



# MINUTES

## Board of Adjustment

June 10, 2008 ~ 7:00 p.m.  
❧ Town Chambers ❧

**Board Members Present:** Chairman David Snider, Reta Berman, Steve Bomgardner, Ryan Cuomo, Margie Ebner, Carolyn Lawson, Michael Schutrum, Michael Sheaffer, and Thomas Snyder.

**Board Members Absent:** None

**Planning Staff Present:** Jack Simoneau, Planning Director, Lisa McCarter, Planner I, David Peete, Principal Planner, and Michelle V. Haines, Secretary.

Robert B. Blythe, Esquire ("Bob Blythe"), appeared as Town Attorney.

Chairman Snider called the Board of Adjustment hearing to order at 7:00 p.m., and determined a quorum. David Peete, Principal Planner introduced Ryan Cuomo, the new member to the Board.

### *Approval of the Minutes*

Mike Schutrum moved to approve the Minutes of the May 29, 2008 meeting, and Tom Snyder seconded the Motion. The vote carried unanimously.

### *Election*

David Snider announced that elections will be held for the Officer position of Vice Chairman, and that nominations will be taken from the floor.

Reta Berman excused herself from the panel.

Carolyn Lawson questioned the vacancy of the seat and office that was held by Steve Howard. Jack Simoneau explained the Rules of Conduct for Members pursuant to the Rules of Procedures to the Board concerning Attendance. The procedures allow the Town Board to replace members for the unexpired portion of their term. Mr. Simoneau added that Mr. Howard would be missed.

Carolyn Lawson nominated Thomas Snyder for Vice Chairman, and Steve Bomgardner seconded the nomination. All members (regular and alternate) were allowed to vote according to the Rules, and the vote was unanimous.

## *Case #V08-06 Called*

Richard McElrath, applicant, and David Peete, Principal Planner, were sworn in prior to giving testimony concerning the matter of Variance # V08-06 – 11111 Arthur Auten Road, Huntersville, North Carolina 28078.

### *Planning Staff Testimony*

David Peete gave his preliminary statement of the case to the Board and entered the facts, findings and conclusions into the record through verbal testimony and written documentation, as follows.

#### **BACKGROUND:**

1. The subject property is zoned Rural (R), and is located at 11111 Arthur Auten Road. There is currently a single-family home on the property. The property is located in the Mountain Island Lake Watershed Overlay.
2. The lot was created in 1996 under Mecklenburg County's jurisdiction.
3. On March 7, 2008, the applicant filed for a variance from the 100 foot undisturbed buffer from the shoreline of Mountain Island Lake in order to add a patio room to the lakeside of the existing home.
4. The information available on POLARIS for this site incorrectly identified the required S.W.I.M. buffer as 50 feet. It is 100 feet in the Mountain Island Lake Critical Area. Mecklenburg County Water Quality Program Staff have identified the error and are working to correct POLARIS. The statewide buffer is 30 feet and is shown on the survey as well.
5. Article 3.3.2 C *Appeals and Variances in MIL-O District* states:
  - 3.3.2-C.1 - The Zoning Board of Adjustment is hereby designated the Watershed Review Board.
  - 3.3.2-C.3.b - Minor variances shall include petitions for the reduction of any numerical standard of the low-density option in the overlay district by a factor of 10% or less.

Minimum statewide water supply watershed protection criteria require a 30' undisturbed buffer from Mountain Island Lake. If the square footage of the proposed addition that is located in the 30' buffer is more than 10% of the total square footage of the area on the property located within the 30' buffer than this variance request is a major variance. Although the entire existing home is within the 100' buffer required by the Huntersville Zoning Ordinance, the existing home or the proposed patio room do not encroach into the 30' statewide buffer. Therefore, the request is a minor variance.

6. Article 3.3.2-C.3.c further states:

Minor variances shall comply with the procedures and standards of Section 11.3 of these regulations (Zoning Ordinance)

7. In summary, as this request is a minor variance, the Board of Adjustment may approve or deny the request subject to the provisions of Section 11.3 of the Zoning Ordinance.

#### **STAFF FINDINGS**

Article 11.3.2 f, Standards for Granting a Variance of the Huntersville Zoning Ordinance:

- 1) Before granting a variance, the Board of Adjustment shall have made the following findings:

- (a) That practical difficulties or unnecessary hardships, as defined in subparagraph 2) below, would result from the strict application of these regulations; and

***The property is currently in use as a single family home; therefore reasonable use is currently being made of the property without the proposed patio room addition.***

- (b) That the variance is consistent with the objectives and policies of any adopted plan for the district or area covering the property, any other adopted written policies governing land development, and the construction and improvement of public facilities, and the general intent of these regulations; and

***The Town intends the property to be used for a single-family residential dwelling and the applicant's proposal is consistent. The request is not consistent with the regulations for the Mountain Island Lake Watershed Overlay and preservation of the 100 foot buffer.***

- (c) That the public safety and welfare have been protected and substantial justice done.

***The cumulative impact of approving variances to the undisturbed buffer from Mountain Island Lake would negatively impact water quality.***

- 2) Only the following three conditions shall constitute a practical difficulty or unnecessary hardship and all must be met:

- (a) The difficulty or hardship would result only from these regulations and from no other cause, including the actions of the owner or previous owners of the property; and

**The existing home was built in 1996 prior to the enactment of these watershed regulations and was not held to the current standards in the Huntersville Zoning Ordinance. This subdivision was approved by Mecklenburg County and not The Town of Huntersville. While the existing home is a legally non-conforming use, any addition or alteration must comply with current regulations.**

- (b) The difficulty or hardship is peculiar to the property in question and is not generally shared by other properties classified in the same zoning district and/or used for the same purposes; and

**As exhibited on the aerial photograph from POLARIS (see Exhibit C), the surrounding properties are a) vacant, b) have single-family homes that appear to encroach into the 100' buffer and c) have single-family homes that do not appear to encroach into the 100' buffer. Not all parcels in this area encroach into the required buffer, but several do and will face similar development limitations.**

- (c) The difficulty or hardship resulting from the application of these regulations would prevent the owner from making a reasonable use of the property. The fact that the property could be utilized more profitably or conveniently with the variance than without the variance shall not be considered as grounds for granting the variance.

***Reasonable use of the property is currently available without the variance.***

***In addition, Article 3.3.2-C.3.a states "in addition to the notification requirements of Section 11.3 (Appeals & Variances), the Watershed Administrator (Town Staff) shall also notify in writing each local government having jurisdiction in the watershed and the entity using the water supply for consumption. Such notice shall include a description of the variance being requested. Local governments receiving notice of the variance request may submit comments to the Watershed Administrator prior to a decision by the Watershed Review Board (Board of Adjustment). Such comments shall become a part of the record of proceedings of the Watershed Review Board. Exhibit D to the Staff Report is a letter from Heather Davis, Water Quality Program Environmental Specialist, recommending denial of this request.***

***During the April 2008 Board of Adjustment Meeting, this request was continued by the Board so that the applicant could work with LUESA staff to determine if a mitigation plan was feasible. A mitigation plan was prepared and it was reviewed by Water Quality Program Environmental Specialist Heather Davis (see Exhibit E). The letter from March 31, 2008 still represents LUESA's recommendation, but an approvable mitigation plan has been developed.***

### **STAFF CONCLUSIONS**

The property is currently being used for a single family residence, and can continue to be used for a single family residence without granting a variance. Staff does not support granting a variance as the request does not satisfy the findings of fact. However, if the Board of Adjustments approves the variance, a LUESA-approved mitigation plan should be added as a condition.

Mike Schutrum asked staff when the 100' buffer was created, and Lisa McCarter, Planner I indicated it was 1993 or 1994 when it was established. David Peete explained that the 100' buffer precedes the date the lot was created, and the error in its mapping on the POLARIS real estate system.

Steve Bomgardner addressed staff and stated that POLARIS is not legally binding and that it should only be used as a guide, which was acknowledged by staff. However, staff pointed out that a 60' variance is substantial and was a factual incident in this case at hand.

Mike Schutrum questioned LUESA not supporting the variance but on the other hand considers a mitigation plan. David Peete addressed that issue as LUESA recommended a mitigation plan if the variance were approved, but that neither the Town nor County can choose to support granting the variance.

### ***Applicant Testimony***

Richard McElrath, applicant, presented argument in support of his application for a variance. In speaking with Heather S. Davis, Environmental Specialist with Mecklenburg County, it was indicated by her to the applicant that she can do a mitigation plan, but can not tell him (McElrath) that she can approve the variance as that was a decision for the Board of Adjustment. The applicant indicated to Heather Davis that he desired a plan that would result in less run off in the lake and more improvements than presently exists.

David Snider asked the applicant if the plan included rain barrels and David Peete answered that it does not, but it was made clear by Mr. McElrath that he will do what is asked, and appropriate. Additionally, the Board could recommend adding rain barrels.

Mr. McElrath pointed out to the Board that he has already made landscaping improvements to the property that are not indicated in the mitigation plan by removing the grass area to the left of the property near the lake and dock. He has planted a garden in that area to make sure that he does what it takes to improve the property with less run off.

There were no persons present to oppose and present argument against the application.

### ***Board Conclusions***

The period for public discussion was closed by the Chairman, and the Board publicly discussed the case with further input and clarification from the applicant and planning staff concerning the buffer and hardship.

Steve Bomgardner reiterated his position from the last meeting that the Board is taking a nonconforming structure and increasing it and there has to be a proven unnecessary hardship, which

not being able to enjoy the [lake] view doesn't qualify as a hardship. He further stated that he does not support this variance, that there is no hardship, and can not vote in favor of granting.

Carolyn Lawson indicated that the key is the 100' buffer did not exist at the time the home was built; that the house footprint is only 700 square feet, and the addition is not a large increase (less than 25%).

Mike Schutrum was concerned that everybody who wants to create a better view will come with a mitigation plan to build in the buffer zone. Carolyn Lawson reminded the members that the older homes typically have lawns, and the new homes will have the buffer; and the key here is that there is a difference between a buffer that mitigates water run-off and a buffer zone.

Margie Ebner stated that she wants to grant the variance; that mitigation is in the spirit of the buffer with the improvements to the property as far as the lake is concerned. The problem will be meeting the criteria to grant the variance. Thomas Snyder agrees, and would approve, but looking at the findings he does not see how this can be done as a hardship. He does not think there is a hardship on the grounds of a house being built prior to setbacks and buffers, and/or that a house on the lake without a view creates hardship.

Mike Sheaffer's concern was setting precedence for other homeowners on the lake.

Carolyn Lawson moves for a **Motion to Approve** and grant the variance based on the following facts of findings:

- 1a: The difficulties or unnecessary hardship is in fact applicable because the regulation stops the homeowner and creates the hardship;
  - 1b: The variance is consistent with the objectives and policies of any adopted plan for the district because there is no buffer and one will be added;
  - 1c: Public safety and welfare are not threatened;
  - 2a: The hardship exist because of the regulations;
  - 2b: The difficulty or hardship is shared with other properties that had no 100' buffer when built and therefore they would all come under the same hardship;
  - 2c: The difficulty or hardship resulting from the application of these regulations does prevent them from using lakefront property as all lakefront property owners would want to use the property.
- Further, the addition is less than 25% of footprint of the house; mitigation is not less than 400% of the buffer, and we can add rain barrels at the front of the house.

Steve Bomgardner wanted clarification from staff for the definition of a "buffer" and conditions of a hardship. He believes there is a 100' buffer there, and it is there to protect the water quality. He did not agree that the difficulty/hardship factors under 2a, b, and c are due to simply the regulations, but that the applicant hasn't proven hardship in justifying the granting of the variance. David Peete read from the Zoning Ordinance the definition of a buffer, and the watershed definition.

The Chairman reminded the members of the Motion on the floor, and Margie Ebner seconded the **Motion to Approve** the variance. Further discussion was held on the Motion. Mike Schutrum felt that this was setting precedence, and would be problematic with the Board and with Mecklenburg

County Water Quality. Margie Ebner proffered that if every homeowner would come before the Board with as much as they (McElrath) are doing, it would improve the land and the water quality.

Carolyn Lawson asked for the Motion to be read. Meanwhile, discussion was taking place with staff, Steve Bomgardner, David Snider, and Bob Blythe concerning the future enforcement of a variance and mitigation plan, the chain of title and the lack of information in the chain of title since variances are not recorded documents.

More discussion was held concerning the percentages of the addition and the mitigation plan. David Snider felt that the member was trying to establish legislation with the terms of this Motion, and future requests when using percentages as equations in the approval process. David Snider further stated that he is torn with this variance request, and following the rules and regulations with adding a sunroom. He further stated that this is our drinking water. Margie Ebner stated that we are improving the drinking water and situation, and will improve the quality overall; that this Board does not have control with people who do not come before us; and the Board can grant a variance based on stipulations. She appreciates the opening of the issues of this variance, but feels that the Board can improve the quality of water with an approved mitigation plan.

Carolyn Lawson asked if there were any further objections to the Motion, and David Snider indicated to take out the long term stipulations. Bob Blythe indicated that the Board should not put a specific size on the variance, but did need to quantify the size or by percentage. Carolyn Lawson felt that they would be raising the bar high if the additions are left small and the mitigation plans are large and use that standard in the future. Thomas Snyder feels that with this specific plan and mitigation the Board is trying to address all additions and mitigation plans in the future, with may be too broad.

Carolyn Lawson modified the **Motion to Approve** by replacing the 25% square footage language with stating the specific 172 square foot front porch addition with mitigation plan as proposed by Mecklenburg County Land Use and Environmental Services. Margie Ebner seconded the Motion. The members voted on the Motion by showing of hands. In favor of the Motion were Carolyn Lawson, Margie Ebner, David Snider, and Thomas Snyder; opposed were Mike Schutrum, Steve Bomgardner and Mike Sheaffer. A concurring vote of four-fifths of the members shall be necessary to decide in favor of the applicant. Therefore, the request for a variance is **DENIED**.

As recommended by the Town Attorney, the prevailing side hereby enters their reasons why they did not grant the variance, which is the Staff's Findings in its entirety (see page 2 and 3 above).

Mr. McElrath addressed the board as "baffled" with this process. Mitigation is for the water quality, and now this Board is guaranteed that no mitigation will take place. The Board of Adjustment had this opportunity to get high standards and results, but now they will have the same run off on the land without any addition, mitigation plan, or guaranteed water quality improvement.

## Case #A08-01 Called

Thomas L. Odom, Jr., Esquire appeared on the behalf of and with the Appellant, Cinco De Mayo and Exit 25, LLC. Jack Simoneau, Planning Director, Lisa McCarter, Planner I, Renee Wilson, Code Enforcement Officer, Claudia Schruhl, Community Outreach Specialist, Sergeant Scott Sharp, various Huntersville Police Officers, ALE Agent Dudley, parties present for the Appellant, James Sherrill, and members and witnesses in the audience all of which were sworn in prior to giving testimony concerning the matter of **Appeal # 08-01.**

### *Planning Staff Testimony*

Jack Simoneau gave his preliminary statement of the case to the Board and entered his facts, findings and conclusions into the record through verbal testimony and written documentation, as follows.

#### **BACKGROUND:**

1. The subject property is zoned Neighborhood Center (NC) Conditional District, and is located at 9610-C Sherrill Estates Road. The official Huntersville Map of Zoning Districts shows that the property is zoned NC. NC zoning district requirements from Article 3 of the Huntersville Zoning Ordinance that includes the permitted uses. A nightclub is not a permitted use in the NC zoning district. In the Huntersville Zoning Ordinance Article 12 Definitions “nightclub” and “restaurant are defined as follows:

“Nightclub - Any commercial establishment serving alcoholic beverages and/or providing entertainment for patrons, including bars, lounges, taverns, cabarets, and similar establishments”.

“Restaurant. A building or operation, the purpose of which is to accommodate the consumption of food and beverages”.

2. The property is located in the Shops at Northcross which was approved as a conditional district rezoning plan on February 21, 1999. This plan limited uses to the uses listed on the *Neighborhood Plan for the Rich Hatchet Community*, an adopted community plan that was a visioning document created to guide future commercial growth in the subject property area which abuts the Rich Hatchet neighborhood. The uses are listed on the approved plan as follows:

The Rich Hatchet Neighborhood Plan	
Adopted by Huntersville Board of Commissioners on 08/17/98	
<b>LAND USES: Area 1</b>	
First Floor Permitted Uses:	Office or Neighborhood Retail/Restaurant
Upper Floor Permitted Uses:	Office or Residential
Prohibited Uses:	Restaurants with drive-through windows Banks (except ATMs) Gasoline Stations
<b>SITE PLAN CONDITIONS FOR APPROVAL OF LAND USE CHANGES:</b>	
All buildings of residential scale	
Maximum Building Height:	two stories
Maximum Building Footprint:	6,000 square feet
Plan demonstrates developer commitment to tree retention and landscaping.	
Plan provides screen plantings abutting neighborhood residential zoning districts.	
Lighting to be max. 6 footcandles; maximum fixture height of 20 feet; decorative fixtures with full spectrum bulbs.	
No retail or restaurant uses in buildings facing Rich Hatchett Road.	

The conditional district rezoning plan was amended on March 20, 2006 to include “indoor recreation” as a permitted use.

3. On April 1, 2008 the Huntersville Planning Department was sent an email from the Huntersville Police Department that stated that they believed the Cinco de Mayo restaurant was operating a nightclub, and if that was a violation of the Huntersville Zoning Ordinance. The police filed several incident/investigation reports for the establishment.

4. On April 1, 2008 the Huntersville Code Enforcement Officer, Renee Wilson, conducted an inspection of the property and found reason to believe a nightclub was being operated (speakers, strobe lights).

5. On April 2, 2008 the Huntersville Code Enforcement Officer, Renee Wilson, and the Community Outreach Specialist, Claudia Schruhl, conducted an on site inspection. They spoke with the owner and an employee of Cinco de Mayo. Exhibit 8 Revised attached to the Staff Report is documentation of the conversation that took place between staff and the owner and employee of Cinco de Mayo. Also, a Warning Notice of Violation letter was hand delivered at that time (and had been sent via certified mail the same day) informing the business and property owner that upon inspection there was reason to believe a nightclub was being operated and that a nightclub was not a permitted use at this location. On April 3, 2008 the letter was reissued with an amended address for the restaurant to include the suite number.
6. Two local newspapers ran advertisements for Cinco de Mayo. The May 20-26 *Hola Noticias-Charlotte* stated that there was dancing with 15 beautiful waitresses between 9PM and 2AM and a DJ. The May 20-26 *Que Pasa* stated that there was space available to dance between 9PM and 2AM.
7. On April 30, 2008 the applicant c/o The Odom Firm, PLLC (Attorneys at Law) filed an appeal from staffs Warning Notice of Violation Letter dated 4-2-08.
8. On May 30, 2008 the Huntersville Planning Director sent an email to the applicant's attorney stating what the applicant would need to do to be classified as a restaurant and be compliant with the Huntersville Zoning Ordinance.
9. ABC Commission:
  - a) On or around June 2, 2008 Renee Wilson, Huntersville Code Enforcement Officer, spoke with Ann Johnson, Director of the ABC Commission, who said that Cinco de Mayo was currently being audited to ensure that 30% of sales are food sales, which is a stipulation of the restaurant type of ABC permit. If there is not at least 30% food sales, then the ABC Commission no longer will classify a business as a restaurant.
  - b) On June 3, 2008 Renee Wilson, Huntersville Code Enforcement Officer, spoke with Vera Smith, with the auditing department of the ABC Commission. Ms. Smith stated that Cinco de Mayo has been assigned an auditor because food sales have dropped significantly.
10. On Friday June 6, 2008 Mr. Odom, the attorney representing Cinco de Mayo, emailed the Planning Director, Jack Simoneau, that at Cinco de Mayo food was served at all times, the bar area was accessory to the restaurant, there was no cover charge, windows were no longer covered and that there was some dancing between 9PM and 2AM.

### STAFF CONCLUSIONS

Staff believes there is sufficient evidence that the Cinco de Mayo establishment is operating a nightclub. A nightclub use is not permitted in that location according to the Huntersville Zoning Ordinance or the approved conditional rezoning plan for Shops at Northcross. A nightclub use is also not in accordance with the Neighborhood Plan for the Rich Hatchet Road Community which calls for less intense uses for that area to preserve the residential character of the Rich Hatchet Road Community which it abuts. If the appeal were granted it would allow the establishment to continue to operate a nightclub at this location.

Thomas L. Odom, Jr., Esquire noted his **OBJECTION** to the hearsay testimony of Jack Simoneau. Mr. Simoneau included information in his Staff Report (#9 above) from the ABC Commission concerning Ann Johnson and Vera Smith, both of whom are employed by the ABC Commission.

Jack Simoneau, Planning Director introduced Renee Wilson, Code Enforcement Officer, who then took the stand and gave her testimony regarding her conversations with Ann Johnson and Vera Smith with the ABC Commission. Thomas L. Odom, Jr., Esquire noted his **OBJECTION** to the hearsay testimony of Renee Wilson concerning her telephone conversation with Ann Johnson and Vera Smith.

### CROSS-EXAMINATION:

Thomas L. Odom, Jr., Esquire cross examined the witness, Renee Wilson, by questioning if it is true that with an ABC permit it is not in violation of the Zoning Ordinance to serve beverages. Jack

Simoneau clarified that a decision of food sales is not the only matter whether the Town determines this operation is a nightclub, but it is a factor in making the determination. It is one element that food is provided. Mr. Simoneau testified that the Alcohol Law Enforcement (“ALE”) Officer is present at the hearing to testify.

Thomas L. Odom, Jr., Esquire noted his **OBJECTION** to any testimony of the ALE Officer concerning the consumption of alcoholic beverages since it does not go to the land use of the property.

**TESTIMONY:**

Jack Simoneau, Planning Director calls ALE Agent Dudley to testify.

Agent Dudley testified that his first encounter with Cinco De Mayo was what he considered a nightclub. The business was using strobe lights, had the music loud (which has since been toned down), and the food issue is a sticky issue as to whether or not there is any ordering of food. There is a gray area as to what constitutes a kitchen remaining open. Agent Dudley testified that after 9:00 p.m. there is very little food, with the exception of maybe chips and salsa being prepared in the kitchen.

**CROSS-EXAMINATION:**

Thomas L. Odom, Jr., Esquire cross-examined Agent Dudley to clarify the amount of visits Agent Dudley had been to the place of business, which was approximately five to six times. He further questioned if the windows were still darkened, and Agent Dudley testified that he can see in better now. As to the strobe lights, Agent Dudley testified that he was not sure if they are still there or not. He was questioned whether it was accurate that since the security system was installed, and security personnel employed that there are less problems after 9:00 p.m. Agent Dudley responded that he was not sure, and that term “security” is vague. He further testified that he did not know if, and how the security personnel were trained. Agent Dudley also answer that it was correct that the Owner had been pleasant.

***Appellant Testimony***

Thomas L. Odom, Jr., Esquire, presented argument in support of the Appeal. In his opening statement he stated that he represents the Appellants, Cinco De Mayo and Exit 25, LLC, and that this is a Hispanic club from 9:00 pm to 2:00 a.m. At 9:00 p.m. they move the tables and play music, and the waitresses do dance with customers when they buy a ticket to dance. Further, he explained to the Board that the decision was erroneous to conclude the Appellant is operating a “nightclub”, and that evidence will show that the Appellants’ use of the property is a legal permitted use. Evidence will further show that the Huntersville Zoning Ordinance does not prohibit Appellants’ use of the property for a restaurant in the Neighborhood Center Zoning District. Mr. Odom then handed to the Board members his Exhibits marked for the record one through ten (1-10), a copy of which is attached hereto as Exhibit “A”.

He further stated to the Board that the business owner, Mr. Olivan Cortez (hereinafter “Cortez”) moved here with his family; has a background as a business owner with restaurants and food service; and that it is correct that the tables are moved away at 9:00 p.m. for dancing. He also entered into evidence that Cortez is embarrassed about the four (4) police reported incidents, and now has additional security. They have installed a camera to make video taped recordings for security purposes, and since the installation they have had no problems. It was further stated that Cortez

intends to be good citizen. Furthermore, Mr. Odom presented the Notice of Violation and entered it as an Exhibit and reminded the Board that the Appeal is a request to overturn and over rule the decision of the Zoning Administrator. He stated that the district in which the business is located they were permitted by right (see Appellants' Exhibit 6 and 7); that it includes restaurants, bars, and then states what is excluded in the commercial use category, and that a bar would be included.

Ted Chucks entered his testimony and was questioned by the Appellants' attorney. Mr. Chucks is employed by Cinco De May since January as a dish washer. He testified that the Mexican people "like to dance". There is dancing with the girls/waitresses, and the customers buy tickets to dance. He also testified that he helped install the security camera, and has received help from the Police Department to learn how to pat down people. There were no further questions for this witness.

Mr. Odom presented the video tape from the security camera. Mike Sheaffer questioned the charges for dancing with the waitresses, to which Mr. Odom replied that it was part of their business plan; that is how he (Cortez) runs his business; how the girls make money and he (Cortez) makes money. He further entered into the record two (2) cases from the Supreme Court of North Carolina (see Appellants' Exhibits 9 and 10); Yancy v. Board of Adjustment, 268 N.C. 263 (1966) and Lambeth v Board of Adjustment, 157 N.C. App. 349 (2003).

In Mr. Odom's closing argument he reminded the Board of all the evidence presented, and requested that they look at the way the ordinance is drafted; that it is not prohibited under commercial use which includes bars; that it is the intent of the owners to be good citizens; that the Board has the job to apply the law and reverse the decision of April 2, 2008.

Further discussion and testimony was held. Jack Simoneau explained to the Board that this business was classified as a nightclub; that Highway Commercial (HC) District allows a nightclub, but the NC District does not. This property had a Conditional Rezoning, which is a right to the property owners with conditions put on the applicant by the applicant, and that a nightclub is not listed in the Conditional Rezoning. Steve Bomgardner asked if the Conditional Rezoning overrides the Zoning Ordinances, and Mr. Simoneau advised it does; and affirmatively responded to Mr. Bomgardner that the Conditional Rezoning is more restrictive than the District conditions.

Mr. Simoneau asked Mr. Odom about the amount of food sales during the time period of 9:00 p.m. to 2:00 a.m. Mr. Odom responded that this information is not tracked on an hour basis, but rather daily and monthly basis. Mr. Simoneau reiterated that he (the Town) was not questioning the operation of the business up the hour of 9:00 p.m., but that it is not a restaurant after 9:00 p.m.; and he would not argue that the owner had made changes after being contacted by the Town of Huntersville. Mr. Simoneau reminded the Board member of the testimony heard concerning the security guards and training provided by the Huntersville Police Department, and it was determined the use was a nightclub and a Notice of Violation was issued.

In response to Mike Schutrum's question, "What is the definition of a bar?" Mr. Simoneau responded that a bar is an area with a bar and stools and mainly provides alcoholic beverages. Margie Ebner asked if food service was an issue with the definition of a bar, and it was clarified that the bar area would typically be smaller in comparison to the restaurant area in a restaurant use.

Carolyn Lawson questioned Mr. Odom, and reminded him that he stated in his opening that this was a Hispanic club from 9:00 pm to 2:00 am. Mr. Odom apologized for that statement, and asked the Board members to look at the property and Zoning regulations. Carolyn Lawson further noted the Rich Hatchet Neighborhood Plan and that the overlay plan is restrictive.

TESTIMONY:

Sergeant Scott Sharp testified that he is a supervisor for the Town of Huntersville Police Department, and knows of the numerous problems at the business location in question until the time of the Notice of Violation was issued and received. He testified that he has knowledge of the strobe lights, little waitress uniforms, has observed the staff moving the tables to the side and covering the windows; and that outside they are searching customers by patting them down before entering the business. He also acknowledged that they have been compliant now, but before there were incidences involving a man being whipped with a belt, an incident in which the owner was a victim; that ABC cited him (the owner) for violations. Steve Bomgardner asked Sgt. Sharp if he felt this was a nightclub, and Sgt. Sharp replied that, "after 9:00 p.m. yes, Sir". Carolyn Lawson asked if there were similar incidents at other locations to which Sgt. Sharp indicated that they have had to respond to the Fox and Hound, which is a bar, but unlike Cinco De Mayo their lights are not turned down, and there are no strobe lights. Sgt. Sharp reminded the Board that Cinco De Mayo covered the windows so you could not see in. Now they are covered with blinds, and in using his flashlight at night he still could not see in the windows.

CROSS-EXAMINATION:

Thomas L. Odom, Jr., Esquire, cross-examined Sgt. Sharp and asked if the strobe light had been removed, to which Sgt. Sharp indicated that he did not know, but that lights are on and every person is frisked before entering.

Mike Sheaffer asked Sgt. Sharp if the Police Department was spending more time at this establishment than others. Sgt. Sharp indicated that they are not now, but prior to the Notice of Violation there was a spike in the reports, and at times they would sit in the parking lot and wait.

Mr. Odom asked Sgt. Sharp if a 22 was found at the location, and it was actually a firearm magazine and .22 caliber bullets.

TESTIMONY:

James L. Sherrill, owner of property in the Rich Hatchet Community appeared before the Board to not only represent himself, but the residents of the Rich Hatchet Road Property Owners Association. He testified that the neighborhood consists of mainly elderly people, and the mixing of alcohol and problems that are from this location is not acceptable to the neighbors. There is noise until 2:00 am in the morning, and problems have continued to exist. He further requested that this Board uphold the decision, and deny the appeal.

Mike Sheaffer discussed with Mr. Sherrill if the noise and nuisance level had improved. Mr. Sherrill indicated that he lives in another neighborhood, but that the homeowners of this community do not want the cars and traffic, squealing tires late at night, and that it had not gotten any better. Mr. Odom questioned if there had been any complaints filed, to which Mr. Sherrill responded that the Neighborhood Community had not filed any complaints.

Jack Simoneau addressed the Board with information that in 1998 the Neighborhood Plan for Rich Hatchet Road Community was approved by the Board of Commissioners. Within the Plan it outlined different areas, and this location is within Area 1. Area 1 is the Neighborhood Edge that consists of approximately 5.4 acres along the east side of Statesville Road, extending from the north side of Rich Hatchet Road. The recommended land uses for this area does not include a bar or nightclub in the Plan. Mike Sheaffer asked Mr. Simoneau if money for dancing impacted his decision in determining this as a nightclub. Mr. Simoneau confirmed that it is providing entertainment, and the money exchanging adds to the fact that entertainment is provided.

Thomas Snyder asked Mr. Odom if he was appealing the ruling that this is a nightclub. Mr. Odom stated that this is not a nightclub, but a bar from the hours of 9:00 p.m. to 2:00 a.m., and a bar is not prohibited. Mr. Odom cited Yancy v Board of Adjustment, in that “Zoning Regulations are in derogation of common law rights and they cannot be construed to include or exclude by implication that which is not clearly their express terms. It has been held that well-founded doubts as to the meaning of obscure provisions of a Zoning Ordinance should be resolved in favor of the free use of property”, and this is not prohibited under the facts of law.

Bob Blythe, Esquire, reminded the Board members that the determination was made at the time the Notice was issued, and if the violation still exists they would continue to be in violation. Concerning the statement in derogation (Yancy v Board of Adjustment), Mr. Blythe pointed out that the members of the Board are “standing in the shoes of the officer”; that the members can reverse, modify, or make clear that it is a restaurant; and if dancing is a problem under the Ordinance, it is prohibited. Bob Blythe, Esquire reminded the Board that Mr. Odom raised objections to testimony, and they were instructed to not put any weight on hearsay evidence.

### ***Board Conclusions***

The period for public discussion was closed by the Chairman, and the Board publicly discussed the case.

Thomas Snyder stated that based on Renee Wilson’s observations and actions, the Police Officer’s testimony and evidence, ALE Agent Dudley’s observations, and that the Appellants’ attorney said “operating a Hispanic club”, plus moving the tables and dancing; he would believe this to be a nightclub. Margie Ebner agreed, and added that no restaurant needs security (bouncer and cameras). Mike Schutrum found the business to be operating as a nightclub, along with Steve Bomgardner, and that operating as a “club” violates the Restrictions and he supports the Code Enforcement Officer’s decision. Margie Ebner further stated that the owner did not show good judgment in that the reported police involved incidents did not stop immediately, and even the owner was found to be drinking alcoholic beverages on the property; and now that they have been caught they have to appeal because they want to continue the operating of the business in the same manner after 9:00 p.m. Carolyn Lawson stated that the strobe light indicated a “club”. Mike Sheaffer felt that this would encourage this type of business in Huntersville.

The Chairman asked the members of the Board to state the substantial evidence in the record to show the Facts of Findings and Conclusions:

## Findings of Fact

1. Substantial evidence in the record shows, and the Board finds the following FACTS:
  - a. Thomas Snyder cited the conditions witnessed by Renee Wilson, Code Enforcement Officer for the Town of Huntersville, members of the Town of Huntersville Police Department, and ALE Agent Dudley. He further noted Thomas Odom's opening statement of this being a "Hispanic club", and based on Appellant's activities after the hours of 9 p.m. by moving the tables out of the way; waitresses dancing for money and providing entertainment; and the two (2) newspaper advertisements shown as exhibits; and
  - b. Mike Schutrum added that the Appellant provides security at the door which is representative of a nightclub; and
  - c. Mike Sheaffer included that the Appellant's video evidence presented during the hearing shows that the waitresses are paid to dance, and there is no food on the tables being consumed by the patrons; and
  - d. Steve Bomgardner added that the Conditional Rezoning Plan clearly doesn't permit use of a nightclub, or in the Neighborhood Plan for the Rich Hatchet Road Community; that it is not an approved use from the Ordinance; that it fits the definition of a nightclub and is not a permitted use in that Zoning District.
  
2. The resolution of this case depends on the interpretation of the Ordinance language as applied to the foregoing facts. It is the Board's CONCLUSION that the following sections of this ordinance, as applied to those facts, shall be interpreted as follows:
  - a. The Conditional District Rezoning Plan does not list nightclub as a permitted use.
  - b. The Neighborhood Center Zoning District does not permit nightclubs.
  - c. The use is a nightclub as defined in Article 12 which is not permitted.

The members voted by showing of hands and **AFFIRMED** the decision of the Zoning Enforcement Officer by a unanimous vote.

There being no further business, the meeting was adjourned at 9:31 pm.

Approved this \_\_\_\_ day of \_\_\_\_\_, 2008.

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David H. Snider, Chairman

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Michelle V. Haines, Secretary