



Board of Adjustment

Meeting Agenda

October 18, 2016 following the Planning Board
Council Chambers, 201 S Main St

1. Approve minutes of the February 16, 2015 meeting
2. New Business
 - A. AP1601 Harden Pedestal Sign. Letter from Keith Whited, City Attorney.
3. Old Business
4. Public comment on non-agenda items

A complete agenda packet is available at www.cityofgraham.com

CITY OF GRAHAM
BOARD OF ADJUSTMENT
February 16, 2016

There was a called meeting of the Board of Adjustment on Tuesday, February 16, 2016 at 7:00 pm immediately following the Planning Board meeting. Members present were as follows: Dean Ward, Bonnie Blalock, Bill Teer, Ricky Hall and Michael Benesch. Staff members present were Nathan Page, City Planner, Martha Johnson, Zoning/Inspections Technician, and Jenni Bost Code Enforcement Officer.

Chair Ricky Hall called the meeting to order, explained the function of the Board. Martha Johnson, Notary Public swore in Nathan Page and Sam Unsworth.

Ricky Hall gave the invocation.

1. Bonnie Blalock made a motion to approve the minutes from the December 15, 2015 meeting, second by Ricky Hall. All voted aye.
2. New Business. VR1601 Washington Lots- An application for a variance from the setback requirements for the creation of two new lots. Nathan Page said this was an application for a variance at 909 Washington Street which is the current zoning. Mr. Page stated that the owner wants to divide the property for a future sale. The distance between the two buildings on the current property is 16 feet which does not meet the side setback requirement of 20 feet. Access easements will be provided for both buildings in the rear of the building from North Main St and between the buildings where the variance is being requested.

Sam Unsworth with Richard Jones Real Estate 2040 S Church Street Burlington, NC represented the applicant. Mr. Unsworth stated with the City of Graham and DOT's permission the owner acquired 30 feet of Main Street which had been abandoned and brought it into their property. This gives better egress from the back to come around the building to service the old building (the machine shop). The owners would like to have this variance approved in order to potentially sell the building in the future.

Michael Benesch asked Mr. Unsworth what was the distance from the road to the dock and Mr. Unsworth said approximately 120 to 125 feet. Mr. Benesch had concerns if a tractor trailer was to come around from that direction that the driver would need to enter into the flow of the traffic to back up to that dock. Bonnie Blalock asked if when you come around toward the feed store, if there is truck traffic would it impede on their parking or would there be any kind of issue between the feed store and the trucks coming through loading or unloading their items. Mr. Unsworth there would not be any because they wouldn't go over the property line. Dean Ward asked if there was actual survey or plat that shows property lines and Mr. Unsworth gave him a copy. Mr. Benesch asked how much was the variance asking for and Mr. Unsworth said two feet on each side. Mr. Hall said it was two feet on each side, four foot overall.

Dean Ward referred to a previous training at one of the Board's meetings. Mr. Ward wondered if Mr. Unsworth's appearance at this meeting has standing for the owner or does the owner need to be available to have standing? Mr. Page said the owner does have to sign the application but he asked if a real estate agent can act as in the stead of the owner. Mr. Unsworth stated that he didn't sign the application and Mr. Page said we have a valid application.

Mr. Hall said that Mr. Unsworth has presented himself here tonight in good faith and that he has a legal binding contract with the property owner to represent his best interests. He felt the applicant went to extra mile, they have added footage to the property to enable trucks to come and go on the property and not impede on the adjacent neighbor's property.

Ricky Hall closed the hearing. After some discussion Michael Benesch mad a motion to approve, second by Ricky Hall. The vote was 4 to 1 for approval with Dean Ward dissenting.

The following five Findings of Fact and four Conclusions of Law were adopted with the motion:

FINDINGS OF FACT

1. The property that is the subject of this variance request, 909 Washington St, is zoned Light Industrial (I-1).
2. The property contains two industrial buildings that, according to the tax records, were constructed in 1889. The two buildings are separated by a space of approximately 16 feet, according to the applicant and aerial photographs.
3. The minimum side yard width in the I-1 zoning district is 50 feet adjacent to a lot zoned residential or any residence on a lot otherwise zoned, or 20 feet elsewhere, as outlined in Section 10.245 of the *City of Graham Development Ordinance*.
4. An application for a variance was filed with the City Planner on January 5, 2016. According to the application, the property owner desires to subdivide the property, with the new property line running between the two buildings.
5. If the property is subdivided, neither existing building will meet the minimum side yard width of 20 feet required by the *Development Ordinance*.

CONCLUSIONS OF LAW

The Board of Adjustment shall vary any of the provisions of the ordinance upon a showing of all of the following:

1. Unnecessary hardship would result from the strict application of the ordinance. It shall not be necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.

Under the strict application of the ordinance, the property would not be able to be subdivided because the existing buildings would not meet the minimum side yard setback of 20 feet, since the buildings are only 16 feet apart.

2. The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance.

The buildings were built in 1889 according to the tax records. The City of Graham first adopted zoning regulations in the 1950s. The spacing between the buildings is peculiar to the property and is not common to the neighborhood or the general public.

3. The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.

The applicant/property owner did not construct these buildings with only 16 feet between them. The applicant/property owner is seeking to subdivide the parcel so that each building will be on a separate parcel.

4. The requested variance is consistent with the spirit, purpose, and intent of the ordinance, such that public safety is secured, and substantial justice is achieved.

The requested variance will not change the existing condition of 16 feet of spacing between the two buildings, but will allow the applicant/property owner to request that the parcel be subdivided.

DECISION

For the above reasons, the Board of Adjustment grants the variance that is the subject of this application.

3. Old Business. There was none.
4. Public comment on non-agenda items. There was none.

The meeting was adjourned.

Respectfully Submitted,
Martha Johnson, Secretary



Notice of APPEAL

P.O. Drawer 357
201 South Main Street
Graham, NC 27253
(336) 570-6705
Fax (336) 570-6703
www.cityofgraham.com/planning

Any person who has standing under G.S. 160A-393(d) may appeal any order, requirement, decision or determination made by an administrative official in the enforcement of any City ordinance that regulates land use or development. This Notice of Appeal must be filed with the City Clerk no later than 30 days from the date the decision was received.

Decision that I am appealing

Date I received the decision: 10-15-2015

Name and Title of official who made the decision:

NATHAN PAGE CITY PLANNER

Name, Title

Type of decision being appealed:

- ☐ Certificate of Appropriateness ☐ Civil Citation
☐ Landscaping, alt methods ☐ Notice of Violation
☒ Sign Permit ☐ Site Plan, administrative amendment
☐ Stormwater Permit ☐ Zoning Permit
☐ Other _____

Brief description of the order, requirement, decision or determination that is being appealed:

54 OVERLAY DISTRICT
NO PEDASTAL SIGNS
MONUMENT ONLY

Reason for Appeal

Describe the reason you are appealing this decision.

TRYING TO MAKE USE
OF EXISTING PEDASTAL
ON PROPERTY

RECEIVED
APR 07 2016
CITY OF GRAHAM
INSR. / P.Z.

Appellant

☐ Property Owner Other BUSINESS OWNER

Name: GARY EVANS

Mailing Address: 141 E. HANDEN ST.

City, State, Zip: GRAHAM NC 27253

Phone # 336-221-0171

Email: 54 DETAILING @ GMAIL.COM

I, the appellant, hereby appeal to the Board of Adjustment from the order, requirement, decision or determination as described in this application.

I certify that all of the information presented by me in this application is accurate to the best of my knowledge, information and belief.

GARY EVANS 4-7-16
Signature of Appellant Date

Property involved with Decision

Street Address: 141 E HANDEN ST

Tax Map#: _____ GPIN: 8884240295

Current Use: DETAIL SHOP

Property Owner: STOP & CO OF NC

Mailing Address: 4401 UNITED ST

City, State, Zip: GREENSBORO NC 27407

Office Use Only. DEVID#

MEMORANDUM OF LEGAL OPINION

To: Honorable Ricky Hall, Chair -City of Graham Board of Adjustment
Honorable Michael Benesch, Honorable Bonnie Blalock, Honorable Bill Teer, and
Honorable Dean Ward

From: Keith Whited, Graham City Attorney

Date: October 3, 2016

RE: **AP1601 – Gary Evans Sign at Business known as Highway 54 Detailing**

I have been asked to render an opinion regarding the procedural stance of the Appeal of the Ruling of the City Planner, to an Application for use of Non-Conforming sign at the corner of Hwy 54 (East Harden Street) and North Marshall Street.

The procedural facts are as follows: On April 7, 2016, the Applicant “appealed” a decision of the City Planner and Zoning Enforcement staff that denied him permission to use an existing sign at his business known as Highway 54 Detailing. This is same decision that was made in a series of hearings on November 17, 2015 and December 15, 2015, when the applicant, Gary Evans, sought to obtain the use of the same sign for the same reason.

In 2015, applicant Gary Evans, obtained a sign permit for a window sign on his new rented business location. However this sign permit did not allow the use of the pole sign at the corner of the streets. This location is a former gasoline station, which had been left vacant and unused for many years. The signs at this location do not conform to the Highway 54 overlay district, which only allows monument signs for new businesses. This sign is more than 15 feet tall, and has a replaceable skin. Gary Evans replaced the skin on the non-conforming sign without permission. The City, in 2015, notified the business owner that the pole sign was non-conforming and requested that it be removed. The lessee of the property and business owner appealed the decision of the City Planner, in case file **AP1501**. At the same time, the property owner applied for a Conditional Rezoning for the property, which if approved would allow the City Council to set parameters of its use of the sign, but also may cause the city to establish other conditions of its use. On November 17, 2015, the Board of Adjustment began the hearing on the Applicant’s appeal, took evidence and received Exhibits into the record. On December 1, 2015,

just before the City Council Meeting, the property owner withdrew his request for a conditional rezoning. On December 15, 2015, the appeal in case number **AP1501**, was heard by the Board of Adjustments. The Board made findings of fact, admitted evidence, and rendered a judgment. The Applicant's Appeal was denied.

Upon denial of the appeal, the applicant's proper legal remedy was to seek an appeal to the North Carolina Civil Superior Court in Alamance County. He did not give notice of appeal and did not perfect any appeal to the Courts.

On April 7, 2016, the former applicant, Gary Evans, the business owner and lessee of the property filed a second appeal of the same decision of the City Planner, this is in the current case file **AP1601**.

Discussion

The hearing on the original Appeal AP1501, beginning November 17, 2015 and concluding on December 15, 2015, was conducted pursuant to G.S. 160A-388 (e2), which is as follows:

(e2) Quasi-Judicial Decisions and Judicial Review. –

(1) The board shall determine contested facts and make its decision within a reasonable time. Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record. Each quasi-judicial decision shall be reduced to writing and reflect the board's determination of contested facts and their application to the applicable standards. The written decision shall be signed by the chair or other duly authorized member of the board. A quasi-judicial decision is effective upon filing the written decision with the clerk to the board or such other office or official as the ordinance specifies. The decision of the board shall be delivered by personal delivery, electronic mail, or by first-class mail to the applicant, property owner, and to any person who has submitted a written request for a copy, prior to the date the decision becomes effective. The person required to provide notice shall certify that proper notice has been made. (2) Every quasi-judicial decision shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to G.S. 160A-393. A petition for review shall be filed with the clerk of superior court by the later of 30 days after the decision is effective or after a written copy thereof is given in accordance with

subdivision (1) of this subsection. When first-class mail is used to deliver notice, three days shall be added to the time to file the petition.

The decision of the Board of Adjustment was made at a noticed meeting on December 15, 2015, and served upon the applicant, Gary Evans, and the property owner. Thereafter, any interested party was allowed to obtain judicial review of the proceeding in Superior Court on or before January 15, 2016, but no time after January 18, 2016.

Instead of seeking judicial review of this hearing, the applicant filed document that purported to “appeal” the same decision of the City Planner and Zoning enforcement personnel. This second appeal, in my opinion, is barred by the doctrine of *res judicata*. This common law doctrine has been described in many cases, most recently in *Basmas v. Wells Fargo Bank Nat’Lass’N*, 763 S.E.2d 536, ___N.C. App.__(2014). The court described the doctrine in *Basmas* as follows: ‘Under the doctrine of res judicata, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.’ The essential elements of res judicata are: (1) a final judgment on the merits in an earlier lawsuit; (2) an identity of the cause of action in the prior suit and the later suit; and (3) an identity of parties or their privies in both suits. ‘When a court of competent jurisdiction has reached a decision on facts in issue, neither of the parties are allowed to call that decision into question and have it tried again.’ ” *Nicholson v. Jackson Cty. School Bd.*, 170 N.C.App. 650, 654–55, 614 S.E.2d 319, 322 (2005) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993), and *Green v. Dixon*, 137 N.C.App. 305, 308, 528 S.E.2d 51, 53 (2000) (other citations omitted)).

This doctrine of common law has been used in the context of a Board of Adjustment hearing, which is a quasi-judicial hearing, of an appointed board, in *Fantasy World, Inc. v. Greensboro Board of Adjustment and City of Greensboro*, 592 S.E.2d 205, 162 NC App. 603 (2004).

In this case, the City of Graham Board of Adjustment issued a final judgment on the merits of Mr. Evans’ application and appeal on December 15, 2015, and this final judgment completely disposed of the issue. This same issue was attempted to be re-heard by filing this

appeal, **AP1601**, was on the very same issues and between the very same parties as the ruling on **AP1501**.

Recommendation

It is my recommendation that the Board of Adjustment, at the next hearing session, vote to dismiss the appeal as having been previously decided on December 15, 2015 in Case Number **AP1501**.