

**BANNER ELK BOARD OF ADJUSTMENT  
WEDNESDAY JUNE 22, 2022  
MINUTES**

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

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

Others Present: James Frye

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.

Chairman Schmitt stated that this meeting is a continuation of Mr. Frye's hearing from Monday evening. He stated that this was 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. Attorney Four Eggers informed the Board that the Board would need to reopen the evidentiary portion of the hearing to address the three deficiencies of Mr. Frye's application. Those deficiencies were: 1. Lack of valid and current lease or owner permission. 2. Current sign is not valid and applied for. 3. Lack of detailed list of artworks to be sold.

The following individuals were sworn in by Chairman Schmitt:

Zoning Administrator Riley Pudney  
James Frye

Zoning Administrator Riley Pudney informed the Board that she had received an application for the sign, and it has been paid for. At the time of this meeting, the sign was still up and did not meet the requirements of the ordinance. She again asked the Board to have this be made a condition of the approval. She also showed the Board a copy of an email/letter that was provided by the homeowner which allowed for Mr. Frye to speak and act on their behalf. Lastly, she provided the Board with a packet of pictures that Mr. Frye had sent. The pictures were examples of the items he would like to sell. She informed the Board that she emailed Mr. Frye at 1:00 p.m. asking for a list specifying what type of items were to be sold but had not been provided one at the time of this meeting.

Chairman Fred Schmitt opened the floor to Mr. Frye to explain what was given to the Board. He said the pictures were self-explanatory and did not want to be limited to what is in those pictures but rather "of like kind". He believes that everything turned in meets the requirements of what was asked. Chairman Fred Schmitt told Mr. Frye that he did not provide a list as it was requested for him to do so. The list is necessary to ensure that what he was applying for and selling fits within the bounds of the ordinance. Chairman Fred Schmitt told Mr. Frye that if he does not provide a list, then he will be restricted to the exact pictures that were turned in. Mr. Frye asked if he needed to turn in a picture of every possible variation of the product that he could make. Chairman Fred Schmitt said no that what he was asking was

for a list that stated “custom metal fire pits” as an example. Ted Silver further tried to explain to Mr. Frye of what was being asked. He said that the Board was asking for a list of materials and types of products being utilized, rather than the end result examples that he has provided. Ted Silver explained that they cannot tell what type of materials are being used by the pictures that were submitted. Ted Silver asked if these products would be left out 24/7 on the property, and Mr. Frye said yes, they would be. Ted Silver explained then that they would like to know the type of materials such as pressure treated, composite, wood, Trex. He told Mr. Frye that he left it up to him so that he wouldn’t be limited by the Board’s recommendations. Morgan Herdklotz and Deka Tate asked the Board if he could make a list. Zoning Administrator Riley Pudney provided Mr. Frye with a piece of paper. Chairman Fred Schmitt asked if it would be appropriate to take a 10-minute recess to allow Mr. Frye to work with Zoning Administrator Riley Pudney to curate a list.

Before the recess, Deka Tate asked Mr. Frye if he was worried about someone stealing his merchandise. Mr. Frye stated that he did not believe there would be any theft issue but if someone wanted to steal it then they could. He is not concerned with someone stealing his product but if they did, then he can easily lock it up. He stated that he never had theft issues on construction sites. She also asked him how he would feel if a new ordinance were to be approved that limited the number of items that can be outside to one and if that would make him worry about the appearance of his business. He answered that it would be the same as Lowe’s having lawn mowers and other equipment outside. Deka Tate asked if he was interested in or concerned with the aesthetics of a community and how he thinks having these items will affect that. Ted Silver added to that by asking Zoning Administrator Riley Pudney how it would be enforced if this property would become a “nuisance, eye sore”. Attorney Four Eggers answered that the applicant would have a vested right since it would have been accepted and allowed in the permit. He further explained that if anything were to exceed the scope, then it can become an enforceable option. Before the recess, Mr. Frye stated to the Board he does care about the aesthetics of the community and that is why he wants to have this kind of artwork available. He is a builder and believes that his houses have made the Banner Elk and Beech Mountain communities better. He also believed that theft is a concern but that it is his problem to deal with, not the Board. Further, he stated that he wants the same thing the Board does and wants to provide quality product to the community and does not want to be an eyesore or a nuisance. Chairman Fred Schmitt asked Mr. Frye how much time he needed to curate his list and Mr. Frye responded 5 minutes. The Board took a brief recess.

The Board reconvened at 6:33 p.m. A copy of Mr. Frye’s product list was provided to the Board and Chairman Fred Schmitt asked Mr. Frye to go over his list. The product descriptions were:

- Custom Metal Firepits
- Custom Metal Light Boxes
- Custom Metal Wall panel or screen
- Custom Metal animals and creatures
- Wood fireplace mantels and corbels
- Wood/log animals
- Custom Metal flags
- Custom metal wood and home décor
- Custom wood and rhododendron trellis
- Wood and carved statues

- Metal trash containers
- Metal deck railings
- Custom signs
- Custom chandeliers and lights

Chairman Fred Schmitt asked for an explanation as to what the metal trash containers are. Mr. Frye said they were for Beech Mountain and were metal trash enclosures that had artwork on them. They are about 3 feet by 5 feet and can hold 2 trash bins with a lock to keep animals out of the trash. Chairman Fred Schmitt clarified that none of these items would be created on site and Mr. Frye agreed.

Ted Silver asked if the yellow highlighted section on the plans was where the artwork planned to be stored, and Mr. Frye said that was correct. He also asked if the DOT plan was still accurate, and Mr. Frye confirmed they were. With no further questions, Chairman Fred Schmitt closed the evidentiary hearing.

Chairman Fred Schmitt closed the public comment section of the hearing and directed Attorney Four Eggers to review the questions that were to be considered. Attorney Four Eggers said there were four questions the Board must address: 1. Is the application complete? 2. Does the application and project substantially meet the requirements of the ordinance? 3. Are there any conditions the Board would like to impose on the permit? And lastly, 4. Does the Board approve the permit?

Chairman Fred Schmitt opened the Board to discuss question one, as to whether the application was complete. Ted Silver motioned that it was complete with the addition of the list and photos as examples with a second by Morgan Herdklotz. The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.

The second question as to whether the application substantially complies with the ordinance was motioned for approval by Ted Silver and was seconded by Chairman Fred Schmitt. The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.

The third question was whether the Board was going to implement any conditions on the project. Ted Silver motioned that the list of items be attached to the provided pictures and be used as examples but not limitations to what can be sold. The motion was seconded by Chairman Fred Schmitt. The vote was:


Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.



Ted Silver motioned for the existing sign to be removed or brought up to compliance to be a condition. The motion was seconded by Chairman Fred Schmitt. The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.

The last question considered was whether the Board approved the permit. Deka Tate motioned to approve and was seconded by Morgan Herdklotz. The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.

Chairman Fred Schmitt congratulated the applicant and Chairman Fred Schmitt motioned to close the hearing. His motion was seconded by Morgan Herdklotz and the hearing for this SUP was closed. The meeting adjourned at 6:55 p.m.

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Fred Schmitt, Chairman to the Board

Attested: \_\_\_\_\_

Approved: \_\_\_\_\_