

**TOWN OF HARRISBURG, NORTH CAROLINA
BOARD of ADJUSTMENT MEETING
TUESDAY, SEPTEMBER 15, 2015
6:00 PM**

MINUTES

**1.
CALL TO ORDER**

Lloyd Quay called the meeting to order.

PRESENT: Lloyd Quay, John Overcash, Mike Hamamgian, Andy Rathke, Kristi Bost (alternate)

ABSENT: Thelma Thorne-Chapman, Scott Noel (alternate)

**2.
CONSENT AGENDA**

- Board of Adjustment meeting minutes from July 21, 2015.
- Board of Adjustment meeting minutes from August 18, 2015.

MOTION:

Andy Rathke made a motion to approve the Consent Agenda with a second from John Overcash. **The motion passed 5-0.**

**3A.
OLD BUSINESS**

None.

**4A.
NEW BUSINESS**

H2015-01 (A) – M/I Homes Appeal of Interpretation. All those speaking for or against this case were sworn in by the Clerk. Josh Watkins, Planning Director presented the background information.

Josh Watkins

As you guys are aware, we have been dealing with this particular case for a number of months trying to figure out the best route to take in order to get this case before the Board of Adjustment. We have previously, and we still have a variance case which has been deferred until October's Board of Adjustment meeting pending the outcome of this case. Essentially what has happened is the Blume subdivision was approved for a conditional rezoning and later a preliminary plat for a single-family subdivision. As part of that process, when a single-family subdivision comes in to the Town of Harrisburg, we require that curb and gutter be placed not only on the roads internally within the subdivision, but we require that curb and gutter be placed on the frontage. So where the property fronts along roads; in this case Rocky River Road and Hickory Ridge Road. What has happened in this case is during the construction plan review, our engineer had made us aware that there was not being shown on the plan any sort of pedestrian connectivity between the first phase of Blume that we refer to as Blume North; everything north of Reedy Creek, and the future phases of Blume which we refer to as Blume South. Again the line that sort of delineates those two areas is Reedy Creek. We talked with Merrick who was drawing the plans for this particular development and there was some question as to whether or not the requirement in the UDO actually requires sidewalk to be extended along this particular route. What it boils

down to is in other developments that do not have streams the developer is required to put sidewalk on the ground for the entirety of their frontage. So wherever their property fronts on the road, they have to install it. The key difference here that we've not run into before is the fact that we have a water body, Reedy Creek that bisects the frontage. It is staff's interpretation of the ordinance that the fact that the stream is there does not negate the need for the pedestrian connectivity. If the stream was not there, the developer would have put that sidewalk right along that frontage and there would be no question. The fact that there is a stream that the developer owns on both sides of has brought this issue to us; which, basically, staff has never run into this issue before. Staff believes that the ordinance; our interpretation of the ordinance is that the requirement is there whether there is a stream there, whether it's wetlands, whatever that hazard is; the requirement is there to put the pedestrian connectivity there. So the applicant submitted a letter asking for our interpretation of that particular ordinance, which you will see in this application packet, and staff has replied to their request for an interpretation. That letter is what is essentially being appealed. So the answer I gave them, which you will see in this packet, is what they are appealing tonight. Again, staff's opinion is; staff's interpretation is that the requirement is to put that sidewalk in by whatever means are necessary to do that to get that pedestrian connectivity, which is the overall goal. If that stream was not there we would not be having this discussion. The stream is there so here we are tonight trying to figure out exactly how we handle it. That is essentially the background on this. With that, if you guys have any questions, otherwise I'll turn it over to the applicant.

Roy Michaux (attorney with K & L Gates)

I've got some if that would be appropriate.

Rich Koch (Town's attorney)

It would probably be best procedurally for Mr. Michaux to ask Josh some questions and then after he has if any members of the Board of Adjustment have questions; that way you will have heard the full measure of his testimony of what he gave directly and also what he may give as response to Mr. Michaux's questions.

Roy Michaux

I think that would probably speed it up for the Board. Mr. Watkins, when did the UDO as it exists today become effective?

Josh Watkins

As it exists today?

Roy Michaux

Yes. The latest revisions I believe were in 2007 but I could be wrong.

Josh Watkins

We revised the UDO last night.

Roy Michaux

Last night? Well, with regard to, let me show you Colin's letter, which is Exhibit 2 that I gave you all. If you will refer to Exhibit 2. Colin's letter, have you got it there? August 12, 2015? He recites in that letter part of Appendix A to the UDO, Section C.4.2.9 Sidewalks. Did you look at that to see if his quote of the ordinance was accurate?

Josh Watkins

That is an accurate quote of the ordinance.

Roy Michaux

So we are all on the same page.

Josh Watkins

Correct.

Roy Michaux

This language that is on the first page of the letter is the correct pertinent language that deals with what we are talking about tonight.

Josh Watkins

Correct.

Roy Michaux

Okay, and do you know when that particular language became effective?

Josh Watkins

That particular language has not been amended to my knowledge since the adoption of the UDO in 2004.

Roy Michaux

In 2004? Okay. So all of this language that Colin has quoted in the letter was in effect when the site specific plan of this subdivision was approved in October of 2014, wasn't it?

Josh Watkins

Correct.

Roy Michaux

Okay. Now let me show you; let me hand you the specific plan. I'll ask you if that is in fact; and you all have that as Exhibit 1; the plan that was approved by the Town of Harrisburg; the final approval in October 2014?

Josh Watkins

Yes.

Roy Michaux

If you look at Exhibit 1 there's an approved stamp in the lower left hand corner. Now, Mr. Watkins, this plan shows a sidewalk along Hickory Ridge Road doesn't it?

Josh Watkins

Yes.

Roy Michaux

It also shows that when it gets to the bridge that it stops at the bridge on each side, doesn't it? The sidewalk goes down to the bridge and then it stops on that plan doesn't it? The plan was that the connectivity would use the bridge.

Josh Watkins

Correct.

Roy Michaux

And not a sidewalk. Not a pedestrian bridge.

Josh Watkins

Correct.

Roy Michaux

I also understand that the DOT had contacted the Town of Harrisburg when it revised the bridge to ask if the Town wanted to make it wide enough to include a pedestrian lane. Is that true?

Josh Watkins

What the DOT had contacted the Town to find out was if this particular bridge was located on our pedestrian and bicycle plan. We said no it was not.

Roy Michaux

Okay. And that was in 2004? Excuse me, that was sometime prior to the approval of this plan.

Josh Watkins

Correct.

Roy Michaux

Do you know how long prior?

Josh Watkins

I don't. I've got email copies of communications with those folks but I don't know exactly how long it was.

Roy Michaux

Do you know if it would have been a couple of years or five years?

Josh Watkins

One of the things when this process was going forward; we had actually alerted the engineers who were working on this plan from Merrick that NCDOT was willing to update this bridge and it might be in their best interest to work with them on a sidewalk extension across that bridge.

Roy Michaux

If the Town had participated in that the Town would have paid 70% of the cost of the widening?

Josh Watkins

It depends. Sometimes it's 70, sometimes it's 80. It just depends on the process.

Roy Michaux

But the Town rejected that. For whatever reason. It wasn't needed or...

Josh Watkins

Correct.

Roy Michaux

And this plan shows the sidewalk running down Hickory Ridge Road which is contemplated in the UDO isn't it? In the language that Colin had recited.

Josh Watkins

Correct.

Roy Michaux

At least you could say it is. It says that sidewalks shall be provided for safe movement of pedestrians separate from the movement of vehicular traffic through residential areas. That's the internal roads.

Josh Watkins

Correct.

Roy Michaux

As well as to commercial, industrial and public places. Sidewalks shall be constructed on both sides of all new streets in a subdivision. Again that's the internal streets.

Josh Watkins

Right.

Roy Michaux

And along any street that provides access to the subdivision. Now in this case I take it that the street that provides access is Hickory Ridge Road.

Josh Watkins

Correct.

Roy Michaux

Well, how far down Hickory Ridge Road are you required to build a sidewalk? I mean is it 2 miles, 5 miles, or 100 feet?

Josh Watkins

The language has never been specific. It says any road that provides access. Well, all roads connect together so that could be blown out of (?) so that's where our interpretation of stopping it at your property lines.

Roy Michaux

But you would agree that's not entirely clear.

Josh Watkins

We made the interpretation.

Roy Michaux

Now, that's why we're here today. Now the other thing that I want to point out to you; I want you to verify, is that this plan actually deals with sidewalks, doesn't it?

Josh Watkins

It does.

Roy Michaux

It has a section under the conditions; the general notes, and general notes are conditions of approval aren't they?

Josh Watkins

Yes.

Roy Michaux

The builder has got to adhere to in order to get the approval that he's asked for.

Josh Watkins

Correct.

Roy Michaux

And he has to agree to those. And in this it specifically deals with sidewalks doesn't it?

Josh Watkins

Correct.

Roy Michaux

And it says it has to be 3000PSI and there are 2 other provisions under the section that deals with sidewalks, and I believe that's; and I had my eyes dilated this afternoon. What is it (?) do you know?

UNKNOWN

I don't have the plan in front of me. I don't know. One of them had to do with handicap ramps.

Josh Watkins

There's wheelchair ramps, and then elevation of the sidewalk shall be related to the elevation of the adjacent roadway.

Roy Michaux

It's sections 19, 20, and 21 if you all can read that. I know it's small and I apologize for that and that's why we brought the bigger plan. So this plan specifically shows the interpretation of the ordinance; at least an interpretation.

Josh Watkins

Correct.

Roy Michaux

And it also specifically deals with sidewalks. But it doesn't show any sort of a pedestrian sidewalk over the creek does it?

Josh Watkins

It doesn't.

Roy Michaux

It shows it goes to the bridge and stops. And that was approved wasn't it?

Josh Watkins

It was.

Roy Michaux

Okay, and then under Section 4.2.9 of Sidewalks is says that a sidewalk has to be constructed on an adequately compacted and properly graded base.

Josh Watkins

Correct.

Roy Michaux

Now, the question that you were asked to determine is whether or not a sidewalk had to be built across the creek wasn't it?

Josh Watkins
Correct.

Roy Michaux
And there's nothing in this plan that calls for that is there? It goes to the bridge and stops.

Josh Watkins
It does go to the bridge and stops.

Roy Michaux
Okay. And so if the sidewalk is not required under the UDO there would not be anything to ask for a variance about would it?

Josh Watkins
Correct.

Roy Michaux
There wouldn't be anything to ask for a variance. We have to ask for an interpretation because it's not clear. You would agree with that wouldn't you?

Josh Watkins
Sure.

Roy Michaux
And this ordinance was in effect at the time this plan was adopted.

Josh Watkins
Yes.

Roy Michaux
As a result of your interpretation; well let me back up; did you all determine with the Department of Transportation that they will not allow the sidewalk to go to the bridge?

Josh Watkins
Yes.

Roy Michaux
Because it's not wide enough is it?

Josh Watkins
Because there is no pedestrian access on that bridge and DOT does not want to assume any liability by leading pedestrians to that bridge.

Roy Michaux
Okay. But it will allow the sidewalk to stop about 50 feet before it gets to the bridge won't it?

Josh Watkins

Correct.

Roy Michaux

And that's not; there's no issue about that.

Josh Watkins

No. DOT would prefer it to stop.

Roy Michaux

So they want it to stop; although at one time the Town could have widened the bridge to include a pedestrian lane, couldn't it?

Josh Watkins

Yes.

Roy Michaux

But now the Town is requiring M/I Homes to do that isn't it?

Josh Watkins

Correct.

Roy Michaux

And do you have any idea of the cost of that?

Josh Watkins

As far as the cost of....

Roy Michaux

Of building a pedestrian bridge over Reedy Creek.

Josh Watkins

We had talked about; batted some numbers around with Joel from Merrick a ballpark of around a quarter of a million dollars.

Roy Michaux

Yes. Alright, there's nothing in the UDO other than the provisions that we've read that relates to sidewalks is there? About the issue we're talking about. I realize there are other provisions but none of them relate to what we are dealing with tonight.

Josh Watkins

Correct.

Roy Michaux

Okay. Is this the first time that the Town has been asked to give its interpretation of the UDO as it relates to this issue?

Josh Watkins

Yes.

Roy Michaux

Now Colin's letter that the members of the Board have as Exhibit 2 has lots of photographs of other subdivisions where sidewalks have stopped before they get to some point don't they?

Josh Watkins

Correct.

Roy Michaux

And do you know if all of those subdivisions that were in those pictures were before 2004?

Josh Watkins

All of them were not. In fact in my letter...

Roy Michaux

That's Exhibit 3 to the members of the Board. Look at your letter, Exhibit 3. You indicated that Bridge Pointe, Brookedale Commons, Blume and Hawthorne were built under the UDO.

Josh Watkins

Yes.

Roy Michaux

Is that right?

Josh Watkins

Correct.

Roy Michaux

But none of those have a sidewalk over a bridge.

Josh Watkins

Blume being the only one.

Roy Michaux

Okay. How did you determine that the others; Abbington, Kensington Forest, Heatherstone and Magnolia Springs were built prior to; was it 2004 that the ordinance was adopted?

Josh Watkins

Correct.

Roy Michaux

Is that the date on which the maps were recorded?

Josh Watkins

That's the date that the UDO and the zoning map were adopted.

Roy Michaux

Okay so those were adopted prior to...because one of those even shows an internal street where the sidewalk stops on both sides before it gets to a creek doesn't it?

Josh Watkins

Yes.

Roy Michaux

But that was before 2004. Is that accurate?

Josh Watkins

Yes sir.

Roy Michaux

Okay, and you say that while a sidewalk could not be constructed to the letter of C.4.2.9 staff is of the opinion that the intent of the ordinance is to continue pedestrian connectivity.

Josh Watkins

Right.

Roy Michaux

But there's nothing in the approved conditions to this rezoning and this plan that says that, is there?

Josh Watkins

Correct.

Roy Michaux

Okay. And this plan with these conditions are really the roadmap that a developer has to go by as to what he's committing to in order to build what's shown on the map. Isn't that right?

Josh Watkins

Correct.

Roy Michaux

Okay. I don't have any further questions.

Lloyd Quay

Does anyone from the Board have any questions for Josh?

John Overcash

Josh, is the two new developments; the extension of one and the new one we just approved on Rocky River; it comes down to the creek and both of those stop. What is the plan to get across that body of water?

Josh Watkins

You're speaking of Bridge Pointe and Churchill Farms?

John Overcash

Right.

Josh Watkins

And that's actually an example that's shown in the pictures here. The development to the north, Bridge Pointe, they own to the north side of the stream. Churchill Farms owns to the south side. We are actually talking to NCDOT right now about the replacement of that bridge and the inclusion of a pedestrian sidewalk that will connect those two pieces of sidewalk on the north and south of that stream. We had a meeting on Thursday with DOT.

Lloyd Quay

The bridge is due for replacement?

Roy Michaux

The DOT will pay for that?

Josh Watkins

Yes.

Lloyd Quay

Have you seen any plans for a pedestrian bridge; a free-standing one? Has one ever been proposed?

Josh Watkins

Not in Harrisburg.

Lloyd Quay

From the Blume developers?

Josh Watkins

No.

Lloyd Quay

So you've never even seen a plan?

Josh Watkins

No.

Lloyd Quay

So nothing can be done regarding the bridge that exists there as far as putting anything on it.

Josh Watkins

It will be many years before NCDOT replaces that one.

Lloyd Quay

Yeah. But as far as even a trial submission or a rough sketch or anything like that as to where it might be located in conjunction with the sidewalk; have you seen any plans or a suggestion of a plan?

Josh Watkins

No.

Roy Michaux

If I could ask one more question; is that; do any of you all have any more questions?

Lloyd Quay

Sir, I've got the meeting here, please respect me.

Roy Michaux

Yes.

Lloyd Quay

Okay who do you want to ask a question of?

Roy Michaux
Mr. Watkins.

Lloyd Quay
Proceed.

Roy Michaux
If that's okay. I told you I was through.

Lloyd Quay
Please proceed.

Roy Michaux
At the time Exhibit 1 was approved the Town knew that the bridge was not wide enough for pedestrian traffic didn't it?

Josh Watkins
No it was not. When this plat was originally approved the DOT had not yet begun the process of widening that bridge, and replacing that bridge.

Roy Michaux
But they did have the plans didn't they?

Josh Watkins
They were in the process of finalizing those plans.

Roy Michaux
Do you know whether it was too late to change them?

Josh Watkins
What I've heard from both Merrick and the NCDOT is that Merrick did reach out to the NCDOT and it was too late. They were too far along in the design process to change the plan.

Roy Michaux
Okay. I'm sorry that was my last question.

Lloyd Quay
Thank you sir. Anyone from the Board have any more for Josh? No? Okay. Thank you Josh. Alright next is...

Roy Michaux
I'd like to ask Joel Madden; he's with Merrick, and ask him a couple of questions.

Lloyd Quay
Well if he'll come up and state his name.

Roy Michaux
He may need that plan.

Joel Madden
It's over here.

Roy Michaux

Okay.

Joel Madden

Joel Madden with Merrick and Company; address 10614 Glen Eden Court, Mint Hill, NC 28227.

Lloyd Quay

Okay, thank you. Go ahead.

Roy Michaux

Joel, what is your capacity with Merrick?

Joel Madden

Civil Engineering department manager.

Roy Michaux

Are you a civil engineer?

Joel Madden

I am.

Roy Michaux

Are you licensed in North Carolina?

Joel Madden

I am.

Roy Michaux

When did you come with Merrick?

Joel Madden

March of 14.

Roy Michaux

Okay, so you came before this final plan, Exhibit I, was approved but you were not here during all the work that led up to it. Is that correct?

Joel Madden

Correct. I wasn't here during the original rezoning, but then there was a revision of the preliminary plat in October of 14 and I was here for that.

Roy Michaux

Okay. And that; do you recall what those revisions related to?

Joel Madden

So, the portion of the property we call Blume South, which is south of the creek.

Roy Michaux

And did that deal with the size of lots?

Joel Madden

Yes. The road network stayed essentially the same and we were just kind of moving; didn't change the lot count but moved some lot sizes; some smaller lots from here to larger lots or vice versa.

Roy Michaux

Okay. Tell the Board what the impact on M/I Homes would be if it had to build a pedestrian sidewalk over this creek.

Joel Madden

Well, I mean it's a large financial impact. Obviously in relation to or in just opposed to a concrete sidewalk that is described in the ordinance which is somewhere in the ballpark of \$4.00 a square foot; we measured that off and it's about; if it was on dry ground it would be about \$10,000 worth of sidewalk. As far as pedestrian bridge, as Josh mentioned, we kind of speculated in an earlier meeting, including permitting, my guess at that time was about a quarter of a million dollars. A piece of that that would take place or that I could speak directly for is things like permitting through FEMA to do a (?) and then after the bridge is constructed to come back with a (?) sort of a conditional letter of (?). So, the permitting fees, the engineering modeling, the survey that would be required just for the engineering modeling to get FEMA to sign off on a bridge like this would be about \$40,000 - \$50,000 including engineering fees, surveying fees, FEMA permitting fees, etc. and possibly some wetland permitting fees in there as well. As far as actual construction costs of the bridge, my client reached out just today to one of the contractors they use a good bit and got some pricing. The pricing they got back was closer to half a million dollars for a bridge like this to span what we would need to span for Reedy Creek, and just for frame of reference the top of bank to top of bank distance for Reedy Creek out there is about 50 feet at kind of the narrowest point just off the face of the existing DOT bridge so if you came out of that creek bank to dig a footing and have enough room to support about 15 foot outside of top of bank it needs to (?) now you've got a clear span of bridge about 80 feet and then about 35 additional feet on each side to just ramp back down to existing ground so you can take it to a (?) type sidewalk or path. So overall you're looking at about a 150 foot span for a pedestrian bridge across Reedy Creek.

Roy Michaux

From your review of the UDO; specifically the section we're talking about and quoted earlier, did you ever have any idea that there would be a requirement to build a pedestrian bridge over Reedy Creek?

Joel Madden

No.

Roy Michaux

And no such bridge was ever shown was it?

Joel Madden

No.

Roy Michaux

Okay, no further questions.

Lloyd Quay

Okay, thank you. Anybody on the Board have a question for Mr. Madden?

Andy Rathke

When you look at these drawings; when you go in and you design stuff in neighborhoods and stuff like that; this can't be the first time that you've encountered a creek crossing like this in all of the development world I'm sure.

Joel Madden

I mean, there's 2 creek crossings within the development, but those are creek crossings that were constructed; that we have control of, and certainly the developer knew they were building roads in the subdivision and they needed to access the back of the property across the creek so we're building subdivision roads so in this case they were culvert pipe, not over a bridge, and the internal sidewalks on both sides of the street are being provided.

Andy Rathke

Even though the ordinance says you're required to put sidewalks there you made the assumption that it's not required to do it at the stream crossing when you own the other side...

Joel Madden

Well, I think the ordinance language was very clear in relation to the inside of the subdivision that you would provide sidewalks on both sides of the street on all internal new subdivision streets. To me that's a pretty clear statement. I think the 2 portions of the ordinance in question as related to the frontage; in my opinion they're somewhat unclear so again the first statement is that you have to provide sidewalk on all roads that provide access to the neighborhood, and again the extreme, almost silly example of that is all roads lead to this subdivision.

Andy Rathke

I think the underlying intent though is to be on your property to the front...

Joel Madden

Well it doesn't specifically speak to the extent; I understand that staff has interpreted that to be property line to property line. Certainly other jurisdictions require it the length of wherever you're widening the road. Different jurisdictions; and that's not really in play here but there's different interpretations and I do think there's some lack of clarity in the way the ordinance is written. Then the other side of this is that it is very specific as it relates to along those roads you'll provide a 3600PSI concrete on a compacted sub-base and clearly a bridge is not a 3600PSI concrete sidewalk on a compacted sub-base. So there's some very specific language there. It doesn't contemplate a pedestrian crossing across something like Reedy Creek through a flood plain. That's something I do strongly believe that's not something that was contemplated or was the intent of the ordinance. I don't read it as that was the intent of the ordinance to require a pedestrian bridge of this magnitude in lieu of a sidewalk.

Lloyd Quay

Also when you were designing this, was there ever a consideration for an internal road to connect the 2 portions of the Blume development across Reedy Creek?

Joel Madden

I wasn't here during the rezoning process and obviously this is a rezoning document we're talking about and staff may be able to speak more to that. Certainly that would be; whether it's a pedestrian crossing or a vehicular crossing, crossing Reddy Creek of this magnitude, and you can see the size of the DOT bridge; that would be a pretty major undertaking, and if that had been a requirement of the rezoning that may have been something that would kill the deal. So I don't know if that was contemplated...

Andy Rathke

Lloyd, I think in the original discussion there was somebody doing the planning and zoning that raised the question of how do you people go from the south to the north and if I recall there was discussion about how people connect to the community and the amenities and stuff and they were discussions of stream crossings at that time.

Lloyd Quay

I see there is extensive flood plain there and I didn't know whether that was the limiting factor and; because you'd not only have to bridge Reedy Creek but construct some sort of causeway in that flood plain and all and it would end up costing an extremely tidy sum of money to do so.

Joel Madden

Certainly the size of the stream and the fact that it is a FEMA floodplain are 2 of the factors that drive this cost significantly over.

Lloyd Quay

If you didn't have all that flat land on the south side. Okay, any more questions for his gentleman from the Board? No? Thank you.

Roy Michaux

That's all the evidence that we have.

Lloyd Quay

Okay, what I understand; is there anybody from staff that needs to present anymore? Well...

Rich Koch

I'm sorry I was looking at Wayne because he was sworn so I didn't know if he was planning to testify or not.

Wayne Krimminger

I just got sworn in case I was called up for anything.

Rich Koch

Oh okay.

Lloyd Quay

Well at this point; we've heard variances but very seldom do we have this sort of hearing before us, and at those variance hearings we're required to either grant or deny the variance. Now here we're having an interpretation of Josh's ruling on the requirement for the sidewalk and Rich if you could just step up and give me a brief example of what do we proceed to do at this point in time?

Rich Koch

Well, the motion would be either to uphold or overturn the interpretation that Josh made in this case. So you would need to decide that. There would be some (?) question of fact and law, and typically whatever you decide I would be happy at the Board's pleasure to prepare the findings based on your decision. Kind of like we do in the case of variances or the conditional use applications. I would point out that since the change in the law a couple of years ago; unlike a variance decision, this is a simple majority decision on an interpretation appeal. So you don't need the high vote requirement in reference to this decision here, but basically you've got to decide ultimately whether you agree with Josh's interpretation of the ordinance relative to this particular situation or not. So like I say, your decision will be one way or the other whether to uphold it or overturn it. Then we'll take it from there.

Roy Michaux

Mr. Quay, I would like to make a couple of closing comments if that's appropriate. I promise I won't belabor this. Before you all decide on a direction there are a couple of comments that I hope you'll...

Lloyd Quay

You're approaching the microphone now so please state your name...

Roy Michaux

I'm Roy Michaux. I'm with the firm of K & L Gates. I'm Colin Brown's law partner. Colin is the one who wrote the letter that is Exhibit 2. I just had a couple of comments that I would like to suggest as an appropriate means of resolving this. You've got a builder who has submitted a plan that the Town has approved. It is a site specific plan, it is very detailed, it has a number of conditions that they've agreed to and they're obligated to follow. That plan actually interprets the ordinance. It shows the sidewalk going down Hickory Ridge Road to the creek. It shows all the internal streets, the lots; it has notes that deal with how the sidewalk is to be constructed so it wasn't ignored. So the whole picture is right there and it was approved by the Town and now because of this question of connectivity, which has probably become a more recent issue, there's an interpretation that in order to accomplish connectivity this builder's got to build a \$400,000 - \$500,000 pedestrian bridge that the Town had already indicated that it wasn't going to pay for. And there's no notice to the builder that it would ever have any such obligation. And it's really a question of fairness. It's just not fair, and the other point that I know is eating at a lot of members of the staff; what sort of precedent are we establishing. And I submit to you there's no precedent at all. The plan was approved, and in the future if you have creeks or low areas and you need connectivity and you've got to have a pedestrian bridge; you put it on the plan, and the builder can either say yes I'm going to do it or no I'm not and if he says no his plan might not get approved. So we're not establishing some precedent that opens the door for everybody else to come in and say, well gosh you didn't make M/I Homes do it so you shouldn't make me do it. And the reason that M/I Homes is not doing it is because it was never communicated on a site specific approved plan. And that's a very important document to a builder. That's their roadmap and that's what they base their costs on. And so once you change that roadmap, you've completely changed the game on them and it's just not fair. So, I appreciate your time and I think you all have been very attentive and we appreciate it.

Lloyd Quay

Also, I would think that what is required actually by the builder is the construction of the sidewalk. There's nothing that says that he has to build a bridge or anything. I mean, the bridges were suggested, but I don't think there's a requirement. Is there a requirement to build a bridge anywhere Josh? I mean it was a suggestion for connectivity, but the requirement as per the UDO is just a sidewalk, correct?

Josh Watkins

Correct.

Lloyd Quay

Am I wrong anywhere on that one?

Mike Hamamgian

Can you build the sidewalk without the bridge?

Lloyd Quay

Well sure. Just build the sidewalk and end it. Because DOT has already requested that the sidewalk be terminated an appropriate distance back from the bridge. They didn't like the idea of people going down the sidewalk, jumping over into the road and crossing the bridge.

Mike Hamamgian

That's right.

Lloyd Quay

But the whole; whether people cross the bridge or not becomes immaterial as to what they're going to do, but what we have to decide is; does the ordinance require them to build a sidewalk? Right now we're not in discussion of building bridges or anything like that. What happens after the sidewalk; it's not in our hands at this point and time from what I see and what the UDO requires.

(After speaking with Rich Koch) Our attorney has advised me that since Mr. Michaux has made a final statement that Josh can have the opportunity to also make a statement also.

Joel Madden

I apologize for interrupting. Can I make one comment or clarification I think on what I may or may not have just heard you say? M/I is very much willing to build the sidewalk up to the point where DOT says this is how far you can build it. They'd absolutely do it. The letter from DOT that the Town staff received from Leah Wagner I believe at NCDOT said we will allow you to build this sidewalk up to 55ft shy of a sanitary sewer line that runs essentially just before the bridge. M/I would absolutely build that sidewalk to that point. I just wanted to be clear on that because I didn't know if that was in question or not. They would absolutely build the sidewalk up to the point where DOT says no more. Just to be clear.

Lloyd Quay

Okay.

Josh Watkins

I just wanted to make a few points. The plan that we're looking at, if you look at it there in the corner there is an administrative revision. So this was approximately 2 years after the Town Council approved the original preliminary plat. What has taken place on this is that the developer saw some issues with some wetlands on the south portion of the property and needed to make some amendments. Staff looked at that and determined that it was a staff level amendment so the October 2014 was the date the administrative amendments were approved. The original preliminary plat I don't (?) 2012.

Joel Madden

2013.

Josh Watkins

2013.

Joel Madden

It was right at a year later. It was October of 13.

Josh Watkins

So...

Roy Michaux

It's on the map, it's stamped on it.

Josh Watkins

When this was approved, the original approval by the Town Council; we, and this is speaking of us as staff, were under the assumption that that bridge; that there was some way that we could work out some method of

getting people across that bridge. In 2014 it was pretty clear that that was not necessarily the case. When they resubmitted this drawing we were looking at that from a review of the southern portion of that development. What, you know, what were the changes that were requested? We weren't relooking at the issue of Hickory Ridge Road and how people were going to get across there. One of the things that keeps coming up is that the DOT approached the Town of Harrisburg about putting a bridge, or putting a sidewalk on that bridge, and there are 2 issues there. When they approached us this area was not in our Town limits so it was not on our Bike and Pedestrian Plan; it was not in our Town limits. The Town of Harrisburg did not develop this property and put 300 homes on it. The Town of Harrisburg did not do that. We did not create a need for pedestrian connectivity. So I understand the question about the fairness, but this was not something that; when we were approached about putting a sidewalk on this bridge, there were cows out there. So, I just wanted to address that; that this was not something that the Town has imposed. Saying that we are requiring a pedestrian bridge; we are requiring some sort of connectivity. Originally the hope was that we could make it happen across that bridge that DOT was building. I've even approached DOT down in Albemarle and asked if there was any way we could have some sort of device that projects off the side of that bridge. They didn't like that idea. They didn't like that idea a lot. So no one has actually said you've got to build a pedestrian bridge. We've looked at different options. We're trying to find ways to protect the intent of this ordinance, which is to provide that pedestrian connectivity, and I will rebut the statement that we're not presenting a case for setting a precedent because, I mean, anybody that's got a stream; well I really don't want to do it, M/I didn't have to do it. I would say that we are setting a precedent. Now, we are going to address this for future developments with a text amendment to our ordinance, but if we did not, this case would set the precedent for how every development that was bisected by a stream would be handled. I just wanted to address those.

John Overcash

And does not the ordinance state that is must be connectivity though the entire frontage of the road?

Josh Watkins

It does not.

John Overcash

It does not.

Josh Watkins

The ordinance states that you will provide sidewalks along all roads that provide access to the development. As these guys have mentioned, and I fully agree with, that has no end.

John Overcash

I'm just saying from north to south of this development.

Josh Watkins

Staff has interpreted it to mean...

Andy Rathke

Property line to property line; and I think that the intent of the drawings show that it is property line to property line. I think everybody understands the intent and the intent was drawn that way by Merrick under that circumstance right there. You know dollars and cents aside, I don't think that's an issue right here. That's not a concern to us; dollars and cents. A developer goes in prior to drawings to make an assumption of what the cost of a development is; does this make sense or not sense by a conceptual plan a lot of times. And yes they do go in front of the Planning and Zoning Board and ask for their consent of it. There are some errors that do come up in drawings that have to be considered. They make mistakes; we make mistakes with drawings in the review process. I myself have been building and left a whole floor out. Well, sorry I still have to build it. Nobody

raised a hand and said I'll give you a 2 million dollar change order to build a floor. Things should have been; also the engineer of record bringing it up to the attention; hey what do we need to do right there. This is not anything new in my opinion.

Josh Watkins

Rich and I have actually spoken about this before but if a permit is issued in error to a particular developer; that does not mean the developer gets a free pass. If an approval was issued in error and the Town goes back an addresses that error, the law still has to be followed and I guess what your question is, is on the reading of the law is that correct or is the way it should be interpreted.

Lloyd Quay

Any more questions for Josh? Thank you. Are we clear on the Board now that the motion will be to uphold Josh's interpretation of the ordinance or to overrule his interpretation of the ordinance? And I know from Rich we really should limit ourselves not to start writing ordinance here on the fly; or, we're not necessarily to engage into lengthy debate at this time as to how we interpret one thing or another unless the Board feels need to clarify something or other. But that's the motion. Am I correct Rich?

Rich Koch

That's correct. So you need a motion one way or the other and then debate and then vote on it.

Lloyd Quay

Waiting on a motion one way or another.

MOTION:

Andy Rathke made a motion to uphold Josh's ruling. Second was made by John Overcash.

Lloyd Quay

Okay do we have any discussion? Andy?

Andy Rathke

You know, this goes back to what you were saying, you know the sidewalks; it says along any street; it talks about the sidewalks right there, and you know the argument is does this sidewalk need to go that point? I'm concerned about the law that we do set a precedent for future developments for the connectivity that we outlined in the ordinance. Is the ordinance written perfectly? Probably not, but there are so many of them that are not, but the intent is there and it's directed that way. And I think we need to uphold that.

Lloyd Quay

Any more discussion?

John Overcash

I think this is not the place to discuss fairness. I think our fairness comes in when we start discussing the variance itself, but I think the ordinance is fairly clear; property line to property line that there was a sidewalk, and that's why I am supporting it.

Lloyd Quay

Thank you, John. Anybody else?

Kristi Bost

Well, I just have a question. This is one subdivision, but there's 2 parts to it; yes? And there's no way from one part to the other part within the subdivision because it's bisected, correct? And this is going to have amenities in

it like a swimming pool and stuff? So how are the kids that live in the other part going to safely get to the part with the amenities?

Lloyd Quay

Are you asking that wanting an answer?

Kristi Bost

I mean, I'm wanting an answer. How are they going to get there? I mean, you need to provide something safe for the children to get to the amenities.

Joel Madden

Well, there's one thing; if you look at the overall site plan; along the frontage along Hickory Ridge Road, there is a parcel that's owned by Piedmont Natural Gas that we don't own and can't control and can't; we cannot physically make a pedestrian connection even if we go across the bridge. Even if the bridge was wide enough, our property ends just on the other side of the bridge, then there's property owned by Piedmont Natural Gas, and then there's more road frontage that's a part of this project. So even if a sidewalk could be constructed across the bridge, which it can't, then there would still be the gap of that triangular piece kind of surrounded on both sides by our parcel.

Andy Rathke

But you could take it along the property line and follow it up with a trail or something like that to get that connectivity to the other part of the community on your property. You could do that through a trail system.

Joel Madden

You could. I mean the ordinance is very specific about saying a sidewalk will be provided along the road...

Andy Rathke

And it would be at that point adjoining to the Piedmont Natural Gas property line.

Kristi Bost

I mean, that's my only concern is the safety of the children that are in this community. Because you've got sidewalks that are going to stop 50ft before a bridge. Well, the kids are going to go across the bridge; walking or going on their bike, and they're not going to be paying attention to traffic. They don't. And you're opening yourself up to a lawsuit or somebody's opening themselves up to a lawsuit with these kids trying to get to the other part of the neighborhood.

Joel Madden

Well, that's why DOT wants us to stop it back 55ft before the sewer easement because they don't want to invite; they don't want to run it right down to the bridge.

Kristi Bost

Right.

Joel Madden

And invite somebody to come down there and say, oh wait a minute what am I supposed to do?

Kristi Bost

Well, the kids are going to jump off the sidewalk onto the road and go on the bridge.

Roy Michaux

You know, you raise a very interesting question. But in the (?) with M/I Homes, why didn't somebody ask that question before they approved the plan?

Lloyd Quay
Excuse me.

Roy Michaux
It's a basic; a very basic plan that shows that the sidewalk ends at the bridge, and the Town knew at the time the plan was approved that the bridge was not wide enough to accommodate pedestrians. I mean, everybody knew that.

Lloyd Quay
Thank you, sir. We're...

Roy Michaux
Well I mean that's the...

Lloyd Quay
I know, but this is the Board's discussion, and we can't engage in the...

Roy Michaux
Well I thought she was asking for an answer and I...

Lloyd Quay
She was given an answer, thank you.

Kristi Bost
Thank you.

Lloyd Quay
Any more?

Kristi Bost
No, I'm good.

Lloyd Quay
No, no. Any more discussion? No? Okay, we have a motion and a second and I'm calling for discussion for the last time. Okay all in favor raise your right hand.

VOTE ON THE MOTION:
A vote was taken by a show of hands and the motion passed 5-0.

Rich Koch
Mr. Chairman would you like me to prepare the findings for the Board to look at for the next meeting?

Lloyd Quay
Yes, please. Rich will prepare the findings of facts for addition to the record. (Findings of Fact herein incorporated by reference)

Roy Michaux

Rich, I don't know what's in the packet that they've been given, but we certainly would want Exhibits 1, 2, and 3 as part of the record.

Rich Koch

They will be, as well as what was in the packet.

Roy Michaux

See I wasn't given a packet so I don't know what's in there.

Rich Koch

Okay.

Roy Michaux

But I assume that you'll make that a part of the record also.

Rich Koch

I'll send that to you tomorrow so you'll have it so you can see what was in there.

Roy Michaux

Yes, that's fine.

Rich Koch

Basically let me just tell you. It consists of; it starts with your application; your petition for the appeal. Then it has Colin's letter of August 12th with his pictures and other exhibits.

Roy Michaux

That's our Exhibit 2.

Rich Koch

Yes sir, I believe that's right. And then there is Josh's letter of August 20th, which I think was your number 3.

Roy Michaux

That's right.

Rich Koch

Then there is a; and I think this was attached to your letter, wasn't it Josh? Appendix C; that particular; I think that's part of your letter. Yes. So that's all there was Roy.

Roy Michaux

Okay. And then we would have our Exhibit 1.

Rich Koch

Yes.

Roy Michaux

Okay good.

Rich Koch

I'll still put all your three in as part of the official record but it does duplicate part of the packet. Would you still like for me to send that to you?

Roy Michaux

No. You can just; you mean 1, 2, and 3?

Rich Koch

No. What was in our packet. The Board's packet.

Roy Michaux

No, you've told me what it is. I've got those copies. That's fine.

Rich Koch

Okay.

Roy Michaux

Thank you.

Rich Koch

Yes sir.

Roy Michaux

Thank you all for your time.

Lloyd Quay

Certainly. Josh, do we have any updates or anything?

Josh Watkins

No.

Lloyd Quay

Does the Board have any business that needs to come before the Board? No?

5.

ADJOURNMENT

There being no further business, Lloyd Quay made a motion to adjourn, with a second from Kristi Bost. **The motion passed 5-0.**

Lloyd Quay, Chairman

Janet Rackley, Secretary

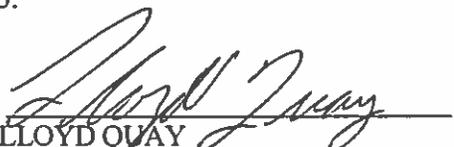
**TOWN OF HARRISBURG
BOARD OF ADJUSTMENT
ORDER INTERPRETING THE UNIFIED DEVELOPMENT ORDINANCE
CASE No. 2015-01 (A)
Applicant: M/I Homes**

The Board of Adjustment for the Town of Harrisburg held a public hearing on September 15, 2015 to consider application No. 2015-01 (A) submitted by M/I Homes, which is an appeal of an interpretation of Section C.4.2.9 Sidewalks of the Harrisburg Unified Development Ordinance (“UDO”) by Planning Director Joshua Watkins. After having heard all of the evidence and arguments presented at the hearing, the Board of Adjustment made the attached Findings of Fact.

The resolution of this case depends on the interpretation of the Ordinance language as applied to the foregoing facts. It is the Board’s unanimous conclusion that the above-referenced UDO section, as applied to M/I Homes’ Blume South property regarding a sidewalk along the entire length of its property along Hickory Ridge Road, requires pedestrian connectivity across Reedy Creek.

IT IS ORDERED that the decision of Planning Director Joshua Watkins is AFFIRMED.

ORDERED this ___ day of October, 2015.



LLOYD QUAY
CHAIR

10-20-2015

NOTE: If you are dissatisfied with the decision of the Board of Adjustment, an appeal may be taken to the Superior Court of Cabarrus County within 30 days after the date this order is served on you.

**HARRISBURG BOARD OF ADJUSTMENT
ADMINISTRATOR INTERPRETATION APPEAL
M/I HOMES
Blume South Property
Hickory Ridge Road
Case No. H2015-01A**

FINDINGS OF FACT

1. After numerous discussions at the staff level between the Town of Harrisburg (“Town”) and M/I Homes (“M/I Homes”), M/I Homes, through counsel, requested an interpretation of Section C.4.2.9 of the Harrisburg Unified Development Ordinance (“UDO”) on August 12, 2015.

2. On August 12, 2015, Joshua R. Watkins, Planning Director for the Town, provided an official interpretation in writing of Section C.4.2.9 of the UDO.

3. Section C.4.2.9 (Sidewalks) reads as follows:

C.4.2.9 Sidewalks

- Sidewalks shall be provided for safe movement of pedestrians, separate from the movement of vehicular traffic, through residential areas, as well as to commercial, industrial and public places. Sidewalks shall be constructed on both sides of all new streets in a subdivision and along any street that provides access to the subdivision.
- Sidewalks shall:
 - have a minimum of five (5) feet in width;
 - be constructed of not less than three thousand (3,000) PSI concrete;
 - be a minimum four (4) inches thick except that where a sidewalk crosses a driveway, it shall be six (6) inches thick; and
 - shall be constructed on an adequately compacted and properly graded base
 - shall have a lateral slope of one-quarter (1/4) inch per foot toward street
 - shall be steel troweled and light broom finished and cured properly. Tooled joints shall be provided at intervals of not more than five (5) feet and expansion joints at intervals of not more than forth (40) feet.

4. In Mr. Watkins' written interpretation, he stated the following:

The Town of Harrisburg Planning and Zoning Department interprets this section to mean that a five (5) foot sidewalk will be installed along the frontage of any proposed residential development. In all developments that were proposed when the Unified Development Ordinance was in place, the interpretation of this section has been that any residential development will install, among other items, sidewalks along the property line abutting a road providing access to the development.

In the case of the Blume subdivision, the development is bisected by Reedy Creek. While a sidewalk cannot be constructed to the letter of Section C.4.2.9 of the Unified Development Ordinance, staff is of the opinion that the intent of the ordinance is to continue the pedestrian connectivity along the entire frontage, including over Reedy Creek.

5. M/I Homes timely appealed Mr. Watkins' interpretation of the UDO.

6. On September 15, 2015, the Town's Board of Adjustment conducted a quasi-judicial hearing on this appeal with statutory notice provided. All persons who testified or spoke were sworn. M/I Homes was represented by counsel and given the opportunity to cross-examine Mr. Watkins.

7. During the time of M/I Homes' ownership of the property on both sides of Reedy Creek along Hickory Ridge Road, the North Carolina Department of Transportation was planning to replace the Hickory Ridge Road bridge across Reedy Creek, and did in fact replace the bridge. The Town made M/I Homes' engineers aware of NCDOT's planning. An opportunity to have a sidewalk across Reedy Creek constructed as part of the bridge replacement was available, but did not occur.

8. Initially, at the time M/I Homes proposed this southern extension of the Blume subdivision, this part of the project was not within the Town limits and was not subject to the Town's Bike and Pedestrian Plans.

9. When the sidewalk could not be constructed in conjunction with the NCDOT bridge across Reedy Creek, the preliminary plat approved by the Town for the property showed the sidewalks along Hickory Ridge Road stopping about 50 feet short of the bridge, because NCDOT did not want the sidewalk to lead to the bridge so as to induce pedestrians to use the road bridge to cross Reedy Creek. The Town thought there was still some opportunity to have the sidewalk constructed in conjunction with the new bridge.

10. The cost of a pedestrian foot bridge across Reedy Creek adjacent to Hickory Ridge Road along M/I Homes' property is a minimum of \$250,000.00 and perhaps as much as \$500,000.00.