

TOWN OF ABINGDON
BOARD OF ZONING APPEALS
REGULAR MEETING
JUNE 10, 2003 - 7:30 P.M.

The Regular Meeting of the Board of Zoning Appeals was held Tuesday, June 10, 2003 at 7:30 P.M. The meeting was held in the Municipal Building, Downstairs Meeting Room.

The meeting was called to order by Mr. Gerald Henninger, Chairman.

ROLL CALL

Members Present: Mr. Gerald Henninger, Chairman
Mr. Fred St. John
Mr. Jeoff Bodenhorst

Comprising a quorum of the Board

Members Absent: Mrs. Pauline B. Gotham
Mr. Richard A. Stevens

Administrative Staff: Mr. Albert C. Bradley, Director of Planning/Zoning

Visitors: Mr. Byrum Geisler, Attorney
Mr. B. L. Conway, Attorney
Mr. Steve Price
Mr. Richard Smith
Ms. Lori Wagner
Mr. Kenny Hobbs
Mr. Frank Stophel

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(2) Approval of Minutes: Regular Meeting, May 13, 2003

Mr. Bodenhorst made a motion that the minutes of the Regular Meeting, May 13, 2003 be approved, with the following correction:

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| Page 03-1 | Visitors: | |
| FROM: | Mr. Byrum Geisler, Attorney | TO: Mr. Byrum Geisler, Attorney |
| | Mr. B. L. Conway, Attorney | Mr. B. L. Conway, Attorney |
| | Mr. Steve Price | Mr. Steve Price |
| | Mr. Richard Smith | Mr. Richard Smith |
| | Mr. Paul Wagner | Mrs. Paul Wagner |
| | Mr. Kenny Hobbs | Mr. Kenny Hobbs |
| | | Ms. Lori Wagner |

Mr. St. John seconded the motion, with unanimous approval.

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- (3) **Case No. 374 - Kenny Hobbs, Dutt & Wagner of Virginia, Inc., (B. L. Conway, II, Attorney/Representative), 1141 West Main Street, Abingdon, Virginia 24210; application for a variance from the requirements of Article 17, General Provisions, Section 17-7, Off-street parking: location, improvements and exemption, in the B-2 Zoning District, contained in the Zoning Ordinance. Tax Map No. 104C2 (4) 1, 2 and 44. (Tabled from Regular Meeting, May 13, 2003).**

The date of this application is March 25, 2003. This application was tabled from the regular meeting, May 13, 2003. At that time Mr. Bradley presented Case No. 374, stating that this application had been advertised as required, and that all adjoining and adjacent property owners were notified of the meeting. However, due to an oversight, he did not feel the notification to adjoining and adjacent property owners was mailed in sufficient time to allow all parties receipt of notification before the meeting, therefore, he suggested that this case be tabled until the next regular meeting scheduled for this date, Tuesday, June 10, 2003 at 7:30 P.M.

The referenced property is located at 1142 West Main Street.

The approximate cost of the development is \$65,631.44 and it has been completed.

The property acquired by Dutt & Wagner of Virginia, Inc. which is referenced on the Town Tax Maps as 104C2 (4-1, 2 and 44. According to the maps, Lots 1 and 2 fronting on West Main Street are divided in zoning between B-2 on the Main Street portion of the frontage and R-3 at the rear of the lots. Lot 44 is entirely zoned as R-3.

Dutt & Wagner of Virginia, Inc. has used a portion of the property zoned R-3 for parking. The R-3 Zoning District provides an allowance for parking of vehicles as may be required by uses that are residential in nature allowed within that zoning district.

The main portion of the Dutt & Wagner of Virginia, Inc. property is zoned B-2. Parking for the uses in the B-2 District is intended to be on the site with the business. Section 17-7-1 of the Zoning Ordinance states as follows:

Section 17-7 Off-street parking; location, improvements and exemption.

17-7-1 Off-street parking – location Required parking space shall be on the same lot with the main building, except that in the case of buildings other than dwellings, spaces may be ~~coated~~ **located** as far away as six hundred (600) feet on another parcel; provided that said parcel is located in a district permitting parking lots.

Since the parking space now in use by Dutt & Wagner of Virginia, Inc. is located within the R-3 District and that district does not permit parking lots, the use of this property to meet parking needs and requirements of Dutt & Wagner of Virginia, Inc. must cease. A letter from Mr. Bradley, Director of Planning/Zoning, made Mr. Kenny Hobbs of Dutt & Wagner of Virginia, Inc., aware of this parking requirement.

There have been several complaints from Mr. Steve Price regarding the noise from the Dutt & Wagner, Inc. parking lot, near his mother's home, and indicates it constitutes a nuisance .

Mr. B. L. Conway, Attorney, representing Dutt & Wagner of Virginia, Inc. submitted information containing the following:

DUTT & WAGNER'S ARGUMENT IN FAVOR OF A VARIANCE

Dutt & Wagner of Virginia, Inc. ("Dutt & Wagner") purchased property directly adjacent to its industrial complex at the cost of \$194,775.00, on December 8, 1977. Dutt & Wagner intended to use the property for a garage and parking facility. Unbeknownst to Mr. Hobbs, Dutt & Wagner's Chief Operation's Officer, one of the tracts of land was zoned B-2 while the other tract of land was zoned R-3. On or about the 12th day of November, 1999, Dutt & Wagner applied for a land disturbing permit which proposed the building of a garage and parking lot. Dutt & Wagner paid a surety in the amount of \$4,000.00 and for a plan review.

Dutt & Wagner subsequently applied for a zoning change when it learned from Mr. Bradley, that one would be required to build a garage.

The Town held hearings regarding the matter. Dutt & Wagner's request was vehemently opposed by Mr. Steve Price, a son of an elderly adjoining homeowner. During the hearings, Mr. Price also declared that complaints would be brought against Dutt & Wagner and demanded that it buy his mother's property. However, when approached by Mr. Haga (Dutt & Wagner's Transportation Manager) regarding purchase of the property, Mr. Price would not offer a purchase price for the property and said that hotels and restaurants were wanting to buy the property. After two hearings, it was apparent that the zoning request would be denied and the application was withdrawn.

Thereafter, Mr. Hobbs asked Mr. Bradley whether the parcel could be used as a parking lot. Mr. Bradley told Mr. Hobbs that this would be a permitted use of the land. Pursuant to Mr. Hobbs' direction, Dutt & Wagner's contractor, Mr. Frank Stophel, also spoke with Mr. Bradley, and Mr. Bradley confirmed that this was a permitted use of the land and that Mr. Stophel could proceed under the existing permit.

Based upon these assurances, Dutt & Wagner directed that Mr. Stophel proceed with the construction of the parking lot. The Town regularly inspected the work during construction. At no time during construction did any official object to the use of the property. Construction of the parking lot was completed on or about July 24, 2000 at a cost of \$65,631.24. A final inspection of the construction site was conducted by the Town on or about July 24, 2000, at which time no items were found requiring correction and the surety in the amount of \$4,000.00 was released.

In late July, Dutt & Wagner began using the parking lot. As he had promised, Mr. Price, the son of the adjoining landowner, began a campaign against this use of the property. There were literally hundreds of complaints made to the Abingdon Police Department for violations of the noise ordinance. Two cases went to trial against Dutt & Wagner drivers. Both were dismissed by the Washington County General District Court and were not appealed. Mr. Price also kept the pressure on Town officials. In September of 2000, the Town Attorney advised Mr. Price of his civil remedies and further advised that the Town could not act to remedy a private nuisance. This apparently did not satisfy Mr. Price because in an undated letter sent sometime after September 18, 2000, Mr. Albert Bradley, in his role as Director of Planning for the Town, ordered Dutt & Wagner to cease using that portion of the parking lot zoned R-3. Mr. Bradley did not advise Dutt & Wagner of its right to appeal his decision and to request a variance as required by Virginia Code §15.2-2311.

Dutt & Wagner continued to use its parking lot. The Town had the power to impose daily fines on Dutt & Wagner. It did not do so. Instead, on the 23rd day of February, 2001, the Town filed a Bill of Complaint against Dutt & Wagner seeking to enjoin its use of the entire parking lot. Hearings were held before Washington County Circuit Court. The Court found that Dutt & Wagner could not use that portion of the parking lot zoned R-3 and directed the Town's Attorney to prepare the appropriate Order. The Order tendered by the Town would enjoin the use of the entire parking lot and effectively prohibit any use of the property. Dutt & Wagner moved the Court to reconsider and to remand this case to the Board of Zoning Appeals for consideration of a variance.

It is true as the Town states that the Washington County Circuit Court ruled against Dutt & Wagner with regard to the strict application of the zoning ordinance. The Court did this with great consternation. The Court wrestled with the issue for over a year. Judge Lowe finally determined that his hands were bound to the strict application of the zoning ordinance. Additionally, Judge Lowe ordered that Dutt & Wagner shall have an appeal to the Board of Zoning Appeals, where equity and good conscience should apply and which has occasioned this hearing. In addition, Dutt & Wagner has appealed Judge Lowe's decision to the Supreme Court of Virginia.

Mr. Byrum L. Geisler, Attorney, representing the Town of Abingdon submitted information containing the following:

TOWN OF ABINGDON'S RESPONSE TO DUTT & WAGNER OF VIRGINIA, INC.'S APPLICATION FOR VARIANCE

Dutt & Wagner of Virginia, Inc. ("Dutt & Wagner") has filed an Application for Variance seeking approval of the use of a parking lot located at its Abingdon facility on land zoned Residential R-3. Article 6-1 of the Zoning Appendix of the Code of the Town of Abingdon lists the permitted uses in areas zoned R-3. A parking lot is not a permitted use in an area zoned R-3. This is confirmed by the March 18, 2003 Final Order of the Circuit Court of Washington County, Virginia in the case, Albert Bradley, in his official capacity as Zoning Administrator for the Town of Abingdon, Virginia v. Dutt & Wagner, Inc. (Case No. CH-01-055), pertaining specifically to Dutt & Wagner's subject parking lot. Because this parking lot is not a permitted use on property zoned R-3, Dutt & Wagner is permanently enjoined by this Final Decree from continued use of the parking lot.

Given that the parking lot is not a permitted use under the zoning for R-3, the Board has no authority to grant Dutt & Wagner a variance for the parking lot. Virginia Code §15.2-2201 and §15.2-22308 *et seq.*, govern the Board's authority regarding applications for variances. Section 15.2-2309 specifically provides, in pertinent part, that a board of zoning appeals has the power "[t]o authorize upon appeal or original application in specific cases such variance as defined in §15.2-2201 from the terms of the ordinance as will not contrary to the public interest, when, owing to special conditions a literal enforcement of the provisions will result in unnecessary hardship [subject to existence of certain conditions that must be found by the board of zoning appeals for authorization of the variance]." Under §15.2-2202, however, a variance is defined as follows:

'Variance' means, in the application of a zoning ordinance, a reasonable deviation from those provisions regulating the size or area of a lot or parcel of land, or the size, area, bulk or location of a building or structure when the strict application of the ordinance would result in unnecessary or unreasonable hardship to the property owner and such

need for a variance would not be shared generally by the other properties, and provided such variance is not contrary to the intended spirit and purpose of the ordinance, and would result in substantial justice being done. It shall not include a change in use which change shall be accomplished by a re-zoning or by a conditional zoning.”

Va. Code §152.2-2201 (1997 Repl. Vol.) (emphasis added). These statutes thus establish the limit of the Board’s authority for authorizing a variance, which would not extend to Dutt & Wagner’s variance application for its parking lot. More specifically, this application is not seeking a deviation from regulation of the size, area, bulk or location of a lot, building or other structure. Rather, it is seeking approval of a non-permitted use, which could only be accomplished by a re-zoning.

Mr. Henninger stated that, as Chairman of the Board, he would take the liberties to let his thoughts be known. Mr. Henninger stated that he could see both sides of this argument and he felt that the statement “there shall not be a change in use” was a very strong statement. However, taking the conscience of the community and Town into account, knowing that there have been very few businesses being any better to the Town than Dutt & Wagner, and even though he may be contrary to the Ordinance, Law or Order Decree, his decision was to approve the request of Dutt & Wagner.

Mr. St. John stated he felt there had been a mistake made and a variance should be allowed for use of existing graveled area in the R-3 District, with suitable sound barrier by plantings. Mr. Bodenhorst concurred.

After discussion, Mr. St. John made a motion that the request for variance in Case No. 374 be approved, allowing use of the existing graveled area in the R-3 District, with suitable sound barrier by plantings. Mr. Bodenhorst seconded the motion, with unanimous approval.

There being no further business a motion was made, seconded and unanimously approved that the meeting be adjourned. The meeting was adjourned at 9:11 P.M.

Gerald Henninger, Chairman

Richard A. Stevens, Secretary