

CITY OF CHARLOTTE
ZONING BOARD OF APPEALS

ROBERTS REAL ESTATE OF CHARLOTTE, LLC
APPEAL FROM THE
CHARLOTTE PLANNING COMMISSION

The following are the findings, conclusions and decision of the Charlotte Zoning Board of Appeals as it relates to Roberts Real Estate of Charlotte, LLC.

FINDINGS

1. Roberts Real Estate of Charlotte, LLC owns property at 407/415 South Cochran in the City of Charlotte. For over 60 years, a Dairy Queen was located at that site. It provided onsite parking and walk up traffic, but there was no drive through at that location. The property was zoned R-1, and was a nonconforming use.
2. On August 8, 2017, Roberts Real Estate filed an application to rezone the parcel to B-1.
3. Under the Charlotte Zoning Code, a restaurant is a conditional use in that zone, which means that it must meet certain design and planning specifications. Under the Zoning Ordinance, the Planning Commission is permitted to impose additional conditions.
4. As part of the rezoning request, a site plan was submitted which provided for the demolition of the existing Dairy Queen along with a vacant commercial building. The original Dairy Queen was 561 square feet, and the vacant office building was 1,067 square feet. The proposed Dairy Queen would provide indoor seating and a drive through, and was considerably larger, at 1,969 square feet. The site plan called for revisions in parking, ingress and egress from South Cochran, storm water retention and, among other site changes, an out of door ordering system.
5. A public hearing was held on September 5, 2017, after which the Planning Commission voted not to approve the rezoning request.
6. On September 11, 2017, the Charlotte City Council considered the rezoning. As with the Planning Commission, there were many people in attendance, the vast majority of which were in opposition to the rezoning and any new site plan development.
7. At the close of the City Council meeting, and after the public hearing, the City Council voted to approve the rezoning.

8. On September 21, 2017, the Planning Commission held its hearing regarding the site plan review. At this meeting as well, many people were in attendance, most of whom opposed and/or recommended changes in the site plan.

9. Under the Charlotte Zoning Code, § 82-229, the Planning Commission’s authority is provided as follows:

“The following uses may be permitted in a Local Business District upon the granting of a permit for such use by the Planning Commission subject to the conditions imposed in this section for each use and subject further to such other conditions which in the opinion of the Planning Commission are necessary to provide adequate protection to the neighborhood and to abutting properties and subject further to a public hearing in accord with § 82-34(C).”

10. At the conclusion of the Planning Commission meeting, the site plan was approved with several changes, including prohibiting the use of an out of door speaker system.

11. On January 29, 2018, Roberts Real Estate filed an appeal with the Charlotte Zoning Board of Appeals. Under the Charlotte Zoning Ordinance, the City Council acts as the Zoning Board of Appeals.

12. The applicable provisions of the Charlotte Zoning Code that apply to appeals such as this are as follows:

§ 82-59 JURISDICTION.

(A) The Zoning Board of Appeals shall not have the power to alter or change the zoning district classification of any property, nor to make any change in the terms of this chapter, but does have power to act on those matters where this chapter provides for an administrative review, interpretation, exception or special approval permit and to authorize a variance as defined in this section and laws of the state. These powers include the following.

(1) *Administrative review.* To hear and decide appeals where it is alleged by the applicant that there is an error in any order, requirement, permit, decision or refusal made by the Building Official or any other administrative official in carrying out or enforcing any provisions of this chapter.

* * *

§ 82-60 ORDERS.

In exercising the powers provided in § **82-59**, the Board may 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 Building Official from whom the appeal is taken.

13. On February 26, 2018, a public hearing was held where representatives of Roberts Real Estate set forth the basis of their appeal.

14. A further hearing was held on September 24, 2018, pursuant to an order of remand from the Eaton County Circuit Court. Again, at that time, representatives of Roberts Real Estate presented further arguments and evidence regarding their appeal. At both Zoning Board of Appeals' hearings, a number of neighbors and citizens appeared, with the largest number in opposition to overturning the decision of the Planning Commission to prohibit the out of door speaker system.

15. The City of Charlotte regulates noise in two specific ordinances. The Zoning Code provides, at § 82-472(5), as follows:

“(5) Noise. The emission of measurable noises from the premises shall not exceed 60 decibels as measured at the boundary property lines, except where normal street traffic noises exceed 60 decibels during such periods, the measurable noise emanating from such premises may equal, but not exceed, such traffic noises. This provision shall apply in all districts except as specified in this section for the I Districts.”

16. At Chapter 52, § 52-71 and 52-72, the Charlotte City Code regulates noise as follows:

§ 52-71 UNLAWFUL ACTS.

It shall be unlawful for any person to make, continue or cause to be made or continued, any loud, unnecessary or unusual noise, or any noise that either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of others within the limits of the city.

* * *

§ 52-72 ENUMERATION OF SPECIFIC OFFENSES.

The following acts, among others, are declared to be loud, disturbing and unnecessary noises in violation of this article, but their enumeration shall not be deemed to be exclusive.

* * *

(B) Radios, phonographs, and the like. The playing, using or operating, or permitting to be played, used or operated, of any radio receiving set, musical

instrument, phonograph, or other machine or device for the producing or reproducing of sound in such manner as to disturb the peace, quiet and comfort of the neighboring inhabitants, or at any time with louder volume than is necessary for convenient hearing for the persons who are in the room, vehicle or chamber in which such machine or device is operated, and who are voluntary listeners thereto. The operation of any such set, instrument, phonograph, machine or device in such a manner as to be plainly audible at a distance of 50 feet from the building, structure or vehicle in which it is located shall be prima facie evidence of a violation of this section.

17. This Dairy Queen and updated site is immediately adjacent to neighbors living in single family dwellings on the north, east and to the south. The speaker as designed is on a curve and it points directly at the northernmost boundary. The speaker, if developed, would be approximately 32 feet from the northern boundary. The speaker would be located so that it appears it will emanate noise off of an onsite storage building to the north and the east of the speaker.

18. Roberts Real Estate was urged to build a two-window ordering system, but did not do so.

19. This property is located in an historic residential district within the City of Charlotte, with its western boundary on north-south Cochran Avenue.

20. Roberts Real Estate operates this business Mondays through Fridays from 11:00 a.m. to 9:00 p.m., Saturdays from 11:00 a.m. to 10:00 p.m., and Sundays from noon to 9:00 p.m.

21. Brett Roberts, owner of the applicant, Roberts Real Estate, stated that the daily operation is busy at the noon time hour, then slows down until school is let out, then slows down just around dinnertime and accelerates with the after dinner customers. The very busiest time of the year is summer, with the busiest hours being between 6:30 p.m. and 8:30 to 9:00 p.m.

22. Mr. Roberts stated that the speaker system would save approximately one-third of the time for an order, with the average order taking approximately three minutes. The current time, by his calculation, is nine minutes per customer when multiple vehicles are present.

23. The speaker system would operate whereby a car would drive up, the speaker would turn on, an order would be placed, and then the speaker would go off.

24. Other than the vinyl fence, Roberts Real Estate has put up no sound baffling to minimize the noise. Mr. Roberts indicated that there was no intention to install any additional sound baffling or noise reduction system.

25. Mr. Roberts stated that he had obtained a proposal from the speaker system

installer that indicated the sound level was calculated to be at 60 decibels at the property line. Attached is a copy of the letter.

26. Mr. Roberts indicated, however, that no actual tests were undertaken to determine the sound levels at the property line, as it was, in his opinion, too expensive. He stated it would cost \$4,000.

27. Under the site plan, there are no limitations on the hours of operation imposed and Roberts Real Estate, or any other owner, could, in its business discretion, operate the Dairy Queen, and the onsite out of door speaker system, at hours later than 10:00 p.m.

28. The adjoining neighbor to the north stated that this development has already brought increased noise from trucks, cars and motorcycles using the drive through, and from other users of the Dairy Queen.

29. Members of the public stated that in their experience, when people use the speaker system, many people seem inclined to yell into the system, in order to make sure that they are heard.

30. From the presentation, Mr. Roberts indicated that he would be able to serve more customers, more quickly, with the speaker system installed.

31. An increase in customer usage of the site with an out of door speaker system, particularly in the prime hours during the summer, could generate noise that could be repetitive, continuous and plainly audible at the homes of the adjoining neighbors to the east.

32. From common experience, it is recognized that during the summertime, many people have their windows and doors open for fresh air, and out of doors, which increases the likelihood of plainly hearing the sounds at the adjacent properties.

33. Roberts Real Estate provided photos of a traffic backup taken in May.

34. Neighbors stated that there were no unusual traffic backups.

35. Roberts Real Estate, as the applicant, has the burden of showing that it can meet the requirements of the City's ordinances as it relates to the regulation of noise.

CONCLUSIONS

The Zoning Board of Appeals concludes as follows:

36. The Planning Commission has the authority to impose reasonable restrictions and it has the authority to impose conditions which in the opinion of the Planning Commission are

necessary to provide adequate protection to the neighborhood and to abutting properties. See § 82-34(C).

37. The question is whether the imposition of no out of door speaker system is a reasonable condition.

38. The property has a history as residential property recently rezoned, and it specifically abuts single family dwellings.

39. Under Chapter 52-72-71 and 52-72(B), the applicant has the burden of showing that the out of door system will not be plainly audible at a distance of 50 feet.

40. In the opinion of the Zoning Board of Appeals, the applicant has not met that burden of proof.

41. In the letter presented by the installer, he set forth his statement of the operation of the speaker. The letter did indicate, however, that he took sound readings without a car present, so it does not represent an actual test on how this system would perform onsite when installed.

42. Roberts Real Estate has provided no actual onsite testing, having explained that it thought the test was too expensive. It has provided no other evidence regarding projected sound levels from the speaker system.

DECISION OF THE ZONING BOARD OF APPEALS

A. Based on the foregoing, the Zoning Board of Appeals is persuaded by the testimony of the abutting landowners that the sound could be highly repetitive, continuous and plainly audible, particularly at prime hours in the summertime between 6:30 p.m. and 8:30 to 9:00 p.m. and at a time when, for many people, their doors and windows would be open.

B. The Zoning Board of Appeals did not find that the issues regarding traffic raised by Roberts Real Estate are material or significant. The statements of adjoining landowners who live on South Cochran stated that they have not observed the traffic and in particular, one stated that since the opening of the property, he has had no problems driving into, or out of, his driveway.

C. The Board recognizes that there were photos from sometime in May when there was a line of cars, but takes note that there was no photographic evidence of any backups in traffic at any time since the photos were taken.

D. Based on the foregoing, the Zoning Board of Appeals finds that it was reasonable to prohibit an out of door speaker system on this property.

E. The Zoning Board of Appeals finds that no error was committed by the Planning Commission, as required by § 82-59(A)(1).

F. The Board finds that even assuming that the Board has all of the powers of the Planning Commission, as provided at § 82-60 of the Charlotte Zoning Code, it believes that prohibiting an out of door speaker system is prudent and necessary to provide adequate protection to the neighborhood and to abutting properties.

G. The Board finds that Roberts Real Estate provided no additional evidence regarding the proposed sound levels from the speaker system to be installed.

H. The Board finds that it is important, in making this decision, that Roberts Real Estate has provided no sound baffling or sound reduction system on the site.



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September 21, 2018

Brett Roberts

RE: Dairy Queen Charlotte

You have engaged me to install an outdoor speaker at the Dairy Queen located in Charlotte Michigan if that speaker is approved by the Charlotte Zoning Board of Appeals. Unfortunately, I am on vacation with my family and will be unable to attend the meeting of the Charlotte Zoning Board of Appeals on September 24, 2018. This letter, however, contains what I would like the Board to know.

The speaker at the Charlotte Dairy Queen will be installed such that its Sound Pressure Level (SPL) will be no more than 78 decibels (dB) at 4 feet away from the speaker. In an outdoor environment, the sound pressure levels decrease by 6 dB each time the distance from the source is doubled. Thus, the speaker SPL at 8 feet away will be no more than 72 dB, the SPL at 16 feet away will be no more than 66 dB, and the SPL at 32 feet away will be no more than 60 dB.

I have sampled a number of local drive thru intercoms and took SPL readings with a Simpson model 886 Sound Level meter type 2 set for an A weighted average set on SLOW, which is how OSHA reading are meant to be taken. I found that the ambient noise, without a car present in the drive-through lane, was between 65 and 74 dB. Thus, at the northern property line of the Dairy Queen, which is the closest property line and is 32 feet from the proposed speaker location, the SPL from the speaker is expected to be no more than 60 dB, which is below the ambient noise level and essentially inaudible. This is especially true because the speaker to be installed in the Dairy Queen is pointed to the east, not to the north. The SPL from the speaker will be much less at the other property lines, which are much further away.

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