

BANNER ELK BOARD OF ADJUSTMENT
MONDAY, 05/06/2021
MINUTES

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

Staff Present: Zoning Administrator Cheryl Buchanan, Town Attorney Michael Green, Town Manager Rick Owen

Others Present: Kyle Silver

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.

Consideration of the April and May 2021 Minutes

The minutes for May 4 were still under review with Four Eggers and were not ready for a vote. Since they are connected to the April 26th meeting, it would be better off they were approved together.

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. Ted Silver said it would be prudent to share that he has no familial relationship with the applicant Kyle Silver. The hearing proceeded.

Zoning Administrator Cheryl Buchanan was affirmed by Chairman Schmitt and Kyle Silver, the applicant, was sworn in as well.

SUP Request for Blind Elk Taproom and Bottling Company

Zoning Administrator Cheryl Buchanan stated that this is a request for a taproom. The intention of the applicant is to feature craft beers and prepackaged foods. Ms. Buchanan said there was not a definition for a taproom; and she equated it to a restaurant, which has more stringent guidelines for matters such as parking requirements. Cheryl Buchanan stated that this business is proposed to be located at 397 Shawneehaw Avenue, prior home of the Louisiana Purchase, which was a restaurant as well. Ms.

Buchanan went over her review (see Exhibit 2 attached) in detail. Ms. Buchanan noted that the previous tenants leased parking from the Von Canons in the back and Mr. Silver is in negotiations with them for the same spaces. Ms. Buchanan verified that with Penny Von Canon. Exhibit 3 is the parking plan, Exhibit 4 is the first proposed roll off cart enclosure made of wood, Exhibit 5 is signage placement, Exhibit 6 is the owner's authorization for the SUP, and Exhibit 7 is a new proposal for a metal roll off cart enclosure.


Ms. Buchanan said she was aware that there was not a definition for a taproom. Brewpubs are covered under Section 923; but are normally associated with an actual brewing operation. Mr. Kyle Silver will not be making malt beverages on the premises, he just wishes to sell them. Since the applicant will be selling prepackaged snacks and foods, Ms. Buchanan used guidelines like a restaurant. Ms. Buchanan said that the previous tenants had a lot of problems with bears getting into the trash and Ms. Buchanan said that she had asked Mr. Silver to provide an alternative that would keep that from happening again, thus Exhibit 7. Although metal is not in the ordinance as an approved material, she felt for health and safety reason, it should be made a condition of approval. Ms. Buchanan said that 40 seats are being proposed, which equates to 17 parking spaces. Ms. Buchanan said that the applicant had illustrated 18.

Morgan Herdklotz asked if Ms. Buchanan knew the hours of operation. Ms. Buchanan replied that she did not, that during preliminary discussions with the applicant he indicated 4pm to 10 pm. Ted Silver asked where the handicap parking space was located. Ms. Buchanan said she was not sure.

Ted Silver reiterated that there is no definition for a taproom or a bar, that a restaurant is food service with some drink while this use is drink service with some food. This line of questioning was an attempt to define the use of a Taproom for interpretation.

Chairman Schmitt said that on the application, page 2, section 3, there was no indication of an action there. Ms. Buchanan said that there is no new construction taking place at this site. Chairman Schmitt said Kyle Silver will need to mark it and initial it as well as sign the application. Chairman Schmitt then gave a definition for a taproom from the Oxford Dictionary, which he associated to a Brew Pub.

During his testimony, Kyle Silver presented the hours of operation as closed on Monday, open on Tuesday through Thursday from 3 pm to 10 pm. Friday and Saturday would be 12 noon to 10 pm and Sunday would be 2 pm to 10 pm. Mr. Silver said there were two (2) handicap parking spaces. One was near the front door and the second was near the art gallery. Kyle Silver said he would



only be taking up one unit, that the previous tenant had taken up two. Kyle spoke to the parking availability and stated that there are three (3) angled spaces that appear that they belong to The Pantry property; but belong to this property.


Ted Silver asked about the type of ABC permit Kyle Silver would need to operate this taproom. Kyle Silver said he had applied for the permit through the ABC Board for on and off premise unfortified wine and malt beverages with less than 16% alcohol content. Kyle Silver said that with this percentage of alcohol, no food is required to be served. Ted Silver asked if this was an AJ or an AK malt beverage license. Kyle Silver said he was not sure that he had applied for an on and off premise malt and unfortified beverage license with the ABC Board. Ted Silver said he thought it would be an AJ and an AL on premise permit he may be needing. Kyle Silver said that was correct. Ted Silver asked if Kyle Silver thought what he was doing was associated with a bar. Kyle Silver said his experience with bars was late hours and liquor being served, not a family friendly environment. Kyle Silver said that where he had travelled to other taprooms, it is more of a family friendly environment. Kyle Silver said that was the reason he would be closing by 10 pm, he was not looking for the same clientele as a bar. Kyle Silver said the reason he used the term Taproom is because it is associated with breweries and beers and that is the main product he would sell.

Morgan Herdklotz asked Kyle Silver to walk the Board through what the inside would look like. Kyle Silver said that they would only be using one unit whereas the previous tenant leased two (2) units. Kyle Silver said that he had Tommy Bureson of Avery County Inspections to come by to make sure the site could handle the renovations.

Chairman Schmitt asked if Kyle Silver asked if he had established a dialog with the Von Canons about leasing parking spaces. Kyle Silver said yes.

Chairman Schmitt asked if Ms. Buchanan had a closing statement. Ms. Buchanan replied that as the Zoning Administrator for the Town of Banner Elk, she believes the application to be complete, that the use is in harmony with the surrounding businesses and that she found Morgan Herdklotz' s question interesting since she had never been inside the building, but that it was not related to the ordinance, that Kyle Silver has demonstrated his willingness to comply with the Zoning Ordinance.

As a way of closing statement, Kyle Silver told the Board that he wants to compliment other businesses in the area. The way he intends to do that is to allow the patrons to order food from other establishments and he would have



an employee pick up the order and deliver it, as a way of providing a different atmosphere to being able to drink.

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

Chairman Schmitt said that before the Board goes into deliberations, he would like to take a vote on whether the application is complete. Motion by Fred Schmitt that the application is found complete. Second by Morgan Herdklotz. Chairman Schmitt said he would take a roll call vote. Ted Silver said he would like to wait until then end. Chairman Schmitt said no and asked for his vote. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Nay


Fred Schmitt – Aye

Deka Tate - Aye. The motion carried with a 3-1 vote.

Ted Silver addressed the Chairman and said he would like to change his vote to a yes. Chairman Schmitt stated that the vote has been changed to a 4-0 vote and asked Attorney Green if that could be done. Attorney Green said he did not know and would ask his research assistant if that was possible. Zoning Administrator Buchanan said it passes either way; but Chairman Schmitt said it was important for the record.

While waiting for a confirmation, Chairman Schmitt said the next question was if the application complies with the Zoning Ordinance for the Town of Banner Elk. There was a lot of discussion as to whether this application falls under Section 1009 or Section 307. Chairman Schmitt said that the Zoning Administrator had equated this application to a restaurant, but there is not a specific use listed for a taproom, allowing the Board an option to consider Section 307. Attorney Green said that although he doesn't disagree with the Zoning Administrator's determination, he could also see a strong argument for applying Section 307. Therefore, Chairman Schmitt read section 307 for the Board's edification.

Ted Silver said he also had a hard time trying to decide which section is applicable to this application. Ted Silver asked Attorney Green if a patron could bring in hard liquor. Attorney Green said he would have to look at that and get back to the Board. Attorney Green answered that his research assistant had provided the information for that question and that if a different ABC license permits it, then spirits could be allowed.



Fred Schmitt motioned that the application meets the specifics under Section 307. Second by Morgan Herdklotz. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

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

At this point, Attorney Green told the Board that if Ted Silver's vote did not change the outcome, he could change his vote. Chairman Schmitt asked that the record reflect Mr. Silver's change vote to aye with a 4-0 final vote if the application is complete.

Fred Schmitt motioned to place a condition that the lease for additional parking with the Von Canon's be executed before the permit is issued so they have the required spaces of 18 spaces to meet the requirements of the zoning ordinance. Second by Deka Tate. 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 to require all signage be approved by the Zoning Administrator before they can be erected along with additional signage directing traffic to the parking in the back of the property. Seconded by Morgan Herdklotz. 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 motioned to require a metal containment system like those illustrated in Exhibit 7 for the roll off carts to prevent bears from accessing trash. Second by Deka Tate. 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 motioned to approve application under case #050621-3 with conditions. 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.

A motion by Fred Schmitt to close the hearing and adjourn the meeting.

Seconded by Deka Tate. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Aye. The motion carried and the hearing adjourned at 7:40 pm.

Respectfully submitted,

Cheryl Buchanan, Secretary to the Board of Adjustment