

BANNER ELK BOARD OF ADJUSTMENT
MONDAY, 10/18/2021
MINUTES

Members Present: Morgan Herdklotz, Fred Schmitt, Ted Silver, Deka Tate, and in-town alternate David Tate

Staff Present: Zoning Administrator Cheryl Buchanan, Town Attorney Stacy Eggers, IV, Town Manager Rick Owen

Others Present: Derek Goddard and Ricky White

Chairman Fred Schmitt called the meeting to order at 6:05 p.m. Chairman Schmitt asked everyone present to stand and join in the pledge of allegiance to the flag.

Consideration of the April 26, 2021, May 4, 2021, and May 6, 2021 Minutes

With no changes noted, Fred Schmitt moved to approve the minutes as submitted. 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.

SUP Request for Planned Commercial Development – Banner Elk Retail

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. Case Number 101821-1 is being heard and witnesses will be sworn in for testimony. 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. All was in order and the hearing began. Zoning Administrator Cheryl Buchanan was affirmed for testimony and asked to present the application to the Board.

Zoning Administrator Cheryl Buchanan gave a brief synopsis of the project and reviewed the list of exhibits that were included in the packets. Ms. Buchanan then went through her review and how the request meets the requirements of the Banner Elk Zoning Ordinance (see attached review).

Chairman Schmitt administered the oath to Derek Goddard and Ricky White as representatives of the owner of the property. Chairman Schmitt stated that before the Board begins asking questions of Ms. Buchanan, the representatives may also ask her questions as well. Derek Goddard asked if the application meets the requirements of the ordinance. Ms. Buchanan responded yes. Mr. Goddard asked if in her planning experience, is this the highest and best use of the property? Ms. Buchanan answered yes.

Ted Silver began with questions for the Zoning Administrator about the North Carolina Department of Transportation (NCDOT) and the approval granted by their agency for this project. Mr. Silver asked about the attached special provisions referred to in the letter. Ms. Buchanan said she got that after the packets went out and forgot to send those later. Ms. Buchanan asked if the Board wanted to see those, to which the responses were yes. Ms. Buchanan left the meeting to send the copies to the printer. When re-entering the meeting Ms. Buchanan told the Board that the report is 48 pages long and would take a few minutes. Derek Goddard said he could testify to the special provisions if the Board needed him to.

Mr. Silver said looking back to the landscaping page, he asked about the NCDOT right-of-way (r-o-w) and if this was an actual r-o-w. Ms. Buchanan said she was not aware of a NCDOT r-o-w on this property, it may be referring to the maintenance r-o-w that all roads have, unless the NCDOT is asking for a specific r-o-w on this project. Mr. Silver asked if this abutted any existing NCDOT r-o-w's and what would the impact be on this property if NCDOT were to widen NC Highway 184 along this property. Ms. Buchanan said that according to her knowledge, NCDOT could not widen past the entrance to Dobbins Road, that the Town had stopped this through local legislation. Mr. Silver said that his understanding on the 2021-2029 STIP was that the road was to be widened to Dobbins. Ms. Buchanan said yes, but this is past Dobbins.

Ted Silver asked about the discussions the Town has had with the developer for either a sidewalk or a greenway trail on the property. Ms. Buchanan said it was her understanding that the Banner Elk Pedestrian Plan noted that of four separate pedestrian options to move pedestrians out of Downtown, this route was the least favorable. Ms. Buchanan said it was her understanding that the developers were in discussions with the Town Manager and Council to provide funds in lieu of building the sidewalk there. Additionally, Ms. Buchanan said that the owners had indicated that they would be willing to grant a greenway easement along the creek at the back of the property.

Deka Tate asked for clarification on the LOMR and what the purpose of this is. Ms. Buchanan said that as far as the State of North Carolina is concerned,

this property is still in the flood plain. Since the owner changed the topography of the property, the LOMR would take the property out of the flood plain on the site where the development will occur, allowing for development in a flood plain. Deka Tate said she had a problem with all the parking and wondered how trucks would be making deliveries. Ms. Buchanan said she thought there was a way for a delivery to be made behind the building. Ms. Buchanan said that the extra parking could allow for a restaurant later if that is what the owner decided to do with the building. Deka Tate asked about the percentage of pervious surface and what parts of it is impervious. Ms. Buchanan noted that it is on the plans and referred to the landscaping plan.

Fred Schmitt said while looking at the plan, he did not see a delivery drive. Ms. Buchanan said he is correct, that she had confused this with a previous plan that had a drive behind the building. Ted Silver said that based on the review of this plan, delivery trucks would have to drive into the parking lot, deliver their goods and then pull out on Highway 184. Ms. Buchanan said this is correct. Mr. Silver asked if there was any discussion about an eighteen-wheel truck making that turn? Ms. Buchanan said there was no discussion. Mr. Silver asked if she thought this was possible. Ms. Buchanan said she did not have enough knowledge on the subject to answer that question.

Deka Tate said she's been through a lot of planning processes; and they always said do not put parking in front. Ms. Buchanan said she understood that this was for the downtown area where the Streetscape is such an important feature that promotes walkability and placing a building on the road frontage is more reasonable downtown than on this site. Ms. Buchanan cited LP on Main as an example with the building on the road frontage and parking in the rear. Another example of this would be the Lees-McRae Nursing Center. Ms. Buchanan said that placing this building up near the road would block the line of sight in that curve around Dobbins Road. Ms. Buchanan cited several examples of buildings where the parking is in front and the majority of those are out along Highway 184. Ms. Buchanan said the original plan had the building at the road, but she asked them to move it to the back of the property.

Ted Silver asked about the future of the pedestrian plan from here towards town. Ms. Buchanan said that there was a study done and that there were four scenarios, this one along Highway 184 was the least favorable. Ted Silver asked about future development and connectivity in this area. Ms. Buchanan said that the Greenway Trail was already out to the Art Cellar Gallery, but that is where it stops. The two adjoining property owners refuse to give any type of connectivity. Ms. Buchanan said she cannot see into the future; but anything could happen and that the adjoining properties are residentially zoned. Ms.

Buchanan stated that this piece of property ends commercial until you get to The Art Cellar Gallery.

Chairman Schmitt said the site plan is one and half acres. Mr. Schmitt said he doesn't think it looks like that. Ms. Buchanan said she agreed; that looks can be deceiving. Mr. Schmitt asked if this had been sealed or certified. Ms. Buchanan said yes, it has been. Mr. Schmitt pointed out that a portion of the road encroaches into the fifty-foot setback from the river and asked if this was acceptable. Ms. Buchanan said they can do roads and parking, but not a building. Mr. Eggers stated that Exhibit 4 provides a percentage of impervious surface and that the acreage would have been needed to make that calculation, that this could be considered as evidence that the property is the acreage it is said to be.

The Town Attorney asked that the NCDOT document be marked as Exhibit 9. Ted Silver asked if the Zoning Administrator was involved in the planning process with NCDOT? Ms. Buchanan said yes, she had spoken to Carson Fisher, and he explained why he chose the ingress and egress and why he asked the developer to move some of the landscaping to provide a clearer line of sight. Ted Silver asked if Ms. Buchanan could elaborate on why NCDOT chose this specific entrance and exit points, especially directly across from Dobbins Road? Ms. Buchanan said Mr. Fisher felt this was the safest point to enter the project at Dobbins Road and that the egress point was the safest point for line of sight. Ted Silver asked if there was any discussion on the amount of traffic along Highway 184? Ms. Buchanan said no, Mr. Fisher did not give specific numbers even though the increase in the amount of traffic in Banner Elk was mentioned. Ms. Buchanan said she did not question the NCDOT's judgement since they have much more knowledge and expertise in safety and traffic patterns than she does. Ms. Buchanan said that when NCDOT told her that they chose those specific points as an entrance and exit, she accepted their expertise and authority on the subject. Mr. Silver commented that on the landscape plan, there are two trees located near the entrance that are back off the road, Ms. Buchanan clarified that they were moved back into the project at the request of NCDOT.


Fred Schmitt commented that the acceptance letter written by NCDOT mentions a 6,300 sit down restaurant as the use of the property. Ms. Buchanan said it could potentially be a restaurant. Mr. Schmitt said that the letter is worded as a restaurant and asked if NCDOT was aware that this is a retail center? Ms. Buchanan said yes, they were aware.

Derek Goddard was recognized and provided qualifications as an expert witness. Mr. Goddard told the Board that he was the principal of Blue Ridge Environmental Consultant and had worked there for 19 years. He has a

master's degree in Geography and Land Planning and is a North Carolina Certified Surveyor. He has experience in planning these types of projects in the High Country as well as expertise in Stormwater Management, Soil and Erosion Control, and experience in permitting; along with Special Use Permitting processes with Boards of Adjustment. Attorney Eggers advised that when qualifications are presented to the Board that the Board should examine those qualifications and then vote on whether to accept them or not. Attorney Eggers noted that Mr. Goddard has been employed by the Town of Banner Elk for his expertise in some of these fields. Chairman Schmitt said that he did not have a resume in front of him, that they would have to rely on the Town's experience in this.

Ted Silver said he had a few more questions for Mr. Goddard. He prefaced his question by stating that land planning could be a very broad subject and asked Mr. Goddard if had experience with street and driveway access published by NCDOT in 2003. Mr. Goddard responded that he did have knowledge of it. Mr. Silver asked if he had experience with screening and scoping of projects by NCDOT? Mr. Goddard said he is familiar with this as well. Chairman Schmitt asked if there was any conflict of interest for Mr. Goddard to be an expert witness as well as a representative of the property owner and Blue Ridge Environmental. Mr. Eggers said no; that a conflict of interest might exist if Mr. Goddard was benefitting financially and that reason could possibly cloud his judgement.

Attorney Eggers asked what licenses Mr. Goddard holds. Mr. Goddard stated that he holds a North Carolina license in surveying. Chairman Schmitt asked if he holds a PPE license. Mr. Goddard responded no. Attorney Eggers asked if Mr. Goddard had been tendered as an expert witness in his career. Mr. Goddard replied yes. Attorney Eggers asked in what specialties. Mr. Goddard said that he represented special land surveying, land planning, permitting, water resources, and development. Mr. Eggers asked Mr. Goddard to identify which courts or boards he had testified before. Mr. Goddard answered with the Board of Adjustment for Watauga, Avery, Ashe, Wilkes, Alleghany, and Gaston Counties and there are more, but that is a general sampling. Attorney Eggers asked if Mr. Goddard is being compensated for his time before the Board and would that interfere with his testimony to this Board. Mr. Goddard said he was being paid to be at the meeting; but it would have no bearing on his testimony before this Board. Mr. Goddard told the Board that he had worked for Blue Ridge Environmental Consultants for 19.5 years and received his master's degree in Geography and Land Planning from Appalachian State University in 2006. Attorney Eggers asked Mr. Goddard about special training he had attended throughout his years. Mr. Goddard says he attends courses about 25 hours a year to maintain his certification for a special surveyor, that



he also attends seminars for stormwater, land development, stormwater management, rural and urban development, and local permitting.

Deka Tate motioned to accept Mr. Goddard as an expert witness specializing in Land Development and Planning and as a Licensed Surveyor. 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.

Derek Goddard stated that he wants to go through some of the questions that he feels needs to address that have come up during the meeting tonight. Mr. Goddard stated that Mr. White is a builder and can answer any questions about the building and materials. Mr. Goddard said this building is roughly 6,500 square feet and to put it into context, that's about half the size of a Dollar General. Mr. Goddard said he heard a question about the size of the property. Mr. Goddard said they surveyed the property, and it is 1.519 acres within the legal boundaries. Mr. Goddard spoke to the two flood zones on the property and their impact on the property. Mr. Goddard said that it is possible to build in the flood plain or zone AE. The fill was to bring it up above the base flood elevation. Mr. Goddard said he doesn't need the LOMR to build but the property owner would need it for flood insurance. Mr. Goddard said it had been submitted but it would be a matter of time for the approval. Mr. Goddard pointed out the 50-foot stream bank buffer which he feels is important to Banner Elk as well as stormwater management on the site.

Mr. Goddard said the existing rock wall will be maintained as well as a small retaining wall behind the building which will be designed and certified during the building process. Mr. Goddard described the stormwater treatment facility on site and compared it to the downtown stormwater system they designed and installed, but on a smaller scale. He noted that it also takes care of thermal pollution. Mr. Goddard said that during the design phase they took the highest use, a sit-down restaurant, and made the project meet those standards. Mr. Goddard said the owners do not intend to have a sit-down restaurant, but if that use happened in the future, the site could accommodate it. Mr. Goddard said the owners already have several retail customers who would like to rent space in the building, that they are not the heavy supply chain type businesses but would most likely rely on deliveries through UPS or FedEx. There are sidewalks in the rear of the building that can handle deliveries to these businesses. There is adequate dumpster space that will be adequately screened. Mr. Goddard said that NCDOT looked at their plans and took into




consideration the internal traffic on site as well as traffic coming and going. Mr. Goddard said his office used some software called Auto Turn that can simulate large trucks and vehicles coming and going on site. Mr. Goddard testified that it would be possible for an eighteen-wheeler truck to make the turn out of the development while staying in their lane and that all this information was provided to NCDOT to help them make their determination. Derek Goddard told the Board that NCDOT felt this restricted access, one way in and one way out, with an entrance that lines up with Dobbins Road took into consideration that traffic is already slowing down because of the entrance/exit from Dobbins Road and said NCDOT felt this was the safest ingress and egress points for this development. Mr. Goddard spoke to the NCDOT maintained r-o-w which is an area that NCDOT uses to help maintain the road, but is not a dedicated r-o-w. Inside their maintained limits they mow, pave, and mark lines on pavement delineating the lanes for traffic. Mr. Goddard explained the special provisions mentioned in the NCDOT permit that relate to items required by NCDOT to connect to their roads.

Mr. Goddard testified to the pervious surface calculation and that it is well below the allowable amount. Mr. Goddard stated that NCDOT requested that they take away some of the landscaping along the front replacing it with not so high growing plants to allow for a better sight for traffic and thanked the Town for agreeing to that. Mr. Goddard said they added additional landscaping in back to make up for that. Water and sewer are available to the site. Mr. Goddard said the photometric plan shows zero candlelight coming off the site guarding against night pollution with fixtures meeting the requirements of the ordinance making them dark sky compliant.

Mr. Goddard addressed greenways and sidewalks. Because there is no connectivity, the owners have offered to do an in-lieu fee for a sidewalk somewhere else in town. Mr. Goddard said they have been in negotiations with the Town Manager and Council about this topic.

Mr. Goddard asked if there could be a five-minute break. Chairman Schmitt agreed and declared the Board in recess. After the break, the Board was called back into session by Chairman Schmitt.


Ted Silver stated that the Board does not have the authority to change any determinations of the NCDOT, he said that whatever the zoning code allows is what could happen on site and that different businesses generate different traffic flow. Mr. Goddard said this is true and that is the reason the site was designed for the most intensive use, a restaurant, in case that was an option down the road. Mr. Silver asked if Mr. Goddard was familiar with the trip site model to which Mr. Goddard replied he was. Mr. Goddard said it is NCDOT's opinion that a restaurant would generate the most traffic flow. Ted Silver



questioned Mr. Goddard's knowledge of traffic studies to which Mr. Goddard said he did not have the authority to ask NCDOT to conduct a traffic study. Mr. Silver asked Mr. Goddard if he was concerned about this site's safety and if being located along a major thoroughfare and across from Dobbins Road was a concern. Mr. Goddard replied that he was not concerned that he trusted that the NCDOT evaluated the project based on their traffic manuals.

Chairman Schmitt asked about some riprap and a stormwater pipe that are noted to be removed. Mr. Goddard said the current pipe is going to be removed and replaced with a pipe that comes from their proposed treatment facility before exiting the property. The riprap is just stock piled materials left over and will be removed as they are not needed. Chairman Schmitt asked about the current rock wall and any additional retaining walls and asked Mr. Goddard if he was familiar with the requirements for walls over eight (8) feet that require an engineering certification. Mr. Goddard replied that he was aware and willing to comply. Chairman Schmitt said there were several boxes of directions on the plans that will need to be met and asked if this was boiler plate for all plans or site specific. Mr. Goddard said it was site specific and that he would ensure they would be met. For example, Mr. Goddard said this property was below the threshold for a required erosion and control plan, but they prepared one anyway demonstrating their desire to go above and beyond the requirements. Chairman Schmitt asked about the ground stabilization and said that the fill was not just dirt, but some vegetative matter had been included and asked if this property would hold. Mr. Goddard said the building will be on slab and that the owner is comfortable with the distribution of weight of the building on the property.

Deka Tate asked about the size of the building and how many businesses would be going in the building. Mr. Goddard said this had not determined at this point although several businesses had contacted the owners. Chairman Schmitt asked about the offer for money in lieu of the sidewalk and the agreement with Town Council. Mr. Goddard said they are in discussion with the Town about this matter. Mr. Silver asked about the greenway dedication on the back side of the property and if this was an either/or scenario. Mr. Goddard said it was undecided at this moment, that they were still talking with the Town about those two proposals. Chairman Schmitt said that a sidewalk is a requirement and that their offer is for something in lieu of that sidewalk. Ms. Buchanan answered that this is correct. Ted Silver asked if this was a mandatory either/or and the Town's Attorney said yes. Attorney Eggers said he was having trouble locating the in-lieu fee section in the ordinance and asked for the Zoning Administrator's help in locating it. Ted Silver asked if a greenway dedication could be offered instead of the sidewalk and Attorney Eggers said yes, if it was allowed by the ordinance, but it would require a modified plan showing the greenway dedication.



Mr. Ricky White spoke to his credentials stating that he has been with Garanco, Inc. since 1995 and that he is one of the owners and is currently Vice President of the business. Mr. White presented elevation drawings and material boards that gave the Board an idea of the materials being proposed as well as colors for the Board's review.

Chairman Schmitt deferred to the Town Attorney's direction that the in-lieu fee pertains only to the Heritage Overlay District in the ordinance and would not apply to this property. Attorney Eggers stated that Town Council would have to amend the ordinance and then the application could come back to the Board in order for this to be applicable. Chairman Schmitt surmised that without the sidewalk, this would be an incomplete application and that would be the end of the hearing. Attorney Eggers offered that the applicant could ask for the meeting to be reconvened, allowing the applicant to come back with an amended plan to include a sidewalk. There was also a discussion about making the LOMR a condition; that the LOMR be obtained before the construction or before occupancy of the building in the flood plain. Chairman Schmitt asked for legal authority as to when the LOMR comes into play. Attorney Eggers suggested the Board could require a certification that the building would be out of the flood plain before it is built. Derek Goddard said a sidewalk can be provided and that is appropriate and could be a condition added to the approval. Attorney Eggers said it would relate to the comfort level of the Board as to how that might affect landscaping and parking on the project without seeing it on a plan. Zoning Administrator Buchanan suggested that the BOA make the sidewalk a condition and if Town Council decided they didn't want the sidewalk, they could change the ordinance and then the applicant can come back before this Board to amend their application. Chairman Schmitt said he would prefer to see it drawn on the plan. Ted Silver stated that perhaps NCDOT may need to be renegotiated with regarding the sidewalk.

Closing comments were offered by Derek Goddard in that he is willing to include a sidewalk as a condition. Ricky White had no comment. Ms. Buchanan commented that in Section 152.086 (E) (8) of the Banner Elk Zoning Ordinance, it states that *"Major commercial developments shall include a system for internal pedestrian movement. These internal walkways shall also be linked with town-wide systems, particularly to greenways and parks."* Ms. Buchanan said the plans show sidewalks inside the development that could later be joined to a connecting sidewalk in future and that this meets the ordinance for commercial developments. Attorney Eggers said this is a matter of interpretation but may not be mutually exclusive and may be two separate issues; that he would defer to the Board for their interpretation.



After all questions were satisfied, Chairman Schmitt declared the evidentiary portion of the meeting closed and opened it up for deliberation among the Board members.

Ted Silver motioned that the application is incomplete based on the evidence and materials presented. Seconded by Fred Schmitt. The vote was:

Morgan Herdklotz – Aye

Ted Silver - Aye

Fred Schmitt – Aye

Deka Tate - Nay. The motion carried with a 3-0 vote.

At this point the Board discussed reconvening the meeting to another date allowing Mr. Goddard time to modify the plan to include a sidewalk. Fred Schmitt motioned to recess this meeting for tonight and to reconvene on Tuesday, October 26, 2021, at 6:00 pm at the Banner Elk Town Hall. Seconded 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.

The meeting was recessed at 9:09 pm.

Respectfully submitted,

Cheryl Buchanan, Secretary to the Board of Adjustment