



**CURRITUCK COUNTY
NORTH CAROLINA**

February 25, 2016
Minutes – Regular Meeting of the Board of Adjustment

CALL TO ORDER

A. Statement

Please be advised that these minutes are not verbatim but are rather a general summary of the discussions at the meeting. A transcript of the meeting prepared by a court reporter will be available at a later date.

OLD BUSINESS

A. Public Hearing and Action: BOA 16-01 R.F. London, Inc.: Special Use Permit request for an adult and sexually oriented business (presently adult entertainment.)

Mr. Palmer reconvened the meeting.

Mr. McRee presented a response to Applicant Exhibit #10. (County Exhibit #3) The board received the exhibit into record.

There were no objections.

Mr. Plumlee presented four additional pages to Exhibit #10. (Applicant Exhibit #11)

Mr. McRee objected to the exhibit due to relevance of what the board was to consider.

Mr. Palmer overruled Mr. McRee's objection.

The board took a brief recess to review the new information contained in County Exhibit #3.

The board came back into order.

Mr. Plumlee offered closing arguments. He primarily addressed secondary affects.

Mr. McRee objected to the line of closing arguments regarding constitutionally.

Mr. Plumlee said that secondary effects are what constitutionally is all about.

Mr. Morrison told the board not to consider constitutionally.

Mr. Plumlee continued regarding the contempt of the county.

Mr. McRee objected to the fact that the board has no authority to consider contempt of court.

Mr. Plumlee continued. He asked for relief on behalf of his client. He asked that the special use permit be issued. He mentioned latches.

Mr. McRee objected to the reference to latches which the board cannot act upon.

Mr. Morrison told the board they could not consider latches.

Mr. Plumlee concluded his closing argument.

Mr. McRee presented closing arguments. He discussed secondary effects and not the actual proceedings to issue a use permit; the application and the fact that it did not meet the UDO regulations to issue a permit at the time it was submitted; court orders; amortization; the board not having the authority to issues a special use permit; testimony in a previous proceeding; testimony on Ms. Berry's analysis; the findings of fact that cannot be met; amortization; etc.

Mr. Plumlee rebutted to Mr. McRee's closing argument.

Mr. Painter asked about the state talking about the effects of this type of business in the appropriate location. He asked if the statues gave direction.

Mr. McRee said the statue gave a locality the authority to determine appropriateness of location for adult businesses.

Mr. Painter asked if there were no negative effects, was it in the appropriate location?

Mr. Palmer asked if issuing a license for the dancers and security was a requirement of the county's ordinances.

Mr. McRee said it was not a requirement of county ordinances.

Mr. Painter confirmed that the business was not in compliance when it opened as an adult establishment.

Mr. Morrison said it had been ruled that at least 5% of the county had to be made available for adult businesses. Mr. Morrison said that in 1994, the ordinance was not in compliance with that ruling.

Mr. Tabor asked if there had been an application for an adult business.

Mr. Morrison said there had been based upon court order.

Ms. McCloud confirmed that the business had never been closed based on the applicant's choice.

Mr. Plumlee said not for 180 days.

Mr. Morrison said that even if the board addresses secondary impacts, the distance to the residential area had to be addressed.

Mr. Plumlee said the judge had ordered the special use permit to be issued and the judge knew the distance to the residential area.

Mr. Morrison said the board had to follow the proper proceedings outlined in the order also. He said the board does not have nor has ever had authority to issue a special use permit. Since it is court ordered, the board has the authority to issue it.

Mr. McRee said the board does not have the authority to issue a use permit, and even if it did, the applicant did not meet the minimum requirements of the UDO.

Mr. Painter asked how setbacks would be addressed.

Mr. Plumlee said there are no secondary affects, so the setbacks do not matter.

Mr. McRee said the order was not to issue the permit, but rather rehear the application. The court could have issued the permit.

Mr. Paint asked about Judge Hight saying zoning was not to be considered and the county could not enforce the ordinance.

Mr. McRee said the county had not enforced the ordinance.

Mr. Morrison said the board is not an enforcement board.

Mr. McRee said that it is not a preclusion of the county to be able to enforce its ordinance.

Mr. Palmer asked about the ordinance not being in alignment with Supreme Court ruling. He asked if the 5% rule could be met and why the county did not answer the request to tell the applicant where they could locate.

Mr. McRee said Mr. London did not try to rezone property on which to operate an adult business.

Mr. Balance asked if there is property in the county on which the business can locate.

Mr. Tabor said it is up to the applicant, not the county, to find a place to operate.

Mr. Palmer said he is trying to keep the board involved and make decisions by consensus.

Mr. Tabor asked how a judge could make the board do something it has no authority to do.

Mr. Palmer said the board is under a court order. He questioned the validity of the ordinance.

Mr. Morrison said it is not the authority of the board to call an ordinance invalid.

Mr. Morrison suggested the board go into closed session to discuss legal matters.

Mr. Painter motioned to go into closed session to discuss legal matters. Mr. Tabor seconded the motion and the motion passed unanimously.

Mr. Palmer called the meeting back into session. He said the first time the board knew about the 16 year old court order was in January. The board is asking Mr. Morrison to draft notice to the Board of Commissioners telling them to let the Board of Adjustment know fort with of court orders that they are involved in.

Mr. Morrison said the board had been put in the middle and the board finds that they have been given a difficult task in reviewing ordinances, orders, etc. The board has no authority to hear or issue a special use permit, but since ordered by court, they have to do it this one time.

Mr. Palmer clarified that all of the findings of fact in Judge Hight's order are incorporated by reference into the board's findings.

Upon advice of Mr. Morrison, Mr. Palmer said the board had heard discussions regarding latches, estoppels, previous decision of BOC, violations, etc., but the board does not have authority to address those things and should leave those items to a higher court.

Mr. Morrison addressed the board's attention to Judge Tillett's order that was incorporated into Judge Hight's order. The order remanded the application back to the board for re-hearing and consideration of the application under Sections 1304 and 808 of the UDO. The board shall consider the application pursuant to Section 1304 and make specific finds of fact and conclusions of law.

Mr. Palmer addressed the findings of fact from the application. He asked what the initial intended use was and if it was compliant with UDO Section 1304.

The board determined that the initial intended use was a bar/nightclub in 1993.

Mr. Plumlee said the use permit was supposed to be granted at the board's earliest time. In 1993 the initial intended use was a pool hall/nightclub. Mr. McRee agreed.

ACTIONS REGARDING SECTION 1304 OF THE UDO

Mr. Palmer asked for a motion about the secondary effects of petitioner's initial intended use of a bar/nightclub.

Mr. Painter motioned that there were no secondary effects from the bar/nightclub. Mr. Tabor seconded the motion and the motioned passed unanimously.

Mr. Morrison mentioned the amended use under UDO Section 1304.

Mr. Plumlee said the amended use was a sexually oriented business.

Mr. Morrison asked when a document was filed with county saying the applicant wanted to amend the use from a bar to a sexually oriented business.

Mr. Plumlee said the applicant submitted a letter in May of 1994 saying the use was going to be an adult nightclub. He said the August 1994 inspection by county staff verified topless dancing.

Mr. McRee said the amended use was the 2000 application for a sexually oriented business.

Mr. Morrison said there was no UDO Section 808 in 1994. All the county got was letter announcing topless dancing. He said it was up to board to decide if a letter is proper notification of amended use. There is no definition of amended use.

Mr. Palmer said the letter of May 1994 was notification of the amended use to the county.

Mr. McRee said Judge Tillett's order remanded the case back to the board to hear a new application. A new application is the proper request for a change of use, not a letter.

Mr. Palmer said the judge said to look at the 2000 application under Section 1304 of the UDO and that section does not address sexually oriented businesses.

Mr. Morrison asked if Section 1304 addressed adult entertainment.

Mr. McRee said Section 1304 references Section 1310 that says where sexually oriented businesses may be located in the county.

Mr. Morrison asked what Judge Tillett's order means when it says "petitioner's amended use" and what that amended use was.

Mr. Plumlee said the amended use was a topless operation in nightclub.

Mr. Morrison said the board can only consider the 2000 application.

Mr. Palmer asked the board what the amended use was under Section 1304. He said a letter was sent in 1994 saying that the use was being amended to a sexually oriented business and that letter was a part of the findings of fact.

Mr. Tabor said a letter is not proper notification of an amended use. You would have to amend the permit.

Mr. Balance said a letter is not a proper notification.

Mr. Painter said when the conditional use permit was issued, there was no a way to deal with the amended use in UDO. The applicant used a letter to develop regulations.

Mr. Tabor said a letter does not make the use properly permitted.

Mr. Painter said the letter said to advise the applicant if the amended use was not a legal use. The sexually oriented business regulations were not added to the UDO until later.

Mr. Painter motioned that the letter announcing operation as an adult establishment under Section 1304 was proper notice and there was no ordinance to address adult establishments when the county got the letter and the letter said to advise if not permissible. Mr. Tabor seconded the motion and the motion passed with Mr. Balance voting no.

Mr. Balance and Ms. McCloud said they thought they were supposed to be considering facts since 2000, not 1994.

Mr. Palmer asked for a motion about secondary effects of petitioner's amended use (Sexually Oriented Business).

Mr. Painter motioned that there was a lengthy operation of business without proven secondary effects of the sexually oriented business. Ms. McCloud seconded the motion and the motion passed unanimously.

Mr. Morrison said the board must consider how secondary effects are affected by different intended uses. He assumes Judge Tillett meant to question if secondary effects are different for a bar compared to a topless establishment. Since the board has ruled that there are no secondary effects from a bar or sexually oriented business, there are no differences in secondary effects between the two.

Mr. Tabor motioned that there are no distinctions between the secondary effects of a bar verses a sexually oriented business. Mr. Balance seconded the motion and the motion passed unanimously.

ACTIONS REGARDING SECTION 808 OF THE UDO

Mr. Morrison said the board, in the alternative, shall consider the petitioner's application against Section 808 of the UDO and make findings of fact and conclusions of law for the 2000 application for a sexually oriented business.

Mr. Tabor motioned that the initial intended use was for a sexually oriented business pursuant to the 2000 application. Mr. Painter seconded the motion and the motion passed unanimously.

Mr. Painter motioned that there were no effects from the initial intended use of the 2000 application for a sexually oriented business. Mr. Ballance seconded the motion and the motion passed unanimously.

Mr. Painter motioned that the sexually oriented business use was never permitted. Ms. McCloud seconded the motion and the motion passed unanimously.

Mr. Painter motioned that there were no secondary effects to consider. Mr. Tabor seconded the motion and the motion passed unanimously.

Mr. Painter motioned that there no secondary effects to differentiate from. Mr. Tabor seconded the motion and the motion passed unanimously.

ACTIONS REGARDING THE 2000 SPECIAL USE PERMIT APPLICATION

Mr. Morrison advised the board to go through the 2000 special use permit submitted by Mr. London line by line and vote on A-E of the application separately. In addition, the board has to consider completeness of the application and conformity of the proposed use with those uses in the table of permissible uses indicated with an "S"; the issue of a special use permit not being in the jurisdiction of the board; and if completed as proposed in the application, the use would not comply with one or more sections of the ordinance.

Mr. Plumlee objected because of applying Section 1310 by reference in Section 1304.

Mr. Painter motioned that the application was complete. Mr. Tabor seconded the motion and the motion passed unanimously.

Mr. Painter motioned that the use is among those listed in the Table of Permissible Uses as a special use indicated with an "S." Mr. Tabor seconded the motion and the motion passed unanimously.

Mr. Tabor motioned that the conditions proposed do not meet or exceed the minimum requirements of the UDO as the request does not meet zoning or setbacks. Ms. McCloud seconded the motion and the motion passed unanimously.

Mr. Tabor motioned that the special use will not endanger the public health or safety. Mr. Painter seconded the motion and the motion passed unanimously.

Mr. Painter motioned that the special use will not injure the value of adjoining or abutting property and will be in harmony with the area in which it is located. Mr. Tabor asked how many objections you have to have from the neighbors to say the use is not in harmony. Mr. Palmer said that harmony is not a legal thing but a secondary effect thing and since the board has ruled that there were no secondary effects, the use was in harmony. Mr. Painter said this location and this use are in harmony with that particular area of the county because there was construction in the neighborhood and the use was similar to a restaurant. David Palmer seconded the motion and the motion passed unanimously.

Mr. Painter motioned that the special use will be in conformity with the Land Use Plan or other officially adopted plan. Mr. Palmer said that staff findings speak to secondary effects and since there had been no complaints, the use is in conformity with the Land Use Plan as it relates to quality of life and secondary effects. Mr. Tabor seconded the motion and the motion passed unanimously.

Mr. Tabor motioned that the special use will not exceed the county's ability to provide adequate public facilities, including, but not limited to, schools, fire and rescue, law enforcement, and other county facilities because it is a commercial use. Mr. Ballance seconded the motion and the motion passed unanimously.

APPLICATION DENIAL

Mr. Palmer announced that zoning and setbacks preclude the board from issuing the special use permit.

Mr. Painter motioned to deny the application because it does not meet zoning and setback requirements. Mr. Tabor seconded the motion and the motion passed unanimously.

The board directed Mr. Morrison to draw up an order of denial and submit it to the board for execution.

RESULT:	DENIAL [UNANIMOUS]
MOVER:	Michael Painter, Vice Chairman
SECONDER:	Cameron Tabor, Board Member
AYES:	Cameron Tabor, Board Member, C. Shay Ballance, Board Member, Donna McCloud, Board Member, Michael Painter, Vice Chairman, David Palmer, Chairman, Vivian Simpson, Board Member

ADJOURNMENT

There being no further business to discuss, Mr. Tabor motioned for adjournment. Ms. McCloud seconded the motion and the motion passed unanimously.



Currituck County Agenda Item Summary Sheet

Agenda ID Number – (ID # 1412)

Agenda Item Title

Public Hearing and Action: BOA 16-01 R.F. London, Inc.:

Brief Description of Agenda Item:

Special Use Permit request for an adult and sexually oriented business (presently adult entertainment.)

Board Action Requested

Action

Person Submitting Agenda Item

Susan Tanner, Administrative Assistant

Presenter of Agenda Item

Ben Woody