

The Alleghany County Board of Commissioners reconvened the variance meeting from Tuesday, July 11, 2006 on Monday, July 17, 2006, at 11:50am in the Conference Room of the County Office Building, 90 South Main Street, Sparta, North Carolina.

Present: Chair Eldon Edwards, Vice-Chair Warren Taylor, Commissioner Graylen Blevins, Commissioner Sandy Carter Herndon, Commissioner Ken Richardson, County Attorney Donna Shumate, County Manager Don Adams, and Clerk to the Board Karen Evans.

Chair Eldon Edwards reconvened the meeting.

County Attorney Donna Shumate stated that she has investigated vested rights concerning the situations that Mr. Marlow presented. She stated that he requested a variance, and it was put before the Board as a variance/appeal. She explained that the ordinance has procedures in place for a variance, and he worked with the County Planner to get the information that was provided for the Board to make a determination on the variance. She said that there is a little bit of information on how to do an appeal and technically that wasn't followed but since the Board decided to hear that, any objections that could have been made about not following that procedure have been waived. She explained that if the appeal process had been followed then there would have been different information presented regarding the issue that is before the Board. She said apparently the appeal is based on the issue of vested rights under the ordinance, and the ordinance doesn't tell anyone exactly what the Board would need to know in order to grant vested rights. She explained that she had read through the ordinance completely again, and there is a small section concerning vested rights and a small section concerning appeals. She stated that there isn't really a written procedure about how to appeal a decision about vested rights. She further stated that in fairness to Mr. Marlow that he is allowed an opportunity to present the additional information that probably does exist for the Board to properly consider a vested rights appeal. She reminded the Board that it isn't his fault that the information wasn't provided because he was proceeding under a variance procedure.

County Attorney Donna Shumate read the section in the ordinance talking about vested rights including the conditions with that. She stated that (a) is the closes one to what Mr. Marlow has presented to the Board. She said that just because says a parcel of land existed at the time of enactment of the ordinance isn't enough because all land in Alleghany County existed at the time of ordinance adoption. She gave an example of someone owning land before the adoption date and now they decide they want to put a gas station on it and not comply with the other conditions of this ordinance.

County Attorney Donna Shumate talked about the information presented, so far, is that the use is changing but the use he is requesting did not exist at the time of the enactment of the ordinance and the structures that he is wanting to put on there did not exist at the time of the enactment of the ordinance, and they aren't even there now. She explained that on the clear reading of what the ordinance says the Board doesn't yet have vested rights where they can say yes they are going to grant that. She further explained that if it isn't clear from the plain reading of the ordinance, then another other source is the General Statutes. She said there is a statute concerning vested rights but it doesn't apply either because it envisions that the county has a zoning ordinance already in place and that he would have to have complied with that zoning ordinance, basically to had a site plan that would have been approved by the county before this ordinance was passed. She reminded everyone that the County doesn't have such an ordinance in place so there is no way he could have complied with something that didn't exist so that statute doesn't apply at all. She stated that the only other way to show vested rights is through common law, which is case law. She further stated that this is where things get complicated and vested

rights law is not straight forward. She talked about the Court of Appeals in North Carolina's Supreme Court has a case-by-case analysis of every situation that has come before them. She further talked about looking at one and you understand it then you look at another one and it won't work when you consider the first one. She stated that it is something that has to be decided on a case-by-case basis. She said that what is clear is that they have established four criteria for establishing common law vested rights.

County Attorney Donna Shumate stated that it isn't fair to Mr. Marlow to make a ruling on vested rights right now because he hasn't known what the criteria were and neither has the Board. She further stated that she thinks it is only fair to him and the Commissioners to give him an opportunity to see what these four criteria are and to have an opportunity to come up with the additional evidence that very well may exist to comply with these four criteria. She stated that her recommendation, at this point, would be for her to give this information to Mr. Marlow and the County Planner because she also needs to have this information, and there may be documentation she may need to gather to present to the Commissioners about why there was a denial. She reminded the Board that she isn't saying no nor is she saying yes, she is saying that the Commissioners don't have enough information to make that determination now.

Commissioner Sandy Carter Herndon asked how lengthy the four points are; pages and pages or bullets.

County Attorney Donna Shumate stated that they are bullets but the interpretations are pages and pages.

Commissioner Sandy Carter Herndon asked for the bullets.

County Attorney Donna Shumate stated that quoting from one of the cases that sets it out fairly clearly, common law rights vest when the party has made, prior to the enactment of the ordinance, expenditures or incurred contractual obligations substantial in amount incidental to or as part of acquisition of a building site or the construction or equipment for the proposed building; the obligations and/or expenditures are incurred in good faith; the obligations and/or expenditures were made in reasonable reliance on or after the issuance of any required permits; the ordinance is detrimental to the party. She reminded them this information is from case law because there is no General Statute on common law vested rights and the Statute itself doesn't apply because of the zoning ordinance requirement.

Commissioner Sandy Carter Herndon and County Attorney Donna Shumate talked about the four criteria being detrimental to the party and the variance is being detrimental to the land.

County Attorney Donna Shumate reiterated her recommendation is continuing this hearing to give the County Planner and Mr. Marlow an opportunity to come up with the additional evidence for these points. She stated that it may be more helpful for them to give the four points and give specific questions that would need to be answered in order for the Commissioners to be able to analysis these four points.

Commissioner Warren Taylor asked the County Attorney if she thinks conditions exist after hearing the evidence in relation to those four points.

County Attorney Donna Shumate stated that she has a list of 5 to 10 questions that would need to be answered before she can answer that question. She further stated that after she has those answers, she can tell the Commissioners whether she thinks it exists or not but at this point

some of the information presented raises more questions than answers.

The Board of Commissioners and County Attorney Donna Shumate talked about dates and times to have another meeting regarding this topic.

Commissioner Warren Taylor asked if this has to come back to the Planning Board.

County Manager Don Adams stated that the Commissioners can meet on this because the Commissioners have the powers to rule on a variance and an appeal and the Planning Board can't decide on both.

Commissioner Warren Taylor suggested that Amy Pardue get with the County Attorney, and the Commissioners schedule another meeting as quickly as possible.

The Board and County Attorney Donna Shumate talked about dates and times for another meeting. The Board decided on August 1, 2006 at 6:30pm at the County Office Building.

Chair Eldon Edwards apologized to Mr. Marlow for this process taking so much time. He explained that this is the first hearing since the ordinance was enacted, and he hopes they can get it resolved as quickly as they can.

Commissioner Ken Richardson made a motion at 12:02pm to recess this meeting until the 6:30pm meeting on August 1, 2006. Commissioner Warren Taylor seconded the motion. Vote 5:0.

Respectfully Submitted,

Karen Evans  
Clerk to the Board

Attest:

Eldon Edwards  
Chairman