



AGENDA
BREVARD BOARD OF ADJUSTMENT– REGULAR MEETING
Tuesday, February 2, 2016 – 3:00 PM
Council Chambers

- I. Welcome**

- II. Introduction of Board Members**
 - a. Certify Quorum and Voting Members
- III. Approval of Agenda**
- IV. Approval of Minutes**
 - a. January 12, 2016
- V. New Business**
 - a. Presentation by Annette Raines, Transylvania County Tax Administrator, Countywide Reappraisal 2016.
 - b. Election of Officers
 - c. Rules of Procedure Discussion
- VI. Old Business**
 - a. Training
- VII. Other Business**
- VIII. Adjourn**

MINUTES
BREVARD BOARD OF ADJUSTMENT – REGULAR MEETING
Tuesday, January 12, 2016 – 7:00 PM – Administrative Conference Room

The Brevard Board of Adjustment met in regular session on Tuesday, January 12, 2016 at 7:00 PM in Administrative Conference Room of City Hall.

Members Present: Judith A. Mathews, Chair
Carol Dillingham
Tad Fogel
Tom Tartt

Staff Present: Daniel Cobb, Planning Director
Janice H. Pinson, Board Secretary
Mike Egan, Board Attorney

Others: Lane Lastinger, Agent for Applicant

I. Welcome and Introduction of Board Members

Chair, J. Mathews called the meeting to order at 7:00 PM, Board introduced themselves. Chair, J. Mathews certified that a quorum of the Board was present.

II. Approval of Agenda

J. Mathews requested a Motion to approve the Agenda. Tom Tartt moved to approve, seconded by Tad Fogel, unanimously carried.

III. Approval of Minutes

J. Mathews requested a motion to approve the Minutes of the October 13, 2015 meeting. Motion by T. Fogel to accept the minutes as submitted, unanimously carried.

IV. New Business

a. Request of Pisgah Forest Outdoors, LLC for a variance in the ground size requirements from 32 square feet surface area per side to allow 48 square feet surface area per side. The property is located at 74 Pisgah Highway within the corporate limits of the City of Brevard, further identified by PIN # 8597-45-3585-000.

The following were sworn: Lane Lastinger and Daniel Cobb.

Chair, J. Mathews explained the quasi-judicial hearing process and polled the Board as to exparte communications, there were none. She polled the Board and Lane Lastinger, as to conflicts of interest and there were none.

Daniel Cobb requested procedural guidance from M. Egan, Board Attorney, as to variance procedures and requirement of a super majority to approve the variance.

Attorney Egan, responded that it would take all four (4) Board Member's votes to approve this variance. Further explaining that the Board's By-Laws state that the Applicant be given a choice to wait until the next meeting because a variance would require four (4) out of five (5) votes, meaning he would be required to obtain all four (4) votes of members present for the variance to be approved.

L. Lastinger stated that he had been made aware of the situation and chose to continue with the proceedings.

Daniel Cobb, Planning Director, presented his Staff Report, which is attached hereto, labeled Exhibit "A", and incorporated herein by reference.

T. Fogel stated that there is a lot of clutter from existing signs along the highway, and that he felt this was a reasonable request. Further asking for clarification as to the location of the sign.

Lane Lastinger testified that their goal was to put their sign on the ground sign with Pisgah Outdoors in order to avoid clutter of signage on Highway 276.

He further stated that he has a tentative agreement with Bi-Lo to connect to their property in order to enter his property, and also is trying to negotiate with another adjoining property owner to gain another access by way of Highway 280, but that this has not come to fruition to date.

J. Mathews and T. Tartt, both shared their concerns about traffic congestion at the adjoining intersections.

J. Mathews stated she was glad to see that the location of the sign would not impede site distance for traffic.

J. Mathews asked, D. Cobb the size of the Oskar Blues ground sign. D. Cobb stated that he was not sure but would get the information for the board.

Lane Lastinger stated that the owner of Pisgah Forest Outdoors is in the process of requesting that NCDOT move the forest signs inside the forest and that he plans to join in these discussions.

T. Fogel brought up that the City's new wayfinding signage gives good direction to the forest from Highway 280.

J. Mathews asked if Mr. Lastinger had any further testimony.

L. Lastinger stated that surrounding properties have signs as large as 80 square feet and that they are not requesting a large sign, but just to be allowed to combine all of their signs into one (1) ground sign.

There being no further testimony, J. Mathews closed the hearing for the Board's deliberation.

J. Mathews reminded the board that all four (4) members were required to agree in order for the variance to be approved. She stated that she was going to briefly go over the four (4) points listed in the staff report.

In order to grant the variance all of the conditions below must be met:

1. Unnecessary hardship would result from the strict application of the regulations. It shall not be 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 a variance.
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 shall not be regarded as a self-created hardship.
4. The requested variance is consistent with the spirit, purpose, and intent of the regulations, such that public safety is secured, and substantial justice achieved. Substantial justice is not achieved when granting the variance would be injurious to the neighborhood or to the general welfare.

T. Tartt stated he felt the sign was in a good location and that he was good with all points.

J. Mathews stated that she felt that the hardship was not a result of action by the property owner or applicant.

It was agreed that the location does create a hardship because the property is located behind others and is outside the view of Highway 276 and that the request was in keeping with the spirit of the ordinance, that public safety and justice would be served by granting the variance.

J. Mathews reminded the board that staff recommended approval of the variance:

Allowing a larger sign to be installed on the Pisgah Forest Outdoor property eliminates the need for an additional separate sign for Pilot Cove. With this arrangement Staff feels the variance is in keeping with the spirit and intent of the City's sign ordinance.

After discussion by the board on all conditions, the following motion was presented by T. Fogel:

With regard to the request by Pisgah Forest Outdoors, LLC for a variance from the maximum sign size requirement contained in Section 12.9.B.1.i of the Unified Development Ordinance, I move the Board to find (a) unnecessary hardship would result from the strict application of the regulations; (b) the hardship results from conditions that are peculiar to the property, such as location, size, or topography; (c) the hardship did not result from actions taken by the applicant or the property owner; and (d) the requested variance is consistent with the spirit, purpose, and intent of the regulations, such that public safety is secured, and substantial justice achieved. Accordingly, I further move the Board to grant the requested variance in accordance with and only to the extent requested in the application. Allowing the larger sign eliminates the necessity for a separate sign for Pilot Cove and is in keeping with the spirit and intent of the ordinance.

Motion seconded by C. Dillingham, unanimously carried.

VI. Old Business; None.

VII. Other Business

J. Mathews, Chair requested that Janice Pinson, Board Secretary, present the results of a survey taken by the Board in reference to their meeting schedule. The results were presented for the Board's discussion.

The Board unanimously approved to change the meeting time to the first Tuesday of each month at 3:00 PM in Council Chambers at City Hall.

There was discussion of board policies and procedures and applications for new members.

Daniel Cobb introduced Paul Ray, Senior Code Enforcement Officer to the board.

D. Cobb discussed board training for the next meeting and it was agreed that the training would be added to the February agenda.

Adjourn

There being no further business the meeting was adjourned at 8:09 PM.

Judith A. Mathews, Chairman

Janice H. Pinson, Board Secretary

CITY OF BREVARD
BOARD OF ADJUSTMENT

PROTOCOL FOR QUASI-JUDICIAL HEARINGS (SUP)

BREVARD BUILDERS, LLC

10 November 2015

A. **Introduction.** [CHAIR INTRODUCES WITH SOMETHING LIKE THE FOLLOWING].

"The Board will now take up Case No. SUP 15-000006, the request of Brevard Builders, LLC, for a special use permit to develop a 44-unit apartment complex at the intersection of Asheville Highway and Chestnut Street, Brevard, North Carolina.

"I want to begin by being very clear about the nature of this proceeding. Although this is a public meeting, it is not a public hearing, such as those conducted by City Council where members of the public are invited to voice their pleasure or displeasure concerning some matter. By State law, this is a quasi-judicial proceeding. This means it is essentially the same as a court of law, and the participants, the public, and this Board must act accordingly. The purpose of this proceeding is limited to hearing evidence and determining, based upon such evidence, whether the applicant has demonstrated compliance with the standards contained in the City's Unified Development Ordinance so that a special use permit should be issued."

"Since this hearing will be *quasi-judicial* in nature, we can only entertain testimony or other evidence which is competent, material and relevant to the case at hand. Generally, this means testimony as to factual matters which are germane to the case. Unless you qualify as an expert, your opinions are not competent evidence, and the Board ought not and will not hear them.

"If you desire to testify within these parameters, please know you must first be sworn, and you will be subject to examination by the members of this Board, by City staff, the applicant or another party who may be opposed to your position. With that said, I'll ask any of you who wish to testify to come forward so that you may be sworn in. Once you have been sworn, I'll ask each of you to state

your name and address so that the clerk can make this a matter of record. [ONCE THE WITNESSES ARE ASSEMBLED, ADMINISTER THE OATH]. 'Raise you right hands. Do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth? If so, please say, 'I do.'"

- B. **Determination of Party Status.** [THE CHAIR STATES SOMETHING LIKE THE FOLLOWING:]

"The City and the applicant are determined to be parties with standing in this matter. Other persons are entitled to give testimony within the parameters I just outlined. If, on the other hand, you desire to examine witnesses or present arguments, you must first be determined to have standing in the case. This means that you would suffer some special damage which is different in kind from that of the general public. If there is anyone who wishes to be determined to have standing, and, thus, become a party to this proceeding, please advise the board at this time so that we may examine you and make that determination."

- C. **Ethical Considerations.** [THE CHAIR SHOULD THEN POLL THE MEMBERSHIP CONCERNING CERTAIN ETHICAL CONSIDERATIONS.]

"I am now going to poll the members concerning certain ethical considerations. [TO THE MEMBERS:] First, have any members of this Board had any conversations or contacts concerning this case other than the agenda packet distributed to the Board in anticipation of this meeting? [IF SO, THE MEMBER SHOULD ANNOUNCE THE NAME(S) OF THE PERSON(S) WITH WHOM THE CONTACT OCCURRED AND THE SUBSTANCE OF THE COMMUNICATION.] Second, is any member subject to a conflict of interest or otherwise unable to be an impartial decision-maker in the matter under consideration? [A MEMBER SHOULD RECUSE HIMSELF FROM HEARING A CASE IF HE OR SHE CANNOT BE AN IMPARTIAL DECISION-MAKER. ONCE CONFLICTED MEMBERS HAVE BEEN EXCUSED, THE CHAIR SHOULD ADDRESS THE PARTIES AS FOLLOWS:] Does any party have an objection concerning the impartiality of this panel?"

- D. **Open Evidentiary Phase of the Hearing.** [THE CHAIR THEN OPENS THE EVIDENTIARY PHASE OF THE HEARING BY CALLING ON STAFF TO PROVIDE A HISTORY OF THE CASE.]
- E. **Staff Presentation.** [THE ZONING ADMINISTRATOR OR DESIGNEE, PRESENTS A SUMMARY OF THE APPLICATION AND CONTENTS OF THE FILE AND ANY OTHER TESTIMONY RELEVANT TO THE MATTER.]

- Cross-Examination.***
- F. ***Applicant's Case.*** [THE APPLICANT OR THE APPLICANT'S REPRESENTATIVE PRESENTS ITS CASE.]

Cross-Examination.

- G. ***Other Cases.*** [ANY OTHERS WHO HAVE BEEN GRANTED PARTY STATUS (INCLUDING THE CITY) PRESENT THEIR CASES.]

Cross-Examination.

- H. ***Other Testimony.*** [ANY OTHERS PRESENT WHO WISH TO TESTIFY ARE INVITED TO DO SO.]

Cross-Examination.

- I. ***Rebuttal.*** [THE PARTIES ARE AFFORDED THE OPPORTUNITY TO PRESENT REBUTTAL TESTIMONY IN THE FOLLOWING ORDER: THE APPLICANT; THE CITY; OTHER PARTIES. REBUTTAL SHOULD BE LIMITED TO ADDRESSING MATTERS RAISED BY OTHER PARTIES IN THEIR TESTIMONY.]

Cross-Examination.

- J. ***Closing Arguments.*** [IF REQUESTED, THE CHAIR MAY ALLOW PARTIES TO PRESENT CLOSING ARGUMENTS. IF CLOSING IS PERMITTED ANY PARTY, IT MUST BE PERMITTED TO ALL & SHOULD BE HEARD IN THE FOLLOWING ORDER: INTERVENORS; THE CITY; THE APPLICANT.]

- K. ***Close the Hearing.*** [AT THE CONCLUSION OF THE EVIDENCE AND CLOSING ARGUMENTS, IF ANY, THE CHAIR SHOULD CLOSE THE HEARING. THERE SHOULD BE NO MORE DIALOGUE BETWEEN THE AUDIENCE AND THE BOARD. THE HEARING MAY BE REOPENED ON MOTION AND A MAJORITY VOTE OF THE BOARD.]

- L. ***Deliberation.*** [POLL THE BOARD WITH REGARD TO THE STANDARDS & GUIDING PRINCIPLES CONTAINED IN §16.11 OF THE UDO.]

1. Has the applicant demonstrated that the use meets all requirements and specifications of the UDO?
2. Has the applicant demonstrated that the use is in harmony with the general intent of such ordinance and preserves its spirit?
3. Does the use meet all requirements and specifications of any adopted land use plans, and is the use in harmony with the general intent of such land use plans and preserve their spirit?
4. Has the applicant demonstrated that the proposed use or structure will be visually and functionally compatible to the surrounding area?
5. Will the proposed use be injurious to the public health, safety, and welfare?
6. Will the proposed use be detrimental to the value of adjoining property and associated uses?

[BOARD MEMBERS SHOULD BE FORTHCOMING ABOUT THEIR ANALYSIS OF THE CASE. REMEMBER THIS IS A PUBLIC HEARING. MAKE SURE YOUR DISCUSSION IS AUDIBLE. STAFF IS WORKING HARD TO MAKE A RECORD, AND THE APPLICANT AND THE REST OF THE PUBLIC IS ENTITLED TO KNOW THE REASONS FOR YOUR DECISION. NO WHISPERING!!]

- M. ***Motion and Vote.*** [USE THE SUGGESTED MOTION WHICH WILL BE PROVIDED TO YOU IN YOUR AGENDA PACKET. ONCE THE MOTION HAS BEEN SECONDED, STATE SUCCINCTLY THE WAY YOU INTEND TO VOTE AND THE REASONS FOR THAT VOTE.]

COURT HISTORY.

In *Weaverville Partners, LLC, v. Town of Weaverville*, 188 N.C.App. 55, 654 S.E.2d 784 (2008), the Town of Weaverville Zoning Board of Adjustment denied an application for a [special use permit], concluding the following:

1. The access road, particularly developing Moore Street as a through street, would create a vehicular and pedestrian safety problem for the neighborhood and the proposed project would be detrimental to or endanger the public health, safety, morals, comfort or general welfare of the neighborhood.
2. The proposed project will be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted and will substantially diminish and impair property values in the neighborhood.
3. The proposed project will 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 the proposed structures will 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.

Weaverville Partners petitioned for, and was granted, a writ of certiorari to review the decision of the Board of Adjustment. The Superior Court for Buncombe County reversed the decision and ordered the BOA to issue the special use permit. The BOA appealed this decision to the Court of Appeals which affirmed the decision of the Superior Court. The Court of Appeals cited *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974) for the following principle of law:

When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, prima facie he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

The Court continued by stating "Speculative assertions and mere opinion evidence do not constitute competent evidence. Further, the expression of generalized fears does not constitute a competent basis for denial of a permit." The Court raised the issue of whether a witness's personal knowledge may be used to rebut an expert's quantitative data in support of granting a petitioner's application for a permit and appeared to answer that in the negative, citing *Cumulus Broadcasting, LLC v. Hoke Cty. Bd. of Comm'rs*, 180 N.C.App. 424, 638 S.E.2d 12 (2006), in which Hoke County Board of Commissioners denied an application for a conditional use permit to construct a radio tower. The Board's decision was reversed by the superior court. The Court of Appeals affirmed the superior court, holding, "[h]ere, the testimony in opposition to the granting of the conditional use permit was from witnesses relying solely upon their personal knowledge and observations. No witnesses rebutted Cumulus's quantitative data and other evidence in support of the conditional use permit."

Instantly, the Court then proceeded to address each of the erroneous conclusions of the Board of Adjustment.

Traffic. The Court noted none of the residents provided any mathematical studies or factual basis for their opinions regarding how the increased traffic generated from the project would significantly impact the surrounding neighborhood. Rather, all of the residents' testimony consisted of speculative opinions.

Property Values. The Court found Mr. Taylor's testimony unpersuasive in that he did not conduct any market studies of neighborhoods in the Town of Weaverville that shared similar characteristics to the neighborhood adjoining the project's site.

Crime Rate. The Court noted that neither one of the residents provided any factual basis for their opinions and the testimony of all the residents who testified consisted of speculative opinions and generalized fears.

Architectural Appeal. The Court stated that the testimony of the opponents was based solely on their personal knowledge and observations. The witnesses did not provide any expert testimony to show any quantitative link between their personal observations and how the project's exterior architectural appeal would cause a substantial depreciation in the property values within the neighborhood.

THE MORAL OF THE STORY. Don't be coming into court (or the board of adjustment, for that matter) without your attorney and your expert witnesses!