



MIDDLEBURG TOWN COUNCIL
Tuesday, July 6, 2010
Town Office, 10 W. Marshall Street



8:00 a.m.

REGULAR WORK SESSION

PENDING APPROVAL

PRESENT: Mayor Betsy A. Davis
Vice Mayor C. Darlene Kirk
Councilmember Kevin Hazard
Councilmember Catherine "Bundles" Murdock
Councilmember Kathy Jo Shea
Councilmember Mark T. Snyder
Councilmember David B. Stewart

STAFF: Rhonda S. North, MMC, Town Clerk
Steven L. Webber, Chief of Police
David M. Beniamino, AICP, Town Planner

ABSENT: Councilmember Trowbridge Littleton

The Town Council of the Town of Middleburg, Virginia held their regular monthly work session on Tuesday, July 6, 2010 in the Town Hall Council Chambers, located at 10 W. Marshall Street. Mayor Davis called the meeting to order at 8:13 a.m.

Mayor Davis welcomed Councilmembers Hazard and Stewart to the Town Council. She also congratulated Vice Mayor Kirk and Councilmember Snyder on their re-election. Councilmember Murdock congratulated Mayor Davis on her re-election.

Council Discussion (continued) – Outdoor Display of Merchandise

Town Planner Beniamino reminded Council that they discussed this item several meetings ago, at which time, they tabled further discussion until more members of Council could be present. He noted that the agenda packet contained copies of e-mails that have been exchanged between the Town staff and representatives from the Virginia Department of Transportation (VDOT). Mr. Beniamino reminded Council that they asked about the difference between the outdoor display of retail merchandise and ornamental displays, such as flowers; and, advised that the e-mails contained VDOT's regulations for each. He noted that one section identified prohibited uses within the rights-of-way, such as signs, vendors and dwellings, while the other section dealt with ornamental items that did not interfere with the right-of-way. Mr. Beniamino confirmed that flower boxes and other types of ornamental displays were allowed with a permit. He advised that as to vendors within the right-of-way, permits would not be issued for the operation of businesses. Mr. Beniamino noted that newspaper boxes were allowed in the right-of-way under the First Amendment. He advised Council that the Town's annual sidewalk sale was allowed under a permit as a Town-sponsored event for a small period of time; and, noted that it would not be allowed on a more permanent basis.

Mayor Davis reminded Council that the information provided pertained to sidewalks. She noted that the Three Crowns had an area that was not a part of the public sidewalk; and, asked whether they could display merchandise in that area. Town Planner Beniamino cited the example of Southern States; and, explained that they had a site plan that showed the outdoor storage of materials. He noted that Southern States had gone beyond what was allowed by the site plan; and, advised that on an annual basis, he would speak with the General Manager to explain what the site plan allowed. Mr. Beniamino explained that flowers were not allowed on the other side of the sidewalk; and, noted that he just had a conversation with them last weekend about the wheel barrels that were located along The Plains Road that were creating a site distance issue. He advised Council that the Three Crowns would be allowed to display merchandise if they had a site plan that was approved by the Planning Commission for the outdoor storage of materials. Mr. Beniamino noted that VDOT's regulations only applied to the right-of-way. He reminded Council that Washington Street consisted of a sixty foot right-of-way; and, suggested that the area mentioned by the Mayor could be located within it.

Vice Mayor Kirk asked whether anyone had applied for VDOT permits for the planters. Town Planner Beniamino expressed his belief that they had not. Councilmember Snyder advised that he would be surprised if they had; and, noted that the Town had benches in the right-of-way. Town Planner Beniamino suggested that the Town could apply for a town-wide permit if desired.

Vice Mayor Kirk noted that Crème de la Crème had baskets sitting on the sidewalk. She asked whether they would have to remove them. Town Planner Beniamino confirmed they would under the ordinance. Vice Mayor Kirk noted that they also had one rack of scarves; and, asked whether it was correct that they were also not allowed on the sidewalk. Town Planner Beniamino confirmed this was correct.

Councilmember Hazard noted that the information provided by VDOT indicated that this was related to vendors in the right-of-way. He asked how the term "vendor" was defined. Mr. Hazard noted that he could read the language two ways; and, advised that one was for a sidewalk vendor with a cart. He asked whether a business was a vendor if it was located in a building but put merchandise on the sidewalk. Town Planner Beniamino noted that these were VDOT's rules; therefore, he was not comfortable defining a vendor. He expressed his opinion as a Zoning Administrator that a store owner who sold or was attempting to sell merchandise on a sidewalk was a vendor.

Mayor Davis expressed her opinion that the merchandise on the sidewalks was more for display purposes in order to entice customers into the store. Vice Mayor Kirk noted that the jockey statues located at the Red Fox Inn were also a display; and, advised that VDOT made them remove the statues. Mayor Davis noted that, in that case, the Inn needed to apply for a permit and failed to do so. Jerry Schiro advised Council that VDOT asked the Inn to apply for a permit; however, he did not know whether it would have been granted. He noted that they did not apply. Mr. Schiro expressed his opinion that the question not so much the status of the person as it was the obstacles that were created in the sidewalk.

Mayor Davis noted that the rack of scarves in front of Lou Lou II was usually in line with the stairs; therefore, it was not where pedestrians would be walking. She further noted that Duchessa also had a mannequin on their steps. Town Planner Beniamino explained that the mannequin was a different issue. He further explained that all of the town's businesses were located within the Historic District. Mr. Beniamino reminded Council that when a business wished to install a sign or paint their door, they must go before the HDRC for approval. He advised that the outdoor display of merchandise also violated the Historic District ordinance; and, expressed his opinion that the HDRC would not approve a mannequin in the Historic District.

Town Planner Beniamino advised Council that he has been holding off on enforcement of the ordinances because he wanted to make sure the Council was in agreement as to how they wished to proceed. He noted that VDOT controlled the placement of signs in the right-of-way. Mr. Beniamino advised that when he saw a sign in the right-of-way, he would remove it even though technically he did not have to. He noted that the Town could enforce VDOT sign regulations or it could do like Loudoun County and allow a citizen task force to do so. Mr. Beniamino advised that in the case of the latter option, the General Assembly recently passed legislation that made the volunteers liable for removing any signs they were not supposed to take. He explained that, in the case of Middleburg, he knew where the right-of-way was located so he removed the signs. Mr. Beniamino reiterated that he did not have to do so since this was a VDOT regulation.

Councilmember Murdock asked about the sandwich board signs. Town Planner Beniamino reminded Council that when they adopted the regulation to allow them, he suggested they should not do so. Councilmember Murdock noted that, at that time, Council had a long discussion about the signs. She advised that she was aware of two sandwich board signs; and, reminded Council that the point of them was to get people into the businesses. Town Planner Beniamino advised Council that many of the sandwich board signs were not in compliance with the Town's ordinance. He explained that the ordinance allowed blackboard-type signs to advertise items such as lunch specials; and, noted that they were not allowed as an addition where the business had a sign on the building. Mr. Beniamino reiterated that some of the sandwich board signs were permanent signs that were not in compliance with the ordinance.

Councilmember Murdock advised that she could not say that scarves were more of a hindrance than an a-framed sign. She expressed her opinion that now was not the time to "come down like a ton of bricks" on the businesses. Vice Mayor Kirk expressed her opinion that the Town did not need to "come down like a ton of bricks"; however, it did need to get items off the sidewalk. She reminded Council that they wanted people to come to Town; however, they would not do so if they could not walk on the sidewalk. Ms. Kirk reminded Council of the need to keep the sidewalks clear for liability purposes.

Councilmember Murdock expressed her opinion that the sidewalks were already narrow and dangerous due to the uneven bricks. She suggested that this was worse than having a rack of scarves on the sidewalk. Ms. Murdock further suggested that if more items were placed on the sidewalks, it may slow pedestrians down so they would not trip on the uneven bricks. She expressed her opinion that enforcing the ordinances would result in the businesses being in an "uproar". Ms. Murdock suggested it was not fair to enforce the regulations at this time.

Councilmember Hazard noted that the information provided by VDOT indicated that they would issue a single-use permit. He asked whether this was per vendor or whether the Town could get a single-use permit for the display of merchandise. Town Planner Beniamino explained that this was for events such as the sidewalk sale, not for the long-term display of merchandise. He reminded Council of their previous discussion related to Madison Street, the Bluemont Concerts and the Farmers Market. Mr. Beniamino noted that a permit could be issued for a limited time, but not indefinitely. He reminded Council of the time and effort required to obtain a VDOT permit.

Councilmember Shea advised Council that she asked that this item be placed on the agenda because she felt the Council needed to address the issue. She noted that the problem was that the encroachments on the sidewalks have increased. Ms. Shea advised that as she tried to walk down the street in front of the Southern States, she had to "jog" around the plants. She expressed her opinion that the Town could not go to Southern States and tell them they could not display merchandise on the sidewalks, but allow Lou Lou's to do so. Ms. Shea expressed her opinion that the Council needed to decide what the regulations would be.

Mayor Davis agreed there were plants located in the sidewalk that pedestrians must walk around; however, she noted that they were not legal. Vice Mayor Kirk noted that Crème de la Crème also placed items in the sidewalk that pedestrians must walk around.

Mayor Davis explained that she was trying to reach a happy medium where the Town would not tell everyone to take all of their items in; and, suggested it would be nice to have some things on the sidewalk if they were done “tastefully” and so as to not impede foot traffic. She expressed her opinion that most of the merchandise was not located in the walk able portions of the sidewalk. Ms. Davis agreed that sometimes Crème de le Crème has taken their displays too far.

Councilmember Shea expressed her opinion that the Council could not let one business display merchandise, but not another. She noted that this would then become a question of what was okay and what was not. Ms. Shea advised that this would not provide a standard; and, explained that this concerned her.

Vice Mayor Kirk agreed with Mayor Davis; however, she noted that what may be tasteful for one person, may not be for another. She suggested the need for a rule that was standard; and, expressed her opinion that it should say that items could not be displayed on the sidewalk.

Councilmember Shea expressed her opinion that the staff needed to ensure that the Town’s rules were not in conflict with VDOT’s. Mr. Schiro expressed his opinion that the basic issue was that unlike other communities, the Town did not own and control its streets and rights-of-way. He advised Council that Middleburg had no agreement with VDOT on the sidewalks or who would maintain them and enforce the regulations. Mr. Schiro suggested that the absence of such an agreement was probably an opportunity for the Town. He reminded Council that when he spoke with VDOT’s District Engineer regarding the slip and fall incident at the Red Fox Inn, he was amenable to negotiating an agreement with the Town. Mr. Schiro suggested that such an agreement could identify not only the maintenance responsibilities, but also who would control the sidewalks. He cautioned, however, that the Council needed to be careful that they did not assume control over and end up with the maintenance responsibilities by default.

Councilmember Murdock inquired as to who paid for the sidewalks. Mr. Schiro reminded Council that the Town did in order to provide enhanced maintenance. He noted that they were VDOT’s responsibility to maintain; however, they would simply cold patch the uneven brick, whereas the Town maintained them as if they were a Town park. Mr. Schiro reiterated that the Town maintained the sidewalks to a higher standard than VDOT. He reminded Council that when someone fell at the Red Fox Inn, he negotiated with VDOT to maintain that VDOT has responsibility for the sidewalk. Mr. Schiro advised Council that the liability then fell on VDOT. He expressed his opinion that there were a lot worse obstacles, such as steps and landings; and, reiterated that the Council needed to be careful to not to get into those responsibilities.

Mayor Davis noted that one of VDOT’s e-mails stated that there should be a written agreement; and, that they were trying to find a standard form. Vice Mayor Kirk agreed the Town should enter into one. Mr. Schiro suggested that the Council could decide the degree to which it wanted to allow encroachments; and, then negotiate that as a part of the agreement. He cautioned them to be careful that they did not assume maintenance responsibilities for the sidewalks as the Town did not have the budget to support it. Councilmember Snyder suggested the standard should be to maintain pedestrian access.

Councilmember Hazard asked whether there was a minimum sidewalk width requirement. He noted that the sidewalk in front of Southern States was only three feet wide. Town Planner Beniamino advised that the ADA standard was five feet; and, confirmed that a lot of the sidewalks in Middleburg did not meet the ADA width requirements.

Councilmember Hazard expressed his opinion that the sidewalk in front of Crème de la Crème was probably six feet wide. He suggested the Council craft an ordinance that said that if the sidewalk was five feet or greater, the merchant could have display space against the building.

Vice Mayor Kirk noted that the problem was that the merchants started out small and then encroached more. She advised Council that she saw a lot of merchandise displayed this weekend in front of Crème de la Crème, as well as Southern States. Ms. Kirk reiterated that they started small and increased the amount of merchandise.

Mayor Davis suggested the Council start with a plan so the staff would have a tool for enforcement. Councilmember Shea expressed her opinion that there was a step in between that needed to be taken first. She suggested that if the Council agreed that it wanted a five foot clearance, it should go to VDOT and say ‘we need an agreement’, which the staff could then enforce. Vice Mayor Kirk suggested that in the interim, the staff should go to the businesses to explain to them that they could not display merchandise on the sidewalk and what would happen if they continued to do so. She asked whether the repercussion of doing so was a fine or a letter. Town Planner Beniamino reminded Council that the Town had an ordinance; and, suggested that it was a convoluted set of rules. He expressed his opinion that when talking about encroachments in the right-of-way, the Town would have to say “get it out or we will take it”. Mr. Beniamino explained that the Town could not cite them for a zoning violation if they did not own the property; therefore, there was not much he could do from an enforcement standpoint. He suggested the Town could put an ordinance on the books that could be enforced. Councilmember Snyder suggested the standard be that there must be access in front of the store that allowed a wheel chair to pass; and, expressed his opinion that the standard could be based upon the percentage of sidewalk width.

Vice Mayor Kirk suggested the Council must first see what VDOT would allow. She noted that the Town did not want to take over maintenance responsibilities. Ms. Kirk encouraged caution if the Town were to allow displays on a percentage basis. Mr. Schiro expressed his opinion that if the Town adopted an ordinance, which it did not enforce, it may have some liability.

Town Planner Beniamino reminded Council that this was a different situation than normal; and, explained that most of the merchandise consisted of removable items that came on and off the sidewalks every day. He asked whether he would have to measure the sidewalks daily. Mr. Beniamino noted that it could be done; however, he suggested it would be difficult to enforce. Vice Mayor Kirk expressed her opinion that this would not be the best use of staff time.

Mayor Davis explained that she was trying to make Middleburg pedestrian friendly and allow businesses to have an enticement for customers to enter the stores. She reminded Council that the initial complaint was not that pedestrians could not get around, but rather was the visual appearance. Ms. Davis advised Council that she has also heard just as many individuals saying they liked seeing merchandise outside.

Vice Mayor Kirk suggested the need for the HDRC’s input. Town Planner Beniamino noted that the HDRC had a process that applicants must go through; and, advised that in some cases, it was a pretty technical architectural review. He cited the example of the Fun Shop, which just applied to paint their door. Mr. Beniamino noted that while they liked the color, the HDRC did not approve the application because there were additional areas where they wanted the colors to

“jive”. He explained that this occurred because the Fun Shop painted the door a different color; and, did not realize they needed to submit an application. Mayor Davis clarified that her sister did this project; and, that she was not aware that the door had been painted blue until she saw it. Town Planner Beniamino explained that if the Fun Shop had not painted the door before submitting the application, it could have been a two month process to get the door painted. He noted that the members of the HDRC took their job seriously. Mr. Beniamino expressed fear that what the Council was discussing as being good for business would not pass the HDRC’s muster as it would not be considered to be historic. He asked how they could tell one person that they must get a feature approved when their neighbor could stick a mannequin in front of their store.

Councilmember Hazard suggested the Council should have the Town Planner draft a standard for their consideration as a first step. Mayor Davis asked whether the staff should talk to VDOT first. Councilmember Hazard agreed they should and then draft a minimum standard. Mayor Davis noted that most towns owned their own streets. She asked whether there were any other towns that the staff could look toward to see if they had an ordinance. Town Planner Beniamino noted that the City of Winchester owned the downtown mall; and, advised that he helped to develop their regulations. Mayor Davis advised that she would like to see something from towns that were similar to Middleburg in that they did not own their streets. Councilmember Shea noted the need to make sure the Town was covered legally. She recommended the Town Attorney review the draft as well.

Town Planner Beniamino recommended that he attend a Biz Buzz meeting to talk to the business owners. Councilmember Murdock suggested the Council discuss this issue first. She noted that there was a lot of raw emotion in the business community; and, suggested the need to handle this matter very carefully. Vice Mayor Kirk noted that the staff should not go to a Biz Buzz meeting now, but rather should wait until the Council was at the finished stage. She noted that the Economic Development Coordinator could get feedback on how the business community felt. Councilmember Murdock expressed her opinion that she already has. She suggested that the Council needed to start with the agreement with VDOT. Mr. Schiro agreed this should be the foundation. Councilmember Hazard agreed the Town should secure an agreement with VDOT. Councilmember Murdock agreed; and, noted that the Town did not want to maintain the sidewalks.

Councilmember Snyder expressed his opinion that VDOT would not enforce regulations regarding the sidewalks; and, noted that they never had. Mayor Davis suggested the agreement be set up so the Town could handle the enforcement. Town Planner Beniamino noted that VDOT would get involved when it received an official complaint; and, cited their involvement when an individual complained to them about the Bluemont Concerts. He suggested that if someone wrote to VDOT to complain about the display of merchandise, they would have no choice but to get involved. Mr. Schiro confirmed that once VDOT was put on notice, it would act. He expressed his opinion that if this matter went to VDOT, they would tell the merchants to take their items off the sidewalk. Vice Mayor Kirk suggested this would occur unless the Town took over the sidewalks completely. Mr. Schiro confirmed it would probably have to take over the liability.

Town Planner Beniamino noted that Winchester required businesses placing merchandise on a public sidewalk to have their own insurance. Mayor Davis suggested the Town work something into the ordinance that would require each business choosing to place items on the sidewalk to sign a document stating that any injuries caused by the merchandise would be their responsibility. Mr. Schiro expressed his opinion that the Town could not delegate its liability responsibilities. Town Planner Beniamino agreed an individual could still sue the Town. He noted that the business should have to have their own insurance in the event of a trip and fall; and, suggested that if they did not, the Town would be an easy target and become part of the lawsuit. Councilmember Hazard expressed his opinion that the Town would be sued anyway.

Town Planner Beniamino confirmed that he would work on finding out if other towns had an ordinance; and, then work to draft one. He noted that he would also talk to VDOT. Vice Mayor Kirk noted the need to look at the bigger picture; and, suggested that the HDRC weigh in on the issue. Councilmember Shea asked whether the Council was in agreement to move ahead to address these issues. Council agreed it was.

Council Approval – Replacement of furnace/AC unit – Town Office

Mayor Davis advised Council that she and Mr. Schiro approved the replacement of the unit as it was urgent at the time. Vice Mayor Kirk reminded Council that purchases such as this were supposed to come to the Council before they were made.

Councilmember Snyder moved, seconded by Vice Mayor Kirk, that Council approve the expense to replace the air conditioning unit, in the amount of \$6,560, to Morgan Oil Inc. for an emergency repair.

Vote: Yes – Councilmembers Kirk, Hazard, Murdock, Shea, Snyder and Stewart

No – N/A

Abstain: N/A

Absent: Councilmember Littleton

(Mayor Davis did not vote as there was no tie to require her vote)

Vice Mayor Kirk reiterated that expenses such as this must come before the Council. Mayor Davis explained that the unit needed to be replaced right away; therefore, she gave the approval. She noted that she sent e-mails to the Council regarding this matter. Councilmember Snyder agreed it was an emergency situation; and, noted that in situations such as this, the purchase could be approved after the fact.

Review of July 8th Meeting Agenda

Mayor Davis noted that the agenda contained a public hearing for a zoning map amendment for 1107 West Washington Street. She asked whether the members of Council had any questions related to this item. Town Planner Beniamino expressed his opinion that the applicant's attorney would talk to the Council about the proffer condition related to the voluntary HDRC review. Mayor Davis noted that when she read that section, she asked herself why this would fall under the HDRC's review when the property was not located in the Historic District. She further noted that she has read the Planning Commission meeting minutes related to this topic. Town Planner Beniamino expressed his opinion that the attorney would ask why this should be proffered if it was voluntary and would not be enforced. He noted that, as proposed, the Town would not do anything if the applicant brought forth plans that the HDRC hated; and, explained that the proffers would allow them to build it anyway. Mayor Davis expressed her opinion that the HDRC would offer suggestions that it would hope would be taken into consideration.

Councilmember Snyder asked why the property was not being proposed for rezoning to R-1 Residential. Town Planner Beniamino explained that the minimum lot size in the R-1 District was too large to allow the property to be subdivided into two lots. He noted that he initially recommended rezoning to R-2; however, the Planning Commission suggested R-3 since the property was surrounded by R-3 zoning.

Mayor Davis asked whether the lot acreage size was listed correctly in the agenda summary sheet. Councilmember Hazard confirmed it should be .48 acres, not 4.48 acres. Town Clerk North noted that this was a typo.

Town Planner Beniamino explained that the applicant wanted to remove one house and rebuild it. He further explained that because the Town Code did not allow two houses on one lot, they had to seek a rezoning. Mr. Beniamino noted that this rezoning would result in the property being connected to Town water and sewer.

Mayor Davis noted that the agenda contained a special use permit request from the Middleburg Fire Department. Town Planner Beniamino reminded Council that they must refer this request to the Planning Commission for their recommendation. He explained that the Fire Department has redesigned the renovation plans; therefore, they must go back through the permit process. Mr. Beniamino noted that they were also seeking a waiver of the permit fees. He recommended that the Council not waive the fees to reimburse the Town for the Town Attorney's reviews.

Closed Session - Personnel

Vice Mayor Kirk moved, seconded by Councilmember Shea, that Council go into closed session as allowed under the Virginia Freedom of Information Act Section 2.2-3711(A)(1) pertaining to the discussion, consideration or interviews of prospective candidates for employment, assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of the public body. Vice Mayor Kirk further moved, seconded by Councilmember Shea, that this discussion be limited to the hiring of a Town Administrator. Vice Mayor Kirk further moved, seconded by Councilmember Shea, that the Council thereafter reconvene in open session for action as appropriate.

Vote: Yes – Councilmembers Kirk, Hazard, Murdock, Shea, Snyder and Stewart
No – N/A
Abstain: N/A
Absent: Councilmember Littleton
(Mayor Davis did not vote as there was no tie to require her vote)

Mayor Davis asked that Council certify that to the best of each member's knowledge (i) only public business matters lawfully exempted from open meeting requirements under the Virginia Freedom of Information Act and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the closed meeting, which the members so did.

There being no further business, a motion was made to adjourn the meeting at 9:05 a.m.

APPROVED:

Betsy A. Davis, MAYOR

ATTEST:

Rhonda S. North, MMC, Town Clerk