

**MINUTES
BOARD OF ADJUSTMENT
THURSDAY, MARCH 6, 2014
HOOD ROOM, MATTHEWS TOWN HALL**

PRESENT: Members Jim Jiles, Walter Monestere and Jeanne Moore; Alternate Members Peter Tuz and Gary Smith; Attorney Robert Blythe; Senior Planner Jay Camp and Zoning Technician/Deputy Town Clerk Mary Jo Gollnitz.

ABSENT: Member Jim Mortimer and Cecil Sumners; Alternate Jerry Meek

CALL TO ORDER/INVOCATION

Member Jim Jiles called the meeting to order at 7:00 pm and gave the invocation.

Walter Monestere made a motion to have alternate members Peter Tuz and Gary Smith serve as voting members for this meeting. Jeanne Moore seconded the motion and it carried unanimously.

Mr. Jiles made a motion to approve the minutes of the February 6, 2014 meeting as presented. Mr. Monestere seconded and the motion was unanimously approved.

SWEARING IN

Senior Planner Jay Camp was sworn in.

REMAND: 1635 Matthews Township Parkway

Attorney Bob Blythe asked staff if they had any new information to provide the Board. Mr. Camp stated that this is variance request for Premier Plastic Surgery is not a new case. He continued stating that the hearing occurred in 2008 and all the evidence was included in the minutes of that meeting, which were provided to the board. He noted that a timeline was included in the brief provided by Mr. Terrell. The brief also includes information from when staff first met with Dr. Ferrari in 2006.

Mr. Blythe informed the Board on background of the reason for the Remand. He stated that the first hearing on the variance request occurred in 2008. At that time the variance request was denied. The request was appealed to the Superior Court which affirmed the decision of the Board of Adjustment. That decision was appealed to the North Carolina Court of Appeals. The opinion from that Court remands the case back to the Board of Adjustment. The summary stated that the Board of Adjustment in 2008 and Superior Court decisions were in error. Mr. Blythe continued stating that the first remand was sent back to the Board not to hear additional evidence but on the particular evidence and hear arguments from council. At that time Mr. Terrell was not representing the applicant. The Town was represented by Town Attorney Charlie Buckley. At that hearing the variance petition was again denied based on certain findings of fact. The written findings were filed. Then Mr. Terrell filed a writ of certiorari.

Mr. Blythe further stated that Judge Boner of Superior Court remanded the Board with specific instructions to review the record and reconsider its decision. He continued that the board was instructed to adopt finding of facts that are consistent with the opinion of the Court of Appeals and the order. Mr. Blythe noted that the Board was provided a copy of the order, findings of fact that the Board made last year and the position that these findings of fact were found to be invalid. The remand is to reconsider the previous order of this Board. He continued stating that the Town was represented at the hearing by Mr. Buckley and the Town has chosen not to appeal the Superior Court's decision.

Mr. Jiles asked what the ramification is in denying the variance. Mr. Blythe said that he would like to defer that question until after the petitioner's attorney provides his arguments.

Tom Terrell 300 N Grime St., Smith, Moore, Leatherwood representing Dr. Victor Ferrari, Genesis Ventures and Premier Plastic Surgery addressed the Board. He understands that the Board has been given a copy of the brief he prepared. He is also aware that some of the board members are new and other members have been through the previous hearings. He is going to assume that the court order is unfamiliar to some of the board members and a copy is attached in tab #3 of the brief. The Court of Appeals decision is included in tab #2 of the brief.

Mr. Terrell continued stating that this is the third time that this Board has heard this variance request. This is the fourth time that this matter has come before the Board in some manner. This case comes before the Board controlled by and under the authority of a decision that was published by the NC Court of Appeal in 2011. He continued stating that it is also under the orders of Mecklenburg County Court Judge Boner that was entered on November 25, 2013. These court orders control the decision tonight.

Mr. Terrell noted that in September of 2012, this Board ignored the decision that was published the year before. Judge Boner has listed three findings in his order stating that the Board's findings numbered five, six and eight; are contrary to the Court of Appeals decision in this matter. He said that it would be fair to say that Judge Boner and the decision of the Court of Appeals does not allow wiggle room for any decision other than granting the variance. He informed the Board that Mr. Buckley has told him that the Town has withdrawn their objections with the granting of the variance.

Mr. Terrell provided an overview of the facts of the case. He stated that this request is for a sign variance in order that a surgery center can keep a sign that was mistakenly permitted by Mecklenburg County. The facts of the record show that approximately 10% of Dr. Ferrari's patients are there for emergency surgery. The example that was given for an illustration is a child that had gotten bitten by a dog and needed to get to a surgeon quickly in order to avoid blood loss and scarring. He continued stating that the record shows that Dr. Ferrari's patients are placed under general anesthesia. When someone is under anesthesia, there is always a risk of complication such as heart attack, stroke or an allergic reaction. In those circumstances, it is necessary to have access to get to an ambulance immediately.

The problem is without that sign, based on Premier Plastic Surgery experience prior to the sign being installed, 90% of first time patients could not find the building. Dr. Ferrari was required to keep trees in the front of his building as part of the site plan requirement. The Town planted trees in the median along Matthews Township Parkway. The trees in the median block the sign which is on the building. Mr. Terrell continued saying that according to the Town's zoning rules, the only location a sign could be placed was 500 feet away, around a long curve, where a sign is invisible to the building and its entrance.

He further noted that the Town of Matthews does not allow a developer to file a common signage plan. Matthews uses a first come first serve basis policy. If you have a multi tenant building the very first tenant can use 100% of

the signage space to the detriment of all the tenants yet to come. Dr. Ferrari bought the fourth of four lots and there was no space left for his sign at the location 500 feet away.

Mr. Terrell continued reading a sentence from the record showing how difficult it would be to find Premier Plastic Surgery if you rely on one entrance: "In order to get to Dr. Ferrari's office from the first entrance, one must travel through the Fuddrucker's parking lot, down a ramp, turn left, at the Chinese food restaurant, go through a somewhat wooded area, up another ramp, and across a multi tenant lot, before taking yet another right before reaching Dr. Ferrari's building." That is how difficult it is without having a monument sign out front of the building, he said. This why Dr. Ferrari testified that 90% of his first time patients before the sign was erected could not find his building and would be as much as one-half hour late. He continued saying that the key point is; if 90% of first time patients cannot find the building without a sign, then there is a 90% chance that an ambulance in a response to an emergency call, could not find Premier Plastic Surgery either. This is something that this Board quibbled with before.

He said that he had one final point and that is substantial justice that this Board must make. Substantial justice can be met by making it possible for one business to have adequate signage because the Town's policies are partially to blame. Substantial justice can be met by allowing a sign that meets the spirit and intent of the ordinance so that citizens can be reached promptly by emergency vehicles.

Mr. Terrell said that in his brief and attachments this Board denied the variance for the second time in September 2012. At that hearing Dr. Ferrari was held to meet every single variance standard with exacting precision. Dr. Ferrari was told initially that he could not get a sign permit. Dr. Ferrari did not go around the Town, he hired a person to get the permit who was with a thirty year sign company. The sign company told Dr. Ferrari that the Town does not permit signs; the county issues permits and he went to the county and received a sign permit. This is cited in the brief numerous times.

Mr. Terrell continued saying that at the next Board of Adjustment meeting there was another applicant that requested a planting yard variance. The Town of Matthews Board of Adjustment actually made a finding that this applicant could make reasonable use of his property. This Board made the finding that the next applicant did cause the problem himself. This Board found the request was to do something that was prohibited and allowed him to do something that was prohibited. This other person was granted a variance.

He further stated that Dr. Ferrari met all the standards for a variance and to deny the variance the Board of Adjustment made up a standard that was not in the ordinance. When Dr. Ferrari met all the standards, he was denied the variance and the next person did not meet the standards but was given a variance; that is not justice.

Mr. Terrell noted that this case has a complicated history and there are some judicial orders that control much of it. He informed the Board that he would be glad to answer facts about the history and will answer questions on the court orders. He provided each of the Board members with prepared findings for the Board to consider. Some of these findings have already been made by the court order. This Board has typically asked if there is reasonable use of the property. Judge Boner found that this standard has never been sanctioned by the Statutes of the State of North Carolina.

Mr. Terrell reminded the Board that the review of the variance is under the old Board of Adjustment rules. If the Board reviews finding #2, the question is whether or not the variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit. He continued stating that North Carolina Court of Appeals has answered that question and Judge Boner emphasized, that in the Town's ordinance where it does meet the spirit and intent.

Ms. Moore asked for clarification about substantial justice. She does not believe that the case Mr. Terrell was referencing after Dr. Ferrari's is a good comparison. She believes they are two different situations. Mr. Terrell said that he mentioned this case and the facts of this case can easily justify substantial justice.

Mr. Blythe asked if Mr. Terrell was confident that the Board is under the previous rules that the variance was heard under the first time. Mr. Terrell said that he chaired the committee that wrote the new statues. There was never a discussion of about what would happen with a case that arose under the old rules but was heard past October 1, 2013. That is how all other situations are handle on a fact pattern that arose prior to a statue changing, they are bound by the former statue.

Mr. Tuz asked for clarification on the reference to the sign standards. He wanted to know that the sign that is there now, and if Matthews would be doing the permitting, would it meet all other standards and codes. Mr. Terrell stated that yes, that if a variance is granted, the sign more than meets the requirements.

Mr. Blythe said that the proposed findings that Mr. Terrell provided are based on the old Board of Adjustment standards.

DELIBERATIONS

Mr. Jiles said that they are looking at findings that lean towards granting the variance. Ms. Moore said that what she remembers of the issue was Mecklenburg County granted the permit and Matthews said it should not have been granted. Her biggest issue at that time was that the County and Matthews were not talking to each other at that time. She did not see any problem with the sign. She feels that Premier Plastics is different from the other uses in the development. Premier Plastics needs some type of recognition by itself and she stands behind her initial decision on the case.

Mr. Jiles said that going through the justifications for approval the urgency of getting in and out of the facility is important. He understands the difficulty of the sign for the development not being located in an easily accessible area for Dr. Ferrari. He continued stating that going through the order it referred to the NC Statues and looking at the idea that consideration of denial would make it difficult for any sign to pass. He is ready to switch to approve the variance after relooking at the evidence. He believes they can find reasonable justification to approve the variance

Ms. Moore said that the fact that this is a unique situation. She continued that Dr. Ferrari's business is different from the others in the development. It is the normal practical thing that this gentleman needs this sign to run his business.

Mr. Tuz said that he reviewed the existing ordinance to see if there was some other solution for this matter. He stated that he drove by the location and looking at the place and knowing that there are trees along the street; if you place the sign on the side of the building you would not see it. The fact that the building is a separate building, without this sign, the building would be unmarked. It is logical to place a sign there. He drove around the development and agrees it is difficult to get around the back of the building. He felt that for safety reasons it is necessary to identify the building. The existing monument sign for the development has no room to place another business name on it. He is in support of the variance, based on safety, health and welfare of the public.

Mr. Jiles said that the point has been made that there are several elements that make it a hardship on the owner to some degree. Ms. Moore commented that it is a hardship on his clients also. Mr. Tuz stated that it would be hindering the business when the Town is trying to promote business.

Mr. Jiles asked Attorney Blythe if the Board could place conditions with the decision. Mr. Blythe stated that the Board has the ability to place reasonable conditions on the variance. You cannot limit it to owner. You can tailor the condition broadly for a facility providing health care or other situations where it is reasonable to assume that emergency vehicles may, from time to time, need to access the facility. Mr. Terrell stated that his client would accept the conditions that the variance remains so long as the building is used for a healthcare facility.

Ms. Moore asked if a condition be added that the sign be properly maintained. Mr. Smith wanted to clarify that the health care facility signage be limited to identification of the facility and not as advertising. He wanted to make sure this could be added and was this covered under the condition. Mr. Blythe said that it would be acceptable to add that condition. Ms. Moore asked if a restaurant wanted to move into the building, would they need a variance for signage. Mr. Blythe answered yes. Mr. Jiles said that the findings and condition that are agreed upon relate specifically to the health care facility and emergency access, not a restaurant, fitness center or other use.

Mr. Jiles made a motion to adopt the findings of fact as presented by Mr. Terrell. Ms. Moore seconded the motion which carried unanimously.

Mr. Jiles motioned that the variance be granted based on the findings of fact with the condition that the sign is for the purpose of identification of a health care facility at this location with proper maintenance. Mr. Tuz asked that the motion be reread. Ms. Gollnitz reread the motion for the Board and clarification. Ms. Moore seconded the motion and the motion carried unanimously.

ELECTION OF CHAIR AND VICE CHAIR FOR THE BOARD

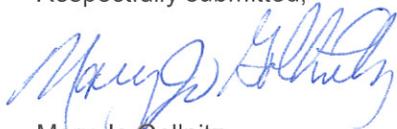
Mr. Jiles opened the floor for nominations for Chair of the Board. Ms. Moore nominated Mr. Jiles and Mr. Monestere seconded the motion. The motion carried unanimously.

Mr. Jiles motioned the nomination and voting on the Vice Chair be delayed until the next Board meeting. Mr. Tuz seconded the motion which carried unanimously.

ADJOURNMENT

Ms. Moore made a motion to adjourn. Mr. Tuz seconded the motion that carried unanimously. The meeting adjourned at 7:50 pm.

Respectfully submitted,



Mary Jo Gollnitz
Zoning Technician/Deputy Town Clerk