

BANNER ELK BOARD OF ADJUSTMENT
MONDAY, 03/15/2021
MINUTES

Members Present: Morgan Herdklotz, Fred Schmitt, Ted Silver, Deka Tate, and in-town alternate David Tate

Staff Present: Zoning Administrator Cheryl Buchanan, Town Attorney Stacy Eggers, IV, Town Manager Rick Owen

Others Present: Matt and Penny Bagley, Jim Frye, Royal Hinshaw

Chairman Fred Schmitt called the meeting to order at 6:00 p.m. Chairman Schmitt asked everyone present to stand and join in the pledge of allegiance to the flag.

David Tate was seated for the first request since he sat on the Board when the initial request was reviewed.

Consideration of the January 2021 Minutes

With no changes noted, Ted Silver moved to approve the minutes as submitted. Morgan Herdklotz seconded. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a 4-0 vote.

Consideration of Switching the Order of the Agenda

Chairman Schmitt said that one of the applicants asked about switching the agenda. Chairman Schmitt said it was a published agenda and that it should be followed as posted, but that it was up for discussion with the Board. After a short discussion, Fred Schmitt motioned to keep the agenda as stated. Ted Silver seconded. The vote was 4-0 and the motion carried.

SUP Request for Trax Recreation Park - Continued

Chairman Schmitt stated that this meeting is a continuation of the November 2020 Board of Adjustment hearing. Before opening the hearing, Chairman Schmitt reviewed the requirements for the board members to be seated. Chairman Schmitt stated that this meeting is a quasi-judicial proceeding,

much like a court proceeding, in which one's individual's rights are being determined. Witnesses will be sworn in for testimony. The Chairman asked if there were any board members present that could not be impartial or who had received information outside of this hearing. None were noted and the hearing proceeded. All was in order and the hearing began. Cheryl Buchanan and Jim Frye were both administered an oath before testifying.

Chairman Schmitt asked the Zoning Administrator Cheryl Buchanan to go over the order issued by the Board for this meeting. Ms. Buchanan read the order listing the 8 items that were required by the BOA for the subsequent meeting. The items were:

1. Provide input from NCDOT, either by guidance or as a driveway connection permit, on the affect of this project on traffic patterns on the Beech Mountain Parkway, including ingress and egress locations.
2. Provide a detailed site plan drawn to scale, including location of buildings, walkways, the track, gem mining, parking, greenspace, and stream.
3. Provide a signed letter from the owner designating Mr. Frye as an agent to speak on his behalf.
4. Provide details as to disposal of trash and any food service available, including any requirements from Avery County Health Department on food service options for this site.
5. Address lighting fixtures in accordance with the Banner Elk Zoning Code.
6. Address color of parapet roof and any other aesthetic changes to be undertaken on the property.
7. Provide information specifying the use of electric cars, not gas-powered cars, only, as well as days and hours of proposed operation.
8. Provide information as to any noise generated by the site, including but not limited to any Public Address System or amplification.

In the packet provided to the Board in January there proved to be sufficient information to meet the required items in the order issued in November 2020. Per Mr. Frye, NCDOT asked that the southern entrance be used by the public and the northern entrance be closed and used only for employees, construction, and delivery vehicles.

Ted Silver asked about handicap parking, where they would be located and how many. Attorney Eggers stated that this is a building code requirement and is not under the authority of this Board. Ms. Buchanan told the Board that the current lighting belongs to Mountain Electric and it is not connected. If lighting is used in the future, Mr. Frye would need approval from the town to make sure he would comply with the ordinance requirements. Mr. Frye is not currently requesting any lighting. Mr. Frye was asked about hours of operation and posting them where the public could see them as well as regulations

stating that no gas-powered vehicles, no drones, or any flying objects could be used on the property. The hours of operation were discussed with the Board reaching a census of 8am to 8pm 7 days a week.

Ted Silver asked about the use of a bull horn or public addressing system. Mr. Frye said he did not intent to have a public address system but might consider using a bull horn during a special event. Ms. Buchanan interjected that the town had a permitting process for special events and Mr. Frye could apply for that when the time comes.

Chairman Schmitt asked if Ms. Buchanan had a closing statement. Ms. Buchanan replied that she believes that Mr. Frye has demonstrated his willingness to be in compliance with not only the Zoning Ordinance but any additional requirements requested from the Board and that she finds him in compliance and in harmony with the intent of the Ordinance. Mr. Frye thanked the Board for their time and he is ready to get started.

Chairman Schmitt closed the evidentiary portion of the meeting and opened the floor for discussion. Chairman Schmitt asked Attorney Eggers to review the steps needed for the Board to be able to vote on this request.

Chairman Schmitt asked for a motion that the application was complete. Motion by Ted Silver that the application is found complete. Second by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a 4-0 vote.

The next action was Chairman Schmitt to read Section 307 and asked the Board to discuss possible conditions that may be considered for this application. Ted Silver motion for the first condition requires the applicant to allow only battery-operated toys on site and to include no drones or other flying toys, battery operated or otherwise. Second by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a 4-0 vote.

Ted Silver motioned that the second condition is that the food items listed in the letter from Toe River Heath District, dated December 2020, are the only

items that can be sold on site. Seconded by David Tate. During discussion, Jim Frye asked about the use of a food truck. Attorney Eggers said that is a different issue addressed in the Zoning Ordinance and would not apply here. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a 4-0 vote.

A motion by Ted Silver that the hours of operation be established as no earlier than 8:00 am no later than 8:00 pm; seven (7) days a week. Seconded by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried.

Ted Silver motioned that the application complies with the Banner Elk Zoning Ordinance and specifically in regard to Section 307, Mr. Silver finds that the application is in harmony with the community, not of the nature of a racetrack with noise or health issues, there's no vibration, and that the hours established should not cause any disturbance to the neighbors and community, that the NCDOT having established a traffic pattern consistent with NCDOT standards, noting that the fine print reads that the north gate is to remain closed to the public, finds that the application meets the intent of Section 307. David Tate seconded. Fred Schmitt noted that Mr. Eggers had asked the Board to address the specific use of "racetrack" in Section 307. Mr. Schmitt said his understanding of the intent by Town Council when drafting this section refers to racetrack as using full sized cars requiring drivers, not the battery-operated toy sized cars being represented tonight. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

David Tate - Aye. The motion carried with a 4-0 vote.

Ted Silver motioned that the application complies with the Banner Elk Zoning Ordinance, specifically addressing Section 307. Second by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye
David Tate - Aye. The motion carried with a 4-0 vote.

Ted Silver motioned to approve the application with conditions. Seconded by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye
Ted Silver - Aye
Fred Schmitt – Aye
David Tate - Aye. The motion carried with a 4-0 vote.

A motion by Morgan Herdklotz to close this portion of the hearing with a second by Fred Schmitt. The vote was:

Morgan Herdklotz – Aye
Ted Silver - Aye
Fred Schmitt – Aye
David Tate - Aye. The motion carried with a 4-0 vote.

A five (5) minute recess followed.

SUP Request for Grandfather View Miniature Golf - Continued

Chairman Schmitt reconvened this meeting following the script for a quasi-judicial proceeding, stating that the process is much like a court proceeding, in which one's individual's rights are being determined. Witnesses will be sworn in for testimony. The Chairman asked if there were any board members present that could not be impartial or who had received information outside of this hearing. None were noted and the hearing proceeded. Chairman Schmitt recognized Deka Tate as being seated for this hearing in place of David Tate, who was seated for the previous hearing.

Matt Bagley, the applicant, and Royal Hinshaw, an Engineer for Davenport were sworn in by Chairman Schmitt. Zoning Administrator Cheryl Buchanan was affirmed.

Zoning Administrator Cheryl Buchanan stated that Mr. Bagley has provided the Board with the items requested during the January Board meeting. The items were as follows:

1. Provide a traffic flow design study relating to the present use of a car wash and the proposed use of a miniature golf course, allowing for the safe movement in and out of the site as well as safe movement inside the parking areas, paying special attention to pedestrian traffic.

2. Provide an estimated cost to restore the property to its original state should the mini golf course fail within the first year to help the Banner Elk Town Council determined a reasonable amount for a bond.
3. Minutes from January meeting draws attention to the lack of information on the reliability of ADA accessibilities. Mr. Bagley was asked to obtain his information as well.

Chairman Schmitt said he noted diagrams illustrating the layout of the site and impervious calculations and asked Mr. Bagley if there was a traffic flow study included. Mr. Bagley said not that he was aware that there was one. Mr. Bagley asked if he could make an opening statement. Chairman Schmitt replied that he could speak to this item and that he would have the opportunity to make a closing statement if he needed to address additional items. Mr. Bagley said he thought the diagram spoke for itself. Mr. Hinshaw said there was an accompanying letter from Davenport's recommendations concerning the circulation of traffic on site.

Mr. Bagley asked if he could make his opening statement. When asked, Mr. Bagley said it was to illustrate the benefits of having a miniature golf course in Banner Elk. Attorney Eggers stated that the Board should be looking for evidence that complies with the ordinance and the items listed that would make the application complete. Mr. Bagley introduced Royal Hinshaw. Mr. Hinshaw is a professional engineer licensed in North Carolina, South Carolina, and Virginia. Mr. Hinshaw said there were five (5) objectives listed on the sheet provided by Davenport. These were as follows:

1. Ensure vehicular safety by reducing the number of conflicting traffic movements and simplifying on-site traffic patterns,
2. Ensure that mini-golf traffic use does not negatively impact car wash operations,
3. Provide safe pedestrian accommodations, particularly to connect pedestrians from parking areas to the Mini-Golf area,
4. Provide an adequate number of parking spaces to serve mini-golf use; desirably, at least 18 spaces for mini-golf customers,
5. Ensure the parking maneuvers are geometrically feasible and do not adversely impact traffic flow.

Mr. Hinshaw reviewed the map that was provided to the Board prior to the meeting. Mr. Hinshaw testified that the layout shows a one-way entrance off of Highway 184 into the parking lot using signage and pavement marking arrows while directing exiting traffic out onto Stonebridge Lane. This is a common practice to reduce the number of conflicting traffic patterns. Additionally, as indicated on the map, the entrance has been narrowed to restrict traffic from exiting onto Highway 184 at the northern access. As for parking, there are six (6) angled spaces as you pull in on the right. There are

five (5) spaces near the southern border of the parking lot and along Stonebridge Lane there are seven (7) angled back in parking spaces allowing for adequate room to pull in or out of the parking spaces. Parking spaces for the Car Wash are in the back. There are four (4) located within easy reach of the vacuum cleaners and two (2) employee spaces. Mr. Hinshaw said in order to discourage pedestrian traffic from strolling through the parking lot there will be a marked pedestrian pathway from the angled parking along the southern border to the parking parallel to Highway 184 across the entrance off Highway 184 to then allow pedestrians to walk up the side of the parking lot the kiosk.

Deka Tate asked if Stonebridge Lane is paved and if it is a two-lane road. Matt Bagley said it is paved but is not a marked two lanes. Mr. Hinshaw said Stonebridge Lane is 24feet wide and they have a 90foot easement along that road. Mrs. Tate asked how traffic would get to the parking lot off Stonebridge Lane if cars were stacked to go into the first car wash bay on the left. Mr. Bagley said if a bay was open they could drive through. Mrs. Tate asked if there was a wall along the front of the parking spaces along Stonebridge Lane, to which he replied yes.

Ted Silver mentioned the AutoTURN program and said he believes it deals with turning radii of vehicles but has no programming for conflicts. Mr. Silver defined conflicts as two things trying to occupy the same space at the same time and the AutoTURN analysis was only to determine if the vehicles had enough space to move around in. Mr. Hinshaw confirmed that this was true. Mr. Silver confirmed that the ITE Trip Generation Manual, 10th Edition, referenced in the Davenport report and its mention of the number of trips per day to a miniature golf establishment, that being 60 daily trips and the car wash indicated 494 trips per day. NCDOT's requirement for a traffic analysis is 3,000 trips per day. It was determined that the reason an NCDOT traffic study was not needed was the number of trips required to warrant such a study. Ted Silver pointed out to confirm the three conflict areas on the map. Mr. Silver asked about the possibility of pedestrians not following signs directing them to follow a certain pathway and wandering into the middle of the parking lot, could that be considered a conflict. Mr. Hinshaw replied yes. Mr. Silver asked where the pedestrians were to walk once they exited their cars parked along Stonebridge Lane. Mr. Hinshaw equated this to a parking lot of a shopping center, in that pedestrians walk along the back or front of the cars. Mr. Silver indicated that the cars would pull up to the wall and this would force pedestrians to walk along Stonebridge Lane to which Mr. Hinshaw confirmed this was true.

Mr. Silver asked if the signage indicated on the map was NCDOT approved. Mr. Hinshaw replied yes. Mr. Silver asked about pedestrian signage and Mr. Hinshaw said it would need to be custom made. Ted Silver pulled up a slide of

pedestrian signage approved by the NCDOT and asked Mr. Hinshaw if this would be the appropriate signage for directing traffic around vehicular traffic. Mr. Hinshaw said it would. This sign could also warn vehicular traffic to be aware of pedestrian traffic. Mr. Hinshaw said this is not regularly used in parking areas.

Ted Silver said there is no indication of which spaces would be ADA spaces. Mr. Hinshaw agreed. Matt Bagley stated that they would be located closest to the kiosk along the northern border. Mr. Silver asked if Mr. Hinshaw was aware of the term "engineer judgement". Mr. Hinshaw said he was aware of the term. Mr. Silver asked if it would be fair to say that people would not think about their safety and may not follow the designate pathways. Mr. Hinshaw said this could be true in almost any parking lot. Mr. Bagley said he could help direct pedestrians with the use of a small picket fence blocking them from cutting across the parking lot.

Morgan Herdklotz said she was concerned with cars stacked to enter the car wash and people are trying to get to the parking areas along Stonebridge Lane and can't get through. Mr. Bagley said this could be a problem but tried to equate the busy car wash days to days that the miniature golf would not be busy.

Chairman Schmitt redirected the meeting to the specific items in the order, specifically the traffic flow design study allowing for safe movement inside the parking areas, paying special attention to pedestrian traffic. Chairman Schmitt said that earlier testimony indicated that the study was not warranted since it did not meet NCDOT requirements. Chairman Schmitt asked if Mr. Hinshaw thought the illustrations provided to the Board met the requirement of a study. Mr. Hinshaw said it was up to the Board to determine if they had met the parameters set by the order and he hopes the Board finds they have.

Chairman Schmitt said the second items was the cost estimate should the business fail; and the property must be restored to its original state. Mr. Bagley said that he has had numerous e-mails back and forth with the Town Manager on the mechanics of how that would work since it had never been done before. The Board asked Town Manager Rick Owen to come forward, be sworn in and speak to this on behalf of the Town. Town Attorney Eggers reminded the Board that traffic testimony needs to be done by an expert witness and any lay person's testimony should be disregarded. Attorney Eggers said that the Board could consider Mr. Hinshaw's testimony as he is a professional engineer. Ted Silver asked Mr. Hinshaw if he could testify to the fact that a clear study has not been done as to the conflicts between the pedestrians, the mini-golf traffic, and the car wash traffic. Mr. Hinshaw

replied that he felt they have analyzed and identified the conflicts and have provided safe passage for vehicles and pedestrians.

Chairman Schmitt asked Mr. Owen about the requirement for a bond on behalf of the Town. Town Manager requested a quote be provided by the Town's Engineer. The cost will not be shared in the meeting tonight because Mr. Owen feels that Mr. Bagley should get a quote for comparison as well. Mr. Owen said Mr. Bagley has put someone in touch with him but that he does not know how much it is for. Mr. Owen said he did not believe this requires any further action from this Board other than to advise Mr. Bagley that Town Council has the authority to require the bond. Attorney Eggers said that the Board would need to make a condition that a bond for at least a period of one year could be required by Town Council.

Chairman Schmitt said there was one more point to the order that required information be provided about ADA accessibility. Chairman Schmitt asked what the source document was for the information provided. Mr. Bagley said he thought it was ada.gov.

Deka Tate asked the Zoning Administrator why she was not in support of this project. Cheryl Buchanan expressed concern about fitting two very different uses onto that piece of property and the level of safety that could be provided if both uses are operating at their maximum capacity.

Chairman Schmitt asked for closing statements from both the Zoning Administrator and the applicant Matt Bagley. Ms. Buchanan said she had just stated her position on this project as the Zoning Administrator. Chairman Schmitt said the Board should consider the project as if both uses would operate at maximum capacity. Matt Bagley had a slide show presentation he wanted to show as part of his closing statement. Mr. Bagley tried to justify why he thought both activities could work in harmony. Chairman Schmitt asked how many trees would need to be removed. Mr. Bagley said five (5) or six (6).

Chairman Schmitt closed the public portion of the hearing. Attorney Eggers reviewed the appropriate actions required of the Board in consideration of the application including Section 920 and 1109 of the Banner Elk Zoning Ordinance.

Ted Silver said he would like to get past the application compete motion so that he could talk about the issues he is struggling with. Chairman Schmitt said that this should come after the consideration of whether the application is complete or not.

Chairman Schmitt motioned that the application is complete. Morgan Herdklotz seconded. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 4-0 vote.

Chairman Schmitt said the next item is does the application meet the specific requirements of the ordinance. Chairman Schmitt read Section 1109 for the edification of the Board.

Ted Silver stated that a new business is always attractive, but his questions expressed his concern for the combined use and the design. Mr. Silver said looking at the letter from Davenport and the testimony of Mr. Hinshaw, he feels that the issue of pedestrian safety was being met “we’ll put a sign up”. Mr. Silver introduce an international sign advising vehicular traffic that there may be pedestrians walking through the parking lot. Mr. Silver said that for every time the answer is “we’ll put up signage”, then that is an acknowledgement that there is a problem. Mr. Silver’s concern is not an analogy to Lowes Hardware parking lot, but an open space allowing for cars to be crisscrossing in five (5) to seven (7) directions simultaneously. In a parking lot, cars go up and down. Mr. Silver said he was also concerned that of the lot is busy, people will just come back later. However, the car must first enter and drive through, creating more traffic confusion.

Mr. Silver said he could take the report by Davenport and assume that there could be as many as 554 cars going in and out of the site per day. Mr. Silver said he was not naive enough to think that is going to happen, but even 250 a day could be a lot, as he has witnessed on the site, and that is still a lot of traffic to cause him to have serious concerns that adding pedestrian traffic to this equation could be a serious concern. Deka Tate and Morgan Herdklotz said they agree with Mr. Silver. Morgan Herdklotz said the words conflict and pedestrian safety are a concern and it is difficult to control pedestrians. Mrs. Herdklotz recognizes the need for recreational opportunities for Banner Elk, but; putting these two uses on that parcel is of great concern for the safety of all involved.

Chairman Schmitt read the list of items in Section 920, with the exception of #8, which is beyond the Board’s pervue, he feels they have been met. Chairman Schmitt said his concerns stem from Section 1109, Powers and Duties of the Board of Adjustment, to decide such questions as are involved in determining whether a special use should be granted. To grant special uses with such conditions and safeguards as are appropriate under this Ordinance,

or to deny special uses when not in harmony with the intent of this Ordinance, more specifically subsection 2 (B) (1): Ingress and egress to property and proposed structures, with particular reference to automobile and pedestrian safety, convenience, traffic flow and control, and access in case of fire or catastrophe. Chairman Schmitt said there had been several concerns raised with respect to this and he shares those concerns. (6) Signs, if any, and proposed exterior lighting, with reference to glare, traffic safety, economic effect, and compatibility and harmony with properties in the district, (7) Required yards and other open space, and (8) General compatibility with adjacent property and other property in the district. Chairman Schmitt said he did not believe the application submitted or the proposed parcel meet the requirements of the ordinance.

Ted Silver motioned that he finds Section 920 (8) is not in compliance with the requirements of the ordinance. Chairman Schmitt seconded. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 4-0 vote.

Ted Silver motioned that according to Section 1109 (2) (B) (1) that ingress and egress and pedestrian walkways are not in the best interest of the community and that the testimony was not convincing to meet the requirement of the ordinance. Seconded by Fred Schmitt. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 4-0 vote.

Fred Schmitt motioned that Section 1109 (2) (B) (6), proposed signage and lighting and glare did not meet the expectations of the ordinance. Chairman Schmitt added that the application does not meet the general compatibility with the adjacent properties or other properties in the community. Ted Silver seconded. For discussion, Ted Silver asked Chairman Schmitt to elaborate as to which portion of that statement was being used to make this determination. Chairman Schmitt said it was the signage as it pertains to traffic safety. Ted Silver amended the motion to insufficient signage and there could not be enough signage to make the project safe. Chairman Schmitt seconded. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 4-0 vote.

Motion by Chairman Schmitt to disapprove the application. Seconded by Ted Silver. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 4-0 vote.

Chairman Schmitt informed Mr. Bagley that there are options to appeal or to reapply as per the specifications of the ordinance.

A motion by Deka Tate to close the hearing and adjourn the meeting.

Seconded by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried and the hearing adjourned at 8:46 pm.

Respectfully submitted,

Cheryl Buchanan, Secretary to the Board of Adjustment