

**Board of Zoning Appeals Meeting
April 1, 2009
Hamilton Town Office**

The meeting was called to order at 7:00 PM and Roll Call followed.

Present: Dr. Thomas Gatewood, Chairman, Ms. Patricia Maher-Wade, Mr. Robert McCann,
Ms. Kelly Gaitten.

Absent: Ms. Winifred Reed

Also Present: Ms. Maureen Gilmore, Town Attorney, Mayor H. Ray Whitbey,
Mr. David Beniamino, Zoning Administrator.

Minutes

Ms. Wade made a motion to adopt the January 7, 2009 minutes into record and Ms. Gaitten made a second on the motion. The vote passed 4-0-1, (Aye: Gatewood, Wade, Gaitten, McCann. Nay: none. Absent: Reed).

Public Hearing

Dr. Gatewood reviewed order in which the hearing will be conducted as prescribed in 4.3 Rules of Procedure, Hamilton BZA.

All attendees stated that there was no conflict of interest.

Mr. Beniamino read the Public Hearing Notice and the affidavit of publication, as advertised in the newspaper.

All members of the BZA acknowledged that they have completed a personal inspection or are familiar with the property at 353 W. Colonial Highway.

Mr. Beniamino reviewed the Appellant's Request, summarizing the applicant contention that the determination of the zoning violation was an error and further that the fence constructed on the appellant's property is a lawful structure.

Mr. Dave Culbert, Attorney, is presenting on behalf of Ms. Heard, Applicant. Mr. Culbert advised that Ms. Heard is present at the hearing and can answer any questions if required and may want the opportunity to make a personal statement in the event it is appropriate. Mr. Culbert began his presentation by noting that there was no Pledge of Allegiance. Dr. Gatewood apologized for the oversight and led the Pledge of Allegiance. Mr. Culbert stated that Ms. Heard had always intended to try to resolve this matter amicably and announced that recently there was legislation passed in Richmond, though he is not aware of the ultimate disposition, which would give the BZA far more latitude than under the existing statutory scheme. Mr. Culbert is requesting a postponement, at the Appellant's request, to give the legislation time to take effect and perhaps render this matter mute. Mr. Culbert believes that the new legislation will allow the BZA the ability to grant variances based on demonstrable hardship. If a continuation request is granted, the Appellant would be willing to waive and confirm in writing the agreement to a continuation and is asking the BZA for their consideration in this matter. Ms. Wade inquired if the legislation, when enacted, will become retroactive and apply to this case? Mr. Culbert responded that "no it is not retroactive, but is asking that the appeal be continued for a period of time until a new application could be processed." Ms. Gilmore asked what the new application would be for and Mr. Culbert responded that it would be for a variance, with Ms. Gilmore responding that the hearing for that request has already occurred. Mr. Culbert stated that the hearing was held under an existing statute, but there will be a new salutatory framework that would allow a new hearing with the standards considerably changed. Ms. Gilmore stated that she is not certain that the new legislation would cover the variance or be retroactive for a variance that has already been denied. Mr. Culbert clarified that it is not intended to be retroactive but to enable a new application to be applied to the current situation. Ms. Gilmore noted that depending the how the BZA rules this evening the determination, if upheld, would be a thing decided and there would be an existing zoning violation that needs corrected. Mr. Culbert explained that this is why he is requesting a continuation of the matter, at their request, so a decision will not be made tonight. Dr. Gatewood voiced his understanding that after the variance was resolved at the September 2008 hearing, the next step for an appeal of the variance would have to go to the court level for consideration. Mr. Culbert made it clear that he is not here to revisit the prior variance, but is raising the issue of the change in the statutory scheme that will allow a new variance application to be filed and considered under the new guidelines. Ms. Gilmore asked Mr. Culbert on what basis is the continuance request being made because there is no authority in the Zoning Ordinance for the BZA to grant a continuance? Mr. Culbert stated that the authority is inherent and that it is done throughout the Commonwealth and in every other

jurisdiction in which he practices. Ms. Gilmore responded that she does not see this authority in the BZA Procedural Rules that are adopted or in the Zoning Ordinance for the type of continuation that is being requested. Ms. Gilmore continued to say that this is not a directive to the BZA but it is her understanding from reviewing the ordinance and the Rules and Procedures, noting strict time frames under which the BZA must act, in which Mr. Culbert acknowledged that her and Ms. Heard are willing to waive. Ms. Gilmore noted that since this issue is not addressed could Mr. Culbert point to a statute allowing this and Mr. Culbert responded that it is certainly up to the discretion of the BZA whether they want to hear the appeal of the determination. Ms. Gilmore again asked if a statute could be pointed out and Mr. Culbert reiterated that he is asking for a postponement of the hearing, for the purpose of giving opportunity through the passage of time, to resolve the matter in a different form. Ms. Wade asked if Mr. Culbert had a copy of the legislation that is being referred to and Mr. Culbert responded he did not have a copy with him but he has sent a copy to Mr. Beniamino. Mr. Beniamino advised that his copy is saved in email but it is not part of this request and was considered it more of an FYI. Mr. Culbert commented that it has passed both Houses of Virginia; Ms. Gilmore understands that it is in the early stages and Mr. Beniamino's understanding of what Mr. Culbert provided is that they were looking into changing the standard for variances for a clearly demonstrable hardship instead of the current standpoint. Dr. Gatewood requested a copy be obtained for the BZA. Ms. Gilmore understands that the legislation will attempt to establish that a demonstrable hardship must be shown and noted that she is unsure how it will play out in ordinances. Mr. Culbert recognized that this is not a guarantee that this BZA will grant a future variance but it is an opportunity to reach a resolution other than what had been advised in September 2008. Ms. Gilmore asked Mr. Culbert if a written request was put in for the deferral or was the Zoning Administrator advised of the request and Mr. Culbert responded that he is happy to go on record tonight as making the official request for a deferral. Mr. Culbert tried to work with Mr. Beniamino early on when the appeal was filed but Mr. Culbert objected, for the record, that the Mayor of the Town of Hamilton and the Town Attorney instructed and directed Mr. Beniamino in his capacity of Zoning Administrator to refuse to speak to Mr. Culbert, which is an adversarial procedure. Ms. Gilmore asked Mr. Culbert when it was decided that he was going to ask for a deferral or continuation because the BZA was clearly not aware of this change and that this was not on the agenda. Mr. Culbert apologized for the lack of communication and noted that under the circumstances he was limited in communication with Mr. Beniamino. Dr. Gatewood advised that the BZA packet did not include this item and that it is the BZA's experience to be properly prepared for the meetings, Mr. Culbert apologized for the shortcoming on his part but stressed that this does not change the substance or the appropriateness of the request. Dr. Gatewood asked if the statute was passed by both houses and Mr. Culbert responded that it is his understanding that it did pass both Houses but it is unsure if it is signed. Dr. Gatewood understands that the language of the definition of hardship has changed and that there has not yet been a test under case law yet. Mr. Culbert agreed and Ms. Wade asked when the effective date was and Ms. Gilmore advised of a July 1, 2009 timeline. Dr. Gatewood opened the item to the BZA as to whether they want to respond to the request and Ms. Wade responded that she is not opposed to the idea and Mr. McCann inquired how long this was going to go on as it has been a year now. Ms. Wade suggested establishing a definitive date and Ms. Gaitten asked how this works with the previous application and the ruling made before. Ms. Gilmore explained that the variance has already been denied and the fence is still up, the applicant has been cited for an existing zoning violation and based on the determination of the Zoning Administrator an appeal was filed. Ms. Gaitten and others on the BZA do not understand how the applicant can reapply and Ms. Gilmore noted that the BZA has several choices before it: there is no requirement that a deferral/continuance be granted or a new application could be started but she is unsure what happens to the existing application. Ms. Gaitten expressed concern for future cases that might come before the Town that have the exact same problem and might be impacted by pending legislation in the interest of being fair to future similar cases. Ms. Gilmore stated that there is an existing zoning violation that cannot be enforced and there is nothing submitted in writing other than the appeal document. Mr. Culbert noted that he had earlier made mention of the possibility of a request for postponement to Mr. Beniamino and Mr. Culbert again acknowledged that he did not provide any written follow up for the postponement request. Mr. Culbert continue to state that there is an old variance application which is history, there is a pending appeal of the Zoning Administrators determination and the request for a postponement of the violation notice under the ordinance would continue unabated. Dr. Gatewood referred to the appeal language in the existing ordinance and within the rules and regulations, asking if there was a mechanism for continuing the 30 day appeal. Ms. Gilmore responded no but that there is also nothing prohibiting it either, but typically when you interpret the Zoning Ordinance, since you derive your authority from the Ordinance that was passed by the Town Council and the things that are permitted are stated in the Ordinance, everything else is

prohibited. Mr. Beniamino was invited to give his opinion and stated that if this is decided tonight, he will take the next step in legal enforcement to remove the violation including an appeal to the circuit court. There may be occasions where things are not specifically dealt with in the ordinance and that is what the BZA is for. It is the Zoning Administrator who makes the initial determination of violation and the applicant who can then come before the BZA in the form of an appeal for review. Dr. Gatewood asked if there was any objection from the BZA to consider the request for continuation and Ms. Wade and Ms. Gaitten agreed to consider the request. Ms. Gilmore stated that she does not know that this can be heard at the discretion of the BZA. Mr. Culbert stated that he does not object and believes that it is the inherent power of every board that the request of the applicant can be postponed to continue a hearing, where all the effective parties were all present. Ms. Wade asked what finite date Mr. Culbert was considering and Mr. Culbert responded that he would have an application ready to file on July 1, 2009. Ms. Gilmore questioned that if this happens, to her understanding, is that the applicant would like to ignore this application and file a new application on July 1, 2009 which is not a postponement but rather a cancellation. Ms. Gilmore noted that the postponement to July would delay the decision and then the appellant would apply for a variance, and if the variance is not granted then you take up the appeal hearing again but you cannot have 2 pending at the same time. Mr. Culbert disagreed on the grounds that that they are not 2 identical applications so they can both be pending at the same time. Mr. Culbert stated that they would file an application for a variance and if the variance was approved it would render this postponed proceeding mute. Also, if the variance was denied the item would remain pending for the BZA to take action. If at that time the BZA decides to deny the appeal then would have denied the variance under the new statute thus denying the appeal. Ms. Wade made a motion to grant the request of Mr. Culbert to continue these proceedings to Wednesday May 6, 2009 at 7:00 PM to determine if the proposed legislation has been signed and enacted to become effective July 1, 2009. Ms. Gaitten made a second on the motion. Mr. McCann asked what would happen on May 6 if the legislation was not yet signed, and Mr. Culbert responded that the BZA would move forward with the decision making process. Mr. McCann asked if this type of decision has been made before, and asked if the BZA would be setting precedence and Dr. Gatewood agreed that we would be in un-chartered territory. Mr. McCann asked if this delayed decision making process would set precedent for the Planning Commission for future decision making and Ms. Wade responded that this might not be the case, but each case needs to be reviewed individually. Dr. Gatewood re-stated that the purpose of tonight is not to re-decide the case but rather to interpret whether the Zoning Administrator has made the correct interpretation of our ruling in making the citation to the landowner. Mr. Culbert believes that is an extremely unique in that there is curative legislation adopted and all he is asking for is 1 month. Mr. Culbert continues to state that, if for some reason that it was not penned a day or 2 ago, that next month they will not be asking for any further continuances and will be prepared to move forward to hear the matter fully. Ms. Gilmore requested that consideration be taken by the BZA as there is now this limbo situation due to a request for deferral, and that next month Mr. Culbert may decide that that he wants to hear the appeal and the BZA would want some representation from the applicant that next month the BZA would not be challenged on using your discretion to hear it, you have already been given a 1 month deferral. Mr. Culbert always understood that if next month, even if the legislation has been signed, there is no obligation on the part of the BZA to grant the request if made by the appellant. Mr. Beniamino noted that it is his understanding that the hearing and decision of the BZA will take place no more than 90 days after the filing of the application and at a quick count it looks like May 6, 2009 is at 89 days as the application is dated February 5, 2009, there is no received date on the application. Even if the deferral is granted to next month that would put the BZA within a time frame by which they are legally bound to make a decision and would provide more time for all parties. Ms. Gilmore agreed with Mr. Beniamino that the 90 days is a mandatory provision in the ordinance that comes directly from the statute. Unlike other provisions in the State Code where an applicant can request a deferral or an approval with conditions by the Planning Commission, there is nothing in the State Code or in the ordinance that will permit the BZA to grant this type of request and in fact the BZA has to take action per the mandatory 90 day time limit. Mr. Culbert disagrees with this interpretation. Ms. Gilmore referred to Article 11, Section 9.2, of the Zoning Ordinance, page 139 and section 15.2, 2312 of the State Code, Procedure on Appeal. The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof or as well as due notice to the parties of interest and make it's decision in 90 days to the application or appeal. Mr. Culbert referred to the case notes and read the first heading which addressed the time period for appeals as not mandatory for jurisdiction, and interprets the time period established for this section so that the BZA's ability to make a decision is directory rather than mandatory. Ms. Gilmore continued to review the next case note saying that Ordinances may permit continuances. Local Zoning Ordinance permitting continuances beyond the 90

day period in within which the BZA is rendered a decision does not conflict with this section. In this case there was an Ordinance in this section allowing this provision but Hamilton does not have an Ordinance which is in effect of this kind. Ms. Gilmore stated that the BZA's ordinance says "and decide the same within 90 days of the filing of the application or appeal" whereas in Tran vs. BZA case the Ordinance was enacted within that body, but this ordinance is not enacted in Hamilton. In the permissive provisions of the State Code a TC can by ordinance permit it's BZA to permit special use permits or conditions, but that does not come to the BZA unless the Town Council specifically puts it in the Ordinance and the BZA does not have the power to adopt, amend or vacate the ordinances of the Town, they have to go to the Town Council and the Council can take action if necessary. Mr. Culbert disagrees and believes it is inherent and asked Ms. Gilmore if she was, in her position as Town Attorney, in fact instructing directing the BZA that they do not have the power to go beyond 90 days. Ms. Gilmore responded that she does not instruct the BZA or any of the bodies in Hamilton but she does give advice and point out what the ordinance states and they can take her advice or ignore her advice. Mr. Beniamino asked Ms. Gilmore to double check the 90 day deadline and stated that the 90 days begins on the day the application was filed/received and asked Mr. Beniamino, as Secretary of the BZA, to calculate the 90 day deadline from the February 5, 2009 stamp on the application. Ms. Gilmore advised that Judge Horne counts the filing date as Day 1 and Mr. Beniamino counted and advised that May 6, 2009 would be over the 90 day time limit at 91 days. Ms. Gilmore advised that the BZA could have a special meeting if that is the direction the BZA wants to take. Ms. Wade amended her motion to reflect the date change as follows:

Ms. Wade made a motion to grant the request of Mr. Culbert to continue these proceedings to Monday May 4, 2009 at 7:00 PM to determine if the proposed legislation has been signed and enacted to become effective July 1, 2009. Ms. Gaitten made a second on the amended motion.

Ms. Gilmore advised that the voice vote did not pass, 2-2-1, (Aye: Wade, Gaitten. Nay: McCann, Gatewood. Absent: Reed)

The advertised Public Hearing began at this time.

Mr. Culbert asked Mr. Beniamino a series of questions in an attempt to understand the nature of the violation and what might be permitted at this property. Mr. Culbert stated that Mr. Beniamino is the unique individual empowered by the Code to interpret the Ordinances and only in the event of an appeal does the BZA, Circuit Court, etc come into play. Mr. Culbert advised that the purpose and intent of the Ordinance is to avoid, on corner lots, a situation that might threaten public health and safety. Mr. Culbert asked that "if you look at that aspect of it, could you interpret the ordinance so that a decision could be reached that the fence be allowed since it does not violate the sprit and the intent of the ordinance, or are you bound by the language of the ordinance regardless of how inappropriate, unreasonable or asinine it may be? "

Chairman Gatewood swore in Mr. Beniamino for his testimony.

Mr. Beniamino asked Mr. Culbert to repeat his question. Mr. Culbert stated "that the purpose of Article 9 is to protect the public and prohibiting privacy fences at intersections which will interfere with the line-of-sight, which this fence does not come close to doing. Are you absolutely, positively, unequivocally, bound by the clear language of the ordinance even if it does not achieve any stated result or can you exercise discretion and reach a different conclusion when circumstances warrant?" Mr. Beniamino responded "that the entire document, the Zoning Ordinance that he is bound to administer and interpret, has gone through the proper public process, public hearings, comments from the public, Planning Commission and Town Council. It is Mr. Beniamino's belief that if something is clearly stated in the Town Ordinance, as the desired will of the Town Council and Planning Commission, then he is then bound to enforce those ordinances if they are clearly stated." Dr. Gatewood asked Mr. Culbert if he is contending that for your appellant that Mr. Beniamino made an error in interpreting the ordinance, as he is reading the language submitted by Mr. Culbert which states that the determination of the zoning violation was an error. Mr. Culbert responded "that this was the essence of the appeal and believes that an erroneous determination was made." Mr. Culbert asked if that if someone owns a house in Hamilton and wants to put up a fence, does he need to hire an engineer, get a site plan, get 16 sealed copies, pay a fee, pay thousand of dollars, all in order to put up a fence. Dr. Gatewood responded no, that is not correct. Mr. Culbert asked if this was a site plan and Mr. Beniamino responded no. Dr. Gatewood reminded Mr. Culbert that it helps to begin by making a proper application for the fence, since you are trying to clarify an earlier decision made. Mr. Culbert asked Mr. Beniamino to read Article 9, Section 1.2 of the Hamilton Zoning Ordinance and Mr. Culbert stated that Article 9 applies to Site Development Plan and Subdivision, which this property is neither. Mr. Culbert believes that Mr. Beniamino's ruling in error since he applied an

Ordinance Section that does not apply and it was established earlier that Mr. Beniamino does not have any discretion for interpretation when the ordinance is clear.

Dr. Gatewood asked if Ms. Heard would like the opportunity to comment and she declined.

Mr. Beniamino reviewed the Staff Report (see attachment) provided to the BZA members covering Background, Appellants Appeal, Subject Property, Zoning Ordinance Provisions, Staff Analysis and Conclusion. Specific reference was made in a letter sent to Ms. Heard on January 8, 2009 with reference to three sections:

Section 9, Section 7.3 (2) (b) of the Hamilton Zoning Ordinance regarding a 6' solid wooden fence constructed at 353 W. Colonial Highway. This section clearly states that solid fences are only allowed in the side and rear yards.

Article 9, Section 7.2 (b) solid fences, as designed to inhibit public view and provide seclusion and, when viewed at right angles, having more than 50 percent of its vertical surface area closed to light and air.

Article 4, Section 6.8, Special Provisions for Corner Lots, each corner lot shall have two front yards and two side yards. Those yards abutting the street shall be considered front.

Mr. Beniamino concluded his presentation with restating that the three violations, when used in conjunction with each other, were the rationale for writing the letter of violation to Ms. Heard.

Dr. Gatewood opened the floor for rebuttal from the appellant and Staff. Mr. Culbert started that the Article does not apply, citing Site Development Plans and Subdivisions references. Mr. Beniamino asked if the first question asked by Mr. Culbert that was answered in part by Chairman Gatewood could be repeated back to him, specifically looking for the exact wording. The Court Reported provided the question Mr. Culbert asked as: "let me ask you this Sir, you're saying that if we want to put up a fence, I have a house anywhere in the Town of Hamilton and I want to put up a fence, I have to go hire an engineer, get a site plan prepared, get 16 sealed copies, spend a fee, pay thousand of dollars to process a site plan, all in order to put up a fence?" Answer, "No", by Dr. Gatewood. "It is not a site plan? No Sir" by Mr. Beniamino. Mr. Beniamino rebutted "that as shown by the Court Recorder, the answer provided to Mr. Culbert's question specifically involved the term of Site Plan, which if you look at Article 17 of the Hamilton Zoning Ordinance it is specifically defined as a drawing illustrating a proposed development and prepared in accordance within the specifications of Article 10. When you look at the terminology used in Article 9, Section 1, Subsection 1.2 as far as applicability, it clearly states the provisions of this article shall apply to all Site Development Plans, which in my opinion as the Administrator of this Ordinance, are not the same thing as an actual Site Plan as defined by the Ordinance and laid out in the Town's Land and Subdivision Ordinance with rules and specificity. If I was asked to make a determination at this moment on what this actual Ordinance means when the term Site Development Plan is used, you don't necessarily have to have an actual site plan as defined in Section 17 to have Site Development Plans. I will tell you that if you will look at the Zoning Permit Applications, the information that is required as part of the development plan is a plat with a location and proposed change and distances to property lines, which I as the administrator of the Ordinance would construe to be a form of a Site Development Plans as defined by Article 9, Section 1.2. The term Site Plan, as defined in the Ordinance, if that is indeed what the intent of what this section of the Ordinance was trying to do would be specifically referenced as a Site Plan as defined by Section 17 in the Zoning Ordinance and not referenced as a Site Development Plan, which is not defined in the Ordinance. Which I would then contend would be the Zoning Administrator's determination, and that determination is not in front of you to decide." Mr. Culbert disagrees that there is a difference between a Site Plan and a Site Development Plan, and Mr. Beniamino noted that if the term Site Dev Plan was meant to be used interchangeable within the Hamilton Zoning Ordinance, it would have subsequently been defined with the Ordinance.

Mr. McCann inquired about the name of the contractor who built the fence, and neither Mr. Culbert nor Ms. Heard could recall. The name is on the application that was denied in June 2008, which was filed after the fence was built. Ms. Heard commented that she was the one who came to Mr. Beniamino to try to resolve the issue after she heard that the Town was upset. Mr. Culbert named RSR Long Service Kidwell Fence LLC as the name of the contractor. Mr. Culbert went on record to state that he and Ms. Heard are very impressed with the professionalism of Mr. Beniamino, though he does not agree with his interpretation of the decision and certainly disagree with the policies of the Town, but they have nothing but respect for Mr. Beniamino.

Dr. Gatewood swore in Ms. Heard for testimony. Background for the fence was given and noted that a permit was not pursued prior to the fence being built. The reason the built is necessary is for safety from

cars on the road and in response to an accident from November 2007 where a car came off the road and caused damage to her property. A fence would give a visual caution to slow down due to the close proximity to the road and Ms. Heard thought the fence was far enough from the corner to allow visual clearance. It was just built to try to protect the safety of herself and her house.

Public Comment

Ms. Linda Newton, 12. S. Hughes St submitted a letter as she could not attend the meeting, and is in support of the fence remaining for the reason of safety.

Mr. Tom Rollins, 318 E. Colonial Hgwy, is hoping the BZA will consider the hardship variance act that will probably be signed into law or hoping for a postponement. Concern was voiced hoping that costly legal action could be avoided, which might potentially burden the Town and the property owner.

Ms. Jodi Haag, 331 W. Colonial Highway, is in support of the fence for safety reasons of traffic and ditches. The fence is beautiful and is a contribution to Town.

Mr. Dick Haag, 331 W. Colonial Hgwy, has previously served on the Planning Commission with his wife and cannot figure out what Ms. Heard has done that is so egregious? The fence is beautiful and the interpretation of the ordinance is preposterous.

Mr. Brent Campbell, 62 E. Colonial Hgwy, appreciated what Ms. Heard has done to the house and property and was hoping for a continuance. The fence is nice and provides safety and would like resolution outside of court/litigation system in an effort to save money to both the Town and Ms. Heard.

The Public Hearing section is complete.

Mr. Beniamino reviewed the forms of decision to be considered. If denying the decision, rational must be provided.

Mr. McCann made a motion to affirm the Zoning Administrators decision. Dr. Gatewood made a second on the motion and the voice vote was 2-2-1, (Aye: McCann, Gatewood. Nay: Wade, Gaitten. Absent: Reed.)

Ms. Gilmore noted that the vote passed. Ms. Wade provided rational for her vote of denial in that she is uncomfortable with the language under the provisions of the article in reference to Site Plans and subdivision applications. Mr. McCann provided rational in support as he believes that there is enough room for Mr. Beniamino to provide support and resolution and it is important to uphold the Town's regulations. Ms. Gaitten rationalized denial based on confusing wording that is somewhat inflexible. Dr. Gatewood will affirm for the same reason as Mr. McCann and believes that clear direction was given to Mr. Beniamino and he followed it to the best of his ability and that he did not err based on what he was given to work with.

Mr. Culbert objected that the prior motion was a tie, 2-2 and the vote did not pass yet this motion was a tie 2-2 and passed. Mr. Culbert continued to dispute the right of the Chairman to vote under Robert's Rules of Order and Ms. Gilmore stated that under the Hamilton Town Charter the BZA Chairman has the right to vote. Mr. Culbert asked Ms. Gilmore to site the Ordinance giving the Chairman the right to vote. Ms. Gilmore states that the Town Charter gives the Chairman the right to be a voting member of the BZA and his vote cannot be discounted. Ms. Gilmore stated that she will be happy to provide additional research and asked Mr. Culbert where the statute is that states that the BZA Chairman cannot vote. Mr. Culbert stated that Town for years has ignored the laws and the Roberts Rules of Order apply to the BZA. Mr. Culbert provided "Section 3, Procedure, Article 11, Board of Zoning Appeals, the board shall adopt such rules and procedures as it may deem necessary or use Robert's Rules or Order in order to carry into effect the provision of this ordinance. Said rules to be in writing and made available to the public." Mr. Culbert states that if the rules are going to be changed that during the period of hearing his client's application is not the time. Ms. Gilmore will do additional research to verify that it is a written policy allowing the Chairman to vote but it has always been the practice BZA in Hamilton to allow the BZA Chairman to vote. Ms. Gaitten inquired about the practice of how to handle split votes and Ms. Gilmore stated "under the State Code and the Hamilton Ordinance a concurring vote of the majority of membership shall be necessary to reverse any order requirement, decision or determination or to decide in favor of the applicant." Mr. Culbert disagrees with the voting allowance of the Chairman. Mr. Culbert stated that none of this would have happened tonight if he would have been allowed to talk to Mr. Beniamino and Dr. Gatewood responded that it would have been helpful if this was made available to the BZA prior to tonight, it could have been presented in paper for review and consideration. Dr. Gatewood requested clarification about his ability to vote and Mr. Beniamino noted that the BZA can continue their decision until the questions are clarified. Ms. Wade voiced disagreement and that it would be unfair to the appellant to deny their request for delay yet delay for the BZA for voting clarification. Ms. Gilmore has never know the Hamilton BZA to be different from any other BZA in 24 years, and Mr. Culbert clarified

that this is matter is moving into a due process issue. Ms. Gilmore referenced "that if you are going to reverse you need a concurring vote of the membership and the membership includes the Chairman, as found under Section 9.2 of the State Code." Mr. Culbert asked if Ms. Gilmore is instructing the board to not take a revote and Ms. Gilmore stated that she is only advising the BZA that if you are going to reverse you need a concurring vote of the membership and the membership includes the Chairman. Ms. Gilmore quoted State Code "In 15.2, 2312, in exercising its powers, the Board may reverse or affirm, wholly or partly or may modify an order requirement decision or determination. The concurring vote of a majority membership of the Board shall be necessary to reverse any order requirement, decision or determination or to decide in favor of the applicant." Ms. Gilmore continued to reference 15.2, 2308 of the State Code and defines membership as 5 or 7 residents of the locality.

Ms. Wade made a motion to reverse the Zoning Administrator's decision based on the reasons as stated before in addition to the uncertainty as to whether the Chairman can second the vote. Ms. Gaitten made a second on the motion and the vote did not pass, 2-2-1, (Aye: Wade, Gaitten. Nay: McCann, Gatewood, Absent: Reed). Ms. Wade provided rational for her vote to reverse the decision as she is uncomfortable with the language under the provisions of the article in reference to Site Plans and subdivision applications and in addition has concern whether the Chairman has the ability to be a voting member of the BZA based on discussion tonight and her understanding that the Chairman votes only to break a tie. Mr. McCann voted against the motion and provided rational that he believes that there is enough room for Mr. Beniamino to provide support and resolution and it is important to uphold the Town's regulations. Ms. Gaitten voted in support of the motion based on the rationalized based on the same comments Ms. Wade expressed. Dr. Gatewood voted against the motion as he is persuaded by the language of the State Code which indicated that he would be a voting member, as are other Chair positions in Hamilton. Ms. Gilmore stated that the motion did not pass as a majority was needed.

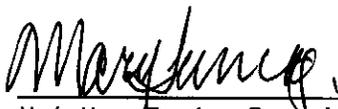
Old Business

Dr. Gatewood reported that the BZA had previously directed the Mayor to verify that contractors are licensed before performing work in Hamilton and Mayor Whitbey advised that before the Town will grant a Zoning Application the contractor is verified for licensing and if not licensed then the applicant is advised to go with a licensed contractor. Dr. Gatewood reinforced the need for this communication to be known in the community in an attempt to avoid future situations like the one before the BZA tonight. Mr. McCann noted that this is the third instance in a row where a citizen has come in asking for permission after the violation is already in place.

Mr. McCann made a motion to adjourn the meeting at 9:19 PM.



Dr. Thomas Gatewood, Chairman



Ms/. Mary Tussing, Recorder