



TOWN OF OAK RIDGE BOARD OF ADJUSTMENT  
DECEMBER 11, 2014 - 7:00 P.M.  
OAK RIDGE TOWN HALL

MINUTES

**Members Present**

Beth Walker, Chair  
Jay Cumbus  
Bill Barbour  
Gray Cassell

**Staff Present**

Bill Bruce, Planning Director  
Bruce Oakley, Town Manager

**Members Absent**

Nancy Stoudemire, Vice Chair  
Dede Cunningham, Alternate

**Staff Absent**

Sandra Smith, Town Clerk

**1. CALL MEETING TO ORDER**

Beth Walker called the meeting to order at 7:00 p.m.

**2. ROLL CALL**

The roll was called and Beth Walker, Bill Barbour, Jay Cumbus and Gray Cassell were present; Dede Cunningham and Nancy Stoudemire were absent.

Walker said that a four-fifths majority vote would be required to render a decision on the case scheduled for later in the meeting. Because only four BOA members were present, the decision would require a unanimous vote.

**3. APPROVE AGENDA**

**Jay Cumbus** made a **motion** to amend the meeting agenda to correct the case number to be heard to BOA-14-02. **Gray Cassell** seconded the motion, and it was passed unanimously (4-0).

**Jay Cumbus** made a **motion** to further amend the meeting agenda to add discussion of whether there was enough substantial information to hear the case. **Gray Cassell** seconded the motion, and it was passed unanimously (4-0).

**4. APPROVE MINUTES OF NOVEMBER 13, 2014, MEETING**

**Bill Barbour** made a **motion** to approve the minutes. **Gray Cassell** seconded the motion, and it was passed unanimously (4-0).

**5. DISCUSSION OF HEARING CASE**

Walker explained that Case No. BOA-14-01 had been heard in August and although the vote was 3-2 in favor, it lacked the four-fifths majority required for approval of a variance. The Board now needed to discuss whether the case coming before it was substantially different or if there were significant changes in the conditions of the site to warrant hearing this case. She asked if those who might speak on the merits of hearing this case should be sworn in at this time, and Town Manager Bruce Oakley said he did not think that was necessary.

Walker said the Board had been supplied with information in the application, and it was up to the Board to decide if this request should be heard as a new case or if it is essentially the same case as the Board heard in August.

Barbour said that was a challenging question, and referred to the fourth conclusion required in order to issue a variance, which says, "that the requested variance is consistent with the spirit, purpose, and intent of the ordinance"; he asked about the chapter in the ordinance, and Bruce responded that it referred to chapter 30, which is the entire chapter on land development. As to whether the application relates to substantially different circumstances or conditions, Barbour said he would consider what he knew about the purpose, spirit, and intention of chapter 30 as part of an evaluation of whether things had changed. Bruce said chapter 30 includes a lot, including subdivision, zoning, development standards, environmental issues and everything regarding land development.

Barbour asked Bruce if he could summarize in a nutshell what is the purpose of the chapter, and Bruce said orderly growth and development.

Cassell stated that all four of the conclusions had to be reached before the variance could be issued, not just one of them.

Bo Rodenbough of the law firm of Brooks Pierce McLendon Humphrey and Leonard asked if he could address the Board. He said Walker was correct regarding the initial question that according to the Town's ordinances, as interpreted by the Institute of Government, that the Board would typically not be able to rehear the same case for a variance in less than one year's time; however, the ordinance contained an exception if there is a substantial difference in conditions or circumstances for the variance that would allow the Board to rehear essentially the same application in less than one year. Regarding that exception, Rodenbough said Oscar Able (the applicant) argued that there had been substantial changes in the application regarding two important circumstances:

1. That the application for the current variance and the accompanying drawing show that the addition to the accessory building would not be parallel to and on the side of the existing accessory structure, and the variance was being sought because that structure is closer to Haw River Road than the residence on the property; the original variance application, which requested an addition to an existing accessory structure that was grandfathered in as a pre-existing use because it was permitted before the property was taken in as part of the Town's ETJ area, would have allowed the addition running along and fronting Haw River Road. The current application would place that addition behind the existing accessory structure and it would not be visible at all from Haw River Road. Regarding Barbour's question about the general point of the chapter, Rodenbough said he thought the chapter – in

- addition to orderly growth and good planning – calls for changes in zoning to be in harmony with surrounding properties. Rodenbough said they thought the addition being placed on the rear of the existing accessory structure and not being visible from the road was in keeping with the spirit of the chapter. When placed behind the existing structure, it will also not be visible from the nearby properties at Pearman Estates, the subdivision adjacent to the Able's property. He referred to an aerial photograph, which was also attached to the application, which showed a line of trees along that side of the property that screens the existing accessory structure and will also screen the addition being requested from Pearman Estates properties.
2. That the driveway location would be different from what was requested on the original application. Rodenbough said when the addition was going to be parallel to the existing structure, the application called for a second driveway entrance to serve the addition from Haw River Road. By moving the addition to the rear, that was no longer the case because the single existing driveway from Haw River Road would serve the property and a new driveway extension would be built off the existing driveway to serve the addition.

Rodenbough said the two changes significantly altered the original application and addressed some of the concerns expressed by the Board, unless the Board felt like Able sandbagged the Board at the hearing in August. When Able completed the original application, he was told by his builder that he could not construct the addition to the accessory structure closer than 50 feet from the well on his property, which is located behind the residence. Since the August BOA meeting, Able had talked with Laura Honeycutt of the county health department, who advised him that the setback from the well was only 25 feet. Rodenbough said that piece of information opened up the opportunity to move the addition to the accessory structure to the rear of the existing building.

Rodenbough said those were the reasons they believed there was a significant difference between the original application that was heard in August and the reason why a new application had been submitted, since they did not know in August that the addition could be located that distance from the well.

Walker asked if the Board felt there was a significant difference in conditions versus the variance request that was heard in August.

Cassell said he thought the case was still substantially the same because the addition to the structure would still be built in front of the front line of the house, and that he did not see a significant difference in the case.

Barbour said he was having trouble with the wording in the law and the cases regarding the res judicata concept in that the differences in this case were nothing like what was provided in the sample cases. He said there was no change in the road or in traffic, as cited in one example, but that this seemed to be a change brought to the Board by the applicant himself. He said the rulings seemed to go toward changes that occur over time by someone other than the applicant. He said the challenge here was the material change in circumstances in the way the law sees them. He said the res judicata cases that the Board was supplied with made no mention of the one-year rule that Rodenbough had mentioned, and said he did not know if there was

any kind of limit for the concept of res judicata being decided – it could be 6 weeks, 6 months or 6 years.

Rodenbough said he thought the ordinance permits the submission of an application for a rezoning or for a zoning variance more than a year from the last application. He said he didn't think any circumstance under the ordinance would prohibit a new application for either a rezoning or a variance from being heard by the Board more than one year after the original. He added that the substantial difference would allow someone to be able to resubmit a case in less than one year.

Addressing Barbour's point, Rodenbough said that he would argue that the ordinance does not say a change must be external to the property. He addressed Cassell's point by saying that all four requirements must be met, but that the fourth requirement speaks to the spirit, not the letter, of the ordinance. He argued that this case does conform to the spirit of the ordinance, and the change proposed does protect the view of the building addition from either the road frontage or adjoining properties, and it requests no change to the current driveway entrance. Rodenbough said it seemed to go against the whole point of having a variance if the ordinance is going to be interpreted that no variance for an addition would be granted because the existing accessory building is constructed closer to the street than the home. He said the building is closer to the street than the home, a fact that is not going change and that it was grandfathered in because it was built before the ETJ area was taken into the Town.

Barbour asked if Rodenbough would agree that the res judicata rule would apply for six, eight or ten years; Rodenbough said he did not think res judicata had any application on the zoning decisions. He added that regarding someone being able to come in and make a new application for either a variance or a zoning, Rodenbough said he thought that was covered under the zoning ordinance, which gives the terms under which someone could make a new application. He said the decision made by the Board in August could not be appealed now because the time for appealing that decision had expired. He said Able had made a conscious decision not to pursue that, and the original decision is res judicata and that barred from the Board from going back and undoing that original decision.

Rodenbough said Able would argue that he was here at this meeting under a new application, and an application that was substantially different from the one denied in August. He said Able was not here asking for the Board to review the original decision, but instead was here in less than a year's time with a new application – something that is permitted by the ordinance if the Board finds the new application is substantially different from the one submitted previously.

Walker said the Board understood that, which was why they wanted to make sure they were hearing the correct case number – so there would be no question about the Board hearing the exact same case. She said she thought the Board's issue was that they were struggling with whether the modifications – and agreed that there are obvious modifications in the new application from the original one – are sufficient to consider this as a new application. For the Board, it is still basically a request to build an addition on to a building for which the property owner has already received a variance. She added that five Board members heard the original

case, and three of them voted to approve the case originally, but the Board was still faced with trying to figure out how to deal with the application.

Walker said the issue of res judicata is concerning to the Board because it needs to be made very clear to the Board why the new application is a substantially different application. If the Board agrees, then it can go on and hear the case, she said.

Rodenbough said Able appreciated the Board's concern in that regard. If the Board grants Able the opportunity for the case to be heard on what they would argue is a significantly different application, Rodenbough asked if the Board could then have every case on which a variance is denied come back with slight changes. Rodenbough said the "bright line" that can be drawn in this case is that while the application is for an addition to an accessory building, that is where the commonality between the two applications ends. He said that is because the location of the addition at the rear of the building is fundamentally different – both from the road and adjoining property owners – and because of the change to the driveway entrance and its effect on traffic on the road. He added that those changes directly address concerns the Board had with the original application. He said this was not simply a case where a developer submitted one application showing three trees on one side and then brought back another application with four trees on that side, but that he thought this was a significant difference.

Cassell said he would disagree with Rodenbough because the house was in the same location, the shape of the lot was the same, there were no improvements being made to the road, no new road was being constructed – the only difference between this application and the previous one was the location of the addition. He said he did not see that as being a substantial change to the application.

Barbour said if the Board looks at the Town's ordinance 30-194 (11), it says that the board may rehear an appeal or application previously denied only if it finds facts supporting a conclusion that there has been substantial change in conditions or circumstances "bearing on the appeal or application." He asked if the Board could find in favor of Able on that fact, and that the wording of the law does not require it to be an external force at work. He said the Board is looking at a substantially different-looking structure and that some of the things that are important under the purpose of the statute, which is to have some consistency in the look and in safety to neighborhoods.

Rodenbough said if the Board just looks at the wording of the ordinance under subpart 11, it does not say that it has to be external issues, traffic or whatever. He said aesthetically this application might be seen as an improvement to the original plan, perhaps safety could be addressed with the driveway because it would not be any less safe because there would be a different place to turn around, and there might be other issues in which the Board could say the changes in the application were substantial. Barbour said in the cases the Board was provided to look at, the wording did not say what issues the Board was required to focus on.

Cumbus said Barbour had shed some light on the issue for the Board, and Barbour said his understanding was that the issue was not limited in time; he agreed there was some gray area, but said the general concept was that "you can't get two bites at the same apple."

Rodenbough clarified that res judicata primarily applies to a lawsuit where parties are arguing a claim, that claim is resolved by a judge or jury, and whether those same parties can come back a re-litigate that same issue or not. He said the law is very clear in that litigation context in that you cannot lose a case, let the appeal rights expire, and then come back a year later and file the same lawsuit with the same issues and re-litigate then again. To transfer that analogy to this case, Rodenbough said he did not think Able could come back and submit the same application he had submitted in August and ask that it be considered. He said he thought that was why there was a provision in the ordinance that a case cannot be reheard unless substantial differences are found.

Walker said the difference between the Board of Adjustment and the Planning & Zoning Board is that BOA is quasi-judicial and P&Z is not, and that the ordinance must be followed and it applies to Board of Adjustment's decisions. She said the Board cannot hear a quasi-judicial case a second time and that the applicant or other affected parties must present evidence at the initial hearing. She reiterated that all the Board was doing at that time was deciding if this case is significantly different; if the Board decides it is not, then res judicata plays a huge part in that they cannot hear the second appeal, Walker said. The Board will need to decide whether the conditions, however it decides to interpret them, are significantly different – and unfortunately the examples given relate to a change in the land itself, the development, the roads, and those types of things, Walker said.

Walker said that the decision on whether to rehear the case requires a majority vote, not a unanimous one. If that decision is made, the parties will be sworn in, evidence presented, and a unanimous vote is required among the four members present in order to be able to approve this request. She asked if the Board had discussed the issue enough to be able to decide if this was a significantly different application, and whether a motion was needed. Bruce and Oakley said yes, and Bruce suggested the Board also include facts in the motion to support that there had been a substantial change. In response to Barbour, Walker said the Board did not need to have heard the case, but said the Board needed to determine whether the modifications were significant enough for it to deem the application a new case.

**Jay Cumbus** made a **motion** that the Board hear Case No. BOA-14-02 because there is a significant enough change in the location of the building addition to warrant hearing the case. **Bill Barbour** seconded the motion, and it was passed 3-1 (Cassell voting in opposition).

## 6. OLD BUSINESS

**Case No. BOA-14-02** (Continued from October 9, 2014, and November 13, 2014): Oscar Able requests a variance to Section 30-382(a) of the Oak Ridge Code of Ordinances, to allow an addition to an accessory structure in front of the front building line of the principal structure. The property is located at 8322 Haw River Rd, Tax Parcel 0166363, Oak Ridge Township, Oak Ridge ETJ (Extra-Territorial Jurisdiction), and is zoned AG (Agricultural).

Oscar Able, Bo Rodenbough and Bill Bruce were sworn in by Oakley.

Able thanked the Board for agreeing to hear the case. Able said that at the previous meeting, Barbour had raised a question about whether the addition could be placed on the rear of the building instead of on the side. At the time, Able had told the Board no because his contractor had stated that there needed to be at least 50 feet of clearance between the addition and the existing well. After the meeting, Able said he did some research and called Laura Honeycutt of the Guilford County health department, and Honeycutt confirmed that on personal property, only 25 feet of clearance is required between the well and the addition.

Able said that opened up an option to him that he did not know he had when he applied for the original variance. He said he had his contractor and Bruce come walk his property and explore various options; the contractor drew some sketches, which are included in the application packet, showing how the addition could be added to the rear of the building. Able said the packet also included the plat, which showed how the driveway would be located, and aerial photographs, which showed the mature evergreen trees along the back of his property line.

Able said adding to the rear of the building is the only real option he has. He added that Rodenbough had already stated that two things were substantially different in this request:

1. It does not add to the frontage of the building, and it will look exactly the same from the road and from the rear of the property because it is screened by tall, evergreen trees planted along the property line so that people in Pearman Estates will be unable to see the addition;
2. By placing the addition on the rear of the existing building, Able said he would not need to create another driveway, but simply add a connection to the existing driveway going to the rear of the building. Doing so would not create any additional safety concerns or things of that nature.

Able said the addition would be constructed of materials identical to what are on the existing building, and it will be attractively maintained. Able said that the addition will appear that it was part of the structure from the time it was built. He asked the Board consider the request, and said he would be happy to answer any questions.

Barbour asked if the Board would see Able again in the future if he decides to make the building even larger. Able said he would not need to make the structure any larger; he said this is what he needs, and if he cannot get this variance passed, he does not intend any other construction projects on this property.

Walker said there is currently a small extension on the back of the building; Able agreed, and said that would have to be removed to accommodate the proposed addition. He said the addition would likely cost more this way than what he originally proposed, but that he liked the configuration better. Walker said the cost is not a hardship that the Board can take into consideration.

Able said he had done some research on hardships, which he failed to do prior to coming before the Board in August. He said he had visited the University of North Carolina's website and read where it discussed hardship as it relates to this type of issue, and the very example given is an odd-shaped lot where the property owner does not have any options. He said that is his substantial hardship.

Cassell said the Board had discussed the septic field repair lines, and asked if Able had found out whether they could be located in some other area than in the back yard behind the house. Able said he did not.

Walker asked about the driveway and whether it would be located far enough from Able's property line, and he said yes. She asked if there was anything behind that area; Able said the septic field was located adjacent to the rear property line, and beyond that there are houses.

Walker said the case was interesting because the Board had already asked most of the questions that it would normally be asking. She said they were simply looking at the new drawings and the driveway location, and that the Board has already discussed the well. She asked if there any other concerns, and none were brought forward by Board members.

Cassell asked Rodenbough if he had any additional comments to make; Rodenbough addressed Cassell's earlier question about possibly locating the building to the rear of the house, and said he thought that was where the drain field and repair area were located. He added that the well is also located in that area, but Able corrected him, saying that the well is on the side of the house. Rodenbough said it would substantially decrease the utility of the building to locate it behind the house rather than adding onto the existing structure, and that it would destroy the back yard and create a situation where nothing could be placed there because of the utility building. He said they believed the proposed new plan screens the addition from the road and neighboring properties, and that it is in harmony with the surroundings. The fact that there will now only be one driveway makes it clear that there will be less traffic problems and safety concerns with a single driveway that previously proposed. He said he would argue that the current plan places no addition burden on the road, and the visibility of the building from adjoining properties or from the road is no greater than what is located there now.

Barbour asked if the Town had anything further to offer; Bruce said if the Board had any additional questions about the ordinance and its interpretation, he would be happy to answer them.

With no further questions, Walker closed the evidentiary hearing and said the Board was ready to deliberate.

Cassell said he thought it would be a hardship for the property owner to locate the building in the back yard because he would have to redo the infrastructure if he were to build a freestanding building behind the house. He added that the Board had been unable to determine that was actually a hardship when the previous case was heard because that concern was financially based.

Cassell said it seemed like the existing building is located close to the road, and that it would seem even more so if an addition were built on the side of it. He said it seemed like putting the addition on the back of the existing building was a better location, but he was unsure of how to frame that in the context of the four-point requirement of the ordinance.

Walker said her original concerns were that the building was already a nonconforming use because a variance had already been granted, yet as she looked at the application she realized that Guilford County – by granting that original variance – had realized there were hardships associated with the property. She said the county had allowed the building to be built. She said she had also had a concern with the driveway and the access, but she thought this modified application addresses that. She said in particular, she thought the unnecessary hardship and the hardship resulting from conditions criteria have been addressed.

Barbour said he agreed, and added that he thought the third point, that the hardship did not result from actions taken by the applicant, had also been taken care of.

Cumbus asked about the spirit of the ordinance and whether that was to keep construction behind the front line of the house in order to maintain the aesthetic look. He said he thought Able's new plan accommodated that. He said he looked at Able's house every time he rode by it now, and that he liked the new plan.

Cassell said the new plan did not change the view of the neighbors directly across the road, and that he stops to rest there at Apple Grove Road when he rides his bicycle in the area. He said it does not change the view coming out of Apple Grove Road.

Walker said she thought the spirit of the ordinance was to prevent eyesores and willy-nilly additions to accessory buildings. Since there is already an accessory building located there, it is pleasant, and it was in the spirit of the ordinance even before the property came into Oak Ridge's extra-territorial jurisdiction, Walker said she personally thought it was within the spirit of the ordinance to allow the variance. She said she thought there was something to not wanting to be too draconian about the use of land in the Town.

Cumbus added that the addition would not really impact anyone else because it could not be seen, and Walker agreed. Walker said she was sure there were other variances where it would be easier to say it was not in the spirit of the Town ordinance, and she thought that was the issue the Board had with Able's original plan. She said her concerns, although she had voted in favor of the variance in August, were much more clearly addressed now. With no further discussion, Walker called for a motion.

**Bill Barbour** made a **motion** to approve the application in that it meets the criteria set forth in the statute as follows:

1. Unnecessary hardship had been established beyond all doubt and that they were beyond the point of prescribed application of the ordinance because a variance had already been granted once; he added that it was a challenge for him in thinking through those words, because that had already happened.
2. The hardship resulted from conditions peculiar to the property as discussed, such as the location of the well and septic and property line requirements.
3. The hardship did not result from actions taken by the applicant in that there is no reason to think the applicant had brought this on himself.
4. The requested variance is consistent with the spirit, purpose and intent of this chapter of the ordinance because it is in harmony with the orderly growth and safety aspects of the statute, it is visibly in harmony with the rest of the property

and does not provide any negative impact on others, and that it will increase safety over the prior application to be consistent with the purpose of chapter 30.  
**Gray Cassell** seconded the motion, and it was passed unanimously (4-0).

7. **ADJOURNMENT**

**Bill Barbour** made a **motion** to adjourn the meeting at 7:59 p.m. **Jay Cumbus** seconded the motion, and it was passed unanimously (4-0).

Respectfully Submitted:

  
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Sandra B. Smith, CMC, Town Clerk

  
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Beth Walker, Chair