

**BANNER ELK BOARD OF ADJUSTMENT
FRIDAY APRIL 22, 2022
MINUTES**

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

Staff Present: Zoning Administrator Riley Pudney, Town Attorney Four Eggers, Town Manager Rick Owen

Others Present: Derek Goddard, Bill Dixon, Brian Rollar, Shaw Kuester, Dan Williams, and Nick Liguori

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.

Consideration of the March 2022 Minutes

The minutes for the March 22, 2022, meeting was approved unanimously as presented with a motion by Ted Silver and Seconded by David Tate.


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. Before opening the hearing, Chairman Schmitt reviewed the requirements for the board members to be seated. 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. The hearing proceeded without further comment.

The following individuals were sworn in by Chairman Schmitt:

- Zoning Administrator Riley Pudney
- Engineer Derek Goddard
- Architect Bill Dixon
- Project Manager Brian Rollar
- Owner Shaw Kuester
- Dan Williams
- Traffic Engineer Nick Liguori who was sworn in via Zoom

SUP Request for Orchard Hill Apartments

Zoning Administrator Riley Pudney stated that this request is for a planned residential development which includes three (3) apartment buildings that total 40 multi-family units. The project is located at 114 Orchard Lane, across from the Banner Elk Elementary School. The lot is zoned M-U and meets the requirements of the setbacks, impervious surface, recreational space, and parking. She informed the Board that the parking (80 spaces) will be in the rear of the complex, which will be out of sight from the main streets. She also stated that they have applied and have been approved to connect to Town Streets and utilities. It will be partially visible from Highway 184 but will have natural colors and materials that will blend into the surrounding areas. Based on the evidence presented and her review, she believes that the application and project meet the requirements of the ordinance. After her review was completed, Chairman Schmitt opened up the Board to any questions they may have for her.



Ted Silver asked Zoning Administrator Riley Pudney to explain how the recreational percentage was calculated. She explained that it has to be a minimum of 15% of the total gross area of the lot, which is 21,645 sqft. The calculation included the square footage of the sidewalk on Orchard Lane, the pathway along the back of the buildings, the outdoor kayak storage space, bike racks and the fire pits and totaled to 15.97% (23,043 feet).


Chairman Schmitt asked Zoning Administrator Riley Pudney what the 39.95% impervious surface calculation meant in regard to the allotted 40%. She explained to the Board that the applicant and their plans were .05% under the maximum allowed surface area covered by impervious surfaces and that they could still increase that by .05% and meet the requirements of the ordinance. With no further questions, Chairman Schmitt invited the applicant to state their case.

Shaw Kuester, Owner of Kuester Companies thanked the Board for their time and introduced the rest of his team. He told the Board he believes these apartments will fit the market and will take what he learned from High Country Square and apply it to this new project. He wants to keep the look and feel of Banner Elk and does not want to over build. After his presentation, Chairman Schmitt opened up to questions from the Board.

Chairman Schmitt asked the applicant who will own the property once the project is completed. Mr. Kuester explained that himself as Kuester Companies will own the property. The units will be leased to individuals and there will not be a POA or HOA. The apartments will be two stories and will be separated by 1-, 2- and 3-bedroom units. Kuester Companies will maintain the grounds and buildings and will act as the property managers. Chairman Schmitt also asked why kayak storage was being offered. Mr. Kuester explained that he spoke with members of the community and believed that the kayak storage or outdoor storage was needed among the community.

Morgan Herdklotz asked the applicant how long the lease will be. Mr. Kuester along with Brian Rollar explained that they would be 9–12-month leases and could be adjusted accordingly. They further explained that it would be conventional housing with plenty of amenities. She recommended the kayak storage to be used more as general outdoor storage. She again asked for clarification on who will be maintaining the buildings, and Mr. Kuester stated it would be Kuester Companies. Chairman Schmitt informed the applicant that the Town does have a short-term rental ordinance and to keep it in mind when renting out the units.

Ted Silver asked the applicant to explain further the 15% recreational space. Mr. Silver believes that the sidewalks are a necessity and should not be included in the calculation. He asked the applicant to provide further explanation on the recreational calculations. Before the applicant answered, Mr. Silver also wanted to include the fact that there will be animals and children at the development and that the recreational requirements are not met. Derek Goddard answered on behalf of the applicant. He stated that he believes the ordinance for recreational space is up for interpretation. He also stated that in the early stages, they worked with Town staff and was told that the sidewalks should definitely be included in the calculation. Chairman Schmitt asked for clarification on where this calculation can be found, and Zoning Administrator Riley Pudney explained that page C100 of the plans has a calculated breakdown of the active recreational area. Town Attorney Four Eggers further explained that the ordinance mentions pathways and trails to not count more than 25% of the calculation, but however are needed for unity of the development. He also stated that it is up to the Board to make that determination.



Mr. Silver continued the questioning regarding the sidewalks by asking to show where the connection to the sidewalk was from building one to Orchard Lane. Mr. Goddard answered that there was a connection between Building one to Orchard Lane, by using the walkway along the buildings up to the sidewalk. Chairman Schmitt asked what the Town's opinion was regarding whether the sidewalks were included in the calculation. Zoning Administrator Riley Pudney stated that in the Town's belief that the sidewalks are to be counted as recreational space. Mr. Silver wants there to be a sidewalk that connects building one to Orchard Lane without passing the other buildings. Derek Goddard explained that there is a steep retaining wall that would inhibit the use of a sidewalk on that side of the development. Mr. Silver requested for a detailed breakdown of the recreational space. Mr. Goddard stated he could provide that to the Town at a further date.

Chairman Schmitt asked Nick Liguori with Davenport if he had anything to add to the traffic report, and if he determined what the impact would be. Mr. Liguori believed that the impact would be not very substantial on the current traffic patterns. The study was conducted with the expectations that the development would operate at 100% capacity. Mr. Silver asked why Davenport did not use the 11th edition in their data software. Mr. Liguori answered that the 10th edition was more conservative in the results. He also stated that they used code 220 for their trip generator. Mr. Silver had issue with the date the report was generated. Stating that there is a seasonal impact that was not considered. Mr. Liguori believes that the time of the study had an accurate reflection of the traffic flow, indicating that it was peak season with school being in session. Mr. Liguori also stated that the study included data from extra traffic flow from the surrounding neighborhoods and peak seasons through the TIA data system, which considers the additional traffic flow. Mr. Silver then questioned the impact of the traffic flow on the design of the sidewalk. Mr. Liguori informed Mr. Silver that they have no control over the design of the sidewalk and how it relates to the flow of traffic.

With no further questions, Chairman Schmitt asked for closing remarks from the applicant and the Zoning Administrator. Mr. Kuester concluded that he is thankful for the Board's time and review of their project and hopes they can continue forward. Zoning Administrator Riley Pudney reminded the Board that they have completed the application as required. Chairman Schmitt closed testimonial session and opened up the Board discussion.

Town Attorney Four Eggers reminded the Board of the requirements to pass and indicated that a simple majority is needed.

The first matter was determining if the application is complete. Mr. Silver believed the lack of recreational space and the discussed sidewalk issues makes the application incomplete. Chairman Schmitt motioned to approve the application as complete and was seconded by David Tate. The vote was:

Chairman Schmitt- yea


Morgan Herdklotz-yea

David Tate-yea

Ted Silver-nay

The motion passed 3 to 1

The second matter to consider was if the application and project substantially comply with the Town of Banner Elk Zoning ordinance. The Board indicated that section 152.032 in matters of the Recreational area was up to interpretation. Chairman Schmitt stated that both the Contractor and Zoning administrator agreed that it is recreational space and that their opinions are heavily weighted. Mrs.



Herdklotz stated that it was difficult to determine which interpretation was the correct one and did not want to set the wrong precedent. Mr. Tate recommended future clarification with Town staff on what is acceptable for recreational space. With no further discussion, Chairman Schmitt motioned to approve this matter with a second by Morgan Herdklotz. The vote was:

Chairman Schmitt-yea

Morgan Herdklotz-yea

David Tate-yea

Ted Silver-yea

The motion passed unanimously 4-0

The third matter was determining any conditions placed on the application. Mr. Silver asked for an additional bike rack to be added at the end of Building one. Mr. Kuester agreed that this was a suitable condition. Mr. Silver motioned to approve this condition with a second by Morgan Herdklotz. The vote was:

Chairman Schmitt-yea

Morgan Herdklotz-yea

David Tate-yea

Ted Silver-yea

The motion passed unanimously 4-0

Mr. Silver stated he wanted another condition to be that Building one gain access to the sidewalk on Orchard Lane. Derek Goddard indicated that this condition was not feasible due to the steep slope behind Building one and the retaining wall that would be in place. Town Attorney Four Eggers informed the Board that if the condition was passed and the applicant could not complete the condition, they would have to stop work and come back to the Board. With no further discussion, Mr. Silver motioned to approve the condition. There was no second and the motion failed.

The last matter was to vote on whether the project and Special Use Permit will be granted with said conditions. Chairman Schmitt motioned to approve the project and grant the Special Use Permit and was seconded by David Tate. The vote was:

Chairman Schmitt- yea

Morgan Herdklotz-yea


David Tate-yea

Ted Silver-nay

The motion passed 3 to 1

Other Business

Mr. Silver along with other members of the Board asked for the Town staff to internally clarify what would count as “recreational areas”. Mr. Silver does not believe a list of items would be sufficient, he would prefer to have a common understanding of what could be used as recreation in regard to standard sidewalks and necessary walkways. Mrs. Herdklotz stated that she was also concerned on counting sidewalks as recreational space for future projects. The Board determined an internal review of this requirement was necessary in determining a common understanding of what should be counted. Town Manager Rick Owen and Zoning Administrator Riley Pudney agreed to a review. With no further business, David Tate motioned to adjourn with a second by Chairman Schmitt. The vote was unanimous, and the meeting ended at 7:58 p.m.



Respectfully submitted,

Riley Pudney, Zoning Administrator