



**Town of Weaverville
Zoning Board of Adjustment
Council Chambers
Monday, February 13, 2017**

Agenda

1. Call to Order – Chairman Al Root.
2. Approval of the Minutes from the December 12, 2016 meeting of the Zoning Board of Adjustment.
3. Approval of an Order Overruling a Decision of the Zoning Administrator Regarding 18 Moore Street.
4. Any Other Business to Come Before the Board.
5. Adjournment.

Town of Weaverville

Zoning Board of Adjustment
Minutes – Monday, December 12, 2016

The Zoning Board of Adjustment of the Town of Weaverville met for its regularly scheduled monthly meeting at 7pm on Monday, December 12, 2016 in council chambers at Town Hall at 30 South Main Street, Weaverville.

Present: Chairman Al Root, Board Members Paul Clauhs, Jeff McKenna and Cynthia Wright, Alternate Members Roger Parkin and Jan Rector, Town Attorney Jennifer Jackson and Town Planner James Eller. Absent: Board Member Tycer Lewis.

1. Call to Order

Chairman Al Root called the meeting to order at 7:03pm.

2. Approval of the minutes from the October 10, October 19 and November 14, 2016 meetings of the Board

Mr. McKenna motioned to approve the minutes presented from the October 10, October 19 and November 14, 2016 meetings of the Zoning Board of Adjustment. Mr. Clauhs seconded and all voted unanimously.

3. Approval of an Order Granting a Variance from the Front Yard Setbacks Established by the R-1 Zoning District for the Property Commonly Known as 12 Perrion Court.

Mr. Clauhs motioned to approve the order as presented. Ms. Wright seconded and all voted unanimously.

4. Approval of an Order Denying a Special Use Permit for a Unified Housing Development on the property commonly known as 97 Lakeshore Drive.

The agenda materials included a draft order on the 97 Lakeshore Drive matter. The Town Attorney presented correspondence that she had just received from Craig Justus, the attorney for Mayfair Partners, LLC, in which he expressed his concerns with the order as drafted. Mr. McKenna motioned to approve the order as presented. Mr. Clauhs seconded and all voted unanimously.

5. Public Hearing on an Appeal of a Decision of the Zoning Administrator Related to a Nonconforming Use Established at 18 Moore Street.

Chairman Root noted for the record the procedures that would be followed for the quasi-judicial hearing on the appeal. The absence of Board Member Lewis was noted and Jan Rector was nominated by the Chairman to serve as an official member in his place.

Mr. Clauhs made a motion to enter into the Public Hearing. Ms. Rector seconded and all voted unanimously.

Mr. Eller explained to the Board the nature of the appeal, that being an appeal from Jerry Parsons, the owner of the property located at 18 Moore Street (sometimes noted as 18 Reagan Street), from a decision rendered by

James Eller, the Zoning Administrator, which found that the nonconforming use of the property as a professional office similar to a medical/dental office had been discontinued for more than 9 months and could not be restarted. Mr. Eller indicated that the entire record on this appeal had been provided in the agenda materials.

Chairman Root asked if any member of the Board, as prescribed, had any conflicts of interest or had taken part in any ex parte communication related to the property or the application. No conflicts or communications were noted.

Parties identified without objection were James Eller on behalf of the Town of Weaverville, Dr. Jerry Parsons as the property owner (represented by Attorney Bill Brazil) and Dr. Mark Ford as the owner of the veterinary clinic that is leasing the property. Don Yelton requested to be a party to the matter and was denied, by unanimous consensus of the Board, based on a lack of standing as Mr. Yelton could not indicate any way in which he would be specially damaged by the action. Ms. Jackson administered the oath to the aforementioned parties and multiple possible witnesses. No witness subsequently testified.

Mr. Eller submitted into evidence an affidavit of mailing (Exhibit 1-B), posting (Exhibit 1-C) and publication (Exhibit 1-A) establishing that the Public Hearing had been duly advertised. Mr. Eller submitted into evidence the current zoning map of the Town of Weaverville (Exhibit 2-A) and a GIS map of 18 Moore Street establishing the zoning and location of the property (Exhibit 2-B). Mr. Eller entered into evidence the application for an appeal of a decision of the Zoning Administrator originally filed with the Town Clerk (Exhibit 3). Mr. Eller entered into evidence sections 36-19, 36-77 and 36-328 (Exhibit 4); Merriam-Webster definitions: abandon, cease and discontinue (Exhibit 5); University of North Carolina School of Government Coates' Cannon blog posting: What Do You Mean I Can't Start Up My Business Again? (Exhibit 6); Town of Weaverville Water System Work Orders dated February 2nd, 2015 and November 15, 2016 (Exhibit 7); photographs taken of the veterinary clinic each establishing variables considered when reaching the decision which is subject to the appeal (Exhibit 8). Mr. Eller submitted into evidence a Notice of Violation / Warning Citation dated November 14, 2016 (Exhibit 9); and Notice of Violation / Civil Citation dated November 15, 2016 (Exhibit 10).

Mr. Eller testified that it was his determination that the nonconforming use status had been forfeited for the property due to the length of time that had lapsed since the previous nonconforming use had discontinued. That length of time was established at one year and nine months by the two municipal water work orders showing the water cut off in February of 2015 and cut back on in November of 2016. Mr. Eller read from the Coates' Cannon blog stating that the courts have determined that the term discontinue means that the use is not active regardless of any intent to resume.

Mr. Brazil argued that the term discontinue was not specifically defined by the Zoning Code of the Town of Weaverville and that nowhere in the code was it established that intent should not be considered when addressing nonconforming uses.

Mr. Brazil submitted a packet of information to the Board (Exhibit 11) and to be introduced into evidence including the Notice of Violation / Warning Citation and Notice of Violation / Civil Citation; Notice of Appeal; Sections 36-19 and 36-328; photographs taken by the appellant; Caselaw; letter from Kopp to Parsons; Affidavit of Terry Hunter; Note from Parsons to Allen; Email from Coyle to Parsons; Duke Energy Bills; and Affidavit of Lynwood Jackson.

Mr. Brazil called Dr. Parsons, the property owner, as his first witness. Mr. Parsons testified as to the history of the property, his efforts to lease the property, his intent to not discontinue the use, the opportunity to quickly make the property available to a potential tenant.

Mr. Eller asked Dr. Parsons if the property had been occupied or used in any way during the period between February 2015 and November 2016 and Dr. Parsons admitted that the property had not.

Dr. Ford testified as to his personal circumstances that led to him occupying the facility, his history in veterinary practice and his desire to be an active member of the community. Dr. Ford also described that the water was terminated during business hours and Chairman Root noted that the action described was not done in conjunction with the night's proceedings.

Mr. Brazil questioned Dr. Ford related to the photos submitted into evidence by the appellant. Dr. Ford described that the facility was ready for business immediately.

Mr. Eller noted in closing that the standard Mr. Brazil was referencing was related to the cessation of a use rather than the discontinuance of a use. Mr. Brazil noted in closing that the ordinance does not adequately relay the intent of the drafters of the ordinance; the ordinance does not take into account the intent of the property owner; the lot was not conducive to a residential use; and requested the Board overturn Mr. Eller's decision.

Ms. Jackson noted that the task before the Board was to make a determination of the law as to whether intent was coupled with the discontinuance of a use.

Chairman Root noted that the nature and appearance of the facility had remained commercial in nature despite its lack of use and suggested that it was his determination that the use had not been discontinued.

Mr. McKenna motioned to exit the public hearing. Ms. Rector seconded and all voted unanimously.

6. Consideration of a motion establishing a ruling on the aforementioned appeal.

Mr. McKenna motioned the Board to find that the use of the property as a commercial landlord offering professional space for rent has not been discontinued and is still a non-conforming use and therefore uphold the appellant's position that the current use is allowable as a nonconforming use and overrule the Zoning Administrator's decision in this matter. Mr. Clauhs seconded and all voted unanimously.

7. Any other business to come before the Board.

Mr. McKenna offered a recommendation to Council that the language within the ordinance related to nonconforming uses should be examined to provide more specifics especially whether intent to discontinue a use is relevant to that determination.

8. Adjournment.

Ms. Wright made a motion to adjourn. Mr. McKenna seconded and all voted unanimously.

**Al Root, Chairman
Zoning Board of Adjustment**

ATTEST:

**James W. Eller
Town Planner / Deputy Town Clerk**

**TOWN OF WEAVERVILLE
STATE OF NORTH CAROLINA**

**IN THE MATTER OF
AN APPEAL OF A ZONING ADMINISTRATOR DECISION
REGARDING THE FOLLOWING PROPERTY:
18 MOORE STREET/18 REAGAN STREET; PIN 9742-28-4780**

THE WEAVERVILLE ZONING BOARD OF ADJUSTMENT (hereinafter “Board”), having held a quasi-judicial evidentiary public hearing on December 12, 2016, to consider an appeal dated November 15, 2016, in which Jerry M. Parsons (“Appellant”) appealed the Zoning Administrator’s determination that the non-conforming use of the Appellant’s property as a professional office/clinic had been discontinued for more than nine (9) months, makes the following **FINDINGS OF FACT** and draws the following **CONCLUSIONS**:

1. This matter came before the Board on December 12, 2016, after being properly noticed and without any objection to notice.
2. The following were found to have standing and, without objection, were recognized as a parties to this action.

James Eller (“Eller”) – Town Zoning Administrator
Jerry M. Parsons (“Parson”) – Owner of 18 Moore Street
Mark Forde (“Forde”) – Tenant at 18 Moore Street
3. Don Yelton (“Yelton”) asked to be recognized as a party to the proceeding but did not present any evidence or a forecast of evidence showing that he would be specially damaged by the outcome of the proceeding. On that basis the Board finds that Yelton lacks standing to participate in the proceeding as a party.
4. The following members of the Board were present, constituted a quorum of the Board, and heard this matter on December 12, 2016: Chairman Al Root, Vice-Chairman Jeff McKenna, Members Paul Clauhs and Cindy Wright, and Alternate Member Jan Rector who was seated as a regular member for the entirety of the matter. Roger Parkin attended as an Alternate Member but did not participate in the proceeding. Tycer Lewis was absent on December 12, 2016, and did not participate in the quasi-judicial evidentiary public hearing.
5. The Chairman inquired as to all seated members of the Board as to matters that would disqualify them from continuing to hear the matter and all indicated that they were qualified to remain seated. No objection was heard from any party as to the ability of any of the members of the Board to consider this matter.
6. On December 12, 2016, the quasi-judicial evidentiary hearing was conducted, documentary evidence was introduced and testimony of witnesses under oath was heard.

7. The Board has the authority to hear this appeal pursuant to NC General Statute §160A-388 and Weaverville Town Code § 36-328.
8. No objection to notice was made and the Board accepted into evidence Exhibits 1-A, 1-B and 1-C showing proper posting, publication and mailing of the notice of this hearing was given. The Board finds and concludes that all parties and all persons entitled to notice have been given proper notice of the hearings in this matter and afforded the right to be heard.
9. The Appellant, Jerry M. Parsons, is the owner of the property known as 18 Moore Street (the "Property"), which lies within the Town's R-1 zoning district.
10. All witnesses who presented testimony before the Board were placed under oath and swore that all testimony before the Board would be the truth. All evidence relied upon in this Order was found by the Board to be credible and reliable.
11. The following documents were accepted by the Board and admitted into evidence:

1-A	Affidavit of Publication
1-B	Affidavit of Mailing
1-C	Affidavit of Posting
2-A	Current Zoning Map of Town of Weaverville
2-B	GIS Map with 18 Moore Street highlighted
3	Appeal Form and Notice of Appeal
4	Excerpts from Town Code: §§ 36-19, 36-77, 36-328
5	Merriam-Webster Definitions: abandon, cease, discontinue
6	Coates' Canons Blog: What Do You Mean I Can't Start Up My Business Again?
7	Town Water Service Work Orders dated 2/2/15 and 11/15/16
8	Photographs taken by James Eller
9	Eller's Notice of Violation/Warning Citation dtd 11/14/16
10	Eller's Notice of Violation/Civil Citation dtd 11/15/16
11	Appellant's Exhibits consisting of:
	Tab 1 - Notice of Violation - Warning - 11/14/16 and Notice of Violation - Citation - 11/15/16 (same as Exhibits 9 and 10)
	Tab 2 - Notice of Appeal - November 15, 2016 (same as Exhibit 3)
	Tab 3 - Zoning Ordinance - §§ 36-19, 36-77, 36-328 (same as Exhibit 4)
	Tab 4 - Photographs Taken by Appellant (same as Exhibit 12)
	Tab 5 - Caselaw
	Tab 6 - Exhibits including: Exhibit 11-A - Letter from Kopp to Parsons dtd 9/25/14

	Exhibit 11-B – Affidavit of Terry Hunter dtd 12/12/16 Exhibit 11-D – Note from Parsons to Allen dtd 3/15 Exhibit 11-E – Email from Coyle to Parsons dtd 12/8/16 Exhibit 11-F – Duke Energy Bills Exhibit 11-G – Affidavit of Lynwood Jackson dtd 12/12/16
12	Photographs (same as Exhibit 11, Tab 4)

12. Section 36-19 of the Town’s Code provides that nonconforming uses shall not be “restarted after discontinuance of the use for nine consecutive months, or in cases of the settlement of an estate, after one year.”
13. Eller made the determination that the nonconforming use of the Property was a professional office similar to a medical or dental office.
14. Eller made the determination that the operation of a professional office similar to a medical/dental office on the Property was discontinued on or about February 2, 2015, and testimony and documentary evidence support such a determination.
15. Eller made the determination that the operation of a professional office similar to a medical or dental office on the Property restarted on or about November 14, 2016, and testimony and documentary evidence support such a determination.
16. Eller determined that the nonconforming use of the Property as a professional office similar to a medical/dental office had been discontinued for a period of more than nine months and, as such, had lost its nonconforming status and was not allowed to restart after the period of discontinuance.
17. Parsons leased the Property as a professional office space similar to a medical/dental office fairly continuously from 1999 to 2014.
18. Parsons attempted to lease the professional office space from 2014 to November 2016 at which point he leased the Property to Mark Forde who began operating an animal hospital/clinic on the Property under the name Mountain Animal Hospital on or about November 14, 2016.
19. The Board finds that the use of the Property as an animal hospital/clinic is a professional office space similar to a medical/dental office as long as such animal hospital/clinic does not offer boarding or kenneling of dogs or other animals.
20. The Board finds and concludes that the nonconforming use of the Property is the leasing of a professional office space for offices similar to medical/dental offices and not the operation of the professional office itself.
21. The Board finds and concludes that the nonconforming use of the leasing of the professional office space for offices similar to medical/dental offices has not been discontinued.
22. Based on the evidence and testimony presented at the hearing and relied on by the Board, and the arguments of the parties, and upon motion properly made, seconded, and unanimously approved by the Town of Weaverville Zoning Board

of Adjustment it appeared to the Board that the determination of the Zoning Administrator that the non-conforming use on the Property had been discontinued and could not be started again is overruled and the Appellant's position that the use of the Property as the leasing of a professional office space for a medical/dental type office has not been discontinued and as such retains its non-conforming use status.

Therefore, based on the foregoing **FINDINGS OF FACT** and **CONCLUSIONS** drawn by the Weaverville Zoning Board of Adjustment, the Zoning Determination is hereby **OVERRULED** as stated herein.

ORDERED this the 13th day of February, 2017.

AL ROOT, Chairman

SELENA D. COFFEY, Town Clerk/Secretary to the Board