

**VARIANCE REQUEST
ZONING BOARD OF ADJUSTMENT
February 25, 2020**

CASE: ZBA-948

PETITIONER: Daniel Lee Brawley and Jeffrey P. Keeter, applicants, on behalf of Susan Moore Skinner and Emily M. Axelrod Trustees, property owners.

REQUEST: Variance from the withholding of approvals penalty for unauthorized removal of regulated trees per Section 5.3.3 B of the New Hanover County Unified Development Ordinance.

LOCATION: 4525 Castle Hayne Road
PID: R01700-002-003-000

ZONING: RA, Rural Agricultural District

ACREAGE: 19.12

BACKGROUND AND ORDINANCE CONSIDERATIONS:

The subject parcel is located on Castle Hayne Road in the north-central portion of the county, approximately 1.5 miles north of the interchange of Castle Hayne Road with I-140. On July 31, 2019, county staff received inquiries pertaining to 5 separate sites in the Castle Hayne area concerning the removal of trees, upon which all were investigated to ensure compliance with the county's tree retention standards. The Zoning Ordinance language in effect at the time prohibited tree removal without a permit or exemption, and set forth a penalty withholding certain development approvals in the event that all or substantially all regulated trees are cleared from a site without approval:

62.1-9: *Tree Removal*

- (1) *Permits Required - No person, directly or indirectly, shall remove any regulated tree from public or private property without first obtaining a tree removal permit from the County Zoning Administrator. A tree removal permit is required before any clearing, grading or other authorizations may be issued including soil and sedimentation control permits and building permits. An approved tree removal permit for new construction shall apply to the entire site. A tree removal permit may be either attached to the submitted site plan or the site plan may be clearly marked for either approval or denial.*

(Paragraphs 2, 3 and 4 are procedure, waivers and permit criteria and have not been included).

- (5) *Failure to obtain a tree removal permit prior to any timber harvest may result in a three or five-year delay in obtaining a building permit or approval of any development or subdivision plan. (2/06/06)*

62.2-3: *Penalty-Withholding of Permits*

After the date of adoption of this section, failure to obtain a tree removal permit from New Hanover County prior to removal of any regulated or significant tree or any timber harvest on property will result in the following:

- (1) *A building permit, site plan approval or subdivision plan approval shall be denied, subject to the following:*
 - (A) *A period of three (3) years after the completion of a timber harvest if the harvest results in the removal of all or substantially all regulated or significant trees from the tract; or*
 - (B) *A period five (5) years after the completion of a timber harvest if the harvest results in the removal of all or substantially all of the regulated or significant trees from the tract if the harvest was a willful violation of County regulations.*
- (2) *This enforcement provision shall run with the land. Therefore, change of ownership does not alleviate the penalty for unauthorized cutting of trees.*

On February 3, 2020, the Board of Commissioners adopted a Unified Development Ordinance, which consolidated all land use regulations into one document in addition to reorganizing and reformatting the language. While there are some minor changes to the tree clearing and retention language, the content, process, definitions, and penalties for unauthorized removal remain the same:

5.3 Tree Retention

5.3.3. FORESTRY AND PROPERTY CLEARING

- A. *A letter of exemption for timber harvest or other exempted forestry activity must be issued by the Planning Director prior to the removal of any regulated or significant tree based on proof of exemption in accordance with NCGS 153A-452.*
- B. *While exempted forestry activities are not subject to the tree retention requirements of this section, failure to obtain a tree removal permit prior to any timber harvest or other property clearing activity will result in the denial of a building permit, site plan approval, or subdivision approval for a period of three years, regardless of any change in ownership, if the harvest results in the removal of all or substantially all regulated or significant trees from the tract. The denial period shall be increased to five years in situations where removal of all or substantially all regulated trees was a willful violation of County regulations.*

5.3.4. TREE RETENTION

- A. *The provisions of this section protect the following regulated trees:*
 1. *Protected Trees, which are hardwood trees at least eight inches (8") diameter at breast height (DBH), all conifer trees at least 12" DBH, and all dogwoods and American hollies, larger than four inches (4") DBH;*
 2. *Significant Trees, which are hardwood and conifer trees at least 24" DBH and dogwoods, American hollies, and flowering trees at least eight inches (8") DBH.*
 3. *Specimen Trees, which are any live oak trees at least 36" DBH.*

Upon conducting a site visit to the subject property on August 1, 2019, staff did find that a majority of the tract had been cleared, and no evidence was presented to indicate that there were no regulated trees on site. After

searching permit records, it was determined that no tree removal permit or exemption had been issued for this work. Therefore, staff determined that “all or substantially all” of the regulated trees on the site had been cleared. A letter was sent to the property owners on August 9, 2019, citing the applicable sections of the New Hanover County Zoning Ordinance related to tree removal and advising them of the penalty.

Upon receipt of the letter, a property owner reached out to staff and advised that the property had historically been used for forestry, and that the owners were unaware of the need for a tree removal permit or an approved forestry management plan in order to qualify for the tree removal permit exemption. Initially, it was the property owners’ intent to harvest the timber and re-plant in the fall when planting conditions would be optimal for the seedlings to take root and grow. A site visit on February 12, 2020 confirmed that the site was replanted with seedling pines, however, a forestry management plan had not been conducted or submitted to staff prior to the removal of the trees. Thus, the owners were notified of the imposition of the 3-year withholding of development approvals, starting from the date of the initial letter.

Subsequent to being informed of this penalty, the owners decided to attempt a sale of the property. However, the 3-year withholding applies to the property regardless of a change in ownership, as stated in Section 5.3.3.B of the Unified Development Ordinance. As a result, the owners have applied for a variance to request relief of the penalty for reasons detailed within their application narrative.

BOARD OF ADJUSTMENT POWER AND DUTY:

The Board of Adjustment has the authority to authorize variances from the terms of the Unified Development Ordinance where, due to special conditions, a literal enforcement of the regulations would result in unnecessary hardship. In granting any variance, the Board may prescribe appropriate conditions and safeguards in conformity with the Unified Development Ordinance. A concurring vote of four-fifths (4/5) of the voting members of the Board shall be necessary to grant a variance. A variance shall not be granted by the Board unless and until the following findings are made:

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
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 the basis for granting a variance.
3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

ACTION NEEDED (Choose one):

- 1.Motion to approve the variance request based on the findings of fact (with or without conditions)**
- 2.Motion to table the item in order to receive additional information or documentation (Specify).**
- 3.Motion to deny the variance request based on specific negative findings in any of the 4 categories above.**