

THE BOARD OF APPEALS OF THE CITY OF BRUNSWICK  
RESOLUTION, AND FINDINGS AND CONCLUSIONS

**NO. BR-BOA-24-03-AEA**

**WHEREAS**, pursuant to Article 24 of the Code of Ordinances of the City of Brunswick (the "**City**"), as amended (the "**Zoning Ordinance**"), the Board of Appeals of the City of Brunswick (the "**Board**") is authorized to hear and decide administrative appeals under the Zoning Ordinance; and

**WHEREAS**, a full, complete and proper application was filed and all required fees paid to the Board by Christopher Worth ("**Applicant Worth**") pursuant to Article 24 of the Zoning Ordinance and the Bylaws and Procedures of the Board (the "**Bylaws**") requesting one (1) decision of administrative error in case number BR-BOA-24-03-AEA (the "**BOA Application**" or this "**Appeal**"); and

**WHEREAS**, the BOA Application requested the Board find administrative error regarding among other things the presentation and interpretation of BR-BOA-23-01-SE made by the planning department and approval of Mooseheart Lofts, LLC's ("**Mooseheart**") site plan application BR-SP-IP-23-03 (the "**Mooseheart Site Plan**") by the City's Planning Commission (the "**Planning Commission**") for a structure owned by Mooseheart (the "**Building**") located at 401-403 East Potomac Street in the City (the "**Site**"), which is zoned R-1 Low Density Residential District under the Zoning Ordinance; and

**WHEREAS**, a video and audio recorded public hearing on this Appeal was held on May 23, 2024, having been duly advertised and required notices sent in accordance with the Zoning Ordinance and the Bylaws; and

**WHEREAS**, at the public hearing, Applicant Worth appeared in person or by agent or by attorney having been duly sworn, offered verbal and written testimony to the Board in support of this Appeal, and the Board received, reviewed, and accepted into evidence for the record testimony in support of the BOA Application and this Appeal; and

**WHEREAS**, at the public hearing, the Board received reviewed, and accepted evidence for the record testimony in opposition to the BOA Application and this Appeal; and

**WHEREAS**, at the public hearing, the Board received reviewed and accepted evidence for the record testimony neither in support of or opposition to the BOA Application and this Appeal; and

**WHEREAS**, in exercising its power, the Board may in conformity with the provisions of State law and of the Zoning Ordinance reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from and may make such order, requirement,

decision or determination as ought to be made, and to that end shall have all the powers of the administrative officer or unit from whom the appeal is taken; and

**WHEREAS**, the Board may not take action that will be contrary to the City of Brunswick's Master Plan. When a question arises as to whether the Boards' contemplated action is contrary to the Master Plan, the Board shall request the recommendation of the Planning Commission.

**NOW THEREFORE**, after due consideration of all of the evidence and testimony in the record presented in support of, in opposition to, and neither in support of or opposition to the BOA Application and this Appeal, including that evidence and testimony presented at the public hearing on the BOA Application, the BOA Application itself, and having inspected the Site, the Board hereby makes the following findings and conclusions with regard to this Appeal:

### FINDINGS

The record reflects all of the following findings made by the Board in support of its decision to deny this Appeal and affirm the decision of the Planning Commission (the "**Planning Commission Decision**"). Applicant Worth filed this Appeal on March 15, 2024. This Appeal challenged the Planning Commission's approval of the Mooseheart Site Plan. A copy of the BOA Application and all evidence and testimony in the record presented in support of, in opposition to, and neither in support of or opposition to the BOA Application and this Appeal have been considered by the Board.

A review of the evidence in the record for this Appeal demonstrates that on August 31, 2023, after a public hearing in which Applicant Worth actively participated, the Board approved a special exception for a 16-unit residential multi-family dwelling within the Building (the "**Special Exception**"). At the public hearing on the Special Exception, Mooseheart presented its application in support of the Special Exception, which included extensive testimony about a 16-unit density for the project and a packet of design drawings and other documents that detailed plans for 16 units for the proposed use and the Building. Mooseheart also specifically answered questions about the proposed number of units for the project. The Board made specific findings that the Special Exception (including the proposed 16-unit density in the R-1 District) was consistent with the purpose and intent of the Master Plan and satisfied the other conditions for its approval under Section 24-8 of the Zoning Ordinance. A written decision approving the Special Exception was issued by the Board, which was entitled "THE BOARD OF APPEALS OF THE CITY OF BRUNSWICK RESOLUTION AND FINDINGS OF FACT NO. BR-BOA-23-01-SE" (the "**Special Exception Resolution**"). And, that written decision specifically stated in pertinent part that "[t]he nature and intensity of the operations involved in or conducted in connection with the use proposed by the Special Exception and the size of the Site in relation to the use proposed by the Special Exception is such that the use proposed by the Special Exception will be in harmony with the appropriate and orderly development of the neighborhood in which it is located because the proposed uses will be primarily contained indoors and will create additional housing stock," and the Board granted the Special Exception subject to certain conditions including but not limited to "[t]he Applicant is bound by their testimony and the testimony of their witnesses and consultants to include the exhibits and documents distributed to the Board at the June 22, 2023 and July 27, 2023 Board of Appeals hearing" and "[t]he uses and areas for those uses are limited to the Special Exception uses listed in the Application and accessory activities that would be customary to the listed uses." The Board, by

approving the Special Exception, approved the use requested by Mooseheart, which included the 16-unit density specified in the application for Special Exception and accompanying documents submitted to and reviewed by the Board. However, neither Applicant Worth nor anyone else timely challenged that written decision by a petition for judicial review to the Circuit Court of Frederick County, Maryland.

After obtaining the Special Exception for its project, Mooseheart submitted the application for the Mooseheart Site Plan to the Planning Commission (the "**Planning Commission Application**"). The Planning Commission Application and Mooseheart Site Plan proposed to renovate the Building into 16 loft-style apartments. The Mooseheart Site Plan further specified that the lower level and upper level of the Building were to contain a mix of one and two bedroom loft apartments, including among other things amenity areas and a rooftop terrace. A review of the record below at the Planning Commission reveals that a thorough analysis was conducted by City staff of all of the following issues and factors as applied to the Planning Commission Application and Mooseheart Site Plan: Master Plan/Land Use; Building(s); Access/Parking/Lighting; Floodplain; Stormwater Management, Sediment Control/Forest Resource Ordinance (FRO); Water and Sewer/Solid Waste/Utilities; Signage; Traffic; Construction Schedule; and Fees.

On January 22, 2024, the Planning Commission held a public hearing on the proposed Mooseheart Site Plan (the "**January 22 Hearing**") at which time Applicant Worth expressed his opposition to the Mooseheart Site Plan. A Staff Report was issued for the Planning Commission Application and Mooseheart Site Plan, which contained a thorough analysis and recommended approval of the Mooseheart Site Plan subject to certain conditions. The January 22 Hearing was continued until March 5, 2024 to provide the Planning Commission with sufficient time to obtain a legal opinion on the permitted density for the Mooseheart Site Plan.

On February 15, 2024, the City Attorney provided his written legal opinion to the Planning Commission, which speaks for itself. In that letter, the City Attorney, among other things, responded to the Planning Commission's request for an interpretation of certain provisions of the Zoning Ordinance regarding the allowable residential dwelling unit density for the Mooseheart Site Plan, and, the City Attorney specifically opined that the proposed density of 16 units is allowed in the R-1 zoning district pursuant to the grant of the Special Exception. The City Attorney also explained that the Planning Commission's role in its review of the Mooseheart Site Plan was to determine whether it is compliant with the applicable requirements of the R-1 District, not whether it is an appropriate use of the Site or consistent with the Master Plan, and, that the final decision as to the use of the Building and Site has already been made by the Board. The City Attorney further opined that the Board's written decision approving the Special Exception for Mooseheart's project (including the proposed 16-unit density in the R-1 District) was not timely challenged by a petition for judicial review and stands as final.

The Planning Commission resumed the public hearing for the Planning Commission Application and Mooseheart Site Plan on March 5, 2024. On that date, the City's Zoning Administrator presented an update to the Staff Report, and the Planning Commission continued with public comment, and analysis, deliberation and discussion. Ultimately, Commissioner Miner made a motion to approve the Mooseheart Site Plan with certain conditions, and the motion carried unanimously.

On or about March 22, 2024, Applicant Worth filed this Appeal. Applicant Worth is not an owner of property located adjacent to the Site that is the subject of the Mooseheart Site Plan. According to the memorandum attached to the BOA Application that is the subject of this Appeal, Applicant Worth summarizes his legal arguments as follows:

The project proposed by Mooseheart Lofts is completely inconsistent with Brunswick law. In support of their request to construct a multi-family dwelling, the Applicant originally cited Zoning Ordinance Article 11.4(8). This provision is completely inapplicable since it only authorizes special exceptions for "[n]on-residential structures". Obviously a multi-family dwelling is a residential structure and cannot be approved by special exception in the R-1 district.

In fact, the only way to get a multi-family dwelling approved in the R-1 district is by complying with the Planned Unit Development ("PUD") procedures set forth in Article 21 of the Zoning Ordinance. Zoning Ordinance Art. 11.2(C) ("The following buildings/structures and uses are permitted in the R-1 District: . . . (C) Planned Unit Developments containing any combination of single family, two-family, duplex, townhouse and multi-family dwelling units, subject to the provisions of Section 21.5"). Since the Applicant made no effort to comply with the PUD procedures, this multi-family dwelling should have been rejected outright at the special exception stage. In fact, the Applicant apparently recognized the impropriety of the Article 11 .6 to its application because it removed the reference from the amended application. Compare Ex. A with Ex. B.

Furthermore, even though a multi-family dwelling was approved by special exception, that does not mean that the Board of Appeals approved a specific number of units or density for the Property. The purpose of a special exception is to grant a "specific use" that would not otherwise be "appropriate" in the zone. See Zoning Ordinance Art.4 (defining "Special Exception"). Here, the Board of Appeals approved a multi-family dwelling that would not otherwise be appropriate because it was not built in a PUD. See Zoning Ordinance A1t. 11.2 (allowing multi-family dwellings in property zoned R-1 only if the rules set forth in A1ticle 21.5 are followed).

Ultimately, Applicant Worth argues that a multi-family dwelling cannot be approved by special exception in the R-1 district and the Board could not approve a special exception for a 16-unit residential multi-family dwelling within the Building. Applicant Worth further argues that a variance was required to be approved by the Board in order for the Planning Commission to approve the Mooseheart Site Plan.

As set forth above, a video and audio recorded public hearing on this Appeal was held on May 23, 2024. The public hearing was advertised and required notices were sent in accordance with the

Zoning Ordinance and the Bylaws of the Board. At that public hearing, Applicant Worth appeared in person and by attorney who offered verbal and written testimony to the Board in support of this Appeal, and the Board received, reviewed, and accepted into evidence and testimony for the record in support of the BOA Application and this Appeal. The Board also received, reviewed, and accepted evidence and testimony for the record in opposition to the BOA Application and this Appeal, and further received, reviewed, and accepted evidence and testimony for the record neither in support of or opposition to the BOA Application and this Appeal. After everyone had an opportunity to present evidence and testimony, the Board closed the record and deliberated.

Upon a motion by Steve White, seconded by Walter Stull, all members of the Board voted unanimously to affirm the Planning Commission Decision and deny this Appeal of administrative error as requested by Applicant Worth.

### CONCLUSIONS

Article 4 of the Zoning Ordinance defines Special Exception as “[a] grant of a specific use that would not be appropriate generally or without restriction and shall be based upon a finding that certain conditions governing special exceptions as detailed in the Zoning Ordinance exist, that the use conforms to the Master Plan, and that the use is compatible with the existing neighborhood.”

Moreover, Section 24.8.C. of the Zoning Ordinance provides in pertinent part as follows:

#### C. Special Exceptions

1. An application for a special exception may be made only by persons with a financial, contractual or proprietary interest in the property for which a special exception is requested.

2. A grant of a special exception is basically a matter of development policy, rather than an appeal based on administrative error or on hardship in a particular case. The Board of Appeals should consider the relation of the proposed use to the existing and future development patterns. A special exception shall be granted when the Board finds that:

a. The proposed use is consistent with the purpose and intent of the Master Plan and of this chapter; and

b. The nature and intensity of the operations involved in or conducted in connection with it and the size of the site in relation to it are such that the proposed use will be in harmony with the appropriate and orderly development of the neighborhood in which it is located; and

c. Operations in connection with any special exception use will not be more objectionable to nearby properties by

reason of noise, fumes, vibration, or other characteristics than would be the operations of any permitted use not requiring special exception approval; and

d. Parking areas will comply with the off street parking regulations of the Zoning Ordinance and will be screened from adjoining residential uses, and the entrance and exit drives shall be laid out so as to achieve maximum safety.

e. The road system providing access to the proposed use is adequate to serve the site for the intended use.

3. In addition to the general requirements listed above, uses requiring a special exception shall be subject to the specific requirements for each use.

4. A special exception approval may be granted in accordance with the general and specific requirements enumerated in this section. The Board of Appeals may, in addition to other requirements imposed under this chapter and is hereby authorized to add to the specific requirements any additional conditions that it may deem necessary to protect adjacent properties, the general neighborhood, and its residents or workers. Violation of such additional conditions, when made a part of the terms under which the special exception permit is granted, is a violation of this chapter and may be grounds for termination of the special exception.

The Special Exception discussed above was approved by the Board pursuant to Sections 11.4.B. and 24.8.C. of the Zoning Ordinance. The record reflects that the Board considered the required findings and factors set forth in, and otherwise complied with the Zoning Ordinance when the Board approved the Special Exception for a 16-unit residential multi-family dwelling use within the Building. When approving the Special Exception, the Board issued the Special Exception Resolution approving the application submitted by Mooseheart. And, the application, testimony, exhibits and other documents filed by Mooseheart and constituting the record before the Board for the Special Exception all proposed a 16-unit density for the proposed special exception use. In fact, in the Special Exception Resolution, the Board specifically bound Mooseheart by its testimony and the testimony of its witnesses and consultants to include the exhibits and documents distributed to the Board at the hearings on the Special Exception. Among other things, the Board had to and in fact did consider the nature and intensity of the 16-unit density and the size of the Building and Site in relation to that density, in order to find that the proposed 16-unit density for the Building and Site will be in harmony with the appropriate and orderly development of the neighborhood in which the Building and Site are located. This was required by Article 24 for the Zoning Ordinance and specifically Section 24.8.C.2. What was clearly before the Board at that time was a 16-unit multi-family dwelling use that the Board concluded was permitted. The Board is not aware of any legal authority prohibiting the Board from making that decision or convinced that the Board's approval

of the Special Exception use density exceeds the Board's authority pursuant to Article 24 of the Zoning Ordinance or any other law.

Pursuant to Section 24.11 of the Zoning Ordinance, appeals from and judicial review of decisions of the Board need to be filed with the Circuit of Frederick County in accordance with the Maryland Rules. Maryland Rule 7-203 requires that any such appeal or judicial review action must be filed within 30 days after the date of the written decision of the Board. No appeal or petition for judicial review was filed to challenge the Board's decision to approve the Special Exception for a 16-unit residential multi-family dwelling use within the Building. Thus, the approval of the Special Exception became a final binding decision of the Board. To provide Applicant Worth with the figurative second bite at the apple to challenge the Special Exception is not fair, justified, or permitted by law.

While the aforementioned conclusions alone support the Board's decision to deny this Appeal and affirm the Planning Commission's Decision, the Board also further concludes that the review of the Mooseheart Site Plan by the Planning Commission is governed by Section 5.12 of the Zoning Ordinance. That provision includes the specific standards and conditions that the Planning Commission is authorized to evaluate for site plan approval. The Planning Commission's role in its review of the Mooseheart Site Plan was to determine whether it is compliant with the applicable requirements of the R-1 District, not whether it is an appropriate use of the Site or consistent with the Master Plan. That final decision as to the use of the Site had already been made by the Board by the time the Planning Commission conducted its review of the Mooseheart Site Plan.

Moreover, the design and dimensional requirements for the Mooseheart Site Plan are set forth in Article 11 of the Zoning Ordinance. As set forth herein multiple times, the proposed use of the Site approved by this Board was a 16-unit multi-family dwelling within the Building. We conclude that multi-family residential buildings are not specifically referenced in Section 11.6 of the Zoning Ordinance. Since they are not, the category "All others" is applicable to the Site and a PUD was not required. We further find and conclude that there are no Minimum Lot Area, Minimum Lot Area Per Dwelling Unit or Use, or Minimum Lot Width requirements listed in Section 11.6 of the Zoning Ordinance that would otherwise determine or limit density in the Building or on the Site. Therefore, the remaining standards for height and setbacks are not applicable to the adaptive reuse and renovation of the Building.

Moreover, a review of the record as it applies to the proceedings at the Planning Commission level indicates that the Planning Commission conducted its review and analysis of the Mooseheart Site Plan consistent with the procedures, the specific standards and conditions, and the Planning Commission's obligations pursuant to Section 5.12 of the Zoning Ordinance. The recordings of record and minutes of the Planning Commission's public hearings on January 22, 2024 and March 5, 2024 reflect the same. And, specifically, the responsibilities of the Planning Commission during the January 22, 2024 and March 5, 2024 public hearings were to review the Mooseheart Site Plan, consider the binding Special Exception approved by the Board, and comply with the rules governing the Planning Commission. The record reflects the Planning Commission did just that and performed its duty in accordance with the Zoning Ordinance and other law. It is not the duty of the Planning Commission to reverse, modify, or otherwise limit the approval of the Special Exception after it became a final binding decision of the Board.

For all of the reasons set forth above, a variance was not required and the Board complied with the Zoning Ordinance when approving the Special Exception use and specifically the 16-unit residential multi-family dwelling use within the Building. Moreover, contrary to Applicant Worth's argument, there is no legal authority in the Zoning Ordinance or elsewhere to conclude that the adaptive re-use of an existing non-residential structure must adhere to the same requirements applicable to Planned Unit Developments, or that the Board could not approve the Special Exception with a 16-unit density.

Given the above, the Board finds it unnecessary to make a conclusion as to the issue of whether or not Applicant Worth had standing to bring this Appeal.

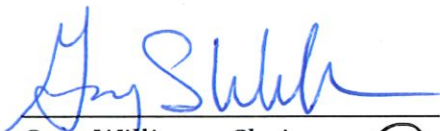
While Applicant Worth disagrees with this conclusion, the record reflects otherwise and Applicant Worth has not presented any evidence or factual information to refute the same. Moreover, Applicant Worth has not presented any legal authority to convince the Board that the decision of the Planning Commission should be disturbed. Contrary to Applicant Worth's arguments, the Special Exception for a 16-unit residential multi-family dwelling use within the Building does not violate the Zoning Ordinance or any other law, and to the extent Applicant Worth desired to challenge the approval of the Special Exception, he should have filed a timely petition for judicial review with the Circuit Court for Frederick County, Maryland.

The record reflects that the Board has applied the Zoning Ordinance and other law to the facts presented.

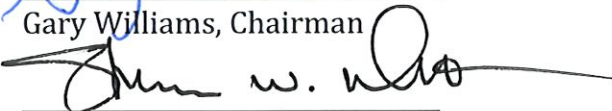
**NOW THEREFORE BE IT RESOLVED**, that based on the foregoing findings and conclusions, the Board of Appeals of the City of Brunswick, affirms the Planning Commission Decision and finds that there is not sufficient merit to overturn, modify reverse the decision.

A final decision may be appealed to the Circuit Court as provided for in the State and City laws. Appeal times begin from the signed, written decision of the Board.

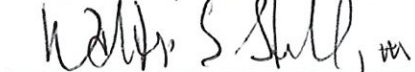
These Findings and Conclusions are hereby unanimously approved by the Board of Appeals on this 25<sup>th</sup> day of July 2024.



Gary Williams, Chairman



Steve White, Vice Chairman



Walter Stull, Secretary