

**BOARD OF ZONING APPEALS
MINUTES**

The Winchester Board of Zoning Appeals held a regular meeting on Wednesday, March 13, 2013, at 4:00 p.m. in the Council Chambers, Rouss City Hall, 15 North Cameron Street.

POINTS OF ORDER:

PRESENT: Chairman Hester, Mr. Phillips, Mr. Pifer, Mr. Ransom, Mr. Crawford

ABSENT: None

STAFF: Aaron Grisdale, Catherine Clayton

CONSENT AGENDA:

Approval of Minutes for January 9, 2013

Chairman Hester asked for approval of the minutes.

Mr. Pifer moved for approval.

Mr. Phillips seconded the motion.

Motion to approve the minutes passed by unanimous vote.

Reading of Correspondence

Mr. Grisdale stated that each member has received a letter in support of BZA-13-95 which will be discussed at the time of the case.

PUBLIC HEARINGS:

BZA-13-84 – Request of Habitat for Humanity of Winchester-Frederick County, subject property owner, for variances pertaining to required side yard setbacks and front porch encroachments pursuant to Sections 5.1-6-1.1 and 18-9.2.1 of the Winchester Zoning Ordinance, respectively, for the property located at 400 Highland Avenue (*Map Number 174-1-L-14*), zoned Limited High Density Residential (HR-1) District. The applicant is requesting relief of the required side yard setbacks and front porch encroachment standards in relation to construction of a single-family dwelling on an existing foundation.

Chairman Hester recused himself and Acting Chairman Phillips opened by asking for the staff report.

Mr. Grisdale read the staff report and stated that the applicant does intend to demolish the existing structure down to the foundation, fix the foundation, and then rebuild the single family home in the same building foot print. He further stated that the applicant's variance request is to allow for a substandard structure that does not conform to the Zoning Ordinance provisions regarding encroachments into side yards and a front porch encroachment to be demolished and rebuilt upon the same foundation. Additionally, the required side yard setback on both the north and south side is 4-feet. The applicant is

requesting a variance of roughly three (3) feet on the south property line, resulting in a 1-foot side setback, and a variance of nearly three (3) feet on the north property line, resulting in a little over 1-foot side setback.

He further stated that the applicant intends to utilize the same footprint as the previous front porch which would require a variance to allow for a six-foot encroachment with the front porch; same as the previous front porch. The Zoning Ordinance allows by-right a porch encroachment to be a maximum of five-feet.

Mr. Grisdale advised that there are three (3) considerations that the Board must take into account when considering this request. First that the strict application of this Ordinance would produce a clearly demonstrable hardship and second that such hardship is not shared by other properties in the same zoning district and the same vicinity. The third consideration is that 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 variances.

Mr. Grisdale, Zoning Administrator, concluded the staff report barring any questions from the Board. Acting Chairman Phillips thanked Mr. Grisdale and asked if anyone had any questions.

Having none, Acting Chairman Phillips open the public meeting and invited anyone to speak, whether in favor or in opposition to the request.

Acting Chairman Phillips sworn in Dave Shore, volunteer for Habitat for Humanity for Winchester-Frederick County, who advised the Board that he and the construction supervisor are available if anyone has any questions.

Having no questions, Acting Chairman Phillips closed the public hearing and requested a motion.

Mr. Pifer moved to approve the variances as submitted.

Mr. Crawford seconded the motion.

Voice vote was made and the motion passed unanimously 4-0-1.

At this time, Chairman Hester resumed leadership and called for the next case.

BZA-13-95 – Request of Sam Warden, on behalf of subject property owner, for a variance pertaining to unenclosed porch and deck encroachments pursuant to Section 18-9-2.1, for the property located at 674 North Loudoun Street (*Map Number 154-07- -3*), zoned Highway Commercial (B-2) District. The applicant is requesting relief of the encroachment standards for an unenclosed porch/patio for the existing restaurant.

Mr. Pifer spoke of his past relationship in respect to this case but stated that he did not feel as though this would affect his decision at this time.

Mr. Grisdale read the staff report and stated that the applicant is seeking relief of the permitted yard encroachment for unenclosed porches and decks in order to install a 13-foot by 31.5-foot covered seating area. He advised that the applicant had started construction of the proposed addition without the requisite building permit; however, once the applicant was notified that a building permit was needed, he submitted the permit application with the Zoning and Inspections office. When a zoning review was made and it was determined that a variance was needed, the applicant did in fact apply for such variance.

Mr. Grisdale stated that staff is aware that the applicant is working with a parcel that does not afford many options for expansion; however, the applicant's request is well above the permitted three-feet of encroachment in Section 18-9-2.1 and that the proposed structure will take up the entire side yard. Additionally, although not as desirable, there may be opportunities for expansion in the rear of the structure.

Mr. Grisdale advised that there are three (3) criteria that the Board must take into account when considering this request. First that the strict application of this Ordinance would produce a clearly demonstrable hardship and second that such hardship is not shared by other properties in the same zoning district and the same vicinity. The third consideration is that 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 variances.

He then stated that the majority of the adjacent properties within the same zoning district also appear to be similarly constrained but that the applicant's request does not appear to be a minimalist request. As such, the applicant is seeking relief of the Zoning Ordinance provisions to the maximum size possible on the lot and that staff does not support this variance request as presented.

Mr. Grisdale, Zoning Administrator, concluded the staff report barring any questions from the Board. Chairman Hester thanked Mr. Grisdale and asked if anyone had any questions.

Mr. Phillips stated that this would not be enclosed to which Mr. Grisdale replied "no, it would not be enclosed, that it would be an outdoor seating area with a roof structure. Additionally, Mr. Grisdale advised the Board of the correspondence from a member of the public who was not able to attend the meeting today and have provided a copy to each of the Board members for their review.

Chairman Hester asked for any other questions of Mr. Grisdale, and question was asked if he knew if the person writing the letter is in fact a resident of the City of Winchester. Discussion was such that the Board was unsure if the individual lives in the City but rather that she represents Hables Realty. Hearing no additional questions, Chairman

Hester opened the public hearing and asked if anyone wanted to speak.

At this time, Acting Chairman Phillips swore in Jody Musolino. Ms. Musolino explained that Mr. Warden was under the impression that he had been approved for the building permit because on or about October 2012, it was stamped approved and was given verbal approval over the phone by John Knight to go ahead and start pouring the concrete. She also stated that Mr. Warden intends to put rails around the porch and also a three-foot (3') wall under the rails. She then spoke of letters of support from adjoining property owners advising that they are very supportive. She then stated that those who are not able to be at the meeting today have written letters of support.

Ms. Musolino stated that Mr. Warden has worked hard on the business the last three (3) years and has become a successful and integral part of the community. Additionally, she advised that only one (1) property owner expressed concern about the restaurant patron parking which has been rectified. She then asked if the Board had any questions of her and at this time, she presented the letters of support to the Board.

Acting Chairman Phillips sworn in Mr. Sam Warden, applicant. He stated that when he started building, he called about the permit and was advised that he was approved; however, when he went in to the office, he spoke with Aaron who advised him [applicant] that he had not been approved for the building permit. Mr. Warden states that the day before he spoke with Aaron, he spoke with John who advised him to go ahead and pour the concrete and so he assumed that everything was okay. But when he went in to the office to get the permit and was told that it was not approved, he [applicant] stopped construction and that is why we are here today. He further stated that the reason he needs the expansion is because they are getting busier and there is not enough room. There are only 32 seats and it is cramped. We cannot build toward to the back nor can we build up so the only choice he had was to the side. He stated that he feels that it will generate more business therefore there will be more profits and more revenue to the City. He added that he really wants to do everything by the book and if this request is approved, it would be wonderful but if not, it would be a disappointment.

Chairman Hester questioned the tables that are located on the patio area, to which Mr. Warden responded that they are all new and that no one has ever sat on them. Chairman Hester then stated that the issue is that the patio is something you want to make your business better and you know that a verbal approval means nothing. Basically, this is not a hardship, not a need, it is a want. Chairman Hester stated that there has to be a hardship and so far, there has been none shown.

Chairman Hester then asked Mr. Warden why he cannot build in the back. Mr. Warden advised that Mr. Grisdale told him that he could not, that the building is what it is. Also, applicant stated that he would lose about half of the available parking. Mr. Grisdale advised Board that the ordinance requires a 25-foot rear yard setback and a 3-foot separation from parking and there would some additional requirements for putting a patio or structure on to the rear of the existing structure but it is a possibility. Mr. Ransom

asked if applicant tried to build in the back to which applicant replied that he was told by Zoning that he could not.

Mr. Phillips asked if applicant would need additional parking with additional seating. Mr. Warden explained about the yellow line no parking across the street and that on the weekends they are allowed to use the parking lot across the street because they are not open.

Mr. Ransom then asked if the brickwork or wall is a separation. Mr. Warden explained that the wall would separate the patrons from the sidewalk to ensure safety. Mr. Ransom then asked why he doesn't just use umbrellas to which Mr. Warden responded that they did have them however, they kept getting blown away. Mr. Crawford then asked about Mr. Warden's testimony about the rear door and whether it led in to the seating area or in to the kitchen. Mr. Warden advised that it leads in to the kitchen.

Mr. Ransom asked how many more seats outside would he gain for the restaurant to which Mr. Warden replied "about 45." Mr. Ransom then stated to Mr. Grisdale that the applicant is seeking an additional 8-foot but asked if applicant would need 8-feet if he only put in one (1) row of booths. Mr. Grisdale stated that it is up to the applicant's design. Chairman Hester stated that Mr. Warden would have to submit a new set of plans to make such a change.

Chairman Hester then asked if anyone else wanted to speak on behalf of or in opposition to this application.

Acting Chairman Phillips then swore in Nancy Mills. Ms. Mills stated that she is a character witness on behalf of Mr. Warden and the restaurant. She advised the Board that she and her husband began to frequent the restaurant several years ago and became friends. She advised that the food is excellent, it is priced right, and that there is a family-friendly atmosphere there. She further advised that she feels as though the restaurant is an asset to the North Loudoun Street area and that Mr. Warden helps anyone who needs it. She said that she believes he has a solid reputation and that he should be allowed to expand and enlarge his ever-growing customer base. She stated that she really hopes that the Board can help Mr. Warden out with this request.

Chairman Hester then asked if there was anyone else who wanted to address the Board. Hearing none, he closed the public hearing. He then asked the Board if there was any discussion.

Mr. Crawford then stated that this is a vexing application. The applicant should not have moved forward without the proper permits and he should have known based upon his background what would be required. However, if the applicant only installed one (1) row of seats, then he would meet the variance; however, most of what is around the restaurant is parking lots and it seems to be a general improvement on the area. From strict application of the ordinance he could not agree with this but that there are other things that come in to play here that would rule in favor of going forward.

Mr. Phillips then stated that he agrees with Mr. Crawford and that he likes the brick wall to separate patrons from traffic and that he leans toward approving. Chairman Hester stated that the applicant has not shown that this is a demonstrable hardship. It is a want and not a need. He also has a difficult time understanding how the applicant can believe that a verbal commitment constitutes a building permit in the City of Winchester and that an applicant needs to do it the right way. There are other possibilities for the applicant.

Chairman Hester then asked for any other comments. Hearing none, he asked for a motion. However, the Board then allowed Jody Musolino to speak again stating that she understands the difficulty with Mr. Warden's background but that they are still confused as to why he has not received an explanation as to why it was approved and then later "slashed." Mr. Grisdale stated that the plans go through a process and they are not officially approved until you get the actual permit. The Building Official had taken a look and it may have been okay for code on the building code side and that may have been why he stamped that. However, I think there is some controversy as to what conversation may or may not have taken place between the Building Official and the applicant. Subsequent to meeting with the applicant or his representative, I did speak with the Building Official to see if he recalled the conversation about giving verbal permission to proceed. Granted I cannot speak to testify for him and he is not here to testify today but he did not recall the conversation giving verbal approval to move forward and that is what I wanted to speak on to the previous comments.

Mr. Phillips stated that if this would have come up and he had not started would we be here today. Mr. Grisdale responded that yes we would still be here today and that staff's position would still be the same. This is a maximum request taking up the entire corner side yard. It is not a minimalist request. It is 100% over what the permitted amount would be. Mr. Phillips then asked if there have been any individual request for 100% variance in the past. Mr. Grisdale stated that he cannot speak for any one case but that each case must be taken on its own merits.

Mr. Ransom asked what the practical concern with staff is if he is allotted the additional eight (8) feet. Mr. Grisdale stated that essentially City Council has set certain guidelines and the staff's duty is to follow through on those guidelines which have been legislated by City Council. Mr. Ransom lamented that the Board is relying on the wisdom of City Council. Mr. Grisdale advised the development guidelines, yes.

Chairman Hester once again asked if there were any other questions or comments. Hearing none, he asked for a motion.

Mr. Crawford moved to grant a variance to BZA-13-95 with no conditions.

Mr. Phillips seconded the motion.

Voice vote was made and the motion passed 3-2.

NEW BUSINESS:

Chairman Hester announced that this would be his last meeting serving on the Board of Zoning Appeals as he is moving in to Frederick County beginning April 1st. He stated that he submitted his official resignation several weeks ago and he wished the Board well. Mr. Phillips acknowledged the resignation and thanked Chairman Hester for all his work with the Board.

OLD BUSINESS:

None.

ADJOURN:

With nothing further, Chairman Hester adjourned the meeting at 4:50 p.m.