

BANNER ELK BOARD OF ADJUSTMENT
WEDNESDAY, 03/06/2019
MINUTES

Members Present: Morgan Herdklotz, Fred Schmitt, Ted Silver, Deka Tate, David Tate

Staff Present: Town Manager Rick Owen, Zoning Administrator Cheryl Buchanan, Town Attorney Representative Josh Coffey, Police Chief Kevin Hodges

Chairman Fred Schmitt called the meeting to order at 6:00pm. Chairman Schmitt asked everyone present to stand and join in the pledge of allegiance to the flag. Chairman Schmitt welcomed two new members, Morgan Herdklotz and David Tate. Morgan Herdklotz is an ETJ member replacing Joe H. Perry and David Tate is an in-town alternate. Both have been confirmed by the appropriate boards.

Consideration of the October 15, 2018 Minutes

With no changes to the minutes, Ted Silver moved to approve the minutes as submitted. Deka Tate seconded. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a majority vote.

It should be noted that a court reporter was present for the hearing and can provide a detailed account of the testimony given at the hearing as the meeting was six and a half (6.5) hours long. For the minutes for this meeting, they have been kept brief to cover the just of conversations.

Hearing for Appeal of the Zoning Administrator's Decision #0215-1 Timing of a Permit

Chairman Schmitt opened hearing #0215-1 with an introduction of procedures for the quasi-judicial hearing for William Stevenson vs. Banner Elk Zoning Administrator. Chairman Fred Schmitt noted that although Mr. Ollis was absent, there was a quorum and majority present to hear the application. All Board of Adjustment (BOA) members present were seated with no objections. Chairman Schmitt read some statements on procedure for this hearing.

Chairman Schmitt opened the quasi-judicial procedure on an appeal by William Stevenson from the ruling of the Zoning Administrator issued on January 14, 2019, which ordered that the conditional use permit granted to

American Towers, LLC, Roderick Hall and Thomas B. Hall remain in effect. At this point in the proceedings, Chairman Schmitt asked if there were any Board members who could not be impartial to the proceedings. DeKa Tate stated that she had been informed that her son, Town Manager Rick Owen had been subpoenaed for the meeting. Mrs. Tate was excused and replaced by in-town alternate David Tate. Mr. Nathan Miller, attorney representing the Appellant, William Stevenson, was asked if he had any objections to David Tate replacing DeKa Tate or with any others on the Board. Mr. Miller stated he had none.

Mr. Pokela, attorney representing American Towers, LLC was then asked if he had any objections to the members participating in this hearing, to which he replied no. Mr. Pokela stated that he had been invited to this hearing but had not been made a party to the case. Mr. Pokela motioned to intervene and provided copies of record to Mr. Miller and the Chairman. Under NCGS §160A-393(d)(1), whereby as a lessee and holder of the permit giving American Towers interest in the property which in turn gives them standing. Attached to the motion is a copulation of the permit itself along with the documents related to the issuance of the permit, lease hold documents and in support of that, Mr. Pokela would call Miss Hill as a witness to establish standing. Nathan Miller said he would not object to Mr. Pokela having standing and did not think all this was necessary. Mr. Miller stipulated to American Towers' standing. Mr. Miller said before they get into anything substantive, he would like to know if there's going to be a full board. Chairman Schmitt said it appears that there will only be four members tonight and Mr. Miller can choose to proceed or not proceed. Mr. Miller acknowledged that he was ready to proceed. Mr. Pokela was confirmed as an Intervener and that he has standing. Mr. Pokela asked for an official action on this point. Motion by Ted Silver to recognize that Mr. Pokela, on behalf of American Towers, LLC and Roderick and Thomas Hall, have established standing and can participate as an Intervener. Second by David Tate. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a majority vote.

Opening of the Hearing

The hearing opened at 6:14pm. Chairman Schmitt presented his expected procedures for how the remainder of the hearing would go, beginning with Mr. Miller, as attorney for the Appellant, allowing 10 minutes for each side to present.

Mr. Miller began with a synopsis of where the cell tower case is today. Mr. Miller reviewed the conditional use permit (CUP) and those whose signatures can be found on the permit dated August 2018. Mr. Schmitt as the Chairman of the Board of Adjustment (BOA) and Cheryl Buchanan as Clerk for the BOA. Mr. Miller referred to the last paragraph (#5) of the CUP as, "The applicant

shall comply with all conditions and requirements of the Ordinances of the Town of Banner Elk.” The CUP was appealed to the Superior Court in Watauga County and Attorney Eggers served the parties with the Judge’s ruling in June 2018. Mr. Miller states that the timing of the permit begins then. Mr. Miller indicates that this date is important because Section 1110(4)(c) allows that a zoning permit shall be issued within six (6) months of approval. Mr. Miller contends that the Zoning Administrator did not issue the zoning permit or the certificate of compliance before the six (6) months was up. Additionally, Mr. Miller states that NCGS § 160A-385.1 allows for a two (2) year vested right conditioned upon the permit holder following the terms and conditions of the approval or the zoning ordinance. Mr. Miller’s argument is that since the zoning permit was not issued by the end of the six (6) months, the permit is void.

Ms. Buchanan’s opening statement begins with a review of the same statute, as referenced in the Banner Elk Zoning Ordinance under Section 107, Time Limit of Permits and Applications, NCGS § 160A-385.1 (d) (6), which reads, *“A right which has been vested as provided in this section shall terminate at the end of the applicable vesting period with respect to buildings and uses for which no valid building permit applications have been filed.”* Ms. Buchanan also drew attention to Section 6(b) of the Banner Elk Telecommunications Ordinance which allows for a zoning permit to be granted for a tower within twelve (12) months.

Due to the appearance that these regulations conflict, Ms. Buchanan looked to Section 104, Conflicting Regulations, of the Banner Elk Zoning Ordinance, which reads: *“In interpreting and applying the provisions of this Ordinance, they shall be held to be the minimum requirements for the promotion of the health, safety, morals and general welfare of the Town of Banner Elk, N.C. It is not intended to interfere with or abrogate or annul other rules, regulations or ordinances of the Town, or any easements, covenants or other agreements between parties. However, if the requirements of this Ordinance are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances of the Town, or with easements, covenants or agreements between parties, the more restrictive or that imposing the higher standards shall govern.”* Ms. Buchanan contends that it is her opinion that the state statute is the higher standard and that American Towers has earned a vested right based upon the approval of the CUP for a site specific development plan and they have two (2) years under this vested right with the option to request an additional three (3) years before it expires.

Mr. Pokela opened with discussion of the NCGS § 160A-385.1 on vested rights and stated that the Appellant has agreed with the vested right, that he will cover other sections of the statute. Mr. Pokela stated that he agrees with a lot of what Ms. Buchanan said and further spoke about a section of this statute that says that a town cannot cause conditions whereby the applicant waives his vested right. Mr. Pokela believes that forcing the applicant to obtain a permit within six (6) months would be in violation of the applicant’s vested

right. Second, Mr. Pokela plans to prove a common law vested right related to expenses of the project and dealing with government agencies over complaints made by Mr. Stevenson. Lastly, Mr. Pokela will present evidence to support equitable tolling, which is used to calculate time accrued on a permit. Mr. Pokela referred to the letter written by Town Attorney Stacy C. Eggers, IV on behalf of Ms. Buchanan using the *Sandy Mush* case and how that relates to this hearing.

Chairman Schmitt reviewed the contents of the agenda packet prepared by Cheryl Buchanan and asked Mr. Miller and Mr. Pokela if they had any objections to the material. None were noted by either Counsel. Chairman Schmitt informed those in attendance that it was time to present evidence and called the Appellant, Mr. Stevenson and his representative, Mr. Miller to be first.

Nathan Miller called Rick Owen to testify. Mr. Owen was sworn in by Chairman Schmitt. Mr. Owen is the Town Manager of Banner Elk and has worked for the Town for eight (8) years. Mr. Owen has also served as an elected official for 22 years and supervises the Zoning Administrator, Ms. Buchanan.

Mr. Miller was asked if he had another witness to which he called Ms. Buchanan. Ms. Buchanan was called and sworn in. Ms. Buchanan works for the Town of Banner Elk in the capacity of Zoning Administrator and has worked there for 19 years.

At this point, Mr. Miller calls Mr. Stevenson to the stand. Chairman Schmitt announced that the BOA would take a 10 minute break. The BOA reconvened at 8:30 pm.

Upon return, Mr. Miller calls McNair Turnow instead. Mr. Turnow was sworn in and testified that he is an Attorney in Banner Elk. Mr. Turnow is also on the Lees McRae College's (LMC) Board of Trustees and serves currently in the capacity of Chairman. It should be noted that LMC holds a 35% interest in the adjoining property to the Halls, referred to as the Carender property. It should be noted that although Mr. Turnow has never visited the property he is answering questions to, he testified that he has seen pictures.

Dave Pokela objected to the subject of standing. There was a lengthy discussion about standing and Mr. Miller moved for a mistrial on the issue of standing. A motion for mistrial was entertained by Chairman Schmitt with a second by Ted Silver. The Board voted as such:

Fred Schmitt: Nay

Morgan Herdklotz: Nay

Ted Silver: Nay

David Tate: Nay

The vote for a mistrial was denied by a majority.

Mr. Pokela moved to dismiss on the issue of standing. Arguments between attorneys were heard by the Board. Ted Silver moved to deny the objection regarding the acceptance of the appeal notice for failure to state damages as an element necessary for that appeal notice to be filed and accepted. Second by David Tate. The vote was:

Fred Schmitt: Aye

Morgan Herdclotz: Aye

Ted Silver: Aye

David Tate: Aye

The vote to deny Mr. Pokela's objection to dismiss was upheld by a majority.

Mr. Miller called William Stevenson to testify. Mr. Stevenson was sworn in by Chairman Schmitt. Mr. Stevenson resides on the adjoining property to the Halls, in a subdivision named Silver Springs. Mr. Stevenson has been there for about eight (8) years. Mr. Stevenson testified to suffering special damages as a result of this case and the time, stress and money he has spent in order to argue against American Towers and the Town of Banner Elk.

Ms. Buchanan cross examined to the application of the Telecommunications Tower Ordinance's requirement for obtaining the zoning permit. In Mr. Pokela's cross examination, he had Mr. Stevenson testify to the cause of his damages being related to the court cases and not to the actual tower itself.

At this time, 10:28 pm, Chairman Schmitt declared the Board would take a 10 minute break. The meeting reconvened at 10:39 pm.

Mr. Miller called David Andrews as a witness. Mr. Andrews was sworn in by Chairman Schmitt. Mr. Andrews told the Board that he is a lawyer licensed to practice in the State of California and that he has been interested in purchasing the Carender property. Mr. Andrews stated during testimony that he is no longer interested in purchasing that property due to the Town of Banner Elk not enforcing its zoning ordinances and the potential for a cell tower on the adjoining property.

No questions by Ms. Buchanan. Mr. Pokela's cross examination clarified that Mr. Andrews is looking to purchase the Carender property and not the Stevenson property. Mr. Silver asked Mr. Andrews about his awareness of the zoning on the property and his mention of possible home sites. Mr. Andrews confirmed he only wanted it for personal use. Mr. Silver asked about his knowledge of zoning ordinances and where there had been any other instances where the Town of Banner Elk had been negligent in enforcing their ordinances. Mr. Andrews could not admit to being aware of any.

Mr. Miller called Geoff Graham. Mr. Graham was sworn in by Chairman Schmitt. Mr. Graham works for Appalachian State University (ASU), more specifically in the Development office. Mr. Graham stated that ASU has a 35%

interest in the Carender property. Mr. Graham testified to ASU's interest and concern with the lack of sale of the property and how it will affect scholarships set up by the Carender sisters. Mr. Graham was asked about his opinion as to how the cell tower will affect this property. Ms. Buchanan's cross examination consisted of asking about the state of the exiting road that is in the right-of-way and the proposed improvements that are part of the CUP. Mr. Graham said he was not aware of all that. Mr. Pokela's cross examination asked about Mr. Graham's basis of the amount of traffic that would be going across the road. Mr. Graham stated that he had heard it was bad. Mr. Pokela asked if he had personal knowledge to which Mr. Graham said no. Mr. Pokela confirmed that the road that was being referred to was across the Carender property and not the Stevenson property. Mr. Graham's response was that was correct. Mr. Silver questioned Mr. Graham on his knowledge about the road, traffic flow and the existing easement.

Mr. Miller called Jon Kokos. Mr. Kokos was sworn in by Chairman Schmitt. Mr. Kokos lives in Silver Springs Subdivision and works for Lees-McRae College as Vice President of Finance and Business Affairs/CFO and Treasurer of Finance and Business Affairs. Mr. Kokos testified that he bought his property at a discounted price because of the pending cell tower case. Mr. Kokos testified about his opinion on the cell towers affect to the marketability of property. No question from Ms. Buchanan. No questions by Mr. Pokela. Mr. Silver asked Mr. Kokos about his prior knowledge of the tower when he was buying his property. Mr. Kokos said that he had prior knowledge and was told that it had been ongoing for some time, but if it hadn't been built in five (5) to six (6) years it probably wouldn't be and the knowledge was used as leverage in negotiating the price of his property.

Mr. Miller called Jack Sparks to testify. Mr. Sparks was sworn in by Chairman Schmitt. Mr. Sparks resides in Silver Springs Subdivision part time and identified where he is in relation to Mr. Stevenson's property. Mr. Sparks testified to being pleased with the high tension wires and the substation being located on or near the Hall property. Mr. Sparks testified to his opinion to the cell tower and the affects it has on his property values. Mr. Sparks stated that if he had known about the possibility of a cell tower he would not have bought the property. Ms. Buchanan had no questions for Mr. Sparks. Mr. Pokela asked about the process of choosing Petra Weisaupt-Smith as Intervener to represent Silver Springs. Ted Silver asked if it would be fair to say that everyone is not happy with the power lines that run through the Hall property. Mr. Sparks said that would be fair.

Mr. Miller asked if he could discuss a matter with Mr. Stevenson in private. Chairman Schmitt stated that it is 11:42 pm and gave Mr. Miller five (5) minutes. The Board reconvened at 11:46 pm.

Mr. Miller stated he did not wish to call any more witness at this time. Chairman Schmitt asked if he was resting on the issue of standing. Mr. Miller said he wanted to make sure that he had introduced all his exhibit A1-6. All

exhibits were accounted for. Chairman Schmitt asked Mr. Miller if he would be presenting any more evidence on just to the matter of standing. Mr. Miller said he was resting on both the issue of standing and his case in chief for his appeal. Mr. Pokela said he had no witnesses at this time but plans to move to dismiss due to Mr. Stevenson's lack of standing. Chairman Schmitt informed Mr. Miller that he would have the opportunity to give closing statements after all evidence had been presented.

Mr. Pokela said he has two boxes of evidence and witnesses to call and will need four (4) or five (5) hours to finish if his motion to dismiss is not approved. Mr. Pokela made his motion to dismiss due to Mr. Stevenson's lack of standing and said he would like to dismiss based on specific damages and lack of standing based on the *Cherry v. Wiesner* case. Mr. Pokela argued why Mr. Stevenson did not have standing. Mr. Pokela read some excerpts of the *Cherry v. Weisner* case and how it relates to the case before the board. Mr. Miller then argued why Mr. Stevenson has standing in this case. Mr. Miller argued against Mr. Pokela's motion on the basis of the ruling by the Judge in 2013 to the issue of standing. The board members then discussed the issue of standing. As Chairman Schmitt called for a vote on the motion to dismiss, per Mr. Pokela's request, the results were:

Fred Schmitt: Nay

Morgan Herdklotz: Nay

Ted Silver: Nay

David Tate: Nay

The vote to deny Mr. Pokela's motion to dismiss due to lack of standing was confirmed by majority.

Chairman Schmitt said his intentions were to convene this hearing and continue it until another time that all parties can attend. Ms. Buchanan asked Mr. Coffey if this will need to be advertised and he said he would prefer that it be advertised. The date set was March 25th at 6:00 pm at this same location. All were in agreement. With no further business, the meeting will be continued to March 25, 2019 at 6:00 pm at the Banner Elk Town Hall.

Respectfully submitted,

Cheryl Buchanan
Zoning Administrator, Town of Banner Elk

