

Town of Seven Devils
Board of Adjustment

Regular Scheduled Meeting

July 28, 2008 – 5:30 p.m.

Call to Order

The meeting was called to order at 5:30 pm by Chairman Richard DeMott. Other Board Members Present was George Ehlinger, Loren Williams Bill Wilkinson, Bobbye Hurlbrink and Alternate Members Lois Dodson and Ernie St. Louis. Also present was the Zoning Administrator Don Fulkerson, Town Attorney Rob Angle and the Town Clerk Karen Daniels recorded the minutes.

Adopt Agenda

Alternate Member Dodson made a motion to adopt the agenda. Member Williams seconded the motion. The members present agreed unanimously.

Approve Minutes

- June 23, 2008 – Regular Meeting

Alternate Member Dodson noted on page (1) under Application for Variance it should reflect Avery County tax map in lieu of Watauga County tax map.

Member Williams made a motion to adopt the June 23, 2008 minutes as amended. Alternate Member Dodson seconded the motion. The members agreed unanimously.

Citizen Comments

David Hooper, 167 Snowcloud Drive – Requested to address the Board regarding the Recommendation from the Seven Devils Planning Board to the Board of Adjustment. The Recommendation dated July 21, 2008 read: *That the Planning Board be more involved in assisting the Board of Adjustment and applicants with decisions on Conditional Use Permits and Variances.* Mr. Hooper explained that the Planning Board felt it would be beneficial to have project planning meetings with people who are interested in doing projects in the Town to help them decide if they should or could do the project. After an amount of discussion, we decided for most projects all they would need to do is come to the Planning Board and ask and we would put them on the agenda and give them our opinion. He explained in the event of a request for a Conditional Use Permit there is a preliminary meeting with the applicant and the Board of Adjustment and we felt it would be nice if the Planning Board could be more involved in that. Currently it states the Planning Board will receive an agenda and we felt it would be nice if the Planning Board would receive the entire agenda packet so the Planning Board could be

informed participants in the Board of Adjustment preliminary meeting. He explained they were making a similar request for a variance. Mr. Hooper said this would be changes in the Zoning Ordinance so it would have to go to the Town Council and there would need to be a Public Hearing to change the Zoning Ordinance. Mr. Hooper said it had been brought to his attention that it was illegal for the Board of Adjustment members to discuss an item that is coming up with anyone.

Chairman DeMott read from the *Zoning Board of Adjustment in North Carolina/Rules of Procedure/IV. Rules of Conduct for Members E. No Board member shall discuss any case with any parties thereto before the public hearing on that case; provided, however, that member may receive and/or seek information pertaining to the case from any other member of the Board, its secretary, or clerk before the hearing.*

The Board requested the Town Attorney to research this and bring his findings before the Board of Adjustment at their next meeting.

Barbara Williams, 149 Four Diamond Drive – Requested to address the Board regarding the Continuation of a Variance Request from – June 23, 2008. She urged the Board not to allow an encroachment onto the 30-ft. right-of-way of the road because it does access the 5.90 acres that she owns.

Yardy Williams, 149 Four Diamond Drive – Stated the terrain in the mountains is aggressive and we have to live with the right-of-way's we already had when we incorporated and became a Town. He said an Ordinance was passed requiring a minimum of a 45-ft. right-of-way. He explained this is to get fire and emergency equipment in. He said if the Town is making improvements to an infrastructure and need to exercise eminent domain to increase the right-of-way; it would be less expensive for the Town when it goes to court to purchase the land if there are no improvements. He encouraged the Board to give very careful consideration to giving any encroachments to the right-of-way.

Board of Adjustment member Kathy Copley arrived at 5:40 p.m.

Old Business

A. Continuation of Variance Request from – June 23, 2008

Chairman DeMott requested all those wishing to give testimony to sign in at the podium. The Town Clerk then administered the oath of testimony to everyone wishing to speak.

Thomas Harmon, Lot 17 Swiss Lane – The Zoning Administrator stated Thomas Harmon is requesting a 15' set back in lieu of a 20' set back. He explained to the Board that if the variance is granted the Board is saying Mr. Harmon can not make a reasonable use of his property without the variance. He told the Board that Mr. Harmon was stuck with the footprint because the foundation had already been constructed when Mr. Harmon purchased the property. Mr. Harmon explained he is requesting a 5' set back to build a

storage shed. He stated he needs to make the storage shed 12' in lieu of 7' to accommodate his ladders and equipment. The Zoning Administrator said last month there was a question about Mr. Harmon's survey. He explained Mr. Harmon's survey showed his lot line and the road as it comes up to the front of his lot but it dead ends and the right-of-way continues and is actually in another subdivision. He then reviewed a copy of Mr. Harmon's plat with the Board showing Mr. Harmon's subdivision, Section 4, Lot 17. Mr. Harmon pointed out the location of the proposed storage shed on the plat and explained that he is not requesting to encroach onto the right-of-way but is requesting to encroach onto the set back. Discussion followed among the Board regarding right-of-way, set-back and why Mr. Harmon could not build a smaller shed for storage. Mr. Harmon explained the footprint of the main structure had already been determined by the previous owner which left inadequate area to construct a storage building with enough square footage to adequately store his maintenance equipment. The Zoning Administrator stated at the previous meeting there was a question of whether Mr. Harmon's lot was in the road right-of-way. The Zoning Administrator pointed out on the plat that Mr. Harmon's lot in Subdivision 4 is not in the road right-of-way. The Zoning Administrator said it is very difficult and some would say impossible to construct an 18' road in a 30' right-of-way. He explained that is why some of the roads in Seven Devils are so narrow. The Zoning Administrator said our ordinance applies to new subdivisions and requires a 45' road right-of-way and an 18' road width. He said this does not apply to any of the old subdivisions that were already recorded, they are grandfathered. Member Copley stated she would like to hear some discussion regarding this proposal. Discussion followed among the Board regarding the importance of standing by and upholding their Ordinances and whether this would set a precedent.

Chairman DeMott read from *The Zoning Ordinance, Section 15.3 - A Variance from the regulations of this Ordinance may be granted by the Board of Adjustment if it finds that strict enforcement of the regulations would result in practical difficulties or unnecessary hardships to the applicant for the Variance, and that, by granting the Variance, the intent of this Ordinance, the Vision Statement, and the Comprehensive Land Use Plan will be observed, public safety and welfare secured, and substantial justice done as prescribed by the North Carolina Municipal Zoning Enabling Act, Chapter 160A, Article 19.* The burden of proving that these conditions exist is on the applicant.

The criteria for the variance were reviewed and Chairman DeMott read the following to the Board:

There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance. Specifically, in reaching their conclusion under this finding, the Board of Adjustment must determine that all of the following are true:

Each statement was voted upon and findings recorded as follows:

- 1a) Strict compliance with the regulations allows no reasonable return from, or no reasonable use of, the applicant's property. *(It is not sufficient that failure to grant the variance simply makes the property less valuable.)*

FALSE: Unanimous

1b) The hardship results from the application of the ordinance. *(The Board of Adjustment must limit itself to evidence of hardship resulting from the application of the ordinance to the property involved.)*

TRUE: Four (4)

FALSE: Three (3)

1c) The hardship is suffered by the applicant's property rather than personal circumstances. *(The hardship must be one that affects the applicant's property directly. The public's hardship is irrelevant. Also, unique personal or family hardships are irrelevant because a variance, if granted runs with the land not with the current landowner's present circumstances.)*

TRUE: Six (6)

FALSE: One (1)

1d) The hardship is not the result of the applicant's own actions. *(The applicant may not show hardship that he inflicted on himself or that the applicant could have avoided.)*

FALSE: Unanimous

1e) The hardship is peculiar to the applicant's property. *(If the hardship results from the conditions that are neighborhood-wide, relief becomes a matter for the Town Council to amend the ordinance.)*

FALSE: Unanimous

Chairman DeMott requested the Town Clerk to tally the votes. The Town Clerk reviewed the votes as follows:

- 1a) FALSE - Unanimous
- 1b) TRUE – Four (4) FALSE – Three (3)
- 1c) TRUE – Six (6) FALSE – One (1)
- 1d) FALSE - Unanimous
- 1e) FALSE - Unanimous

Having failed on four (4) of the five (5) criteria, the Application for a Variance was denied by the Seven Devils Board of Adjustment.

New Business

- A. **High Country Conservancy – Richard DeMott** – The Zoning Administrator presented a map to show where the High Country Conservancy would be placing 80 acres in Seven Devils and another 45 acres outside of Seven Devils for hiking, walking and natural areas. Chairman DeMott stated he had spoken with the High Country Conservancy and there is to be close to 200 acres total which will go across the top of the ridge in Seven Devils and

down into Valle Crusis. He elaborated the High Country Conservancy has obtained the property and will be turning it over to the State and this week the Ranger will be up to survey this property. Chairman DeMott told the Board and Citizens that the High Country Conservancy will be at the next Town Council meeting on August 11, 2008 to give a presentation and he urged everyone to attend and get more detailed information and clarification of any questions they may have.

Chairman DeMott announced their have been three letters received for the vacancy on the Board of Adjustment. He stated these three names will be sent to the Town Council and the three interested people are; Lois Dodson, Sarah Manning and Carol Isquith.

B. Appeal of Civil Penalty – The Board reviewed a letter submitted by Lee Rawlinson to the Board of Adjustment requesting an appeal of the decision of the Zoning Administrator regarding a civil penalty in the amount of \$2,000.00 for removal of locust trees at the Seven Devils Resort Club. Mr. Rawlinson presented a letter from Mr. Wilkie Tester of Birdhouses, Crafts, and More confirming he was contracted by the Resort Club to remove several mature locust trees. His letter stated he had inspected the trees to be removed and he found them to be diseased and/or dying and in his estimation they would fall naturally in the next 12-24 months. He stated all the trees were in close proximity to the existing electrical lines and posed a serious threat to power disruption should they fall. Mr. Rawlinson told the Board it is with much embarrassment and regret that he has to come before the Board for this appeal. He explained to the Board that that he is the individual responsible for maintenance of the grounds and it was his duty to acquire the necessary approvals from the Town of Seven Devils before commencing any work. He said he failed in his duties and that he intended on getting a permit prior to their contractor arriving on the site and was surprised to find out that the contractor had begun work ahead of schedule. He read the following from the Seven Devils Resort Club May 30, 2008 minutes: *A locust tree at the front of the yard near the street fell unexpectedly during the winter, and there are several more locust trees that could be a threat to the clubhouse. Lee will investigate the possibility of getting a permit to cut them down and locating someone who will cut them at no charge in order to use them for firewood. They would be replaced with more desirable trees.* Mr. Rawlinson pointed out that he was sited for illegally cutting four (4) trees but only three (3) were taken down without permission as one (1) of the trees had previously fallen in a storm. He then had Mr. Jim Schaffer, 105 Longview Drive – give a presentation on the plans for the Seven Devils Resort Club to replace the trees. Mr. Schaffer presented photographs showing the eight (8) fifteen foot (15') tall red maple trees they propose to plant as replacement. After discussion, the Board agreed the original fine should have been \$1,500.00 in lieu of \$2,000.00. Mr. Rawlinson requested the Board accept the proposal to landscape the area as sufficient mitigation to the civil penalty. It was the consensus of the Board that the outcome of the eight (8) red maples will

eventually be an improvement to the loss of the locust trees. The Board reviewed the following revision to the Zoning Ordinance regarding fine and replacement that was passed by the Town Council on June 09, 2008:

Pursuant to North Carolina General Statutes 160A-175(b), a violation of any provision of Article 8.9, Tree Protection, shall subject the offender to a civil penalty in the amount of \$500.00 to be recovered by the Town. Violators shall be issued a written citation which must be paid within ten (10) days after receipt of the written citation. If the violator does not pay the penalty within ten (10) days after receipt of the written citation, the Town may recover such penalty in a civil action in the nature of a debt. In addition, trees removed without approval shall be replaced with two (2) six foot (6') tall, two inch (2") in caliper trees for each tree illegally cut. Such replacement trees shall include but not be limited to the following list:

The Zoning Administrator noted to the Board that this revision to the Zoning Ordinance was not in place when this violation occurred.

Ernie St. Louis, 281 Cliffside Lane – Asked the Board to speak. The Town Clerk then administered the oath of testimony to Mr. St. Louis. Mr. St. Louis told the Board one of the trees in question came down in the wintertime and was lying on the electrical wires and had to be cut so, there were only three (3) trees that were illegally cut and at a fine of \$500.00 per tree, the fine should be reduced to \$1,500.00. The Board members agreed this was the case.

The Zoning Administrator told the Board that he would have granted permission to remove the trees and would have accepted their plan to landscape had they asked in advance. He pointed out to the Board that the trees the Resort Club are proposing to replant are more numerous and greater in size than the Ordinance requirements. Discussion followed among the Board regarding the enforcement of previously issued penalties and a reduction in the civil penalty for this case.

Member Copley reviewed Mr. Rawlinson's reasons compelling the Board to consider a reduction in the civil penalty.

- The cutting was not done to promote a better view.
- The trees removed were locust trees and not desirable trees.
- The trees are being replaced with more desirable red maples.
- The replacement trees of eight (8) fifteen foot (15') high trees exceed the Zoning Ordinance requirements.
- The trees which the Seven Devils Resort Club removed were a problem for the power lines.
- The Zoning Administrator would have given permission to remove the trees if permission had been requested.
- The error in cutting occurred because the tree cutter, Wilkie Tester begun work ahead of schedule and prior to a tree permit.

Chairman DeMott noted that at least half the Board members are also members of the

Seven Devils Resort Club. The Zoning Administrator stated he had spoken with Rich Ducker with the Institute of Government regarding the Resort Club members being excluded and the Board not having a quorum. Rich Duckard said in such a situation, the law provides the remaining Board can be considered the whole Board and it would be legal for the remaining Board to cast a vote. He reminded the Board that it would still require four/fifths of a majority vote. The Town Attorney stated as a quasi-judicial body it would not be unadvisable for the members of the Resort Club to recuse themselves. Chairman DeMott then requested any Board members wishing to recuse themselves from voting to please do so. Members Williams; Dodson; Hurlbrink and DeMott requested to be recused from voting.

Member Ehlinger made a motion to reduce the fine by half, for a total of \$750.00. Member Copley seconded the motion. The remaining members agreed unanimously.

Board Member Comments

None

There being no other matters to bring before the Board, the Chairman asked for a motion to adjourn. Member Williams made the motion to adjourn. Member Copley seconded the motion. The members agreed unanimously. At 7:20 p.m. the Board adjourned.

Richard DeMott, Chairman

Karen E. Daniels, Town Clerk