

REGULAR BOARD MEETING of February 17, 1999, with Mayor Buck Trott and Commissioners Mike McCall, H. N. James, Ron Sanders, Zeke Sossomon, and Amy Patterson present.

Also present were Richard Betz, Lamar Nix, Eddie Madden, Bill Coward, Kim LeWicki, Alan Marsh, Paul & Jan Chmar, Sherry Sims, Charlie McDowell, Jolene Niblack, David Hourdequin, Wistar Gary, Steve & Brenda Pierson, Horace Duncan, Chuck Cooper, Sherry & Buddy Kremser, Ran & Margaret Shaffner, Lewis Doggett, George Schmitt, J. B. Coram, Rosemary Fleming, and others.

I. Call to Order.

Mayor Trott called the meeting to order at 7:00 p.m.

II. Approval of Agenda.

The Mayor noted that the Town Attorney was ill, and suggested hearing his report first under New Business so that he could leave.

The Clerk asked that two items of New Business be added to the agenda: approval of a proposed addition to the Highlands Playhouse, and a Petition for Rezoning from Sharon & Buddy Kremser.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. SANDERS, AND UNANIMOUSLY CARRIED TO APPROVE THE AGENDA AS AMENDED.

III. Approval of Minutes.

The minutes of the February 3 Regular Board Meeting had been distributed by mail.

MOVED BY COMM. SANDERS, SECONDED BY COMM. JAMES, AND UNANIMOUSLY CARRIED TO APPROVE THE MINUTES AS DISTRIBUTED.

IV. Reports.

1. Each Board member had received a copy of the Town Administrator's report. Richard Betz reported that he had learned that the County will be receiving a \$12,500 grant from the Capacity Building Grants Program for its proposed Comprehensive Water and Sewer Plan; the request had been for a \$20,000 grant, to be matched with \$8,500 from the County, \$8,500 from Franklin, and \$3,000 from Highlands, for a total \$40,000 project. He asked for permission to write a letter requesting that part of this grant money be used to fund the Town's proposed engineering/ annexation study by W. K. Dickson, as discussed informally at the dinner meeting with the County on January 18 and at the January 20 Board meeting. The Board agreed by consensus.

Mr. Betz also reported that the matter of amending the County's Watershed Protection Ordinance had been referred to the County Attorney and would be discussed at the March 1 Commissioners meeting.

He also said he wrote a letter to Sam Greenwood on February 11 asking the County Board of Commissioners to refund excessive landfill fees, pursuant to Board action at the last meeting. The right-of-way agreement with Steve & Brenda Pierson had been sent to the Town Attorney for recording; two additional right-of-way agreements (for property on the opposite side of the road) had still not been returned.

However, plans had been prepared by W. K. Dickson, the Town's consulting engineer, several months ago, and the project was ready to go to bid.

MOVED BY COMM. MCCALL, SECONDED BY COMM. SANDERS, AND UNANIMOUSLY CARRIED TO RECEIVE BIDS ON PHASE I OF THE BOWERY ROAD WATER SYSTEM IMPROVEMENTS, PURSUANT TO PLANS PREPARED BY W. K. DICKSON.

Mr. Betz also reported that he had again written to the Jackson County

Board of Commissioners concerning the Board's December 17 request for consideration for funding for water system improvements in the Bowery Road area of Jackson county in the coming fiscal year; no response had been received to date.

A petition for annexation had been received on February 8 from Henry Mendler, but the petition from Martin Allen had not yet been received.

Comm. James asked the Clerk to check on the statutory time limit for responding to a petition for annexation.

Mr. Betz also said he had received a letter from Ward Hendon and had spoken to Ann Hobson Haack regarding reduction of the escrow for the Hobson Land Company Subdivision by 50%; he had told them both that in order to reduce the escrow, an updated cost of the improvements would have to be provided.

Finally, Mr. Betz reminded the Board that last July 15 he had prepared a proposed Policy on Pay Increases, which the Board had agreed to consider the first meeting in March; there was no objection to placing this on the agenda of the March 3 meeting.

V. New Business.

1. Chuck Cooper had forwarded some changes recommended by his FCC attorney to the Town Attorney on the proposed WHLC lease, last discussed by the Board on February 18, 1998. Bill Coward had no objection to the proposed changes, as follows:

- Paragraph 4, Term: "to commence on the first day of March 1999 . . . and end on the first day of March 2009."
- Paragraph 15(a): insert the words "or other Lessee's" after the word "Lessor."
- Paragraph 15(f): insert the words "after receiving FCC approval" at the end of the second-to-last sentence.

2. Bill Coward said that, considering the possibility of a pending lawsuit, he wished to advise the Board regarding the Episcopal Church appeal in Closed Session pursuant to the attorney-client privilege exception in the Open Meetings Law.

MOVED BY COMM. MCCALL, SECONDED BY COMM. SANDERS, AND CARRIED TO GO INTO CLOSED SESSION TO DISCUSS THE EPISCOPAL CHURCH APPEAL WITH THE TOWN ATTORNEY, PURSUANT TO G.S. §143-318.11(a)(3). Comms. McCall, Sanders, Sossomon, and James voted "aye;" Comm. Patterson voted "nay."

In consideration of the number of people in the audience and the inclement weather, the Board, the Town Attorney, the Clerk, and the Town Planner then left the conference room and re-assembled in the adjoining lobby of the Chamber of Commerce. Bill Coward discussed with the Board at some length the legal issues related to the recent decision of the Zoning Board to appeal the Superior Court ruling in the Episcopal Church case, as well as his own ethical duty as an attorney. The Board then re-assembled in the Conference Room.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. SANDERS, AND UNANIMOUSLY CARRIED TO GO INTO OPEN SESSION.

The Mayor stated that the Board had listened to the advise of the Town Attorney in Closed Session. He pointed out that the Zoning Board was a reflection of the Town Board and was appointed by the Town Board, and he knew its decisions were not easy ones. He asked the Board to make a decision this evening on which way the Town would go in the matter of the Episcopal Church and the Zoning Board, and he opened discussion to the Board.

Comm. Patterson felt the Town Attorney should first explain who had

jurisdiction in an appeal.

Bill Coward said that, although he was certain it had been dealt with before, the question of jurisdiction had never come up in a North Carolina case, and a written court decision was therefore not available to guide the Board. He thought that, because the Zoning Board and the Episcopal Church were the only two parties to the appeal, it made sense that a losing party could appeal. However, there were arguments on both sides. His research had found nine cases from other states where courts had held that the Zoning Board had the right to appeal, and seven cases where they did not. Although it was unclear whether the Zoning Board had the right to appeal, that Board had made its wishes clear at its last meeting when it had voted to appeal the decision. The Zoning Ordinance also had a provision that Board members should be reimbursed for "expenses," but it was unclear whether that included attorney fees.

Comm. Patterson said she felt it was a simple question, since this Board did not hear the testimony or evidence in the case: does the Town Board support the Zoning Board? That Board wanted to appeal, they were an extension of the Town Board, and she felt this Board had to give them the right to appeal. The Board had appointed conscientious, reasonable people, who were not capricious, and they had made a decision; she felt the Board should back them up.

Comm. Sossomon agreed, and said he felt even more strongly about the question. He thought the Zoning Board was essentially the Town Board; the initial responsibility for zoning was given to Town Boards, but if it didn't want to, it could create a Zoning Board to do it.

As long as the Town Board let that situation exist, he didn't see how it could do anything else. The Board could do away with the Zoning Board, but he didn't think anybody wanted to do that. He thought it would be pushing the limits to decide whether the Zoning Board was right on a case by case basis; he felt there should be a uniform standard. The Zoning Board had been given a job to do, and although the Town Board might have a right to say it would provide no money, it was illogical to "cut them loose."

Comm. James said that he had always supported the Zoning Board, but he did not personally agree with all of their decisions; he felt they had made a mistake on this one. He thought the Zoning Board was not the Board to be making a decision to appeal to the State Court of Appeals because they were not the party of interest. However, they had been advised that they had the right to appeal, had decided to do so, and it was out of the Town Board's hands.

Comm. McCall agreed. He felt that the Town Board was elected by and was responsible to the taxpayers. While he was not saying that he did not support the Zoning Board, he felt the Town Board should make the decision on an appeal.

Mayor Trott asked the Board to make a decision. Comm. Sossomon said he was not sure anything was before the Board; he pointed out that nobody had asked the Board to pay the bill. However, he felt that Mr. Coward's obligation extended at least through the notice of appeal.

MOVED BY COMM. MCCALL THAT THE TOWN SUPPORT THE ZONING BOARD IN THE APPEAL, THAT TOWN ATTORNEY BILL COWARD FILE A NOTICE OF APPEAL, BUT THAT THE TOWN BOARD WILL NOT FUND THE APPEAL. There was no second to the motion.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. PATTERSON, THAT TOWN ATTORNEY BILL COWARD BE AUTHORIZED TO FILE A NOTICE OF APPEAL, AND IF PRESENTED WITH A BILL THAT THE TOWN FUND THE COST OF THE APPEAL.

J. B. Coram, a member of the Episcopal Church, was present, and pointed out that Comm. Sanders's wife was employed by the Episcopal Church and served at the discretion of the church; he asked the two attorneys present their opinion on a possible conflict of interest.

Comm. Sanders said that he did not pick up his wife's check on Monday, and she did not ask him to vote; he said there was no conflict of interest, and he resented the question.

Bill Coward read the applicable statute, G. S. §160A-75, which stated that "no member of a city council shall be excused from voting except upon matters involving the consideration of *his own financial interest* or official conduct." In his opinion there was no financial interest.

Comm. Sanders pointed out that Comm. Sossomon and the Mayor were both members of the parish of the Episcopal Church.

Rosemary Fleming was present and asked, if money was an issue, why the Town had spent a fortune in the Poplar Street matter.

Comm. Patterson pointed out that the Board should never let cost rule over principle. Comm. McCall agreed, but felt that the decision to fund or not to fund an appeal was still a Town Board decision.

Ran Shaffner spoke briefly in support of the Zoning Board's decision to appeal. He said that the Zoning Board had felt that the Judge's ruling in the case was not consistent with its ruling and that an appeals court should decide. He said he had spoken with four attorneys and they had all told him the ruling would not stand up to appeal. He also said that one individual had told him that the Judge's decision was based on a "yellow dog Democrat" ruling against a Republican Town Attorney.

The Mayor called the question on the motion by Comm. Sossomon. Comm. James said that he agreed with the first part of the motion but not the second part. The vote was called and the motion carried, with Comms. Sossomon, Patterson, and James voting "aye," and Comms. Sanders and McCall voting "nay."

MOVED BY COMM. JAMES, SECONDED BY COMM. SANDERS, AND CARRIED TO GO ON RECORD DISAGREEING WITH THE ZONING BOARD'S DECISION TO APPEAL.

Comms. James, Sanders, and McCall voted "aye;" Comms. Patterson and Sossomon voted nay. Comm. Sossomon said he did not feel this was a proper question for the Board, and would not have voted except not doing so would have been considered an "aye."

Bill Coward asked, in consideration of the second motion, if the Board had any objection to him representing the Zoning Board in the appeal. The consensus of the Board was that they had no objection.

He then asked if the Board would consent to the Town Board being substituted or added as a party in order to make the appeal more viable; he felt this might be useful in order to be able to vigorously defend the Zoning Board.

Comms. James said he did not agree; Comm. Patterson also said she had a problem with that.

Mr. Coward explained that he felt he would have a better chance on appeal if the case were argued on its merits, with the Town Board as a party, rather than simply on the question of whether or not the Zoning Board had the right to appeal, where the case might be thrown out on a technicality.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. PATTERSON, THAT TOWN ATTORNEY BILL COWARD BE AUTHORIZED TO DO WHATEVER IN HIS LEGAL JUDGEMENT HE DEEMS NECESSARY FOR THE EFFECTIVE PROSECUTION OF THE APPEAL. Mr. Coward informed the Board that, if the motion failed to carry, he would have to withdraw from the case after filing the notice of appeal, because there would be a conflict. The motion failed to carry, with Comms. Sossomon and Patterson voting "aye," and Comms. James, McCall, and Sanders voting "nay."

Bill Coward then left the meeting room.

VI. Old Business.

1. The Board again discussed a recommendation of the Finance Committee and the Town Administrator accepting a quotation from Stanberry Agency for General Liability, Property, Public Officials, Law Enforcement, Commercial Umbrella, and Automobile Insurance, retaining coverage through VFIS for Fire Department insurance, and retaining coverage through the North Carolina League of Municipalities Risk Management Group for Workers Compensation, as discussed at the previous meeting. The Town Administrator said he had met with Comm. Sossomon since the last meeting and discussed his concerns over the limits of liability; Comm. Sossomon said he was satisfied.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. PATTERSON, AND UNANIMOUSLY CARRIED TO APPROVE THE FOREGOING CHANGE IN INSURANCE, EFFECTIVE APRIL 1.

2. The Board again discussed a request from Sherry Kremser made at the previous meeting that the Board consider trading off connection fees for her new project in exchange for her providing public rest rooms; the matter had been taken under advisement. Comm. James felt this matter would require a lot of study, and should include detailed plans on the rest rooms and their cost; he had not understood that it would be placed on the agenda again so soon.

MOVED BY COMM. JAMES, SECONDED BY COMM. SANDERS, AND UNANIMOUSLY CARRIED TO TABLE CONSIDERATION OF THE REQUEST.

3. The Board considered the lease with WHLC for antenna space on the new Big Bearpen tower; the Town Attorney had recommended approving the changes suggested by Chuck Cooper's attorney earlier in the meeting. Town Administrator Richard Betz said that the new tower had been erected, but that he had learned that WHLC had placed five antennas on it in addition to the two Comair antennas; his understanding from a review of the record was that only two antennas had been approved by the Board over the years. He felt it was important to establish how many antennas were to be permitted on the tower, in accordance with "Exhibit C" of the lease, in light of the moratorium on new antennas.

Mr. Cooper stated that the five antennas were the same ones that had been on the two utility poles on that site since 1993, with the exception of a second auxiliary broadcast antenna recently discussed.

In addition to the two broadcast antennas, the tower held two auxiliary antennas: a 160-megahertz antenna used for telemetry, and a 450-megahertz antenna installed as another auxiliary in case of emergencies. The fifth antenna was a parabolic antenna which received signals from his studio. He said that all of the antennas were occupying only 46 feet of the 180 feet of rentable space on the tower, and he pointed out that additional sections could be added to the tower in the future.

Comm. McCall remembered that the Board had agreed on only two antennas; he did not think that the additional auxiliary antennas should be mounted on the tower now "just in case." Mr. Cooper said he would like to ask to keep those antennas on the tower for now.

Comm. James pointed out that the Board had never been provided with Exhibits A, B, or C in the lease agreement; he felt the matter should be tabled until those exhibits had been provided.

Mr. Cooper also said that Mr. Betz had asked him about the orange "radome" covers for the two broadcast antennas; he said that they were designed to prevent ice from accumulating, and although he had found that they could not be painted, they and the tower itself would become dull over time.

VII. New Business.

1. The Town Administrator reported that he had received only two bids—from Consolidated Constructors Inc. and from Schmitt Building Contractors Inc.—for the redesigned warehouse building, pursuant to a request for formal bids. By consensus, the Board agreed to re-advertize for bids.

2. George Schmitt was present on behalf of the Board of Directors of the Highlands Community Theatre to request permission for remodelling the ladies' rest room and constructing a small addition to the sewing room at the Highlands Playhouse building. All of the improvements would be within the existing footprint of the building except for a 144-SF addition on the north side of the building, visible only from the parking lot.

MOVED BY COMM. SANDERS, SECONDED BY COMM. JAMES, AND UNANIMOUSLY CARRIED TO APPROVE THE PROJECT.

Comm. James asked if the Appearance Commission would be reviewing the project. The consensus of the Board was that the project be presented to the Appearance Commission at their next meeting.

3. Sherry & Buddy Kremser were present with a petition for re-zoning a portion of their property on Main Street. Ms. Kremser said that it had been discovered early in the development of the property that, while the portion where the Country Store was located was still zoned B-2, the remainder had been re-zoned B-3 several years ago. The Zoning Board had not approved a requested setback variance at their previous meeting, and she felt that the project would look better with the 8-foot covered deck originally approved by the Appearance Commission, which extended into the front setback area. Her request was that the portion of the property adjoining the Country Store on Main Street be re-zoning to B-2, where there would be no setbacks, while the portion located adjacent to Smallwood Avenue remain B-3.

Mayor Trott pointed out that the property was still usable meeting all of the requirements of B-3. Ms. Kremser described several trees which she said would not have to be cut if the property was re-zoned.

MOVED BY COMM. PATTERSON, SECONDED BY COMM. JAMES, AND UNANIMOUSLY CARRIED TO SEND THE REQUEST TO THE PLANNING BOARD FOR A RECOMMENDATION.

4. The Board then began to discuss the proposed amendments of the Zoning Ordinance and the public hearing which the Board, at their January 20 meeting, had already set for March 17 on various amendments of the Zoning Map; the Board had agreed to consider the related recommendations of the Land Use Planning Committee prior to that public hearing, as well as the proposed Appendix C. Comm. James pointed out that the hour was late and there was much to discuss; Comm. Sossomon agreed, and suggested setting a Special Work Session to address all of the proposed amendments.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. MCCALL, AND UNANIMOUSLY CARRIED TO RESCIND THE BOARD'S ACTION OF JANUARY 20 SETTING A PUBLIC HEARING FOR MARCH 17.

MOVED BY COMM. SOSSOMON, SECONDED BY COMM. JAMES, AND UNANIMOUSLY CARRIED TO SCHEDULE A SPECIAL WORK SESSION FOR 7:00 P.M. ON FEBRUARY 24 TO CONSIDER THE ZONING AMENDMENTS.

VII. MOVED BY COMM. PATTERSON, SECONDED BY COMM. SANDERS, AND UNANIMOUSLY CARRIED TO ADJOURN.

There being no further business to come before the Board, the meeting was declared adjourned by the Mayor at 9:15 p.m.

Richard Betz, Town Clerk