

December 8, 2011

The Board of Zoning Appeals for the Town of Sullivan's Island met on the above date at Town Hall, all requirements of the Freedom of Information Act having been satisfied.

Present were: Jimmy Hiers, Chairman
Ward Lasso
Susan Middaugh
Bachman Smith
Elizabeth Tezza
Carlin Timmons

Randy Robinson, Zoning Official
Ellen Miller, Town Clerk
Derk Van Raalte, Attorney for Zoning Official
Trenholm Walker, Attorney for Board of Zoning Appeals
William Barr, Attorney for Applicant

Chairman Hiers called the meeting to order.

Motion was made by Bachman Smith, seconded by Elizabeth Tezza to approve the October 16, 2011 minutes, carried unanimously.

Chairman Hiers stated the agenda is a request for re-hearing of 2063 Middle Street application. He added that before the proceeding begins, legal counsel was present so he asked for a motion to go into executive session to receive legal advice from the Board of Zoning Appeal's counsel.

Motion was made by Susan Middaugh, seconded by Ward Lasso, to go into executive session at 7:05 pm to receive legal advice regarding the request for re-hearing for 2063 Middle Street, carried unanimously.

Motion was made by Susan Middaugh, seconded by Elizabeth Tezza, to come out of executive session at 7:30 p.m., carried unanimously. Chairman Hiers stated that no votes or action took place during executive session.

Chairman Hiers stated the Board would hear the request for a re-hearing, in particular, any new evidence the applicant has to present; and then the Town would present. There will not be any public comment during the request for re-hearing. If the request for a rehearing is granted tonight, there will be plenty of time for comment during the actual rehearing.

Chairman Hiers asked the applicant to present. Attorney Bill Barr represented the applicant, Brad Creger.

Mr. Barr stated that when his applicant filed an application for an appeal of the Zoning Administrator or as a variance, the variance was granted by this Board by a vote of 5-0. However, Town Council indicated that they disagreed with the method on the decision of the Board on the variance. As a result of Council reversing the variance, this Board's prior result allowing the applicant to proceed was effectively reversed and the Board's by-laws state that a re-hearing could be granted if there is an additional change. The only new additional evidence is the change of condition that occurred when Town Council reversed the earlier Board of Zoning Appeals variance. Mr. Barr submitted that the Supreme Court case Bennett vs. City of Clemson allowed the re-hearing proceedings if there was evidence of fraud, surprise, mistake (inadvertent) or change of conditions. He continued that there has been a significant change of condition in the fact that the Council reversed the variance thus requiring the applicant to comply with the ordinance. It would prove an injustice to the applicant not to re-hear this matter based upon the fact as they have presented before and treat the matter as an appeal as it was originally presented. That is the basis of grounds for appeal and subsequent action of the Town of Sullivan's Island. The change of condition would warrant this Board to open this matter again and allow the case to be heard as an appeal rather than as a variance.

Chairman Hiers asked Randy Robinson, Zoning Official, to present. Mr. Robinson gave the floor to Attorney Derk Van Raalte. Mr. Van Raalte stated he was at the meeting on behalf of the Town and Mr. Robinson. He stated he disagreed with Mr. Barr with respect to whether it is appropriate to have a re-hearing because there is no evidence. Article IV, Section 9 of the Board's procedure states that a re-hearing is only appropriate where there is new evidence that could not have reasonably been presented before, and that is not the case here. The plan is the same, the same restaurant use, and the same ordinance language. When none of the facts have changed, it would seem that the result cannot change. The appeal in this matter was decided the last time, so he took exception with Mr. Barr's statement about the Board's prior ruling becoming a nullity.

Mr. Van Raalte continued that analytically there are two distinct things that happened when the Board first considered this matter. The first was there was a determination on an appeal. The Board heard the argument and decided that the Zoning Official's interpretation of the ordinance was correct. The Board then went on to consider a variance which looked at a separate set of elements which are unrelated to the analysis of the "appeal" question. The variance was granted and subsequently overturned, but Town Council's decision on that variance question did nothing to disturb the original decision about the appeal. There is an appeal ruling by the Board of Zoning Appeals on the record and the applicant is asking the Board to look at the same unchanged fact, the same unchanged law and reverse its position to give relief. This is not appropriate under the procedure rules.

Chairman Hiers asked Mr. Barr if he had any comment.

Mr. Barr stated the procedural rules for the Board deal with change of facts; however, the Supreme Court case definitely deals with change of conditions, which he believed was relevant to this application.

Bachman Smith asked Mr. Barr questions regarding the dining area of the restaurant, seating capacity, and if someone could have a different opinion about what was presented at Town Council.

Mr. Barr stated that the enclosed dining area (at previous hearing there was a difference of opinion in the interpretation of what is enclosed area) was being rearranged that would actually reduce the seating capacity of the interior building, and he took the position it was not an expansion because it is already a de facto enclosed area being the deck, awning, roof on deck, and paneling. Mr. Barr added that in reviewing Mr. Van Raalte's brief, it stated that essentially the vote to recognize the physical dimensions of the non-conformity would be expanded, but granted use variance so long as the number of the seats in the restaurant would be reduced by two. He did not believe that was the correct interpretation of the Board's ruling because the Board's ruling basically dealt with two issues, and the Board found on his argument that the number of seats were not into consideration because there are other uses than seats. However, what the Board did find in their Order was that there was an overall reduction in the space devoted to restaurant use and therefore not an expansion of the non-conforming use. Mr. Barr continued that the seating capacity was actually being reduced. They have 90 seats inside and 35 seats on decks. The interior seating capacity of the restaurant was 127 now within the confines of the roof which will be 90; and then there was going to be additional seating capacity out on the deck which is on the front of the building. His understanding was that they don't really regulate whether decks and seating capacity on decks or even patio seating. There will be less seats in the interior of the building after renovations.

Bachman Smith inquired if the square footage of the space would also be reduced after renovations. Mr. Barr stated the existing ground floor is 1790 square feet, and the proposed ground floor area is 855 square feet. The upstairs existing floor plan is 2177 square feet and the new area upstairs is 2729 square feet. There is an increase of 552 square feet upstairs, but a reduction of 935 square feet downstairs.

Chairman Hiers inquired if the downstairs space is legally usable as part of the restaurant. Mr. Barr stated it is legally usable as restaurant as argued in the previous proceeding because it is in Flood Zone A, and it can be used in that fashion if flood proofed. It is currently being used for storage and one cooler. Susan Middaugh stated that space is usable space that is being used, so essentially the applicant is expanding. Chairman Hiers asked Building Official Randy Robinson to help clarify the downstairs space, as discussed in previous proceedings.

Mr. Robinson asked the Board if they had read the letters from the Town to FEMA regarding the downstairs space. Elizabeth Tezza said they had not received that information, and Mr. Barr stated that this was proceeding on the record to support the request for reconsideration and the applicant was not admitting any new evidence. Mr. Van Raalte stated perhaps the applicant's position that the propriety of granting a rehearing must be judged on the record from the prior Board of Zoning Appeals hearing underscores the fact that there are no new facts for the Board to rehear. He believed Mr. Barr was saying that we are going back over the same argument. That has already been ruled on once correctly.

Bachman Smith stated he thought answers were being given to the questions he raised; but Chairman Hiers stated the question has to be related to if the Board should rehear this case. Chairman Hiers asked Mr. Barr if the applicant is asking the Board in this appeal to overrule the zoning administrator and his decision, and Mr. Barr answered affirmatively. Mr. Barr added at the previous meeting, this case was presented as an appeal, the arguments were based on an appeal, and close to the end of the proceedings it was asked if this an appeal or is this a variance. Mr. Barr told the Board it had the alternative to grant a variance, or grant an appeal. Chairman Hiers stated that the Board granted a variance. The Town has now ruled that the Board does not have the power to grant a use variance. In the Town Council's Order on point #5, they state "Zoning Administrator Randy Robinson denied the requested permits on the ground that the proposed work would result in the expansion of a non-conforming use." Then they go on point 10: The Council finds that the enclosed floor space of the existing restaurant structure would rise due to the proposed construction and that this would be a physical expansion". If you look at points 20 and 21, adding square footage to the restaurant is a physical expansion and the requested permit would result in extending physically the nonconforming use.

Mr. Hiers continued that Town Council has not left much room to reconsider a re-hearing because they have directly addressed the zoning administrator's finding. Although he was told that the chairman could act solely to deny or grant the request for a hearing, Mr. Hiers said as chairman his practice was to let Board decide whether a rehearing should be conducted. He continued that the re-hearing statute said a Board may grant, *not must grant*, but may grant a rehearing of an application that was denied upon written request filed with the secretary within 15 days of the delivery of the Order accompanied by new evidence. It was filed within the 15 days; however, Chairman Hiers asked Mr. Barr to present evidence or facts to the other requirements for a rehearing: new evidence which could not have been presented at the hearing, or evidence of a clerical error, or mutual mistake of fact affecting the outcome. Mr. Barr replied that he would be remiss to argue that there are additional facts because there are no new facts. He continued that although the Clemson court case is not incorporated by reference in the Board's bylaws and rules, it is still a Supreme Court case that says that it can be heard if there are changes of conditions. He submitted that there are changes of conditions, and also that the Board had the opportunity just as easily at the last meeting to grant the appeal and not as a variance. The Board chose to grant a variance. He said he does not know if it was fully stated on the record, but he believed that the reason the variance was chosen was because it had the least impact on the Town as a whole. Mr. Barr continued, at one point in the proceeding, Ms. Timmons indicated that the Board is sort of on the same side and the Board should not overrule Mr. Robinson. Mr. Hiers noted that was the opinion of one Board member.

Mr. Barr stated he understood that, but believed it would be an injustice at this stage. The Town came in and basically substituted its decision for the Board when it reversed the variance. And essentially, the Town Council Order tracks certain ordinance elements. There's a term in law about "dicta" which are remarks not necessary to reach a decision. Dicta is not really binding. He submitted that paragraph 11 that is an expansion of non-conforming use. This entire Town Council Order is based upon 21-179 (C) paragraph 2. Paragraph C says the Board of Zoning Appeals may not grant a variance, the effect of which would be to extend nonconforming uses of land. Paragraph 10 of the Council's Order is almost an exact verbatim regurgitation of that section. Paragraph eleven of the Council's Order

is about the same. When you're getting over to paragraph 20 and 21 of the Council's Order, adding square footage to the restaurant is a physical expansion and the requested permit would result in extending physically a non-conforming use, and Mr. Barr submitted that in the prior hearing Mr. Robinson didn't argue section 21-179(C) (2), would have precluded the Board from making a decision, because had that argument been made on the night in question, the Board probably would have said we probably shouldn't do that; we should grant an appeal. But Mr. Barr believed from the standpoint of the applicant, it was an injustice not to grant the re-hearing and allow this Board to make a decision based upon the case as it was really presented to the Board as an appeal.

Elizabeth Tezza stated in the Board's Order, on page 3, item 3, second sentence – it says the applicant does not seek to increase the total square footage of the structure devoted to restaurant activities, only to rearrange how and where these restaurant operations are conducted within the building. She continued that she believed what the Board was saying at that point was the building was not non-conforming, the restaurant was non-conforming, and because the Code did not say the Board could not consider the restaurant use, not the building; that is why the Board granted the variance, because through the applicant's floorplan it was documented that the restaurant square footage was not increasing.

Chairman Hiers pointed out that if Town Council found that the variance granted by the Board is a use variance and is subject to Council review, the Ordinances of the Town of Sullivan's Island forbid the expansion of non-conforming uses and the Zoning Official denied the request for expansion of a non-conformity. Mr. Barr replied that Mr. Robinson took the position that it was an expansion of a non-conforming use, and this Board found contrary to that.

Susan Middaugh took exception with Mr. Barr's characterization of the record. On the bottom of page 2 of the Board of Zoning Appeal's Order, it says that the additional 665 square feet will be used for restaurant use, the enclosed deck and building expansion will be used as a restaurant, and that there is no use other than restaurant for the entire building. The Board of Zoning Appeals said that any expansion to the entire building is an expansion, therefore, the Board affirmed the decision of the Zoning Administrator and denied the relief requested by the applicant in its appeal. So the prior Board of Zoning Appeals Order deals with Mr. Barr's position. Mr. Barr stated that the Order also says that in so ruling the Board acknowledges that the appeal is a close call since the applicant appears to have demonstrated that the renovation will slightly decrease the overall square footage of the building devoted to restaurant use. Ms. Middaugh stated that it is clearly in the Town's regulations definitions of a non-conforming use. A non-conforming use is a land use, meaning its use of a restaurant. She continued in Section 21-150 (a) definition of non-conforming uses - A non-conforming use is a land use and section (c) says a non-conforming use shall not be expanded. It is a restaurant. If the building is expanded, any aspect of the building is used as a restaurant so the Board cannot grant a physical expansion of the building. It's not a matter of how many seats, how many tables, how many people can come in the door; it's whether the building is physically going to be expanded.

Chairman Hiers recognized the applicant, Mr. Brad Creger. Mr. Creger stated a lot of numbers are being thrown around, in addition to use, restaurant use, and seating capacity. Atlanticville at this time is 3900 square feet. The proposal of the Wild Olive is 3600 square feet, so the overall size of the

building is actually decreasing. Susan Middaugh inquired what is being taken away. Mr. Creger responded that square footage is being taken away from the building. The actual footprint of the building is being reduced and the size of the building overall is being reduced. (From the prior proceedings, however, it should be noted that plans exist in the record).

Chairman Hiers stated they were discussing whether to re-hear the application. He stated that the Town has issued a very thorough Order with a finding of facts and with conclusion of law. When the Board granted the variance, there were grey areas that the Town Council had not defined such as use, square footage, and expansion. Town Council has reviewed, and they have stated this is the way we intend for that law to be interpreted, and they agree with the Zoning Administrator's denial of the permit on the grounds that the proposed work would result in the expansion of a non-conforming use. They've stated that adding square footage is a physical expansion. The requested permit would result in extending physically non-conforming use. Mr. Hiers stated he was not prepared to vote to grant a re-hearing because the applicant had not met any of the three tests; no new evidence was admitted and there was no clerical error.

Mr. Barr interrupted Chairman Hiers stating he had material he wanted the Board to review. He planned to present it in rebuttal or the presentation, but essentially he said it was a document which the Board might consider to be new evidence. Atlanticville became non-conforming in 2005 when the new zoning ordinance was passed because a restaurant could only be located between Station 22 and Station 22-1/2. In 2008 another ordinance was passed that a restaurant could not be located within 300 feet of another restaurant, which made every restaurant non-conforming.

The documents Mr. Barr distributed to the Board (included as part of record) he stated showed changes made to restaurants which increased their seating capacity. Mr. Barr stated Taco Mamacita increased by 37 seats in 2011 without a variance; Home Team increased by 40 seats, and Station 22 increased by 38 seats in 2009, a year after the ordinance was changed. He stated there is a basic injustice here that should not be tolerated.

Chairman Hiers inquired why Mr. Barr did not present this information at the original hearing. Mr. Barr responded that it was not necessary. However, it is additional evidence that is pertinent to the decision tonight. Mr. Barr confirmed that he did want to present this as new evidence.

Chairman Hiers asked for discussion from the Board regarding the new evidence.

Susan Middaugh stated that none of these restaurant issues came before the Board and what happened with other properties and other restaurants is not a factor in this Board's determination. This would be a cause for the Atlanticville owner to complain to Town Council. It is not really a new fact related to this case.

Mr. Barr stated he had a point of order because earlier he asked attorney Trenholm Walker if the participation of Board members here tonight that were not present at the original hearing was technically correct. Chairman Hiers responded that this is a new matter.

Motion was made by Bachman Smith, seconded by Elizabeth Tezza, to go into executive session to receive legal advice, carried unanimously.

Motion was made by Elizabeth Tezza, seconded by Susan Middaugh, to come out of executive session, carried unanimously. Chairman Hiers stated that no action or votes were taken during executive session.

Motion was made by Bachman Smith, seconded by Elizabeth Tezza, to re-hear the matter as the evidence presented to us tonight in my opinion warrants a rehearing on the matter of 2063 Middle Street.

Susan Middaugh stated there were no facts that have been presented that are grounds for a rehearing. Chairman Hiers stated that the previous minutes will point out that the Board did discuss other restaurants and specifically Station 22 and Sullivan's, and he agreed that the grounds for a rehearing were not met.

Ward Lasso stated he appreciated Mr. Barr's attention to the other court cases to give the Board a broader sense to consider a rehearing, but according to the documents and rules, it does not meet this Board's standard.

Bachman Smith stated that there is enough confusion that, in the spirit of the community, he would rather the Board be more open and approachable in this matter. To have a vote to not re-hear, it is as if the Board has taken away someone's right to re-hear it, and contrary to the spirit of fairness. Mr. Smith was in favor of erring to the side of rehearing it. Elizabeth Tezza agreed with Mr. Smith.

Chairman Hiers stated Town Council has issued a detailed finding of fact regarding expansion of restaurants, as well as a conclusion of the law and directly addressed the zoning administrator's decision. The reasoning of the Town's Order on the variance was something the Board could consider as proceeded. He added it was a close call for him as far as the new evidence; however, the Board did speak of other restaurants during the previous hearing.

Bachman Smith stated that is why he voted the last time to allow the changes proposed to the restaurant. It is a non-conforming use because it is in a zoning area that is not zoned for restaurants. The changes they have proposed seem to be consistent with the type of changes that have happened in the other restaurants.

Chairman Hiers responded that he made good points for the argument as he sees on the rehearing; however, the Board already reviewed the history of this restaurant. It has already been expanded with a deck like many of the other restaurants. He thought there was sort of a loop hole about use and conformity, but Town Council has defined that issue extremely detailed in their Order. The Board needs to follow the rules for the rehearing, and there is no evidence to rehear this.

Bachman Smith stated with all due respect to the Zoning Administrator, but he found it shocking that he appealed it and then went to Town Council without members of this Board knowing anything about it.

Chairman Hiers stated this is a very unusual case. The Board made a decision, and Town Council clearly closed the loop hole that we perceived as existing.

Carlin Timmons stated she did not want the Board to be deadlocked. As much as she would like to rehear just in the interest of openness and not feeling good about it; but strictly looking at the rules, the elements to allow for rehearing of the case were not met.

Elizabeth Tezza stated she wanted to make sure the Board understood that to vote for the rehearing did not mean that it overturns the decision.

Susan Middaugh called for the question.

Chairman Hiers stated there was a call for the question. The Board has a motion to grant a rehearing. There was no further discussion. Chairman Hiers stated all in favor to grant a rehearing, respond aye and raise hands. Elizabeth Tezza and Bachman Smith voted affirmatively.

Chairman Hiers asked for those opposed to grant the rehearing. Carlin Timmons, Susan Middaugh, Ward Lasso and Jimmy Hiers opposed granting the rehearing.

Chairman Hiers stated the request for the rehearing is denied.

Motion was made by Bachman Smith, seconded by Carlin Timmons, to adjourn at 8:35 p.m., carried unanimously.

Respectfully submitted,

Ellen Miller