

**BANNER ELK BOARD OF ADJUSTMENT  
MONDAY MAY 15, 2023  
MINUTES**

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

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

Others Present: Markus Ribas and Joe Crosswell

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.

Consideration of the April 2023 Minutes

The minutes for the April 17, 2023, meeting was approved unanimously as presented with a motion by Chairman Fred Schmitt and Seconded by Ted Silver.

**VARIANCE REQUEST-138 Willow Way: Kimberly Wilson.**

Chairman Fred Schmitt referred to Attorney Four Eggers to guide the discussion regarding the variance request. Attorney Eggers explained to the Board what a variance entails and that there are four items that need to be proven in order for the request to be granted. He also stated that each criteria must be a unanimous vote based on there only being four members of the Board. The four considerations are:

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be a basis for granting a variance.
- (3) The hardship did not result from action taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

Zoning Administrator Riley Pudney explained to the Board that this request was for an existing structure that encroaches over the property line. The side of the building encroaches on the setback and property line and that the applicant was asking for a variance to keep it compliant with the ordinance. She further explained that the applicant wanted to do an addition to the property and cannot get a permit without a variance so that the structure meets the requirements of the ordinance.

Joe Crosswell, the agent for Kimberly Wilson, addressed the Board by stating that it existed when the property was purchased by the applicant, that the applicant did not create the hardship and that they

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wanted to bring everything into compliance. Chairman Fred Schmitt asked for clarification on what the variance was for. Zoning administrator Riley Pudney stated that the variance was for the existing building and was separate from any future projects.

Attorney Eggers reminded the Board of the four votes they must unanimously pass in order to grant the variance.

- Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
  - o Ted Silver motioned that it does create an unnecessary hardship needed to justify the variance due to the property being purchased with the existing encroachment and was seconded by Morgan Herdklotz, The Board voted 4-0 that there was an unnecessary hardship.
  
- The hardship results from conditions that are peculiar to the property, such as location, size or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be a basis for granting a variance.
  - o The Board voted 4-0 that the hardship is peculiar to the property since the house sits across the property line, with a motion by Chairman Fred Schmitt and seconded by Ted Silver.
  
- The hardship did not result from action taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
  - o The Board voted 4-0 that it is not a result of the homeowner with a motion by Ted Silver and seconded by Chairman Fred Schmitt.
  
- The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
  - o The Board voted 4-0 that the variance request was consistent with the ordinance with a motion by Ted Silver and seconded by Morgan Herdklotz.

Based upon the findings of the Board, Deka Tate motioned to approve the variance and was seconded by Chairman Fred Schmitt. The motion passed 4-0 and the request was approved.

**SUP REQUEST 151 Shawneehaw Ave- Ribas Restaurant**

Zoning Administrator Riley Pudney presented to the Board and application for a restaurant at 151 Shawneehaw Ave. She stated that it was in the C-1 zoning district, so the parking requirement was met through existing shared and public parking. She further explained that the applicant is proposing to have 24 seats, which would equate to 8 parking spaces. She stated that they had an agreement to use the existing dumpster and have installed a grease trap.

Chairman Fred Schmitt asked how the Town felt about the existing public parking and if there was an adequate amount for another restaurant. Zoning Administrator Riley Pudney answered that the Town is aware of the lack of parking and that there is not a sufficient amount. She explained that the Planning Board and Town staff are working to address the problem, but for the case in front of them, as the ordinance read, it meets the requirements.

Deka Tate asked if the color of the front door was in compliance with the Town color chart. Zoning Administrator Riley Pudney stated that it was not and that the Board can make that a condition of approval if they deem fit.

Markus Ribas, the owner, stated to the Board that his restaurant is something that the Town needed and will offer pre and post dinner meals along with alcoholic beverages. Ted Silver asked if he had a written agreement to use the shared dumpster, and Mr. Ribas stated that yes, he had one. Ted Silver then asked how he was planning on accessing the dumpster. Mr. Ribas explained that he is putting stairs on the rear of his property and will access the dumpster through the stairs and adjoining property. Ted Silver asked if he had permission from the adjoining property owner to access the dumpster that way. Mr. Ribas stated that he did not and will look into it.

Chairman Fred Schmitt asked if any of the Board members had any questions. With none, he directed Attorney Eggers to review the questions the Board were to address. Mr. 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. Morgan Herdklotz motioned that it was with a second by Ted Silver. 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 Deka Tate. 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. The Board implemented the following conditions:

Ted Silver motioned for a written agreement for the use of the dumpster be submitted to the Zoning Administrator. Chairman Fred Schmitt seconded the motion. The vote was:

Chairman Fred Schmitt-yea  
Ted Silver- yea  
Deka Tate- yea  
Morgan Herdklotz- yea  
The motion passed unanimously.

Ted Silver motioned for a condition that adequate proof of access to the dumpster be provided to the Zoning Administrator. Deka Tate seconded the motion. The vote was:

Chairman Fred Schmitt-yea  
Ted Silver-yea  
Deka Tate- yea  
Morgan Herdklotz- yea  
The motion passed unanimously.

Deka Tate motioned that the door and exterior façade be brought into compliance with the Town's color chart. Ted Silver seconded the motion. 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 Chairman Fred Schmitt. The vote was:

Chairman Fred Schmitt-yea  
Ted Silver- yea  
Deka Tate- yea  
Morgan Herdklotz- yea  
The motion passed unanimously.

The application was granted and the hearing for the special use permit was closed.

#### **OTHER BUSINESS**

Zoning Administrator Riley Pudney provided a staff update to the Board. She informed the Board that Tiki Taco's approval for a restaurant had been revoked per the owner's request and is reverting back to the original use as an art gallery.

She also further explained that the Town will be looking into the parking issue and counting the spaces and the type of uses in the shared parkin area. Town Manager Rick Owen also stated that additional public parking will be provided when the Historic School site project is completed.

Ted Silver motioned for staff to bring their concerns to the planning board and begin discussion on solutions. His motion was seconded by Morgan Herdklotz and passed unanimously.

Town Attorney Four Eggers provided the Board with an update on the StandUp Properties, LLC appeal. He stated that he is still getting the record prepared and will inform the Board of the court date.

With no other business, Chairman Fred Schmitt motioned to adjourn the meeting and was seconded by Ted Silver. The motion passed and the meeting adjourned at 7:30 p.m.

Respectfully Submitted,

Riley Pudney, Zoning Administrator

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

Fred Schmitt, Chairman to the Board

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