised Master Plan
 Exhibit D - Approved/Stamped Preliminary Plat
 Exhibit E - Preliminary Plat Page from Board of Commissioner's Packet/Presentation
 Exhibit F - Approved Construction Drawings
 Exhibit G - Approved and Recorded Final Plat
 Exhibit H - Violation Pictures

Mr. Nash submitted a Response to Motion to Dismiss following exhibits to the board:

Exhibit 1 - Master Sketch Plan, Page C1
 Exhibit 2 - Site and Utility Plan, Page C2
 Exhibit 3 - Deed Book 587, Page 182
 Exhibit 4 - Overall Project Plan Final Plat, Page C1

RESULT:	REVERSED STAFF'S DECISION [UNANIMOUS]
MOVER:	Cameron Tabor, Board Member
SECONDER:	Donna McCloud, Board Member
AYES:	Zia Montesi, Board Member, David Palmer, Chairman, Donna McCloud, Board Member, Vivian Simpson, Board Member, Cameron Tabor, Board Member
ABSENT:	C. Shay Ballance, Board Member, Michael Painter, Vice Chairman

CLOSED SESSION

Closed Session pursuant to G.S. 143-318.11(a)(1) to review and approve closed session minutes and to prevent the disclosure of information that is confidential pursuant to the law of this State.

Mr. Gallop informed the board that they did not have to go into closed session to approve the minutes.

Ms. McCloud motioned to approve all minutes as presented. Mr. Tabor seconded the motion and the motion passed unanimously.

- A Approval of Closed Session Minutes January 14, 2016**
- B Approval of Closed Session Minutes January 28, 2016**
- C Approval of Closed Session Minutes February 25, 2016**

ADJOURNMENT

There being no further business to discuss, the meeting adjourned at 10:45 p.m.