

**BOARD OF ZONING APPEALS  
MINUTES**

The Winchester Board of Zoning Appeals held a special meeting on, August 11, 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, W Roberson and B Pifer (5)  
**ABSENT:** J Phillips (1)  
**STAFF:** V Diem and A Walsh (2)  
**VISITORS:** Ben Butler, Chris Hahj, Larry Baker, Ron Mislowsky, and Allen Cartwright

**MINUTES**

*Mr. Koneczny moved, seconded by Mr. Hester, to approve the minutes of July 14, 2010 as amended.*

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

**CORRESPONDENCE**

Mr. Diem stated that Item 4 on the Agenda, Motion to Reconsider, was added to Old Business and will be heard at that time.

**PUBLIC HEARINGS**

**BZA 10-396** Request of Allen Cartwright for dimensional variances pertaining to minimum required lot area, lot width, setback, and side yard provisions for a two-family dwelling, pursuant to Sections 5.1-3-3; 5.1-4.2; 5.1-5; and 5.1-6-1.2 of the Winchester Zoning Ordinance at 362-364 Charles Street (*Map Number 174-01-Q-36*), zoned Limited High Density Residential (HR-1).

Mr. Diem presented the request seeking relief of the Winchester Zoning Ordinance to re-use and occupy a previously nonconforming two-family dwelling, which has since lost its nonconforming status due to an extended period of vacancy.

The property owner has responded to the City's most recent concerns regarding the condition of the property and fully intends to move forward with a complete rehabilitation, re-use and occupancy of the structure as a two-family dwelling. The use is permitted only with a conditional use permit in the HR-1 district; therefore, the applicant has submitted a CUP application and site plan sketch to address the off-street parking requirements. These actions have further demonstrated the applicant's good faith effort to resolve the blighting influence on the surrounding neighborhood.

Within the surrounding neighborhood, there are a variety of housing types, including other examples of two-family dwellings which do not meet the dimensional requirements of the district. The proposed use and occupancy would be no more intensive to the neighborhood than what otherwise exists; and, would prevent the further blight and deterioration of an existing property.

**Chairman Hurt opened the public hearing.**

Allen Cartwright explained his plan to renovate the property to a two family unit, providing moderate income housing. He had done the same thing with a property that he had on Highland Avenue and it worked out well. He asked that the requested variance be approved.

**Chairman Hurt closed the public hearing.**

Mr. Koneczny stated that if it did not increase the footprint it should be granted. He added that he would also like to see the parking area cleaned up a little.

Mr. Hester agreed, stating that it would benefit the neighborhood.

*Mr. Hester moved, seconded by Mr. Roberson, to grant a variance pertaining to minimum required lot area, lot width, setback, and side yard at 362-364 Charles Street based on the following circumstances:*

- 1. Whereas, the property owner has demonstrated that his property was acquired in good faith and where by reason of the exceptional narrowness, shallowness, size, or other extraordinary situation or condition of such piece of property, the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the re-use and occupancy of the property, without substantial demolition; and,*
- 2. Whereas, the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant; and,*
- 3. Whereas, such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and,*
- 4. Whereas, the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.*

**MEMBER**

**VOTE**

Mr. Koneczny	Yes
Mr. Roberson	Yes
Mr. Pifer	Yes
Mr. Hester	Yes
Mr. Hurt	Yes

**BZA 10-445** Request of PHR&A, on behalf of O’Sullivan Films, for a variance pertaining to front setback pursuant to Section 12-6 of the Winchester Zoning Ordinance, for a property located at 2004 Valley Ave (*Map Number 251-01- -10 - A*), zoned Intensive Industrial (M-2) District.

Mr. Diem presented the request for relief of the main building setback requirements, to accommodate a vertical expansion of an existing industrial building.

The applicant intended to construct a vertical addition onto an existing industrial structure, so as to accommodate production equipment. No additional land area will be encumbered by the addition; however, as the public right-of-way of Valor Drive was extended north and adjacent to the subject property, the building setback has since become nonconforming. The extension of the unimproved Valor Drive right-of-way represents a significant affirmative governmental act; and, should be taken into consideration by the Board of Zoning Appeals, as this condition was not created by the applicant.

On behalf of the property owner, the applicant has provided a site plan sketch and written statement to support the request; and, has correctly identified the circumstances involved.

**Chairman Hurt opened the public hearing.**

Ron Mislowsky, representing PHR&A, stated that what Mr. Diem had stated was accurate. The extension of Valor drive inflicted the need for the variance. He asked that the request be approved.

Mr. Koneczny asked if there were plans to add additional structures that would add to the non-conformity.

Mr. Mislowsky explained that there are structures being added but they will not require a variance.

**Chairman Hurt closed the public hearing.**

*Mr. Roberson moved, seconded by Mr. Hester, to grant a variance pertaining to main building setback at 2004 Valley Avenue based on the following circumstances:*

- 1. Whereas, the property owner has demonstrated that his property was acquired in good faith and where by reason of a significant affirmative governmental act (i.e., extension of Valor Drive public right-of-way), the strict application of the terms of the ordinance would effectively prohibit or unreasonably restrict the re-use and occupancy of the property, without substantial demolition; and,*
- 2. Whereas, the granting of such variance will alleviate a clearly demonstrable hardship, as distinguished from a special privilege or convenience sought by the applicant; and,*
- 3. Whereas, such hardship is not shared generally by other properties in the same zoning district and the same vicinity; and,*
- 4. Whereas, the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance.*

**MEMBER**

**VOTE**

Mr. Koneczny	Yes
Mr. Roberson	Yes
Mr. Pifer	Yes
Mr. Hester	Yes
Mr. Hurt	Yes

**NEW BUSINESS**

None

**OLD BUSINESS**

**BZA-10-355** Request of the Winchester Medical Center for a motion to reconsider and amend the final order of the Board of Zoning Appeals entered on July 15, 2010, pertaining to a determination of the permitted use and occupancy of the property located at 401 Campus Blvd. (*Map Number 149-03- -1*), which is zoned Medical Center (MC) district and subject to the provisions of Article 15.1 of the Winchester Zoning Ordinance.

Mr. Diem explained that legal counsel for the applicant would be presenting their motion to the board.

Ben Butler, attorney for Valley Health Systems, did not feel that the Final Order entered on July 15, 2010 reflected the vote taken on BZA 10-355, nor did it adequately reflect the second vote. Prior to the meeting, he submitted an Order that he felt more adequately depicted the vote as he heard it. However, it was not until yesterday (August 10, 2010) that he was able to listen to the actual recording of the minutes. Mr. Butler stated that it was his understanding that the Board was going to keep this item under deliberation during the four (4) month period. He felt that this was indicated when Mr. Hurt stated that it would be held under consideration. There was no motion made to that fact, but he claimed he heard it on the recording.

He wanted to make it clear that the petition had been filed for the text amendment. It is set for the September Planning Commission meeting with the City Council meeting following in October. He concluded by asking that the board reconsider the Final Order by entering the amended Order he submitted. This would mean that it would be as if the first Order was never entered and the new Order would take its place. Mr. Butler handed out the amended order for review. He added that there was a case in Virginia, back in 2000, where the Supreme Court voted that the 90 days in which the Board of Zoning Appeals has to render a decision is only directional. The Board would be well within their right to hold this in deliberation for a period of time.

Mr. Koneczny stated that he was troubled by this request. When it first came before the Board it was a matter of affirming the decision or overturning the appeal. He made the motion to affirm the decision because the law is written the way it was written for a reason. He explained that after discussion there was further proof of non-adherence with the fact that they were doing public service and retail with the building being detached from the hospital. The Board cannot change the law. It is not their job to act as legislators. He felt that in that sense, everything that was outlined was in violation whether it was outdated or not. Mr. Koneczny explained that in all good

faith, the Board was trying to ease the 'yes or no' by giving latitude for the center to go through the process.

Mr. Butler interjected that those were not the words used.

Mr. Roberson stated that his intent was to uphold the administrator's decision and to state that if the text amendment was not approved at the end of four (4) months, then all public advertising must cease and therefore the board would be done with it. It was not to continue to deliberate the issue or that the administrator was wrong. It was to give some leeway to deal with the issue, which through Mr. Butler's testimony and others was that the text that exists was outdated. He apologized for the misunderstanding.

Mr. Koneczny stated that it was also the way he understood it. At that time, he even complimented Mr. Roberson on his compromise.

Mr. Hester also agreed.

Mr. Roberson added that looking at the text of his motion it clearly states that at the end of four (4) months all public advertising must cease.

Mr. Butler stated that he was not there to argue. He listened to the transcript and that is not the way it came out.

Mr. Roberson stated that as he read the transcript, it is stated correctly; at the end of four (4) months if it is not approved, all public advertising must cease.

Mr. Butler explained that the Order entered on July 15, 2010 did not indicate that the original motion to affirm the Zoning Administrator's decision was voted down with three (3) **No** votes and (2) **Yes** votes. He did not interpret Mr. Roberson's motion to mean anything other than they were holding this matter in abeyance while the Medical Center went to Planning Commission and City Council.

Mr. Roberson stated that it was not the intent of the motion.

Mr. Butler stated that it is not up to him to argue, just to give the record as complete as he can. At the end of the day, what everyone wants is for the Zoning Ordinance to be up to date and for the Medical Center and the city to recognize what is taking place there.

Mr. Koneczny asked Mr. Butler what he was asking for.

Mr. Butler explained that he is asking to report the motion as he understood it; the first vote stated that the Zoning Administrator's decision was not affirmed and the second vote was approved unanimously that the Medical Center had four (4) months to file the petition and at the end of four (4) months as Mr. Roberson stated, that all advertising must cease. On the other hand, if it's approved then it is a non-issue.

Mr. Koneczny stated that he still did not understand what Mr. Butler wanted from the Board. He thought it was clear that the Medical Center got the four (4) months to get the text amendment approved.

Mr. Roberson clarified that what Mr. Butler wanted them to state was that in the second motion the board did not affirm or deny the Zoning Administrator's decision.

Mr. Koneczny stated that his interpretation was that *if the text amendment was not approved all advertising must cease* would be total affirmation of the Zoning Administrator's determination. All of the remaining members agreed stating they felt the same way.

Mr. Hester stated that it was up to interpretation.

Mr. Roberson added that it seemed logical that after four (4) months the Medical Center would have to adhere to the current text which would affirm the determination.

Mr. Koneczny stated that he thought it was abatement for four (4) months.

Mr. Butler stated that he was not trying to put words in the Chairman's mouth but he had stated that it would stay on the calendar for the four (4) month period. Mr. Butler explained that it was his understanding that there would be a decision made and they would come back.

Chairman Hurt explained that the four (4) months was the time it would take to get through the text amendment process not to come back to the board. He stated that all the members are in agreement that it would proceed that way.

*Mr. Koneczny made a motion that the Motion to Reconsider be denied. The motion was seconded by Mr. Pifer.*

Chairman Hurt interrupted and asked if Mr. Diem had anything to add before they voted.

Mr. Diem stated that he also listened to the tape. He wanted to clarify that during the initial motion made by Mr. Koneczny, Mr. Roberson attempted to interject. In his discussion he was speaking about administrative options for text amendments at which point Mr. Koneczny requested that the board members get back to the motion. That motion failed; however what was stated by Mr. Roberson when he presented the second was *I'd like to make an addendum to... or a second motion* clearly indicated intent of wanting to attach it to the first motion. The board unanimously approved this motion. Mr. Diem added that he had affidavits stating this fact, that have been signed by each of the board members and notarized. He read the content of the affidavit.

Mr. Koneczny stated that he is still not clear as to what Mr. Butler wanted them to do. He felt Mr. Roberson's motion was on target. It gave the Medical Center latitude to advertise during the text amendment process, which he thought was generous.

Chairman Hurt agreed. He stated that he would have had them cease advertising at that time.

Mr. Koneczny asked that if the board reconsiders, would it be reconsidering the entire hearing held in July.

Mr. Butler stated that the problem he had was that it appeared that the motion made by Mr. Koneczny was affirmed on a unanimous vote. He pointed out that it was denied on a 3-2 vote. He also did not understand the motion made by Mr. Roberson because what he called an addendum or a second motion stated in substance that Winchester Medical Center would file a petition for a text amendment, during that four (4) month period of time it would be considered. He did not feel

that the Order reflected that. He explained that the Order states that the determination was affirmed and that was not what he heard. Mr. Butler stated that he just wanted to get the record straight. At the end of the day, he felt that what Mr. Roberson wanted was to make the point that this is a text amendment matter that needed to be taken to City Council. The Order does not reflect that. He asked that the Board state that the Order entered on July 15, 2010 be set aside and a new one entered stating the denial of the determination on a vote of 3-2 and Mr. Roberson's second motion giving the Medical Center four (4) months to submit an application for a text amendment.

Mr. Roberson stated that he did not see how that was any different then what has already been entered, stating that at the end of four (4) months if that text amendment is not granted the advertising must stop. He asked if that was not an affirmation of the Administrator. It reverts right back to what the text currently states, which is you cannot publically advertise.

Mr. Koneczny stated that if it was not an affirmation he would not have voted for it. He did because he felt it would ease the pressure on the Medical Center during the legislative process. He explained that if it was in any way voting against the Administrator's decision he would have voted against it.

Chairman Hurt added that a discussion had taken place regarding the time period it would take to work through that process and that was where the four (4) months/160 days came from.

Chairman Hurt asked that the motion be restated.

*Mr. Koneczny made a motion to deny the Motion to Reconsider. The motion was seconded by Mr. Pifer.*

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

### OTHER DISCUSSION

Mr. Diem asked if the members had received the documentation regarding clarification of roles. He asked if there were any questions.

Mr. Koneczny stated that he was glad that he sent it out. A lot of what is in there is what was taught at the class he and Mr. Hester attended.

**Meeting adjourned: 4:49PM**