

**ROBERT A. FORRESTER**

110 CROOKED GULLEY CIRCLE  
SUNSET BEACH, NC 28468

Cell (732) 768-4523  
(910) 575-2333

[robertforresterlaw@verizon.net](mailto:robertforresterlaw@verizon.net)

April 3, 2015

Rawls Howard, AICP  
Director of Planning & Inspections Town of Sunset Beach  
700 Sunset Boulevard  
Sunset Beach, NC 28468

**Re: IN RE APPEAL BY OWNERS OF LOTS 1-10 OF PALM COVE SUBDIVISION  
AND PALM COVE OWNERS ASSOCIATION  
BOA FILE NO. 15-01**

Dear Mr. Howard:

Enclosed please find the original of the signed ORDER encompassing the written decision of the Board of Adjustment in the above referenced matter. Mr. Mannen prepared, reviewed and approved the final draft.

Kindly provide copies of the signed ORDER to all counsel, including Mr. Mannen, and provide copies to the Board members in their information packets for the April 15, 2015 board meeting.

Very truly yours,



ROBERT A. FORRESTER  
Chairman, Board of Adjustment

Enc.

Cc: Jerry Mannen Esq. by email

STATE OF NORTH CAROLINA  
BRUNSWICK COUNTY

BEFORE TOWN OF SUNSET BEACH  
BOARD OF ADJUSTMENT

*IN RE* APPEAL TO BOARD OF ADJUSTMENT  
FOR TOWN OF SUNSET BEACH  
BY OWNERS OF LOTS 1-10 OF PALM COVE SUBDIVISION  
AND, PALM COVE OWNERS ASSOCIATION, INC.

BOAAPPEAL FILE NO. 15-01



\*\*\*\*\*

**WRITTEN DECISION**  
**PURSUANT TO N.C. GEN. STAT. § 160A-388(e2)(1)**  
**AND TOWN OF SUNSET BEACH U.D.O. § 4.04(L)**

\*\*\*\*\*

THIS CAUSE came on to be heard, and was heard, before the Honorable Board of Adjustment for the Town of Sunset Beach (“Board”), on 25 February 2015 and 2 March 2015 upon appeal by Palm Cove Owners Association, Inc. and the individual owners of Lots 1-10 of the Palm Cove Subdivision (collectively, “Appellants”) from the 17 December 2014 determination of the Town’s Uniform Development Ordinance Administrator, Susan Parker (“Administrator”), denying Appellants’ requests that (1) each of the ten (10) lots within the Palm Cove Subdivision (“Subdivision) be allowed to have a swimming pool; and, (2) each of the ten (10) lots in the Subdivision be allowed to have their own individual dune crossover as vested rights.

Presiding at the hearing for the Board on both of the hearing dates were Pete Larkin, Peter Scott, James Strandquist, Gene Allen, and Chairman, Robert Forrester. Appearing before the Board were representatives of the Appellants and Appellants’ legal counsel, Kenneth A. Shanklin, Esquire and Matthew A. Nichols, Esquire of Shanklin & Nichols, LLP. Appearing

before the Board were officials with the Town of Sunset Beach (“Town”) and the Town’s legal counsel, G. Grady Richardson, Jr., Esquire and Susan G. Renton, Esquire of the Law Offices of G. Grady Richardson, Jr., P.C. The Board was represented by Jerry A. Mannen, Jr., Esquire of Yow, Fox & Mannen, LLP.

The Board received into evidence, *inter alia*, the following: Town’s staff report and overview; the parties’ stipulated Record on Appeal and Index to same, collectively identified as Exhibit 1; the Affidavit of Perry Davis, PLS, PE, identified as Exhibit 2; the Town’s one-page chronology and summary of Town’s evidence and facts; and, sworn witness testimony from Susan R. Parker, Randall Walters, Sandy Wood, Steve Tanhouser, and, Perry Davis. During the public comment period of the hearings, the Board also received comments from Tim Jackson, a person who is not a party to the subject proceedings.

After consideration of Appellants' appeal; the materials, evidence, and memoranda of law submitted by the parties; sworn witness testimony; the Record proper; and, arguments of the parties’ counsel, the Board makes and enters the following Order:

STIPULATIONS OF THE PARTIES

At the beginning of the parties’ hearing before the Board, the parties, through their counsel of record, stipulated and agreed as follows:

1. All parties to this proceeding were properly before the Board.
2. Common law vested rights were not part of the Appellants’ appeal to the Board because the Board does not have jurisdiction to consider same.
3. The Appellants’ appeal to the Board and the hearings before the Board were all timely and proper.

## FINDINGS OF FACT

The Board makes the following Findings of Fact which are supported by the substantial, material, and competent evidence in the Record:

1. N.C. Gen. Stat. § 160A-385.1(b)(6) defines a vested right as the “right to undertake and complete the development and use of property under the terms and conditions of an approved site specific development plan.”

2. N.C. Gen. Stat. § 160A-385.1(d)(6) states a vested right “shall terminate at the end of the applicable vesting period with respect to uses for which no valid building permit applications have been filed.”

3. On 5, 18, and 19 October 2006, the owners of lots 1 through 10 in the Subdivision – the Appellants - submitted their Applications for Statutory Vested Rights (“Applications”) to the Town associated with their properties within the Subdivision, expressly acknowledging the two year expiration of said rights.

4. On or about 10 October 2006, Cape Fear Engineering submitted a “Site Specific Plan” (“Site Plan”) in conjunction with the Appellants’ Applications, which document depicted and referenced in the Notes section individual dune crossovers for the ten lots but made no mention of nor depicted pools whatsoever.

5. On 20 October 2006, swimming pools and individual dune crossovers for each lot were permitted under the zoning ordinance of the Town of Sunset Beach for lots in the applicable zone district.

6. On 20 October 2006, the Board issued a Certification granting the Appellants’ requested statutory vested rights pursuant to the Applications and their accompanying Site Plan,

which certification also provided that said rights would expire 19 October 2008.

7. On 1 February 2007, a Subdivision plat map was recorded depicting the Subdivision's lots 1 through 10, referring to individual dune crossovers in the Notes section, and reciting the statutory vested rights expiration date of 19 October 2008. Pools were neither depicted nor referenced anywhere on this plat map.

8. On 5 February 2007, after public discussion including express opposition by one of the main representatives and owners in the Subdivision Bert Exum and his legal counsel and other parties with interest in the property, the Town of Sunset Beach amended its restrictions in the CR-1 Zone District, in which the Subdivision is located, to prohibit swimming pools and limiting dune crossovers to one per every four lots.

9. From May 2008 through April 2009, six lots – Lots 8, 5, 9, 10, 2 and 3 - within the Subdivision applied for and received several CAMA Minor Permits.

10. On or about 30 July 2009, North Carolina Session Law 2009-406, Senate Bill 831, "*An Act to Extend Certain Governmental Approvals Affecting the Development of Real Property Within the State,*" was enacted and subsequently amended by Session Law 2010-177, House Bill 683, "*An Act to Amend the Permit Extension Act of 2009,*" collectively known as the Permit Extension Act ("Act").

11. As a result of the Act, the statutory vested rights of the Appellants were likely extended until 19 October 2012.

12. For the period of 20 October 2006 through at least 30 July 2009, there are no CAMA Minor Permits or the like for Lots 1, 4, 6 and 7 in the Subdivision.

13. In response to a telephone call in March of 2014, from Perry Davis of Cape Fear Engineering to Sandy Wood, the UDO Official for the Town of Sunset Beach, explaining that the

appellants had someone interested in the property, Sandy Wood told Perry Davis that he was not fully familiar with the property and had not been involved with the question of vested rights.

14. On or about July 9, 2014, a conference was held between Perry Davis and Sandy Wood in which the subjects of swimming pools and individual dune crossovers were discussed and Sandy Wood told Perry Davis that he was not fully familiar with the question of swimming pools and individual crossover in that zone district.

15. On or about July 14, 2015 a meeting was held between Perry Davis, Sandy Wood and Randy Walters in which the position of the Town of Sunset Beach was articulated to Perry Davis that swimming pools and individual dune crossovers would not be honored by the Town of Sunset Beach.

16. Perry Davis acknowledged in his testimony that following the July 14, 2014 meeting, he knew of the position of the Town of regarding vested rights to swimming pools and individual dune crossovers.

17. On 23 July 2014, a map of the Subdivision not depicting individual dunes crossovers and referenced "pools" in the Notes for the first time ever was presented to Sandy Wood for signature. This map was signed by Sandy Wood. The map was tendered to the Town and Mr. Wood by the Appellants notwithstanding the fact that on several occasions and days prior to its submission, the Appellants and Appellants' representatives, including Perry Davis and Steve Saieed, were expressly made aware of and notified by the Town (through, among others, Sandy Wood) of the Town's position that the Appellants' statutory vested rights from the Site Plan and Certification had expired.

18. No building or other necessary and/or required permits have been pulled or issued to any of the Appellants to build their desired pools or dune crossovers.

19. None of the Appellants' desired pools or dune crossovers have been constructed.
20. No extensions of their claimed statutory vested rights have ever been sought by or granted to the Appellants in the Subdivision.
21. The ownership of all of Lots 1-10 in the Subdivision by the Appellants has remained the same and unchanged from the Town's Board's Certification of statutory vested rights issued on 20 October 2006 through the dates of the subject hearings before the Board.

#### CONCLUSIONS OF LAW

Therefore, based on the foregoing Stipulations, and Findings of Fact, and such other facts contained in the Record proper, the Board makes the following Conclusions of Law:

1. The Appellants' appeal from the 17 December 2014 decision of the Administrator to refuse to issue a certification of vested rights for swimming pools and individual dune crossovers was timely and is properly before the Board.
2. To the extent the Appellants had statutory vested rights in their desired and depicted dune crossovers on the Site Plan, the Appellants have allowed any such statutory vested rights to expire.
3. The Appellants have never had any statutory vested rights in pools.
4. Alternatively, even assuming *arguendo* the Appellants had statutory vested rights in their desired pools, the Appellants have allowed any such statutory vested rights to expire.
5. The issuance of a CAMA permit does not give a property owner in the Town's jurisdiction the right to build, construct, or develop in violation of the Town's applicable zoning ordinance.
6. To the extent there are any maps, plats, or other documents signed by Town employees suggesting the Appellants had any statutory vested rights to build pools at any time in

the Subdivision in violation of the Town's zoning ordinance, the Town employees erred in signing or certifying such documents.

7. To the extent there are any maps, plats, or other documents signed by Town employees suggesting the Appellants had any valid remaining statutory vested rights that had not expired to pursue their desired dune crossovers on each of their lots in the Subdivision in violation of the Town's zoning ordinance, the Town employees erred in signing or certifying such documents.

8. Zoning and regulation of the use of land is within the proper power of the State of North Carolina under its "police powers" and has been delegated to municipalities under Title 160A et seq.

9. The legislative authority for the Town of Sunset Beach is vested in the Town Council, which is responsible for regulating zoning and land use.

10. Absent compelling factors, which have not been found by this board to exist here, the act of an administrative official of the Town cannot abrogate the duly enacted legislative act of the Town Council.

Based on all of the foregoing, Board member Peter Scott moved to deny the Appellants' appeal and to uphold the Administrator's 17 December 2014 determination to deny a certification of vested rights for swimming pools and individual dune crossovers as requested by the appellant, which motion was seconded by Board member James Strandquist, and was unanimously approved by the Board.

Therefore, by ORDER of the Board of Adjustment for the Town of Sunset Beach, the 17 December 2014 determination of the Town's Administrator denying the Appellants' request for a certification that they are entitled to vested rights to construct swimming pools and individual

dune crossovers on the ten lots in the Subdivision based upon any purported statutory vested rights is AFFIRMED.

SO ORDERED, this the 3 day of April, 2015.

A handwritten signature in black ink, appearing to read "Robert Forrester", written in a cursive style.

Robert Forrester, Honorable Chairman  
Town of Sunset Beach Board of Adjustment