



**Town of Weaverville
Board of Adjustment
Monday, October 10, 2022, 6:00pm**

Agenda

1. Call to Order – Chair Tycer Lewis
2. Election of Officers
3. Approval of the Agenda
4. Approval of the Minutes from the June 13, 2022 Meeting of the Board
5. Approval of Orders for 104 Fortress Ridge and 12 Banks Town Road
6. Any Other Business
 - Board of Adjustment Jurisdiction and Standards
 - Review of Quasi-Judicial Procedures - Evidence
 - Updated Roster
7. Adjournment

OVERVIEW OF BOARD OF ADJUSTMENT MATTERS – PROVIDED AS INFORMATION ONLY AND NOT AS LEGAL ADVICE

The Board of Adjustment almost exclusively does its work by making **QUASI-JUDICIAL** decisions on appeals from administrative decisions, variance requests, applications for special use permits, and applications for waivers of sidewalk and vegetative screening requirements. Strict adherence to statutorily prescribed procedures before, during, and after a hearing must be followed to ensure that constitutional due process rights of all parties are preserved. **AS RIGHTS ARE DETERMINED IN THESE HEARINGS IT MAY BE ADVISABLE FOR YOU TO CONSULT WITH AN ATTORNEY ON THESE MATTERS.**

PUBLIC NOTICE OF HEARING

The Town Staff must provide notice of the hearings.

MAILED NOTICE – Notice of hearings must be mailed to the applicant, the owner of the affected property, and owners of properties abutting the property affected. Mailings are sent first class to addresses maintained by Buncombe County Tax Office and must be sent at least 10 days but not more than 25 days prior to the scheduled hearing.

POSTING OF PROPERTY – The property that is subject to an appeal, variance request, special use permit application, or other request must be prominently posted. This posting must be on the property affected or on an adjacent street or highway right of way and must also be done at least 10 days but not more than 25 days prior to the scheduled hearing.

INTRODUCTION AT HEARING

The Chairman of the Board of Adjustment or the Board's attorney will provide an introduction prior to the start of the hearing in order to make sure that those in attendance understand the matter to be heard, who is allowed to participate, and a general overview of the procedural aspects of the hearing including the burden of proof and standards the Board of Adjustment must apply.

BURDEN OF PROOF – All decisions of the Board must be based on competent, material, and substantial evidence presented during the hearing. The person appealing an administrative decision, or applying for a variance, special use permit, or sidewalk or vegetative screening/buffering waiver has the burden of providing sufficient evidence for the Board of Adjustment to conclude that the applicable standards have been met. If insufficient evidence is presented, the application must be denied or the Board of Adjustment can continue the hearing to a later date to receive additional evidence. Once sufficient evidence has been presented that the standards have been met, the applicant is entitled to approval. If conflicting evidence is presented, the Board must determine which facts it believes are correct.

STANDARDS - The Town's land development regulations provide specific standards for the issuance of variances, special use permits, sidewalk waivers, and vegetative screening/buffering waivers. See separate Section on Standards.

BOARD DISCLOSURES AND RECUSALS

The Board of Adjustment must make sure that it is an impartial decision maker and that all communications with the Board on the matter prior to the hearing have been disclosed.

RECUSAL FOR BIAS/CONFLICT OF INTEREST - Prior to the opening of the hearing, the Chairman will inquire of the Board members if there is any reason that they could not be an impartial decision maker. If any member has a fixed opinion prior to the hearing, a close familial, business or other associational relationship with an affected person, or a direct or indirect financial interest in the outcome he or she should not participate in that hearing, deliberation or vote. Alternate members of the Zoning Board of Adjustment have been appointed to fill a seat in those situations. If there are members who express bias or conflict of interest then the recusals of those members would be appropriate.

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OUTSIDE COMMUNICATION – The Chairman will also provide an opportunity for members of the Board to disclose any communication that has occurred prior to the hearing. Some incidental communication is common and hard to avoid. However, substantial communication that occurs outside of the hearing should be disclosed.

IDENTIFICATION OF PARTIES

Only those people who have a sufficient interest, or standing, in the outcome of matter before the Board are allowed to become a party and present evidence. Anyone that can show some “special damage,” or damage not common to all other persons who may oppose what is being requested, will have standing to contest the matter and will be a proper party. The following have standing:

- (1) Anyone that has an ownership interest in the property that is the subject of the hearing;
- (2) Anyone that has a leasehold interest in the property that is the subject of the hearing.
- (3) Anyone that has an interest in the property that is the subject of the hearing that has been created by an easement, restriction, or covenant.
- (4) Anyone that has an option or contract to purchase the property that is the subject of the hearing.
- (5) Anyone that is an applicant before the decision-making board.
- (6) Any other person who will suffer special damages as the result of the decision.
- (7) An incorporated or unincorporated association to which owners or lessees of property in a designated area belong by virtue of their owning or leasing property in that area, or an association otherwise organized to protect and foster the interest of the particular neighborhood or local area, so long as at least one of the members of the association would have standing as an individual.
- (8) The Town if the Town believes that the Board of Adjustment improperly granted a variance from or made a decision that it believes is inconsistent with the proper interpretation of an ordinance adopted by Town Council.

OATH OF WITNESSES

State law requires that the Board of Adjustment’s decisions be based on testimony that is given under oath. The Chairman will ask that anyone wishing to testify at the hearing come forward to be sworn under oath before the hearing begins.

HEARING IS OPENED FOR THE PRESENTATION OF EVIDENCE

The hearing is conducted in order to determine the facts relevant to the matter before the Board of Adjustment. The decision of the Board of Adjustment must be made based on competent, material, and substantial evidence in the record of the hearing. The Board of Adjustment’s scope is limited to applying facts to the standards set forth in the land development regulations. Any testimony as to unrelated matters is inappropriate and cannot be considered.

DOCUMENTARY EVIDENCE/EXHIBITS – Examples of documents that can be entered into evidence include: the application, staff reports, supporting documentation, documents from witnesses, maps, photographs, videos, studies.

FACTUAL TESTIMONY – Testimony about facts within the personal knowledge of a witness can be fully considered by the Board of Adjustment. Factual testimony should be limited to those facts which relate to the standards. The Board of Adjustment can only rely on opinions offered by qualified experts. The testimony of lay witnesses offering only opinions or conclusions is not considered as competent evidence on which the Board can basis its determination.

OPINION TESTIMONY BY QUALIFIED EXPERTS – Opinion testimony should be provided only by properly qualified experts. North Carolina law specifically prohibits the use of non-expert testimony on how the use of a property would affect property values, the increase in vehicular traffic resulting from the proposed development would pose a danger to public safety, or any other matters that a court would require expert testimony in court. Non-expert opinions on these technical matters are not considered to be competent evidence upon which a decision can be made.

OVERVIEW OF BOARD OF ADJUSTMENT MATTERS – PROVIDED AS INFORMATION ONLY AND NOT AS LEGAL ADVICE

CROSS-EXAMINATION

In order to preserve constitutional rights, parties have the right to cross-exam or question all witnesses. Board members are also free to pose questions to anyone presenting evidence.

HEARING IS CLOSED AND BOARD DELIBERATION BEGINS

At the close of the hearing the Board then takes an opportunity to review the evidence in light of the standards that the Board must apply. The Board's review should focus on contested facts. Where conflicting evidence is presented, the Board of Adjustment has the responsibility of deciding how much weight to accord each piece of evidence. The Board also has the responsibility of determining credibility of witnesses. In its discussion the Board can consider conditions that might be imposed in order to bring the project into compliance with a standard.

VOTING

For most matters coming before the Board of Adjustment a simple majority vote is all that is needed. For variance applications, however, North Carolina law requires a super majority of at least 4/5.

WRITTEN DECISIONS

The Board's decision must be reduced to writing; however, this is usually done at a subsequent meeting. Prior to that it is permissible to issue a temporary order consistent with the Board's deliberations and vote. The written decision must determine any contested facts and apply the facts to the applicable standards. Staff drafts a written decision and presents it to the Board at the Board's next meeting for consideration and adoption.

APPEALS

Anyone "aggrieved" by a decision of the Board of Adjustment can appeal a decision by filing a petition for writ of certiorari with the Buncombe County Superior Court within 30 days of the mailing of the written decision or the filing of that decision with the Board's clerk or secretary, which is later. It is important to remember that the time is not measured from the date of the decision, but from the mailing of the written decision. It is also important to note that appeals are not heard by Town Council.

OVERVIEW OF BOARD OF ADJUSTMENT MATTERS – PROVIDED AS INFORMATION ONLY AND NOT AS LEGAL ADVICE

STANDARDS

The standards as adopted by the Town Council must be set forth in an unambiguous manner so that the Board of Adjustment can apply those standards to the facts of a particular case. This doesn't mean that the standards must all be objective standards; subjective standards (such as "general welfare" and "hardship") are permissible.

STANDARDS FOR SPECIAL USE PERMITS

- (1) The establishment, maintenance, or operation of the special use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.
- (2) The special use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood.
- (3) The establishment of the special use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
- (4) The exterior architectural appeal and functional plan of any proposed structure will not be so at variance with the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood or with the character of the applicable district as to cause a substantial depreciation in the property values within the neighborhood.
- (5) Adequate utilities, access roads, drainage and/or other necessary facilities have been, are being, or will be provided.
- (6) Adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets.
- (7) The special use shall, in all other respects, conform to the applicable regulations of the district in which it is located, except as such regulations may, in each instance, be modified by the board of adjustment.

STANDARDS FOR VARIANCES

- (1) Unnecessary hardship would result from the strict application of the regulation. It is not 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 the variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- (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 is not a self-created hardship.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the regulation such that public safety is secured and substantial justice is achieved.
- (5) The variance is not a request to permit a use of land, building or structure which is not permitted in the zoning district in which the property is located.
- (6) The variance is not a request to permit a prohibited sign.

Standards and limitations on **SIDEWALK REQUIREMENT WAIVERS** and **VEGETATIVE SCREENING/BUFFERING WAIVERS** are available upon request.

TOWN OF WEAVERVILLE
ZONING BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, October 10, 2022
Subject: Election of Officers
Presenter: Planning Director / Town Attorney
Attachments: None

Description:

Municipal ordinance currently calls for an annual election of officers for the Board as per the following Sec. 2-163.

Sec. 2-163. Officers.

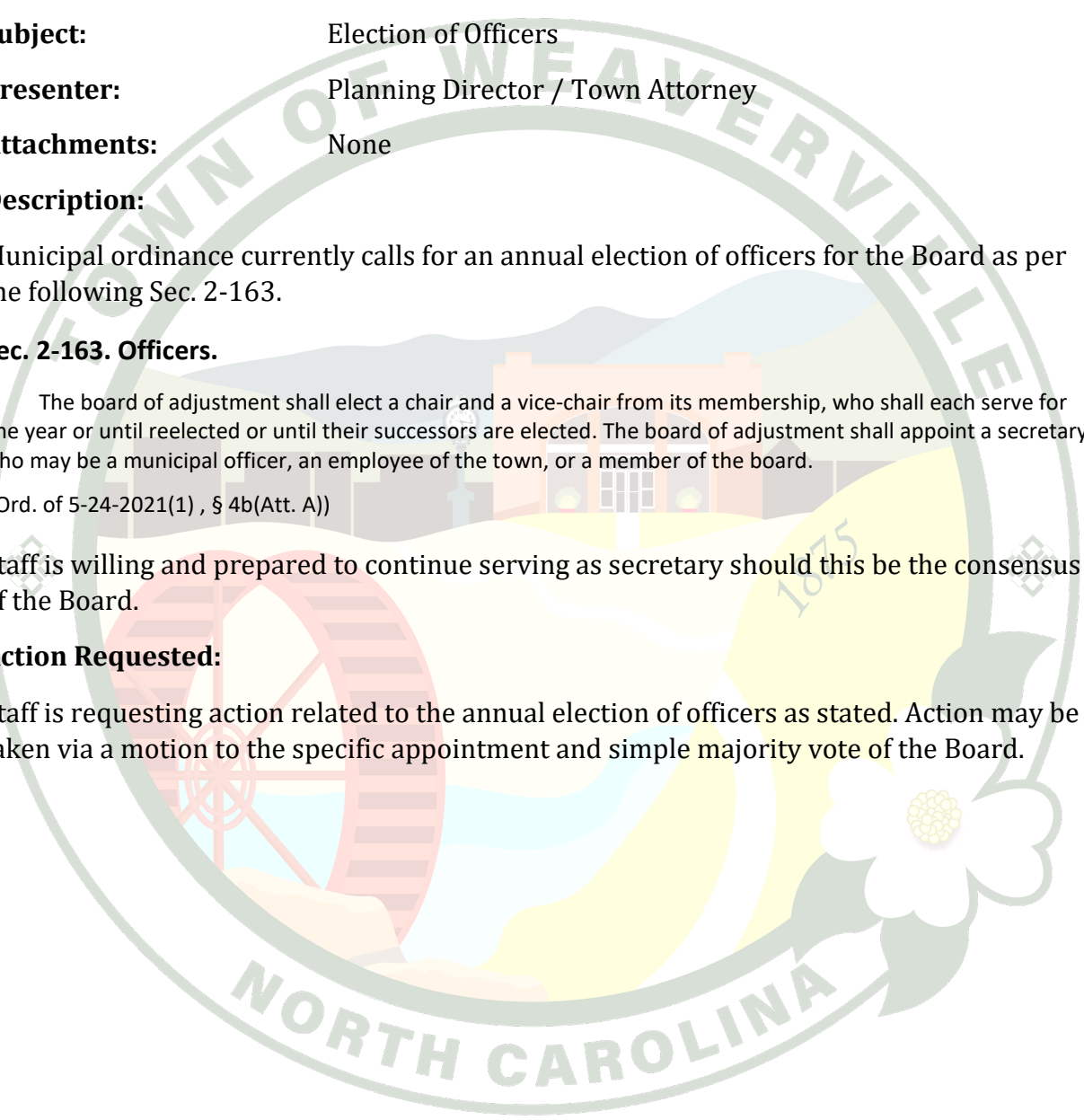
The board of adjustment shall elect a chair and a vice-chair from its membership, who shall each serve for one year or until reelected or until their successors are elected. The board of adjustment shall appoint a secretary, who may be a municipal officer, an employee of the town, or a member of the board.

(Ord. of 5-24-2021(1) , § 4b(Att. A))

Staff is willing and prepared to continue serving as secretary should this be the consensus of the Board.

Action Requested:

Staff is requesting action related to the annual election of officers as stated. Action may be taken via a motion to the specific appointment and simple majority vote of the Board.



TOWN OF WEAVERVILLE
BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, October 10, 2022

Subject: Minutes

Presenter: Planning Director

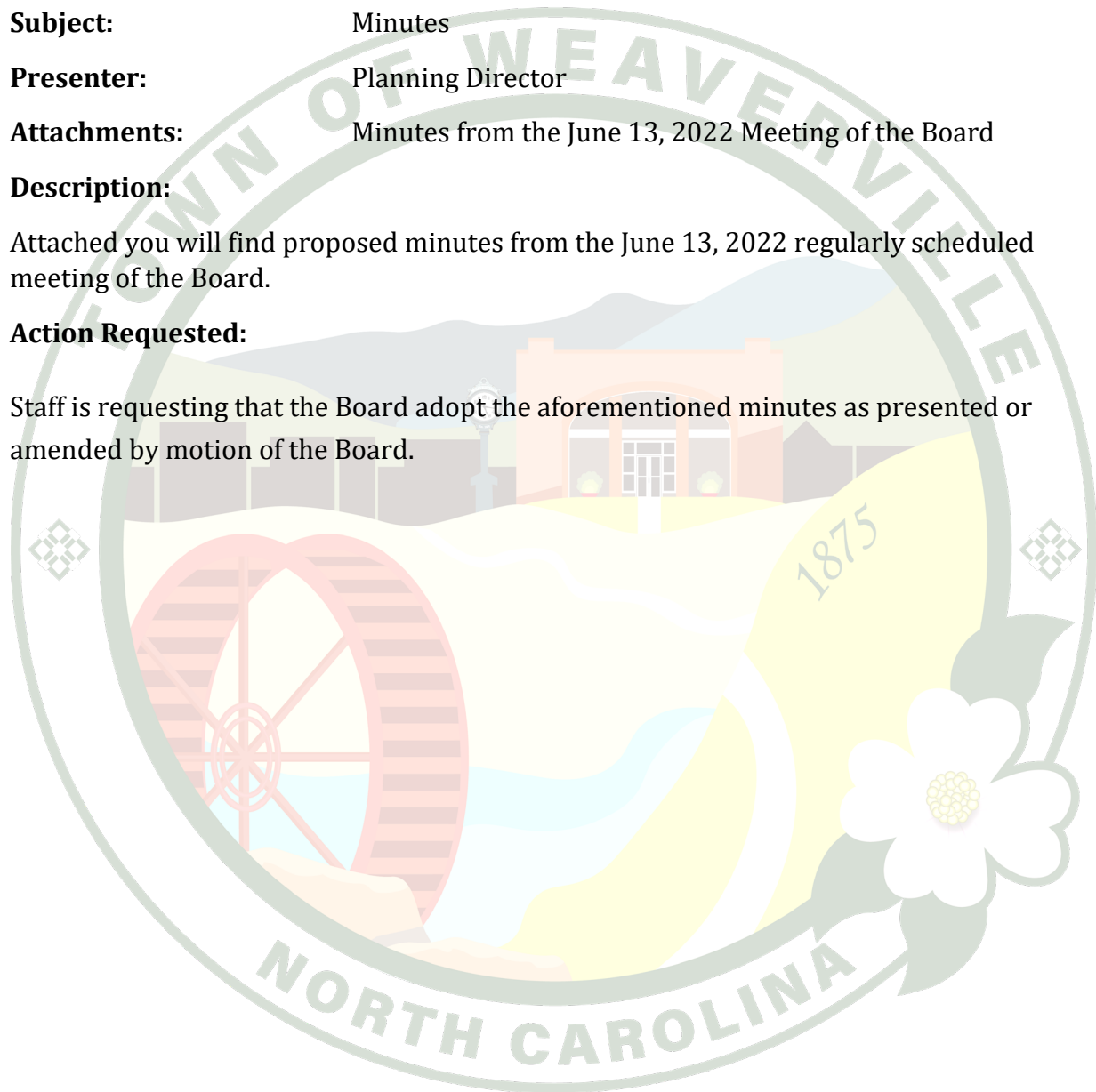
Attachments: Minutes from the June 13, 2022 Meeting of the Board

Description:

Attached you will find proposed minutes from the June 13, 2022 regularly scheduled meeting of the Board.

Action Requested:

Staff is requesting that the Board adopt the aforementioned minutes as presented or amended by motion of the Board.



Town of Weaverville

Board of Adjustment

Minutes – Monday, June 13, 2022

The Board of Adjustment of the Town of Weaverville met for its regularly scheduled monthly meeting at 6 pm on Monday, June 13, 2022, in the Community Room and Council Chambers at Town Hall, 30 South Main Street, Weaverville.

Present: Vice-Chair Cynthia Wright, Board Members Paul Clauhs, Roger Parkin, and Peter McGuire, Alternate Member Larry Murray, Town Attorney Jennifer Jackson and Planning Director/Zoning Administrator James Eller. Chair Tycer Lewis and Board Member Caleb Fieser were absent.

1. Call to Order

Vice-Chair Wright called the meeting to order at 6:00 pm and welcomed those in attendance to the meeting. The board members and staff introduced themselves. Board Member Larry Murray was recognized as a regular voting member of the Board.

2. Approval of Agenda

Without objection, Vice-Chair Wright declared the agenda approved.

3. Approval of Minutes

Board Member Clauhs made a motion to approve the minutes from the March 14, 2022, meeting of the Board. Board Member Parkin seconded the motion and all voted in favor of approving the minutes as amended.

4. Evidentiary Hearing on a Variance Application for 104 Fortress Ridge

Vice-Chair Wright 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 quasi-judicial evidentiary hearings on two variances application. The purpose of the hearings 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 hearings are 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, but can also include evidence admitted without objection, and evidence that appears to

be sufficiently trustworthy and reasonable for the Board to rely on. 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 applicants 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 evidentiary hearings will consist of the following general steps: ensuring an impartial board, identifying parties that have standing and wish to participate, putting all witnesses under oath, receiving evidence from staff on the application, receiving evidence from the applicant and any other parties, hearing any final argument by the parties, deliberating and deciding the case. Each party will get an opportunity to question all witnesses and to present evidence in the form of documents or testimony.

At the request of Vice-Chair Wright, Attorney Jackson introduced the matter by stating that William Richard Hanby is the owner of property located at 104 Fortress Ridge bearing Buncombe County Parcel Identification Number of 9743-60-1107 which is zoned R-1 and has applied for a variance from the front yard setback. Town Code Sec. 20-3108(d) authorizes the BOA to grant variances, the standards of which were reviewed.

Vice-Chair Wright 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.

Vice-Chair Wright noted that Applicant/property owner and James Eller on behalf of the Town of Weaverville, both had standing as parties to this matter.

The following individuals were sworn in and gave testimony: James Eller and Rick Hanby

Mr. Eller reviewed the administrative materials that included the following: Affidavit of Mailing and Posting; Application for a Variance dated May 2, 2022, including the attached survey dated March 15, 2022; and Staff Report; said packet was received into the record without objection as Exhibit A. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.

Eller reviewed the noticing of the matter and his staff report by providing information concerning the subject property and the variance application.

Mr. Hanby reviewed his application and his responses to the standards and noted that due to the steep topography, especially on the back side it will be virtually impossible to build a residence on the lot. He indicated that there is a steep drop off in the back that was not apparent when the property was purchased and only revealed when the property was cleared. A sewer easement makes 25-30% of the area in the back unbuildable. Geotech engineering has been performed and has indicated that the property is stable. Mr Hanby indicated that his contractor and engineer have informed him that without a 7-foot front yard setback

variance, resulting in a 23-foot setback from the road right-of-way, the residence as it was laid out on the survey shown with the application is not buildable. A 7-foot front yard setback variance would allow the residence to move up the hill and be built.

Mr. Eller indicated that the road frontage on the lot is approximately 135 feet.

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

Based on documentary and testimonial evidence presented during the hearing, Board Member Parkin made the grant the variance requested. Board Member McGuire seconded the motion. All voted in favor and the motion passed unanimously. By consensus the Board indicated that Mr. Eller could proceed with the issuance of any zoning permits prior to the adoption of the written decision.

Vice-Chair Wright declared the evidentiary hearing closed.

5. Evidentiary Hearing on a Variance Application for 12 Banks Town Road

At the request of Vice-Chair Wright, Attorney Jackson introduced the matter by stating that Steven and Lori Ottofy are the owners of property located at 12 Banks Town Road bearing Buncombe County Parcel Identification Number of 9742-04-7237 which is zoned R-1 and has applied for a variance from the minimum lot width. Town Code Sec. 20-3108(d) authorizes the BOA to grant variances, the standards of which were reviewed earlier in the meeting.

Vice-Chair Wright 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.

Vice-Chair Wright noted that the applicant/property owner, who was represented by contractor James E. Hunter, and James Eller on behalf of the Town of Weaverville, both had standing as parties to this matter.

The following individuals were sworn in and gave testimony: James Eller and James Hunter.

Mr. Hunter informed the Board that the non-conforming commercial structure on the property has now been demolished and the property owners plan to build a residence in order to bring the use of the property into compliance with the R-1 zoning. He also indicated that there are several instances of minimum lot width variances that the Board has granted under similar circumstances, including for a property just down the street at 27 Banks Town Road.

Mr. Eller reviewed the administrative materials that included the following: Affidavit of Mailing and Posting; Staff Report; and Application for a Variance dated May 20, 2022; said packet was received into the record without objection as Exhibit A. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.

Eller reviewed the noticing of the hearing, his staff report by providing information concerning the subject property, noted that the board has jurisdiction to hear and decide variances from minimum lot width requirements.

Through the testimony it was determined that the property was a former non-conforming lot with a non-conforming structure/use that is now being converted into a compliant use on a non-conforming lot. The residence that is proposed will be an 1800 square foot, arts and crafts style residence that is similar in size and appearance to others along Banks Town Road. All requirements of R-1 can be met except for the minimum lot

width. The variance requested is to allow a 75-foot lot width instead of the 100-foot lot width required by the zoning regulations.

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

Based on the documentary and testimonial evidence presented during the hearing, Board Member Murray made the motion to grant the variance requested. Board Member McGuire seconded the motion. All voted in favor and the motion passed unanimously. By consensus the Board indicated that Mr. Eller could proceed with the issuance of any zoning permits prior to the adoption of the written decision.

Vice-Chair Wright declared the evidentiary hearing closed.

6. Any Other Business

The Board discussed having the application amended to include questions regarding consideration of alternate building designs. Mr. Eller posed the question about whether the Board would like staff to pursue legislative fixes to decrease the matters coming before the Board. The consensus was that the Board likes that these hearings provide an opportunity for neighbors to be heard and does not propose a change at this time.

7. Adjournment

At approximately 6:58 pm, Board Member Murray made a motion to adjourn, which was seconded by Board Member Clauhs. All voted in favor and the meeting was adjourned.

Tycer Lewis, Chair
Board of Adjustment

ATTEST:

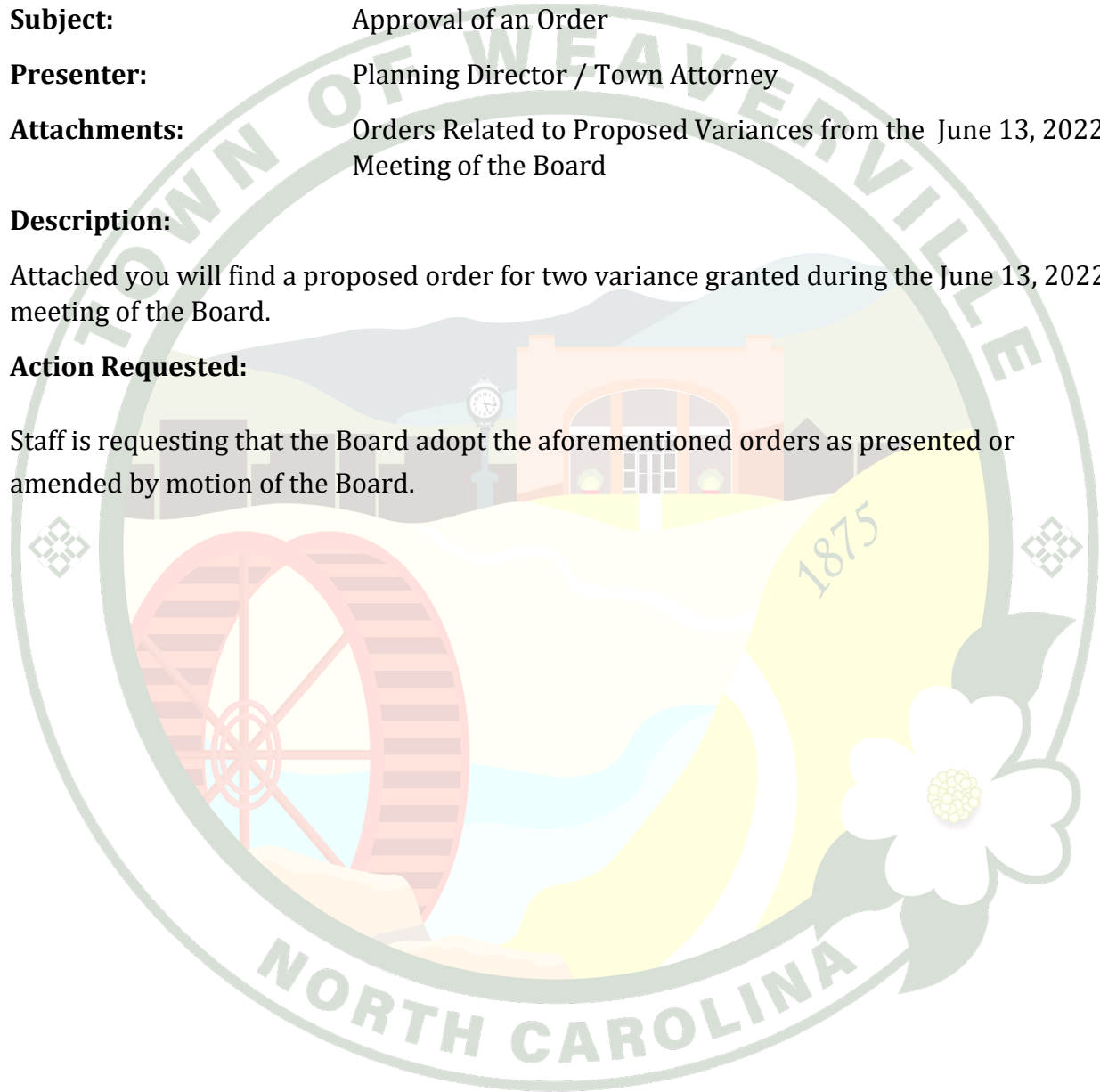
James W. Eller
Town Planner / Town Clerk

TOWN OF WEAVERVILLE
ZONING BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, October 10, 2022
Subject: Approval of an Order
Presenter: Planning Director / Town Attorney
Attachments: Orders Related to Proposed Variances from the June 13, 2022 Meeting of the Board

Description:
Attached you will find a proposed order for two variance granted during the June 13, 2022 meeting of the Board.

Action Requested:
Staff is requesting that the Board adopt the aforementioned orders as presented or amended by motion of the Board.



Prepared by and return to
Jennifer O. Jackson, PO Box 338, Weaverville, NC 28787

**COUNTY OF BUNCOMBE
STATE OF NORTH CAROLINA**

**ORDER ISSUED BY TOWN OF WEAVERVILLE BOARD OF ADJUSTMENT
GRANTING A VARIANCE**

APPLICANT/PROPERTY OWNER: William Richard Hanby (a/k/a William Richard Hamby)

PROPERTY LOCATION: 104 Fortress Ridge, Weaverville, NC

DEED REFERENCE: Book 6079/Page 1160

PARCEL IDENTIFICATION NUMBER: 9743-60-1107

The Board of Adjustment of the Town of Weaverville (hereinafter "Board") held a quasi-judicial evidentiary hearing (hereinafter "Hearing") on Monday, June 13, 2022, at 6 p.m. in Council Chambers at Town Hall at 30 South Main Street, Weaverville, on a request for a variance of the front yard setback.

A quorum of the Board was present with Vice-Chair Cynthia Wright, and Board Members Paul Clauhs, Roger Parkin, Peter McGuire, and Larry Murray in attendance. Town Attorney Jennifer Jackson and Zoning Administrator James Eller were also present.

The Hearing was held after notice of the meeting had been mailed to property owner and applicant, and to the property owners abutting the subject property, and notice of the meeting was posted on the subject property, all in accordance with North Carolina law and Town Code.

Prior to the hearing the Board was polled as to 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 *ex parte* communication between the Board members on this matter was indicated. No objection to the Board members hearing the matter was noted by anyone in attendance.

At the hearing on June 13, 2022, Vice-Chair Wright presided. The Board acknowledged that the following had standing to participate in the hearing and were made parties to this matter: Applicant/property owner, William Richard "Rick" Hamby, and James Eller on behalf of the Town of Weaverville.

The 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, finds as fact and concludes as follows:

1. Documentary evidence was submitted and admitted into evidence without objection as follows:
 - a. Administrative materials that included the following: Affidavit of Mailing and Posting; Application for a Variance dated May 2, 2022, including the attached survey dated March 15, 2022; and Staff Report; said packet was received into the record without objection as Exhibit A.
 - b. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.
2. The following individuals were sworn in and testified: James Eller and Rick Hamby.
3. The Applicant owns the real property located at 104 Fortress Ridge which is described in Book 6079 at Page 1160 and bears Buncombe County parcel identification number 9743-60-1107 and is zoned R-1 residential. The property is currently unimproved.
4. The subject property is all of Lot 13 of Phase 2 of Hamburg Mountain as shown on a plat recorded in Book 68 at Page 64, Buncombe County Registry.
5. The front yard setback in the R-1 zoning district is 30 feet and the applicant has requested a variance to allow construction of a single-family residence on the subject with a front yard setback reduced to 23 feet.
6. The applicant/property owner has indicated that due to topographical conditions on the property, specifically a steep and sudden dropoff at the back of the property, a front yard setback is needed to construct a residence.
7. Town Code subsection 20-3108(d) allows the Board to consider requests for variances.
8. Without the requested variance the subject property is not reasonably able to be used as a single-family residence which is the primary purpose of the R-1 zoning district.
9. The requested variance will have a minimal impact on the neighboring.
10. The Board further finds and concludes that:

- a) an unnecessary hardship will result in the strict application of the regulations as the lot without the variance cannot reasonably be used for single-family residential purposes, the primary use within an R-1 zoning district;
- b) the hardship results from conditions that are peculiar to the property, including specifically the natural topography that includes a steep and sudden dropoff, are not a result of personal circumstances, and did not result from action taken by the applicant or property owner;
- c) the requested variance is consistent with the spirit, purpose and intent of the land development regulations;
- d) the requested variance is not a request to permit a use of land, building or structure which is not permitted within a residential zoning district, nor does the variance concern a prohibited sign.

NOW THEREFORE, based upon the foregoing findings of fact and conclusions, the Board of Adjustment for the Town of Weaverville concludes that: (1) it has jurisdiction to hear this variance request, and (2) the request for a variance from the front yard setback should be granted as the request meets the required findings of subsection 20-3108(d) of the Code of Ordinances of the Town of Weaverville.

IT IS, THEREFORE, ORDERED that the Applicant's request for a variance to allow construction of a single-family residence on Lot 13 of Phase 2 of Hamburg Mountain as shown on the map recorded in Plat Book 68 at Page 64, with a 23-foot front yard setback is hereby granted.

ORDERED ADOPTED THIS the 13th day of June, 2022, in a vote of 5 in favor and 0 against; and **WRITTEN DECISION** approved by the Board on the ____ day of _____, 2022, in a vote of 5 in favor and 0 against.

**Tycer Lewis, Chair
Board of Adjustment**

ATTEST:

**James Eller
Clerk to the Board /Town Clerk**

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

I, _____, a Notary Public of Buncombe County, North Carolina, certify that **JAMES ELLER** personally came before me this day and acknowledged that he is the Town Clerk of the Town of Weaverville, a municipal corporation, and Clerk to the Board of Adjustment for the Town of Weaverville, and that by authority duly given, the foregoing instrument was signed in its name by Tycer Lewis, Chair of the Board of Adjustment for the Town of Weaverville, and attested by himself as the Town Clerk and Clerk to said Board.

Witness my hand and official seal, this the ____ day of _____, 2022.

Notary Public

My commission expires:

[Notary Seal]

**COUNTY OF BUNCOMBE
STATE OF NORTH CAROLINA**

**ORDER ISSUED BY TOWN OF WEAVERVILLE BOARD OF ADJUSTMENT
GRANTING A VARIANCE**

APPLICANT/PROPERTY OWNER: William Richard Hanby (a/k/a William Richard Hamby)

PROPERTY LOCATION: 104 Fortress Ridge, Weaverville, NC

DEED REFERENCE: Book 6079/Page 1160

PARCEL IDENTIFICATION NUMBER: 9743-60-1107

The Board of Adjustment of the Town of Weaverville (hereinafter “Board”) held a quasi-judicial evidentiary hearing (hereinafter “Hearing”) on Monday, June 13, 2022, at 6 p.m. in Council Chambers at Town Hall at 30 South Main Street, Weaverville, on a request for a variance of the front yard setback.

A quorum of the Board was present with Vice-Chair Cynthia Wright, and Board Members Paul Clauhs, Roger Parkin, Peter McGuire, and Larry Murray in attendance. Town Attorney Jennifer Jackson and Zoning Administrator James Eller were also present.

The Hearing was held after notice of the meeting had been mailed to property owner and applicant, and to the property owners abutting the subject property, and notice of the meeting was posted on the subject property, all in accordance with North Carolina law and Town Code.

Prior to the hearing the Board was polled as to 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 *ex parte* communication between the Board members on this matter was indicated. No objection to the Board members hearing the matter was noted by anyone in attendance.

At the hearing on June 13, 2022, Vice-Chair Wright presided. The Board acknowledged that the following had standing to participate in the hearing and were made parties to this matter: Applicant/property owner, William Richard “Rick” Hamby, and James Eller on behalf of the Town of Weaverville.

The 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, finds as fact and concludes as follows:

1. Documentary evidence was submitted and admitted into evidence without objection as follows:
 - a. Administrative materials that included the following: Affidavit of Mailing and Posting; Application for a Variance dated May 2, 2022, including the attached

survey dated March 15, 2022; and Staff Report; said packet was received into the record without objection as Exhibit A.

- b. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.
2. The following individuals were sworn in and testified: James Eller and Rick Hamby.
3. The Applicant owns the real property located at 104 Fortress Ridge which is described in Book 6079 at Page 1160 and bears Buncombe County parcel identification number 9743-60-1107 and is zoned R-1 residential. The property is currently unimproved.
4. The subject property is all of Lot 13 of Phase 2 of Hamburg Mountain as shown on a plat recorded in Book 68 at Page 64, Buncombe County Registry.
5. The front yard setback in the R-1 zoning district is 30 feet and the applicant has requested a variance to allow construction of a single-family residence on the subject with a front yard setback reduced to 23 feet.
6. The applicant/property owner has indicated that due to topographical conditions on the property, specifically a steep and sudden dropoff at the back of the property, a front yard setback is needed to construct a residence.
7. Town Code subsection 20-3108(d) allows the Board to consider requests for variances.
8. Without the requested variance the subject property is not reasonably able to be used as a single-family residence which is the primary purpose of the R-1 zoning district.
9. The requested variance will have a minimal impact on the neighboring properties.
10. The Board further finds and concludes that:
 - a) an unnecessary hardship will result in the strict application of the regulations as the lot without the variance cannot reasonably be used for single-family residential purposes, the primary use within an R-1 zoning district;
 - b) the hardship results from conditions that are peculiar to the property, including specifically the natural topography that includes a steep and sudden dropoff, are not a result of personal circumstances, and did not result from action taken by the applicant or property owner;
 - c) the requested variance is consistent with the spirit, purpose and intent of the land development regulations;

- d) the requested variance is not a request to permit a use of land, building or structure which is not permitted within a residential zoning district, nor does the variance concern a prohibited sign.

NOW THEREFORE, based upon the foregoing findings of fact and conclusions, the Board of Adjustment for the Town of Weaverville concludes that: (1) it has jurisdiction to hear this variance request, and (2) the request for a variance from the front yard setback should be granted as the request meets the required findings of subsection 20-3108(d) of the Code of Ordinances of the Town of Weaverville.

IT IS, THEREFORE, ORDERED that the Applicant’s request for a variance to allow construction of a single-family residence on Lot 13 of Phase 2 of Hamburg Mountain as shown on the map recorded in Plat Book 68 at Page 64, with a 23-foot front yard setback is hereby granted.

ORDERED ADOPTED THIS the 13th day of June, 2022, in a vote of 5 in favor and 0 against; and **WRITTEN DECISION** approved by the Board on the ____ day of _____, 2022, in a vote of 5 in favor and 0 against.

**Tycer Lewis, Chair
Board of Adjustment**

ATTEST:

**James Eller
Clerk to the Board /Town Clerk**

*Prepared by and return to
Jennifer O. Jackson, PO Box 338, Weaverville, NC 28787*

**COUNTY OF BUNCOMBE
STATE OF NORTH CAROLINA**

**ORDER ISSUED BY TOWN OF WEAVERVILLE BOARD OF ADJUSTMENT
GRANTING A VARIANCE**

APPLICANT/PROPERTY OWNER: Steven H. Ottofy and wife Lori L. Ottofy

PROPERTY LOCATION: 12 Banks Town Road, Weaverville, NC

DEED REFERENCE: Book 6068/Page 1192

PARCEL IDENTIFICATION NUMBER: 9742-04-7237

The Board of Adjustment of the Town of Weaverville (hereinafter "Board") held a quasi-judicial evidentiary hearing (hereinafter "Hearing") on Monday, June 13, 2022, at 6 p.m. in Council Chambers at Town Hall at 30 South Main Street, Weaverville, on a request for a variance of minimum lot width.

A quorum of the Board was present with Vice-Chair Cynthia Wright, and Board Members Paul Clauhs, Roger Parkin, Peter McGuire, and Larry Murray in attendance. Town Attorney Jennifer Jackson and Zoning Administrator James Eller were also present.

The Hearing was held after notice of the meeting had been mailed to property owner and applicant, and to the property owners abutting the subject property, and notice of the meeting was posted on the subject property, all in accordance with North Carolina law and Town Code.

Prior to the hearing the Board was polled as to 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 *ex parte* communication between the Board members on this matter was indicated. No objection to the Board members hearing the matter was noted by anyone in attendance.

At the hearing on June 13, 2022, Vice-Chair Wright presided. The Board acknowledged that the following had standing to participate in the hearing and were made parties to this matter: Applicant/property owner, represented by their contractor James Hunter, and James Eller on behalf of the Town of Weaverville.

The 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, finds as fact and concludes as follows:

1. Documentary evidence was submitted and admitted into evidence without objection as follows:
 - a. Mr. Eller reviewed the administrative materials that included the following: Affidavit of Mailing and Posting; Staff Report; and Application for a Variance dated May 20, 2022; said packet was received into the record without objection as Exhibit A.
 - b. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.
2. The following individuals were sworn in and testified: James Eller and James Hunter.
3. The Applicant owns the real property located at 12 Banks Town Road which is described in Book 6068 at Page 1192 and bears Buncombe County parcel identification number 9742-04-7237 and is zoned R-1 residential.
4. The subject property is 0.24 acres with a lot width of 75.05 feet, as shown on a plat recorded in Book 217 at Page 157, Buncombe County Registry.
5. The subject property is a non-conforming lot in that the lot width is narrower than the 100-foot minimum lot width required for R-1.
6. The subject property was previously the site of a commercial building that existed and was in use prior to the enactment of zoning regulations and, as such, was considered a non-conforming use. The commercial building has recently been demolished and the subject property is currently unimproved.
7. The applicant has requested a variance to allow construction of a single-family residence on the subject with a minimum lot width of 75 feet.
8. Town Code subsection 20-1602(b)(2) allows the Board to consider requests for variances for nonconforming lots.
9. Without the requested variance the subject property is not able to be used as a single-family residence which is the primary purpose of the R-1 zoning district.

10. The requested variance will have a minimal impact on the neighboring properties as there are other properties in the area that have lot widths of less than 100 feet.

11. The Board further finds and concludes that:

- a) an unnecessary hardship will result in the strict application of the regulations as the lot without the variance cannot be used for single-family residential purposes, the primary use within an R-1 zoning district;
- b) the hardship results from conditions that are peculiar to the property, are not a result of personal circumstances, and did not result from action taken by the applicant or property owner;
- c) the requested variance is consistent with the spirit, purpose and intent of the land development regulations as there are lots in the immediate vicinity of the subject property with lot widths less than 100 feet;
- d) the requested variance is not a request to permit a use of land, building or structure which is not permitted within a residential zoning district, nor does the variance concern a prohibited sign.

NOW THEREFORE, based upon the foregoing findings of fact and conclusions, the Board of Adjustment for the Town of Weaverville concludes that: (1) it has jurisdiction to hear this variance request, and (2) the request for a variance from the minimum lot width should be granted as the request meets the required findings of subsection 20-3108(d) of the Code of Ordinances of the Town of Weaverville.

IT IS, THEREFORE, ORDERED that the Applicant's request for a minimum lot width variance to allow construction of a single-family residence on the 0.24 acre tract of land shown on the plat recorded in Plat Book 217 at Page 152 is hereby granted.

ORDERED ADOPTED THIS the 13th day of June, 2022, in a vote of 5 in favor and 0 against; and **WRITTEN DECISION** approved by the Board on the ____ day of _____, 2022, in a vote of 5 in favor and 0 against.

**Tycer Lewis, Chair
Board of Adjustment**

ATTEST:

**James Eller
Clerk to the Board /Town Clerk**

STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

I, _____, a Notary Public of Buncombe County, North Carolina, certify that **JAMES ELLER** personally came before me this day and acknowledged that he is the Town Clerk of the Town of Weaverville, a municipal corporation, and Clerk to the Board of Adjustment for the Town of Weaverville, and that by authority duly given, the foregoing instrument was signed in its name by Tycer Lewis, Chair of the Board of Adjustment for the Town of Weaverville, and attested by himself as the Town Clerk and Clerk to said Board.

Witness my hand and official seal, this the ____ day of _____, 2022.

Notary Public

My commission expires:

[Notary Seal]

**COUNTY OF BUNCOMBE
STATE OF NORTH CAROLINA**

**ORDER ISSUED BY TOWN OF WEAVERVILLE BOARD OF ADJUSTMENT
GRANTING A VARIANCE**

APPLICANT/PROPERTY OWNER: Steven H. Ottofy and wife Lori L. Ottofy

PROPERTY LOCATION: 12 Banks Town Road, Weaverville, NC

DEED REFERENCE: Book 6068/Page 1192

PARCEL IDENTIFICATION NUMBER: 9742-04-7237

The Board of Adjustment of the Town of Weaverville (hereinafter "Board") held a quasi-judicial evidentiary hearing (hereinafter "Hearing") on Monday, June 13, 2022, at 6 p.m. in Council Chambers at Town Hall at 30 South Main Street, Weaverville, on a request for a variance of minimum lot width.

A quorum of the Board was present with Vice-Chair Cynthia Wright, and Board Members Paul Clauhs, Roger Parkin, Peter McGuire, and Larry Murray in attendance. Town Attorney Jennifer Jackson and Zoning Administrator James Eller were also present.

The Hearing was held after notice of the meeting had been mailed to property owner and applicant, and to the property owners abutting the subject property, and notice of the meeting was posted on the subject property, all in accordance with North Carolina law and Town Code.

Prior to the hearing the Board was polled as to 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 *ex parte* communication between the Board members on this matter was indicated. No objection to the Board members hearing the matter was noted by anyone in attendance.

At the hearing on June 13, 2022, Vice-Chair Wright presided. The Board acknowledged that the following had standing to participate in the hearing and were made parties to this matter: Applicant/property owner, represented by their contractor James Hunter, and James Eller on behalf of the Town of Weaverville.

The 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, finds as fact and concludes as follows:

1. Documentary evidence was submitted and admitted into evidence without objection as follows:
 - a. Mr. Eller reviewed the administrative materials that included the following: Affidavit of Mailing and Posting; Staff Report; and Application for a Variance

dated May 20, 2022; said packet was received into the record without objection as Exhibit A.

- b. A copy of the owner's deed to the subject property was received into the record without objection as Exhibit B.
2. The following individuals were sworn in and testified: James Eller and James Hunter.
3. The Applicant owns the real property located at 12 Banks Town Road which is described in Book 6068 at Page 1192 and bears Buncombe County parcel identification number 9742-04-7237 and is zoned R-1 residential.
4. The subject property is 0.24 acres with a lot width of 75.05 feet, as shown on a plat recorded in Book 217 at Page 157, Buncombe County Registry.
5. The subject property is a non-conforming lot in that the lot width is narrower than the 100-foot minimum lot width required for R-1.
6. The subject property was previously the site of a commercial building that existed and was in use prior to the enactment of zoning regulations and, as such, was considered a non-conforming use. The commercial building has recently been demolished and the subject property is currently unimproved.
7. The applicant has requested a variance to allow construction of a single-family residence on the subject with a minimum lot width of 75 feet.
8. Town Code subsection 20-1602(b)(2) allows the Board to consider requests for variances for nonconforming lots.
9. Without the requested variance the subject property is not able to be used as a single-family residence which is the primary purpose of the R-1 zoning district.
10. The requested variance will have a minimal impact on the neighboring properties as there are other properties in the area that have lot widths of less than 100 feet.
11. The Board further finds and concludes that:
 - a) an unnecessary hardship will result in the strict application of the regulations as the lot without the variance cannot be used for single-family residential purposes, the primary use within an R-1 zoning district;
 - b) the hardship results from conditions that are peculiar to the property, are not a result of personal circumstances, and did not result from action taken by the applicant or property owner;
 - c) the requested variance is consistent with the spirit, purpose and intent of the land development regulations as there are lots in the immediate vicinity of the subject property with lot widths less than 100 feet;

- d) the requested variance is not a request to permit a use of land, building or structure which is not permitted within a residential zoning district, nor does the variance concern a prohibited sign.

NOW THEREFORE, based upon the foregoing findings of fact and conclusions, the Board of Adjustment for the Town of Weaverville concludes that: (1) it has jurisdiction to hear this variance request, and (2) the request for a variance from the minimum lot width should be granted as the request meets the required findings of subsection 20-3108(d) of the Code of Ordinances of the Town of Weaverville.

IT IS, THEREFORE, ORDERED that the Applicant’s request for a minimum lot width variance to allow construction of a single-family residence on the 0.24 acre tract of land shown on the plat recorded in Plat Book 217 at Page 152 is hereby granted.

ORDERED ADOPTED THIS the 13th day of June, 2022, in a vote of 5 in favor and 0 against; and **WRITTEN DECISION** approved by the Board on the ____ day of _____, 2022, in a vote of 5 in favor and 0 against.

**Tycer Lewis, Chair
Board of Adjustment**

ATTEST:

**James Eller
Clerk to the Board /Town Clerk**

TOWN OF WEAVERVILLE
BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, October 10, 2022
Subject: Review of Board Duties and Responsibilities
Presenter: Town Attorney
Attachments: BOA Jurisdiction and Standards
Town Code § 4-86 – Animal Control Appeals Board

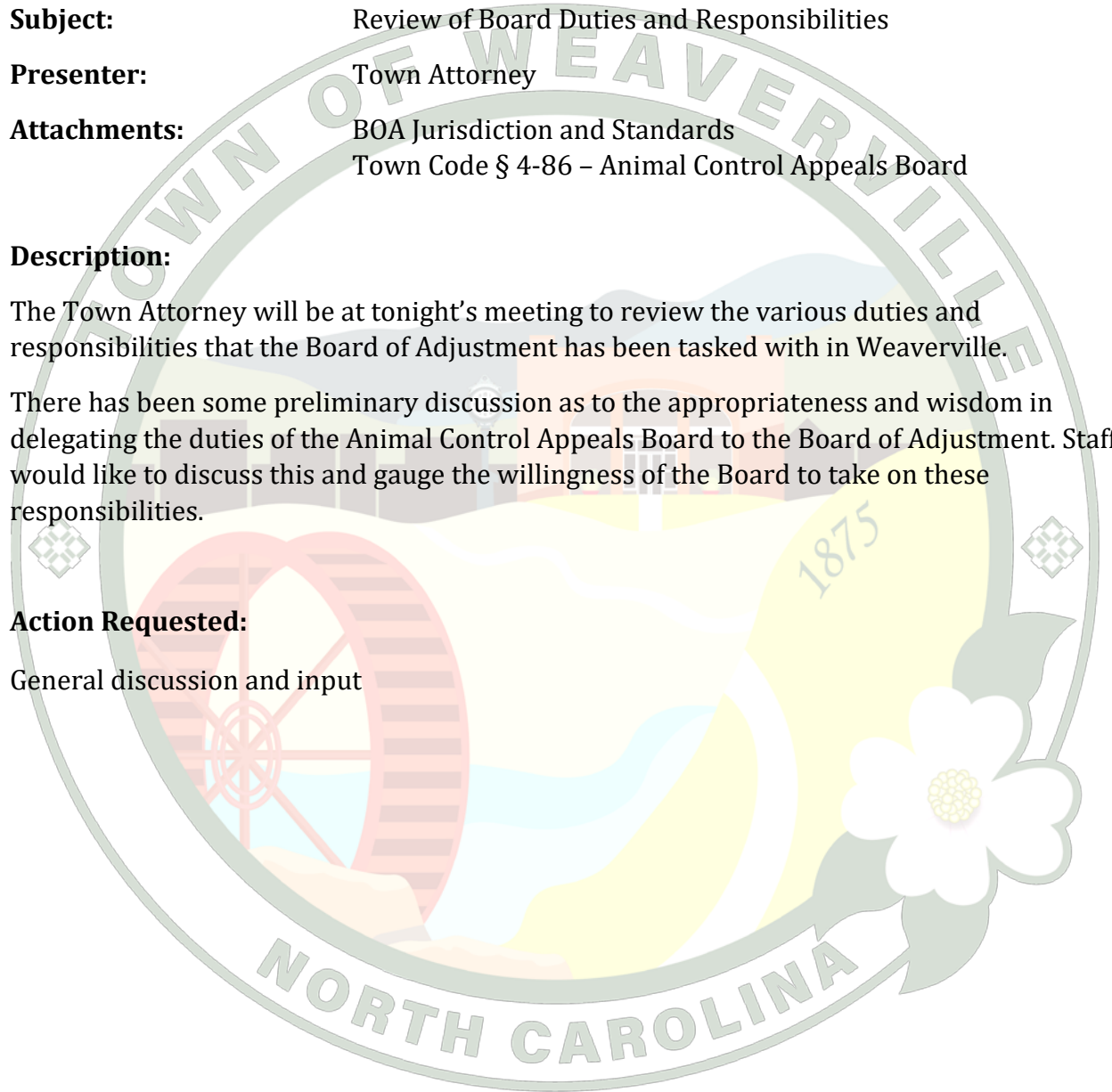
Description:

The Town Attorney will be at tonight’s meeting to review the various duties and responsibilities that the Board of Adjustment has been tasked with in Weaverville.

There has been some preliminary discussion as to the appropriateness and wisdom in delegating the duties of the Animal Control Appeals Board to the Board of Adjustment. Staff would like to discuss this and gauge the willingness of the Board to take on these responsibilities.

Action Requested:

General discussion and input



JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

APPEALS OF DEVELOPMENT REGULATION DECISIONS

JURISDICTION: Code Sec. 20-3108(b) authorizes the BOA to hear and decide appeals of administrative decisions regarding administration and enforcement of all development regulations and to hear and decide appeals arising out of any other ordinance that regulates land use or development.

STANDARDS FOR APPEALS OF ADMINISTRATOR DECISIONS: When hearing an appeal, the board may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision. The board must also ensure that the rights of the appellant have not been prejudiced because the administrative findings, inferences, conclusions, or decision were:

1. In violation of constitutional provisions, including those protecting procedural due process rights.
2. In excess of the authority conferred upon staff by ordinance.
3. Inconsistent with applicable procedures specified by statute or ordinance.
4. Affected by other error of law.
5. Unsupported by competent, material, and substantial evidence in view of the entire record.
6. Arbitrary or capricious.

QUESTION FOR DELIBERATION: Based on the competent, material, and substantial evidence in the record, should the decision/determination/order be reversed or affirmed, wholly or partly, or does the board wish to modify the decision?

SPECIAL USE PERMITS (ISSUANCE AND AMENDMENTS)

JURISDICTION: Code Sec. 20-3108(c) and 20-3204 authorizes the BOA to grant and amend special use permits.

STANDARDS FOR SPECIAL USE PERMITS:

1. The establishment, maintenance, or operation of the special use will not be detrimental to or endanger the public health, safety, morals, comfort, or general welfare.
2. The special use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted nor substantially diminish and impair property values within the neighborhood.
3. The establishment of the special use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district.
4. The exterior architectural appeal and functional plan of any proposed structure will not be so at variance with the exterior architectural appeal and functional plan of

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

the structures already constructed or in the course of construction in the immediate neighborhood or with the character of the applicable district as to cause a substantial depreciation in the property values within the neighborhood.

5. Adequate utilities, access roads, drainage and/or other necessary facilities have been, are being, or will be provided.
6. Adequate measures have been or will be taken to provide ingress and egress so designed as to minimize traffic congestion in the public streets.
7. The special use shall, in all other respects, conform to the applicable regulations of the district in which it is located, except as such regulations may, in each instance, be modified by the board of adjustment.

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the amendment as requested by owner/developer meets the standards and should therefore be granted?

DEVELOPMENT REGULATION VARIANCES

JURISDICTION: Code Sec. 20-3108(d) authorizes the BOA to grant variances when hardships would result from carrying out the strict letter of the terms of the land development regulations. Variances require a 4/5 vote of the board.

STANDARDS FOR VARIANCES:

1. Unnecessary hardship would result from the strict application of the regulation. It is not 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 the variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
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 is not a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the regulation such that public safety is secured and substantial justice is achieved.
5. The variance is not a request to permit a use of land, building or structure which is not permitted in the zoning district in which the property is located.
6. The variance is not a request to permit a prohibited sign.

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the variance requested by the property owner meets the standards and should therefore be granted?

SIDEWALK WAIVERS

JURISDICTION: Code Sec. 20-3108(e) authorizes the BOA to hear and decide all requests for waivers of sidewalk requirements.

STANDARDS AND LIMITATIONS FOR SIDEWALK WAIVERS:

1. Sidewalk requirements imposed by a conditional district or special use permit are not eligible for a waiver of such sidewalk requirements.
2. Major subdivisions are not eligible for a waiver of the sidewalk requirement for sidewalks on new streets proposed for construction within the major subdivision. Major subdivisions may, however, be granted a sidewalk waiver of the sidewalk requirements along existing streets upon the finding that:
 - a. The construction of the sidewalk is proposed to be constructed within an existing right-of-way where sufficient right-of-way or easement width does not exist or cannot be dedicated to build the sidewalk; or
 - b. The construction of the sidewalk is not feasible due to special circumstances including but not limited to impending road widening or improvements or severe roadside conditions or slope which would prohibit sidewalk construction.
3. Minor subdivisions may be granted a sidewalk waiver upon the finding that:
 - a. The construction of the sidewalk is proposed to be constructed within an existing right-of-way where sufficient right-of-way or easement width does not exist or cannot be dedicated to build the sidewalk; or
 - b. The construction of the sidewalk is not feasible due to special circumstances including but not limited to impending road widening or improvements or severe roadside conditions or slope which would prohibit sidewalk construction.

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the property is eligible for a sidewalk waiver and meets the standards and should therefore be granted?

VEGETATIVE SCREENING AND/OR BUFFER WAIVERS

JURISDICTION: Code Sec. 20-3108(f) authorizes the BOA to hear and decide whether to alter or eliminate the required vegetative screening or buffering requirement

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

STANDARDS AND LIMITATIONS FOR VEGETATIVE SCREENING/BUFFERING WAIVERS:

1. The owner of the property affected and the adjacent residential property are in single ownership; or
2. A notarized statement is presented which is signed by the property owner affected and the adjacent residential property owner and waives or modifies the screening provisions.

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the property is eligible for a vegetative screening/buffering waiver and meets the standards and should therefore be granted?

EXTENSION OF TIME FOR REPAIR/REPLACEMENT OF NONCONFORMING STRUCTURE

JURISDICTION: Code Sec. 20-1603(h)) authorizes the BOA to extend the period of time allowed for a nonconforming structure to be repaired or restored after it is destroyed or damaged by fire, flood, wind, or other disaster, by an additional 180 days.

STANDARDS FOR APPEALS OF ADMINISTRATOR DECISIONS: The BOA may grant such an extension upon good cause shown. Good cause could include, but is not limited to, delays related to estate administration, casualty insurance issues, or litigation concerning the property.

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that there is good cause for the delay and that an additional 180 days should be allowed?

REPLACEMENT OF A NONCONFORMING USE WITH ANOTHER NONCONFORMING USE

JURISDICTION: Code Sec. 20-1604(d) authorizes the BOA to hear and decide requests for replacement of a nonconforming use of a structure by another nonconforming use.

STANDARDS FOR APPEALS OF ADMINISTRATOR DECISIONS: The BOA may grant such a request if the applicant can demonstrate that the proposed new use is as compatible or more compatible with the surrounding properties and district than the original nonconforming use. Factors for the BOA's consideration include, but are not limited to the following: traffic, noise, site activity, hours of operation, lighting, vibration, dust, smoke, odor emissions, and any other factors that the BOA finds relevant to compare or differentiate between the existing use(s) and the proposed replacement use(s). The BOA may establish conditions to ensure that the compatibility factors are maintained as approved.

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the proposed replacement use is as compatible or more compatible with the surrounding properties and district than the original nonconforming use and should therefore be allowed?

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

PUBLIC HEALTH NUISANCE APPEALS

JURISDICTION: Code Sec. 9-208 authorizes the BOA to decide appeals of decisions regarding public health nuisances and related abatement orders.

STANDARDS FOR APPEALS OF ADMINISTRATOR DECISIONS: After hearing all interested persons and reviewing the findings of the Town Manager, his or her designee or the Code Enforcement Officer, the BOA may affirm or reverse the finding that a nuisance exists in the Town. If the BOA shall determine that the findings are correct and proper, it shall adopt an order specifically declaring the condition existing on the property to be a danger and hazard to the health and safety of the inhabitants of the Town and a public health nuisance and direct the Town to cause such conditions to be abated.

QUESTION FOR DELIBERATION: Based on the competent, material, and substantial evidence in the record, should the decision/determination/order be reversed or affirmed?

FLOOD DAMAGE PREVENTION VARIANCES

JURISDICTION: Code Sec. 13-79 authorizes the BOA to hear and decide requests for variances from the requirements of Ch. 13 entitled "Flood Damage Prevention." Variances require a 4/5 vote of the board.

STANDARDS FOR VARIANCES:

1. Variances may be issued for:
 - a. The repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and that the variance is the minimum necessary to preserve the historic character and design of the structure;
 - b. Functionally dependent facilities if determined to meet the definition as stated in Code Sec. 13-50, provided provisions of subsection 13-79(9)(b), (c), and (e) have been satisfied, and such facilities are protected by methods that minimum flood damages during the base flood and create no additional threats to public safety; and
 - c. Any other type of development, provided it meets the requirements of Code Sec. 20-79.
2. BOA shall consider all technical evaluations, all relevant factors, all standards specified in Ch. 13, and:
 - a. The danger that materials may be swept onto other lands to the injury of others;
 - b. The danger to life and property due to flooding and erosion damage;
 - c. The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

- d. The importance of the services provided by the proposed facility to the community;
 - e. The necessity to the facility of a waterfront location as defined in Code Sec. 13-50 as a functionally dependent facility, where applicable;
 - f. The availability of alternative locations, not subject to flooding or erosion damage, for the proposed use;
 - g. The compatibility of the proposed use with existing and anticipated development;
 - h. The relationship of the proposed use to the town's comprehensive land use plan and floodplain management program for that area;
 - i. The safety of access to the property in times of flood for ordinary and emergency vehicles;
 - j. The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and
 - k. The costs of providing governmental services during and after flood conditions including maintenance and repair of public utilities and facilities such as sewer, gas, electrical and water systems, and streets and bridges.
3. Variances shall not be issued when the variance will make the structure in violation of other federal, state, or local laws, regulations, or ordinance.
 4. Variances shall not be issued within any designated floodway or non-encroachment area if the variance would result in any increase in flood levels during the base flood discharge.
 5. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief.
 6. Variances shall only be issued prior to development permit approval.
 7. Variance shall only be issued upon:
 - a. a showing of good and sufficient cause;
 - b. a determination that failure to grant the variance would result in exceptional hardship; and
 - c. a determination that the granting of the variance will not result in increase flood heights, additional threats to public safety, or extraordinary public expense, create nuisance, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances.
 8. The BOA may attach such conditions to the granting of variances as it deems necessary to further the purposes and objectives of Ch. 13.

JURISDICTION AND STANDARDS FOR BOARD OF ADJUSTMENT MATTERS

QUESTION FOR DELIBERATION: Does the record include competent, material, and substantial evidence that the variance requested by the property owner meets the standards and should therefore be granted?

FLOOD DAMAGE PREVENTION APPEALS

JURISDICTION: Code Sec. 13-80 authorizes the BOA to hear and decide appeals from any order, requirement, decision, or determination made by the floodplain administrator. A vote of 4/5 is needed in order to reverse any order, requirement, decision or determination, or to decide in favor of the applicant.

STANDARDS FOR APPEALS OF ADMINISTRATOR DECISIONS: The BOA may hear and decide appeals based upon an allegedly improper or erroneous interpretation of Code Ch. 13 and those based upon alleged hardship resulting from strict interpretation of Code Ch. 13. BOA may reverse or affirm, wholly or partly, or modify the order, requirement, decision, or determination appealed from.

QUESTION FOR DELIBERATION: Based on the competent, material, and substantial evidence in the record, should the decision/determination/order be reversed or affirmed, wholly or partly, or does the board wish to modify the order, requirement, decision or determination?

TRAFFIC AND PARKING APPEALS

JURISDICTION: Code Sec. 28-3 authorizes the BOA to hear and decide appeals from any and all decisions made under Ch. 28, entitled "Traffic and Parking."

QUESTION FOR DELIBERATION: Based on the competent, material, and substantial evidence in the record, should the decision/determination/order be reversed or affirmed, wholly or partly, or does the board wish to modify the decision?

Sec. 4-86. - Animal control appeals board.

- (a) There is hereby created an animal control appeals board which shall consist of three representatives appointed by the mayor and approved by the town council. One member shall be appointed for an initial term of three years, one member shall be appointed for an initial term of two years, one member shall be appointed for an initial term of one year, and all members shall thereafter be appointed for terms of three years. The board members shall elect a chair from amongst the members. Appeals shall be heard by all three members of the board whenever all three can be present, but two members shall constitute a quorum to hear appeals in the event that all three are not able to be present. The members shall be expected to disclose any prior personal involvement they have had with the case or other conflicts of interest, and recuse themselves accordingly. The board shall have jurisdiction to hear and determine all appeals from determinations made by the animal control officer in accordance with this article, excluding matters referred to criminal prosecution or civil actions for injunctive relief.
- (b) Upon determination made by the animal control officer from whom an appeal is authorized in this article, the owner/custodian or any other aggrieved person may appeal the determination by filing written objection with the animal control appeals board within three calendar days of receipt of the written determination. Upon timely receipt of an appeal, the appeals board shall hold a hearing within ten business days of the filing of the appeal, unless a different hearing date is consented to in writing by the appellant. Any party has the right to have counsel present before the appeals board, to examine and cross-examine witnesses and to have witnesses' testimony be sworn. Any appeal from the final decision of the appeals board shall be taken to Superior Court of Buncombe County by filing notice of appeal and a petition for review within ten calendar days of written receipt of the final decision of the appeals board. Appeals from the rulings of the appeals board shall be heard de novo before a superior court judge presiding in Buncombe County.

(Ord. of 6-18-2013, § 1)

TOWN OF WEAVERVILLE
BOARD OF ADJUSTMENT AGENDA ITEM

Date of Meeting: Monday, October 10, 2022
Subject: Review of Quasi-Judicial Procedures - Evidence
Presenter: Town Attorney
Attachments: SOG Article, "What's a Scintilla? Recent NC Court Decisions Clarify Quasi-Judicial Evidence Standards"

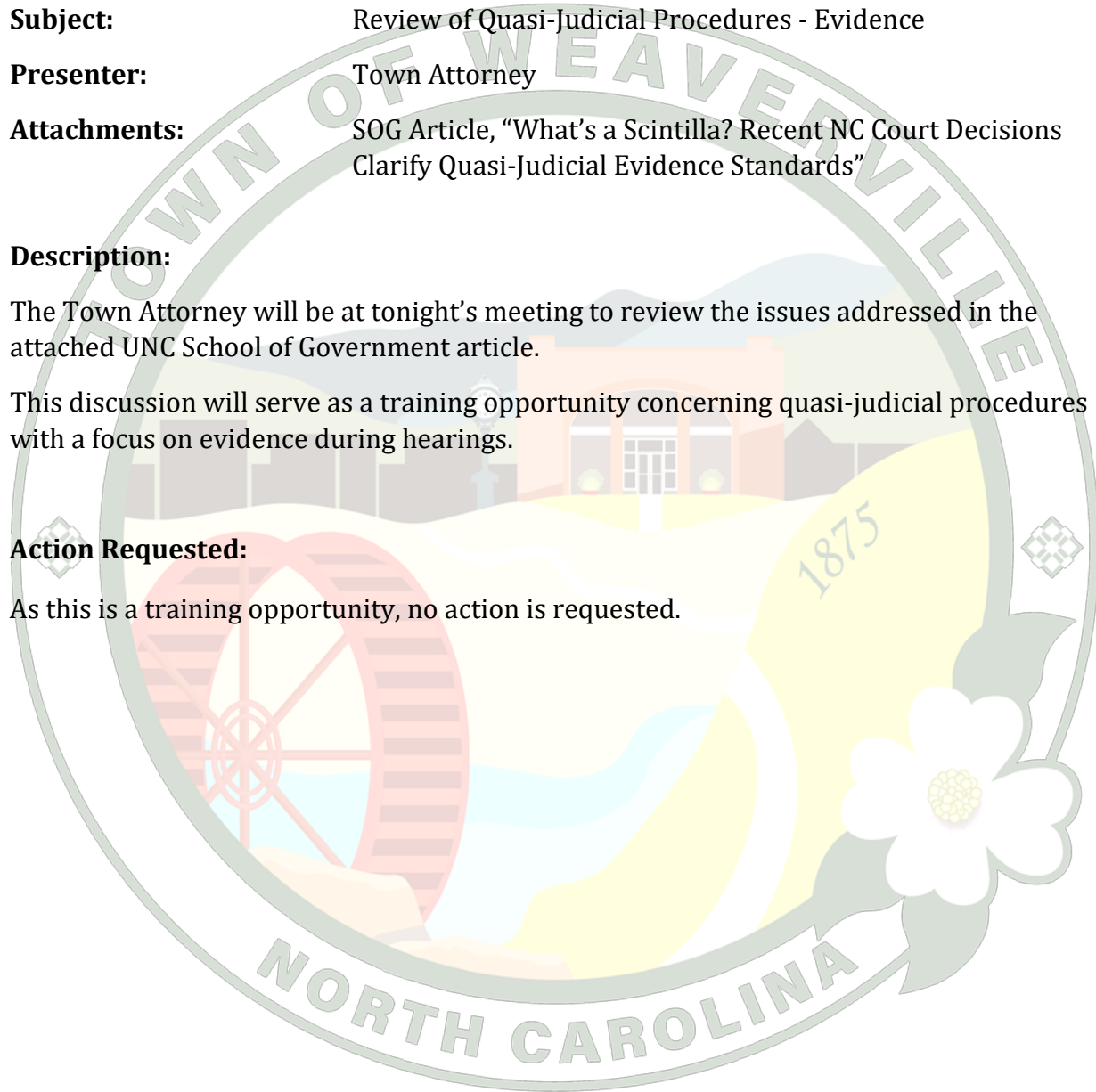
Description:

The Town Attorney will be at tonight's meeting to review the issues addressed in the attached UNC School of Government article.

This discussion will serve as a training opportunity concerning quasi-judicial procedures with a focus on evidence during hearings.

Action Requested:

As this is a training opportunity, no action is requested.



<https://canons.sog.unc.edu/2022/03/whats-a-scintilla-recent-nc-court-decisions-clarify-quasi-judicial-evidence-standards/>



Coates' Canons NC Local Government Law

What's a Scintilla? Recent NC Court Decisions Clarify Quasi-Judicial Evidence Standards

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Quasi-judicial zoning decisions can be confusing creatures: They are zoning decisions, but they function in some ways like court cases. They require an elected or appointed board to make a decision about a proposed development project, but the board's discretion is constrained by specific standards. On March 1, 2022, the N.C. Court of Appeals provided a reminder of the kinds of evidence necessary to approve or deny a special use permit request, and the lessons or reminders of this case apply similarly to other quasi-judicial approval procedures. This blog will review those lessons and reminders.

What makes these permits different from all other permits?

First, it is important to remind oneself what special use permits are designed to do. A zoning ordinance can treat a given use in one of several ways: it can prohibit the use entirely in a given district; it can allow the use "by right," meaning that only administrative approvals such as certificates of zoning compliance or building permits are required, and no discretionary zoning approval such as a rezoning or variance is required; it can allow the use under specific objective limitations such as an increased setback; or it can allow the use as a "special" use, which is permitted under certain conditions. When a land use is permitted as a special use, the governing board has already made a legislative decision to allow the special use, provided the applicant shows the standards for that approval set by the ordinance will be met. Some or all of the standards that apply to a special use will require the application of judgment and some limited discretion; for example, the conditions may include a

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requirement that the use be “in harmony with” surrounding uses or “not substantially injure” the use or value of adjoining property. Because these standards require some analysis and judgment to apply, the decision to approve a special use is a quasi-judicial one. A hearing must be held to gather the evidence and judge whether the conditions have been met. For more on the different kinds of development decisions and their respective procedural requirements, [this blog post](#) from Adam Lovelady on the types of development decisions local governments make.

The N.C. Court of Appeals reinforced this definition of a special use in its March 1 decision in *Dismas Charities v. City of Fayetteville*, __ N.C. App. __, __ S.E.2d __, case no. COA20-914 (March 1, 2022).

In its opinion, the court described special uses as those “permitted in a zoning district upon proof that certain facts and conditions detailed in the ordinance exist.” *Id.* ¶2. Similarly, the N.C. Supreme Court described special uses as those “which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist” in its 2020 decision in *PHG Asheville v. City of Asheville*, 374 N.C. 133, 148, 839 S.E.2d 755, 765 (2020) (citations and internal quotations omitted).

How much evidence is enough?

Because a quasi-judicial hearing is—as the name implies—like a court trial, the board’s role is to review the evidence provided and assess that evidence against the legal requirements. In the case of a special use permit, the legal requirements are those conditions the ordinance prescribes for a particular special use. Similarly, the legal requirements for a variance are those outlined in statute (at G.S. 160D-705(d)).

How much evidence is required to approve or deny was at issue in both *Dismas* and *PHG Asheville*.

Here are the rules for the sort of reverse-tug-of-war game that plays out in a quasi-judicial hearing:

1. The burden is first on the applicant. They must produce competent, material, and substantial evidence tending to show that they meet the conditions that the ordinance requires. Note that the standard is that the evidence “tends to show,” not “proves.” As the Court of Appeals confirmed in its *Dismas* decision, all that is needed to “tend to show” that a condition is met is something more than a “scintilla” (in other words, a tiny trace) of evidence.
2. Once the applicant has met this burden of production, the burden shifts to any opponents of the proposal. If no evidence is presented to counter the applicant’s evidence, then the applicant is entitled to the permit and the local government lacks the authority to deny it.

What happened in *Dismas*?

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The *Dismas* case related to a special use permit application for a halfway house in Fayetteville's downtown area. The property at issue was located in an "Office and Industrial" zoning district that allowed halfway houses as a special use. The City Council denied the applicant's request for a special use permit, finding that the applicant had failed to satisfy one of the standards for allowing the special use. Specifically, the standard at issue required the special use to "allow[] for the protection of property values and the ability of neighboring lands to develop the uses permitted in the zoning district." The applicant did not present expert testimony regarding the effect on surrounding properties, and residents spoke against the proposed halfway house. However, no competent, material, and substantial evidence was provided to counter the applicant's evidence.

The Court of Appeals, overturning a superior court decision affirming the City's denial of the special use permit, held that the language of the relevant standard did not require expert analysis, and since the applicant "produced more than 'a scintilla' of evidence" that they satisfied the relevant standard, the board lacked discretion to deny the special use permit.

The court also provided some insight into what kinds of evidence would have been sufficient to counter the applicant's evidence: "testimony or evidence tending to show that Dismas' evidence was not credible; that there were other reasonable steps Dismas could take to protect property values generally; or that the Facility would limit the way they could use their properties." *Dismas* ¶ 24. In the absence of such evidence, the City did not have authority to deny the special use permit. The court remanded the case to the City to issue the permit.

The *Dismas* decision refers several times to the N.C. Supreme Court's opinion in *PHG Asheville v. City of Asheville*, 374 N.C. 133, 839 S.E.2d 755 (2020), issued just under two years ago. *PHG Asheville* also addressed the denial of a quasi-judicial permit in which the applicant for a special use permit presented its evidence, including expert testimony, at the quasi-judicial hearing. During the hearing, the City Council questioned the assumptions on which applicants' experts based their opinions and the methodology used, and a member of the public expressed some general concern. No additional testimony or evidence was presented to counter the applicant's evidence. As the *Dismas* court would do almost two years later, the *PHG Asheville* court held that, because PHG had produced competent, material, and substantial evidence to satisfy its burden of production and no competent, material, and substantial evidence was offered on the other side, the City Council lacked the authority to deny the permit.

Are there other takeaways?

Two other points are important to note from the *Dismas* case and its predecessor, *PHG Asheville*.

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First, any standard to which an applicant is held must be reflected in or supported by relevant ordinance language. In the *PHG Asheville* case, the City Council raised concerns about the assumptions and methods of the applicant's expert analyses. However, the Supreme Court held that the applicant's experts had no reason (based on the relevant ordinance language) to think that they would need to address the concerns raised by the City Council at the hearing. As the court put it, applicants are not required to "negate every possible objection to the proposed use." *PHG Asheville*, 374 N.C. at 155, 839 S.E.2d at 770 (quoting *Woodhouse v. Nag's Head*, 299 N.C. 211, 215-16, 261 S.E.2d 882, 886 (1980)). Second, the *Dismas* decision highlights another way in which special use criteria should be carefully worded. The court differentiated between the language of Fayetteville's ordinance, which among other criteria requires that the project "allows for the protection of property values," and the language of the ordinances in *PHG Asheville* and the much earlier *Kenan v. Board of Adjustments*, 13 N.C. App. 688, 187 S.E.2d 496 (1972), which required that the proposed special use not "substantially injure" the value of surrounding property.

The *Dismas* court identified two key differences between these phrases:

1. "substantially injure adjoining or abutting property" refers specifically to adjacent properties while "allows for the protection" is concerned with property value more generally; and
2. "substantially injure" means that the evidence should reflect the impact on other properties, while "allows for the protection" only requires that an applicant show that it has incorporated *reasonable elements* into its plan to provide for the protection of property values *generally*.

This difference in ordinance language is part of why the Court of Appeals held the applicant's evidence to be sufficient – the applicant provided information tending to show that they were taking steps to protect property values, but no specific appraisal of values. As evidence of the applicant's steps toward protecting property values, the court pointed to information the applicant provided that tended to show that (1) pollution would be low, (2) the building height would be compatible with nearby structures, (3) the building complies with setback requirements, (4) landscape buffers would screen adjacent residential property, and (5) the parking area would be private, planted, and screened., which was enough under the "allows for the protection" language but might not be under the "substantially injure" language.

So what is a local government to do about such things?

The *Dismas* decision, and the *PHG Asheville* decision that preceded it, offer a couple of clear lessons for staff and boards working on quasi-judicial matters.

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Know the decision type. Quasi-judicial decisions have different limitations compared to legislative decisions. It is important to remind staff, the public, and board members of these differences when approaching a quasi-judicial decision. This is especially important if a governing board also sits as the board of adjustment. Under those circumstances, the board makes both legislative decisions and quasi-judicial decisions, and has to keep the two processes separate. In these cases, one would be well advised to introduce any quasi-judicial hearing as such and to remind everyone present that state law requires that the quasi-judicial decision be made on the basis of the evidence offered and the standards provided in the ordinance.

It's all about the evidence. Speaking of which, regardless of what board is making the quasi-judicial decision, boards and community members should be reminded that the decision must be made on the basis of the evidence. The board must not be swayed by popularity and public opinion; the question before them is solely whether there is sufficient evidence to show the standards will or will not be met. This kind of clarification can be particularly helpful in communities that do not often encounter quasi-judicial hearings, and may be disappointed by the approval of an unpopular use that nonetheless qualifies for a quasi-judicial entitlement.

Choose your words carefully. Check the wording of your standards carefully, and make sure that your standards ask for the conditions and community-specific circumstances you want an application to address. For example, make sure that your ordinance asks for the kind of evidence you want – should the applicant have to show that they will not “substantially injure the value of adjoining properties” or should they show that they are more generally taking steps “to provide for the protection of property values”? If there are circumstances in your community (such as traffic impacts at particular peak periods or seasons) that your decision-making board will want to see addressed, the conditions in the ordinance should address those circumstances.

Educate the public. Advise members of the public about the nature of quasi-judicial decision-making and the role of evidence in the process. This message can be spread in a number of ways, including on the local government’s website, in pamphlets that may be available on the website or in board meetings, or in letters providing notice of an upcoming quasi-judicial hearing. As my good buddy G.I. Joe used to say, knowing is half the battle.

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**WEAVERVILLE
BOARD OF ADJUSTMENT**

Regularly meets 2nd Monday of the month at 6:00 pm (subject to cancellation)
in Community Room/Council Chambers at Town Hall

NAME AND POSITION	CONTACT INFORMATION	FIRST APPT	DATE OF APPT	TERM (3 YEARS)
John "Tyce" Lewis Chairman	14 South College Street (cell) 279-4290 tycerrenovations@gmail.com	2017	August 2020	September 2020 - 2023
Cynthia Wright Vice-Chairman	88 Hillcrest Drive (cell) 703-862-8428 wright.cindy2011@gmail.com	2014	August 2021	September 2021 - 2024
Paul Clauhs Regular Member	P.O. Box 483 74 Hamburg Drive 828-768-6679 weavervilleplumbing@hotmail.com	2011	September 2022	September 2022 - 2025
Roger Parkin Regular Member	57 Church Street 828-337-2868 rdplimey@gmail.com	2017	August 2020	September 2020 - 2023
Peter McGuire Regular Member	11 Whitetail Drive 828-230-1862 pbumcguire73@gmail.com peter@strausslaw.com	2021	August 2021	September 2021 - 2024
Larry Murray Alternate Member	7 Alexander Road 828-645-4285 flurmur104@aol.com	2021	November 2021	November 2021 - Sept 2023
Alternate Member				_____ 2022 - 2025
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Jennifer Jackson Town Attorney	828-442-1858 jjackson@weavervillenc.org			