

**BOARD OF ZONING APPEALS
PUBLIC HEARING
MINUTES
February 21, 2018**

The Board of Zoning Appeals (BZA) held one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on February 21, 2018, beginning at 8:00 PM with Michael Gadell presiding as Chair. The following members were present: Bill Daly, Robert Dowler, Robert Petersen, Donald Chumley and George Creed, Absent: Gregory Haight. Also attending and representing staff were Frank Simeck, CZA, Senior Zoning Inspector and Sharmaine Abaied, Board Clerk.

Item No. 1

Recommendation to the Board of Zoning Appeals for approval of a conditional use permit for live entertainment and outdoor seating. Applicant wishes to amend and combine the existing conditional use permits to allow for consumption of alcoholic beverages outdoors, increase allowable number of outdoor seats, and extend the allowable number of months of live entertainment to year-round. Application filed by Kyle Mincey, AIA of MV+A Architects, Agent for Whole Foods.

Mr. Kyle Mincey was sworn in to give his testimony.

Mr. Mincey stated they submitted the application for Conditional Use Permit to revise the existing two CUP's related to Whole Foods market. He continued stating they are asking for additional seating in the outdoor seating area as well as requesting an extension of the live entertainment outside in the seating area to year-round. Mr. Mincey stated their final request with the application was that the current CUP's stipulation prohibiting the sale and consumption of alcohol on the outdoor patio area be removed.

Mr. Petersen asked how they envisioned the sale of alcoholic beverages in the outdoor seating area to proceed: indoor to outdoor or served by Whole Foods employees. Mr. Mincey stated that the store would sell beer and wine within the store to the customer and the customer would then take the drink to the enclosed outdoor seating area. Mr. Petersen followed up asking if they envisioned servers serving to the outdoor area. Mr. Mincey stated that was not the intention at that time and then stated an employee from Whole Foods was present and could elaborate.

Mr. Kiren Cross was sworn in to give his testimony.

Mr. Cross stated that customers would be able to purchase wine or beer in the pub area and bring it outside, but Whole Foods would not be serving.

Mr. Creed stated his concern, for the record, due to Whole Foods having come before the board 6 months earlier and it appearing they were piecemealing their requests.

Mr. Dowler asked where the musicians would set up and perform. Mr. Mincey stated there was not a stage for the musicians to set up. Mr. Cross stated there was space in the corner of the enclosed area in which the bands would set up and with a tent if it's sunny outside. Mr. Dowler asked if they wanted to increase the seating to 75 outdoor and 70 indoor with a maximum seating of 120. Mr. Mincey stated that, based on the code, the maximum number of seats for both interior and outdoor seating area is 120. He continued stating the plans that were submitted showed a layout with a maximum number of

70 seats for the indoor seating and 75 outdoor with 120 total for indoor and outdoor. Mr. Mincey then said that the number of seats would shift based on weather. If it was warm there would be more seats outside than inside, but in colder months or inclement weather there would be more seats inside than outside. Mr. Dowler asked if they would want the ability to have 75 seats outside and they would be taken from the inside. Mr. Mincey stated that was correct.

Mr. Dowler asked how the patio area was separated from the parking area and what prevents cars from going into the patio area. Mr. Mincey stated the parking spots all have wheel stops. Mr. Dowler then asked if there were plans to put bollards along that area as it had been required in other seating applications. Mr. Mincey stated there were no plans to alter the outdoor patio seating area with any permanent structures.

Mr. Creed asked if there was fence at the seating area now. Mr. Mincey stated there was a fence there now. Mr. Dowler commented that it was ornamental.

Mr. Daly asked if they would address Mr. Creed's concern that was mentioned earlier, why the request was coming at that time instead of 6 months earlier. Mr. Cross stated that he Mr. DiMarco (Whole Foods store Team Leader) were new to the area and had just started in December 2016. Mr. Cross continued stating that he came from the Fairfax Fair Lakes store which gave back to the community with live entertainment and not for profit. Mr. Cross said he had initiated the process of live entertainment at the Vienna store without prior knowledge of the previous permits, but was made aware when applying for live entertainment. He then said that the last time he was in front of the board he had told the board he would want to revisit the permits as they are all connected. Mr. Daly stated that it had cleared things up. Mr. Cross let the board know that they had not booked any bands for the current year as they were awaiting the outcome of the BZA meeting.

Mr. Daly asked if the 120 seats were based on parking. Mr. Mincey stated that was correct. Mr. Daly then asked how the parking is calculated with staff needing parking and patrons needing parking. Mr. Mincey stated that the minimum required parking that was calculated for the store customers, employees, and non-café patrons was 116 spaces. Mr. Mincey stated that they currently have 141 spaces with a balance of 25 spots allocated for seating alone. Mr. Mincey also stated that based on the code, 1 parking spot equals 4 seats, which gives 100 seats, plus 20 seats the code allows for the interior of the café seating area. Mr. Daly asked if the 20 interior seat spaces had to be left inside. Mr. Mincey stated that was correct.

Mr. Chumley asked what is to be done when it rains and if they would move all the chairs inside. Mr. Mincey stated no, some chairs would stay outside. Mr. Chumley then asked what would be done in the cold months and if they would still put people outside to listen to entertainment. Mr. Mincey stated they would not if the weather didn't permit for any type of live music. Mr. Cross confirmed they would not in inclement weather. Mr. Chumley stated his assumption that there would not be live music every weekend, especially when cold. Mr. Daly followed up by asking if the maximum indoor seats during the cold and rainy days would be 70 indoor seats. Mr. Mincey stated it was a small seating area and that it was currently maxed out with the seating that could be provided along with tables. Mr. Daly then stated under the application being reviewed that the board or applicant could go beyond the 70 and up to 120 indoor seats. Mr. Daly continued asking about the number of indoor and outdoor seats when the weather was nice and when the weather was unpleasant. Mr. Mincey stated he was asking to maximize the number of seats allowed in the outdoor seating area due to the restrictions on the outdoor seating area from the original conditional use permit. Mr. Mincey continued stating the

application showed the maximum number of seats for both the interior and exterior based on the codes requirement for parking. Mr. Mincey stated he wasn't asking for a specific number for seating on the interior or exterior, but to allow for the maximum number of seats for the building based on the parking calculations. He also stated he wanted the conditional use permit to reflect the seating so the store could have the maximum number of seats in the exterior area. Mr. Daly stated that was a great explanation and that it was the 120 they had discussed and Mr. Mincey stated that was correct.

Mr. Petersen expressed concern about the amount of potential people attending the events and how they would deal with a large crowd that would spill past the ornamental fencing and possibly onto the sidewalk. Mr. Cross said he attended every Saturday event in 2017 and they did not exceed 75, but understood the concern. He also stated they had two people monitoring the seating area to make sure no one goes beyond the gates, as the sign states no alcohol beyond this point. Mr. Cross stated that they did not have any incidents last year. Mr. Mincey added that the store has their ABC liquor license and that with that license there are rules and guidelines that have to be followed to maintain that license. He continued stating the rules and regulations will dictate the serving of customers and how they conduct themselves within the confines of where the liquor license is applied.

Mr. Petersen said that part of the Planning Commission's recommendation, as well as the staff's report, is that the live music would be scheduled in consideration of contemporaneous town events. Mr. Petersen then stated he felt that it wouldn't conflict with town events, but enhance town events. Mr. Petersen then asked if they had any comments based on the Planning Commission's recommendations and the staff's support statement. Mr. Cross stated that with the initial permit application process in 2017 the concern was presented so he booked the bands with town events in mind so nothing overlapped with a town event. Mr. Cross did state that if the town felt it would enhance the town event they would be open to working together. Mr. Creed stated the only potential conflict would be any event on the town stage at the town green which is across from Whole Foods. Mr. Cross stated that although he works for Whole Foods he understands it's a partnership with the town so they would give the towns' event priority. Mr. Simeck stated that in the Planning Commission meeting they didn't want the bands competing across the street, but when Whole Foods came previously they were requesting live entertainment for a stand-alone performer and not a band.

Mr. Dowler inquired about the 120 seats and if they spread out indoor and outdoor. Mr. Mincey stated that was correct. Mr. Dowler asked if a maximum of 60 outdoor seats would be amendable. Mr. Mincey asked why Mr. Dowler wanted a limitation. Mr. Dowler stated the patio area was small and he wasn't sure how it was figured that 75 people would be able to be seated in that area. Mr. Dowler continued stating that he assumed Whole Foods and the town would not like an excess of people spilling out, as Mr. Petersen had stated earlier. He then said that having a control that would keep a reasonable number of people, 60, would keep that from happening. Mr. Dowler also stated he wasn't sure how the remaining seats were calculated. He also mentioned the current permit had a specific number of tables and seats which the current request is a substantial increase. Mr. Mincey agreed that the outdoor seating area is a limited area and that it would be hard to imagine a lot of seats in that area and that he doesn't see 120 seats there. Mr. Mincey then said his hesitation with limiting it to 60 seats is that it would put another limitation on the property requiring Whole Foods to come back and amend the CUP if the code changes in the future. Mr. Mincey continued saying that 120 seats gives Whole Foods the flexibility of moving seats inside and outside and that there would most likely be no more than 75 seats outside unless they removed all the tables. Mr. Mincey followed up saying that the current plan shows 75 seats with a mix of bench seating, two-tops, and stools along a perimeter where a ledge would be located for people to rest their drink. Mr. Mincey then asked that there not be a

limitation of 60 seats unless that would bring them to a resolution. Mr. Dowler reiterated his earlier concern that the outdoor seating area was too small for 70 seats and an entertainer. Mr. Mincey stated that in terms of maintaining egress and circulation, with the band out in that area as well, they may not be able to maintain 75 seats, but when there is no band performing Whole Foods would like to give the maximum number of seats to satisfy the customer base. Mr. Simeck stated that this same question came up with the Planning Commission as well. There was continued discussion based on the request of maximum 120 seats shared with the interior and exterior.

Mr. Creed directed the boards attention to the staff report showing the patio area of Whole Foods as it is currently. He continued stating that based on the dimension of the patio in the seating area that if 120 seats were proposed for the exterior they would not fit in that area. He continued stating limiting the amount of seats in the exterior would allow patrons to move about the seating area safely. Mr. Creed also commented that the plan didn't show where the band would be located in the outdoor seating area.

Mr. Chumley commented that their current limited CUP must have been reasonably successful since they have come back before the board. He then asked what Whole Foods does currently to prohibit people from taking alcohol outside. Mr. Cross stated that currently they do not have anyone monitoring the area to ensure no one takes alcohol outside as they thought their current permit allowed for alcohol consumption in the outdoor seating area. Mr. Cross continued stating that when they came to request for live music they were informed that they would need to have a permit for the alcohol consumption on the exterior as well as the number of people in the seating area. Mr. Chumley asked staff if the police department had indicated that there were any problems at Whole Foods. Mr. Simeck stated there had been none.

Mr. Petersen said he would like present his understanding of the number of the seats inside and outside. Mr. Petersen said, from his understanding, the application is for a maximum of 120 seats limited to 75 outside and 70 inside. Mr. Petersen then said if there were 70 inside they would be limited to 50 outside and likewise if there were 75 outside they would be limited to 45 inside and at no time can they exceed 120 inside and outside combined. Mr. Mincey stated that was correct and also stated the application was asking for a maximum number of seats for the interior and exterior for a total of 120. Mr. Mincey also stated they would never exceed that seat count for both the interior and exterior and continued discussing the potential arrangements for the interior and exterior seating. Mr. Mincey went further to state, again, that he was requesting to not put a number on the maximum number of seats in the patio area, but that there be a maximum number of seats for the interior and exterior, based on the code, that applies to the store currently. Mr. Mincey stated he understood the concern based on the amount of people who would be outside, but he stated that there would never be 120 seats in the small area as there was not enough space there. Mr. Mincey also stated that they did not want the limitations as that would then force them to come before the board for additional requests if the code was ever to change. Mr. Petersen stated that he was concerned about the limitation on the number of seats outside although the written application states the maximum outside seats would be 75 seats. Mr. Mincey stated the plan submitted shows a layout of 75 seats. Mr. Petersen continued stating the schematic drawing with the application shows 54 seats and wanted to know how they came up with a number of 75 seats for the application and also stated his concern regarding the board putting a limitation on seats without specific numbers. Mr. Petersen continued stating that the application shows specific numbers and that he is comfortable going with the specific numbers of the application. Mr. Daly stated he counted 75 seats on the schematic and based it on the 5 tables that seat 6, and 11 seats at the large portion of the triangle, 5-2 person tables, and many 2 person tables near the parking area on

the right totaling 75 seats. Mr. Petersen thanked Mr. Daly for clarifying the seat count.

Mr. Daly asked that with popular bands would they do like Jammin' Java and then take away the tables and put 120 people outside and have no one sitting inside or were they asking for 3 separate conditions of 120 maximum seats with a maximum 75 outside and a maximum 70 inside. Mr. Daly continued stating that with these three separate conditions if any of the three were violated, that would represent a violation of the conditional use permit. Mr. Cross said they would not have 120 patrons outside. Mr. Daly then asked if they would be okay with the board giving those three separate conditions. Mr. Cross stated they would be okay with those conditions.

Mr. Petersen said that with the 75 people seated outside they could subsequently have dozens of other people easily and safely accommodated outside as well. Mr. Petersen then said he would not want a condition limiting the number of people, but rather the seats. Mr. Daly agreed with Mr. Petersen's comment. Mr. Daly then asked if anything in the town code would cap the number of people allowed in the outdoor area. There was nothing capping the number of people.

Mr. Creed asked if there would be an issue with the health department or fire department based on the amount of people in the outdoor seating area; standing and seated. Mr. Simeck stated the fire marshal would do their annual inspections and if they see any violations, they would notify Whole Foods. Mr. Creed stated that they could potentially have 75 seats assuming the plan was to scale and then Mr. Creed asked if the plan was to scale. Mr. Mincey stated it was not to scale. Mr. Creed stated his concern with the patrons who would not have seats and the possibility that they would hinder the view of those who were seated. Mr. Creed also mentioned that where the band was located patrons may not be able to see per the submitted plan as their backs would be to the band.

Mr. Gadell asked if, based on the original permit, the live music was for Saturday night only and if the indoor / outdoor seating and alcohol consumption, subject to the ABC board, would be all week long. Mr. Simeck stated it would combine the two CUP's into one and due to their restrictive nature they wanted the maximum indoor and outdoor seating with live music and alcohol consumption outside. Mr. Gadell then asked if this was to allow for live entertainment on nights other than Saturday and Mr. Simeck stated yes. Mr. Simeck followed up by saying they would have to close by 9:00 pm. Mr. Gadell asked how this was received by the community since August 2017 and what the was the largest crowd. Mr. Cross stated it has gone over very well and majority of the patrons are families with kids. He also stated the largest crowd was for a band from Annapolis and the crowd was about 40 people. Mr. Cross also stated he was there every Saturday for the three months they had live entertainment. Mr. Gadell asked if they had traffic from the bike trail and Mr. Cross stated they had very little traffic from the bike trail. Mr. Cross told the board that they do not have the live entertainment for profit. Mr. Gadell asked if they were a grocery store that provides entertainment and food for their clientele and not a supermarket trying to be a restaurant and bar. Mr. Cross explained that one of Whole Foods core values is to give back to the community they are in and that this is one way for them to give back. Mr. Cross also stated his vision is for it to be an outdoor family event in which parents can also have a glass of wine or beer. Mr. Gadell asked Mr. Simeck if there had been any police complaints regarding noise due to the live music. Mr. Simeck stated there had not been any complaints. Mr. Gadell then stated that he and Mr. Creed could attest that Whole Foods has been a valuable part of the Vienna Business Association and the Vienna community.

Mr. Gadell asked for a motion to close the public hearing.

Mr. Creed made a motion to close the public hearing. Mr. Daly seconded the motion

Motion: Creed
Second: Daly
Passed: 6-0
Absent: Haight

**BOARD OF ZONING APPEALS
REGULAR MEETING
MINUTES
February 21, 2018**

The Board of Zoning Appeals (BZA) met in regular session to review one advertised public hearing in the Council Room of the Vienna Town Hall, located at 127 Center Street, South, Vienna, Virginia, on February 21, 2018, beginning at 8:00 PM with Michael Gadell presiding as Chair. The following members were present: Bill Daly, Robert Dowler, Robert Petersen, Donald Chumley and George Creed, Absent: Gregory Haight. Also attending and representing staff were Frank Simeck, CZA, Senior Zoning Inspector and Sharmaine Abaied, Board Clerk.

Item No. 1

Recommendation to the Board of Zoning Appeals for approval of a conditional use permit for live entertainment and outdoor seating. Applicant wishes to amend and combine the existing conditional use permits to allow for consumption of alcoholic beverages outdoors, increase allowable number of outdoor seats, and extend the allowable number of months of live entertainment to year-round. Application filed by Kyle Mincey, AIA of MV+A Architects, Agent for Whole Foods.

Mr. Petersen made a motion that the Board of Zoning Appeals approve the request for live entertainment and outdoor seating as submitted with the following conditions: permitting year round live entertainment not to extend beyond 9:00 pm, seating would be limited to 120 seats with a maximum 75 outside and a maximum 70 seats inside, and the alcohol service to be conducted inside and outside in compliance with all applicable Virginia ABC regulations. The live music performances would be scheduled with consideration of contemporaneous town events in anticipation that such performances could enhance town events such as Oktoberfest and Viva Vienna. This would also consolidate the two previous conditional use permits that have been issued to Whole Foods incorporating the two CUP's that they do not conflict with the CUP being approved and limited to 5 years.

Mr. Gadell asked for a second

Mr. Daly seconded the motion

Mr. Petersen stated that the submission from the applicant, the town's written comments, and the testimony heard made it clear that this would enhance Vienna and fit in with the comprehensive town plan and the goals of the town having a lively, thriving, pedestrian friendly town of Vienna. Mr. Petersen said he felt it was a good opportunity and a good step forward for the town.

Mr. Daly stated that as a dad of four kids in band he has appreciated the opportunity for his children

to listen to live music. He then stated the amount of money paid for them to watch at Jammin' Java is worth it and he appreciates that opportunity. Mr. Daly then stated that what Whole Foods offers gives the opportunity to enjoy the outdoors, increase the likelihood for families to see performances, and at no cost to the families. Mr. Daly continued stating it doesn't appear there have been any problems and he didn't foresee there being any problems in the future and was in agreeance with what Mr. Petersen had said.

Mr. Creed stated he was okay with the 120 total seating, and the 75 maximum outdoor seating, but the maximum of 70 seating indoor could be exceeded during inclement weather. Mr. Creed stated there doesn't need to be a cap on the indoor seating. There was continued discussion on the indoor seating maximum. Mr. Dowler stated that with a maximum of 120 seating ideally they could put a 120 outside or 120 inside or any division of that. Mr. Dowler then stated with a cap of 75 outside that would be the maximum that could be put outside. He then stated the remainder would stay inside. Mr. Dowler then stated they could have the flexibility to put all 120 inside or 25 outside the remaining inside. Mr. Dowler stated that they should keep maximum of 120 total, with a maximum of 75 outside, and no cap for the inside. Mr. Dowler then asked why the need to put a 5 year limit on the CUP. Mr. Dowler then stated that since there have been no complaints there would be no reason to have them come in again and that if there were problems it would come before the board.

Mr. Gadell asked, for clarification, that when stating 75 outside they mean 75 seats and not 75 people to which board members said yes.

Mr. Creed asked to amend the motion to remove the restriction of 70 seats inside and to remove the 5 year cap.

Motion:	Creed
Second:	Dowler
Nay:	Petersen
Passed:	5-1
Absent:	Haight

Mr. Gadell asked for further discussion.

Mr. Daly stated he agreed with Mr. Creed and Mr. Dowler and as long as it was safe and makes sense that there would be no reason to cap it.

Mr. Chumley stated he didn't believe that there was a need for a 5 year limitation.

Mr. Gadell called for a vote on the motion as amended

Mr. Petersen stated the motion, as amended, approving the application for live entertainment and outdoor seating as submitted with the following conditions: permitting year round live entertainment not to extend beyond 9:00 pm on any night, seating on the outside patio would be limited to a maximum of 75 seats, and the alcohol service to be conducted inside and outside in compliance with all applicable Virginia ABC regulations. The live music performances would be scheduled with consideration of contemporaneous town events in anticipation that such performances would enhance town events such as Octoberfest and Viva Vienna. The time limit on the CUP is taken out and the motion incorporates the two previous conditional use permits that have been issued to Whole Foods

that do not conflict with the CUP being approved.

Motion: Petersen
Second: Daly
Passed: 6-0
Absent: Haight

Approval of the Minutes:

Mr. Gadell stated there were two sets of meeting minutes; the revised July 2017 minutes, and the January 2018 minutes.

Mr. Chumley asked to be recused from the vote for both meeting minutes, as he was not at either meeting.

Mr. Dowler and Mr. Creed mentioned amendments on pages 4, 9, 10, and 14 that needed to be made to the January meeting minutes. Mr. Petersen stated that he had given his copy of minute's corrections to the board clerk, which included typographical corrections as well as substantive changes on pages 4, 5, and 3.

Mr. Petersen made a motion that, with the substantive corrections and typos corrections, that the January 2018 minutes be adopted.

Mr. Creed seconded the motion.

Motion: Petersen
Second: Creed
Passed: 5-0
Abstain: Chumley
Absent: Haight

Mr. Petersen made a motion to adopt the revised July 2017 minutes as submitted.

Mr. Dowler seconded the motion

Motion: Petersen
Second: Dowler
Passed: 5-0
Abstain: Chumley
Absent: Haight

Administrative Discussion

Mr. Gadell opened up for discussion opportunity for the BZA to convert from hard copy agenda packets to all digital iPads packets. Mr. Gadell also mentioned this had come before the board before, but there were not enough members present to discuss at the time.

Mr. Chumley stated he was opposed due to those who may not have the computer capacity to work with the documents digitally and he personally would print copies for 90% of the documents to be able to work with. Mr. Chumley stated he would prefer the town incur the expense of printing and sending the copies.

Mr. Gadell asked the board clerk if it was all or nothing. The board clerk explained that the IT department had begun an initiative for all boards to go paper free and that the BZA was the last board to go paper free. There was continued discussion regarding the process for receiving packets and utilization of the iPads.

Mr. Dowler asked if the BZA orders would be able to be posted to town website with the new process to which the board clerk stated the order could be uploaded with the minutes when approved and signed.

Mr. Daly asked if it would be possible to circle things and make comments on the iPad with touch screen and if not was there a possibility to have another way to circle and make comments. The board clerk stated there was the capability to type notes, and highlight, but would have to get back to board members regarding the possibility of circling and writing notes with the touch screen.

Mr. Chumley said that if Town Council, commissions, and other boards have moved to digital packets that the BZA should go digital as well.

The board continued discussion of digital packets and ended their discussion stating they would go to digital iPad packets.

Mr. Chumley made a motion to adjourn the meeting. Mr. Daly seconded the motion

Motion:	Chumley
Second:	Daly
Passed:	6-0
Absent:	Haight

Adjournment

The meeting was adjourned at 9:28.

Respectfully submitted,
Sharmaine Abaied
Board Clerk