

**BOARD OF ZONING APPEALS
MINUTES**

The Winchester Board of Zoning Appeals held a special meeting on, July 14, 2010, at 4:00 p.m. in the Council Chambers, Rouss City Hall, 15 North Cameron Street, Winchester, Virginia.

PRESENT: B Hester, H Hurt, C Koneczny, J Phillips, W Roberson and B Pifer (6)
ABSENT: None (0)
STAFF: V Diem and A Walsh (2)
VISITORS: **Ben Butler, John Scully, Mark Merrill, Dixon Wentworth, Deana Kent, Gerald Bechamps, and James Wilkins, Jr.**

MINUTES

Mr. Phillips moved, seconded by Mr. Koneczny, to approve the June 9, 2010 minutes as presented.

<u>MEMBER</u>	<u>VOTE</u>
Mr. Koneczny	Yes
Mr. Hester	Yes
Mr. Roberson	Yes
Mr. Phillips	Yes
Mr. Hurt	Yes

CORRESPONDENCE

Mr. Hester read into the minutes a statement that he submitted to the board prior to the meeting based on a conversation he had with John Scully. (see attached)

Mr. Koneczny spoke of a conversation with Joseph Silek. He asked Mr. Koneczny if it would be appropriate to speak on the issue. Mr. Koneczny stated that it would not and Mr. Silek understood. He added that he was a member of the Wellness Center. He stated that he would recuse himself if it was an issue.

Mr. Pifer stated that he had a similar conversation with John Scully. Mr. Scully asked about procedures and expressed his opinions on the matter.

Mr. Phillips stated that he had a phone call from James Wilkins. Knowing immediately what the conversation was about, he terminated the call. On Saturday, he was approached by Mr. Wentworth at a social gathering. Mr. Wentworth stated that he would see him on Wednesday and that was the extent of the conversation.

Mr. Roberson stated that he also had a conversation with Mr. Wentworth – talked about the procedural process and that was the extent of the conversation. Mr. Roberson also wanted to make it known that he is also a member of the Wellness Center, but he did not think that would interfere with his ability to hear the case.

Mr. Hester added that he was also a member of the Wellness Center.

Mr. Ben Butler attorney for Valley Health, asked for a few minutes to discuss this new information with his clients. Chairman Hurt gave them three (3) minutes for discussion. Mr. Butler returned, stating that there were no objections to the members continuing.

PUBLIC HEARINGS

BZA-10-355 Request of Winchester Medical Center for an appeal of the Zoning Administrator's decision pertaining to permitted use and occupancy, pursuant to Section 15.1-1 of the Winchester Zoning Ordinance, for the property located at 401 Campus Blvd. (*Map Number 149-03- -1*), which is zoned Medical Center (MC) district.

Mr. Diem presented the request to appeal the Zoning Administrator's decision regarding the use and occupancy of the Valley Health Wellness & Fitness Center, located at 401 Campus Boulevard, Winchester, Virginia.

On May 7, 2010, the Zoning & Inspections Administrator issued a Zoning Determination Letter to Vickie Lord, Regional Real Estate Manager of Valley Health. The official notice was issued as a result of several forms of advertisement having been identified, which demonstrated an extensive effort to market the Valley Health Wellness & Fitness Center to the public-at-large. In accordance with § 15.2-2311 of the Code of Virginia (1950) as amended, the property owner's right to appeal within thirty days of their receipt of the notice was outlined within the body of text in the notice.

The subject property is located at 401 Campus Boulevard, within the MC Zoning District, and is subject to the provisions outlined in Article 15.1 of the Winchester Zoning Ordinance. Permitted uses within the MC District, and which most closely represent the present use and occupancy of the subject property, specifically include:

- 15.1-1-30 Recreational facilities (indoor and outdoor) intended for the primary semi-private use of doctors, hospital staff, in- and out-patients to the District and families and guests, provided that such facilities are not marketed to the public-at-large and, further, are in keeping with the stated objectives of the District.
- 15.1-1-31 Private health clubs and sports medicine clinics intended for the primary use of doctors, hospital staff, in- and out-patients to the District and families and guest related thereto, provided that such facilities are not marketed to the public-at-large and, further, are in keeping with the stated objectives of the District.

The articles of advertisement that were identified, consisted of a bulk mail flyer, publication in the Winchester Star on May 4, 2010, an official internet website (<http://www.vhwellfit.com>), and a separate poster/flyer advertising a limited-time offer for 50% off enrollment which expired on May 31, 2010. It was specifically noted on at least two of the advertisements that "*membership includes a comprehensive fitness assessment.*" The incorporated reference to the words "membership" and "fitness" within the public marketing advertisements further establish a distinct relationship with Section 15.1-1-31, as outlined above, as private health clubs and sports medicine clinics would denote that they are generally not open to the public without membership, and that the primary purpose of the use and occupancy is for health and sports medicine.

The MC district provisions were substantially revised and amended by the Common Council on January 9, 1990, as submitted as a privately-sponsored text amendment by Frank D. Cox, Jr., of

the Cox Company, and on behalf of the Winchester Medical Center. There have been no further modifications or amendments to the language identified in either 15.1-1-30 or 15.1-1-31, since the published version of the Ordinance (Ord. No. 90-01, TA-89-08) was adopted by Council.

In response to the Zoning Determination Letter, dated May 7, 2010, Ms. Lord of Valley Health provided a written response, dated June 3, 2010. The City of Winchester received the letter from Ms. Lord, via certified mail, on June 4, 2010. Within the written response, Ms. Lord challenged the determination based on a number of circumstances. She first alleges that the letter from the City takes no formal governmental action; and, therefore an appeal to the Board of Zoning Appeals was not necessary. She adds contention to the language contained in the City's letter regarding potential conflict, as compared to actual conflict.

Ms. Lord, on behalf of Valley Health, asserted *“that the actual use and occupancy of the Wellness Center is permitted under Article 15.1 of the Winchester Zoning Ordinance, as the operation supports the medical and related health care services provided by WMC and Valley Health on behalf of residents of the City and surrounding communities. Accordingly, the Wellness Center is a permitted use and occupancy of the WMC campus property under City zoning ordinances.”* Ms. Lord continues in the June 3, 2010 letter by stating that *“WMC and Valley Health have a vested right to the use, occupancy and promotion of the Wellness Center. WMC and Valley Health have relied, in good faith, on the City's repeated actions in approving the development, construction and operation of the Wellness Center facility.”* Ms. Lord specifically identified certain actions taken by the City's Planning Director, Building Official and Zoning Administrator as *“significant, affirmative governmental acts.”*

On June 7, 2010, City officials including the Zoning & Inspections Administrator, Jim O'Connor (City Manager), and Tony Williams (City Attorney) met with representatives of Valley Health, including Ms. Lord, Mark Merrill (President and CEO), Todd Way (Sr. Vice President), John Scully (Board member), and Ben Butler, Esq. (legal counsel for Valley Health). The discussion provided an opportunity for Valley Health to seek further clarification and confirmation of the City's determination pertaining to the use and occupancy of the Wellness Center. It was further re-iterated that the May 7, 2010 Zoning Determination Letter was, in fact, a formal governmental action as established by the incorporated reference to the right to appeal, pursuant to § 15.2-2311 of the Code of Virginia (1950), as amended. Finally, the City staff offered an opportunity for Valley Health to present a text amendment to the Zoning Ordinance provisions, which could alleviate or repeal specific language that exists in the Ordinance as it relates to marketing to the public-at-large. To date, a privately sponsored text amendment has not been received.

Following the discussion between the City and Valley Health officials, an application for appeal was submitted by Mr. Butler, Esq., along with a revised letter from Valley Health President and CEO, Mr. Merrill, dated June 7, 2010. The letter presented further debate concerning the use and occupancy of the Wellness Center; and, that it specifically falls under the broad category of personal services identified in Section 15.1-1-17 of the Ordinance. In addition, Mr. Merrill cited the facility's assimilation with other sections of the Ordinance to include: 15.1-1-1 – Educational Facilities; 15.1-1-11 – Medical Research; 15.1-1-20 – Outpatient Treatment; 15.1-1-22 – Durable medical equipment; 15.1-1-25 – Accessory uses; and, 15.1-1-29 – Conference facilities.

With regards for that array of uses, staff cannot locate architectural plans for the building but they were able to locate a site plan that was prepared by Valley Engineering and approved by Director of Planning, Tim Youmans on February 6, 2007. Within that site plan, it points out the parking allocations for uses within that building; 1523 sq. ft. for conference, 1264 sq. ft. for preventative health, 6861 sq. ft. PT/OT, 1007 sq. ft. children's program, 9888 sq. ft. physical training /weight

training, 5773 sq. ft. lap pool, 2061 sq. ft. therapy pool, 1255 sq. ft. multipurpose, 2026 sq. ft. aerobic, and track 3879 sq. ft.

Through further consideration of the types of uses that have been advertised and depicted on the website and other items that were presented, it was concluded that the most closely resembling ordinance provision would be private health club and sports medicine because of the health and fitness opportunities there and the amount of square footage denoted in the parking allocations for fitness, health and sports medicine. The provision within the ordinance is that such facilities are not to be marketed to the public-at-large. The items that were presented and their website would say otherwise.

Mr. Diem affirmed that there are several ancillary uses within the subject property, as described by Mr. Merrill in the June 7, 2010 letter; however, the principal use of the property is best described by its official designation – Valley Health Wellness & Fitness Center.

Mr. Diem did not agree with the assertion by Valley Health that the approval of site plans, certificates of occupancy or any other development documents in any way constitute a significant affirmative governmental act, which would create a vested right to use the property in conflict with the Ordinance. City staff has no way of determining whether or not a building designed to serve as a private health club and sports medicine clinic will be marketed to the public-at-large, through the administrative review and approval of site plans, construction documents, or the process of issuing a certificate of occupancy. Presumably, public marketing and advertisement occur subsequent to any official approvals by the City of Winchester for any use and occupancy that exist or are to be established in the city.

Mr. Diem recommended that the Board of Zoning Appeals affirm his determination, as originally stated in the May 7, 2010 official notice; and, further direct the appellant to immediately cease and desist from any further public marketing and advertisement of the Valley Health Wellness & Fitness Center.

Chairman Hurt opened the public hearing.

Dixon Wentworth, Chairman of Valley Health System, made comment in regard to the communication with the board members prior to the hearing. He stated that to the best of his knowledge Valley Health had never been before the Board of Zoning Appeals. The communication was simply to prepare for the proceedings, to find out what the expectations were. Mr. Wentworth went on to explain that Valley Health Systems was there to appeal the Zoning Administrator's determination, the subject being Valley Health and Wellness Center, a medically-based, commonly-missioned, not-for-profit organization within the Valley Health System. They planned to convince the board that Valley Health Wellness & Fitness Center is greatly differentiated in concept and in function from a recreation center, a private health club or sports medicine clinic. The speakers following him would explain that this facility provides a vast array of services, many without charge to the community, without exclusivity, and with a common purpose of providing and improving the public's health. The name "Wellness Center" was hardly a concept in the health industry when the ordinance was crafted twenty (20) years ago.

Mr. Wentworth went through the list of speakers and their topics and asked for permission to return to the podium at the conclusion of their presentation.

Mark Merrill explained that he planned to explain why the facility does not fall under the classification of a private health club or a recreational facility, and provide some additional information with regard to activities that are conducted.

Mr. Merrill started with the Mission Statement, which they are very proud of - "Serving our regional community by improving health." He explained that they are a medical district but health is much more than just the diagnosis of and treatment of acute illness and treating patients. It encompasses everything; wellness, prevention, disease management, acute care, recovery care and more. Valley Health System and the facilities that they operate through the region, perform a broad range of services to promote health and restore function for the patients that they serve. These include the diagnostic capabilities, in-patient and out-patient treatment, recovery and restoration to include recovery and rehabilitation facility, and a home care/visitation component that allows people to recover in their home. They have a behavioral health component, to treat mental illness and substance abuse for all ages and programs for health maintenance.

He added that as a not-for-profit organization, Valley Health also has other responsibilities in addition to what was previously mentioned. The amount of charity care has drastically increased in the last five (5) years. Discounted care is provided to patients that are unable to afford service and promote community building activities, most notably, the ones north of Winchester to promote health in this particular jurisdiction. Also, substantial education is provided to the area for positions in nursing as well as outreach programs, screenings and promotion including CPR training and health fairs.

Valley Health consider themselves stewards of health care in the region. Recent legislature that was passed required hospitals to be more involved with wellness, prevention and promotion of health in the communities that they serve. Americans' health care needs are changing with the aging of the population, and most notably with diabetes. It is the leading cause of mortality in the country and is growing exponentially.

Mr. Merrill drew attention to a brochure listing a number of programs that is offered across the region in the six (6) hospitals that they operate. There is no mention of membership in the brochure. There are free educational enrollment classes to educate people on health issues that will benefit them. Just in the months from July to September, the Winchester Medical Center had twenty three (23) programs to educate the public including screening, exercise and most recently disease management.

The statement of intent of the Medical Center (MC) District back in 1989-1990 when the district was considered talked about creating a campus for hospital and closely related medical uses to include, medical offices, diagnostics, pharmacy, special care units, housing and provisions for alcohol and detox facilities. All in the interest to promote an improved convenient and efficiently planned master campus for health care and the delivery of services for the community. He believed that the Valley Health Wellness and Fitness Center fits that definition and is not a private health club or recreation center.

Mr. Merrill gave examples of several services that do occur at the Valley Health Campus:

- Educational Facilities
- Daycare Center
- Medical Research
- Medical and Dental Clinics
- Personal Service and Retail
- Outpatient Treatment Centers
- Prosthetic Devices
- Conference Centers

Valley Wellness and Fitness Center fits multiple categories. If it had to be fit into one category, *Personal Services and Retail Establishments* would be the more appropriate classification.

Mr. Merrill pointed out some of the differences between a private health club and a medically-based wellness center. First and foremost being that the fact that the IRS considers the Wellness Center tax-exempt. The Commonwealth of Virginia has also recognized Valley Wellness and Fitness Center as exempt from the Virginia Health Spa Act. It is a fully incorporated component of a 501(C)3, not-for-profit organization. It is not a distinct unit. The assets are owned by the Winchester Medical Center and staff is provided by them, as well.

The Wellness Center has multiple clinical programs. Specifically, for weight management, cardiac rehab, physical therapy, diabetes, cancer, fit for surgery, and more. All of the programs follow the American College of Sports Medicine guidelines. The staff that are employed are all professionals in the area of fitness and exercise with either a bachelors or masters degree in subjects like health motion and exercise science or they have a certification in that respective discipline.

Patients who are referred for clinical programs pay no enrollment fee. The Wellness Center has no long-term contracts. The center has operated within the guidelines for community health and follows the medical fitness guidelines for medical screening and pre-assessment exercise. 77% of members have been a patient of Winchester Medical Center within the last three (3) years. Unlike a private health club there are no restrictions on membership.

Mr. Merrill wanted to take time to tell the board about the Senior Health Resource Program that operated out of the Wellness Center. This is an 800-number referral service for patients or family members to call and ask for assistance with loved ones. This is a free referral service. Finally, the Wellness Center provides scholarships to for low-income and needy individuals who need to participate in health and wellness programs.

In conclusion, Mr. Merrill explained that as recently as ten (10) years ago it was unheard of for cancer patients undergoing chemo-therapy to have an exercise regimen, which is no longer the case. Contemporary science is showing that it is better for cancer patients to get up and exercise as quickly as possible, so that their function can return to full capacity as quickly as possible. The longer a patient is dormant or inactive the more difficult their recovery. A cancer program would not be found in a private health club or recreational facility.

Chairman Hurt called for questions from the board on this portion of the presentation.

Mr. Pifer asked in a given year, what percentage of memberships is employee/patient related.

Mr. Merrill explained that approximately 40% of memberships are from employees and patients of Valley Health.

Chairman Hurt asked if the current 77% of patients were referred to the Wellness Center or acquired through marketing.

Mr. Merrill stated that they do not have a breakdown of that number.

Mr. Hester stated that Mr. Merrill said that if the patient is referred there are no enrollment fees. He asked if there are fees associated with their membership after that.

Mr. Merrill explained that if they were there as part of an outpatient program such as physical therapy there would be no fee, but if they were referred for wellness or fitness services they would have to pay a monthly fee.

Neither Mr. Koneczny nor Mr. Hester recalled an enrollment fee when they joined.

Mr. Merrill explained that there was no enrollment fee if a person joined prior to the official opening of the facility.

Mr. Phillips asked if the facility planned on addressing the public before the opening or if they had planned on referrals only.

Mr. Merrill explained that he was not here when it was designed but his understanding was that there were a large number of employees, as well as, physicians that wanted to participate but he could not comment on the exact breakdown.

Chairman Hurt asked how many current memberships there are.

Mr. Merrill stated that they have roughly 5800 members.

Mr. Phillips asked what the capacity would be. He wanted to know if the members were standing in line waiting to use the equipment.

Deanna Kent answered this question, stating that it depends on the time and hour of the day, roughly 6500-7000. She explained that they monitor the floor. During peak season, there can be a twenty (20) minute wait.

Mr. Hester asked what the membership fees go towards.

Mr. Merrill explained that it goes to support the Wellness Center. He added that if you were to do an economic P&L, you would see that the center operates at a loss.

Mr. Phillips asked if it was necessary to send the advertisements to support the center or would it support itself with normal referrals.

Mr. Merrill stated that it was a good question. It would be speculation on his part. Clearly, the bulk of advertising that is done, not including the website, are for the wellness and education programs.

Mr. Hester asked how many of the 5800 members came to the Wellness Center from advertising through the website, flyers, etc.. He wanted to know if it was tracked.

Mr. Merrill could not answer that question.

Ms. Kent stated that it would be very hard to answer that question. They try to track the members but a majority joined before the center opened and since that time they gain memberships every year.

Mr. Hester asked if physicians were giving referrals before the center was open.

Ms. Kent stated that they were. They have a medical advisory board that educated the physicians well before they opened.

Mr. Hester asked if they were advertising before they opened and was the website functioning at that time.

Ms. Kent stated that their advertising has not changed since 2007 when they began. The center did not open until 2008. She added that it is their mission to market to the public. Exercise is an important part of preventative health. The goal is to be public and open, to allow anyone with any type of medical condition to exercise and improve their health. She stated that taking away the public aspect would be very significant.

Mr. Hester asked that based on that statement, anyone off the street could come in and start using the equipment.

Mr. Merrill stated that they could for a one-time fee. If they planned to continue they would have to have a fitness assessment.

Mr. Hester asked Mr. Merrill to elaborate.

Mr. Merrill explained that staff would obtain their medical history. If there is anything that throws up a flag, the individual would have to have a physician sign off for them to continue.

Mr. Hester asked what would happen if someone comes in off the street and does not have a physician.

Ms. Kent explained that every potential member fills out the health history questionnaire, which is a self reported health history. That is then evaluated by a health physiologist. If the individual meets a certain number of risks a physician has to sign off for you to continue. If someone comes in off the street, they receive a guest pass and must sign a waiver. If they did not have a physician, staff would help them locate one.

Mr. Hester asked if she would agree that those stipulations would make it semi-private.

Ms. Kent said “no,” stating that they are not restricting access, they are trying to improve health and awareness.

Mr. Roberson stated that he was not sure if Mr. Merrill was the one to answer this question. Correspondence was read in regard to a meeting that occurred on June 7th between city representatives and representatives of the hospital that he was a part of. At that point, review of the Medical Center district was done. He asked if it was made clear to Valley Health System staff that the issue revolved around code, interpretation of code and that there was a process besides the BZA, i.e., a text amendment that could be done.

Mr. Merrill explained that they were given that option; however the purpose of the meeting was the appeal of the determination. It was in their opinion some ambiguity with regard to what appears in the violation that it most closely resembles a private health club or recreation center and they disagree with that interpretation. Mr. Diem had stated that it was his ruling, so given their options at that particular time was to request an appeal.

Mr. Roberson asked if it was presented to them what the Board as the ability to do or not do.

Mr. Merrill stated that the Board's abilities were not discussed.

Mr. Roberson agreed with the portion in the presentation that over the last twenty (20) years there have been a lot of changes in health care. He asked if they had an opportunity to review what other issues have changed and will create addition ambiguity as this code is written and may their be more detailed issues that need to be addressed beyond even what is currently being discussed.

Mr. Merrill stated it was a great question. And, as they are attempting to digest the recently approved health reform, there are significant implications for health systems with regard to what they may be required to include. He stated that they will be evaluating what other needs they may have, but their contention was that the Wellness Center is not a private health club.

Mr. Pifer had questions regarding their P&L statement that was brought up earlier. He asked if 6800 memberships would be the facilities break-even point.

Mr. Merrill stated that once their debt is paid, they would probably break even at the current membership 5000-6000 members. Absent of that, it would be more like 6500-7000 members.

On that subject, Mr. Koneczny stated that it was indicated including depreciation the center operates at a loss. He asked what the net operating income would be, not including depreciation or interest payments.

Mr. Merrill explained that if you take the direct operating revenue for the fitness center, it would be positive.

With no other questions, Chairman Hurt asked for the next speaker.

Dr. Gerald Bechamps, stated that he has been practicing in the Winchester community for the past 39 years. He spoke in regard to the benefits of the medical based health and fitness center. He reminded the board the Winchester Medical Center was based at 200 S. Stewart Street up until 1990. It enjoys a very unique reputation throughout the Commonwealth attributed to the high quality of staff that they have been able to attract. It is unusual to have such a large medical center in a town of 22,000 people. With the expanding medical staff it was determined that more space was needed and with the existing zoning, they were locked into the location of Stewart and Cork Street. In 1982, a decision was made to move from that location to a new location with room for expansion. At that time, Article 15.1 was created because they knew that medical knowledge and care was going to expand rapidly with scientific and technological advances, doubling every ten (10) years.

Dr. Bechamps explained that Wellness Centers became popular in the 1990's. Even though there was a need and strong support, the Valley Wellness and Fitness Center was not completed until two (2) years ago. A board meets quarterly to oversee the clinical programs, risk reports and safety management. Development of this center was strongly supported by staff because they could refer patients for specific wellness and preventative medicine programs knowing that highly-trained professional staff to oversee ongoing medical care. There are 28 members on the medical and wellness staff with various degrees.

The clinical aspect of the center is for recovery from surgery or to prepare a patient for upcoming surgery. Dr. Bechamps gave several examples. He explained that participation in these programs improves surgical outcome and reduces post-operative complications. All of these activities reflect a trend in healthcare and the changing demographics such as the increasing age of our

population. When Medicare was introduced in 1965, the average life expectancy was 69, today it is 80 years old. These individuals are interested in staying well and preventing illness by exercise and maintaining good health and nutrition in conjunction with other programs.

Dr. Bechamps explained that traditionally the focus has been on diagnosis and treatment, which is still the majority of medical care. However, the medical center recognized that the new approach in medicine is to prevent the need for medical care and promote wellness. This reduces the instances of hospitalization and re-hospitalization for those who have chronic illnesses. He stated that there is scientific data to support this.

The staff at the Wellness Center also give free lectures here and at sister hospitals in the Valley Health System, including talks on sleep deprivation and healthy lifestyles. To date, since opening the Wellness Center has had 318 patients that have participated in the bariatric program, 60 that have participated in pre-operative surgery program, 71 individuals have graduated from the rehab facility at 333 W. Cork Street and continue their rehab through the Wellness and Fitness Center. The facility also includes a therapeutic pool for those who have arthritis.

Dr. Bechamps stated that the Valley Wellness and Fitness Center is unlike any other fitness center. It is truly medical-based with clinical programming, professional staff and the ability to meet the individual health needs of its members. He thanked the board for their time and stated he would be available for questions.

Mr. Pifer asked if there are any plans to expand the center.

Dr. Bechamps stated that the question would have to be addressed by the administrative staff.

Chairman Hurt asked if the individuals with issues like obesity and diabetes come to the center as a referral or on their own.

Dr. Bechamps explained that most are from referrals giving the bariatric surgery program, as an example. The data is coming out that these programs have lengthened the life expectancy of these individuals with this nationally-accredited program.

To clarify, Chairman Hurt asked if once a patient has entered into therapy through a doctor's referral they have the freedom to sign up as a member.

Dr. Bechamps stated that was correct.

With no other questions, Chairman Hurt asked for the next speaker.

Ben Butler, attorney of Valley Health System presented the legal side of the case. He started with the Statement of Intent of the MC district, stating that it is very broad; specifically, the statement "*uses that support the medical center.*" He challenged anyone to go through the other zoning district within the Ordinance and find language as broad as that statement.

Mr. Butler stated as a matter of clarification that when he consulted with the Zoning Administrator and looked through the file, there was no reason why the language regarding *marketing to the public* got put in. He stated however that in his legal opinion it never gets that far, because Valley Health can prove that it is not a private health club or a sports medicine clinic. In searching the legislative history, he was unable to find how the ordinance was changed in respect to the MC district.

He explained that there is no definition within the Ordinance for private health clubs, sports medicine clinics or recreational facilities. The Supreme Court of Virginia has stated that if you find a situation when an Ordinance does not define what the terminology is or what the standards are, you have to go to the general definition that is given by Webster's Dictionary.

Mr. Butler explained that Valley Health Center thought that they were providing a service. It came as a great surprise to them that the Zoning Administrator made that determination.

Referring to Webster's Dictionary, 3rd edition, Mr. Butler read the following definitions:

Private - intended for or restricted to the use of a particular person, group, or class of persons. Not freely available to the public.

Club - a: an association of persons for social and recreational purposes or for the promotion of some common object, usually joined and supported meeting periodically.; **b:** an association of persons participating in a plan by which they agree to make regular payments or purchases in order to secure some advantage.

Health - the condition of an organism or one of its parts in which it performs its vital functions normally or properly.

Recreational – of or related to recreation.

Facility - something that is built, installed, or established to serve a particular purpose.

Mr. Butler asked the Board to keep these definitions in mind because as Mr. Merrill pointed out, the medically-based fitness center is a completely different animal from a private health club. It is a facet of many things. He felt that had the conversation and the information been given to the Zoning Administrator prior to June 7th, his determination would have read differently. As far as the text amendment, he wanted to take the time and address all the issues at once in a comprehensive text amendment.

Mr. Butler went on to explain that the letter addressed the facility as a private health club or sports medicine clinic which he felt was untrue, also the fact that it had been marketed to the public at large. This presents a problem when you talk about marketing. He asked if sending out information about the free programs you offer, is trying to buy people or is it trying to educate the public so they may help themselves. Mr. Butler stated that it was harsh to say that the advertisements were extensive efforts to market the facility.

The Ordinance addresses *Personal Services*. Mr. Butler stated that there is nothing that says the function that that they serve could not fall under that use. His understanding was that the rationale used by the Zoning Administrator was that he saw the words "*fitness*" and "*membership*" and determines that establishes a distinct relationship as a private health club. Prior speakers have explained that it is opened to the public, there are free programs, and patients of the hospital are admitted without membership. Mr. Butler stated that as far as memberships go, a person would need one for Costco. He questioned whether staff would call that a private club based on that fact. He stated that a membership is needed for the medical-based wellness center to establish the health needs of the people that join, so that they can follow those people and the progress of whatever injury or disease they may have. He felt it was noteworthy to add that the Zoning Administrator focused on private health clubs not recreational facilities. The Wellness Center is an appropriate name because it is part of a larger entity which is Valley Health. He

stated that the Zoning Administrator has not considered the various features offered at the Wellness Center that cannot be found at a regular fitness center.

In conclusion, Mr. Butler reiterated that the center has been determined to be tax-exempt by the State of Virginia and the Internal Revenue Service. He asked that the board make a determination today that Valley Wellness and Fitness Center is not a private health club or a sports medicine clinic.

In reference to Mr. Roberson's suggestion of a text amendment, Mr. Butler stated that the Ordinance needs to be looked at, but on a comprehensive level.

Mr. Pifer asked if the advertising included clinics that cost money.

Mr. Butler stated that there were and some membership requests, as well. He added that it does not come into the picture because they are not a private club.

Mr. Hester asked if he would agree that the facility is better served under personal services and retail establishment. He asked if Mr. Butler had the Webster's definition of that, as well.

Mr. Butler stated that he looked it up but it was not listed, probably because it is too broad.

Mr. Hester asked why there has been such a delay in reviewing the Ordinance if there have been so many changes.

Mr. Butler stated that there have been different administrations over the years. If there are decisions and no one objects, it continues. He stated that the facility has been in operation since 2008 with no questions, at all. If there was a failure, it is with the facility for not educating the Zoning Administrator on their function.

Mr. Koneczny stating that he was having a hard time understanding what the state spa statute had to do with this hearing. (5:42:37)

Mr. Butler explained that the center was compared to Gold's Gym and Snap Fitness, which are health spas under the state law. The state said that the Wellness Center is not a health spa.

Mr. Koneczny stated that he was having trouble tying the two together. He was concerned with the ordinance that is on file here in Winchester. He agreed that the Wellness Center in his opinion, did not classify as a spa either. However, that was not what they were there to determine.

Mr. Butler explained that if Gold's Gym were located there, under the current ordinance it would be a private health club.

Chairman Hurt stated that Costco was given as an example for requiring memberships, but they are not non-profit. He asked Mr. Diem if anyone with Valley Health got back to him regarding the text amendment.

Mr. Diem explained that he had been in contact with Mr. Butler regarding the possibility of a text amendment, but he had not received an application.

In response to earlier statements, Mr. Diem stated that both Mr. Merrill and Mr. Butler both had summarized that the use of the facility more broadly represents personal service and retail. He

pointed out that the facility is not located within the main structure or is it contiguous thereto. In order for that use to exist at this address it would have to fit one of those categories. The facility is located across the street and several hundred yards away from the hospital. He explained that if what they stated was accurate, it would require a Conditional Use Permit (CUP) for which we do not have on file. Further he stated, looking at the Site Plan submitted by Valley Engineering, the uses allotted specify the parking calculation, and did not include Personal Service and Retail. They were a wide array of things related to fitness, exercise and health and wellness. The Medical Center provisions now clearly define the use of health clubs and sports medicine clinics as well do the commercial zoning districts. Under these provisions, Snap Fitness and Gold's Gym would fall under *Physical Fitness and Martial Arts Establishment*. There is not a designation of *private club* in those other zoning district provisions for a relationship to fitness and exercise. Mr. Diem referred back to what the Cox Company submitted in 1989, as far as what their client wanted by specifically and narrowly defining that particular use in their vision. He explained that he wanted to bring up those points in the event that the board wanted to inquire why the WMC would feel that they qualify as a Personal Service and Retail Establishment when they are in a building that is separate from the medical center without having a CUP, which would also constitute a violation of the city's Zoning Ordinance.

Mr. Roberson brought up Mr. Diem's point regarding the significant difference in the parking calculation. He asked if Mr. Diem had those numbers.

Mr. Diem stated that he did not have the calculations that would have been in place in 1989. He reminded the board of a comprehensive amendment to the parking provisions adopted by Council, October of 2009. Looking at the provisions now, *Personal Service* would require 1.5 parking spaces per chair or station. Retail Sales would be one (1) for every 300 sq. ft. of general or open to the public, excluding storage space, and Indoor Recreational Facility would be one (1) per each person based on maximum occupancy.

Chairman Hurt asked if the determination of use would stem from the advertising that they have done publicly. The MC District states clearly No Public Marketing and it was his understanding that once that was done it became an issue as far as use. He also stated that marketing the programs and not the membership would be advertising for the health of the community which would be allowed by right.

Mr. Diem agreed. He referred to the example of advertising that was submitted to the members stating to "act now, along with the "waiving of enrollment fees" or "special discounts." By including that statement in the advertisement, it denotes there is a fee associated with the membership.

Mr. Phillips asked if there have been complaints from other private health centers regarding Valley Health.

Mr. Diem stated that there have not been any that he was aware of.

With no further discussion, Chairman Hurt called for the next presenter.

John Scully, a member of the hospital board, as well as, the Valley Health Board and Real Estate Committee, gave a history of the Medical Center zoning explaining that the intent was to be as broad and all encompassing, as possible. He went back to the Statement of Intent because he felt it set the tone for how broad the Ordinance needed to be. When the zoning was passed, the idea of a wellness center, as it is known today, was not contemplated. Mr. Scully read from the staff

report pointing out the Zoning Administrator's attempt to fit the center into a category when in fact it fits across many of the other uses. He thanked the board for their time and asked them to overturn the determination and allow them to continue to provide services to the community, which included allowing them to advertise a wellness center.

James Wilkins, Jr. stated that he has served on the board for the hospital for 29 years. He was present to support the medical-based wellness center. He stated that like the board, he is just a citizen. The board is made up for community members trying to do what is best for the community. He was Chairman of the Real Estate Commission in 1989 when the Ordinance was written. They turned to their engineer, Frank Cox to cover all the issues the best he could. He explained that the mission statement is the difference of the hospital today and the one of the past. Then, the role was to treat the sick; today, it is to prevent sickness.

Mr. Wilkins went back to Mr. Koneczny's statements regarding cost. If the Wellness Center is operating at a break-even point, that does not count the cost to build the building, the cost of the land, or the equipment. The Wellness Center was built because of their mission statement. That is their goal.

He explained that they are no longer a hospital. The bulk of patients are outpatients, which was not the case 20 years ago. During the development, it was hard to find any hospital in the country that had done what they wanted to do. He asked how in 1999, they were supposed to fit the center into language that occurred in 1989, when something like this was not even thought of. Mr. Wilkins pointed out that there have never been any issues with the city. Winchester Medical Center is the biggest asset of the city and the biggest employer. In conclusion he asked for board's assistance to stay open and running for the community.

Mr. Wentworth gave his final comments, thanking the board for their patience and time. He made reference to advertising, naming some of the 23 programs available at the Wellness Center, pointing out that these cannot be found at the other establishments that they have been equated with. He stated that he hoped they had made the point that they should not be lumped into the category of private health club. Twelve (12) million dollars were invested in the facility for the express purpose of serving the community, which is their mission. He explained that this is done without a positive financial reward, just as they open their hospital to all who need them, regardless of who knocks. They need to be able to extend and advise the community of this service. He concluded by stating that this is not a recreational facility, a private health club or a sports medicine clinic. It is a medically-based wellness center that is sorely needed by the citizens of this community. He requested that the Board of Zoning Appeals overrule the Zoning Administrator's determination.

Chairman Hurt closed the public hearing.

Chairman Hurt stated most of the issues are over the MC designation and what falls under that as far as public advertising. He asked if there could be an effort by the board or staff to work with Mr. Butler or Valley Health on a text amendment, so that a happy medium could be made. The determination was based on the violation of advertising publically not what the center is classified as. He asked for comments.

Mr. Diem stated that if it were not a private health club as identified in the ordinance, it is inconceivable that the center would have two very similar or the same type uses on the same property. Aside from that, the opportunity was presented to consider a text amendment prior to the hearing. Not taking anything away from what they provide the community, it comes down to,

are they operating under a permitted use? Certainly, staff avails themselves to work with anyone and until the issue is resolved they would stand in violation based on the May 7, 2010 determination and could be subject to civil penalties.

Mr. Koneczny stated that no one questions the hospital's asset to the city or the services they provide. He explained that the board is a quasi-judicial entity, not a legislative entity. If it's legislation that has to be done, it has to be done through City Council. This board's job is to verify deviation or variation of law. In his opinion, to overturn the Zoning Administrator's ruling, they would be changing law, which is not their job.

Mr. Koneczny moved, seconded by Mr. Hester, to uphold the Zoning Administrator's determination.

Mr. Roberson reminded the board of a similar case, in which the board ruled that there was a process in place to rectify the issue. The board ruled that the applicant go through the proper channel, which was a text amendment.

<u>MEMBER</u>	<u>VOTE</u>
Mr. Koneczny	Yes
Mr. Roberson	No
Mr. Phillips	No
Mr. Hester	Yes
Mr. Hurt	No

Mr. Roberson continued by asking Mr. Diem to go through the text amendment process.

Mr. Diem proceeded to explain the process and timeline.

Mr. Roberson moved, seconded by Mr. Phillips, to allow the applicant four (4) months to move through the process, during that time they can publically advertise. If the text amendment is denied by City Council, all public advertising must cease.

<u>MEMBER</u>	<u>VOTE</u>
Mr. Koneczny	Yes
Mr. Roberson	Yes
Mr. Phillips	Yes
Mr. Hester	Yes
Mr. Hurt	Yes

NEW BUSINESS

Election of Officers

Mr. Phillips nominated Hunter Hurt for Chairman, this was seconded by Mr. Roberson.
Motion passed unanimously 5-0.

Chairman Hurt nominated Conrad Koneczny, this was seconded by Mr. Phillips.
Motion passed unanimously 5-0.

OLD BUSINESS

None

Meeting adjourned: 6:27PM

DRAFT