

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF HENDERSON

SUPERIOR COURT DIVISION

2021 OCT 28 P 4:09

FILE NO. 21 CVS 1971

MATTHEW COOKE and 547 CRAB CREEK, LLC,

HENDERSON CO., C.S.C.

BY



Petitioners,

**PETITION FOR WRIT OF CERTIORARI**

v.

HENDERSON COUNTY,

Respondent.

NOW COMES Matthew Cooke and 547 Crab Creek, LLC (herein collectively "Petitioners") and petitions the Superior Court of Henderson County, North Carolina, pursuant to N.C.G.S §§160D-1402 and 160D-406, to review a decision of the Respondent Henderson County's zoning board of adjustment ("BOA") as hereinafter set out, by proceedings in the nature of certiorari, and in support thereof shows unto the Court as follows:

1. Petitioner, Matthew Cooke is a citizen and resident of Henderson County, North Carolina.
2. Petitioner, 547 Crab Creek, LLC is a North Carolina limited liability company authorized to do business in the State of North Carolina.
3. Respondent Henderson County ("County") is a county and political subdivision organized under the laws of the State of North Carolina pursuant to Chapter 153A of the North Carolina General Statutes.
4. The BOA is an administrative agency of the County organized pursuant to law that is authorized by Sections 42-304 and 42-355 of the County's Land Development Code ("LDC") to grant special use permits where allowed in a particular use district.
5. At all relevant times hereto, Petitioners owned the subject property located at 547 Crab Creek Road, Henderson County with the following Parcel Identification Number: 9456-83-9038 ("Site"). The Site is proposed for the installation and operation of A self-storage warehouse ("Self-Storage").
6. Petitioners have standing to bring this action as a result of being the applicant before the decision-making board whose decision is being appealed and for owning the property that is the subject of the decision being appealed as both are provided for in N.C. Gen. Stat. §160D-1402(c)(1).

7. The Site consists of approximately 9.53 acres and is zoned by the County as Residential District Two Rural ("R2R") – under Chapter 42 of the LDC. The Property is bounded by other R2R zoned properties to the north, east and south, and by Residential 3 ("R3") – property to the west. The Property's southern border is the "Mud Creek", a perennial stream that eventually joins the French Broad River.

8. Crab Creek Road abuts the North side of the Site. Crab Creek Road is a two-lane public road or highway maintained by the North Carolina Department of Transportation.

9. The County has adopted County-wide zoning regulations applicable to its entire political limits and territorial jurisdiction.

10. In Section 42-29 of the LDC, the intent of the R2R District is stated as follows:

The intent of this district is to allow for low to medium density residential development and rural commercial and light industrial development consistent with the recommendations of the Comprehensive Plan. This general use district is typically meant to be utilized in areas designated as Transitional ("RTA") in the Comprehensive Plan.

11. Among the uses permitted as of right in R2R are fire and rescue station, solar energy generation facility  $\leq$  30 acres, solid waste facility - county owned/operated, indoor or outdoor commercial shooting ranges, utility substation and recycling centers, drop-off facility.

12. In the LDC (Section 42-61), multiple uses and structures are allowed to be established in R2R pursuant to a special use permit upon the showing that specified conditions exist. They include: self-storage warehousing, waste collection and transfer facility (non-hazardous), wastewater treatment plant, water treatment plant, police stations, youth centers, kennels, machining and assembly operations  $\leq$  10,000 sq ft (of gross floor area) and manufacturing and production operations  $\leq$  10,000 sq ft (of gross floor area).

13. On March 15, 2021, Petitioners submitted an application to the County for a special use permit ("SUP") for its Self-Storage facility on the Site ("Project") as provided for in Chapter 42 of the LDC.

14. Petitioners' application, which is incorporated herein by reference, was complete and in compliance with the application and development plan requirements in Section 42-355 of the LDC. In all respects, Petitioners complied with the procedural requirements for requesting a SUP for the Project as set forth in the LCD.

15. A driveway permit from the North Carolina Department of Transportation, like other developments with driveways connecting to State roads, will be required for the addition of the Self-Storage at the Site. Said State agency is delegated responsibility from the North Carolina General Assembly to protect the safety of the traveling public as a result of new driveway connections to State roads for new developments (N.C. Gen. Stat. §136-18(29)).

16. Petitioners' request for a SUP came before the BOA for a hearing on July 28, August 11 and September 15, 2021 (collectively "BOA Hearings").

17. The Project complied with all of the technical requirements of the LDC for Self-Storage facility in the R2R District, including, without limitation, the dimensional requirements for development such as separation between uses, building height, setbacks, lot sizes and lighting and buffering requirement.

18. Sections 42-355.H(1) of the LDC establishes additional general standards for the issuance of a SUP, to wit:

- a. will not materially endanger the public health, safety or welfare;
- b. will not substantially injure the value of property or improvements in the area; and
- c. will be in harmony with the surrounding area.

(hereinafter "General SUP Standards").

19. Petitioners presented evidence in favor of the application, including testimony from Petitioner Matt Cooke and several documented experts, including a professional engineer, a traffic engineer, and property appraiser. Each testified on behalf of Petitioners regarding the Project's adherence to the standards in the LDC and to its compliance with State law.

20. During the BOA Hearings, a single property owner, Mr. Melvin Doss, who resides across Crab Creek Road from the Site was, contrary to law, given party status and allowed to presented evidence through expert witnesses in opposition to the Project ("Opposition"). The Opposition testimony only addressed generalized, nonspecific concerns about the Project, including traffic, property values and general welfare.

21. After closing the public hearing, the BOA, by a 5-0 vote, decided to deny Petitioners' SUP.

22. On September 29, 2021, the BOA, by and through its Chairperson, issued a written decision, a copy of which is attached as Exhibit "A" and incorporated herein by reference (the "Order"). In the Order, the BOA concluded that the Petitioners "failed

to produce sufficient competent, substantial and material evidence that the proposed use will meet all the requirements listed in §42-355.H of the LDC.

23. Essentially, the BOA's decision is that Petitioners did not satisfy a so-called "burden of proof" related to the General SUP Standards for issuance of the SUP for Self-Storage.

24. Petitioners have timely appealed the Order to Henderson County Superior Court.

### **Count One Errors of Law**

25. Petitioners incorporate by reference the allegations contained in paragraphs 1-24 above.

26. North Carolina common law mandates as part of due process all decisions of a zoning board of adjustment must be supported by competent, material and substantial evidence introduced at a hearing. This is codified in G.S. §160D-406(j).

27. Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable *de novo*. G.S. §160D-1402(j)(2).

28. When an applicant such as Petitioners present competent, material and substantial evidence of the existence of facts and conditions which the zoning regulations require for the issuance of a special use permit, *prima facie* the Applicant is entitled to it. This burden is one of production only, and not a burden of proof.

29. The BOA committed an error of law in finding and/or concluding in its Order that Petitioners had not presented competent, material and substantial evidence to make a *prima facie* showing of compliance with all of the standards for a SUP, including those set forth in §42-355.H and the General SUP Standards of the LDC.

30. Specifically, Petitioners presented competent, material and substantial evidence that that the Project would not adversely affect the public health, safety or welfare of persons residing or working in the neighborhood of the proposed use by showing, among other things, compliance with all the standards for a Self-Storage in an R2R District, by offering expert testimony and documentary evidence regarding compliance with the LDC, by showing direct access from the Site to a public highway and by offering up reasonable conditions to address impacts, such as environmental health improvements, erosion and stormwater control, that it would not impede emergency service response and that a driveway permit would be acquired from the State of North Carolina Department of Transportation.

31. Petitioners presented competent, material and substantial evidence that the Project would comply with State regulated matters, including standards for stormwater and erosion.

32. The inclusion of a particular use in a zoning ordinance as one which is permitted under certain conditions, as here the use of the Site for a Self-Storage in R2R, is equivalent to a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district, the surrounding area and the general zoning plan. Such inclusion by definition is in accord with the purpose and intent of the LDC. There was no competent, material and substantial evidence presented in the record to rebut this presumption arising from the County's legislative decision to allow Self-Storage warehousing facilities in R2R. In addition, further competent, material and substantial evidence was presented that the use of properties surrounding and in close proximity to the Project included commercial businesses, a 21,000 sq ft metal building and other such non-residential uses.

33. Despite compliance with all the standards that are adopted by the County to lawfully curb unguided discretion through the required application and hearing process for the SUP, Petitioners were subjected by the BOA to vague, over-reaching, and nebulous standards. Said standards in the quasi-judicial context to be applied by nonelected appointees of a zoning board of adjustment constitute an unlawful delegation of legislative authority as set forth in Article II, Section 1 of the North Carolina Constitution (*Jackson v. Guilford County Bd. of Adj.*, 275 N.C. 155, 165, 166 S.E.2d 78, 85 (1969) and the due process and equal protections clauses of the United States Constitution (*State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 122, 49 S.Ct. 50, 52(1928))).

34. The BOA's denial of Petitioners' SUP for the reasons stated in paragraph 13 of the findings of facts regarding "public welfare" was effectively a rezoning of the Site and an unlawful exercise of legislative power by the BOA in violation of the United States and North Carolina Constitutions. Section 42-355.H.(1)a. of the LDC concerning whether the use will "not materially endanger the public . . . welfare" is unconstitutional and void for failing to furnish a standard which can be uniformly applied and leaves the rights of Petitioners subject to the unguided will and unbridled discretion of the BOA who has exercised it to give exclusive privileges to the Opposition to effectively eliminate Self-Storage as a use within R2R zoned areas.

35. Although the BOA concluded that Petitioners failed to produce sufficient competent, substantial and material that the proposed use will meet all the requirements listed in §42-355.H, it further concluded that had Petitioners present such evidence, the Opposition presented competent, substantial and material evidence that the proposed use will not meet such requirements of the LDC. The Opposition testimony, as a matter of law, constituted speculative assertions of generalized fears

and mere opinion evidence by laymen that would not be competent evidence based on case law and the application of G.S. §160D-1402(j)(3).

36. The expression of generalized fears does not constitute a competent basis for denial of a permit. None of the Opposition witnesses presented any mathematical studies or factual basis for their opinions regarding how the Project would impact the so-called “public welfare” or the surrounding area. Unlike the evidence presented by experts for Petitioners, there was no expert opinion presented by the Opposition to quantitatively link any observations or opinions to the BOA’s denial of the SUP.

37. Specifically, Petitioners presented competent, material and substantial evidence that that the Project would not substantially injure the value of property or improvements in the area by showing compliance with all the technical standards for a Self-Storage facility in an R2R District, by offering expert testimony and documentary evidence regarding compliance with LDC, by showing direct access from the Site to a public highway and by offering up reasonable conditions to address impacts.

38. The BOA’s denial lacks an essential nexus with and rough proportionality to the impacts of the Project, contrary to *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S.Ct. 3141 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994) and *Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586 (2013).

39. The BOA committed errors of law in granting Mr. Doss party status as an aggrieved party who will suffer special damages as the result of the decision being appeal. Mr. Doss’ limited testimony which was wholly unsupported by facts concerning special damages related to the aesthetics of the Self-Storage facility and speculative, generalized fear of increased traffic.

### **Count Two**

#### **Arbitrary and Capricious, Findings and Decision Not Supported by Record**

40. Petitioners incorporate by reference the allegations contained in paragraphs 1-39 above.

41. The BOA’s Order is not supported by competent, material and substantial evidence and is therefore arbitrary and capricious in that the uncontroverted evidence in the record is that the Project meets all the requirements for issuance of a SUP.

42. The BOA’s findings of facts paragraphs 13 and 21 that the proposed use would materially endanger the public health, safety and welfare and does not minimize the environmental impact on the neighborhood are not supported by competent, material and substantial evidence in the record.

43. The BOA's findings of facts paragraph 18 that the addition of traffic associated with Self-Storage facilities and the lack of public water and fire hydrants along with narrow travel lanes within the Project would detrimentally affect the health, safety and welfare of the community near the Site are not supported by competent, material and substantial evidence in the record.

44. The BOA's findings of facts paragraph 19 that the Project will substantially injure the value of some of the surrounding properties is not supported by competent, material and substantial evidence in the record.

45. The BOA's findings of facts paragraph 20 that the Project is not in harmony with the surrounding area is not supported by competent, material and substantial evidence in the record.

46. Paragraphs 2, 3, 4, and 5 of the BOA's conclusions of law that the Applicant failed to produce sufficient competent, substantial and material evidence that the Project will meet the applicable requirements of the LDC, that the Opposition presented competent, substantial and material evidence that the Project will not meet the applicable requirements of the LDC and that the SUP should be denied was not supported by competent, material and substantial evidence in the record and was erroneous as a matter of law.

47. Since the BOA's Order denying Petitioner's SUP is not supported by competent, material and substantial evidence, it is arbitrary and capricious and constitutes a manifest abuse of discretion.

48. The BOA failed to indicate any course of reasoning for its decision, acted in complete disregard of facts or law, including not following the directive of the County staff, and rejected the Project without any determining principle. The BOA's decision ignored the staff's testimony, was grounded in standards not found in the ordinance, and was based on a preference for favoring generalized, speculative and vague concerns expressed by the Opposition. As such, the BOA acted arbitrarily and capriciously.

### **Count Three Constitutional Violations**

49. Petitioner incorporates by reference the allegations contained in paragraphs 1-48 above.

50. In North Carolina, a property owner or permit applicant such as Petitioners have a right to make any lawful use of his or her land as he or she sees fit.

51. The BOA's actions denying Petitioners' SUP constituted an unlawful exercise of legislative power in violation of Article II, Section 1 of the North Carolina

Constitution and the due process and equal protection clauses of the United States Constitution.

52. Substantive due process protects the Petitioners from government action that unreasonably deprives it of a liberty or property interest. Governmental action must have a rational connection to a valid State objective, and not be unreasonable, arbitrary or capricious. This is a guaranty provided by the law of the land clause in Article I, Section 19 of the North Carolina Constitution and the 14<sup>th</sup> Amendment to the United States Constitution.

53. At all relevant times hereto, Petitioners had a fundamental property interest in the lawful use of the Site.

54. Since the BOA acted in excess of its legal authority, without an adequate grounding in a valid State objective, in a manner that shocks the conscience and for being arbitrary and capricious in its decision making, the BOA violated Petitioner's substantive due process rights.

55. By denying the Project for the reasons stated, the BOA acted in excess of its legal authority and Petitioners have been deprived of its property rights without just compensation in contravention of Article I, Section 19 of the North Carolina Constitution and the Fifth and 14<sup>th</sup> Amendments to the United States Constitution.

WHEREFORE, the Petitioners pray the Court as follows:

1. That a Writ of Certiorari ("Writ") be issued to the Respondent, Henderson County, by which the County shall certify to this Court within thirty (30) days from the date of the Writ the complete record of the proceedings, including the BOA Hearings, any exhibits, minutes, stenographic recordings, and audio tapes concerning the BOA's decision, as set forth in this Petition, that is the subject matter of this appeal.

2. That the Court, for any and all reasons enumerated above, reverse the decision of the Respondent County's BOA, and remand the matter to said agency instructing it to issue the SUP for the Project.

3. That the costs of this action be taxed to the Respondent.

4. For attorney's fees incurred by Petitioner in defense of the County's actions pursuant to N.C. Gen. Stat. §6-21.7.

5. For such further relief this Court deems just and proper.



This the 28<sup>TH</sup> day of October, 2021.

**VAN WINKLE, BUCK, WALL,  
STARNES AND DAVIS, P.A.**

By:  \_\_\_\_\_

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**HENDERSON COUNTY  
ZONING BOARD OF ADJUSTMENT  
FILE SUP-21-02**

In the Matter of the Special Use Permit Application  
SUP-21-02 Crab Creek Mini Storage,  
MATTHEW COOKE,  
Applicant

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**ORDER**

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THIS MATTER was heard in a quasi-judicial hearing before the Henderson County Zoning Board of Adjustment (the "ZBA") on July 28, 2021, August 11, 2021, and September 15, 2021. After hearing all the evidence, and after public deliberation, the ZBA makes the following findings of fact:

1. The ZBA was made up of the following members on July 28, 2021:

Ronald Kauffman, Chairman  
Anthony Engel  
James Hysong

Willard Fishburne  
Robert Pierce  
Louise St. Romaine (alternate member)

However, Mr. Pierce was unable to attend the remainder of the hearing of this matter, and Louise St. Romaine, who had been present and heard all the evidence presented on July 28, joined the remaining members of the ZBA, such that the ZBA deciding this matter was made up of the following members:

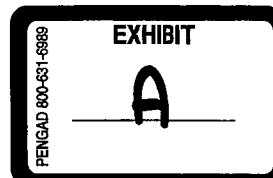
Ronald Kauffman, Chairman  
Anthony Engel  
Louise St. Romaine

Willard Fishburne  
James Hysong

2. This hearing was held pursuant to Henderson County Code §42-355, and pursuant to N.C. Gen. Stat. §160D-705(c), on the application filed by Matthew Cooke regarding real estate located at 547 Crab Creek Road in Hendersonville, North Carolina (Henderson County REID 401556), hereafter the "Property".

3. The application filed herein was joined in by the current owner of the Property, 547 Crab Creek LLC, of which Mr. Cooke is a member. Together, Cooke and 547 Crab Creek LLC are the "Applicants".

4. Melvin Doss ("Doss") owns property directly across Crab Creek Road from the Property, at 4 Conger Drive. He uses this property as his residence. Doss' sole access to his residence is from Crab Creek Road, which also provides it with all emergency services. Doss identified reasons for why the damage he would suffer from the granting of the special use



permit sought are distinct from the public at large. Those reasons were accepted by the ZBA, which allowed Doss party status.

5. The Property consists of approximately 9.53 acres, and is zoned Rural Two Rural ("R2R") – medium to low density residential – under the Land Development Code, Chapter 42 of the Henderson County Code (hereafter, the "LDC"). The Property is bounded by other R2R zoned properties to the north, east and south, and by Residential 3 ("R3") – low density residential – property to the west. The Property's southern border is the "Mud Creek", a perennial stream that eventually joins the French Broad River.

6. The Applicants seek to use the property as self-storage warehousing, as that term is defined in the LDC. They wish to construct 125,728 square feet of enclosed "mini-storage" space in several structures on the Property. Under the Applicants' proposed site plan there would be 7.45 acres of disturbed land, with 9.3% of the property remaining as open space.

7. Under the LDC, self-storage warehousing is permitted in an R2R zoning district only as a special use.

8. §42-355.H. of the LDC sets out the standards for the hearing of an application for a special use permit:

The ZBA shall not approve a permit unless it makes written findings that the regulations of . . . [the LDC] that set forth specific standards for the use have been met. The ZBA may consider the type of use, size of the use, size of the property and other relevant factors in evaluating the permit application. The applicant will not bear the burden of proving that all of the site standards (as listed below) have been met; however, the applicant will be required to produce evidence sufficient to rebut any evidence presented that the site standards would not be met or that a condition is necessary. The applicant may be required, in his/her rebuttal, to show that the proposed use will:

- a. Not materially endanger the public health, safety or welfare;
- b. Not substantially injure the value of property or improvements in the area; and
- c. Be in harmony with the surrounding area.

Additionally the applicant may be required, in his/her rebuttal, to show that the proposed use shall be located and developed in such a manner as to:

- a. Comply with all applicable local, state and federal statutes, ordinances and regulations;
- b. Be in accordance with the Comprehensive Plan, Long Range Transportation Plans and Comprehensive Transportation Plans of the County and/or Long Range Transportation Plans and Comprehensive Transportation Plans of any municipality of the County;
- c. Minimize the effects of noise, glare, dust, solar access and odor on those persons residing or working in the neighborhood of the proposed use; and
- d. Minimize the environmental impacts on the neighborhood including the following groundwater, surface water, wetlands, endangered/threatened species, archeological sites, historic preservation sites and unique natural areas.

Finally, the applicant may be required, in his/her rebuttal, to show that satisfactory provision/arrangement has been made (where applicable or required) concerning:

- a. Ingress and egress to property and proposed structures thereon (with particular reference to automotive/pedestrian safety/convenience and traffic flow/control);
- b. Off-street parking and loading areas;
- c. Utilities (with particular reference to locations, availability and compatibility);
- d. Buffering and landscaping (with particular reference to type, location and dimensions); and
- e. Structures (with particular reference to location, size and use).

9. The Applicants presented a site plan prepared and testified to by Jared DeRidder, P.E., of WGLA Engineering. DeRidder was accepted by the ZBA as an expert in civil engineering and land planning. DeRidder testified that the proposed construction on the Property in the site plan met the requirements for the location and size of the proposed structures, the impervious surface area, and the stormwater plan with a stream buffer (to Mud Creek) for the site.

10. The Applicants presented a traffic plan prepared and testified to by David W. Hyder, P.E., of J. M. Teague Engineering & Planning. Hyder was accepted by the ZBA as an expert in traffic analysis. Hyder testified that the sight distances to the highway created by the site plan are sufficient, and the increase in traffic on Crab Creek Road, on which the Property is located, would be 340 trips per day. Hyder further testified that the access lane widths of 25 feet were sufficient for fire-fighting vehicle access.

11. The Applicants presented an appraisal report prepared and testified to by Kyle Winters, MAI/ASA, of Integra Real Estate Services. Winters was accepted by the ZBA as an expert in real estate appraisal. Winters testified that the project would cause no measurable harm or impact on property values on the real estate surrounding the Property if the application is approved.

12. Doss presented a traffic analysis prepared and testified to by Richard A. Hall, P.E., of Hall Planning & Engineering. Hall was accepted by the ZBA as an expert in traffic analysis. Hall estimated a lower number of trips per day to and from the Property if the application is approved, but opined that because of the design of Crab Creek Road it would be difficult to handle additional trips created by the proposed use, particularly truck trips. The design of Crab Creek road was "antique", with geometry that made it particularly inappropriate for trucks driven, as is often the case for self-storage facilities, by truck-renters who are not generally as experienced in their operation as a professional truck driver.

13. Doss presented a soil scientist and landscape architect's report prepared and testified to by Barrett L. Kays, Ph.D. Kays was accepted by the ZBA as an expert in soil science and landscape architecture. Kays opined that the application if granted would not be in harmony with the surrounding area. The surrounding area is primarily single-family residential. In addition, he opined that the application's proposed stormwater control encroaches on the mandatory thirty-foot stream buffer with non-water dependent structures. Kays further opined that the requirements of the LDC for high-density projects, such as the application proposes, would not be met by the application. As such, the application as proposed would materially endanger the public health, safety and welfare.

14. Doss presented the testimony of Angelyn Beth Bell, who is a captain for the City of Asheville Fire Department. Bell was accepted by the Board as an expert in fire protection, including fire science and incident traffic management. She opined that fire access and protection for the facility as proposed would be inadequate. There are no fire hydrants within a relevant distance from the Property, so water supply would have to arrive by water shuttles, for which there is insufficient room for operation on the Property as planned in the application.

15. Doss presented an appraisal report prepared and testified to by Raymond Murphy, MAI, SRA, AI-GRS, of Murphy & Hays, Associates. Murphy was accepted by the Board as an expert in real estate appraisal. Murphy opined that values of at least five properties in the vicinity of the Property would be substantially and actually adversely affected by the construction as proposed by the Applicants by diminution in the value of their view, and in the values of additional properties due to the stigma perceived in the market because of the proposed use.

16. Doss presented an appraisal report prepared and testified to by Donald I. Read, MAI, of Read's Real Estate Services Company. Read also opined that market values of several parcels in the near vicinity of the Property would be lowered as a result of view diminution should the proposed use application be granted.

17. The ZBA also heard further from neighbors in the community as to their opinions on the Applicants' proposed use of the Property.

18. Given the nature of the location on Crab Creek Road, the addition of traffic, particularly of the type traffic associated with a self-storage facility, would detrimentally affect the health, safety and welfare of the community near the Property. In addition, the lack of any public water and fire hydrants, and the narrow travel lanes inside the facility as proposed, make adequate fire protection unlikely or impossible, detrimentally affecting the health, safety and welfare of the community near the Property.

19. The ZBA is not persuaded that the proposed use will not substantially injure the value of the property or improvements in the area. To the contrary, there will be a substantial injury to the value of some of the surrounding properties, including that of Doss.

20. The ZBA does not find the proposed use of the Property – a commercial use leaving less than ten percent of the acreage of the Property as open space – to be in harmony with the surrounding area, which is overwhelmingly single-family residential.

21. The ZBA does not find that the proposed use minimizes the environmental impacts on the neighborhood as required by the LDC; rather, the large amount of impermeable surface and lack of open space and stormwater protection so near Mud Creek does the opposite.

From the foregoing, the ZBA concludes as a matter of law:

1. That this matter is property before the ZBA.

2. That Doss presented competent, substantial and material evidence such that, in order to obtain and special use permit, the Applicants were obliged, under §42-355 of the LDC, to show that the proposed use will meet all the requirements listed in §42-355.H.

3. That the Applicants failed to produce sufficient competent, substantial and material evidence that the proposed use will meet all the requirements listed in §42-355.H. of the LDC.

4. That even had the Applicants presented such evidence, Doss presented competent, substantial and material evidence that the proposed use will not meet the requirements listed in §42-355.H. of the LDC.


5. That the special use application should be denied.

**WHEREFORE, IT IS ORDERED** that the application for special use permit in the matter is hereby denied.

Announced after a unanimous vote of the ZBA on September 15, 2021. On September 29, 2021, board member Louise St. Romaine was unable to attend the board's meeting, the purpose of which was to approve a written order in this matter. The remaining members of the board adopted as the Order of the ZBA, after the vote shown below:

Ronald Kauffman	<u>Yes</u>	Willard Fishburne	<u>Yes</u>
Anthony Engel	<u>Yes</u>	James Hysong	<u>Yes</u>

Signed this the 29<sup>th</sup> day of September, 2021.

  
RONALD KAUFFMAN, Chairman

CERTIFICATE OF SERVICE

This is to certify that the undersigned has delivered a copy of the foregoing pursuant to the provisions of N.C. Gen. Stat. §160D-406(j) to all parties to this proceeding by electronic mail addressed to:

For the Applicant: [bgulden@vwlawfirm.com](mailto:bgulden@vwlawfirm.com)  
For Doss: [jnoor@roberts-stevens.com](mailto:jnoor@roberts-stevens.com)

This the 30<sup>th</sup> day of September, 2021.



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