

BOARD OF ZONING APPEALS MEETING

July 16, 2020

Members Present

Ann Sasser Evans
Nicole Garrison
Lawrence Meder
Gus Dyer
John Hiltzheimer

Members Absent

Gus Dolianitis
Michael Nicholas

Staff

Ken Gillie
Lisa Jones
Ryan Dodson

Chairman Dyer called the meeting to order at 10:00 a.m.

ITEMS FOR PUBLIC HEARING

1. *Variance Application Number PLVAR20200000110, filed by Mark and Karen Davis, requesting a variance from Article 7., Section B, Item 2 of Chapter 41 of the Code of the City of Danville, Virginia, 1986, as amended (City of Danville Zoning Ordinance) at 734 Mt. Cross Road, otherwise known as Grid 0708, Block 002, Parcel 000005, of the City of Danville, Virginia, Zoning Map. The applicant is requesting a variance to allow for a deck constructed without permits onto a legal non-conforming use to remain on a residential property in area zoned HR-C Highway Retail Commercial District.*

Mr. Dyer opened the Public Hearing.

Mr. Dyer closed the Public Hearing.

Mr. Dyer stated I do have one question does the code say you can't expand a legal nonconforming use or does it say you can't expand a structure that is being used for a legal nonconforming use.

Mr. Gillie stated there is a provision that covers both.

Mr. Dyer stated are you Ms. Davis. We have already opened the meeting, and we have already had the public comment period and you were not here in time. We closed the public hearing.

Mr. Dodson stated they can still be available for questions if members have any.

Mr. Dyer stated if you would have a seat. If you could clarify that for me, Mr. Gillie.

Mr. Gillie stated there is a portion on nonconforming structures under C1 it talks about repair or reconstruction of nonconforming structure and under C2 it talks about Alteration or enlargement of nonconforming structure. They are a nonconforming structure then you have section B, nonconforming uses: Change, Discontinuation and Expansion. It says B1 change of nonconforming use to more restrictive use and B2 Expansion of nonconforming use.

Mr. Dyer stated that is what I am not concerned about, the nonconforming use. What I am concerned about is expanding a property that is physically expanding a property that's not being used as a legal nonconforming use.

Mr. Gillie stated it would be a nonconforming use because of the residential property in a commercial use zone except as provided here a nonconforming use shall not be expanded or extended beyond the floor area or lot area it occupied on the effective date of this ordinance.

Mr. Dyer stated right because if they are being cited for expanding the use and I don't think they are expanding the use. I think expanding the use would be going from one residential unit to two residential units but if it prohibits them from expanding physical structure. Why is that? This house could be converted to a dentist office tomorrow or insurance office.

Mr. Gillie stated they could request to do it but there might be modifications necessary to comply with building code and commercial code at that point.

Mr. Dyer stated so there's nothing in the code that says an insurance or dentist office can't have a deck. So, your not further putting this property beyond it's logical use as commercial property right? Do you know what I'm saying.

Mr. Gillie stated right now it is residential property and again the code states it should not be extended beyond the floor area that it occupied. The deck is expansion to that.

Mr. Dyer stated so is a deck considered flooring?

Mr. Gillie stated yes.

Ms. Evans stated even though it is not enclosed?

Mr. Gillie stated it is still floor area and it has gotten larger.

Ms. Garrison stated and it requires a building permit?

Mr. Gillie stated yes it does require a building permit.

Mr. Dyer stated the building permit part that is not why we are here today and that is something different. This house has restrictions on the occupancy based upon the floor area. Does adding a deck allow them to higher occupancy level?

Mr. Gillie stated it expands the floor area of the structure of what we would classify.

Mr. Dyer stated you consider this floor as a deck area.

Mr. Gillie stated yes.

Mr. Dyer stated is that defined in the code?

Mr. Gillie stated Section 15 Floor area, net. The area designed for tenant occupancy of all floors of all buildings on a lot, measured from the center line of joint partitions to the interior faces of exterior walls, which excludes areas designed for permanent uses such as toilets, utility closets, corridors for pedestrian or vehicle through traffic, enclosed parking areas, meters, rooftop mechanical structures, mechanical and equipment rooms, fire exits, stairwells, elevators and escalators. For the purposes of this ordinance, the term "net floor area" shall not include outdoor display areas for the sale, rental and display of recreational vehicles, boats and boating equipment, trailers, horticultural items, farm or garden equipment and other similar products.

Mr. Dyer stated that is the definition for commercial.

Mr. Gillie stated that is the definition for floor area in the code. There is no difference in commercial and residential. This is why we considered it to be floor area because they have expanded the floor area.

Mr. Dyer stated if this house has an occupancy level of eight and you add a deck. That doesn't increase the occupancy level above eight?

Mr. Gillie stated it doesn't increase the occupancy level but it does increase the floor area. It specifies that you cannot increase the floor area.

Ms. Evans stated so a front porch is considered floor area.

Mr. Gillie stated correct.

Mr. Dyer stated I do not think it is because I don't consider a front porch when you calculate your occupancy level.

Ms. Evans stated it's not occupancy.

Mr. Dyer stated that is what I am saying.

Ms. Evans stated this is about floor area.

Mr. Dyer stated if the thing said footprint then it is different from floor area because floor area can be multi story. If you have a two-story house that occupies a 1000 sq. ft. footprint then you would have a 2000 sq. ft. of floor area.

Ms. Evans stated can we have a definition of footprint?

Mr. Dyer stated it's not used in the code.

Mr. Gillie stated footprint is not mentioned in the code but floor area is that is why I read you the definition for floor area. According to this, it is floor area and the code says they can't expand the floor area.

Ms. Evans stated even though the floor cannot be used in our geographic area, probably won't be used, year round in the winter. Except maybe, you can go outside

and grill. I am just asking so it still floor area regardless whether or not it's year round use.

Mr. Gillie stated correct, this is a commercial property as a nonconforming residential property on it. Nonconforming residential cannot expand the floor area. They added a deck and the reason I put in there about the permits we would have advised them don't build the deck because it was not permitted. They built a deck anyway.

Mr. Dyer stated another thing is are we getting into a Catch Twenty-two deal. Where if we say we don't think that this deck is subject to the rules and therefore they are not violating the code. They still have to go get a building permit, they come to you for zoning clearance, and you go no they are expanding a floor area.

Mr. Gillie stated no. There would not be a Catch Twenty-two because they requested a building permit; that's how this all came about. They were cited for building without a permit. They came for it and I told them I can't give you one, because you are not allowed to do this. If you had asked first I would have told you no. Then you could have asked for the variance before you build it. Now they are kind of asking for forgiveness as opposed to asking for permission.

Mr. Dyer stated the bottom line is the intent of that is so that if we have a piece of property that is a legal nonconforming use ultimately the City wants to see that property used in its proper zoning. In other words, the City feels like this property should be Commercial. The house is grandfathered in as a legal nonconforming use. What the City doesn't want to see happen is for them to do something with this residential property that make it less likely that it could be ultimately inverted into commercial. I feel like that is the intent of the code. The code has to have some intent; it's just not so do you disagree with that, with the intent of what the code is?

Mr. Gillie stated no. The intent is that this will be a commercial property.

Mr. Dyer stated does this by the fact that this deck was added on this house, does it make it more likely or less likely or inconsequential to whether this property ultimately use for commercial. Is it the City's contention that adding a deck is making this property less likely, that it would be used for commercial?

Mr. Gillie stated yes. Your question earlier about could this be inverted to a commercial use potentially. It does have to meet a different standard at this point. I don't know whether that standard has been met.

Mr. Dyer stated the standard would be building code not zoning code.

Mr. Gillie stated correct.

Mr. Dyer stated so we are zoning, we are not building?

Mr. Gillie stated I am both.

Mr. Dyer stated I know you are both. Therefore, we are BZA and we need to determine whether the zoning code is being damaged by allowing this deck to remain. As opposed to whether the building code is being damaged by allowing this deck to remain.

Mr. Gillie stated from staff's prospective if they want to keep it they can ask to rezone the property to residential.

Mr. Dyer stated I don't think that is a good call.

Mr. Gillie stated that is an option available to them. They have options available. One, they could have obtained a permit and they could have asked first. We could have advised them to go through the proper steps, which they failed to do, or they come here and ask for this. They have other means available to them to get what they want. That is why staff is saying a variance is not necessary in this case. Should it be granted, there are other options they could ask for.

Ms. Evans stated that would be the possibility of spot zoning.

Mr. Dyer stated let me ask Mr. Dodson a question. I am assuming that we have the authority to say under normal circumstances that they are supposed to meet those five criteria's to get that variance. Is a second option for us to say that we don't agree with the zoning administrator that this is in fact an expansion of a legal nonconforming use.

Mr. Dodson stated that is not one of the questions that the BZA is considering today.

Mr. Dyer stated do they have to request that we make that decision for them or can we make that decision on our own?

Mr. Gillie stated they would have to request it, that the interpretation is wrong.

Mr. Dyer stated I know we have had that situation before. Whether they have actually asked to have the interpretation, back during the skilled gaming machine was a question of your interpretations of what the actual interpretations is.

Mr. Gillie stated correct.

Mr. Dodson stated this application is specifically for just a variance.

Mr. Dyer stated this is requesting a variance but I feel like they don't need to request a variance because they are not expanding enough. I feel like I am trapped .

Ms. Evans stated I know this is legal nonconforming but say they wanted to sell the property to a developer and the developer comes in and mows down that house. They make something much bigger; it is no big deal right.

Mr. Gillie stated if bigger and commercial that is not. This all hinges on this is a residential property and we have them all over town. You have a lot of legal nonconforming use. The goal of it is for them to stay as they are and eventually to go away to a use that is conforming with the zoning code. That is our goal and that is the

intent of the zoning ordinance. We don't allow any nonconforming uses to expand. They are what they are until such time that they comply with the code. Our position is this one, again they built something and didn't ask and they don't comply with the code. It's supposed to be commercial anyway, the deck shouldn't be there. Now they could ask to bring it. Now to answer your spot-zoning question they could ask for it. You could go with the residential thing or there are ways to do it. We recently had a kennel on Ash Street, where they did a conditional zoning so in effect it was spot zoning but that is the only piece that can be used for in that commercial district. They are commercial in a residential district kind of the opposite of this one. This one is residential in a commercial district. They could ask for that same thing go to City Council. Council is a means to address this situation not this Board. Are they expanding? Yes. The facts are clear they are expanding and the code says that you shouldn't. They shouldn't go this route and they should go a different way.

Ms. Evans stated shouldn't or can't?

Mr. Gillie stated you can grant it but if you grant it, I think the City will appeal it because the proper means for them to address what they want, if they want to stay residential in a commercial district is just rezone the property.

Mr. Dyer stated unless we are disagreeing with your interpretation of the code because this whole violation is based upon the interpretation that a deck equals for area.

Mr. Gillie stated because the code says it does. There is no other way, and reading that the code says it is for floor area. There is no footprint or anything else. The definition of floor area is quite clear and this is floor area.

Mr. Dyer stated can you read it again?

Ms. Evans stated slowly.

Mr. Meder stated is this the section where it says deck is considered flooring.

Ms. Evans stated we don't care about lawn equipment or mechanical.

Mr. Gillie stated I was reading the entire definition for the record. Floor area, net. The total floor area designed for tenant occupancy of all floors of all buildings on a lot, measured from the center line of joint partitions to the interior faces of exterior walls, which excludes areas designed for permanent uses such as toilets, utility closets, corridors for pedestrian or vehicle through traffic, enclosed parking areas, meters, rooftop mechanical structures, mechanical and equipment rooms, fire exits, stairwells, elevators and escalators. For the purposes of this ordinance, the term "net floor area" shall not include outdoor display areas for the sale, rental and display of recreational vehicles, boats and boating equipment, trailers, horticultural items, farm or garden equipment and other similar products.

Ms. Evans stated does it mention porches?

Mr. Meder stated no or decks. It did mention in the first sentence that it is from the

center dividing line to the exterior walls. The deck is not considered an exterior wall.

Mr. Gillie stated designed for tenant occupancy of all floors of all buildings on a lot, measured from. This is a floor design for tenant occupancy of all buildings on a lot.

Mr. Dyer stated it says occupancy of this room is fifty people and so if we were to go out here and add a deck out here that doesn't increase the occupancy. The floor area is determined by the total living space.

Mr. Gillie stated you can have an occupancy of that deck because that is floor area.

Mr. Dyer stated suppose this was a concrete patio instead of a deck would you consider that the same thing?

Mr. Gillie stated grade level we wouldn't address it because it's not a structure of anything in the code. Anything above six inches that's above grade counts as floor area.

Ms. Evans stated that's not the definition, is it?

Mr. Gillie stated I can go to grade level and read all of that.

Ms. Evans stated what if you go three steps up to their front porch is that?

Mr. Dyer stated that is considered floor area. Do any of the Board members have questions for the applicants? You all purchased this property last fall. Was this a private sell or did you have a real estate agent?

Ms. Davis stated we had a real estate agent involved and we knew nothing of the zoning.

Mr. Dyer stated the real estate agent should have informed you.

Ms. Davis stated we got everything approved for the mortgage and then he came back and told us that we can't give you a residential loan. We ended up having to do a cash sale because of it. The only reason we acted is because the back steps were not safe.

Mr. Gillie stated so why didn't you just replace the steps?

Ms. Davis stated there are three boys living there and my son is one of them. They are all 6'5 plus three hundred pounds. They are Averett students and we did want them to grill out there. We thought if we were going to build steps then we might as well put a deck. We had no clue.

Mr. Meder stated I do have a question on the deck are they 4 by 4's or 6 by 6's holding up this deck.

Mr. Dyer stated again I think that would be building code.

Mr. Meder stated are they going into concrete?

Mr. Davis stated yes sir.

Mr. Meder stated is there a reason why the corner beam is crooked?

Mr. Dyer stated it might be from the perspective of the photograph.

Ms. Davis stated I don't think it is crooked.

Mr. Davis stated the inspector that came and looked at it said it was one of the best built decks that he has ever seen.

Ms. Evans stated he is a building contractor but he didn't know about getting a building permit?

Mr. Davis stated we thought we did or we thought that we asked the right people.

Mr. Dyer stated based upon the level of activity that I have seen at Lowe's in the last four months I bet there are a lot of non-permitted decks built in the City. Again, that is not the issue the building code part of it and permit part of it that is not our bailiwick. What we are here to determine is whether the zoning code is being properly applied when they were issued a violation for this deck.

Mr. Meder stated I think it has already been cleared up for me, but this is a commercial property that is being used for residential. Therefore, it is considered nonconforming?

Mr. Dyer stated it is legal nonconforming, the common term is grandfathered in.

Mr. Meder stated it's legal to live there and it is considered nonconforming because it is zoned out commercial and you want it to stay that way.

Mr. Dyer stated I think they are telling us the code is so when it says legal nonconforming use shall not be expanded and to me a legal nonconforming use expansion would be going from one unit to two units. If they wanted to convert this into a duplex then I would have issues with that because that would be expanding the legal nonconforming use. I agree with you that the use is residential and as long as this is a single thing with residential use and I'm not convinced that the use is being expanded.

Mr. Meder stated if it was grandfathered in and I'm consuming that the deck was built on a residential house and zoned residential and they had a permit that it would be allowed.

Mr. Dyer stated right and if they didn't have a permit then they would have to go get a permit. I don't feel like that they qualify for a variance and my argument would be is that they are not required.

Mr. Hiltzheimer stated my thoughts too.

Mr. Gillie stated a nonconforming structure or use shall not be extended, enlarged, reconstructed or structurally altered except to conform with this article and are required

to do so by law ordinance when the change does not compound the existing violation.

Mr. Dyer stated this is structurally altered.

Mr. Gillie stated it is very plain in black and white of what they have done and should not have done and it is not permitted.

Mr. Dyer stated it is structurally altered.

Ms. Evans stated they requested a variance, which they don't need. Are we allowed as the Board to make a recommendation or motion to not grant the variance, but to suggest or require they go before the Planning Commission and City Council for rezoning?

Mr. Gillie stated you can remand this to Planning Commission yes.

Ms. Davis stated I put on my application about something about getting it rezoned. I didn't know how to do that.

Mr. Dyer stated my gut reaction is that would not succeed that the City would first see that this property zoned commercial. Sometimes the common sense approach isn't always the legal approach. I don't see where the City would be damaged by this house and that is the bottom line. I think if we are using the code in a nonconstructive way maybe that is why we are here to insure that the code is being used in a constructive way.

Ms. Evans stated I agree with you that it is not hurting the City, but if it is against the code then I have concerns. There is no way around it.

Mr. Meder stated are there long time property owners in this area that are suddenly zoned commercial, say I'm not selling hamburgers out in front of my house.

Mr. Dyer stated yes there are a lot of people that are notified that things are changing and don't participate in that process only to find out that their property has been rezoned. Then they will claim that it is without their knowledge when, in fact, they had the opportunity to be informed they just did not take that opportunity to inform themselves about it.

Mr. Meder stated will they be prevented from building a deck to.

Mr. Dyer stated yes.

Mr. Meder stated shit.

Mr. Dyer stated I am prepared to accept a motion from the Board.

Mr. Davis stated when we recently bought the house, the football coach over at Averett who was no longer there and had just left. When my son started going there he said if there is any way that you can buy that house because I would love to be able to put my

football guys in there and they would not cause you any trouble. That is the only reason that we did this because my son will be there for four years. We had no idea that it was going to go commercial or that it was commercial.

Mr. Dyer stated how was this brought to your attention? Did William, the Building Inspector bring this to your attention?

Mr. Gillie stated I believe the complaint went to William.

Mr. Dyer stated so somebody complained about it.

Mr. Gillie stated I believe so and I will not testify to that because I got this from William. I believed they complained to William and then he turned it to me.

Ms. Evans stated who is William?

Mr. Gillie stated William is the Building Inspector.

Mr. Dyer stated I noticed here that fourteen notices were sent out about this issue, only one was received, and it was unopposed. Someone that complained about this did not bother to respond or they are not one of the fourteen surrounding property owners.

Mr. Gillie stated it could be. That is also a heavy traveled commercial corridor and it is visible from the roadway.

Ms. Evans stated you have to look for it.

Mr. Dyer stated I had to look for it hard.

Mr. Gillie stated again I can only tell you that is hearsay. I will not testify to that. My inspector said that he got a complaint and that is how he got involved. Whether the complaint was a neighbor, I don't know because I didn't go that far into it. It doesn't matter once we get a complaint. We investigate and this is where it has led to us. We have sent out a number of violations for decks and I believe it could have been someone else that was cited for doing work without a permit.

Ms. Davis stated I went online, applied for a permit, and sent the money in and that check has not been cashed yet. They have had it for months.

Mr. Gillie stated we have had a substantial number of things that are illegal construction during this period.

Mr. Hiltzheimer stated will they be required to tear it down?

Mr. Dyer stated yes.

Ms. Evans stated if they have to tear it down what about the step that were not safe. Do they have to take those down and get a permit?

Mr. Gillie stated they will have to get a permit for the steps.

Mr. Davis stated the steps are gone.

Mr. Gillie stated we may have records on what was there before. I don't know. We will have to look in to it. They would have the option asking to rezone the property. If this Board denies the variance there are still options available to them. I pointed out in the staff report and the variance is not the proper way. They need to try to rezone the property and if they get the rezoning then they can go from there. There are other options available and you can only grant a variance if there are no other options available.

Mr. Dyer stated does that other option, is there a time limit on reapplying under different circumstances, if in fact they wanted to challenge the zoning official interpretation to the code.

Mr. Dodson stated the date that begins to run is the date that they got the notice. The date that they would have to file by is the same date they were to apply for the variance. In this case, they applied for the variance as the route of challenging the official in the determination of the violation.

Mr. Dyer stated they would be precluded from being able to do that?

Mr. Dodson stated I'm assuming we are passed the appeals period and I don't know when they filed their application or received their notice.

Mr. Gillie stated I do not know and I would have to go back and check.

Mr. Dodson stated if they are still within that original time period then they would be able to refile, if they are not then they are precluded.

Mr. Dyer stated it seems to me with the skilled gaming machines they did one thing one month and turned around did something else.

Mr. Dodson stated I think they filed both routes at the same time.

Mr. Gillie stated the skilled gaming people did file both at the same time but they also had a lawyer involved.

Mr. Dyer stated I don't think the fact that you can afford a fancy lawyer should determine whether you succeed in your application.

Mr. Gillie stated which the skilled gaming didn't.

Ms. Evans made a motion that we deny the variance because it doesn't meet the code.

Ms. Garrison stated what happens if I don't seconded.

Mr. Dodson stated it dies for the lack of a second.

Ms. Garrison stated then what?

Mr. Dyer stated we can either entertain a motion to grant a variance and if either we don't get that motion or that motion failed then the zoning official's determination is upheld. We have to decide one-way or other.

Mr. Dodson stated grant, deny, or will remand. You can remand it.

Mr. Dyer stated we can make a motion that this be turned over to the Planning Commission, right?

Mr. Gillie stated you can and you can remand it to Planning Commission.

Ms. Evans stated may I amend my motion and can I make another motion?

Mr. Dyer stated you certainly can.

Ms. Evans made a motion to remand this to Planning Commission. Ms. Garrison seconded the motion. The motion was approved by a 5-0 vote.

Mr. Dyer stated do you understand what we have done? We did not deny the variance application.

Mr. Dodson stated correct you did not deny the variance application.

Mr. Dyer stated is it tabled or does it become null? What's happening?

Mr. Dodson stated effectively enforcement is suspended pending the remand to the Planning Commission. In the mean time they don't have to do anything.

Mr. Dyer stated any type of enforcement that you might or any order you see, you might receive to tear the deck down has been suspended until this issue has been addressed by the Planning Commission.

Ms. Davis stated what do we need to do? Pay money?

Mr. Dyer stated if we remanded it back to Planning Commission do they have to make an application?

Mr. Gillie stated they have to fill out the application because it still needs the paperwork but they don't have to pay. What your next step will be, I will get you an application for rezoning of your property. You will not have to pay for it because this Board has remanded it to Planning Commission and City Council. It will be up to City Council to rezone the property or not. If City Council fails to rezone the property then you can come back to this board and ask, because they did not do that. If they rezone the property, it will take care of it.

Ms. Davis stated there are literally four other houses right across from the North Campus Averett and that is where this is. Would it be best if we all came together and I believe a Davis owns the two houses beside us and he uses them as rental property?

Mr. Gillie stated if you try to go as a block, it will definitely be better than a single property asking for it. Yours is going to be free because this board has sent it over to them. That means I have to eat the cost of paying for the ads in the newspaper and all of the letters and stuff. If the other people ask, they are going to have to pay because we still have to run adds in the newspaper and send everything out. I can get the application to you and you can make copies of it and give out to them because it will always be better as a block. The thing that Ms. Evans said, there is a thing called spot zoning which is giving one property special privileges that others don't have. That is what would happen in your case. They would give you special privileges that no one else has.

Ms. Evans stated and we don't like to do that.

Mr. Dyer stated I will add one more thing. If your neighbors decide that yeah we would like to have our property zoned residential but they don't want to pay the application fee. It would not hurt if they go to Planning Commission and City Council and say we think our property should be zoned residential because you don't have to pay to get it rezoned but you do have to pay to ask for it to be rezoned. You don't have to pay to go to City Council and ask for something.

Mr. Davis stated I just don't understand why the people didn't tell us when we bought it.

Mr. Dyer stated your real estate agent should have told you.

Ms. Evans stated shame on you real estate agent.

Mr. Gillie stated it has been that way since 2004 and I don't know why they didn't tell you.

Ms. Evans stated will this make it to the August Planning Commission Meeting or will it be in September?

Mr. Gillie stated to the answer to your question yes the Planning Commission Meeting is August 10.

Mr. Dyer stated you're status quo until you receive a response from City Council, which will again be another month after the Planning Commission Meeting. You will have two months that you will not have to worry about the deck. We have resolved this issue.

II. OTHER BUSINESS

III. APPROVAL OF MINUTES FROM JANUARY 16, 2020.

The JANUARY 16, 2020 minutes were approved by unanimous vote.

IV. ADJOURNMENT

With no further business, the meeting adjourned at 10:40 a.m.

APPROVED