

Town of Weaverville

Board of Adjustment

Minutes – Monday, October 12, 2020

The Board of Adjustment of the Town of Weaverville met for its regularly scheduled monthly meeting at 7pm on Monday, October 12, 2020, in the Fire Department Training Room at 3 Monticello Road, Weaverville.

Present: Chair Tycer Lewis, Vice Chair Cynthia Wright, Board Members Paul Clauhs, Roger Parkin, and Sylvia Valois, Town Attorney Jennifer Jackson and Planning Director James Eller. Absent: Alternate Member Gene Knoefel.

**1. Call to Order**

Chair Tycer Lewis called the meeting to order at 7:00pm and welcomed those in attendance to the meeting. The board members and staff introduced themselves.

**2. Election of Officers**

Board Member Clauhs made a motion to re-elect Tycer Lewis as Chair and Cynthia Wright as Vice-Chair of the Board. Board Member Parkin seconded the motion and all voted to approve the motion. James Eller agreed to continue to serve as the Board's secretary.

**3. Approval of Minutes**

Vice Chair Wright made a motion to approve the minutes from the February 10, 2020, meeting of the Board as presented. Board Member Clauhs seconded the motion and all voted in favor of approving the minutes.

**4. Evidentiary Hearing on an Application for an Amendment to an Existing Special Use Permit Applicable to the Property owned by BH2 Partners, LLC at 39 Fairfield Approach Drive**

Chair Lewis asked Attorney Jackson to provide an overview on how quasi-judicial hearings work. The following were Attorney Jackson's statements:

Tonight the Board of Adjustment will hold a quasi-judicial hearing on an application to amend a special use permit. The purpose of the quasi-judicial hearing is for the Board of Adjustment to hear and consider pertinent facts related to the request. 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 is asked to make a quasi-judicial decision which is like a court decision in several important ways. It requires the Board to use its judgment in applying general laws to a particular land use situation while ensuring the constitutional due process rights of all parties.

Tonight's hearing is a formalized means of gathering evidence relevant to the issues that are before the Board tonight. This is not an opportunity for citizens to come and just speak their minds like in a public hearing on a legislative matter before Town Council. The Board's decisions can only be made based on competent, material and substantial evidence in the record of the respective hearings. "Competent" evidence is generally understood to mean that evidence which is legally admissible in a court of law. Competent evidence does not include the opinion testimony of lay witnesses as to any of the following:

- Use of property in a particular way affecting the value of other property;
- Increase in vehicular traffic resulting from a proposed development posing a danger to the public safety;
- Matters about which only expert testimony would generally be admissible under rules of evidence applicable to trial courts.

The burden is on the applicant to demonstrate that the application complies with the review and approval standards of the zoning ordinance. Once an application has been submitted and all evidence in support of the application has been presented, then the burden shifts to those who have standing to oppose the application to present evidence to the Board. Where conflicting evidence is presented the Board must determine the weight of the evidence and the credibility of witnesses. The Board can consider reasonable conditions that, if imposed, would bring a project into compliance with the standards set out in the zoning ordinance.

Chair Lewis introduced the matter by stating that BH2 Partners, LLC, is the owner of approximately 1.8 acres at 39 Fairfield Approach Drive (Buncombe County Parcel Identification Numbers of 9742-09-7663), and, through its agent, FFC Limited Partnership, has requested an amendment to the special use permit in order to obtain development approval on the undeveloped parcel subject to the existing special use permit previously issued for the Fairfield Inn project. The proposed development is for a restaurant with a drive-thru, which is a permitted use in the underlying C-2 zoning district. Town Code Sec. 36-328(1) authorizes the BOA to grant amendments to special use permits. The standards for special use permits were reviewed.

Chair Lewis declared the evidentiary hearing open and began by polling the board members to see whether or not any members had conflicts of interest or bias that might disqualify them from serving on the Board during the hearing. None were reported. No board member indicated that they had had any *ex parte* communication with the applicant. No concerns were noted about the board hearing the matter were expressed.

Chair Lewis noted that the applicant/property owner, BH2 Partners, LLC, through its authorized agent FFC Limited Partnership, had standing to participate in the hearing as a party, as did James Eller on behalf of the Town. No one else expressed a desire to be made a party to the proceeding.

The following individuals were sworn in and gave testimony: James Eller and Tad Dolbier of FFC Limited Partnership.

Mr. Eller described the administrative materials contained in agenda packet that was sent to the Board and applicant in advance of the meeting. The administrative materials were noted to include the following: coversheet, notice of hearing, staff report, special use permit issued on October 10, 2016, application for amendment, agent authorization, certificate of authority for limited liability company, colored rendering, preliminary site development plan, boundary and topographical survey, affidavit of publication, and affidavit of

mailing and posting. These administrative materials were marked as Exhibit 1 and entered into the record without objection from any party.

Mr. Eller reviewed the application by stating that the requested amendment would allow the development of the parcel into a restaurant with a drive-through, which is a permissible use within the underlying zoning district of C-2. Mr. Eller also noted that while a restaurant use is a permissible use within the C-2 zoning district the property is currently subject to a special use permit that was issued in 2016 as a part of the Fairfield Inn project. Mr. Eller indicated that he is of the opinion that since the proposed restaurant use for the parcel is a permissible use under C-2 zoning that the parcel that was previously identified for future development in the special use permit could be removed from the operation of the special use permit. Mr. Eller also noted that it was previously determined that a traffic impact study was not necessary due to this property being on a private road that connects to an NCDOT maintained roadway at an intersection that is already signalized and includes dedicated turning lanes.

Tad Dolbier of FFC Limited Partnership, appeared and gave sworn testimony which was consistent with and in support of the application, stating that FFC Limited Partnership is a franchisee of Wendy's and has been for many years. They hope to purchase the property and develop it into a Wendy's. The parcel provides for good visibility, including from the interstate, and the current traffic pattern is better for the potential customers as it is just off Weaver Boulevard.

The administrative materials provided evidence that BH2 Partners, LLC, is the owner of the real property located at 39 Fairfield Approach Drive, which also bears Parcel Identification Number 9742-09-7663.

There was Board discussion concerning the appropriateness of removing the parcel from the operation of the special use permit in order to provide better efficiency for the property owner and for the Board. With the understanding that special use permits are meant to be used for specific enumerated uses, and the proposed use is not generally subject to a special use permit, and with the consent of all parties, the Board indicated that it was inclined to remove the parcel from the operation of the special use permit and allow that development to take place under the standard regulations of the C-2 zoning district.

Having heard all of the evidence and the responses to all questions asked, Chair Lewis asked if there was a motion on the matter.

#### **5. Ruling on the Application to Amend an Existing Special Use Permit – Monticello Development, LLC**

Based on the documentary and testimonial evidence presented during the hearing, Board Member Parkin made the motion to amend the special use permit issued on October 10, 2016, in order to remove the subject parcel that was shown as "future development" from the operation of the special use permit. Board Member Clauhs seconded the motion. All voted in favor and the motion passed unanimously.

Chair Lewis declared the evidentiary hearing closed.

The Town Attorney reviewed a proposed written decision drafted based on the Board's ruling for possible adoption. Board Member Valois made a motion to adopt the written decision. Vice Chair Wright seconded the motion. All voted in favor and the written decision was adopted.

## 6. Other Business

Mr. Eller noted that the Board was provided with an updated roster which showed the loss of Alternate Board Member Bob Pace. Town Council will be working on filling that vacancy in the coming months.

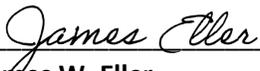
Ms. Jackson reviewed with the Board the Chapter 160D project that staff is working on in order to bring all of the Town's development regulations into compliance with the newly adopted laws regarding development. She also mentioned that as part of that work that conflicts of interest have been broadened to include close familial, business, and associational interests.

## 7. Adjournment

At approximately 7:45 pm, Board Member Clauhs made a motion to adjourn, which was seconded by Board Member Parkin. All voted in favor and the meeting was adjourned.

  
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Tycer Lewis, Chair  
Board of Adjustment

ATTEST:

  
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James W. Eller  
Town Planner / Town Clerk