



**BOARD OF ADJUSTMENT
REGULAR MEETING
THURSDAY, DECEMBER 01ST, 2022
ASSEMBLY HALL
395 MAGNOLIA ROAD
PINEHURST, NORTH CAROLINA**

04:30 PM or IMMEDIATELY FOLLOWING THE P&Z MEETING

Board Members Present:

David Alzamora, Chair
Jeremy Hooper
Jack Farrell
Matt Jones, Alternate
Paul Roberts, Alternate

Board Members Absent:

Julia Latham

Staff Present:

Darryn Burich, Planning Director
Alfred Cassidy, Senior Planner
Maria Carpenter, Planner
Kelly Brown, Planning & Zoning Specialist
Kelly Chance, Village Clerk
Lori Hercules, IT Technician

Approximately 11 member(s) of the public in attendance.

I. Call to Order

Mr. Alzamora called the meeting to order at 4:30 PM, confirmed a quorum was present, and explained the purpose of this meeting.

Motion to Seat Alternate Members

Mr. Farrell moved to seat Paul Roberts and Matt Jones as voting members of the Board of Adjustment for the Regular Meeting of December 01st, 2022. Seconded by Mr. Hooper. Approved by a vote of 3-0.

II. Approval of Minutes

A. 07-07-2022 Regular Meeting Minutes

Mr. Hooper moved to approve the minutes of the July 07th, 2022 Regular Meeting. Seconded by Mr. Farrell. Approved by a vote of 5-0.

Mr. Jones and Mr. Farrell stated they did visit the properties today but did not have any conversation with the Applicant. Mr. Alzamora noted he does have some relationship through his law firm but does not have any direct relationship with the case and explained the procedures of a quasi-judicial public hearing. Mr. Hooper also stated he has a relationship with the Contractor but does not have any relationship directly with this case, nor will profit in any manner from the case.

Mr. Alzamora moved to recess the Regular Meeting and enter into the Public Hearing. Seconded by Mr. Farrell. Approved by a vote of 5-0.

Mr. Alfred Cassidy was sworn into the Public Hearing and testified as follows.

III. Public Hearing

A. PLN-2022-00193 (11 Shenecossett Ln. Variance)

The purpose of the public hearing is to receive testimony for a variance request from Section 9.13 Fences, Walls and Columns (F) Retaining Walls & 9.2a Tables of Dimensional Requirements for the property addressed as 11 Shenecossett Lane, further identified by Moore County PID # 00014624. This property is located within the R-10 (High Density Residential) Zoning District. Specifically, the applicant, Goneau Construction, on behalf of the owners, is requesting the variance to allow for a retaining wall in the golf course setback.

Mr. Cassidy discussed the proposed work and submitted into evidence the Staff Report with attachments / exhibits, Presentation, and Application and Applicant's materials / exhibits. Mr. Alzamora accepted the materials submitted by Mr. Cassidy into evidence.

The Board and Mr. Cassidy discussed verifying the date the photos were taken with the Applicant, the retaining wall height of over 36" being the reason a variance was requested, the retaining wall not being part of the initial application and was discovered during a later inspection, the process followed when an item not applied for or approved is discovered during an inspection, the fact that a shorter retaining wall included on the original application would have been approved, the areas of Exhibit A-3.2 marked C and D depicting the height overage locations (C is 38" and D is 39"), the Pinehurst Development Ordinance having landscape requirements for properties abutting a golf course, the Pinehurst Development Ordinance not having drainage requirements, the lack of photographs depicting erosion or runoff at the property prior to the retaining wall being installed, and the need for the applicant to provide a timeline on when the dwelling was completed and the retaining wall was installed.

Mr. Billy Hornbaker, Superintendent for Goneau Construction, was sworn in.

Mr. Hornbaker stated the elevations shown in the "As-Built" survey were taken prior to all work being completed on the retaining wall (which would include further grading and backfilling); work being stopped at the request of the Village due to the retaining wall installation being a gray area; the target height of the retaining wall being 30"; there being gravel and piping behind the retaining wall to channel water to the right side of the property and down to the street; the project originally having been one of Mr. Marcel Goneau's projects prior to his passing and Mr. Hornbaker taking on the project late; the retaining wall having been built on a footing that was already present when Mr. Hornbaker took over the project; based on information given to Mr. Hornbaker the footer and vertical rebar for the retaining wall had been installed prior to the framing of the dwelling; when Mr. Hornbaker started overseeing construction he elected not to install the retaining wall immediately and tried to find ways to control the runoff with landscaping and different types of drainage options; the topography of the adjacent golf course causing runoff and erosion at the property; based on the continued issues with runoff and erosion on the property, Mr. Hornbaker decided to complete installation of the retaining wall assuming there was already a permit for the retaining wall due to a footing and foundation already having been installed at the

beginning of construction at the property; and since installing the retaining wall, the runoff and erosion problems at the property have stopped (the foundation and crawl space are now dry).

The Board, Mr. Cassidy, and Mr. Hornbaker discussed a permit being required for the installation of a retaining wall even if the retaining wall height is below 36"; the intention not being to create a level back yard but to continue backfilling and grading the back yard to create a slight swell between the retaining wall and the dwelling; the current height of the retaining wall being 38-39" due to work being stopped preventing reducing the height to 30"; sod and pine straw having been installed around the retaining wall area (which Mr. Hornbaker noted could easily be removed and replaced after the backfilling and grading to reduce the retaining wall height had been done); the wall having a stucco finish (which will be painted) and backfilled over as much as possible until only the brick at the top of the retaining wall is exposed; with the grading and fill on both sides of the dwelling, the maximum height of the wall will only be 30"; the retaining wall not being initially shown on the site plans submitted to the Village and having been found during the permitting and inspection process, which is when construction on the retaining wall was to cease; section 9.13 of the Pinehurst Development Ordinance (PDO), which prohibits structures over 18" within the rear setback of a property that abuts a golf course; the application of the PDO and the question of hardship in the Board's decision; the fact that the footers for the retaining wall were already in place when Mr. Hornbaker took over responsibility for the project and believed a retaining wall was needed in order to complete the construction in a way that addressed the erosion and water issues in the crawl space; the significant grading of the property leading to erosion and water runoff; the gravel and pipe work that was done to try to prevent erosion and water runoff; the gravel and pipe work channeling water down to the street instead of to a basin or trough leaving only the water that collects in the backyard; the property having been clear cut in order to create a level home site while surrounding lots with similar topography were not clear cut and also have slopes or grades away from the golf course; the dwelling not having a sump pump or humidifier installed in the crawl space; the clear cutting of the lot being necessary due to the grading exposing the tree root systems causing the trees to die and possibly damage the dwelling; the side entry garage being a preference of the Owners due to it providing a more level entry to the garage and eliminating steps (important due to the age and health of the Owners); the attempts made to curb erosion and water runoff prior to installing the retaining wall (berms and swells); and the removal of the retaining wall resulting in a return of erosion and water penetration issues in the crawl space.

The Board, also, debated the interpretation and application of the PDO in relation to retaining walls.

Mr. Alzamora asked whether there were any members of the audience who wished to speak.

Ms. Susie McAuliffe, 13 Shenecossett Ln., was sworn in. Ms. McAuliffe submitted to the Board for review photographs she had taken of the property and surrounding areas;

and discussed the similarities of the property with surrounding properties which would negate any claim of hardship, the topography of the property prior to and post excavation, the timeline of the construction of the retaining wall and lack of permitting during construction, the question of public safety having a retaining wall of this height so close to a golf cart path, landscaping work having been completed within a week prior to the Public Hearing, the erosion that has occurred on Ms. McAuliffe's property since construction on the property began, the topography of Ms. McAuliffe's property, Ms. McAuliffe's desire to have greater communication with surrounding properties from builders and the Village when construction will be taking place, Ms. McAuliffe having resided at 13 Shenecossett Ln. for approximately 10 years, erosion (specifically in the area surrounding the propane tank) being a result of the construction at the property, the vegetation and topography of Ms. McAuliffe's and surrounding properties, and Ms. McAuliffe's opinion the retaining wall stands out in relation to surrounding properties.

Mr. Richard Higginbotham, representative for Pinehurst Resort located at 80 Carolina Vista, was sworn in. Mr. Higginbotham discussed the retaining wall being too close to the cart path posing a public safety issue, the fact that when dealing with a variance to a golf course setback the Owner or Contractor would usually discuss the variance with the Resort prior to submitting an application allowing the Resort to provide feedback and to come to some sort of compromise with the Owner or Contractor (which was not the case with this property), 16 lots on the right side of the fairway where the property is located having similar or even more extreme topography, the precedent allowing the encroachment at the property to remain will set not only for surrounding properties but properties that abut golf courses all throughout the country, other options to control water (landscaping, in-ground drainage, etc.), Mr. Higginbotham's personal experience with a sloping lot, the visibility of the retaining wall (both to neighbors and to players on the golf course), the retaining wall not conforming to the 30' setback, the topography of the property not creating a hardship due to its similarity to surrounding properties, the Resort's request that (should the Board find the retaining wall actually does comply) landscaping consistent with the golf course and that would provide protection against a golf cart going over the retaining wall be required, the Resort's familiarity with the surrounding area and the topographical difficulties encountered there, and the most recent construction done on the golf course in the surrounding area that could have potentially affected water runoff being the restrooms at the back of the tee in approximately 2005-2006.

Having no further members of the audience wishing to provide testimony, Mr. Alzamora moved forward with Board deliberation but left the Public Hearing open in case further Owner or Applicant testimony was required.

The Board deliberated whether the separate definition of retaining walls as listed in Section 9.13 F merited a different consideration or application of the PDO, the drainage issues cited as the reason for constructing the retaining wall were a result of the property topography or the excavation done during construction, the type of excavation done and the footers having been poured at the beginning of construction pointed to the

retaining wall having been planned from the start given these events occurred prior to any issues with water drainage being known or appearing, and a variance would be needed if grading was allowed to continue to reduce the wall height to below 36”.

Mr. Darryn Burich, Planning Director, was sworn in.

The Board asked Mr. Burich if a variance would be needed if the height of the retaining wall was reduced to below 36”. Mr. Burich stated, historically, fences / walls / columns / similar structures over 18” cannot be within the golf course setback and anything under 18” has not been regulated. Mr. Burich verified the height of the retaining wall in question is over 18”. The Board and Mr. Burich discussed the distinction between fences / walls and retaining walls as listed in the PDO, both Sections 9.13 B and 9.13 F being applicable to the review of the retaining wall application, and the original application lacking mention or depiction of a retaining wall on the property.

The Board continued deliberation on whether the hardship was self-created due to the excavation of the property for construction, the decision to have a side entry garage increased the need to have a retaining wall due to how the dwelling would need to be positioned on the property, the topography of the property not being unusual for the surrounding area, the variance request should be considered from the view point of the original lot with the original slope and would a variance have been granted then, the topography surrounding the lot contributes to water runoff onto the lot that has not occurred on other surrounding lots, the original intention when construction began was to have a level lot, the potential to create berms or swell similar to those present on surrounding lots to help direct water and lessen the impact of runoff from the golf course, the Board not having been given the opportunity to consider a variance before construction began impacts the Board's ability to consider the variance request, the impact the removal of the retaining wall will have on the dwelling, and the removal of vegetation and clearcutting of several significant trees during excavation of the lot created the hardship.

The Board asked Mr. Burich to verify even if backfilled to a height of 20” a variance would be required, to clarify if the application and Staff Report correctly referenced the PDO section to be used when considering the variance request, and whether historic interpretation of the PDO would allow for the retaining wall to remain if backfilled to reduce the height to 18” or less.

The Board continued deliberation on whether removal of the retaining wall and installation of a berm would create water runoff for the surrounding property owners, and the need to apply the Board's understanding of the PDO as a whole when considering the variance request.

Mr. Burich stated the notice of Public Hearing outlines the purpose being to receive testimony for a variance request from Section 9.13 (fences, wall, and retaining walls) and Section 9.28 (Tables of Dimensional Requirements).

The Board continued deliberation on how to use the PDO in their assessment of the variance request and whether it was feasible to backfill the rear yard to achieve a retaining wall height of only 18", to require installation of vegetation around the retaining wall to create a berm or buffer between the retaining wall and the golf course to alleviate water runoff and reduce the possibility of a stray golf cart going over the retaining wall, and the grading and excavation of the lot in order to create a level back yard created the hardship.

The Board asked Mr. Burich what the communication from Staff was to the Applicant regarding the variance request. Mr. Burich stated he would have to research what, if any, communication was available due to him not being a party to any of the conversations with the Applicant but would speculate the Applicant was told they were to seek a variance due to the encroachment of the retaining wall into the golf course setback.

The Board continued deliberation on whether the original condition of the lot or the current condition of the lot should be used in determining the approval or denial of the variance request and the variance request should be considered under Section 9.13 B or 9.13 F.

Mr. Burich stated, if the Board required additional information, additional testimony could be heard, or the hearing could be continued to provide time to gather additional information.

The Board continued deliberation of whether it was appropriate to consider the precedent it would set approving a variance request on a structure already built without approval, and the question of the hardship being self-created.

Mr. Burich stated, based on historical interpretation, had the variance request come in with a retaining wall under 18", the request would have been granted.

The Board and Mr. Burich discussed the options for approval or denial available to the Board, debated whether a continuance would provide any additional information for the Board to use when deciding, and deliberated over the potential wording of a motion citing reasons for approval or denial of the variance request.

Mr. Alzamora moved to adjourn the Public Hearing and re-enter the Regular Meeting. Seconded by Mr. Jones. Approved by a vote of 5-0.

Mr. Farrell moved the Board of Adjustment deny the variance request for 11 Shenecossett Ln. AND adopt the following Findings of Fact:

- A. Unnecessary hardship would not result from the strict application of the ordinance as there are other alternatives to control the water flow other than a retaining wall.***
- B. The hardship does not result from conditions that are peculiar to the property as there are multiple properties along the lane of similar topography and similar***

water flow that have been controlled in a different fashion rather than a retaining wall.

- C. The hardship did result from actions taken by the applicant or the property owner that is the clear-cutting and grading the land such that water flow became a problem.*
- D. The requested variance is not consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved as it is not consistent with the neighborhood and the spirit of the neighborhood and the Resort's desire for development that's appropriate next to a golf course.*

Seconded by Mr. Hooper. Approved by a vote of 4-1. Mr. Jones voting "Nay".

Mr. Farrell moved to recess the Regular Meeting for five minutes at 07:00 PM. Seconded by Mr. Hooper.

Mr. Alzamora reconvened the Regular Meeting at 07:05 PM.

Mr. Alzamora moved to recess the Regular Meeting and enter the Public Hearing. Seconded by Mr. Farrell. Approved by a vote of 5-0.

Mr. Alzamora disclosed a personal relationship with the builder for the Applicant, Mr. Mark Stewart, through Mr. Stewart's son but did not feel the relationship was a conflict of interest nor would it affect Mr. Alzamora's ability to make an impartial decision. The Board did not raise any objections to Mr. Alzamora participating in the hearing for this case.

Mr. Farrell and Mr. Jones visited the site and Mr. Jones did have non-substantive ex parte communication with the Applicant that would not preclude Mr. Jones from making an impartial decision.

Mr. Hooper, also, disclosed a personal relationship with Mr. Stewart but did not feel the relationship was a conflict of interest.

B. PLN-2022-00200 (25 Aronimink Ln. Variance)

The purpose of the public hearing is to receive testimony for a variance request from Section 9.13 Fences, Walls and Columns (F) Retaining Walls & 9.2a Tables of Dimensional Requirements for the property addressed as 25 Aronimink Lane, further identified by Moore County PID # 00024619. This property is located within the R-10 (High Density Residential) Zoning District. Specifically, the applicant and owner, Teresa Johnes, is requesting the variance to allow for a retaining wall in the golf course setback.

Mr. Cassidy discussed the proposed work and submitted into evidence the Staff Report with attachments / exhibits, Presentation, and Application and Applicant's materials / exhibits. Mr. Alzamora accepted the materials submitted by Mr. Cassidy into evidence.

The Board and Staff discussed whether the discrepancy between the hearing notification listing 9.13 F and the application listing 9.1 E for the variance request would require an amendment to the application or re-submittal of a corrected application, and the notice was made improperly and a new notice needed to be sent and the hearing continued to a later date.

Mr. Farrell moved to recess the Public Hearing for 10 minutes at 07:25 PM. Seconded by Mr. Alzamora.

Mr. Alzamora reconvened the Public Hearing at 07:38 PM.

The Board debated whether to receive any additional evidence or to close the Public Hearing.

Mr. Alzamora moved to adjourn the Public Hearing and re-enter the Regular Meeting. Seconded by Mr. Hooper. Approved by a vote of 5-0.

Mr. Alzamora stated in order for the Board to consider the variance request an amended notice would need to be sent so what is stated in the notice matches the application for the variance request. Mr. Alzamora asked the Board to determine when the Public Hearing for the case would be continued. The Board decided to continue the Public Hearing for the case to the next regularly scheduled meeting of January 05th, 2023 and asked the Applicant if she would be available for the hearing on this date.

Ms. Johnes stated she would be available for the January 05th, 2023 meeting, she never received notice that the retaining wall on her property was a problem, Mr. Stewart's secretary (Anita) received an e-mail from Staff stating the retaining wall encroached into the setback without any reference to what PDO sections were violated, after discussing how to complete the application and searching the system for encroachment she listed the section given by the system in the application along with a copy and paste of the text provided by the system, a letter should be sent to the Owner of the property notifying them of the violation not the Builder or their secretary, she had already gotten the Certificate of Occupancy and started moving in when she learned of the violation, and she feels the Village did not notify her properly of the violation so she was able to cite this information in her application.

Mr. Alzamora stated the Board and Staff would work to correct the issue and apologized the Ms. Johnes for the inconvenience.

Mr. Alzamora stated the case would be continued to the Public Hearing on January 05th, 2023 and asked for a motion on the continuation.

Mr. Hooper moved to continue the Public Hearing to the January 05th, 2023 regularly scheduled meeting after the Planning and Zoning Board meeting. Seconded by Mr. Farrell. Approved by a vote of 5-0.

IV. Next Meeting Date

A. 01-05-2023 Regular Meeting

Respectfully Submitted,

Kelly Chance
Village Clerk
Village of Pinehurst

A videotape of this meeting is located on the Village website: www.vopnc.org.

The Village of Pinehurst is a charming, vibrant community which reflects our rich history and traditions.

Mission: Promote, enhance, and sustain the quality of life for residents, businesses, and visitors.

Values: Service, Initiative, Teamwork, and Improvement.