

**BANNER ELK BOARD OF ADJUSTMENT
MONDAY JUNE 20, 2022
MINUTES**

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

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

Others Present: James Frye, Angelo Acceturro, Valerie Codgill, 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.

Consideration of the May 2022 Minutes

The minutes for the May 16, 2022, meeting was approved unanimously as presented with a motion by Chairman Fred Schmitt and Seconded by Morgan Herdklotz.

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. Attorney Four Eggers informed the Board that he previously had worked with Kyle Silver to create Mr. Silver's business corporation. Attorney Four Eggers believes there is no conflict of interest, and that Mr. Silver is aware that he is acting as the legal counsel for the Town and no for Mr. Silver. The Board found no issue with the statement.

The following individuals were sworn in by Chairman Schmitt:

Zoning Administrator Riley Pudney
James Frye
Angelo Accetturo
Kyle Silver

SUP REQUEST JAMES FRYE- CHANGE OF USE WINDOWS, DOORS AND MORE

Zoning Administrator Riley Pudney stated that this is a request for a change of use to a new business at 1378 Beech Mountain Parkway. The applicant, James Frye, is applying for a Windows, Doors and Arts & Crafts business that will take the place of the old RC Car business at that location. She informed the Board that nothing on the exterior will be different, and the parking requirements have been met. Zoning Administrator Riley Pudney informed the Board that there is currently an illegal sign on the premise and requests as a condition that it be applied for and brought into compliance. She explained to the Board that Mr. Frye provided pictures with the items he would like to sell.

Mr. Frye believed that his sign was approved and in compliance with the ordinance. Chairman Fred Schmitt asked if any of the Board had questions for the Zoning Administrator. Ted Silver asked if the

advertising for Beech Mountain on his sign was allowed in our ordinance? Zoning Administrator Riley Pudney and Attorney Four Eggers agreed that it would be considered as an off-premises sign which is not allowed, however, with the lack of an application, there is nothing that can be determined at this point. Ted Silver also asked if there had been a new lease provided since the one with the application had expired. Zoning Administrator Riley Pudney answered that there was not a new lease given to her at this time.

Chairman Fred Schmitt asked if the use for the application can be clarified. Zoning Administrator Riley Pudney stated that the original application for Windows and Doors fell under the Building Supply use which requires a SUP and the later added arts and crafts was considered an accessory use. With no further questions, Chairman Fred Schmitt asked Mr. Frye to present his case.

Mr. Frye explains that he is confused as to what he is actually presenting. He believed he was here to just discuss the location of where he can sell his arts and crafts rather than if he could sell items. He explained that it is not his intention to have items lined up along the roadside and he plans to keep it in the designated area. He also indicated that there would be a designated area if a carver were to come on the property. Chairman Fred Schmitt stated that a carver would not be allowed on premise since it would change the use of the property. Mr. Frye clarified that he wants to have premade art on location rather than manufacture it on site. Zoning Administrator Riley Pudney informed the Board that it was necessary to know what Mr. Frye plans on selling due to the fact that it could change the use of the permit.

Ted Silver asked Mr. Frye what the condition of the lease was, since the one provided was expired. Mr. Frye answered that he was not aware of his lease being expired and could have a new valid lease as soon as tomorrow morning. Ted Silver explained that his concern was that there was no legal interest for Mr. Frye regarding the property. Ted Silver also asked what the status of the DOT permitted parking lines were for the parking space. Mr. Frye stated that he was not aware that this was an issue and that the DOT permit was for the prior use. Mr. Silver expressed his concern for people being able to drive through the parking area without properly painted lines. Mr. Frye stated that people would be able to park anywhere within his property.

Ted Silver asked about the previous business's equipment and carpet. Mr. Frye answered that he is having them removed from the property and donated. Chairman Fred Schmitt acknowledged the Planning Board's concern to have the old pieces removed before a new business were to open. DeKa Tate asked if there was an ordinance regarding the number of items that can be outside of a business. Zoning Administrator Riley Pudney stated that she did not believe that there was an ordinance pertaining to that matter, but she will double check. Attorney Four Eggers told the Board that they can limit the location of where the items may be stored and referred them to the map that Mr. Frye had provided. Ted Silver asked Mr. Frye to further his explain his parking plan and if drivers can drive up to the building. Mr. Frye testified that the parking lot is striped but that there is not a barrier to keep cars from driving up to the building and art area. Mr. Silver asked if the provided exhibit is what matched what was currently on the pavement and Mr. Frye answered that it was not. Chairman Fred Schmitt asked if the arts & crafts were going to be the main source of income rather than the Windows and Doors. Mr. Frye stated that he couldn't answer that since he does not know and that he didn't think what he was asking for was difficult. Chairman Schmitt asked if Mr. Frye would be ready to accept

conditions that limited what he could sell. Mr. Frye answered that yes, he would accept those conditions. Ted Silver asked if Mr. Frye could provide a list of the types of things, he would sell so the Zoning Administrator had something to go by for enforcement. Mr. Frye stated that he plans on selling rhododendron arch ways, metal fire pits, bears and sculptures, metal trash can enclosures and things made from natural materials. With no further questions, Chairman Fred Schmitt closed the evidentiary portion and asked Attorney Four Eggers to go through the questions needing review.

Attorney Four 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. Ted Silver asked if the applicant is required to have a valid and current lease to be considered complete. Attorney Four Eggers stated that the applicant must have permission from the property owner and is a threshold condition for the application. Ted Silver believes that the expired lease is not enough evidence to continue to question 2. Deka Tate asked if it can be conditional on Mr. Frye obtaining a current lease? Chairman Schmitt stated that it could not be conditional based on it being a threshold condition. Ted Silver motioned that the application is incomplete for the following reasons: 1. Lack of valid and current lease. 2. Current sign is not valid and applied for. 3. Lack of detailed list of artworks to be sold. Chairman Fred Schmitt seconded the motion, and it was passed unanimously.

The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

Deka Tate motioned to reconvene the meeting until Wednesday June 22, 2022, at 6pm and was seconded by Chairman Fred Schmitt. The motion passed unanimously, and this SUP hearing has been recessed.

SUP REQUEST ANGELO ACCETTURO- TIKI TACO

Zoning Administrator Riley Pudney explained to the Board the scope of the project. Mr. Accetturo is planning on opening a new restaurant named Tiki Taco. His goal is to have a food truck on premise while his addition for bathrooms and kitchen is finished. He will have 30 seats inside and is required to have 10 parking spaces, which they have provided. The dumpster/trash compactor satisfies the ordinance requirement and so does the ARG's for the addition. Zoning Administrator Riley Pudney states that there is no sign that has been applied for yet but will work with the applicant to have a sign that follows the ordinance. The project meets the impervious surface requirement at 47% which is well beneath the 80% allowance.

Chairman Fred Schmitt asked if the applicant is planning on completing construction since the application does not reflect that. He stated that Mr. Accetturo will be able to change and initial the

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application. Ted Silver asked her if she believes that the trash dumpster and set up is satisfactory. She answered that yes, she is satisfied. He also asked if there will be an ADA parking spot and she stated that Mr. Accetturo is working with the Avery County Building Department to make sure everything is ADA complaint.

Chairman Fred Schmitt asked for clarification regarding the use of the food truck. Zoning Administrator Riley Pudney explained that it will be parked on the side of the building on a paved parking area. It will be connected to permanent power and the applicant will have permission from the adjoining property owner. Chairman Fred Schmitt asked the Zoning Administrator if she was satisfied with the parking requirement. She stated that she was because they have 10 private spaces for the restaurant along with the four spaces that are within the property lines. Ted Silver asked Mr. Accetturo if he would put a 2 bike-bike rack on the property. Mr. Accetturo said he would. Mr. Silver also asked if Mr. Accetturo had research if the property needed to become ADA compliant and how he was going to do so. Mr. Accetturo answered that he was working with the County to do what was necessary. He will have handicap parking and an ADA ramp from parking to the entrance of the building, which will be in the rear of the building for ADA.

Morgan Herdklotz asked if it was his intention to remove the food truck when the kitchen addition was finished. Mr. Accetturo answered that it was his intention to remove the Food Truck when the project was finished.

With no further questions, Chairman Fred Schmitt closed the public comment section of the hearing and directed Attorney Four Eggers to review the questions that were to be considered. Attorney Four 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. Ted Silver motioned that it was with a second by Deka Tate. 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. Ted Silver motioned for the Condition of having a two-bike bike rack installed on the property and was seconded by Morgan Herdklotz. The vote was:

Chairman Fred Schmitt-yea

Ted Silver- yea

Deka Tate- yea

Morgan Herdklotz- yea

The motion passed unanimously.

Chairman Fred Schmitt motioned for the condition for no obstruction or blockage of any existing signs from public view due to construction or food trucks on the property and was seconded by Morgan Herdklotz. 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. Ted Silver motioned to approve 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.

Chairman Fred Schmitt congratulated the applicant and Ted Silver motioned to close the hearing. His motion was seconded by Chairman Fred Schmitt and the hearing for this SUP was closed.

SUP KYLE SILVER BLIND ELK SUP MODIFICATION

Town Attorney Four Eggers informed the Board that this request was for a modification of an existing SUP. The applicant is asking the Board to expand his permit to include the ability to sell spiritous liquors at the Blind Elk. Attorney Four Eggers told the Board that their question to answer is if their original decision to only allow the sale of beer and wine was still in line with public health, safety and welfare. Chairman Fred Schmitt called for Mr. Silver to testify as to why he believes the permit should be amended.

Mr. Silver explained to the Board that when he got his original SUP he was under the impression that he could do what he proposed and sell beer and wine with a regular ABC permit. After his approval, he went to Raleigh to obtain his ABC permits and found out that a local Town of Banner Elk ordinance prohibited the sale of liquor unless the establishment was classified as a restaurant, hotel or motel. Due to this issue, Mr. Silver had to spend additional money to obtain an ABC "private bar" license, which allowed for him to sell beer, wine and liquor. He testified that after receiving this ABC permit, he

returned to the Town and spoke with the prior Zoning Administrator, Cheryl Buchanan, where she told him that he did not need any further permits. Mr. Silver began selling liquor in the form of shots and sidecars. The Town contacted him to confirm that he was selling liquor and he replied yes. The Town then informed him that he was in violation of his special use permit, which only allowed him to sell beer and wine. He then began the application process to have his permit amended and continued selling liquor as he did so.

Mr. Silver informed the Board that his intention is not to sell mixed drinks because the space is not set up for that. He wants to be able to continue selling the sidecars, shots, and the occasional mixed drinks.

Chairman Fred Schmitt asked if the Town had any other information to provide. Zoning Administrator Riley Pudney stated that the application is the same as their previous application from the prior year and that they were currently in violation of their SUP. She reminded the Board that Mr. Silver sold the idea to the Board that it would not be a bar. Chairman Fred Schmitt asked if there had been any consequences for Mr. Silver and Zoning Administrator Riley Pudney said no, that it is dependent on their decision tonight.

Ted Silver asked if in his original application, Mr. Silver only wanted to sell beer and liquor. Mr. Silver said that was correct. Ted Silver asked if Mr. Silver was currently selling liquor and mixed drink and Mr. Silver said that he was. Mr. Silver stated that when Town Manager Rick Owen informed him that he was in violation, Manager Owen told him that the continuation of selling alcohol was Mr. Silver's choice, and if he received a complaint, the Town would serve a Notice of Violation. Ted Silver asked if Cheryl Buchanan gave him consent to exceed the extent of the Special Use Permit that was granted to him. Mr. Silver said that in that context, she did. Ted Silver asked Mr. Silver to explain how he would not be a bar if they granted him his request. Mr. Silver stated that they would not be serving mixed drinks on a daily basis. He serves a single pour and patrons could purchase a non-alcoholic mixture at an additional cost. He stated that the Blink Elk has only served mixed drinks previously, which was a Bloody Mary bar for the Art show.

Ted Silver stated that he had to question Mr. Silver's credibility because he had the opportunity to change his business model from what he sold to the Board. Ted Silver asked if he had the option to remain in the beer and wine sales rather than adding liquor only because he had the availability to do so. Mr. Silver said that was correct because it was a smart business decision to do so. Ted Silver explained that by granting him this request, he would be allowing for him to become a standalone, no food, full fledged bar.

Chairman Fred Schmitt stated that he was not going to question the good faith actions of Mr. Silver and that the only way to change a SUP was to go through this current process and any past conversations can not make that determination. Morgan Herdklotz summarized what Mr. Silver was asking for and the issues he faced to make sure she understood what he was applying for. She wanted to verify that the ABC permit he had to obtain cost more due to the Banner Elk Ordinance. She asked if he was intending to have many different liquors available. Mr. Silver said that was not his intention and that it would be around three different liquors at maximum. He further explained that it was not his goal to have his patrons become intoxicated and that his bartenders were trained in handling such situations. She also asked what his highest alcohol rated content was and he stated that it was around 12-13%.

Chairman Fred Schmitt asked Attorney Four Eggers how to proceed and which questions would they be considering. Attorney Four Eggers stated that the question that needed to be answered was if the current conditions still met the goals and intentions to promote public health, safety, and welfare or if it should be amended to meet the applicant's request.

With no further questions, Chairman Fred Schmitt closed the public comment section of the hearing and directed the Board to discuss whether the condition should be amended. Morgan Herdklotz believed that the request was viable and still adhered to the promotion of public health, safety, and welfare.

Ted Silver believed that the additional cost of the permit is not justifiable for Mr. Silver to sell liquor and knowingly in violation by doing so. He stated that there are no stand-alone bars in Banner Elk and there are no limitations that can be put on the approval to limit the amount or type of drinks being sold. Ted Silver believes that a full fledge bar is not compatible with the rest of downtown Banner Elk. He also stated that the Board bent over for the original permit by allowing an unaffiliated Tap Room to be in Town and he is not comfortable with doing so again by allowing liquor. He also stated issues with illegally using handicap spaces, food trucks issues and public safety are things to consider. Morgan Herdklotz said she believed that it was more than a full fledge bar because it did offer food trucks.

Chairman Fred Schmitt commended Mr. Silver for recognizing the situation and coming in and trying to make it right and in line with his permit. With that being said, Chairman Fred Schmitt agrees with Ted Silver to stay within the original guidelines of his permit and to not allow the expansion into selling liquor.

Morgan Herdklotz motioned to approve Mr. Silver's request to amend his SUP to allow the sale of liquor and was seconded by Deka Tate. Chairman Fred Schmitt and Ted Silver voted against the motion and the vote was 2-2, indicating that the motion does not carry.

Chairman Fred Schmitt motioned to close the hearing and was seconded by Ted Silver.

Deka Tate motioned to recess the meeting until Wednesday, June 22nd, 2022, at 6:00pm and was seconded by Morgan Herdklotz. The motion carried unanimously. The meeting was recessed at 8:57 p.m.

Fred Schmitt, Chairman to the Board

Attested: _____

Approved: _____

