

**MINUTES**  
**BREVARD BOARD OF ADJUSTMENT REGULAR MEETING**  
**Tuesday, April 6, 2021 – 3:00 PM – Council Chambers**

The Brevard Board of Adjustment (BOA) met for a regular meeting on Tuesday, April 6, 2021, at 3:00 PM in Council Chambers of City Hall.

Members Present: Judith A. Mathews, Chair  
Tom Tartt, Vice Chair  
Kevin Jones  
Allen Delzell

Members Absent: Tad Fogel

Staff Present: Aaron Bland, Assistant Planning Director  
Leigh Huffman, Planner  
Brian Gulden, Board Attorney  
Kaitland Finkle, Planner – Acting Clerk to the Board- attended via Zoom

Others Attending via Zoom:  
Lane Lastinger, Applicant  
Toby Brown  
Ken Warren, Party with Standing  
Attending in Person:  
Cashion Smith, Applicant Agent  
Charles Warren, Party with Standing  
Stacy Payne, Party with Standing  
Tore Borhaug, Applicant

**I. WELCOME**

Chair J. Mathews called the meeting to order at 3:00 PM and welcomed those present.

**II. INTRODUCTION OF BOARD MEMBERS**

Board members, Board Attorney and Staff, introduced themselves.

**III. CERTIFICATION OF QUORUM**

Chair Mathews certified a quorum of the Board was present.

**IV. APPROVAL OF AGENDA**

K. Jones moved seconded by A. Delzell, to approve the agenda as presented, carried unanimously.

## V. APPROVAL OF MINUTES

K. Jones moved, seconded by T. Tartt that the March 2, 2021, minutes be approved as presented. Motion carried unanimously.

## VI. NEW BUSINESS

a. Consideration of Application for Special Use Permit #SUP-21-001 by Lastinger Properties, LLC to allow a bike coaching, guide service, and campground in the General Residential (GR) zoning district on property owned by the Lastinger Properties, LLC, and located on the Asheville Highway within the Extraterritorial Jurisdiction (ETJ) of the City of Brevard and further identified by PIN# 8597-57-7985-000.

Chair, Mathews explained quasi-judicial procedures.

Chair Mathews asked if the Applicants had any conflicts of interest with any of the Board members. They replied that they did not.

The following were sworn by Kaitland Finkle Via Zoom: Lane Lastinger and Ken Warren. In person: Cashion Smith, Aaron Bland, Assistant Planning Director, Leigh Huffman, Planner, Charles Warren, Stacy Payne.

Ms. Huffman stated that the matter before the Board was properly advertised, property posted, and neighbors notified by mail in accordance with the NC General Statute requirements.

Ms. Huffman presented her staff report a portion of which follows:

### **Background**

Mr. Lastinger of Lastinger Properties, LLC submitted an application to the City on February 5, 2021, for a Special Use Permit (SUP) to build and operate a *Campground* and a *Bike Coaching and Guide Service* on a vacant parcel on Asheville Highway (Attachment A).

*Campgrounds* are defined in Chapter 19 of the City's Unified Development Ordinance (UDO) as "Establishments accommodating campers and/or artists and their equipment, including tents, tent trailers, travel trailers, and recreational vehicles. Facilities and services include cabins, washrooms, food services, recreational facilities and equipment, and organized recreational activities."

A *Bike Coaching and Guide Service* falls under the UDO's definition for *Recreation Facilities, Outdoor*: "Parks and other open space used for active or passive recreation such as ball fields, playgrounds, greenway trails, tennis courts, riding stables, campgrounds, and golf courses, and their customary accessory uses including, but not limited to, maintenance sheds, clubhouses, pools, restrooms, and picnic shelters. This definition is inclusive of both non-profit and for-profit operations."

Mr. Lastinger's application includes a sketch plan to illustrate the possible locations of the different uses on the property, and included narratives of the two primary uses. It is important for the Board to remember they are approving the use of the site and a detailed, construction-ready site plan is not necessary at this stage. However, given that the Board does not have specific details of the site, it is well within the Board's purview to impose conditions to the granting of the SUP that the Applicant would have to abide by when submitting their plans to the Planning Department Staff for zoning approval to begin actual construction at a later date.

### **Site and Surrounding Conditions**

In accordance with UDO Section 16.11.C, Planning Staff reviewed the application and found it to be complete. Staff circulated the application to the Technical Review Committee for comments as to the proposed use's conformance to all applicable standards and requirements (Attachment B).

The parcel proposed for the SUP is 62.4 acres and zoned General Residential – 4 (GR4), and the applicant is proposing to develop within a 9.9-acre area. Most of the parcel is located in the Extra-Territorial Jurisdiction, but the south westernmost portion of the parcel is within City Limits. The majority of the parcel is within the steep slope area, defined as those areas with a slope of 15 percent or greater. Section 6.4 of the UDO outlines the steep slope requirements (Attachment C). The applicant provided a sketch plan that notates both the steep slope areas and the contours. However, staff noticed discrepancies and there are areas not listed as steep slope where the contours meet the UDO's definition of a steep slope area (Attachment D).

The applicant is proposing the use of modified shipping containers as part of the Bike Farm. Chapter 5. – Architectural Standards of the UDO does not allow metal buildings (Attachment C), so a shipping container used as a building does not comply with the UDO.

The parcel completely surrounds a City-owned property where a water tank is located. The adjoining parcels to the southeast are not within the City's jurisdiction (Attachment E). The County has zoned these areas as Corridor Mixed Use. The adjacent parcels to the southwest are part of the Forest Gate Shopping Center, and include the following business: Hampton Inn, Belks, and Wal-Mart. Pisgah National Forest also adjoins the parcel to the north.

Of the properties zoned GR4 surrounding the parcel, only one contains a single-family home which is located directly to the west of the Applicant's parcel. Pilot Cove, which is also owned by Lastinger Properties, LLC, is located northwest of the parcel and zoned GR4. The Board of Adjustment approved a SUP for parcel to be used as a campground in 2015, and Staff has received no complaints or experienced any problems from this approved use.

### **Special Use Permits**

Special uses are generally compatible with the land uses permitted by right in a zoning district, but require individual review of their location, design, and configuration so as to

evaluate the potential for adverse impacts on adjacent property and uses. Special uses ensure the appropriateness of the use at a particular location within a given zoning district. Only those uses enumerated as Special Uses in a zoning district, including but not limited to hours of operation, height, bulk, mass, intensity of use, etc. shall be authorized by the BOA.

The evaluation and approval of the Special Use Permit shall be based upon the sworn testimony and evidence presented at the hearing relevant to the following findings of fact:

- a) The use meets all requirements and specifications of the Ordinance and any adopted land use plans and is in harmony with the general purpose and intent and preserves its spirit; and
- b) The proposed use or structure will, if developed according to the plan submitted and approved, be visually and functionally compatible to the surrounding area; and
- c) The proposed use or structure will not be injurious to the public health, safety, and welfare, and will not be detrimental to the value of adjoining property and associated uses.

In approving an application for a Special Use Permit, the BOA may attach fair and reasonable conditions which support the required Findings of Fact; however, the Board may not require the landowner to waive a vested right. The burden of proof of producing evidence to support these Findings and to overcome any challenges that approval of the plan would be contrary to one or more of these Findings rests entirely with the applicant.

### **Staff Recommendation**

Staff believes that given the lack of visibility from the street and given the surrounding land uses, which include a campground and the Pisgah National Forest, this proposed use is harmonious with the surroundings and can be built and operated without detriment to neighboring properties. The Board may consider and craft site-specific conditions to mitigate any potential negative impacts to neighboring properties as it sees fit.

If the Board approves the Special Use Permit, Staff recommends that the Board consider adding the following conditions:

1. Preserve areas with an average steep slope area of 25 percent outside of the 10-acre development envelope.
2. Within the development envelope, the Board should consider a condition to address the extent of grading; the degree of land disturbance; and the location, form, and design of proposed structures and driveways so as to minimize land disturbance. Staff recommends limiting development and land disturbance to 50 percent of the 10-acre development envelope, not including stormwater infrastructure.

3. Allow the shipping container as an accessory structure without a principal structure on the same parcel as long as it is not visible from the road. In addition, the Board may wish to consider and craft additional conditions that discuss the use of the shipping container and allowed utilities.
4. Require the developer provide proof of approval from applicable City, County, and State entities, including but not limited to NCDOT, Transylvania Health Department, Transylvania Building and Inspections Department, and Brevard Technical Review Committee prior to final development approval.

A. Delzell asked questions about the adjoining campground, Pilot Cove.

T. Tartt asked about the location of the Allison Deavor House in relation to the property.

K. Jones followed up by asking about the original special use permit for Pilot Cove and whether this needs to be considered.

Attorney Gulden responded that the board is looking at this as a standalone application and that the board can recommend approval without conditions if they so choose.

Attorney Gulden stated that the character of the applicant is not being questioned, and therefore previous developments by applicant should not be considered.

Attorney Gulden further reminded the Board of the standards for granting a special use permit.

1. The use meets all requirements and specifications of the ordinance and any adopted land use plans and is in harmony with the general purpose and intent and preserves its spirit; and
2. The proposed use or structure will, if developed according to the plan submitted and approved, be visually and functionally compatible to the surrounding area; and
3. The proposed use or structure will not be injurious to the public health, safety, and welfare, and will not be detrimental to the value of adjoining property and associated uses.

Board Attorney, Brian Gulden asked the Board if they had any conflicts of interest or ex parte communications. There were none.

Cashion Smith, appointed agent, is 50% owner of the Bike Farm along with his wife. The Bike Farm currently operates in Transylvania County and is permitted in Pisgah National Forest and DuPont State Park. He explained that they are looking for a place to store mountain bikes, meet their clients prior to going for rides at the trailheads in the forests. He is further requesting approximately .25 acre area to create features to teach individuals to ride before trailhead rides.

Mr. Tartt asked that he clarify the request for the shipping container.

Mr. Smith spoke to the temporary nature of the use of the shipping container, and explained that he was told that for a more permanent nature it would have to meet the required architectural standards.

Mr. Tartt spoke to his concerns about the risk of using a shipping container.

Mr. Smith spoke to working with families and mitigating risks. He explained that the choice of the building, and materials have been considered for safety reasons.

Mr. Lastinger, pointed out that the use of Bike Farm and Campground can and should be treated separately. The shipping container cannot be seen from any adjoining properties. He explained that the newly acquired parcel lends itself to campsites and that purchasing this additional property allows for a new access to the existing Pilot Cove campground. The proposal is for a maximum of ten (10) campsites per acre for a total of one hundred (100) sites. Sitework Studios of Asheville are the landscape architects who will design the layout including the completion of the slope calculations, etc. Before entering into a contract to secure their services, applicant would like to have the Board's approval of the use. He further noted that the submitted site plan shows a 30-foot buffer to all adjoining property lines. He also understands that additional approvals will be required and has already had preliminary conversations with NCDOT for curb cuts and David Lutz, Public Works Director in reference to water and sewer services. Most comments came from Chief Harris, City of Brevard Police Department, in regards to security concerns. There will always be a campground host on site 24/7 to oversee the facilities, noise, and manage transients. The restrooms will only be accessed via door codes. He explained his wishes for the removal of conditions restricting steep slopes and grading of 50%.

Ms. Mathews asked about previous use of security officer.

Mr. Lastinger explained that they have had transients camping in the woods for which the sheriff was notified. He stated that there are two (2) employees that live on site for Pilot Cove to manage security 24 hours a day. He stated that a sheriff's deputy lives on property adjoining this site, and is aware of the plans and has offered to look after the site.

Ms. Mathews asked about the shipping container.

Mr. Lastinger stated that the shipping container had already been approved as a temporary use.

L. Huffman, Planner, did confirm that a Temporary Use Permit had been issued which allows storage on site for a temporary time frame. The shipping container would need to be removed if the special use permit for a campground is not approved and the temporary use

permit expires. Further stating that Staff does recommend that the shipping container be allowed to stay on site as a condition, since it is not visible from other properties.

Charles Warren, 2905 Asheville Highway, asked about a spring on the property that they have rights to on the deed in perpetuity. He explained that there are two (2) houses that need access to the spring. He further expressed concerns about water being dumped onto his property and mud killing fish in the pond.

Attorney Gulden, stated that the Board needed to consider if Mr. Warren had standing.

Mr. Jones stated that he heard two (2) questions: Does Mr. Warren have standing and does there need to be an expert testimony on the opposition on the possible damage to the pond.

Attorney Gulden, confirmed.

Mr. Jones stated that Mr. Warren is in proximity and has concerns with the project's impact on his property.

Mr. Tartt, seconded, upon vote as to whether Mr. Warren had standing, vote was 3-1, voting in favor, J. Mathews, T. Tartt and K. Jones, opposed A. Delzell.

Stacy Payne is an adjoining neighbor at 3221 Asheville Highway, who voiced his concerns about runoff from the steep slopes and submitted photos.

Attorney Gulden, stated that the board needed to only consider standing at this point.

Stacy Payne stated his concerns with the campground including trespassers and harm to the natural spring that crosses his property.

Ms. Huffman, Planner, indicated where the campground would be located in proximity to Mr. Payne's property.

Motion to allow Stacy Payne to be a party with standing by A. Delzell, seconded by T. Tartt, unanimously carried.

Toby Brown's property located at 2861 Asheville Highway is near the location where the RV's will be placed. He is concerned that 30 feet seems like a small setback, and has concerns about the grading that has already occurred.

Attorney Gulden, stated that he does not think Mr. Brown should be included as a party with standing.

Ms. Mathews, stated that she would like to proceed without a vote as to Mr. Brown's standing, since not voting results in not having standing.

Attorney Gulden stated that he thought the board should allow Steve Warren via Zoom to be considered the same standing as Charles Warren.

Charles Warren, party with standing stated his concerns that the pond may be contaminated, and his continued access to the pond as stated in his deed.

Ms. Huffman, Planner, referred to UDO Chapter 6 which requires a 30 foot buffer to all streams to protect surface water, and further that the project will have to meet engineered storm water requirements.

Chair Mathews asked where the individuals lived in relation to the Applicant's property.

Ms. Huffman, Planner, stated that all individuals who have spoken are located in the County.

Mr. Lastinger, Applicant, testified that the trout pond was not functioning when he purchased the property. He stated that he will take all necessary steps to prevent contamination of runoff. He further stated that the Campground area would not drain toward the Warren property due to the ridge. He will ensure that guests of the campground property will be adequately contained. He further testified that the neighbors have already installed no trespassing signs. He further testified that they have not had many people bring their own firewood, that Mr. Payne sells firewood, as does the campground, further stating that individuals would likely buy more wood.

Stacy Payne provided pictures supporting the stormwater runoff that is already occurring and lack of erosion control measure that is contaminating surface waters, stating that the wooden structures were already in place. Pictures are attached and labeled, Exhibit "A".

Mr. Jones asked if anything proposed would not fall under existing City ordinances, as well as other regulating agencies.

Ms. Huffman, Planner, stated that condition 2 is language that the Board is allowed to add the regulation of land 15%-24%. 25% will stand no matter what the Board decides. Campgrounds do not currently have explicit standards like others in Chapter 3.

Mr. Jones stated that he wanted to discuss the 4 conditions staff has recommended. He stated that he is fine with conditions 1, 3 and 4, but wants to discuss 2 about grading, and disturbance cap of 50%. He explained that he feels that this is outside the Board's purview.

Chair Mathews stated that she believes condition 2 needs to be included as requested by Staff. Staff will enforce it, but can only do so if the Board adds it as a condition.

Attorney Gulden read language that it is within the Board's purview to add condition 2. He further states that condition #1 cannot be a condition as it falls outside of the area being requested, further explaining that the Board can also specify the specific number and types of campsites allowed.

Attorney reviews the findings with the Board:

1. The use meets all requirements and specifications of the ordinance and any adopted land use plans and is in harmony with the general purpose and intent and preserves its spirit; and
2. The proposed use or structure will, if developed according to the plan submitted and approved, be visually and functionally compatible to the surrounding area; and

Number and types of campsites? 20 RV, 20 Yurt, 60 Campsites

Attorney stated the Board should keep the application as presented.

3. The proposed use or structure will not be injurious to the public health, safety, and welfare, and will not be detrimental to the value of adjoining property and associated uses.

Mr. Jones moved to grant the requested special use permit in accordance with and only to the extent represented in the application and plans and subject to Staff's recommended conditions 2-4, as follows:

2. Within the development envelope, the Board should consider a condition to address the extent of grading; the degree of land disturbance; and the location, form, and design of proposed structures and driveways so as to minimize land disturbance. Staff recommends limiting development and land disturbance to 50 percent of the 10-acre development envelope, not including stormwater infrastructure.
3. Allow the shipping container as an accessory structure without a principal structure on the same parcel as long as it is not visible from the road. In addition, the Board may wish to consider and craft additional conditions that discuss the use of the shipping container and allowed utilities.
4. Require the developer provide proof of approval from applicable City, County, and State entities, including but not limited to NCDOT, Transylvania Health Department, Transylvania Building and Inspections Department, and Brevard Technical Review Committee prior to final development approval.

Second by T. Tartt, unanimously carried.

b. Consideration of Application for Special Use Permit #SUP-21-002 by Tore's Properties, LLC to allow a 12 bedroom (24 residents) assisted living facility in the General Residential (GR) zoning district on property owned by Tore's Properties, General Residential (GR) zoning district and further identified by PIN# 8585-67- 8032-000.

Attorney Gulden, asked the Board about ex parte communications and conflicts of interest, there were none.

He further asked Tore Borhaug if he had any conflicts with the Board as seated to hear his application. He had none.

Tore Borhaug was sworn by Kaitland Finkle, acting Clerk to the Board.

Aaron Bland, Assistant Planning Director, presented his staff report, a portion of which follows:

### **Background**

Mr. Tore Borhaug of Tore's Home submitted an application to the City on February 18, 2021 for a Special Use Permit (SUP) to build and operate a *Housing Service for the Elderly* on a vacant parcel on Gallimore Road (See Attachment A).

*Housing Services for the Elderly* are defined in Chapter 19 of the City's Unified Development Ordinance (UDO) as "Establishments which offer a wide range of housing services for those, such as the elderly who cannot care for themselves. This term includes uses such as retirement housing, congregate living services, assisted living services, continuing care retirement centers, and skilled nursing services. (LBCS F1200)"

Mr. Borhaug's application includes two basic potential site plans to illustrate the size of the building he would construct and its possible location on the parcel. The exact location is dependent on determinations from other agencies that regulate these facilities. It is important for the Board to remember they are approving the use of the site and a detailed, construction-ready site plan is not necessary at this stage. However, given that the Board does not have specific details of the site, it is well within the Board's purview to impose conditions to the granting of the SUP that the Applicant would have to abide by when submitting their plans to the Planning Department Staff for zoning approval to begin actual construction at a later date.

### **Site and Surrounding Conditions**

The parcel proposed for the SUP is 1.01 acres and zoned General Residential – 8 (GR8). The parcel has Special Flood Hazard Area (100-year floodplain and floodway) covering the majority of the lot. Additionally, there is an 8-inch sewer pipe that runs through the property which connects to the Gallimore Road Lift Station. This lift station is on a City owned parcel immediately adjacent to the north of the subject parcel. See Attachments B & C for site information.

The adjoining parcel immediately to the south is another City-owned property, a small pocket park called Picklesimer Park. Adjacent to the east is a large County-owned parcel which is planned to become parks and recreation facilities. To the west of the parcel is Gallimore Road with a vacant lot across the street. This property is unique in that it is essentially buffered on all sides by government-controlled land.

Other surrounding land uses include: two apartment complexes, a dental clinic, a medical office building, and the applicant's existing *Housing Service for the Elderly* facility. Despite the entire area being zoned GR8, there are no single-family homes in the immediate surroundings of the subject parcel; the nearest house is approximately 225 feet away on the other side of Gallimore Road.

### **Special Use Permits**

Special uses are generally compatible with the land uses permitted by right in a zoning district, but require individual review of their location, design, and configuration so as to evaluate the potential for adverse impacts on adjacent property and uses. Special uses ensure the appropriateness of the use at a particular location within a given zoning district. Only those uses enumerated as Special Uses in a zoning district, including but not limited to hours of operation, height, bulk, mass, intensity of use, etc. shall be authorized by the BOA. The evaluation and approval of the Special Use Permit shall be based upon the sworn testimony and evidence presented at the hearing relevant to the following findings of fact:

- a) The use meets all requirements and specifications of the Ordinance and any adopted land use plans and is in harmony with the general purpose and intent and preserves its spirit; and
- b) The proposed use or structure will, if developed according to the plan submitted and approved, be visually and functionally compatible to the surrounding area; and
- c) The proposed use or structure will not be injurious to the public health, safety, and welfare, and will not be detrimental to the value of adjoining property and associated uses.

In approving an application for a Special Use Permit, the BOA may attach fair and reasonable conditions which support the required Findings of Fact, however the Board may not require the landowner to waive a vested right. The burden of proof of producing evidence to support these Findings and to overcome any challenges that approval of the plan would be contrary to one or more of these Findings rests entirely with the applicant.

### **Staff Recommendation**

Staff believes that given the surrounding land uses, which includes multi-family apartment complexes and other medical offices, that this proposed use is harmonious with the surroundings and can be built and operated without detriment to neighboring properties. Staff recommends the Board carefully consider and craft site-specific conditions to mitigate any potential negative impacts to neighboring properties. Application and supporting documentation is attached and labeled, Exhibit "B".

A. Bland stated that no one attended the Neighborhood Compatibility Meeting; that he believes that the sewer line is abandoned, but is waiting for confirmation from the Public

Works Director and Staff recommends that existing vegetation remain along the creek of Mr. Borhaug's property line to buffer the French Broad Apartments to the North.

T. Tartt asked about flood waters.

A. Bland explains the difference between floodway and floodplain and that any development in the floodplain is required to be raised 2 feet above base flood elevation.

Tore Borhaug, Applicant speaks to the need for this type of development and the connectivity to his existing facilities across the street. He provided information as to the State licensing requirements for this type of facility.

K. Jones asked about Staff's recommendation to maintain landscaping along the creek.

Mr. Borhaug stated he would like to replace the buffer with another landscaping buffer.

A. Bland states that he just wants to see a landscaped buffer required to fulfill the intention of the recommended condition.

A. Delzell requests more information about the sewer line.

A. Bland and Mr. Borhaug confirm that an email was received during the hearing from David Lutz, Public Works Director, confirming that the sewer line is abandoned.

T. Tartt asked about the layout of the building.

Mr. Borhaug referenced existing buildings on Gallimore Road speaking to the size being a combination of the two existing buildings with a different architectural design. He further explained that the commercial kitchen is a true need at this time.

Motion to grant the special use permit as requested with the condition that landscaped buffer remain along the creek to the north, by K. Jones. Second by A. Delzell, unanimously carried.

**VII. UNFINISHED BUSINESS – None.**

**VIII. REMARKS – None.**

**IX. ADJOURN**

K. Jones moved, seconded A. Delzell, that the meeting adjourn. Motion carried. Meeting adjourned at 5:30 PM.

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Kaitland Finkle, Acting Board Clerk

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Judith A. Mathews, Chair