

CITY OF GASTONIA
ZONING BOARD OF ADJUSTMENT
February 10, 2021 Meeting Minutes

The special meeting of the Zoning Board of Adjustment was held on Wednesday, February 10, 2021 at 9:05 a.m. live-streamed with video and audio conferencing using Zoom.

Board Members present: Chairman Lee Taylor Jr., William Marino, Shaun Jones, Sidney Craig, and James Nebo

Alternate Board Members present: Octavius Reid

Board Members absent: None

Staff present: Joe Gates, Zoning Administrator; Charles Graham, Assistant City Attorney; and Chrystal Howard, Secretary

Chairman Taylor called the Board of Adjustment meeting to order.

Roll Call

All board members were present and no one received any calls or contacts.

Chairman Taylor declared a quorum.

Item I: Approval of January 28, 2021 Minutes

In the opening sentence of the meeting minutes it states Thursday, January 2021 and Chairman Taylor noted that the day was missing. Board Member Marino made a motion to approve the January 28, 2021 minutes with the amended date and Board Member Nebo seconded the motion. The motion was unanimously approved (5-0).

Item II: Consider a petition for rehearing of file # PLVAR202000299

- PLVAR202000299 – Matthew Fry – 834 Hillcrest Avenue
- The applicant has submitted a variance request to increase height of privacy fence in rear yard.

Chairman Taylor opened the public hearing and recognized Mr. Joe Gates, Zoning Administrator for staff presentation. Mr. Gates thanked the board for being present this morning. He referred to the staff memorandum on agenda page II-1 and recognized Assistant City Attorney, Charles Graham. Attorney Graham stated this meeting was technical and legal in nature; therefore, he was presenting the staff presentation. He commented that this was not a public hearing so statements would not be heard from the applicant or the person requesting the rehearing. He continued that in order to grant a rehearing, the Unified Development Ordinance (UDO) requires that the board hold an approval vote of 4/5 for a rehearing. Attorney Graham referred the board to the last paragraph of the January 28, 2021 meeting minutes, and noted the technical problem. He shared that the zoom software shutdown, the entire meeting was not broadcast and open for the public to view, not all the minutes were recorded resulting in the minutes abruptly ending. The minutes reflect what happened. Recalling the last meeting, a vote was made and discussion ensued after the vote about procedures that had occurred and some of that occurred after the zoom shutdown. Recognizing constitutional due process, Attorney Graham stated in a quasi-judicial hearing the constitutional obligation is to protect the due process rights of everyone with standing, which includes the applicant and applicant's neighbors. During this emergency pandemic resulting in remote meetings and the original declaration of emergency made by the Governor, all meetings had to be suspended as it was unauthorized under statute to have meetings through zoom; afterwards, the legislature passed a brand new statute N.C.G.S.166A-19.24 allowing it, including quasi-judicial hearings. Attorney Graham commented to protect due process, the legislature wrote into the statute to allow anyone with standing to submit notes, additional information or evidence up to a full twenty-four hours after a hearing and vote. Under the statute, the board must reconsider this information; therefore, the reason this board is having their meeting today. In terms of granting a rehearing, Attorney Graham referred to the UDO section listed in the staff memorandum on agenda page II-1 as applicable to this meeting, and for consideration in the vote, Attorney Graham included a legal recommendation. Largely due to technical difficulties and not having a complete record of the meeting, he recommended the board grant the rehearing. Attorney Graham gave an example of the request being appealed to Superior Court and him having to defend the board's decision without a complete record. He continued that based on the UDO section referenced in the staff memorandum in granting a hearing, the board needs to determine if there was substantial change in the evidence or conditions governing the case. He commented that the statute requires

us to allow the neighbors to submit written comment and testimony within twenty-four hours and a neighbor submitted within the allotted time. Written testimony and photos are considered new evidence. In the best interest of the City and the board, Attorney Graham reiterated his recommendation to rehear the hearing. The hearing will be considered de novo, treated as a new meeting. Due to the zoom program abruptly ending and beyond staff's control, the meeting ended unexpectedly after the vote and it was reflected in the minutes.

Chairman Taylor agreed with the recommendation, because the situation was beyond our control.

Board Member Nebo made a motion to rehear this case at the next hearing meeting on February 25, 2021 and Board Member Marino seconded the motion. The motion was unanimously approved (5-0).

Item III: Other Announcements or Business

Discuss Board Procedures:

Chairman Taylor recognized Mr. Joe Gates, Zoning Administrator for staff presentation. Mr. Gates displayed the Unified Development Ordinance (UDO) Section 4.5.1 – Establishment and Duties. Attorney Graham thanked the board for their time and recognized their commitment to attend these meetings. With the situation just discussed and the struggle with remote meetings, Attorney Graham commented that this was an opportune time to provide some guidance at the special meeting. Attorney Graham began sharing with the board the ordinances and the following; how a meeting ought to be conducted, the procedures to follow that will be in line with Roberts Rules of Order, and how to make an ideal motion for the lawyer who has to defend the board's decision if the matter goes to Superior Court. Attorney Graham commented on the increase of complaints and appeals being received; therefore, his concern is about having a good record that he can defend. In order to ensure a good record, Attorney Graham stated proper procedures need to be followed, especially with zoom meetings. Attorney Graham began with Section 4.5.1 and stated the board is to hear and decide appeals from staff decisions and the Historic District Commission, variances, and special exceptions. He read Section 4.5.1 (B), "The Board of Adjustment shall not have power, jurisdiction, or authority to amend any ordinance." He stated this was the starting point for their decisions and that they are here to uphold the ordinance and grant relief in very limited circumstances. Section 4.5.11 (C) was displayed and Attorney Graham read, "The Board shall determine contested facts and make its decision based upon competent, material and substantial evidence in the record." Attorney Graham gave the following examples; don't base a decision on the number of people that show up in opposition or in favor of a request, don't base a decision on the opinions of witnesses or self. Attorney Graham commented opinions that an ordinance should be written differently need to be addressed to City Council, who is authorized to amend ordinances. He reiterated that the duty of the board is to enforce the ordinance and grant the very limited relief that the ordinance allows to grant. Attorney Graham commented that this is the proper way to make a motion and have it in the record. Regarding appeals, he gave the example that the board would be the judges, and the Superior Court would be their judge. He asked the question, "Did you find evidence and what was that evidence to support the decision you made?" He commented on the record being preserved to show what the evidence was and that the motion states what was heard in the hearing that supports the decision made. Section 5.12.1 was displayed and Attorney Graham commented that this was the starting point for special exceptions. Referring to Section 5.12.1 (B), he provided an example of changing a nonconforming use to another nonconforming use. He commented that this example would be governed by Section 5.12.1 (B) and read, "Expansion of certain nonconforming structures in accordance with Section 3.5.5(B);" Attorney Graham noted the importance of reading Section 3.5.5 beforehand for reference as it would explain what can or cannot be done. He continued that this evidence should also be in the minutes showing that this section was followed. Section 5.12.2 (B) was displayed and Attorney Graham explained that in order for a board to grant a change of a nonconforming use, the board has to find all three statements to be true using substantial factual evidence.

Attorney Graham gave an example of an ideal motion to approve:

"I, *(state your name)*, move that we grant this change because I find;

1. The proposed use will be more suitable and appropriate for the lot(s) upon which it is located than the existing use, because *(state evidence that makes this statement true)*, and I further find that
2. The proposed use will have a less harmful effect on adjacent properties than the existing use, because *(state evidence that makes this statement true)*; and I conclude that

3. The change in use will be in harmony with the general purpose and intent of this Ordinance and will not be injurious to the neighborhood or otherwise be detrimental to the public welfare.

Attorney Graham commented this motion includes everything in the record needed, because it shows the ordinance was followed and evidence was used to support the decision. This type of motion would probably be sufficient for a judge to dismiss an appeal. He emphasized that it was critical to handle motions in this manner, especially for zoom meetings and for the meeting minutes. He emphasized on reviewing the ordinances before attending the meeting and taking notes of evidence during the meeting, especially for the 'because statement' to be included in the motion. Referring to Section 5.14.1, Attorney Graham commented that this section explains what situations the board is authorized to grant for a variance. He read portions of this section and gave brief explanations; "The variance process is intended to provide limited relief", and, "it's not intended so that variances can be granted so as to merely remove inconveniences or financial burdens ...may otherwise impose on property owner", and "it is intended to provide relief where the requirements of this Ordinance create unnecessary hardship" and then he noted this was for those hardships that would not be faced by the general public. Section 5.14.4(D) was displayed and Attorney Graham explained that in order for a board to grant a variance, a 4/5 vote was required. He read, "Insofar as practical, a motion to make an affirmative finding on each of the findings contained in Section 5.14.5 shall be accompanied by one or more reasons, based on evidence heard at the public hearing, supporting such motion." Section 5.14.5 was displayed and he explained that all four statements have to be true in order to grant a variance.

Attorney Graham gave an example of an ideal motion to approve:

- "I, (*state your name*), move that we approve this variance because I find;
- A. Unnecessary hardship would result from the strict application of the Ordinance, because (*state evidence that makes this statement true*); and I further find that
 - B. The hardship results from conditions that are peculiar to the property, because the location (*state evidence that makes this statement true*), the size (*state evidence that makes this statement true*), or topography (*state evidence that makes this statement true*); and I further find that
 - C. The hardship did not result from actions taken by the applicant or the property owner (as demonstrated by (*state evidence that makes this statement true*), and I conclude that
 - D. The requested variance is consistent with the spirit, purpose and intent of the Ordinance. Attorney Graham commented that a 'because statement' can be added to this last sentence (D) to make it better but not required.

Attorney Graham reiterated this motion would include everything needed in the record. He explained the importance to create a procedure to run a public hearing consistently in order to make these kinds of motions. Attorney Graham will forward to staff an outline on how to conduct a public hearing for this board.

Board Member Nebo asked if the board would use the same four statements to not grant a variance, because not enough evidence was found. Attorney Graham stated that he was correct and it would be in reverse.

Attorney Graham gave an example of an ideal motion to deny:

- "I, (*state your name*), move that we deny this variance because I find no;
- A. Unnecessary hardship resulted from the strict application of the Ordinance, because (*state what the issue was using evidence*); and I find that no
 - B. Hardship conditions are peculiar to the property, because the location (*state what the issue was*), the size (*state what the issue was using evidence*), or topography (*state what the issue was using evidence*); and I find that
 - C. Hardship did result from actions taken by the applicant or the property owner as demonstrated by (*state what the issue was using evidence*); and I conclude that
 - D. The requested variance is not consistent with the spirit, purpose and intent of the Ordinance.

Board Member Nebo commented on the hardships being more of opinions and not necessarily facts. Attorney Graham replied that this would be an interpretation of the evidence more than a personal opinion and gave a brief example of considering a variance to allow someone to build in a side setback variance.

Board Member Jones inquired about discussion taking place in open session and asked if the board could discuss in a closed session. Attorney Graham replied that the board cannot have closed

sessions, because these are quasi-judicial hearings. He commented that the board has the option to continue a meeting to the next hearing if it was unable to make a decision and to allow time to digest the information received, or request the applicant to come back and provide additional information.

There being no further questions, Attorney Graham suggested an outline for conducting a hearing.

1. The Chair needs to be in control. No one should speak unless recognized by the chair, especially with zoom meetings. It is the chair's duty to stop someone from speaking if he/she has not been recognized or interrupts.
2. The Chair begins every hearing by announcing the case.
3. The Chair recognizes staff for staff's presentation. Staff presents their presentation. The Chair will ask the board if they have questions and will recognize members one at a time to ask their questions.
4. The Chair recognizes the applicant. The applicant presents their evidence. The Chair will ask the board if they have questions and will recognize members one at a time to ask their questions.
5. The Chair recognizes anyone signed up to speak in support of the applicant and allows them to speak one at a time. The Chair will ask the board if they have questions after each speaker.
6. The Chair recognizes anyone signed up to speak in opposition to the applicant and allows them to speak one at a time. The Chair will ask the board if they have questions after each speaker.

Attorney Graham recommended to not begin discussing the hearing anytime during the testimony. Also, limit comments and do not make comments on what the witnesses are saying. Do not answer questions, as the board does not have to answer questions. Allow the witnesses to present their evidence. Ask questions and get clarifications with further questions if needed from the witnesses, but do not enter into deliberations during this time.

7. The Chair should recognize the applicant to have the opportunity to present anything presented against them and allow rebuttal. The Chair will ask the board if they have questions.
8. The Chair will ask one final time if the board has any final questions of any witness.
9. Chair should entertain a motion to close the public hearing, have it seconded and voted upon. If the motion passes, the hearing is closed, no more comments are to be received from witnesses, and deliberation among board members may begin.
10. The Chair can then recognize board members one at a time to make comments on their intended vote and why.
11. At any time after closing the public meeting a board member may make a motion. If seconded more discussion can be held on the particular motion or the Chair can call for a vote. If discussions are ongoing, any board member can also call the question and ask for a vote. The Chair should call for a vote at that point.

Attorney Graham commented that if the board forgets to vote to close the public hearing and a board member makes a motion to approve or deny, that will automatically close a public hearing. He requested that the board makes their motion as he has outlined. Attorney Graham encouraged them to listen and take notes, avoid jumping from topic to topic, let all the evidence come in asking questions as needed, then add to the notes. Don't enter into discussion with each other until all evidence has been heard and ready, and consider all evidence together. If more evidence is necessary, the board may make a motion to continue the hearing requesting the applicant present more information at the next meeting.

Chairman Taylor commented that after a vote is made to close the public hearing, the board is visible for everyone to see, deliberation is in public, and the applicant and witnesses cannot talk during this time. Attorney Graham replied that he was correct. Chairman Taylor clarified that the board is still on record and visible during discussion. Attorney Graham briefly explained his obligation if a case was appealed to Superior Court, how a public record is used, and how a motion is justified. He commented that his current recommendation for a rehearing was because we did not have a complete record. Chairman Taylor requested an outline for conducting a meeting and a transcript of what has been heard be emailed to the board. He commented on his chair sheet he receives and requested a one page reference sheet on a motion to be included in their packets. Brief discussion ensued with staff on the request. Chairman Taylor shared different types of cases and expressed the importance of the board needing to interpret and follow the ordinance regulations, no matter a person's thought or whether neighbors are for or opposed. Chairman

Taylor noted his responsibilities and the need to follow the Roberts Rules of Order. He asked staff for help in bringing matters to his attention if he misses something. Chairman Taylor shared his appreciation for everyone's time, consideration, and interpretation of the facts and ordinance.

Discussion ensued on the visibility of everyone and asked if the zoom participants can see the same views that are being live streamed in the future. Mr. Gates stated he will discuss with Tech Services to see what is available and will update the board. Chairman Taylor stated that they need to see staff for the purpose of a public meeting. Attorney Graham replied that he agreed. Further discussion ensued on what was currently being seen live-stream as opposed to zoom. Along with the live-stream view, Attorney Graham reiterated that staff will work with Tech Services to try and include those speaking at the podium to be seen on zoom too. Chairman Taylor commented that the monitor in the Council Chambers was too far away to see anyone at the podium, as well as, board members sitting in the chambers. Staff reiterated that they will try and work with Tech Services on the problem.

Board Member Craig thanked Attorney Graham and staff for the information they provide in the board's packets, as well as, thanked Chairman Taylor for his service. Chairman Taylor thanked everyone involved to make this process work right.

Chairman Taylor reminded the board members to wait for witnesses to finish their presentation to avoid interrupting their flow of conversation before asking questions.

There being no other announcements or business, Chairman Taylor entertained a motion to adjourn the meeting. Board Member Marino made a motion to dismiss the meeting and Board Member Nebo seconded the motion. The motion was unanimously passed 5-0.

Respectfully Submitted:

Chrystal Howard, Secretary

Zoning Board of Adjustment
City of Gastonia, NC

Chairman Lee Taylor Jr.

Zoning Board of Adjustment
City of Gastonia, NC