

TOWN OF CARRBORO



BOARD OF ADJUSTMENT

301 West Main Street, Carrboro, North Carolina 27510

A G E N D A

7:00 P.M.

**Remote Meeting*

M a y 6 , 2 0 2 0

**To view this meeting, please send an email to Dorian McLean at dmclean@townofcarrboro.org to receive an invitation to view the meeting. Requests to remotely attend the meeting shall be made within 24 hours of the meeting start time.*

- I. **MINUTES APPROVAL**
Consideration of February 19, 2020 minutes.

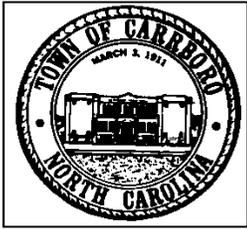
- II. **Consideration and Approval of Appeal Order of the Zoning Administrator's decision regarding a stream buffer encroachment on property located at 3200 Damascus Church Road.**
The Board of Adjustment is asked to review, edit if needed, and approve the Appeal Order regarding their February 19, 2020 decision on the appeal related to an encroachment into a stream buffer on property at 3200 Damascus Church Road.

- III. **Discussion of Potential Additional Virtual Meetings to Consider Quasi-Judicial Applications**

- IV. **Old/New Business**

- V. **ADJOURN!**

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BOARD OF ADJUSTMENT

MINUTES

Town of Carrboro

301 W. Main Street Carrboro, North Carolina 27510

F e b r u a r y 1 9 , 2 0 2 0

7:00PM

Town Hall Room 110

MEMBERS PRESENT		TOWN ATTORNEY	STAFF
Garrett Baker	Michael Crowell	Nicholas Herman	Marty Roupe
James Baker	Richard Ellington	Bob Hornick	Jeff Kleaveland
Linda Bowerman	Sriv Navaratnam		Marsha Pate
Joseph Collins			

Absent/Excused: Brian Hageman (Excused), Wil Heflin

Town Council Representative: Damon Seils

MINUTES APPROVAL:

MOTION MADE BY JAMES BAKER AND SECONDED BY SRIV NAVARATNAM TO APPROVE MINUTES FROM JANUARY 15, 2020 MEETING. VOTE: AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam). NOES 0: ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

Linda Bowerman opened the Board of Adjustment’s (BOA) public hearings and requested public speakers regarding the Variance Request or the Zoning Appeal may rise to be sworn in. Marsha Pate, Town staff swore in town staff and members of the general public that wished to speak concerning the Variance Request at 403 Tripp Farm Road and the Appeal request regarding 3200 Damascus Church Road. Those in attendance registered on the sign in sheet. Town staff Marty Roupe reiterated the format of the meeting in regard to the items on the agenda for the evening.

7:10 PM PUBLIC HEARING: Variance Request at 403 Tripp Farm Road

The applicants, Marsha Hamilton and Frank Pitts are requesting a variance to allow encroachment into the Zone 2 Water Quality Buffers as regulated by Section 15-269 of the Land Use Ordinance. They are working with the architects from Notch Design. The variance would allow construction of a 511 sf building addition (350 sf heated) to the back of the existing 1580 sf home; the proposed addition will encroach within the Town’s Zone 2 regulatory stream buffer.

Jeff Kleaveland gave a brief Power Point presentation of the subject property regarding the proposed building addition. Mr. Kleaveland provided details which included the dimensions, concept and how the standards are met for the project. In addition, Mr. Kleaveland explained that the buffer only existed as of 2012 after the home was built which led to the clients reasoning behind the request.

James Baker asked clarifying questions which verified that the ground under the deck is not impervious, the direction of the gutters (which could be installed to flow away from the phase 2 buffer), and the existence of the 30' buffer.

Michael Crowell requested more information regarding the hardship #2 on the variance request Attachment C2 which stated: This lot is peculiar because the stream is closer to the house than the rest of the houses in the neighborhood. The house is also particularly small compared to the other houses in the neighborhood. Frank Pitts responded with the comparisons especially on the limitations as to where to place the addition.

Mr. Kleaveland stated that, due to the age of the building, the LUO allows up to 5000 sf of new impervious surface on the lot (the existing impervious is grandfathered).

7:20 PM MOTION WAS MADE BY JAMES BAKER AND SECONDED BY SRIV NAVARATNAM TO CLOSE THE PUBLIC HEARING. VOTE: VOTE: AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam). NOES 0: ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

Michael Crowell began the conversation that the project was well thought out, mindful of the buffer, and the request hardships meet the standard.

Richard Ellington questioned the hardship regarding the buffer location and the size of the house. James Baker suggested that the lot in question has a unique hardship as it is proportionally more constrained than the adjacent lots due to its proximity to the stream. The unique circumstance is that 50% of the property is located in the buffer.

MOTION WAS MADE BY RICHARD ELLINGTON AND SECONDED BY SRIV NAVARATNAM THAT THE APPLICATION IS FOUND TO BE COMPLETE IN SECTION I. VOTE: AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam). NOES 0: ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

MOTION WAS MADE BY RICHARD ELLINGTON AND SECONDED BY JOSEPH COLLINS THAT THE PROPOSED VARIANCE APPLICATION COMPLIES WITH ALL FOUR OF THE CONDITIONS IN SECTION II OF THE VARIANCE WORKSHEET. VOTE: AYES 6 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Richard Ellington, Sriv Navaratnam). NOES 1 (Michael Crowell) ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

The NOES represent dispute with: #2 The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be that basis for granting the variance.

7:34 PM MOTION WAS MADE BY JOESEPH COLLINS AND SECONDED BY JAMES BAKER TO PASS. THE APPLICATION IS GRANTED, SUBJECT TO THE FOLLOWING CONDITIONS AGREED UPON UNDER Section III OF THE VARIANCE WORKSHEET. AYES 6 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Richard Ellington, Sriv Navaratnam). NOES 1 (Michael Crowell) ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

1. The applicant shall complete the development strictly in accordance with the presentation submitted to and approved by the Board on February 19th, 2020, a copy of which is filed in the Carrboro Town Hall. Any deviations from or changes in these plans must be submitted to the Zoning Administrator in writing and specific written approval obtained as provided in Section 15-64 of the Land Use Ordinance.
2. That all activities shall be designed, constructed and maintained to minimize soil and vegetation disturbance and to provide the maximum water quality protection practicable, including construction, monitoring, and maintenance activities.
3. To the extent practicable, the plan will demonstrate compliance with the diffuse flow requirements of Section 15-269.4 of the Land Use Ordinance.
4. If any of the conditions affixed hereto or any part thereof shall be held invalid or void, then this permit shall be void and of no effect.

7:40 PM PUBLIC HEARING: APPEAL REQUEST OF THE ZONING ADMINISTRATOR'S DECISION REGARDING A STREAM BUFFER ENCROACHMENT ON PROPERTY LOCATED AT 3200 Damascus Church Road

The Zoning Administrator has determined that grading work on the property has disturbed an ephemeral stream buffer on the south side of the property, in violation of Land use Ordinance Section 15-269.2. The property is zoned Watershed Residential. Mr. Tony Merritt and Mrs. Ilene Merritt have submitted an application appealing the decision.

Marty Roupe explained the scope of the appeal referring to it as "Merritt's Gravel Pit." There have been many disturbances on the site due to permissible mining activities but the focus is on the southern property line where the stream is located. Many regulatory authorities are involved in permitting for the property including the State of NC, the Town of Carrboro, and Orange County. Grading activities have disturbed the ephemeral stream and disrupted its functionality, which has caused ponding on the adjacent property and must be restored. This area of the site is within the western portion of the property, no longer regulated as a mine by the State of North Carolina.

Robert Hornik, Town Attorney, spoke to the violations and the timely appeal of Mr. Merritt. He explained that the appeal was submitted on Monday, October 28, 2019, which was the last day it could be considered timely. Mr. Hornik is not clear on the reason behind the appeal from the

Appellant. The Towns' concern is only regarding the intrusion into the stream buffer. The Town of Carrboro is asking the BOA to uphold the findings and require, as outlined in the September 2019 letter, that Mr. Merritt complete a survey of the land and submit a remediation plan that is in accordance with Land Use Ordinance regulations regarding stream buffer areas. Upon approval of the remediation plan, the Merritt's must implement the plan in a timely manner.

Mr. Roupe explained that the Bob Hornik is familiar with this situation and has provided guidance to staff in his role as Town of Carrboro attorney. Nick Herman is here as a Town Attorney as well, focused on providing guidance to the BOA. Present are neighbors, Shelley Welch and Kevin Poimboerf of 3100 Damascus Church Road to present as well as others during the public hearing. Shelley contends that the stream modifications are causing water to pond on her property, consequently causing damaging to her land.

Mr. Roupe explained the ephemeral stream was identified by way of the town's GIS system. The GIS modeling needs to be ground trothed by way of a professional survey to determine in accordance with professional standards where the stream is located on the ground.

Mr. Hornik reiterated that the newly constructed road, located along a shared easement area crossing the shared property line, is the cause of the modifications to the stream.

Linda Bowerman opened the BOA hearing to the Appellant to present information.

Pat Shillington (3008 Anderson Dr. #102, Raleigh) is an Engineer for the Appellant and spoke in their defense. Mr. Shillington presented a (1972-1975) USDS- Orange County 1977 topographical map which was most likely prepared 1972-1975. He explained the map and how it relates to how and when disturbance occurred over the years in accordance with the State issued Mining Permit. He also shared that the erosion control permitting falls under the jurisdiction of Orange County. He suggested that the effect of the mining both cut the ground down and terminated the stream.

Mr. Shillington stated that he has observed seeing wetland areas develop over time in different areas on the site. However, he contends that there is no ephemeral stream in the area under discussion and does not view the request for a survey of the land as relevant. He reiterated that the access road is within the shared easement area and is legal and permissible. Therefore, the consequences of the ponding water as a result of the road being constructed is something that can be solved by a means of conveying the water by constructing a drainage pipe, but that it should not be considered an ephemeral stream ordinance violation.

Mr. Ellington explained that bodies of water are different that of streams. He noted that ditches can become a stream if the subject area develops the natural characteristics of a stream. He also noted that when a stream is totally cut off, it may not be able to return to a natural stream, and that this may be the case in this situation because of the extent of damage caused by mining activities.

The Board then opened the hearing to receive public comments.

Mr. Steven Crabtree (1521 Smith Level Road) spoke to his history with the Merritt's land and the geographic description of the Womble's, Merritt's, and other neighboring lands. He noted that he personally contacted members of the Mining Division at the State level about changes that were occurring on the land and was assured that they would continue to appropriately regulate the mine. Eventually, however, a 50-foot tall wall of dirt was installed and that State Mining Division stated that the subject area is no longer regulated as a mine. He then further described how the changes to the Merritt property have negatively affected his property as well. Mr. Crabtree presented photos showing impacts to the neighboring properties, and suggested that the BOA conduct a site visit to see the relevant areas.

Mr. Michael Bury (203 Antler Point Rd) spoke and requested the Appeal be denied. He noted that constant pumping is occurring on the Merritt's property to remove ponded water and expressed that the map that was presented should not be considered as valid.

Shelley Welch (3100 Damascus Church Road) stated that the construction of the access road has caused ponding on her property and damaged her land, including killing many trees. She also reiterated Mr. Bury's statement about the pond pumping on the Merritt property. To her knowledge, the pumping can only happen 48 hours per month or they are violating their State mining permit. She also spoke about her history with the Merritt's before she purchased her property in 2018, and following the purchase. When purchased, she observed that there was a flat meadow and a road in the subject area under discussion. Upon the road being constructed, she began to observe ponding on her property and eventually the loss of trees as a result.

Kevin Poimboerf (3100 Damascus Church Road) shared historical documentation which showed a timeline of the geographic changes of the property and surrounding properties. He requested the BOA deny the Appeal. He stated that the access road was constructed in a way that extended in a designated stream buffer. Mr. Poimboerf shared current pictures showing the large dirt wall, along with the 3100 Damascus Church road property, and what is currently happening as a result of the road's construction. He then stated that this should be considered sufficient evidence proving that there is an ephemeral stream in the area.

Ms. Welch spoke to her knowledge that the mining work had to have a reclamation plan that reclaimed areas that were formally mined. The mining area then is removed and the land is reclaimed and cannot be mined again. Ms. Welch stated that there are private lawsuits between the two property owners that are presently active, but that the purview of the Board of Adjustment is only about the intrusion into the ephemeral stream buffer. She believes that the existence of the stream is a fact.

Mr. Hornik summarized that the Town would like to see the Merritt's comply with what is requested in the September 2019 letter regarding the stream buffer encroachment and requested that the BOA uphold staff's findings and require the 3200 Damascus Church Road owner to comply with the requirements stated in the letter.

Mr. Shillington restated that he believes that there is no ephemeral stream.

The Board of Adjustment then closed the public hearing and deliberated the matter.

9:30 PM MOTION WAS MADE BY JAMES BAKER AND SECONDED BY SRIV NAVARATNAM TO CLOSE THE PUBLIC HEARING. VOTE: VOTE: AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam). NOES 0: ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

9:50 PM
MOTION:

A MOTION WAS MADE BY MICHAEL CROWELL AND SECONDED BY RICHARD ELLINGTON TO DENY THE APPEAL FROM MR. TONY MERRITT. THE BOARD OF ADJUSTMENT UPHOLDS THE TOWN'S DECISIONS FROM THE September 26, 2019 Notice of Land Use Ordinance Violations served to Tony Merritt. A TIMELINE for responding with the necessary information is included in the letter, with the time for responding beginning when the APPEAL ORDER is served on the applicant, MR. MERRITT. Those actions upheld and thereby required to be addressed include, as further described in the letter:

A professional survey must be conducted in order to determine which portions of the road are located within the stream buffer. Upon determining by survey where the buffer area is in relation to the gravel drive, any disturbed portion of the stream buffer in that area needs to be restored and the functionality of the drainageway in the area which was impeded, causing ponding on the adjacent property, must be restored. You must provide the Town with a survey and remediation plan within 30 days of the date of this letter, then commence remediation work within 14 days of the town approving your remediation plan. The survey must identify (i) the location of the gravel drive, (ii) all utility poles installed in the gravel drive, (iii) the mining area boundary (i.e., identify the area on your property which is now subject to the State mining permit), and (iv) the ephemeral stream and buffer area.

VOTE: AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam). NOES 0: ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin)

**TOWN OF CARRBORO
BOARD OF ADJUSTMENT**

IN RE: APPEAL OF THE ZONING ADMINISTRATOR’S DECISION REGARDING A
STREAM BUFFER ENCROACHMENT ON PROPERTY LOCATED AT 3200
DAMASCUS CHURCH ROAD

DECISION AND ORDER OF THE BOARD OF ADJUSTMENT

On February 19, 2020, pursuant to Section 15-91 of the Carrboro Land Use Ordinance (“LUO”), the Carrboro Board of Adjustment held a quasi-judicial hearing on an October 28, 2019 appeal by Tony Merritt and Ilene Merritt (“the appellants”) of a “Notice of Land Use Ordinance Violations – 3200 Damascus Church Road (Orange County PIN: 9777 36 7019)” issued by the Town’s Zoning Administrator on September 26, 2019. Based on the documents and exhibits submitted into the record and the sworn testimony of the Zoning Administrator, a representative for the appellants, and other witnesses, the Board makes the following:

FINDINGS OF FACT

1. Appellants (as members/managers of TIK,LLC) are the owners of a parcel of property located at 3200 Damascus Church Road, Chapel Hill, North Carolina. The western and southern portion of this property, which abuts a separate parcel at 3100 Damascus Church Road (“the Wildflower property”), is the subject matter of this appeal (“the Subject Property”). The Town has land-use regulatory authority over this Subject Property, which is zoned Watershed Residential.
2. On August 14, 2019, the Zoning Administrator issued a Notice of Land Use Ordinance Violation to appellants, which Notice stated, in part:

[W]e have determined that the creation and extension of the “haul” road along the southern boundary of your property in common with the Wildflower property violates Land Use Ordinance Section 15-261.1 and 15-269.2(c). Moreover, per LUO 15-45(a) a permit is required before excavating or grading activities may occur on the portion of the property no longer under the State mining permit. There is a stream along the southern boundary as shown on the Town’s GIS database, that is protected by a stream buffer under the Land Use Ordinance. Any disturbance of that stream is prohibited (with limited exceptions, which we do not believe exist here).

Based on the foregoing, you must **cease** and **desist** any further grading, excavating, or hauling in of fill materials from any other location onto the western portion of your property, which area is no longer subject to a State Mining Permit. You must also take **immediate** steps to develop a plan to restore the stream buffer along your southern boundary (line in common with the Wildflower property).

Appellants did not appeal this Notice of Violation.

3. On September 26, 2019, the Zoning Administrator issued a Notice of Land Use Violation to appellants, which Notice stated, in part:

[W]e have determined that there is a protected ephemeral stream running along your southern boundary, see red, outlined portion on attached map. Under Town regulations (LUO Section 15-269.2) there is a 30 foot wide protected buffer around such streams. When you extended the gravel drive westward along the southern boundary line onto the portion of your property that is no longer subject to the State’s mining permit, part of the stream buffer was disturbed. **A professional survey must be conducted in order to determine which portions of the road are located within the stream buffer.** Upon determining by survey where the buffer is in relation to the gravel drive, any disturbed portion of the stream buffer in that area needs to be restored and the functionality of the drainageway in the area which was impeded, causing ponding on the adjacent property, must be restored. **You must provide the Town with a survey and remediation plan within 30 days of the date of this letter, then commence remediation work within 14 days of the Town approving your remediation plan.** The survey must identify (i) the location of the gravel drive, (ii) all utility poles installed in the gravel drive, (iii) the mining area boundary (i.e., identify the area on your property which is now subject to the State mining permit), and (iv) the ephemeral stream and buffer area.

4. Appellants timely appealed this September 26, 2019 Notice of Violation to the Board of Adjustment. At the hearing before the Board, the testimony on behalf of the appellants was that there is no ephemeral stream as alleged in the Zoning Administrator’s September 26, 2019 Notice of Violation, that any waterways on the Subject Property were destroyed by mining before the Town’s ordinances were implemented, and therefore any grading of the gravel drive on the Subject Property did not violate LUO Section 15-269.2(c).

5. LUO Section 15-269.2(c) provides that “[b]uffers [i.e., a 30-foot protective buffer] shall also be established adjacent to all ephemeral streams and ponds not shown on the above described maps that have a contributing drainage area that is at least five acres in size, as depicted in the Town’s GIS database.” This regulatory provision applies to the Subject Property.

6. The Town’s GIS database shows an ephemeral stream on the Subject Property, and grading activities for the extension of a dirt or gravel road (as shown by photographs) on the Subject Property have encroached within the stream buffer, disturbing the stream and disrupting its functionality so as to cause ponding of water on the adjacent property at 3100 Damascus Church Road.

CONCLUSIONS

7. Based on the whole record, there is competent, material, and substantial evidence to support, by the greater weight of the evidence, all of the foregoing Findings of Fact.

8. Based on the whole record, there is competent, material, and substantial evidence to conclude, by the greater weight of the evidence, that the grading activities on the Subject Property constitute a violation of LUO Section 15-269.2(c) as stated in the Zoning Administrator’s

September 26, 2029 Notice of Violation and to sustain the requirement of a survey and remediation plan as set forth in that Notice of Violation.

ORDER

Based on the foregoing Findings of Fact and Conclusions, the Board affirms the Zoning Administrator's September 26, 2019 Notice of Violation to ORDER as follows:

Appellants must conduct a professional survey in order to determine which portions of the road are located within the stream buffer. Upon determining by survey where the buffer is in relation to the gravel drive, any disturbed portion of the stream buffer in that area needs to be restored and the functionality of the drainageway in the area which was impeded, causing ponding on the adjacent property, must be restored. Appellants must provide the Town with a survey and remediation plan within 30 days after a copy of this ORDER is served on appellants, and appellants must then commence remediation work within 14 days of the Town approving the remediation plan. The survey must identify (i) the location of the gravel drive, (ii) all utility poles installed in the gravel drive, (iii) the mining area boundary (i.e., identify the area on your property which is now subject to the State mining permit), and (iv) the ephemeral stream and buffer area.

This ORDER was orally adopted by the Board on February 19, 2020 on motion of Michael Crowell and seconded by Richard Ellington with AYES 7 (James Baker, Garrett Baker, Linda Bowerman, Joseph Collins, Michael Crowell, Richard Ellington, Sriv Navaratnam); NOES 0; ABSENT/EXCUSED 2 (Brian Hageman, Wil Heflin).

This written Decision and Order of The Board of Adjustment was reviewed and adopted by the Board on _____ by motion of _____ and seconded by _____ with AYES _____; NOES ____; ABSENT EXCUSED _____.

Chair, Carrboro Board of Adjustment

Date of Signature of Chair: _____

Filed with the Clerk to the Board and Carrboro Planning Department on _____.