

**BOARD OF ZONING APPEALS
MINUTES**

The Winchester Board of Zoning Appeals held its regular monthly meeting on, July 11, 2007, at 4:00 p.m. in the Council Chambers, Rouss City Hall, 15 North Cameron Street, Winchester, Virginia.

PRESENT: Koneczny, Phillips, Wiley

ABSENT: Hurt

VISITORS: Louis DiBitonto, Patrick Sowers, Jon Welling, Shawn McDaniel, Tammy McDaniel, Laurence Miller, Connie Middleton, Joyce Golightly, Susan Nicholson, James C. McDaniel, Shawn Roop, Jennifer Roop, Tommy Shea-Roop, Thomas Shea, Randy Stowers, Jennifer Zhai

**EX-OFFICIO
& STAFF:** Diem, Van Diest, Parker, Grisdale, Moore, Lewis, Gaynor

On motion by Mr. Phillips, seconded by Mr. Wiley, the minutes of the June 13, 2007 meeting were unanimously approved.

CORRESPONDENCE

None

Mr. Koneczny questioned Mr. Diem on an administrative approval for a 10% sign variance sent to the board members. He added that his concern is if anyone can do this, it violates the sense of the law. Mr. Diem gave a detailed explanation of the sign. Mr. Koneczny asked if the City would benefit from the change. Mr. Diem stated it will be a more attractive sign and it will remove an existing non-conforming structure. Mr. Koneczny asked Mr. Diem to keep forwarding the requests to the board members.

PUBLIC HEARINGS

BZA-07-11 – Request of Frederick Ward, Associates, for variances of the Winchester Zoning Ordinance, Sections 18-8-6.2b(1) and 18-9-2.9, pertaining to proposed numbers and permitted square footage area of freestanding signs for a commercial center, and permitted height of retaining walls at the Shoppes at Tevis site located on East Tevis Street (*Section 292, Double Circle 2, Lot 2*) zoned Commercial Industrial (CM-1) District.

Mr. Diem described the area. He stated the subject property is located entirely within the CM-1 District, and is bordered on the east by the Interstate 81 right-of-way. The multi-frontage lot parcel is situated north of East Tevis Street, between the intersections of East Tevis Street and Legge Boulevard and East Tevis Street and the I-81 right-of-way.

Mr. Diem presented the comments from the Zoning Department. He stated that within a letter dated May 22, 2007, as prepared by Jennifer Zhai, Frederick Ward Associates, the applicants indicate their need for the variances requested. This case is very similar to precedence established within **BZA-04-21**, affecting a property located at 2500 South Pleasant Valley Road, which is within the same vicinity.

Mr. Diem stated that within this particular request, the applicant proposes to construct one (1) freestanding sign, measuring 165 square feet in area, with five (5) additional monument style signs, each 25 square feet in area. The proposed sum of square footage of sign area would equal 290 square feet. He added the applicant has also indicated that the parcel is deficient in the required amount of linear feet of public street frontage and that with an additional 180 linear feet of public street frontage, the applicant would otherwise be permitted to have a sum of freestanding sign area of 300 square feet.

Mr. Diem stated that the commercial development that is proposed will include four (4) main buildings, three (3) of which with three (3) or more tenants. An additional four (4) parcels for “pad sites” are identified on the site plan. He added for comparison purposes, if the site was not considered a commercial center, the applicant would possibly be permitted to install approximately eight (8) freestanding signs, each measuring 75 square feet for a total sum of 600 square feet.

Mr. Diem stated the sign is requested to be 165 square feet, which could be administratively approved within the standards outlined in the Winchester Zoning Ordinance, Section 23-3(b). The request represents a 10% deviation from the maximum amount of sign area. The proposal by the applicant to construct an aggregate sum of sign area less than would otherwise be allowed, may justify the request for the 10% variance.

Mr. Diem stated that the applicant also requests that the Board of Zoning Appeals consider and grant a variance pertaining to maximum height of a retaining wall within a front yard. The spirit and intent of the Ordinance, in limiting retaining wall heights is believed to prevent an overwhelming sense of barriers between commercial development and public rights-of-way. The topographical conditions of this site are such that the height of the retaining wall is physically necessary, so as to minimize adverse impacts on adjoining properties. He added the elevation of the site in comparison with the elevation of the travel lanes of I-81 would not appear to create the visual barrier that is intended to be minimized through the current Ordinance standards.

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Mr. Koneczny opened the public hearing.

Jennifer Zhai and Louie DiBitonto were available for questions.

Mr. Philips asked what the length of the retaining wall would be. Mr. DiBitonto stated the wall will be approximately 100-120 linear feet.

Mr. Koneczny asked if the grading is in anticipation of the fly over I-81. Mr. DiBitonto stated that it is and he added the bridge will be 16 feet over the roadway.

Mr. Koneczny closed the public hearing

Mr. Philips informed the guests at the meeting that this was not the first time the applicant has been in front of the board. The board has reviewed the whole project before this meeting and is prepared to vote on it today.

Mr. Philips, seconded by Mr. Wiley, moved to permit the construction of one (1) freestanding sign measuring 165 square feet in sign area, along with five (5) additional monument style signs, each measuring no more than 25 square feet in sign area for a proposed commercial center, as well as, construction of a retaining wall in excess of 3' above finished grade; but no greater in height than 6' at any one point, because,

- a. The variances are in harmony with the intended spirit of the Ordinance; and,
- b. That the strict application of the Ordinance would produce clearly demonstrable hardships to the property; and,
- c. That the authorization of the variances will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.

The motion passed 3-0-0.

Mr. Wiley stated that for the record, the applicants will need to have a unanimous vote to be approved tonight.

BZA-07-12 – Request of James B. Justice, for variances of the Winchester Zoning Ordinance, Sections 10-5-1 and 18-6-5.1, pertaining to main building setback and required off-street parking at 537 North Cameron Street (*Section 153, Double Circle 2, Block E, Lot 32*) zoned Commercial Industrial (CM-1) District.

Mr. Diem described the area. He stated the subject property is located within the CM-1 District, and is bordered on the west and south by High Density and Limited High Density Residential (HR and HR-1) Districts. The corner parcel site is located at the intersection of Wyck Street and North Cameron Street.

Mr. Diem presented the comments from the Zoning Department. He stated that within a letter dated May 22, 2007, as prepared by James B. Justice, the applicant indicates the need for the variances requested. He added the Board of Zoning Appeals established precedence with regards to the request for a variance of main building setback, within **BZA-06-25**, affecting a property located directly across the street and within the same zoning district.

Mr. Diem stated that the applicant intends to utilize a steel frame, unenclosed pavilion structure as an outdoor venue for concerts, exhibits, farmer's market activities, and other similar types of assembly. Previously, the applicant was granted a temporary event permit, during the course of the 2007 Apple Blossom Festival, so as to host a variety of entertainment events. He added that additional interest in utilizing the structure for those types of activities has been noted by City staff, based on the amount of requests received. Assembly use is permitted by right within the CM-1 District; however, City staff feels that it would be in the best interests of the City to grant a permanent Certificate of Occupancy, as opposed to random temporary event permits. In order to accomplish this; however, the applicant has to formally address a nonconforming main building setback that currently exists, along with a deficient number of off-street parking spaces.

Mr. Diem stated that City Staff acknowledges the physical hardship that exists with regards to the location of the pavilion structure; and, has considered the positive site improvements that could occur as a result of redeveloping or changing the use of the former lumber yard site to an outdoor entertainment venue. The pavilion is approximately 12000 square feet in size, which would require a minimum of 120 off-street parking spaces, based on the standards outlined within Section 18-6-5.1. A total of 39 spaces are provided on the subject parcel. The Winchester Zoning Ordinance allows for off-street parking to be delineated within 300' of the subject parcel; and, in an effort to accommodate the need for parking, the applicant has consulted with Bowman Consulting to outline a plan for off-street parking north of the subject property and within 300'. He added that it is important to note that off-street parking that is proposed north of Wyck Street is also intended to be used for a variety of uses and occupancies existing and proposed at the former ZeroPak facility, 536-590 North Cameron Street. The applicant has indicated during prior meetings that the likelihood of simultaneous uses to occur between the outdoor assembly pavilion and the ZeroPak mixed-use development is minimal; and, that consideration of a time-shared parking arrangement would be advantageous.

Mr. Koneczny opened the public hearing.

Jim Justice was present to answer any questions from the board.

Mr. Koneczny asked Mr. Diem if any negative comments have been received. Mr. Diem stated that no comments have been received since the public hearing sign was posted. One citizen asked what type of events would be held and if there would be coordination with the police

department to control the alcohol consumption. He added the events would not be permitted to continue after 10 pm or before 6 am.

Mr. Konecny asked Mr. Justice if the events will be contained in that area. Mr. Justice stated yes and eventually all events will be moved indoors as the site is developed.

Mr. Konecny closed the public hearing.

Mr. Philips informed the guests that this was not the first time the applicant presented before the board.

Mr. Wiley, seconded by Mr. Philips, moved to permit the use of a nonconforming structure for assembly use, and provide for an overall reduction in required off-street parking by 20% of the sum of the proposed uses on site; because,

- a. The variances are in harmony with the intended spirit of the Ordinance; and,
- b. That the strict application of the Ordinance would produce clearly demonstrable hardships to the property; and,
- c. That the authorization of the variances will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.

The motion passed 3-0-0.

BZA-07-13 – Request of Patton Harris Rust & Associates for a variance of the Winchester Zoning Ordinance, Section 18-6-8.1, pertaining to required off street parking at 101-121 Weems Lane (*Section 271, Double Circle 4, Lot 101*) zoned Highway Commercial (B-2) District.

Mr. Diem described the area. He stated the subject property is located in the B-2 District with High Density Residential (HR) District to the south. The proposed site is within the parking lot of an existing commercial center.

Mr. Diem presented the comments from the Zoning Department. He stated the business that intends to occupy the proposed kiosk structure is Bear Creek Coffee, and will primarily serve beverages. It is the determination of the Zoning Administrator that this use would constitute a restaurant, as defined within the Winchester Zoning Ordinance. He added the kiosk will primarily be accessible by motorists who drive up to an order window and purchase their beverages. The applicant has indicated that the process of ordering, paying, and receiving purchases will occur at the same window, as opposed to traditional fast-food restaurants that have a 2-3 step process at different locations within the drive-through lane. Section 18-6-8 defines the required amount of standing space for restaurants that offer a drive-through service to be 5 per pick-up window with at least 3 located before each order station

Mr. Diem stated the applicant has also stated that they intend to provide additional site improvements to include new sidewalk installation and conversion of existing paved area to landscaped area within the parking lot. He added it would appear as though there is an excessive amount of off-street parking at the commercial center; and, that an additional use within the existing parking lot may actually break up the otherwise unattractive appearance of excessive paved area. By requiring the kiosk to have a minimum of five (5) spaces per window, the accessibility and off-street parking pertaining to the existing commercial center would be significantly impacted.

Mr. Koneczny opened the public hearing.

Patrick Sowers and Jon Welling presented the plan to the board. Mr. Sowers stated the product will be ordered and delivered at the same window. He added that the displacement of the existing parking will not drop the number of parking spots below the requirement.

Mr. Koneczny and Mr. Philips asked for clarification on the parking presented in the plan. Mr. Sowers explained the sidewalk proposal for the walk-up window.

Mr. Koneczny commented that some items could take longer to prepare. Mr. Sowers stated that that is the reason additional parking is provided for customers to pull forward. Mr. Koneczny stated because of the length of time for a sale, he could see the line stacking up. Mr. Sowers stated they could do 4 spots but 5 would be tough.

Mr. Koneczny stated the ordinance calls for 5 spots. Mr. Sowers responded that since this is a coffee stand, he expected the use to be limited. Mr. Koneczny asked what would happen if the stand is more popular than expected. Mr. Sowers stated the only option would be to displace more parking spots. He added that since it would only be beverages, the service will be faster.

Mr. Koneczny made the comment that in a situation where there would be a back up, it would not be into a public street. Mr. Philips agreed and stated that it would only hurt the owner of the center and his tenants.

Mr. Koneczny closed the public hearing.

Mr. Koneczny stated everything would be contained on their own property. Mr. Philips stated he thought it would be committing suicide but he wished them good luck.

Mr. Philips, seconded by Mr. Wiley, moved to permit the construction of a kiosk and allow the use and occupancy to consist of restaurant, specializing in serving beverages, by granting a variance to the requirement of the amount of standing spaces (off-street parking); because,

- a. The variance is in harmony with the intended spirit of the Ordinance;

- b. That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,
- c. That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.

The motion passed 3-0-0.

BZA-07-15 – Request of Jenkins-Cooper, LLC for a variance of the Winchester Zoning Ordinance, Section 8-8-1, pertaining to the corner side yard setback at 2944-2950 Valley Avenue (*Section 310, Double Circle 1, Lots 27 & 28 and Section 310, Double Circle 8, Block B, Lot 1A*) zoned Highway Commercial (B-2) District with Corridor Enhancement (CE) overlay.

Mr. Diem described the property as being located within the Highway Commercial (B-2) District, with Corridor Enhancement (CE) overlay. The site currently exists as a single-family dwelling structure, adjacent to an existing automobile sales and service establishment. The single-family dwelling is considered nonconforming.

Mr. Diem presented the comments from the Zoning Department. The Department of Planning has been working with the applicants, regarding their intended conversion of a nonconforming single-family dwelling property to commercial use within the Highway Commercial district. It is the property owner's intention to expand their existing automobile sales and service establishment onto the subject parcel; however, the existing corner side yard setback does not meet current ordinance requirements. The required corner side yard setback within the B-2 district is thirty-five (35') feet. The actual distance that currently exists is 18.45', as depicted on a site plan prepared by Montgomery Engineering Group, Inc., dated May 21, 2007 (revised).

Mr. Koneczny opened the public hearing.

Laurence Miller of 501 Treetop Lane asked where the setback occurs. He added he did not want anything to happen that would change the ordinance to anything bordering the 458 running feet next to the front lots on Valley Avenue. He does not like to see the ordinance change any more than it has to be for any reason. It is very frustrating when you want to do something.

Mr. Wiley asked where Mr. Miller's address is located. Mr. Miller's property backs up to the subject property.

Mr. Miller stated that he was compelled to give 60 feet in order to enter the street in case we wanted to develop anymore. The reason was it had to be 60 feet wide, they have only used 50 feet and I have been forced to give 10 feet to the people it borders on. He added he was

compelled to give 100 feet for a cul-de-sac. I have counted 21 vehicles on the cul-de-sac everyday, not just for one time festivities. He added we have got to change the ordinance but not enough to change anymore land. I have a plan for the rest of my land. The people who are interested in a setback on one have their own plan. He stated that his plans enhance the Valley Avenue area, not take it away. We have a good west side and he would like to see the east side come up too.

Mr. Koneczny asked Mr. Miller how this would affect him. He didn't see it changing the curb line or the street side line; it would just affect the different use of the building. Mr. Miller was concerned the usages would encroach into his land or be used right up to the current property line. Right now, the property is residential and we know its going to get worse, it is headed towards that direction. There has already been some movement by the city to take down trees that weren't supposed to be taken down and other things.

Mr. Miller stated that 10 years ago, when his land could be divided, the ordinance permitted a setback from Valley Avenue to be 30 feet and the street on the side was 30 feet and 15 feet from the property line. That was made very clear to the landowner and that took care of it. Recently, when building on there, they allowed them to use the building if they tore off the front end of it because it was setting too close to Valley Avenue. They would rather the front was off the home than them to use it as a residence and use it as an office.

Mr. Koneczny stated this is a non-conforming residential area anyway. Mr. Koneczny asked Mr. Diem if the rear of the property would be affected. Mr. Diem stated that this is strictly a requirement to facilitate the change of use as a non-conforming residence to a commercial use of the property. They have to formally recognize that there is an encroachment within the required corner side yard. Mr. Diem added that after further testimony, if the board approves the variance conditions could be imposed to prevent further construction or expansion that would cause any concerns of further encroachment.

Randy Stowers, representative for Montgomery Engineering, was present to answer any questions. He added that Treetops Lane was put in after the house was constructed. The creation of Treetops Lane actually created the non-conformance on the side yard setback. It was a regular side property line until Treetops Lane was built; but, it didn't come from the property the house is on, it came from the adjoining property.

Mr. Philips asked if it has been discussed with Mr. Miller that he can take the existing property and convert it to commercial and leave it where it is as long as it doesn't go back to residential. Mr. Diem stated that we have not personally discussed it. Mr. Philips confirmed that this is what the applicant wants to do. Mr. Diem stated that commercial use of the property is what they intend to do. Mr. Stowers stated that the applicant wants to convert the current residence into a business use with no expansion of the current dwelling.

Mr. Koneczny asked if the applicant understood that it could not go back to be a residence. Mr. Stowers mentioned that he was at the meeting in lieu of Ben Montgomery who has been working on the project so he did not have all the answers. He added it is his understanding that no expansion or no reverting back to residence use is planned.

Mr. Philips asked if the project had been discussed with Mr. Miller. Mr. Diem stated it had not been discussed directly. Mr. Philips asked if it could be done now before the board made a motion. Mr. Wiley asked Mr. Philips if he was suggesting that it be done before the board made a decision. Mr. Philips stated he thought the board could make it a requirement so he can understand it. Mr. Stowers stated that it is his understanding that Mr. Miller is the adjoining property owner to our property and does not have any interest. Mr. Philips asked if the property owner has no plans of expansion. Mr. Stowers replied to the best of his knowledge.

Mr. Wiley suggested tabling the project for further discussion. Mr. Stowers agreed to request a table.

Mr. Koneczny closed the public hearing.

BZA-07-16 – Request of Shawn L. McDaniel for a variance of the Winchester Zoning Ordinance, Section 18-10-1, pertaining to accessory structures located in a front or side yard at 2936 First Street (*Section 331, Double Circle 3, Lot 45*) zoned Medium Density Residential (MR) District.

Mr. Diem described the subject property as being located within the Medium Density Residential (MR) District. The site currently exists as a single-family dwelling structure, and is located at the intersection of Summit Avenue and First Street; therefore, existing as a corner lot parcel.

Mr. Diem presented the comment from the Zoning & Inspections Department. He stated that staff recognized a proposal to erect an above ground swimming pool within the front yard during the permit review process. Further research and communication with the property owner/applicant, revealed that a solid wooden fence measuring up to 6' in height had already been erected, so as to enclose the swimming pool area. The applicant indicated that prior to erecting the fence; they had contacted the Zoning & Inspections Department and were told that their proposed fence height would be in conformance. However, it was later surmised that there may have been some confusion between the applicant and City staff regarding the definition of yard areas as it relates to the subject property, which would explain the difference in interpretation.

Mr. Diem stated the corner lot parcel was developed with a single-family dwelling that faces First Street. The driveway, main entrance to the residence, and front elevation are on the First Street side of the property. The applicant maintains that they have used either "side" of their

house as side yards and that they really do not have a “rear” yard, per se. The manner in which the applicant uses or refers to their yard areas is inconsistent with the definitions provided for within the Zoning Ordinance.

Mr. Diem stated the portion of the property that is between the dwelling unit and Summit Avenue is actually considered to be the *front yard*. The portion of property that exists between the dwelling unit and First Street is actually considered to be the *corner side yard*. The *rear yard* would then be considered the portion of property that exists between the dwelling unit and the common property line to the north of the dwelling, shared by their neighbors on First Street. The portion of property that exists between the dwelling unit and the common property line shared by their neighbors on Summit Avenue, between the front and rear yards, would constitute the *side yard*.

Mr. Diem stated that although, the applicant appears to have a reasonable amount of property area within their actual rear yard to erect the above ground swimming pool and privacy fence, the topography of the site is not conducive for erecting a pool, due to its current slope. The applicant has expressed concern with regards to potential flooding and property damage to the adjoining property that could result from locating the pool in that portion of the parcel.

Mr. Diem stated that the applicant has gathered several signatures from neighboring property owners within 300’ feet of the subject property, on a petition that is included with the application materials. One of the property owners identified, suggested that the fence should be lower. He added the Department of Zoning & Inspections has received two additional concerns from property owners regarding the height of the fence, adjacent to Summit Avenue. No objections to the above ground swimming pool were noted on either the petition or through correspondence received by City staff. He added for clarification with regards to fences required to surround a swimming pool, the Uniform Statewide Building Code the required height is at least four (4’) feet.

Mr. Koneczny opened the public hearing.

Susan Nicholson stated she does not have a problem with the fence. Actually, she doesn’t like to look in backyards. The fence does not block the view of anything trying to see around it. There might be 11 cars that go down the street in a day. She thought it would be better if the fence stayed where it is for privacy and for the safety for kids in the neighborhood. She added she lives 3 houses down on Summit.

Shawn McDaniel was present for questions. Mr. McDaniel offered pictures of the property for the board to view. He added that when he started the fence, he was under the impression that he was good to go. Once he was notified, he stopped.

Mr. Wiley asked about the process for installing the above ground pool. Mr. McDaniel stated that you level the ground, put sand underneath it, and put the base of the pool on top of the sand. Mr. Wiley asked that if he is doing that, what the concern of the slope of the ground is. Mr. McDaniel stated that over the years the ground has moved. He added that he put a trailer on the property in the Fall and had to pull it out of a sunken area in the Spring. Mr. Wiley stated that the problem is the ground is fill dirt. Mr. McDaniel agreed and stated the other side of the yard is not.

Mr. Philips asked what is the height of the pool. Mr. McDaniel stated the pool is 4 ½ feet above the ground and the fence would be 6 foot high. Mr. Philips stated that the height of the fence is the problem since the property is on a corner. Mr. McDaniel stated that he wanted it that high because his father had an in ground pool and through the years, he has pulled out various animals and a child.

Mr. Wiley asked if the fence will be painted. Mr. McDaniel stated he will stain it.

Mr. Koneczny asked if the entire fence will be opaque. Mr. McDaniel stated it will be when it is finished. Mr. Koneczny asked if opaque is not allowed in front yard. Mr. Diem stated that is correct. He added that in a required front and side yard, the fence height is a maximum of 4 feet and must be at least 25% open. The styles that have been used are split rail, chain link, rod iron or picket. He added that the applicant could remove every 4th board. In a non-required front and corner side yard, the fence height is a maximum of 5 feet and can be solid; but, then it is setback a distance from the right of way.

Joyce Golightly of 2935 First Street stated that she lives directly across from the property on the corner and does not have a problem with the view. The fence should be there for safety the animals and the children. Mr. Koneczny asked if she has any problem with the height of the fence. Ms. Golightly stated her house sits on the corner and her driveway is right off to the side of Summit Drive. She did not have any problems. She added that she does not have any problems looking at it because it is a nice fence.

Connie Middleton of 401 Summit Avenue stated that she has a problem with the above ground swimming pool being in the front yard. She has an above ground swimming pool in her back yard with a 4 foot fence around it that has been there for 20 years. She has not had any child fall in her pool or any hazardous problems. She stated that her concern is we are here because of the laws, the variance. She added that she is on a school bus route. When the kids are on her front porch, they can't see the school bus because of the 6 foot fence. She knows there is a rule about the 6 foot fence in the front yard but did not know how far away it had to be from a fire hydrant. There is a hydrant on that corner. She is concerned that every person in the City needs to hear this because once one person is granted a variance, it will be easier for the next person to have a swimming pool and 6 foot fence in their front yard. Eventually, the price of the homes in the neighborhood will go down with a stockade fence in the front yard. It will eventually

look like an alleyway. She added she would go along with a chain link fence in the front yard that would allow people to see around the corner because it is hard to see as it is. With the children crossing the street and everything else, it will make it worse. She asked how far out into Summit Avenue do people have to pull in order to see. She is concerned that since there is no sidewalk in the area, the children have no where to skate except in the street. What is going to happen? She is fine with a chain link in the front yard but thinks the swimming pool is tacky. If everyone in the City decides to put one in their front yard, what are you going to do. Unless you have a land association, it is going to be hard if one person is given a variance but the next person is not. You will have a legal battle.

Mr. Wiley asked Mr. Diem to confirm that the setbacks are in coordination with the Department of Transportation so that people can see. Mr. Diem stated that from the intersecting lines of both streets, you should be able to go 25 feet down Summit Avenue and 25 feet down First Street. From those points, you would form a hypotenuse and there should be no visible obstruction in that triangle area created on the corner. Mr. Philips asked if the applicant did that. Mr. McDaniel stated that it does. Ms. Middleton asked whether the land was surveyed before he put the fence up to say it is far enough back into the yard to make this clearance. Mr. Diem did not know if the applicant did that or not. It is not something the City requires as part of the permit process for fences. Mr. McDaniel stated that he measured by the neighbors' fences. One side is at 25 feet and the other side is at 22 feet. The intersection we are talking about measures 27 feet and 6 inches. Mr. Diem stated that was okay.

Susan Nicholson readdressed the board and stated that she does not let her children play in the road. She didn't see what the difference in the bus coming makes if the children are standing on the porch waiting for it. You can see around the fence. When the bus comes to the corner of First Street and turns left into her front yard to pick up a group of kids. If your kids don't play in the road, you don't have to worry about seeing around the fence. There are dogs across the street that jump a chain link fence. I don't want somebody's dog come after my child swimming in a pool or the dog jumping in and tearing up my yard or popping my pool after I spent that much money for a pool. The Middletons have an above ground pool and a chain link fence. You can see everything that happens in that back yard and that to her it is an eyesore. She stated she does not want to see people in their swimsuits, climbing in and out, heeping and yelling, and throwing water every place. Especially in their land, they have no back yard. They have two feet from their back porch to his father's property. With the side yard that sinks and the front yard, what are they going to do? You have to have a fence for safety reasons. You can see around it. You can see the school bus. The bus is yellow for that purpose, so you can see it. She asked the board to think about the safety reasons.

Mr. Koneczny closed the public hearing.

Mr. Diem added that he believed the building code permits shrubs to be used as fencing as well and there is no provision in the ordinance about shrub heights in a required front or corner side

yard. Mr. Koneczny stated it does state the required 4 foot fence height around a pool. Mr. Diem stated that is could also be a shrub that would prevent access to the pool area. He suggested that the board consider a combination of 4 foot wooden fence and landscaping to screen the pool. Mr. McDaniel stated he does plan to plant shrubs around the whole area and that he has already planted the one side of the property along Summit Avenue.

Mr. Wiley, seconded by Mr. Philips, motioned to permit the erection of accessory structures (including an above ground swimming pool and fence) in the front yard, by granting a variance of Section 18-10-1, with the following conditions imposed:

1. Any portion of the fence located within either the 30' required front yard or 20' required corner side yard of the property as defined by the Winchester Zoning Ordinance, shall not exceed four (4') in height, and shall be at least 25% open; and,
2. Any portion of the fence that is located in either the non-required front yard or non-required side yard, shall not exceed five (5') in height, and can be of solid wood, opaque, construction; and,
3. As long as the accessory above ground swimming pool remains in the front yard area, the existing single-family dwelling cannot be re-oriented or re-constructed with a front elevation facing Summit Avenue; and,
4. Required landscaping be done around the fence to be finalized by October 1, 2007; because,
 - a. The variance is in harmony with the intended spirit of the Ordinance; and,
 - b. That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,
 - c. That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.

The motion passed 3-0-0.

BZA-07-17 – Request of Shawn Roop for a variance of the Winchester Zoning Ordinance, Section 18-9-2.8, pertaining to fences in required corner side yards at 448 North Braddock Street and 21 West North Avenue (*Section 173, Double Circle 1, Block I, Lots 20 and 21*) zoned Medium Density Residential (MR) District.

Mr. Diem describes the subject property as being located within the Medium Density Residential (MR) District, with Historic Winchester (HW) overlay. The site currently exists as a single-family dwelling structure, and is located at the intersection of North Avenue and North Braddock Street; therefore, existing as a corner lot parcel.

Mr. Diem presented the comments from the Zoning & Inspections Department. He stated that Staff has received citizen complaints regarding the apparent construction of a wooden fence in the Historic District, without a Certificate of Appropriateness having been issued by the Board

of Architectural Review. Upon notification of this concern, the property owner immediately ceased construction of the fence and submitted an application for review by the BAR.

Mr. Diem stated that prior to the BAR meeting, a review of photographs and submitted materials revealed that the fence was erected within the required corner side yard area of the property. During the BAR discussion held on June 21, 2007, the height of the fence was provided by the property owner, and said to be up to 5'11". Additionally, the property owner indicated that the fence was setback from the North Avenue sidewalk approximately two (2') feet. He added that the members of the BAR commented that the style of fence and materials used were appropriate and architecturally compatible with the Historic District. A Certificate of Appropriateness would conceivably be granted upon approval from the Board of Zoning Appeals for a variance to permitted fence height in a required corner side yard.

Mr. Diem stated the BAR meeting also presented an opportunity for the property owner to explain why they erected the solid wood fence. According to their testimony, a recent influx of registered sex offenders, drug addicts, and other threatening persons have moved into their surrounding neighborhood. The owners intend to provide full enjoyment of their rear yard area to their small children, without the continued threat or fear of exposure to those persons. He added that the owners expressed that they have recovered syringes, empty alcohol bottles and cans, and alluded to having seen people stopping to look at their children. The fence was erected so as to provide an additional level of safety and security for their family.

Mr. Diem stated the narrowness of the lot would prevent full enjoyment of the rear yard area, if the fence were to be located outside of the required corner side yard; or, setback 20' from the public right-of-way of North Avenue. Furthermore, the positioning of a fence at that location would prevent the use of a side door into the residence from the rear yard area.

Mr. Diem stated the Department of Zoning & Inspections has not received any concerns from property owners regarding the height of the fence adjacent to North Avenue. He added that he has a copy of the minutes from the BAR meeting reference BAR-07-46 specifically the request from Jennifer Shea-Roop and Shawn Roop for approval of a fence and satellite dish at 446 North Braddock Street. He wanted to particularly call attention to a comment made by the chairman of the BAR. Mr. Lawton Saunders, the chairman, suggested that the board table this with the applicant knowing that the BAR is okay with the fence and painting it. He would further like to add Section 14-12 of the Winchester Zoning Ordinance that states:

Due to peculiar conditions of design and construction in historic neighborhoods where building and structures are often built close to the lot lines, it is in the public interest to retain a neighborhood's historic appearance by granting variances to normal yard requirements. Where it is deemed that such a variance will not adversely affect neighboring properties, the board of review may recommend to the Board of Zoning Appeals that such variance to standard yard requirements be made

Mr. Diem further offered that there appear to be a number of non-conforming fences that present the same appearance as this address within that particular neighborhood.

Mr. Koneczny opened the public hearing.

Shawn Roop and Jennifer Shea-Roop presented before the board. Mr. Roop stated he brought satellite pictures of the area to show how the lot is non-conforming. Mrs. Shea-Roop asked for a definition of non-conforming. Mr. Diem informed her that it is something that is deficient in size or yard width compared to today's standards. He added it could be the property was developed before the current ordinance standards. If it was in existence beforehand and it has maintained the same use, you have a right to keep it. Mr. Roop continued to explain the satellite picture to the board.

Mr. Wiley stated he is the neighbor that lives 3 houses down from the applicant. He added that the fence doesn't look like it is complete and the fence sags. Mr. Roop stated the fence has not been cemented in because they stopped construction until they get the approvals. Mrs. Shea-Roop added that they want to get the approval and want to landscape the area as well.

Mrs. Shea-Roop presented letters written by a few neighbors who were not able to attend the meeting but who support the fence. Mr. Koneczny asked if any negative comments had been received by the department. Mr. Diem stated there were not.

Mr. Philips asked if the fence is 6 feet high. Mr. Roop stated it is 5 feet 11 inches. Mr. Philips stated the fence should not exceed 5 feet. Mr. Diem stated that being that the fence is in the required corner side yard, the fence should not exceed 4 foot high and it should be 25% open. It is the same as the previous case. The only difference that he would point out is the historic district provision that allows for yard variances based on the BAR recommendation. He added that he does not have a formal recommendation from the BAR but that the board could see from the minutes that they were in approval of the fence and accepted the materials and design. They were going to grant approval based on the BZA variance.

Mr. Koneczny stated that the big difference here is that the fence does not come up to the front of the house. Mr. Diem stated that is correct.

Mr. Wiley asked when the applicant plans to landscape. Mr. Roop stated as soon as he gets the approval, they want to finish the fence and plant a flower bed with 2 feet high plants.

Mrs. Shea-Roop stated that what prompted the fence is finding drug paraphernalia and beer bottles in the bushes. They called the police who came out to pick it up and made a report. Mr. Philips asked what will stop it now. Mrs Shea-Roop stated they are hoping the height of the fence will do it. There have not been any problems since the fence went up. She added that

there are also 4 sex offenders in the block behind them. The neighbors feel safe that their kids are playing in the fenced yard.

Mr. Roop stated he thought he did everything correctly and even made sure the garbage truck would have enough room to turn the corner without hitting the fence. The property just fell in with the corner side lot guidelines that they had to put together two articles in the ordinance together to come up with the regulations.

Barbara Dimagio of 447 Loudon Street stated that the house has been vacant for 2 ½ years. People used to congregate around there that she didn't want around. With the fence, those characters have not been there. She added that she is in favor of the fence.

Thomas Shea-Roop stated that he plays with friends in the backyard and was there when his mother found the drug paraphernalia. The fence makes it safer for them to play.

Thomas Shea stated that he comes to the house fairly often to watch the kids. The fence has made it safer from the traffic on North Street and Braddock Street. He added the height prevents people from looking at the children playing.

Charles Gaynor stated that he wanted to confirm there are sex offenders and group homes in the area. Jack Philips made the comment "are we listening" and we are. He added that he hopes the board received the request favorably.

Mr. Koneczny closed the public hearing.

Mr. Philips, seconded by Mr. Wiley, moved to permit the erection of a solid wood, opaque, privacy fence, by granting a variance of Section 18-9-2.8, with the following conditions imposed:

1. Any portion of the fence located within the 20' required corner side yard as defined by the Winchester Zoning Ordinance, shall not exceed five (5') feet in height above finished grade; and,
2. That if the property owner intends to maintain the existing height of the fence in the required corner side yard, the portion of property that exists between the sidewalk and the fence shall be re-graded or landscaped, so as to create the appearance of the existing fence height to be no more than five (5') feet; and,
3. That any additional re-grading or landscaping as noted within the aforementioned condition shall be completed within one (1) year; because,
 - a. The variance is in harmony with the intended spirit of the Ordinance; and,
 - b. That the strict application of the Ordinance would produce a clearly demonstrable hardship to the property; and,

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- c. That the authorization of the variance will not be of substantial detriment to the adjacent properties and that the character of the district will not be changed by the granting of the variance.

OLD BUSINESS

OTHER

With no further business to discuss, the meeting was adjourned at 5:39 pm.