

**TOWN OF ELKTON
BOARD OF ZONING APPEALS
FEBRUARY 21, 2019
MINUTES**

Present: Heather Mahaffey; Shirley Hicks; Dawn Schwartz; Richard Czernik; Rob Massimiano; Lisa Blackson, Esq., Legal Counsel; Chip Bromwell, Zoning Administrator

Absent: Robert Olewine

The meeting was called to order by Ms. Mahaffey. She called for a motion to approve the minutes from the January 17, 2019 meeting.

ACTION: Motion was made by Ms. Schwartz to approve the minutes from the January 17, 2019 meeting as written. The motion was seconded by Ms. Hicks and unanimously approved.

CASE # 1542 – REQUEST OF CHARLES L. SCOTT, JR., ESQUIRE REPRESENTING ELKTON UCCC, LLC, 109 EAST MAIN STREET, ELKTON, MARYLAND FOR AN APPEAL OF THE ZONING ADMINISTRATOR’S DECISION THAT ANY MEDICAL DOCTOR OR GROUP REQUIRES A SPECIAL EXCEPTION FOR A MEDICAL USE. THIS ACTION CONCERNS PROPERTY LOCATED AT 101 CHESAPEAKE BOULEVARD, ELKTON, MARYLAND, TAX MAP 316, PARCEL 2439, ZONED C-2

Mr. Charles L. Scott, Jr., Esquire and Mr. Avraham Sauer, Member and Managing Partner of Elkton UCCC, LLC were in attendance to make this appeal.

Ms. Lisa Blackson gave procedures for the appeal regarding how presentation would be made with regard to the order in which persons would be presenting their cases.

Mr. John Downs, attorney for the Town of Elkton, questioned Mr. Bromwell the Building Official for the Town of Elkton. Mr. Bromwell stated his initial correspondence to the property notified the owner(s) that should a new medical practice move into the building a special exception would be required. He explained the difference between a variance (which remains with the property) and a special exception (which is granted to a person).

Mr. Downs asked Mr. Bromwell to explain changes which had been made to the Town Zoning Ordinance regarding medical uses. Mr. Bromwell stated the Town was having issues with businesses moving into different areas without building permits and then determining that they were conducting business which was not conducive to the zone into which they had moved. The Mayor & Commissioners placed a six month moratorium on medical uses in order for changes to be made to the Zoning Ordinance to address these concerns. The Zoning Ordinance was changed to require ‘any medical use’ to require a special exception in order to be knowledgeable

about what the practice would entail whether dental, general practitioner, clinic, etc. to determine whether it met the conditions of the zone.

Mr. Bromwell was questioned by Mr. Downs about the non-conforming use at this location. Mr. Bromwell explained that at this particular location a doctor who is currently practicing in the building was in practice prior to the changes to the Ordinance and therefore that practice is now determined to be non-conforming. Mr. Scott objected for the record that he believed that Mr. Bromwell was giving legal conclusions. Mr. Downs stated that being the Zoning Administrator the information he is giving falls within the nature of his job description to make these types of determination and the task which the Mayor & Commissioners gave him to do regarding changes to the Ordinance with respect to medical uses. It was noted that not just anyone could apply to have a medical use at any location it would have to be a doctor or medical professional making the application for the special exception. It was agreed that the building in question has been fitted out for a medical use initially by Dr. Falco.

Mr. Downs questioned whether a special exception for a medical use would likely be approved at this location should someone apply. Mr. Bromwell stated that it would likely be approved. Mr. Bromwell explained the procedure for applying for a special exception and which boards hear the request. Mr. Downs asked what the zoning for this property is currently. Mr. Bromwell stated it is zoned C-2 (Highway Commercial) and that medical uses are allowed in the C-2 Zone.

Mr. Downs completed his questioning of Mr. Bromwell. Ms. Schwartz inquired whether this business had been heard by the Planning Commission. Mr. Bromwell stated that they had not been before the Planning Commission because they are appealing his decision that a special exception is required. It was noted that as part of the changes to the Ordinance there were specific allowances for numbers of doctors in the same practice.

Ms. Hicks asked how long it would take to apply for and receive a special exception. Mr. Bromwell stated the entire process would take approximately a month and a half.

Mr. Scott requested that Mr. Bromwell's initial letter be marked into evidence. There being no further questions for Mr. Bromwell the floor was opened for Mr. Scott to present his case.

Mr. Scott introduced himself and Mr. Sauer to the Board. He stated Mr. Sauer owns a surgery center and medical office building located at 101 Chesapeake Boulevard which they lease to the Social Security Administration who utilize approximately 5,000 square feet of the building.

Mr. Scott explained their reasoning for appealing the decision which included: the fact that the building has been there since 2006 as a medical use; the only reason for the special exception is that Resolution 2018-01 was passed on February 27, 2018; they believe they are grandfathered from the change in the Ordinance; they feel that any medical use already in place should be allowed to remain. He went on to explain that his client purchased the property in 2013 for \$5.6 million dollars and the reason he did that was that the renovations to the building were completed which added operating rooms, offices, etc. He stated in September of 2017 when Dr. Falco's lease was up part of the medical building was leased to Precision Orthopedics. This practice was

up and running for five months prior to the Ordinance change. Mr. Scott pointed out Article 8, sections 2-5 which address non-conforming uses. He stated he feels any existing use should be allowed to remain and not be required to apply for a special exception.

Mr. Scott asked the Board to review Article 8, Sections 2-5 regarding non-conforming uses which are where he believes this use should be addressed. He read the definition of a non-conforming use as defined in the Town Zoning Ordinance. He explained that he believes the use in question has been deemed a non-conforming use by the adoption of Resolution 2018-01. He explained that Dr. Rishi occupies and continues to perform his medical use at this location. He stated his understanding of the Zoning Ordinance means that Dr. Rishi can continue to perform his use unless it is discontinued for 180 days. He said if the Board only takes away one thing they should take into consideration Section 5 of Article 8 which would allow the existing medical use to be extended throughout the entire building without creating more of non-conformity.

Mr. Scott questioned Mr. Sauer regarding the purchase cost of the property and the breakdown of the building use by square footage for the surgery center, office space, etc.

Mr. Scott asked what requirements the State of Maryland has for a surgery center. Mr. Sauer stated that although he is not a medical doctor he was able to see the inspections done by the State of Maryland and they were very detailed with regard to what is required in procedure rooms for surgeries. Some of the systems required were suction, oxygen and air purification. He also mentioned the lead requirements for the walls in x-ray rooms and special electricity for different areas. The equipment required is similar to the equipment in hospital rooms. There are additional requirements for scrub rooms, anesthesia rooms with locking storage and waiting and observation rooms.

Mr. Scott shared the leases within the building since it opened in 2006 and the space used by each. It was shown that Dr. Falco increased his use within the building numerous times over the years he was at the location until he was at 21,250 square feet.

Mr. Sauer provided a copy of the footprint of the building showing where the different uses are located. Copies of the leases were provided to the Board. It was noted that Dr. Rishi entered into a lease September 25, 2017 which was approximately 5-6 months prior to the zoning changes. Mr. Sauer explained that there might be two doctors working in the same building and sharing the surgery center. They would schedule patients on certain days/times. The State of Maryland requires scheduling needs to be completed 30 days ahead of time.

Mr. Scott questioned whether Dr. Falco had requested to come back to the surgery center. Mr. Sauer stated he was at the point of signing a lease. Dr. Falco's office was contacted prior to signing the lease that a special exception would be required for his practice prior to starting his business at this location. Mr. Bromwell sent a letter regarding that fact to Dr. Falco. He had spoken with Jennifer at Dr. Falco's office. Mr. Scott stated that Dr. Falco chose to terminate his lease at that point.

Mr. Sauer provided pictures of the surgery center to the Board for the record to show how the building is currently set up. Ms. Mahaffey and Mr. Czernik conceded that the building is set up for a medical use and did not feel it was necessary to go over information about the building since the special exception is not about the building but about the use that would be going into the building. Mr. Scott objected stating the issue they have is regarding the non-conforming use and asked to continue. He stated that he felt the Board needed to decide whether the Zoning Administrator was correct in his interpretation of the Ordinance.

Ms. Blackson informed the Board that they could call for a closed meeting should they need clarification regarding the special exception versus non-conforming use. Mr. Downs advised that procedurally Mr. Scott should be given the opportunity to present his case and the Town will follow up after he has completed his discussion. Pictures of the interior of the building were provided to the Board and their use explained. Discussion and questions ensued regarding specific pictures. It was noted that the State of Maryland does annual inspections and spot inspections from time to time.

Mr. Scott questioned whether these special design features could be used for any other purpose to which Mr. Sauer stated he was not aware of any other way they could be used. A letter dated January 7, 2019 from Mr. Scott appealing Mr. Bromwell's decision was placed into evidence.

There was discussion regarding the need for a closed meeting. It was determined the discussion part of the meeting should be completed prior to the closed meeting being called.

Mr. Downs asked Mr. Sauer whether the lease with Dr. Falco was in his name or a business name. Mr. Scott confirmed the lease was in the business name Mid Atlantic Pain Institute, Inc. Mr. Downs asked whether the lease with Dr. Rishi was in his name or a business name. Mr. Scott confirmed the lease was in his business name Precision Orthopedics and Sports Medicine, LLC. Mr. Downs pointed out that these are separate businesses which occupy the same space but do not share monies, they are two separate practices in the same building.

Mr. Downs asked whether Dr. Falco would become an employee of Dr. Rishi to which Mr. Sauer replied that he would not be an employee. Mr. Downs confirmed that they would be separate practices in the same building. Mr. Czernik explained the difference between an LLC and an incorporated company.

Mr. Downs asked Mr. Bromwell if it was correct that he did not have a problem with Dr. Rishi being at this location. Mr. Bromwell agreed and stated he had contacted Dr. Rishi when the moratorium was put into place and a copy of his lease dated prior to the approval of the moratorium was provided and therefore there was no issue with him continuing to practice at this location.

Mr. Downs asked if Dr. Rishi wanted to expand into the entire building would Mr. Bromwell have any issues with him doing so. Mr. Bromwell stated he would be able to do that and not require a special exception. Mr. Downs asked if a new person who had been at this location in the past wanted to come back what your response would be. Mr. Bromwell stated that if it is a

separate practice they would need a special exception. Mr. Bromwell noted that Dr. Rishi is an existing non-conforming use and the building is fitted out for a medical use and the Town has no concerns with that use. He stated the changes to the Zoning Ordinance did not change whether a medical use would be allowed but simply that a special exception would be required. Mr. Downs asked Mr. Bromwell if, in his opinion, Dr. Falco applied for a special exception did he believe it would be approved or denied. Mr. Scott objected to this questioning since the special exception was not being heard. Mr. Downs asked if Dr. Rishi employed another doctor to work in his practice would that person be required to apply for a special exception. Mr. Bromwell stated they would not need a special exception as long as they were doing the same work as Dr. Rishi.

Mr. Scott questioned whether a new doctor at Union Hospital going into the medical office building would require a special exception. Mr. Downs asked Mr. Bromwell where zoning would require a special exception for a medical use. Mr. Bromwell said that a special exception would be required in any zone called out in the new regulations for medical uses.

Mr. Downs asked if a new doctor going into the hospital would require a special exception. Mr. Bromwell stated if they are an employee of the hospital they would not require a special exception only if they were starting their own practice.

Mr. Scott asked about the medical office across from the hospital and whether a doctor who changes their practice opens a new office would require a special exception. Mr. Bromwell stated that the special exception is not about how the building is set up but about the practice that would be going into that building. Mr. Scott stated he wanted to determine whether every doctor had to get a special exception in the existing medical office building.

Ms. Blackson interjected that the zoning for the medical office building and the hospital are in the TC (Town Center) zone whereas the Elkton UCCC, LLC property is in the C-2 (Highway Commercial) zone. She explained that in the TC zone a medical use was no longer allowed in that zone so if a medical use is not continued in that zone for more than 180 days then they would no longer be permitted. That is not the case for the C-2 zone, a medical use is allowed in that zone but would now require a special exception.

Discussion continued regarding whether Dr. Falco wanted to move back into the building in question. Mr. Sauer stated that he had terminated his lease. Mr. Bromwell stated that if another doctor wished to lease the building they would simply have to apply for a special exception. Mr. Scott stated his position is that the building is grandfathered and therefore does not need a special exception. Mr. Bromwell stated there is no grandfathering for the special exception.

Mr. Scott read the definition of a non-conforming use and stated the whole building was legal for medical purposes until the resolution change to the Ordinance. His position is that the use can be extended to the whole building and therefore a special exception is not required.

Mr. Downs stated he felt the Board's attention was being diverted to an issue which is not relevant in this instance. He confirmed that no one said the building was not outfitted properly

or that it was not appropriate for a surgical center. No one said that Dr. Rishi was not ok at this location. He pointed out that Dr. Falco was not coming in to work for Dr. Rishi he is coming in as a new practice. All the uses in this building do not need to be medical uses. The Town made changes to the ordinance simply for medical uses.

Mr. Downs said the Board needed to answer the question "Did Mr. Bromwell make the correct decision?" The Ordinance does not grant the special exception to a building but to a use.

Mr. Scott referred to Article 8 of the Town Zoning Ordinance regarding non-conforming situations. He read the definition which states the use can be extended throughout any portion of the building. He stated that a non-conforming situation flies in the face of Article 8, Section 5 and therefore they do not believe a special exception is necessary. He stated that a non-conforming use also applies to a building as shown in Article 8.

He noted that the only disagreement about this location is not Dr. Rishi's area but the remainder of the building. Mr. Bromwell and Mr. Downs feel that since the ordinance was changed anyone who comes into the remainder of the building as a medical use must get a special exception for that use. Mr. Scott stated the non-conforming section says it can be extended into any portion of the building. He asked the Board if they have proven that this building was fitted out for a medical use and he believes they have and both Mr. Bromwell and Mr. Downs have conceded as much. He asked the Board to follow the Town Zoning Ordinance and determine that Mr. Bromwell incorrectly determined that a special exception is needed.

Mr. Downs pointed out to the Board that the existing non-conforming use is able to be extended by Dr. Rishi throughout his area of the building. If a new practice moves into the building it would need a special exception.

Mr. Czernik stated that we have established that the equipment in the building is the same but we have a new doctor moving into the building that is a different specialty but using all the same equipment. Ms. Schwartz added that the new doctor would require a special exception. Mr. Downs confirmed they were correct.

Ms. Hicks noted that in the beginning of Mr. Scott's comments he stated that Dr. Falco had not received a special exception and she questioned why that had not happened. Mr. Scott stated their position is a special exception was not required by virtue of the fact that this is how the building was already being used.

Ms. Hicks asked if he believed that any medical use of any kind could come into that building and assume it would be allowed in any part of this building other than the social security area. Mr. Scott stated he believes that Article 8, Section 2 and Paragraph 5 of the Zoning Ordinance allows that use to be extended to any part of that building that is specifically designed for that use.

Discussion ensued between board members, Mr. Scott and Mr. Sauer regarding the use of the building, non-conforming uses and applying for a special exception.

Ms. Mahaffey asked the Board members if they wished to request a closed meeting. It was determined they would like a closed meeting and therefore Ms. Mahaffey completed the remaining business prior to the closed meeting being called.

OLD BUSINESS: There was no business to discuss.

NEW BUSINESS: Mr. Bromwell stated that there are two cases for special exceptions for medical uses submitted for the March meeting.

Ms. Mahaffey stated the next meeting of the Board of Zoning Appeals will be March 21, 2109. After additional discussion Ms. Blackson questioned whether the Board members wished to call for a closed meeting.

MOTION: Ms. Schwartz made a motion for a closed meeting. The motion was seconded by Mr. Czernik and unanimously approved. The closed meeting began at 9:05 p.m.

The closed meeting was completed and the regular meeting was called back into session at 9:32 p.m.

Ms. Mahaffey entertained any questions from the audience. There being no questions she called for a vote on Case # 1542.

MOTION: Motion was made by Mr. Massimiano to affirm Mr. Bromwell's decision for the following reason: The portion of the building occupied by Dr. Rishi is a non-conforming use. Because the remainder of the building has been unoccupied for more than 180 days it is not considered a non-conforming situation. Therefore anyone who seeks to occupy this remaining portion, other than Dr. Rishi, will need to apply for a special exception. The motion was seconded by Ms. Hicks and unanimously approved.

Ms. Blackson informed Mr. Sauer that should he decide to appeal the Board's decision he can appeal to the Circuit Court within thirty (30) days of the signed legal opinion.

There being no further business to discuss the meeting Ms. Mahaffey adjourned the meeting at 9:38 p.m.

Respectfully submitted,

Brie Humphreys