

Applicant:
TimberKnolls Spirit Cove, Inc.

ORDER ON SPECIAL USE APPLICATION

On January 31, 2024, and continuing February 23, 2024, the Henderson County Board of Adjustment (the “Board”) conducted a quasi-judicial hearing on the Application of TimberKnolls Spirit Cove, Inc. (the “Applicant”) for a special use permit for an office on a parcel located in an area zoned “R2R” under the Henderson County Code. As to procedural matters in this matter, the Board made the following findings:

1. On January 31, 2024, the Board of Adjustment was made up of the following persons:

Andrew Riddle, Chair
Louise St. Romain
Carlos Ruiz

Steve Dozier, Vice-Chair
Mark Casoria
Lynn Bush (alternate)

2. The Board recognized as parties to this matter Henderson County Zoning Department staff, the Applicant.

3. In addition to the foregoing, the Board heard two requests from other persons to become parties to this action, from John Newcomer and Pat Newcomer (collectively “Newcomer”), and from Michael Gregory (“Gregory”). Both Newcomer and Gregory own homes in which they live that are located adjacent to and adjoining the Applicant’s property which is the subject of this permit request. Both were allowed to act as parties for the purpose of this hearing.

4. Prior to the resumption of the hearing on February 23, 2024, the Board received affidavits from Bruce Hatfield (“Hatfield”), a resident of the area in which the Applicant’s property is located, and from Gregory. Hatfield alleged via affidavit that Board Vice Chair Dozier made comments to him prior to the January 31, 2024, session “to the effect: ‘You will not like the outcome of the board vote tonight’” Gregory alleged via affidavit that Dozier made comments to him prior to the January 31, 2024, session “to the effect: ‘You may not like me by the end of the night.’”

5. Dozier stated that his comment to Hatfield was that Hatfield “may or may not like the outcome of the board vote tonight.”

6. On motion duly made, the other members of the Board recommended to Dozier that he recuse himself from the balance of the hearing, to avoid any appearance of impropriety. Dozier did so, and alternate member Lynn Bush became a voting member of the Board for this hearing.

As to the merits of this application, the Board makes the following findings:

7. The Applicant has purchased the following five adjoining tracts located off Evans Road in Crab Creek Township, Henderson County, North Carolina:

- Parcel identification number 9546495669 (shown on site plan as “Lot 1”)
- Parcel identification number 9546497614 (shown on site plan as “Lot 2”)
- Parcel identification number 9546498553 (shown on site plan as “Lot 3”)
- Parcel identification number 9546590147 (shown on site plan as “Lot 4”)
- Parcel identification number 9546496130 (shown on site plan as containing a “proposed dog therapy center with wrap around porch”, referred to herein after as the “Subject Parcel”)

8. Newcomer owns property to the west, across Evans Road, from the Subject Parcel.

9. Gregory owns property to the northwest of the Subject Parcel and to the west of much of “Lot 1”, separated from both of the Applicant’s parcels by a utilities easement not owned by the Applicant.

10. The Applicant’s request for a special use permit is for what is characterized by Henderson County’s Land Development Ordinance (the “LDO”), codified as Chapter 42 of the Henderson County Code, as “Office: Business, Professional and Public”. The special use application in this matter only concerns the Subject Parcel, which contains 4.76 acres, more or less, and is zoned as Residential District Two Rural (“R2R”) by the County.

11. Under the LDO, general requirements for uses located in an R2R district are as follows:

- A. No density maximum, as the proposed use is not residential.
- B. Setbacks of ten feet side and rear, and for front, varying between fifteen feet and ninety feet, depending on the classification of the road on which the parcel fronts. Notwithstanding how Evans Road is classified where it abuts the Subject Property, the site plan proposed by the Applicant exceeds even the largest setback provided for in the R2R district.
- C. Maximum height of forty feet, as determined under the LDO.
- D. Maximum impervious surface as calculated under the LDO of 80% and a maximum floor area limit of 80,000 square feet.

12. “Supplemental Requirement 6.9” has the following requirements for an “Office: Business, Professional and Public”:

- A. A major site plan.
- B. Adequate lighting (as defined in the LDO), with lighting mitigation (also defined in the LDO).

13. The Applicant's proposal is as follows:

[T]o develop the subject area as a professional office with one structure. The proposed structure is shown as approximately 4,032SQFT and will be encompassed with a wraparound porch. The structure will be accessed by a private driveway easement from Evans Rd (SR1196) with a cul-de-sac for emergency response vehicles. The structure will also contain 8 parking spaces and 1 ADA accessible parking space. The major site plan shows a total disturbance of 0.71 acres. The major site plan also shows the existing 130' wooded buffer to remain along Evans Rd (SR1196) and the eastern edge of the subject area. Total open space is shown as 4.41 acres.

14. The Applicant's proposal was reviewed by the County's technical review committee, which recommended the following conditions in addition to compliance with the general R2R requirements and the specific Supplemental Requirements listed above: Obtain a North Carolina Department of Transportation driveway permit; obtain a North Carolina Department of Transportation encroachment agreement; and provide Americans with Disabilities Act a van-accessible parking space. The Applicant does not object to these conditions.

15. The Applicant has consented to the requirements as stated in 14., above.

16. No party offered evidence to the contrary of the foregoing.

From the foregoing, the Board concludes as a matter of law that the evidence shows that the Applicant's initial burden of production, showing existence of facts and conditions required for the issuance of the permit, has been met. Pursuant to PHG Asheville, LLC v. City of Asheville, 374 N.C. 133, 839 S.E.2d 755 (2020), the Applicant is *prima facie* entitled to the Special Use Permit sought.

The Board then moved to the second portion of the inquiry under Henderson County Code §42-355.H., as to whether the proposed use will or will not materially endanger the public health, safety or welfare, whether the proposed use will or will not substantially injure the value of property or improvements in the area, and whether the proposed use will or will not be in harmony with the surrounding area.

17. Under the LDO (County Code §42-355.H.),

The Applicant will not bear the burden of proving that all of the site standards (as listed below) have been met; however, the Applicant will be required to produce evidence sufficient to rebut any evidence presented that the site standards would not be met or that a condition is necessary. The Applicant may be required, in his/her rebuttal, to show that the proposed use will:

- a. Not materially endanger the public health, safety or welfare;

- b. Not substantially injure the value of property or improvements in the area; and
- c. Be in harmony with the surrounding area.

18. There was no evidence presented that the proposed use did not meet the applicable site standards under the LDO.

19. The Board heard evidence from two persons allowed to provide expert evidence as property appraisers, Lynn Carmichael (who was presented as a witness by the Applicant), and Jackson Tate (who was presented as a witness by Newcomer). After hearing both, the Board was not persuaded that the proposed use would significantly affect neighborhood property values.

20. The Board was further not persuaded that the proposed use would endanger the public health, safety or welfare.

21. The Board heard significant evidence that, in the absence of conditions, the use would not be in harmony with the surrounding area, particularly the property owned by Gregory.

22. The Board is of the opinion that the conditions stated below sufficiently remedy this issue.

From the foregoing, the Board concludes as a matter of law that this matter is appropriately before the Zoning Board of Adjustment, and that the special use permit sought, with the conditions stated below, should be granted.

WHEREFORE IT IS ORDERED that the Special Use permit sought by the Applicant is hereby granted, on the following conditions:

1. Those recommended by the County's Technical Review Committee, namely,
 - A. That the applicant obtain a North Carolina Department of Transportation driveway permit, and comply with the same in construction of a driveway to the Subject Parcel.
 - B. That the applicant obtain a North Carolina Department of Transportation encroachment permit for any sight lines required in the driveway permit.
 - C. That the Americans with Disabilities Act parking space on the property be van accessible.
2. That all the conditions of the R2R district and the supplemental requirements be met, including lighting mitigation and the submission of a revised site plan for the

Subject Parcel (copy attached to the final Order entered) showing the below conditions regarding buffering and fencing.

3. That no persons live in or remain overnight in the building shown on the site plan as the office on the Subject Parcel.

4. That the hours of operation of the office be 8:00 a.m. to 5:00 p.m. for standard operating hours five days per week. In addition to these standard operating hours, not more than six special events per year, for which the office may be used until 10:00 p.m.

5. That a vegetative buffer be as shown on the revised site plan for the Subject Parcel, which is attached.

6. That fencing between the office and the Gregory property be located where shown on the revised site plan, at a height of six feet.

7. That the driveway to the Subject Parcel be located as far east as possible while meeting the North Carolina Department of Transportation gradient rise standards.

After motion duly made, the foregoing was approved by a unanimous vote of the Board. Further the Board unanimously approved the form of this Order.

Announced in substance on February 23, 2024, and signed _____.

FOR THE BOARD OF ADJUSTMENT

CHAIR