

MINUTES
ORANGE COUNTY BOARD OF ADJUSTMENT
FEBRUARY 8, 2010

MEMBERS PRESENT: Jeffrey L. Schmitt, Chair
Thomas Brown, Vice Chair
David Blankfard, Alternate
Dawn Brezina
James Carter
Mark Micol, Alternate

STAFF PRESENT: Michael Harvey, Zoning Enforcement Officer
Tina Love, Administrative Assistant

OTHERS PRESENT: John Roberts, County Attorney

1. CALL TO ORDER

Jeffrey Schmitt: This is the regularly scheduled meeting of the Orange county Board of Adjustments and we have a quorum.

4. A-8-09 – Canine College – Class II Kennel at 719 New Hope Church Road

Mr. Gene Lonsway, owner/operator of Canine College, is requesting the issuance of a Class B Special Use Permit to allow for the development and operation of a Class II Kennel at 719 New Hope Church Road.

As detailed within the application, Mr. Lonsway is seeking to construct a 3,200 square foot boarding/training building to house up to twenty (20) dogs as well as a 1,600 square foot storage building. The project also involves the fencing in of a 1,800 square foot area of the property to serve as an exercise area for the animals.

Access to the proposed facility is proposed to be through an existing driveway onto New Hope Church Road.

Mr. Lonsway is proposing to reside within an existing single-family residence already located on the property to provide twenty-four hour care for the animals boarded at the facility.

Individuals signed up to be sworn in:

| | |
|--------------------|------------------|
| Harold Southerland | Tony Whitaker |
| Bobby Mauer | Gene Lonsway |
| Joan Austin | Noral D. Stewart |
| Joe Rogers | Robert Haddad |
| Carol Woodell | Kevin N. Morley |
| Steve Hutzler | William M. Kick |
| Vic Knight | Michael Harvey |

Jeffrey Schmitt: I am going to dispense with some things here at the beginning. Mr. Herman, how long will your presentation last?

Mr. Herman: Two to three hours.

Jeffrey Schmitt: Mr. Maitland?

Mr. Maitland: I could probably get it to 90 minutes but in fairness, I would say two hours.

1 Jeffrey Schmitt: We could be talking about six hours. I don't think I can, in all fairness, ask the members to stay until
2 2:00 am. That is not fair to anyone. We have some options. We can present the applicant's case and adjourn. At the
3 next regularly scheduled meeting we can hear the case from those who had properties around where the applicant lives.
4 A second option is that we could adjourn this hearing tonight and reconstitute it at an earlier hour during a weekday
5 hoping we could get through. Even if we started at 5:00 P.M. it could be 11:00 P.M. before we finish. Another option
6 would be to reconvene the board on a Saturday; sometime in the afternoon so there will be plenty of time for the case to
7 be presented by both sides and so the members of the board has all the issues from both sides. The applicant would like
8 to see it brought to a conclusion as soon as possible. I have to solicit from my board members what would be there
9 pleasure.

10
11 Mr. Herman: Our preference is that we try and find time when we can do it all together.

12
13 Jeffrey Schmitt: I understand that and I agree with that but in all fairness I want to make sure that everyone has the
14 options available to them.

15
16 John Roberts. I would say that if we start at 4:30 P.M. or 5:00 P.M. that we could be done at a reasonable hour.

17
18 Jeffrey Schmitt: Does everybody think they could make a 4:00 P.M. on a Monday? The next Monday is the 15th or the
19 22nd. Is the 22nd President's day?

20
21 Mr. Maitland: We need as much time as you are able to give us to get our impact study completed.

22
23 Jeffrey Schmitt: Two weeks?

24
25 Mr. Maitland : At least two weeks.

26
27 Jeffrey Schmitt: The 22nd or the 1st? I would vote for the 22nd. All the kids are in Orange County Schools.

28
29 Michael Harvey: The 22nd is the Quarterly Public Hearing of the Orange County Board of County Commissioners and Mr.
30 Roberts cannot attend. There are members of the Board of the Adjustment that will be obligated to be at the Public
31 Hearing.

32
33 Jeffrey Schmitt: I can miss that.

34
35 Michael Harvey: Our staff may not be able to attend either, specifically me.

36
37 Jeffrey Schmitt: Have you got a presentation that night?

38
39 Michael Harvey: Yes.

40
41 Jeffrey Schmitt: Mr. Lonsway, if we went another month, what happens?

42
43 Gene Lonsway: We just went another month but we have to do what we have to do. If that date is the earliest date that
44 works for everyone it is acceptable. If we can do it sooner, I would love that.

45
46 Jeffrey Schmitt: I hope you have the second Monday's on your calendar. Now, we just move this from 7:30 to 4:00 P.M.
47 on the 8th of March. Because of the nature of this and trying to accommodate this with all it happening in one day, we
48 are going to adjourn this meeting, which we have not called to order, and continue this case until the next regularly
49 scheduled meeting date of the Board of Adjustments in March which is March 8th at 4:00 P.M. in this room. Tina, would
50 you reserve this at 4:00 P.M.?

51
52 Tina Love: Yes.

1 Michael Harvey: Staff needs a point of clarification. You adjourned this meeting to a date and time specific, correct?
2 You continued the case to a date and time specific.

3
4 Jeffrey Schmitt: Yes.

5
6 Michael Harvey: The reason I am asking is because as a result I will have to send out notices. Ladies and gentleman, if
7 I could have your attention please. This Board of Adjustment has adjourned this particular case to a date and time
8 certain. We are not obligated to send out reminder notices of this hearing. You will not be getting anything in the mail
9 and we are not required to post a sign on the property indicating the date when this meeting will be reconvened.

10
11 **2. CONSIDERATION OF ADDITIONS TO AGENDA**

12 There were no additions to the agenda.

13
14 **3. APPROVAL OF MINUTES**

15 **a. January 11, 2010**

16
17 Jeffrey Schmitt: Please read through to see if there are any modifications that need to be made. Tina, because of the
18 nature and length of this meeting, would it be possible to get water and maybe fruit for the board.

19
20 Michael Harvey: Mr. Chairman, I would refer to Mr. Roberts, but I am going to suggest that, as always, any corrections to
21 the minutes be made before approving the minutes, then you begin working on the order of interpretation so that you are
22 approving the record and the order at the same time, and then finally you will approve the minutes from the January 11,
23 2010 regular meeting.

24
25 You have before you an order of interpretation in draft form. It is an example of the findings that ought to be made
26 regarding the Shields' case, based on your discussion at the January meeting. As the minutes of the Shields' meeting
27 includes a motion to affirm the zoning enforcement's decision, we believe that those minutes should not be approved until
28 this order is completed and voted on so the minutes will reflect the issuance of the final order. The order has to become
29 part of the record.

30
31 David Blankford: On page 48, line 1, "you had a turn of phrase for it, and you said it was made".

32
33 Thomas Brown: On page 12, line 29, should read, "But the advertisement for someone to come and play with us," Page
34 16, line 10 should read, "Do the six teams in your league..." Page 24, line 28 should read "If it was built". Page 25, line
35 41 should read, "The principal is..." Page 28, line 26 should read, "don't you feel like being privy..." Page 30, line 52
36 should read, "You never intended..." Page 52, line 4, "No evidence has been presented and I have not seen it." Page
37 53; line 6 "Thomas Brown moved that for the appeal number A-7-09, the decision of the zoning officer..."

38
39 **5. A-7-09 – APPEAL OF A DECISION MADE BY THE PLANNING DEPARTMENT SUBMITTED BY MS. SARA SHIELDS.**

40
41 The Board of Adjustment shall review and certify the record concerning the denial of an APPEAL
42 application, submitted by Ms. Sara Shields, relating to the Zoning Officer's decision to allow the
43 development and use of outdoor sports field lights to illuminate the playing area of the athletic field by the
44 Lattisville Grove Missionary Baptist Church.

45
46 The purpose of this item is to allow for the Board members to certify the record concerning the disposition
47 of this case. The PUBLIC HEARING on this item was closed on January 11, 2010 and no additional public
48 comment on the proposal shall be heard.

49
50 Jeffrey Schmitt: I would like to move to the document Michael has in front of you, "Order of Interpretation".
51

1 Michael Harvey: Staff has provided you with a script, a basic outline of the Order of Interpretation and who it will be
2 issued to, from our standpoint to the Shields' and the Lattisville Grove Baptist Church as they offered testimony on the
3 case.
4

5 Ultimately both parties have the right to appeal the Board's decision. The "FOR" section is why we are doing this, we
6 have included a general breakdown of what the applicant had requested. There is a purpose section and general
7 findings of fact, which are not in dispute. This includes basic information relating to the case, for example that the
8 Lattisville Grove Baptist Church is located at a specific property, 1701 James Ed Road, size, zoning and what not .
9

10 These are intended to be the facts that are not in dispute. It is supposed to be universal. It is not supposed to focus on
11 the board's action. As a reminder we conclude the general fact section with the statement that the Board of Adjustment
12 has jurisdiction over all parties on the matter.
13

14 Jeffrey Schmitt: Why don't you give us a minute to read this?
15

16 Jeffrey Schmitt: Part of this may revolve around this 30-day window once a permit was issued. The permit which was
17 dated May 6, 2008, we actually have that permit?
18

19 Michael Harvey: The permit was in the file, yes.
20

21 Jeffrey Schmitt: It has that date on it. I think there is a 30-day window?
22

23 John Roberts: That is correct, 30 days to appeal.
24

25 Jeffrey Schmitt: On September 4, that is the first time we had received anything in verbal or writing?
26

27 Michael Harvey: September 4 is the day we received the complaint from Ms. Shields. September 24 is the date we sent
28 out our first courtesy notice of violation.
29

30 Jeffrey Schmitt: This complaint was in the form of letter or phone call.
31

32 Michael Harvey: Letter and phone call.
33

34 John Roberts: This May 6 date was just for the lights. The ball field was approved in 2007. At the end of the last
35 meeting or hearing, Counsel for Ms. Shields was saying that what they are appealing is the ball field itself and somehow
36 they are arguing that this approval of the lights extended their appeal time for the ball field as an accessory of use even
37 though that happened in 2007 and no one ever appealed anything or brought anything forward but he was suggesting
38 that somehow the approval of these lights tolled the period they had to appeal.
39

40 Jeffrey Schmitt: Is this is going to be appealed to Superior Court?
41

42 John Roberts: If they decide to do that. Yes.
43

44 Jeffrey Schmitt: That is why I wanted to make sure there is a documented record for all these dates that are cited that
45 can be produced.
46

47 Michael Harvey: There is not a date here that I cannot substantiate where staff specifically testified to the issuance of the
48 lighting permit. If you will recall, I testified to the May 29th date, specifically when we authorized the church to begin using
49 the lights for games. As detailed within Number 10 of your script, I testified to the May 29th date as well as the date when
50 the appeal was filed, specifically June 26th.
51

52 Jeffrey Schmitt: I know it went back and forth between the ball field and the lights.
53

1 Michael Harvey: I am going to make the following statement. Towards the end of the meeting, the applicant's attorney,
2 in the minutes, made several comments relating to the ball field. The applicant testified that she would not care if the ball
3 field was there, only if the lights were gone. Our argument, at the end, was that the applicant has conceded the point that
4 the ball field is a customary accessory use. They are arguing over the lights and because we allowed them to erect
5 lights, they attempted to argue that the simple erection of the lights changed the nature of the accessory use and
6 because of the change, it takes it out of that category. That is what he is essentially trying to argue at the end of the
7 evening. Staff doesn't buy that. When we start going through the conclusions, you will see what staff's thought process
8 is and it will give you some guidance on what to include for the record.
9

10 Jeffrey Schmitt: There is nothing in these findings of fact that state that there has been a measurement of illumines to
11 show that it is in violation of the county ordinance regarding that?
12

13 Michael Harvey: On page 2, numbers 9 and 10, staff stipulated that from October 2008 to May 29, 2009 we conducted
14 numerous inspections of the ball field and required substantial work be done reorienting the lights requiring additional
15 shielding be erected. On the 29th of May, 2009, we conducted an inspection and concluded the lights were compliant and
16 could be utilized by the church. If the board wants to add to number 10 compliant with all applicable county zoning
17 standards, that is fine.
18

19 Jeffrey Schmitt: Counselor, is number 10 sufficient from your perspective?
20

21 John Roberts: I would prefer to see more detail in the actual finding.
22

23 Jeffrey Schmitt: Part of the evidence she submitted is the picture taken from her porch with the glaring lights. Can we
24 just make these modifications and I can come in and sign this?
25

26 Michael Harvey: I would suggest that if you see anything you want to add, let staff know. I would suggest that you go
27 over the conclusions and how it should be formatted. These are not the only findings you have to make.
28

29 Let's move on to page 3. Basically, we have said we held the Public Hearing on January 11, 2010 which is not in dispute
30 and that after the hearing and reviewing all the submitted evidence, the board affirmed the decision of the zoning officer
31 relating to the erection and use of the outdoor sports field lighting on the church property.
32

33 In rendering this decision, the Board relied on the following: Timeliness of appeal – ball field as accessory. Mr. Roberts
34 had talked at length about this as reflected within the minutes but what we have essentially recommended is that the
35 board make a finding that the appeal, as submitted, was not timely and you made this decision on the following: the
36 applicant's testimony and affidavit indicating that she was fully aware of the County's decision to allow the ball field as an
37 accessory use on the church property in the summer of 2007. This includes conversations with the church
38 representatives as well as an unidentified member of the Planning Department. In her affidavit she clearly states she
39 called a member of the planning department and asked and was told that yes we allowed them to erect the ball field.
40 While I dispute some of the humorous she puts in her affidavit as to what this individual said, it was nevertheless that she
41 was informed of the decision.
42

43 The second point, based on testimony by the church members, was that they had met with the applicant and informed
44 her of their intention to develop a ball field on the property. Next, statements made by the applicant during the hearing
45 indicated that she did not mind the ball field as much as she minded the use of the outdoor sports field lights. Further the
46 applicant indicated during cross-examination that if the lights were removed she would not mind games being played on
47 the ball field. I added at the bottom, it is the Board's contention that the development of a ball field on the property is not
48 the issue the applicant wishes to appeal. It is the ball field with lighting they wish to appeal. At issue for the board is that
49 the appeal was not written in this manner. It brings the accessory nature of the ball field into question. The Board finds
50 that the appeal of the decision to allow the ball field in the first place is not timely.
51

52 John Roberts: I would add the reason that it is not timely is because it was not appealed within 30 days of whatever the
53 date is. That demonstrates to the judge that not only is it not timely but it is two and one half to three years not timely.
54

1 Michael Harvey: We can add that.

2

3 Jeffrey Schmitt: Please.

4

5 Michael Harvey: The next is Timeliness of appeal – erection of outdoor sports field lights. Staff has written this script as
6 reinforcing comments made by members during the hearing indicating that the board has found the appeal was not
7 submitted in a timely manner.

8

9 In rendering this decision, the board relied on the following: The applicant's testimony and affidavit indicating she was
10 fully aware of the County' decision to allow the church to erect outdoor sports field lights in September of 2008. The
11 applicant's affidavit that indicated that she was told of her appeal rights by the Planning Director on January 13, 2009.

12

13 As you will recall from her affidavit, it indicated that Craig Benedict, Planning Director, indicated she could appeal our
14 decision at that time. Both North Carolina General Statute and the Orange County Zoning Ordinance state that an appeal
15 must be filled within thirty (30) days from a party being aggrieved by the decision of a planner. It is my contention, as it
16 was that evening, as it is before you this evening that she was fully aware she had the rights to appeal and didn't file her
17 application in a timely manner. In fact, she waited four months after she was told she had to right to appeal to file her
18 application. This is not for the Board's jurisdiction to consider, the church spent a lot of time and money to bring the lights
19 in compliance. The reason I don't think it is applicable here is because they would have to do that anyway so that is why
20 you don't see that here.

21

22 I have also included in this section that the applicant presented no evidence that the church did not comply with the
23 development provisions or submittal requirements, associated with the submittal of a lighting plan per Section 6.31 of the
24 ordinance. In fact, the record clearly shows that the applicant's attorney clearly states that the conforming status of the
25 lights, with respect to regulations detailed within the Ordinance, are not an issue. Toward the end of the evening, it is in
26 the record in the minutes, that they would not mind the use of the ball field if the lights were removed. That is not an issue
27 they were focusing on. Per John's recommendation, we will include an appropriate timeline herein. The argument is that
28 she didn't file a timely appeal because she should have filed it technically in September or October and in theory, January
29 since the Planning Director gave her that specified amount of time to file the appeal.

30

31 Tom Brown: How are we, as the board, finding that the Planning Staff, inappropriately suggested. Where is that
32 documented?

33

34 Michael Harvey: It is in her affidavit.

35

36 Tom Brown: Staff agrees with her affidavit?

37

38 Michael Harvey: What the affidavit says is that the planning director told her that she had an unlimited amount of time to
39 appeal this decision. That is not consistent with the state law or zoning ordinance. I cannot offer any kind of testimony
40 that is what the planning director said because I was not at the meeting.

41

42 Tom Brown: As a board, why would I want to say that?

43

44 Michael Harvey: Right. My point of putting it in here is that you have to go by the ordinance, which says 30 days.

45

46 David Blankfard: Is that from when the permit was issued?

47

48 Michael Harvey: It is technically, from my interpretation, when the permit was issued. There have been a couple of
49 court cases where they say it is 30 days from when the decision is made available to the affected or harmed party which
50 in this case is September but if you allow January it still would have been due in February.

51

52 David Blankfard: My problem is that the board is finding something based on an affidavit, is that appropriate?

53

1 John Roberts: You do not have to find that is the truth of the matter. You judge her veracity in her affidavit just like you
2 judge any witnesses that come before you. If you do not find that to be the truth, you do not need to put it in.

3
4 Mark Micol: Do we have a statement from Craig?

5
6 Michael Harvey: There is no statement from Craig entered into the record. You have a statement from me saying that
7 30 days is the appeal time. The affidavit says that I can take as long as I want which denies the church due process.

8
9 Tom Brown: As a board, I wouldn't be willing to state that as fact.

10
11 Michael Harvey: Would the board be willing to say that with respect to this matter, the board accepts the fact that this
12 affidavit says what it says but the ordinance and status are clear there is a 30 day timeline allowing an appeal to be filed.
13 Would you be more comfortable if I said that instead?

14
15 Jeffrey Schmitt: The comments of the Board reflect the understanding that Section number whatever, requires a 30 day
16 notification to be made and notwithstanding any comments from anyone else for her affidavit. I guess before we go
17 further, it would seem to me that if this does go to Superior Court, that the judge will be looking for dates and the actual
18 documentation of those dates provided and on record. Either in the record or somewhere. That is what this revolves
19 around.

20
21 Michael Harvey: Yes.

22
23 Jeffrey Schmitt: John, this doesn't revolve around the ability of the church, under the guise of the extension of
24 community building and fellowship to host and participate in this activity. This is not in contention whatsoever?

25
26 John Roberts: That was part of his argument in his brief submitting as part of the record that the ball field is not an
27 accessory use to the church. He argued that, there are only a couple of things in case law that have been found by
28 courts to be accessory uses, one of those could be providing a place to eat but just because a judge has not found that
29 previously does not mean it is not an acceptable accessory use it just means that it hasn't gone to court yet and the
30 question has not been asked yet but that is one of his contentions. It was a minor contention at the end but it was
31 something he was arguing.

32
33 Tom Brown: Did we ever refute that anywhere?

34
35 Michael Harvey: There are a couple of different places where staff refutes that line of logic. We can make sure the
36 language is in there. For example, on page 3, A.iii, statements made by the applicant during the hearing indicating that
37 she did not mind the ball field as much as she minded the use of the outdoor sports fields lights associated with nighttime
38 games. Further the applicant indicated during cross-examination that if the lights were removed she would not mind
39 games being played on the ball field. She made that statement. Our position is that the appeal isn't written in a manner
40 that says we think the ball field should go. We added that at the end but it is not timely for various reasons and
41 contradictory testimony and that is the argument we suggest you make.

42
43 James Carter: I am looking at these in terms of whether she wants the field but not lights.

44
45 Michael Harvey: If you recall from the minutes at the conclusion of the meeting, in an exchange between Mr. Schmitt,
46 John Roberts and the Shields' attorney, essentially on page 46, line 38 reads, Jeff Schmitt ask the question, "Before we
47 ask questions, I would like to get some counsel provided. I would like to get some counsel on what it is that we are to
48 adjudicate here?" John Roberts's response was "Between the evidence presented and the appellate brief, there are a
49 number of issues, some of which I don't think are relevant and/or appropriate for your consideration. Some of the
50 considerations will be determined on dates and some of those dates have been presented into evidence.
51 Constitutionality, the ordinances I don't think it is appropriate for your consideration." Mr. Ferguson's response was,
52 "That is all for presentation, we don't wish to be heard on that." John Roberts said, "That was a mention of nuisance,
53 noise." He is not arguing that these are violations of these regulations just bringing up points. I am going to draw your
54 attention to page 047, line 10, Mr. Ferguson, "I am not arguing that the lights are out of compliance with the lighting

1 ordinance. I am saying that the lit ball field does not meet the parameters of an accessory use." That is what he has
2 appealed. A lit ball field does not constitute an accessory use.

3
4 Jeffrey Schmitt: So defacto, he is saying that if it is not okay?

5
6 John Roberts: They are arguing the timeline is to preserve their rights to appeal this?

7
8 Michael Harvey: Yes. Let me also call your attention to line 35, the same page, and Mr. Ferguson statement, "What we
9 appeal from is the zoning officer's decision whether this meets and fits within the accessory use. Counsel, "Are you
10 saying that the ball field is not an appropriate accessory use, that the lighted ball field is not an appropriate accessory use
11 or that the lights are not an appropriate accessory use?" Mr. Ferguson, "I don't think you can segregate it because when
12 you determined accessory use under the polices, you have got to look at all the use, not bits and pieces of it, to make a
13 determination if it dwarfs the principal use and so forth. You can't piecemeal it, you have to look at what the use is and in
14 fact, the use is the ball field.'

15
16 He is trying to use the lights to cause the whole accessory use question to be brought back to be examined but testimony
17 throughout contradicts these statements that is what we are arguing here.

18
19 Dawn Brezina: But he still goes on and says that if it is offered during daylight hours it is different than a ball field at
20 nighttime.

21
22 Michael Harvey: Yes, it is the contradiction.

23
24 David Blankfard: He was saying that if it is a baseball field that is fine, if it is a lit baseball field that is different. It is the
25 lights that are trying to change its accessory use.

26
27 Michael Harvey: He is essentially arguing that the lights change the nature and therefore reevaluated whether or not a lit
28 ball field constitutes an acceptable accessory use. And as John Roberts, there is no distinction in the ordinance.

29
30 Jeffrey Schmitt: Item C.

31
32 Michael Harvey: Erection of outdoor sports field lights requires a special use permit. During various times of Ms. Shields'
33 testimony and their actual appeal application, the argument was made that we did not require the church to get a special
34 use permit.

35
36 Obviously, it was staff's argument that there is no place in the ordinance requiring the special use permit for the simple
37 erection of outdoor sports field lights. We are saying that the board finds there are no legal requirements within the
38 ordinance requiring the issuance of a special use permit prior to the erection of outdoor sports field lights in and of itself,
39 nor is there a requirement that the property owners are to be notified or invited to attend a special hearing to review a site
40 plan where outdoor sports field lights are proposed for permitted uses of property as detailed within the ordinance.

41
42 If you recall from the abstracts, one of the arguments made were there were no other land uses in rural portions of the
43 county that would be allowed to erect sports field lights without having to go through the special use permit. That is a
44 falsehood. Essentially, there are two things you are finding, there is no special use requirement and there are uses that
45 you can erect sports field lights without going through a formal review process inviting the public in. Permitted uses don't
46 have to go through that process. Suggested findings were obviously referencing testimony from staff indicating there is
47 no such provision, review of the ordinance we submitted in the record, review of our abstract that we entered into the
48 record during the meeting, failure of the applicant to provide documentation outlining the specific section of the Ordinance
49 they were relying on to make this argument. Finally, a certified copy of the August 24, 2009 Quarterly Public Hearing
50 which Ms. Shields' petitioned the Board of County Commissioners to do exactly what she is arguing here. Basically
51 going on to say this proves that she knows this provision doesn't exist. Page 5, "The use of property constitutes a
52 "Recreational Facility".

1 As you know there was a big argument that what the Board of Adjustment ought to do was refer this back to staff so staff
2 could review its finding. They argued in their application and certain portions of their testimony that this technically
3 constitutes a recreational facility. While they keep asking questions, they never provided any documentation or evidence
4 to prove that, at least from our perspective. The findings are basically that there was no evidence provided. Our abstract
5 provides an argument why it's not. Testimony from the church say their operational characteristics don't lend itself being
6 a recreational facility. And the final argument at the conclusion is that the Board of Adjustment can't make this decision
7 in the first place. The reason is that the applicant has not exhausted her administrative mechanisms to us, as a staff to
8 review. If you look at Articles 21 and 23 specifically, we are the ones that make that determination; you are here to
9 review if we made a mistake or not. They were asking you to tell staff they made a mistake and reexamine it. That is not
10 what your responsibility is. Your responsibility is to interpret staff error the way the ordinance is written. Since there has
11 been no formal complaint or no formal evidence submitted, they can't make this argument, you can't decide it is a
12 recreational facility and staff has done its due diligent in accordance with the administration of the ordinance. Section E,
13 Erection of lights – alter accessory: During the hearing, the applicant argued that the erection of the outdoor sports field
14 lights altered the accessory use nature of the ball field and, as a result, the ball field was no longer functioning as an
15 accessory use per staff's original approval. The Board finds there was insufficient documentation and evidence
16 submitted demonstrating this argument and that the applicant failed to meet her burden of proof.
17

18 Michael Harvey: That is the script and format. With all due respect to John Roberts, the only sections he technically
19 reviewed were the timeliness and the appeals. He didn't have an opportunity to review this whole document.
20

21 Jeffrey Schmitt: Where we can cite specific parts of the ordinance, I think we should do.
22

23 Michael Harvey: That is a general request we can adhere to without a problem.
24

25 Jeffrey Schmitt: We should do it all the way through with all the particular cases. We have already talked about page 4,
26 second paragraph, amending that so we don't look like we are fighting that the planning director made inappropriate
27 statements.
28

29 Michael Harvey: I understand.
30

31 Jeffrey Schmitt: The argument went several directions... by the nature of the fact that we addressing these things in a
32 way that the applicant doesn't... are we falling into a trap and saying too much here?
33

34 John Roberts: That depends on which judge would hear it.
35

36 Jeffrey Schmitt: I am kind of gun shy because we had an appeal associated with the sign notification on the case we just
37 continued saying that there was not enough information on the notification for all the surrounding properties.
38

39 John Roberts: What the judges' order actually said is the notice did not comply with the ordinance. He made no specific
40 finding, he made that general statement. He really did not say anything that could help you change any notice or direct
41 anyone to where the mistake was made. As far as this case, what the lawyer did was called the shotgun approach. He
42 doesn't have a clear avenue to take so he makes every argument he could think of in hopes that one of them sticks. If
43 you don't pick up on something that an appellant level judge will look at it and say that this works. I don't know that you
44 can say too much if you address the time limits. A reasonable judge should dismiss this on the time limit. You go on into
45 it and address the other factors and say even if the time limit is not a factor, we should have listened to it, we did consider
46 the other points and they failed for the reasons stated.
47

48 Michael Harvey: Staff did not mess up the notice with Mr. Lonsway.
49

50 John Roberts: That is correct.
51

52 Jeffrey Schmitt: I take a lot of pride in making sure that what we have is a complete record so that if it is appealed, there
53 is not something that was overlooked or not included. Since we seem to have a succession of appeals in front of us, I
54 want to make sure we are in agreement from a legal perspective. This is very complete Michael.

1
2 John Roberts: Nick Herman is one of the most respected land use attorneys in the state and his quote about where that
3 judge got the opinion about the notice is something that I can't repeat. He thought less of it than idea. Staff didn't make
4 a mistake and neither did you.

5
6 Michael Harvey: Is there anything you think we missed?
7

8 Mark Micol: Just for clarification, the mere existence of the lights do not alter the accessory nature by extending the
9 times the ball field can be used?

10
11 Michael Harvey: We said no because it was still only going to be utilized in the manner we approved by the church
12 league and by members of the church. Since it wasn't open to the public, our argument to the Board of County
13 Commissioners back in August when this first came up, that the mere presence of lights does not alter the nature of the
14 land use the way the current ordinance is written. Should that be changed, probably but we are not there. Board of
15 County Commissioners has not authorized the staff to amend the ordinance. It is in your purview to make a statement to
16 the Board of County Commissioners saying staff did make an error, if you believe that is the case, but we really need to
17 reevaluate this type of activity. You are being asked if staff did error in the way the ordinance is currently written and the
18 way pervious decisions have been made with respect to what constitutes an accessory use.

19
20 Jeffrey Schmitt: Is there anything else we have not discussed within the package that is documented and/or what was
21 provided in the case last month.

22
23 James Carter: Could we get more details in Section B?
24

25 Jeffrey Schmitt: Yes.
26

27 Thomas Brown: I guess I am okay with the intent as long as the chairman and the counsel believe this is cohesive and
28 coherent and can be supported. All the facts are there but we are kind of throwing the kitchen sink back at them.
29

30 John Roberts: The only way to defend it is to address each of those points because if you don't address one, he will find
31 that one and hammer that with a judge. I would say 99 out of 100 judges will throw this out because of a timing issue but
32 you could always get that one.
33

34 Mark Micol: We don't know if they are going to appeal?
35

36 Michael Harvey: Oh, they will appeal.
37

38 John Roberts: He told me they were thinking about it.
39

40 Michael Harvey: There were comments in the local paper where she indicated she would go. In all due respect to her,
41 her attorney has got to make a decision as to whether or not he can win the appeal.
42

43 Mark Micol: She has thirty days from the time the permit was issued for the lights?
44

45 Michael Harvey: The ordinance specifically states that any individual grieved by the decision of the zoning ordinance will
46 have 30 days from the date of the decision to appeal before the County Board of Adjustment. That is Article 2, Section
47 2.3.7.2
48

49 Mark Micol: When does the clock start ticking?
50

51 Michael Harvey: Staff argued...
52

53 Thomas Brown: In 2007, the accessory use was the ball field.
54

1 Mark Micol: How would she know the clock is ticking... how would she know the permit was issued?

2
3 Michael Harvey: When she called staff in the summer of 2007, staff told her that we issued a permit and we were
4 allowing the ball field. Technically I could see an argument from that point on that was 30 days but she didn't file. From
5 a standpoint of the lighting, she obviously knew we had issued a permit in September 2008 that we issued lighting
6 because I told her we had.

7
8 Mark Micol: Did we tell her she had 30 days?

9
10 Jeffrey Schmitt: How did she know that?

11
12 Michael Harvey: My recollection was that I told her in September that we had made the decision back in May and that
13 technically I told her she had lost her appeal right. Craig told her in January that she could appeal that decision so part of
14 my argument is going to be that on the 12th of January that she had 30 days from then that Craig said he would allow an
15 appeal which should have been in February.

16
17 Jeffrey Schmitt: There are no minutes documented from any of those conversations nor do we have a document
18 provided by the county that said we have issued this permit on such and such a date for lights to be added to the ball
19 field. You have under section X that you have 30 days to appeal. There is nothing that she has formally in her hand.

20
21 John Roberts: And there is nothing that is required to be given. A land use situation is one that is open and notorious
22 and an aggrieved party can see that it is there and the law is available for that person to learn and figure out that I have
23 30 days from when I became aware of this to appeal. Since she was given verbal notice in January, apparently in
24 January, that she could appeal this, then technically the 30 days would start then. She needed to take the affirmative
25 action to learn what the law was and appeal within that time period. Staff is not required to give her anything to say that
26 she has 30 days to appeal this.

27
28 David Blankfard: Can you add, in your findings of fact, that it was determined that the baseball field was stated to be an
29 accessory use?

30
31 Michael Harvey: Yes.

32
33 David Blankfard: If we put that in the findings of fact then nothing is debated and then they will get to the heart of the
34 matter. When you add the lights, that changes it, because there is nothing that we as a board can say, there is nothing to
35 change that.

36
37 Jeffrey Schmitt: Can we go off the record with this?

38
39 John Roberts: I would suggest that we not go off the record because this is all part of your findings.

40
41 Jeffrey Schmitt: I would rather not include that.

42
43 David Blankfard: Okay.

44
45 Jeffrey Schmitt: I don't think the board needs to be in the position of interpreting and/or making law about all the things
46 that can constitute an accessory use at a facility like this. And by saying that, that is what we are going on the record and
47 saying.

48
49 Thomas Brown: Aren't we saying that anyway, defacto, by taking the position we are.

50
51 Jeffrey Schmitt: Yes, but from my perspective, I would rather that it sit behind it as opposed to being right out front.

52
53 David Blankfard: It is a finding in the back, the last sentence in the conclusion.

54

1 Jeffrey Schmitt: Anything regarding conclusions that we have not talked about or Michael has not modified here?

2

3 Michael Harvey: My recommendation is that you first of all, when deciding this, indicate that the findings of fact as
4 provided by staff on pages two through four.

5

6 Jeffrey Schmitt: Yes. We will do that but I wanted to see if there was anything to be added. Section D and E. What I
7 would like to have is a motion for approval for Sections A through Sections B with modifications as discussed that will be
8 made by staff.

9

10 **MOTION** made by David Blankfard to accept the Order of Interpretations Sections A through B with modifications that
11 staff will be making. Dawn Brezina seconded.

12 **VOTE:** Unanimous

13

14 John Roberts: I think the only way to do this is to move to withdraw that motion and do it again. I would prefer rather
15 than modifications that staff would make to say modifications that this board has agreed to. I think procedurally to do that
16 you have to withdraw the previous motion and vote on that and then redo the motion.

17

18 **MOTION** made by David Blankfard to withdraw the previous motion. Dawn Brezina seconded.

19 **VOTE:** Unanimous

20

21 Jeffrey Schmitt: How do I want to say this?

22

23 John Roberts: Move to accept the A through E of the Order of Interpretations subject to the additional modifications that
24 this board has approved contained in the record.

25

26 **MOTION** made by David Blankfard to accept the Order of Interpretations Sections A through E with the additional
27 modifications that were mentioned and contained in the motion. Dawn Brezina seconded.

28 **VOTE:** Unanimous

29

30 Jeffrey Schmitt: Michael and Tina, if you would just let me know when the changes have been made, I will stop by the
31 office. If we could go back to the minutes, we have made modifications to them. Do I hear a motion for the approval of
32 the minutes as contained on pages 1 through 53 with modifications as enumerated?

33

34 Thomas Brown: Before we do that, are you talking about the modifications in the Order of Interpretations that will affect
35 the minutes?

36

37 Jeffrey Schmitt: I think we are trying to improve the minutes that actually happened during the conduct of the meeting
38 which those minutes become part of the Order.

39

40 **MOTION** made by David Blankfard to approve the minutes of January 11, 2010 as part of the Order of Interpretation
41 discussed this evening with the changes in the record and as amended this evening. Dawn Brezina seconded.

42 **VOTE:** Unanimous

43

44 **MOTION** by Thomas Brown to move that for the appeal number A-7-09 of the decision of the zoning officer to allow for
45 the use of the outdoor sports field lights as stated in the agenda is upheld as detailed within the attached order of
46 interpretation. David Blankfard seconded.

47 **VOTE:** Unanimous

48

49 Jeffrey Schmitt: You should hang onto your package provided on this date.

50

51 **6. Adjournment**

52

53 **MOTION** made to adjourn by Thomas Brown. David Blankfard seconded.

54 **VOTE:** Unanimous

- 1
- 2
- 3
- 4
- 5 Tina Owen, Minutes Preparer