

**MINUTES  
BOARD OF ADJUSTMENT  
THURSDAY, APRIL 19, 2012  
HOOD ROOM, MATTHEWS TOWN HALL**

**PRESENT:** Chairman Eric Welsh, Members Walter Monestere and Jim Mortimer, Alternate Members Jim Jiles, Jeanne Moore and Cecil Sumners; Attorney Robert Blythe; Planner II Jay Camp, Code Enforcement Officer Carlo McKoy and Zoning Technician/Deputy Town Clerk Lori Canapinno

**ABSENT:** Vice Chairman Stephen Lee, Member Derek Morgan

**CALL TO ORDER/INVOCATION**

Chairman Welsh called the meeting to order at 7:00 pm. and gave the invocation.

**APPROVAL OF THE MINUTES**

Mr. Monestere made a motion to approve the minutes of the January 5, 2012 meeting. Mr. Mortimer seconded and the motion was unanimously approved.

**SWEARING IN**

The following were sworn in: Jay Camp, Tim Hanson, Dzung Le

**VARIANCE REQUEST – CASE 2012-1: Phat Hue Buddhist Temple; 11502 Idlewild Road**

**STAFF REPORT**

Senior Planner Jay Camp explained the applicant is requesting a variance for 11502 Idlewild Road. The temple congregation purchased two large single family lots and constructed a new approximately 4,000 square foot worship facility. According to tax records, this project began in 2008. A final inspection must be performed before a project is issued a Certificate of Occupancy (CO), and in late 2011 Mr. Camp was contacted by a Mecklenburg County Zoning Inspector about some concerns that were raised in relation to a few landscaping issues on this site. A few issues were identified and most of them have been taken care of now – some missing parking lot trees and street frontage trees, for example – but a concern still exists regarding required screening.

**APPROVED 6/7/2012**

There is a linear area between the temple property and an adjacent home which is heavily wooded with large mature hardwoods, but the town's landscape requirements call for a landscape buffer that is more or less at eye level to provide screening between properties. A variance has been requested to not have to plant the evergreen portion of that buffer. Without the buffer installed or a variance granted, Mecklenburg County will not issue a final CO on the property.

Ordinance section 153.075(l)(1) reads, "Site Perimeter Screening. Screening is required along all side and rear yard property boundaries abutting an existing residential use or residentially zoned area. Screening shall be designed and installed to provide a visual buffer of at least 75% opacity to a height of six (6) feet. When screening is to be accomplished with plant materials, this height and opacity must be reached within four growing seasons. Whenever practical, plantings to achieve screening shall include preserved vegetation, especially trees, existing on the site." Mr. Camp explained that this situation is a bit of a hybrid since there are existing hardwoods trees already existing in the buffer area. In similar situations in the past, the town has required only the evergreen portion of the screening to be planted. Mr. Camp displayed photographs and aerials of the site and adjoining properties, all of which are included in the staff report.

Mr. Mortimer asked how much area needs to be screened. Mr. Camp said the linear measurement is between two hundred and three hundred feet. There are trees there but they don't provide much of a visual screen between the two properties. Mr. Camp mentioned that the area does not appear to have been disturbed during construction.

Ms. Moore asked if the applicant was aware that trees were supposed to be planted. Mr. Camp explained that in 2007 he approved a landscape plan that did show all of the required screening.

Tim Hanson represented Phat Hue Temple and addressed the Board. He explained that he walked the property at the monks' request. He teaches English as a Second Language at Central Piedmont Community College and had been solicited to act as an interpreter in this case. He walked the property today and can give testimony based on what he witnessed and offer additional information based on what was told to him by the Temple leadership.

Mr. Hanson said he knows the Temple wants to comply with both the intent of the code and the aesthetics. Mr. Hanson explained he has a background as a topographer and said portions of the Temple's property is not conducive to planting. There is about a 20% no gain area to the property – it's a steeply contoured valley that is not adaptable to any sort of ornamental or permanent plantings. The north side adjacent to the homeowners' residence has mature woods on the entire length of the line and are not conducive to new plantings because trees would have to be removed to accommodate the planting and also because the existing canopy from the old growth prevents new plantings. The Temple has tried to plant but the plantings don't last more than half a season. Things that they have put in don't grow because of the shade from the canopy is prohibitive to accommodate the four season criteria in the code.

Mr. Hanson said there are two spots along the southern line that don't meet the six foot buffer criteria – one near the power line and another spot further back, and it is his understanding that some trees were removed at the request of the adjoining property owners. The Temple wishes to use their new building as soon as possible and are very receptive to any suggestions on how to accommodate that. As far as complying with the aesthetic component of the ordinance, there are countless plantings all over the property that are not apparent in an aerial view. Potted plants, bushes and ornamentals have been installed. There is no resistance to planting – the required plantings are not in place simply due to soil and sunlight conditions.

Chairman Welsh asked Mr. Hanson about his testimony regarding previous attempts to plant. Mr. Hanson said the problems related to keeping the plantings alive for four seasons. Chairman Welsh asked for specifics on those planting attempts – size, location, quantity, type of plant, etc. Mr. Hanson said he did not do a head count during his walk-around inspection this evening since some of them were already dead. He did not have any photographs.

Ms. Moore asked if the problems with those plantings were brought to the attention of County or Town staff. Mr. Hanson said he did not have that information. He could speak only of what he witnessed during his walkthrough inspection that day.

Mr. Mortimer said it looks from the photographs like nothing was planted in the area – the area appears to be undisturbed. Mr. Hanson said he does not know whose trees are whose in that area but that the area is well wooded. Ms. Moore asked if those trees lost their leaves in the fall and winter. Mr. Hanson said yes. Ms. Moore pointed out that those plantings, if they existed, would provide the screening. Mr. Hanson said plantings wouldn't comply with the four season requirement. Mr. Mortimer pointed out that evergreens would comply. Ms. Moore said the deciduous trees seen in the photographs would not offer the buffer after they lost their leaves, so there would be no buffer at all for several months out of the year. Since the Temple had trouble planting, perhaps there could be a discussion about the appropriate evergreen plantings that could withstand the specific site conditions.

Mr. Jiles said his property is similar to the Temple property and he has evergreens underneath his tree canopy. He said it is his opinion that the required screening is possible.

Chairman Welsh asked Mr. Camp about the specificity of the landscape plan – does it specify what types of plants? Mr. Camp confirmed that it does.

Chairman Welsh asked about the age of the aerial photography. Mr. Camp explained that they are 2011 aerials from the Mecklenburg County GIS program, which are typically taken in the winter. The other photographs were taken in the last month.

Mr. Mortimer asked if there had been any contact between town staff and the temple to explain what the best types of plants would be for that area. Mr. Camp said he consulted with the town's Landscape Manager, who suggested planting Ligustrum, a hardy evergreen that does well in the shade. Mr. Camp could not speak to the drainage or slope issues that Mr. Hanson testified about.

## **DELIBERATION**

Mr. Mortimer said he wondered if the problem is simply one related to the language barrier. From all evidence it appears that it is possible to plant an evergreen buffer. He wondered if the town could work with the applicant to educate them on appropriate plant species.

Mr. Monestere said he approximated that buffer to need only about twenty bushes per every hundred linear feet of buffer.

Mr. Jiles said the mature trees already exist, so the shrubbery would be what is required.

Ms. Moore said she believes they need that buffer. The trees are getting very tall and there needs to be shorter materials to offer that screening effect. She said she thinks they need to comply with the ordinance.

Chairman Welsh asked if the Temple would receive its CO immediately after planting or would have pass a waiting period while the plantings mature. Mr. Camp explained they could have the CO issued the next day – there would be no delay on the CO once they do the planting.

Chairman Welsh said they have not heard any real evidence to indicate that the planting is not possible. There was anecdotal information offered but absolutely no specifics about the plantings that were done before, and he would have liked to see something to elaborate on that and figure out what the problem is. He agreed with a lot of the comments, that it seems like there could be plantings done that would accommodate the canopy and conditions. He said he understands the need to resolve this so they can get their CO but thinks they can go ahead and plant and get the CO. He said he viewed this as a situation in which the applicant has not brought enough evidence to the Board to support the variance request.

There was some discussion about the specifics of the variance request. Mr. Camp confirmed that the only area currently in violation is the one specific area detailed on the staff report and measures roughly two hundred feet. He said it would be up to the Board to determine how they would like to word their motion. Staff determined that there was enough vegetation in the other buffer areas to be in compliance.

Chairman Welsh designated Mr. Sumners and Mr. Jiles to act as voting members.

Mr. Mortimer made a motion to deny the requested variance, and presented findings of fact. There was not enough evidence presented to indicate that the required plantings could not be done. The property owner can plant in the area as required for screening. There is no hardship to the applicant based on any evidence that was presented. The variance, if granted, would not be in harmony with the general purpose and intent of the ordinance and would not preserve its spirit.

Chairman Welsh seconded. In terms of the hardship aspect, what he has heard from the Town is that of the applicant were to make the plantings they would get their CO, which is the only hardship that was expressed in the testimony. He said he believes the applicant failed to meet the burden with respect to each aspect of the variance request.

The motion to deny the requested variance was unanimously approved.

Chairman Welsh explained that the variance request was denied and a written notice will be sent to the applicant. The applicant will have thirty days to appeal the decision if so desired.

#### **APPEAL (NOTICE OF VIOLATION) – CASE 2012-2: Reece Simon, 1326 Brittle Creek Drive**

#### **SWEARING IN**

The following were sworn in: Reece Simon, David Krause, David Geiger

#### **STAFF REPORT**

Mr. Camp explained this is an appeal to a Notice of Violation (NOV). Reece Simon, the property owner of 1326 Brittle Creek Drive, operates Simon Lawn Care and conducts it as a home occupation. Based on a complaint regarding a commercial vehicle being parked at the property, Code Enforcement Officer Carlo McKoy inspected the property and issues a Notice of Violation on February 7, 2012.

Zoning Ordinance section 153.166(I) states, "Vehicles used primarily as passenger vehicles only will be permitted in connection with the conduct of the customary home occupation." Home occupations are allowed in Matthews, although specific prohibitions are made regarding outside storage, noise and other circumstances that could potentially detract from other residents' peaceful enjoyment of their homes. It is the opinion of Matthews staff that the vehicle in question is a commercial vehicle. Its initial design was for commercial purposes – it is not a vehicle that was designed so that its primary purpose was to transport passengers but rather one in which the primary purpose is to transport goods. By "passenger vehicle," the code implies that the primary use of the vehicle is to transport persons to and from daily activities.

Mr. Camp said he read the application that was submitted and in it the appellant stated that the vehicle is occasionally used for personal use. Mr. Camp said it would be difficult to argue that the lawn truck is used as a passenger vehicle most of the time.

Mr. Simon can continue to operate a home-based business here – this is not an issue and there are many such businesses in Matthews today. However, according to the Matthews Zoning Code, the above-mentioned truck should not be allowed to be stored in conjunction with this business.

Mr. Camp displayed photographs of the truck in question, all of which are included in the staff report.

Chairman Welsh asked what the Town's position was on whether or not the business is considered a Customary Home Occupation under section 153.166. Mr. Camp said the accounting/record-keeping aspect of the business is not an issue and there is no concern relating to that aspect being conducted from the house. The trouble is specifically related to the vehicle that is used in conjunction with the business, which falls under subsection I as previously discussed.

Chairman Welsh asked if there have been previous occasions in which the Town has been called on to interpret this provision relating to defining a vehicle that is primarily a passenger vehicle. Mr. Camp said that is an interpretation from staff – there is not a definition in the Town Zoning Ordinance to define what a commercial vehicle is or what a passenger vehicle is.

Mr. Sumners asked if the Town has a history of this type of violation. Mr. Camp said the issue does come up on occasion.

Attorney Kim Gossage represented applicant Reece Simon and addressed the Board. She explained that Mr. Simon has been in business since 2002. He owns the property at 1326 Brittle Creek Drive and has always operated his business from the home. From 2002 to 2006, he parked the vehicle in the lower part of the driveway. In 2006 he added a parking area in the back so the vehicle could be positioned further from the road. From 2006-2012 he has parked the vehicle in the manner depicted in the photographs. At no time prior to the receipt of the NOV has anyone complained about it, nor was Mr. Simon cited by the Town or any other official entity.

Mr. Simon spoke to many of his neighbors after receiving the NOV. Ms. Gossage said it is her understanding that many of his neighbors intend to testify in support of Mr. Simon. In addition, there are a number of homeowners who were not able to attend this meeting but have signed statements of support and indicate that those neighbors are not upset with the vehicle and are pleased with Mr. Simon as a neighbor.

Ms. Gossage explained there is a witness, the President of the Homeowners Association (HOA) where Mr. Simon lives, who will represent the HOA Board and will speak in support of Mr. Simon. She said Mr. Simon has been an

upstanding member of the citizenry in Matthews. He has operated his business without any interference from the Town and without any intent to violate anyone else's rights.

With regard to the ordinances themselves, Mr. Camp highlighted only 153.166, but the NOV included reference to an additional statute as well – 153.054. The NOV dated February 7, 2012 incorrectly summarizes that ordinance by saying that it is not a use permitted by right to park a commercial truck. Ms. Gossage said she is prepared to address that but questioned if the Town was waiving that claim. Mr. Camp agreed that was an error in the NOV – there is no prohibition on parking a commercial vehicle in a residentially zoned property when there is no associated Customary Home Occupation. It is only when there is also a Customary Home Occupation in place that the violation occurs. Ms. Gossage said there were a number of paragraphs cited in the NOV. After discussion, it was clarified that 153.166(l) is the only section at issue.

Ms. Gossage said there will be some testimony to address some of Mr. Camp's staff report. He talked about the vehicle being used primarily for passenger use versus being used primarily for business use. While that may be the Town's interpretation, it is not spelled out in the ordinance, so it is the applicant's position is that Mr. Simon is being singled out and accused of violating a statute that is not very well defined within the Town's ordinances.

Finally, David Geiger will be testifying. Mr. Geiger owns and operates a business called A & D Heating in Matthews. About the same time Mr. Simon received an NOV, Mr. Geiger received a virtually identical NOV. He subsequently received notice from the Town of Matthews that his NOV had been withdrawn because his vehicle had the possibility to be used as a passenger vehicle. Ms. Gossage said in light of the inconsistencies, not only in the ordinances themselves but the way in which they're being applied, Mr. Simon cannot be held responsible for this violation.

Chairman Welsh asked Ms. Gossage if she agreed that section I should be read with the ordinary, customary use of the English language. Ms. Gossage agreed. Chairman Welsh asked how she would respond to the fact that it says that it is to be used primarily as a passenger vehicle. Ms. Gossage says she agreed that that is exactly what it says, but the questions related to the word "primarily." Chairman Welsh asked if, through her argument, she is simply avoiding the use of the word "primarily." Ms. Gossage disagreed. She said the ordinance does say "primarily" but the question is how is that going to be defined by the Board and by the Town of Matthews. Additionally, if the Town of Matthews is going to begin imposing these restrictions - and this undefined word "primarily" - on all home-based businesses, then the Board is going to have a lot of work ahead of it. Chairman Welsh asked if she was suggesting that it is incumbent upon the Town to have specific examples in the ordinance of every single vehicle that would not be considered to be primarily a passenger vehicle. Ms. Gossage said no, but it is incumbent upon the Town to reach some sort of definition of some of the terms that are used in the ordinances. In 153.166(l), there are several questionable terms – "primarily" is questionable, "connection with the conduct of a Customary Home Occupation". The question is, is the Board willing to restrict the use of vehicles that are so far from the road that they're very difficult to even see from the road? She asked if the Board was willing to

take that step and restrict that use, because if so then Mr. McKoy's work is going to increase dramatically. There are people all over the Town of Matthews doing exactly what Mr. Simon is doing.

Chairman Welsh noted that the location of the vehicle has nothing to do with the definition of it being primarily a passenger vehicle or not. Ms. Gossage agreed and said this whole complaint was brought presumably because Mr. McKoy was acting on a complaint. Her client does not have the opportunity to know who made that complaint or why – all the other neighbors have indicated that they support Mr. Simon.

David Krausse of 323 Minden Lane and President of the Courtney Homeowners' Association addressed the Board. He said it is his understanding that there isn't specifically a commercial vehicle ordinance in the Town of Matthews or Mecklenburg County, so if Mr. Simons parked his vehicle in Mr. Krausse's driveway there wouldn't be an issue. If he rented a storefront and officially had his business located on Trade Street. he could then park his vehicle in his own driveway. He is being prosecuted under an ordinance whose intent is to keep the neighborhood looking and feeling residential and prevent home businesses that are noisy, smelly or unsightly. He has a grass-cutting business. His work is done at his customer's house, not his own. He does not do the work of the business at his home and his clients and employees do not cause an unusual number of cars at his residence. His materials and equipment are normally stored in his garage. There is no unusual noise or odor.

Mr. Krausse explained that Mr. Simon is a big-hearted person making ends meet for his family. He keeps his own lawn immaculate and cares for the front entrance of the HOA at a deeply discounted price. He is willing to help out his neighbors when they have difficulties. He discussed the HOA's "Being Neighborly" policy, which was initiated in 2007 to support the Town's statutes in lieu of having binding covenants. If three neighbors complained about an issue covered by a Town ordinance, the HOA Board must seek resolution. The HOA has not had the prerequisite three complaints concerning Mr. Simon. In fact, his immediate neighbors have signed a document indicating that he is complaint with the spirit of the ordinance. Mr. Krausse asked the Board to not prosecute Mr. Simon, who works to increase the beauty of his neighborhood.

E.W. Burdorff, 1321 Brittle Creek Drive, addressed the Board. He lives directly across the street from Mr. Simon. He said he had no problem with Mr. Simon's business either visually or audibly. He thinks the fact that Mr. Simon had the extra driveway section built so he could park his vehicle all the way in the back makes it virtually impossible to see the vehicle from the street. He wholly supported Mr. Simon's appeal.

David Geiger of 440 Alexander Street and owner of A& D Heating addressed the Board. He said Mr. Simon is a friend of his who has a company truck just like he does. Mr. Geiger has had a company truck in Matthews for fifteen years. He said he received the same citation that Mr. Simon received and came to the Town Hall to speak with Town Manager Hazen Blodgett. Mr. Blodgett told Mr. Geiger that his truck is allowed to be there. It is a three-quarter ton pickup truck with a utility bed. It was bought commercially. It has a front seat just like Mr. Simon's vehicle. Mr. Blodgett said Mr. Geiger could go to the grocery store with his vehicle, but Mr. Geiger said the same

is true of Mr. Simon's truck. Mr. Geiger said the ordinance is way off, and if the Town wants to enforce it then there needs to be an explanation included of a truck, a passenger vehicle and a commercial truck. He said a pickup truck with a single front seat and lettering on the side and was bought commercially was okayed by the Town Manager. He also runs his business out of his house. He said the only difference between his business and Mr. Simon's is that A & D Heating has 24-hour service. If a client calls at 2 am, Mr. Geiger can walk right out his door, get into his truck and get to his client's home.

Mr. Geiger said he loves the Town of Matthews but if the Town is going to enforce the issue with Mr. Simon then there will be complaints lodged against all the other people who have similar vehicles. He said he knows of about 65 other houses where commercial trucks are parked and they should all be addressed too. He said it should be looked at a little differently than how the ordinance is stated. The Town of Matthews is a railroad and construction town – that's how construction is done and how it needs to be addressed. He said Matthews is a town of people that work with one another, not fight against each other.

Ms. Gossage asked Mr. Geiger about 24 hour service and asked if he could still offer 24 hour service if he could not keep his truck at his home. Mr. Geiger said he would still have to offer it but he would have to travel to get the truck and then delay his arrival to his client's house and back to his own. Ms. Gossage asked if that could result in a loss of business and Mr. Geiger said it could. She asked if that could result in additional cost to the business. Mr. Geiger said it could. She asked if that additional cost could in part be due to the requirement to locate the vehicle elsewhere. Mr. Geiger said it could.

Ms. Gossage asked Mr. Geiger about his earlier suggestion to classify vehicles. Mr. Geiger said he considers there to be three types of vehicles: the residential car that everybody drives – sedans and so on, then pickup trucks that could be used for residential or commercial use, and then commercial trucks like what Mr. Simon has, which is still the same as a pickup truck except it has a flat nose instead of a hood and a flatbed on the back. It's the same as a flatbed pickup truck. Mr. Geiger said he has an 80,000 pound flatbed but it's classified as an RV and he can park it at his house, although he doesn't park it there. The State of North Carolina classifies it as an RV.

Ms. Gossage asked about the NOV issued to Mr. Geiger. It was for a Ford F250. Mr. Geiger said the difference between that vehicle and Mr. Simon's was a little bit of size. His is a little bigger but the weights are comparable between the two vehicles. Mr. Geiger said Mr. Simon's vehicle is approximately four or five feet longer than his. The noise levels are comparable as are the uses.

Discussion of Mr. Geiger's NOV continued. He said he contacted the Town and a local news channel after he received the notice. Town Manager Hazen Blodgett responded to Mr. Geiger's inquiry by email. The email referenced a conversation Mr. Blodgett had with Code Enforcement staff, during which it was determined that Mr. Geiger's truck was not in violation of the ordinance because that truck has the potential to be used as a

passenger vehicle. Ms. Gossage asked Mr. Geiger if he used that truck primarily as a passenger vehicle and he said no. It is used to transport himself and his employees. She asked if, in his opinion, that could make it at least in part a passenger vehicle. He said it could. She asked him if he knew how to interpret the ordinance. He said no – he has a real problem with it.

Chairman Welsh asked Mr. Geiger if he knew the weight of his pickup truck that he just testified about. Mr. Geiger said it is tagged at 12,000 pounds. Mr. Simon's truck is in the neighborhood of 10-12,000 pounds, although he does not know that for sure, nor does he know the exact measurements of that truck.

Chairman Welsh asked Mr. Geiger if he would agree that a pickup truck could be used as a passenger vehicle. Mr. Geiger said yes. Chairman Welsh asked if he would agree that Mr. Simon's truck would, in the customary course of life, would not be used primarily as a passenger vehicle. Mr. Geiger said no, that it could be used as a passenger vehicle. Chairman Welsh asked him to clarify that his testimony to the Board was that the ordinary, customary use of a vehicle like Mr. Simon's would be as a passenger vehicle. Mr. Geiger said his own F250 has a utility bed on the back. It's not a standard pickup truck like what would be driven off the lot. It is a commercial truck. Just like if someone buys an F250 or F350 pickup truck with a regular bed on the back, it's technically classified as a commercial truck. The only truck that is actually a residential truck is an F150, a Chevrolet 1500 or a Ram 1500. When you go to a three-quarter ton truck, one ton or above it gets classified as a commercial truck. Mr. Geiger pointed out that one can take a commercial truck to the grocery store – he does it. Chairman Welsh asked if Mr. Geiger would agree that Mr. Simon's truck, in the customary lifestyle that the average person has, would not be used primarily as a passenger vehicle. Mr. Geiger said it all depends on the situation. It can be taken to the grocery store. Chairman Welsh asked if Mr. Geiger has personally observed people driving a truck of that type to the grocery store, bank, dry cleaner, or other typical outings. Mr. Geiger said yes. He has two similar vehicles and his employees use them to go to the grocery store and movie theater with their family in it. It can be done.

Carlo McKoy was sworn in.

Code Enforcement Officer Carlo McKoy addressed the Board. He issued an NOV to Mr. Simon based on the size of his vehicle. Mr. Simon then came into the office to discuss the issue and gave Mr. McKoy a list of names and business locations that he believed were violating the ordinance, including Mr. Geiger. Mr. McKoy inspected Mr. Geiger's property. His wife was home at the time so Mr. McKoy told her that the vehicle could potentially be in violation. When Mr. McKoy got back to his office, Mr. Geiger was waiting to see him. They discussed the issue but a Notice of Violation had not been issued to Mr. Geiger.

Mr. McKoy introduced a photograph of Mr. Geiger's vehicle, a Ford F250 (Exhibit A hereby referenced and made a part of these minutes).

As a point of clarification, Mr. Camp noted that Mr. Simon was issued a Change of Use permit for his Customary Home Occupation in 2005. At the time the associated vehicle was a Ford F250, which would have been allowed. The vehicle currently in question was put into service at a later date. The permit for a home occupation was not issued with this vehicle in service. According to Mr. Simon, he did check with the Town regarding the use of such a truck, but the Town does not keep records of verbal conversations and cannot confirm or deny that. The business began in 2002 and the Change of Use permit was applied for and received in 2005.

Chairman Welsh noted another pickup truck in the background of the second photograph of the staff report. Mr. Simon said it is a Ford F150 and had been but was no longer used in the business.

Mr. Mortimer asked how the ordinance provision is interpreted. Mr. McKoy said in the past, the Town has said that an F250 could be used primarily as a passenger vehicle – they are pretty big but people do use them in that manner. He said there are not many people who use a vehicle similar to Mr. Simon in the course of their daily lives.

Ms. Moore asked if it would make a difference if this truck did not have the Simon Lawn Care advertising on it. Mr. McKoy said the logos are not the relevant issue – the fact that this vehicle is not considered to be one that is primarily a passenger vehicle is the issue. Ms. Moore asked if a different homeowner - one who did not own a business - purchased a vehicle like this and kept in on his property, would also be in violation. Mr. McKoy said there are two issues in this case: one is that there is a Customary Home Occupation and the second is that there is a vehicle that is being used in association with that business. The way the ordinance reads now, if a similar vehicle was parked but the homeowner was not also running a Customary Home Occupation then there would be no violation.

Mr. Monestere asked if an F350 would be too large. Mr. McKoy said he would have to look at the use of it and determine if it was being used primarily as a passenger vehicle or not.

Mr. Monestere asked Mr. Simon about seat belts in his vehicle. Mr. Simon said there were three sets.

Ms. Moore noted that Mr. Simon obtained a permit to have his business in his home. She asked what would happen if he did not have his business in his home. Mr. McKoy clarified that the ordinance does not address that.

Chairman Welsh asked about future effects if the variance were to be granted. Mr. Camp said the Board would be setting a precedent. Attorney Blythe said it could set an interpretation precedent. It wouldn't depend on the specific vehicle but it would depend on what the interpretation is of a passenger vehicle in connection with a home business.

Mr. Sumners asked how many similar citations were issued in the past year. Mr. McKoy explained that he was hired approximately six months ago. The Simons NOV was the fourth such citation issued – the other three were for bucket trucks – vehicles that were clearly not passenger vehicles.

Ms. Moore asked Mr. Camp how many similar cases came up in the past three years. Mr. Camp said the issue comes up from time to time. Landscaping businesses run from the home are very common in Matthews. The interpretation that has always been given to people coming in to apply for the permit is that there can be a truck.

Mr. Camp said it is staff's opinion that Mr. Geiger's truck is indeed a pickup truck. Mr. Geiger mentioned three different types of vehicles in his own testimony – cars, pickup trucks and commercial vehicles. A person can go to a Ford dealership and buy an F250 for family use. He said Mr. Simon's vehicle is not one that can be purchased from just any dealership that sells passenger vehicles – it's a vehicle sold for fleet purposes. F250s are pickup trucks that can be outfitted in many different ways, but it is staff's opinion that from a scale standpoint, Mr. Simon's vehicle is much different from the other referenced trucks.

Ms. Moore asked if the NOV would have been issued if Mr. Simon was able to house his vehicle in an enclosed structure. Mr. Camp said that would still not be allowed.

Chairman Welsh asked if the Town has consistently interpreted this provision in the manner he described earlier. Mr. Camp said yes. Chairman Welsh asked if the Board were to grant the appeal, would there be anything in the ordinances that would act to prevent the applicant from having a whole fleet of those trucks at his house. Mr. McKoy said there is nothing in the ordinance that would limit the number of vehicles.

Mr. Krausse spoke to say the ordinance does cover the number of vehicles associated with the business. Chairman Welsh explained that he was mistaken – the ordinance addresses the number of client vehicles that may enter the property but not the number of vehicles associated with the business itself.

Mr. Krausse then said that the Federal Motor Carrier Safety Administration starts to define a commercial motor vehicle as one that is in excess of 26,000 pounds. He encouraged the Board to set a standard in that way.

Reece Simon of 1326 Brittle Creek Drive and owner of Simon's Lawn Care addressed the Board. He said he wanted to be sure he was being treated the same way as everyone else. He said he went to the Dale Jarrett dealership and asked if Mr. Geiger's vehicle was a commercial vehicle or not. He said he was told it was in the commercial fleet because of all the boxes and things that have to be locked up on the truck.

Mr. Simon said he spoke to Mr. Camp about Mr. Geiger's F250 and asked if it was a commercial vehicle. He said Mr. Camp said that it was. Mr. Simon asked why, if it was a commercial vehicle, was Mr. Geiger allowed to keep two of them there? He also has a large box truck. Mr. Simon said Mr. Camp told him that Mr. Camp did not make

the decision - Town Manager Hazen Blodgett made that decision and Mr. Simon should speak to Mr. Blodgett. Mr. Simon said his biggest concern is that he wants to be treated like everyone else. There are many businesses out there and there are some scary things out there. There are big commercial trucks out there.

Mr. Simon said Charlotte specifies measurements for allowable trucks. He said his truck would be allowed at his property if he lived in Charlotte. He said he does not like the idea that people have defined what is and is not a commercial vehicle. To him, an air conditioning company's truck with materials in lock boxes and things in the back instead of seats should be labeled commercial. He just wants to be treated fairly like Mr. Geiger and other people in town.

Chairman Welsh asked Mr. Simon what the model is of the vehicle in question. Mr. Simon said it is an Isuzu NVR. It was purchased from a commercial truck company out on Highway 85. Chairman Welsh noted that Mr. Camp stated earlier that the truck is unlike a Ford F250 in that they are not available at just any dealership. Mr. Simon disagreed and said the Chevrolet dealership on East Independence Boulevard sells them, as does Dale Jarrett. Dealerships have commercial fleets.

Chairman Welsh asked if Mr. Simon was aware of anyone else who received a Notice of Violation for a truck relating to a business and then were permitted to keep the truck on site and had the violation expunged. Mr. Simon said he is not aware of it. Chairman Welsh asked Mr. Simon what he was referencing when he said he wanted to be treated like everyone else, and Mr. Simon clarified that he was referencing the description of what a commercial truck is. Chairman Welsh noted that Mr. Simon mentioned wanting to be treated the same as other people and other businesses, and clarified that the only thing Mr. Simon is pointing to as not being fair in terms of treatment is how an F250 truck would be treated if it was a commercial truck versus Mr. Simon's Isuzu truck. Mr. Simons agreed and said that was the only reference he had – Mr. Geiger has two F250s and a large box truck with advertisements on his property.

Chairman Welsh noted that the ordinance does not use the wording "commercial truck." but rather "...used primarily as passenger vehicles." Mr. Simon said he understood what Chairman Welsh was saying but that he is at grocery stores and schools and the like with that truck multiple times per week. He does use it for non-business reasons.

Chairman Welsh asked Mr. Simon if he believed that a Coca-Cola distributor with a large delivery truck parked in his driveway would be in violation, or would it be considered to be a truck that is used primarily as a passenger vehicle. Mr. Simon said he could not answer that and said the Town would have to make that decision.

Ms. Gossage led a discussion to clarify Mr. Simon's point of reference. It was determined that Mr. Simon is aware of other vehicles in town that are parked in driveways but are used for commercial purposes. A property on Pleasant Plains Road has had two semi trucks parked on the property for years. There are many other examples

as well. Mr. Simon took photographs of multiple sites with commercial vehicles around town (Exhibits A through M hereby referenced and made a part of these minutes). Landscape trucks, bulldozers and semis are all there.

Mr. Simon said he and Mr. Geiger both had the same situation come up at the same time. Mr. Geiger and Mr. Simon met with the Town Manager but only Mr. Simon was told that his truck was in violation and needed to be removed. Mr. Geiger was allowed to keep his trucks. Mr. Simon believes he and Mr. Geiger are being treated differently, as are he and the people who own the vehicles depicted in the photographs.

Ms. Moore asked if there was evidence to prove that the photographs were of vehicles connected to businesses associated with a Customary Home Occupation, or if they just happened to be parked there. Mr. Simon said they were definitely kept at the houses. Chairman Welsh asked how many of those depicted had received citations under the same provision. Mr. Simon said he spoke to three of the people who said they had not been approached by the Town about their vehicles. As far as he knows none of them received a Notice of Violation.

Mr. Geiger said that two of the photos depict semi trucks parked at a property on Pleasant Plains Road. He explained that the property owner had been cited about ten years ago. He removed the trucks for about three months before bringing them back and they have been located there ever since. Mr. McKoy said that case did come before the Board of Adjustment after receiving a Notice of Violation for the trucks. The property owner testified that he planned to retire in the near future and requested to be allowed to keep the vehicles on site until he retired. The Board elected to continue the case without making a vote. Chairman Welsh noted that the code provision was applied in a consistent manner in each case.

## **DELIBERATION**

Chairman Welsh appoint Ms. Moore and Mr. Sumners to act as voting members.

Ms. Moore said she was confused about the differences in the stories and why one person's vehicle was allowed while another was not. She said that she sat on the Board when Mr. Privette, the property owner with the trucks on Pleasant Plains Road, petitioned the Board. The Board let it go because he said he was going to retire but she could not remember all of the details of the case. She said she didn't understand why Mr. Simon was cited if there are not many other cases out there. She said it could open a Pandora's box and guessed the Town would have to continue following up on these.

Chairman Welsh referred to the old case with Mr. Privette's semi trucks and said that showed that the code was consistently applied and NOVs were issued for those vehicles that were determined to be not primarily used as a passenger vehicle. He said he did not understand why the previous Board did not take any action on the case but looking at the underlying facts it is clear that the Town has been consistent in applying the code. The photographs

that were introduced into evidence didn't come with a lot of information but there was testimony that they have not been cited. That does not mean that they should not be cited, just that they have not yet been cited.

Ms. Moore said they have no proof that those vehicles were associated with home businesses. She said they perhaps should not be taken into consideration because no one knows the whole story behind them. Chairman Welsh agreed and noted that the issue is not simply that the vehicles are located on the property but that they are there in conjunction with a home occupation.

Mr. Mortimer said he was bothered by the general nature of the code. He believes Mr. Simon's truck is a commercial vehicle but another person may look at it and believe differently. A resident with a home occupation could inadvertently buy a commercial vehicle that doesn't meet the code because it could be interpreted as a vehicle that is not primarily a passenger vehicle. Chairman Welsh noted that the code doesn't reference "commercial vehicles." There is a distinction. Mr. Mortimer said the Board should suggest to the Town of Matthews that they rework the ordinance.

Mr. Jiles said it seems like the Town might be open to a text amendment or clarification. He said none of the Board members are really able to identify the difference between those vehicles that are primarily passenger vehicles and those that are not. The ordinance is not clear. Ms. Moore agreed that it is not clear. Mr. Jiles said there is an open area for interpretation. It is unreasonable to expect a list of acceptable vehicle models in the ordinance. He noted the State of North Carolina driver's licenses do not identify if someone has a commercial vehicle or not. Mr. Mortimer said there could be size definitions.

Ms. Moore questioned other scenarios, such as travel trailers and other large vehicles that are brought onto residential property.

Attorney Blythe explained that the question at hand is whether or not the Town's interpretation is correct that Mr. Simon's vehicle is used in connection with a home occupation and is not a vehicle primarily used as a passenger vehicle. That is the interpretation of the Code Enforcement Officer and the Board must determine if he is correct or incorrect about that interpretation.

Chairman Welsh said the way he reads section I, one must look at the vehicle itself. The question is not whether the specific individual who owns that particular vehicle is using it primarily as a passenger vehicle but whether or not that vehicle in general would be one that is used primarily as a passenger vehicle or not. You have to bring some common sense into the discussion. The ordinance is intended to deal with the situation of operating a business within the Town at a residence, and so one must put it into that context as well. He said he believes the word "primarily" is the key word – he does not for a second believe that the Isuzu qualifies as a vehicle that is primarily used as a passenger vehicle.

Ms. Moore agreed but said it bothered her that Mr. Geiger's vehicle was determined to be not in violation. Chairman Welsh said an F250 can be bought at any dealership and used primarily as a passenger vehicle – the vehicle itself is structured to do that. It could be modified after that but it doesn't change the fact that the vehicle starts out as one that is primarily used as a passenger vehicle. He said he does not believe there is anyone who could credibly say that the Isuzu belonging to Mr. Simon is a vehicle that can be used primarily as a passenger vehicle. Ms. Moore said she does not believe that to be true of Mr. Geiger's vehicle either.

Ms. Moore said since the ordinance is so confusing, the Board should recommend that the Town look at it again. Attorney Blythe noted that the Board can make that recommendation to the Planning Board and Board of Commissioners but that would not affect the NOV that is currently in effect. He said he could not imagine having a deferral long enough to go through the entire text amendment process. Ms. Moore asked if there was any way that Mr. Simon could rectify the situation to satisfy the Board. Chairman Welsh said that would require Mr. Simon to remove the vehicle from his property.

Mr. Mortimer asked if he could simply park the vehicle at someone else's property. Mr. Jiles pointed out that the ordinance refers to the vehicle in connection with a Customary Home Occupation. They are linked, so even if the vehicle were to be parked elsewhere it would still be in violation. Mr. Jiles also agreed that the ordinance needs to be revised.

Attorney Blythe noted that a 4/5 vote is needed to overturn the decision of the Code Enforcement Officer, so at least four members would have to vote to overturn the decision. Chairman Welsh took a straw poll to gauge the members thinking. Three members were in favor of granting the appeal, which would overturn the decision of the Code Enforcement Officer and two were against it.

Mr. Mortimer made a motion to grant the appeal, which would overturn the decision of the Code Enforcement Officer. Mr. Monestere seconded. Ms. Moore voted in favor and Chairman Welsh and Mr. Sumners voted in opposition. The motion to grant the appeal failed.

Chairman Welsh read findings of fact. There was testimony from the Town that the applicant is running a business out of his home which constitutes and qualifies as a Customary Home Occupation. Under section 153.166, he utilized a vehicle for that occupation at that address. The vehicle is an Isuzu truck, for which pictures and testimony are part of the record. The testimony that Chairman Welsh heard was that the vehicle would not constitute a vehicle that is used primarily as a passenger vehicle – it is a very large truck that is distinguishable from an F250 pickup truck. The ordinance is clear on this point about the vehicle having to be one that is primarily a passenger vehicle in connection with the conduct of the Customary Home Occupation. The evidence is that the Isuzu truck does not qualify as one that is used primarily as a passenger vehicle. Over the years the Town has consistently applied the same standards. With respect to Mr. Geiger, evidence was presented that the Town has consistently applied that standard as well. The applicant had an F250 pickup truck in past years and that was

accepted by the Town – the NOV was issued to the Isuzu, not the previous F250. There was evidence that violations have been brought by the Town consistently against these types of vehicles.

Mr. Sumners agreed and added that any other issues that were brought up in the meeting are not matters to be addressed by the Board. The vehicles used in conjunction with a Customary Home Occupation are what are in question, not simply any vehicle that is labeled as a commercial truck.

Chairman Welsh agreed and added that with respect to the photographs that were introduced, there was no evidence to say whether or not any of those locations also involved a Customary Home Occupation.

Mr. Mortimer, who voted to grant the appeal, stated that the basis for his decision is that the particular section of the ordinance is not clear to him and is subject to many interpretations that are not evident to citizens who have small businesses in their homes in Matthews. He said he believes the ordinance needs to be revised with a lot more detail.

Chairman Welsh explained that the appeal was denied. A written notice or order will be issued by the Town. Attorney Blythe noted the injunction against enforcement will stay in effect until the order is received.

Attorney Blythe said the Board may want to make a recommendation to the Planning Board or Board of Commissioners to examine the provisions of this ordinance. Chairman Welsh said he did not think there is anything wrong with the ordinance but that anyone else who felt differently could make that recommendation. Mr. Monestere said he believes the ordinance is confusing. Mr. Jiles said even though he voted to deny the appeal, he believes the ordinance as written is weak and leaves room for interpretation. The language could be cleared up without compromising that position. Mr. Monestere suggested including specific requirements for gross weight, size, height or other things of that nature.

Mr. Camp noted that staff has already begun doing research but that it will be at the Board of Commissioner's discretion whether or not to make any changes.

#### **ADJOURNMENT**

Mr. Sumners made a motion to adjourn. Mr. Monestere seconded the motion and the meeting adjourned at 9:19 pm.

Respectfully submitted,

Lori Canapinno  
Zoning Technician/Deputy Town Clerk