

**REGULAR MEETING OF THE SEMINOLE COUNTY
BOARD OF ADJUSTMENT
JUNE 26, 2023
6:00 PM**

MINUTES

CALL TO ORDER AND ROLL CALL

Present (4): Chairman Bernard Johns; Vice Chairman Jim Hattaway; Larry Wright; and Alternate Tom Kunzen

Absent (2): Austin Beeghly; and Alternate Heather Stark

VARIANCES:

1. **Planning Manager Appeal** – Appeal of the Planning Manager’s decision in the measurement of a setback from the first vertical plane; (Douglas K. Gartenlaub, Appellant) County-wide (Mary Moskowitz, Planning Manager)

Mary Moskowitz, Planning Manager, presented this item as stated in the staff report.

Douglas K. Gartenlaub, Appellant, was present and introduced each of the witnesses he has in attendance. Using his provided PowerPoint presentation, he stated that there are two (2) issues. One is an ADU issue that under Section 40.71 that specifically requires that all the zoning decision must be made prior of issuance of the permit. This was submitted back then and the Board can see in the plans that it was there, but nobody mentioned anything about it and they did not file an affidavit for the ADU and they are making him comply with the ADU requirements. If there were specific requirements for that zoning district, they should have brought it up at the beginning and not at the end.

He referenced Ordinance 40.71 compliance with zoning requirements “all work done pursuant hereto shall conform to setback and other zoning requirements and no permit shall be issued for any installation which does not, or will not, comply with said requirements”. Mr. Hayne will testify that he has done a lot of permits and he will not try to avoid zoning review. Civil compliance with Section 40.71 would’ve prevented where we are now, which is CO, as this building is already built. That’s when they raised this issue when they needed to add an additional meter because they needed additional power is when it was brought up. They have held the CO for two (2) years based on this ADU issue and setback issue, which the County has created. In October of 2021 was when Seminole County Planning & Development first brought this issue over a year after they have applied for this permit.

The ADU Ordinance came into place in 1972, and on this property, there was already a structure prior to 1972. The applicant bought this property in 1987 and they combined this structure to the main residence so this ADU is not detached. The applicant applied in August of 2020 and they did not say anything, but a couple months later they said that the foundation of the property is fine but the stem wall has deteriorated to the point that it has to be replaced and a new permit was submitted with the new drawings and they never said anything about the setbacks or the ADU issue.

After the third submittal around February of 2021, the issue was raised by a building inspector that they had a cantilevered roof that they built to create a long overhang and the architect can testify that they don't need it, but the inspector insisted that they do and that they also have to add columns in to hold the roof, and this was permitted and resubmitted again and the new drawings are on the paper that was submitted for the Board to see. When they made the applicant submit this column, they did resubmit with all the changes and they did not mention anything about the ADU issue or the columns yet. Is fair for the applicant that they had an approval, but they changed their mind when they resubmitted and took that approval away. It's not fair because the applicant already spent \$700,000 on this. The first issue was the setbacks in the first vertical plane that they told the applicants to put the columns in and there was the setback change. The second problem is the ADU. The applicant would have to submit the affidavit attesting that the unit will be rented at an affordable rate to an extremely low income, which was never submitted because it's not an ADU.

The original design was a cantilevered roof and there wasn't a setback issue. It's not until the building inspector required the columns that the setback issue came up. Despite that, they have trusted and complied with the requests of the inspector and they put the columns in, and they did not raise the issue in that moment until they received an email on October 21, 2022. The variances are applied under two (2) circumstances typically when the Planning Department said in the beginning of the review is needed or they build something they weren't supposed to.

If there was an issue in February of 2021 the very first time that they raised this months later when they were already in CO and saying that they did not built this according to the plans is false.

Mr. Gartenlaub introduced Paul Medley, the architect, and asked him questions. He asked if he was familiar with this project and he responded yes. He asked if he has permitted more than a few previous projects like this one, he responded yes. Mr. Gartenlaub asked Mr. Medley if there were in some in Seminole County and he responded yes. Mr. Gartenlaub asked him if there was any attempt to make this pool house an ADU and he responded no, this was supposed to be a summer kitchen as the location of the kitchen is between the house and the lake and the location of this structure was there before they even started this project and they were already using it as a summer kitchen. They ended up opening it up more and creating much more connection with the pool deck. Mr. Gartenlaub asked Mr. Medley if is realistic how the space is laid out to be able to be a rental and he responded no because this is right on the back patio between the house and the lake. Mr. Gartenlaub asked him if it was unusual to put a summer kitchen in and he responded no that they put summer kitchens in almost every single project that he does.

Mr. Gartenlaub provided plans to the Board to reference. Mr. Medley explained on the plans that they presented the columns that the building inspector instructed them to install. He received a call from the job superintendent, not from the inspector, that they needed to install the columns there, he also asked if the owner of this property was okay with them. He modified the drawings and submitted them back to the Building Department for review and he had the contractor come and get the plans for submittal. Whenever he makes a change like this, he has to cloud it and make it different colors and there is a delta revision number on it and in the title block on the side it lists the change and that will get back in to the County for review. The initial process for this is they make the original drawing and they are submitted to the County and they come back and if they have any comments they will make the adjustments and they will put the cloud on it, a delta number, the reason, the date and then it will go back again and if they don't have any more comments they will issue the building permit. Anytime a change is made, it will be treated like he stated.

Mr. Gartenlaub asked Mr. Medley if they raised the issue at the time of the second submittal with the changes made and he responded no they did this submittal early, this type of projects need different types of inspections all the way until drywall and they never mentioned the issue with the columns until after the job was done, then the client came in doing the final inspections to get the CO and that's when the County bring the setback issue up. They further discuss the plans and explain the floor plan and layout of the structure.

Mr. Gartenlaub asked Mr. Medley if he has ever seen the vertical plane be measure from the wall to the columns and he responded that he has seem them go both ways in different counties. Mr. Gartenlaub asked him if that setback issue was supposed to be brought up during plan review and he responded yes.

Mr. Gartenlaub introduced Richard Hanes and asked him questions. He asked him what his position with this project is and he responded he is the CEO of RLH Residential and RLH Construction. Mr. Gartenlaub asked Mr. Hanes if he was the license holder and he responded yes. He asked him if he is familiar with this project and the process of permitting in Seminole County and he responded yes. He asked Mr. Hanes if the contractor should point out when zoning review should occur, and he responded no. Mr. Gartenlaub asked who will be responsible for that and Mr. Hanes answered that would be the responsibility of the county guidelines. Mr. Gartenlaub asked him how many times this project went for review and he responded at least three (3) times, maybe four (4). Mr. Gartenlaub asked Mr. Hanes in what part of the project was this setback issue raised and he responded that they had already completed the construction and waiting for power and CO. He asked him if it was his understanding that the Seminole County Building Inspector was requiring the addition of the columns and he responded that he wasn't on site, but received a called from the president of the residential division asking for clarification that the inspector required the addition of the columns and he told him it's an architect deal and he couldn't believe an inspector would put his neck on the line like that. Explanation ensued regarding the work that was completed, and Mr. Hanes stated that the columns were flown to the property via helicopter, so to dismantle it would be substantial.

Mr. Gartenlaub introduced Curtis Sheffield, the neighboring property owner, and asked him questions. Mr. Gartenlaub asked him if he's familiar with the home in question and he responded yes, he lives next door to him on the north. He asked him if he had any objections to the structure and he responded no at all. Mr. Gartenlaub asked Mr. Sheffield even if a variance had been sought, he did not have any objection and he responded no.

Mr. Gartenlaub introduced Dr. Ronald Shaw, the property owner, and asked him questions. Mr. Gartenlaub asked Dr. Shaw if he has been involved in the whole permitting process and he responded yes. He asked if he was present the day that the inspector told them about the changes and what was his reaction and he responded yes, the project was about ninety (90) percent done, they were putting the decking down and the inspector said that he did not like the cantilevered roof and they will need to add the posts, and the project manager on site said that the architect said they don't need it and that the inspector told them he didn't care, that they want those columns installed. He stated that they called Mr. Medley about revising the plans and adding the columns and those plans were sent to the County. He further explained that after that was submitted and done is when the setback and ADU issue appeared. Mr. Gartenlaub asked Dr. Shaw in what point of the project was when he learned of the ADU and setback issue and he responded that they informed him about the issue at the end when they tried to apply for the CO.

Chairman Bernard Johns stated that assuming that the County make an error in the permitting review and understanding the doctrine of invested rights and how the courts have ruled that just

because the government made an error, it's a greater injustice to compound the error and have made people tear down structures because of these types of things and asked Mr. Gartenlaub how he responds to that. Mr. Gartenlaub responded that he responds by the cases that he cited, equitable estoppel is argued over for this reason. He stated that yes maybe there was a mistake but at the same time they will have to weigh the equity and the County could've prevented this, but the applicant or the architect could've prevented this from happening. This permit went through three (3) review cycles and in the very last one after the columns were installed, is where they mentioned something about setbacks. He stated this was not a mistake and is all based on interpretation.

Jim Hattaway asked Mr. Gartenlaub if there's anything in Florida statutes that they are preempting the County by that definition of an accessory dwelling unit and he responded no. Mr. Hattaway asked so that means that the County is free to define an ADU any way they want to, right? Mr. Gartenlaub replied no that it's not supposed to let the county define it any way they want too if it conflicts with the statute and said yes, they are preempted. Mr. Hattaway asked Mr. Gartenlaub what Seminole County's definition of an ADU is and he responded that an auxiliary dwelling unit that is intended for rental to lower and middle income housing. Mr. Hattaway added that if it is true that in the Seminole County Land Development Code uses the word "rental" in the definition of the ADU and he responded that it uses the word rental in that they require an affidavit where it does.

Mr. Hattaway asked Mr. Gartenlaub when the inspector said that he wanted to add the beams and the columns was he acting beyond of the scope of his authority and he responded no he was the Building inspector and he was allowed to make that change. Mr. Hattaway asked if he appealed that decision and he responded no.

Mr. Hattaway added that the meaning of the permit being issued is that the applicant only have the ability to start the project not to be free of subsequent government review and approval, correct and he responded that it means that once the permit is issued and the plans are provided now, they are vested in the right of those plans. Mr. Hattaway asked if it still has to be consistent with the Seminole County Land Development Code and he responded yes, but that the reason of the Seminole County's Ordinance 40.71 that makes that determination at the beginning of the process.

Mr. Hattaway also asked if they uphold Ms. Moskowitz's determination, they will still have the right to seek a variance and he responded yes. He asked if they are all in agreement that it's not uncommon in Florida law for the courts to demand even multi-story structures to be demolished because they did not comply with the local land development code. He responded if the was a violation of the code, yes.

Mr. Hattaway asked if Mr. Gartenlaub is suggesting that because this project was really expensive that this applicant deserves any rights above and beyond any other citizens of Seminole County. Mr. Gartenlaub responded that the amount is only relevant in the sense that under the equitable estoppel doctrine the amount of damage to the party is weighed in considering the equities. Mr. Hattaway asked that if the applicant was in the wrong, no amount of money puts them in the right, and he responded correct, because if his client is in the wrong, you would have unclean hands and wouldn't be entitled to it in your favor.

Tom Kunzen asked Mr. Gartenlaub on what basis did the building inspector override the design choice of the architect asking for the addition of the columns, if he cited a particular part of the Land Development Code or engineering judgement? Mr. Medley responded and said that the field inspector just said I want it installed and even if they ask for something that isn't required

by the Code, they do it without argument, so he had the drawings updated and to the County the next morning. Mr. Hattaway asked Mr. Medley that if part of the thought process was acceding to the columns was to avoid politics on a future project and he responded that it is primarily to move the job forward, but it's not about bucking heads with the guys doing their job.

Mr. Kunzen asked Paul Chipok, Acting County Attorney, if in Chapter 15 of the Land Development Code goes into determination for vested rights and the appeal process when the property owner would apply for this and he responded that will go towards the application of the Comprehensive Plan situation, it's not applicable to this situation.

Mr. Gartenlaub provided the Board an affidavit from the superintendent and documents regarding the County's definition of an ADU. He explained that they had no intent of filing the affidavit for an ADU to have the low cost living.

Mr. Hattaway stated that on the paper that he just provided the definition says an accessory dwelling unit is a dwelling unit attached to or included within a principal dwelling unit, or located on the same lot and having an independent means of access, such units may include a full kitchen. He asked if the structure meets this definition and Mr. Gartenlaub replied that he will need to read the entire definition as any statute needs to be read in its entirety and although this fits the definition meets as an ADU, you would need to apply for an ADU, so in order to apply for an ADU, you would need to file the affidavit. Mr. Hattaway stated that is not correct and went through the handout he provided asking for clarification of how it defines it.

Chairman Bernard Johns asked Ms. Moskowitz what make this structure an ADU and she responded that the zoning review at the time believed that it could be an ADU and zoning does not approved this permit but the person who review it asked for additional information like providing the gross floor area of the primary residence because ADU has a limit of thirty-five (35) percent of the gross floor area or 1,000 square feet, whichever is less. She further stated that they also needed to identify the off-site parking space and needed to meet the impervious surface coverage. At that time she did not have enough information to determine if it was an ADU but as Mr. Hattaway indicated, the definition of the ADU is a subordinate structure that is either attached to a principal building or located on the same lot and has an external entrance. She stated that the requirements for the rental and affordability applies to the waiver of the impact fees to be considered an affordable housing unit.

Chairman Johns asked Ms. Moskowitz if in the past they had people that wanted to build structures on their property, like a shed, and they wanted to put a kitchen in it and they are told no as it is not an ADU. Ms. Moskowitz responded that in the past there was a use called a guest cottage, which did not allow for a kitchen. Chairman Johns asked if the ADU requires that they submit a paper saying that they are going to use it only for rental purposes and she responded no that only applies for the impact fee waiver.

In rebuttal Ms. Moskowitz stated that this permit was reviewed by our zoning department and they made the comment about meeting the setbacks and whether or not it was an ADU, they tried to fix the situation and come up with a solution that would help all the parties. Her primary goal was for them to be in compliance with the Code and they offered the ability to apply for the variances and for the terms of the accessory dwelling units, they did do research and they found that there was another structure on site that was treated as a ADU.

A motion was made by Jim Hattaway, seconded by Tom Kunzen, to uphold the Planning Manager decision.

Mr. Hattaway added that Seminole County has the right to define an accessory dwelling unit however it sees fit as the state of Florida has not preempted that and he also thinks that the estoppel is inapplicable in this situation. He stated that there's nothing here that the appellant showed that he met his burden to overturn the decision of Mrs. Moskowitz.

Larry Wright stated that his concern is that the appellant went through the process three (3) or four (4) times and they did not give a reason why they had to erect the columns and result of that, now they have a violation. In his opinion, they were given the direction of installing them and they did and then found out they were not in compliance with the setback.

Mr. Kunzen added that the intervention of the building inspector at that point to mandate the addition of those columns, which was not in the original design of the architect, this would not have become an issue and the inspector was duly empowered as an employee of Seminole County and the applicants and the appellant seem to be acting in good faith.

Chairman Johns stated that he has a lot of sympathy for the owner, but they do have another option for them to fix this, but the issue is that if its considered an ADU, they way that they measured it is different and if they overturn this decision, they will have to go back and fix every single one that they did before on the permits and that is unreasonable. He stated that although this property owner doesn't intend to make it an ADU, that doesn't mean the next property owner wouldn't. He further stated that he would be more willing to go for a variance given the circumstances, but that is not what is before them, so he is not willing to override the County's decision.

Mr. Kunzen asked the Board that the variance applications that come before them and them making a decision on those the precedent and establishing the aye or nay, and what are they creating on them in this particular circumstances and asked what precedence they would be creating by voting yes or no on this. Chairman Johns responded that if they override the Planning Manager's decision on how its measured, that will change every other one that they have ever done.

Ms. Moskowitz stated that the decision on whether this is an ADU has not been made, they asked for the additional information, so they can still make that determination. Chairman Johns asked if it is determined that it is not an ADU, would the columns be good and she responded that it is the measurement of the setback, they haven't made the determination whether or not it's an ADU. Chairman Johns asked even if it was a regular house, it will be measured from the columns not the wall and she responded yes.

Mr. Hattaway asked Mr. Chipok on appeals like this what difference or standard of review is applicable in this case and he responded that the standard of review in this situation is to uphold the zoning managers decision on her interpretation of the code based on the evidence that was presented before you as to whether it is supportable or not in her determination. Mr. Hattaway asked if staff presumed correct and he responded that there is a presumption that they acted in good faith, but they will need more evidence that her determination was correct than incorrect.

Chairman Johns advised the appellant of their right to appeal.

Ayes (3): Chairman Bernard Johns; Vice Chairman Jim Hattaway; and Alternate Tom Kunzen

Aye (1): Larry Wright

Absent (2): Austin Beeghly; and Alternate Heather Stark

