

## HARRISONBURG BOARD OF ZONING APPEALS

The Harrisonburg Board of Zoning Appeals met in regular session in the City Council Chambers on Monday, May 6, 2024, in order to consider the following request which was duly posted. Members present were Chair Matthew Phillippi, Adriel Byrd, Jeffrey Holsinger, William Holland, and Emmy Maskell. Also present were Tyler Blanks, Zoning Specialist, Christopher Perez-Leon, Zoning Specialist and Thanh Dang, Deputy Director of Community Development/Interim Zoning Administrator, and Wesley Russ, Deputy City Attorney.

Chair Phillippi called the meeting to order at 4:00 PM.

Chair Phillippi: The first order of business we have the approval of the minutes from the August 7, 2023, meeting, the last time we met. Did everyone get a chance to look through that and have any comments, suggestion or motions?

Mr. Holsinger: I move.

Mr. Byrd: Second.

The Board unanimously approved the August 7, 2023, Board of Zoning Appeals minutes.

### NEW BUSINESS:

The first item of new business is the appeal of an administrative decision regarding a property on 813 Chicago Ave (39-F-6).

Mr. Blanks read the following request:

A request by Lock-Minn Holdings LLC for an appeal of an administrative decision regarding a violation of proffers associated with the 2013 rezoning of the subject property. The property is addressed as 813 Chicago Avenue, is identified as tax map parcel 39-F-6, and is zoned B-2C, General Business District Conditional. The appeal is specific to the use of the property as a parking lot and vehicle access for businesses located on an adjacent parcel at 841 Chicago Avenue. (Note: There is an adjacent parcel that shares the same address of 813 Chicago Avenue and that is identified as tax map parcel 39-F-1.)

### **Relevant Sections of the Zoning Ordinance and Definitions**

#### Article F. - Definitions

*Parking lot:* A defined area for the storage of operable motor-driven vehicles and operable accessory vehicles. A parking lot includes all areas used for parking, maneuvering, loading, driveways, travelways, and drive-throughs, except public street ingress and egress.

Article Q. – B-2 General Business District Regulations, a copy of which is attached with this report.

### **Background**

The property (originally identified as tax map parcel 39-F-1 and today is identified as tax map parcels 39-F-1 and 6) was annexed into the City of Harrisonburg in 1962. The 1963 Zoning Ordinance designated this property as M-1, General Industrial District. Prior to the 2013 rezoning, the parcel contained several

buildings where a truck and tire service center for over the road tractor trailers operated. It was noted during the 2013 rezoning there were multiple City Code violations on the parcel including storage of inoperable vehicles, tall grass and weeds, junk and discarded materials, and unscreened storage and repair of vehicle. The graveled area currently being used for parking and vehicle access existed as a part of the larger operation described above.

In 2013, Jeffrey D. and Michael S. Sites, represented by Hammond Real Estate Services, petitioned to rezone the property from the M-1, General Industrial District to the B-2C, General Business District Conditional. This request was specific for the development of a Family Dollar retail store. The applicant submitted four proffers during the rezoning which included the following as summarized below along with staff's interpretation:

The conceptual Site Plan (Exhibit A). Exhibit A controls how the site is developed.

A list of uses permitted on the property. Only the uses listed are allowed on the property and anything not included on the list is considered prohibited. Repair of vehicles was not included in the proffered list. Public and privately owned parking lots and parking garages are included in the proffered list.

Additional landscaping for the Family Dollar development.

Restrictions on square footage and height of signage.

The full proffer letter and "Exhibit A" are attached to this report.

Harrisonburg City Council approved the rezoning with the submitted proffers on September 10, 2013. An engineered comprehensive site plan was approved on April 22, 2014. Building permits were issued for the Family Dollar Building on August 28, 2014. On October 23, 2014, the Family Dollar property was subdivided to separate a +/-6,181 square foot area from the developed portion of the parent tract and created the subject property of this appeal, tax map parcel 39-F-6.

Almost two years after the property was subdivided, on August 24, 2016, Melvin E. Higgins Sr. purchased the subject parcel (39-F-6). At that time, Mr. Higgins also owned the two adjacent properties to the north (tax map parcels 39-F-2 and 3). Prior to the purchase, Mr. Higgins contacted Raini Ott (former zoning staff in Community Development) about setting up a meeting to discuss the parcel. In an email to other staff dated August 8, 2016, Ms. Ott noted that Mr. Higgins wanted to use the parcel for parking to support the uses on his adjoining along Rockingham Drive and Mr. Higgins understood that it could not be used for parking unless the parcel was rezoned. Staff today are not sure if the requested meeting took place but are confident that Mr. Higgins was informed before he purchased the property that, unless the property was reserved for open space as shown in the rezoning's Concept Plan (Exhibit A), any use would require a rezoning to amend the proffers. Based on the aerial images, it appears that the property was used as parking and vehicle access after being purchased by Mr. Higgins. Aerial images are attached herein.

Mr. Russell Lockey purchased parcel 39-F-6 on November 5, 2020, from Mr. Higgins along with tax map parcels 39-F-2 and 3. Since Mr. Lockey's purchase of the property, it has continued to be used for parking vehicles associated with and access for the businesses operating on the adjacent properties which principally included vehicle repair. These parcels have periodically been in violation of City Codes for junk and trash, inoperable vehicles, prohibited signage, and a food truck (parked on tax map parcel 39-F-6).

In May 2023 Mr. Lockey submitted a rezoning application and petitioned to amend the proffers of parcel 39-F-6. The request would have removed all the existing proffers and replaced them with a list of prohibited uses. City staff recommended denial of the request due to concerns that the proposed allowed uses - specifically vehicle, recreation equipment, and trailer sales; repair of vehicles, recreation equipment and trailers; and warehousing and other storage facilities with floor area limited to 20,000 square feet, which are contiguous to permitted uses in the district, - are not in line with the surrounding area or aligned with

the Comprehensive Plan's Land Use Designation of Mixed Use. City Council denied the rezoning request on July 11, 2023. Mr. Lockey was told during the process that if the rezoning was denied he would have to remove the parking lot and all vehicles from the parcel as the current uses were not permitted. A copy of the staff report, extract from the minutes of the June 14, 2023, Planning Commission Meeting, and extract from the July 11, 2023, City Council meeting are attached herein. A notice of violation to enforce the proffers of the 2013 B-2C rezoning, dated January 5, 2023, was received by Mr. Lockey on February 2, 2024.

### **Staff Determination**

Staff maintains the proffered conceptual site plan included with the 2013 rezoning of the property controls the uses permitted on parcel 39-F-6, even though the land was subdivided 2014. Proffers are voluntarily offered by an applicant during a rezoning process and accepted by City Council in conjunction with a rezoning approval. In this case, the then owner of the property offered to voluntarily restrict development on the parcel by proffering the conceptual site plan, types of uses, and signage. The zoning district and proffers do not change when a parcel was subdivided and do not change when a property is sold to a new owner. Amending or removing proffers on the property would require another rezoning. The 2013 proffered conceptual site plan shows the area known now as parcel 39-F-6 to contain no development. While it is true a graveled area existed on the parcel before 2013, the rezoning to B-2C changed the allowed uses on the property. Uses on this parcel should have ceased and the area turned into open space in accordance with the proffered conceptual site plan.

It is not known if staff initiated any enforcement to convert the area into open space or if anything was discussed with the then property owner before the Family Dollar received its certificate of occupancy, the project was closed out, or when the property was subdivided. Ultimately, this does not change the fact that the property was and still is being used illegally.

Furthermore, the inclusion of an improved entrance for this parcel, as a part of the City's Waterman Elementary School Safe Routes to School (STRS) Project, which was completed in December 2013, should not be taken as an indication that the City wants any particular type of use on the parcel. With that said, construction of the STRS project began in March 2013 and the agreement between the City and *the* then property owner (Michael S. and Jefferey D. Sites) for the dedication of land for public right-of-way and entrance construction was completed in May 2012 before the 2013 rezoning.

The applicant points out in their letter that there was no reference to proffer restrictions on the deed or within the subdivision documents recorded with the Rockingham County Circuit Court. There is no legal requirement that the zoning district or proffers be recorded within deeds or subdivision plats. Nor is there any requirement for the City to proactively inform all purchasers of property of restrictions. It is the responsibility of the property owner or their representative to contact the City and inquire about this information.

Chair Phillipi: Thank you very much. Does anyone on the board have any questions for staff?

Mr. Byrd: Did staff ever receive a zoning verification letter or application for this particular parcel?

Mr. Blanks: Not to my knowledge, we have not received one no.

Chair Phillipi: When was the first time Mr. Lockey was contacted by the staff regarding the property bring in violation of the proffered conditions?

Mr. Blanks: The proffered conditions or just violations in general?

Chair Phillippi: Violations in general.

Mr. Blanks: Give me a second, I might have to look that up. I have this particular case regarding the proffers at the very least going back to November 21, 2023. I have a note regarding the food truck that was originally there which conflicted with the proffers. Back at least that far, but I think there is something further back than that.

Chair Phillippi: I know it was mentioned that with a denial of the rezoning request he was informed that he would have to make changes to the use and you covered that in the staff report so I just wanted to have an idea for when staff reached out to him specifically.

Mr. Blanks: Well, the notice of violation that he received would have been the actual notice that was given in the staff report would have been the formal notice that things had to change at that point but there had been discussions prior to that there were proffers on the property that were going to create issues.

Chair Phillippi: It was discussions with staff that would have initiated the process for him seeking the rezoning?

Mr. Blanks: The rezoning I believe began as a result of the food truck being located on the property.

Ms. Dang: I do not know that it was just the food truck or if it was all of the matters associated with that. It gets a little more complicated that simultaneously when the rezoning was requested there was also a special use permit for the next door parcel as well.

Mr. Byrd: Were you curious about around what time that was occurring?

Chair Phillippi: Really what I was trying to figure out is the timeline of Mr. Lockey being notified of the proffers being in existence and it being not compliant with those proffers and then the rezoning request, trying to just figure out that timeline.

Mr. Blanks: As Christopher reminded me in the staff report that the rezoning application occurred in May of 2023 asked to remove the proffers. Sounds like there would have been discussion prior to that of there having been issues that would have been beneficial to the rezoning to have occurred.

Chair Phillippi: You are unaware of what those necessarily were.

Mr. Blanks: At the moment yes and some of that is because I do not have access to our typical LAMA system that would allow me to look at that. Mr. Lockey might be able to shed a little bit more light on that when he has the ability to come up and discuss here.

Chair Phillippi: When we get to that part, I will make sure to ask him.

Ms. Dang: I have a little bit. This is where I am like I do not know the exact details but it looks like at least a matter related to the food truck was first discussed with Mr. Lockey

or at least a case was open in 2021 in our system. I see some emails from our prior Zoning Administrator two iterations ago in 2020 that had some questions about the food truck but I do not know when they had reached out.

Mr. Holsinger: What time frame in 2020? Because he did not buy it until November.

Ms. Dang: It looks like there was some discussion amongst staff in May of 2020 about 841 Chicago Avenue next door.

Chair Phillippi: Sorry to make you all go hunting for stuff.

Mr. Blanks: She has access probably to the thing that I do not have access to at the moment.

Chair Phillippi: The timeline is helpful for me to kind of understand the process here. I do not have any more questions for staff.

Chair Phillippi opened the public hearing portion of the meeting.

Russell Lockey, applicant and resident of 79 Laurel Street came forward to speak to the request.

Chair Phillippi: As this proceeding is a function of the Circuit Court, please raise your right hand and swear that anything you are about to say is the truth under penalty of law.

Mr. Lockey: To clarify what you were discussing, none of the restrictions were relayed to me when I purchased the property in 2020. I found out the restrictions on the parking lot in early 2023 before I put the appeal in. After it went through the process it went to the Board of Appeals and then we went to the City Council. Got absolutely nothing in writing for their decision. Although I was at the meeting I was waiting for something in writing to know might...until I got the letter in January. The letter in January is the first formal writing from the City I have received saying it was in violation. Since I put my appeal in, I have gone back and looked at some other legal issues with the property. That is what I do for a living is title work on properties. Looking back at this particular property all the way through 1941 to present. No easements were ever granted to cross this property but if we look at aerial photographs from the City's website, we can clearly see back in 2000 there is vehicles parked on the property and a driveway across the property. If you go into 1994, it is fuzzy but I would argue that you can see a roadway and cars parked on the property. In 1989 you can see a roadway across from the property. In 1974, it is extremely fuzzy but I would argue that you can see the road across from the property. Under Virginia law, if someone uses your property continuously open and notorious way actual claim that is hostile to the then owner of the property, they have adversely possessed it, 15 years, period. You do not have to go to court, you do not have to do anything, by statute and by common law, you own it after 15 years. I would argue pictures going back to the 1970s and 1980s clearly show it has been used as a parking lot and there is no record anywhere from 1941 to present of anyone ever granting an easement or giving permission to be used on that property. Therefore, when Micky purchased it in 1988, I believe. From 1988 to 2003, he adversely possessed it and he could also have tacked that on to his predecessors back how ever many years. He actually owned the property when he acquired the actual title from the dollar store property next door and because he owned that property, the proffers made by the dollar store people had absolutely no effect on

the property at that point in time because they did not own it. In the alternative, if we look at prescriptive easement, which is an easement granted by continuous use over a piece of property. That requires 20 years. For Micky, 1988 to 2008, he acquired an easement by prescription across the property to use it as his parking lot for his building. At that point in time the easement passes through the property has been continuously in use until today and that easement cannot be taken away unless it is sold by the owner. Which is now me because I purchased it from Micky. That is the quick and dirty of it, but I would argue that it has been used as a parking lot for 50 years. I do not see why we need to change it. I will do my best to get it cleaned up and try to make it conform to some issue but it still needs to be a parking lot for that business or it will put that small business out of the City.

Mr. Holland: You say clean it up, what do you mean?

Mr. Lockey: I mean I will work with them to make it look neater. I have been working with them to get rid of the junk cars.

Mr. Holland: There are 25 cars in there and if you walk, I live there, when you walk down the backside, even down at that building in the back there are five more cars.

Mr. Lockey: I am in the process of having those removed.

Mr. Holland: 30 cars in that place is tight.

Mr. Lockey: I am in the process of having that tenant remove those vehicles. That is an issue with the City. Rockingham Drive, which I need to get the City to actually improve because I got too many potholes back there.

Mr. Holland: There are also cars behind that field.

Mr. Lockey: That is not my property.

Mr. Holland: Still, 30 cars in there is tight.

Mr. Lockey: It is and I have been trying to work with the current tenants to get the number down. Get rid of most of them and get it down to a reasonable number that is not 25. 15 at the most. I would argue that it could comfortably have 15 on that property and if you include the 841 property probably 20 on the front side of that property.

Mr. Byrd: Concerning the lot you are referring to, roughly you are thinking of 15 because that is how it would be a defined parking lot with that particular number?

Mr. Lockey: Yes. If you could put the last picture back up, the aerial photograph shows the parking. Before along the building is actually if I parked close to the building that is the other property. Really, we are talking about 10 or so spots on this side and 10 or so spots on the other side. Those four, with the exception of the very tips of them, are not on the property in question.

Chair Phillippi: Can I actually see the images you were discussing at first?

Mr. Lockey: That is from the City's GIS website. As you get past 2000, they get a little fuzzy.

Mr. Byrd: You were making the calculations and you were going back some years but you skipped past the owners of 39 F 1 who owned six at that time and created a lot.

Mr. Lockey: I went back and looked at who owned that lot since 1941 and no one ever granted an easement across that property. Back to property law school 101, property is a bundle of sticks and you own the bundle of sticks but you can give one of those sticks an easement for a powerline or an easement for a waterline or an easement for a driveway across your property, you can do that. Now if somebody comes along and if your fence is right here but I mow 20 feet on the other side of it and keep doing that for 20 years you do not give me permission after 15 years, I own that. That is statute in Virginia and common law as well. I would argue that if we go by that logic then Micky and his predecessors for the previous 20 years before him plus the 20 year he had it had adversely possessed that lot anyway and they already owned it. You do not have to go to court, you get a quiet title action, you can you do not have to.

Mr. Byrd: You are saying that would mean that they would have access to drive to that property?

Mr. Lockey: That would grant him ownership of the lot.

Chair Phillippi: The entire lot or the spot that was being used.

Mr. Lockey: That spot that he was using as a parking lot.

Chair Phillippi: That is only a third or a quarter of that lot.

Mr. Lockey: To me it does not matter. I would argue that he adversely possessed that parking lot by continually using it.

Mr. Holsinger: The portion that he was using?

Mr. Lockey: The portion that he was using only. When the dollar store people sold him that lot they were correcting a problem that existed for many years in giving him title to the property. The alternative is a prescriptive easement. If you can show that others had the right to use that as well and you probably can with those photographs that show the road going around what used to be there before the dollar store. You can still clam a prescriptive easement, which is an easement for using it as you have been using it even though other people have right to use it that gives you an easement, does not give you the ownership of the property but that gives an easement to use the property for that purpose. Once that is established, it cannot be destroyed.

Chair Phillippi: Again, we are only talking about a portion of that property.

Mr. Lockey: I am only talking about the 6,000 square foot portion of the bigger property that was... The parking lot is 6,000 feet, the other one was one point something acres, I have to look it back up to define what that originally was before...

Mr. Holsinger: Just under an acre and a half I believe.

Mr. Lockey: It was before those 6,000 square feet were carved off of it. I would argue that the selling of the 6,000 square feet was correcting the legal problem of...

Chair Phillippi: In those images, they are only taking up a portion of that 6,000 square feet, that is what I am referring to.

Mr. Lockey: I think you have covered pretty much all of it.

Chair Phillippi: If you look, in those images I am only seeing cars really parked along that upper line there and along that diagonal. That is mostly what you are seeing.

Mr. Lockey: Some of those pictures had them going all the way back. Then it becomes the argument on whether it was used as a driveway or parking and I would argue that it has been set up as parking and as a minimum a driveway to access the property.

Chair Phillippi: Maybe when the one image after that he was told to move them and that is why they moved. I think the problem we are running into here is we are not here to determine legal ownership of it. Based upon the records we have to go with, that property belonged to Family Dollar it was done and then the proffers existed with it. We can only make the decision based upon the Zoning Ordinance and what the Zoning Administrator has decided. We cannot make determinations on the property laws and things like that.

Mr. Holland: I would like to hear from the City Attorney about what he just explained to us.

Mr. Russ: An adverse possession claim or a prescriptive easement claim requires that something be done without permission but we do not have the person who allegedly did something without permission here to say no, I never asked for permission. We do not have the owner of the property here to say no I did not grant him permission. I do not know how we could ever establish, based on what we have here, a second hand adverse possession claim. To the extent that it is even relevant to the question before the board.

Mr. Byrd: Whether that is the case or not, Rockingham Drive exists, correct?

Mr. Lockey: Yes, it does.

Mr. Byrd: Access to the building is not restricted by that piece of property.

Mr. Lockey: It is restricted to park vehicles to be worked on.

Mr. Byrd: That is a particular use. You are referring to easements and I was going oh access to a thing and it has Rockingham Drive.

Mr. Lockey: It does which is a terrible shame. It needs to be fixed. It is Rockingham Drive, it is not my driveway, it is Rockingham Drive. Rockingham Drive goes to three feet by the buildings. All of the cars back there are technically parking in the street. I have been trying to get the tenant to stop doing that.

Mr. Byrd: When trying to correct this with the Planning Commission and City Council, did you bring up this ownership concern?

- Mr. Lockey: I did not. Like I said, that was some recent research that I have done looking at the property but I would argue that the City approved a 45-foot curb cut right there to access the property.
- Mr. Byrd: I would like to point out that parcels exist...
- Mr. Lockey: It is on the plat the City keeps saying it restricts my access to that property.
- Mr. Byrd: If the City makes access at the curb for potential use of a tax parcel, that is not a judgement created by the City. I would not accept that type of argument to say that accepting that parcel is going to be used for a certain thing. There are other parts of the City where streets have been provided access to empty fields. I have seen one provide access to a forest. It is just the City thinking forward that if that parcel exist, it might have a use.
- Mr. Lockey: My point is, they keep pointing to the plat that says there can be nothing in there. If there was nothing to be in there, why did they build a curb cut to access it? That is my point.
- Mr. Byrd: That is my concern about this whole thing. The area was zoned and they marked that area as grass and put their parking somewhere else. There was nothing there until that was done. Then they proceeded to do nothing with that area is what you were arguing beforehand.
- Mr. Lockey: Okay I am arguing that if the City knowing what proffers had been made reviewing the site plan that they keep pointing to saying these proffers are based on this site plan, why would you approve a 45-foot-wide curb cut if you want it to be unused open greenspace? That is question number one. Second question would be why was the Certificate of Occupancy granted over a property with a 45-foot curb cut and a parking lot there when it was supposed to be vacant space, why did the City enforce it at this point in time and why did they not put something on the plat when they agreed to the subdivision of the property two years later?
- Ms. Dang: I just want to clarify the timeline here. Mr. Blanks, you had a slide that showed when various things happened. This property was rezoned, I am looking for the month the rezoning occurred. I believe the rezoning occurred after the City had completed construction...
- Mr. Blanks: This is in the staff report, it just may not have been reflected as well on the slides that...just a second I will find it...
- Mr. Holsinger: It was completed in December 2013 it was approved in 2012 to do the safe school route project.
- Ms. Dang: Correct. The agreements between the then owner, Michael and Jeffery Sites, they entered into agreements with the City prior to May 2012. The rezoning occurred later in 2013. At that time, the Family Dollar was working with the property owners. Let me clarify also that it is not the subdivision plat that staff is referring to that regulates how the land is used. It is this concept plan that was included with the rezoning.

Mr. Holsinger: That concept plan was actually approved after the safe school routes were completed.

Ms. Dang: Correct. This was approved in September 2013.

Mr. Holsinger: In the staff report, Exhibit A was approved in 2014.

Ms. Dang: No, the subdivision...

Chair Phillippi: The subdivision was 2014. This is the one that Family Dollar applied for the rezoning with, leaving this open. Then a year later that is when that was subdivided out. That is the subdivision plat.

Mr. Lockey: My point is that on that approved plat of the dollar store is where it clearly shows the curb cut being approved by the City. It is the same as the curb cuts for the dollar store to give access to both sides. Then you have the separate curb cut for that parking lot.

Ms. Dang: I think you are mixing up the plats.

Mr. Lockey: No, put the plat up.

Mr. Holsinger: I would like to call attention to something in the staff report. Unless it is a misprint, there is a paragraph that says Harrisonburg City Council approved the rezoning with the submitted proffers on September 10, 2013. An engineered comprehensive site plan was approved on April 22, 2014, which would have been the same year the parcel in question was sold. Building permits were not issued until August of 2014. The site plan got approved after the rezoning in April, building permits were in August of 2014. It does give us a date on the parcel in question being sold in October of 2014, it does not give us a date on the certificate of occupancy. In my mind should have enforced this open space, that is, I think, the biggest problem that we have with this whole thing. City staff at that time did not enforce it.

Mr. Lockey: On this plat that the City sent me, it says approved by City Council 9/23/13. The curb cut is clearly viable on that plat.

Ms. Dang: Right, it already existed at that time. It was already constructed at that time.

Mr. Byrd: I just want to highlight that making arguments about what the City does with its street and curb gutter says nothing about our persons property past that point. As I have tried to point out to you, there are places where there is access to land that is a forest and one is just a field.

Mr. Lockey: I understand what you are saying but I would argue that if you do not want someone to do something you should not build a curb cut there. Plus, that is when I went back and looked at the adverse possession and prescriptive easements and I would argue that there definitely the minimum prescriptive easement across this property to use it as a parking lot.

Mr. Byrd: I have one more question because I was reading the applications to try to change the zoning. It sounds like everyone got distracted by all the surrounding properties and all this other stuff. I noticed you made comments about you wanting a parking lot.

Mr. Lockey: When I first came into the City, I asked could I have a special use permit to have the parking lot there when I first heard that there it was not supposed to be there. The staff at the planning office said no you need to request a rezoning. So, I put in a request for rezoning and then they said you should put proffers on it to do this and they gave me a list of recommended proffers and then they said we disagree with that. I was doing what I was told by the planning staff what I needed to do to make the change and then all of a sudden they said we do not agree with the change. That was frustrating to me when I went through the process because I was trying to do it the right way. I still want to do it the right way, but if I lose the parking lot, we lose a small business in the City. He has to have a place to park cars that are not actually in the shop being worked on at the time, but they can be brought in to be worked on and brought back out.

Mr. Holsinger: To be fair, he is already parking in the street on the other side.

Mr. Lockey: That is a subtenant and that is [unintelligible] that is being argued.

Mr. Holland: They cannot use that side of the building is all I am saying.

Mr. Lockey: I understand. There is no way to use it because those are illegally parked cars to begin with and I keep dealing with the police to get rid of them.

Mr. Holland: Every garage you see has extra cars around it but it is 25 of them.

Mr. Lockey: I agree with that. That fluctuates from time to time and I think they are going through a...

Chair Phillippi: The main thing though is that the board is [unintelligible] determination of whether the Zoning Administrators have made the correct decision. Public interest is not something that we are really suppose to take into account. Whether or not it is an eyesore that there is a bunch of cars out there or that there could be a potential loss of a small business, those are not considerations that this board is allowed to use in our determination.

Mr. Blanks: Jeff, did you get your answer to the dates? I was trying to look up to see if I could figure it out but I kind of got lost.

Mr. Holsinger: Matt was trying to explain it to me. The comprehensive site plan question that I referred to that was approved on April 22, 2014 had to do with the building inspection office.

Chair Phillippi: Like the building itself, it was not through City Council.

Mr. Holsinger: That points again to my complaint that the City staff at that time did not enforce what the City Council legislated. That is a problem. I am just saying as a City citizen, that is a problem.

Mr. Blanks: As we mentioned in the staff report, there is no record and we do not know why that did not happen.

Mr. Holland: Did you ask about this before you bought the property?

Mr. Lockey: No, I did not. Like I said I do title examinations for a living and I have never in 20 years of doing this come across a property with proffers on it. Nowhere in my normal public record, which is everything at the courthouse and the tax records for the City does it say that there are limitations on the property. It just says zoning B-2C and I did not know what that meant. I now know that I have to come over here and figure out whose file drawer it sits in because public information should be out there in the public and it should be made known. That is my fault but once again 20 years of doing this, I have never come across that.

Mr. Byrd: When you say 20 years, you are referring to the state of Virginia.

Mr. Lockey: I am a title examiner by profession. I have been working in the state of Virginia since 2001 examining titles for a living as an attorney. I have never seen that restriction on a property before.

Mr. Byrd: When you say that restriction...

Mr. Lockey: A conditional zoning that has proffers on it. I would not know where to look for that.

Chair Phillippi: That was not included on the deed?

Mr. Lockey: It is not referenced in the deed, yes. I have seen it referenced in deed restrictions on properties but never just a zoning B-2C and known what that meant.

Mr. Byrd: The state of Virginia's code says what about that?

Chair Phillippi: Different localities are going to do different zonings.

Mr. Lockey: I do not know that the code says anything about it but my point is as a title examiner I look at a specific set of records to determine the use of property and the ownership of property and what it can and cannot be used for. It is not in the usual places, it is over here in a file drawer somewhere not in the public records I am normally looking at.

Mr. Byrd: You said not in the public records you normally look at implying that the City cannot hold public records.

Mr. Lockey: It does but it is not clearly marked anywhere on the tax ticket or tax receipts that this property has restrictions on it. I did not know to look for it.

Mr. Byrd: We are talking about the zoning.

Mr. Lockey: The proffers on the property, I had no way to know where or what the proffers were. I did not even know that they existed because I did not know what that meant.

Chair Phillippi: He was not aware of what the zoning B-2C meant.

Mr. Byrd: You saw B-2C and then you did not verify.

Mr. Lockey: I just moved on with the rest of my search I did not know what that meant. I had never seen it before and it did not register with me that was a problem. Now I know and I am more thorough in my examinations but I did not know it at that time.

Mr. Byrd: You did not apply for a zoning verification letter from the City.

Mr. Lockey: I have never done that and never had to do that on a property.

Mr. Byrd: What you never had to do is not what we are discussing, Sir.

Mr. Lockey: No, I did not because I did not know I needed to.

Mr. Byrd: You also stated that you did not know what B-2C meant.

Mr. Lockey: That is right.

Mr. Byrd: You are appealing this because you are concerned that the City evaluated this parcel as what.

Mr. Lockey: I am appealing it because I believe that the continued use for 50 years needs to be honored and if the City wanted it closed in 2013 or whatever they should have ordered the thing closed.

Mr. Byrd: You are arguing that it is a nonconforming use of a parking lot of this particular parcel.

Mr. Lockey: It was a conforming use prior to the proffers being offered. It was prior to that and it has continued to be used.

Mr. Byrd: The City keeps citing a particular rezoning. What you are discussing is saying that it is nonconforming to that zoning.

Mr. Lockey: It had been used for that purpose for 40-50 years before that. If the City wanted it to be vacated, why did they not vacate it? Why did they not come in and say get the cars off, put the grass in, and close the curb cut. When I purchased it I had no clue that was an issue.

Mr. Byrd: The City is not making a lot of comments on that, they are just discussing what the zoning is at the time that they are addressing it. There might be other reasons of no malice or benefit to anyone of why the City was not actively enforcing certain codes. I can think of them and they are unrelated to anything.

Chair Phillippi: I mean the main point there is that the lack of enforcement does not automatically...

Mr. Byrd: Well, the City does not have staff to make that decision.

Chair Phillippi: The lack of enforcement does not automatically mean approval.

Mr. Byrd: Is there anything else that you want to present to us to explain why we should continue to allow this non-conforming use of the current zoning because that is what we are discussing?

Mr. Lockey: I think I have said everything that I can say. I just do not want to lose my business. I do not want to lose that income from that property, which I would lose. I know that is not what you are concerned with but that is why I am here.

Mr. Holland: How was he supposed to know this was an issue before he bought the property?

Mr. Byrd: You go to the City and you ask them what does B-2C mean.

Mr. Holland: The average citizen is going to do that?

Mr. Byrd: The average citizen if they are concerned about the zoning of the property can do like I did a couple of days ago, I typed in Harrisonburg on a search engine. I clicked on the City's website in the search site I clicked zoning.

Mr. Holland: You work for them.

Mr. Byrd: I just told you what I did. Harrisonburg was the first thing I searched for, found the City's website, clicked on that. Went on the City site and it says search this site, I typed zoning, and the third thing that came up was the zoning verification letter. I did not know what that meant to be honest with you and then I clicked on it and it told me what it meant. The point is, if you go to the jurisdiction in which you live in.

Mr. Holand: The average citizen is supposed to do that before they buy something?

Mr. Byrd: Yes.

Mr. Holand: What do they have realtors for?

Mr. Lockey: As a professional title examiner and real estate attorney I can say I have never done that. The other question I have is are the proffers listed on that or does it tell me where to go or tell me that it is conditional? The only things I have ever seen the City say is that there are conditions on it but it does not tell me where to look for those or how to find them.

Chair Phillippi: That would be something that you would contact City staff about.

Mr. Blanks: If I may just provide a little clarification on the process. Typically, if somebody requests a zoning verification letter or even just calls us, if somebody calls us and says "I have an address, what is the zoning on this property" and we look it up and

it comes back B-2C or whatever it happens coming back with. We would usually say “this property is zoned B-2C we are going to have to go pull the file”. Usually, it is a file in the filing cabinet upstairs. It looks something kind of like this [referring to a file in his hand] and there will be a letter in it that outlines all of the conditions that were placed on the property if it was zoned conditionally and then we can provide them with a copy of that particular condition. It is easier if it is more recent because staff is much better at providing concise copies of conditions. Some of the older ones we have to go into minutes and it might require some research.

Ms. Dang: They are usually letters. It has to be a proffered letter that might not be as clear as what we document up front today but there always is a letter signed by the property owner at that time that lists the proffers.

Mr. Blanks: If somebody were to request that information we would be able to provide to them either over the phone or through email maybe brief little research is required but upon request we can provide that to them.

Mr. Holland: My frustration with this is I get he cannot stand the way it is, I have no problem with that. I feel like this a professional who does this for a living and he made a mistake but it was not ill intent. He is not trying to do this, he is trying to fix it. He did not even know he made this mistake and all we are saying is rules say this but it does not feel right.

Chair Phillippi: Well unfortunately that is the way the Board of Zoning Appeals is set up by the Commonwealth of Virginia.

Mr. Holland: I have spent three and a half weeks being tortured beyond imagination and I get that but is it right? If you all were standing right there would you all be happy with what is being said?

Chair Phillippi: Absolutely not.

Mr. Byrd: I feel that the thing that is fueling a lot of this frustration is that during...it is not you personally I am speaking in general because you might not know I am a little frustrated.

Mr. Holland: I am not saying that I am going to walk by there everyday and wave to him.

Mr. Byrd: During the rezoning process, the desire for a parking lot seems to have gotten lost in a bunch of other things. As I was reading the minutes of the City Council and the Planning Commission again, everyone was talking about the past violations and other things.

Ms. Dang: May I ask what date? There are two rezonings that are apart of this use, just to clarify.

Mr. Byrd: The one that was denied.

Ms. Dang: The recent one.

- Mr. Byrd: I am operating under the position that the rezoning that currently exists in law, the one from 2013. The owners of that property sold someone land that exists with a zoning of being nothing. So the City is operating on that parcel being nothing as the plans shows and the proffers submitted. It then has someone using a nonconforming use on that piece of parcel and then when you try to get a rezoning, everyone concerned about the past violations and the neighboring properties. They are discussing all of these things, there was no discussion of a parking lot. Are we against a parking lot, I did not see the City Council members say they were against a parking lot being there. I did not see the Planning Commission say they were against the parking lot being there, they were against a salvage repair parking lot. They were against that, I remember people saying something like that. I did not see what you are discussing which are working vehicles parked to go to a business.
- Mr. Lockey: They are vehicles to be repaired by the business and some of them are supposed to all be drivable but occasionally he gets one in that he has to strip a part off of and tries to get rid of it immediately. I am trying to make that happen.
- Mr. Byrd: I think that is where the problem comes. It seems like the governing body is against that being there.
- Mr. Lockey: I think one person on City Council made a comment that granting me the parking lot would undo the prior zoning and that is the only comment about it at the time.
- Mr. Byrd: Sir, storage of vehicles for repair is different for the parking lot. Parking lots are for... If the governing body was against that, it makes it harder for me to consider your appeal.
- Mr. Lockey: It was always referred to as a parking lot, I do not know whether they are looking at it as junk storage or a parking lot.
- Chair Phillippi: I think that is one of the problems here is because in the proffer it says that parking lots are allowed but the storage of vehicles for sale or service is not. That is what we are seeing there. If it was a parking lot where customers came and parked while they ran to the store, that would be one thing, but because it is being used for storage of vehicles that are being serviced on, that is against the proffers.
- Mr. Holland: The Family Dollar parking lot would not be a big deal.
- Mr. Russ: Just to be clear, the conceptual site plan does not indicate that the parking will be there anyway and so it could not be parking in that spot.
- Mr. Byrd: I do not want us to fall into that same thing again. Where we are going the current zoning, nothing is supposed to be there we are all aware of this. What you are discussing is not a parking lot no matter how the City of Harrisonburg's zoning ordinances are written. Yours falls under a different number in the list of uses and that is the storage of vehicles in repair or salvage and the governing body was against that. If that is your desire, I do not know if this body...I know I would not be in favor of that because that is a decision that is left to the governing body to make.

- Ms. Dang: Mr. Byrd just for clarity, you are explaining that was the reason why City Council last year denied the rezoning request that would have allowed the ability to store parked vehicles and do vehicle repair on this property.
- Mr. Byrd: Yes, because when I was reading those minutes I was noticing no one was talking about a parking lot which is number seven. Everyone was referring to number eight general service and repair shops permitted by right and there was another one that also refers to...
- Ms. Dang: If I may help, the BZA is asked to consider staff's determination on compliance with the proffers from 2013. Know that the person, like Mr. Lockey, could come back to rezone the property so that other uses could be allowed there if City Council were to approve that rezoning to amend the proffers but the question this evening is about staff's determination about compliance with the conceptual plan and the proffer of 2013.
- Mr. Byrd: I want to correct some statements I made. Now looking at the ordinance itself, the repair vehicles and all activities related to that is number seven under session 10-3-90. The parking is number 14 and the one I read of general services that was number eight in that section of the ordinance.
- Mr. Holsinger: Is that under the by right use?
- Mr. Byrd: These are just the ordinances because I had made statements about things related to numbers and I just wanted to clarify that.
- Mr. Blanks: We should clarify that typically number 8 the general services and repair shops is more for appliances and things than it is for actual vehicles. Vehicles have an actual section called out that says vehicles... I just wanted to clarify.
- Chair Phillippi: We have been trampling the weeds for a little bit 201 now.
- Mr. Byrd: I feel that clarifying some of these is important because I think that is what has led us to the situation. People have not been clear about what was going on and now we have someone in front of us who is trying to appeal the situation that I do not think I would be in favor of. Going against how staff has looked at the ordinances of the City. It comes to me as you are either desiring a thing that the governing body does not want to have on that parcel or you had a misunderstanding of what you have a right to have there and we need to have that...
- Mr. Lockey: That may be true. I was trying to let them park the vehicles they needed to park there not distinguishing between a parking lot like you say for run in run out like the dollar store but one they can leave the vehicles there while we are working on them. They do not work on them outside anymore. It is kind of squishy on the back side of the parking lot because some of it is on the M property and some of it is on the B-2 property. That gets to be another issue, exactly where the properties are. I kind of know where they are but I do not know specifically six inches one way or the other where the line is.
- Mr. Byrd: I would review the existing documents that you have to see what were those governing body's positions on the ordinance number seven, repair of vehicles,

recreational equipment, trailers with all activity storage of inoperable vehicles completely enclosed within a permanent structure be able excluded overruled because that is referring to what you are talking about if you want to have vehicles from a repair shop stored there. That might require fencing and all kinds of other things. That is not what we are dealing with before us because you are appealing their decision. Their decision is concerned with the zoning that has your property being nothing.

Chair Phillippi: Do you have anything further Mr. Lockey?

Mr. Lockey: I have just always been confused by the idea that just because there is nothing in that blob on the plat it means there can be absolutely nothing there because the property does say it can be used for parking. It does not say that vacant spaces have to remain vacant. There is some good [unintelligible] on the proffers. If you read the proffers it does not say all vacant areas will remain vacant, it just says the property can be used for this and this including parking and it does not say that that cannot be used for parking it just says...They keep saying there is nothing drawn in it so you cannot have anything in it. I am confused by that logic there.

Chair Phillippi: I think one of the things there is if you look at the letter from the applicants of the proffer back in 2013, the following is proffered, the conceptual site plan is provided in exhibit A as proffered. That right there means that the way that site was drawn with that vacant lot, that is part of the proffer that exists with that. Do we have any further questions for Mr. Lockey?

Mr. Lockey: I think I have said everything I can say. I still would like to try again. If I am told I cannot do it, I will try again to get it rezoned as necessary to keep the business there. I would hate to lose a business in the City.

Chair Phillippi: With that, I am going to go ahead and close the public comment section because I do not see anyone. Now we come to the motion portion of the evening.

Mr. Byrd: Well, in light of the fact that when the minor subdivision plat occurred and no zoning was changed then that means the current zoning is what it is. Therefore, I move to deny the appeal of the administrative decision for 813 Chicago Avenue identified as tax map parcel 39-F-6.

Chair Phillippi: We have a motion, do we have a second?

Mr. Holsinger: I will second.

Chair Phillippi: Any further discussion on the motion?

Mr. Byrd: I would like to point out that this is a strange case. I have seen a zoned area be then later subdivided and part of that sold off to someone else when they know the zoning for that is nothing.

Mr. Holsinger: To that end that is why I struggled with the idea. The idea that the proffers are in a file cabinet in City Hall and not with the deed. I cannot get past that in my mind but I understand what we are here to decide for today.

Mr. Byrd: I am going to have to make sure when I am at Planning Commission in a couple of days that I mention that we need to be a bit more clearer in what we are for and against when we have a lot of proffers attached to something or a lot of proffers to remove things to make sure people understand where we are so that they do not have to appeal decisions.

Mr. Holland: My frustration is he did not know this. There was no willful act to do this. I get that what happens and I understand that. He is trying to find a way to make it right and I am not seeing we are helping him with that. I do not agree with that. We are the Friendly City, right? I am frustrated that he had this \$300 fee, another \$300 fee I think he paid a lawyer too. He is trying to make it right, he is not trying to go around some of the other cases we had where they ignored getting a building permit. You are a contractor that is on you dude I am not feeling sorry for you one bit. I do not think this is right and I get what we are here to decide but we are not helping somebody who is trying to make it right. If somebody can help him with that I would appreciate it. Any suggestions with that?

Chair Phillippi: That is talking to legislative bodies because they are the ones who can change things.

Mr. Holland: As in the City Council?

Chair Phillippi: City Council and also the General Assembly with their authority that they get provided the Board of Zoning Appeals.

Mr. Holand: If that was you standing there, how would you feel?

Chair Phillippi: I have already said, I would be frustrated with the situation.

Mr. Holland: I am not a touchy feely guy, I just feel he is trying to do something right. Reward it, encourage it and work with him.

WHEREAS: Chair Phillippi called for a roll call vote: Mr. Holland: No; Mr. Holsinger: Yes; Mr. Byrd: Yes; Ms. Maskell: No; Chair Phillippi: Yes

BE IT, THEREFORE, RESOLVED: The Board voiced a decision of 3-2 to deny the appeal.

The next order of business was the approval of the Board of Zoning Appeals annual summary.

Ms. Dang: Last year as you can see within the report you all had three items that you all considered over two meetings. This report is required by City Code for us to put together and I am happy to answer any questions you all have. I also ask that you all take a vote that this be forwarded to City Council for their review.

Chair Phillippi: Anybody have any questions on the report for Ms. Dang?

Mr. Holsinger: I move to submit the report to City Council.

Mr. Byrd: Second.

BE IT, THEREFORE, RESOLVED: The Board unanimously approved the BZA 2023 Annual Summary.

With no further business, the meeting adjourned at 5:23pm.

Respectfully submitted, \_\_\_\_\_Chair

\_\_\_\_\_Secretary