

Minutes
City of Huntington Board of Zoning Appeals
July 20, 2021

A meeting of the City of Huntington Board of Zoning Appeals was held on July 20, 2021 at 5:30 p.m. in the City Hall Council Chambers. *Mr. Dolin* called the meeting to order.

Members Present: Jacqueline Proctor, C.W. Dolin, Sherry Houck, Howard Anderson, Dan Earl

Members Absent: Isabell Cross

Staff Present: Breanna Shell, Planning Director
Janney Lockman, Planner
Patricia Usher, Zoning Officer
Ericka Hernandez, Assistant City Attorney

Hearing no corrections or objections, *Mr. Dolin* approved the June Minutes.

Hearing no corrections or objections, *Mr. Dolin* approved the Orders.

BZA 21-C-06

A petition for a Conditional Use Permit to allow for a Day Care in an R-2 Residential District. The property is located at 1309 18th Street.

Petitioner: Marcelena White 1309 18th Street, Huntington, WV 25701

Property Owner: Jerrod Sneed 1309 18th Street, Huntington, WV 25701

Marcelena White presented the petition. She told the Board that she currently runs a day care out of her home with a maximum of 6 children. She would like to increase the number of children allowed to 12, but to do so she would need to become a facility, which means meeting the requirements of the city.

Mr. Dolin – How many children are you planning to care for at your facility?

Ms. White told the Board that she is allowed to have 12 children at one time, but can have a maximum of 24 in one day.

Mr. Anderson – Do you have all licensing required to operate or are you working toward those licensing requirements?

Ms. White stated that the approval of a Conditional Use Permit is the first step in the process for the business prior to the review of the Health Department or Fire Marshall. She assured the Board that she has already taken steps to meet all other requirements with the city for the use.

Mr. Dolin – What are your hours of operation?

Ms. White told the Board that she operates her day care from 7:30 am to 7:00 pm.

Janney Lockman presented the Staff Report, giving the Board some background on how the petition came about, what the requirements are for the use in a residential district, and the recommendation of staff in support of the petition.

Samuel Moore, 2136 10th Ave., is Ms. White's pastor and came to support her. He informed the Board that she is the director of the nursery at their church. She has training through programs supported by the church and is competent in her role with the church with no complaints from any of the parents.

Shirley Ann Martin, 1245 18th St., neighbor to Ms. White, told the Board that she believes that Ms. White is an excellent caregiver. She claimed that Ms. White does such a good job that it is hard to tell there are children at her home. Ms. Martin told the Board that she often sits on her porch and enjoys watching the children play. She is in support of the approval of the use.

Mr. Anderson made comment that he would be in favor of approval on condition that all requirements for licensing be met.

Ms. Proctor – Will there be other staff members to assist you with such a large amount of children?

Ms. White told the Board that she is allowed to have at least 2 other staff members, but she is currently only looking to hire one additional staff member.

Ms. Proctor – Would you be the one seeing to their qualifications and trainings?

Ms. White confirmed that she would, and anyone hired must go through all of the trainings and qualifications that she went through prior to employment.

Ms. Proctor – When do you intent to start operating at maximum capacity?

Ms. White explained had hoped to start by August 1, but it will have to wait until at least September because the state will need time to conduct their review.

Mr. Anderson made a motion to conditionally approve BZA 21-C-06 with the condition that all licensing requirements and approvals are met; *Ms. Proctor* seconded the motion.

Roll Call BZA: Ms. Houck, Yes; Ms. Proctor, Yes; Mr. Anderson, Yes; Mr. Earl, Yes; Mr. Dolin, Yes

BZA 21-C-06 petition for a conditional use was **conditionally approved** with a vote of 5 Yes to 0 No.

BZA 21-A-02

An appeal of the requirement, decision, or determination made by the administrative official charged with the enforcement of the Zoning Ordinance, Article 1359.01.1 regarding continuation of conditionally-permitted uses of a LVL/bar. The property is located at 733 Washington Avenue.

Petitioner: Chris Johnson, 318 23rd St. W. Huntington, WV 25704

Property Owner: Ron Myers, 733 Washington Avenue, Huntington, WV 25701

Scott McClure, attorney to the petitioner and property owner, presented the petition. He explained to the Board that he and his clients are appealing the decision made by the Planning Director stating that the use of the LVL/Bar had been abandoned. He stated that he has 3 individuals in attendance to testify and he would like to question them to get their testimonies on record.

Mr. Dolin stated that he is not comfortable with Mr. McClure's request to cross examine as there is not an attorney present to represent the city; Ms. Hernandez is here to represent the Board in these hearings.

Mr. McClure acknowledged that his request is not the typical process for the Board, and justified his request by explaining that there is specific information that he wanted to make sure would be put on record.

Mr. Earl questioned why the individuals would not be able to provide testimony without the prompting of questions and why the Board would need to function differently for this petition.

Mr. McClure stated that the individuals present would be able to provide testimony without questioning, but requested that he be able to come back to the podium from time to time.

It was determined that the Board would not operate differently in this case.

Mr. Earl – When reading through the petition, it seemed that there is a question as to the definitions of lawfully operating and abandonment. Could you speak to that?

Mr. McClure stated that he believed the use of the term lawful had been added recently and attached to the abandonment and conditional use articles.

(Mr. McClure passed around a document with citations from state law and past WV Supreme Court rulings)

Mr. McClure explained that a municipal ordinance cannot conflict with the state law and that the city's code regarding abandonment conflicts with the state. The state statute recognizes the intent of the owner or lessee to use the property where the city code does not. Additionally, the state statute for abandonment is one year and the city code specifically for Limited Video Lottery is six months, conflicting with state statute. There is further issue with the shutdown due to the pandemic and does not believe it should be included in the measurement of time of disuse.

Mr. Earl – I agree with the argument that ignoring the “intent to operate” is conflicting with the state code, but I do not agree that the greater restriction of six months is conflicting as municipalities are allowed to impose greater restrictions in their codes. I would like to understand the difference between the city's decision that the business was not lawfully operating since July 2019 and your argument?

Mr. McClure believes that the city is claiming there was not a valid license in July 2020. *Mr. Earl* clarified that his interpretation of the city's determination is that the start of the unlawful use of the business began on July 2019.

Further discussion ensued regarding whether the city's code for abandonment was conflicting or a greater restriction. Ms. Hernandez pointed out that the issue at hand is not the abandonment of a conditional use but the abandonment of a non-conforming use, which the state law does not have a time restriction on, allowing local governments to implement a time restriction of their own.

Mr. McClure described to the Board that the location has always been a bar with limited video lottery, the testimonies of the others present will show that Alley Kats II was in operation prior to Mr. Johnson seeking ownership of the location, and the property owner was conducting renovations to the location.

Mr. Earl – Why go through this process? Why not just apply for the Conditional Use and Variances to run the business?

Mr. McClure replied in question by asking the Board, “If you already have authority to operate, why ask for permission to continue?” He added to his response that at least 4 petitions are required for this location and the risk for denial is too great.

Mr. Earl responded to this claim by informing Mr. McClure this Board is not in the habit of denying the continued use of a business that is already well established in the city.

Ronnie Myers, 9 Berkley Pl., property owner, spoke to the renovations that occurred, and Mr. Johnson's interest in taking over the business at the location.

Mr. Dolin – When did you purchase this location?

Mr. Myers stated that he purchased the building roughly 30 years ago and it has operated as an LVL/Bar business the entire time.

Mr. Earl – Do you run the business or just own the property? Please describe how the business was operating from July 2019 up to the pandemic in March 2020? What evidence is there of operation?

Mr. Myers explained he owns the property and is in business with the operators of the machines, but he does not run the business himself.

(The Board was provided documentation from Southern Amusement, owner of the machines, as a means to prove operation of the business during the stated time period.)

Mr. Earl – Can someone explain to me the documentation that was provided in the packet?

Mr. McClure informed the Board they have been provided with details of the payouts by Southern Amusements, the operator of the machines, and described the filled out grid sheet as a representation of beer sales.

Mr. Dolin – Were the appropriate taxes and fees being paid to the state and the city during this time?

Mr. McClure informed the Board that Ms. Stanley was the only employee at the time and he is unclear if she is up to date on all her tax requirements, but the taxes and payments are being handled by her accountant currently. Mr. McClure made the argument that there are many businesses that are not up to date on their taxes.

Mr. Earl – Does any of the documentation provided show there was activity happening from July 2019 to March 2020?

The documentation that was submitted focused mostly on the year 2020.

(Mr. McClure submitted documentation from Southern Amusement showing the distribution of funds from the time period in question)

Garrienne Stanley Creamens, 2721 11th Ave, has rented the location for many years as an LVL/Bar, although, most patrons do not drink while there. She insisted that her license for the business was valid from 2019-2020; however, the LVL machines were not operational during the nationwide shutdown caused by the pandemic. Ms. Stanley explained to the Board that once businesses were allowed to open back up, at only allowed 50% capacity, she was not making enough money to continue operating the business. Near the end of August, she approached the property owner to inform him she would be leaving the business. She assured the Board the business was operational the entire year of 2020 other than the months of the pandemic shutdown.

Ms. Proctor – You surrendered your license in October? Did you notify the state when you surrendered your license?

Ms. Stanley informed that Board that she did not renew license with the state, and there is no need to notify the state when closing your business; a non-renewal of the license means they will not turn your machines on.

Mr. Dolin – What were your hours of operation? Who ran the establishment during those hours?

Ms. Stanley operated the business between 10 am to 9 pm and was usually the only one running the location with the exception of her mother who would help out if she needed to run errands.

Mr. Dolin – How does the cash out work with the machines? Do you get a print out of what is paid to the state?

Ms. Stanley explained that cash outs happened on Sundays. Someone would come to remove money from the machines and settlement of payouts would take place at that time. She did not receive documentation showing what the state would receive as it was the responsibility of Southern Amusement to take care of that aspect of the business; she just rented their machines.

Mr. Anderson – It seem there is new information being presented and it is apparent that they were in operation, is there room for staff to review the new information and settle this issue?

Ms. Hernandez stated that the Board could allow for more evidence and direct staff to reconsider the decision.

Mr. Earl – I would like to understand what lawfully operating means. It has been proven that the business was in operation, but the important aspect here is lawfully operating.

Ms. Hernandez described the criteria that the city uses to determine if a business is lawfully operating within the city.

Mr. Earl stated that, unfortunately, there are many businesses throughout the city that do not meet the referenced criteria for lawful operation.

Mr. McClure called attention to the city's use of the city business license expiration of June 2020 and indicated that the state extended state licenses to September. In addressing the question about the city service fee, Mr. McClure reminded that Board that only Ms. Stanley was employed there and claimed that she is also employed with Autism Services who pay her city user fee.

Discussion ensued regarding the time period that was used for staff's determination.

Ms. Lockman presented the Staff Report.

Mr. Earl expressed confusion with the city's definition of lawfully operating, asserting that a business a month late on city fees would be considered illegal by the criteria mentioned. He reiterated his claim that there are many business currently operating that would be considered unlawful by this standard. He asked if there were a written definition of the term lawful in any of the city codes.

Ms. Hernandez informed the Board that the decision as to whether a business is operating lawfully is made by the finance department. She stated that they do have a process for cease and desist with noncompliant businesses, but is not aware how, when, or what triggers the process.

Ms. Proctor identified there are differing definitions of what "lawful" means in the context of this issue among the Board, staff, and the petitioner; discrepancies in when licensing was valid and held with the correct operator; and believes there should be little regard as to whether the community recognizes this location as an LVL/Bar. She pronounces the issues at hand to be whether or not the operator has been doing their due diligence. She acknowledged *Mr. Earl's* claim that there are other businesses not up to date on taxes and fees, but declare this to be poor foundational reasoning to excuse this process or allow it to happen simply because "everyone else is doing it too".

Ms. Proctor went on to list the number of petitions that would be necessary for the location to continue operating as an LVL/Bar and expressed her disappointment that the new operator chose

to appeal the staff's decision rather than apply for the petitions. Due to the long history of the location operating as an LVL/Bar, she believes this issue could have been resolved months ago.

Ms. Proctor concluded that the determination before the Board is not whether there should be a reconsideration of new evidence, but if the city made the correct determination given the evidence initially provided. She agrees with Mr. Anderson's desire to avoid further litigation, but pointed out that the expense of applying for the conditional uses and variances would have been less.

Chris Johnson, 318 23rd Street W., petitioner, told the Board that he owns two other locations in the city and was approached by Mr. Myers about Alley Kats II closing in mid-October.

(Mr. Johnson provided the Board with a copy of his state Business License for Bottle Cap showing the date it was issued.)

Mr. Johnson told the Board it was not clear to him what the order needed to be when opening up the business and visited other departments prior to Zoning, such as the Health Department. His visited Planning and Zoning office in January when he was told of the need for the conditional use permits and variances. He was then told by other LVL operators in the area that he would likely not win if he petitioned the Board for the variances.

Ms. Proctor – Could you clarify what you were told by the other operators regarding the distance to another LVL and why you elected to not apply for the variance?

Mr. Johnson explained that he was told he would not be able to operate on Washington Ave because of the locations proximity to other LVL. He also believed he was within the time frame of the prior operators use of the state license was active. He did not ask for the variance because he believed his request would not be approved.

Mr. Anderson made a motion to accept new evidence and broaden the appeal to reconsider the determination by staff; *Ms. Proctor* seconded the motion.

Roll Call BZA: Ms. Houck, Yes; Ms. Proctor, Yes; Mr. Earl, Yes; Mr. Anderson, Yes; Mr. Dolin, Yes

BZA 21-A-02 petition for an appeal will allow for reconsideration with a vote of 5 Yes to 0 No.

Mr. Anderson made a motion to move petition BZA 21-A-02 to the next month's agenda, which will be held on August 17, 2021; *Ms. Proctor* seconded the motion.

Roll Call BZA: Mr. Anderson, Yes; Mr. Earl, Yes; Ms. Proctor, Yes; Ms. Houck, Yes; Mr. Dolin, Yes

BZA 21-A-02 petition for an appeal was **broadened to allow for new evidence to be accepted and reviewed and moved the petition to the next month's agenda** with a vote of 5 Yes to 0 No.

BZA 21-V-06

A petition for a variance from the fence materials limitations of Article 1341.19(C)(7) to install fabric around a chain link fence. The property is located at 2935 Washington Boulevard.

Petitioner/Property Owner: Lynn Kast, 2935 Washington Blvd., Huntington, WV 25705

Due to lack of representation, the Board voted to move the petition to the end of the agenda to allow time for the petitioner to arrive.

BZA 21-V-07

A petition for a variance from Article 1345.12(E) to use a non-conforming sign cabinet that exceeds the size requirement for a wall sign in a C-1 commercial zone more than six months after discontinuation of use. The property is located at 2501 Washington Boulevard.

Petitioner: Paris Signs, 2500 5th Street Road, Huntington, WV 25701

Property Owner: 402 Holdings, 2189 Kennon Lane, Huntington, WV 25705

Saul Thompson presented the petition, informing the Board that the proposal is requesting to allow for the use of an existing sign structure.

Ms. Lockman presented the Staff Report.

Monty Fowler, 65 S Terrace, is fine with the replacement face of the structure in question. In return, he would like for the store to take down the excessive amount of signage that is currently in place on the walls, widows, and parking lot poles. There are 14 additional signs on this property to advertise all the products they sell.

Mr. Anderson – Could Mr. Thompson speak to the signage that Mr. Fowler is referring to? Could Mr. Fowler describe in more detail the signage that he is referring to?

Mr. Dolin assumes the signage in question is not signage for the store itself, but for the different products that are sold. Mr. Fowler confirmed this and described the various sizes of the signs used.

Ms. Lockman assured the Board and Mr. Fowler that planning staff may pursue any compliance issues that violate the current sign ordinance. Mr. Thompson further assured the Board that he and his company did not manufacture or install the signage Mr. Fowler is referring to.

Ms. Houck made a motion to approve BZA 21- V-07; *Ms. Proctor* seconded the motion.

Roll Call BZA: Mr. Earl, Yes; Mr. Anderson, Yes; Ms. Houck, Yes; Ms. Proctor, Yes; Mr. Dolin, Yes

BZA 21-V-07 petition for a variance was **approved** with a vote of 5 Yes to 0 No.

BZA 21-A-03

An appeal of the requirement, decision, or determination made by the administrative official charged with the enforcement of the Zoning Ordinance Article 1320 denying continuation of an alleged non-conforming use of a duplex in an R-2 Single-family Residential District. The property is located at 2687 Collis Avenue.

Petitioner/Property Owner: Thor Meeks, P.O. Box 1046, Hurricane, WV 25526

Thor Meeks presented the petition and began by telling the Board he bought the property in 2008 as a non-conforming, single-family home which was rented out as a duplex. The property was mainly rented to baseball players from Marshall University. He explained the last few years there have been issues with break-ins and destruction of the property. Two years ago, he elected to board up the property and within the last year it was demolished. He would like to rebuild a true duplex in its place. He hoped that the Board will approve of the proposed plans that he submitted and agree that it would complement the neighborhood.

Ms. Lockman informed the Board that the proposed plans for the duplex were not included in the Staff Report as the petition is an appeal of staff's decision and not whether the plans fit the code.

Ms. Lockman presented the Staff Report explaining the timeline of events, the evidence provided, and the regulations of the city for this district.

Mr. Anderson – If we agree that there was not enough evidence that there was a duplex at this location, would the next steps be to apply for a variance of *Section 1355.G* or would this be a rezoning issue?

Ms. Hernandez explained that a duplex may not be built in an R-2 District as the use is not permitted. The property would need to be rezoned and that would go through the Planning Commission. If the property had been a lawful, non-conforming duplex, a variance from the one year limit could be sought.

Mr. Anderson commented that the facts in the issue seemed straight forward, the use had been abandoned for many years and it is questionable how the property was handled before. There is no evidence of a lawful non-conforming use. Ms. Hernandez confirmed that the city has no evidence of a duplex ever operating on the property.

Mr. Anderson concluded that the process should be through rezoning. The area of the property is nice and the addition of a duplex would be better than a vacant lot.

At this comment, members of the public in attendance voiced their disagreement with a loud and punctuated, no.

Mr. Earl – This structure had to have been a duplex and, if it was, the petitioner could request a variance from the one year limitation, correct?

Mr. Hernandez confirmed *Mr. Earl's* conclusion. Ms. Lockman added that a single-family home could be constructed on this lot as a permitted use.

Mr. Anderson cannot conclude that a duplex ever operated at the location for any length of time given the information provided. He cannot disagree with the determination made by staff. He made clear that he would like to have something better than the hole in the ground that is currently there.

Ms. Houck – Do you not have anything else that you could provide that would prove that a duplex existed at this location?

Mr. Meeks declared what has been provide is the only evidence that exists. He hoped the different dollar amounts would show there were two different residences. He stated that to build anything other than a duplex would not be financially beneficial to him.

Mr. Earl – What would be required for or evidence of a duplex in the city today? Would separate meters be required?

Ms. Lockman confirmed that separate meters and refuse fees would be required as evidence of a duplex, they would also need to meet all building codes, be built in a zone that allows a duplex, meet zoning regulation, acquire a certificate of occupancy, and pass plan reviews from the various inspectors.

Mr. Dolin – On an appeal, our decision is strictly on what the appeal entails and not what people wish for the use of the land?

Ms. Hernandez confirmed that the Board could only decide on the appeal and further explained that the Board had no authority to change how the land could be used.

Mr. Dolin asked the Board members if moving forward without public comment would be acceptable to them, and noted that the “boos” earlier was sufficient to make their opinions known.

Mr. Earl expressed his consent to exclude public comment, unless there were anyone that could speak for the petitioner, as the facts were enough for a decision to be made and no further evidence is going to be presented.

Mr. Anderson did not believe that evidence was provided to prove there was a duplex and agrees with staff’s decision.

Mr. Anderson made a motion to uphold the decision made by staff on BZA 21-A-03; *Mr. Earl* seconded the motion.

Roll Call BZA: Mr. Anderson, Yes; Mr. Earl, Yes; Ms. Proctor, Yes; Ms. Houck, Yes; Mr. Dolin, Yes

BZA 21-A-03 petition for an appeal, the board affirmed the staffs decision and the appeal was **denied**, with a vote of 5 Yes to 0 No.

BZA 21-V-06

A petition for a variance from the fence materials limitations of Article 1341.19(C)(7) to install fabric around a chain link fence. The property is located at 2935 Washington Boulevard.

Petitioner/Property Owner: Lynn Kast, 2935 Washington Blvd., Huntington, WV 25705

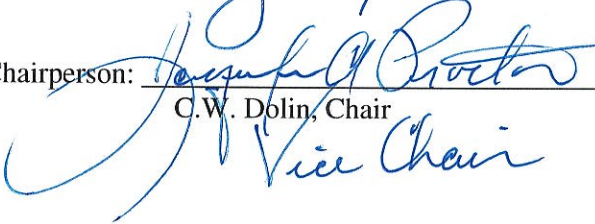
Mr. Anderson made a motion to move BZA 21-V-06 to the next agenda on August 17, 2021; *Ms. Houck* seconded the motion.

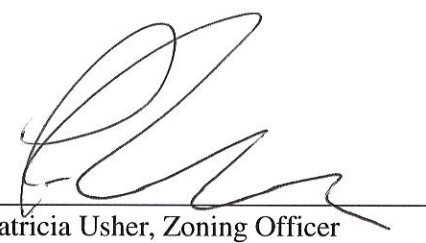
Roll Call BZA: Mr. Anderson, Yes; Mr. Earl, Yes; Ms. Proctor, Yes; Ms. Houck, Yes; Mr. Dolin, Yes

BZA petition for a conditional use was **decision** with a vote of 5 Yes to 0 No.

The meeting concluded at 7:30 p.m.

Date approved: Aug 17, 2021

Chairperson: 
C.W. Dolin, Chair
Vice Chair

Prepared by: 
Patricia Usher, Zoning Officer