

**Camden County Board of Adjustment  
Minutes  
July 8, 2008, 7:00pm  
Historic Courtroom  
Camden County Courthouse Complex**

**BOARD MEMBERSHIP PRESENT/ABSENT**

Present:	Absent:
Chairman Roger Lambertson	Vice Chairman John Sawyer
Don Keaton	Francis Eason (Alternate)
Bradley Smith	
William McPherson	
Janice Hassell (Alternate)	

**STAFF PRESENT**

Name:	Title:
Dan Porter	Director of Planning
Dave Parks	Permit Officer/Flood Administrator
Amy Barnett	Planning Clerk/Clerk to the Board
Courtney Hull	County Attorney

**OTHERS PRESENT**

Name and Town of Residence:	Title:	Purpose / Representing	Meeting Section
April White	Applicant	Variance Re-Application	Old Business, & Item #1 (Not Heard)
Gloria Williams	Mother of Applicant	Same as Above	Old Business, & Item #1 (Not Heard)

**Call to Order & Welcome**

Chairman Roger Lambertson called to order the July 8, 2008 meeting at 7:00 PM. Chairman Lambertson read the rules of procedure, and then indicated whom the voting members for tonight's meeting would be. Since there were only 5 members present, those voting members would be all five present: Chairman Lambertson, Mr. Keaton, Mr. Smith, Mr. McPherson, and Ms. Hassell (who is an alternate, but will be voting tonight).

20 **Consideration of Agenda**

21  
22 Chairman Roger Lambertson called for the consideration of the agenda.

23  
24 Motion to Approve made by: William McPherson  
25 Motion Seconded by: Don Keaton

26  
27 The motion was approved with Chairman Roger Lambertson, Regular Members Don Keaton,  
28 Bradley Smith, William McPherson, and Alternate Member Janice Hassell voting aye; none  
29 voting no; 2 absent; none not voting.

30  
31 **Consideration of the Minutes- June 10, 2008**

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33 Chairman Roger Lambertson called for the consideration of the minutes from the June 10,  
34 2008 meeting.

35  
36 Motion to Approve As Written made by: Bradley Smith  
37 Motion Seconded by: Don Keaton

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39 The motion was approved with Chairman Roger Lambertson, Regular Members Don Keaton,  
40 Bradley Smith, William McPherson, and Alternate Member Janice Hassell voting aye; none  
41 voting no; 2 absent; none not voting.

42  
43 **Comments from the Public.**

44  
45 None

46  
47 **Old Business**

48  
49 ***Item #1 Follow-up consultation with attorney - April White Variance***

50  
51 The Board of Adjustment discussed whether the board has the legal right to, or even should,  
52 hear this variance since it is a re-submittal of an earlier variance without any changes being  
53 made. An opinion was asked for from the County Attorney two meetings ago, where the  
54 County Attorney was not in attendance. The matter was tabled until an opinion could be  
55 obtained. Ms. Courtney Hull, County Attorney, was present at the June 2008 meeting and  
56 gave some good information to the board but still left a few questions, so this matter was  
57 tabled again until the July 2008 meeting with the goal that the board obtain enough  
58 information to make a decision as to whether they will hear this variance request with the  
59 idea that if a vote is made to hear the variance, with the applicant present the board can  
60 proceed with the application for the variance.

61 At this time, Chairman Roger Lambertson asked for Ms. Hull to be sworn in to provide  
62 further information. Dave Parks swore her in.

63  
64 Ms. Hull gave the following information:

- 65  
66 • NC case law shows this is an issue of first impression, an instance of prior  
67 approval, and then rescission<sup>1</sup> of that approval based on failure to meet  
68 conditions. The issue at hand is whether or not to hear a case wherein the  
69 applicant submits the same exact request as before, having failed to meet the  
70 conditions previously set.
- 71 • Issue has not been heard by any Board of Adjustment or court in NC
- 72 • Issue may be subject to Res Judicata
- 73 • In case titled Little Vs. Board of Adjustment, City of Raleigh: plea of Res  
74 Judicata was used, and so is available for use based on precedent, even though  
75 that case did not involve a case where there was no adverse decision.
- 76 • Ms. Hull contacted 2 professors at the Institute of Government for their input
  - 77 ○ Professor Ducker's findings were shared with the board in June 2008
  - 78 ○ Professor David Owens advised:
    - 79 ■ If no case law on point within the state, courts typically look to  
80 surrounding jurisdictions to see how they have ruled.
      - 81 • In cases involving non adverse prior decisions, jurisdictions  
82 have held that Res Judicata applies in a manner consistent to  
83 require the same prior decision be upheld.
      - 84 • The purpose of the doctrine of Res Judicata is to prevent  
85 inconsistent decisions.
      - 86 • The majority of jurisdictions would hold that Res Judicata  
87 applies in situations such as this, and would require the same  
88 decision of approval and grant an extension of time based on  
89 that approval.
      - 90 • A minority of jurisdictions would hold that Res Judicata does  
91 not apply, and that the applicant could start the whole process  
92 over, requiring the Board of Adjustment to make a whole new  
93 decision.
    - 94 ■ Recommendation from Professor Owens regarding Res Judicata: A  
95 NC court would think that Res Judicata does apply, and would bind  
96 you to make the same decision as previously made, which in the case  
97 at hand was approval.
    - 98 ■ Regarding time limits on variances and special use permits:
      - 99 • Time limits are becoming increasingly common.
      - 100 • Applicants come back and apply again and are given new time  
101 limits.
    - 102 ■ Regarding attaching conditions to a variance in a re-heard case where  
103 Res Judicata applies:

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<sup>1</sup> a. the act of cutting, to cut off; annulling; (Webster's Dictionary)

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- Professor Owens recommended against attaching conditions other than changing time limits, thus granting extensions consistent with the use of the doctrine of Res Judicata.
  - Regarding Ms. Whites original failure to obtain a building permit:
    - Failure to obtain the building permit is "an exhibition of a non-exercise of rights that she had, and not necessarily a violation of the order" given in the original variance.
    - Appropriate remedy is a zoning enforcement or injunctive action by the county.
      - The board has already taken action to inform Ms. White that she is in violation of certain state and county codes for her failure to follow certain conditions listed in the original variance, specifically not obtaining the building permit.
  - Professor Owens submitted 2 options to Ms. Hull regarding this issue:
    - (1) Follow the majority of surrounding jurisdictions and hold that Res Judicata does apply and applies in a manner so as to require the board to recommend approval unless there have been changes in conditions on the application, and grant additional time to obtain the building permit;
    - (2) Follow the minority of jurisdictions and hold that Res Judicata does not apply and the board should treat the application as a whole new application.
  - If the board goes with option (1), they would need to incorporate by reference the prior order (variance) ruling unless conditions on the application have changed.
    - State for the record that certain issues have already been addressed in the previous order (variance), so that evidence would not have to be heard again.
    - Findings of Fact: State that Res Judicata applies and requires the same decision of approval based on the prior ruling.
    - Grant new time extension.
  - If the board goes with option (2):
    - The board would have to re-hear the case and make a new determination.
    - If denied:
      - The board would need to supply supporting reasons for a different ruling than the previous variance, so that if it was appealed to a higher court, the court would have the reasoning as to why.

140 At this time, Ms. Hull entertained questions from the board.

141

142 Janice Hassell asked for clarification of option 1.

- 143 • Ms. Hull confirmed:
  - 144 ○ If board goes with option 1, board would be refusing to re-hear case and
  - 145 would instead grant extension of time for Ms. White to comply with
  - 146 conditions of original variance.

147

148 Chairman Lambertson asked for further clarification of option 1.

- 149 • Ms. Hull confirmed:
  - 150 ○ If board goes with option 1, original variance remains in effect.
  - 151 ○ Board would not have to go through any additional findings of fact, etc.
  - 152 ○ Simply state that Res Judicata applies and incorporate prior variance by
  - 153 reference and set new time limits.

154

155 Janice Hassell asked the following:

- 156 • If Ms. White fails to comply with new time limits, would it then become a zoning
- 157 and code enforcement issue?
  - 158 ○ Ms. Hull answered yes it would.
- 159 • Will this ever come back to the Board of Adjustment.
  - 160 ○ Ms. Hull answered that it would not, it would be a zoning and code
  - 161 enforcement issue for the county to enforce.

162

163 Dan Porter pointed out the following:

- 164 • If Ms. White is in violation of county codes or state building codes, both of which
- 165 state that she has to have a building permit, then the remedy for that is through the
- 166 magistrates office and the court system.
  - 167 ○ Ms. Hull added that if Ms. White doesn't follow through, then the county
  - 168 would need to initiate code enforcement actions (which are already underway
  - 169 at this point, and will continue unless Ms. White obtains the building permit).

170

171 Chairman Lambertson asked the following:

- 172 • Will the variance conditions stay the same or change.
  - 173 ○ Ms. Hull responded:
    - 174 ▪ Time limits can be changed at the discretion of the Board of
    - 175 Adjustment.
    - 176 ▪ If the board chooses option 1, they need to set a beginning and ending
    - 177 date for compliance of the conditions which were in the original
    - 178 variance.

179 Chairman Lambertson asked the following about option 2:

- 180
- 181 • If the case is heard as a new application, and the board reaches a different  
182 decision, does the board have to justify the different decision?
    - 183 ○ Ms. Hull responded:
      - 184 ▪ Indicated a recommendation to give the justifications for any different  
185 decisions.
      - 186 ▪ If the board did not make a justifying statement, and the case was  
187 appealed to a higher court, that court may remand the case and require  
188 you to make those findings based on the case law.
    - 189 • Would new members on the board be sufficient justification for a different  
190 decision?
      - 191 ○ Ms. Hull responded:
        - 192 ▪ That may not be sufficient. Recommend each member give a reason  
193 for their decisions and for the way they vote on this issue.

194 Dan Porter stated the following:

- 195
- 196 • If the board goes with option 2, the following would be required:
    - 197 ○ A new public hearing
    - 198 ○ New findings of fact
    - 199 ○ Each board member would need to state reasons for the way they voted.

200 Chairman Lambertson stated that the Board needed to decide if Res Judicata applies to this  
201 case.

202

203 Ms. Hull stated the following with regard to Res Judicata:

- 204
- 205 • Typically applies when people try to appeal an adverse decision where there was  
206 no change in circumstance.
  - 207 • Law does not allow for multiple re-hearings of cases where Res Judicata applies,  
208 as in a denial or case involving an adverse decision.
  - 209 • This case is different because it involves a non-adverse decision.
  - 210 • Majority of surrounding jurisdictions would require to make the same decision.

211 Ms. Hull indicated her opinion:

- 212
- 213 • The previous variance approval could be seen as being contingent on Ms. White's  
214 meeting the conditions of that approval.
  - 215 • Failure to meet those conditions could then change the prior approval to denial,  
216 since approval was contingent on those conditions being met.
  - 217 • If this were to be held to be the case, then the board would be dealing with an  
218 adverse decision (denial) instead of a non-adverse decision (approval), and the  
219 case could be heard as an appeal.
  - 220 • Upon consultation with Professor Owens, he indicated his opinion to Ms. Hull  
221 that Ms. White's failure to obtain the permit was more a non-exercise of a right  
222 than a violation of an order, which would mean the board would still be dealing  
223 with a non-adverse decision.
  - Ms. Hull indicated that there were arguments either way.

224 Chairman Roger Lambertson asked hypothetically:

- 225
- 226 • What would happen if the board re-heard the re-application and approved it, she  
227 failed to comply, and 6 months later the variance is revoked. What is to prevent  
228 her from coming back before the Board of Adjustment with another re-  
229 application?
    - 230 ○ Dan Porter Responded:
      - 231 ▪ If Ms. White does not comply with the conditions, it becomes a code  
232 enforcement and building code violations issue.
      - 233 ▪ If she does not comply with the orders of the code enforcement officer,  
234 she can be taken to court for failure to comply.
    - 235 ○ Dave Parks added:
      - 236 ▪ If court actions become necessary:
        - 237 • she would be subpoenaed and taken to court for the specific  
238 violations of the building code and the specific violations of the  
239 unified development ordinance of the county.
        - 240 • The court would hear her case, and would likely then order her  
241 to comply by obtaining a building permit.
    - 242 ○ Dan Porter added:
      - 243 ▪ If Ms. White ignored the orders of the court system, she could be  
244 found in contempt of court and could face jail time, fines, or both.

245 Brad Smith asked the following:

- 246
- 247 • If the board decides to rehear the case, and she subsequently fails to comply and  
248 ends up before the board again after her variance goes into revocation after 6  
249 months, can the board make recommendations to the code enforcement officers to  
250 add language into the code that if an applicant fails to meet conditions of a  
251 variance, a fee would be assessed before any re-application / appeal of revocation,  
252 etc., could be brought back before the Board of Adjustment?
    - 253 • Mr. Smiths has concerns regarding the time and money the county has tied up on  
254 this, as this is the 4th meeting on this subject, 2nd meeting of Board of  
255 Adjustment this time.
      - 256 ○ Dan Porter responded that his opinion (not legal standpoint) is that negligence  
257 fees could be written into the code.

258 Dan Porter stated the following regarding the case in general:

- 259
- 260 • Planning Staff recommendations:
    - 261 ○ If the board chooses to say that Res Judicata applies, and uphold the  
262 revocation of the prior variance, an appellate court might reverse that  
263 decision.
    - 264 ○ If the board chooses to say that Res Judicata applies, and hold that the prior  
265 variance still stands, do not grant any extension of days. Simply stated, she  
266 has a structure in the county that needs a building permit. Let it be a code  
267 enforcement action, and let the inspectors enforce their code. It takes time to  
268 get cases heard in the court system through the magistrates office. By that  
time, she may have gotten her building permit.

269 Ms. Hull followed up on what Mr. Porter stated:

- 270 • From a legal standpoint, it does become a code enforcement action
- 271 • Code enforcement actions would hopefully correct the reason for her coming
- 272 before the Board of Adjustment again.

273

274 Brad Smith stated an opinion:

- 275 • Some kind of system of fees needs to be put in place to stop this kind of case from
- 276 being able to be re-heard multiple times in the future.
  - 277 ○ The County's time would be covered for having to rehear and rehear cases.
    - 278 ▪ Ms. Hull stated that she concurred with Mr. Porters idea of a
    - 279 negligence fee and that it could be suggested as a possible amendment
    - 280 to the ordinances for those reasons.
    - 281 ▪ Chairman Lambertson added that increased variance fees might also
    - 282 prevent multiple hearings of cases.

283

284 At this time, Chairman Lambertson asked if there were any further questions from the board.

285

286 Ms. Hassell asked why it was taking so long for code enforcement action in this case.

- 287 • Dan Porter and Dave Parks indicated that the code enforcement and building
- 288 inspection officers were working with staff on this
  - 289 ○ They are waiting on the outcome of the Board of Adjustment decision before
  - 290 taking any definitive actions.
  - 291 ○ If the board decides that Res Judicata applies and grants Ms. White an
  - 292 extension on the time to obtain the building permit, then code enforcement
  - 293 would wait and allow her time to abide by that.
    - 294 ▪ If she fails to comply within the extended time frame, code
    - 295 enforcement officers would then go straight to the magistrate and have
    - 296 it put on the court docket.

297

298 Dave Parks provided clarification on the revocation of the variance:

- 299 • Letter was sent to Ms. White in September, 2007 to revoke the variance.
- 300 • Ms. White came in and re-applied for another variance, therefore the form was
- 301 not submitted to the Registry of Deeds revoking the variance. Form submittal
- 302 was put off pending outcome of these proceedings.
- 303 • The original variance still stands in the Registry of Deeds office.

304

305 Ms. Hull stated that the current actions of the code enforcement and building code officers

306 (waiting for outcome), falls right in line with the recommendations of Professor Owens:

- 307 • The Board should notify Ms. White of their decision and any extensions of time
- 308 • A cover letter be attached to the new order and explain any extension of time that
- 309 may or may not be granted.
- 310 • Inform Ms. White that the process for code enforcement will proceed
- 311 accordingly.



312 Chairman Lambertson indicated a concern regarding setting precedents.  
313       • Feels that Res Judicata does apply and that the variance from a year ago should be  
314 re-instated.  
315       • Stated that he was not making a motion at this point and wanted to hear further  
316 comments on this if any.

317

318 Not hearing any further comments, Chairman Lambertson called for a motion.

319

320 ***Motion: "Accept the fact that Res Judicata does apply in this case, and would result in the***  
321 ***reinstatement of the variance that was granted a year ago."***

322

323 ***Motion made by:*** Chairman Roger Lambertson

324 ***Seconded by:*** Brad Smith

325

326 ***Discussion on the motion:***

327

328 Janice Hassell asked the following:

- 329       • Does this motion include the conditions that were on the variance from a year  
330 ago, or does the Board need to vote on amended conditions, specifically condition  
331 #4 which says that the variance must be signed by a certain date.  
332       • She also asked about the inclusion of any changed dates in the cover letter  
333 mentioned by Ms. Hull.
- 334       ○ Dave Parks clarified the issue with the following:
    - 335           ▪ Ms. White met the requirements of condition #4 in that she did sign
    - 336           the variance before the date specified in the original variance.
    - 337           ▪ The issue to which Ms. Hull (attorney) referred to, had to do with any
    - 338           extension of time relating to the obtaining of a building permit.

339

340 Bradley Smith asked about the time limits of obtaining the building permit:

- 341       • Should Ms. White be given 15 days to get the building permit as stated in the  
342 original variance?
  - 343       ○ Dave Parks recommended 7 working days, since Ms. White has had over a
  - 344       year already.
  - 345       ○ Ms. Hassell asked if the board is allowed to change variance conditions.
  - 346           ▪ Ms. Hull (attorney) said that time periods for compliance can be
  - 347           changed.

348

349 Chairman Lambertson amended his motion to the following:

- 350       • "Accept the fact that Res Judicata does apply and the applicant has 7 business  
351 days from 7-9-08 to obtain the building permit."

352

353 There was some discussion regarding condition #4:

- 354       • Time limit in which the applicant has to sign the variance
  - 355       ○ The board decided to amend the variance in order to change the date on this
  - 356       condition
  - 357       ○ Amended & signed variance will be recorded in the Register of Deeds office.

358 Chairman Lambertson once again amended his motion to the following:  
359 • "Accept the fact that Res Judicata does apply and the applicant has 7 business  
360 days from 7-9-08 to obtain the building permit. With regard to condition #4, the  
361 applicant has 10 days, that is until 7-18-08, to sign the variance."

362  
363 Chairman Lambertson called for a roll-call vote:

- 364 • Ms. Hassell: Aye;
- 365 • William McPherson: Aye;
- 366 • Chairman Roger Lambertson: Aye;
- 367 • Brad Smith: Aye;
- 368 • Don Keaton: Aye.
- 369 ○ The motion passed with the above members all voting Aye.

370  
371 **New Business**

372  
373 ***Item # 1 Variance Application (UDO 2008-04-28) April White***

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375 Variance was not heard as Res Judicata applies as indicated in the Old Business section of  
376 these minutes.

377  
378 **Information from Board and Staff**

379  
380 None

381  
382 **Consider Date of Next Meeting – August 12, 2008**

383  
384 **Adjournment**

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386 At 8:10 PM, a motion was made to adjourn the meeting.

387  
388 Motion made by: Janice Hassell  
389 Seconded by: William McPherson

390  
391 The motion was approved with Chairman Roger Lambertson, Regular Members Don Keaton,  
392 Bradley Smith, William McPherson, and Alternate Member Janice Hassell voting aye; none  
393 voting no; 2 absent; none not voting.

394  
395 Date: \_\_\_\_\_

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398 Approved: \_\_\_\_\_  
399 Chairman Roger Lambertson

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401  
402 Attested: \_\_\_\_\_  
403 Amy Barnett, Planning Clerk