

MINUTES
BREVARD BOARD OF ADJUSTMENT REGULAR MEETING
Tuesday, May 4, 2021 – 3:00 PM – Council Chambers

The Brevard Board of Adjustment (BOA) met for a regular meeting on Tuesday, May 4 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
Tad Fogel

Staff Present: Paul Ray, Planning Director
Janice H. Pinson, Board Clerk
Brian Gulden, Board Attorney

Others Dale Freudenberger, Noble Cider
Josh Leder, Mahalo Brevard, LLC, Property Owner
Sally Stepp, Executive Director, SAFE, Inc.
Sharon Gurtler, Board President, SAFE, Inc
Phil Harris, Brevard Police Chief, Board Member SAFE, Inc.
David Guice, Board Member SAFE, Inc.

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

Mr. Jones moved seconded by Dr. Delzell, to approve the agenda as presented, carried unanimously.

V. APPROVAL OF MINUTES

Mr. Jones moved, seconded by Dr. Delzell that the April 6, 2021, minutes be approved as presented. Motion carried unanimously.

VI. NEW BUSINESS

a. Consideration of Application for Special Use Permit #SUP-21-003 by Dale Freudenberger, Noble Cider, Agent for Mahalo Brevard, LLC, Josh Leder, Property Owner, to allow a Taproom serving their ciders and a food truck site on property owned by the Mahalo Brevard, LLC and located at 63 Four Seasons Plaza within the City of Brevard, in a Neighborhood Mixed Use (NMX) zoning district and further identified by PIN# 8586-63-2355-000.

Chair Mathews explained quasi-judicial procedures.

Attorney Gulden explained the qualifications to be a party with standing, and the procedure to identify those with standing. He further stated that 160D prohibits the Board from accepting lay person opinion testimony into evidence.

Sally Stepp, Sharon Gurtler, Phil Harris and David Guice gave a short explanation as to why they believe they have standing. (Their testimonies reflect their reasons).

Mr. Jones moved that Sally Stepp, Sharon Gurtler, Phil Harris and David Guice all be qualified as parties with standing, second by T. Fogel, unanimously carried.

Mr. Jones moved that Josh Leder, Mahalo, LLC, as the property owner be a party with standing, second by Mr. Tartt, unanimously carried.

Chair Mathews polled the Board as to any conflicts of interest or ex parte communications about the matter before them. There were none.

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 the Board Clerk:

SAFE : Sally Stepp, Sharon Gurtler, Phil Harris, David Guice, Dale Fruedenberger, Josh Leder and Paul Ray

Mr. Ray 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.

Mr. Ray presented the staff report a portion of which follows:

Background

Dale Freudenberger of Noble Cider submitted an application to the City on March 11, 2021 for a Special Use Permit (SUP) to operate a *Bar* in an existing building addressed 63 Four Seasons Plaza Suite 1. Property is owned by Mahalo Brevard LLC and identified as PIN 8586-63-2355-000. The application includes a site plan illustrating the size of Suite 1 as

1,200 Square feet in the existing building. It also shows a possible location for a food truck pad and an outdoor seating area on the parcel.

Bar/tavern/nightclub is defined in Chapter 19 of the City's Unified Development Ordinance (UDO) as "A business where alcoholic beverages are sold for on-site consumption, which are not part of a larger restaurant. This term includes bars, taverns, pubs, and similar establishments where any food service is subordinate to the sale of alcoholic beverages. It may also include beer brewing as part of a microbrewery and other beverage tasting facilities. Entertainment including live music, and/or dancing, comedy, etc. may also be included."

Site and Surrounding Conditions

The parcel proposed for the SUP is .395 acre and zoned Neighborhood Mixed Use (NMX). The Use categories and tables of permitted uses in Section 2.2 of the City's Unified Development Ordinance denotes Bar/tavern/nightclub as a use permitted upon issuance of a Special Use Permit in NMX zoning districts. The majority of the immediate area is zoned NMX, with Downtown Mixed Use (DMX) nearby. There is also Special District zoning in the vicinity for SAFE and Brevard College. Site plan Attachment "A".

The adjoining 6.46 acre parcel to the southwest is owned by SAFE INC and operating as Stacey's House offering emergency housing for women and children who need a safe place to go (300+ feet). Adjacent to the northwest is a 2.56 acre parcel owned by the Brevard Church of God (300+ feet). Immediately to the north is a 1.13 acre parcel owned by Roger and Sharon Petit and operating as MountainSide Home Builders and Cancun Mexican Tienda. Immediately to the east is a .239 parcel also owned by Mahalo Brevard LLC, currently a vacant building available for rent. To the south is a .92 parcel owned by JDL Pinebrooke LLC and operating as Creek Side Subs. Other surrounding land uses include: Food Lion Shopping Center, Brevard College, Burger King, Fifth Third Bank, Verizon, Ingles Gas Station, and miscellaneous other commercial uses.

Special Flood Hazard Area (100-year floodplain and floodway) covers the majority of the parcel with Tinsley Creek in the vicinity.

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, the 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.

Mr. Fruedenberger stated that he appreciates the concerns of SAFE and that he believes that they can make it work. He explained that the facility is a 1200 s.f. space that will include the taproom, ADA compliant restrooms, storage, etc. He proposed in his application that he will close at 10 PM, that any music that they might provide would be acoustical, and not loud bands. He has no intentions of spillage of parking or any other operational activities into the right of way into the SAFE facilities. Further, that he has been in business in Asheville for several years, and that they are involved in the community, and provide support. That their intention is to have that same presence in Brevard. He would like to use the side yard area for picnic tables, and to use a food truck site to provide food trucks for patrons.

Mr. Tartt asked if there were other tenants in the building. Mr. Leder answered that there were none, but that the parking is adequate for full occupancy.

Chief Harris testified that SAFE purchased the property, and began the operation of Stacey's House, their shelter in 2006. That their property in front of the proposed taproom is SAFE's administrative offices, counseling and training facility. That there are concerns of the use of the outside area, not only the noise, but the possible blockage of the right of way, preventing the access of emergency vehicles to the shelter. He explained that his biggest concern is that alcohol is a trigger for both the abuser and the victim. Placing a taproom

between the two facilities makes it hard to provide adequate security. Security is still a work in progress, and it is not totally sufficient. He explained that victims are often on foot, passing to and from the shelter, meeting people at the gate for rides, etc. That having the taproom operating right outside the gate takes away their security. Normal procedures are that if someone is outside the gate it alerts the people in the shelter to check on the situation. It will prove hard to keep up this level of security.

He thanked the board for allowing him to talk.

Dr. Delzell asked that the location of all the facilities be explained to the board on the GIS map. Chief Harris pointed out the different locations to the board.

Mr. Frudenberg expressed that he understood their concerns, but that the clientele they draw are a low key crowd. He asked if the area can be delineated better as to still give you comfort for the residents.

Chief Harris stated that he did not believe that would solve the problem.

Mr. Fogel asked if there was a gate, foliage, or any other fencing.

Chief Harris answered that there is fencing, but it is not that difficult to breach. That the interior of the shelter has adequate security, but that the outer perimeter is being worked on to make it safer.

Mr. Ray asked what type of fencing is in place. Chief Harris answered 6' wood fence.

Sally Stepp, Executive Director stated that she has 37 years of experience working with victims of domestic violence. She explained that SAFE applied for, and was granted a special use permit in 2006 to operate Stacey's House as a safe haven for victims of domestic violence. She stated that alcohol consumption can escalate violence. She said that they house 12-15 victims per night right now. She said their operating hours are 24/7 and victims are allowed to come at any time. She is concerned for the safety of the residents, and said all it takes is one incident, and that she wants to be proactive not reactive. She expressed her concerns about their right of way being blocked by parking taking place in undesignated areas. She asked that the board not allow a bar, tavern, nightclub to occupy in such close proximity. She requested that the applicant be required to have a traffic study prepared to understand the impact on the area. She believes that the right of way should be clearly marked, and unauthorized vehicles towed. She would hope that the condition that the only alcohol that could be sold would be hard cider, that no loud bands be allowed only acoustical, non-amplified music. That she has concerns about the noise level for her occupants. She further requested that the hours of operation be confined to 11 AM-10PM.

She further stated that if approved, she would like to work with them to make it work for all parties.

She believes that there is not ample parking, not room for a food truck, etc., and that the area will be very congested, with no way to manage it.

Mr. Ray stated that they meet the ordinance requirements for adequate parking for the proposed use.

David Guice, board member for SAFE, gave a history of his work experience. He said that when SAFE acquired the property for their shelter it was very appealing that it was tucked away and private, but also in the City limits with access to emergency services. He noted that it is the only domestic violence shelter in Transylvania County, and that special things happen there. He believes that parking is already a problem, and will only get worse as businesses are added. He challenged the board stating that the proposed use is not a good fit for the area. He stated that there is a church that also abuts the property.

Sharon Gurtler, Board President, SAFE, Inc., stated that all of her concerns had been addressed, but that the use is just not a great fit for the neighborhood.

Mr. Jones went over what he noted as the concerns of SAFE as follows:

Maintaining the right of way to make sure emergency vehicles have access

Surveillance and viewing

Alcohol is a trigger

Noise from music and other activities

Alcohol being available to abusers

Parking capacity

He said that he felt like there was almost a conversation on how to mitigate some of the concerns. He asked Mr. Freudenberger and SAFE Representatives if they had even discussed the concerns. They stated that they had not.

Chief Harris stated that the abuser is looking for a legitimate place to abuse and/or intimidate the victim. That the shelter is meant to be a private place, hidden from our public. If the shelter location becomes known the abuser can make eye contact, and surveillance the location of the victim.

Mr. Tartt stated that the shelter is a long way from the entrance, and people could stand there all day long.

Mr. Jones said that he walked the site for the second time that morning, and that they do watch, because within seconds someone was out there asking what he was doing there.

Josh Leder, Mahalo, LLC, property owner, stated that he felt that this was a heavy meeting. That he believes that SAFE is an unbelievable organization. He stated that he buys

neglected and falling apart buildings in town, improves them, and tries to bring businesses to town. He apologized to the applicant, stating that it was hysterical to him. That there are no parking issues. That there have been no conversations between Noble and SAFE, because SAFE is supposed to be private. He stated that SAFE is in the middle of a commercial district. He explained that SAFE knows that they will work with them, and they will not block their driveway. Stating that SAFE is a local hero. He further stated that he thinks SAFE can enter their property from the Railroad Avenue side if they chose to change their entrance. He said that Noble Cider has been trying to come here for a year, the pandemic slowed down their process. He said that the conversation is way too heavy to put upon them. Mr. Leder said that he respects Ms. Stepp and Chief Harris, but that he feels this is being totally unfair to this business. He explained that he believes that they meet every requirement to be able to operate the business in that location.

Chair Mathews asked if anyone had any questions for Mr. Leder. There were none.

Mr. Frudenberg addressed SAFE stating that he understood their concerns, and would hope that they can figure out something to help mitigate those concerns.

Sally Stepp stated that no one had engaged them to discuss the matter.

There being no further questions, Chair Mathews closed the hearing.

Dr. Delzell stated he had negative feelings about approving the special use permit. He further stated he did not want to see SAFE jeopardized in the area.

Mr. Jones asked Attorney Gulden if the decision needed to be made at this meeting. Attorney Gulden stated that historically the board had done so. He reminded the board that conditions can be placed on the permit, but that the Applicant has to agree to those conditions. He explained that the board can discuss with added conditions, and it will pass or fail.

T. Fogel made a motion to approve as follows:

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

Yes

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

Yes

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.

Yes, but with the following conditions:

1. NO parking be allowed within the designated right of way.
2. NO music after 10 PM, and music shall not be amplified.
3. Hours of operation to cease at 10 PM
4. A 6' privacy fence is required to be built to obscure the view of the entrance to SAFE from the outdoor seating area of the taproom.

Seconded by Mr. Tartt, the board was polled on their vote: K. Jones, abstain (which counts as a yes vote), T. Fogel, yes, T. Tartt, yes, A. Delzell, yes and Chair Mathews, no.

VII. UNFINISHED BUSINESS – None.

VIII. REMARKS – None.

IX. ADJOURN

Dr. Delzell moved, seconded by Mr. Jones, that the meeting adjourn. Motion carried. Meeting adjourned at 5:12 PM.

Janice H. Pinson, Board Clerk

Judith A. Mathews, Chair