



The Hickory Regional Board of Adjustment will hold its regular meeting on **Wednesday, June 24, 2020 at 6:00 p.m. in the City Council Chambers of City Hall**. The following will be the agenda for the Regular Meeting:

AGENDA

- Parliamentary Call to Order
- Welcome
- Roll Call
- Items of Correspondence
- City Council Action
- Approval and Signing of Minutes from the July 27, 2016 Meeting

PRESENTATIONS AND PUBLIC HEARINGS

1. **Appeal of Administrative Decision (AAD) 20-01.** Request by Lutz Reissmann, owner of Aloha's Player Arcade, to appeal the Planning Director's decision of a violation of Land Development Code Section 9.7 at 2440 Highway 70 SE. The property is shown as PIN 3721-05-07-1814 on the Catawba County G.I.S. maps.

OTHER BUSINESS

1. None.

The Hickory Regional Board of Adjustment does not discriminate on the basis of disability in the provision of its service as charged by the City Council of the City of Hickory. All meetings are held in accessible facilities. Any person with a disability needing special accommodations should contact the Planning Department at telephone number (828) 323-7422 at least 48 hours prior to the scheduled meeting.

Hickory Board of Adjustment
Wednesday, July 27, 2016, 6:00 pm

A regular meeting of the Hickory Board of Adjustment (BOA) was held on Wednesday, July 27, 2016, 6:00 pm, in Council Chambers of the Julian G. Whitener Municipal Building, Hickory NC.

Members Present: Randall Mays, Bill McBrayer, Jeff Kerley, Junior Hedrick, Jim Noggle, John Eldridge, Wallace Johnson and Sam Hunt

Members Excused: Shauna O'Brien

Members Absent: none

Others Present: Community Development Manager Dave Leonetti, Planner Ross Zelenske, City Attorney John Crone, Deputy City Attorney Arnita Dula and Minutes Clerk Anne Starnes

Parliamentary Call to Order & Welcome: Randall Mays, Chairman, called the meeting to order at 7:15 pm and welcomed everyone present.

Roll Call: Community Development Manager Dave Leonetti stated a quorum was present, and Shauna O'Brien was excused. He noted that in order to grant a variance, a four-fifths majority is required, which would be eight (8) affirmative votes.

Items of Correspondence: none

City Council Action: none

Approval and Signing of Minutes from the October 28, 2015 Meeting: Minutes of the previous Board of Adjustment meeting were distributed to members in advance. No additions, deletions or corrections to the minutes were stated. Sam Hunt moved, seconded by Junior Hedrick, to approve the October 28, 2015 minutes as presented. By a show of hands, the motion carried unanimously.

PRESENTATIONS AND PUBLIC HEARINGS

Mr. Mays said one public hearing for a variance petition was on the agenda. City Attorney John Crone said he would help in any way needed.

Mr. Mays reminded Commission members this is a quasi-judicial hearing, and reviewed the procedure they must follow. He said that anyone wishing to testify must come forward and be sworn in by the clerk, and any written material would be submitted to the clerk for evidence. He said there would be a roll call vote on the petition.

Mr. Crone asked if there was anyone present who would be presenting evidence. The applicant said he had filed the variance, and Mr. Mays said the public hearing had not yet been opened.

1. Variance Petition 16-01. Request by Phillip and Karen Pruett for variance from Article 7, Section 7.1 of the Hickory Land Development Code. The specific request pertains to a side street yard setback. The subject property is located at 1056 5th Avenue NW and 526 10th Street Place NW, and shown in more detail as Pins 3703-17-12-1216 and 3703-17-12-0042 on the Catawba County G.I.S. maps.

The Minutes Clerk swore in all speakers prior to their testimony.

Dave Leonetti presented the Staff Report and referred to PowerPoint slides during his presentation.

Mr. Leonetti reviewed slide #18 (Variance Petition 16-01). He said Variance Petition 16-01 was a petition from Phillip and Karen Pruett for a conventional variance. They own two properties adjacent to one another, and from the records that he had seen, he said it appears that nearly all of the accessory structure being discussed would be on only one of the two properties.

- Applicant: Phillip and Karen Pruett
- Property Location: 1056 5th Avenue NW and 526 10th Street Place NW
- Property Zoning: R-2 (Residential)
- Lot acreage: 0.734 acres
- Request: A reduction in the required 15-foot side setback, down to 5-feet, to allow for the placement of an accessory building.

Referring to slide #19 (Map 1: Existing Land Use and Floodplain), Mr. Leonetti said the slide makes it clear that there is a good amount of floodplain and floodway along the subject properties. He noted the intended location for the accessory building, outside of the floodway, to protect it as much as possible.

Referring to slide #20 (Map 2: Existing Zoning), Mr. Leonetti said the zoning for both lots is Medium Density Residential, R-2. He noted the General Business, C-2, appearing on the map is the nearby Old Lenoir Road.

Referring to slide # 21 (Exhibit A), Mr. Leonetti said this photograph of the property includes the location of the property line. He noted it is 5-feet from the property line to the outermost part of the accessory structure, and approximately 12-feet from the property line to the edge of the street pavement.

Referring to slide #22 (Exhibit B), Mr. Leonetti said this photo shows where the 15-foot setback would be, essentially the top bank of Fitz Creek, but it is hard to see in the photo. The creek bank is located just past the swing set.

Mr. McBrayer asked if he had misunderstood, and had Mr. Leonetti said this is where the applicant intends to put the structure. Mr. Leonetti said they have placed the structure on the lot, and did have a permit for placing the structure, but where the contractor ended up placing the structure was not within the setback required. He said they are basically requesting the variance because the contractor did not place it where it was intended, which was due to the floodway and not known at the time, based on the original permit application.

Referring to slide #23 (Exhibit C) and slide #24 (Exhibit D), Mr. Leonetti said these photos show the approximate location of the top bank of Fitz Creek to the right, and the actual property line.

Mr. Leonetti reviewed slides #25 through #28 (Analysis). He said there are four (4) standards under North Carolina state law for granting a variance. He noted the law was changed approximately three (3) years ago, to provide a little bit more flexibility, and that previously an applicant had to prove that there would be no reasonable use of the property without the variance being granted; now the standard is that unnecessary hardship would result from the strict application of the ordinance. He noted this is stated under #1 of the four standards.

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
 - *The property would not be unusable without the variance. However, it would be nearly impossible to place any accessory structures on the property, if the ordinance is strictly applied.*

Mr. Leonetti said that it used to be nearly impossible to grant a variance. He said the property would not be unusable without the variance, but due to the location of the floodplain and floodway on that property, it would be essentially impossible to place any accessory storage buildings on the property if the ordinance was strictly applied.

2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography.
 - *The presence of Fitz Creek directly impacts this property in a way that other properties are not affected. The amount and location of the lot covered by floodplain significantly differs from other properties in the neighborhood.*

Mr. Leonetti said that, in this case, that peculiar condition to the property is the presence of Fitz Creek, directly impacting that property in a way it does not affect other properties in the immediate vicinity. The amount of floodplain and floodway coverage on that lot is significantly greater than the other properties.

3. The hardship did not result from actions taken by the applicant or the property owner.
 - *The waterway is a naturally occurring hydrologic feature that was not created by the applicants.*

Mr. Leonetti said the waterway itself is a naturally occurring feature, so the location where they were able to place that structure existed, and was not the creation of the applicants.

4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.
 - *The variance will enable protection of the floodplain while allowing the petitioners to construct an accessory building on the property.*

Mr. Leonetti said the variance, if granted, would enable the property owners to place the building in a location on their property where they would be able to utilize it, and would also allow protection of the floodplain by ensuring that no structures are constructed within that floodplain. He said that staff believes it is located an adequate distance off the roadway, in terms of traffic safety.

Referring to slide #29 (Recommendation), Mr. Leonetti said staff recommends approval of the requested 10-foot side setback reduction.

Mr. Leonetti asked for questions from Commission members.

Mr. Hunt asked what the long range plan is for the street. Mr. Leonetti said it is a local street, and there are no plans to widen it.

Mr. Mays requested the slide of Map 1 be presented again, and asked if the area hashed in red represents the floodplain. Mr. Leonetti said yes, that is the floodway, and there is some purple floodplain to the north. He noted it appears, from when Cal Overby visited the property, that it is not mapped 100% accurately, and this is something staff may look at in the future. He said that based on the grade there and the location of

the creek, it does not appear that the floodway should be quite as wide as it is, but at this point the map is what it is and cannot be changed.

Dr. Eldridge asked if their existing house is in the floodplain, and Mr. Leonetti said yes.

Mr. Kerley said he went by the property today and is a bit surprised by the staff recommendation, because it is right in the front yard of the neighbor's home, that he could understand adjusting it a foot or two, but this is for 10-feet.

Mr. McBrayer asked if there had been any calls from the public or neighbors since the report was printed and mailed, and Mr. Leonetti said no.

There were no additional questions for Mr. Leonetti from Commission members.

Mr. Crone asked if any members of the audience had questions for Mr. Leonetti, and there were none.

The Staff Report was submitted to the Minutes Clerk, and entered into the record as Exhibit E.

Mr. Mays again reminded Commission members this is a quasi-judicial hearing, and reviewed the procedure they must follow. He said that anyone wishing to testify must come forward and be sworn in by the clerk, and any written material would be submitted to the clerk for evidence. Proponents of the petition would be allowed to speak first, followed by the opponents, with rebuttal time allowed for each. He said there would be a roll call vote on the petition.

Chairman Mays opened the Public Hearing.

PROPONENTS

Phil Pruett addressed Commission members. Mr. Pruett, the applicant, thanked members for their time. He said he was trying to keep his wife happy, that she had requested the building located on the property. He referred to the slide of Map 1 in explaining the actual location of the structure. He noted the property where their existing home is located, and said they later bought the other piece of property. The bank of Fitz Creek comes up tight near the edge of the structure. He said their concern is that if they were to move the structure, according to the City code, then the side doors of the structure would be right on the bank of Fitz Creek, or right on the edge of it and deeper into the floodplain, and this is his concern. He said you would not be able to use the doors on the backside, which is an exit. If moved, someone would step out those doors and drop 15-feet into Fitz Creek, and with the way the creek has eroded in the past, he is afraid that the ground would disappear from underneath the structure, and render it unstable. Their hope is that the structure can remain where it is and they will not need to move it further into the floodplain.

Mr. Pruett explained the intent for the structure, saying that his wife works from home and this was intended to be her office, at least part time, with power run to it. She will use it as a small home office.

Mr. Mays asked if there were any questions for Mr. Pruett.

Mr. Mays asked if the accessory structure is actually located on the second piece of property. Mr. Pruett said yes, and that the two properties have been re-surveyed by Jim Bradshaw, and it is currently one piece of property. Mr. Mays said that was his question, whether these were still two separate properties, or had they been consolidated, and Mr. Pruett said they were consolidated as one property at the 1056 5th Avenue NW address.

Mr. Mays said that Mr. Pruett applied for a permit for this accessory structure, and asked him why there was not an exact plan for where to put it to guide the contractor. Also, why had the contractor not surveyed where he wanted the structure placed, why was this not looked at prior to the placement on his property. Mr. Pruett said that was a good question, the permit was never discussed, and when asked where he wanted the structure to go he was not very specific at the time. He said it is his fault, an oversight, and was not done on purpose and it was not an intentional disobedience. He said that, as he looks at it now, he is embarrassed, considering his job in interpreting law.

Mr. Kerley asked if he had hired a contractor to place the building on the site, and Mr. Pruett said yes, it was a contractor in Sawmills where his grandfather lives. Mr. Kerley asked who pulled the permit, and Mr. Pruett said he had the permit, and later there was a permit through the county, as well.

Dr. Eldridge asked when the problem was noticed, and Mr. Pruett said the Code Enforcement Officer Bobby Baker had seen it and made note of it. Mr. Pruett was made aware of the problem when Cal Overby visited the house. They discussed the situation, and Mr. Pruett asked what his options would be. Mr. Overby explained the variance option, which brings him here tonight.

Dr. Eldridge asked if the Code Enforcement Officer had noticed it, or had someone complained. Mr. Pruett said no, to his knowledge no one had complained, but that numerous people have come by and praised him and his wife, saying it's the cutest thing they have ever seen, and that they love it, but they have had no complaints from the neighbors. He said there are a lot of people who walk through that neighborhood, coming from the Spa or just walking for exercise, and numerous people have stopped to look and inquire about it. He said the neighborhood is quite happy it is there, that the property had been grown up and was quite a mess before they purchased it, and there has been a very positive reaction from members of the community.

There were no additional questions for Mr. Pruett.

Mr. Mays asked if there were any other speakers in favor of the petition, and there were none.

OPPONENTS

none

The Public Hearing was closed.

Members discussed the variance petition.

Mr. Kerley noted again that he made a site visit today, that he knows they put it there for a reason, and said he is okay with a variance this close, but it is a 10-foot variance right next to the road. He said if he hired a general contractor they should have brought it to their attention where it could be located, and made arrangements for it.

Mr. Mays asked how many total homes are on 10th Street Place NW, and if it is a through street or a dead end. Mr. Pruett said it is not a dead end, it makes a circle around, and there are five houses on the left side.

Dr. Eldridge asked what the City had based their recommended approval on, and Mr. Leonetti said that it must meet all four of the criteria. He said that Cal Overby prepared the staff report and was not present to comment, but his opinion was that it met all of the criteria.

Mr. Mays said the main consideration is the encroachment on the floodplain area.

Mr. McBrayer asked if the members are deciding if the structure stays right where it is now. Mr. Mays said members would either approve or deny the request for a variance; a decision to approve means the structure stays where it is, and a decision to deny means he would need to move the building into the designated setback that is set forth by City Code.

Mr. McBrayer asked what harm the building does sitting where it is, and Dr. Eldridge said that is why he had asked if there were any complaints from the neighbors, or any calls of concern about it. Mr. Hunt said it is good that it was not put in an extreme curve. Mr. Mays said it is not at an intersection, where it would be blocking anyone's view up or down the street, or blocking access to the street. Dr. Eldridge said he would have expected some of the neighbors to have issues with it, and Mr. Kerley said especially the ones directly across the street. He also noted if there was an issue with the utility lines it could be a concern, that it is closer to the road in person than it looks on paper. Mr. Mays said it is 12-feet from the pavement, and Mr. Hunt said he has seen homes where you step out the front door and right into the street.

Mr. Mays asked if there was any more discussion, or any further questions for the witnesses presenting testimony and evidence.

Mr. McBrayer asked Mr. Pruett to clarify what he said, that where it shows the building is located (on paper) is not actually where it is, and what would be the problem with moving it, since it is a mobile unit. Mr. Pruett said it was brought in on the back of a truck. Mr. Mays said the two lots are not that large, which can be seen by the property slides and photos provided. The aerial photo slide (Exhibit D) was examined again, and the structure location noted.

Mr. Mays said the structure is in place, and the applicant is requesting a reduction in the required 15-foot side setback, down to 5-feet, to allow for placement of the accessory building.

Mr. McBrayer asked what precedent the Commission would be setting going forward, if they approve the variance request. Mr. Mays said that each case is considered individually.

Bill McBrayer moved, seconded by Wallace Johnson, to approve Variance Petition 16-01.

Mr. Mays stated that as a quasi-judicial hearing and there would be a roll call vote, and members would vote individually, stating their reasons as to why they were voting for or against the petition.

Mr. Noggle voted in favor of the motion to approve Variance Petition 16-01, based on the evidence presented during the public hearing, including the staff report and spoken testimony, and that it meets the four criteria in his opinion.

Mr. Hunt voted in favor of the motion to approve Variance Petition 16-01, based on the background information and testimony given, and it meets the four variance criteria.

Mr. Johnson voted in favor of the motion to approve Variance Petition 16-01, based on the staff report and that it meets the four criteria.

Dr. Eldridge voted in favor of the motion to approve Variance Petition 16-01, based on the evidence presented and it meets the four variance criteria as required.

Mr. Mays voted in favor of the motion to approve Variance Petition 16-01, based on it keeping the floodplain area intact, and that the testimony given does qualify it for the variance.

Mr. Kerley voted in favor of the motion to approve Variance Petition 16-01, saying he struggled with this as it was a variance, and those laws were put in action for a reason, but that he did not want to cause a hardship, so he is in favor of the variance as presented.

Mr. McBrayer voted in favor of the motion to approve Variance Petition 16-01, based on the testimony given and the four criteria are met, and stated he agreed with Mr. Kerley that the mistake of placing it were it is should have been caught earlier, but considering the neighborhood that it is in, the aesthetics that it brings and the low traffic flow, there is not an issue or reason enough to deny it.

Mr. Hedrick voted in favor of the motion to approve Variance Petition 16-01, based on the finding of facts, the staff recommendation and that it meets the four criteria, and that he personally believes that they have created a nice looking property.

Mr. Mays advised Mr. Pruett that Variance Petition 16-01 was granted.

Other Business: Mr. Mays asked if there was any other business for members, and Mr. Leonetti said there was none.

Mr. Mays asked Mr. Crone if he had any further business for the Board of Adjustment, and he said no.

Adjourn: Bill McBrayer moved, seconded by Sam Hunt, to adjourn. There being no further business, the meeting adjourned at 7:50 pm.

Randall Mays, Chairman
Hickory Board of Adjustment

Anne Starnes, Minutes Clerk
City of Hickory

APPEAL OF ADMINISTRATIVE DECISION ANALYSIS

PETITION: AAD 20-01

APPLICANT: Lutz Reissmann, owner of Aloha's Player Arcade

PROPERTY LOCATION: 2440 Highway 70 SE

PIN: 3721-05-07-1814

ACREAGE: ~1.09 acres

WARD: The property is located in Ward 3

ZONING: Regional Commercial (C-3)

REQUESTED ACTION: The applicant requests an appeal of an administrative decision (AAD) by the Planning Director, in accordance with Land Development Code Section 2.10.

BACKGROUND: On March 19, 2018, Lutz Reissmann, applicant, filed permits to open a skill based gaming business at 2440 Highway 70 SE known as Aloha's Player Arcade. Following the application, permits were issued and a building safety inspection was held on March 21, 2018 where past Zoning Enforcement Officer Tyler Nix was present and evaluated the zoning compliance of the tenant's existing space, as well as, proposed changes. The business was approved to open after re-inspection on March 23, 2018.

In February 2020, a question was posed to the Planning Director, Brian Frazier, about the legality of strip lighting around the fenestration of buildings in the Hickory zoning area. A determination was made by the Planning Director that these lights were in violation of the Land Development Code. On February 18, 2020, Zoning Enforcement Officer Jason Meier identified the subject property as having strip lighting and photographed the violation. On March 3, 2020, a Notice of Violation was mailed to both the property owner and business operator by the Zoning Enforcement Officer informing them of the violation and that the violation needed to be corrected within 10 (calendar) days of the date of the letter. On March 8, 2020, Mr. Reissmann, business operator, filed a written appeal of the Director's decision.

EXPLANATION: The outdoor lighting standards (Section 9.7) of the Land Development Code (LDC) states the following:

Sec. 9.7 Outdoor Lighting (TA 14-01) (TA 18-01)

9.7.1 *The purpose of this section is to ensure site lighting contributes to the character of the site and does not disturb adjacent development as light spillage.*

9.7.2 *General Guidelines:*

A. The light source of outdoor lighting fixtures shall not be directly visible from property outside the zoning lot on which it is located. Additionally, the maximum illumination permitted at the zoning lot line from any use, other than single-family residential, onto a lot line of any adjacent residentially zoned lot shall be 0.20 foot-candles.

The decision of the Planning Director was rendered based upon the following administrative findings:

- The applicant installed strip lighting around two windows and the door on the front façade of the business.
- The Land Development Code (Section 9.7) specifically states that the purpose of the regulations are to ensure site lighting does not distribute adjacent development as light spillage and that outdoor lighting fixtures shall not be directly visible from the property outside the zoning lot on which it is located.
- Strip lighting is directly visible from the property lines and is not shielded to prevent lighting spillage.

BOARD OF ADJUSTMENT AUTHORITY: Land Development Code Section 2.10 vests the Board of Adjustment with the responsibility of considering requests for appeals of administrative decisions rendered by the Planning Director in the administration or enforcement of the provisions of the Land Development Code.

The Board of Adjustment may reverse administrative decisions upon finding of substantial, factual evidence in the official record that the administrative official erred.

PUBLIC COMMENT: As of June 4, 2020, no public comment has been received.

RECOMMENDED ACTION: Staff recommends the Board of Adjustment affirm the decision rendered by the Planning Director based upon the following findings:

1. The property was issued a permit allowing skill based gaming business, but no permits or approvals were given allowing such strip lighting; and
2. The existing strip lighting does not comply with the regulations outlined in Land Development Code 9.7.

Request for Appeal Letter

March 8, 2020

To: Brian Frazier
Planning Director
City of Hickory, NC 28603

I am in receipt of your letter dated March 3, 2020 stating that I am in violation of City of Hickory's Land Development Code 9.7 Outdoor Lighting.

I have read the complaint and don't feel that the lights in question denigrate from the buildings character and it does not disturb adjacent tenants as light spillage.

I also don't understand 9.7.2 "lighting fixture shall not be directly visible from the property outside the zoning lot on which it is located."

I would like an opportunity to seek a variance and be able to continue use of the LED lights. Many other commercial buildings exhibit light on their building that can be seen from a much further distance than mine. An example would be the new LED and other lite billboards that are brilliantly lite up. Also, restaurants such as "Cook Out" and many other establishments use bright neon and LED's to attract "eyeballs" to their establishments. My light is only visible when directly in front of them. Please reconsider as we are a small business that is trying to attract customers to a small strip center. We are not a large commercial tenant that has 10' letters plastered over their building to attract customers.

Thank you, for your time and consideration.



Lutz Reissmann
Owner of Aloha's Player Arcade
2440 Hwy 70 SE
Hickory, NC 28602

336-250-3027.



Office of Business Development

City of Hickory
PO Box 398
Hickory, NC 28603
Phone: (828) 323-7422
Email: jmeier@hickorync.gov

Notice of Violation Letter

March 3, 2020

TO: Aloha Players Arcade
2440 Hwy 70 SE
Hickory, NC 28602

SUBHASYS ESTATES HH70 LLC
17812 CAMPBELL HALL CT
CHARLOTTE, NC 28277-2055

A recent inspection has identified that the property located at **2440 Hwy 70 SE** is in violation of the City of Hickory's Land Development Code; Sec. 9.7. Outdoor Lighting.

9.7.1 The purpose of this section is to ensure site lighting contributes to the character of the site and does not disturb adjacent development, as light spillage.

9.7.2 General Guidelines:

A. The light source of the lighting fixtures shall not be directly visible from property outside the zoning lot on which it is located.

In order to remedy this violation, please remove all lights from and around all windows and doors of the business. (See attached photograph) **This property must come into compliance within ten (10) days of the date of this letter.** If you fail to abate this violation after this deadline, you will be subject to civil citations in the amount of \$100.00 per day until the violation is corrected, in accordance to Land Development Code Section 13.5.9.

- 13.5.9 Civil Penalties:
Any act constituting a violation of the provisions of this Land Development Code or a failure to comply with any of its requirements, including violations of any conditions and safeguards established in connection with the issuance of variances or special use permits shall also subject the offender to a civil penalty of **One Hundred 00/100 Dollars (\$100.00) per day that the offense continues.** If the offender does not pay the civil penalty within 10 days after he or she has been cited for a violation of this Land Development Code, the civil penalty may be recovered in an action in the nature of debt.

Regards,

Jason Meier
Zoning Enforcement Officer

cc: Brian Frazier, Planning Director



Feb 18, 2020 at 3:19:55 PM
2440 US 70 E
Hickory NC 28602
United States



Feb 18, 2020 at 3:19:55 PM
2440 US-70 E
Hickory NC 28602
United States

- B. Notwithstanding the requirements of subsection 6.2.A above, dumpsters and other trash receptacles shall be considered accessory structures, and shall adhere to the accessory structure setbacks outlined in Article 7 of this Land Development Code.
- C. No trash receptacles shall be located within the front yard area except on solid waste collection days, when receptacles may be placed at the curb on the day prior to collection and shall be removed by 7:00 PM on the day of collection.

Sec. 9.7 Outdoor Lighting (TA 14-01) (TA 18-01)

9.7.1 The purpose of this section is to ensure site lighting contributes to the character of the site and does not disturb adjacent development as light spillage.

9.7.2 General Guidelines:

A. The light source of outdoor lighting fixtures shall not be directly visible from property outside the zoning lot on which it is located. Additionally, the maximum illumination permitted at the zoning lot line from any use, other than single-family residential, onto a lot line of any adjacent residentially zoned lot shall be 0.20 foot-candles.

B. Lighting fixtures shall be limited to heights of 30 feet for parking lots and 20 feet for pedestrian walkways.

C. All outdoor lighting fixtures shall be cut-off fixtures and have flat lenses and/or shielding. A cut-off light fixture emits 0% of its light above 90 degrees, and no more than 10% above 80 degrees from horizontal.

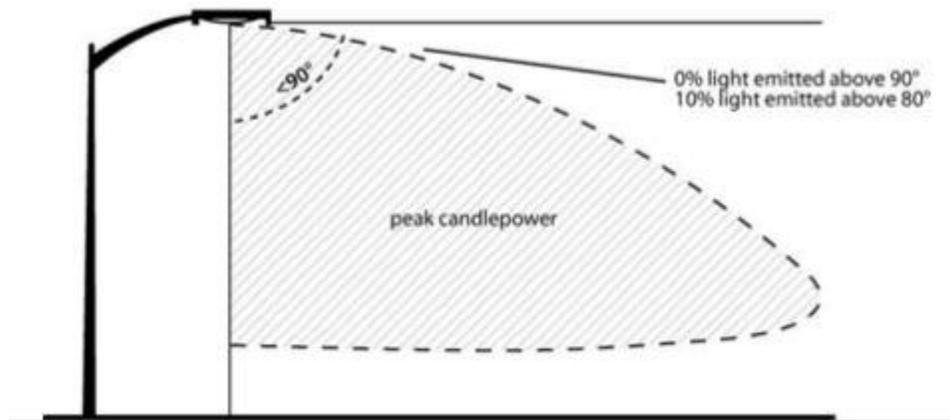


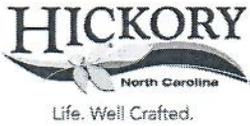
Figure 9-1: Cut-Off Lighting Fixture

D. Roof-top lighting is prohibited in all zoning districts.

E. Outdoor Lighting Standards for Outdoor Recreational Uses

Because of their unique requirements for nighttime visibility and their limited hours of operation, outdoor recreation uses are exempt from the outdoor lighting standards of this section. Instead, outdoor lighting for outdoor recreation uses are subject to the following standards:

- i. Lighting must be designed to minimize adverse impacts on traffic safety and nuisance impacts on residentially zoned properties. Mitigation can be required via extra landscaping, earlier shut-off times for the fixtures, cut-off fixtures, where feasible, and other techniques.
- ii. The maximum height for outdoor lighting fixtures shall be sixty (60) feet.



Fire Only _____
Bldg/Fire

CITY OF HICKORY COMMERCIAL ZONING APPLICATION

(A City of Hickory application becomes a permit upon approval by a City of Hickory Zoning Administrator)
Office (828) 323-7410 Fax (828) 323-7474

Parcel ID No. (If Known): 3721-05-07-1814 Date: 3/19/18

Physical Address: 2440 US HWY 70 SE

The Proposed Use For This Building Or Land Is (Specific): ARCADE, Skill

The Building Or Land Was Previously Used For (Specific): Flooring Store

List Physical Changes To Building Or Land: NONE

Is The Proposed Land Disturbance Under One (1) Acre?

- Yes, Please complete the City of Hickory Application for Grading Permit
- No, Permit for Erosion & Sedimentation Control Plan from Catawba County Erosion Control must be forwarded to the City of Hickory Engineering Department for plan approval.
- N/A, No land will be disturbed as part of this work

Pre-Application Requirement: All projects that involve the construction, renovation, or addition to a structure of 15,000 ft² of floor area, create multiple principal structures, require the creation of new streets or utility line extensions, and/or generate a significant increase in traffic are required to have a pre-application conference with staff, prior to the submission of this application and plans.

Applicant: Lutz Reissman Applicant's Telephone No.: 336-250-3027

Applicant's Address: 206 Comanche Trail Lexington, NC 27295

Applicant's Fax: _____ Applicant's E-mail: lutz@RE3.com

Property Owner: _____ Owner's Telephone No.: _____

Owner's Address: _____

Business Name If Different From Above: Aloha's Playor Arcade

Applicant's Signature: [Signature] Date: 3/19/18

FOR PLANNING & DEVELOPMENT USE ONLY

- | | | |
|---|---|--|
| <input type="checkbox"/> Change In Use | <input type="checkbox"/> Remodeling | <input type="checkbox"/> Accessory Structure |
| <input type="checkbox"/> Change in Occupancy | <input type="checkbox"/> Home Occupation | <input type="checkbox"/> Temp. Const. Office |
| <input type="checkbox"/> New Construction | <input type="checkbox"/> Manufactured Housing | <input type="checkbox"/> Parking/Loading |
| <input type="checkbox"/> Interior Renovations | Other: _____ | |

FOR ZONING ADMINISTRATOR USE ONLY

REFERENCE NUMBER _____ ZONING DISTRICT C-3 OVERLAY DISTRICT _____

- | | | |
|--|---|--|
| <input type="checkbox"/> Front Setback | <input type="checkbox"/> Approved PD | <input type="checkbox"/> Size of Lot |
| <input type="checkbox"/> Rear Setback | <input type="checkbox"/> Approved Minor PD | <input type="checkbox"/> Use Permitted |
| <input type="checkbox"/> Side Setback | <u>NO</u> <input type="checkbox"/> Flood Plain | <input type="checkbox"/> Trees Required |
| <input type="checkbox"/> Side Street Setback | <input type="checkbox"/> Elevation Certificate Required | <input type="checkbox"/> Airport Ordinance |
| <input type="checkbox"/> Maximum Height | <input type="checkbox"/> Watershed <u>III</u> <u>IV</u> Protected | <input type="checkbox"/> Critical |

Other (Describe): _____

Zoning Approved: _____ Date: _____

Zoning Administrator

Conditions of Approval: _____

No building, structure or zoning lot for which a zoning compliance permit has been issued shall be used or occupied until the Planning Director has, after final inspection, issued a certificate of zoning compliance.

Zoning Disapproved: _____ Date: _____

Zoning Administrator

Reasons for Disapproval: _____

The Board of Adjustment



**THE BROUGH LAW FIRM
T.C. MORPHIS
JANUARY 22, 2014**





If Nothing Else, Remember This!



1. If you think you might have a conflict of interest let someone know immediately.
2. Quasi-judicial decisions must be based on substantial, competent, material evidence in the record.

Types of Local Government Decisions



- Legislative
- Quasi-Judicial
- Administrative/Ministerial
- Advisory and Nonbinding Resolutions*

*David W. Owens, *Land Use Law in North Carolina*, 2nd ed., p. 5-8 (UNC-School of Government 2011).

Legislative Decisions



- These decisions generally involve broad policy matters.
- The City Council has broad discretion to approve or deny legislative requests.
- Examples include rezonings, zoning map and ordinance text amendments.

Quasi-Judicial Decisions



- These decisions generally involve the application of City policy (i.e. ordinances) to a defined project.
- These decisions are made by applying the City's standards to unique facts and involve some discretion by the decision maker.
- Examples include variances, appeals of staff decisions and waiver requests. The Planning Commission considers master land use plans and special use permits, and the Historic Preservation Commission considers certificates of appropriateness.

Administrative/Ministerial Decisions



- City staff make these decisions; there is little discretion to approve or deny.
- Examples include zoning compliance permits, building permits, and subdivision plat approvals.

Advisory Decisions and Nonbinding Resolutions



- These decisions are nonbinding.
- An advisory opinion is any recommendation given by a City advisory board, for example zoning recommendations given by the Planning Commission.
- The City Council can also adopt nonbinding resolutions, for example in support of or opposition to a project over which the Council has no authority.

Duties of the Board of Adjustment



- The Planning Commission serves as the Hickory Board of Adjustment.
- The Board:
 - Considers variance requests;
 - Hears appeals of administrative decisions, including interpretations;
 - Hears appeals of certificate of appropriateness decisions; and
 - Considers waiver requests.
- All decisions made by the Board of Adjustment are quasi-judicial in nature.
- *See also*, LDC Sec. 2.11.3 and G.S. § 160A-388 and the HRPC Rules of Procedure

What Does the Board of Adjustment Not Do?



- The Board does not make new ordinances.
- The Board does not issue special use permits.
- The Board cannot invalidate an ordinance no matter how much Board members might dislike it.
- The Board cannot hear most constitutional questions (for example due process and equal protection claims), except for questions regarding vested rights.

Quasi-Judicial Procedure In General



- “Quasi-judicial decisions involve the application of ordinance policies to individual situations rather than the adoption of new policies.”*
- These proceedings are like miniature court hearings. The Board must protect the applicant’s due process rights, and the Board must base its decision only on substantial, competent and material evidence in the record.
- *See also*, LDC Sec. 2.8 through 2.10, Rules Sec. 5, and G.S. § 160A-388 and 160A-393.

*Owens, p. 5.



Prior to the Hearing, Board Members Must...



- **Disclose relevant information, including**
 - *Ex parte* communications;
 - Site visits;
 - Specialized relevant knowledge; and
 - Possible conflicts of interest including
 - ✦ Having a fixed opinion prior to the hearing that is not susceptible to change,
 - ✦ Undisclosed *ex parte* communications,
 - ✦ A close familial, business, or other associational relationship with an affected person, or
 - ✦ A financial interest in the outcome of the matter.
 - ✦ *See*, G.S. 160A-388(e1).

*See also, **Rules of Procedure Sec. 7.1, which imposes additional requirements.***

Responsibilities of the Chairperson



- *See, Rules of Procedure 2.1.*
- The Chair presides over the hearing and recognizes speakers and members of the Board before they may be heard.
- The Chair rules on objections or requests.
- The Chair should allow every speaker to be heard, but may limit and/or cut off evidence or testimony that is irrelevant, repetitive, incompetent, inflammatory, or hearsay.

Responsibilities of the Chairperson



- The Chair may also place reasonable limitations on the presentation of evidence, arguments, and cross-examination. But the applicant must be given sufficient opportunity to present the evidence needed to support his/her application.
- Practice Tip: If the Chair knows that a hearing will be contentious, he or she may, with the advice of the Board's attorney, work with the parties prior to the hearing to establish hearing guidelines.

How Formal Does the Hearing Have to Be?



- Quasi-judicial decisions are similar to court hearings in that due process protections such as the rights to a hearing, to present evidence and to cross examination apply, but the rules of evidence do not apply.
- Exhibits and other documentary evidence should be submitted prior to the hearing if possible, but documentary evidence may also be submitted during the hearing.

Who May Appear at the Hearing



- Individual applicants, for themselves or through an attorney.
- Those opposed to an application, for themselves or through an attorney.
- Corporations and other business entities must be represented by an attorney.
- Engineers, architects, real estate agents, planners and other nonlawyers may only appear as witnesses; they may not represent an applicant or those opposed to an application.
- If the applicant desires to have a nonlawyer act as his or her representative at the hearing, the attorney advising the Board of Adjustment will advise the Board that it must vote on whether to allow the representation, and the request may be denied.

Evidence and Testimony



- All witnesses and presenting staff must be sworn in.
- Decisions must be based on **substantial, competent and material** evidence in the record.
- The applicant has the burden of proof. If the applicant meets this burden, the burden shifts to opponents to present substantial, competent and material evidence to the contrary.
- The 15-minute limit on a party's testimony (Rules Sec. 4.5) does not apply. Use the open ended procedure in Rules Sec. 5.
- The parties can direct examine and cross-examine witnesses.
- After the public hearing has been closed, no new evidence may be introduced, but the Board members may ask clarifying questions.



Lay Versus Expert Testimony



- General rule: Anyone with material knowledge can provide factual information, but only experts can provide opinion testimony.
- Lay witnesses can provide opinion testimony, but this testimony is generally incompetent unless it is corroborated by competent evidence.
- Even expert testimony must be competent and material before the Board can rely on it.
- Exception: G.S. § 160A-393(k)(3) now requires expert testimony in three cases, including the following:
 - The use of property in a particular way would affect the value of other property;
 - The increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety; and
 - Matters about which only expert testimony would generally be admissible under the rules of evidence.

You don't have to be Matlock to cross-examine someone...



- The Board can only base its decision on what is in the record, so if you think evidence is missing on a key point, you should ask as many questions as necessary to get evidence in the record on that issue.



Rendering a Decision



- The Board must make findings of fact and render conclusions of law as to each standard for approvals. The better practice is to do the same for denials.
- Key factual findings **cannot** be based solely on nonexpert opinion evidence or unsupported allegations.

Rendering a Decision



- Precedent: “The general rule is that prior decisions are not legally binding on the board. However, similar cases should generally produce similar results, and it is incumbent on a board to know how and why prior cases have been decided.”*
- *Res Judicata* applies. In other words, a denial may be reconsidered only if there is a material change in the applicable standards or conditions.

*Owens, p. 158.

Voting: The Rules Have Changed



- Previously, the Board could only take action with a 4/5 majority vote.
- Now a 4/5 majority is required only to grant a variance. All other decisions require only a simple majority. G.S. § 160A-388(e).
- A failure to vote by a member who has not been excused counts as an affirmative vote. Rules Sec. 7.2.

The Variance Statutes Have Been Revised.



G.S. § 160A-388(d): “Variances. – When unnecessary hardships would result from carrying out the strict letter of a zoning ordinance, the board of adjustment shall vary any of the provisions of the ordinance upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other ordinance that regulates land use or development may provide for variances consistent with the provisions of this subsection.”

Variations



- **What Has Changed**
 - It is no longer necessary for the applicant to show that no reasonable use of the property can be made.
- **The Unanswered Question**
 - If the applicant presents substantial, competent and material evidence on each of the four criteria, must the Board grant a variance?
 - Do the standards in G.S. § 160A-388 replace the standards in the LDC 2.8?

Waivers



- A waiver is like a variance “light.” Some local governments call them special exceptions.
- The Board may grant dimensional and parking waivers for properties in a historic district. LDC Secs. 4.4.8 and 4.4.9.
- The process is quasi-judicial, but the Board may limit its findings to those required by the LDC.
- Under the revised version of G.S. § 160A-388, the standards for variances probably do not apply.

Appeals of Interpretations and Decisions



- G.S. § 160A-388(b1)(8): “The board of adjustment may reverse or affirm, wholly or partly, or may modify the decision appealed from and shall make any order, requirement, decision, or determination that ought to be made. The board shall have all the powers of the official who made the decision.”
- The Board may only hear appeals of final decisions.

Certificate of Appropriateness Appeals



- Appeals to the Board of Adjustment are in the nature of *certiorari*.
- This means that no new evidence may be added to the record.
- The Board considers issues of law *de novo*.
- *See*, LDC Sec. 2.5.13 and G.S. § 160A-400.9(e).

Ordinance Interpretation



- While the staff's interpretation is entitled to “due consideration,” interpretation of an ordinance is *de novo*.*
- Rules of Ordinance Interpretation (in order of importance):
 1. The main goal is to give effect to the intent of the legislative body that enacted the ordinance (i.e. the City Council).
 2. Absent a definition in the ordinance, the plain meaning of a word controls.
 3. The ordinance should be construed as a whole.
 4. Ordinances should be interpreted to avoid absurd consequences.
 5. If conflicting provisions cannot be reconciled, the later adopted provision prevails.
 6. “[W]hen the ordinance restricts property rights, restrictions not clearly included within the ordinance should not be implied.”*

*Owens, p. 182-183.

Questions or Need More Information?



- Call or email Brian Frazier, City of Hickory Planning Director
Tel.: (828) 323-7422
Email: bfrazier@hickorync.gov
- Call or email Arnita Dula, City of Hickory Staff Attorney
Tel.: (828) 323-7564
Email: adula@hickorync.gov

