



Town of Vienna

127 Center Street South
Vienna, Virginia 22180
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TTY 7111

Meeting Minutes Board of Zoning Appeals

Wednesday, October 16, 2019

8:00 PM

COUNCIL CHAMBERS-VIENNA TOWN
HALL

1. Roll Call

The Board of Zoning Appeals (BZA) held one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on October 16, 2019 beginning at 8:00 PM with Robert Dowler presiding as Chair. The following members were present: Jonathan Rak, Robert Petersen, George Creed, and Bill Daly. Michael Gadell was absent. Also attending and representing staff were Frank Simeck, CZA, and Sharmaine Abaied, Board Clerk.

At the beginning of the meeting Mr. Dowler asked the clerk to call roll and gave an opening statement reviewing the purview of the Board of Zoning Appeals.

2. Public Hearings

124 Melody Ln SW - Continuance for an appeal of a zoning violation

Continuance - request for an appeal of a zoning violation stating the subject property is not in compliance with Town Code §18-218 as it relates to building permit requirements, for the property located at 124 Melody Lane, SW, in the RS-10, single-family detached residential zone. Application filed by Nicholas Cumings agent of Walsh Colucci Lubeley & Walsh PC.

Mr. Dowler asked Mr. Cumings where the request stood. Mr. Cumings stated that they were currently compliant and that he was withdrawing the appeal. Mr. Dowler stated the Zoning Administrators decision was made in March of 2019 and with the withdrawal of the appeal the determination stands as correct. Mr. Cumings stated it did. Mr. Dowler stated there should be a motion to accept the request for a withdrawal.

Mr. Creed stated that he was disappointed that it took from March until October and commented that it was a waste of the Board, clients, and staff time.

Mr. Daly stated he didn't feel the Board needed to take any action. An appeal can be withdrawn without any requirement that the Board act. Mr. Petersen concurred with Mr. Daly's assessment of the withdrawal.

Mr. Simeck stated the Board members were correct and that they should go on record stating the Zoning Administrator and the Town were correct in their determination.

Mr. Dowler asked Mr. Cumings if he agreed with Mr. Simeck's statement, and he said yes.

Mr. Dowler asked if the Board wanted to make a motion. Mr. Daly stated that the agreement that the Zoning Administrator was correct can be reflected in the minutes. There doesn't need to be a motion, the minutes will accurately reflect that the

applicant/appellant agreed that the Zoning Administrators prior decision was accurate. Mr. Cumings stated that was correct and he acknowledged that. There was continued discussion regarding whether there was a need for a motion.

108 Yeonas Cir SE - Conditional Use Permit

Request for approval of a conditional use permit for a Family Day Home of up to ten (10) children at 108 Yeonas Circle SE, in the RS-10, Single-Family Residential zoning district. Application filed by Tania Giviani-Faris and Kambiz Faris.

Mr. Dowler swore in Ms. Faris to give her testimony.

Ms. Faris thanked the Board for reviewing her application. She stated their application was to continue, with no expiration, a conditional use permit for 10 children at Happy Younglings Daycare. Ms. Faris asked that the Board consider the immediate actions they had taken to address the concerns and recommendations raised at the hearing from the previous year. Ms. Faris stated the part-time employee status remains and they park outside the cul-de-sac walking to the daycare daily. The increase of two children has not increased traffic due to sets of siblings under their care. The conditional use permit was granted with a limit of 12 months to see what was accomplished to address the neighbor's recommendations. Ms. Faris stated they made all the recommended, not required, changes since the last meeting. They had added four parking spaces on top of the two parking spaces they had added the previous year maximizing the number of spaces available to clients. Ms. Faris discussed the parking best practices they had developed and distributed to clients the previous year after the Planning Commission meeting. They had also built a 4 foot fence along the property line shared with their neighbor at 106 Yeonas Circle, per the neighbor's request. Eight more evergreen trees were planted along the fence to further establish a barrier. Ms. Faris discussed the attempts at having good relationships with all their neighbors. Ms. Faris stated she appreciated the consideration by the Board for a no term limit to care for 10 children.

Mr. Dowler asked if the Board had any questions.

Mr. Creed asked how many parking spaces were behind the red fence; Ms. Faris stated there were four. Mr. Creed asked who parked there. Ms. Faris stated she, and her family park there. Ms. Faris also stated that for the Christmas party they may keep the gate open for clients to park. They were considering this due to the families parking on Yeonas Dr. the previous year and walking in the cold weather to Yeonas Circle to attend the party. Mr. Creed said he asked because he could not see beyond the fence when he had driven past and Ms. Faris stated they did that so it didn't look commercial. Mr. Creed asked how many cars can park in front of the gate. Ms. Faris stated around five cars can park there. Mr. Creed stated that he witnessed her clients parking in the designated parking area. Ms. Faris stated she appreciates that her clients are following the parking best practice standard. Mr. Creed asked the height the fence to the right, and Ms. Faris stated it was a 6 foot gate. Mr. Creed asked about the 4-foot fence on the left side of the property. Ms. Faris stated it was between the neighbor at 106 Yeonas Circle and their property. Mr. Creed asked if the fence in the front could be any taller than 4 feet or if it was that was what was allowed per town code. Mr. Simeck stated it was the maximum allowed per town code, 4 feet from the front property line to the front of the building line of the house. Mr. Simeck also stated the applicant obtained a fence permit for the 4-foot fence.

Mr. Daly asked if the letter written to the Board requesting the conditional use permit be denied was the house shown in a photo. Ms. Faris stated that was correct. Mr. Daly asked about the 4-foot fence that was added as well as the evergreens. Ms. Faris pointed out in a photo the new evergreens planted to add a barrier. Mr. Daly inquired about the 6-foot fence

gate and parking.

Mr. Daly asked if anyone else wanted to testify.

Ms. Marie Armstrong of 203 Albea Court NE was sworn in to give her testimony. Ms. Armstrong stated she was not at the hearings last year, but she was at the Planning Commission hearing and was aware of the situation with the neighbor. She stated she was surprised by the complaints by the neighbor. She has been a client of Ms. Faris since August 26th and had not seen more than three cars total at the residence as the parents stagger drop off and pick up. She continued stating that Ms. Faris gave parking instructions on the first day with a diagram explaining where to park the cars. Five cars can fit in the driveway if the first car pulls up to the fence. Ms. Armstrong stated that Ms. Faris sends weekly text reminders for parents to park only in the driveway. Ms. Armstrong also stated she had not noticed any speeding in the cul de sac, but had noticed a lot of construction in the cul de sac prohibiting speeding. Ms. Armstrong stated they neighbor commented that she did not like people slamming their car doors so Ms. Armstrong stated she doesn't close her door all the way to accommodate the neighbor. She also commented that the parents try to be accommodating to the neighbor and do not talk in the driveway either. Ms. Armstrong told the Board that good child care is hard to find and her experience is that Ms. Faris is best for her child and felt it would be a disservice to the children of Vienna to cut back the number of children in her car.

Mr. Petersen asked how long Ms. Armstrong had been a client of Happy Younglings. Ms. Armstrong stated August 26th 2019.

Mr. Daly asked Ms. Armstrong asked if she could get out if she parked all the way up by the fence and four others pulled in behind her. Ms. Armstrong stated she could not get out. Mr. Daly asked if all four would have to move and Ms. Armstrong stated yes. Mr. Daly asked about the construction in the cul de sac. Ms. Armstrong stated there was construction on the house and construction vehicles in the cul de sac. Mr. Daly asked if it was the applicant's house and Ms. Armstrong stated it was a house two doors down from the applicants. Mr. Daly asked if any parking issues in the cul de sac on the street is more likely to be caused by the construction vehicles than the business being run out of the house. Ms. Armstrong said 100%.

Mr. Wenfeng Li of 9942 Longford Ct was sworn in to give his testimony. Mr. Li stated they were first time parents and they looked for the best daycare for their son and felt Happy Younglings provided that as well as the community feel provided by the daycare. Mr. Li agreed that speeding was difficult due to the construction and stated they all follow Ms. Faris's instructions and best practices regarding parking. He stated that they receive text message and email reminders about parking best practices.

Ms. Karoline Tjell of 102 Cunningham Park Ct SE was sworn in to give her testimony. Ms. Tjell stated she agreed with the other parents that Happy Younglings was a high quality daycare and that it has everything a parent would want in a daycare. She stated they are dedicated to making an environment that develops children at their pace. Ms. Tjell stated that in the 9 months that her child has been at the day care she has not needed to park anywhere, but the driveway. She also commented that she drives slowly since it was not possible to speed through a cul de sac. Ms. Tjell said she also bikes to the daycare at least once a week. She also stated that when they started with the daycare Ms. Faris spent time explaining the parking policy and emailed the documents as well.

Mr. Kambiz Faris of 108 Yeonas Circle SW was sworn in to give his testimony. Mr. Faris stated he wanted to address some of the technical questions asked. He stated that in the previous year's meeting the neighbor asked for a 6-foot fence, but he was aware that it

would not be approved. When installing the 4-foot fence they added 8 evergreen trees that will be around 20-30 feet tall and the older trees in the back were planted 10 years earlier when they started the daycare in efforts to be a good neighbor. Mr. Faris also commented that he believed the increased driveway was mentioned by a Board member in the previous year's meeting. Because of the Board members recommendation they felt it made sense and was the right thing to do.

Mr. Matt Couture of 2020 Labrador Ln was sworn in to give his testimony. Mr. Couture stated he wanted to confirm the other testimony that was given that evening. He also stated he had been a client for 3 years with 2 children attending the day care, a 3 year old and a 1 year old. He stated that he didn't feel parking had been an issue before. Mr. Couture said that he felt the Faris's have gone above and beyond ensuring that all clients are following all guidelines set forth that are in the best interest of the cul de sac, and the community. Mr. Couture stated he was at the previous year's meetings and heard the concerns and felt the Faris's had gone above and beyond to alleviate those concerns.

Mr. Creed asked that the written submission from Darlene Hough and Steven Charlop of 106 Yeonas Circle SE be read into the record.

Mr. Dowler responded to Mr. Creed's request, stating the letter would be entered into evidence. Mr. Creed stated that a paragraph in the letter indicated that neither the Planning Commission, nor the Board of Zoning Appeals had placed conditions on the business other than the number of children to be cared for. Mr. Creed continued saying the author of the letter didn't indicate conditions they felt needed to be put on the application and would like to have asked them what specific conditions they would have wanted placed on the applicants.

Mr. Dowler stated the letter Mr. Creed referred to and the letter of opposition attached with the Planning Commission's recommendation of approval for the conditional use permit will be made part of the record. Mr. Dowler closed the public hearing.

3. Regular Meeting

The Board of Zoning Appeals (BZA) met in regular session to review one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on October 16, 2019, beginning at 8:00 PM with Robert Dowler presiding as Chair. The following members were present: Jonathan Rak, Robert Petersen, George Creed, and Bill Daly. Michael Gadell was absent. Also attending and representing staff were Frank Simeck, CZA, and Sharmaine Abaied, Board Clerk.

Item No. 2

Request for approval of a conditional use permit for a Family Day Home of up to ten (10) children at 108 Yeonas Circle SE, in the RS-10, Single-Family Residential zoning district. Application filed by Tania Giviani-Faris and Kambiz Faris.

Mr. Dowler asked for a motion.

Mr. Rak made a motion to approve the application and Mr. Daly seconded the motion. Mr. Rak asked if the granting of the conditional use permit would run with the land. Mr. Dowler stated he was told it would run with the land and Mr. Simeck stated that was correct. Mr. Rak stated a uses operations can affect how the business impacts the neighbors it would be appropriate to add a condition that it is only issued to the applicant. Mr. Rak asked if that condition could be added to the conditional use permit. Mr. Daly

stated he felt that would be a friendly amendment except that the town would want the condition to be upon transfer of title of real estate. If the new owner would like to continue the business or start a similar business they would have to provide an application to do that. Mr. Rak stated he wasn't convinced the condition was necessary, but wanted to offer it for the Boards discussion in efforts to alleviate some of the concerns. Mr. Rak stated the home day care use appears to be a use permitted in the residential zone and it's just the intensity of the use the application is requesting. The record over the last year indicates the additional children at the day care, does not have an adverse effect on the neighbor's so it makes sense to give the approval.

Mr. Creed asked if the motion was being amended to include the condition and asked if the person who seconded the motion agreed with him.

Mr. Rak stated the motion the motion with the amendment and Mr. Daly seconded the motion with the amendment.

Mr. Dowler asked where in the code allows a permitted use for a family day care. Section 209, The Board of Zoning Appeals may issue a use permit for any uses enumerated in Section 210. The closest a family day care would come is nursery schools and preschools, item W. Mr. Dowler stated they start as a home business and then it goes into the former Zoning Administrators memo. A home business was approved with 4 children and no employees, currently the state says you can have up to 12 children, and the former Zoning Administrators memo states they can apply for a conditional use permit. The memo does not state how the BZA has the authority to grant a conditional use permit. Mr. Dowler stated the Town needs to add family day care to the code section because it is licensed specifically as a family day care. Mr. Dowler stated that the licensing makes the family day care different from nursery and pre-schools. He also stated that if the Board continues to approve family day cares exceeding 4 people as a home business then the Board has then carved out an exception which they should not do. Mr. Dowler stated for those reasons he would vote no. Mr. Simeck stated Mr. Dowler was correct and the code had no provisions for family day cares. The former Zoning Administrator put it under the home occupation and looked to Fairfax County provisions and that is where the Town currently is. Mr. Simeck continued stating that until there is a code update, the Department of Planning and Zoning is under the determination of the old Zoning Administrator. There should be a code re-write in the next few years which should address all the issues.

Mr. Dowler stated he felt the blending by the former Zoning Administrator was vague and the authority of the Board was clear. The Board grants conditional use permits enumerated in Section 210 and the applicant has two employees so under section 210 they would not qualify. Mr. Dowler stated the Town needs to address this issue right away and put family home day care under Section 210.

Mr. Daly agreed with Mr. Dowler's idea. He asked what the county and state regulations were with respect to the number of children. He also asked if the issue had been brought to the town attorney in reference to whether the former Zoning Administrator was right in his interpretation. Mr. Simeck stated the numbers were correct, allowing up to 12 through the state and the county. Mr. Simeck wasn't aware if the former Zoning Administrator had conferred with the Town Attorney regarding his determination. Mr. Daly stated they had made determinations in the past regarding similar businesses within the town. Mr. Simeck stated there had been 6-8 since 2013. Mr. Daly stated he felt concerned about making conclusions inconsistent with prior CUP's that could lead to the Fairfax County Circuit Court making determinations with respect to the inconsistency. For that reason Mr. Daly stated the motion should carry and he also stated the Town

should nail down what is allowed. He suggested that Town Council clarify any issue with respect to Family Day Homes.

Mr. Dowler stated he read the memo and the code section and understood that the state allows up to four children by right as a family business, but anything more, by ordinance, needs an zoning administrator to use an administrative process to issue zoning permits for a family day care serving 6-12. The Town has never given the zoning administrator that authority and the code does not give it to the Board of Zoning Appeals. Mr. Dowler then stated that he did not feel the Board had the authority until it was clarified.

Mr. Daly stated that there needed to be a certain way to give the zoning administrator the leeway and the former zoning administrator had been exercising that authority and had the authority to do what he was doing as administrator.

Mr. Dowler explained that the code stated a local governing body may by ordinance allow a zoning administrator and the Town does not have that ordinance.

Mr. Daly asked that if what Mr. Dowler had read earlier was the ordinance that would need to be modified to add one more item to the list.

Mr. Dowler said the Town ordinance stated the Board of Zoning Appeals may issue a use permit for any of the uses enumerated in section 210.

Mr. Daly asked Mr. Simeck if there was any other ordinance that was similar that gave certain authority that the former zoning administrator may have been operating under at the time he granted the authority.

Mr. Simeck stated the memo sent out by the former zoning administrator in 2013 included all town staff which led him to believe it had been forwarded to the Town Attorney and Town Council.

Mr. Daly said it was something the BZA does need to be concerned about, from a legal perspective. He suggested that the motion be modified to allow for another year because it would have an adverse impact on the applicants business and then have the issue send to the Town Attorney and have him provide an opinion. If the opinion is that there should be a modification to the ordinance to enumerate one more (family day home) that would give the zoning administrator the authority to allow certain businesses. This is how the Board should proceed, and it would give the business another year to operate the business and take care of the kids.

Mr. Dowler agreed and thought it was a basic proposition

Mr. Daly felt the Board was doing the Town a service by bringing the issue up, and sending it over to the Town Attorney. He also felt the Board could not turn down the CUP.

Mr. Creed stated his issue was the Town knowing for several years that the zoning is way out of date. A year and a half earlier there were provisions given to do the updating, choosing which need to be done and none of them have been updated. He then asked Mr. Simeck if any codes had been updated. Mr. Simeck stated there had been no code update. Mr. Creed then stated that a lot of time has been spent on MAC, and the Town needs to clean some of the code up starting with the issue of the family day home. It would need to go to the Town Attorney and then go before Town Council to have the ordinances updated.

Mr. Dowler stated that powers and duties under state law in reference to CUP's, it is to

hear and decide applications for special exceptions as authorized in the ordinance.

Mr. Daly asked if there was a catch all.

Mr. Dowler said he was unable to find anything other than trying to utilize the code section pertaining to a CUP for a nursery school or kindergarten. Family day homes and nursery schools are separate entities with different criteria.

Mr. Rak agreed with the concern of the other Board members, but was also concerned that the applicant was acting in good faith, following all procedures that Town issued. He expressed his reluctance to grant only a one-year permit with the uncertainties of coming before the Board again. Mr. Rak asked if it would be possible to differ until the next meeting asking for an opinion from the Town Attorney about the accuracy of the former zoning administrator's interpretation, allowing some certainty for the applicants.

Mr. Creed stated his concern with Mr. Rak's suggestion. The request would go to the Town Attorney for a determination, and then it would need to go to Town Council in an ordinance change. The process could drag on for more than a month.

Mr. Rak suggested that the Town Attorney come back and express the reasons the procedure could be justified. Trying to find a way to accommodate the request of the applicant, as they did not create the uncertainty.

Mr. Daly stated his concern about case law in Virginia allowing the zoning administrator to interpret the zoning ordinance for the town, which the former zoning administrator had done in 2013, and cautioned that the Board should be careful before changing the determination. He then stated that utilizing the condition of change of title or a year limit, to make it clear the need of a determination by the Town Attorney. The determination should state whether the former zoning administrator was incorrect and have the Town Council address the issue allowing the families to continue with the daycare. Mr. Daly stated that if the Board had the authority a year ago, he felt they still did unless a court or the Town Attorney stated otherwise. This allows the family a year to do what they need to do to take care of their business.

Mr. Petersen said he did not see a need to add a one-year limitation. The motion, as originally amended and seconded is appropriate. Mr. Petersen suggested the Board move forward, take a vote, and ask the Town Attorney to review the legality and validity of the action the Board takes with no connection to a one-year limitation.

Mr. Daly agreed with Mr. Petersen and stated that was his preference.

Mr. Creed agreed as well, as the Town has 6-8 currently existing operations in the Town.

Mr. Simeck stated that after the vote on the motion the Board should ask for a clear answer from the Town Attorney to move forward with future CUP's.

Mr. Petersen asked if the Board could add to the request of the Town Attorney that he review the legality and validity of any action taken. The position of the Board is that they do not wish to receive any further requests for (family day home) CUP's until there is a determination from the Town Attorney.

Mr. Daly restated the motion, and said that when the motion is resolved, the Board will put together a memo for the Town Attorney to review.

Mr. Rak agreed with the motions, one to submit the request to the attorney and the other to vote on the application. Mr. Rak also reminded the Board of the friendly amendment by Mr. Daly conditioning the approval.

Mr. Daly stated the condition was the expiration of the permit upon transfer of title to the real estate. A new owner of the property would need to ask the Board for the same CUP moving forward at that time.

Mr. Dowler said the motion was to approve the conditional use permit for a family day care for 10 children with the condition that it would expire upon transfer of the real estate.

Mr. Creed asked if the order would contain the same findings of fact as the previous year's order with the only change being the elimination of a one-year limit and incorporating the expiration upon transfer of title.

Motion: Rak
Second: Daly
Passed: 5-0
Absent: Gadell

4. Approval of the Minutes

Mr. Dowler stated, in reference to the request to the Town Attorney, the minutes from that section of the meeting could be sent with the Boards question regarding whether the Board has jurisdiction to grant CUP's for more than four children, pursuant to Section 18-210 of the Town Code, for a family day home. Mr. Dowler asked the Board if they wanted to add that the Board would decline any future family day home CUP applications until the issue of the Boards jurisdiction was resolved.

Mr. Daly asked to amend that request. The Board cease hearing new requests, but if there were any current CUP's with a time limit that the Board could move forward in a manner consistent with past decisions, if the Town Council does not move as quickly as the Board would like to see.

Mr. Dowler asked if there were any other applications similar to the current application. The Board clerk stated there was one at Jade Court that would be heading back before the Board in 2020. Mr. Dowler stated it was time for the issue to get resolved.

Mr. Daly stated the Board should ask the Town Attorney if the limited language in the ordinance precludes the zoning administrator, Board of Zoning Appeals, or Town Council from acting in a manner consistent with what was done in the past to allow home day care centers to move forward since they are in compliance with state and county ordinances. Mr. Daly asked if there was any general language in the zoning ordinance that allowed the former zoning administrator to make his determination from 2013.

Mr. Daly explained that the state statute give the zoning administrator authority if the town gives the authority, but does not answer whether the Board has any authority.

Mr. Creed stated that the document (zoning code) gives the authority and currently it is not in the document (zoning code) so it does not give the Board the authority.

Mr. Daly stated a given document must be read as a whole and the law of Virginia states it must be read with respect to related documents. The zoning administrator, in 2013, may have known something that was not discussed by the Board and it was possible he had

conferred with the Town Attorney.

Mr. Dowler stated the Board, in reference to family day homes, knows of the memo from the previous zoning administrator and the codes sections.

Mr. Dowler asked if there was a motion to approve the minutes.

Mr. Creed stated there was a correction on the first page where it stated: "Mr. Creed would like an explanation. Mr. Creed would like to go on to item one." It needs to be correct to Mr. Dowler would like to go on to item one. Mr. Creed stated it had been corrected.

Mr. Petersen made a motion, with the correction, that he minutes be approved.

Motion: Petersen

Second: Rak

Passed: 4-0

Abstain: Daly

Absent: Gadell

Mr. Dowler asked for any additional business to discuss.

Mr. Daly discussed with the Board he would be moving outside of Vienna and would no longer be able to serve. He inquired about the current vacancy. The Board discussed the replacement of Board members.

Mr. Creed spoke to the Board about his attendance and education, along with Mr. Simeck and the Board Clerk, at the 38th Certified Board of Zoning Appeals Program at VCU. He explained that it may in the Boards interest to have a work session to see if there may be a better way of doing business, comparing notes with other Boards.

Mr. Simeck stated that was a good suggestion and other Boards have by-laws. The Board continued discussion regarding the previously discussed issue with family day homes.

Adjournment

Mr. Petersen made a motion to close the meeting. Mr. Daly seconded the motion.

Motion: Petersen

Second: Daly

Passed: 5-0

Absent: Gadell

The meeting was adjourned at 9:15.

Respectfully submitted,
Sharmaine Abaied
Board Clerk

5. Meeting Adjournment

THE TOWN OF VIENNA IS COMMITTED TO FULL COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT STANDARDS. TRANSLATION SERVICES, ASSISTANCE OR ACCOMMODATION REQUESTS FROM PERSONS WITH DISABILITIES ARE TO BE REQUESTED NOT LESS THAN 3 WORKING DAYS BEFORE THE DAY OF THE EVENT. PLEASE CALL (703) 255-6341, OR 711 VIRGINIA RELAY SERVICE FOR THE HEARING IMPAIRED.

About the Board of Zoning Appeals