

TOWN OF ABINGDON  
BOARD OF ZONING APPEALS  
REGULAR MEETING  
MARCH 10, 2009 - 6:00 P.M.

The regular meeting of the Town of Abingdon Board of Zoning Appeals was held Tuesday, March 10, 2009, at 6:00 P.M. The meeting was held in the Municipal Building, downstairs meeting room.

Mr. Gerald Henninger, Chairman, called the meeting to order and explained the duties of the Board of Zoning Appeals as follows: "This board was created by authority of the Code of Virginia§15.2-2309; our board shall have the following powers and duties. To hear and decide appeals from any order, requirement, decision or determination made by an administrative officer in the administration or enforcement of this article or of any ordinance adopted pursuant thereto. The decision on such appeal shall be based on the Board's judgment of whether the administrative officer was correct. The board shall consider the purpose and intent of any applicable ordinances, laws and regulations in making its decision."

Therefore, the purpose for this hearing was to decide whether or not the Zoning Administrator properly interpreted Article 26, Section 26-83, and definition of Personal Services in the Town of Abingdon Zoning Ordinance. It is not the board's responsibility to make any determination of whether or not tattoo parlors are an appropriate business within the Town limits.

Mr. Jackson called the roll.

Roll Call:

Members Present:                   Mr. Gerald Henninger, Chairman  
  Mr. Kenneth Shuman  
  Mr. Cameron Bell  
  Mr. Mark Graham

Comprising a quorum of the Board

Members Absent:                   Ms. Marva Jo Wheeler

Administrative Staff:           Mr. W. Garrett Jackson, Director of Planning/Zoning  
  Mr. Sean Taylor, Assistant Director of Planning/Zoning  
  Mrs. Deborah Icenhour, Town Attorney

Visitors:                           Mr. Jeffrey A. Davidson  
  453 West Main Street, Abingdon, VA 24210  
  Mr. Mathew Richey  
  Deer Run Estates, Abingdon, VA 24211  
  Ms. Cathy Richey  
  Deer Run Estates, Abingdon, VA 24211  
  Mr. Dennis Davidson  
  Address unknown  
  Ms. Patsy McGee  
  Address Unknown  
  Mr. Levi Ratcliff  
  Address Unknown  
  Others

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(2) Approval of Minutes Regular Meeting, August 12, 2008

Mr. Shuman made a motion that the minutes of the regular meeting, August 12, 2008 be approved. Mr. Bell seconded the motion.

VOTE:	Mr. Shuman	Aye
	Mr. Bell	Aye
	Mr. Henninger	Aye
	Mr. Graham	Aye

The motion passed.

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(3) **Case No. 395 - Jeffrey Alan Davidson, dba Bleeding Canvas, 453 West Main Street, Abingdon, VA 24210; application for an appeal of the Zoning Administrator's decision relating to the requirements of Article 12, Section 12-1-3, Permitted Uses, in the B-3 Central Business District and Article 26, Section 26-83, Definitions of Personal Services business as contained in the Zoning Ordinance. Property location is 453 West Main Street. Tax Map No. 19 (1) 1A.**

The date of the application is February 19, 2009, and the application was scheduled to be heard on this date, March 10, 2009.

The application was duly advertised in accordance with the requirements of the Code of Virginia (1950, as amended, Section 15.2-2204) and all adjoining owners were notified of the meeting.

Mr. Jackson stated that this is a request from Article 12, Section 12-1-3, Permitted Uses, and Article 26, Section 26-83 Definitions of Personal Services business as contained in the Zoning Ordinance, for property located at 453 West Main Street and further explained that the matter to be considered at this meeting tonight is due to his denial of a business license because of his interpretation of Section 26-83 definitions of Personal Services as contained in the Zoning Ordinance, which reads "a business that provides services to persons to including beauty shops, barber shops, fitness or weight control studios and other similar activities." Mr. Jackson's interpretation was that these are health welfare activities and tattooing is seen as an elective activity.

In August 2008, the Town Staff was made aware of a sign announcing a tattoo parlor opening on September 1, 2008, at the referenced address. Preparations were made to discuss the matter with the owner when a license was applied. The previous business, Crazy Daizy Tattoo, was indeed issued a business license from the Town, though it's zoning verification was never certified by the Town's Zoning Department.

Bleeding Canvas opened on September 1, 2008, however, the license was not applied for until September 16, 2008. The Zoning Department made several attempts to contact Mr. Jeffrey A. Davidson, the business owner, leaving messages about the status of the license, that he needed to come into the office to discuss the matter. Furthermore, he was told he was operating illegally without the approved business license. Mr. Davidson did not respond. The business continued to operate illegally since that time.

In late January Mr. Jackson met with Mr. Davidson, the Town Attorney, the Town Attorney's Assistant and the Code Compliance Officer; at which time Mr. Davidson was given the two options that any business is given; when aggrieved in a situation as this, (1) to appeal the decision or (2) amend the Zoning Ordinance, which would require going before the Planning Commission to request that tattooing be included in the definition of the Zoning Ordinance as a use by right or a special use of a certain district. Mr. Davidson chose to appeal Mr. Jackson's decision.

Mr. Jackson explained that his decision was also based on a court case heard before the Circuit Court Clerk in Washington County in 2006. The Washington County Administrator was sued for the same purpose of the interpretation of tattoo as a Personal Service. Judge Randall Lowe deemed that cosmetology, beauty shops, and barber shops are not the same as tattooing. The Department of Professional and Occupational Regulations for the State of Virginia does separate these professions and there are certain educational factors associated with each of these categories and each have to be licensed as such.

Mr. Davidson, owner of the referenced business, Bleeding Canvas located at 453 West Main Street, stated that he was requesting that a motion be made to allow tattooing as a Personal Service in the proper zone and that the Town grant him a business license for that service, allowing him to continue to operate his tattoo business as it has been operated since 2003. He stated that he is legally licensed by the Commonwealth to perform as it stands now.

At the beginning of Mr. Davidson's discussion, he requested that he be allowed to pass around to the audience, a petition to support free enterprise, and he was granted that request. He explained that he had presented all information requested by Mr. Jackson, with no resistance, but was still denied a business license. He considers that denial of a business license is unacceptable and discriminatory in considering this business has been in operation since 2003. Mr. Davidson explained that denying his business license is unconstitutional and down-right un-American.

He further stated that the Declaration of Independence states, "the pursuit of happiness"; this business is Mr. Davidson's pursuit and he feels attempt is being made to take it away from him. Mr. Davidson stated, "the American economy is tight right now and as Americans, we need to do all we can to pull out of this slump...look u p and down Main Street, businesses are folding left and right, and with the denial of issuing a business license for his business isn't helping matters or rectifying the problem."

Mr. Davidson stated that in 2003 his first business was located at 953 West Main Street and later in approximately 2006-2007, the business relocated to 469 West Main Street, with present business location being 453 West Main Street. The previous name of the business was Crazy Daizy.

At that time Mr. Henninger asked Mrs. Deborah Icenhour, Town Attorney, to speak for a legal opinion of this matter. Mrs. Icenhour stated that before she rendered her legal opinion she would like to ask Mr. Davidson some questions and she was granted that request. Some of the questions asked were as follows:

1. Mrs. Icenhour asked Mr. Davidson how much experience he has in tattooing and his reply was "one and one-half years."
2. Mrs. Icenhour asked Mr. Davidson, approximately, how many tattoos he had completed during that time and his reply was, "I have no idea."
3. Mrs. Icenhour asked Mr. Davidson how much money he had made during that time and his reply was, "unknown."
4. Mrs. Icenhour asked what the general charge for a tattoo is and Mr. Davidson replied, "it varies."

5. Mrs. Icenhour asked Mr. Davidson what his annual income is and Mr. Davidson replied, "between \$20,000 and \$30,000."

Mrs. Icenhour explained that Mr. Jeffrey Davidson doing business as Bleeding Canvas, is the lessee at 453 West Main Street in Abingdon, located in the B-3 Zone. In applying the law with regard to this zoning appeal, it was of her opinion that Mr. Jackson, the Town's Zoning Administrator was correct in denying Mr. Davidson a business license for 2009. Pursuant to the Code of Virginia §15.2-2280 the Town of Abingdon is enabled by ordinance to divide and classify the permitted uses of its territories through zoning. Pursuant to the Town of Abingdon Zoning Ordinance the operation of the tattoo parlor is not permitted, either as by right or special use permit. The Town's Zoning Administrator, Mr. Garrett Jackson, is given the authority and the responsibility under the Code of Virginia, §15.2-2286 to insure compliance with the Zoning Ordinance making zoning determinations within the scope of his authority, and to exercise discretion in making such determinations as the one being presented at this meeting tonight.

She further stated that Mr. Jackson explained that Article 12 of the Zoning Ordinance of the Town of Abingdon sets out the permitted uses allowed within the B-3 District, and tattoo parlors is not included in those permitted uses. Further, tattoo parlors fail to fall within the definition included there as well. For this interpretation we rely upon 28<sup>th</sup> Judicial Circuit Court decision by Judge Randall C. Lowe in a 2006 case; Southern Development LLC v. Mark Reeter, Zoning Administrator of Washington County, a case from the local Circuit Court and one with very similar facts to the matter being heard in this appeal presented at this time.

Mrs. Icenhour further explained that in the Southern Development case, the first determination made by the Court was that of a tattooist named Mr. Davidson, not a necessary party to the action, therefore, the Court heard the appeal from the property owner's prospective. In this matter, apparently, the property owner is not interested in a Circuit Court Appeal. At that time, the Court set forth that a tattoo parlor does not come within the definition of a beauty shop or barber shop, thereby setting forth differences between personal Service businesses and that of a tattoo parlor. The Court draws its conclusion from a number of sources, most convincingly from the dictionaries and definitions set forth in the Regulatory Materials issued by Virginia Department of Professional Occupational Regulations (DPOR) and from its reliance on the 2002 Supreme Court Case, Ancient Art Tattoo Studio, LTD v. City of Virginia Beach, which reemphasizes that the Zoning Administrator has discretion in making decisions of this type.

Mrs. Icenhour stated that while it is true that the tattoo shop known as Crazy Daizy Tattoo did have a Business License 2003 - 2008, it existed at three (3) different addresses during that time and failed to notify either (1) the State Regulatory Board (which requires 30 days notice) or (2) the Town of its move on either occasion. When the shop changed owners, the same occurred without notification of either the state or local government, both of which are required. Mr. Davidson claimed it was unfair for the Town to have allowed these activities during this span of time and now refuses to issue his license, however estoppel or laches, equitable defenses which guard against acquiescence of a party, does not apply to a municipality when it is acting in a governmental function, as the Virginia Supreme Court ruled in Westminster-Canterbury of Hampton Roads, Inc. v. City of Virginia Beach, in 1989. Further defense of laches may not be asserted as a defense against the Commonwealth, the rule from Sink v. Commonwealth, Virginia Court of Appeals, 1992.

Mrs. Icenhour continued, stating that for these reasons and (*\*other reasons as noted*), it is the legal opinion of the Office of the Town Attorney that the Zoning Administrator acted properly by denying the issue of a Business License to Mr. Davidson and therefore, urges the Board of Zoning Appeals to AFFIRM his determination that the operation of a tattoo parlor is prohibited in the Town's B-3 Zoning District.

Mrs. Icenhour supplied copies of letters, explaining that *\*Mr. Davidson is not licensed as either a tattooist nor is he registered an apprentice; (required under Virginia Department of Professional Occupational Regulations ) per Mr. William H. Ferguson, Executive Director, DPOR, Richmond, Virginia, Wednesday, March 4, 2009.*

Also, *\*Mr. Richey, who spells his name in more than one way, thereby makes the process of checking for validity very difficult for the local agencies as well as his Regulatory Board, is the only individual with a tattooist license at the business, but he is NOT designated as an apprentice sponsor, and we believe he is supervising two (2) unregistered, self-appointed tattoo apprentices.*

Mr. Mathew Richey, stated that he and his wife are the former owners of Crazy Daizy Tattoo, and that he is a legally licensed tattoo artist, but no apprentice sponsor. He stated that Mr. Davidson purchased the business from him and does have a current license to operate his business. Mr. Richey referred to the B-3 District Zoning Ordinance stating that B-3 District is approved for cosmetologist, barbers and similar service. Mr. Richey stated that tattoo is considered a similar service. All of these services are governed by the Commonwealth under the Board of Barbers and Cosmetology. He explained that he had received information from DPOR stating that other local businesses in Abingdon, listed as tattoo parlor, were Healing Waters Day Spa, A Step Ahead and Foxy Hair. Mr. Richey also stated that from 2003 – 2008 his former business was granted a Business License for the Town of Abingdon.

Mr. Jackson replied to Mr. Richey's comments, stating that he had been serving as Director of Planning/Zoning since 2005 and the previous business, Crazy Daizy Tattoo, was indeed issued a Business License from the Town, though it's zoning verification was never certified by his office. Several businesses were found to have been operating, for some time, without a zoning certified license. This was corrected in 2008 when his office asked the Finance Department to send ALL NEW BUSINESS LICENSES to him for review and his signature. This seems to have remedied the problem and has brought about this current situation.

Mr. Jackson further explained that several "red flags" had been discovered throughout the course of the offices' investigation. When the applicant applied for the 2009 Business License, the "professional license" which Mr. Davidson presented was not a valid license through the Virginia Department of Professional Occupational and Regulation. Mr. Davidson has since corrected this matter with a properly issued license. The DPOR held several inconsistencies in their licensing which were not properly complied with when the business moved and/or changed its name and ownership.

Mrs. Cathy Richey spoke on behalf of Mr. Davidson, explaining that a tattooing service is not a salary service, business is not guaranteed everyday and this could be an explanation for inconsistent recorded amounts of income for Mr. Davidson; this type of business is strictly by reputation and income is not steady. She further explained that when she and Mr. Richey originally opened their business, Crazy Daizy Tattoo, in 2003 she contacted the Zoning Department and was told a tattooing service was legal. At that time a zoning permit was signed, business license was issued and she was also informed that there were sign regulations to be followed in acquiring signage. In 2007 – 2008 the business was sold to Mr. Davidson and she and Mr. Davidson came to the Town office and informed them that the business was sold to

Mr. Davidson. At that time staff in the Finance Department informed them that it was so late in the year it was not necessary to issue a new business license, it would be renewed at beginning of year. Since Crazy Daizy Tattoo was named for Mr. and Mrs. Richey's daughter "Daizy", at the beginning of 2009, they asked Mr. Davidson if he would change the name of his business, at which time he changed it to Bleeding Canvas. Mrs. Richey stated her husband is a licensed artist that works for this business which provides revenue for the Town; customers come from Korea, California, Pennsylvania, Lebanon, Castlewood, Bristol and many other areas, with all patronizing local motels and restaurants. This business causes no trouble for anyone, no unnecessary signs displayed and it is her hope that the Town won't deny this business a license to operate, with the economy failing, which provides two or three persons a job opportunity.

Mr. Dennis Davidson spoke on behalf of his son, explaining that this shop is one of the cleanest businesses located in Town and he feels that the business should be "grandfathered" and be allowed to continue operating as it has since 2003. He stated that this establishment has no drinking on the premises, no trash, there is no record of the police department ever having been called, therefore, why not let this good business continue to operate. Mr. Davidson stated that this situation has caused a lot of people to be very angry and requested that consideration be taken in this matter to not deny this request, but give his son an extension whereas he can have the proper frame of time to prepare to take appropriate measures for the Planning Commission to consider the matter.

Mr. Jackson once again explained that the reason for this meeting tonight was strictly to determine if he had made the right decision in enforcing the ordinance.

Mr. Shuman stated that he is not only a member of the Board of Zoning Appeals, he also serves as a member of the Planning Commission and after hearing this matter, the proper procedure for this situation is to go before the Planning Commission and make a request to change the definition of Personal Services for the B-3 District to include tattoo parlor. Mr. Shuman further explained that the responsibility of the Board of Zoning Appeals is to focus on whether or not Mr. Jackson's interpretation of Personal Services was correct. He believes Mr. Jackson's decision was correct and that there is an opportunity to make a change, but the Board of Zoning Appeals is not the body to make the change. He further explained that he could not guarantee the Planning Commission would recommend the change to Town Council; however this is the proper procedure to follow.

Mr. Bell explained that even though Crazy Daizy Tattoo previously had a license, it doesn't mean it would be "grandfathered", meaning if the license was issued incorrectly, a license isn't required to be issued to Bleeding Canvas based on that basis.

Ms. Patsy McGee, a citizen of the Town for more than 60 years, spoke in regards to this matter stating her concerns as to whether or not Mr. Davidson would still have the chance to go forward to try to continue this business. Mr. Shuman stated that the opportunity is there but the responsibility is that of Mr. Davidson to carry forward to the Planning Commission with this request. Ms. McGee thanked the Board and indicated that she just wanted to have the understanding that this business could still be a legal, viable income for the community.

Mr. Levi Ratcliff, an employee of the tattoo shop, explained that a tattoo is a "personal service" and this is what Bleeding Canvas provides, a personal service.

After a lengthy discussion, Mr. Bell made a motion that in Case No. 395, the board vote to AFFIRM Mr. Jackson's decision that tattoo parlor is not included within the Zoning Ordinance, Section 26-83 Personal Services business but that the Board stay the effect of that affirmance for ninety 90 days from March 10, 2009 and that the applicant be required to show proof of proper licensure before the 90 day deadline. Mr. Shuman seconded the motion, with unanimous approval.

VOTE:

Mr. Bell	Aye
Mr. Shuman	Aye
Mr. Graham	Aye
Mr. Henninger	Aye

The motion passed.

The decision of the Zoning Administrator was upheld by the Board of Zoning Appeals and Mr. Davidson was asked to meet with Director of Planning/Zoning to proceed with the amendment process to the Planning Commission within the requirement of ninety (90) days.

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There being no further business, the meeting was adjourned.

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Gerald Henninger, Chairman

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W. Garrett Jackson, Secretary