

**\*\*DRAFT\*\***

BANNER ELK BOARD OF ADJUSTMENT  
MONDAY, 19 DECEMBER 2011  
MINUTES

Members Present: Jerome Clapp, Jimmy Ollis, Joe H. Perry, Deka Tate, Bill Wilson, Scott Woodward

Staff Present: Cheryl Buchanan, Stacy C. Eggers, IV (Town Attorney), Rick Owen

Others Present: Nico Avila, Tommy Bursleson, Brandon Cox, Caroline & Ross Fischer, Bret Gardella, Derrick Rowley, Charlie B & Penny VonCanon

Chairman Scott Woodward called the meeting to order at 7:00 pm as advertised. A quorum was present and the Chairman opened the meeting with the pledge of allegiance to the flag.

**Consideration of the November 2011 Minutes**

Chairman Woodward entertained changes to the minutes. None were noted and he called for a motion. Jimmy Ollis moved to approve the minutes as submitted. Bill Wilson seconded the motion. The vote was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Scott Woodward (yea),  
Joe H. Perry (yea), and  
Jerome Clapp (yea). The motion carried.

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

Chairman Woodward explained the procedure for a quasi-judicial meeting. This reading addresses the statutory requirement to make those in attendance aware that an individual's rights are being determined. Chairman Woodward 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 that were present to give testimony were sworn in. (See attached witness form).

**Request to Amend a CUP – T & A Investments, LLC**

**Testimonies:**

Zoning Officer Cheryl Buchanan began by giving a brief history of the property from the time the building was built in 1967, the annexation of the property in September 1993, and the conditional use permit (CUP) that was issued to T & A

Investments, LLC in April 2002. The CUP had five conditions placed on it and were as follows:

1. Zoning Administrator's review of drainage mitigation on the property.
2. Landscaping plan to be submitted.
3. Exterior Lighting on the project to be pre-approved by Zoning Administrator before installation.
4. Review and approval of metal posts and railings before installation.
5. Signage waiting for approved CUP.

There was also a discussion in the Board of Adjustment (BOA) minutes from April 2002 about future uses being added to the business. The Chairman stated that as long as the use was a permitted use, they would not need to come back before the board. However, if it was a conditional use, then the CUP would need to be amended, referencing Section 904 for a Planned Commercial Development. Ms. Buchanan illustrated that a warehouse is a conditional use and that this is a different company that will be using the warehouse, not only for storage, but also as a staging area to put "kits" together for assembly at another site. There is also a proposal to place solar panels on the roof, which changes the look of the building and the board will need to decide whether it will be in harmony and with the intent of the ordinance. Ms. Buchanan said they plan to put a new roof on the building, exactly like the existing roof, but then they will install the panels on the new roof. She said the application does not reflect the percentage of the roof that will be covered by the panels.

Ms. Buchanan then reviewed the sections of the ordinance that pertain to this request, paying special attention to Section 502, Architectural Review Standards, Building Designs, and Roofs. According to the ordinance, a flat roof is allowed in the C-2 zoning district as long as it has a parapet wall. This building has a partial parapet wall around the front and a portion of the sides. Ms. Buchanan told the board that there is a road that runs parallel on the south side of the building known as Glove Factory Lane leading to a residential neighborhood behind the building that could possibly be impacted by this request. It was also noted that in section (b), the ordinance states that solar panels are prohibited on street side. Ms. Buchanan said she was concerned about the percentage of coverage of the roof and the degree of tilt required for these panels.

Scott Woodward asked why the alteration of the warehouse use requires an amendment to the CUP. Ms. Buchanan referred to the table of uses in that a warehouse in a conditional use, this warehouse has been used for storage only, but the proposed use will require employees parking on site and some assembly being done inside the warehouse and this is new to this site.

Joe H. Perry noted that Section 502.4 (b) states that solar panels on street side are prohibited. Ms. Buchanan confirmed that it does read that way. Mr. Perry asked if this meant a main street or any street. Ms. Buchanan told Mr. Perry that the Town's Attorney, Mr. Eggers, would need to answer that question. Mr. Eggers said that this would be a question of ultimate interpretation and the board can address that during their deliberations as to whether the intent of

the ordinance was to address limiting solar panels on the dominant street side or a side that faces any street.

Jerome Clapp asked Mr. Eggers that if the parapet wall went all the way around the building would that allow the panels. Again, Mr. Eggers informed the board that this is something they will need to determine during their deliberations and whether shielding these from view would satisfy the ordinance requirements.

Mr. Brandon Cox came forward to provide testimony. Mr. Cox was present on behalf of the owner, Mr. John Turchin and Chris Quinn of Electron Solar Energy. Mr. Cox said that the proposal includes these modules at a 10-degree tilt, that they are not very large, and would most likely be placed in a landscape orientation. The modules measure 65"x40" (18sf). The design is meant to keep everything below the parapet wall. Mr. Cox said you could probably see the panels from Lowes Home Improvement parking lot and the proposal is to not extend anything outside the parapet wall. They are also proposing to use a black frame instead of aluminum, so it should appear totally black. Mr. Cox said that they pay attention to aesthetics and did not want this project to look like solar panels "just landed there." Mr. Cox said that it is a good industry and that the panels will make Banner Elk look "progressive." Mr. Cox testified that he thought this would lay out a groundwork for future projects.

Jimmy Ollis confirmed the size of the panels and the angle. Mr. Ollis asked if he could assume that they would be about two-feet high off the roof and this was confirmed as well. Mr. Ollis asked Mr. Cox to clear up what he meant by a landscape design. Mr. Cox replied that it has a rectangular look. Mr. Ollis asked about the percentage of the roof that would be covered and Mr. Cox said that he felt 75% would be adequate in meeting NEC codes including walking space between panels for maintenance.

Scott Woodward asked about the utilization of the warehouse space and how many employees might be there. Mr. Bret Gardella offered to speak but was advised that he should wait until he has been called to testify.

Ms. Buchanan asked if there would be any extra paraphernalia on the outside of the building in order to get the power to the power company. Mr. Cox said there would be some conduit that will carry the power into the meter box.

Mr. Wilson asked for the number of panels being proposed. Mr. Cox answered 830 panels. In essence the 40"x65" is one panel and they will need 830 of them on the roof, for a total of 14,981.50sf.

Mr. Eggers asked Mr. Cox how close to the sides of the parapet wall the panels would be placed? Mr. Cox answered that they should be placed at least 5-6 feet off the wall. Mr. Eggers asked that Mr. Cox orient him to how these panels would face. Mr. Cox replied to the south towards Sugar Mountain. Mr. Eggers asked where would these panels be visible from? Mr. Cox answered from Lowes parking lot and the neighborhood behind the building. Mr. Eggers asked if they could be seen from Tynecastle Highway and Mr. Cox replied that he thought

there wouldn't be much that could be seen from the highway. Mr. Eggers asked if these could be seen from the apartments on Sugar Creek Lane and he answered that yes, he had been there previously with Ms. Buchanan and they could see the roof well.

Jimmy Ollis asked if any of the neighbors had been contacted and had any spoken out against it. Mr. Cox said no, they are still assessing the provisional stage of this project. This concluded Mr. Cox's testimony.

Mr. Tommy Burleson was present and stated that he is the Director of Avery County Planning and Inspections. He testified that solar panels have come a long way from when they were first introduced on the market. These panels are silicone based, DC powered with a three-phase line, and they will be combined and grounded. He told the board that the roof is 8" of concrete and could sustain the weight of the panels. Mr. Burleson told the board that these panels will look like a black skylight or black glass. Mr. Burleson told the board that once the energy is collected it will go into a combiner box and then into an inverter and then into the meter box, and they are proposing to produce roughly 250,000kw per hour. Mr. Burleson said that this is a very significant amount of power and could possibly operate 35 to 40 houses during the day. The tax incentives are helping attract people to these types of projects and these panels work better in Avery County because they are like a motor in that they work better and more efficiently with cooler temperatures. Mr. Burleson assured the board that they would have to go through a lot of inspections to meet State and NEC codes.

Jimmy Ollis asked about reflectivity and Mr. Burleson said they will be like black glass and he is not bothered by them, nor is there any reason for them to be tilted more than 12 degrees. Mr. Burleson said they would not glare, that they will look like black glass and that the panels are absorbing the light. Mr. Cox also said that the panels are treated with an anti-reflective glare finish. Mr. Ollis asked about the number of conduits coming off the building? Mr. Burleson gave several responses that did not answer this question specifically, from one to five or six. Ms. Buchanan asked for a more exact number of conduits. Mr. Burleson answered if you want one then one, but then decided to say that this was not possible that perhaps five or six are more realistic. Mr. Cox said that they could penetrate the roof and put the conduit inside. Mr. Burleson said that the conduit needs to run to the inverter that will be sitting on the roof as well. Mr. Cox said the inverter would be going inside since it would not weather well in extreme weather. Jimmy Ollis asked which side of the building the conduit would come down on and Mr. Burleson said they should come down on whichever side the meter bases are located.

Mr. Eggers asked Mr. Cox if he could identify Exhibit #1 and #2, but he did not take the pictures and was not sure. Ms. Buchanan said she took the pictures because Mr. Quinn had agreed to set up a row of the panels to allow the board to see how they will be oriented on the roof and to the neighborhood. Exhibit #1 is a picture of the back of the panels from the top of Sugar Creek Lane. Exhibit #2 is towards the back of the building on Glove Factory Lane. Also

Exhibit #3 is a site plan prepared by Joe Pavelchak that has a north arrow and should provide the board with enough information about which direction is south and which direction these panels would be facing. Ms. Buchanan had Mr. Cox confirm on Exhibit #3 the direction the panels should be facing, which was South.

At this point, Mr. Gardella was allowed to address the board. Mr. Gardella is the Economic Development Director of Avery County. Mr. Gardella said that he could not speak to this project but has been working with Mr. Quinn to entice him to move his operation to Avery County. Mr. Gardella said they were planning to start with 15-20 jobs initially and if he finds a good location to work out of he could increase it to 30-40 jobs. Attorney Eggers instructed the Chairman, as a point of order, that the focus of the board should be on the requirements of the development ordinance and whether the application is in harmony with the community and not necessarily with issues of economic development and the benefits to the economy.

**Closing Remarks:**

Having received the testimony of all sworn witnesses, the Chairman recognized that the testimony portion of the meeting had come to an end and said that final remarks would be entertained starting with staff. Ms. Buchanan said the first thing she would ask the board to consider would be that this is not the only building in the C-2 zoning district with a flat roof and their decision tonight may set a precedent in Banner Elk. As far as parking goes, they meet the parking requirements and these were broken down by spaces in the review. She reviewed the shipping and receiving facilities that exist in the building and found them adequate. Ms. Buchanan asked the board to consider requiring a definitive maximum percentage of coverage for the roof per this request with perhaps no greater than 85% and that it should not be left open ended. She stated that she took the pictures from Glove Factory Lane behind the building and that Section 502.4 states that the ordinance allows a flat roof as long as it has a parapet wall. She suggested they might consider extending the parapet wall and read the beginning paragraph of what the purpose of this section on roofs is intending. Ms. Buchanan said she would like the board to consider the neighbors on Glove Factory Lane and that not much could be done for the ones that live on Sugar Tree Lane as far as screening goes. Ms. Buchanan asked that the inverter be located inside the building since the board does not know what size it would actually be.

Mr. Cox's closing remarks included that he thinks this is a "good thing" and that Washington, DC has some pretty strict guidelines for solar panels and aesthetics. Mr. Cox referred to it as a display technology and feels it shows the "progressiveness" of whoever uses them.

**Board Deliberation:**

Scott Woodward declared the evidentiary section at an end and directed the Board into the deliberation portion of the meeting. Attorney Eggers, by way of

background information, reiterated the issue before the board as an amendment to an existing CUP and while reviewing the application before them, the board should consider all the terms of the development ordinance and decide for themselves if the proposed amendment meets all the requirements of the development ordinance and is in harmony with the terms of the development ordinance and the surrounding community. The board should also consider only the evidence that has been presented and the material in the agenda packets in terms of the ordinance before them. As the Attorney has alluded to one of the issues that you will need to address, Section 502 addresses building design and how it relates to the roof top specifications and the board should reach an interpretation to the language that addresses solar panels on the street side of the roof. These are items for discussion and consideration. If the board decides to grant the amendment to the CUP, the board may also impose additional conditions, however, any vote to approve must be by a 4/5ths majority vote to pass as per statutory authority granted to the BOA. As the Town's Attorney, Mr. Eggers stated that he does not have any position on the application and any questions or guidance he has offered should not be misconstrued as a "for" or "against" to the application before the board.

Scott Woodward said he sees this as two different things, a change in the utilization of the warehouse space and the placement of solar panels on the roof. Mr. Woodward read from the ordinance where solar panels on street side are prohibited. Mr. Perry asked which street side and what the intent of the ordinance was. Mr. Woodward said he was not sure. Mr. Ollis said if the parapet wall went all the way around the building, there would be no impact on the neighborhood behind the building. Mr. Woodward said he felt it was pretty clear that the solar panels are prohibited and that it is simply a function of the ordinance. Mr. Perry felt that street was referred to in singular form and he considered that reference to the main street. In trying to interpret the meaning of the words in the ordinance, Attorney Eggers instructed the board that as to the meaning of words; that you should give those words such meaning as you would employ in your common everyday usage, applying common sense and within the ordinance framework as a whole to guide you in your interpretation of the ordinance. There was some discussion of the word "visible" being considered in front of street side. Mr. Wilson asked if a "lane" was a street?

Attorney Eggers advised that the option available to the applicants should the board deny this request is to ask for a text amendment in the wording to the ordinance from the Planning Board to Town Council or to go through the variance process. Attorney Eggers told the board that they have an obligation to interpret the ordinance as is. Joe H. Perry suggested that they should start at the beginning of Section 502 and read it in its entirety. Scott Woodward said that if the word "visible" was in the phrase "solar panels on street side", then he could accept that, but what it says is solar panels on street side are prohibited and he feels street side is any street side. Mr. Perry asked if the board could get an interpretation from the Attorney or the Zoning Administrator, but the Attorney's reply was that the interpretation belongs to the five members on the

board and it would not be appropriate for either he or Ms. Buchanan to instruct the board members on their interpretation of the ordinance.

Scott Woodward said that he felt he had been very precise in how he interprets the ordinance and feels that it is expressly prohibited. Jimmy Ollis remarked that his interpretation is that he wants to put that word “visible” into it. Jerome Clapp says he keeps looking at the parapet roof requirement. Mr. Clapp asked the Attorney if he could ask a question of Mr. Cox. Mr. Eggers replied that technically the Chairman would have to reopen the public hearing portion of the meeting again. Mr. Eggers told the board that their deliberations should be made on the testimony presented but that should the board vote to reopen the public hearing, additional testimony could be accepted. Mr. Clapp expressed no desire to reopen the public hearing portion of the ordinance. Mr. Clapp said he was concerned that the parapet wall does not go all the way around the building and he believes it should.

Mr. Ollis asked the board how they felt about what percentage of open space that should be allowed on the roof. Scott Woodward said he felt that State and NEC codes would probably have more control over that space than Banner Elk’s Zoning Ordinance. Jimmy Ollis asked the board to consider the inverter and the conduit and where they should be located.

Joe Perry said that the one sticking point for the board is where solar panels on street side are prohibited. Mr. Perry said he does not understand this sentence. Mr. Wilson asked if the solar panels could be considered mechanical or electrical equipment? Chairman Woodward answered most certainly. Mr. Wilson said that the ordinance requires that you screen this type of equipment from surrounding properties, but would this take care of the problem? Chairman Woodward asked if the board was ready to make a motion? Joe H. Perry moved to approve the application to amend the Conditional Use Permit, with the following stipulations and conditions:

1. The total area that can be used by the panels should be no more than 75%;
2. Extend the parapet walls around the outer edge of the roof to the same height and appearance as the existing to match the existing wall;
3. The electrical equipment should be located inside;
4. To meet all State building codes and the National Electrical codes for the installation of the solar panels and electrical equipment.

Attorney Eggers advised the Board that to clarify for matters of the record, is it part of the motion that it is this boards’ interpretation that the prohibition of solar panels on street side should not be visible from street side and is that a condition of the motion? Mr. Perry said that would be part of it and that is correct. Attorney Eggers addressed the Chairman and said if that is a motion before the board it would require a second and discussion, if desired. For the motion to be approved it requires a 4/5ths vote to approve. Bill Wilson seconded the motion. No discussion was forthcoming and the vote of the board was:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Scott Woodward (nay),  
Joe H. Perry (yea), and  
Jerome Clapp (yea). The motion carried with a 4/5ths majority vote in the affirmative.

Attorney Eggers also stated that as a part of the motion, the board has the right to include any additional conditions that were not included in the original motion that were related to this application. It would also be appropriate to consider recommendations from staff and that it is appropriate that one of the conditions could be that the applicant comply with the representations made here to the board tonight from which they have based their decisions. Joe H. Perry moved to add as a condition of the amendment that the applicant comply with all representations made to the Board on its behalf. Jerome Clapp seconded. There was no discussion. The vote was unanimous with:

Bill Wilson (yea),  
Jimmy Ollis (yea),  
Scott Woodward (yea),  
Joe H. Perry (yea), and  
Jerome Clapp (yea). The motion carried.

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

Chairman Woodward called the quasi-judicial portion of the meeting to a close.

**Adjournment**

With no further business, Jimmy Ollis moved to adjourn. Bill Wilson seconded. The vote was unanimous and the meeting came to a close at 8:55pm.

Respectfully submitted,  
Cheryl Buchanan, Zoning Officer and Secretary to the Banner Elk Board of Adjustment