

BANNER ELK BOARD OF ADJUSTMENT  
MONDAY, 17 JUNE 2013  
MINUTES

Members Present: Jimmy Ollis, Joe H. Perry, Ted Silver, Deka Tate, Bill Wilson along with newly appointed ETJ Alternate Art Neuberger

Staff Present: Zoning Administrator (ZA) Cheryl Buchanan, Town Manager Rick Owen, and Town Attorney Stacy C. Eggers, IV

Others Present: Allen and Rebecca Bolick, Ruth and Peter Liberatore, Bob Littleton, Charlie B & Penny VonCanon

Chairman Joe H. Perry called the meeting to order at 6:00 pm. Chairman Perry asked everyone present to stand and join in the pledge of allegiance to the flag.

There was a quorum present and Chairman Joe H. Perry administered the oath of office for Art Neuberger as an ETJ Alternate.

**Consideration of the May 2013 Minutes**

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

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea).  
The motion carried.

**Opening of the Quasi-Judicial Portion of the Meeting**

Chairman Perry explained the procedure for a quasi-judicial meeting. He addressed the statutory requirement to make those in attendance aware that an individual's rights are being determined. Chairman Perry opened the Public Hearing portion of the meeting identifying the applicant and inquiring among the board members if they could deliver a fair and unbiased decision and whether they had received any information prior to the meeting. There were no conflicting answers and the board indicated they were ready to hear the request. All parties and witnesses that were present and willing to give testimony were sworn in. (See attached witness form).

## **Conditional Use Permit for Bob Littleton, President of the Elk River POA**

### **Testimony:**

Zoning Administrator (ZA) Cheryl Buchanan began her testimony with an overview of the application. The request is for a conditional use permit as per Section 804 (1-6) of the Banner Elk Zoning Ordinance and is located at 643 Banner Elk Highway. ZA Buchanan reviewed the request for a fueling station for aircraft as it pertains to the zoning ordinance. Section 804 (1-6) covers a conditional use permit for a Gasoline Service or Filling Station. ZA Buchanan noted that the following exhibits and the Zoning Administrator's review were submitted and are attached as part of the official record:

- Exhibit 1: CUP Application,
- Exhibit 2: Current Conditional Use Permit,
- Exhibit 3: Design Specification for the fuelling station,
- Exhibit 4: Proposed sites for the station,
- Exhibit 5: Letter from Avery County Fire Marshall,
- Exhibit 6: GIS Map of the locale,

ZA Buchanan noted that the application appeared to be complete. There is a request to place a structure on Site "A". The structure will be a concrete enclosure with the fuel tanks located inside. This new enclosure is able to withstand an explosion and to keep it contained with no damage to surrounding structures. Although concrete walls are not specifically mentioned in the ordinance, exposed concrete block is prohibited. ZA Buchanan said she felt this material should be allowed since it is in the best interest, safety and welfare of the citizens of Banner Elk.

Section 309 outlines the setback provisions in the ordinance and Exhibit 4; page 2 gives the Board an idea of how far the site is setback from a stream, a property line and the road. Stormwater and Wellhead protection specifics of the ordinance do not apply to this request since stormwater impacts should be minimal and this site is not located in the wellhead protection area.

There are no requirements for parking as this is not a facility that requires permanent parking. The current aspects of the site consist of a maintenance building and four hangars. No lighting will be needed; as this facility will be used from dawn to dusk only. The electrical will be placed underground.

The structure measures 34'3" x 7'8" x 14' and will be painted to match the surrounding buildings. Some landscaping will be placed along the side and the back of the structure to help keep it in harmony with the other buildings. The structure has a flat roof with a canopy. The flat roof is necessary for venting and gauging. No signage is proposed, save the necessary directions for use that will be placed on the pump.

Section 804 requires a filling station to be located at least 40 feet from any existing buildings and 15 feet away from any street right-of-way or 20 feet from the edge of the road. Setbacks illustrated on Exhibit 4 are adequate to meet the

needs of these requirements. All service, storage, or similar activities shall be conducted entirely on the premises. No open storage is being proposed for this facility. However, there will be a spill kit available should some fuel be spilled on the ground.

Chairman Perry asked if anyone had any questions of the Zoning Administrator. None were forthcoming. Chairman Perry recognized Bob Littleton, who was present and representing Elk River. He stated that he had nothing to add to the ZA's Testimony. Ted Silver asked about enforcement procedures for the "dawn to dusk" rule. Mr. Littleton said they have a security gate that should ensure that no one enters with out the authority of Elk River. Mr. Silver asked the Town Attorney if it would be acceptable for the Board to make the enforcement of the "dawn to dusk" rule a condition. The Town Attorney said it could be a condition. Mr. Silver asked about procedures concerning spillage on the ground. Mr. Littleton said he would be certified, along with one of his staff members and a security guard, as well as a spill kit located on site. Mr. Silver mentioned the orientation of the facility and Mr. Littleton confirmed that he and Ms. Buchanan had spoken about the best possible position for this facility. ZA Buchanan said the setbacks are adequate for either orientation.

Attorney Eggers asked the board about the prohibition of exposed concrete blocks mentioned in Section 502.2 (b). ZA Buchanan said that this would not be exposed concrete blocks, but rather a concrete slab. She testified that this containment system was much safer and aesthetically pleasing than a big round tank on top of the ground and she felt this would be in harmony with the Zoning Ordinance as well as the Land Use Plan. Jimmy Ollis asked if this would be a candidate for a variance. The Town Attorney said he did not think it would meet the requirements of the ordinance for a variance.

Ted Silver asked if there would be any other signage, or what would prevent anyone from putting a big sign on the side of the building. ZA Buchanan said this is Elk River and that she seriously doubted any signage is allowed in Elk River. Bob Littleton confirmed that they do not allow any signage, other than what the management places in the development.

Chairman Perry asked if either party had a closing remark for the Board. Both parties answered no. Attorney Eggers gave his remarks to everyone present as to the procedural actions the Board are required to take at this time. Attorney Eggers asked Mr. Littleton if he and ZA Buchanan had shared any of the info with him and if he was in agreement with how the material was presented. Mr. Littleton answered, yes.

Chairman Perry closed the Public Hearing portion of the meeting at this time (6:35pm). Bill Wilson moved to close the Public Hearing section. Jimmy Ollis seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and

Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Ted Silver made a motion that the application is complete as submitted. Dekka Tate seconded his motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Jimmy Ollis made a motion that the application was in compliance and in harmony with Banner Elk's Zoning Ordinance and that the concrete encasement is in harmony as well. Dekka Tate seconded. Ted Silver said he thought that there should be an amendment that the concrete encasing is acceptable.

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (Yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Ted Silver would like to make a motion to include the following conditions:  
#1. Elk River must maintain enforcement procedures for the "dawn to dusk" rule of no fuel dispensing during those hours.  
#2. Comply with state and environmental regulations.  
Deka Tate seconded this motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Deka Tate moved to approve the application in favor of the applicant. Bill Wilson seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Chairman Perry asked Mr. Liberatore and ZA Buchanan to come forward and be sworn in to give testimony.

**Testimony:**

ZA Cheryl Buchanan began her testimony with an overview of the application. Although the request for a conditional use permit is not covered precisely in either Section 804 or 903 of the Banner Elk Zoning Ordinance, it seems to be a combination of the two. Additionally, the Table of Uses does list an auto body repair shop as a conditional use in the C-2. The property is located at 104 Hardees Lane, off US Highway 184. ZA Buchanan reviewed the request for an auto body repair shop as it pertains to the remainder of the zoning ordinance. ZA Buchanan noted that the following exhibits and the Zoning Administrator's review were submitted and are attached as part of the official record:

- Exhibit 1: CUP Application,
- Exhibit 2: Previous Conditional Use Permit for an auto mechanic repair shop,
- Exhibit 3: Site Plan,
- Exhibit 4: Parking Plan,
- Exhibit 5: Signage Plan,
- Exhibit 6: A flood map produced off the NC Floodplain Mapping Program's website,
- Exhibit 7: Written permission by the property owner, Larry Hazen.

ZA Buchanan noted that the application appeared to be complete. The town received an application to consider the operation of an auto body repair shop where previously there was an auto mechanic repair shop. The applicant is not requesting permission for any additions to the building. It should be noted that the property is located in a flood plain and there is a good possibility that the property will flood on occasion. Mr. Liberatore is aware of this and I have discussed the need for an evacuation plan with contact numbers for any vehicles that may not be able to be moved on their own due to mechanical failure as well as the need for some plan other than a dumpster for solid waste removal. There is a small room located at the back of the building that is open and could support roll-off carts but the room will need a door to keep the carts in should the property flood.

Access to the property is off of Hardees Lane, a private road. Dr. Johnson's dentist office is on the south side of the property as well as the vacant Hardees building in front, so the use is in harmony with the surrounding zoning districts. Behind this parcel is a small housing subdivision known as Mariposa. There are several evergreen trees that serve as a buffer along with other evergreen buffers to the north and east, making Mr. Liberatore in conformance with the requirements for screening and buffering in the zoning ordinance.

Parking requirements call for 12 parking spaces and Exhibit 4 illustrates 15 spaces are identified. Mr. Liberatore has asked if he may trim some of the bottom branches of the white pines away because they have grown into the parking spaces. ZA Buchanan told the Board that this issue could be dealt with through Section 705, the Tree Preservation Ordinance.

Mr. Liberatore has asked if he can place some wooden cut out letters on the mansard roof for signage. ZA Buchanan advised the Board that this was allowed per the ordinance and that he was also entitled to an off-premise sign that could be placed along Highway 184, with the property owner's permission. Mr. Liberatore plans to repair some of the lighting; which is located at the corners of the building. The lighting points down towards the ground and is in harmony with the zoning ordinance.

ZA Buchanan finished her review by reiterating that she would like the board to consider a condition for Mr. Liberatore to file an evacuation plan with contact information with the Zoning Administrator in case of flooding.

Deka Tate asked ZA Buchanan about the person(s) responsible for Hardees Lane. ZA Buchanan said she wasn't sure exactly who is responsible for Hardees Lane. Deka Tate asked Attorney Eggers if egress and ingress could be denied off that private road. Attorney Eggers said the deed would give us more information, but without looking at it, he could not provide any more information.

Deka Tate asked about the hours of operation mentioned in the Planning Board minutes. ZA Buchanan said it was a recommendation made out of concern for the residential neighborhood located behind the property. Chairman Perry said the hours should not go beyond the times set for the noise ordinance in the Town Code. Deka Tate suggested considering 8 am to 7 pm.

Ted Silver said that the Planning Board minutes had mentioned drainage and asked Mr. Liberatore if he knew where it goes, more specifically the drain for the outside bay.

At this point, Chairman Perry recognized Mr. Peter Liberatore and asked if he had any testimony to add to his request. Mr. Liberatore said he did not have any extra to add to Ms. Buchanan's testimony.

Ted Silver asked again exactly what kind of business Mr. Liberatore was planning to open. Mr. Liberatore replied that it was to be collision repair, paint and body. Mr. Silver asked if Mr. Liberatore was familiar with the State requirements for chemicals in paints and how to dispose of and clean up any excess. Mr. Liberatore said he has a paint shop now in Florida and has operated it for 30 years and he stated that the paint is stored in drums and is picked up for recycling or disposal, that he doesn't handle the excess. Mr. Liberatore said that paints are safer now than they were 10 years ago and he is switching to a water-based paint that is now allowed to clean up the debris can go down the drain. When Mr. Liberatore contacted North Carolina State about licensing or requirements for this occupation, the State asked him to check with Avery County for any additional requirements, that they had none.

Bill Wilson asked if Mr. Liberatore would be doing commercial-sized vehicles. Mr. Liberatore said that he did not think he could get anything that big in the building or on the property; he would probably just do passenger vehicles.

Ted Silver noted the trees along the property line between Hardees and this property and asked how much Mr. Liberatore would like to trim them. Mr. Liberatore said he wasn't quite sure what to do with them, that they need to be trimmed at least on one side so that he can use the parking and he won't have to worry about the limbs and debris falling on people's cars. Mr. Liberatore expressed concern for their height as well and is worried that sometime they may become a problem.

With no further questions, Town Attorney asked if Mr. Liberatore had been provided the information that had been reviewed today and was he in agreement with the statements that had been made. Mr. Liberatore answered affirmatively.

Chairman Perry asked for closing statements from either ZA Buchanan or Mr. Liberatore. Mr. Liberatore had none, but ZA Buchanan said that she felt this use was in harmony with the zoning district and surrounding businesses and that it was very close to the same type of use the previous CUP allowed. The only request that ZA Buchanan had was to require the evacuation plan that she had asked for earlier in the meeting. ZA Buchanan also mentioned that there is an apartment in this building that is an accessory use for this project and Mr. Liberatore said he might like to rent it out, which would be in harmony with the zoning ordinance.

Attorney Eggers gave his review of the remainder of the process for the meeting. Chairman Perry called the public hearing portion of the meeting to a close and opened the deliberation between the board members.

Deka Tate made a motion that the application is complete as submitted. Ted Silver seconded his motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Deka Tate made a motion that the application was in compliance and is in harmony with Banner Elk's Zoning Ordinance and Land Use Plan. Bill Wilson seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (uea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Ted Silver made a motion to include the following condition:

#1. An evacuation plan complete with contact numbers outlining any outside vehicle that might need to be moved will be prepared and filed with the Zoning Administrator and the Banner Elk Police Department  
Bill Wilson seconded this motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate, (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Deka Tate moved to set the hours of operation as 8 am to 8 pm, Monday through Saturday. Ted Silver seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Ted Silver moved to require any state permits must be complied with before work can begin on the property. Bill Wilson seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Jimmy Ollis moved to rescind Ms. Tate's previous motion to set the hours of operation. Joe H. Perry moved to second the motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (nay). The motion carried with a 4/5's majority in favor of the applicant.

Jimmy Ollis made a motion to approve the application with the noted conditions and the issuance of the permit. Bill Wilson seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and

Ted Silver (yea). The motion carried with a unanimous vote in favor of the applicant.

Other Business:

Art Neuberger said he was pleased to be a part of the Board and looked forward to working with each one.

Jimmy Ollis moved to adjourn. Dekka Tate seconded. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Deka Tate (yea),  
Joe H. Perry (yea), and  
Ted Silver (yea). The meeting came to a close at 7:30 pm.