

**BANNER ELK BOARD OF ADJUSTMENT
MONDAY JANUARY 16, 2023
MINUTES**

Members Present: Morgan Herdklotz, Fred Schmitt, Ted Silver, David Tate

Staff Present: Zoning Administrator Riley Pudney, Town Attorney Four Eggers

Others Present: Attorney Nathan Miller, Attorney Tyler Moffatt and respective clients

Chairman Fred Schmitt called the meeting to order at 6:03 p.m. Chairman Schmitt asked everyone present to stand and join in the Pledge of Allegiance.

Consideration of the August 2022 Minutes

The minutes for the August 15th, 2022, meeting was approved unanimously as presented with a motion by David Tate and Seconded by Ted Silver.

Chairman Schmitt stated that this is a quasi-judicial proceeding much like the court proceedings, it's one in which one's individual's rights are being determined. Only people who can demonstrate they'll be affected by the outcome of the decision are allowed to participate as parties in the proceeding. Testimony will be limited to only those issues concerning whether the appeal of the decision of the zoning administrator should be granted. Before opening the hearing, Chairman Schmitt reviewed the requirements for the board members to be seated. The Chairman asked if there were any board members present that could not be impartial or who had received information outside of this hearing. None were noted. Chairman Schmitt stated for the record that Dekka Tate was not present, and David Tate would be hearing the case as the alternate member.

Outback Lane Subdivision Zoning Decision Appeal

Chairman Fred Schmitt began the hearing by asking if there are any individuals who wish to intervene as a party to this action? He explained that such individuals must show special damages related to the application beyond those concerns of the community as a whole. A time will be provided to receive testimony from those present who may wish to testify separate from intervening as a party. Town Attorney Four Eggers stated that there were individuals requesting to intervene and were being represented by Tyler Moffatt. He requested Mr. Moffatt to identify those wishing to intervene. Mr. Moffatt introduced the following parties:

- Laurent C. Bureau, Trustee
- Robert Jones Jr., and wife Nancy Jones
- Janet Speer and husband Allen Speer, III
- JRMON NC, LLC
- Kent Willard
- Mary D. Gilmer
- Mary M. Gilmer and Ellen Stapleton
- Kenneth D. Varnadore
- Janis Hodges and husband William Hodges

- Nicole Moffa-Macri and Jeffrey Macri

Town Attorney Four Eggers then asked if there any other individuals present who believe they have standing and would wish to intervene as a party in addition to those just listed. None were noted. He then instructed the Board to open an evidentiary hearing regarding the standing of the intervenors. He stated that this hearing is separate and apart from the merits or consideration of the main case or the main issue that will be before you later and relates simply to a determination by the board and a finding as to whether individuals have special damages procedurally.

Mr. Moffatt called Mr. Allen Speer, further referred to as Mr. Speer, as his first witness. Mr. Speer was sworn in and took the stand. Mr. Speer stated he lives on Horse Bottom Ridge. Mr. Moffatt introduced exhibit 1A, which was accepted and admitted by all parties. Exhibit 1A is a GIS map of the surrounding areas. Mr. Moffatt asked for Mr. Speer to identify his properties. He identified properties 2, 5, 13, 14 and 3 as his properties and built his current home in 1987. Mr. Moffatt asked Mr. Speer if he understood the issue being addressed and what his concerns were about the proposed subdivision. Mr. Speer answered that his main concern was the road. He states that Outback Lane has five blind curves and has witnessed numerous accidents on the road. Mr. Moffatt had no further questions. Mr. Miller was invited to question Mr. Speer.

Mr. Miller asked if Mr. Speer was aware that the tract he purchased in 1986 was a subdivided tract of land from a 6-acre tract. Mr. Speer stated that he did not know that and did not know that it was in the ETJ as well. Mr. Miller asked him if his concern was the additional traffic that would be added. Mr. Speer stated that it was a safety concern and that the road was dangerous. Mr. Miller then asked if he believed they should be able to build on the four tracts. Mr. Speer answered he believed one house would be reasonable. Mr. Miller had no further questions. Zoning Administrator Riley Pudney had no further questions. Attorney Eggers asked if the Board had any questions for Mr. Speer. Ted Silver asked for clarification on which part of the road Mr. Speer thought was unsafe, specifically referring to the gravel section. Mr. Speer stated that yes it was the gravel portion of the road and was very narrow. The Board had no further questions and no redirect was initiated.

Mr. Moffatt introduced Kent Willard, further known as Mr. Willard, as his next witness. Mr. Willard was sworn in and took the stand. Mr. Moffatt asked if Mr. Willard could identify his properties from exhibit 1A. Mr. Willard stated that his properties were 11 and 12 and that they have had those properties for approximately seven years. Mr. Moffatt asked him to explain to the Board his main concerns for the proposed subdivision. Mr. Willard stated that it is road safety that there are various places where vehicles tend to get trapped, slide off the road or stuck where no one else can get by. That's not only a problem for them, but it's also a problem for anyone that wants to get by including any emergency vehicles that couldn't reach the residence if they needed to. He stated he witnessed an accident on the road earlier that weekend. He also stated the proposed subdivision would double the amount of houses on that road. Mr. Moffat had no further questions. Mr. Miller was invited to question Mr. Willard.

Mr. Miller asked Mr. Willard if he believed sixteen homes would be too many to be built. Mr. Willard stated that 16 is too many. Then was asked about 8 and then 4 and Mr. Willard believed 4 was too many as it is a 50% increase in housing and traffic for the road. Mr. Miller asked if he had issues with emergency vehicles reaching his property. He answered that he had not, but he could see that that could occur because there have been many times that vehicles have gotten stuck on the road, and it wasn't wide enough for any other vehicle to get past them. There were no further questions from Mr. Miller. Zoning Administrator Riley Pudney stated she did not have any questions. Attorney Four Eggers

asked the Board if they had any questions. Chairman Fred Schmitt asked what his primary concern was with respect to this appeal. Mr. Willard stated that it would increase 50% or double the amount of traffic because of the number of residents there and the road is thin, narrow, windy road surface is difficult. He believes that there would be more accidents and stuck vehicles that prevent others from getting by as well as potentially emergency vehicles. Ted Silver asked if he had driven the road into the subdivision. Mr. Willard stated that he had as well as walked it. Ted Silver asked if the turn into the subdivision would be considered narrow and at a 90-degree angle. Mr. Willard stated that that was correct. The Board had no further questions.

Mr. Miller, on a follow-up, asked how fast he drove on Outback Lane. Mr. Willard answered 15 at the most and at times 5 mph. Mr. Miller asked if he had ever gotten into an accident on the road. Mr. Willard said he had not. He then asked if Mr. Willard was aware of the four lots when he purchased the property in 2015. Mr. Willard stated that he did know there were four lots there. There were no further questions raised.

Mr. Moffatt called Mary D. Gilmer, further known as Mrs. Gilmer, as his next witness. Mrs. Gilmer was sworn in and took the stand. Mr. Moffatt asked if Mrs. Gilmer could identify her property on exhibit 1A. She stated that it was 13 and 14. He then asked what her concerns were with the proposed subdivision. She stated that the road is dangerous and had relatives involved in multiple collisions on the road. She also stated that the road is narrow and does not allow cars to pass without one backing up. She believes emergency vehicles would be slowed when traveling on the road. Mr. Moffatt had no further questions. Mr. Miller was invited to question Mrs. Gilmer.

Mr. Miller asked if her property was originally subdivided from a 22-acre tract. She said she did not know and that she had sold pieces of her property at least three times. Mr. Miller asked if the road was in the same condition when she purchased land as it is now. She stated that it was a logging road, and it was widened so that they could reach the properties. Mr. Miller asked if she had ever witnessed an emergency vehicle not being able to make it up the road. She stated that the only ambulance she had seen took a long time to reach the property. He asked if there were any speed limit signs or speed bumps on the road to slow traffic down. She answered that there were not any. Mr. Miller had no further questions. Zoning Administrator Riley Pudney did not have any questions. Attorney Eggers asked the Board if they had any questions.

Chairman Fred Schmitt asked her to repeat her main concern. Mrs. Gilmer stated that there would be more traffic on a road that is already unsafe. Ted Silver asked her if the road was wide enough for two cars to pass. She stated that it was not. There were no further questions.

Mr. Moffatt called Kenneth Varnadore, further known as Mr. Varnadore, as his next witness. He was sworn in and took the stand. Mr. Moffatt asked if he could identify his property on exhibit 1A. Mr. Varnadore stated that it was 15 and that the proposed subdivision cuts right through his property. Mr. Moffatt asked if he could explain his primary concern for the proposed subdivision. He stated that it would increase traffic greatly on an already narrow road. He stated that he believed the road was no greater than 12 feet in width and less in some areas. Mr. Moffatt had no further questions. Mr. Miller was invited to question the witness.

Mr. Miller asked when he had bought his property. He stated that he bought it in 2022. Mr. Miller introduced exhibit 9, which was accepted by all parties. Exhibit 9 is a plat of the proposed subdivision property and is also exhibit 4 in the Board packets. Mr. Miller then introduced exhibit 10, which is the plat to Mr. Varnadore's property. Mr. Miller asked if he was familiar with the 50' right-of-way that is

shown on his plat. Mr. Varnadore stated that he was. Mr. Miller asked if he knew if his property and the property in question was in the ETJ. He stated he did not know. Mr. Miller asked if he knew there were four lots above him when he purchased the property. Mr. Varnadore said he was aware. He then asked if he was aware of the state of Outback Lane when he purchased his property. He stated that yes, he knew the condition. Mr. Miller had no further questions. Zoning Administrator Riley Pudney did not have any questions. Attorney Eggers asked the Board if they had any questions.

Chairman Fred Schmitt asked what Mr. Varnadore's main concern was. He answered that it was a safety concern due to the traffic on the road. Ted Silver asked if Mr. Varnadore could identify the signature on his plat. He stated that it was signed by Tommy Burleson with Avery County. There were no further questions.

Mr. Moffatt called his final witness, Mark Bureau, further known as Mr. Bureau. Mr. Bureau was sworn in and took the stand. Mr. Moffatt asked if he could identify his property from exhibit 1A. Mr. Bureau stated that his property was number 1. Mr. Moffatt asked what his concerns were regarding the subdivision. Mr. Bureau stated that his concerns were the same as the others. That it is regarding the safety of the road and the blind curves and road width. Mr. Moffatt had no further questions.

Mr. Miller asked if Mr. Bureau was familiar with exhibit 10. Mr. Bureau stated that he has trouble seeing and cannot identify the document. Mr. Miller explained that it was the plat to his property that showed the 50' right-of-way through his land. Mr. Miller asked if he was aware that the subdivision had access through this right of way. Mr. Bureau stated that he was aware. Mr. Miller asked if he was aware of the four lots at the time of purchase. He stated that yes, he was aware that there were four lots. There were no further questions from Mr. Miller. Zoning Administrator Riley Pudney did not have any questions. Attorney Eggers asked if the Board had any questions.

Ted Silver asked how much road width was available with an average sized vehicle on the road as he approaches the turn to Stacy Lane. Mr. Bureau stated that there is about 2 feet on either side of the vehicle. There were no further questions.

There were no further witnesses called on behalf of intervening. Attorney Eggers called for the parties to make their closing statements regarding the issue of standing.

Mr. Moffatt began by stating that the standard for intervention was twofold. Proximity to the property has been accurately proven by the use of the same access road. He stated that the second standard is proving special damages. Mr. Moffatt argued that the evidence showed is that each of these proposed interveners utilized the same access roads. They have the same concerns about the safety issues on those access roads which are unique to the people in that community different from the residents of Avery County at large. And he believes that in and of itself meets the standard for special damages is the issue of safety which the witnesses have testified to. He asked the Board to allow for those who testified to intervene in this action.

Mr. Miller began his closing statement by stating that Mr. Varnadore and Mr. Bureau bought property after this subdivision and were aware of the four lots above them. He believes by them purchasing their property with that knowledge, that they waived their right to be concerned about safety. He further stated that none of the witnesses proved any damages in regards to safety, that they were concerned

about the potential increase of traffic. There were no testimonies regarding injuries from any accidents. He closed by requesting the Board to deny intervenor status for all.

Attorney Eggers instructed the Board to enter into their deliberations regarding intervenor status. He reminded the Board that the standard has been argued to them as whether a party has standing to participate as a party in this matter. It does require a finding of special damages unique and different from that of the general community and by case law, those factors include whether the property is adjacent or nearby to the proposed development. The effect of the proposed use on the property as it relates to the intervener's property and any other factors which would result in injury to the interveners, which is separate and distinct from any harm to the community in general. He requested the Board to make a motion regarding all the possible intervenors listed.

The Board began deliberations on the following:

Mr. Speer- Ted Silver believed that Mr. Speer showed adequate evidence of special damages regarding the safety, condition, and width of the road. He further stated that as the road sits now, Mr. Speer and many residents are already concerned about safety. Therefore, Mr. Speer has special damages regarding potential future development that would make the road even more unsafe. Chairman Schmitt and David Tate agreed with Mr. Silver. Mr. Silver motioned for Mr. Speer to be admitted as an intervenor and was seconded by Chairman Fred Schmitt. The motion passed 4-0.

Mr. Willard- Ted Silver began with the same argument stating that he proved special damages regarding the safety of the road. He states that Mr. Willard testified to going between 5-15 mph on the road due to safety concerns for blind spots and traffic. Chairman Schmitt agrees and motions to admit Mr. Willard as an intervenor. The motion was seconded by Ted silver and passed 4-0.

Mrs. Gilmer- Chairman Fred Schmitt and Ted Silver believe her testimony of it not being safe and witnessing accidents is enough to prove special damages. Chairman Fred Schmitt motions to admit Mrs. Gilmer as an intervenor and was seconded by David Tate. The motion passed 4-0.

Mr. Varnadore- Ted Silver states that Mr. Varnadore's proximity makes him even more relevant to all the same issues that have been previously stated. Ted Silver motions to admit Mr. Varnadore as an intervenor with a second by Chairman Fred Schmitt. The motion passed 4-0.

Mr. Bureau- Morgan Herdklotz stated that Mr. Bureau is closest to the property and has driven it many times and stated why it was dangerous to him and the residents of Outback Lane. Chairman Fred Schmitt motioned to admit Mr. Bureau as an intervenor and was seconded by David Tate. The motion passed 4-0.

The Board then discussed the witnesses listed who did not testify and their ability to intervene. The Board denied the following witnesses due to lack of a testimony:

- Nancy B Jones: motion to deny by Ted Silver, seconded by Chairman Fred Schmitt. Motion passed 4-0
- JRMON NC, LLC: motion to deny by Ted Silver, seconded by Chairman Fred Schmitt. Motion passed 4-0

- Mary M. Gilmer and Ellen Stapleton: motion to deny by Chairman Fred Schmitt, seconded by David Tate. Motion passed 4-0
- Janis Hodges and husband William Hodges: motion to deny by Chairman Fred Schmitt, seconded by Ted Silver. Motion passed 4-0
- Nicole Moffa-Macri and Jeffrey Macri: motion to deny by Chairman Fred Schmitt, seconded by Ted Silver. Motion passed 4-0

A brief recess was taken at 7:44 p.m and reconvened at 7:50 p.m.

Chairman Fred Schmitt opened the evidentiary portion of the appeal and asked all parties for an opening statement.

Mr. Miller opened by stating that this is simply a governmental error between Avery County and the Town of Banner Elk. His clients bought the property under the assumption that it was four lots that were legally subdivided since there was a recorded plat from 2007 that showed it. He states the road is safe and has a video and testimony of emergency personnel that proves the road is safe. He asks for the Board to rectify a governmental error.

Mr. Moffatt began his opening statement on behalf of the intervenors by reiterating the safety concerns due to road conditions. He also stated that he believes the statute of limitations does not apply in this case since the Town was not aware of the issue until 2022 and there was not a triggering action. He asks the Board to affirm the decision of the Zoning Administrator.

Zoning Administrator Riley Pudney began by giving a brief history of the case. She stated that the issue was brought to her attention in March by concerned property owners. She became aware of the possible development of 8 homes and did more research on the property since there had been no permits approved by the Town for a development. That is when she came across the plat that subdivided the property but was never approved by the Town. Due to the lack of initial Town review and public safety concerns for a new development, she denied the four lot subdivision and deemed it illegal.

A 10-minute recess is taken at 8:02 p.m. and reconvened at 8:12 p.m.

The Board invited Mr. Miller to call his first witness. Mr. Miller called Zoning Administrator Riley Pudney, further known as Ms. Pudney. Ms. Pudney was sworn in and took the stand. She stated that she has been an employee of the Town since February 2022 and was made aware of the issue in March. Mr. Miller introduced exhibits 18 and 19 which were the Town of Banner Elk zoning maps. Mr. Miller asked Ms. Pudney if the maps showed the lots as four individual parcels. She said that the maps do show the four lots, however the map pulls data from Avery County and the zoning maps are used to show the allowed uses. He asked her to explain her decision to deny the subdivision. She explained that it is an illegal subdivision that the Town did not sign off on. The subdivision does not meet the requirements of the Town, nor does it meet the requirements of Avery County. She stated that part of her decision was due to safety concerns regarding the road width and ability of emergency vehicles to respond. He asked if she had driven the road and she stated that she had gone up there multiple times, with the Town Manager and Ted Silver. She explained that Ted Silver did not know where the property was, so she visited the site with him. Mr. Miller asked what conversations were had with Ted Silver while visiting the site. She stated that they had discussed bikes and that she told him where to turn and where the lots were. Mr. Miller then asked if any accident on the road had been reported to her. Ms. Pudney answered

Board of Adjustment Minutes

August Meeting

Page 6 of 8

that accidents would not be reported to her as the Zoning Administrator. Mr. Miller asked if one house could be built on the 10-acre tract, and she stated that yes one house could be built per parcel as is stated in the Town Ordinance. Mr. Miller had no further questions.

Mr. Moffatt began his cross examination by asking Ms. Pudney where the data for the zoning maps comes from. She answered that the parcel data was pulled from the Avery County GIS system. He asked how long it would take to investigate every parcel in the ETJ to ensure that there were no additional plats signed off by the County. She stated that she believes it would take a year to go through all the data and plats. Mr. Moffatt had no further questions.

Ms. Pudney reiterated to the Board that the plat did not meet the Town's requirements nor did it meet the Avery County requirements and those requirements are there for safety purposes.

Ted Silver asked Ms. Pudney if there was any way to tell based off the Zoning Maps if the lots were formally approved by the Town. She stated that there was no way to tell since the purpose of the maps is to show zoning districts. He asked if she knew why there were minimum design standards for roads and subdivisions. She stated that it would be for public health and safety. Chairman Fred Schmitt asked if the 2007 plat would have come to the Town, would it have been approved. Ms. Pudney said it would not have since Outback Lane, a private road, did not have the minimum 45' right-of-way to a public road.

Mr. Moffatt asked if the applicants had contacted her prior to being aware of the issue. Ms. Pudney stated that they had not. There were no further questions.

Mr. Miller made a motion to have Ted Silver removed from the hearing due to 160D-109(d) of having ex-parte communications with Ms. Pudney that was not disclosed prior to the hearing beginning. Attorney Eggers stated that it is a proper motion that an applicant can make. It does require an individual board member to address any undisclosed or parte communications which they have had. And also, the board members will need to state whether they have formed any opinion, fixed opinion that is not susceptible to change. And also, whether they have any interest in the effective issue that of a personal or financial interest which would affect the outcome of the manner. Attorney Eggers asked Ted Silver if it was common practice that he visited sites before hearing the case. Ted Silver stated that he visited the site of each case, and that communication was limited to where to turn. Attorney Eggers then asked if Ted Silver had received any additional information prior to the hearing that was not part of the agenda packet or site visit. He stated that he had not. Attorney Eggers then asked if any undue influence was exerted on him that created a fixed opinion to where he could not be an impartial decision maker. Ted Silver stated that there was none exerted, and he was impartial. Attorney Eggers directed the Board to address the motion as to whether Ted Silver should be recused. The Board unanimously agreed that he should and would remain as a Board member for this hearing.

Mr. Miller called Seth Norris, further known as Mr. Norris, as his next witness. Mr. Norris was sworn in and took the stand. Due to Mr. Norris's emergency services background in Watauga County, Mr. Miller motioned to introduce him as an expert witness. The motion was accepted by the Board. Mr. Miller introduced exhibit 24, a video taken by Mr. Norris of the road. Mr. Miller asked what his expert opinion of the road was. Mr. Norris stated that he believed the road was adequate to have emergency vehicles respond and that only 8 feet of road was needed to fit a fire truck. He also stated that the 2 ponds along

the way act as critical water points for their tankers. He believes that the additional 4 lots does not pose a risk to public health or safety. Mr. Miller had no further questions.

Mr. Moffatt asked Mr. Norris if a firetruck met another vehicle on the road, would it be able to pass? Mr. Norris stated that it would not be able to pass on Outback Lane and one vehicle would have to back up or turn around. Mr. Moffatt had no further questions.

Ms. Pudney asked if Mr. Norris was familiar with the fire code and its requirements for minimum road width. He stated that he was familiar with the code but not any specific requirements. She asked if he was aware that the code requires 20 feet of unobstructed width for a firetruck. Mr. Norris said that that was accurate. Ms. Pudney asked if he knew the current width of the road. He stated he believed it to be 9-10 feet. She had no further questions.

Ted Silver asked Mr. Norris if he could explain operational reality in regard to Outback Lane. Mr. Norris stated that the reality is that a firetruck would answer any call and make it to any property in question regardless of the road width. Ted Silver asked if he was familiar with the trucks that Banner Elk Fire Department would respond with. Mr. Norris said he did not. He stated that he believed a truck and emergency services could respond without concern and in a timely manner for the area. There were no further questions from the Board.

Ted silver motioned to recess the meeting until February 7th at 6:00p.m. The motion was seconded by David Tate and passed unanimously. A recess was entered at 10:00 p.m.

Respectfully Submitted,

Riley Pudney, Zoning Administrator

Attested: _____

Fred Schmitt, Chairman to the Board

**NOTE: A transcript of the audio recordings is attached to the minutes