

OCTOBER 5, 2022 PLANNING BOARD SPECIAL MEETING / BOARD OF
ADJUSTMENT HEARING

MEETING TRANSCRIPT/MINUTES:

Planning Board Special Meeting-October 5, 2022, 1:00 P.M.

Location: Pitts Center-5377 N Virginia Dare Trail, Southern Shores, NC 27949

CALL TO ORDER:

Chairperson Andy Ward called the meeting to order at 1:00 pm. Planning Board Members Lynda Burek, Ed Lawler, Robert McClendon, Tony DiBernardo (Vice Chairperson), Andy Ward (Chairperson), Jan Collins (alternate #1), Dan Fink (alternate #2), Deputy Town Manager/Planning Director Wes Haskett and Town Clerk Sheila Kane were present.

ALSO PRESENT:

Jay Wheless, Planning Board Attorney

Louis "Johnny" Hallow, Staff Attorney

Casey Varnell, Appeal Applicant Attorney

PLEDGE OF ALLEGIANCE:

Chairperson Ward led the Pledge of Allegiance.

APPROVAL OF AGENDA:

Vice Chairperson DiBernardo moved to approve the agenda for the special meeting of October 5, 2022, Seconded by Planning Board Member Lawler. Motion passed unanimously. The motion passed unanimously (5-0).

PUBLIC COMMENT:

None

NEW BUSINESS:

Chairperson Ward: "The Planning Board will be performing the duties of the Southern Shores Board of Adjustment with a public hearing to consider APA-22-01 an appeal application submitted by Adam Ward to appeal the zoning administrator's decision to deny approval of a recombination plat for the property located at 55 Skyline Road, at this point I am going to turn things over to our board's attorney, Jay Wheless."

Jay Wheless, Attorney: "The Planning Board is now acting as the Town of Southern Shores Board of Adjustment and is scheduled to hold a quasi-judicial hearing at this time. Momentarily we will open the evidentiary hearing for this matter known as APA-22-01 the appeal of Skyline

Oaks Properties LLC. Distilled down, the appellate believes the Zoning Administrator incorrectly denied its proposal, its proposed recombination plat for property at 55 Skyline Rd. prior to the receipt of any evidence, I present the following preliminary remarks and questions to the parties, the board members, and to the alternate member. The board's decision will be made by a simple majority vote, all issues, and the ultimate issue before today. This hearing is a quasi-judicial evidentiary hearing, state law sets specific procedures and rules concerning how this board must make its decision. These rules are different from other types of land-use decisions like rezoning cases. This board is not composed of attorneys or land use experts. Some issues could arise during the hearings that may be quite complicated, and this board will do its level best to decide all matters fairly and properly. The board's discretion is limited though, the board must base its decision upon competent, relevant, and substantial evidence in the record. A quasi-judicial decision is not a popular contest; it is a decision constrained by the standards in the ordinance and based on the facts presented during the hearing. If you were to be a sworn witness please focus on the facts and the standards, not personal preference, opinion, or hearsay. Participation in this hearing is also limited, the meeting is open to the public and everyone is welcome to watch but only parties with legal standing have a right to participate fully. Parties may present evidence, call witnesses, and make legal arguments. Parties are limited to the applicant, the town, and individual to show they are aggrieved by special damages not suffered by the ordinary public. Other individuals may serve as witnesses when called by either of the parties or the board. General witness testimony is limited to facts, not opinions. For certain topics the Board needs to hear an opinion testimony from expert witnesses. These topics include projections about the impacts on property value and projections about traffic flow congestion and so forth. If the need for such testimony arises, individuals providing expert opinions must be qualified as experts before this body and provide the factual evidence upon which their expert opinions are gathered and testified to. As mentioned, most decisions will be made by the board by a simple majority. From time to time however, we might expect the attorneys to make evidentiary objections. As a board, I would like for you to authorize the chair to rule on such objections without entering into a full-blown discussion with the board. I will help the chair as best I am able to make decisions on any objection or matter of evidentiary procedure.

Do any of you object to this? (No member objected)

Now let us open the appeal for hearing. First, we will determine whether there are any conflicts for board members or challenges for cause from the parties. Board of adjustments members shall not participate in or vote on any quasi-judicial matter in any matter that would violate the affected person's constitutional rights to an impartial decision. We have one member, Mr. McClendon who has an outright conflict, in that he is an owner member of the applicant LLC and I understand that he recuses himself.

Is that right, Mr. McClendon?"

McClendon: "That is correct."

Jay Wheless: "Thank you very much. Mr. McClendon is excused, and one of the two alternates needs to be seated. I believe that to be Mr. Fink, is that right because he did not participate in the last one and Ms. Collins did. (Alternate Dan Fink takes a seat with the board). Mr. Fink, do you have any objection to the chair making all evidentiary and all hearsay and so forth ruling on those without full board participation?"

Mr. Fink: "No."

Jay Wheless: "Turning my attention to the balance of the board I ask these 4 questions of any of you:

1. Has anyone ever communicated with other board members parties or their attorneys or staff about this matter?
2. Does any board member have a fixed opinion that is not susceptible to change?
3. Does any board member have any close familial business or association or relationship with any party?
4. Does any board member have a financial interest in the outcome of this matter?

Ms. Burek do you answer affirmative to any of those questions?"

Linda Burek: "No"

Jay Wheless: "Mr. DiBernardo?"

Tony DiBernardo: "No"

Jay Wheless: Mr. Lawler?

Ed Lawler: No

Jay Wheless: Mr. Fink?

Dan Fink: No

Jay Wheless: Coming back to the Chair, Mr. Ward?

Andy Ward: Yes, I do.

Jay Wheless: Can you describe to us what that is, please?

Andy Ward: I had an inadvertent conversation with one of the owners of 55 Skyline Road prior to the filing of their appeal. Therefore, I will ask to recuse myself and will leave the hearing at this time.

Jay Wheless: Hearing no objection from the rest of the board, it is appropriate that he recuses himself. Thank you, Mr. Ward. (Chairperson Andy Ward steps down)

Ms. Collins, Congratulations and Mr. DiBernardo will rise to the level of Chair, please. (Alternate Jan Collins takes a seat with the board).

Jay Wheless: Ms. Collins do you have an objection to the Chair ruling of objections entered by either party on evidentiary matters?

Jan Collins-No.

Jay Wheless: Do you answer affirmative to any of those four questions that I asked about conflicts of interest or bias?

Jan Collins: No, sir.

Jay Wheless: Were you able to hear her answers, madam clerk?

Town Clerk: yes.

Jay Wheless: I promise, we are almost there. These remarks are addressed to the board. An appeal from a decision of the zoning administrator is similar to but certainly not the same as a variance hearing like a variance like any variance here and you are the finders of fact. Your duty is to review the record, hear testimony, consider documents and in the end hear arguments from the parties and/or their attorneys. You are to make one of the following decisions:

1. Affirm in whole or part the denial of the recombination plat.
2. Reverse in whole or part the denial of the recombination plat.
3. Modify the denial of the recombination plat.

You have all the powers of the zoning official who made the decision to disapprove this particular recombination plat. Each decision requires a three-fifths vote, not a four-fifths like in a variance, so a simple majority carries the day. As in a variance, it is very important that your decision be complete with a full account of the reasons, the facts upon which you base your decision. Your consideration of the appeal might necessarily mean that you need to interpret what certain language in the ordinance means. Accordingly, I give this guidance. Your primary objective is to determine to intent of the Town Council in adopting the language in question. You should do the following things:

1. Listen carefully to the arguments of the town and the appellate.
2. Determine and give effect to the intent of the Board of Commissioners.
3. Examine the ordinance text itself, if it is clear and unambiguous, apply to text as written.
4. If the ordinance provides definition, consider those definitions thoroughly.
5. If the ordinance provides an interpretive guidance, use it.
6. Contrast other provisions in the ordinance to provide meaning to the terms or the sections in issue.

7. Apply a logical meaning to words.
8. Use the dictionary if necessary.
9. Avoid absurdity.
10. If ambiguity exists resolve it in favor of the property owner and the free use of land.

Witnesses in this hearing must be sworn prior to their testimony, if you are to be a witness please stand, raise your right hand and you will be affirmed. (Town Clerk swore in those providing testimony).

Jay Wheless: Mr. Chairman, I turn this evidentiary hearing over to you.

Tony DiBernardo- good afternoon just some housekeeping. Can everyone turn their phones off or put them on silent. It would be appreciated during this hearing. The appellant will present the evidence first. Mr. Varnell, you are up.

Casey Varnell: I will call my first witness. I call Mr. Robert McClendon to the stand. Would you please state your name.

Robert McClendon: Robert McClendon

Casey Varnell: Mr. McClendon, where do you reside?

Robert McClendon: 146 High Dune Loop in Southern Shores.

Casey Varnell: How long have you been in Southern Shores?

Robert McClendon: 10 years

Casey Varnell: This is somewhat duplicative as the subdivision plat wasn't finished according to the application but I'll hand it up so we can get some clarity on that. The parcels of land shown on that plat, are you an owner?

Robert McClendon: Yes, I am an owner.

Casey Varnell: When you say an owner, what does that mean?

Robert McClendon: The property is owned by an LLC of which I am a member.

Casey Varnell: How many other members?

Robert McClendon: There are a total four members in the LLC.

Casey Varnell: And the land again is tied up in the name of the LLC?

Robert McClendon: That is correct.

Casey Varnell: What is the LLC name?

Robert McClendon: Skyline Oaks Properties LLC

Casey Varnell: When did you and your partners in the LLC purchase these particular parcels?

Robert McClendon: June of 2021, July, maybe August. I am not sure exactly when the closing date was.

Casey Varnell: Have you commenced any construction or anything on these Parcels?

Robert McClendon: No

Casey Varnell: They existed vacant Parcels today?

Robert McClendon: that is correct.

Casey Varnell: In terms of the purchase itself, did you acquire or did the LLC acquire all of the parcels at one time or over time?

Robert McClendon: No, they were purchased all with a single sale.

Casey Varnell: So, just for the board, kind of explain the makeup of the parcels as they currently exist without any form of recombination. How many Parcels of land are we really dealing with.

Robert McClendon: there are four platted lots that were plated in 1949, I think. they've been held in the same ownership since 1952 until we purchased it in 2021. There are four platted parcels and then there is an adjacent parcel of land as well.

Casey Varnell: So, your testimony is that what we are dealing with here, as far as you say four lots. These were lots shown on the original subdivision plat or a recorded subdivision section of Southern Shores.

Robert McClendon: That is correct, they were recorded there.

Casey Varnell: and describe the excess land, I'm calling it access but you referred to it as an adjacent parcel.

Robert McClendon: It is about 100 feet behind each parcel and the same behind every one of those parcels, the four platted lots. There is an additional 100 ft on each edge, outside edge, so it is a little more than 100 feet in the center I think, I'm not sure.

Casey Varnell: May I approach the witness?

Tony DiBernardo: Yes.

Casey Varnell: I am going to hand you this document. For judicial notice, this is an unmodified version of the recorded subdivision plat. Recorded with the Dare County public registry.

Tony DiBernardo: Which subdivision?

Casey Varnell: Southern Shores, The plats title is amended portion section one Southern Shores.

Jay Wheless: book and page?

Casey Varnell: I think page 91. Looking at this particular plat Mr. McClendon, did the parcels of land that you just testified to is only do exist on this part on this plat.

Robert McClendon: Yes, they do.

Casey Varnell: and I notice there is a drawn in, and again for the judicial notice, this is unmodified. This is how the document is recorded with the register of deeds but there is a drawn in portion of land existing behind the four lots you own. Is that adjacent the adjacent parcel you are referring to?

Robert McClendon: That is correct, yes.

Tony DiBernardo: Excuse me Mr. Varnell, do you have a copy?

Casey Varnell: I was about to introduce it into evidence and then hand you a copy. Having said that and with this being a recorded document, Chairman, I would ask to introduce this amended portion section one Southern Shores subdivision plat plaintiff's exhibit one, or petitioners exhibit one.

Tony DiBernardo: Mr. Hallow, any objection?

Johnny Hallow: No objection.

Casey Varnell: May I approach. I am going to pause while you guys' review.

Jay Wheless: Mr. Varnell, we are going to call this plaintiff's exhibit number two, number one will be your board your packet with application.

Casey Varnell: understood.

Casey Varnell: I will ask the board, have you reviewed the plat, look at the parcels in the testimony that was just provided. What I am again calling this excess parcel that was actually drawn in by, we assume, the developer when it got recorded. Do you believe it makes your land or the parcels that you own unusual to adjacent properties or nearby properties in any way.

Robert McClendon: Yes, I do. Certainly.

Casey Varnell: How so?

Robert McClendon: The other parcels were that were plated in 1949 are fixed in size and we have four parcels that could be subdivided, or recombined, or something like that. It is not very often that people have the opportunity to acquire an undeveloped piece of property that is adjacent.

Casey Varnell: . And does this undeveloped piece of property do you believe call it a larger area created, is that why you were able to design the subdivision that you propose and were denied is that the reason you were able to design and manage

Robert McClendon: Yes, certainly

Casey Varnell: And without having this excess land or adjacent parcel would you even be here today attempting a subdivision

Robert McClendon: No, certainly not

Casey Varnell: Mr. McClendon, I had you up there I wanted really for you to establish your ownership of the property given you are the landowner, is there anything you'd like to add before I carry it over to the council

Robert McClendon: I will just say this, I have a master's degree in landscape architecture from NC State and I've studied sustainable land design, low impact development that's what I did primarily in my professional career and the questions always ask why more people don't try to save trees and why they don't try to develop in a more sustainable manner and the answer is time, time and money, and we have spent a year studying this parcel, we've had the trees identified and located on a survey, we've had the topographic nature of the land completely studied there's a scale model of the plat over here that our architect put together so that we could understand exactly where the slopes were, where storm water would go, that kind of thing. Over the last year we've looked at multiple ways to subdivide the property and we felt that the scale along Skyline Road lends itself to maintaining four lots and we were able to identify a way that would provide for those four lots to each have a hundred feet in width at the location of developing the house which we felt is really the most sustainable and the best way forward for that property. Subdividing it in smaller, only two lots, would mean a much larger development footprint and a big giant beach house or something and the amenities that go with

that, we don't think that fits the scale. That's what we've come up with and we have studied it for over a year to come up with this particular scenario.

Casey Varnell: I have nothing further.

Tony DiBernardo: Do you wish to cross examine?

Jonny Harlow: I don't have any questions for cross-examination

Tony DiBernardo: anybody have any questions for Mr. McClendon?

Ed Lawlor: I have one, when was the additional 100 feet added?

Robert McClendon: In 1952

Ed Lawlor: 52?

Robert McClendon: Yes. The previous owner Mr. Shepherd purchased it in 1952, left it to his wife 20 years later when he died, 20 years later when she died, she left it to her two daughters, The two daughters have died and they left it in a trust and we purchased it. That's the reason that when you see the old photographs it was just a sand dune, there were absolutely no trees whatsoever. If you look at the new ones its covered in live oaks and tall pine trees. The fact that it's been owned by the same people for 70 plus years is a reason why it's been able to succeed with that vegetation.

Ed Lawlor: Thank you.

Tony DiBernardo: Mr. Varnell?

Casey Varnell: I'll call my next witness, Mr. Mark Bissel to the stand. Would you please state your name for the record.

Mark Bissel: Yes, Mark Bissel

Casey Varnell: And Mr. Bissel would you tell the board what's your professional occupation?

Mark Bissel: I am a professional engineer.

Casey Varnell: Any particular type:

Mark Bissel: I am a civil engineer.

Casey Varnell: And what exactly is a civil engineer, just so that way there's an understanding.

Mark Bissel: My firm primarily focuses on land development, engineering, and surveying, and so forth, related to the planning and design of what you can do with a piece of land.

Casey Varnell: And I am going to be asking the board of adjustments to accept Mr. Bissel as an expert, however, I am going to be asking some questions here to attempt to qualify you.

Jay Wheless: Expert in what field?

Casey Varnell: The field of engineering and site planning.

Jay Wheless: thank you.

Casey Varnell: So, Mr. Bissel, In terms of your occupation, civil engineering, how long have you practiced in this field.

Mark Bissel: I was first registered in 1982, so forty years ago, been practicing a bit longer than that.

Casey Varnell: And, in terms of your current business if you will, who do you work for what's your company's name?

Mark Bissel: Well, the company is Bissel professional group and I am the senior principle of that firm, we have a number of engineers, technicians, surveyors, and so forth, that work for the firm and we do a lot of subdivision design work, a lot of planning and zoning.

Casey Varnell: I know you said you were licensed in eighty-two, how long has Bissel professional group been running?

Mark Bissel: I came out here and moved to the outer banks in 1984 and went to work for a managing office called triangle engineering and during the following year I ended up acquiring the assets of that firm, so we've been practicing since 1985.

Casey Varnell: And the entire time has your practice since eighty-five, or since you took over, Bissel, has that been here on the outer banks

Mark Bissel: Yes, it has.

Casey Varnell: What education requirements are associated with your field?

Mark Bissel: It requires a four-year degree and then an internship and then a couple of exams to become licensed to practice.

Casey Varnell: What is your four-year degree in?

Mark Bissel: I have a degree from Duke University in civil engineering

Casey Varnell: What kind of license requirements are associated with your field of work?

Mark Bissel: I'm a licensed professional engineer in the state of North Carolina

Casey Varnell: And what's required for a professional engineer to obtain that

Mark Bissel: You have to have a four-year degree from a credited engineering school, a minimum of four years practicing underneath a professional engineer, and you have to pass two exams, one on the fundamentals and one on principles of practice.

Casey Varnell: And you currently hold that in life

Mark Bissel: And then your credentials are reviewed by a licensing board, and they make a determination, yes I do have an active license

Casey Varnell: And have you ever been sanctioned or anything like that

Mark Bissel: I had a minor infraction, once upon a time, probably 20 years ago, which was a really unusual situation because we had a client who owned land on the state line who had a surveyor that was involved that was working on his Virginia side and he had to do some work on the North Carolina side that he sent to us and we incorrectly relied on because as it turned out he wasn't licensed in North Carolina.

Casey Varnell: Now since the inception of your practice, kind of describe what your day-to-day functions, and what you typically do on a day-to-day basis.

Mark Bissel: We do a lot of land development work, we will work on anything from a single lot to a commercial development, a zoning case, or a commercial site plan, anything from that up to a thousand acre planned community and we do a lot of master planning, and planning and zoning, we do a lot of subdivisions. From small subdivisions and recombination's, up to large major subdivisions.

Casey Varnell: And have you ever done any assisting a client with subdivisions similar to this type of exempt subdivision, maybe not directly at home, but similar?

Mark Bissel: Right, we do this kind of work pretty routinely.

Casey Varnell: Okay and the project that you're referring to they involve reading and interpreting codes of local government on a consistent basis?

Mark Bissel: They do, we do work in a lot of different local governments and a lot of different jurisdictions and we have to be familiar with their codes and how to interpret those codes

Casey Varnell: And do you work again with those local governments

Mark Bissel: We do, it's kind of a bread-and-butter kind of thing, we review those codes on an almost daily basis

Casey Varnell: And do you feel that you you're confident to provide an expert opinion in merits of this particular appeal?

Mark Bissel: I do

Casey Varnell: At this point I would like to ask the board, I'd like to tender Mr. Bissel as an expert in the fields of civil engineering and site planning

Tony DiBernardo: Okay, it's approved

Jay Wheless: Mr. Chairman, just for the record let's recall that if specialized technical or scientific testimony is needed, it can only be offered through an expert, and the expert must have a foundation laid, and that foundation would include his knowledge, skill, experience, training, and education, is that based upon that you're accepting him

Tony DiBernardo: Yes, I am

Jay Wheless: Do you have any objections

Johnny Hallow: No objections

Jay Wheless: Thank you

Casey Varnell: Mr. Bissel I'm obviously reviewing the plat I can't help but notice that your firm is involved in preparing a subdivision plat, were you yourself, somewhat involved in the project as well

Jay Wheless: Excuse me, for clarity, you mentioned the subdivision plat, you're talking about

Casey Varnell: The one that was denied, sorry, yes

Mark Bissel: The plat was prepared by Michael Barr who is the senior licensed professional land surveyor with our firm, but I was involved in reviewing it

Casey Varnell: Okay, so then safe to say you're familiar with the issues which are being raised today?

Mark Bissel: I am

Casey Varnell: And during your review process of these particular interviews, did you review the provisions of the town code that you believe to be subject to this appeal

Mark Bissel: Yes, I did

Casey Varnell: If you don't mind can you kind of recite what provisions you believe those to be

Mark Bissel: Right, there are related provisions in both the zoning code and subdivision ordinance that have to do with minimum standards of design that have to do with height, bulk density, coverage, setbacks, and so-forth, and some of those include section 36-202 the single family residential district, section 36-90 on height, bulk, density, lot coverage, yards, open spaces, section 36-92 on reduction of lots or areas below the minimum and so-forth and chapter 30 subdivisions

Casey Varnell: I have not, or I did not tinder because it's hard to plan that, well the recombination plat was attached to the application, may I, would the board object to me just handing Mr. Bissel a copy in the event he did not have a saying

Tony DiBernardo: No objection, do you object?

Johny Hallow: No objection

Casey Varnell: And what you're holding there is this the same subdivision plat that your firm prepared that you've been to testify regarding

Mark Bissel: Yes, it is

Casey Varnell: And you mentioned a review of certain code provisions I assume that you've reviewed also the town's denial letter

Mark Bissel: I did

Casey Varnell: So, you feel like you have a grasp on why this town denied this particular subdivision request

Mark Bissel: I believe I do

Casey Varnell: In comparing your professional opinion and the town's professional opinion can you describe to the board again what you believe to be the validity of this particular request

Mark Bissel: Sure

Casey Varnell: Where do you stand on that

Mark Bissel: Well, when I reviewed the town code, I find the term used over and over again in both the subdivision ordinance and in the zoning code, the terms, minimum requirements. For example section 36-90 on yards and open spaces and lot sizes says , these are minimum standards you cannot have a lot that is narrow or a front yard that is smaller than what's prescribed, 36-92 states that yard or lots created shall meet at least the minimum requirements and 36-202d says has a minimum lot width of 100 feet and part three of that says a minimum front yard setback is 25 feet, but there is no place that I see that has a maximum width or a maximum setback or a maximum lot size or anything of that nature

Casey Varnell: So in interpreting and in reading these provisions do you believe that the subdivision plan that's been presented by my clients and denied by the board of adjustments, do you believe that it's in compliance with the town code, and if so please explain why

Mark Bissel: I do believe it that made suit because it complies with, it either meets or exceed all of the minimum standards of the town code in terms of area, bulk, density, coverage, or not coverage in this case, but yards, setbacks

Casey Varnell: And the issue here as the town has pointed out in their denial, kind of explain your opinion on where the front yard setback could be a better problem.

Mark Bissel: Well in the absence of the code prescribing a maximum setback, it appears that a developer can set the setback anywhere that they choose that makes sense as long as it exceeds the minimum, and in this case, where the setbacks have been drawn, they exceed the minimum, the lot widths at that point exceed that minimum.

Casey Varnell: And what are the lot widths?

Mark Bissel: The lots with are the required lot widths are 100 feet. As this is drawn you have lot widths 101.4, 104.9 it looks like, anyway they exceed 100 feet.

Casey Varnell: and is it your testimony that the town's code set a minimum setback, not anything max. The owner could be more restrictive upon themselves if they so want.

Mark Bissell: Exactly, I would look at it kind of like if you have a minimum elevation for a building pad to keep it out of the flood zone if that pad were say eight feet as a minimum and you built the pad to 10 feet to exceed the minimum requirement, that would certainly be in conformance with the code.

Casey Varnell: Again, you found nothing in the town code that sets a maximum setback for lots?

Mark Bissell: No, I didn't.

Casey Varnell: Anything concerning a static setback, a required static? You know, just across the board setback.

Mark Bissell: No, I didn't and all I found is you had to have 100 feet measured at the setback and the setback has to be a minimum of 25 feet but obviously can be more, so no. I found no reason it wouldn't comply.

Casey Varnell: In laying this foundation for you as an expert, you testify that you consistently and probably have dealt with Southern Shores Planning Department on occasions, that when dealing with a local government um on whether it is a site plan or subdivision approval, whatever the project that you are working on may be, without there being that type of explicit language, mandate something, such as 25-foot framework etc. Is it your experience that again that a town would generally not allow the owner to be more restrictive, if they chose to do so, in the absence of such explicit language.

Mark Bissell: No, that's not my experience at all. And it has also been my experience that the local governments generally aren't able to impose additional restrictions that aren't spelled out in the code.

Casey Varnell: That aren't explicit?

Mark Bissell: yes.

Casey Varnell: One more time for the record. Is it your professional opinion that the proposed subdivision (which was attached to plaintiff's exhibit one) that that subdivision complies with all facets relative to subdivisions within the town code ordinance, that it complies with all code provisions.

Mark Bissell: yes.

Casey Varnell: Mr. Bissel before I turn you over is there anything else that you would like to add?

Mark Bissell: The only thing I'd add is in reviewing Mr. Haskett's letter I think that in my opinion, the second paragraph should read in this case all the proposed lots should have a minimum width of 100 feet measured in a line that is parallel to and at least 25 feet from the current right away

Casey Varnell: And just for the boards because it's in front of them and you are reading and amending, what particular addition to that letter did you believe should have been made

Mark Bissell: The words at least 25 feet rather than at 25 feet

Casey Varnell: Rather than mandating between lines

Mark Bissell: Exactly.

Casey Varnell: Thank you very much Mr. Bissell I've got nothing more from this witness

Jay Wheless: Don't leave yet, we like you could you stay up there a little longer

Mark Bissell: Sorry about that

Johnny Hallow: I have no questions on cross examination

Tony DiBernardo: No cross examination, does anybody on the board have any questions

Jay Wheless: the last statement that you offered in response to Mr. Varnell's questions was a redraft of one sentence out of Mr. Haskett's letter, when you added the word minimum in front of 25 feet, which is what your redraft would have said had it been your draft, correct?

Mark Bissell: Yes, at least 25 feet right

Jay Wheless: Is that what the ordinance says, we're kind of ill-equipped here we're relying on you here to tell us what it is, I don't have it but does the ordinance say minimum 25

Mark Bissell: It does not, well yeah, the ordinance says minimum 25 feet

Jay Wheless: But not as to this particular provision to 100 feet it says as to the

Mark Bissell: It says the minimum lot width 100 feet measured at the building set up line and then the very next paragraph in that same section of the ordinance says the minimum front yard setback is 25 feet

Casey Varnell: And then what is the definition of building setback line, May I approach the witness

Tony DiBernardo: Yes

Jay Wheless: Could you re-ask your question

Casey Varnell: For clarity purposes, let's walk through the provisions which I've just handed you, again they're director prints off the website, 30-97 in the subdivision, and it requires that again, all dimensions are required of the rs1 or whatever zoning district you're dealing with when you're talking about when you created that lot that they meet the dimension requirements of that zoning district which now I'll turn it to you and 36-202 D2, could you read that for the board please, and this is referring to the required width of any lot
Inside a newly created lot

Mark Bissell: D is dimensional requirements and two says minimum lot width 100 feet parentheses measured at the building setback line end parentheses

Casey Varnell: Okay an 36- 2 of D3 reads as what when it comes to front yard setback

Mark Bissell: As the minimum front yard setback is 25 feet

Casey Varnell: And then going to 36-57 we've got the definition of building setback, which is where the width must be measured from, what is the definition of building setback

Mark Bissell: That means a line parallel to or concentric with the street right-of-way establishing the minimum allowable distance between such right-of-way and the nearest portion of any building excluding the outermost three feet of any uncovered porches, steps, gutters, and similar fixtures

Casey Varnell: So, it's measured from the building setback line and it must establish the minimum allowable set correct?

Mark Bissell: Yes

Casey Varnell: And the minimal setback for front yard setbacks is

Mark Bissell: 25 feet

Casey Varnell: Now taking that into consideration I'll ask the question this way, why do you believe that because

Of the land that you just testified to, because of what's in the code, why do you believe there is no mandate or static 25-yard front yard setback

Mark Bissell: Because in every section or applicable section that we've looked at the ordinance prescribes a minimum but no maximum. The word maximum is never used

Casey Varnell: And it's your professional opinion that in order for a local government to impose a maximum, or something static, that it must be explicitly stated

Mark Bissell: I believe that -that's my opinion yes, that's my experience yes.

Casey Varnell: And those code provisions you just went over, do you find that any such mandate exists

Mark Bissell: I don't

Casey Varnell: Before I do have, I printed a ton of copies of the code provisions, if you want me to hand them to you, I thought they were within the packet, I'm sorry, the variance is what I'm used to, so I apologize for that, I do have copies though, May I approach

Tony DiBernardo: Yes

Tony DiBernardo: Mr. Hallow, do you have any questions

Johny Hallow: I have no questions for cross examination

Tony DiBernardo: Okay, is there any questions from the board, if there's no questions, guess what you can leave now

Mark Bissel: Now I can leave, thank you

Casey Varnell: ready for next witness

Tony DiBernardo: Yes

Casey Varnell: I'll call Mr. Adam Ward to the stand

Casey Varnell: Would you please state your name for the record

Adam Ward: Adam Ward

Casey Varnell: And Mr. Ward are you the applicant on both the subdivision or in particular words I'll say, did you deal with the town on proposing this subdivision?

Adam Ward: Yes

Casey Varnell: And are you also the applicant on this appeal

Adam Ward: Yes I am

Casey Varnell: How did you come to be involved with the proposed subject

Adam Ward: In the summer or late summer of 2021 the owners of the property approached me and my business partner to help them with site planning strategy for how to develop this piece of property

Casey Varnell: How long have you been working on this project

Adam Ward: For just over a year, we started last September.

Casey Varnell: How many different proposals out of curiosity did you fathom up

Adam Ward: Site plan schemes?

Casey Varnell: Yes

Adam Ward: 10, 15, 20 I'm not really sure, I mean there were a lot of different schemes that we looked at and studied

Casey Varnell: good hard work

Adam Ward: yes

Casey Varnell: Board, I am going to ask that you accept him as an expert in the fields of architecture and site plan.

Jay Wheless: going to lay the foundation?

Casey Varnell, yeah, I'm going to lay the foundation. I am telling you why I am going down this lane because it is educational history and because otherwise you probably wouldn't even care.

Casey Varnell: What is your professional occupation?

Adam Ward: I'm a licensed architect in the State of North Carolina.

Casey Varnell: And how long have you practiced?

Adam Ward: I graduated in 2013 and took my first job for an architecture firm in 2014 January, and I have been working in architecture since. I have been licensed in North Carolina since 2017.

Casey Varnell: What educational requirements are associated with an architect?

Adam Ward: To become a licensed architect you need to have a professional architecture degree that can be a five-year bachelors' or a masters of architecture.

Casey Varnell: and what degree do you have?

Adam Ward: I have a Master of Architecture from NC State.

Casey Varnell: and a four-year degree?

Adam Ward: I have an unrelated four-year degree in an unrelated law degree.

Casey Varnell: How about license and stuff, how does licensure work in the field of architecture?

Adam Ward: It is pretty much the same now but when I did it to get licensed you had to have an approved degree from an accredited university, then you had to intern under a licensed architect for it was measured by hours, but it roughly translated to about two and a half to three years. Then you had to take seven licensing exams, one including, they were arranged according to different areas of the field, one including site planning and design.

Casey Varnell: So, you hold one license but there are several different fields of course of architecture and you kind of have to hit all the nodes, yeah like a lawyer.

Adam Ward: Yes, yes.

Casey Varnell: And how long again have you been licensed as an architect?

Adam Ward: four to four and a half years, I believe in North Carolina. That is the only license I hold, so four and a half years I believe.

Casey Varnell: and have you been practicing, well maybe even prior

Adam Ward: So, I've been working in an architecture firm because I had to intern under a licensed architect for eight and a half years, but some of that was in North Carolina, some of that was in California

Casey Varnell: I understood, with the sense you began your practice, or began practicing in this field, what are your day-to-day functions

Adam Ward: our day to day functions are to help clients, I've mostly worked in residential architecture, some small commercial, but our day to day tasks are to help clients with anything from site planning to designing structures, to helping them figure out programmatic elements of a project, but if we start with a client who has a fresh piece of land, we start with site planning and we go from there and work on schematic designing for the structures that would go on the property.

Casey Varnell: Is it fair to say that a project such as this that you've been retained for by the landowners, is this a project that you would typically work on or is this outside of your availability

Adam Ward: No it's a pretty typical project we are contracted with them in a unique way that we're working specifically on site planning with them now with the goals once we have approved subdivision that they'll retain us to help design the houses as well

Casey Varnell: And in a given project or the majority of your projects, do these involve, as I asked Mr. Bissell, reading and interpreting local government codes

Adam Ward: Yes, certainly either for site planning purposes, reading the code, the zoning code setbacks, easements, thing like that, and then for the actual design of houses, the building codes

Casey Varnell: And do you work with local governments on these site plans for example on a consistent basis

Adam Ward: Yes

Casey Varnell: And do you feel after, let me ask this first actually, you're the applicant so it's kind of a default type question, but you're familiar with the merits of what's going on correct

Adam Ward: Yes, that's correct

Casey Varnell: And do you feel you're confident to provide opinion in the field of architecture and site planning regarding this particular field

Adam Ward: Yes, I do

Casey Varnell: At this point, I would ask to tender my witness as an expert, in the field of architecture and site planning

Johnny Hallow: No objection

Tony DiBernardo: Okay approved

Casey Varnell: Thank you. So, Mr. Ward I'm going to actually shift away a bit from code interpretation side of things as far as the subdivision ordinance and dimensional requirements and where you're making setbacks from and we've heard Mr. Bissell's opinion on that, before I do, I will ask, have you reviewed the provisions subject of this appeal that Mr. Bissell testified to

Adam Ward: Yes, I have

Casey Varnell: And again, that's in your general nature as an architect to do the same

Adam Ward: yes

Casey Varnell: And do you believe that those code provisions that we're discussing, do you believe that the proposed subdivision complies

Adam Ward: Yes, I believe that the recombination plan that we submitted, applies or meets all the code requirements

Casey Varnell: I don't think that surprises anyone there, so I'll just ask you why

Adam Ward: Why? Well, because we meet all of the minimum lot sizes we meet the minimum requirements that are set in the code for a new lot and particularly to the language of the denial we believe that the code sets a minimum front yard setback at 25 feet, but as long as we meet that minimum we can surpass it and have a setbacks that's 26 feet or 40 feet or 100 feet because the code doesn't set a maximum

Casey Varnell: So that was going to be my next question, in reviewing the code did you find anywhere that it was mandated at static or maximum front yard setback being or rendered by the town

Adam Ward: No

Casey Varnell: Okay and in your experience, and then I want to get off this code interpretation, but in your experience with working with local governments is it usual that a local government would not allow a landowner to be more restricted on themselves, in the event they choose to do so

Adam Ward: No, I don't think so

Casey Varnell: And would that go for setbacks

Adam Ward: Yes, for setbacks, yes

Casey Varnell: Okay, thank you very much, now as far as the, let me ask that, what zone are these particular parcels in.

Adam Ward: it's in the rs1 residential zone

Casey Varnell: And for the rs1 residential zone if you had a chance to review the code provisions concerning the spirit and purposes and intent of that particular zone

Adam Ward: Yes, I believe I have

Casey Varnell: Do you believe you're familiar enough with them to provide an opinion on the spirit and intent of the rs1 zoning district

Adam Ward: Certainly

Casey Varnell: Would you do so please

Adam Ward: Yes, I believe the spirit and the intent of the code, especially under the subdivision code and the purpose listed in 30-5 is to provide orderly layout of the land, to make sure that traffic flow is protected, and to make sure that we can serve the environment and the spirit of the town of Southern Shores, essentially I believe that the intent of the code is to prevent southern shores from growing to large or having properties that are too big, it's to respect the town as it is and build in a way that is cohesive with the existing town

Casey Varnell: And is that an interpretation or does 30-5 in the purposes of the rs1, does 30-5 actually recite those items

Adam Ward: It doesn't recite specifically, it recites-

Casey Varnell: Do you have that

Adam Ward: I don't have it in front of me, I don't know if you have a copy of it or not

Casey Varnell: Actually, attached to plaintiff's exhibit one attached to my legal opinion that was rendered as part of this application, I have the quoted language from 30-5 for your reference if you want to look into that, I am going to hang up here, this is the legal opinion that was attached to the exhibit, just so Mr. Ward has an actual copy

Tony DiBernardo: Mr. Hallow?

Johnny Hallow: That's okay with me

Casey Varnell: Would you read that provision concerning the purpose and intent of the rs1

Adam Ward: yes, it says the rs1 district is established to provide for the low-density development of single-family detached dwellings in an environment which preserves sand dunes, coastal forests, wetlands, and other unique natural features of the coastal area, the district is intended to provide stable permanent neighborhoods characterized by low vehicular traffic flows abundant open space and low impact of development on the natural environment and adjacent land uses in order to meet this intent the density of population in the district is managed by establishment of minimum lot sizes, building setback, and height limits, parking regulations, and maximum occupancy limits for single-family residences used as vacation cottages

Casey Varnell: So, have you had a chance, Mr. Ward, to consider alternatives, or what if you will, could be built on the particular lot, on the parcels, but I'm going to ask this in two particular ways

Adam Ward: Ok

Casey Varnell: Have you examined what could be built using the particular subdivision proposal, using four lots that you guys were asking for

Adam Ward: Yes

Casey Varnell: How about the town's interpretation, using their interpretation

Adam Ward: So, it's my belief that if we follow the town's interpretation

Casey Varnell: And what would that look like, the town interpretation

Adam Ward: Okay so the town's interpretation that the front yard setback, that the minimum lot width of 100 feet must be measured at precisely 25 feet back from the property line, that in order to have that requirement and the front setback being static at 25 feet, that the almost two-acre parcel of land would only allow for two lots to be developed on it, as opposed to four that we've drawn

Casey Varnell: And at this point I'm going to hand up two exhibits actually, I'm going to have him qualify these things and then they're accepted I think that'll provide a better illustration of what we're discussing here, town interpretations and result versus our interpretation and result

Jay Wheeler: I classified the three sections of the ordinance as plaintiff's exhibit number 3 so you'll be on number four

Casey Varnell: these things are marked as exhibit four, did you prepare the particular, actually you tell me what they are, how about that

Adam Ward: okay they were prepared by my business partner, but I reviewed them

Casey Varnell: What are they

Adam Ward: They are two comparisons of what the parcel would look like subdivided as we've proposed in exhibit 5 and subdivided into two lots in exhibit four

Casey Varnell: And again, this was prepared by your firm

Adam Ward: Yes, this was prepared by my firm

Casey Varnell: You had intimate knowledge of this

Adam Ward: yes

Casey Varnell: Given that chairman, I would ask to tender plaintiff's exhibit 4 and 5

Tony DiBernardo: Any objection Mr. Hallow?

Johnny Hallow: No objection.

Casey Varnell: I'm going to hand these up, just let me know when everyone has these in front, What more could you explain about exhibit four, describe that document please.

Adam Ward: So plaintiff's exhibit four shows the parcel of land recombined into two lots, the dark area shows the buildable area that's defined by the setbacks set in the code and those both have 25 foot setbacks because the lots are wide enough at 25 feet to be 100 feet wide and then the white area in the middle is the coverage allotment for the lots, a rough approximation of the coverage, and then exhibit 5 is the same.

Casey Varnell: So, in your professional opinion, this has not been submitted I understand.

Adam Ward: Certainly.

Casey Varnell: But in your professional opinion this is what would result in a recombination if you will, this is what you could do if you abided by the towns interpretation.

Adam Ward: Yes.

Casey Varnell: With plaintiffs' exhibit four as an illustration.

Adam Ward: Yes

Casey Varnell: understood. Please continue.

Adam Ward: So, exhibit five is showing what we have proposed, a four lot solution that meets in our opinion all requirements of the code and what it shows is that we have in the dark area again, is the buildable area set by the side and rear back then twenty-five feet setback as written in the code as well as the front yard setback that we have set further back than 25 feet to meet the minimum lot width. As you can see from it, it produces more concentrated buildable areas on the lot preserving more of the lot, more of the overall acreage, from construction.

Casey Varnell: so, having read and interpreted and understood the person intent language that you recited verbatim earlier, describe in your professional opinion whether plaintiffs exhibit four or plaintiffs exhibit five, four being the town's interpretation and five being our interpretation, which particular subdivision would better comply with the spirit and purpose of the zoning ordinance.

Adam Ward: So, in my professional opinion I believe that exhibit five that we have submitted more fully conforms to the intent of the code in that it creates a subdivision that fits the neighborhood, that is respectful of the neighborhood, that would produce smaller lots that meet

the minimum, that are closer to the neighborhood. The challenge for us was that most of the lots in the neighborhood don't meet today's code. They are smaller than today's code. We wanted to design something that fits in the neighborhood and was respectful of the town and the subdivision but still meeting today's code. That is how we arrived where we are. My professional opinion is what we have designed it allows us to build four houses that are more comparable in nature to the size of the existing houses. That it will fit the context of the neighborhood and the fabric of the neighborhood. Whereas in the other, in exhibit four, if we do two lots the buildable area is much larger and we could build in a lot more spaces which means we could have a larger footprint possibly but also it would not fit the fabric of the neighborhood as well.

Casey Varnell: what about the disturbance of typography or saving of natural developments.

Adam Ward: Ultimately, that is what we spent the last year trying to do. To create a plan that would allow us to be as observant of the natural topography and the trees that exist, and you know I believe our plan allows us to do that because we are going to build four smaller structures that we can nestle into the existing site. We can be cognizant of how, taking down as few trees as possible and maintaining the topography as it exists, as best as possible. Whereas is the two lots solution in my opinion would require the construction of the largest possible house the code would allow in order to make it a profitable venture and that would probably result in more clearing of space and maybe more site work than if we nestle four houses into spaces that the site kind of allows for it already.

Casey Varnell: larger development?

Adam Ward: Yes.

Casey Varnell: Did you review any other documents pertinent to the goals and intent of Southern Shores in this particular zone district or across the town.

Adam Ward: Yes.

Casey Varnell: 2005 or January 2006 is the long-range planning committee report, is that one of those documents?

Adam Ward: It is, yes.

Casey Varnell: May I approach the witness?

Tony DiBernardo: yes,

Casey Varnell: Handing you what is marked plaintiff certificate six. That particular exhibit as it is titled Town of Southern Shores 2005 Long Range Planning Committee Report.

Tony DiBernardo: Excuse me Mr. Hallow, Is this, okay? Do you have any objection?

Johny Hallow: I would like to see a copy of it.

Casey Varnell: I was there next. What I was going to say is the entire print copy was right from the website. I apologize, I jumped the gun.

Johny Hallow: No issue

Casey Varnell: What exactly is it, you said it is a document you reviewed?

Adam Ward: So yeah, it is a report that the Town of Southern Shores prepared in 2005, well it is dated 2005, for the long-range planning goals.

Casey Varnell: does this plan apply across the town?

Adam Ward: I believe it does.

Casey Varnell: Did you find provisions that are applicable to the RS1Zoning District?

Adam Ward: We looked primarily at this document to gain a better understanding to what the Town's goals were when it came to planning and development. So we looked particularly at the document at the Town's mission and the Town's core values in trying to develop a site plan that was responsible and reflective of the town's goals and missions.

Casey Varnell: And it is your testimony that that's essentially what this document establishes, your professional opinion in reading it, those goals.

Adam Ward: I believe so, yes.

Casey Varnell: And to your knowledge, you obtained this document from the Town's website to your knowledge was this produced by the town?

Adam Ward: To my knowledge it was.

Casey Varnell: I have asked to enter that as plaintiff's exhibit six.

Tony DiBernardo: yes, it is six.

Casey Varnell: And I have copies for everyone, may I approach?

Tony DiBernardo: yes.

Casey Varnell: Mr. Ward, what I am going to ask, and the board may very well have questions but now that the document is in front of everybody, Do you feel that there are any provisions within this long-term planning that are pertinent to today's proceedings?

Adam Ward: Yes, I think the mission statement at the beginning and the core values are something that we looked at when we did our analysis of the site plan and informed the site plan that we presented to the city. I'm sorry, the subdivision.

Casey Varnell: How does a subdivision, in your opinion, better carry out?

Adam Ward: Certainly, in the mission statement if I can read it, it stated that Southern Shores carefully controls growth and development so this unique community remains the most desirable place to live and visit on the Outer Banks; family oriented, tranquil, friendly, environmentally sensitive and full of beautiful natural attributes. So, in that statement alone our goal and the property owner's goal of this project from the beginning was to develop property that respects the neighborhood it is in, that fits in the fabric of the neighborhood, and is tranquil for better words. We want to leave as many of the trees as we can and preserve the natural beauty and be environmentally sensitive when we plan for drainage and septic fields and any of the construction that we would need to do.

Casey Varnell: And back to plaintiff exhibit four being what could exist as a subdivision using the Town's interpretation, plaintiff's exhibit five, which is your proposal on subdivision. Which of the proposed subdivisions in your opinion better complies with the long-range planning for Southern Shores?

Adam Ward: In my opinion it is the one that we submitted, exhibit 5.

Casey Varnell: And is that for the reasons you recited already?

Adam Ward: Yeah, I think it respects the site and the natural beauty of the site and it fits into the fabric of the neighborhood and is cohesive with the town and the neighborhood it fits in.

Casey Varnell: have you had a chance to review surrounding areas or lots within Southern Shores, particularly to compare how the lots created by your subdivision would reconcile with the size of currently existing lots?

Adam Ward: Yes, we have.

Casey Varnell: The models that I handed up as plaintiff's exhibits four and five, did they have any of that information on there?

Adam Ward: on exhibit five, I guess it is on both exhibit four and exhibit five, there is a chart that shows the 43 parcels on Skyline Rd. In particular, it shows the square footage of the existing lots.. They range anywhere. The largest is 38,000 but it is owned by the town I believe or the Civic Association, but it is 8000 square feet larger than the next largest lot. The average

lot is about 16,000 square feet. If you remove the extreme lots and do an average, it is about 14,000 square feet. So, the Lots we're proposing are all meet the minimum 20 000 square foot lot requirements so they would be uh among the larger Lots on the street as we're proposing them.

Casey Varnell: How about using the town's analysis.

Adam Ward: okay if we use the two-lot solution then we would have the two largest lots on the street. They would be over 40,000 square feet each, making them the two largest and if you take out the 38,000 lot they would be three or the next largest lot would be three quarters of the size of the lots that we had and If we and they would all be you know more than double the average lot size on the street, nearly triple.

Casey Varnell: It's fair to say then that the law using your subdivision proposal there's going to be smaller lots created, is that what you're taking.

Adam Ward: yes, smaller lots that fit and in with the fabric of the existing neighborhood but still meet today's code.

Casey Varnell: Mr. Ward is there before I unleash, is there anything else uh you'd like to add to your testimony?

Adam Ward: only that I I don't know if it was clear enough, actually no it was clear enough I I don't think so.

Casey Varnell: There is a model behind you there, before we even get into the evidentiary what is that model?

Adam Ward: So that is a site model that we built early on in our process so that we could look at the site and get a better understanding of how the topography of the site slopes and where ideal locations for a site plan might be and it also shows all the trees on the site that were included in a survey that the homeowners had done last summer.

Casey Varnell: Is a bit unusual but I'll ask the board we're not here to review a site plan but if that we have this model here as he testified to it is one of the models that he's created if you guys would like to see that we will certainly introduce that into evidence with your admission.

Tony DiBernardo: we're going to take a break shortly so at the break they can whoever want to go over and look at that I think that would be an appropriate time

Casey Varnell: as part of the record.

Jay Wheless: We either need to admit it or not look at it.

Casey Varnell: I would say if we admit it then they could go over during the break.

Tony DiBernardo: Without any discussions.

Casey Varnell: Then I'll attend to that as plaintiff's exhibit seven.

Tony DiBernardo: yes seven. Okay is there any objection no objection? That'll be seven and when we take the Break without discussion you may go over and take a look at the site plan okay

Casey Varnell: On that break this is my last witness, and I am finished questioning.

Adam Ward: Yeah, can I just have one thing about it so, this is a working site model that we have been working on. So, if when you do take a look at it we have shown the lot lines as proposing our recombination application. You will see there are lots of different squares and things on there because it's a model that we have played around with so there's no real site plan on it. There's it was but you will see some locations where we thought about over the last year the potential placement of properties of housing.

Casey Varnell: Of the structure?

Adam Ward: yeah

Johnny Hallow: I have a question. In your opinion but they're not very sufficient area to create three lots instead of four and still meet all the zoning requirements?

Adam Ward: I don't think so. I think that if we measure at 25 feet back across the entire parcel it's less than 300 feet.

Johnny Hallow: Okay even if you rework the parcels as they're currently shaped and made it to where the middle two Parcels were combined into one and one larger parcel it still wouldn't make it 100 feet.

Adam Ward: yeah no, I don't think so. I think if you drew a line, so the code says that the line needs to be parallel to the front uh property line and if we if we looked at the entire parcel as as a singular piece of property and drew a line 25 feet back from the front property line and measured that line, I don't think it measures 300 feet.

Johnny Hallow: Have you actually gone through any simulations to see whether or not it would actually make.

Adam Ward: yes, yes, we have. I don't remember.

Johny Hallow: Did you bring any of those with you today?

Adam Ward: I did not. I don't remember the number off the top of my head.

Johny Hallow: Do you happen to know how many lots of skyline were approved before this ordinance was adopted?

Adam Ward: How many of the lots on Skyline Road were approved?

Johny Hallow: Is this something you looked into?

Adam Ward: Yeah, we did look into that. I've got it in our in the packet, the exhibit. I believe there's some information in there. Do you have a copy of that with you? I believe it is exhibit D

Casey Varnell: Exhibit D in the appeals application.

Adam Ward: I believe that page has that information on it. But I don't have it in front of me.

Johny Hallow: Were a number of those approved before the town was incorporated.

Adam Ward: I believe a number of those were on the original plat. That the property, that the forward lots that we are. The four lots that exist as they are were drawn on.

Johny Hallow: I don't have any other questions, thank you.

Tony DiBernardo: Does anyone have any questions?

Jan Collins: Yes, if you don't mind. On page 41 of the long-range planning. Do you have that in front of you? 41 under growth, just read what that says.

Adam Ward: I'm sorry that's 42. Growth, so this is Southern Shores to 2005 long range plan opinion survey written comment summary. It says growth keep it simple, too much too fast, slow it down, keep it like it was, no more mini hotels, clear cutting stop commercial, stay family oriented, stop playing to wealthy investors, and tourism interests. Change is not necessarily progress.

Tony DiBernardo: Anybody else?

Jay Wheless: On the original subdivision plan MacBook 3 page 91 there were four laws- eight, nine, ten, and eleven

Adam Ward: Yes.

Jay Wheless: Would the would the Appellate be entitled to go ahead and have those four lots?

Adam Ward: It's my understanding that they cannot.

Jay Wheless: Do you have knowledge as to whether those lots were combined at some point and the dividing lines between them were vacated? Is that the reason they're now subject to this new ordinance?

Adam Ward: Yes. Well, they're subject to the new ordinance because the property owners would like to build on them and it's my understanding that the town would not let them build on those lots because they don't meet today's minimum requirements, size requirements.

Jay Wheless: Okay thank you.

Tony DiBernardo: I have a I have a question also. Earlier you were talking about the Spirit.

Adam Ward: Yes

Tony DiBernardo: Tell me, could you explain why you do not include the spirit in the dimensional requirements in number three. Why is it the spirit of the town's code. You didn't even include that. So you're including the spirit in earlier you talked about the spirit.

Adam Ward: okay

Tony DiBernardo: D3 where it says minimum front yard setback uh 25 feet and why are you not including the word minimum as a spirit. In other Words, there's a letter of the law in the spirit of the law.

Adam Ward: certainly.

Tony DiBernardo: Basically, you brought up the spirit of the law. Do you think the spirit of the law was 25 feet?

Adam Ward: I think, no I think the spirit of the law was that we create, or we don't create, the town created a minimum setback of 25 feet to provide a buffer from the front of the property line and from the street, to where buildings would exist and so the spirit is about creating that buffer in my opinion. So, if we have 30 feet, we're only expanding that buffer and further validating or the spirit of creating a buffer. I feel like if we were asking to go 10 feet that we would be not in harmony with the spirit if we were trying to do a 10-foot setback but because we're being further restrictive, we're furthering the spirit of the buffer of the front yard setback.

Tony DiBernardo: So, then the spirit is kind of a moving thing because you said 10 feet doesn't work but 25 feet will so is the spirit a moving.

Adam Ward: No, I believe that the language of the code states that there is a minimum setback and that if we're if we're to try to understand why there is a minimum setback why that was the language that was chosen by the town when they created the code it must be that they wanted to maintain space between the right-of-way or the front property line and any buildings. So that would be the spirit that they wanted at least 25 feet of space. So if we were to inhibit or if we were to encroach on that 25 feet it would be it would be contrary to the spirit of creating a buffer but if we were to have a 40-foot set back then we would just be furthering the spirit by creating a larger setback and creating a larger buffer to protect from overcrowding on the street or whatever the intent of the front yard setback was. Does that make sense?

Tony DiBernardo: Yeah, that's basically kind of what you're saying the spirit of and the buffer is a movable, it's not static.

Adam Ward: I mean I believe it's not static because that is the language of the code but if we're talking about setbacks in general, the spirit of setbacks is to create a buffer of space from your property lines to keep buildings from being too close to the property lines and those could be for aesthetic reasons, they could be for fire protection, so fires don't spread from one house to another. If there is a spirit to that it is creating a larger buffer would be better than creating a smaller buffer. The buffer is there for some reason, for some reason towns have chosen to put the setbacks in and if we're creating a larger buffer then it's not harming the intent and the spirit. It's my opinion.

Ed Lawler: is there any other subdivision in the town that has a floating front setback?

Adam Ward: Well, depending on the zone whether you're rs1 or rs2

Ed Lawler: RS1

Adam Ward: They all have minimum setbacks. They might be set at 25 feet; they could be set at another number. I don't have the code in front of me right now so I can't tell you exactly what that number is but they all state front yard setback, minimum front yard setback, and then some number. So, in my opinion and in my belief, yes, they're all floating. There's a minimum that they can be larger.

Ed Lawler: Well, isn't the 25-foot setback the point at which the lot width is measured.

Adam Ward: So, the code requires that the lot be 100 feet wide at the building set back line. When you look at the definition of the buildings that let back line the building setback line just says that that is a line parallel to the street that must be a minimum of the Required. The front yard setback is a built-in setback line. We have the building setback line which is a broader category that includes front yard setbacks rear yard setbacks, side yard setbacks, and then in the code for each zone it sets a minimum setback. For rs1 it sets the minimum setback of 25 feet.

Ed Lawler: So, if the town move went with this loading setback line then that would be set a precedent.

Adam Ward: I think the precedent is already set. I think that there are already houses that that don't have their front yard setback at 25 feet. I don't believe that there's anywhere in the code that requires the front set back line to be static at 25 feet.

Ed Lawler: The lot has to be 100 feet.

Adam Ward: At the building setback line but the building setback line has to be a minimum of 25 feet. A front yard setback line that is 30 feet wide meets. If the lot is 100 feet wide at 30 feet back then it meets the minimum setback width at a front yard setback that is at a minimum of 25 feet. It is greater than 25 feet, so it meets the minimum requirement.

Ed Lawler: So, does this then open it up to flag Lots?

Adam Ward: Not necessarily. I mean it is not opening anything up, it's just interpreting the code as it is written. That there's a minimum setback and not a static setback.

Tony DiBernardo: Anybody have anything else?

Casey Varnell: redirect. Let me just try and be clear.

Jay Wheless: Mr. Varnell, we've had a member get up and walk out.

Casey Varnell: okay, I didn't see.

Tony DiBernardo: okay right yes so why don't we take a break. We will take a 10-minute break.

Brief Recess 2:37 p.m.

Reconvened 2:45 p.m.

Tony DiBernardo: it is 2 45 and we're going to reconvene the hearing.

Casey Varnell: Mr. Ward on redirect here. I just wanted to try to see if maybe we can rehabilitate you a little bit on some of the questions short asked. The idea of the rs1 zoning district, the intent is going to be disrupted and or a precedent is going to be set if this as it was referred to it floating setback is created. We know that we don't believe there's a floating setback for the reason you said but are there other restrictions in play that if a more restrictive setback than 25 feet was used. Does that property have other restrictions that is that are going to constrain what you could build on that lot?

Adam Ward: Certainly. You know every lot is going to have a rear yard setback and side yard setbacks and so if a property owner chooses to set a front yard setback further back than 25 feet, they're only making their buildable area smaller. Like and so they're not creating an opportunity to create something that doesn't fit within the scope of the Town, they're just putting restrictions on themselves saying look, now I can only build in my lot in this smaller area than this larger area.

Casey Varnell: Do you think it is it fair to say in your professional opinion that's why usual landowner is not going to want to deviate from them.

Adam Ward: Certainly. I think a usual landowner is going to, if the lot meets, is going to set their front yard setback as close to the front as they can so long as their lot meets the minimum width requirement.

Casey Varnell: Okay and final question. So, we've focused on and a board member was discussing with you the fact that it does, in the code, front yard setback minimum 25 feet. What would your opinion be, professional opinion be if the code read front yard setback 25 feet removing the minimum.

Adam Ward: If you remove the word minimum my professional opinion would be that there was a static front yard setback at 25 feet. That your front yard setback had to be at 25 feet back from the front property line and that's where you'd measure your lot.

Casey Varnell: And this code does not have that, correct?

Adam Ward: It does not.

Casey Varnell: No further questions.

Johnny Hallow: I do not have any other questions.

Tony DiBernardo: Thank you and you can sit down Mr. Ward. Mr. Varnell do you have any further Witnesses?

Casey Varnell: I rest my whole entire case

Tony DiBernardo: At this time Mr. Hollow.

Johnny Hallow: Thank you very much Mr. chair. At this time, I'd like to call Mr. Haskett to the Stand. Mr. Haskett can you please state your full name for the record.

Wes Haskett: Wesley Taylor Haskett.

Johnny Hallow: What's current occupation.

Wes Haskett: Deputy Town manager/ planning director for the Town of Southern Shores.

Johnny Hallow: And about how long have you been in that position.

Wes Haskett: it'll be 13 years in November.

Johnny Hallow: And it's part of that position do you consider these recombination requests on a regular pretty regular basis.

Wes Haskett: um a few a year I wouldn't say it is a regular basis.

Johnny Hallow: You decided to deny the application in this case. Could you explain the reasons you deny the application.

Wes Haskett: oh yes sir, the applicant received a letter from me, a denial letter, basically explaining that the recombination request was being denied due to the fact that it could not satisfy the requirement and based on my interpretation of the town's lot width requirement of 100 feet at the building setback line. The lot width requirement is established in section 30-97. The zoning ordinance requirements are tied into the subdivision ordinance. Even though this is a recombination, it still has to meet the requirements. So, the main reason why their application for this recombination was denied was due to my interpretation that it does not satisfy the town's lot with requirement of 100 feet, which I believe measured from the buildings set back line which is 25 feet from the front property line. It is my belief that the building setback line is a point of measurement. It's a line that establishes the minimum distance. That's where you draw the line. That's where you draw the minimum distance, not beyond 100 feet. Section 202-d3 of the zoning ordinance establishes the front yard setback as minimum 25 feet. Again, you have a line establishing that distance, so it's based on what I believe to be a point of measurement.

Johnny Hallow. okay and while we're on this denial letter, Mr. Bissell suggested earlier that he thought that the language should be changed and the second paragraph that says all the proposed lots should have a minimum width of 100 feet measured at a line that is parallel to and 25 feet from the current right-of-way. He suggested earlier that that sentence should have read that the proposed law should have a minimum width of 100 feet measured at a line that is parallel to and at least 25 feet from the current right-of-way, can you explain why you didn't include that at least language in your letter?

Wes Haskett: The ordinance doesn't say at least.

Johnny Hallow: This 2005 long-range planning committee report, to your knowledge has the town. First of all, is this any kind of official document that is followed. You know, in terms of an actual policy of the town right at the moment or has it been replaced by anything since 2005.

Wes Haskett: The 2005. The current land use plan. The town's land use plan that's in effect was adopted in 2012. It was accepted by the town, and it may have been policy at one point but it's my belief that it's not currently in effect.

Johnny Hallow: There's been a lot of discussion about the interpretation of the ordinance today. When you denied this application did you deny it based on what you thought the intention of the ordinance was, or what you thought the purpose of the ordinance was, or did you deny it based on the actual language of the ordinances.

Wes Haskett: The language found in section 36-202d.

Johnny Hallow: Again, I know we've been over this and it's probably getting a bit repetitive to the board at this point but 36-202D dimensional requirements subsection 2 requires the minimum lot width to be measured at 100 feet in the building set back line. Is that what you understand it to read?

Wes Haskett: Yes sir.

Johnny Hallow: And do you have a copy of the definition of building setback line in front of you?

Wes Haskett: Not a copy but it's in the letter that was included in the denial letter.

Johnny Hallow: Do you have that up there with you?

Wes Haskett: Yes sir.

Johnny Hallow: Would you read the definition of building set back line?

Wes Haskett: yes sir. It is defined as a line parallel to or concentric with the street right of way establishing the minimum allowable distance between such right-of-way and the nearest portion of any building excluding the outermost three feet of any uncovered porches steps gutters and similar fixtures.

Johnny Hallow: Okay and again the 36-202D2 it doesn't say a minimum lot width 100 feet measured at some point beyond the building setback line. It doesn't say that, does it?

Wes Haskett: I believe it says at the building setback line.

Johnny Hallow: Okay and last thing here. There was some discussion earlier about some of the policy purposes of the town and some density discussion and how the recombination, if approved, would meet the spirit. What are your thoughts on the whole density argument earlier? Do you believe there'd be you know more of a density issue if this recombination request were to have been approved?

Wes Haskett: Well not knowing what the septic capacity would be for the structures if either their proposal was approved or another proposal was approved. If we were to assume that it was a 14-person septic capacity, which is the maximum allowable in the town, if you have four houses with 14-person septic capacity that's quite a big difference in density than two lots or three

Johnny Hallow: Have you had any other recombination requests in the past that you've dealt with? Specific to this lot?

Wes Haskett: Yes, specific to this lot. I believe when it was for sale, I was contacted by several different realtors that were invested or representing prospective buyers that were interested in the property. Whenever I was called and asked questions usually the question is, how many lots can I get out of this property? My answer was, I do not know. But I did quote or cite the lot width requirement and the 20,000 square foot lot minimum lot area requirement and when I quoted the requirement, I refer to section 36-202d where it states that the building setback line is 25 feet from the front property line.

Johnny Hallow: So, in other words your conversation with the prospective buyer, the realtor at that time was based on the exact language of the ordinance and the same interpretation that you applied in this case.

Wes Haskett: Yes sir.

Johnny Hallow: Okay, and for other recombination requests that have come up in the past involving these definitions have you always applied the same exact definition the same manner to recombination requests.

Wes Haskett: Yes, and the first I recall was from 2014. There was an inquiry from a local surveyor about a piece of property on Ocean Boulevard and they wanted to create two flags lots.

Casey Varnell: Hearsay.

Tony DiBernardo: Sustained.

Johnny Hallow: Okay, have you applied this exact same language to other recombination in the past. Recombination requests in the past, have you applied the same interpretation to other recombination requests in the past?

Wes Haskett: Yes.

Johnny Hallow: Okay and did those result in denials for the same reason that this application resulted in the denial.

Wes Haskett: Yes.

Johny Hallow: Okay, I don't have any further questions for Mr. Haskett.

Tony DiBernardo: Cross.

Casey Varnell: Just a few just, a few. Are there, outside of the provisions we've been discussing today, are there any other provisions that you can think of that set minimums?

Wes Haskett: There are for yard, it does say minimum. For lot width, it does say minimum. No one else come to mind at the moment.

Casey Varnell: And for those yards and lot width minimum, if an owner came to you and said okay I'm going to you know further constrain myself in this subdivision and make my lots as minimal as possible, I mean could they deviate? I guess is what I'm trying to drive from these minimums trying to figure out why setbacks and the use of the word minimum is different from any other provision in your code and how it's applied.

Wes Haskett: The other one that did come to mind is minimum lot size 20 000 square feet. I don't understand the question though, can you repeat the question?

Casey Varnell: So. No, I'll go forward. In general zoning oftentimes I represent (Kill Devil Hills) so I hear this whole meet or exceed standard a lot. Why is that not applicable to this particular scenario and what I mean by that is this particular proposal must meet and or exceed the regulations um the particular zoning district. That's a pretty general and principal term in Zoning. Why doesn't that apply here? Because if it did, they do exceed the requirements.

Wes Haskett: I think that if it did meet or exceed it would be approved. In my opinion in my interpretation clearly is that it doesn't meet or exceed.

Casey Varnell: But how could you exceed? Wouldn't that only be to be more restrictive? With the setback.

Wes Haskett: In this case it is not met because I believe the building setback line is a unit or point of measurement. It's a line that is established with the front setback at 25 feet.

Casey Varnell: it's two quick ones here just because our views the word believe. As far as the testimony regarding potential density on the lot itself, are you certain as to that can you definitively say that your testimony is that they could produce a more dense development using their proposal?

Wes Haskett: I'm saying, that if you were to go to the maximum of 14 person septic capacity in each home multiply 14x4 versus 14x 2 or 3 and that density number of units per acre of people, per acre is higher.

Casey Varnell: But a plan such as that's not been presented to you yet correct?

Wes Haskett: The exhibits that you provided or that were shown earlier show four potential homes versus two.

Casey Varnell: Right, but you have not reviewed any of the site plans because we don't have a subdivision.

Wes Haskett: No sir, I have not received any building plans for this specific property.

Casey Varnell: And same deal here because of the 2005 land long range planning document, you said you didn't believe. Are you absolutely certain that this long-term plan has been amended and or is no longer in effect.

Wes Haskett: I am not aware of any amendments it was put into effect prior to my employment with the town. I came employed in 2009. Since I've been here myself, the planning board, the Town Council, whenever decisions have been made, I don't recall that document being considered.

Casey Varnell: understood. No further questions.

Tony DiBernardo: Any redirect?

Johnny Hallow: No redirect.

Tony DiBernardo: any question, anybody have a question any questions? I do have one.

Wes Haskett: Yes, sir.

Tony DiBernardo: Since 2009 has this issue ever surfaced before?

Wes Haskett: yes, it has not gotten to this level or risen to this level of an appeal. The earliest one that I recall was from 2014. It was a situation that I was about to explain earlier on Ocean Boulevard. There was a piece of property of the person who was inquiring was asking if they could actually.

Casey Varnell: Objection.

Tony DiBernardo: Sustained. We don't need the detail of that individual. The other follow-up question I have is what happened or what was the effect as a result of those discussions.

Wes Haskett: I issued a advisory interpretation which is an interpretation that cannot be appealed to this individual and they ultimately never pursued any form of recombination or subdivision on the property. There have been others, well you didn't ask that.

Tony DiBernardo: My final question is, an approximation, I'm not going to hold you, just an approximation how many developed lots are in Southern Shores approximately.

Wes Haskett: I can't recall that number, I apologize.

Tony DiBernardo: No that's fine. Of the ones that you're aware of has the 25-foot setback been Or have they used that in a lot that that you've been dealing with?

Wes Haskett: 25-foot front building setback?

Tony DiBernardo: yes.

Wes Haskett: For lots that were established after the adoption of the zoning ordinance which was 1979. The 1979 zoning ordinance established a front setback of 25 feet and so lots prior to that did not have a setback requirement, at least not a town setback requirement but there might have been something from the county.

Tony DiBernardo: Are you aware of any lot that does not utilize a 25 foot setback?

Wes Haskett: I recall a couple on the Avenues that I've seen that were platted before the ordinance was adopted, I recall at least one were a garage encroaches that 25 foot

Tony DiBernardo: But nothing ever not nothing recently basically

Wes Haskett: No sir we would not approve a permit application unless it meets the 25-foot building setback

Tony DiBernardo: Okay I have nothing further

Jay Wheless: Mr Haskett, part of the board's charge is to understand what the intent of the government's body was in adopting this language do you have any direct knowledge did you attend any meetings where this language has been discussed and interpreted or adopted by the governing board

Wes Haskett: No sir

Jay Wheless: Have you had any discussions with any of the board members relative to this specific language that's at issue here

Wes Haskett: Our elected officials?

Jay Wheless: Yes sir

Wes Haskett: No sir

Jay Wheless: Do you know of any ordinance Provisions that help interpret what this language means other than its plain meaning on the face of these Pages

Wes Haskett: No sir, only the definitions in the subdivision and zoning ordinance

Jay Wheless: All of which have been presented here to this nothing else other than the materials that have been presented

Wes Haskett: Correct I've not used any other documents for basing my interpretation on it if that's what you're asking

Jay Wheless: Thank you, based on those questions any redirect any recalls

Tony DiBernardo: okay is there any aggrieved public here, nobody's agreed okay fine everybody loves it yeah everybody loved, okay at this point okay

Carnell Varnell: May I go to the bathroom before closing, I was talking to the clients during that break

Jay Wheless: but real quick let me ask you this for the town I have exhibit one, which is the entire package including the original application dated June 22 2022, various receipts that they've paid their application fees notices proof of delivery certified mail things of that nature, anything else documentary from the town?

Casey Varnell: That's it

Jay Wheless: okay and for the Appellate we've got the appellate package of 11 pages dated July 29, 2022, plaintiff's exhibit number one we have exhibit number two three four five and six being long-range planning document anything oh and then you accepted the number seven what do we call them, the model

Casey Varnell: It works for me sounds good

Jay Wheless: Anything else?

Casey Varnell: That is all.

Jay Wheless: Does anyone have any objections as to the notices that were provided to any of the parties or the adjoining property owners, anything like that? Okay there are certain notices that have to be presented and we just want to make sure everybody thinks that everything was done by the town that should have been done thank you okay

Tony DiBernardo: and five minutes?

Tony DiBernardo: okay we're back the town, you're up, closing argument.

Johny Hallow: Thank you very much, all right ladies and gentlemen of the board thank you all first of all for being here today um we do appreciate the time and your service to the community I want to start by just making clear that our position here is that this board today should affirm the decision to just deny the applicant's recombination requests for Lots 8 through 11 located at 55 Skyline Road because it is our position that these Lots fail to meet the towns design standards for the rs1 residential zoning District as established in the towns zoning ordinance there's a lot of discussion earlier today and there's a lot of moving parts so I want to make one thing really clear and that is that your obligation today is not to decide policy it's not to decide Spirit your obligation is to apply the language of the text as it's written to the facts of this case your decision shouldn't be based on opinions about what the code should read or the desirability of the project or the feasibility of the project, instead this decision should solely be based on whether that applicant has provided substantial competent material evidence the town has misinterpreted the zoning requirements and denied the application in other words it's not our obligation to show that we correctly interpreted and applied the ordinance it's their obligation to show that we incorrectly interpret and applied the ordinance now there's really three code Provisions here that are at issue and when you look at the exact language of the code it becomes pretty clear that Mr. Haskett is correctly applied and interpreted the language to the set of facts now again 3097 of the ordinance requires that all lots of the new subdivisions shall conform to the zoning requirements of the district in which the subdivision is located we've established here that the subdivision would be locating the rs1 single-family residential district, section 36 202 of the zoning ordinance governs the dimensional requirements for that section as you've all heard today, subsection D2 provides the minimum lot width of 100 feet is measured at the building set back line the language of the code doesn't read that it the lot width of 100 feet has to be measured beyond the building set back line near the building set back line at some point past the building set back line provides that it has to be applied at the building setback line now the definition of building setback line is also pretty straightforward it is defined in section 3657 as a line that is parallel or concentric with a street right-of-way establishing the minimum allowable distance between the right-of-way and the nearest portion of any building excluding the outermost three feet of any uncovered porches steps gutters and similar fixtures this definition in our view makes it clear that the building setback line is a line it is not an area or a permissible area it is a line that establishes the minimum distance in other words as Mr. Haskett pointed out earlier we believe that this building's setback line is a unit of measurement to determine the dimensional requirements on the Lots now it's true that a building can be placed beyond a minimum setback line but that's not what's at issue here the issue here is that

the building setback line that is the place where the building setback line is located on the map is used as a point of measurement to determine whether the Lots meet the minimum width requirement of 100 feet pursuant to section 36-202 D2 again this this requirement requires all the lots to be 100 feet measured at the building setback line it doesn't provide anything about the measurement taking place beyond setback Line near the setback line but if you look at the plat it's pretty clear that Lots 9 and 10 are not 100 feet wide measured at the building set back line which is 25 feet and for those reasons these Lots violate section 36 202 D2 so if the board were to approve the applicant's request here the board would be approving an invalid recombination request under the actual language of the ordinance now there's been some talk about some of the prior lots that have been approved that may have setback lines that were measured Beyond 25 feet it's also been established that most of those lots we don't know the exact number or whether it was all the Lots were approved before the town adopted this ordinance at issue now Mr. Haskett has provided that during his tenure here at the town he has not approved any recombination requests that did not meet the dimensional zoning requirements as he currently interprets them he's used the same interpretation in the past to give advisory opinions he used the same interpretation in this case to give an advisory opinion to the applicant along with that the Advisory opinion Mr. Haskett also suggested to The applicant that he may have better luck looking for a variance uh however the applicant has decided not to do that and instead he has moved forward with the appeal it is our position that the more appropriate remedy in this case would be for the applicant to look for variants or to possibly amend the language of the text to fit his needs or to make a motion or to submit an application to amend the language of the text because as the text is written and the way it reads it's pretty clear at this point now I understand that they want this text to they think this text may you know allow them to build their Lots if it's interpreted to where that medium set or that minimum set back line can be measured anywhere past 25 feet on the Lots but that's just never happened and there's no reason to start doing that today we've got the precedent in place on this you know even assuming that some of those lots in the past were approved with this current ordinance in place which we have no evidence of at this point there are a couple of court of appeals decisions out there that have that have shown that boards are not required to follow what they have done in Prior cases actually in Hardin versus City of Raleigh this is a 1926 case from the Supreme Court of North Carolina that Court recognized that the board's exercise of its quasi-judicial function does not subject to the board to the objection the board has dealt with similar cases in the past without regard to uniformity another case from 1999 out of our court of appeals Through the Looking Glass Inc versus zoning Board of adjustments for the city of Charlotte in that case the court of appeals declared that the board of adjustment was quote not required to Grant a petition or a variance merely because it granted another petition or variance for the same type of property in the same distance I know we're not dealing with the variance today but the same logic would apply because like this hearing today a variance is a quasi-judicial hearing so to kind of sum things up again your obligation today is not to decide policy it's not to decide what the ordinance should read or anything like that the obligation is to apply the language of the ordinance as it's written to the facts of this case this decision should be made on any kind of opinions about you know what this policy should be or the desirability of the project or the feasibility of moving the Lots back instead this decision should solely be based on whether applicants provided substantial competent material evidence the town has

misinterpreted the zoning requirements and deny the application we don't believe that they've put forth such evidence today and again it's not our burden to show that we interpreted this correctly it's their burden to show that we interpret it incorrectly um it's our view they haven't provided substantial competent material evidence that the staff misinterpreted this definition of building setback line and wrongfully denied the application as mentioned earlier the town staff appropriately used the building setback line as a unit of measurement to determine whether the applicant's Lots met the width requirement of 100 feet at set forth and 36 202 D2 and has demonstrated it's clear that the minimum building line or the front yard setback on the lot shown is on the map anywhere from 46.2 to 47 feet instead of 25 feet but even if you move that line up to 25 feet it's clear that the two lots in the middle at no point are they going to measure 100 feet in width um so for those reasons we would ask that this board uphold the decision to deny the application thank you all for your time today.

Casey Varnell: Chairman members of the board first off thank you guys it's been a long hearing I've been through quite a few of these this is one of the longer ones so I appreciate you guys indulging us and listening to these obviously complex issues I do want to know though that what we're talking about here is an interpretation I think that's important Mr Haskett I've dealt with Mr Haskett he's a fantastic planner has nothing to do with his ability to operate his planning director but he has testified to the fact that he's got no direct knowledge whatsoever of what the legislators meaning the the town councils of the past intended when these ordinances that we've been discussing were adopted and as Mr. Wheless put in his report you do intense absolutely critical to these particular interpretations or cases involving interpretation you must decipher an intent in order to interpret as far as the ordinances in play not to be redundant but since it's on my paper 30-97 its true it states that you know in subdivisions all dimensional requirements of particular zoning District must be met no dispute there 36 202 D2 establishes that the minimum lot width must be a hundred feet measured at the building setback line you go over to the definition of building setback line, and we find that this is a line parallel or concentric To the street right-of-way which establishes the minimum allowable distance between such right-of-way and the nearest portion of any building then of course we've got 36 202 D3 which states that the front yard setback is a minimum of 25 feet now what I really want you guys to consider is this I asked my witness earlier would this be a different situation would you guys consider this a different code if it read front yard setback 25 feet or is that the same thing as a code that reads as this does front yard setback minimum of 25 feet Mr. Wheless pointed out something in his report which I liked which is that dictionaries do come in handy in cases like this the word minimum has a meaning it means least if you have a least you must have most well we don't have anything in this code we have nothing which establishes that there's a maximum setback that this is as far as you can set yourself back we have something that says this is the least amount of setback that you must be set back this far um again without remote without some language that requires a static 25-yard setback which in our opinion I mean perhaps the only way to do that is to remove the word minimum then we're stuck with a scenario where we've got an ambiguous cut and we've got in our opinion we've got an interpretation that says that any exempt subdivision lot for building purposes must be set back at least 25 feet because that is the definition of minimum again if there's a minimum there's a least there must be a most so we had an expert today testify going to substantial and

competent evidence a man who's been in business here on the Outer Banks and working with Outer Banks towns since 1984 1985 he's never heard of a scenario where a town utilizes the word minimum but then doesn't allow just because the very nature of the word doesn't allow an owner to be more restricted than what the least is so we quite honestly I feel that's something that's very prevailing in this particular matter and again as far as all of the code requirements that we've been discussing has been testified to by Mr. Bissell you take our interpretation and there's also no dispute that our Lots would meet and comply with the code if you take our interpretation I see two very critical components um that I'm asking you guys to consider when it comes to your analysis of this whole interpretation issue one is again there's no explicit Authority in the code for the town to require a static or a set setback line of 25 feet our position is pretty clear we think I mean at best the code's ambiguous as I've said and without removal of that word minimum you have subjected yourself to okay well again if there's a minimum then could there be a maximum should there be a maximum that's what ambiguity is um and pursuant of North Carolina law Mr. Wheless said this as well ambiguities if you determine one to exist then you must rule in in the most in the least restrictive manner as far as ruling or in other words you must rule in favor of the landowner and we believe certainly that that ambiguity exists and I mean obviously if you get outside what the code gives you the authority to do now you're committing Ultra Berry's actions which can be brought up on appeal and which attorney's fees now are allowed pursuing the statute for homeowners in these particular cases who Prevail and what I'm asking you guys to realize is that there is ambiguity here because again our reading of this code if you have the word minimum and I know I keep saying that but it's also splattered all over the code if you have that word minimum then you subjected yourself to interpretation to ambiguity and we believe and as Mr. Bissell testified to if a homeowner wants to be more restrictive and they're all it says is that there's a minimum as long as he's not exceeding that matter as long as he's not encroaching on that minimum then the homeowner's done his job in submitting his plan um because again there's no language regarding a requirement of something static and the second part that I focus on as well would be the definition of building setback line this does apply all the way across the rs1 district. I mean it applies across the town. So, you know you guys can it's not in evidence today, but I'll make the point and I'm sure you guys are aware of it there are scenarios where plaques and things of that nature even in Southern Shores after 1979 where plats created more than 25-yard front setbacks. In other words, the plot set itself there's a hundred yards front yard setback those lots exist. Why? Because the word minimum you're not encroaching on that 25 feet that's why these covenants and that's why these setbacks can exist. So again, we are just plain and simple don't feel as though that to take an interpretation that use of this word minimum means a must it just doesn't jive it doesn't jive with the dictionary. I've searched Merriam-Webster, Oxford, Black's Law, you name it and what you get is establish means to bring about, okay. To bring about. Well, that's what my clients have done they've brought about a lot or four lots that do not encroach or meet that minimum setback. Why, because they're more than 25 feet off of the right-of-way. Again, there's of course been a testimony as to how this better complies with the spirit and intent of the ordinance. Miss Collins mentioned or had my witness read the synopsis uh within the long-range planning, no mini hotels. I think any of us locals we understand that more than more than most. Well, we've got testimony here today from my clients who state that from a financial perspective you do what the town's asking you can have

a bigger building footprint that's what you're going to get, the less loss the bigger the house. That's all there is to it, so again just from a principal perspective but also from complying with the intent of this ordinance you allow these four particular lots which by the way are peculiar why because of this excess acreage. The only reason my clients are even able to configure their lots in such a way that we believe they comply with the ordinance is because they have all this excess land abutting to the west or immediately adjacent to the four lots that were part of the original subdivision. Well, we're trying to make the best use of that land as far as we're concerned but the best use for the town. As we've testified and as you've heard the testimony concerning density you've heard the testimony concerning saving the topography, you've heard the testimony concerning keeping the orderly neighborhood in play. Well, I mean if that's what the big home using these two lots it's what Southern Shores desires and that's what they feel more complies with the intent, than okay. But four lots, which again comply as we feel with the ordinance, that are going to provide a smaller building footprint, that are not going to allow for the larger homes that we just we feel that is we feel that's more accurate and more in line with the spirit and intent of the particular ordinance. So, I mean I suppose what I'd what I'd leave you with is that we have provided substantial and competent testimony. We have had two experts one in the field of civil engineering who's dealt with local governments forever, one in the field of architecture who's been able to talk about the possible uses of the land using our subdivision proposal and whether you go or buy into the interpretation that we're making which is that you've got an ambiguous code here. North Carolina law says in the event of ambiguity you must rule in favor of the landowner or the least restrictive use of the land the least restraint the decision that affects the least restraint on land. Or you say that it doesn't comply with the spirit and intent of Southern Shores ordinance concerning the rs-1 district, either of those arguments we're fine with if you rule in our favor of course. That's again based on the evidence we presented exactly what we're asking you guys to do. So, I'll leave you with that and just again ask you to really consider whether you think this code is different if you take out the word minimum. Because if the code's different, if you remove the word minimum, then minimum has a meaning, and you must apply some form of interpretation and definition to that meeting. Thank you very much.

Jay Wheless: Mr. Chairman that concludes the hearing. Board members you are to make one of the following decisions:

- affirm in whole or in part the denial of the recombination
- reverse in whole or part the denial of the recombination
- or modify the denial of the recombination

Each decision requires a three-fifths vote, not a four-fifth like a variance, a simple majority of hand carries the day. The chair will now guide you through your discussions and decisions.

Tony DiBernardo: Okay and what I would like to do is hear from each member and their thoughts and arguments. Yay or nay, just what your thoughts are. We will start down this end.

Dan Fink: I will keep my thoughts to a minimum. A minimum is a minimum. You can exceed.

Ed Lawler: I just think the town has made the correct move and the applicant should have asked for clarification before going through all this process.

Linda Burek: I believe the town evaluations, so I believe the town is correct.

Tony DiBernardo: Linda?

Jan Collins: I agree with that the interpretation, and it should have been pursued before.

Tony DiBernardo: Okay my opinion, or not opinion, my version is I had a lot of trouble with this. Because you have the spirit, and you have the letter. The spirit of the town has always been how the town interpreted the law, the ordinance, not the law. The ordinance, the letter of it I have to go by what is written and to me what is written, and I think that valid point is minimum. I had a hard time. I've researched this for a couple days. Using the word minimum really causes a problem to me because it's subject to interpretation. What is the minimum? I don't know what the minimum is. I think a point that was a good point that was brought up is the height aspect, the minimum is eight feet but if somebody says 10 feet nobody's going to say, "can't go 10 feet." You know it's actually conducive and better for the thing, the building. I also believe that this is using this is with the interpretation of the law. It's kind of getting around things basically, I think. Everybody knows here I believe that 25 feet is what has been used in this town forever, that I know of. That's why I asked Mr. Haskett why or are there any places that do not use 25 feet and he couldn't come up with any. Everybody uses it 25 feet. However, the word minimum causes problems and I think minimums when not only on the front setback, I think when the on all of the setbacks using the word minimum is subject to interpretation. Because we have to go with if there's ambiguity we have to go with the landowner I probably and even though the spirit I think is being twisted of the town of Southern Shores by going over 25 I've always said you have to go by what the regulation is unless there is a really strong argument that they're against it and so anyway that's my opinion now we'll have to vote okay so what I need is those that wish to affirm the town please vote and

Jay Wheless: let's do this if there is a motion presented to you to affirm or deny then that motion will be before you if it gains a second and then you discuss it.

Tony DiBernardo: okay do I have a motion to affirm the town?

Ed Lawler: certainly.

Tony DiBernardo: Do I have a second of that motion?

Jan Collins: second.

Jay Wheless: Mr. chairman there is a main motion before you to affirm the denial of the recombination it is open for discussion

Tony DiBernardo: Yes, anybody wish to discuss, if there's no discussion to the motion, we'll have a vote at this time all those in favor to affirm the town please say yay one two three we have three so the motion is carried and it is Affirmed part of me, Nays do we have any nays, two okay at this point

3: 35. we are coming

Dan Fink: Can I make a comment?

Tony DiBernardo: yes if you wish it's already voted on now at this point.

Dan Fink: I understand. I didn't want to interrupt what it actually does and there's experts here that I would defer to. When you make it one measurement and one measurement only, I think based on the geometry of properties, in lots, it constrains solutions that would meet the spirit of the town.

Audience member: that's a good argument I appreciate it.

Dan Fink: it is.

Jay Wheless: Mr. Chairman each of your decisions must be supported by facts findings of fact I don't think that there's any better factual recitation of supporting that motion than Mr. Hallows argument on stand so I know that those comments will be drafted and does the board choose to adopt his argument as the basis of following which this decision is made

Tony DiBernardo: yes

Jay Wheless: thank you

Tony DiBernardo: And I believe that concludes the hearing do I have a motion to close the hearing, oh please somebody say yes, you have a motion?

Jan Collins: Yes

Tony DiBernardo: do I have a second

Dan Fink: Second

Jay Wheless: all right all in favor of turning back to the agenda before you still have a couple of items on the agenda say aye, no say nay, the ayes have it the chairman finish the hearing and you're back on the agenda

Tony DiBernardo: Yes, uh public comments do we have any, planning board member you have a comment you come public

Robert McClendon: I'm sorry I'd just like to refer you to exhibit E in the packet that you received before there were several of you that asked about whether or not this 25-foot setback requiring 100 feet width was heavily enforced in the town and anywhere that there are curved streets and there are cul-de-sacs there are not there is not 25 feet back there's not a 100 foot width at 25 feet and exhibit e shows you how prevalent it is in the town

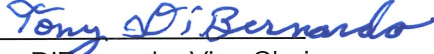
Tony DiBernardo: thank you, any other public comments? Planning Board member comments? We've already heard does Mr. Lawler. Linda? No. Okay any announcements? I do not have any announcements okay.

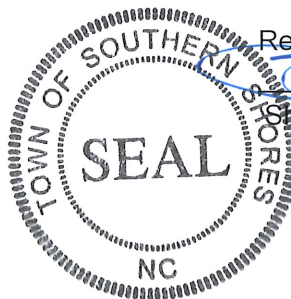
Wes Haskett: Well last night Town Council approved uh PSP 2201 the subdivision request at 267 Hillcrest Drive they also unanimously approved zta-2108 and zta-2210 all three as recommended by the board the next planning board meeting will be October 17th the agenda may contain the ZTA submitted, Mr. Varnell on behalf of Miss Pledger and also a discussion of commercial design standards and lastly we are looking into scheduling a joint meeting with the Town Council and the planning board on November 15th at 9am I'll be in touch with you all to see if that date and time works for you all and this would be in regards to the land use Plan update it'll be a joint meeting that's all I have Mr. chairman

Tony DiBernardo: Okay anybody have any closing okay.

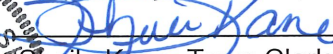
Motion to adjourn the meeting made by my motion Planning Board Member Lawler, Seconded by Chairman Tony DiBernardo. Motion passed unanimously. The time was 3:41 p.m.

ATTEST:


Tony DiBernardo, Vice Chairperson



Respectfully submitted,


Sheila Kane, Town Clerk