



Planning, Development & Inspections

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MINUTES OF REGULAR MEETING TUESDAY, NOVEMBER 12, 2019 (9:00 a.m.)

Wake County Board of Adjustment

Wake County Justice Center
300 S. Salisbury St., Room 2700
Raleigh, North Carolina

Members Present: (7) Mr. Brenton McConkey (Chair), Mr. Don Mial (Vice Chair), Mr. Waheed Haq, Ms. Sheree Vodicka, Mr. John Barker, Mr. Dustin Engelken, Mr. Jeffrey Goebel

Members Absent: (2) Mr. DeAntony Collins, Mr. Will Barker

County Staff Present: (6) Mr. Steven Finn (Land Development Administrator), Mr. Tim Maloney (Planning Development & Inspections Director), Ms. Beth Simmons (Community Services Operations Supervisor), Ms. Loretta Alston (Clerk to the Board), Mr. David Parks (Planner), Mr. Geoffrey Pearson (Code Enforcement)

County Attorney Present: (1) Mr. Ken Murphy (Senior Assistant County Attorney)

- 1. Meeting called to order:** Mr. McConkey called the meeting to order at 9:02 a.m.
- 2. Approval of Minutes of the October 8, 2019 Meeting:** Mr. McConkey requested minutes be revised to show his absence at the last meeting. Mr. Engelken made a motion to approve the October 8, 2019 meeting minutes as they were corrected. The motion was seconded by Mr. Mial and the minutes were approved unanimously.
- 3. Approval of Written Decision Regarding PLG-A-001681-2019:** Mr. McConkey noted that four of the five original voting members present were Mr. McConkey, Mr. Mial, Mr. Haq, Ms. Vodicka, and Mr. Engelken. Mr. Mial made a motion to approve the written decision as drafted. The motion was seconded by Ms. Vodicka. By a vote of 4-0, the written decision was adopted.
- 4. PLG-ZV-001691-2019 - Special Use Permit to change an existing nonconforming use to another nonconforming use of equal or less intensity.**
Before the case was heard, Wake County Planning staff member, Mr. David Parks, was duly sworn. Mr. Parks began by introducing himself and the title of the case before the board.

Voting Members (5)

The voting members were identified as: Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Engelken, and Mr. John Barker

Documentary Evidence

Staff Report, PowerPoint presentation, Petitioner's Application with supporting documents

Testimony of Staff

Mr. Parks, Wake County Planner, asked that the staff report (Appendix 1) and the PowerPoint presentation (Appendix 2), and the petitioner’s application be accepted as evidence into the record.

Mr. Parks stated that the petitioner is requesting a special use permit to allow for a change from one nonconforming use to another nonconforming use within the R-30 zoning district. The petitioner is Andrew Petesch and the subject site is located along the southern side of Ten Ten Road, near the Kildaire Farm intersection and contains approximately 1.66 acres.

Mr. Parks stated that the site received a Special Use Permit in 1985 to allow for the construction of a 4,000 square foot building to be used as office and warehouse space for the storage computer supplies for a commercial business. This existing use is classified as nonconforming because it was lawfully established prior to the creation of the UDO, which would currently not allow the use within the R-30 zoning district. Mr. Parks further stated that the current request for a motorcycle repair business within the existing building would also be considered nonconforming due to the site not being located within an Activity Center as defined by the Wake County Land Use Plan.

Mr. Parks presented several site plans and discussed the parking area to be improved to provide required spaces and to add required accessible parking spaces. Mr. Parks also indicated that the applicant will be installing landscape buffers along the front and back of the site. Mr. Parks stated that the applicant will not increase the impervious area on the site.

Mr. Parks presented several photos and a video of the subject site. Notification letter to adjoining property owners were mailed on October 22nd and a public hearing sign was placed on the site on October 24th.

Mr. Parks stated that staff recommends that, if the Board of Adjustment reaches positive conclusions on all required findings, that it approve the special use request to subject to the conditions identified in the staff report. Additionally, a recommended staff condition to approval is that the two parcels in question be combined into one parcel due to common development.

Mr. McConkey asked Mr. Parks to clarify the nonconforming use and Ms. Vodicka inquired to staff for a definition of an Activity Center. Director of Planning and Development, Mr. Tim Maloney, was duly sworn and stated that an activity center is neighborhood, community and regional area that allow types of nonresidential uses. There is no activity center identified at the site location so in lieu of changing the land use plan and creating an activity center, a change from one nonconforming use to another nonconforming use is allowed.

Mr. McConkey asked for clarification from Mr. Ken Murphy, County Attorney, on the process in moving forward. Mr. Murphy stated that the Board would need to determine if the nonconforming use is of equal or less intensity than the old use and would then move on to decide on the five findings.

Testimony of the Petitioner

Mr. Andrew Petesch of Petesch Law, LLP (127 W. Hargett St, Raleigh, NC) represented the petitioner and introduced two exhibits at the quasi-judicial hearing: Exhibit 1, a packet of documents from Cary’s Land Use Plan and Zoning Ordinance; and Exhibit 2, GIS aerial maps depicting the Subject Properties at various times between 1999 and 2017. Mr. McConkey accepted both Exhibits into the record as evidence.

Mr. Petesch began with background of the subject property stating that on May 7, 1985, the Subject Properties received a Special Use Permit from the Wake County Board of Adjustment to allow for the construction of a 4,000 square foot building to be used as office and warehouse space for the operation of a commercial computer supply business on the Subject Properties. Living Light Properties, LLC (the "Applicant") has a purchase agreement with Mr. William Gerald Smith to purchase the Subject Properties and a third property immediately adjacent to the Subject Properties to the west and has prepared a preliminary recombination plat of the two parcels within Wake County's planning jurisdiction.

Mr. Petesch presented land use plans and the Cary Land Use Plan and explained the mixed-use centers and subdivisions surrounding the property, mostly in the town of Cary, would eventually be annexed into Cary.

1. The property is bordered to the north by Ten Ten Road, and the parcels across Ten Ten Road are in the Town of Cary's zoning jurisdiction and are zoned commercial and used for commercial purposes.
2. The property is bordered to the east by a small vacant lot which is in the Town of Cary's zoning jurisdiction, on the other side of which is the major intersection of Ten Ten Road and Kildaire Farm Road.
3. The property is bordered to the south by a parcel that is in the Town of Cary's zoning jurisdiction and is used for multi-family residential purposes (large apartment complex).
4. The property is bordered to the west by the third parcel which contains a single-family residence. Mr. Petesch stated that the change from office and warehouse space to a motorcycle repair business is a change from industrial use to commercial use and is permitted by the Cary table of uses. Mr. Petesch stated that the change in use will also eliminate tractor-trailer truck traffic.

Mr. Petesch stated that interior improvements will be made to the existing 4,000 square foot building (with lounge and retail component), the exterior of the building will be painted, and a new parking pad will be added on the east side of the existing building. Mr. Petesch presented aerial maps of the area showing the growth and demonstrated that the property is consistent with the surrounding growth and use.

Mr. Petesch introduced the applicant, Mr. Jeb Zarzour (3035 Banks Rd, Raleigh, NC). Before testimony was given, Mr. Zarzour was duly sworn. Mr. Zarzour stated he is the owner of Tapped Out Cycles, that does repair and retail sales of parts and accessories and is planning to expand his business. Mr. Zarzour plans to have two full time employees, in addition to himself, and two part time employees. Mr. Zarzour estimates that he will have between 5 and 10 customers per day during the summer, and between 2 and 6 customers per day during the winter. Mr. Zarzour stated that hours of operation will be from 9am-5pm Monday-Friday and from 10am-2pm on Saturday, and deliveries during that time are by UPS and FedEx. Mr. Zarzour stated that he tries to keep the noise level at a minimum and is exclusively used to test the motorcycles.

Mr. Haq inquired if there was a site improvement plan. Mr. David Parks introduced Ms. Susan Jones, PE, and she was duly sworn. Ms. Jones stated that gravel is considered impervious surface and since Mr. Zarzour plans to replace the gravel lots with concrete, the percentage of impervious surface will not be increased. Additionally, Ms. Jones stated that some gravel will also be replaced with landscaping. The concrete area will include 9 parking spaces, as required by UDO Section 15-

10 and will be ADA compliant and state that the site plan is compatible with the surrounding development in the area.

Mr. Petesch stated that Mr. Zarzour is a small business owner, contributing to the economy and hiring local employees, and bearing significant expense to purchase and make improvements to this property. Mr. Zarzour will also be adding buffering the property on several sides to improve aesthetics and noise reduction.

Public Hearing

With no additional attendees wishing to speak in favor of the petition and no attendees present spoke in opposition of the petition, Mr. McConkey closed the public hearing portion of the meeting at 10:08am.

Board Discussion and Determination that the proposed nonconforming use is of equal or less intensity than the existing non-conforming use

Mr. McConkey reminded the Board that in order for the board to approve this petition, it will need to determine that the change will have less of an adverse impact on those most affected by it or will be more compatible with the surrounding neighborhood than the current non-conforming use in operation. Mr. McConkey concluded that it would have less of an adverse impact due to the fact that the applicant plans to have a minimal number of staff and that a service/retail business is more compatible with the development in the area. Mr. Engelken agreed and further stated that with the extra vegetation planned and the discontinuation of the tractor-trailer truck traffic, there will be less adverse impact. Mr. Mial agreed as well and stated that motorcycle traffic has less adverse impact than tractor-trailer truck traffic and during the 'off-season' motorcycle traffic will be greatly reduced. Mr. Barker further agreed and stated that retail/commercial use has less of an adverse impact than the current industrial use, as well as the limited hours of operation.

There being no further discussions regarding this determination, Mr. McConkey asked for a motion. Mr. Mial made a motion that after discussion the board determine that the proposed nonconforming use will have less of an adverse impact and will be more compatible with the surrounding neighborhood than the current non-conforming use in operation. The motion was seconded by Mr. Engelken. The motion passed by a unanimous vote (5-0).

Board Discussion and Findings of Fact for Special Use Permit

1) The proposed development will not materially endanger the public health or safety.

Mr. Mial stated that there will be less traffic in the area due to the reduction of tractor-trailer trucks, and that services and utilities will not be affected as it will use existing well and septic, and there are plans for buffer vegetation. Mr. Haq stated that the applicant will be reducing the impervious surface percentage as to not cause added soil erosion or sedimentation.

2) The proposed development will comply with all regulations and standards generally applicable within the zoning district and specifically applicable to the particular type of special use or class of special uses.

Mr. McConkey stated that the proposed commercial use does comply in that it has adequate parking spaces, will not increase impervious surface, will have appropriate vegetation buffers, and it will utilize the existing driveway.

3) The proposed development will not substantially injure the value of adjoining property or is a public necessity.

Mr. McConkey stated that the proposed use is a continuation of a commercial use of equal or less intensity and will have less of an adverse impact on those more affected by it and will be more compatible with the surrounding neighborhood. Mr. McConkey reiterated that tractor-trailer trucks traffic will be eliminated, additional vegetation planted, and hours of operations will be limited.

4) The proposed development will be in harmony with the area in which it is located.

Mr. Mial reiterated that the development will be eliminating the tractor-trailer truck traffic and interior and exterior improvements will be made, including a new parking pad and buffer vegetation. Mr. McConkey also reiterated that the board has already determined that the new nonconforming use will have less of an adverse impact to the surrounding area due to the limited number of staff and the fact that a retail/service business is more compatible with the surrounding area.

5) The proposed development will be consistent with the Wake County Land Use Plan.

Mr. McConkey stated that since the Wake County Land Use Plan is just a designation on a map and the area will likely eventually be annexed by Cary and re-zoned, the planned development is a use allowed by right in Cary's General Commercial zoning district and would be compatible with the area at that time.

There being no further discussions on the findings of facts, Mr. McConkey asked for a motion.

Motion and Conclusions of Law:

In the matter of PLG-SU-001691-2019, Mr. Engelken made a motion that the Board find and conclude that the petition does meet the requirements of Article 19-23 of the Wake County Unified Development Ordinance and the special use permit be granted with the recommended staff conditions. The motion to approve is based on the following findings of fact:

- 1) The proposed development will not materially endanger the public health or safety;
- 2) The proposed development will comply with all regulations and standards generally applicable within the zoning district and specifically applicable to the particular type of special use or class of special uses;
- 3) The proposed development will not substantially injure the value of adjoining property or is a public necessity,
- 4) The proposed development will be in harmony with the area in which it is located.
- 5) The proposed development will be consistent with the Wake County Land Use Plan

The motion was seconded by Mr. Mial. The special permit was granted with a unanimous vote (5-0).

It is Therefore Ordered:

- 1) The petitioner must record the notarized form pertaining the Order of the Wake County Board of Adjustment in the Wake County Register of Deeds' Office and return a copy to the Current Planning Section of Wake County Planning;
- 2) The petitioner must obtain and complete appropriate permits from the Wake County Inspections/Development/Plans/Permits Division and Wake County Environmental Services;
- 3) The landowner must submit an exempt subdivision plat to recombine the two parcels that comprise the Subject Properties;
- 4) A final zoning inspection to verify site plan compliance must be performed by the Wake County Zoning Administrator prior to the issuance of a certificate of completion by the Wake County Planning, Development and Inspections Division of Community Services; and
- 5) The landowner must maintain compliance with the special use approval and Wake County Unified Development Ordinance.

5. PLG-ZV-001836-2019 – Appeal by Clifton Forsythe of Planning Staff's Determination that a Residential Property Located at 6105 Yates Mill Pond Road, Raleigh, NC is in Violation of UDO Section 4-11

Before the case was heard, Mr. Murphy, County Attorney, reminded members that the Board will be reviewing Mr. Forsythe's appeal of the Notice of Violation issued by the zoning officer in September 2019 and deciding whether the Board agrees with the interpretation and findings of staff.

Voting Members (5)

The voting members were identified as: Mr. McConkey, Mr. Mial, Mr. Haq, Mr. Engelken, and Mr. Goebel

Documentary Evidence

Staff Report, PowerPoint presentation, Petitioner's Application

Testimony of Staff

Before the case was heard, Wake County Planning staff member, Mr. Geoffrey Pearson, Code Enforcement Coordinator, was duly sworn. Mr. Pearson began by introducing himself and the title of the case before the board. Mr. Pearson asked that the staff report (attached here as Appendix 1) and the PowerPoint presentation (attached here as Appendix 2), and the petitioner's application be accepted as evidence in the record. Mr. McConkey accepted the evidence into record.

The petitioner is Mr. Clifton Forsythe, and the subject site is located at 6105 Yates Mill Pond Rd, which is located near the intersection of Yates Mill Pond Rd & Tryon Rd. The parcel consists of 1.2 acres, is zoned Residential-40 Watershed and is also located in the Rural Non-Urban Area of the Swift Creek Watershed.

The surrounding properties are residentially zoned and developed.

Mr. Pearson stated that on July 17, 2019, the Wake County Planning Division received a complaint that the property located at 6105 Yates Mill Pond Rd was being used to operate a lawn mower repair and sales operation. Wake County Staff investigated the property and determined that a prima facie business of lawnmower repair and service was being conducted from the residentially

zoned property. A Notice of Violation was issued to the property owner, Mr. Barry Teater, as well as the tenant, Mr. Clifton Forsythe, on September 9, 2019. Mr. Forsythe submitted an Appeal Application on October 10, 2019. A public hearing notice was placed on the subject property on October 30, 2019.

Mr. Pearson stated that, per Mr. Forsythe's appeal justification, he claims that he repairs and refurbishes lawn mowers and other yard equipment for neighbors and friends and that he does this as a hobby.

Mr. Pearson presented to the Board the definition of a Prima Facie business as defined in the UDO as:

"Any use or activity that functions as a traditional business or commercial use, whether or not such use or activity is performed for profit or financial gain. An individual who repairs vehicles owned by other people will, for example, be deemed to be operating a prima facie business regardless of whether payment is received for such services."

Mr. Pearson presented several photos, all taken on the same day, used in his determination, including those showing equipment being dropped off for repair, equipment being stored on the property, and a photo showing refurbished lawn mowers for sale.

Mr. Pearson stated that having applied this definition to this case, concluded that the activity met the qualifications of a prima facie business and the UDO prohibits all retail sales and service with the Residential-40 Watershed Zoning District, therefore rendering his determination valid.

Mr. Goebel asked if staff based its decision on the wording on the UDO. Mr. Pearson stated that he did not base his decision on the UDO's definition of a 'vehicle.'

Testimony of the Appellate

Before testimony was given, witnesses were duly sworn:

Mr. Clifton Forsythe, 6105 Yates Mill Pond Rd, Raleigh, NC

Mr. Forsythe stated that he repairs lawn mowers and other yard equipment as a hobby, which he began pursuing when health issues made it impossible for him to work. He stated that he repairs for himself, his neighbors, and his friends, and that he does not charge labor, but does have the customer pay for the part and occasionally they will give him a tip which he accepts as a donation.

Mr. Forsythe states that he currently owns about 12-14 mowers and all mowers he is working on are kept behind the residence. He further states that he does not store nonworking mowers for long periods of time, as he takes them to the scrap yard, and he does not allow oil to leak into the soil on the property.

Mr. Barry Teater, 5800 Hagen Stone Park Rd, Pleasant Garden, NC was duly sworn and spoke in favor of the petitioner. Mr. Teater stated that Mr. Forsythe rents the property from him and is one of the best tenants he has ever had. Mr. Teater stated that Mr. Forsythe does not pose a danger to public health and safety and his hobby is part-time and there are no noise issues with his mower repair.

Mr. Haq inquired about posted hours or advertising. Mr. Forsythe stated that he does not do any advertising, except for posting on Next Door a year ago. Mr. Haq asked Mr. Forsythe if he had any financial gain from his hobby, and Mr. Forsythe stated that he does not.

Mr. Goebel asked Mr. Forsythe if he is registered with the Secretary of State as a business, if he pays business taxes, and if he advertises. Mr. Forsythe said that he does not, not even on Craigslist.

Mr. Mial asked Mr. Pearson for clarification of the definition of Prima Facie regarding 'traditional' business or commercial use. Mr. Pearson stated there is purchasing, selling, storage, and repair services, and in his interpretation is that it functions as a traditional business even if the intent is not that it is a business.

Mr. Engelken asked Mr. Pearson what is the exact activity that causes the threshold into business operations. Mr. Pearson said that there is not a specific activity that can be identified, but since there was a complaint and an investigation was completed to determine that the function was like that of a business. Mr. Engelken asked if there was a level of activity that the appellate could participate in that would not constitute a business. Mr. Pearson stated that there is not a certain way to define allowed activity without creating a precedent. Mr. Pearson stated that other options for Mr. Forsythe would be to relocate his operations outside the R-40 zoning district or operate out of a mobile unit.

Having no other attendees speaking in favor or opposed to the petition, Mr. McConkey closed the public hearing portion of the meeting at 11:04am.

Board Discussion

Mr. McConkey agreed with staff that there does appear to be a level of business operations in this case and would not be inclined to reverse the planning staff's determination. Mr. Mial agreed that Mr. Forsythe's operation does appear to be a traditional business even if there is no financial gain. Mr. Murphy responded to a question from Mr. Goebel, and stated the board is limited to considering the evidence as presented i.e. staff report, any attachments to that, power point presentation and the testimony of all the witnesses. Mr. Goebel agreed to support staff's decision based on the evidence presented.

Motion and Conclusions: Based on the applicable Wake County Unified Development Ordinance provisions, and on the evidence submitted in the matter of PLG-A-001836-2019, Mr. McConkey moved that the Board find and conclude that the Planning staff's determination should be upheld, and the issuance of the Notice of Violation is affirmed. The motion to affirm is based on the following findings of fact and conclusions of law related to:

1. Evidence that the issuance of the zoning notice of violation was not issued in error, and the subject property is in violation of the Wake County UDO.

The motion was seconded by Mr. Mial. The planning staff's decision was affirmed with a 4-1 vote, with Mr. Haq dissenting.

Mr. McConkey encouraged Mr. Forsythe to connect with the planning staff to find a way to do this in compliance with Wake County Unified Development Ordinance in order to continue investing in his hobby.

6. Planning, Development & Inspections Report

Mr. Finn reported on the following items in terms of recent trends and constructed UDO:

- Development applications remain consistent the past month. He noted that in general we have seen some peaks such as 14 per day on the high end with 2 or 3 on the low end.

- Development review staff is stepping into phase two of the land development permitting software getting ready to do testing and upgrade based on what we have learned during the first year working with vendor. Mr. Finn sees this as a positive note. There were less than five percent applications during the first year that came in inaccurately or required resubmittal.
- For the new board members, Mr. Finn talked briefly about the way the UDO is constructed in Article 4 which sets forth general parameters for land use types and the general classifications for making interpretations of how an application or proposal may work or can fit.
- Regarding the case heard today, Mr. Finn explained the two relevant policies in place being passive code enforcement where we receive complaints versus actively seeking violations and having a goal of compliance. He noted that generally 2-3% of cases go to court whereas 70-80% do not know they are in violation and comply after a field visit or letter within a month or two. He did note that as a recent trend we have had several complex cases the last few months including repeat violations.

Mr. McConkey asked of the planning staff if a review of procedures would be beneficial for determining if a change in conformity is of equal or less intensity and Special Use Permits. Mr. McConkey feels that once the first determination is made that is less than or equal to should satisfy the permitting requirements for the Special Use Permit. Mr. Finn accepted the task and noted he would report back to the Board at a future meeting.

Mr. Murphy reminded the Board of the appeals process going forward, as there may be an appeals case heard at the December meeting. Their role is to hear the evidence that was used in making the original determination by planning staff and to determine if staff interpreted the UDO correctly. If the appeal goes to court, Mr. Murphy's role changes from advising this board to advocating for what this board decided and defending its decision, and therefore incorporating board discussion into the motion is recommended.

7. Adjournment

Mr. McConkey adjourned the meeting at 11:27am.

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REGULAR MEETING
WAKE COUNTY BOARD OF ADJUSTMENT
November 12, 2019

All petitions complete, Brenton McConkey declared the regular meeting
of the Wake County Board of Adjustment for
Tuesday, November 12, 2019 adjourned at 11:27 a.m.

Respectfully Submitted:



Brenton McConkey
Wake County Board of Adjustment

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