



# BOARD OF ADJUSTMENT *MINUTES*

**Thursday, November 30, 2023 at 7 PM**  
Town Council Chambers  
900 7th Avenue · Garner, North Carolina 27529

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## **I. CALL TO ORDER**

Vice Chair Wayne Brewer called the meeting to order at 7:01 p.m. on Thursday, November 30, 2023, in the Town Council Chambers.

Mr. Brewer then asked that the Secretary call roll.

## **II. ROLL CALL**

The Secretary, Joseph Linsky, conducted a roll call.

The following members were present: Joseph Gupton, Judith Ratcliffe, Robert (Wayne) Brewer, Willie Dupree, and Richard Squires.

The Board Secretary informed all present that there were five members present thus meeting quorum.

Jeff Triezenberg, Planning Director; Reginald Buie, CZO, Zoning Administrator; Joseph Linsky, Planner I; and Thomas Waltersdorf, Planning Technician were present representing the Planning Department. Terri Jones, Town Attorney, was also present along with David Gadd, Attorney to the Board.

## **III. INTRODUCTION**

Mr. Brewer welcomed everyone to the meeting. Mr. Brewer asked the members to review the minutes from the previous meetings.

#### **IV. MINUTES**

Mr. Brewer introduces the minutes for review from pervious cases A-21-03 5020 Winterlochen Road at the 8/26/21 meeting, and A-23-01 0 Spring Drive at the 5/25/23 meeting. Mr. Brewer asks if anyone has any questions or issues. No one speaks up. No changes necessary either. Ms. Ratcliffe mentions she did get the 8/26/21 minutes. Mr. Linsky mentioned that it was sent digitally because it was 200+ pages long and it was appealed to a higher court.

Mr. Brewer asks for a motion to approve the minutes. Ms. Ratcliffe moves to approve the minutes. Mr. Dupree seconds the motion. Mr. Brewer presents a vote on the motion. The ayes pass it unanimously.

#### **V. SWEARING IN NEW MEMBERS**

The Secretary mentions that Mr. Brewer and Mr. Squires would need to be sworn in, as they were not sworn in at the previous meeting.

Mr. Brewer is sworn in. Mr. Gupton is sworn in. Mr. Squires is sworn in.

#### **VI. ELECTION OF CHAIR/VICE CHAIR**

Ms. Ratcliffe nominates Mr. Brewer for Chairman. Mr. Squires seconds the motion. The Ayes pass unanimously. Mr. Brewer is the new Chairman.

Ms. Ratcliffe nominates Mr. Dupree as Vice-Chair. Mr. Brewer and Mr. Squires second the motion. The Ayes pass unanimously. Mr. Dupree is the new Vice-Chair.

#### **VII. OLD/NEW BUSINESS**

Mr. Brewer reminds the Board about the nature of quasi-judicial proceedings.

The Secretary calls the first and only case of the night: A-23-02 7950 Bryan Road. The case is an appeal by Joshua Mitchell to allow auto repair use to continue at a residential property. The property is identified as Wake County PIN: 1720102449.

Mr. Gadd reminds the Board that since the case is an appeal of a staff decision, rather than a variance, there is not the same test criteria to satisfy in order to reach a decision. The Board is to look at the evidence presented and determine if there is material evidence in the record to

either grant or deny the appeal. Additionally, only a simple majority would be required to grant the appeal.

Mr. Buie, Zoning Administrator of the Town, is sworn in by Mr. Brewer prior to presenting testimony.

Mr. Buie presents the facts of the case from the Staff Report to the Board. The basis for the staff decision comes from Section 2.3.5(A) of the UDO detailing nonconforming uses. He also provides the legal information from General Statute: §160D-1402(c) providing standing for Mr. Mitchell to appeal the order of the Town. After the presentation, Mr. Buie asks the Board to ask questions of him.

Mr. Squires asks if the grandfather clause was triggered due to the death of the property owner.

Ms. Ratcliffe asks if 180 days have passed since the business ceased to exist. No more questions are asked of Mr. Buie.

Mr. Brewer asks if anyone is present to speak in favor of the appellant.

Mr. Mitchell steps forward to speak, and is sworn in by Mr. Brewer. He states his close relationship over the years with the Wall family and their auto shop. Mr. Mitchell believed that him taking over the business would be allowable and trigger the grandfather clause of nonconformity. He states that Ms. Wall is agreeable to the continued operation of the business. Mr. Mitchell says he has made changes to the property since Mr. Buie issued a violation. Mr. Mitchell asks if he can present photos, bill statements, and a letter from Ms. Wall as evidence.

Mr. Gadd reminds the Board that a letter from Ms. Wall would be considered hearsay evidence which cannot be cross-examined. However, they may accept and receive the letter, but limit the weight and credibility of that based on what is presented.

Mr. Brewer discloses for the record his familiarity with the Wall family but states he has not spoken to them in years.

Mr. Mitchell proposes conditions and changes that he will make if he is allowed to continue operating this auto repair facility.

Ms. Ratcliffe asks if the appellant has any proof of a lease agreement. Mr. Gupton asks if work ever stopped at the property. Mr. Mitchell states that Dream Customs took over work initially at the shop following the lifting of Covid work restrictions by Governor Roy Cooper. Dream Customs workers were former workers of Mr. Wall. Dream Customs has since moved to a new location, and Mr. Mitchell says he then took over the property and auto repair use in 2022.

Mr. Dupree and Mr. Brewer ask for details regarding the nature of Mr. Mitchell's work. Mr. Gupton asks for proof of a lapse of 180 days of continuous operation.

Mr. Dupree asks if Mr. Mitchell signed a lease agreement as a business or as an individual. Mr. Mitchell says he has a lease as an individual.

Mr. Gadd explains the definition of a non-conforming use to the BOA members. Mr. Gadd suggests that the Board finish any questions for Mr. Mitchell prior to discussion.

Mr. Gupton asks for proof whether a lapse of 180 days occurred. The question of water service and water meter removal is posed in regards to the business being not in use. Mr. Dupree asks if a lease or payment to Ms. Wall exists.

Mr. Mitchell makes his final statement presenting his case, and thanks the Board for their time and consideration.

Mr. Brewer asks if anyone else would like to speak in support, and no one steps forward. He then asks if anyone would like to speak against the appeal, and again no one steps forward.

Mr. Squires poses a question to the legal definition of a business operating/opening. Mr. Gadd reminds the Board that "abandoned" or "discontinued" is the standard which they should consider for the non-conforming use.

Mr. Dupree asks one more question of Mr. Mitchell where he asks for arrangements of changes he has made to minimize traffic. Mr. Mitchell states that he has removed the Mini Coopers from this property and has not stored them on the property anymore. He states he does not do public work, so customers would not be coming to the property.

Mr. Gadd points to UDO language of prohibited use: "automotive repair including engine/body or other repair or repainting of any vehicle owned by those not residing at the address." He asks the Board if they have further questions for Mr. Buie.

Ms. Ratcliffe references Ms. Wall's statement that the business discontinued operation in 2020. Mr. Buie said he searched and found that Dreamers Customs claimed to operate at that address, but no dates were available, and no Zoning Compliance Permit was issued. No record of a legal business operation exists. Mr. Buie says that all he had was Ms. Wall's word that the business closed in 2020. He says if the business had continued to operate as non-conforming, it could have continued, but that when Mr. Wall opened the business it may not have been required to have a Zoning Compliance Permit. However, once the business ends for 180 days, the grandfather clause would no longer apply. Mr. Buie says that Ms. Wall stated her husband's illness was the result of the business closure, and not Covid.

Mr. Buie states that there is no legal record of Dreamers Customs existing at that location, so it is hard to prove a business continued to operate. Mr. Dupree asks about residency

regarding working on a vehicle. Mr. Buie states that in a residential zoned area, only a resident/tenant/owner may operate on their own vehicles. Mr. Buie says that the non-conforming use could continue without a lapse of 180 days.

Mr. Squires asks if the equipment in the photos is Mr. Wall's or Mr. Mitchell's equipment. Mr. Mitchell says that he was left all the equipment from Mr. Wall, so it is now his.

Mr. Brewer asks if a continuance could be issued to gather more information. Mr. Gadd says they may, but it is not recommended to continue for various reasons. He suggests they weigh the evidence they are presented with and make a decision based on that.

The Board closes the public portion of the meeting. Mr. Brewer asks them to look over the application and call for a vote on completeness. Ms. Ratcliffe proposes a motion, and Mr. Dupree seconds. Mr. Brewer states that completeness has been approved. Ms. Squires asks about the potential for modification of the appeal. Mr. Gadd says it is not a good fit because of the nature of the appeal.

Mr. Squires says he does not believe that the business was abandoned or discontinued. He and Ms. Ratcliffe debate the issue. Mr. Triezenberg moves forward to present the definitions from the UDO Article 2.2.1. of "abandon" and "discontinued." Ms. Ratcliffe then says she does not believe it was abandoned or discontinued by definition. Mr. Brewer agrees that Ms. Wall allowed the business to continue through others.

Mr. Gupton asks if the appeal is granted, what would need to be completed to maintain compliance, or get into compliance. Mr. Gadd mentions that it would need to remain in operation as a non-conforming business without further 180 day lapses.

Ms. Ratcliffe questions why no one has come forward to speak out in favor of the Town's decision and against Mr. Mitchell. She says it does not seem to be an issue.

Mr. Brewer suggests a final vote.

Ms. Ratcliffe moves to reverse the decision of the Planning Department. Mr. Squires seconds. Mr. Gadd interrupts to say there needs to be a finding of fact supporting their decision as part of the motion presented. Ms. Ratcliffe moves to reverse the decision based on the evidence presented that the business did not cease operation for more than 180 days.

Mr. Triezenberg states that Staff needs to know how they are arriving at their interpretation. Ms. Ratcliffe says that the information provided by the applicant such as Google reviews and light/electricity bills helped inform their decision. Mr. Dupree mentions that although it is considered hearsay, the letter from Ms. Wall helped him make his decision.

Again, the motion is introduced with Mr. Squires seconding. Mr. Brewer calls for a voice vote for all those in favor of the motion to reverse the decision of the Planning Department. All five Board members say aye. No one responds when asked if anyone is opposed.

As a result, the BOA overturns the decision of the Planning Department Staff based on the appeal.

The Town Attorney, Ms. Terri Jones, speaks on the nature of Quasi-Judicial Hearings—Rulings on Objections, and roles in Land Use Decisions/Variances. She says issues of standing and objections may come up with contested cases with multiple parties. She says in those cases, the Board would consider the issue of standing as well as objections and the quality of the evidence.

Ms. Ratcliffe mentions that there are a few new members of the Board and thinks Ms. Jones's guidance on finding of fact is helpful. Mr. Squires asks if there is an ethics statement they should uphold. He suggests that it would be nice to have a statement of such as part of their materials/packet. Ms. Jones says she can pass along any updates from the UNC School of Government as it comes up to help them perform their duties. Mr. Linsky mentions training materials from the UNC SOG that may be useful to members.

## **VIII. CLOSING**

Mr. Brewer brings the meeting to a close at 8:29 PM. Mr. Squires brings forth a motion to adjourn. Ms. Ratcliffe seconds.

The meeting is adjourned.

Minutes submitted by: Thomas Waltersdorf