

TOWN OF HILTON HEAD ISLAND
Board of Zoning Appeals
Minutes of the August 22, 2016 2:30pm Meeting
Benjamin M. Racusin Council Chambers

Board Members Present: Chairman Glenn Stanford, Vice Chairman Jerry Cutrer, Steve Wilson, David Fingerhut, John White, Lisa Laudermilch, Robert Johnson

Board Members Absent: None

Council Members Present: Mayor David Bennett

Town Staff Present: Greg DeLoach, Assistant Town Manager; Brian Hulbert, Staff Attorney; Shawn Colin, Deputy Director of Community Development; Teri Lewis, LMO Official; Nicole Dixon, Senior Planner & Board Coordinator; Teresa Haley, Secretary

1. Call to Order

2. Pledge of Allegiance to the Flag

3. Roll Call

4. Freedom of Information Act Compliance

Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.

5. Swearing in Ceremony for New and Reappointed Board of Zoning Appeals Members

Mr. Greg DeLoach, Assistant Town Manager, performed the swearing in ceremony for reappointed BZA members, Ms. Lisa Laudermilch, and Mr. David Fingerhut, and new BZA member Mr. Robert Johnson.

6. Election of Officers for the July 1, 2016 – June 30, 2017 term

Mr. Fingerhut made a **motion** to elect Glenn Stanford to serve as Chairman for the new term. Mr. White **seconded** the motion. There were no additional nominations for the office of Chairman and the motion to elect Glenn Stanford as Chairman **passed** unanimously.

Mr. Wilson made a **motion** to elect Jerry Cutrer to serve as Vice Chairman for the new term. Chairman Stanford **seconded** the motion. There were no additional nominations for the office of Vice Chairman and the motion to elect Jerry Cutrer as Vice Chairman **passed** unanimously.

Chairman Stanford made a **motion** to appoint Ms. Teresa Haley to serve as Secretary for the new term. Mr. Wilson **seconded** the motion and the motion **passed** unanimously.

7. Welcome and Introduction to Board Procedures

Chairman Stanford welcomed the public and introduced the Board's procedures for conducting the business meeting.

8. Approval of Agenda

Vice Chairman Cutrer made a motion to **approve** the agenda as submitted. Mr. White **seconded** the motion. The motion **passed** with a vote of 7-0-0.

9. Approval of the Minutes

Chairman Stanford requested that the term “restricted” covenants be revised to “restrictive” covenants in the minutes of the May 23, 2016 meeting. Mr. Fingerhut made a motion to **approve** the minutes of the May 23, 2016 meeting as amended. Mr. White **seconded** the motion. The motion **passed** with a vote of 6-0-1. (Mr. Johnson abstained from the vote as he was not present at the meeting.)

10. Unfinished Business – None

11. New Business

(Mr. Johnson recused himself from review of Request from Chester C. Williams: Motion for Stay or Postponement in connection with Appeal APL-001006-2016 due to a professional conflict of interest. A Conflict of Interest form was completed and signed, and attached to the record.)

Request from Chester C. Williams: Motion for Stay or Postponement – filed on behalf of ArborNature, LLC, the Appellant in connection with Application for Appeal APL-001006-2016, which was originally scheduled to be heard by the BZA on June 27, 2016. The Appellant moves for a stay or postponement of further action by the BZA until the issues subject to the appeal are decided by the court in the pending lawsuit.

Chairman Stanford cited specific Board of Zoning Appeals Rules of Procedure related to the case. Chairman Stanford asked Mr. Williams to come forward and make a presentation.

Mr. Williams introduced himself and Mr. Taylor as counsel for ArborNature, LLC, the Appellant. Mr. Williams requested that the Board ignore and strike from the record the letter dated August 8, 2016 from the law firm of Ruth & MacNeille P.A. regarding the ArborNature, LLC appeal (the “Letter”), based upon Article IX, Section 2, Paragraph 6 of the Board of Zoning Appeals Rules of Procedure, which states “Public comment is not permitted in a case involving an appeal from an Administrator decision.”

Chairman Stanford asked Mr. Hulbert whether the Board has the authority to strike the Letter from the record. Mr. Hulbert indicated that the Letter is not a part of the record at this point, as neither party to the appeal case has properly introduced it as part of the record. Mr. Hulbert recommended that the Board make a motion and vote on whether or not to consider the Letter.

Chairman Stanford made a **motion** that the Board disregard the Letter and the contents thereof, and proceed on the record as presented. Mr. Fingerhut **seconded** the motion. The motion **passed** with a vote 6-0-0.

Mr. Williams presented the Motion for Stay or Postponement as described in his letter dated July 22, 2016 and provided in the Board’s packet. Mr. Williams stated that there are numerous factual matters that are identical to both the appeal and pending litigation. Mr. Williams noted a cause of action in the pending lawsuit is an alleged violation of the LMO; and that there is no reason for the BZA to make a determination as to whether or not there is a violation of the LMO at the same time that the

issue is before the Circuit Court. The pending lawsuit gives the opportunity for extensive discovery, which involves depositions. Mr. Williams indicated that while the Board has authority to issue subpoenas; there is nothing that explicitly authorizes or prohibits the Board to issue subpoenas for depositions. Mr. Williams stated that he will want to depose witnesses and there is no reason for the duplication of efforts for both the appeal and the pending litigation cases. Mr. Williams noted the possibility that if the decision in the pending lawsuit is adverse to the Appellant, it may render the appeal case moot. Mr. Williams asked that the appeal be postponed until the pending lawsuit is resolved.

The Board discussed the LMO issue versus the private nuisance claim and whether or not there is potential for conflicting decisions. Mr. Taylor stated an allegation in the pending lawsuit against ArborNature, LLC is that it is in violation of the Town's statute in order to support the nuisance claim. Mr. Taylor stated that generally, courts have held that if you are in violation of a local statute, then you are probably a nuisance. Further, the Circuit Court may have to address this issue as it was brought to them. Mr. Taylor indicated the intention was to have the BZA decide this appeal case, however, the pending lawsuit was filed and should be decided in Circuit Court first.

Chairman Stanford asked for the Town's position. Ms. Lewis stated that Staff does not always take a position on a Motion for Stay or Postponement, but several members of the community have expressed concern about the ongoing activities at ArborNature, LLC. The Town has been receiving complaints for more than a year now. Staff believes it is important to consider everybody's rights. Staff believes that the subject of a private nuisance is separate from a violation of the LMO and that the appeal can move forward without delay.

Chairman Stanford stated that proceeding on the merits now can cause substantial unnecessary expense to the parties and could result in contrary decisions of the BZA and the Circuit Court. The Circuit Court is a more effective and efficient court for deciding these issues. Chairman Stanford asked for comments from the Board. The majority of the Board believes it is the Board's duty to decide on the appeal issue regarding whether or not the Appellant's use of the property is in violation of the LMO. The majority of the Board believes the Circuit Court will decide as to the private nuisance issue in the pending lawsuit. These are separate issues and decisions that would not conflict. The Board expressed concern for prolonging this matter.

Vice Chairman Cutrer made a **motion to deny** the request from Chester C. Williams: Motion for Stay or Postponement in connection with the application for Appeal APL-001006-2016. Mr. White **seconded** the motion. The motion **passed** with a vote of 5-1-0.

(Roll: Mr. Wilson, Mr. Fingerhut, Mr. White, Ms. Laudermilch, Mr. Cutrer – for the motion; Mr. Stanford – against the motion.)

Chairman Stanford stated that the Board, acting through the Chairman, has the power to issue subpoenas limited to persons and entities residing within the Town limits. Mr. Hulbert added that it is the discretion of the Chairman to issue subpoenas for witnesses requested by the Board or either of the two parties to the case.

Chairman Stanford asked for a motion that the Chairman of the Board of Zoning Appeals be permitted to issue subpoenas for live testimony, as well as subpoenas for depositions in anticipation and preparation for the hearing on the merits in this matter. Mr. Hulbert advised asking the parties as to their position prior to the Board making a decision. Mr. Williams stated that he thinks that

depositions afford a much more economical and efficient hearing on the merits. Mr. Taylor stated that the Board may want to consider accepting sworn testimony via the Circuit Court depositions for the purpose of the appeal hearing.

At 3:30p.m., Mr. Fingerhut made a **motion** to enter into Executive Session to receive legal advice related to receiving testimony. Vice Chairman Cutrer **seconded** the motion. The motion passed with a vote of 6-0-0.

Mr. Williams stated his objection to a potential fact witness giving legal advice to the Board on the pending appeal. Mr. Hulbert stated he is employed by the Town as legal counsel to Town created public bodies and Town employees, so such communications are protected by attorney client privilege and he should not be a fact witness in the case.

At 3:40p.m., Chairman Stanford called the meeting back to order and announced there was no action taken as a result of the Executive Session. Chairman Stanford stated that the discussion related to the means of providing testimony before the Board for the hearing.

Vice Chairman Cutrer made a **motion** to **approve** the Chairman of the Board of Zoning Appeals, Glenn Stanford, to sign subpoenas for live testimony of witnesses, with the parties requesting the witnesses to provide the names and the relevance of the expected testimony to the case at hand. Mr. Fingerhut **amended** the motion to add that the Board has no authority to sign subpoenas for pre-hearing discovery, just for live testimony. Vice Chairman Cutrer accepted the amendment to the motion. Mr. Fingerhut **seconded**. The motion **passed** with a vote of 6-0-0.

Chairman Stanford requested that the party requesting the subpoena, prepare the subpoena and provide it to him, understanding that the jurisdiction of that subpoena is limited to persons and entities residing within the Town limits of Hilton Head Island.

Vice Chairman Cutrer commented that the number of witnesses that may be subpoenaed is unknown and therefore, suggested that changing the September 26 meeting start time may be appropriate.

Ms. Laudermilch made a **motion** to **approve** the start time of the Board of Zoning Appeals Meeting on September 26, 2016 to 1:00p.m. Mr. White **seconded** the motion. Chairman Stanford asked for any comments by the parties. Mr. Williams stated that he has no objection. Ms. Lewis stated that Town Staff has no objection. The motion **passed** with a vote of 6-0-0.

12. Board Business – None

13. Staff Reports

Waiver Report – None

14. Adjournment

The meeting was adjourned at 3:45p.m.

Submitted by:

Approved by: September 26, 2016

Teresa Haley, Secretary

Glenn Stanford, Chairman