

**TOWN OF HILTON HEAD ISLAND**  
**Board of Zoning Appeals**  
**Minutes of the Monday, May 18, 2009 Meeting**  
**2:30pm – Benjamin M. Racusin Council Chambers**      **APPROVED**

Board Members Present:      Chairman Jim Collett, Vice Chairman Charles Raley,  
Alan Brenner, David D’Amico, Roger DeCaigny, and Rita Jones

Board Members Absent:      Bob Sharp, Excused

Council Members Present:      Bill Ferguson, John Safay and George Williams

Town Staff Present:      Heather Colin, Development Review Administrator  
Anne Cyran, Planner  
Jayme Lopko, Senior Planner & Board Coordinator  
Kathleen Carlin, Administrative Assistant

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**I      CALL TO ORDER**

**II      ROLL CALL**

**III      APPROVAL OF THE AGENDA**

Chairman Collett stated that New Business, Application for Appeal, APL090001, will be heard first today followed by the review of Unfinished Business, Application for Special Exception, SER090001. The change in review order is due to the availability of Board members to hear the application for appeal.

Vice Chairman Raley made a **motion** to **approve** the agenda as revised. Mr. DeCaigny **seconded** the motion and the motion **passed** with a vote of 5-0-0.

**IV      APPROVAL OF THE MINUTES**

Vice Chairman Raley made a **motion** to **approve** the minutes of the April 27, 2009 meeting as amended. Ms. Jones **seconded** the motion and the motion **passed** with a vote of 5-0-0.

**V      NEW BUSINESS**

**APL090001**: Request for Appeal from Robert M. Deeb, Jr. of McNair Law Firm on behalf of Dr. Harinderjit Singh. The Community Development Department determined that relocation of kitchens within an existing nonconforming use is not permitted by the Land Management Ordinance. The appellant contends that the Community Development Department erred in its decision and is requesting a reversal of the Administrative decision.

Ms. Heather Colin made the presentation on behalf of staff. Today’s application for appeal is in response to the Administrator’s decision to deny the application to alter the location of kitchens in various units within the Motel 6, located on Marina Side Drive. This is a nonconforming motel. The application is the result of numerous discussions between the staff and Mr. Ed Flynn, a potential buyer/partner, for this property. The property is zoned OL –

Office and Institutional. The property is surrounded by Residential, Planned Developments and other office use. Motel use is not permitted in the OL district. The Motel 6 is operating as a legally nonconforming use and is bound by the requirements in Chapter 7 of the LMO. Chapter 7 specifically addresses nonconforming uses. There are three different types of nonconformities identified in the LMO:

- 1) Nonconforming uses
- 2) Nonconforming site features
- 3) Nonconforming structures

Nonconforming uses include this type of property, retail service in the OL districts, residential in Light Industrial – basically a use that has existed prior to the zoning change that resulted in the nonconformity. Nonconforming site features include things such as parking lots with too small sizes, no wheel stops, and design standards that do not meet the LMO. And nonconforming structures, which may include buildings that are over density or located within setbacks or buffers.

There are provisions in the LMO that allow changes to both nonconforming site features and structures through a waiver process to allow for flexibility and to encourage redevelopment. However, the staff has not received direction to make any changes allowing flexibility for nonconforming uses. The idea is that over time the nonconforming uses will redevelop into conforming uses. Although determinations are not site specific, this interpretation did come about through inquiries related to a specific location.

The Motel 6 was constructed in 1986 as a motel. Information found in archived files indicates that the property was located within the Long Cove Planned Development and removed from the PUD, initially zoned as C-3 (Office Institutional/Low Intensity and then translated to OL – what it is today). Consequently, it was built as a conforming use and met all applicable regulations at the time of approval; however, with the change in the zoning district it became a nonconforming use.

Chapter 7 of the LMO addresses nonconforming uses in very specific ways. Section 16-7-105 indicates that changes to nonconforming uses are limited to repairs and maintenance required to keep them in a safe condition. There has been no evidence presented by the appellant to state that the relocation is necessary to keep them in a safe condition. Furthermore, we have researched the building permits and the evidence suggested that the burners within the kitchenettes were not approved by the Town of Hilton Head Island.

The motel consists of 116 rooms with 39 kitchenettes. The existing kitchenettes consist of cabinets, sink, microwave, refrigerator, and burners. The kitchens would continue to function as an efficiency style kitchen in different units. The reason to relocate the kitchens is to eliminate duplicate kitchenettes in adjoining rooms.

The motel is a commercial structure and there are different standards for the installations of kitchens. Even if the Board of Zoning Appeals reverses the Town's decision, the kitchens as they exist today, may not be able to meet the building code without a great deal of construction changes.

The appellant does have options for redevelopment. He may maintain and renovate the existing provided that all building codes are met. He can go through the Redevelopment Floating Zone and keep his density as well as his nonconforming status. He could apply for a Zoning Map Amendment for a different zoning classification to become conforming or redevelopment.

The Board and the staff discussed the building footprint and the issue of repair and maintenance. At the completion of the staff's presentation, Chairman Collett requested that the applicant make his presentation.

Robert Deeb, Esq., with McNair Law firm, presented statements in support of the application. The applicant discussed the need for interior renovations to the property. At the completion of the discussion, Chairman Collett requested public comments and none were received. Chairman Collett then requested that a motion be made.

Vice Chairman Raley made a **motion** to **reverse** the Administrator's decision on Application for Appeal APL090001 with the condition that there is to be no change to the building footprints, the parking, the entrance, or anything else other than just relocating the kitchenettes. Mr. Brenner **seconded** the motion and the motion **passed** with a vote of 5-0-0.

## **VI UNFINISHED BUSINESS**

**SER090001**: Angela Adams, on behalf of Walis Parra, is requesting a Special Exception for a pool hall, which is classified as Indoor Entertainment, in the Commercial Center (CC) district. The property is located at 2 Southwood Park Drive (Suite C), further identified as Parcel R510 008 000 223A.

Chairman Collett prefaced today's presentation by stating that Board member, Mr. David D'Amico, is recusing himself from the discussion and vote on this application due to his absence from the April 27, 2009 meeting.

Ms. Anne Cyran made the presentation on behalf of staff. Ms. Cyran presented a brief history of the application based on its presentation to the Board on April 27, 2009. At the previous meeting, staff initially recommended approval of the application with the following conditions attached:

1. The applicant shall provide a floor plan to Town staff demonstrating that 80 percent of customer space is dedicated to billiards; and
2. When the applicant renews his business license, he will provide a copy of the business's earnings to the LMO Official, who will ensure that alcohol sales do not exceed fifty percent of the business's total revenue; and
3. The business is not open before 2:00 PM on weekdays; and
4. The applicant does not allow customers to use the back door of the building (except in an emergency) to avoid disturbing residents of Sandalwood Terrace; and
5. Any subsequent indoor recreation use at 2 Southwood Park Drive abides by the above conditions.

At the conclusion of the discussion on April 27, 2009, the Board remanded the application to the staff for further research. The Board questioned whether the Town can legally limit a business's percent of revenue from alcohol sales, and whether a South Carolina alcohol license includes requirements for serving food and providing seating.

The first recommended condition was meant to ensure the business does not become a bar (which is a prohibited use due to 2 Southwood Park Drive's proximity to a residential district. The Town already has procedures in place to ensure compliance with the Land Management Ordinance and to address possible disturbances to neighboring communities. If the Town receives complaints about this business, the Legal Division may audit the business's records to determine whether they are in violation of the LMO.

The third and fourth recommended conditions were meant to ensure that the pool hall would be compatible with the neighboring communities. The staff suggests that any nuisance violations would be enforced by the Town's Public Nuisance Ordinance. This Ordinance allows the Town to revoke a business license if the police are repeatedly called for crimes or noise complaints.

The Board's second concern was whether South Carolina requires businesses that serve alcohol to also serve food or provide seating. The Alcohol Beverage Control Board requires businesses that serve liquor to be able to serve forty hot meals to patrons seated at tables, but these requirements do not apply to businesses that serve only beer and wine.

The applicant has not yet applied for either license for El Patron, but if he does, the public will be notified with a posting in the local newspaper as well as a posting at the business. The public may comment on or protest an application by writing to the Alcohol Beverage Control Board within fifteen days of the publication of the legal notice and within fifteen days of the posting on the applicant's storefront.

The Board and Mr. Gil Guillen, business partner with applicant, Mr. Walis Parra, discussed the possibility of a different location for the business. The applicant stated that he has looked at alternative locations and none seems to be available to him. Mr. Guillen stated that he intends to operate a safe and law abiding business at this location.

At the completion of the discussion, Chairman Collett requested public comments. The following citizens presented statements in opposition to the application: Ms. Dorothy Law, Mr. Elliott Sherrell, and Mr. Charles Young, III.

At the completion of public comments and final discussion by the Board, Chairman Collett requested that a motion be made.

Vice Chairman Raley made a **motion to approve** the Special Exception application for the reasons stated by the staff and also for the reasons previously stated that the Board is being asked to place a prior restraint on opening a business which is actually fully compliant with the LMO, based only on a presumption that a pool hall, as opposed to a restaurant, for example, automatically creates a nuisance which it does not. It may demonstrate that, and with this community as active as it is, I

am sure that the community will assist in policing anything that goes on there and will register the proper complaints. At this point, however, the Board cannot be asked to stop a business from opening when the business is entirely proper under the Town's Code. The Board should, however, reconsider what the staff has proposed as far as dropping some of the recommended conditions. The applicant should provide a floor plan to the staff demonstrating that 80% of its customer space is dedicated to billiards. This is an appropriate condition. When the applicant renews his business license, he is to provide a copy of the business's earnings to the Town's Business License Department to ensure that the business is compliant with the LMO. The applicant should not allow customers to use the back door of the building except in an emergency to avoid disturbing the residents of Sandalwood Terrace. Any subsequent indoor recreational use at 2 Southwood Park Drive should also abide by these conditions. And, finally, a condition that was previously discussed with the perspective owners about any violation shown by an audit would immediately shut down the business pending the resolution of that violation.

The Board is concerned that if there is an audit, and it shows a violation, then demonstrating that the business owner will comply later on would allow the business to remain open for another year. It would be better to stop the business, based on a violation shown by the audit, and resolve the violation shown by the audit prior to the business being allowed to resume operations. Chairman Collett requested statements from the Town staff regarding the contents of the motion.

Brian Hulbert, Staff Attorney, stated that parts of the motion may be problematic as far as being able to be enforced by the Town. If the business owner is in violation of any of the conditions of the business license, the Town could suspend them from operating the business pending a hearing before Town Council 30-days later to revoke a license. This would be the proper step under the Town's Code.

Regarding the issue of using the back entrance of the building, there must be a fire exit available and there must be a place for smokers to smoke outside. The designated smoking area must be a reasonable distance from the entrance so that anyone entering or exiting the business does not have to travel through the smoke. This designated smoking area must not impact the entrance to this business or any other business. It can be an enforcement problem to start to place exceptions that are not based in the law.

Regarding the role of local police, Mr. Hulbert discussed the distinction between enforcing a nuisance violation and a more serious criminal offense.

At the completion of the discussion, Chairman Collett asked Vice Chairman Raley if he would like to amend his motion. Vice Chairman Raley stated that the intention of the proposed conditions was in response to the concerns voiced by the neighborhood.

Mr. DeCaigny stated his concern with the application's ability to meet the all of the conditions of Criteria # 4 (regarding nuisance). Mr. Hulbert stated that the criteria for nuisance can be difficult to determine due to its subjectivity and vagueness. Mr. Hulbert stated that loitering and outside gathering is not a part of the Town's nuisance law.

The Board and Mr. Hulbert discussed the hours of operation for the business particularly related to parking. The hours of operation may not be an enforceable condition for this business as adequate parking does not seem to be a problem. Lastly, the Board and Mr. Hulbert discussed the Town's requirements for identifying the business's revenue sales.

At the completion of the discussion, Vice Chairman Raley made a **new motion to approve** the application for Special Exception. The requirement to submit a floor plan that shows that 80% of the customer space is dedicated to billiards use is appropriate. The second condition is modified as follows: when the applicant renews his annual business license, he will provide a copy of the business's earnings to the Town's Business License Department broken down into revenue from alcohol, food and pool use. Vice Chairman Raley requested that the applicant stand before the Board today and respond to this condition. Business owner, Mr. Gil Guillen, stated his agreement to this condition for the record.

For the record, Mr. Gil Guillen also agreed to the condition that patrons of this business will not loiter at the entrance to the building or the backdoor of the building except to the extent of complying with the Town's smoking ordinance. Chairman Collett requested a second for this motion and the motion **failed** due to the **lack** of a second. Chairman Collett then requested that another motion be made.

Mr. DeCaigny made a **motion** that this application be **denied** based on the fact that it does not meet all of Facts and Conclusions of Law contained in Criteria # 4 (due to the potential hazards to the surrounding residential land; and that a pool hall can create a general nuisance). Ms. Jones **seconded** the motion. The vote on this motion was **tied 2-2**. Chairman Collett broke the tie with a vote **against** the motion. Consequently, this motion **failed**.

The Board discussed the possibility of taking a break to go into Executive Session. The purpose of the Executive Session would be to seek advice from the Board's attorney. Mr. DeCaigny and Mr. Hulbert discussed the definition of nuisance.

Vice Chairman Raley stated his concern with the legal propriety of putting a prior restraint on a business. Mr. Hulbert stated that he will need to research this issue further. For this reason, Chairman Raley stated that this matter should be remanded to the staff for needed research. Vice Chairman Raley presented additional statements regarding the issue of permitted use as this is not an adult entertainment application.

At the completion of the discussion, Vice Chairman Raley made a **motion to remand** this case back to the staff for another 30 days for needed research. The Board will reconsider this issue at its June 22, 2009 meeting. Mr. Brenner **seconded** the motion and the motion **passed** with a vote of 4-0-0.

**VAR090003:**  
**PUBLIC HEARING**

**VAR090003:** The Town of Hilton Head Island, on behalf of the Breakers, is requesting a variance from Land Management Ordinance Section 16-5-809, Permitted Activity in Other Buffer Areas, to construct an emergency access at an angle through an adjacent use buffer. The property is located at 4 North Forest Beach Drive.

Ms. Anne Cyran made the presentation on behalf of staff. The staff recommended that the Board approve the application based on the Findings of Facts and Conclusions of Law stated in the Staff's Report dated May 18, 2009.

Ms. Cyran stated that Fire Chief Lucas requested that an alternate emergency access to the Breakers be constructed when the Coligny Beach Park was redeveloped. The staff determined that the only feasible location for a new access was near the northwest corner of the Breakers site. The applicant is applying for a variance from LMO Section 16-5-809, Permitted Activity in Other Buffer Areas, to construct an emergency access at an angle through an adjacent use buffer.

The staff considered two designs for the potential access. One design would run at an angle through a small portion of the adjacent use buffer and would require removing a little vegetation from the buffer. This design would also require pruning more than 30% of the canopy of a Live Oak tree, which is considered tree removal per LMO Section 16-3-402.A.4. The tree is large, nearly specimen size; it is 57 inches in Diameter at Breast Height (DBH) and multi-limbed Live Oak trees are considered specimens at 60 inches in DBH.

The Design Guide supports the preservation of this tree in its current state. The Guide states two major components of Island Character are: (1) preserving the location of existing trees in parking lots (this tree is adjacent to the Coligny Beach Park parking lot); and (2) preserving existing trees in their natural shape and size.

The alternate emergency access design would run at an angle through a larger portion of the Breakers' buffer and would require removing more existing vegetation from the buffer. This design would avoid pruning any portion of the Live Oak. The staff feels the Live Oak should not be pruned or removed, if at all possible, and therefore is applying for a variance to use the design that has no impacts on the nearly specimen tree.

The Board and the staff discussed the application. The Board agreed with the staff's design recommendation. At the completion of the discussion, Chairman Collett requested that a motion be made.

Mr. DeCaigny made a **motion to approve** Application for Variance VAR090003 based on the required Summary of Facts and Conclusions of Law contained in the Staff's Report. Vice Chairman Raley **seconded** the motion and the motion **passed** with a vote of 4-0-0.

## **VII STAFF REPORT**

1. Mrs. Jayme Lopko presented the Administrative Waivers report.
2. Mrs. Jayme Lopko presented changes to the Rules of Procedure.

Following staff's presentation on the proposed revisions to the Rules of Procedure and discussion by the Board, Chairman Collett requested that a motion be made.

Ms. Jones made a **motion to approve** the staff's revisions to Article III and Article XI, Section 1. Mr. DeCaigny **seconded** the motion and the motion **passed** with a vote of 4-0-0.

Chester C. Williams, Esq., presented statements for the record regarding the issue of an application being withdrawn.

**VIII ADJOURNMENT**

The meeting was adjourned at 4:40pm.

Submitted By:

Approved By:

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Kathleen A. Carlin  
Administrative Assistant

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James Collett  
Chairman