

MINUTES
BREVARD BOARD OF ADJUSTMENT
March 09, 2010

The Brevard Board of Adjustment met in regular session on Tuesday, March 09, 2009, at 7:00 PM in Council Chambers of City Hall.

Members Present: Rick Lasater, Vice-Chairman / Chairman
Frank Pearsall
Fred McCrary
Charles Landreth
Allen Delzell
Carl Brown

Members Absent: None

Staff Present: Brad Burton, Assistant Planning Director
Michael Egan, Board Attorney
Joshua Freeman, Board Secretary
Desiree Perry, City Clerk

Others Present: Harvest Leisure, Agent, Mountain Sun Community School, SUP-10-002; Expert Witness, VAR-10-019
Steve Prichard, Agent, VAR-10-018
Diane Zerby, Applicant, VAR-10-019
Jack Zerby, Applicant, VAR-10-019
Keith Arbogast, Witness, VAR-10-019

Vice-Chairman Lasater called the meeting to order; a quorum was present. Board members and City Staff were introduced.

Vice-Chairman Lasater explained to all present that the Board is a quasi-judicial body and explained the necessary procedure one must follow if one desires to be heard by the Board, and stated that all testimony given during the meeting shall be sworn testimony. All appeals of the Board's decision shall be made to the Superior Court within thirty days from the date of the Board's Notice of Decision.

Approval of Minutes

It was noted by Vice-Chairman Lasater at the agenda for the March 9, 2010 Board of Adjustment meeting incorrectly identified the minutes for approval as being the minutes of the March 10, 2009. F. Pearsall moved, seconded by A. Delzell, the minutes from the November 10, 2009, meeting be approved as written. Motion carried unanimously.

Election of Officers

Vice-Chairman Lasater called for nominations for the position of Board Chair. A. Delzell

nominated R. Lasater. The motion was seconded by F. Pearsall. Vice-Chairman Lasater called for further nominations for the position of Board Chair. Hearing none, Vice-Chairman Lasater called for a motion to close nominations. F. Pearsall so moved, and C. Landreth seconded. Motion carried unanimously. Vice-Chairman Lasater called the question on the nomination of R. Lasater for the position of Board Chair. The motion carried unanimously.

Chairman Lasater called for nominations for the position of Board Vice-Chair. A. Delzell nominated F. Pearsall. The motion was seconded by Chairman Lasater. Chairman Lasater called for further nominations for the position of Board Vice-Chair. Hearing none, Chairman Lasater called for a motion to close nominations and to approve F. Pearsall as Board Vice-Chairman. A. Delzell so moved, and C. Brown seconded. The motion carried unanimously.

Charles Landreth Oath of Office

D. Perry administered the oath of office, and C. Landreth was sworn in as a new member of the Board of Adjustment.

Special Use Permit SUP-10-002 - Mountain Such Community School

Chairman Lasater asked that Board members disclose any visits to the property that is the subject of the Special Use Permit application. F. Pearsall and F. McCrary disclosed that they had visited the site. All Board members affirmed that they have no conflict of interest, bias, or fixed opinion as to the outcome of the Special Use Permit request. All Board members affirmed that there had been no ex parte conversations with the Applicant or other individuals relevant to the Special Use Permit application.

B. Burton was sworn in and then entered into the record Staff's Report dated February 15, 2009 (Secretary's note for record: the Staff Report was incorrectly dated. The correct date is February 15, 2010), totaling eight pages, as well as the Applicants submittal packet. A copy of the Staff Report is filed in the case file. Mr. Burton made specific reference to the appointment of agent form wherein the property owner, Carolyn Smith Robinson, designates Raymond Raney and Harvest Leisure as agents of the property for the purposes of the Special Use Permit request. A copy of the Applicant's submittal contained within filed in the case file. B. Burton made specific reference to page 3 of the Staff Report, which contains an aerial photograph of the site. B. Burton made specific reference to the business plan for Mountain Sun Community School, as well as the proposed campus site plan, which were included in the Applicant's submittal packet.

B. Burton summarized specific elements of the site plan as shown in the Applicant's submittal, summarized applicable Unified Development Ordinance requirements, summarized applicable state or federal requirements, and summarized Staffs markup of the Applicants site plan as shown on page 3 of the Staff Report. B. Burton specifically noted the following:

- Schools are permissible within the general residential 4 zoning district that means a Special Use Permit.
- Plan B expansion as shown on the site plan is in close proximity to septic drain field, which will require approval by the Transylvania County Department of Environmental Health.

- Plan B expansion is shown for informational purposes and is not proposed for approval by the issuance of the Special Use Permit. Plan B. expansion will require additional review by the Board of Adjustment by means of future Special Use Permit.
- Plan B expansion is likely to trigger requirements for on-site storm water management.
- Use of the existing one-story block building will not trigger requirements that the existing gravel driveway and parking area be paved. However, the proposed Plan B expansion may trigger paving requirements in the future.
- The site plan proposes the establishment of new parking spaces. These parking spaces are in excess of the minimum required by City Code. The Applicant was advised that the spaces must be removed, or that the driveway and parking area be paved.
- Staff has concerns with the flow of traffic from North Country Club Road into the site and with the orientation of parking spaces within the site as shown on the site plan.
- Required landscaping is not shown on the site plan. 5% of the site must be landscaped.
- Citizens who attended the neighborhood compatibility meeting on date expressed concern about the absence of vegetation along a recently graded slope located at the rear of the existing one-story building.

B. Burton explained that Staff conducted a neighborhood compatibility meeting on January 28, 2010, which was attended by three citizens who live or own property within close proximity to the proposed school. Citizens express the following concerns:

- The need for clearly defined pick-up and drop-off procedures for school students.
- The need for a traffic control plan that would allow for safe flow of traffic without stacking on Country Club Road.
- The need to re-vegetate the recently graded slope and eliminate ongoing erosion problems.
- The potential for children to wander onto Country Club Road, and the need for a secure play area.
- The need for disclosed hours of operation.
- Given the previous use of the existing block structure as a daycare facility, citizens expressed no concerns about the use of the property as a school, per se.

B. Burton stated that the Applicant appears to have committed to addressing these concerns to the satisfaction of the citizens who attended the neighborhood compatibility meeting.

B. Burton certified that all property owners within 200 feet of the subject property properly were noticed at the public hearing in accordance with state law and City code, and at the same property owners were invited to attend the neighborhood compatibility meeting.

B. Burton stated that the City of Brevard Technical Review Committee met on February 3, 2010 in the administrative conference room to consider this Special Use Permit request, and summarized the comments and recommendations of that committee:

- Recommended on-site traffic control to avoid congestion on Country Club Road.
- Recommended traffic control at the points of ingress and egress.
- Recommended that the point of ingress be at the southernmost driveway, and at the point of egress at the northernmost driveway, a long Country Club Road, and that parking

- spaces has shown that time be realigned to conform to this direction of flow.
- Noted that septic system capacity is sufficient for the proposed school at the present time, but that an expansion in the number of students or the addition of new buildings would necessitate review and approval by the Transylvania County Department of Environmental Health.
- Noted that it is unlikely that an expansion to the septic system could be approved due to existing site constructs.
- Recommended the establishment of a secure play area for children.
- Noted that changes to existing lighting must comply with Chapter 11 of the Unified Development Ordinance and approved by the City.
- Recommended establishment of a secure a playground area.
- Noted that future expansions may trigger additional parking, storm water management, landscaping, or other requirements of the Unified Development Ordinance.
- Recommended the Applicant clarify hours of operation.
- Required the installation of a Knox Box Rapid Entry System.
- Required that the Applicant verify compliance with North Carolina fire code's required ratio of one student per 20 square-foot. B. Burton testified that the Applicants Agent, H. Leisure, has provided this information.
- Recommended requiring school district signage along Country Club Road in the vicinity of the subject property. B. Burton stated that this condition would require North Carolina Department of Transportation (hereafter, "NCDOT") approval.

B. Burton summarized Staff's review of the Special Use Permit request in the context of parameters for the consideration of the Special Use Permits as set forth in section 16.11.B of a Unified Development Ordinance, referencing comments within the Staff Report beginning on page 6:

- Location: the proposed use is allowable within the GR four zoning district upon issuance of a Special Use Permit.
- Future land use / City of Brevard Comprehensive Land Use plan: the plan recommends use of the subject property for Isolated /Neighborhood Business uses. B. Burton commented that growth in the number of pupils on the subject property would require oversight as to traffic, wastewater, and other issues.
- Transportation / pedestrian issues: the Transylvania County Comprehensive Transportation plan calls for one potential route of the Sylvan Valley Parkway to pass just north of the subject property. No pedestrian facilities are proposed within City planning documents.
- Visual / functional compatibility: metaphysical exterior changes are proposed to the existing structure. Architectural elevations are not provided for Plan A expansion, B, or C expansion. Further comment was deferred to discussions pertaining to the site plan review section of the Staff Report.
- Impact upon adjacent properties / uses: B. Burton made reference to narrative, provided by the Applicant and transcribed onto page 7 of the Staff Report, which describes the business plan of the proposed use.

B. Burton summarized Staff's comments and recommendations:

- B. Burton noted that the previous use of the existing structure and subject property subject property was "The Lighthouse for Little Folks", a daycare facility, and that proposed occupancy of Mountain Sun Community School will be comparable to The Lighthouse for Little Folks.
- B. Burton noted that a primary concern of Staff, the Technical Review Committee, and the neighbors who attended the neighborhood compatibility meeting, is traffic coming to and from the proposed school. B. Burton noted that it is a Staff recommendation, and the Applicant concurs, that traffic should enter the school at the southern access point and exit at the northern access point.
- The primary focus of this application is to request approval to operate a school in the existing block structure. Expansions as generally noted in the Applicant's site plan will necessitate further consideration by the Board of Adjustment in the form of an amended Special Use Permit.
- Members who attended the neighborhood compatibility meeting expressed some concerns but, overall, appeared amenable to the idea.
- The City of Brevard Technical Review Committee unanimously voted to recommend approval of the application, subject to the conditions as previously outlined. Staff feels these conditions are fair and reasonable and are germane to the scope of the project.
- The Applicant has paid utility impact fees for operation at the school's current location, St. Timothy's United Methodist Church, and therefore will not be assessed further impact fees at this time.

A. Delzell requested a definition of the Sylvan Valley Parkway. B. Burton explained the purpose and route of the Sylvan Valley Parkway, a proposed bypass around the City of Brevard.

F. Pearsall identified the drain field area as noted on the site plan as shown on page 2 of the Staff Report, and questioned whether it was a low area. B. Burton stated it is not a particularly low area, but noted that it is the replacement area for an older, failing drain field that been discontinued. F. Pearsall commented, and B. Burton confirmed, that this existing drain field could be in conflict with future expansion plans shown on the site plan.

F. Pearsall referenced and questioned a notation as shown on the site plan on page 2 of the Staff Report, which questions whether First Citizens Bank is aware of the driveway, which crosses property owned by said bank to access the subject property. B. Burton stated that the bank was provided notice of this public hearing as well as the neighborhood compatibility meeting, and that Staff did receive a telephone call from a representative of the bank. However, while such representative did ask questions regarding the status of the Special Use Permit, he offered no comments pro or con.

Chairman Lasater questioned, and B. Burton clarified, that parking as shown on the Applicant's site plan is intended to address parking needs associated with use of the existing structure, but that future expansions on the subject property could trigger additional parking requirements.

A. Delzell questioned, and B. Burton clarified, that the playground area as shown on the Applicant's site plan is not fenced in, but simply shown on the site plan for the purposes of delineation.

Chairman Lasater questioned, and B. Burton clarified, and that it is Staff's recommendation that signage denoting the subject property as a school campus and prohibiting firearms, drugs, and etc., be placed on the subject property, and that laws applicable to school campuses to be applicable to the subject property.

F. McCrary questioned whether or not it would be better to locate the entrance at the northern access point so as to provide better visibility for drivers making a left into the subject property. Chairman Lasater pointed out that there might be a longer field of sight distance in both directions at the southern access point.

Chairman Lasater swore in H. Leisure, agent for Mountain Sun Community School. H. Leisure introduced himself as Chair of the Board of Mountain Sun Community School.

H. Leisure summarized the Applicants request:

- Requesting approval for use of the existing block structure as a school.
- Confirmed that the Applicant would seek all necessary City and County permits prior to making improvements to the existing structure.
- Confirmed that the Applicant does have future expansion plans, but that the Applicant does not seek approval of such expansion plans at the present time.
- Stated that the location of the subject property makes sense as the location of a school given its proximity to Brevard high school.
- Stated that the proposed use is similar to the previous use of the subject property as a preschool.
- Stated that proposed hours of operation are consistent with those of area public schools.
- Stated that the Applicant concurs with the recommendations of Staff and Technical Review Committee regarding the placement of the entrance at the southernmost access point, and the placement of the exit at the northernmost access point, but that the Applicant is willing to do otherwise if required by the Board of Adjustment.

Chairman Lasater requested that H. Leisure address each of the concerns of the Technical Review Committee as set forth in the Staff Report.

H. Leisure responded as follows:

- Ingress / egress: the Applicant intends to provide one school Staff member to provide traffic control during pickup and drop-off periods.
- Parking patterns: the Applicant intends to reverse the direction of parking spaces to match the flow of traffic within the site.
- The Applicant intends to reduce the number of parking spaces has recommended by Staff.
- Septic system capacity: the Applicant acknowledges limitations of the current septic system and acknowledged the requirement to seek approval from the Transylvania County Department of Environmental Health prior to undertaking any expansion of the number of students on campus. The Applicant intends to perform a percolation test prior to purchasing property.
- The Applicant intends to plant evergreen trees and other vegetation in order to ensure that

children are physically barred from Country Club Road.

- Lighting changes: the Applicant intends to comply with any applicable requirements.
- Parking: H. Leisure noted that, while future expansion plans as shown on the Applicant's site plan are a starting point presented for informational purposes only, the Applicant acknowledges that additional parking would be required.
- Knox box: the Applicant intends to install an Knox box.
- Confirmed that the existing building will provide 20 ft.² of space per student as required by fire code.
- Speed limit signage: Chairman Lasater acknowledged that speed limit signage and school zone signage would require approval from the North Carolina Department of Transportation.
- Erosion: the Applicant acknowledges that the property has been denuded of vegetation and that erosion is an ongoing problem, and stated that the Applicant is prepared to address this problem through plantings.
- Chairman Lasater questioned, and H. Leisure confirmed, that the Applicant is willing to install signs designating the property as a school campus and prohibiting drugs, firearms, and etc., and further stated that such would be consistent with the school's policy.

C. Landreth advised H. Leisure to fully investigate the stability of, and costs associated with, stabilizing the slope located behind and east of the existing structure.

Chairman Lasater closed the public hearing and called for deliberation.

Chairman Lasater stated that it appears that the Applicant is making an effort to achieve a positive outcome with regard to every concern of the Technical Review Committee, and to comply with the Unified Development Ordinance. Chairman Lasater stated that he has some concern over the easement (Secretary's note: a reference to the fact that the southernmost access point crosses property owned by first citizens Bank.), but that this could be addressed by relocating the access point in the future, if necessary. Chairman Lasater expressed satisfaction with the Applicant's commitment to provide a structured play area.

M. Egan offered a prepared motion for the Board's consideration. Chairman Lasater reminded the Board that it is the Board's practice to formulate a motion in the positive to approve the request.

A. Delzell made the following motion:

With Regard to the Special Use Permit application for Mountain Sun Community School, SUP-10-002, I move the Board to find that:

1. *The use meets all requirements and specifications of the ordinance and any adopted land use plans, and is in harmony with the general purpose and intent, and preserves its spirit.*
2. *The proposed use will, if developed in accordance with the plan submitted and approved, be visually and functionally compatible to the surrounding area.*
3. *The proposed use will not be detrimental to the public health safety and welfare and will not be detrimental to the value of adjoining property and associated uses.*

Accordingly, I further move that the Board approve this application for a Special Use Permit.

Chairman Lasater called for, and F. Pearsall offered, the second to the motion. The motion carried unanimously.

A. Delzell requested clarification as to whether the Board should impose specific conditions upon issuance of the Special Use Permit. M. Egan affirmed the Board's authority to impose conditions.

A. Delzell moved that the Board's approval of the Special Use Permit be conditioned upon compliance with the recommended conditions of Staff and the Technical Review Committee, as stated on the record.

Chairman Lasater called for, and F. Pearsall offered, the second to the motion. The motion carried unanimously.

Variance Request VAR-10-003 – John Christy & Steve Pritchard

Chairman Lasater opened to the public hearing.

B. Burton entered into the record Staff's Report, dated 02/15/2010, as well as the Applicant's submittal packet, copies of which are on file in the case file. B. Burton made particular note of the application form and the appointment of agent form. B. Burton certified that the public hearing was properly advertised, the subject property was properly posted, and all parties properly noticed in accordance with State law and City code.

Chairman Lasater asked that Board members disclose any visits to the property that is the subject of the variance application. F. Pearsall disclosed that he had visited the site. All Board members affirmed that they have no conflict of interest, bias, or fixed opinion as to the outcome of the variance request. All Board members affirmed that there had been no ex parte conversations with the Applicant or other individuals relevant to the variance application.

B. Burton made reference to the Applicant's site plan, as shown in the Applicant's submittal packet and the Staff Report. B. Burton reiterated that the public hearing was properly advertised, the subject property was properly posted, and all property owners within 200 feet had been properly noticed in accordance with state law and City code.

B. Burton summarized the application and the Staff Report, stating the following:

- The subject property is located at the corner of French Broad Street and Franklin Street.
- The subject property is connected to City water and sewer.
- The subject property is a double fronted lot (the property has two front yards).
- The front of the house faces east, towards Franklin Street.
- The physical side of the house faces south, toward French broad Street.
- Topography on the property is essentially flat, with a slight incline rising from north to south towards French Broad Street.
- there is currently a screened in covered porch / deck on the west, rear side of the house, which was built atop a set of existing cement stairs.

- The project as proposed is a bathroom addition in the approximate location of an existing window, which is located to the right of an existing HVAC unit, as illustrated by within the Staff Report.

B. Burton summarized the facts of the case:

- The Applicant states that the variance request is to allow setback encroachment to construct a bathroom, because there is no bathtub in the home and only one shower.
- Prior to the adoption of the UDO, the parcel was zoned R-2, which required a 20 foot setback.
- It is not known when the screened in covered porch / deck was constructed.
- The screened in covered porch / deck complies with the former 20 foot setback requirement. B. Burton stated that this determination was made based upon Staff's measurements in the field, which is not survey-accurate.
- The covered porch / deck does not attain the 25 foot setback requirement currently in place. This structure has a pre-existing nonconforming status.
- Steve Prichard, Applicant / Agent on behalf of Mr. John Christie, property owner, is asking for a 4 foot reduction in the 25 foot rear yard setback for the construction of a bathroom.

B. Burton direct to the Board's attention to page 3 of the Staff Report, wherein a reference to guidance pertaining to the consideration of variances is provided.

B. Burton stated that the Board may grant a variance after first having held a public hearing, and after having made certain findings as set forth in Section 1612. Referring to page 4 of the Staff Report, B. Burton summarized the requirements for the granting of a variance as set forth in on a general statutes and the City of Brevard Unified Development Ordinance, and offered Staff's comments pertaining thereto:

- Are there extraordinary and exceptional conditions pertaining to the particular piece of property because of its shape, size, or topography that are not applicable to other lands were structures with the same district?* Staff comments: the setback requirements that were in effect at the time that the house and covered porch / deck were built allowed a compliant placement of the structure of the lot. As the house and covered porch / deck are situated at present, the structure would be considered pre-existing nonconforming with regard to the rear yard setback. There are no exceptional or extraordinary conditions pertaining to the Applicant's property based upon size, shape, or topography.
- There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance.* Staff comments: The application of the ordinance prior to the UDO imposed no hardship in the construction of the house and porch / deck. The current owner has full, functional use of the property at present.
- The variance is in harmony with the general purpose and intent of the ordinance and preserves in spirit.* Staff comment: while the structure is nonconforming, it is currently legal as it exists in terms of the rear setback and the covered porch / deck. The ordinance does not contemplate the creation of a new, nonconforming situation; Chapter 14, Section 14.3.C, which states that a nonconforming structure may not, under any circumstances, be enlarged or altered in a way that increases its nonconformity.
- In granting the variance, the public safety and welfare of the insured and substantial justice*

has been done. Staff comment: it would appear that, to allow the creation of an additional nonconforming setback situation by granting the variance where not absolutely necessary due to size, shape, or topography of the lot, but only cause more harm to neighboring property owners who rely on dimensional zoning requirements; granting variance would not ensure substantial justice for all had been done.

- e. *The reasons set forth in the application justify the granting of the variance, and the granting of the variance is the minimum necessary to make possible a reasonable use of the property, land or structures.* Staff comment: S. Pritchard provides no specific reasons for granting the application other than an implication as to the owner's desire for a bathtub in the house. Expanding a structure that cannot comply with the dimensional requirements of the district is not allowed within the UDO.
- f. *In the Applicant complies with the provisions of the ordinance, he or she can secure no reasonable return from, nor make any reasonable use of the property.* Staff comments: The Applicant currently has, and will continue to have, full and complete use of the house and all structures on the property that have legal, pre-existing nonconforming status.
- g. *Granting the variance will not confer upon the Applicant any special privileges that are denied to any other property owners, residents, or establishments within the district in which the property is located.* Staff comments: granting the variance, in this instance, will confer upon the Applicant special privileges which are denied to other property owners within the district due to rear yard setback requirements, and would create an additional nonconforming appendage to an already nonconforming structure.
- h. *Practical difficulties in an unnecessary hardships are not the result of the actions of the Applicant.* Staff comments: There are no discernible hardships not of the Applicant's control based on the size, shape, or topography of the lot. All existing structures of a lot enjoy a legal, pre-existing nonconforming status.

B. Burton made reference to Chapter 14, Section 4.3.C , which states that the granting a variance many not under any circumstances be enlarged in a way that increases its nonconformity, and stated that, as there are no hardships or special circumstances pertaining to the subject property due to its size, shape or topography, the creation of a nonconforming situation would not be harmony with the general intent of the ordinance or preserve its spirit.

B. Burton summarized Staff's summation as shown on Page 7 of the Staff Report:

- Staff feels the application fails to meet each of the determinations for the issuance of a variance as set forth in the Unified Development Ordinance, Chapter 16, Section 16.11.D.2.
- Staff recommends that the Board closely review this application and consider Staff's comments in the Board's decision.

A. Delzell questioned, and B. Burton confirmed, that the original house, not including the covered porch / deck, would comply with the 25 foot setback requirement.

A. Delzell questioned whether the intent of the ordinance was to prevent this type of small project and whether the ordinance would be reasonable in that regard. B. Burton responded that the presence of the deck within the 25 foot setback area makes the entire structure nonconforming, that some jurisdictions allow for expansions of nonconforming structures to "square off a footprint" or similar, but that is not the case in Brevard's code and the ordinance is

clear in this situation.

F. Pearsall questioned whether any of the neighbors had offered any objections. B. Burton responded that the City had not heard from any of the neighbors.

F. Pearsall questioned how long the covered porch / deck has been in place. B. Burton responded that the covered porch / deck appeared to be less than 10 years old but could not be certain.

C. Brown stated that the Board should follow the letter of UDO and should be careful not to set a precedent by allowing new nonconformities. Chairman Lasater stated that each case is considered on its own merits. M. Egan advised the Board to take testimony from the Applicant prior to engaging in deliberation.

F. McCrary questioned the setback status of structures on neighboring properties. B. Burton responded that he did not have that information.

Chairman Lasater swore in Steve Pritchard, Applicant's Agent.

S. Pritchard clarified that the purpose of the request, stating the following:

- The purpose is not just to create a space in which to install a bathtub.
- The Applicant, J. Christy, intends to eventually move into the house and who is aging, prefers a particular walk-in bathtub design for its ease of use over the shower that is currently in the home.
- It is J. Christy's desire that S. Pritchard and wife live in the house in order to keep it in good condition until he moves to Brevard from California.
- J. Christy's family suffers from anxiety & claustrophobia, further necessitating a larger bathtub.

A. Delzell suggested that S. Pritchard consider investigating putting a walk-in tub where the existing shower is located. S. Pritchard responded that the existing shower space is too small.

Chairman Lasater closed the public hearing and called for deliberation.

F. Pearsall questioned whether the Board could legally approve the variance request or, is this an application that should not have been brought forward in the first place?

Chairman Lasater questioned whether the need to modify a shower to accommodate a person's infirmity could be considered a practical difficulty? C. Landreth responded that it is a personal hardship, but questioned whether it could be considered a hardship of the property. Chairman Lasater stated that it could become a public safety issue if the existing condition resulted in an injury.

M. Egan responded that Section 14.3.C should be taken into consideration in the context of the variance provisions of Chapter 16. M. Egan further stated that the question is: is it the intention of the ordinance that a variance never be issued in relation to a nonconforming structure? M.

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Egan stated that he does not believe that that is the intent. M. Egan stated that it is the role of the Board to examine the eight conditions for issuance of a variance as set forth in the UDO and determine whether the Applicant has proven that he meets all eight conditions.

Hearing no further discussion, Chairman Lasater called for a motion.

A. Delzell made the following motion:

With regard to the Variance Application of John Christy, VAR-10-018, I move the Board to find that finds that the Applicant has demonstrated compliance with each and every determination contained in Section 16.11.D.2 of the UDO. I further move that the Board grant the variance in accordance with, and only to the extent represented, in the application.

Chairman Lasater called for, and F. Pearsall offered, a second to the motion. The motion failed for lack of a super majority, with F. Pearsall and F. McCrary voting in favor, and with C. Landreth, A. Delzell, and R. Lasater voting against.

S. Pritchard requested clarification of Chapter 14 Section 14.3.C. Chairman Lasater directed S. Pritchard to make contact with B. Burton after the meeting.

Variance Request VAR-10-003 – John Christy & Steve Pritchard

Chairman Lasater opened the public hearing.

Chairman Lasater asked that Board members disclose any visits to the property that is the subject of the variance application. F. Pearsall disclosed that he had visited the site. All Board members affirmed that they have no conflict of interest, bias, or fixed opinion as to the outcome of the variance request. All Board members affirmed that there had been no ex parte conversations with the Applicant or other individuals relevant to the variance request.

B. Burton introduced the Applicant's submittal packet, making specific reference to the following:

- The Applicant's application for variance.
- The Applicant's narrative.
- A printout listing adjoining property owners within 200 feet as provided by the Transylvania County Land Records Office.
- A survey of the subject property illustrating a proposed, covered patio that is the subject of the variance request.
- The original application for zoning site plan approval, submitted by the Applicant and received by the City on August 2, 2004 for the construction of an American Modular Home, which is the existing structure located on the subject property.
- A City of Brevard Planning Department zoning compliance inspection form, which illustrates successful completion of a preliminary setback inspection.
- The City of Brevard planning department zoning compliance inspection form, dated January 25, 2005, which illustrates successful completion of a final setback inspection subject to the condition that, "... the patio slab at the rear of the house is to remain as a slab, if covered

shell require additional permit and may not be compliant with rear yard setback." This statement is followed by B. Burton's signature.

- A scanned copy of the original site plan will that accompanied the original zoning site plan application for the existing structure.

B. Burton certified that the public hearing was probably advertised, and relevant parties properly notified in accordance with the City code and State law, noting that the hearing was advertised in the Transylvania Times on two consecutive weeks prior to public hearing, and that an all-weather sign was placed on the property notifying neighbors and passersby of the time and date public hearing, and that the Applicant and adjoining property owners were notified by United States mail.

B. Burton entered into the record Staff's Report, dated 02/25/2010, and summarized that document by making the following statements:

- The subject property is located within the City of Brevard, on Jordan Road.
- The subject property is served by City water and sewer.
- The front of the existing structure faces east toward Jordan Road.
- Referred the board to the Staff Report, which illustrates geographic information system data depicting site topography, clarifying the topography is illustrated thereupon is not intended to be survey grade accurate.
- The subject property rises in elevation from Jordan Road to the rear of the property, with an elevation change of approximately 14 feet.
- The existing patio is located on the south rear of existing structure.
- The existing patio is approximately 20' x 12' in size.
- From the Southwest and of the patio to the western property line of the subject property, there is an elevation change of approximately four to five feet, and there is a row of hemlock separating the subject property from the neighboring property along the western property boundary.

B. Burton explained that the Applicant's variance request is for an 11 foot reduction in the 25 foot rear yard setback requirement of the Unified Development Ordinance.

B. Burton further summarized the Staff Report, as well as the facts of the case, by making the following statements:

- Referred the board to page 2 of the Staff Report, which contains a photograph of a proposed project area, noting that the patio is covered with brick pavers and furniture.
- B. Burton repeats a quote from the narrative, stating that the Applicant claims that the, "...discovery of latent structural damage to our five year old house caused by water seeping in her room our rear, on grade, brick over concrete slab, 12 x 20 patio and in the main beam and concrete block in the rear foundation of our crawlspace."
- Photographs taken in September, 2009, provided by the Applicant, appeared to support this claim.
- The Applicant claims that in September 2009, the Applicant's contractor removed several rows of brick pavers, jack hammered portion of the patio located adjacent to the foundation of the existing structure, and installed a barrier between the patio and the foundation.
- Daniel Cobb, assistant zoning administrator, climbed underneath the house on February 9

2010, and observed one area that appeared to be receiving water, but also observed that the sill plate appeared to be dry.

- Referenced Introduction to Zoning, produced by David W. at Owens, North Carolina School of Government, and directed the board's attention to excerpts of that publication which are included on page 3 of the Staff Report.

B. Burton summarized the findings of fact that must be considered in the granting of a variance application, as set forth Chapter 16 of the UDO, and offered Staff comments pertaining thereto:

- *There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape, and topography that are not applicable to other properties, lands or structures in the district.* Staff comment: setback requirements in effect when the house and patio were built allowed a compliant placement of structure upon the lot. The structure is compliant with current setback requirements. There are no exceptional or extraordinary conditions pertaining to the Applicant property based upon size, shape or topography.
- *There are no practical difficulties or unnecessary hardships in the way of carrying out strict letter of the ordinance.* Staff comment: the application of the ordinance was no hardship in the construction of the patio as a slab on grade, as a slab is not subject to setback requirements. B. Burton referenced the condition is noted upon the aforementioned City of Brevard Planning Department zoning compliance inspection form, dated January 25, 2005. the Patio is functional in its present form. The Applicant claims the sill plate has been repaired.
- *The variance is in harmony with the general intent ordinance and preserves its spirit.* Staff comment: to allow a roof to be constructed over the existing, functional, repaired patio would make the home non-conforming in terms of the rear setback requirement for the zoning district, and as such would not be in harmony with the general purpose and intent of the City of Brevard Unified Development Ordinance.
- *In granting the variance, the public safety and welfare has been assured and substantial justice has been done.* Staff comment: it would appear that to allow the creation of a non-conforming setback situation by granting a variance for the Applicant, where not absolutely necessary due to size, shape, and topography of the lot, will in the long run, cause more harm for the neighboring property owners who rely upon dimensional zoning requirements. Granting a variance would not assure that substantial justice for all had been done.
- *The reasons set forth in the application justify the granting of a variance, and the variance is a minimum one that will make possible the reasonable use of land or structures.* Staff comment: water inundation issues stemming from the patio design have already been repaired, and the Applicant currently has reasonable use of the structure. The addition of a roof, the Applicant freely admits, is the recommendation of a contractor and not a necessity.
- *If the Applicant complies with the provisions of this ordinance, he/she can secure no reasonable return from, or make no reasonable use of, the property.* Staff comment: the Applicant currently has and will continue to have, full and complete use of the house and patio area, and all structures are in total compliance with the UDO.
- *Granting the requested variance will not confer upon the Applicant any special privileges that are denied to other property owners, residents, structures or establishments within the district within which the property is located.* Staff Comment: granting the variance would confer upon the property owner special privileges that are denied to other property owners

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with the district due to rear yard setback requirements and would create a nonconforming structure.

- *The practical difficulties and unnecessary hardships are not the result of the actions of the Applicant.* Staff Comment: poor design is the only hardship in this case, and the problem has been repaired by the contractor, according to the Applicant. There are no discernible hardships not outside the Applicant's control based on the size, shape, and topography of the lot. All structures upon the lot are currently in conformance with the ordinance.

B. Burton summarized by stating that it is Staff's position that the Applicant fails to meet each of the determinations in considering a variance as set forth in Chapter 16, Section 16.11.D,2 of the City of Brevard Unified Development Ordinance, and that it is Staff's recommendation that the Board closely review this application and consider Staff's comments in their decision regarding the requested variance.

Chairman Lasater questioned whether there is there any drainage in place around the slab. B. Burton responded that he did observe what appears to be drainage pipe near the south end of slab, but could not testify as to its origin.

Chairman Lasater provided opportunity for the Applicant to cross-examine B. Burton.

J. Zerby reserved the right to question B. Burton at a later time. J. Zerby questioned whether B. Burton had received and circulated a letter from Mr. Jerry & Mrs. Bronwen Starnes. B. Burton responded that he had, but that he had not provided copies to the board. J. Zerby questioned whether B. Burton objected to entering copies of such letter into the record, and B. Burton responded that he did not. (Secretary's note: the aforementioned Starnes letter is attached hereto and incorporated by reference as Applicant's Exhibit 1.)

J. Zerby called K. Arbogast as a witness.

Chairman Lasater swore in K. Arbogast.

K. Arbogast offered the following testimony:

- He is the Applicant's southern neighbor.
- He supports and has no objection to granting the variance in order to preserve the Applicant's property "as it is" and to prevent further damage.
- His and other properties along Jordan Lane are located below properties that front Maple Street, and receive water from those properties.

B. Burton questioned K. Arbogast training and expertise as it pertains to his statements regarding water mitigation on the Applicant's property. K. Arbogast responded that he is just an observer.

J. Zerby questioned whether K. Arbogast considers the granting of this variance to confer a special privilege upon the Applicant that is not granted to others in the neighborhood. K. Arbogast responded that he hopes the same privilege would be granted to others in the neighborhood who are posed with the same problem.

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J. Zerby called Joan O'Hara as a witness.

Chairman Lasater swore in J. O'Hara.

J. O'Hara offered the following testimony:

- She views it as an improvement to help the problem and that she does not object.
- She referenced other conditions in the neighborhood not applicable to the application.

B. Burton questioned whether J. O'Hara has any personal knowledge of the Applicant's property. J. O'Hara responded that she had visited the house and observed the problem.

J. Zerby questioned whether J. O'Hara considers the granting of this variance to confer a special privilege upon the Applicant that is not granted to others in the neighborhood. J. O'Hara stated that she did not. J. Zerby questioned whether J. O'Hara received a notice of this public hearing. J. O'Hara responded that she had.

J. Zerby requested that the board accepted into the record, the aforementioned Starnes letter. J. Zerby read the Starnes letter into the record. Chairman Lasater questioned M. Egan as to whether the Starnes letter can be accepted as evidence given that the author is not present at the hearing. M. Egan responded that the letter can be accepted into the record, but that it is hearsay, and hearsay testimony cannot serve as a basis for the board's decision. (Secretary's note: the aforementioned Starnes letter is attached hereto and incorporated by reference as Applicant's Exhibit 1.)

Chairman Lasater swore in J. Zerby.

B. Burton questioned whether J. Zerby is an attorney and acting as such for purposes of this application. J. Zerby responded that he is not a licensed attorney in the State of North Carolina, that he and his wife are representing themselves who own the property as "tenants by the entirety".

Chairman Lasater swore in D. Zerby.

D. Zerby presented photographs, stated that she had previously presented these photographs to B. Burton, and asked that they be entered into the record. B. Burton stated that he had no objection. Chairman Lasater requested that B. Burton examine the photographs and certify that they are the same photographs in D. Zerby had previously presented to him. B. Burton examined the photographs and certified that they were the same. (Secretary's note: Such photographs are attached hereto and incorporated by reference as Applicant's Composite Exhibit 2.)

J. Zerby called H. Leisure as a witness. Chairman Lasater reminded H. Leisure that he was previously sworn in.

H. Leisure offered the following testimony:

- He is a licensed contractor in North Carolina, and a remodeler.
- He is the owner of Harvest Home Improvements.

- He has been in construction for approximately 12 years, and has built numerous structures similar to the proposed structure.
- He has inspected and assessed the property, has determined that there has been water damage and does not believe that it has been eliminated entirely.
- This assessment is based upon the poor design of the patio, which is not sloped away from the house.
- Water has pooled upon the patio and flows towards the structure.
- The contractor who built the home, Ed Burdette, has attempted a repair, but H. Leisure questions the integrity of the repair and its ability to alleviate further damage.
- The Applicants have lived in the structure for 5 years and have experienced substantial damage to the structure.
- The proposed roof structure would eliminate further water pooling atop the patio and draining toward the structure, completely eliminating any further damage. Water collected upon the roof would be drained away from the structure via gutters and downspouts.
- He inspected the existing drainage piping at the rear of the structure, but believes that it drains existing gutters. He does not believe that any french drainage system exists at the rear of the structure.
- He did observe water penetrating the basement wall within the structure, and believes that this is due to the problem created by the patio.

Chairman Lasater requested clarification: is it H. Leisure's testimony that the water is getting into the sill plate because it is puddling atop the concrete slab that is beneath the brick pavers and then draining towards the structure, and not because there is backsplash from water hitting the pavers? H. Leisure believes that both issues contribute to the problem, but that water running towards the structure is the major problem, and that he has not performed an inspection of the backsplash issue and could not quantify the degree to which either source contributes to the problem on a "percentage" basis.

B. Burton questioned how long H. Leisure has been in the employ of the Applicants. H. Leisure stated that he has provided an estimate of the cost to place a roof over the patio. B. Burton questioned whether it was after October, 2009? H. Leisure stated that he cannot remember the exact month, but that it was after October 2009.

Chairman Lasater questioned whether there might be seepage from some other area. H. Leisure stated that he could not say for certain, but that he has only observed moisture in the vicinity of the patio.

J. Zerby asked H. Leisure to reiterate for the board the importance of the proposed roof over the patio and its associated gutter system. H. Leisure stated that the roof would support a guttering system, which would capture water and pipe it to the left and right of the structure so that it would create no further damage. J. Zerby questioned whether H. Leisure has observed the location where the existing gutter drains discharge. H. Leisure stated that he had, and that they discharge at approximately the same location where, in his recommendation, the gutter drains of the proposed roof should discharge. J. Zerby questioned, and H. Leisure affirmed, that the peak of the proposed roof would be lower than the peak of the roof of the existing structure.

Chairman Lasater questioned whether the new drains associated with the proposed roof would discharge atop the ground or in some other manner. H. Leisure responded that the new drains, on both the left and right sides of the structure, would discharge atop the ground in such a way as to not create a "water wash", and would not enter a neighbor's property before entering the Jordan Road ditch line.

H. Leisure offered the following, additional testimony:

- The rotted beam (Secretary's note: as shown on 2-A, Side 2 of composite Exhibit 2) was not fully repaired or replaced, but was covered up with, "another water barrier".
- There is damage that was not repaired. If water were to penetrate this repair, it could, "very quickly turn into a very large issue for the Applicants, in that maybe jacking the whole house up to replace that carrying beam under the house."

Chairman Lasater questioned whether there is any other remedy to get the water away from the structure, other than putting up a roof and gutters. H. Leisure responded that, "that appears to be the best remedy, in my opinion."

J. Zerby called D. Zerby, Co-Applicant, as a witness. D. Zerby presented a photograph of the existing structure and asked that the Board accept it into the record. (Secretary's Note: Such photograph is attached hereto and incorporated by reference as Applicant's Exhibit 3.) D. Zerby offered the following testimony:

- The existing structure is a modular home.
- Ed Burdette was the general contractor, who built the porches, patio, and completed the finish work.
- Prior to January 7, 2010, the Applicants met with an unnamed Planning Department Staff Member, who informed the Applicants of the \$500 non-refundable application fee and, in the course of explaining the variance process, explained that, "the variance procedure under the UDO allows for very few variances." The Applicants left this meeting very discouraged.
- On January 7, 2010, the Applicants met with J. Freeman & B. Burton regarding the variance request. The purpose of the meeting was to express concern over the potential loss of the \$500 application fee, to explain the threat to the existing structure posed by water damage, to explain the purpose of the variance request, and to seek J. Freeman's opinion as to whether or not they should apply for the variance.
- A previous contractor, Alan Paduano (Secretary's note: spelling not confirmed), speculated that the entire structure would need to be jacked up to replace the rotted beam. A. Paduano removed vinyl and discovered a large area impacted by carpenter ants, the area saturated by water, and the main beam rotted.
- E. Burdette, the original contractor, placed a barrier between the patio and the structure in September, 2009 and told the Applicants that no beam replacement was necessary if no further water damage occurred, and that a roof over the patio would be the best way to assure that water no longer leaked into the structure.
- A roof over the patio is absolutely necessary in order to assure that water does not leak into the structure, and to give the Applicants peace of mind regarding the preservation of their home and primary investment.
- The damage and worry concerning their home loss has caused D. Zerby a great deal of worry and loss of sleep.

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- In the January 7, 2010, meeting, B. Burton and J. Freeman both stated that there is very good reason to believe that the variance request would be approved, and encouraged the Applicants to apply for the variance.
 - The Applicants paid the \$500 non-refundable application fee, secured a survey of the property, and D. Zerby now cannot comprehend B. Burton's now finding so negatively on all / every criteria concerning the variance, as none of the facts have changed from the meeting when he recommended that the Applicants apply for the variance.
 - Subsequent to the submittal of this variance application, B. Burton and Daniel Cobb visited the subject property and observed the top of the patio and the crawl space, but did not look for new leakage beneath the vinyl.
 - The Applicants were originally made aware of the damage when a Terminex representative noted soft wood around an electrical outlet. There was no outward, visible evidence of the damage, then or now. This is extremely worrisome to the Applicants and a mental hardship as well as possible monetary calamity.
 - The Applicants wish to maintain and preserve their home for many years, and a roof would provide a reliable assurance that there will be no further leakage in that area.
 - The Planning Staff's report states that repairs have been completed by the contractor and that a roof is not necessary. Ed Burdette did make a repair, but also recommended a roof over the patio as a, "permanent, sure protective measure." Without a roof, there is no assurance that water is not now leaking or will not begin to leak at some point in the future. The Applicants wish to do everything they can do to save their home. A roof is an absolute necessity to assure the preservation of the home.
 - The roof over the patio would be attractive, would in no way be a nuisance to neighbors.
 - There is a natural buffer of hemlocks along the property line, and the roof would be virtually unseen.
 - The Starnes family desires that the roof be added.
 - The roof would be unseen from the street, and all neighbors want the Applicants to attain the roof's protection.
 - The roof would be a home improvement, and an improvement to the values of all the properties on Jordan Lane, rather than a detriment.
 - The variance ordinance reads, "When practical difficulties, special conditions, or unnecessary hardships would result from carrying out the strict letter of this Ordinance, the BOA shall have the power to vary or modify any of the requirements or provisions of this Ordinance relating to the construction or alterations of builds or structures." The situation is one of hardship and possible extreme or total loss, and deserves the granting of a variance.
 - The Applicants pray that the Board will grant the variance.

B. Burton questioned whether D. Zerby is a licensed contractor. D. Zerby stated that she is not, but that she is the home owner.

A. Delzell questioned whether D. Zerby intends to replace the rotted beam before placing a roof over the patio. D. Zerby stated that it was E. Burdette's position that once waterproofed, the beam would dry out and would not need to be replaced.

J. Zerby addressed each of the eight criteria for consideration of a variance as set forth in the UDO, by providing the following testimony:

- *Extraordinary and exceptional conditions.* The application presents an extraordinary condition with regard to lot size as it is impacted by zoning. Had the setback requirements been the same in 2004/2005 as they are now, the Applicants could have constructed the house 20 feet closer to Jordan Lane than it now stands, leaving ample rear setback for the proposed structure. J. Zerby made reference to the site plan that was submitted along with the City's Zoning Application for Site Plan Approval, and which is included within the Staff Report. Such site plan shows the front setback at 38 feet. The UDO allows 15' setback, as opposed to 35' as required in 2004/2005. The patio is already in place and would only be enhanced by the proposed roof. Contrary to B. Burton's conclusion, the Applicants believe there is an extraordinary condition pertaining to lot size.
- *Practical difficulties and unnecessary hardship.* The ongoing uncertainty as to the damage caused by water is an unnecessary hardship that can be remedied by the construction of a roof. The Board has no expert testimony before you to counter H. Leisure's professional, expert testimony as to the potential for further damage. All the Board has is conjecture by B. Burton.
- *General harmony with the purpose and intent of the ordinance, and preservation of the spirit of the ordinance.* Certainly, the purpose, intent and spirit of the ordinance is not to require homeowners to remain uncertain about their largest investment where there is a reasonable remedy available to make that uncertainty, certain. Chapter 1.2 states that the purpose of the ordinance is, "to promote health, safety, and the general welfare, and to conserve the value of land and structures." The Applicants' objective is to preserve the value of the home against further damage. The projection of the back roof of the existing accessory structure is in symmetrical line with the proposed patio roof, thus there is no further encroachment or visual attack upon the integrity of the neighborhood. If the letter of the ordinance allows the shed, then the patio roof should be considered in the spirit of the ordinance.
- *Assurance of public safety, welfare, and the performance of substantial justice.* Granting the variance would in no way impede public safety or welfare and freeing the Applicants from the unnecessary uncertainty of further damage to their property would accomplish substantial justice.
- *A variance being a minimal one to allow use of land or structures.* The Board's collective experience, judgment, discretion, and common sense will determine what constitutes reasonable use. The Applicants believe reasonable use constitutes being able to continue living in their house free of the uncertainty of further damage and ruin.
- *Reasonable return.* What is reasonable use will be the Board's determination based upon the evidence provided in this hearing. There would be no use, reasonable or otherwise, if the house collapses from water damage.
- *Special privileges denied to other property owners in the neighborhood.* O'Hara and K. Arbogast have testified that they do not believe that granting the variance would confer a special privilege. Nineteen property owners were notified of this hearing. None of the other seventeen have made objection or opposition.
- *Actions of the Applicants.* The Applicants do not agree that they had control over the design of the home, as they were not present when the property was constructed. Rather than a design problem, we have a potentially devastating situation.

J. Zerby reminded the Board of a decision that it made on April 08, 2008, to grant VAR-08-103, submitted by Grady and Louise Morgan, and stated that the circumstances were very similar to

this application. J. Zerby stated that in the case of VAR-08-103, the board found the existing, nonconforming structure, a deck, to be a hardship and approved a variance to permit an even larger structure to replace part of existing structure. J. Zerby stated that there was no issue of structural integrity in that case; the only stated hardship was the traffic flow within the house and access to the new deck and porch that were to be built. J. Zerby stated that the Applicants' uncertainty about further structural damage are at least as much of a hardship as the board found present in the Morgan case. J. Zerby presented the minutes of VAR-08-103, along with written comments summarized in this testimony, for the record.

J. Zerby summarized his testimony with the following statements:

- Thanked the Board for its attention.
- Stated that the Applicants entrust their application to the Board's collective experience, judgment, and discretion.
- Stated that the Board is a quasi-judicial body with authority greater than that of the Planning Staff.
- Asked the board to consider the continuing uncertainty as to future damage; the exceptional condition resulting from a new, less restrictive UDO front setback; granting the variance would perfectly serve the spirit of the UDO.
- Reminded the Board of its April 08, 2008 granting a rear setback variance of 12.5' under similar circumstances, reminded the Board that the 4th variance criterion is substantial justice, and stated that to grant this variance following the April 08, 2008 decision would be to recognize the Board's own, quasi-judicial precedent, ensure the predictability in future circumstances, and honor the rule of law and accomplish substantial justice.
- Asked the Board to consider the purpose, intent and spirit of the ordinance, which specially includes conservation of the value of land and structures, and stated that the Applicants' wish to preserve the value of their home.

F. Pearsall stated that the April 08, 2008 decision did not involve any water damage. J. Zerby stated that that was his point, that the only hardship cited in minutes was the flow of traffic within the house and the access from within the kitchen to the deck, and that the threat of collapse is more of a hardship than traffic flow.

B. Burton addressed a number of points given in the Applicants testimony, stating the following:

- Clarified that, with regard to D. Zerby's testimony regarding the Applicants' aforementioned meeting with B. Burton and J. Freeman, that it is not the department's practice to offer assurances regarding the outcome of variance applications, that he did not offer assurances as to the outcome of this variance request, that he probably only stated that it did seem like a "good" application, and that the conversation in that meeting did not occur as represented by the Applicants.
- Clarified that, when D. Cobb and B. Burton met D. Zerby on site, that D. Zerby inferred in a conversation the repairs affected by E. Burdette appeared to be working, although it would be better with a roof.
- Stated that Staff considers letters such as the Starnes letter to be heresy, that Staff left that letter to the Applicant to submit into the record, and questioned whether Starnes' status as a former chairperson of the Board of Adjustment confers upon him any special qualifications in this case.

- Reminded the Board that, when Chairman Lasater asked H. Leisure if the roof was the only available remedy to the water problem, H. Leisure stated that it would be the best choice but did not testify that it would be the only choice.
- Questioned whether O'Hara and K. Arbogast are qualified to make the determination that granting the variance would confer upon the Applicant any special privileges.
- Stated that, with regard to the April 08, 2008 granting of the Morgan variance, the Board serves as a "pop-off valve" for the ordinance on a case-by-case basis.
- Questioned whether it would be appropriate to consider a change in zoning districts or regulations to be a hardship.
- Reminded the Board that, with regard to the accessory structure roof orientation argument offered by J. Zerby, it is "apples and oranges" as accessory structures have different setback requirements under the ordinance.
- Questioned whether the Applicants have presented grounds for the variance under the ordinance when other options could be explored.
- Stated that, when the structure was originally constructed, that there was no opportunity to put a roof over the patio and that the Applicants were advised of that fact at that time.
- Stated that design and poor workmanship have created a situation that has been partially, but not fully repaired as per the Applicants' statements, and questioned whether the E. Burdette, the contractor, would jeopardize his contractor's license by perpetuating the risk structural collapse that have been presented by the Applicant.
- Stated that this is an unfortunate set of circumstance, that he (B. Burton) is not a building inspector, but that there are options that have not been explored and reminded the Board that costs associated with exploring other options are not grounds for issuing a variance.

C. Brown questioned the direction of flow of the slab. B. Burton stated that, during his onsite visit, he placed a 4' contractor's level on the patio and verified that the slab slopes towards the house. C. Brown, clarified his question, and B. Burton responded, that water cannot percolate through the slab by means of some drainage and that it must flow atop the slab in some direction.

F. McCrary questioned whether the construction was inspected by building inspectors. B. Burton responded that it was. F. McCrary stated that it looked like somebody goofed, that it is common sense that water goes downhill not uphill, that you have to pump water uphill. B. Burton answered that someone might have goofed, but that the slab appears flat to the eye.

J. Zerby asked D. Zerby to reiterate and clarify for the Board regarding her understanding as to if E. Burdette's work and recommendations had been fully disclosed to B. Burton. D. Zerby responded that it had been; that she had explained to B. Burton that E. Burdette inspected the water damage and advised the Applicants to cover the patio with plastic to allow the soggy beam to dry out prior to his placing a barrier to prevent further water damage, but that E. Burdette further recommended that the Applicants install a roof.

D. Zerby stated that she cannot understand why Staff is so opposed to the Applicants protecting their house, that if B. Burton were, "walking in our moccasins, that Mr. [Burton] would want his house taking care of...he would consider this a very big hardship if he were experiencing it himself."

Chairman Lasater closed the public hearing and called for deliberation.

F. McCrary stated that he had probably said, "too damned much already".

C. Landreth stated that it is his position that the remedy that should be sought in this matter is with the contractor, and not with the Board of Adjustment or the zoning process.

Chairman Lasater stated the following:

- There is testimony that a repair may or may not have been made.
- There is rot in the sill.
- There is testimony that a roof is the remedy.
- There is testimony that there is no pitch to the slab to drain water away from the structure.
- C. Landreth has a point about the contractor in this case.
- It appears that, as long as it continues to rain, that the problem will continue.

Chairman Lasater called for a motion.

F. Pearsall offered the following motion:

With regard to Variance Case # 10-019, the application of Jack and Diane Zerby for a variance from the rear yard setback requirements of the UDO, I move the Board to find that the Applicants have demonstrated compliance with each and every determination contained in Section 16.11.D.2 of the UDO. I further move the Board to grant the variance in accordance with, and only to the extent represented in the application.

Chairman Lasater called for, and C. Landreth offered, a second to the motion. The motion carried with Chairman Lasater, A. Delzell, F. Pearsall, and F. McCrary voting in favor, and with C. Landreth voting against.

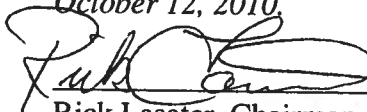
Other Business:

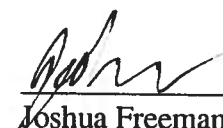
B. Burton introduced Shana Huggins as the newest member of the Planning Department.

A. Delzell moved that the meeting be adjourned, which was seconded by F. Pearsall. The motion carried unanimously.

The meeting adjourned at 10:10 PM.

These minutes approved by unanimous vote of the City of Brevard Board of Adjustment on October 12, 2010.


Rick Lasater, Chairman Date: 11/16/2010


Joshua Freeman, Secretary Date: 11/10/2010

February 22, 2010

Brad L. Burton, Assistant Planning Director-City of Brevard
City of Brevard
95 West Main Street
Brevard, North Carolina 28712

Attention: Chairman and members of the City of Brevard Board of Adjustments

Having served as a member and chairman of the Brevard Board of Adjustments, I sincerely appreciate the contribution that your board serves to uphold the zoning laws of the City of Brevard. One of your duties from time to time is to grant variances of these laws. It is to the request by Jack R. and Diana M. Zerby (case number VAR-10- 019) that this letter is directed.

The Zerby's have requested to have a pitched roof over an existing patio. Their request requires an 11-foot reduction in a 25-ft. rear yard set back requirement. As neighbors who are directly affected by this request for a variance, we strongly urge the board to grant this request for the following reasons.

1. This roof will improve the drainage of water for the rear of the Zerby's home.
2. The addition of a covered patio will enhance the property value of the Zerby's home. This improvement will also improve the property value of all affected properties.

We wish to make the board aware of the fact that a row of hemlocks over 20 ft. tall exist on dividing line between the two properties. These hemlocks and many others in the neighborhood are alive and healthy today due to the leadership of Diana Zerby. Mrs. Zerby initiated a neighborhood purchase of hundreds of beetles to combat an infestation of the Wooly Adelgid.

The Zerbys have greatly contributed to the cultural and educational climate of Brevard and Transylvania County. Granting this variance will welcome the Zerbys to our community.

Respectfully yours,

Jerry A. Starnes
Bronwen B. Starnes

Jerry and Bronwen Starnes

APPLICANT'S COMPOSITE
EXHIBIT 2

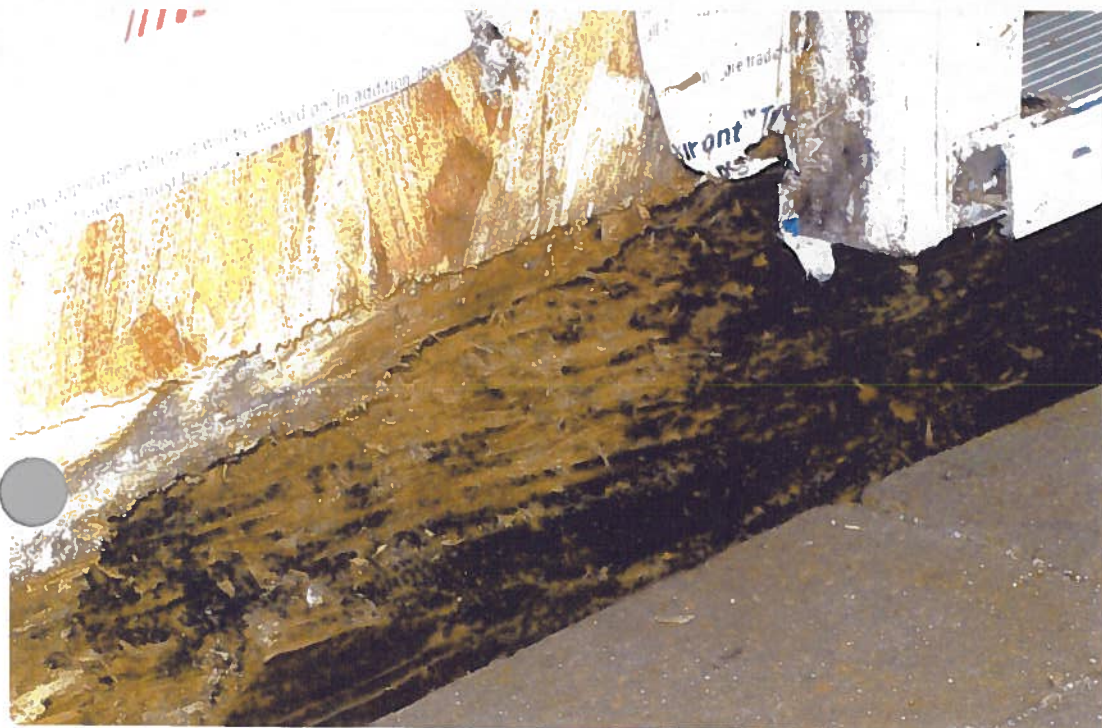
EXHIBIT 2-A, SIDE 1

9/29/09 next to right edge of patio

#1

9/29/09 to left of back door

#2



to the right of back door

9/29/09

990201862 0.1P3 16 @ 41X
990201862 003 N N N N

#3

to the right of back door

9/29/09

990201862 0.1P3 14 @ 41X
990201862 003 N N N N

#4

APPLICANT'S COMPOSITE
EXHIBIT 2

EXHIBIT 2-B, SIDE 2



APPLICANT'S COMPOSITE
EXHIBIT 2

EXHIBIT 2-C, SIDE 1

9/29/09 water damage

500201862 0.005 3 @ NIK
500201862 0.005 3 @ NIK

#5

9/29/09 water damage

500201862 0.005 9 @ NIK
500201862 0.005 9 @ NIK

#6

**APPLICANT'S COMPOSITE
EXHIBIT 2**

EXHIBIT 2-C, SIDE 2



alongside left side of patio

9/29/09

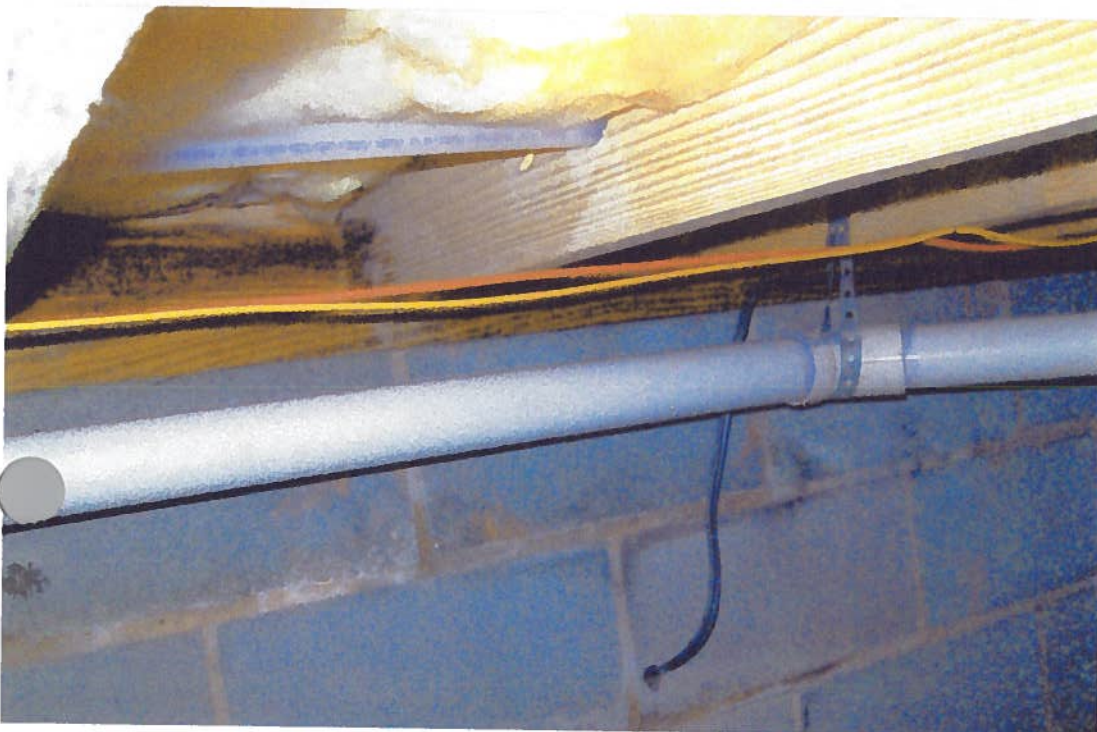
190201062 0.1Pg 5 @ AUX
190201062 003 N N N N N

#7

2/2/10 crawl space
area that had gotten wet

190201062 0.1Pg 1 @ AUX
190201062 003 N N N N N

#8



APPLICANT'S EXHIBIT 3

