

IN THE MATTER OF THE APPLICATION OF
FIRST CONTACT MINISTRIES, INC., Applicant, and
MUD CREEK BAPTIST CHURCH, Owner
To the
HENDERSON COUNTY ZONING BOARD OF ADJUSTMENT
Permit Authority,
For a
SPECIAL USE PERMIT for an
ASSISTED LIVING RESIDENCE

The Henderson County Zoning Board of Adjustment held a quasi-judicial hearing, pursuant to N.C. Gen. Stat. §§ 153A-345.1 and 160A-388(a1), and to §42-356 of the Henderson County Code, to consider the application SUP-18-06, seeking a special use permit to allow the use of certain property for the use “assisted living residence” under Chapter 42 of the Henderson County Code (the “Code”). Having heard all the evidence presented, and the arguments presented at the hearing, the Zoning Board of Adjustment (the “Board”) makes the following findings of fact:

1. This hearing was begun on September 26, 2018, and continued on October 10 and October 17, 2018. At the September 26, 2018, session, the Board consisted of the following members:

Ronald Kauffman, Chair
Anthony Engel
William Fishburne
Louise St. Romain
Hilliard Staton

The Board had one alternate member, Bob Pierce, who was present and heard all the evidence on September 26. At the October 10 and October 17, 2018, sessions, Anthony Engel was unable to attend, and Bob Piece took his place as a voting member of the Board.

2. At the beginning of this hearing, all members of the Board affirmed their ability to make an impartial decision in this matter, and no party or member objected to any member’s participation in this hearing.

3. Notice of the quasi-judicial hearing was duly and timely given in accord with the provisions of §42-371 of the Code. This included certified mailing to the applicants and all adjacent property owners to the boundary of the subject property, published notice, and the posting of notice on the subject property.

4. The Special Use Permit Application was filed by First Contact Ministries, Inc., a North Carolina Non-Profit Corporation (the “Applicant”), as applicant and leaseholder and on behalf of Mud Creek Baptist Church, a North Carolina Non-Profit Corporation, as property owner.

5. The parcel for which the application was filed is Henderson County PIN 9577084182 (the “Property”), which is 2.76 acres, more or less, located on Erkwood Drive near its intersection with Rutledge Drive.

6. The Property is located in an area zoned by Henderson County, although it is near the boundary of the Village of Flat Rock and the boundary of the City of Hendersonville's extra-territorial zoning jurisdictions.

7. The Property is split zoned, with the northern and western portions of the parcel (roughly one-half the total parcel, and including all the portions of the parcel in which the proposed site plan shows the proposed use) zoned R1, and the southern and eastern portions of the parcel zoned R40.

8. At the commencement of this hearing, the Board recognized the Applicants and the Henderson County Planning Department as parties to this hearing.

9. In addition, the Board recognized a group which was represented by counsel and included Andrew Starling, the owner of real property adjoining the Property, as parties to this action, without objection.

10. Pursuant to §42-356 of the Code, a special use permit may only be granted if the Board finds that "specific standards for the use" have been met.

11. The application for the permit states that the type of special use permit sought to be permitted is "Commercial".

12. After inquiry with the Applicant, County staff considered the application to instead be one for an "assisted living residence" under the Code.

13. An "assisted living residence" under the Code is defined as

A group housing and services program for seven (7) or more unrelated persons, by whatever name it is called, that makes available, at a minimum, one (1) meal a day and housekeeping services and provides personal care services directly or through a formal written agreement with one or more licensed home care or hospice agencies. The Department of Health and Human Services may allow nursing service exceptions on a case-by-case basis. Settings in which services are delivered may include self-contained apartment units or single or shared room units with private or area baths. Assisted living residences are to be distinguished from *nursing homes* subject to provisions of *NCGS §131E-102 (NCGS §131D-2(1d))*. *Extended care facilities* with seven (7) or more residents (excluding *hospice residential care facilities* and *nursing homes*) shall, for the purposes of this Chapter, be included with and permitted in the same fashion as an assisted living residence.

[All Code definitions cited herein are from Code §42-391. As in any quotation from the Code herein, italicized text is in the original; as such, it denotes a term that is elsewhere defined in the Code.]

14. Under the Code, an "extended care facility" is defined as

A licensed care facility that provides continuing services to residents and which shall include: *family care homes, hospice residential care facilities, assisted living residences, adult care homes, mental health facilities, multiunit assisted housing with services, nursing homes and continuing care retirement communities.*

- *Mental Health Facilities.* A facility that provides services to individuals who are mentally ill, developmentally disabled, or substance abusers for one or more minors or for two (2) or more adults. These services shall be residential services provided for 24 consecutive hours or more. Facilities for individuals who are substance abusers include chemical dependency facilities.

15. The application filed by the Applicant states that the proposed use will function as a residential recovery center for persons who have been identified as substance abusers.

16. Notwithstanding initial statements by witnesses for the Applicant, it is plain to the Board (as later advocated by the Applicant) that the proposed use is for a “mental health facility”, and as such an “extended care facility” as defined by the Code. As stated above, under the Code an “extended care facility” is to be “permitted in the same fashion as an ‘assisted living residence’”.

17. An “assisted living residence” is allowable only with a special use permit in the R1 zoning district, and is not allowed in the R40 zoning district.

18. Under the site plan submitted by the Applicant, all of the area to be leased to the Applicant by the property owner, which area would include all construction, would be on the portion of the Property zoned R1.

19. Under the §42-356.H.1 of the Code, regarding special use permits,

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:

- Not materially endanger the public health, safety or welfare;
- Not substantially injure the value of property or improvements in the area; and
- 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:

- Comply with all applicable local, state and federal statutes, ordinances and regulations;
- 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;
- 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
- 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).

20. Substantial evidence was presented by those opposed to the application in this matter which tended to negate some of the foregoing.

21. Among the issues raised by those opposed to the application are issues of safety, harm to surrounding property values, and lack of harmony with the surrounding area. Those opposed to the application presented evidence of:

A. Loss of property value (including the testimony of a realtor who was of the opinion that the project if granted would lower property values in the area, a prospective purchaser of a home within a relevant distance from the proposed site who decided against the particular home because of the prospect of the grant of this proposed permit).

B. A neighbor whose property already suffers from significant flood problems from a creek that adjoins both his property and the Property, who testified that flooding problems would be exacerbated by runoff from the additional impervious surface from a greater than 20,000 square foot building and a similar sized parking lot upslope from the creek.

C. The structure is not in harmony, due to its size, scope and design, with the surrounding area.

D. The use is not in harmony, particularly as the proposed use would not be licensed or regulated by the State, to allow for nearby residents to be reasonably assured that it would operate in harmony with the community.

22. As to the supplemental requirements of this proposed special use under Code §42-63, S.R.1.1 (“Assisted Living Residence”), the Applicant demonstrated that no Certificate of Need is required from the State of North Carolina for the use as applied for.

23. No other issues under the supplemental requirements were raised other than as would be dealt with in conditions made on any special use permit granted hereunder.

24. The Applicant did not, to the satisfaction of the Board, show that the proposed use would not materially endanger the public health, safety or welfare. Substantial issues regarding the non-secure nature of the proposed facility, the difficulty of the task (substance abuse rehabilitation) undertaken and the general low success rates therein, and the ability of the proposed facility to control the behavior of its patients and thereby preserve safety and welfare of the surrounding area were not sufficiently countered by the Applicant.

25. The Applicant did not, to the satisfaction of the Board, show that facility as indicated in the site plan and in the Applicant’s exhibits would not substantially injure the value of property or improvements in the area.

26. While the Applicant presented the testimony of an appraiser in this regard, the lack of similar facilities in this area or elsewhere did not provide sufficient evidence to overcome the more

general evidence of decline in relative property values for properties located near other drug treatment facilities generally. The one facility cited by the appraiser as a comparable property was almost exactly half the building square footage of the Applicant's planned facility, on a site of over 11 acres (versus the roughly one and one-half acres of the Property in the R1 zone for which the proposed site is a possible special use), and the area in which the cited facility is located (a mixed use district) is significantly more rural than the area in which the Applicant's facility would be located.

27. The Applicant did not, to the satisfaction of the Board, show that the facility as indicated on the site plan and in the Applicant's exhibits would be in harmony with the surrounding area. With one substantial exception, the other structures in the area relevant to this application are far smaller, and overwhelmingly single-family residential.

28. The proposed structure is indicated on the site plan at 20,358 square feet.

29. The only other structure of the size of the proposed structure in the relevant area is the building housing the church facilities of the property owner. These structures are significantly larger than the proposed structure, and mostly predate zoning in the area. However they are not commercial in nature.

From the foregoing, the Board concludes that the special use sought by the Applicant herein should be denied.

IT IS SO ORDERED.

The foregoing order was reviewed, any amendments desired by a majority of the Board made, and approved, this the 24th day of October 2018.

VOTE: _____ Aye
 _____ Nay

RONALD KAUFFMAN, Chair
Henderson County Zoning Board of Adjustment