

MINUTES OF THE HENDERSONVILLE BOARD OF ADJUSTMENT

Tuesday, September 13, 2022
1:30 p.m. in the City Operations Center

The Hendersonville Board of Adjustment held its regular monthly meeting on August 9, 2022, at 1:30 p.m. in the Assembly Room in City Operations Center, 305 Williams Street, Hendersonville, North Carolina. Those present were: Melinda Lowrance, Chair, Ernest Mowell, Vice-Chair, Laura Flores, Charles Webb, Kathy Watkins, Stefan Grunwald, Peter Hanley, Fred Nace, Libby Collina, Sharon Alexander, Attorney to the Board, Lew Holloway, Community Development Director, Matthew Manley, Planning Manager, Alexandra Hunt, Planner I, Daniel Heyman, Staff Attorney, Tyler Morrow, Planner II and Angela Beeker, City Attorney.

Absent: Michael Edney

Chair called the meeting to order at 1:30 p.m.

Approval of the Agenda: A motion was made by Mr. Mowell to approve the agenda. The motion was seconded by Ms. Watkins and passed unanimously.

Approval of the Minutes of the August 9, 2022 meeting. A motion was made by Mr. Mowell and seconded by Ms. Collina to approve the minutes as written. The motion passed unanimously.

Approval of the Decision: **B22-070-VAR** – James Walgenbach, Variance. A motion was made by Mr. Mowell to approve the decision as written. Ms. Collina seconded the motion which passed unanimously.

Administrative Appeal – OP Management, LLC – Oak Preserve (B22-051-ADMIN).

Chair stated today we have one Administrative Appeal to hear from OP Management, LLC. Any persons desiring to testify in these hearings must first be sworn in. Since this is a quasi-judicial hearing, it is very important that we have an accurate record of what goes on here. Therefore, we must ask that you refrain from speaking until recognized by the Chair and, when recognized, that you come forward to the podium and begin by stating your name and address. Anyone present who has knowledge of anything of value that has been given or promised in exchange for a position to be taken on this application should disclose it now.

Angela Beeker, City Attorney stated for the record that she would not be a witness but was here in her capacity as the City Attorney.

Chair swore in all persons to give testimony. Those sworn in were Alexandra Hunt, Matt Manley, Lew Holloway, Travis Penland, Tyler Morrow, Chris Conard, Ben Allamong, David Lee and Troy Lee.

Chair opened the public hearing.

Angela Beeker, City Attorney for the City of Hendersonville stated she would be appearing here to represent the City of Hendersonville in this appeal. This is an appeal of a Notice of Violation that was

issued by the city to OP Management, LLC. There are a couple of preliminary matters that need to be addressed before they start the hearing. The first being the city has retained Sharon Alexander to be the Board's legal counsel. That means that Ms. Beeker is here advocating for the city and while she will make legal arguments and give legal opinions, they are in the representation of the city. The Board will need to look to Sharon Alexander if they have legal questions and they need an opinion. That is why she is here, to provide representation to the Board today. Ms. Beeker stated the second thing is they do have a quorum and just for the record it is staff's position that this is not a variance but an appeal that a majority is all that is required to make this decision. Ms. Beeker stated this is the first appeal since she became City Attorney, and it is quasi-judicial hearing, and their position is that the very first order of business would need to be identification of the parties. Parties and witnesses are different under quasi-judicial procedures. Ms. Beeker asked if Ms. Alexander would like to explain this. Ms. Alexander stated she was fine with Ms. Beeker's explaining. Parties are afforded full procedural due process rights. That means they can ask questions, they can do cross examination, they can make arguments as long as they are representing themselves, they can represent themselves. A witness can just get up and give testimony, so the people who are entitled to full due process rights need to first be identified. For the record she would submit that she knows that the City of Hendersonville is a party and the property owner OP Management, LLC is a party. She did not know if there were any other parties. Parties who can establish standing to participate fully as a party and not just a witness. She would ask that those be identified.

Sharon Alexander, Attorney to the Board stated to the Chair that she understands that Ms. Beeker is advocating on behalf of her client telling what her opinion is and her understanding of the law and she agrees with what she said, and she cannot answer any questions that the Board has but Ms. Alexander would be happy to answer any questions the Board may have about that. Ms. Alexander stated she agreed with Ms. Beeker that before the Board gets into the substance of this, they do need to identify those persons with standing that would be considered a party. Chair asked if she needs to have each one state their name and address individually. Ms. Alexander stated yes and tell them the basis for their position that they are a party to this action.

Chair stated those individuals that were sworn in, if you are a party would you please come forward and state your name and your reason.

Troy Lee stated his name and that he was the managing member and majority shareholder of OP Management and as such he has adequate standing to represent his company.

David Lee stated his name and that he is there as a witness and to show support because Troy is his brother. He lives here in the county and has been here over 20 years. He works and plays here, and he loves this city. He appreciates they have an opportunity to discuss this with the Board today. He may or may not have a comment, but he just wanted the Board to know who he was. He lives at 2207 Kanuga Road.

Ms. Beeker stated for the record that they object to Mr. Lee appearing in a representing capacity on behalf of OP Management, LLC. She thinks he can testify as a witness, and she understands he has law degree but he is not licensed in the State of North Carolina and she has the statute on the unauthorized practice of law and an advisory opinion issued by the North Carolina State Bar who enforces the unauthorized practice of law which basically says that to appear in a representational capacity in a quasi-judicial matter like this you must be an attorney licensed at law. And unless he can establish

standing for himself individually, we would object to him appearing in a representational capacity on behalf of OP Management, LLC.

Mr. Grunwald asked if the objection was to Mr. Troy Lee or Mr. David Lee. Ms. Beeker stated actually she didn't get to Mr. David Lee. She doesn't believe he has put forth adequate information or adequate evidence to support his being named a party either. So yes, they would object to him being a party. He could testify in their opinion, but their position would be he could not testify as a party. Ms. Alexander stated she was looking at the property address and it does not look like he is an adjacent property owner so he would not have standing to appear as a party. And if the Board has any questions on how to draw the distinctions between Mr. Troy Lee testifying and representing the company, she will be glad to address those. It is a difficult issue to dice. Ms. Watkins found it difficult to understand why he couldn't represent himself. Ms. Alexander stated the party is the company and there are lots of court cases as well as this opinion and others that say that is a separate entity from Mr. Lee and so for someone to represent that independent entity, because he has probably worked pretty hard to maintain the integrity of that as a separate entity, so it is not one and the same. Chair stated so he can't represent them legally. Ms. Alexander stated he can't represent them at all. Chair stated so they cannot hear this.

Mr. Lee asked if he could say something. Ms. Beeker stated their position is he can testify and anyone else that is with him can testify. He just can't cross examine witnesses and make legal arguments and those kind of things. Absolutely he can testify. He just cannot practice law.

Mr. Lee stated he understands the argument that counsel is making, however if you look at the deed and all the paperwork, it is his signature that is on there. He also filed the notice of appeal in his name, and he was granted the appeal. If you look at the notice of appeal it says "I, Troy Lee", and as such he was given this hearing based on that particular document. As such, he feels it would be an incredible disservice to not only himself but to other people that a property owner cannot come before a Board and discuss a notice of violation that he would have to pay. As far as being able to point to statutory language to the Board and discuss the legislative intent as it is written in the code books, he is just reading and pointing to it, he is not interpreting it and he should be able to discuss that with the Board. It is public knowledge.

Ms. Alexander stated he is right it is public knowledge, but he would be stepping over his line from testifying as to the facts within his knowledge. What a lay witness can testify about is facts of which they have firsthand knowledge. He does not have firsthand knowledge of the facts about, for example the statutory history of the ordinance, really, he is not a competent witness as to prove the ordinance. The problem is, it is a problem for him because he would be committing a crime and you all would be involved with assisting him in doing that if you allow him to act in any way as an attorney. It would put Ms. Beeker and herself in a spot because they are required by the state bar to report to the bar anybody practicing law without a law license. It seems like a silly fine line to draw but it is an important line. In this case he is certainly free to testify to the facts. As to the notice of appeal he filed, she thinks the Board can take that in one or two ways in that it certainly is in your discretion to interpret this. You can take it that it is invalid because it was not signed on behalf of the applicant, which is required by the ordinance. Or you can take that he signed it in his capacity as a manager of the LLC. But you cannot take it that he, it's not valid if you take his position that it was signed by himself individually. Then it is not a valid notice of appeal.

Ms. Watkins asked if they could take it as him filing it as the member manager. Ms. Alexander stated absolutely and that is the way she read it because that is the party that had the right to appeal.

Mr. Mowell asked the Board members if they were accepting this as a valid notice of appeal and now, they are strictly talking about Mr. Lee's capacity at the hearing. Ms. Alexander stated if you determine to read his signature on that appeal as being shorthand and he just left off the part that he was signing it on behalf of the LLC, that's the party that had the ability to, that is the aggrieved party that could appeal from the administrative decision. Ms. Collina stated technically it should have said LLC, member manager by, then it should have said I, Troy Lee. Ms. Alexander stated that is correct.

Ms. Beeker asked if she could be heard on this issue since this is a new issue unrelated to his ability to participate fully in this hearing. His testimony was that he filed it individually, he, himself. He filled it out and he signed it individually, he himself. He under oath testified that he did it individually so on that basis they would move that his appeal be dismissed.

Ms. Alexander stated that is an issue upon which the Board can rule at this point. Chair asked if they should go into closed session for this for discussion. Ms. Alexander stated she can certainly talk abstractly with the Board about the law about signatures on documents and give you legal advice under closed session. They cannot talk about these facts in a closed session. Ms. Alexander asked if any of the parties had an objection to that. Chair stated they wanted to go into closed session so that Ms. Alexander can explain the legal aspects but not pertaining to this case, just the signatures. Chair asked if anyone had an objection to that. No one had any objection.

Mr. Lee stated he can still testify as a witness. He was the person that did the physical acts themselves. He was the person that was onsite, and he has firsthand knowledge. So, although the company may be unrepresented, he should be able to give the Board the necessary facts to be able to determine whether or not this notice of violation is indeed valid. Ms. Alexander stated she does not think they are there yet. She thinks the city has made a motion to dismiss because the notice of appeal is invalid, and the Board needs to rule on that. If you want to go into closed session to get legal advice as to the law abstractly on that issue, then she thinks that is the next step.

Ms. Watkins made a motion that the Board go into closed session for the purpose of getting legal advice from their attorney. Mr. Hanley seconded the motion which passed unanimously.

The Board went into closed session at 1:49 pm.

Mr. Mowell made a motion that the Board come out of closed session. Mr. Hanley seconded the motion which passed unanimously.

The Board returned from closed session at 2:07 pm.

Chair stated the Board members have heard Ms. Beeker and the city's position on this. They are now open for discussion. Mr. Mowell stated it seems to him at least procedurally the question is, is it a valid appeal and if he is understanding correctly that is what they have to decide before they can do anything else. Chair stated yes.

Mr. Mowell asked if they were allowed to ask the City Attorney a question. Ms. Alexander stated she certainly is an advocate for her client and so they can ask her questions in that capacity. You cannot ask her to give you advice, but you can certainly ask her position and her understanding of the law.

Mr. Mowell stated his question is more of a clarification. He is asking the City Attorney is the argument that this is not a proper appeal based on how Mr. Lee is represented in the signature block? Ms. Beeker stated yes sir, and she is going to explain standing and give their position, she is not giving them legal advice. She stated in a court of law and in a quasi-judicial proceeding like this there is something called standing that you have to be able to have to move forward. It goes all the way back to the filing of the appeal. You have to have standing to even file the appeal. And Mr. Lee testified that he filed that appeal individually. That individually he wrote it, individually he saw it because he was trying to establish his individual standing, he said that and so as an individual he has no standing to file an appeal on behalf of the corporation and so therefore, we are moving that it be dismissed because he had no standing to file the appeal and because he testified that he did it individually.

Chair asked for a motion. Ms. Alexander stated there is a motion by the city and their motion should address whether to grant or deny the city's motion.

Mr. Nace moved the Board grant the City's motion to dismiss this appeal on the grounds that the notice of violation was provided to OP Management, LLC and OP Management LLC did not appeal that decision. Ms. Watkins seconded the motion.

Chair called for the vote. The following vote was taken by a show of hands.

Mr. Hanley	Yes
Mr. Mowell	Yes
Mr. Webb	Yes
Ms. Lowrance	Yes
Mr. Grunwald	Yes
Ms. Flores	Yes
Ms. Watkins	Yes
Mr. Nace	Yes
Ms. Collina	Yes

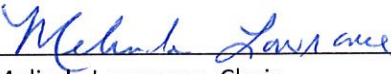
The vote was unanimous. Motion approved.

Ms. Beeker stated for the Board's knowledge and consideration, the notice of violation that was issued offered Mr. Lee two options. To either do a planting or pay a fine, he has agreed to do the planting, which was what the city was really going after anyway. They will have to work out the logistics of the procedure on that. This is so the Board has knowledge that the violation is going to be abated with the planting.

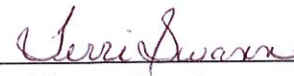
Ms. Beeker asked Chair who she wanted to prepare the order. Ms. Alexander stated she would prepare the order.

Mr. Hanley made a motion to close the public hearing. Ms. Watkins seconded the motion which passed unanimously.

Meeting adjourned at 2:25 p.m.



Melinda Lowrance, Chair



Terri Swann, Secretary