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**TOWN OF CHARLOTTE
ZONING BOARD OF ADJUSTMENT
JANUARY 21, 2015**

DRAFT

MEMBERS PRESENT: Frank Tenney, Chair; Matt Zucker, Jonathan Fisher, Douglas Webster, Andrew Swayze.

ADMINISTRATION: Britney Tenney, Zoning Clerk.

OTHERS PRESENT: Michael Russell, Chris Fortin, Becky Fortin, Ashley Robinson, Peter Trono, Liam Murphy, Steve Mack, Maratha Whitfield, Kristin DeStigter, Eric Silfen.

Minutes subject to correction by the Charlotte Zoning Board of Adjustment. Changes, if any, will be recorded in the minutes at the next meeting of the Board.

AGENDA:

- **Continuation: ZBA-14-09: Fortin Conditional Use Review, property located at 2737 Lake Road.**

CALL TO ORDER

Mr. Tenney, Chair, called the meeting to order at 7:32 p.m.

**CONTINUATION: ZBA-14-09: FORTIN CONDITIONAL USE REVIEW,
PROPERTY LOCATED AT 2737 LAKE ROAD.**

Chris Fortin and Becky Fortin, owners, and Michael Russell, attorney, appeared on behalf of the application.

STAFF NOTES

Mr. Tenney reviewed staff notes, and noted that new exhibits had been submitted as follows - Exhibits G, H, I, J, and K.

Mr. Tenney noted that the applicant's, Chris and Becky Fortin, and Mr. Russell were still under oath.

Sworn in were: Liam Murphy, Kristin DeStigter, Maratha Whitfield, and Steve Mack.

APPLICANT COMMENTS

Mr. Russell reviewed the following submitted exhibits:

- Exhibit G: date stamped 12/17/2014, Vermont Supreme Court case regarding Woodstock Community Trust and Housing PRD;
- Exhibit H: Appeal of Armitage, et al, date stamped 12/17/2014, which Ms. DeStigter had referred to at a previous hearing;
- Exhibit I: Supplemental Memorandum in Support of the application, date stamped 01/21/2015;

- 46 • Exhibit J: two photographs of example cedar hedges located on Dorset Street,
47 date stamped 01/21/2015; and
48 • Exhibit K: two photographs of example fuel bunker structures taken in
49 Ferrisburgh, date stamped 01/21/2015.
50

51 Mr. Russell asked why the ZBA had continued the hearing. Mr. Tenney replied that the
52 ZBA had continued the previous hearing in order to seek a legal opinion from the Town
53 Attorney regarding the applicants' argument of a 'successive application doctrine'. The
54 Town Attorneys', Stitzle, Paige and Fletcher, P.C., opinion has been accepted as Exhibit
55 L, dated 01/16/2015, said Mr. Tenney.
56

57 It was the consensus of the ZBA members to enter Exhibit L into the record.
58

59 **EXHIBIT L: the ZBA marked and entered the Town Attorney legal opinion, dated**
60 **01//16/205, regarding 'successive application doctrine' as Exhibit L.**
61

62 Ms. Tenney, ZBA Clerk, provided copies of Exhibit L to the applicants, Mr. Russell, and
63 Mr. Murphy for review.
64

65 ZBA QUESTIONS/COMMENTS

66 Mr. Swayze read the Town Attorneys' legal opinion into the record. A second application
67 was not successive application, said Mr. Swayze.
68

69 Mr. Russell asked if a second site visit was needed. Mr. Fisher replied no.
70

71 Mr. Tenney asked if the Town had received any documented noise complaints since the
72 previous application. Mr. Russell replied there were none known.
73

74 Mr. Murphy reviewed that Mr. Hotaling had communicated with the Zoning
75 Administrator (ZA) over the summer regarding a series of violations over the years that
76 the Town had not addressed, or enforced. Since the May ZBA decision the Fortin's
77 business has continued. The Town lack of enforced was a problem. An applicant could
78 ignore a decision since the Town doesn't enforce its regulations, said Mr. Murphy.
79

80 Mr. Webster asked if there had been changes in the Fortin operations since the May
81 decision. Mr. Fortin explained that during the ZBA site visit he ran his equipment so that
82 the ZBA members could hear and judge what 'noise' was created. The ZBA members
83 had to stop talking in order to hear the machines. There wasn't that much noise, stated
84 Mr. Fortin.
85

86 Mr. Tenney said that he understood as per the current site plan the commercial area was
87 reduced, and the wood processor equipment removed from the property.
88

89 Mr. Russell explained that all lawn equipment has been moved inside since the May ZBA
90 denial of the Fortin application for a Home Occupation III permit. Since his involvement,
91 his client asked for a Certificate of Compliance from the ZA. Nothing could be stored

92 outside. The ZA visited, inventoried the outside equipment and decided it would be hard
93 to continue operations under a Home Occupation I permit. Mr. Fortin agreed to take steps
94 to re-apply for a Home Occupation III, comply with the criteria, and to solicit his
95 neighbors input. He did that. In discussions on how to comply: he reduced the 30 percent
96 commercial use, did on-sight visits with everyone, and addressed visual and noise
97 concerns by rotating a building 90 degrees to create a visual and noise barrier. The
98 proposed screening at the east corner was changed. There were a few months when the
99 equipment was off-site and outdoor equipment storage would work. If the ZA has
100 received complaints it was due to equipment still stored outdoors. The applicant has
101 detailed storage of equipment in and out side. A previous long berm proposed in the
102 previous application has been replaced by an agricultural structure. The applicant has
103 supplied a site plan to the ZA and the agricultural structure would provide noise and
104 visual screening, reiterated Mr. Russell.

105

106 Mr. Fisher recalled that during the site visit the applicant said that he would plant a row
107 of cedars on a berm.

108

109 Mr. Webster asked what equipment was now stored inside. Mr. Fortin replied rototillers,
110 excavators, brush hogs, etc.

111

112 Mr. Tenney asked if fence details were required or proposed. Mr. Russell said in
113 developing the application the applicant thought the ZBA might seek fencing as a
114 condition. The cedar tree plantings would address screening concerns, said Mr. Russell.

115

116 Mr. Webster asked if the number of commercial vehicles and equipment met the
117 regulations. Mr. Russell replied that the commercial vehicles impact was visual other
118 than when they were started up and left the property. When the equipment was off site
119 there was no impact. There were Vermont court cases that overrode the Town
120 regulations. The Town can't have discretionary regulations, stated Mr. Russell. Mr.
121 Tenney pointed out that the Town could limit the number of vehicle. Mr. Russell replied
122 that he didn't think the Town had a provision that was enforceable.

123

124 Mr. Murphy read the May ZBA decision into the record regarding conditions. The realty
125 was what was seen on site. Every summer morning three employees drove in and parked.
126 Mr. Fortin readied the mowers, trailers, trucks and equipment to move materials. There
127 were dump trucks idling, material being loaded, three trucks and trailers with mowers go
128 out and coming back sometimes after dark. The primary Home Occupation I activities
129 must occur indoors. You wouldn't load stone, dirt, or compost indoors, or ready mowers
130 indoors. The landscaping plan from the application shows 10' high plantings. Ten foot
131 trees wouldn't be planted and it would take years for those trees to grow to a 10' height.
132 Regarding bulk fuel tanks related to Home Occupation III, the size of the tank must be
133 characteristic of what would be found in a residential use versus large commercial tanks.
134 The traffic to the Fortin business already exceeds the number for the area and that won't
135 change. The area was not a commercial area. It was residential in nature. The number of
136 vehicles and equipment exceeds what was shown on the proposed site plan. The
137 neighbors respect the Fortin's as hard working people that have created a successful

138 business. However, if the application was approved then that would open the Town to
139 more contractor yards. A lighting plan was unknown. Trucks, trailers, and employees all
140 generate noise. The ZBA review focus should be “changed conditions”. It was still a
141 residential neighborhood, and the neighbors haven’t left. If the ZBA considered imposing
142 conditions those conditions should be specific – the size of the trees to be planted,
143 number of vehicles, number of employees, hours of operation, etc. There has been no
144 evidence that operation has changed. There was still a contractor’s yard next to
145 residential houses, reiterated Mr. Murphy.

146

147 Mr. Zucker asked what percentage of Mr. Fortin’s business was from Charlotte residents.
148 Mr. Fortin replied 95 percent.

149

150 Mr. Swayze said to Mr. Russell and Mr. Murphy that typically the ZBA approved an
151 application with conditions and enforcement was left to the Town. Were there any
152 mechanisms to allow for a review of compliance following an application approval. For
153 example, would a board conduct site visits following an approval to make sure that the
154 conditions were complied with, clarified Mr. Swayze. Mr. Russell replied that Burlington
155 did follow up visits and reported back to a board. He was not aware of a post approval
156 ‘trial’ period in Charlotte. The applicant was open to revisiting a decision by the ZBA
157 after the fact. In the current site plan the applicant tried to be specific where equipment or
158 material would be stored. It would be easy for the ZBA to say “that’s not what you said
159 you would do”, suggested Mr. Russell.

160

161 Mr. Murphy said there were two parts to the application:

- 162 1. Physical, as in structures. The ZBA could condition approval upon a Certificate of
163 Occupancy.
- 164 2. Compliance. The ZBA could ask the applicant to return with documentation that
165 the applicant has complied with conditions, or could hold a compliance hearing to
166 determine if additional conditions should be imposed.

167

168 Mr. Swayze asked how the ZBA should view the application. Should it be as: the
169 business existed at that location and conformed to the character of the neighborhood. Was
170 it a part of the neighborhood since it existed. Or, should it be viewed as a new business
171 moving in with a new application. Those were two different things, stated Mr. Swayze.

172 Mr. Murphy said it was dangerous to “grandfather” in something after the fact. A
173 grandfather clause applied only to something that legally existed in the first place. For
174 example; before zoning people could build a house on a one-half acre. Then zoning
175 became 5 acres. The existing house on the one-half acre was still legal. A different view
176 was “I’m here, so why not just let me do it.” Three Bianci statutes have dealt with the
177 mistaken concept that if there was a violation and it has continued 15 years or longer,
178 then the town can’t stop it, said Mr. Murphy.

179

180 Mr. Swayze asked if it was Mr. Murphy’s opinion that the ZBA should look at the
181 application in the context that it exists. Mr. Murphy replied no. That would award
182 illegality. What was approved over a phone was ‘yes, you can have a lawn care business

183 as long as it occurred inside and the owner was the only employee'. In this case the
184 neighbors were trying to get their neighborhood back, said Mr. Murphy.

185

186 Mr. Swayze asked if the ZBA should look at the business as if it didn't exist, and should
187 look at it as an application for a new business in this area. Mr. Murphy replied yes.

188

189 Mr. Russell asked if Mr. Swayze was asking if this business, or any business like it
190 should be in the neighborhood. Mr. Swayze said he was asking if the ZBA should look at
191 it as if this business was located on this lot, or as a bare lot and was a new application.

192 Mr. Russell said that Mr. Murphy's reasoning was that this business has been illegal.

193 First the ZBA must determine if it was in character of the area, and to define 'character of
194 the area'. When the Town allowed home occupation's it required a conditional use
195 permit. Regarding the illegal issue – there are several other businesses in Town that have
196 existed every bit as this business. They may have not grown, or come to the attention of
197 the Town. This business and others like it in the residential areas do factor into the
198 character of the area. A conditional use was problematic. It was not clear without a
199 'character of the neighborhood' standard, stated Mr. Russell.

200

201 Mr. Murphy pointed out that an "officer, every one else was speeding too" excuse was
202 not acceptable. A question was what as the character of the neighborhood, said Mr.
203 Murphy.

204

205 Mr. Tenney asked shouldn't a Home Occupation I business come into consideration. Mr.
206 Murphy replied that by putting everything inside and no employees the applicant could
207 do a Home Occupation I if that was a base level of 'character' of the area. However, the
208 business doesn't have a permit currently. Where does the level of business growth stop
209 was a question. Look at the neighborhood as if the business was not there in order to
210 determine 'character' of the neighborhood, suggested Mr. Murphy.

211

212 Mr. Russell said that there was testimony presented that was addressed in the
213 Memorandum, such as vehicle storage, storage of fuel that was safe and not visible to the
214 neighbors. No precedential value in this case. The applicant would agree with Mr.

215 Murphy that the ZBA could specify conditions in an approval. The applicant didn't want
216 a Notice of Violation. The case was not that everyone was breaking the law and this one
217 got caught. The Town should work on its ordinances to make this work, said Mr. Russell.

218

219 Mr. Mack said there were 2-3 other contractor's yards existing near his house. Where in
220 Charlotte was there an area for a contractor's yard. He had 7-8 houses within 1,000 feet
221 of his own house, said Mr. Mack.

222

223 Ms. DeStigter noted that the fact that 'other people were doing it' was brought up
224 repeatedly. That did not make it OK. Her house was to the north of Fortin's. The
225 Hotaling's and Goodman's lived to the south of Fortin's. Yes, there were agricultural
226 uses in the area as well, but it was a residential area. She has lived in her house since
227 2001. She wants the Fortin's to succeed; just not in this location. The Town had no
228 checks or balances in place. The Fortin business has grown and there was no

229 enforcement. She saw trucks and cars spilling out onto the Fortin's front yard. Trucks and
230 cars were visual impact that impacted her property values. The proposed trees to be
231 planted were saplings. It would take years for those trees to grow high enough to mitigate
232 the visual impacts. She wanted to preserve the character of where she lived. If this was to
233 be a small business without the impacts it has now then why do they need large oil
234 tankers coming in to fill a few mowers, asked Ms. DeStigter. Mr. Russell clarified that
235 the Fortin's have one 500 gallon and one 260 gallon tank and used 750 gallons of fuel per
236 week.

237

238 Mr. Fortin said he has lived there since 2001 and his business hadn't changed much. He
239 could prove what equipment was bought and when, stated Mr. Fortin.

240

241 Mr. Murphy said that at the last hearing he had submitted aerial photographs from 1994
242 to 2012 that showed how the Fortin business has grown.

243

244 Mr. Murphy submitted a new packet of materials that included a cover letter from his
245 office, documents from the Town records, and aerial photographs. The photographs show
246 the progression of the commercial use area coverage, trucks, and equipment. The
247 business started with 1-2 mowers, in one building and has grown into a major
248 contractor's yard, said Mr. Murphy.

249

250 Mr. Russell said that it was not clear that the ZBA should accept the whole Town file
251 other than the photographs. Mr. Fisher suggested that there were new ZBA members that
252 might like to have the submittal.

253

254 **EXHIBIT M: Murphy, Sullivan and Kronk letter, dated 12/12/2013, regarding a**
255 **request by the Fortin's for a "Wood Processing facility", Town records, and**
256 **photographs were accepted and entered as Exhibit M.**

257

258 Mr. Murphy gave a copy of the letters and photographs to the applicant for review. The
259 2005 photograph was the clearest, said Mr. Murphy.

260

261 Mr. Russell handed in a copy of the 2005 photograph that the Fortin's had marked to
262 indicate the business use area in 2012. Most of the property was used as a garden and
263 agricultural use, said Mr. Russell.

264

265 Mr. Tenney noted that most of the business use was to the south, and included storage of
266 materials.

267

268 Mr. Russell asked to use the marked photograph of the applicant's business use over time
269 as a submittal.

270

271 **EXHIBIT N: a 2005 photograph drawn on, dated 05/19/2012, and submitted by the**
272 **applicant as the business use area was marked and accepted as Exhibit N.**

273

274 There were no further questions or submissions.

275

276 **MOTION by Mr. Fisher, seconded by Mr. Swayze, to close the hearing regarding**
277 **ZBA-14-09, a request by Chris and Becky Fortin for a Conditional Use review,**
278 **property located at 2737 Lake Road, and to take up consideration in Deliberative**
279 **Session.**

280 **VOTE: 5 ayes; motion carried.**

281

282 **DELIBERATIONS**

283 The ZBA members entered Deliberative Session at 8:50 p.m.

284

285 **ADJOURNMENT**

286 The ZBA meeting was adjourned at p.m.

287

288 Minutes respectfully submitted, Kathlyn Furr, Recording Secretary.

289

290

DRAFT