



**Town of Weaverville
Zoning Board of Adjustment
Council Chambers
April 11, 2018, 7pm**

Agenda

1. Call to Order – Chairman Jeff McKenna.
2. Approval of the Minutes from the May 7, 2018 Meeting of the Board.
3. Approval of an Order Denying an Appeal and Affirming a Decision of the Zoning Administrator Related to the Establishment of a Mobile Food Vendor on the Property Commonly Known as 320 Merrimon Avenue.
4. Any Other Business to Come Before the Board.
5. Adjournment.

Town of Weaverville

Zoning Board of Adjustment

Minutes – May 7, 2018

The Zoning Board of Adjustment of the Town of Weaverville met a special called meeting at 7pm on Monday, May 7, 2018 in council chambers at Town Hall at 30 South Main Street, Weaverville.

Present: Chairman Jeff McKenna, Vice Chairman Tyker Lewis, Board Members Paul Clauhs, Roger Parkin and Cynthia Wright; Alternate Board Member Sylvia Valois; Town Attorney Jennifer Jackson and Planning Director James Eller.

1. Call to Order

Chairman Jeff McKenna called the meeting to order at 7:00pm.

2. Oath of Office

Town Attorney Jennifer Jackson administered the Oath of Office to recently appointed alternate board member Sylvia Valois.

3. Approval of the minutes from the March 12, 2018 meeting of the Board.

Mr. Clauhs motioned to approve the minutes as presented. Mr. Parkin seconded and all voted unanimously.

4. Public Hearing Regarding an Application to Appeal a Decision of the Zoning Administrator Related to a Nonconforming Use Established at 320 Merrimon Avenue.

We will now open the evidentiary hearing on an appeal from a zoning administrator's decision.

On March 28, 2018, the zoning administrator issued a decision that mobile food vendors can no longer operate on the property located at 320 Merrimon Avenue owned by David Robinson. On April 9, 2018, Jeremiah McDaniel and Tracy Shenkin, who have leased the property for their Southern Smoke BBQ food truck business, filed an appeal to this Board.

Tonight the Board will holding a quasi-judicial hearing so that we can hear and consider pertinent facts related to the appeal. The Board is required to comply with procedural rules much like those of a trial court and to provide for the constitutional right to due process such as proper notice of the meeting, an impartial decision maker, sworn testimony of witnesses, and an opportunity for parties to be heard by allowing direct examination and cross examination of witnesses.

The Board's decision can only be made based on competent, material, and substantial evidence in the record of the hearing.

The burden is on the appellant to demonstrate that the decision of the zoning administrator was not proper. Where conflicting evidence is presented the Board must determine the weight of the evidence and the credibility of witnesses.

The Town Attorney is with us tonight to help us conduct the hearing properly.

No conflicts of interest or ex parte communications were noted or revealed.

James Eller, Planning Director; Jeremiah McDaniel and Tracy Shenkin, leaseholders of 320 Merrimon Avenue and owners of the mobile food vendor Southern Smoke; Russ Roberson, owner of 320 Merrimon Avenue; Rachel Smith and Tom Sawicki were sworn in as parties to the matter.

Mr. Eller entered into evidence as exhibit 1 3 ordinances; those being Section 36-130 effective March 19, 2018, Section 36-130 in place prior to March 19 and Section 36-19 Nonconforming Uses. Mr. Eller also entered into evidence exhibit 2 a packet of information distributed to the Board for this particular hearing including a notice of violation, an application to appeal a decision of the zoning administrator, University of North Carolina School of Government publications related to nonconformities, affidavits of posting and mailing as exhibits 3A and 3B, and an email suggesting the public hearing had been advertised in a paper of record in place of the affidavit of publication. No objection to the noticing was given.

Mr. Roberson asked staff if he should have been directly contacted related to the ordinance change that affected his property. Mr. Eller suggested that the ordinance change was duly advertised as per state statute and relayed the lengthy process undertaken by the Planning and Zoning Board and Town Council.

Mr. Roberson asked if Squeelin' Pig, a previous mobile food vendor which inhabited the site, would have been forcibly removed. Mr. Eller denied suggesting that it was the former inhabitant who would have been afforded nonconforming protection.

Tracy Shenkin testified that she and her husband were present to appeal the decision of the zoning administrator, a verbal contract had been entered on March 8, and submitted into evidence as exhibit 4 a signed lease to use the property a site for a mobile food vendor from March 18 suggesting that these actions predated the passage of the ordinance and constituted the commencement of the use. Ms. Shenkin also testified that if the notice of violation were upheld, an undue hardship would be applied to her and her husband as well as the property owner Mr. Roberson. Ms. Jackson noted to the Board and applicant that the lease submitted into evidence showed an effective date of April 1, 2018.

Mr. Roberson testified that the property had been advertised for general lease and not for the specific use of the property to house a mobile food vendor.

Mr. Eller testified that neither Mr. Roberson nor the leaseholders had contacted municipal staff over the proposed use of the property.

The leaseholders and Mr. Roberson suggested that Mr. Roberson should have been contacted directly over the change in ordinance which affected the use of mobile food vendors in certain zoning district. Mr. Eller testified that the process for such a zoning text amendment prescribed by municipal ordinance and state statute had been adhered to and such a notice to individual property owners or leaseholders was not feasible when considering the entirety of the jurisdiction.

A lengthy conversation ensued between board members as to the applicability of Sec. 36-19 Nonconfirming Uses and as to whether any ambiguities existed within same.

Mr. Eller noted other sections of code that were not being observed based upon the establishment of this use without permit for zoning and signage; landscaping regulations; and sidewalk requirements.

Mr. Eller inquired Mr. Robinson and the leaseholders as to whether any evidence could be produced establishing that Southern Smoke was operational on the property at the time of the ordinance passage on March 19. No such evidence was produced.

The leaseholders alleged they were being attacked by Mr. Eller; that the Board and Staff were being pressured by an individual member of Town Council; the enforcement of the zoning ordinance of the Town upon the property was a violation of their 14th amendment rights; and the zoning text amendment should not be enforceable because individual property owners were not noticed.

Ms. Jackson noted that no such influence over the Board existed as noted earlier in the meeting when no ex parte communication was revealed and no objection was offered toward same.

5. Consideration of a Motion Establishing a Ruling on the Aforementioned Appeal.

Chairman McKenna motioned to deny the appeal and affirm the decision of the zoning administrator. Ms. Wright seconded and all voted unanimously.

6. Any Other Business to Come Before the Board.

No further business was conducted by the Board

7. Adjournment.

Mr. Lewis motioned to adjourn. Mr. Parkin seconded and all voted unanimously.

**Jeff McKenna, Chairman
Zoning Board of Adjustment**

ATTEST:

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

**TOWN OF WEAVERVILLE
ZONING BOARD OF ADJUSTMENT**

**ORDER AFFIRMING
ZONING ADMINISTRATOR DECISION**

APPELLANT: Jeremiah McDaniel and Tracy Shenkin/Southern Smoke BBQ

PROPERTY LOCATION: 320 Merrimon Avenue, Weaverville, NC

PARCEL IDENTIFICATION NUMBER: 9732-80-7768

The Zoning Board of Adjustment of the Town of Weaverville (hereinafter “Board”) held a quasi-judicial evidentiary hearing (hereinafter “Hearing”) on Monday 7 May 2018, at 7 p.m. in Council Chambers at Town Hall at 30 South Main Street, Weaverville, on an appeal of a zoning administrator decision.

A quorum of the Board was present with Chairman Jeff McKenna, Vice Chairman Tycer Lewis, Board Members Paul Clauhs, Cynthia Wright, and Roger Parkin in attendance and participated in this matter without objection. Town Attorney Jennifer Jackson and Town Planner/Zoning Administrator James Eller were also present.

The Hearing was held after notice of the meeting had been mailed to property owners within five hundred feet of the subject property, notice of the meeting was posted on the subject property and notice of the meeting was duly advertised in a paper of record.

At the Hearing on 7 May 2018, Chairman McKenna presided. The Board acknowledged that the following had standing to participate in the Hearing and were made parties to this matter: Appellants Jeremiah McDaniel and Tracy Shenkin who are doing business as Southern Smoke BBQ and who have a leasehold interest in 320 Merrimon Avenue, and Zoning Administrator James Eller. David “Russ” Roberson, an owner of the property, was also made a party to the matter.

The Zoning Board of Adjustment for the Town of Weaverville, after having held the Hearing in this matter and having considered all the evidence and arguments presented at the hearing, and weighing the credibility of witnesses, finds as fact and concludes as follows:

1. Documentary evidence was submitted and admitted into evidence without objection as follows:
 - a. A packet of the relevant Town Code provisions (including the amendments to Code § 36-130 adopted on 19 March 2018, Code § 36-130 adopted on 21 August 2017, and Code § 36-19 that was in effect at all times relevant to this Hearing) were submitted and accepted into evidence by James Eller as Exhibit 1.
 - b. A packet of information submitted to the Board in which the following items were included: agenda, notice of violation with zoning administrator letter dated March 28, 2018, photographs of the property taken by James Eller, Code § 36-19, excerpts from Town Code re mobile food vendors, appeal application dated April 9, 2018, UNC School of Government information on nonconformities, copy of affidavit of posting, copy of affidavit of mailing, email correspondence with Weaverville Tribune regarding publication of notice of hearing; said packet was submitted into evidence by James Eller as Exhibit 2.
 - c. An Affidavit of Posting and Affidavit of Mailing were submitted into evidence as Exhibits 3a and 3b, respectively. An affidavit of publication showing that the legal advertisement ran

in the Weaverville Tribune was not available at the Hearing, however Mr. Eller testified that the ads did run on 26 April 2018, and 3 May 2018. No objection concerning noticing of the meeting was heard from any party.

- d. The Commercial Gross Lease agreement entered into by and between Russ Roberson, Landlord, and Southern Smoke BBQ and Jeremiah McDaniel, Tenant, for the property located at 320 Merrimon Avenue was accepted into evidence as Exhibit 4.
2. The following individuals were sworn in and gave testimony: James Eller, Jeremiah McDaniel, Tracy Shenkin, and Rachel Smith. Tom Sawicki was also sworn but did not give testimony as he believed that his comments in support of the appeal had already been made by others.
3. Russ Roberson is the owner of 320 Merrimon Avenue, which is zoned C-2 Commercial and bears Buncombe County parcel identification number 9732-80-7768 (hereinafter "Property").
4. The Property has previously been used by the Sqweelin' Pig mobile food vendor but the Sqweelin' Pig moved from the Property on or about 1 March 2018.
5. Russ Roberson had the Property, and the vehicular canopy located thereon, available for lease for any legal use, and not just for mobile food vendor. Mr. Roberson did not characterize his use of the Property as rental property (including the structures and connections located thereon) to be leased for mobile food vendors only, but rather rental property for any legal use.
6. The Appellant entered into a verbal agreement to lease the Property on 8 March 2018, and signed a written lease (Exhibit 4) with Russ Roberson and paid a deposit on 18 March 2018, with a noted effective date of 1 April 2018.
7. Neither Russ Roberson nor the Appellant consulted the Town's zoning administrator to see what was permissible on the Property prior to entering into the lease agreement.
8. The Town is not, nor should it be, involved in private contracts such as lease agreements. If Town staff is not consulted prior to leases being executed or agreed to, Town staff cannot be held to knowledge of such lease and the potential use of a property. Town staff can only make zoning determinations once conditions are present on the property indicating a particular use or once actual knowledge of a use is obtained.
9. On 21 August 2017 the Weaverville Town Council first enacted regulations pertaining to mobile food vendors with a duly adopted zoning text amendment. On 19 March 2018 Town Council enacted certain text amendments to the Weaverville Town Code that amended the regulations pertaining to mobile food vendors within the C-1, C-2, and I-1 zoning districts effectively immediately.
10. The 21 August 2017 regulations and the 19 March 2018 amendments were properly adopted after advertisement and public hearing consistent with Weaverville Town Code and North Carolina law. Neither the Weaverville Town Code nor the North Carolina law require mailed notice to individual property owners or posting of individual properties for general text amendments, either prior to or after adoption.
11. A sign advertising that Southern Smoke BBQ would be "coming soon" was placed on the property on or about 27 March 2018.

12. Upon discovery of the Southern Smoke BBQ “coming soon” sign, James Eller mailed a notice dated 28 March 2018 to Russ Roberson advising him that the reestablishment of a mobile food vendor on the Property would be a violation of the Town’s zoning regulations.
13. Had the Sqweelin’ Pig been operating on the Property on 20 March 2018, the day after the 19 March 2018 amendments were adopted, then the mobile food vendor known as the Sqweelin’ Pig would have been considered a non-conforming use on the Property and been eligible for the protections under Town Code Section 36-19.
14. On 20 March 2018 there was no mobile food vendor operating on the Property. As such, there was no activity on the Property that was made illegal by the 19 March 2018 amendments.
15. The Appellant’s Southern Smoke BBQ mobile food vendor was open for business and operating on the Property sometime after 28 March 2018.
16. The Board finds and concludes that on 20 March 2018 no mobile food vendor was located on the Property at 320 Merrimon Avenue and that the Southern Smoke BBQ mobile food vendor that was moved onto the property after 20 March 2018 was not a lawful use established on or prior to the 19 March 2018 Code amendments.
17. The Board further finds and concludes that Southern Smoke BBQ is not a nonconforming use as defined by Town Code Section 36-19, and any mobile food vendor that is to be located on 320 Merrimon Avenue must fully comply with the Code amendments adopted on 19 March 2018 pertaining to mobile food vendors.
18. The Board finds and concludes that since there is no principal building or use on 320 Merrimon Avenue, no mobile food vendor can be permitted on the Property.
19. The Board finds that there was no evidence presented indicating that Mr. Eller violated any constitutional provisions, acted in excess of his authority, acted inconsistently with North Carolina law or Town Code, committed an error of law, or acted arbitrarily or capriciously, and the Board concludes that his actions in issuing the decision dated 28 March 2018, were permissible and proper.

NOW, THEREFORE, based upon the foregoing findings of fact and conclusions, the Zoning Board of Adjustment for the Town of Weaverville, in a unanimous vote, concludes that: (1) it has jurisdiction to hear this appeal; (2) that there was no use of the 320 Merrimon Avenue property that was made unlawful by the 19 March 2018 Code amendments, and therefore no use entitled to protections under the Town’s nonconforming use provisions; (3) the amendments adopted by Town Council on 19 March 2018 concerning regulation of mobile food vendors fully apply to the Property located at 320 Merrimon Avenue; and (4) Southern Smoke BBQ food truck is an unlawful use of the property located at 320 Merrimon Avenue absent a principal use operating on the Property.

IT IS, THEREFORE, ORDERED that the 28 March 2018 decision of the zoning administrator is affirmed as it is consistent with the findings and conclusions of this Board in this matter.

ORDERED THIS the 11th day of June, 2018.

**Jeff McKenna, Chairman
Zoning Board of Adjustment**

ATTEST:

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

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