

Draft

BOARD OF ADJUSTMENT

MINUTES

Thursday September 13, 2013

The Blowing Rock Board of Adjustment met on Thursday, September 12, 2013 at 5:30 p.m. Members present were Chairman Mark Klein, Ron Oberle, Jerry Starnes, Annie Whatley and Dr. Charles Davant. Staff present was Planning Director Kevin Rothrock, Town Attorney Allen Moseley and Administrative Assistant Tammy Bentley.

Chairman Klein called the meeting to order at 5:30 p.m.

APPROVE MINUTES:

Mr. Starnes made a motion to approve the minutes from April, 2013. Ms. Whatley seconded the motion. All were in favor of the motion.

Kevin Rothrock and Mr. William Brooks were sworn in for testimony to the Board.

Mr. Rothrock gave the staff report to the board in reference to Appeal #2013-02:

Finley House Antiques has appealed the decision of the Zoning Administrator that requires the change of the paint color of a commercial entry door located at 1121 Main Street.

Staff discovered that the front door and part if the entryway ceiling at Finley House Antiques had been painted pink. Staff spoke with owner Dean Bullis and informed him that the color did not comply with the Land Use Code and approved colors. Through further contact staff provided the owners with ordinance references requiring compliance. In July owner William Brooks viewed the approved color book in the Planning Department and spoke to staff about color options. On July 26, 2013 the applicant was sent a Notice of Violation, via certified mail, requiring that the pink color on the exterior be changed. The applicant was also required to submit an Exterior Change Permit application along with a paint sample that was consistent with the “nature blending” color list.

On August 6, 2013, Mr. Brooks filed an appeal to the final decision of the Zoning Administrator on the grounds that:

1. “The code is not applicable to the simple painting of a door.”
2. “The color painted is not in violation of the Code.”
3. “The town has no legal basis for enforcement of the painting of a door.”

Ms. Whatley motioned to have the applicant speak. Mr. Starnes seconded. **All were in favor.**

Mr. William Brooks told the Board that he appreciated their time in hearing this appeal and thanked them for their time. Mr. Brooks stated that he has owned several businesses in Blowing Rock and had owned Finley House Antiques since 2004. He stated the door was painted pink for 2 reasons—for breast cancer awareness and that Finley House was now a Lilly Pulitzer store and pink is their signature color. He said that they donate to the Susan G. Komen foundation monthly and that Lilly Pulitzer is a nationally branded, upscale, very popular line. He also stated that having the Lilly Pulitzer line would draw people to Finley House and to Blowing Rock.

Mr. Brooks stated that they were not inclined to change the color as they are not in violation per Section 16.4.1.1 of the Land Use Code, which states that a zoning permit is required for substantially altering a building. He said that they had not changed the color of the building; only the door. He also stated that painting a door is not a change, but merely maintenance. Mr. Brooks pointed out that there are several buildings in town that do not comply with the approved colors and one sign that is painted almost the same color pink as the Finley House door.

Mr. Brooks gave the Board a copy of a petition that contained around 700 signatures in favor of keeping the door pink. He stated that the petition represents a cross section of visitors and residents. He also stated that they feel singled out.

Mr. Brooks told the Board that they have always tried to set a high standard and have the best stores in town. The stores have won the Chamber of Commerce award for the “best windows” so many times that the Chamber presented them with a lifetime award. He asked the Board to reverse Mr. Rothrock’s decision, stating that Finley House wants to continue promoting breast cancer awareness and to continue to carry the Lilly Pulitzer line.

Dr. Davant asked Mr. Moseley if a municipality can regulate design standards since the state did not back-up architectural review boards and since our review board has been dissolved. Mr. Moseley responded that a municipality can regulate design standards outside of a conditional use permit. He also stated that this specific question does not specifically apply to this situation and that his role is to advise the Board as to procedural aspects of the Board of Adjustment and not to render his opinion. He further advised the Board that their function is to render a decision to reverse, affirm or to modify Mr. Rothrock’s interpretation of the Land Use Code.

Dr. Davant asked Mr. Rothrock if he would cite the other businesses that Mr. Brooks mentioned should the Board agree with his interpretation. Mr. Rothrock replied that he would not, as those were different circumstances. Dr. Davant also asked Mr. Rothrock if painting was considered maintenance. Mr. Rothrock confirmed.

Mr. Oberle said when in doubt to go back to the reasonable man test and that the reasonable man won’t say that pink is not pink. He further stated that the reasonable man would attempt

to change the rules and that the discussion should be limited to this one case and not include other violating businesses.

Mr. Rothrock stated that we are not deciding if the door looks good, but if the color meets the Code.

Mr. Oberle noted that we don't run the country on petitions.

The Board discussed the meaning of "substantial." Ms. Whatley asked if a substantial change was determined by the cost or area changed and why would it not be the same for maintenance. Mr. Rothrock responded that maintenance would be painting the door the same color and this case involved changing the color of part of the building.

Chairman Klein said that to the best of his memory the other businesses mentioned by the applicant were grandfathered. Mr. Rothrock confirmed, with the exception of the Sister Act sign. He said that he had tried to work with them on the sign and they had toned down the color. He also stated that the yellow on the Subway sign on Valley Boulevard was also toned down.

The Board discussed whether allowing the color to remain would set a precedent. Mr. Rothrock said that either decision would set a precedent.

*Ms. Whatley made a motion to close the public comment, seconded by Dr. Davant. **All were in favor of the motion.***

Mr. Starnes said that the "reasonable man rule" would indicate that this change is not substantial. Ms. Whatley agreed. Dr. Davant said that the Town Council could amend the ordinance language to include doors, windows and trim. Mr. Oberle stated that the decision needs to stand. Ms. Whatley disagreed. Dr. Davant said that the ordinance should give applicants flexibility. Ms. Whatley agreed and said that the painting of the door is a business decision, that the color is a national brand and that it gives people the ability to enhance their business and promote a good cause.

Mr. Rothrock asked to address the Board.

*Dr. Davant made a motion to re-open the hearing to comment, seconded by Mr. Starnes. **All were in favor of the motion.***

Mr. Rothrock asked the Board if they make the judgment that doors are not a substantial part of a building, does that mean that all doors could be any color. Dr. Davant said that the Town should act quickly to amend the ordinance to specifically include doors.

Mr. Rothrock said that the code included an extensive section on commercial design that refers to parts of buildings and even includes gutters. He then asked the Board if they would agree to bright green gutters. He continued that this decision is not based on his personal opinion of the color, but based on how the ordinance is written.

Ms. Whatley said that they are playing “what if” and bright green gutters are for another day.

Mr. Rothrock asked if doors are ok, what other parts of the building are substantial. Ms. Whatley replied that “substantial” needs to be better defined.

Dr. Davant asked Mr. Rothrock if a door is part of the exterior of a building. Mr. Rothrock replied yes. Dr. Davant noted that the ordinance states that building exteriors should be stone or brick and that this would require stone or brick doors. Mr. Rothrock asked the Board how specific do they want the ordinance to be.

Ms. Whatley asked Mr. Brooks if there is any case law defining “substantial structure.” He replied that he was sure that there is and that it would have to be researched; he can’t pinpoint one particular case now. He added that any ordinance or statute that is in derogation of common law must be strictly construed against the maker.

Ms. Whatley made a motion to close the public comment, seconded by Mr. Starnes. All were in favor of the motion.

Chairman Klein said that he read the definition of façade and did not see how doors could not be included. Ms. Whatley agreed with Mr. Klein but said that painting a door is not a substantial alteration and a permit is not required unless all or most of the façade is being altered.

Mr. Oberle made a motion to uphold the Zoning Administrator’s decision, seconded by Chairman Klein. For the motion: Mr. Oberle and Chairman Klein. Against: Mr. Starnes, Ms. Whatley and Dr. Davant. Motion failed.

Mr. Starnes referenced section 16.21.1 (d) and said in the spirit of this paragraph he would like to make a motion to make a very narrow interpretation and reverse the staff decision. He added that the “reasonable man interpretation” is that one pink door is one incident. Chairman Klein said that the Town Council must now be more specific in the ordinance. Mr. Moseley told the Board that if they wanted to narrow the motion that they should cite specific findings of fact. Chairman Klein asked if shop owners would be free to paint doors however they liked. Ms. Whatley said she thought they were just trying to make a living.

Dr. Davant asked Mr. Rothrock if someone could paint their building with stripes and polka dots in nature blending colors. Mr. Rothrock said that would be up to the Planning Board and Town Council.

Mr. Starnes made a motion to reverse the Zoning Administrator’s decision based on section 16.21.1 (d,) that the pink door is not a substantial part of the building. Ms. Whatley seconded. For the motion: Mr. Starnes, Ms. Whatley and Dr. Davant. Against: Chairman Klein and Mr. Oberle. Motion failed to pass by a 4/5 majority.

Chairman Klein asked if staff's decision was overturned. Dr. Davant responded that it was not as a 4/5 majority was required to overturn staff's decision. Mr. Brooks said that he would appeal to the Town Council. Mr. Moseley told Mr. Brooks that he would need to appeal to Superior Court. He added that if the Board reversed staff's decision that the Town Council would come in and specify the ordinances.

Ms. Whatley noted that the applicant must now go to Superior Court. Chairman Klein asked what the fine is. Mr. Rothrock answered \$100 per day, but no fines have been assessed.

Dr. Davant made a motion to reverse staff's decision based on section 16.21.1 (d) based on this particular site. Ms. Whatley seconded. Chairman Klein asked Mr. Moseley if this motion is enough to not set a precedent. Mr. Moseley said that if the Board is concerned about setting a precedent they need to include as many finding of facts as possible to narrow the effect. He also said he did not know the relevance of "this site".

The Board discussed the best way to list findings of fact in a motion.

Dr. Davant made a motion to reverse staff's decision based on these findings of fact:

- 1) That the ordinance does not specifically mention that doors, windows, trim colors are substantial,*
- 2) That the color selected is that of a national brand and charity;*
- 3) That strict enforcement of the ordinance would stifle the creativity, expression and individually of this property owner.*

*Ms. Whatley seconded the motion. **For the motion: Mr. Starnes, Ms. Whatley and Dr. Davant. Against: Chairman Klein and Mr. Oberle. Motion failed to pass by a 4/5 majority.***

*Dr. Davant made a motion to ask the Town Council to review this ordinance and be more specific with the language of the ordinance. Ms. Whatley seconded. **All members were in favor of the motion.***

*Ms. Whatley made a motion to adjourn. Dr. Davant seconded the motion. **All members were in favor of the motion.***

Adjourn

With no further business, the Board adjourned at 7:00 p.m.

Mark Klein, Chairman

Tammy Bentley, Administrative Assistant