

BANNER ELK BOARD OF ADJUSTMENT  
MONDAY, 06/20/2016  
MINUTES

Members Present: Art Neuberger, Joe H. Perry, Deka Tate, Fred Schmitt, Ted Silver

Staff Present: Cheryl Buchanan, Town Attorney Stacey Eggers, IV. Esq.

Chairman Fred Schmitt called the meeting to order at 6:00 pm. Chairman Schmitt asked everyone present to stand and join in the pledge of allegiance to the flag. Chairman Schmitt noted that there is a quorum present to hear the application.

Consideration of the May 16, 2016 Minutes

Chairman Schmitt noted that Jimmy Ollis was not recorded in the vote to adjourn and needs to be added. With no other changes to the minutes, Joe H. Perry moved to approve the minutes as submitted. Ted Silver seconded. The vote was:

Art Neuberger - Abstain

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt - Aye. The motion carried with a majority.

Chairman Schmitt opened the quasi-judicial portion of the hearing with an introduction of procedures for a variance hearing and an opening statement. All Board of Adjustment (BOA) Members were seated with no objections and Attorneys Dave Pokela for applicant American Towers and Nathan Miller for the Intervener were recognized.

**Application for a Variance from Section 305, Required Road Access in the Banner Elk Zoning Ordinance for American Towers.**

Attorney Eggers reviewed the case starting with American Towers as applicant for a Conditional Use Permit (CUP) and a hearing was held on December 3, 2013. The CUP was granted by the BOA but was later appealed by the Intervener, Petra Weishaupt-Smith. Superior Court Judge Davis remanded the decision back to the BOA for another hearing on the CUP. On February 3, 2015, a vote from the Board denied the previous CUP as well as a request for a variance from Section 305 of the Banner Elk Zoning Ordinance. This decision was then appealed by American Towers, and on January 16, 2016, Superior Court Judge Coward remanded the variance request back to the BOA for a second review. There was no objection to the brief summary of the case from

Attorneys Pokela or Miller. The Attorneys were allowed five minutes each for an opening statement.

The applicant's Attorney, Dave Pokela, was allowed to go first and he called his first witness, Zoning Administrator Cheryl Buchanan. Ms. Buchanan was sworn in by Chairman Schmitt.

Mr. Pokela asked Ms. Buchanan to state her name and her position with the town. A collection of documents, Applicant's Exhibits A, B, C, D, J were reviewed by Mr. Pokela verifying that the witness recognized them and was familiar with them.

A cross-examination by Mr. Miller on Exhibit J, Section 305 (2), and a review of the history of zoning in Banner Elk establishing when the first ordinance was adopted and if this section was part of that and when the Hall property actually came into the ETJ. There was also some clarification about the relevance of the Subdivision Ordinance. Ms. Buchanan testified that the Subdivision Ordinance was a standalone ordinance, much like the Telecommunications Ordinance and does not replace the Banner Elk Zoning Ordinance, but is applied when the Town is considering a subdivision of land for development.

Ted Silver asked Ms. Buchanan if she had any knowledge of the TVA's use of the Hall property and if they have a row or legal access to maintain those lines. Ms. Buchanan replied that she did not have any knowledge of this. Mr. Silver confirmed that per the current ordinance, the Halls could build one dwelling unit and no more and Ms. Buchanan confirmed this was correct.

Deka Tate asked if there have been any amendments to the Subdivision Ordinance since 1978. Ms. Buchanan answered that she was not aware of any since she had been in this position, but could not testify of any before.

Mr. Pokela did not wish to redirect.

Mr. Pokela called his next witness and asked him to identify himself. Mr. Hall was sworn in by the Chairman and approached the podium. Mr. Thomas Brown Hall of PO Box 96, Plumtree, 28644 was confirmed as the next witness. Mr. Pokela reviewed Exhibits L, E, G, F, H, I, and U. These Exhibits concerned the Hall property with a deed, map, and easement. Mr. Hall testified that he bought the property from the Smiths, who were relatives of the Carenders in 1981. Since that time the property has been used to grow Christmas Trees. Mr. Hall described the amount of traffic on the 20 ft. easement during a years' time. For harvesting, 5 days a week, 3 – 4 trucks a week beginning in early November. Planting is March and April with 2-3 vehicles each day. Shearing is July or August with the same number as planting. Then there are occasional trips for maintenance reasons.

Mr. Miller began his cross-examination by requesting how much the Halls were paid for their initial agreement. Mr. Hall identified a one-time payment of

\$800.00 to be split between the two brothers. Additionally, they will receive monthly payments once the tower is built but he did not know how much that would be. Mr. Hall testified that when he bought the property the TVA lines were already there but he did not know how they access the property. Mr. Hall said that he did not remember requesting an easement from the Carenders, he just received a document in the mail granting them a 20 foot easement. At that time Mr. Hall did not know anything about Banner Elk's zoning jurisdiction or the required 25 feet ruling. Mr. Hall's last question was whether he still grows Christmas trees on the property and he answered that as of last month not any more. When asked by Mr. Miller what he plans to do with the property he said that they were still discussing that and had not reached a decision.

Ted Silver asked about the access of the road and if he had seen Mountain Electric Cooperative use the access road to which he replied he had never seen them.

At this point the Board called for a 10 minute recess. When the meeting was reconvened, Mr. Pokela called Julia Schnell. Mrs. Schnell was sworn in by Chairman Schmitt. Mr. Pokela asked Mrs. Schnell to introduce herself to the Board. Mrs. Schnell said she lives in Monroe and is a Senior Construction Manager for American Towers. Mr. Pokela reviewed Exhibits D, Q, and C with Mrs. Schnell. Mrs. Schnell testified that AT&T determined the need for the cell tower in the proposed location on old Turnpike Road. Mrs. Schnell also stated that the standard width in other jurisdictions in North Carolina for service roads was 12 feet and the largest she was aware of was 20 feet. Mr. Pokela asked if Mrs. Schnell had measured fire trucks in Banner Elk. Mrs. Schnell had visited Station #1 and #2 and measured the largest trucks, minus the mirrors. She testified that they measured 12 feet in width. Mr. Pokela introduced Exhibit P, the recent copy of the North Carolina Fire Code, and asked Mrs. Schnell to read the required width for fire apparatus. Mrs. Schnell read that the requirement is 20 feet.

During Mr. Miller's cross-examination he questioned Mrs. Schnell on who determines the width requirements of a right-of-way (r-o-w) for a tower site. Mrs. Schnell answered that it is usually the Fire Marshall or the planning department of the jurisdiction that is being worked with and that they do not always interpret or enforce the fire code to the strictest letter. Mr. Miller asked what the requirement is for Banner Elk's site. Mrs. Schnell said it is typical to ask for 20 to 30 feet and then construct for 12 feet, with shoulders if necessary.

Ted Silver asked Mrs. Schnell to look at Exhibit D, Page C-10 and identify if that is an access gate. Mrs. Schnell said it is and that it is 16 feet wide without the posts. Mr. Silver asked if she felt that they would need a shoulder on that 20 foot easement access road, having visited the site. Mrs. Schnell said she doesn't build shoulders, she makes sure the road is crowned and that there is sufficient drainage on either side to take the water away from the road. Since portions of the road naturally fall away from the road, they may not need

ditches. When asked if she would need the full 20 feet, Mrs. Schnell said she was not sure, she would have to wait until they began construction. Art Neuberger said that there seems to be a lot of talk about fire trucks and he asked Mrs. Schnell how many fires she has had at any of the sites she has worked on. Mrs. Schnell replied that she has never had any fires.

Mr. Pokela referenced Exhibit M for measurements of fire apparatus per the International Fire Agency. Nathan Miller objected to this submission, not being familiar with this agency. Ted Silver moved not to accept this as evidence. Dekka Tate seconded. The vote was:

Art Neuberger - Nay

Joe H. Perry - Nay

Ted Silver - Aye

Dekka Tate - Aye

Fred Schmitt - Nay. The motion carried by majority and the document was allowed to be submitted as evidence.

Mr. Pokela had another submission, Exhibit N, NC's 911 Board statistics with an affidavit from Avery County's Jamey Johnson. Mr. Johnson is Director for Avery County's 911 Communications and could not be present at the hearing. Exhibit N shows that in 2015, 74.4 % of 911 calls were wireless. There was a subpoena issued for Mr. Johnson, but he expressed that he had football practice and could not appear, so an affidavit was issued by Mr. Johnson in lieu of his testimony. The affidavit was Exhibit O.

Mr. Pokela called his last witness, Michael Berkowitz. Mr. Berkowitz was sworn in by Chairman Schmitt. Mr. Pokela asked Mr. Berkowitz to identify himself to the Board. Mr. Berkowitz gave his address as 1100 Sundance Drive, Concord, NC. Mr. Berkowitz is an independent contractor and does work for JT Harris & Associates. Mr. Berkowitz testified that he is a Senior Appraiser at JT Harris and has a degree in Economics from Duke and that he is a certified general appraiser and has been an expert real estate appraiser in North Carolina since 2003. Mr. Berkowitz testified before this Board in 2013 as to the impact of the cell tower on a property that is already impacted by utility infrastructure. Reiterating again that the cell tower would not make a large impact considering the substation and high tension wires already in place on and near the Hall property. Mr. Pokela asked Mr. Berkowitz to look at two things. First, would the granting of the variance change the use of the property and second, will the granting of the variance directly damage property values in the surrounding area. Mr. Berkowitz issued a letter, Applicant Exhibit R, providing his professional opinion as an addendum to his previous report issued in 2013 on the same subject matter. Applicant Exhibit S is an update version of the report. Mr. Berkowitz's opinion is that the use of the property will not change based on the volume of traffic currently on the access road and the proposed volume that will take place if the tower is built.

Mr. Miller cross-examined Mr. Berkowitz as to his testimony. Landscaping and comparable property values were part of the testimony given. Mr. Berkowitz testified that he used The Reserve on Sugar Mountain because it was the only one that provided enough information to give him the comps he needed. As for the remainder of the testimony there were a few discrepancies compared to the data provided by the witness.

Ted Silver asked about the current use of utilities on the property with the addition of the one cell tower. Deka Tate asked about the height of the power lines and Mr. Berkowitz answered that typically they are 50-60 feet high. Ms. Tate asked if Mr. Berkowitz really believed the tower would not affect the property values of those in Silver Springs. Mr. Berkowitz gave Ms. Tate an explanation of how he arrives at the computation of values on property and what factors he uses based on the market.

Mr. Pokela pointed out that Mr. Berkowitz had a fairly simple task of appraising the use of the road and the easement and not the entire Hall property. Mr. Berkowitz agreed stating that the opinion he gave on the cell tower proposal on the Hall property was a testimony he gave three (3) years ago and had not anticipated on giving it tonight. Mr. Berkowitz confirmed that the use of the 20 foot easement and access road would not diminish property values on the surrounding properties. Mr. Pokela pointed out that the survey on page 32 of 54 was a survey included in this report by mistake. Additionally, page 43 of 54, the diagram of the plantings is just a general representation of general locations of plants and not an exact location of every bush and tree.

Mr. Pokela recalled Mrs. Schnell for one last question. Asking her to turn to Exhibit D, Page L-1. Mr. Pokela asked her if in her construction role, is she familiar with these landscaping plans? She was asked for the difference in the planting schedule and the actual diagram? Mrs. Schnell replied yes, the difference is that the diagram is a representation of locations where a large tree and/or smaller bushes should be placed on the property. Whereas, the correct information for the type and quantity is always found in the schedule.

At this time the Applicant rested.

Mr. Miller called his first witness, William Stevenson. Mr. Stevenson was sworn in by Chairman Schmitt. Mr. Stevenson stated for the record that he lives at 314A Silver Springs Farm Drive, Banner Elk. Mr. Miller asked Mr. Stevenson to provide a little information about the video represented in Exhibit U. Mr. Stevenson said it was an aerial video of Silver Springs Farm and the Halls' property. Mr. Miller wanted to show the video on the big screen but Mr. Pokela asked some questions before it could be shown. Mr. Stevenson answered that the video was shot 5 weeks before the hearing and it was prepared by Jordan Nelson of Nelson Aerial's. As Mr. Nelson was not present to testify to the video or any other justification that it was taken at that time, Mr. Pokela objected to the video being hearsay. The Board did not allow the video to be seen.

The next line of questioning had to do with when zoning was established in Banner Elk, including the Extraterritorial Jurisdiction (ETJ). Mr. Pokela objected to the fact that the information came from Ms. Buchanan. Mr. Eggers said that since Ms. Buchanan is a party to these procedures, then this testimony should be allowed. Mr. Stevenson was allowed to repeat the information given to him by Ms. Buchanan. Mr. Stevenson then tried to testify to a letter written by a Mr. Al Dundun from AT&T, but objections to his testimony of this letter without Mr. Al Dundun's presence was not acceptable. Mr. Miller then asked Mr. Stevenson to present a picture he had taken of other towers in the area. Mr. Stevenson testified that he took the pictures and then proceeded to talk about the different types of technology that was being used in the area. Objections to the fact that he is not an engineer or expert in that field and was not able to testify with competence were made and the pictures were not used as evidence.

A cross-examination by Mr. Pokela asked Mr. Stevenson about his profession. Mr. Stevenson said he is a retired school principal. Mr. Pokela asked if Mr. Stevenson had any experience with building roads, to which he replied no.

At this point, the BOA took a second 10 minute break at 10:33 pm. The meeting went back into session at 10:43 pm.

Mr. Miller reviewed that Intervener's Exhibit D and E will not be tendered as evidence. Intervener's Exhibit C is the 1973 ETJ Map was tendered into evidence. Intervener's Exhibit B is a video commissioned by Mr. Stevenson and was not tendered as evidence. Intervener Exhibit A is the Banner Elk Subdivision Ordinance and was tendered. Mr. Miller stated that the Intervener rests.

Ms. Buchanan had a final testimony. She clarified the mapping procedures and adoption of the ETJ map in 1973. Additionally she spoke about the floodplain area on the Carender's property and the fact that the maps had changed during that time. Ms. Buchanan said she had been in conversation with someone with American Towers about the need to reexamine the durability of the culvert crossing to ensure that a flood would not wash it away and she wanted this noted for the record and to potentially make this a condition. Lastly, she refuted Mr. Stevenson's testimony that Mr. Al Dundun was present at the hearing in 2013, that he testified and that it was recorded in those minutes. Ms. Buchanan said that the variance application applies to the property today and the date of the ETJ maps are irrelevant.

Mr. Miller verified that the ETJ map was in place before the property was purchased in 1981. Therefore, the Halls were under zoning when they bought the property.

Chairman Schmitt asked if there were any third party persons in attendance that wished to testify. A sign-up list was presented to the Chairman and those

who wished to speak were sworn in one at a time as they were called. Attorney Eggers informed those who wished to speak that their comments should be kept to the application for a variance for the road easement restriction. These are listed in the order they spoke:

1. Mr. William Stevenson of 314A Silver Springs Drive reviewed the variance procedures with the Board, stating that all these items in the procedures have not been proven. With an objection to a legal conclusion by Mr. Pokela, Mr. Stevenson stated that he was concerned that he could not speak as he wanted to about this case, he thought that was what the public session was for. Attorney Eggers again reiterated that the BOA is bound by rules just as the courts in North Carolina are and cannot deviate from them.

2. Mr. Carroll Berkley of 241 A Silver Springs Drive spoke about the testimony on the 911 calls by Jamey Johnson stating that the information was irrelevant. He testified that a traffic engineer would need to provide the information as well as Skyline, Skybest, and AT&T. Mr. Berkley gave his credentials and expertise from his past work record that allowed him to speak to this topic. Mr. Pokela asked him to look at the App Exhibit O and asked if he knows Jamey Johnson. Is his testimony not truthful? Answered no. Mr. Pokela asked him to turn to N, and asked if he was familiar with the 911 Board; which annually publishes statistics from wireless phones. Mr. Berkley answered yes and had nothing further to share.

3. Beverly Payne, lives at 220A Silver Springs Drive. She owns property that is adjacent to the Halls as well as a trustee of 34 properties that are being evaluated in Silver Springs as of the time of George Meyer's death. Mrs. Payne stated she was just concerned about property values. Ms. Payne's testimony was stricken due to the fact that she is not an expert in property values.

4. Mike Bruce Halus, of 220A Silver Springs Drive wanted to address the granting of the ordinance based on the safety and welfare of the public and that justice is received. Mr. Halus read the petition that was presented to the BOA in 2013. Mr. Halus said he had 44 signatures. Mr. Pokela objected that there are 44 people he has no chance to cross-examine. The petition was not accepted by the Board.

5. Duane Schell, lives at 372 Silver Springs Road. Mr. Schell said that he has gotten lost in a lot of the details of the variance but he is concerned about the increased use of the road.

Opportunities for rebuttal evidence from the Applicant, Intervener or Town Staff. None was presented.

Town Staff Cheryl Buchanan declined to give a closing statement. Intervener's Attorney, Mr. Miller, reviewed the opposition's previous mistakes and those the BOA has made and the need to go to court twice. Mr. Miller reviewed the costs everyone has been burdened with. Mr. Miller said he didn't have to prove

anything, the burden is on American Towers. Mr. Miller's argument was that the Board must find all four things of the variance requirements in order to pass this request for this application to prevail and he feels they cannot do that. Mr. Miller's arguments were:

1. The Halls do not have a hardship and have used their property for Christmas Trees all these years. A non-inhabitable building cannot be allowed and just because they want to do it doesn't make it ok.
2. Hardship as to the nature of the property such as location, size and topography. Mr. Miller argued the property is not land-locked and has been served by a private right-of-way for many years. This is why the zoning matters, since they had the zoning when they bought it and used it with the 20 foot r-o-w for 35 years. Many people in Banner Elk live on a private r-o-w and have the same peculiar situation. Final point is this is a self-created hardship.
3. Consistency with the spirit of the ordinance is not relevant to the 20 foot easement and Mr. Miller said the NC State Fire Code requires a 20 foot road, not an easement. The issue is road way versus right-of-way. It is impossible to have a 20 foot road within a 20 foot r-o-w.
4. The last point is about security and the 911 calls. It's not about 911 calls. It's about the variance and this road. You cannot predict the future and that's why we plan. Things happen. There needs to be a way for emergency vehicles to show up. The State Fire Code doesn't apply in this circumstance. The Fire Code's requirement is a 20 ft. road, not a right-of-way. Mr. Miller argued that 20 ft. may not be enough room, they may need more room to maneuver. Mr. Miller said it all boils down to roadway versus right-of-way. Ditches must be in the right-of-way to have proper drainage. Mountain Electric Co-op (MEC) has their right-of-way, which is 75 ft. How they access the Hall property is their problem and if they are trespassing, then they are trespassing. In Tab D, C-1, the applicant argues that a 12 ft. right-of-way is ok, but the engineers have drawn a 30 ft. right-of-way on the plans.

Mr. Pokela reviewed the evidence as it relates to the application in his closing statement. First, unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that in the absence of a variance a reasonable use can be made of the property. The unnecessary hardship was proven, but the ordinance says nothing about a strict hardship. When Section 305 is applied which prohibits any structures or buildings, unless there is a 25 foot easement, gives the meaning that the Hall property can only be used as a Christmas Tree Farm, or gardening, or to have picnics, which is an exception. The Halls cannot even have a lean-to for their trees. Mr. Pokela pointed out that this is a peculiar exception such that a single family dwelling could be erected without the 25 foot easement if recorded before a certain time. As to the easement, Mr. Hall did not argue for a 20 foot easement, the property was landlocked at the time they bought it and the easement came with the property. The survey, the plat, the deed, and the easement agreement are all in evidence which shows where the unnecessary hardship arises.



Second, the hardship results from conditions that are peculiar to the property, such as locations, 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 a basis for granting a variance. It does not touch a public road, which makes it landlocked. There was no evidence that there are properties in this community that are landlocked and are served by 25 foot easements. Mr. Stevenson was asked if he knew of any and he said he had not concentrated on that. Ms. Buchanan was asked and she didn't testify that this was common here. So, despite the testimony, there is no argument that this is something that is common here.

Third, 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. Mr. Pokela pointed out that it was not Mr. Hall's fault that the property he purchased in 1981 did not have a 25 foot easement. Mr. Miller has argued that Mr. Hall bought this property in 1981 with an easement that doesn't allow structures or easements but didn't ask for the 5 extra feet. Section 305 and 160A-388 covers this issue in the plainest of terms. The act of purchasing property with the knowledge that conditions exist that the granting of a variance shall not be determined as creating a self-created hardship. That's what the general assembly was doing when it came up with this legislation so that when a situation arises like this, a variance can be granted.

Lastly, the requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved. An exception is noted in Section 305, if you have a platted r-o-w before that time, and you have one dwelling unit, well you're ok. We're going to allow a house with residents and where there might be some risk to emergency vehicles, well that's ok. Then it is in the intent and spirit of this ordinance to allow a variance for an uninhabitable structure, such as a cell tower with a simple maintenance structure. There is nothing that is inconsistent with your ordinance by allowing a variance in this situation. The Fire Code allows for a 20 foot easement and the testimony that you heard allows for 20 feet as per the lay of the land. First, it is not the Interveners point to raise, and second, in NC it is an established case that a property owner that has an easement has the right to enjoy that easement to the fullest.

Attorney Eggers reviewed the process the Board would follow in order to find the findings of fact and conclusion of law in order to vote on each item. As to Section 1109.3.A, Art Neuberger moved that the applicant has demonstrated sufficient evidence that an unnecessary hardship would occur as a result of carrying out the strictest letter of the ordinance with a second from Joe H. Perry. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye

Fred Schmitt – Aye. The motion carried unanimously.

As to Section 1109.3.B, Ted Silver moved that the applicant has demonstrated that the hardship results from conditions that are peculiar to the property. Art Neuberger seconded. The vote was:

Art Neuberger - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt – Aye. The motion carried unanimously.

As to Section 1109.3.C, Art Neuberger moved that the applicant provided sufficient evidence to demonstrate that the hardship is not a self-created hardship. Joe H. Perry seconded. The vote was:

Art Neuberger - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt – Aye. The motion carried unanimously.

As to Section 1109.3.D, Joe H. Perry moved that the applicant provided sufficient evidence to demonstrate that the requested variance is consistent with the spirit, purpose, and intent of the ordinance, with a second from Deka Tate. The vote was:

Art Neuberger - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt – Aye. The motion carried unanimously.

Attorney Eggers said it would be appropriate to consider any conditions that may be necessary.

Art Neuberger motioned that the conditions previously considered with the CUP are intact and are being considered as a whole in this hearing. Joe H. Perry seconded. The vote was:

Art Neuberger - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt – Aye. The motion carried unanimously.

During the hearing the Zoning Administrator testified that a portion of this road easement is in a flood plain and that special measures may be needed to

ensure that the road and culvert remain intact should a flooding event occur. Fred Schmitt moved to add this condition to the existing conditions. Dekka Tate seconded. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Fred Schmitt - Aye. The motion carried unanimously.

Joe H. Perry moved to grant the variance. Dekka Tate seconded. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Fred Schmitt - Aye. The motion carried unanimously.

Art Neuberger motioned that the application for the variance is complete. Joe H. Perry seconded. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Fred Schmitt - Aye. The motion carried unanimously.

Joe H. Perry moved that the application complies with the Banner Elk Zoning and Telecommunication Ordinances. Fred Schmitt seconded. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Fred Schmitt - Aye. The motion carried unanimously.

With no additional conditions, Fred Schmitt moved to grant the Conditional Use Permit. Joe H. Perry seconded. The vote was:

Art Neuberger - Aye  
Joe H. Perry - Aye  
Ted Silver - Aye  
Deka Tate - Aye  
Fred Schmitt - Aye. The motion carried unanimously.

Nathan Miller moved for a new trial based on the comments by the Board Members that they already had their minds made up before the hearing. Attorney Eggers suggested that the Chairman poll the members to see if they

were open minded coming into the hearing and did not have any preconceived notions beforehand. The poll was:

Art Neuberger: No preconceived notion, was open minded.

Joe H. Perry: No preconceived notions, was open minded.

Fred Schmitt: No preconceived notions, was open minded.

Deka Tate: No preconceived notions, was open minded.

Ted Silver: No preconceived notions, was open minded.

Art Neuberger moved to deny the new trial based on the broad statement and the nature of the motion. Joe H. Perry seconded. The vote was:

Art Neuberger - Aye

Joe H. Perry - Aye

Ted Silver - Aye

Deka Tate - Aye

Fred Schmitt - Aye. The motion carried unanimously.

Attorney Eggers said that the Zoning Administrator would be working with his office to prepare the documents within 30 days.

Deka Tate moved to adjourn. Ted Silver seconded. The vote was unanimous and the meeting came to a close at 12:40 am.

Respectfully submitted,

Cheryl Buchanan,  
Zoning Administrator, Town of Banner Elk