

BOARD OF ZONING APPEALS MEETING
April 19, 2012

| <u>Members Present</u> | <u>Members Absent</u> | <u>Staff</u> |
|------------------------|-----------------------|------------------|
| Mr. Dyer | Mrs. Evans | Alan Spencer |
| Mr. Campbell | | Ken Gillie |
| Mr. Bralley | | Renee Blair |
| Mr. Hiltzheimer | | Emily Scolpini |
| Mr. Snipes | | Christy Taylor |
| Mrs. Rich | | Clarke Whitfield |

Chairman Mr. Gus Dyer called the meeting to order at 10:00 a.m.

Mr. Snipes arrived at 10:06 a.m.

I. ITEMS FOR PUBLIC HEARING

- 1. Variance Application Number PLVAR20120000111, filed by Paul Hughes, requesting a variance from Article 3E, Section F, Item 2a(1), of Chapter 41 of the Code of the City of Danville, Virginia, 1986, as amended (City of Danville Zoning Ordinance) at 450 Locust Lane, otherwise known as Grid 2817, Block 026, Parcel 000040 of the City of Danville, Virginia, Zoning Map. The applicant is requesting a variance to allow a 16' front yard setback where 20' is required.*

Forty-eight (48) notices were mailed to surrounding property owners. Five (5) respondents were unopposed; zero (0) respondents were opposed.

Open the Public Hearing.

Present on behalf of the request was Mr. Paul H. Hughes. Mr. Hughes stated I am applying for a variance to have a 4'x6' awning on the front slab porch.

Mr. Dyer asked what type of awning is this?

Mr. Hughes responded it is going to be a metal awning from JW Squire.

Mr. Dyer asked is this actually required for an awning?

Mr. Gillie responded yes, because of the setback area.

Mr. Dyer stated I thought awnings were allowed.

Mr. Gillie stated it is a cover over the porch. The porch itself can extend 4' into it. You cannot put a cover over top of it. If you put a cover over top of it, it has to meet the minimum setbacks.

Mr. Dyer asked even for an awning?

Ms. Blair responded it is not a retractable awning. It is permanent.

Mr. Gillie stated you can have an open unenclosed porch, deck, something like that in the setback area; but once you roof over top of it, it is considered part of the structure and that structure has to meet the minimum setbacks.

Mr. Nicholas asked if the awning were retractable would it have to meet the setbacks?

Mr. Gillie responded technically yes, because it is still a cover that extends into the setback. The issue with the permanent structure is once they are there, they then become enclosed, they put walls around them, and they put down additional floor space. Now you've got a floor space encroachment into the setback area. That is why we allow unenclosed, open porches, decks, things like that so they cannot be enclosed.

Mr. Dyer asked is he required to get a building permit?

Mr. Gillie responded if it is a permanent structure with posts and everything else, yes.

Mr. Dyer asked does this have posts underneath it or does it just hang off of the house?

Mr. Hughes responded it will be attached to the house.

Mr. Gillie stated he will still need a permit because it is attaching to the house.

Mr. Dyer stated Mr. Hughes, what we need from you is for you to explain to the Board why you feel like that you need to be granted this variance and why you meet these 4 criteria. There are 4 criteria that you need to meet. Was that explained to you?

Mr. Hughes responded it was given to me, yes sir. I'll tell you what the reason was. I didn't think about doing it. It is a new house. When the individuals moved in they said that when it is raining and they open the door, it rains in the living room especially when the wind is blowing from the west. Every time they open the door to go outside if it is raining, it rains in the house. I had not contemplated doing this when I built the house. After they moved in, they discovered that it was a little problem. I told them that I would see what I could do about it.

Mr. Dyer asked so you own the house?

Mr. Hughes responded yes, sir I own it. It is a rental house.

Mr. Dyer asked but you don't live there?

Mr. Hughes responded right, and I want to make it as comfortable as possible for them.

Mr. Nicholas asked does anyone else on the street have awnings?

Mr. Hughes responded several houses have awnings going toward the river from mine on the same side.

Mr. Dyer asked did you go out and measure how far the house is off of the street? What are you using to determine that the house is only 20' off of the street?

Miss Scolpini responded we measured from the front of the house to the property line.

Mr. Dyer asked and it is exactly 20'?

Miss Scolpini responded yes.

Mr. Dyer asked did you measure any of the other existing houses on the street to see if they were closer than 20' to the property line?

Miss Scolpini responded the lots adjacent are both vacant and the houses across the street are all further than 20'.

Mr. Dyer stated ok, I am looking at this picture here and it appears that if you go past Ivy Street those next 2 houses are closer than 20' to the property line. I know that at one point if you were in an existing neighborhood and the houses were closer than what the Code required you were allowed to come out even with those houses. Is that still in effect?

Mr. Whitfield responded I don't believe so.

Mr. Dyer asked is that something that was changed?

Ms. Blair responded you can do the average of your adjacent parcels. In his case those are vacant.

Mr. Dyer asked but not the average of the street?

Mr. Gillie responded by reading the Code section.

Mr. Nicholas asked the measurements, is that 20' from the beginning of the house or 20' from the end of the porch?

Miss Scolpini responded 20' from the house.

Mr. Nicholas asked did you measure the porch to the street?

Miss Scolpini responded it is within the 4' allowed into the setback. Coming into the setback, he is allowed 4'.

Mr. Nicholas asked how far into the setback is he going? Is it exactly 4'?

Miss Scolpini responded it is 4'.

Mrs. Rich asked is that from his property line or even with the City's extended right-of-way?

Mr. Gillie responded the end of the right-of-way and his property line are the same line, so it is measured from what is the end of our right-of-way and his front property line, that common point where the 2 intersect.

Mr. Dyer asked to the best of your knowledge, was this picture actually taken during construction? I can't see a porch on the front of the house, so it is hard to judge.

Miss Scolpini stated it is covered by the shadow.

Mr. Hughes stated the main concern is to try and keep the rain out of the house when they open the door.

Close the Public Hearing.

Mrs. Rich stated seeing that it is just hanging off of the house; I move that we approve the variance. There are no poles holding it up or nothing that he could eventually put a structure around.

Mr. Dyer stated I am going to ask that when a motion is made that you please address the 4 criteria. If your motion is going to agree with the Planning staff's recommendation, then you can site that as your reasoning. If you are going to recommend something that does not agree with the Planning staff I would like for you to either use the evidence presented by the applicant or your own evidence to support your motion.

Mrs. Rich stated the criteria that this is shared by other properties, it seems that there are other awnings up, so I feel like he does meet that. The criteria of strict application, doesn't put it on the homeowner but since it is a rental property it does on the people having water in their living room. Since the property on both sides is vacant, it is not going to affect them. The City agreed with the last.

Mr. Dyer asked is that a motion to approve?

Mrs. Rich responded that is a motion to approve the variance.

Mrs. Rich made a motion to approve Variance Application PLVAR20120000111 stating reasoning for meeting the 4 criteria as mentioned above. Mr. Hiltzheimer seconded the motion. The motion was approved by a 4-1-1 vote (Mr. Snipes abstained and Mr. Nicholas voted in opposition).

Mr. Gillie stated I am going to put on record that staff may appeal that.

- 2. Variance Application Number PLVAR20120000112, filed by BKH Properties, LLC, requesting variances from Article 3M, Section E. 2 b. and Article 8, Section C, Item 1(a), of Chapter 41 of the Code of the City of Danville, Virginia, 1986, as amended (City of Danville Zoning Ordinance) at 1307 South Boston Road, otherwise known as Grid 3718, Block 006, Parcel 000001 of the City of Danville, Virginia, Zoning Map. The applicant is requesting variances to allow a 5' side yard setback where 20' is required, to allow a 12' side yard setback where 30' is required and to allow a 16' two-way drive aisle where 24' is required.***

Twenty-six (26) notices were mailed to surrounding property owners. One (1) respondent was unopposed; three (3) respondents were opposed.

Open the Public Hearing.

Present on behalf of the request was Mr. Bill Harville, property owner and Mr. Bryant Gammon, Engineer. Mr. Gammon stated I guess first of all, I received the report that staff put together and the report, let me just be frank with you, I got the report yesterday afternoon about 3:00. I got the report and went through it on the phone with Mr. Gillie. My understanding is that this is a legal issue and from what the court has said in the past about you being able to show that there is something unique and specific about the particular parcel itself that actually allows you to get a variance is what we intend to deal with. I am just going to go ahead and actually start off with the first one. I am going to pass out something.

Mr. Dyer stated we do have a copy of that.

Mr. Gammon passed out a written statement addressing the 4 criteria.

Mr. Gammon read criteria 1.

Mr. Dyer stated there seems to be some conflict between the plats that we have presented and your application. Can you show us where you are planning to have the 5' yard setback as opposed to the 20' setback?

There was discussion about the layouts included in the packets.

Mr. Gammon stated just so you know, when I first put this together we had not done a boundary survey. We used the GIS information to be able to fit in our layout, to make sure that it would work from a project point of view. We went out in the field and done a boundary survey and we also did a topographic survey to be able to obtain the elevations to do a design on this facility. What you see there, where I have a red line has the grading plans on it. That actually is a layout on top of the real boundary of the property and is a grading plan using actual elevations of the site. I will go more into that as we go along answering the specific 4 issues. To answer your question, because at the time I put this together I only had the GIS information of a boundary, which is not an exact thing. I did not know for a fact that I was going to be able to get 20', which is actually what I am showing here today. I asked for somewhat less. I asked for 16'. As you are looking at the property on the left hand side there are 2 residential pieces that are behind the existing store that is upfront on 58. Those lots that are back there are residentially zoned. We are supposed to have a 30' side yard setback off of them. Normally in this district, if were not a residentially zoned area you would only have to have a 20' setback. Because it is residential you have to have a 30'. At this time what I am proposing actually is a 20' on the left hand side. On the right hand side you have an Advanced Auto Parts store that is zoned HR-C. The current Zoning Ordinance as it is written does not allow for anything in terms of a reduction because you are adjacent to HR-C. It is irrelevant. You still have to have 20'. We are not putting a proposed building in that setback. We are only asking to take our dumpster and put it inside that setback. It is up against an auto parts store. From a point of view of looks, from a point of view of what anybody could imaginably be upset about by having that there, in my opinion should not be an issue.

Mr. Nicholas asked where exactly are you proposing to put this dumpster?

Mr. Gammon showed the proposed location of the dumpster on the layout.

Mr. Dyer called for a 5 minute recess.

Mr. Dyer called the meeting to order at 10:25 a.m.

Mr. Gammon stated the topography of the lot from the back to the front slopes pretty steeply. If you look at what is exists today, you have the Advanced Auto Parts store on the right hand side. The grave difference between the parking lot and our lot is about a 4' drop into the Advanced Auto store. We are limited to where we can access the roadway. We can only access the roadway at this front entrance here because this is the only one that we have an easement for. Without getting into a lot of details about VDOT access management roadway regulations and the actual laws behind that, when this was going through they only allowed them 1 connection point and staff has represented it as a benefit for us, but in reality it actually plays are part into limitations for us, because that is our only point of access. We have to tie into that point on that existing elevation that we are at. If you think about this as a science experiment or has an understanding that you have fixed things, what is fixed? I have a fixed lot width and I will go on to show in a few minutes that the fixed lot width is unique in that it is narrow compared to any other lots around that are zoned HR-C. You also have a topography issue that runs from the back of the lot to the front. We also have a point that we have to connect at. We have 3 fixed items that we cannot change whatsoever that is unique about this specific lot in nature. Let's go down all 4 of these things.

Mr. Gammon read the first Criteria Analysis.

Mr. Gammon stated what does all of this mean? The whole reason I did this grading plan is because when you do a layout, staff's layout looks beautiful from a 2 dimensional point of view; however from a realistic, engineering and grading perspective it physical does not work.

Mr. Nicholas asked why not?

Mr. Gammon responded if you look at the grading plan and let's just talk about a few things. The location at the entrance that I am fixed at, I am stuck at elevation. I have to begin at that point and a parking lot cannot be but so steep. You can only have it at about 5% basically. As you go up into the building point, I have grading on each side that I have to tie into. If I have parking that is in the rear, which is what they are showing, what that is going to do is that is going to increase the area that I have to impact for my lot. If you look at the criteria analysis under the first point, it is about the VSMP Permit. Here is how the VSMP Permit laws work: if you go over 1 acre of land disturbance, you have to get a VSMP Permit. When you get a VSMP Permit, you are required by law to do 2 things: you are required to do water quality for all of the storm water runoff on your site, which basically means that you have to treat the water that runs off of your site from a quality perspective, basically a filtering perspective; and you also have to detain the water and release it at a rate that is no more than what is existing today. If you disturb less than 1 acre of land you do not have to get a VSMP Permit at all. For a site this size, it is very common and I can't tell you how many Dollar Generals I have done, where you are right under 1 acre in size and you do not have to get a VSMP Permit, which allows you to not have to do these 2 specific regulations. Now do not misinterpret this and think that he is just going to release this water and do damage, etc. there are other regulations that I still have to abide by to make sure that the release that I have is going to meet the minimum standards of the State Code as it exists. It just means that I don't have to do water quality. It just means that I don't have to automatically do storm water management. I still have to release it at a rate that is acceptable and will pass through the culverts downstream and everything will still be fine. I still have to meet those regulations. What I am trying to get at is this: if we did the layout that she is showing it does many particular things. First of all, it puts parking behind the building which is going to be right behind the residential area. If I was a resident and I lived there, the activities and the things that go on inside parking lots, I would not want that. I would not want the cars, the noise, and all that stuff. What we are proposing is the building being up against that side and the building itself acts as a shield naturally. We don't have any entrances on that side. We don't have any lights along that side. It acts as a natural shield in and of itself to protect the residents from this. As a matter of fact, I believe that you (Mr. Harville) has spoken with some of the adjacent residents in particular about this and my understanding is that if they would have understood that some of the comments would not have been made. We cannot do what the staff has laid out from an engineering and grading perspective and not have to do water quality. Now, what does that mean? I can't do water quality because I physically don't have any room on my site to do that. The water runs from the back to the front. If you look at either one of the layouts, there is no room upfront to put any storm water management pond or put any retention filter or anything of that nature. As I have it right now would physically work including what you see from a grading perspective right here. What they have laid out does many things opposing the thought process behind what you are really trying to save. You are trying to save the quality of life of the residents behind you, which that layout does the opposite of. It puts me into this category where it is more asphalt, it is not a cost issue. Does it cost more? Yes, it does; but that is not the issue. What the issue is that it is basically more asphalt, it is more environmental issues, and it puts me into a category that is a double jeopardy where I have to do more quality and I have to do things that I don't even have room to do. There is one other particular issue that we asked for a variance on, and once again, I asked for a 16' driveway width. In reality, we found out that we can get a little bit more than that, because you remember the layout that I did was based upon GIS information. I had

to ask for a little bit more than what I thought maybe I could get. I am providing actually like 19.6' or something. I am revising my request really to ask for 19' instead.

Mr. Dyer asked where is that? Is it towards the back near the dumpster pad?

Mr. Gammon responded that is exactly right. The idea behind this is that if you have a parking lot with parking on 1 side and parking on the other side and you have a drive aisle in the middle that is 2 way, that drive aisle is normally 24' in width. By Code, by your Ordinance, it has to be 24'. This particular example is not that way. I only have parking on 1 side and it is really only 4 spaces in the back that don't meet that exact 24' requirement. The other spaces up front do. All of the spaces in the front meet it. All of the spaces on the side meet it, all except for the last 4.

Mr. Dyer asked is the amount of parking spaces the amount of minimum required?

Mr. Gammon responded it is.

Mr. Dyer asked so you don't have 4 extra spaces?

Mr. Gammon responded I don't have 4 extra spaces that I could loose and still meet that. That is correct.

Mr. Dyer asked does the Code allow for, I know we have like compact car spaces but they are in excess of what is required by Code. Is that correct?

Mr. Gillie responded correct. You have to meet the minimum first before you can have any compact car spaces.

Mrs. Rich asked so he would have to find 4 more spaces somewhere before he could declare these compact?

Mr. Gillie responded that is correct.

Mr. Gammon stated which basically means that I can't make the spaces smaller. A typical space is normally 9'x18'. Does your Code require 20' length?

Mr. Gillie responded 9'x18'.

Mr. Gammon stated actually what I showed at first on my diagram is 9'x20'. The thought behind the 16' was really based on a 20' length of a space. In reality I have 19.6'. That is the width that I have and it is not really a two-way situation, simply because of where it is, it is in the very back corner. It is about traffic movement. It is about being able to get a car in and out. We have a sophisticated program called Auto Turn that utilizes the real turning dimensions of a car. I have passed that out to you guys. What I have done is basically shown that those spaces in the back work.

Mr. Dyer stated I noticed that there is a sidewalk between the edge of the parking and the building. Does the City allow any overhang of that sidewalk to be counted as the length of the parking space?

Mr. Gillie responded no.

Mr. Gammon stated it usually the face of the curb to the back. The reason we have a 5' sidewalk is generally because when you have a car and they pull in, it overhangs on the sidewalk a little bit. If you have a 5' sidewalk, that leaves enough room for someone to be able to get by.

Mr. Dyer stated let me ask you about your building, since obviously a smaller building would require fewer parking spaces. It appears to me that the front entrance to the store is in the corner. I know that in other Dollar General stores in Danville we don't have that configuration here. Is this a cookie cutter plan?

Mr. Gammon responded it is. It is tailored around that. It is definitely massaged to the property as best as I could do to make it work here. There are 7 different types of Dollar Generals in terms of the orientation of where the doors are at.

Mr. Dyer asked are all of those stores the same square footage?

Mr. Gammon responded yes. They are 9,100 square foot. You might say, and I will be the devil's advocate here, how come you have to put it at those dimensions? You know 9,100 square foot is very typical, and very standard in terms of shape and size compared to other HR-Cs. The whole question in this matter is, is this parcel unique enough in shape and size different than other parcels in the HR-C area. Staff has said that our parcel is similar to shape and size of the adjacent parcel where the Advanced Auto store is. That is completely not the case. I am going to pass out another thing that actually shows that the width of the parcel where the Advanced Auto Parts store is 228' and our parcel is only 149'. That is 150% wider than what our parcel is. The whole issue that we have an issue with is the width. I am declaring that our parcel has a particular shape that is abnormal than other parcels that are in the area. If we had 70 more feet I would not be here today.

Mr. Nicholas stated it is smaller. They look pretty similar; it is just that yours is smaller.

Mr. Gammon stated mine is narrower.

Mr. Campbell stated it is smaller.

Mr. Dyer asked was this a grandfathered lot? Was this already subdivided before it was zoned HR-C? What is the minimum lot width on a HR-C?

Mr. Gammon responded I think it is only 100', which we meet that.

Mr. Dyer stated so there are uses for HR-C lots that could be accommodated on this lot. In other words, if we don't allow this it is not like the lot can't be used. It is just that this building is just too big to go on this lot.

Mr. Gammon stated my argument would be to that answer is that the size of our building is not in any way abnormally large compared to the other HR-Cs that are out there.

Mr. Dyer stated but there are variations in the size of HR-C lots.

Mr. Gammon stated I've got the whole corridor. I will pass it around. If you take a look at it and this was very interesting, if you take a look at the whole corridor all along in front of the airport down to the actual interchange itself, and you look at how many buildings currently do not meet 20' setback it is like 60% or 70% of the buildings do not meet it. Many buildings are literally right on top of the property line. I brought that issue up last night when I was talking to Mr. Gillie and his answer was "well, they done prior to the 2004 zoning requirements. That is true, but also if you

continue that argument and say look at the size and shape of my lot and how narrow it is; and you compare it with all of the other HR-C lots along this whole corridor mine is much narrower than all of the others.

Mr. Nicholas stated but you knew that when you acquired it, correct? I mean you knew the width of your lot.

Mr. Gammon stated the argument is not necessarily whether I knew it or not, the argument is that my lot is in a nature in which it is particular different than any other lot along this area.

Mr. Nicholas stated sure I understand that is your argument. My question to you is did the owner of lot know that when you acquired the lot?

Mr. Harville and Mr. Gammon responded no.

Mr. Harville stated I didn't know it until right now. I mean I knew the size of the lot.

Mr. Dyer stated I think we can all appreciate the argument you are making, but my argument to you is that it appears that you are trying to fit a round peg into a square hole. The only way that we can grant a variance for what you are asking for is that if this lot couldn't be used for HR-C. It could be used for HR-C, just not a building of this size. In other words, if you had a 6,000 square foot building sitting on this lot we wouldn't be having this conversation; because it could meet all of the criteria. What we are charged with is, we are not Council, we are not Planning Commission, we can't see that we think this is a good idea for you to do this and so we are going to change the Zoning Code. What we need is some evidence that the Zoning Code, that there is something particular about this lot that the Zoning Code doesn't address; because it is so neat that it would not be appropriate to have the Zoning Code address just this 1 lot.

Mr. Nicholas stated in listening to your presentation I think you attempt to answer that, but the plan that staff proposed and please correct me if I am wrong, the way that I understand your argument is that it can be done the way that staff proposes it. It would just require you to take additional steps and do additional work, incur additional costs, but it could be done.

Mr. Gammon stated that is not correct.

Mr. Nicholas asked so it physically can't be done?

Mr. Gammon responded it physically can't be done, because of the storm water management requirements. You cannot do that layout there. You would have to take that thing and slide it way back, which is actually going to pinch it even more and continue to create problems because we don't have room to put in a storm water management pond. I cannot put it in the State's right-of-way. It has to be on my own property lines. I can do storm water management underground retention. I can put large pipes underground. That is not my argument. It is water quality.

Mr. Dyer asked so what you are saying is that this configuration here would require extra grading and that extra grading would put your disturbed area over the 1 acre?

Mr. Gammon responded yes.

Mr. Dyer stated if you go over the 1 acre you are required to do a storm water management plan, which probably includes a storm water management pond, retention pond, or something like that and then you cannot take this and the storm water retention pond and put it all on this 1 lot.

Mr. Gammon stated right. The argument is that staff's plan works is what they are saying. Staff's plan does not work. It works from a 2 dimensional layout point of view. It looks beautiful, but it does not work from a physical function. I still have to meet State requirements, not just the town ordinance.

Mr. Hiltzheimer asked could you cut down the size of the building by 1,000 square feet or something like that?

Mr. Gammon responded the argument is no, I can't from a perspective of Dollar General. No, they will not allow me to cut down the size of the building. Your argument is Dollar General doesn't have to go there. It could be somebody else. My argument against this whole thing is that it is not necessarily just that issue. The size of my building is not, if you look at the other examples of HR-C properties along this whole corridor there is something unique about my property in the narrowness of it. You are going to cause me to have to put up a size building that is not like the other buildings along the same corridor. There is something very specific about the lot that would cause and give a legal answer as I presented these 4 things that would allow you to be able to grant this variance. If you did it this way, certainly I think it is just a common sense thing that the arguments I have made about how it would protect the residential property next door would certainly be much better than the scenario that staff has laid out.

Mr. Nicholas stated let's address that. Were you given a copy of the responses?

Mr. Gammon responded yes, last night. What I've done literally is gone through the responses and changed the specific answers.

Mr. Nicholas stated I am sorry let me clarify. Were you given a copy of the responses from neighboring property owners from notices that were sent out?

Mr. Gammon responded no, I was not. I saw it 10 seconds ago when I sat down.

Ms. Blair stated those aren't complied until just before the meeting, so that there is enough time for everyone to respond that can.

Mr. Gammon stated the 2 answers from what I read were basically that the 12' setback off of the side does not help them because they have kids, etc. We are not asking for 12' setback anymore. That was based on an approximate. We didn't have an answer. We are asking for a 20' setback. In reality if this was not a residentially zoned area, the 20' would be ok anyhow. We are using the back of the building as a shield. There are other things that we have to do anyhow. We have to put some landscaping along that side there. We talked about that last night. There has to be x number of trees and plantings along there too. We are willing to also put up a 6' fence although we don't know if that may be something the residents want. They may not want to look at the back of a fence instead of looking at nice, green shrubbery and being that the building shields the activity in the parking lot. We are willing to put a 6' fence up if that is what the residents desire. If you look at the layout, not only do they have the parking lot but there is also this 5' sidewalk that runs down adjacent to the residential piece. First of all, that is probably a safety issue from a security point of view. In addition to that you are going to have pedestrians continuing to go down this thing as they are shopping right beside the residential piece. That is obviously much more detrimental to me. If I had kids in my back yard and I had a bunch of greenery, a big buildings back, no entrances, and no lights I would not have a problem with that whatsoever compared to a sidewalk and parking lot that is not shielded.

Mr. Nicholas asked in preparing this here did you consider the arguments of topography and things that we've heard from our presenter today in constructing this?

Mr. Gillie responded when we prepared that we did not have the topographic information. That was prepared without that.

Mr. Nicholas asked do you anticipate or do you believe that your position will change or has changed at all having heard the concerns of the applicant as to the feasibility of your proposed layout?

Mr. Gillie responded the feasibility of our proposed layout would probably change slightly. We would have to redesign some of that. The parking, it is clear that with the grades I could not put the storm water management in the front of the property. The only way around that would be to lessen the parking in front, maybe remove the first row and make more parking toward the rear of the property. These are things that I haven't had a lot of time to investigate. We were on the phone last night to well after 6:00 p.m. trying to look at the grading and some other things. I can't say how this would be redesigned to make it work. Whether it can or can't work, I don't know. I am not an engineer that is his forte, not mine. On the other criteria: the hardship on the property owner is a hard one to prove no matter what, I will leave that one up to you. The second one, not shared by other properties in the area, he is narrower in the rear in relation to some of the other properties. The necessity of storm water management, pushing the building back is probably not a realistic option; because it does get narrower in the back. To get all of the grading done out front where you have to have your storm water basin, your water quality basin, it is probably not realistic to shove that building back. On the other 2, I don't know we haven't got that far yet.

Mr. Harville stated I went to about 12 residents and knocked on doors trying to talk to these people. Mrs. Thomas and Ms. Chapman are the main ones. Ms. Chapman is the first one off of the commercial zoning. Their concern along with Ms. Thomas' concern was the children in the backyard, the dogs running loose in the back, etc. When I explained to them the position of where the building was sitting, where it was proposed to be set, the building is solid on their side. There is no openings, no exits of any kind. On the back the only exit that is there are for heating and air conditioning units. There are no doors on the back. All of the disruption to the residential part is all toward the auto parts store or towards South Boston Road, the lighting, the parking. They were under the impression that if you all don't approve the change in the setback that there was going to be an asphalt driveway going around the building. They would have access to customers coming and going and they didn't want small children running around in the back yard opening into a parking lot. When I explained to them the way the building was sitting on the property where none of that would be exposed to the residential side, and the purpose that Mr. Gammon moved all of that stuff and aimed it towards the auto parts store was to take it away from the residential side, Ms. Thomas who I've talked to many times about many things about this particular lot, said that if she would have been aware of that she would not have been opposed to it.

Mr. Gammon stated the third one, and I can go down and read the whole thing if you want, but it basically comes down to the point that the driveway width, and I have already shown that from an engineering perspective that it does work. What we are going to end up doing, it is not that I am proffering things, but I am going to tell you what I am going to do, because it is a little bit narrow instead of making the width of the parking space just 9' wide, I am going to end up making it 10' wide. I am talking about just the 4 spaces in the back. If you make it a little bit wider it is easier to swing in there instead of being worried about hitting another car and stuff like that. It will work either way and I have already shown that. We can do those particular things and we have enough room to do that and that is what we will end up doing. I do think that the layout I have is actually much better from many perspectives, from the point of view that I am disturbing less land, I am

having less asphalt, and it is much less environmental impact. The neighbors will be more shielded. It goes on and on that this is a better determination than the old current scenario. The specifics about the lot being particular in shape and size, I think that I have shown all of that information.

Mr. Dyer stated let me address that for a second, because what you seem to be saying is that for a similar size lot other lots in the area have a similar size building.

Mr. Gammon stated no I am saying that they are not similar size width lots along the corridor.

Mr. Dyer stated ok, because what has happened since a lot of that development has taken place is that we have a new Zoning Code. It was City Council and Planning Commission that determined what these setbacks were, because I think at one time the setbacks were only 20'. It was Council and the Planning Commission that decided that they wanted more setbacks, more landscaping, things like that. We are not allowed to overturn their decisions whether we agree with them or not, if that is the argument that you are making.

Mr. Gammon stated my argument is that this lot is narrower than other HR-C lots.

Mr. Nicholas stated what I am having a hard time understanding is that before anybody makes a decision about whether or not they are going to buy a store obviously they consider what land they are going to put it on. You know what lot you are going to have and you knew or should have known that the lot was such and such wide and whether or not it could conform to HR-C zoning requirements. Other lots being what they are, I mean they are what they are; but it is not as if the width of the lot was unknown.

Mr. Dyer stated it concerns me. What is the cutoff point? I mean obviously you wouldn't have any problem getting a 6,000 square foot building on this lot. If you are proposing 9,000 square feet, let's say the next guy comes in and he's got 12,000 square feet and he goes well you have to let me put a 12,000 square foot building on a similar lot. We are sorting setting precedence. If we allow this we are sort of setting precedence just because we are saying just because the lot is too small to do what you want to do we are going to let you do it anyway.

Mr. Gammon stated I understand your point behind that but my argument is if you look at what I am proposing, you have a different type of zoning for up to 3,000 which is N-C and so 9,000 is not a 16,000 square foot building or a 12,000 square foot building. It is not something that is abnormal at all in terms of metal buildings, in terms of retail operations 9,000 square foot is not in any way absorbent. It is very common. That is the reason that Family Dollar, Dollar General and a lot of these other retail stores are coming out of the shopping center environments, because the physically don't have enough room inside of those to be able to do that. That is why they are going out on their own; all I can say is to be able to have merchandise. This is a Highway Retail Commercial area. If you look at the size of Advanced Auto Parts, that is a wider building than this. All I am saying is that compared to other lots along the HR-C, we are narrower than other lots. Whether or not someone came in with a very skinny building, let's say they with 130'x 60' that is abnormal. At 60' you are starting to push down on the narrowness of this. I still believe that the narrowness of this lot compared to other lots is abnormal. Even if you didn't want to make that argument, you could also tie the topography in, tie the other conditions in that I have to meet on each side, tie the issue in that I only have 1 access point, there is a uniqueness about the lot that I believe the Board could say is unique enough to be able to grant the variance.

Mr. Nicholas stated I think what the concern is, I agree with you that the lot is narrower than surrounding lots, but if we grant your variance do we not set precedence that the next person that sees a lot that is narrower and too small for a standard size store of 9,000 square feet to come in and

say “we want you to allow us to do that regardless of the Zoning Code.” I think what we are doing with the precedence is supplanting City Council and the Planning Commission and spot by spot altering the requirements of the Zoning Code simply because the lots are small. What if anything about this lot other than it is just a small lot would justify or make it unique to grant the zoning variance that a similarly situated store on a similarly situated lot would not have in the future?

Mr. Gammon responded most of the HR-C properties are not adjacent to residential and don't have to have a 30' setback. We are asking for a 20' setback, which is normal inside of the HR-C area. The other thing is topography. Other lots would not necessarily share a limited availability in terms of design like this lot. It is slopped steeply from the back to the front. I cannot grade on the adjacent property. I have to tie in and I have to tie into the entrance. All 3 of those specific things are very specific about this lot.

Mr. Campbell asked did you want to say anything about the 4th criteria?

Mr. Gammon responded they agreed with that. They were saying basically that this is not such a common event that the City would have to change their Ordinance and I agree with them.

Close the Public Hearing.

Mr. Nicholas stated I am wondering given this information and Mr. Gillie you said that you would have to rethink this in some way; do you believe that want they want to do can still be done without a variance being granted?

Mr. Gillie responded being done without a variance as it is proposed, no I don't believe so.

Mr. Dyer stated it is not a matter of cost. It is not a matter of extra trouble and things like that. It is just that basically that without the variance this project is dead.

Mr. Nicholas stated right, for me just speaking for myself, I am not persuaded by extra steps, extra hoops, and extra costs. That is what you get when you buy a lot the size that it is. If it physically can't be done, then that in itself presents a different issue.

Mr. Dyer stated like I said, it is not whether or not I think this is a good project. He has done an excellent job trying to fit a square peg into a round hole. I don't believe the argument that you would only have to have a 20' setback if it wasn't adjacent to residential property. Well, it is adjacent to residential property and City Council considered that. If you are adjacent to commercial property you have to have 20' and if you are adjacent to residential then you have to have 30'. We think that is appropriate. Whether or not you think that is appropriate or not is irrelevant. That is what the Code is. It is not like this is an orphan lot where it is going to be unusable if we don't grant a variance, because like I say you could build a 5,000 or 6,000 square foot building on this lot and meet all of the zoning requirements. That tends to sway my opinion in opposition to the variance.

There was discussion among the Board members about this particular lot.

Mr. Nicholas stated I will make a motion. Adopting staff's reports but also considering the evidence presented by the applicant I don't believe that the narrowness of the lot is in sufficient uniqueness of hardship to justify the variance. I think that the other conditions, the abutment of a residential area and a 30' setback required thereof is a decision made by City Council. I don't believe there has been sufficient evidence presented as to why this property is unique enough to grant a variance incorporating all of the other arguments made by staff.

Mr. Nicholas made a motion to deny Variance Application PLVAR20120000112. The motion failed due to the lack of a second.

Mr. Whitfield stated the Board has to act one way or another. You are either going to have to affirm it or you are going to have to deny it.

Mr. Gammon stated if the Board feels like they need to make a recommendation, the 4 points that I have given addressed the specific answers of how I felt that it meets it.

Mr. Dyer stated right, if you wanted to make a motion in support of this application you could use Mr. Gammon's criteria. You wouldn't have to come up with your own reasoning behind it.

Mr. Nicholas stated well we've got to do something.

Mr. Dyer stated I mean a motion has been made to deny it. If you don't feel like it should be denied but someone is not willing to make a motion that it be accepted.

Mrs. Rich stated quit looking at me. I am going to abstain. I am friends with him.

Mr. Campbell seconded Mr. Nicholas' motion to deny the variance. The motion was approved by a 5-1 vote (Mrs. Rich voted in opposition).

3. *Appeal Application Number PLAZ20120000113, filed by Mark Matherly, requesting an appeal of administrator decision that a ground sign permitted under Article 3U., Section M, Items 6&7, of Chapter 41 of the Code of the City of Danville, Virginia, 1986, as amended (City of Danville Zoning Ordinance) does not have to comply with the signage site plan and typical tenant signage exhibit, at 363 Central Boulevard, otherwise known as Grid 1808, Block 005, Parcel 000002 of the City of Danville, Virginia, Zoning Map. The applicant is requesting to install a ground sign not shown on the signage site plan and not in conformance with typical tenant signage exhibit.*

Mr. Dyer stated we are actually being requested to interpret the Code as opposed to actually approving or denying an appeal, correct?

Mr. Gillie responded yes and no. He has applied for a permit. He has been denied his permit based on what we feel the Code is. He has appealed that, so it is not requesting a variance for that Code because in this case he is appealing our determination because he has to comply with those regulations.

Mr. Nicholas stated we are determining whether or not the Code applies.

Mr. Gillie stated correct.

Open the Public Hearing.

Present on behalf of the request was Mr. Mark Matherly. Mr. Matherly stated I appreciate you guys taking the time to listen and I would like to start by saying that most of what you just heard is totally not accurate. That is not at all why we are here. We are not requesting any type of variance. We are not requesting a ground sign. We are simply asking to be able to put up building signage per the existing Code.

Mr. Dyer asked it does not involve a ground sign?

Mr. Matherly responded it does not involve a ground sign.

Mr. Dyer stated a building sign mounted to your building.

Mr. Matherly stated not for us, but for our tenants. The issue as I interpret it, seems to be the interpretation of the word landlord. I will go through some different points to kind of explain how we got to this point in our situation. I certainly don't have any legal background, although I have been running a business for 20 years now in the City. I guess about 4 years ago, we were approached by North American Properties. We just happen to have a little house right on the corner of the new shopping center property. Initially they were going to purchase our property, demolish the building, and the net result after about 2 years of negotiations back and forth was that we ended up keeping the house and selling them part of the property. Just the mechanics of making it work were that we needed to share an entrance. To do that, we needed to be under the requirements of the signage restrictions of the shopping center. I am going to go really quickly through 5 points. One is just background information. I will talk a little bit about the interpretation of the documentation and possible remedies as I see it and the results of that interpretation. Our property is not a part of Coleman Market Place. It is adjacent to it and we share an entrance with Golden Corral. We are clearly not a part of the shopping center and I don't think that is being contested. We are under the signage restrictions that are part of the shopping center. We are part of the PSC-O the Overlay District that encompasses the shopping center and us. One of the things I would like to do is, I've got a couple pieces of information that I would like to hand out. I've highlighted some information on it, so that you guys can follow where I am. I know you probably have a lot of this already.

Mr. Dyer stated it references here that Landlord approval is required for signage. The City does not have any aesthetic requirements for signage or anything like that. Is that correct?

Mr. Gillie responded correct.

Mr. Dyer stated whereas North American Properties who is the Landlord of Coleman Market Place probably does. Is that the reason?

Mr. Gillie responded they want their signage to be uniform. We put that in as part of the Zoning Code for that shopping center.

Mr. Dyer stated in other words, everything in PSC-O before someone can get a permit to put a sign up they have to get approval from North American Properties. Is that correct?

Mr. Gillie responded correct.

Mr. Dyer asked is that opposed to having objections by North American Properties? In other words, my understanding is that North American Properties does not object to Mr. Matherly's sign. Is that correct?

Mr. Matherly responded that is correct.

Mr. Dyer stated you see where this is a little confusing. Do you have to have a letter stating that they approve of this signage or a letter from someone saying "we object to this signage?"

Mr. Gillie stated I have to have a letter from them saying that they approve of the signage, the appearance of the signage, and then I check it for Zoning Code compliance to make sure that it is not too big and that it is in the proper location. Once it has that then I will issue the permit.

Mr. Dyer asked if they don't issue a ruling at all, if they say they don't want to have anything to do with it and don't care, does that?

Mr. Gillie responded according to that I can't issue it, because they haven't given approval for any signage to be mounted on a structure that is within that district.

Mr. Dyer asked even though they don't own the property?

Mr. Gillie responded because it is part of this, correct.

Mr. Dyer stated in other words, they are given domain over property that they don't own.

Mr. Gillie stated but that they worked with the applicant to develop.

Mr. Nicholas stated that is a big thing.

Mr. Gillie stated he submitted to that to allow Golden Corral to be constructed.

Mr. Dyer asked how can the City see their responsibility to this? Could the City create some Ordinance in which some private entity could control my property?

Mr. Gillie responded if you are in agreement with it at the time, yes. That is the whole catch on this. When they went to build that facility, this property wasn't part of the shopping center. It was never originally part of it. When they went to build Golden Corral they needed the land. They couldn't work out an arrangement between the 2 of them, so they have this agreement where he got his property rezoned to allow for Golden Corral to be constructed. As part of Golden Corral being constructed he had to submit to their approvals on certain things. They haven't given him those approvals on certain things, so I can't as a City say "it is ok." As a tradeoff for him to keep his building and build what he needed to and for Golden Corral to build those 2 had to agree on it; and now apparently they're not agreeing. From a City end my hands are kind of tied, because he can't get them to say yes or no.

Mr. Dyer asked have you approached North American Properties and they just won't respond?

Mr. Matherly responded there are 2 things that I would contest with that. One is that we did not agree for them to have approval over signage. What the legal documents say is that we are required to abide by the signage regulations, which are clearly defined as to what we can and cannot put on the building. That is part of the City Code, as part of the operation and easement agreement that is part of City records.

Mr. Dyer asked we have a copy of that agreement. Is that correct?

Mr. Gillie responded yes.

Mr. Matherly stated North American Properties has attempted to make it clear to us and the City that they are not required to approve that. I've got copies in your paperwork of emails sent back to one of our tenants basically clarifying that they went back re-reviewed the documents and asserted that they are not required to make any approval and that we are simply required to follow the regulations.

Mr. Dyer stated we are here today to determine whether Mr. Gillie's and the Planning Staff's interpretation is correct. You basically agree with what North American Properties is saying and they are agreeing with what you are saying.

Mr. Matherly stated I look at it from the standpoint that many times with legal documents you don't have the opportunity to go back to the origination point and go "what did you mean?" In this case, we do.

Mr. Dyer asked Mr. Gillie can you show me in this document where it expresses that they have to have written approval?

Mr. Gillie responded how many underlined spots do we have in there?

Mr. Gillie read the underlined sections of the agreement.

Mr. Matherly stated in the operation of the easement agreement it clarifies that the approving parties for Target is Target, approving parties for Home Depot is Home Depot.

Mr. Gillie stated it is Target and North American Properties. Target has to present the signs. North American has to agree to it. We as a City issue permits.

Mr. Nicholas stated my question is if you are saying that the parties have the right to approve, we have an email here saying that we don't have to approve from the party reported having the authority, to me is a dis-ordinate or dis-endowment of.

Mr. Gillie asked which email do you have? I don't see that.

Mr. Nicholas stated this is in the packet he just passed out from Sherry Ross.

Mr. Nicholas read the highlighted portion of the email sent from Sherry Ross included in the applicant's handout.

Mr. Dyer stated it seems to me that this document was put into place to benefit North American Properties and Coleman Market Place.

Mr. Nicholas stated I think we have to be careful here, because if they didn't care they would still have the authority. He would still need to apply for a variance, because they would have the authority and they are not doing it.

Mr. Dyer stated their interpretation of what is written here is

Mr. Nicholas stated is that they don't have it.

Mr. Dyer stated they don't cite the clause in which they say this is where we don't.

Mr. Nicholas stated it seems to me that North American Properties does not believe that they have the authority to approve or disapprove of this sign.

Mr. Matherly stated they seem to make a very clear distinction between out parcel signage and building signage and most of the things that were just read relate to out parcel signage, the ground signs not the building signage. Building signage seems to be very cut and dry.

Mr. Dyer asked is it City's contention that Mr. Matherly's building is part of Coleman Market Place?

Mr. Gillie responded yes. It is part of the same zoning, same overlay, so it is part of the shopping center. Anything within that overlay is considered part of that shopping center.

Mr. Matherly stated legally we are not. We are part of the overlay district, but we are not part of the shopping center.

Mr. Gillie stated from a City's perspective is the question that was asked. From a City perspective you are part of that shopping center.

Mr. Dyer stated let me ask the legal experts that we have here. If the wordage says "parties shall have the right to approve the design" that is the same thing as saying they have the right to disapprove the design. Correct?

Mr. Spencer responded I would say inherently if they have the right to approve they would have the right to reject.

Mr. Dyer asked could that then be substituted? Would it change what this sentence is saying by changing right to approve to right to disapprove?

Mr. Spencer responded I think it would still mean the same thing.

There was discussion about if the agreement wording stated "right to disapprove."

Mr. Nicholas stated if an affirmative approval was required then I think the sentence would be drafted to something of the effect of "the approving parties' approval shall be required." That interpretation is not what is written here. I think the evidence of the party in question saying "we don't have to."

Mr. Dyer stated I think that is their interpretation of it as well.

Mr. Spencer stated if I were to rewrite this I would probably say something like "30 days after submission to the Zoning Board, Coleman Market Place shall approve the design within 30 days after they submit it." This way it puts them in charge of making some affirmative action.

Mr. Dyer stated the way that it is written here they are not required to make any action. It leaves it in limbo technically, because it just says that they have the right to approve. If it said they had the right to disapprove, then failure to disapprove would allow it.

Mr. Nicholas stated it is a distinction about a difference I think. If this document gives them the right of approval, or disapproval would be the inherent authority and you specifically disclaim that right, then there is no obligation because there is no requirement that approval be given. There is just a right to apply approval or disapproval. That party has disclaimed the right to do so.

Mr. Dyer stated it is being disclaimed in this email. The problem with that is that we don't know who this person is that wrote this.

Mr. Nicholas stated correct. It is assuming that it is.

Mr. Matherly stated can I for a second refer you to page 4 that starts with the City Code?

Mr. Matherly read item number 7 on page 4.

Mr. Matherly stated all of which say “signage shall be approved by the Landlord.” I am not an attorney, but there are numerous precedences about literal interpretation of the word Landlord in legal documents. Landlord means someone who owns and rents or leases property. In this case we are the Landlord. You can say “I don’t think it means that;” but it certainly does not say anything else. I don’t see anywhere else in the documents where it does say anything else. After sitting down and looking at the documents that is what clarified it for me. From their standpoint, when they wrote these documents they could have put a lot of other words in there besides Landlord. They could have put shopping center management, shopping center owner, but they chose to use Landlord and I think because it gives a clearer meaning. It does allow for exceptions like this.

Mr. Dyer stated North American Properties is not your Landlord.

Mr. Nicholas asked do they have any legal interest in your property?

Mr. Matherly responded they do not.

Mr. Gillie asked could they shut the driveway off coming into your property, because it is a cross between theirs? Do they have any other easements?

Mr. Matherly responded we have an easement agreement with Golden Corral.

Mr. Gillie asked which is a tenant of North American, right?

Mr. Matherly responded they actually own that property I believe. They are a part of the shopping center, but it is my understanding that they own that property.

Mr. Spencer asked what is your business up there?

Mr. Matherly responded there is actually 3 tenants in our building. We are Security Zone. We do security systems; in fact we do a lot of stuff in this building. We have Legacy Hospice of Piedmont, which is a hospice thing that is part of Danville Regional Medical Center. We just lost a tenant the end of last month. To be honest with you, this is one of the primary reasons for this.

Mr. Spencer asked is this on Piney Forest Road?

Mr. Matherly responded yes, right beside Golden Corral.

There was some discussion about the ownership of Golden Corral’s lot.

Mr. Matherly stated I would like to add a final thought. I have spoken with North American Properties numerous times about this to the point that they have told the City “don’t call us anymore. We’ve told you what to do.”

Mr. Gillie stated they have never told us that.

Mr. Matherly stated Justina had said that she told Emily that, but that is heresy. That is what they told me; but they have made it extremely clear to me that they will not and have no intention to participate in this process. Their stand is that the Code is clear and that the City is responsible for making sure that tenants abide by the City Code. It spells out very clearly how the sign has to get designed. The other issue with North American Properties, one proposed resolution was to have

them request a Code Amendment. I talked with them about that, because that seemed like a logical route. My understanding from them is that the City Code and the documents, the own/operating agreements that all these big corporations, Home Depot and Target signed off on have to match. You are looking at tens of thousands of dollars to even start that process. It is just not going to happen. That resolution from what they are telling me is not happening.

Close the Public Hearing.

Mr. Nicholas made a motion to reverse the decision of the Zoning Administrator of Appeal Application PLAZ20120000113. Mr. Campbell seconded the motion. The motion was approved by a 6-0 vote.

II. APPROVAL OF MINUTES

Mrs. Rich made a motion to approve the minutes from the April 19, 2012 meeting. Mr. Nicholas seconded the motion. The motion was approved by a unanimous vote.

III. OTHER BUSINESS

Mr. Gillie stated the first case; I am going to put you on advisement. Staff may or may not appeal that case, because that clearly does not meet the criteria for granting a variance. You can have a 4' open, unenclosed porch sticking out into the setback, which is the way that house is constructed. He wants to put an awning up, sorry he could have built the house differently. We clearly feel that should not have been approved. That is the Board's choice, but I just want to you know about that. We don't have any cases filed for next month at the moment, but the gentlemen for the second case had suggested that he may come back with another design, which may need additional variances. You may have a case for next month.

Mr. Dyer stated one thing about that one that I had a problem with was that what he was asking for didn't meet what we had written. He was saying that we were going to be able to do it with a 20' and he was still asking for a 5'; so if we would have granted his variance, he actually would have been granted the 5'.

Mr. Gillie stated you could have conditions on any variance. You can say we will grant it if it is a lesser number. Where he asked for 5' you could have approved it at 15' as long as we advertise for a higher number.

Mr. Dyer stated no less.

Mr. Gillie stated no less than what was asked for. When he came to us he hadn't had the survey done or anything else. We went with what he thought it was. As they done the survey on the property, they found out that they had a little more room to work with. That is why the number changed today. We apologize for that, but we have to go with what was advertised. We can't change the fact afterwards. That is why he suggested that he would come back later on. That may confuse the issue a little bit. I don't know if it did or didn't; but right now we don't have any cases for next month. Mrs. Evans had called to say that she couldn't attend because she had a conflict with 1 or 2 of the cases, so there was no reason for her to be here. I just wanted to note that she let everybody know ahead of time.

Mrs. Rich stated I have jury duty May and June, so I may or may not be here.

There was some discussion about the Board members taking a class.

With no further business, the meeting adjourned at 11:43 a.m.

APPROVED