

MINUTES

WARRICK COUNTY BOARD OF ZONING APPEALS

Regular meeting held in Commissioners Meeting Room,
Third Floor, Court House,
Boonville, IN
Monday, March 23, 2009, 6:00 P.M.

MEMBERS PRESENT: Tony Curtis, Terry Dayvolt, Scott Dowers, Bill McCune, Don Mottley and Joe Schitter.

Also present were Sherri Rector, Executive Director and Secretary; Morrie Doll, Attorney; and Susan Hilgeman, staff.

MEMBERS ABSENT: Richard Medcalf.

MINUTES:

Upon a motion made by Terry Dayvolt and seconded by Joe Schitter, the Minutes of the last regular meetings held February 25, 2009, were approved as circulated.

The Chairman explained the Rules of Procedure to the audience.

VARIANCE:

BZA-V-09-06 - Applicant: Hafer Associates, PC by Jeffrey A. Justice, Managing Principal Owner: Deaconess Hospital, by Tom Barnett, Manager Engineering
Premises: Property located on the W side of Epworth Rd. approximately ¼ mile S of the intersection formed by SR 66 & Epworth Rd. Ohio Twp. 4011 Gateway Blvd. Tract 1, 3, 5, and 7 Gateway Center Minor Sub. *Complete legal on file.*

Nature of Case: Applicants request a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana to allow an Improvement Location Permit to be issued for on premise signage of 4,182 square feet exceeding the 1,000 square feet allow by 3,182 square feet in a "M-1" Light Industrial zoning district.

Present was Jeff Justice, Managing Principal of Hafer Associates and also represents Deaconess Hospital.

The Chairman called for a staff report.

Mrs. Rector stated all return receipts from certified mailing of notice of this meeting have been submitted. She stated the applicant is requesting a variance to allow an Improvement Location Permit to be issued for on premise signage of 4,182 square feet exceeding the 1,000 square feet allowed by 3,182 square feet in an "M-1" Light Industrial zoning district. She then stated the surrounding property to the North is zoned "C-4," "C-1", and "R-1A", with Residences and Businesses, to the West is "A" and "C-4", with Residences and Businesses, to the South is "C-4" and "A", with Fire Department and a Church, the property to the East is Interstate 164. She stated there is some 500 year flood plain on the Northwest side of the property; however it does not affect any of the signage. She stated the access to the property is off of Epworth Road and the interial street of Gateway Boulevard.

Mrs. Rector stated the owner was not aware that permits were not obtained for most of the existing signage, by a sign company that is no longer in business, until there was a request for permits on the new signage. She stated Attorney Doll and I met with the Deaconess Representatives and Mr. Justice with Hafer Associates & reviewed all the existing & proposed signage to determine which ones require permits. She stated each

Board Members have a packet which shows the result of that meeting. She stated therefore, they are requesting the Variance to allow the installation of 2,314.93 square feet of new signage that is existing and proposed in addition to the 1,866.27 square feet of signage already permitted. She stated the additional signage is necessary for the way finding of patients and visitors to the medical campus. She stated they did get permits for the 1,866 square feet of signage; the rest is for existing and proposed. She stated some of the signage is directional so it is exempt from the Comprehensive Zoning Ordinance. She stated Mr. Hafer took pictures of all the signs and they went over them, whether they needed a permit or not, and that is how they came up with this figure. She then stated the application is in order. She stated she is working on amending the Comprehensive Zoning Ordinance for complexes such as this where they will go by the square frontage of the front of the buildings and allow so much per size of the building. She stated as this Board knows Wal-mart was here last month having to do the same thing. She stated in our Ordinance now it does not care whether it is a small building or a large complex.

The Chairman asked if the applicant had anything further to add to the staff report.

Mr. Justice stated it is a challenge to have all the individuals coming to the site to find their way. He stated it is over 50 acres and 8 major buildings, dozens of different destinations and at times it is confusing. He stated Deaconess does not wish to put up any more signage than is absolutely necessary. He stated at this point he hopes the Board believes that they try to tastefully put up signs and are adhering to the County's guidelines, once they fully understood them and realized what had not been done in the past.

The Chairman called for questions by the Board.

There being none, the Chairman called for remonstrators.

There being no remonstrators the Chairman called for a motion.

Tony Curtis made a motion as follows:

I, Tony Curtis, make a motion to approve the Variance Application based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.

Attorney Doll expanded the new findings of fact for Variances and what the Board member making the motion needed to do with finding #3 and gave examples of hardships and peculiar conditions that the Board may want to use.

3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a marked exception to the property in the neighborhood. Such condition is size of property and different destinations on the property.
4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practical difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.

5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
10. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:
 - a. Subject to an Improvement Location Permit being obtained.
 - b. Subject to any required Building Permit from the Warrick County Building Department being obtained.
 - c. Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
 - d. Subject to all utility easements and facilities in place.

The motion was seconded by Joe Schitter and unanimously carried.

SPECIAL USE:

BZA-SU-09-07 - Applicant: Tina Marie Guffey. Owner: Rickie Allen Guffey & Tina Marie Guffey.

Premises - Property located on the E side of Sawmill Rd. approximately 380' N of the intersection formed by Sawmill Rd. and SR 68, Greer Twp., 11066 *Sawmill Rd.* (Complete legal on file.)

Nature of Case - Applicant requests a Special Use, SU-12, for the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, Indiana, to allow a home occupation of a one chair/one operator beauty shop not occupying more than 25% of the first floor area in an "A" Agriculture zoning district.

Present was Rickie Allen Guffey.

The Chairman called for a staff report.

Mrs. Rector stated all return receipt from certified mail of notice of this meeting have been submitted. She stated the applicant is requesting a Special Use, SU-12, to allow a home occupation of a one chair/one operator beauty shop not occupying more than 25% of the first floor area. She then stated the plot plan shows the residence to be 1852 square feet which would allow 463 square feet, however they are only using 140 square feet. She stated the surrounding property is zoned "A" Agriculture with Residences to the North, South, & West. She then stated the property to the East is vacant. She stated there is no Flood Plain on the property; it is in a Zone X. She stated the access is off of Sawmill Road and is showing off street parking on their property. She stated we have

letter from Aaron Franz from the Health Department stating the existing septic system is adequate. She stated attached to the application the applicant has provided a proposed use statement answering the six questions relating to their business. She stated in the Zoning Ordinance a Home Occupation is also subject to the regulations as stated for time periods and those things.

The Chairman asked if the applicant had anything further to add to the staff report.

Mr. Guffey stated he did not.

The Chairman called for questions by the Board.

Mr. Curtis asked if they were only planning on having one chair in the beauty shop.

Mr. Guffey stated that is correct.

Mr. Schitter asked would there be any retail sales.

Mr. Guffey stated no.

Mr. McCune asked how many customers would she have per day.

Mr. Guffey stated somewhere between three and six. He then stated and only 3 days a week.

Mr. Schitter asked if that is all the business would be in operation is three days a week.

Mr. Guffey stated that was correct.

There being no further questions by the Board and no remonstrators, the Chairman called for a motion.

Joel Schitter made a motion as follows:

I, Joel Schitter, make a motion findings of fact be made as follows:

1. The USE is deemed essential or desirable to the public convenience or welfare.
2. The USE is in harmony with the various elements or objectives of the Land Use Plan for Warrick County.
3. The USE will not be a nuisance or serious hazard to vehicles, pedestrians, or residents.
4. The USE as developed will not adversely affect the surrounding area.
5. Adequate and appropriate facilities will be provided for proper operation of the USE.
6. The specific site is appropriate for the USE.
7. The USE will allow the property to continue to be used for a residence and will not change the physical appearance of the residence.

And the Application be approved in accordance to the application and plans on file, subject to the following conditions:

1. No identifying or business sign shall be erected or placed on any site for which an SU-12 has been granted by the Board of Zoning Appeals
2. Except for the shipment and receipt of goods, products or items necessary for the SU-12, the use shall not be visible from the exterior of the premises.
3. The maximum time for which the first SU-12 shall be granted is two years from the date of approval; thereafter, a subsequent grant of a SU-12 for the same parcel property for the same use shall be granted for such length of time as approved by the Board of Zoning Appeals.
4. No person or persons may be employed in the SU-12 home occupation at the site other than the resident (or residents) of the site for which the SU-12 has been granted.
5. The use may not be varied from the specified home occupation identified by the applicant for which it is granted.
6. Subject to all rules and regulations of the local Health Department.
7. Subject to the property being in compliance at all times with the applicable zoning ordinance of Warrick County.

The motion was seconded by William McCune and unanimously carried.

OTHER BUSINESS:

BZA-CU-02-11 - Applicant: Fireworks Galore by Lori Lamar, Owner. Owner: Gabriel & Lori Lamar – Time to remove inflatable business and reduce the fireworks area to the approved home occupation area and conditions as approved on 5/22/02.

Present was Les Shively, Attorney for the Lamar's.

The Chairman called for a staff report.

Mrs. Rector stated Mrs. Lamar tried to rezone her property due to the fact that she has expanded her business to include inflatables and expanded the fireworks portion of it. She stated the rezoning was denied by the County Commissioners. She stated Attorney Doll and I had talked and thought she could continue operating the fireworks business as it was approved by the Board of Zoning Appeal on May 22, 2002. She stated what was approved was a 24' x 31' portion of an unattached storage building which is 744 square feet. She stated each Board member should have a copy of all the other conditions placed on the approval. She stated Mrs. Lamar is unable to be here and Attorney Shively can tell the Board, she is on the agenda requesting a time period to be allowed to move the rest of the business. She stated she believes Mrs. Lamar is trying to buy another piece of property to move this to.

The Chairman asked if Attorney Shively had anything to add to the staff report.

Attorney Shively stated Mrs. Rector pretty well covered it. He stated the rezoning was denied by the County Commissioners February 23rd, following that meeting the Lamar's took immediate steps to reduce the square footage they were using for fireworks to conform to the conditions of the May 22, 2002, Conditional Use approval. He stated that has been done. He stated the fireworks are now in compliance. He stated in regards to the inflatables, they have found a piece of property that they thought was zoned correctly, and before they made an offer they got a zoning certification from the Area Plan Commission. He stated they then made an offer on the property and the offer

was accepted and they are to close on the property in the middle part of next month. He stated because there are requirements for the items to be stored indoors, there is an outbuilding on the property but it is not in the best of shape and there is a residential structure on the property that is clearly not in the best of shape, and the plan once they get possession of the property is to remove the residential structure and repair the outbuilding so that it is suitable for the inflatable business. He stated they hope to have all of that done, moved, and relocated by the end of June. He stated that is their game plan and they have already taken a step by identifying a piece of property, certifying that it is zoned correctly, purchasing the property, and then finish up by the sequence he just outlined.

Attorney Doll stated the Boards purpose tonight is to determine what period of time, if any, are they willing to give the applicant to move the inflatable business. He stated the fireworks is not moving and it is permitted to be where it is. He stated it just needs to be the size in which the Conditional Use was approved.

Mr. Dayvolt asked if he understood that the fireworks was not in compliance.

Attorney Shively stated the only thing that was not in compliance is that they exceeded the cap of the square footage that could be devoted under the Conditional Use. He stated they have changed that, so in the fireworks aspect they are in compliance right now. He stated when they get back; Mrs. Rector can go up there and check it.

Mr. Dayvolt asked what the time period they believe they need is.

Attorney Shively stated they would actually, to be able to complete the closing, assuming the closing occurs when it is supposed to, take possession, tear down the residential structure, repair the outbuilding that is there, and then move everything, they would like to know they have until the end of June to get it all moved and up and running.

Mr. Dayvolt asked if this was a true feeling that they think they can have this done.

Attorney Shively stated yes.

Mr. Schitter asked if they could just say it has to be done by July 1st.

Discussion was held on setting a date.

Mr. Dayvolt stated you never know what is going to happen with closings and the weather.

Mrs. Rector stated Mrs. Lamar was in immediately with plans to move, she is going full blast trying to get this thing done.

Mr. Dayvolt stated as long as they are trying he is willing to work with them.

Terry Dayvolt made a motion to allow the applicant until July 27, 2009, to move the inflatable operation and come into compliance with the Conditional Use. The motion was seconded by Joe Schitter and unanimously carried.

ATTORNEY BUSINESS:

Attorney Doll stated he would like to go back to the Variance they approved tonight. He stated they will notice there is a new resolution and the reason is to try to attempt to address a deficiency that Judge Meyer filed in the Hamby decision. He stated he will get to that decision in just a second. He stated what this resolution form does is take the strict statutory requirements of the findings of fact that the Board must make in order to

approve a variance. He stated then it also takes the Ordinance requirements as what the Board may find as findings of fact in order to approve a variance and they don't match the State Statutes. He stated it takes those two and puts them together and that is why there is a two page resolution instead of a one page resolution. He stated if any of the Board members would like for him to read the resolution, since he wrote it, into the record for them, he would be happy to do that. He stated on #3 they do have to insert some fact that they find unique to the property that justifies the Variance.

Attorney Doll stated as to the Special Use approved tonight, the applicant did fill out the new form.

Mrs. Rector stated they are going to do that for the Variances as well.

Attorney Doll stated this form has the questions and answers written on it that they are required to give the Board for evidence in order for the Board to approve it. He stated so instead of having them testify each time and us forgetting to ask them, now they are part of the application and this is why they think it is appropriate for them to have it.

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Attorney Doll stated last point, Judge Meyer has ruled in the Hamby case and he has remanded it back to the Boards loving care and attention. He stated each member has a packet and the packet is their homework for the April meeting. He stated it is the complete record of the proceedings and the top document is Judge Meyers order. He stated if each member would turn to page 5 of the Judge's order, which is an excellent order and probably one of the most thorough trail judge orders he has ever read in thirty years, paragraph 10 a, b, and c is their issue. He stated they are not going to talk about it tonight, because they are sending public notices to all the interested parties and inviting everyone to be here for the April meeting. He stated at that time, they will notice that the court says in the introduction of paragraph ten, "the BZA, not the court, has the discretion to determine whether or not the applicant for the Variance presented sufficient evidence to establish the three factors required." He stated that order says that the Board may not take new public comment, testimony, or documents. He stated it is what was presented, hence this packet of information. He stated they are going to be asked to decide three questions, a. If the approval would not be injurious to the public health, safety, morals, and general welfare of the community. He stated what the prior motion said was would not be detrimental to the public welfare and the judge says that is not the same thing. He stated b. that the use and value of the adjacent property included in the variance will not be affected in a substantial adverse manner. He stated the prior motion said that it would not be substantially detrimental to adjacent property and the judge says that is not the same thing. He stated lastly that the application of the terms of the zoning ordinance will result in practical difficulty to the use of the property and the Board said nothing about that. He stated there was a portion in the motion that said trees and the sloping of the bank made it difficult, judge said not the same thing. He stated that is all he has to present tonight, because he does not want to get into a discussion with them tonight. He stated each member needs to familiarize themselves with this and then at the April meeting any of them under other business can bring this up and move any motion they wish. He stated the question is if they want help to prepare any motions in advance, if they will tell us, so they can prepare motions as they ask us to about any of these. He stated for example a debating point is under "A" there really is four parts to "A". He stated is it injurious to public health, could that be one motion by its self. He stated the answer is yes, is it also injurious to safety, could that be a second one or could it go with the first one. He stated they could make those 4 motions or they could make that one motion, but it has to contain each of those words. He stated the new resolution does, hence the longer version.

Mrs. Rector asked if this would over ride the motion that was made or will these be in addition to.

Attorney Doll stated they are supplemental to the motion that was made. He stated a remand means it is incomplete and he is sending it back for them to finish it. He stated if the Board denies any of those questions they have defeated the variance, but if they approve all of those that Judge Meyer has asked them to address, then they fulfilled the rest of the requirements and the approval stands. He stated that means we are back to litigation.

Mr. Dayvolt stated they have to approve a, b, and c.

Attorney Doll stated that is correct and it has to be based on what was submitted.

Mrs. Rector stated so when they make a motion it would be in addition to the findings of fact at the whatever meeting it was, they make the addition.

Attorney Doll stated yes that is a very good point.

Mr. Dayvolt asked if they would be amendments or additions.

Attorney Doll stated it would be an addition because they did not address them at all in some instances.

Mr. Mottley stated that looking through the material, as far as a safety issue, the opposition did not represent anything dealing with a residential turbine. He stated everything that they represented was based on industrial.

Attorney Doll stated that is for you to consider. He stated Mr. Schitter will be at a disadvantage because he did not hear the public presentations.

Mr. Schitter asked if this Variance is on a wind turbine or a 60' tall structure.

Attorney Doll stated the issue is a Variance for the construction of a wind turbine. He stated they could build it at 40' without a Variance, they asked for a 20' Variance to get it 20' higher for efficiency reasons and the rest is in the packet. He stated that is what they must rely on is what is in the record.

Mrs. Rector asked if they want to make a motion to deny after it has already been approved, and it has been sent back, then would they just simply make a motion to deny this based on and then read the findings.

Attorney Doll stated if someone was opposed to this and they felt it was a safety issue, Judge Meyer under subsection "A" says they are required to find that the approval will not be injurious to public safety. He stated if they felt it was injurious to public safety, then you would frankly not make any motion. He stated if the Board does not act on this, the permit or Variance dies. He stated if they want to make it clear they could make a motion that they find it is injurious to the public safety. He stated if that motion is made and seconded and passes, the Variance dies.

Mrs. Rector stated so it is very important that all Board Members be at the next meeting.

Attorney Doll stated there is no obligation and he wants the Board to vote their consensus based upon their understanding of the facts in the records.

Mr. Dayvolt asked if the Board would be discussing this again.

Attorney Doll stated that the Board can discuss it again.

Mrs. Rector asked how it should be listed on the agenda.

Attorney Doll stated it needs to go under other business.

Mr. McCune asked if they would have the right to be here.

Mrs. Rector stated yes, and they are going to send notice and advertised.

Attorney Doll stated there will be no questions, there will be no remonstrations, there is no public presentation, it has to be past tense, what has been presented.

Mr. Dayvolt stated the people are going to want to see them schooled in it, and why they have reasons for it.

Attorney Doll stated Judge Meyer in his beginning sentence of paragraph 10 on page 5 says, "The BZA, not the court, has the discretion to determine whether or not the applicant for the Variance presented sufficient evidence to establish the three factors required." He stated this is the Board decision, apply common sense to the issue and vote accordingly.

Mr. Mottley asked if everyone had a blue book to look up the statute.

Mr. Dayvolt stated he did not.

Mr. Schitter stated he would scan it and send it to him.

Discussion was held on copyright and there being no copyright laws for State statutes.

Mr. Dayvolt asked if this is deemed that they have not proven all of the facts that Judge Meyers is requesting.

Attorney Doll stated then you vote accordingly.

Mr. Dayvolt stated okay, say it is the opposite of what it was last time.

Attorney Doll stated then the Variance fails.

Mr. Dayvolt stated then do they have the option of refile a new application.

Attorney Doll stated yes.

Mr. Dayvolt so they do have an out to come back.

Attorney Doll stated or they could build it at 40'. He stated everyone should have what they need and if anyone needs assistance in the preparation of motion they intend to offer, because all motions have to be in writing, go through the office and they will be happy to take the idea, committee them to written format necessary, and present them before the meeting.

Mr. Mottley asked since the Judge has ordered this and it is not our regular application, can they talk to other Board members.

Attorney Doll stated no, not if you violate the open door law. He stated each of you should come to the meeting fully briefed on what is in the record, made notes about questions you may have, and all discussion should be held at the meeting.

Mr. Curtis asked if one Board member has a motion for one way and he has a motion for another way, if that motion doesn't carry, can he then make his motion.

Attorney Doll stated yes, and there is a discussion point after a motion is made and seconded. He stated at that point in time if someone has a motion that is a little different, they can inform the Board that if that motion does not pass they have another motion on the same subject that would do "X".

Mr. Dayvolt asked if the Board could subpoenaed in this.

Attorney Doll stated yes.

Mrs. Rector stated the Board of Zoning Appeals members cannot be sued individually.

Attorney Doll stated that was correct they have government immunity.

EXECUTIVE DIRECTOR BUSINESS: None

Being no other business, the meeting adjourned at 7:00 p.m.

Don Mottley, Chairman

ATTEST:

The undersigned Secretary of the Warrick County Area Board of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of said Board at their monthly meeting held March 23, 2009.

Sherrri Rector, Executive Director & Secretary