

BOARD OF ZONING APPEALS
Agenda
Cape Charles Civic Center - 500 Tazewell Avenue
September 9, 2015
10:00 A.M.

- 1. Call to Order; Roll Call**
- 2. Invocation and Pledge of Allegiance**
- 3. Public Comments**
- 4. Consent Agenda**
 - A. Approval of Agenda Format
 - B. Approval of Minutes of August 5, 2015 Public Hearing and Meeting
- 5. Old Business**
 - A. Variance Application – 309 Jefferson Avenue
- 6. Adjourn**



DRAFT
Board of Zoning Appeals
Public Hearing & Meeting
Cape Charles Civic Center
August 5, 2015
10:00 a.m.

At 10:00 a.m. in the Cape Charles Civic Center, Vice Chairman Jay Wiegner called to order the Board of Zoning Appeals Public Hearing and Meeting. In attendance were Board members Diane D'Amico and Bill Murphy. Pete Baumann and Gene Kelly were not in attendance. Also present were Town Planner Larry DiRe, Assistant Town Clerk Amanda Hurley and applicants of 309 Jefferson Avenue John Hanson and Carol Selby. There were two members of the public in attendance.

Jay Wiegner led the Board in the recitation of the Pledge of Allegiance.

PUBLIC COMMENTS

Anthony Storey, 223 Jefferson Avenue

Assistant Town Clerk Amanda Hurley read the email submitted by Mr. Storey. (Please see attached.)

Anne Stratton, 223 Jefferson Avenue

Assistant Town Clerk Amanda Hurley read the email submitted by Ms. Stratton. (Please see attached.)

There were no other public comments to be heard.

CONSENT AGENDA

Motion made by Jay Wiegner, seconded by Diane D'Amico to accept the agenda format as presented. The motion was approved by unanimous consent.

The Board reviewed the minutes from the May 21, 2015 Public Hearing and Meeting.

Motion made by Bill Murphy, seconded by Diane D'Amico, to approve the minutes from the May 21, 2015 Public Hearing and Meeting as presented. The motion was approved by unanimous consent.

NEW BUSINESS

A. Board of Zoning Appeals 2014-2015 Annual Report

Larry DiRe explained that the BZA Annual Report was a State Code requirement and it consisted of a brief synopsis of the Board's activities. The 2014-2015 report had been presented to Town Council.

B. Variance Application – 309 Jefferson Avenue – Change of Use Pursuant to Zoning Ordinance Sections 2.5.1 and 2.5.4

A previously existing, non-conforming commercial use was located on the lot, which was zoned R-1. The previous commercial use was a barber shop, which was sometimes considered "personal services" usage but not defined as such in the Town Zoning Ordinance.

Mr. John Hanson explained his plans for the structure stating that he proposed to renovate it for retail/restaurant use. The footprint of the building would not change.

Jay Wiegner voiced his concern regarding the definition of “more restrictive classification” as stated in Section 2.5.4 of the Zoning Ordinance.

Larry DiRe stated that his interpretation was to look at permitted use versus conditional use in the commercial district. Conditional use was more restrictive. The previous use of the building was personal services and the applicant was proposing retail/restaurant. It was still a commercial use but a different type of use.

There was some discussion regarding the proposed parking lot in the adjacent lot between the structure and the church.

Jay Wiegner stated that if there was no expansion of use by definition, then the Board did not need to grant a variance because it already existed. Also, the building had been used commercially in the past and nothing was changing about the property so nothing needed to be done.

Bill Murphy questioned whether it was more restrictive or less restrictive classification and this was unclear. Bill Murphy felt that it didn't fall under the purview of the Board because it was a by-right use.

Jay Wiegner questioned whether the Board had legal ground to deny the variance. If it was denied, the applicants could appeal to the Circuit Court.

Diane D'Amico expressed her concern regarding setting a precedent if the Board approved or denied the variance without the definition of less restrictive or more restrictive.

There were no definitions or examples for “less restrictive” and “more restrictive” relative to commercial use and the Board felt that more clarification was needed before a decision could be made.

Motion made by Diane D'Amico, seconded by Jay Wiegner, to direct staff to obtain a legal opinion to clarify “less restrictive” and “more restrictive” relative to commercial use. The motion was approved by unanimous consent.

Motion made by Jay Wiegner, seconded by Bill Murphy, to table the variance application for 309 Jefferson Avenue until legal clarification was obtained by staff. The motion was approved by unanimous consent.

Motion made by Jay Wiegner, seconded by Bill Murphy, to adjourn the Board of Zoning Appeals Meeting. The motion was approved by unanimous consent.

Vice Chairman Jay Wiegner

Assistant Town Clerk

August 5, 2015 Board of Zoning Appeals Public Hearing & Regular Meeting
Public Comments Provided in Writing

Dear Sirs,

In regard to the Aug 5th hearing on the proposed variance for the property located at 309 Jefferson Ave I would like the following objections to the variance read into the public record:

Personal Issues:-

- A) My property located at 223 Jefferson Ave and my 2 lots to the East bordering Strawberry St (across from the proposed store) currently has foot traffic from the apartments on Washington St, using it as a convenient way to cut off the corner at Washington and Strawberry on their way towards Mason Ave. The proposed store would make this traffic (and the tourist traffic) much more prolific causing a considerable expense of fencing the whole perimeter of my property.
- B) Additional foot and golf cart traffic to the proposed store along Jefferson Ave would be increased considerably.
- C) Depending on the configuration the noise level and activity would be detrimental to my property and personal well being.

Town related:-

The direction of the town has been to keep commercial enterprises to the Mason Ave corridor that seems to have an existing business that caters the identical items the property at 309 Jefferson wants to emulate, so as to the financial well-being of Cape Charles being improved I doubt that will occur.

Adjacent property:-

The previous Barber shop was a very low impact business, (which never the less should never been allowed to occupy this lot) so in regards to property values it seemed to be negligible. The proposed restaurant/store would have a much more negative impact on property values in the surrounding residential area.

In closing the activity, noise and other consequences of locating a property such as this at this location will never be a positive; lets' take the opportunity to make the Cape Charles historic area stay historic.

Thank you for your time

Yours truly

Anthony G Storey
223 Jefferson Ave
Cape Charles VA 23310
(804-363-8433)

Date: August 4, 2015
To: Board of Zoning – Cape Charles Virginia
Item: 5B - Variance Application – 309 Jefferson Avenue – Change of Use
Pursuant to Zoning Ordinance Sections 2.5.1 and 2.5.4

It is my understanding that there will be a meeting concerning the proposed variance to the property at 309 Jefferson Avenue. I own the lot on the corner of Jefferson Avenue and Strawberry Street and also the house at 223 Jefferson Avenue. I am very much opposed to a commercial establishment being located at 309 Jefferson although I am aware that it has been used as a non-conforming commercial barbershop with very little pedestrian traffic.

My concerns:

1. Too much traffic for a residential area.
2. Too much trash being dropped on my property as there is already too much from people cutting through from the apartments.
3. The noise level from people crossing my yard is bad enough now and would increase.
4. The residential neighborhood is “residential” and should not be changed because if one “commercial” lot is allowed, more will come in the future and change the value of this part of Cape Charles.
5. The barbershop was a non-conforming commercial use and should not have been allowed.

Thank you for considering this request and please think of my concerns as though you live right across the street.

Sincerely,

Anne W. Stratton
223 Jefferson Avenue
Cape Charles, VA 23310

Board of Zoning Appeals Staff Report

From: Larry DiRe 
Date: September 3, 2015
Item: 5A - Variance Application – 309 Jefferson Avenue
Attachments: Attorney's response to BZA request

Background

This lot is in the Residential-1 zoning district, and is not a standard lot shape of 40 x 140 (5600) square feet. The lot in consideration before the Board is 33.19 feet across, and 80 feet deep (2654 square feet). A previously existing, non-conforming commercial use was located on the lot, within the footprint of the existing building. The previous commercial use was a barber shop, sometimes considered among “personal services” usage but not defined as such in the Town Zoning Ordinance. The current water/sewer utility account lists the usage as “commercial.”

Application Specifics

The applicant intends placing a new commercial operation (restaurant/retail) not continuing the barber shop or other personal services usage within the footprint of the existing building, while doing some cosmetic and structural improvements to the building. The footprint area will not change. The applicant is seeking relief from the requirements of Article II Sections 2.5.1 and 2.5.4. Those sections state the following:

“Section 2.5.1 Continuation of Existing Non-Conforming Uses and Permits

A. Any legal use, building, or structure existing at the time of adoption of this ordinance or any amendment thereto may be continued even though such use, building, or structure may not conform with the provisions of this ordinance for the district in which it is located. Such use, building, or structure shall be deemed a “Non-Conforming Use.” A non-conforming use, building, or structure may be continued provided by the following.

- 1. No such non-conforming use, building, or structure shall be enlarged or increased or extended to occupy a greater area of land than was occupied at the effective date of the adoption of this ordinance, unless said enlargement does not result in an increase in nonconformity or result in a change to a use permitted in the district.*
- 2. No such non-conforming use, building, or structure shall be moved in whole or in part to any portion of the lot or parcel other than that occupied by such use, building, or structure at the effective date of adoption of this ordinance or amendment of this chapter, unless such move results in decreasing the degree of nonconformity with the requirements of this district.*
- 3. No additional structures which do not conform to the requirements of this ordinance shall be erected in connection with such non-conforming use of land. No additional uses of a nature which would be prohibited generally in the district involved shall be permitted.*
- 4. Any non-conforming use may be extended throughout any parts of the building which were manifestly arranged or designed for such use at the time of adoption or amendment of this ordinance.*
- 5. When any non-conforming use is superseded by a permitted use, the use shall thereafter conform to the regulations for the district, and no non-conforming use shall thereafter be resumed with the exception of existing duplexes specifically designed as such.*

6. *If any such non-conforming use or structure ceases for any reason for a period of more than four* years, except when government action impedes access to the premises, any subsequent use of such land or structure shall conform to the regulations specified by this chapter for the district in which such land or structure is located with the exception of existing duplexes specifically designed as such. *(The Town Attorney's letter informs staff that the state code changed this to two years, which will require a text amendment to the zoning ordinance but does not affect the status of this application.)*

B. The rights pertaining to a non-conforming use, building, or structure shall be deemed to pertain to the use or building itself, regardless of the ownership of the land or the building on or in which such non-conformity is conducted or of such non-conforming building or the nature of the tenure of the occupancy thereof."

"Section 2.5.4 Change of Use

The use of a non-conforming building or structure may be changed to the same use or a use of a more restrictive classification, but where the use of a non-conforming building or structure is hereafter changed to a use of a more restrictive nature, it shall not thereafter be changed to a use of a less restrictive nature with the exception of existing duplexes specifically designed as such."

The Board discussed the issue of "more" and "less" restrictive at the August 5th meeting and was not able to come to a satisfactory determination of those terms and how they may apply to this property and the proposed usage. The Board requested staff to contact the Town Attorney for an opinion. That opinion was received, and provided to the Board for review and consideration. That opinion is also attached to this report, and constitutes part of the public record for this application.

According to page 3 of the Attorney's opinion "there is a reasonable basis of discretion to determine" that the "character" either changed or continued. The six issues to consider yield a decided mixed bag when applied to this property and the applicant's proposed use. Continued "character" is found in issues i; ii; iii; and iv. Issue v is an unknown, but reflects the concerns of neighbors which were expressed during the August 5th public hearing. Change is demonstrated in issue vi, since the goals reflected in the Town's current and proposed future land use maps show that parcel and area to be zoned as single-family residential. While continued character of the prior use is clearly evident in the use proposed by the applicant, it is not definitive.

Variance Criteria

As noted on page 3 of the Attorney's opinion, the Town's current zoning ordinance is out of date. The new language of Virginia Code Section 15.2-2309 prevails over the previous undue hardship test. As cited in the concluding sentence of the Attorney's opinion (page 4), the "reasonableness test" is sufficient basis to consider the variance request.

Recommendation

Staff recognizes reasonable evidence of continued character of use. Staff recognizes reasonable evidence that strict application of the ordinance would unreasonably restrict the utilization of the property for a use that is of continued character, but not an exact use. Staff recognizes that there is not so general or recurring a nature of uses as to require an amendment to the ordinance. Staff recognizes that the property was acquired in good faith and any hardship was not created by the applicant. These findings are the basis for staff recommending an approval for this variance request.

VANDEVENTER BLACK LLP

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August 27, 2015

Lawrence DiRe, MPA MA
Town Planner
Town of Cape Charles
Town Hall
2 Plum Street
Cape Charles, VA 23310
larry.dire@capecharles.org

Re: Zoning Issue
Our File No.: 05620-0043

Dear Larry:

You have asked us to review the requirements applicable to continuation of a nonconforming use, based on an application submitted by certain property owners for use of a property as a combined retail and restaurant establishment “selling food items such as ice cream products, show balls, cold sandwiches, pizza and soft drinks,” instead of as a commercial barber shop.

Va. Code § 15.2-2307 requires localities to protect nonconforming uses “so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years.” Va. Code § 15.2-2307 is not “merely enabling” legislation such that an ordinance is required to implement it. *Lamar Co. v. City of Richmond*, 287 Va. 348, 756 S.E.2d 444 (2014). The Town Zoning Ordinance incorrectly provides for discontinued use of more than four years (Section 2.5.1.A.6), and should be amended. However, the applicable law is two years. Our analysis assumes that the use was not discontinued for over two years which is not clear from the record you provided.

The Virginia Supreme Court has specifically identified a nonconforming use as a type of “vested right.” *Alexandria City Council v. Mirant Potomac River, LLC*, 273 Va. 448, 643 S.E.2d 203 (2007); *Holland v. Bd. of Sup’vrs*, 247 Va. 286, 441 S.E.2d 20 (1994). Only existing or approved uses and structures may receive protection under this statute. Also, a nonconforming use cannot be established solely on the basis of an accessory use. Only a primary use of property can qualify for continuing legal protection. *Knowlton v. Browning-Ferris Industries*, 220 Va. 571, 260 S.E.2d 232 (1979); see also *Hurd v. Zoning Appeals Bd. of Warren County*, 50 Va. Cir. 213 (Warren County. 1999); *Seekford v. Town of New Market BZA*, 49 Va. Cir. 112 (Shenandoah County. 1999).

As summarized in the *Handbook of Virginia Local Government Law* (2015 Ed.), the principal inquiry in regard to the “expansion” or “alteration” of a nonconforming use is whether the “character” of the use has been continued or impermissibly changed. The increase in size or scope of a nonconforming use is “merely one circumstance relevant to the key determination of whether the character of the use has been changed,” the relevance of which depends in each case on the

“quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote.” *Knowlton v. Browning-Ferris Industries*, 220 Va. 571, 260 S.E.2d 232 (1979). The Zoning Administrator has significant discretion in making such a determination.

In *Knowlton*, transformation of a general trucking business using four trucks engaged in hauling random cargoes into a commercial refuse operation with eighteen large trash compactors and a spacious garage was deemed a manifest change in the character of the previously existing use. Similarly, transformation of an auto body shop into a plant manufacturing metal railings was deemed a change in character. *BZA v. McCalley*, 225 Va. 196, 300 S.E.2d 790 (1983). See also *Wheelabrator Clean Water Sys., Inc. v. King George County*, 43 Va. Cir. 370 (King George County 1997) (character of a legal nonconforming use that allows biosolids storage and application of biosolids on the same property would be impermissibly changed by the transport of biosolids from the storage facility to other properties).

In adopting the change of character test, the Virginia Supreme Court has specifically rejected the argument that the property owner retains the right to use his property for any other use permitted by the same zoning classification as would apply to the original nonconforming use. *McCalley, supra*. Rather, the changed use must be either “more restrictive” or of substantially similar character to the original use. See also *Masterson v. BZA of Va. Beach*, 233 Va. 37, 353 S.E.2d 727 (1987). Whether a use is more restricted depends a comparison of the nonconforming use on the date the zoning ordinance was adopted with the current use. *Knowlton, supra*.

In *Town of Mt. Jackson v. Fawley*, 53 Va. Cir. 49 (Shenandoah County 2000), the circuit court held that a legal nonconforming use as a commercial garage could have remained a legal nonconforming use as a private vehicle maintenance facility supporting a transport business, had it not been used for more than two years as storage for carnival equipment. This provides an example of how a nonconforming use may permissibly evolve over time, e.g. commercial garage to private vehicle maintenance facility. However, “Nonconforming uses are not favored in the law because they detract from the effectiveness of a comprehensive zoning plan.” *City of Chesapeake v. Gardner Enterprises*, 253 Va. 243, 248, 482 S.E. 2d 812 (1997).

Accordingly, the Zoning Administrator for the Town, which I understand is part of the function of the Town Planner, is to determine if the expansion or alteration of a nonconforming use is such that the “character” of the use has been continued or impermissibly changed. If you determine that there was no impermissible change the use continues without review by the BZA, unless it is challenged by a person with standing. If you determine that there was an impermissible change the applicant can appeal to the BZA. In the alternative the applicant can apply to the BZA directly for a variance. It appears from the record that the applicant filed an appeal prior to a determination by you, but also applied for a variance. This was not the correct procedure. The BZA does not have jurisdiction over an appeal until you issue a decision.

With respect to the merits it appears that there is a reasonable basis of discretion to determine either that the “character” of the use has been continued or impermissibly changed. The issues for consideration include whether: (i) there is special provision for barber shops or beauty parlors in the ordinance; (ii) a commercial barber shop, retail sale or restaurant establishment would be a permissible use under the same zoning classification under the ordinance; (iii) both uses are licensed by a regulatory body; (iv) the proposed use as a combined “retail sales” and “restaurant” establishment would be more restrictive than a “commercial use” pursuant to the definitions in the ordinance; (v) any change in the level of anticipated consumer and vehicle traffic, trash removal, deliveries, noise or other activity at the property; and, (vi) any detrimental effect upon the purposes and policies the zoning ordinance was designed to promote.

As a practical matter it may be more defensible to decide that the use is not continued, and then proceed with the variance procedure. You should document the reason for your decision.

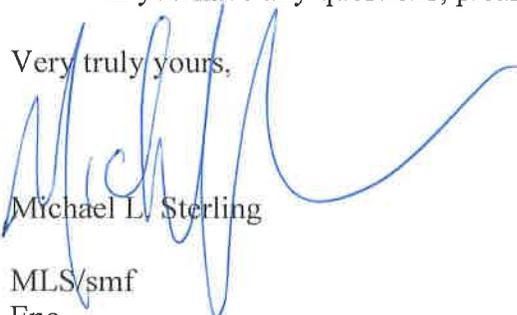
Should a variance be required it appears that the Town Ordinance is out of date. The standards for the granting of a variance changed as of July 1, 2015 by Va. Code 15.2-2309. The changes significantly eased the variance test, and the Ordinance should be amended to reflect this and other procedural changes (ensuring participants have equal time as the Town for presentation is one). Here is the new language in section 2309 that excises the undue hardship test in many respects:

Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and (i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of § 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A 4 of § 15.2-2286 at the time of the filing of the variance application.

The BZA would evaluate this variance request under the new, first prong of whether the “strict application of the terms of the ordinance would unreasonably restrict the utilization of the property,” as the use likely does not relate to a physical condition relating to the property (the five listed requirements still apply to both prongs, however). This reasonableness test is probably sufficient to permit a variance.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Michael L. Sterling

MLS/smf

Enc.

Cc: Brent T. Manuel, Town Manager