

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION**

CATHERINE H. BARBER MEMORIAL  
SHELTER, Inc.

*Plaintiff,*

v.

BOARD OF ADJUSTMENT OF THE  
TOWN OF NORTH WILKESBORO and  
the TOWN OF NORTH WILKESBORO,  
a municipality,

*Defendants.*

Civil Action No.: 5:20-cv-163

**Complaint and Petition for a North  
Carolina Writ of Certiorari**

**INTRODUCTION**

1. This civil-rights case challenges discrimination in violation of the Equal Protection Clause and violations of North Carolina property law. Plaintiff Catherine H. Barber Memorial Shelter applied to the Town of North Wilkesboro for a conditional-use permit to operate a small overnight shelter for those experiencing temporary homelessness mainly due to domestic abuse, financial emergency, family breakdown, or health crisis. The Town requires homeless shelters, but not similarly situated land uses such as “emergency shelters,” to endure the lengthy, expensive, and burdensome process of obtaining a conditional-use permit. Furthermore, despite agreeing that the Shelter satisfied all zoning criteria for a homeless shelter, the Town Board of Adjustment nevertheless denied the permit for patently irrational reasons. For example, homeless shelters are required to be in the Highway Business district—and hence must be next to busy roads—but the Board of Adjustment denied the conditional-use permit on public-safety grounds because the Shelter would be next to a busy road. The Town of North Wilkesboro’s Zoning Ordinance and the Board of Adjustment’s decision lack *any* rational basis

in their treatment of homeless shelters, thus violating the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Likewise, the Board of Adjustment's decision does not comply with North Carolina state law. The Shelter is entitled to declaratory and injunctive relief, as well as compensatory and nominal damages, to redress the constitutional and statutory violations and enable the Shelter to operate free of irrational and illegal government action.

### **JURISDICTION AND VENUE**

2. Plaintiff brings this civil-rights lawsuit under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02.

3. Plaintiff seeks declaratory and injunctive relief, as well as compensatory and nominal damages, to redress past harms and enjoin future harms that Defendants Town of North Wilkesboro and its Board of Adjustment caused and continue to cause in, respectively, requiring and denying Plaintiff a conditional-use permit to operate a small homeless shelter at 106 Elkin Highway, North Wilkesboro, N.C. 28659.

4. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

5. This Court also has supplemental jurisdiction under 28 U.S.C. § 1367 to decide Plaintiff's state-law petition under N.C.G.S. § 160D-1403.1(d).<sup>1</sup>

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<sup>1</sup> The Board of Adjustment recognized that Chapter 160D of the North Carolina General Statutes applies to proceedings concerning the Barber Shelter's application for a conditional-use permit. North Carolina recently amended its land-use laws to add Chapter 160D. The predecessor to Chapter 160D is Chapter 160A. Several bills affecting these chapters interacted, including their effective and repeal dates. To the extent any provision of Chapter 160D is deemed not to apply here, references to a Chapter 160D statute should be read to include its Chapter 160A predecessor. The predecessor provision of N.C.G.S. § 160D-1403.1 is N.C.G.S. § 160A-393.1; the predecessor of N.C.G.S. § 160D-1402 is N.C.G.S. § 160A-393; and the predecessor of N.C.G.S. §§ 160D-302, 406 is N.C.G.S. § 160A-388.

6. Venue lies in this Court under 28 U.S.C. § 1391(b).

### **PARTIES**

7. Plaintiff Catherine H. Barber Memorial Shelter, Inc. (“Barber Shelter” or “Shelter”) is a North Carolina nonprofit corporation in good standing. The I.R.S. has recognized the Barber Shelter as a charitable entity under § 501(c)(3) of the Internal Revenue Code.

8. Defendant Town of North Wilkesboro (“Town”) is a municipality in Wilkes County, North Carolina organized under the laws of North Carolina and the Town Charter.

9. Defendant Board of Adjustment of the Town of North Wilkesboro was created by the Town of North Wilkesboro via ordinance and is authorized to, among other things, grant conditional-use permits. N.C.G.S. § 160D-302; North Wilkesboro Zoning Ordinance § 3.2(B)(2)(c).

### **FACTUAL ALLEGATIONS**

#### **A. The Barber Shelter and Its Need to Relocate After 31 Years.**

10. The Barber Shelter is a 501(c)(3) nonprofit that provides overnight shelter on a temporary basis to those experiencing homelessness in the Town of North Wilkesboro, North Carolina, and in the wider Wilkes County community in which the Town is located.

11. The Barber Shelter is run by an 11-member board of directors, all of whom are volunteers.

12. The Barber Shelter’s current annual budget is approximately \$50,000, which the Shelter earns through fundraising, donations, and grants.

13. The Barber Shelter has two employees who serve as night managers during the Shelter’s operating hours of 6:30 p.m. to 6:30 a.m.

14. The Barber Shelter opened in 1987 in the Town of North Wilkesboro, originally operating out of a church before moving to a single-family home at 86 Sparta Road, North Wilkesboro, in March 1988.

15. The owner of the home at 86 Sparta Road charged the Barber Shelter below-market rent to support the Shelter's mission.

16. The Barber Shelter's clients consist mainly of people experiencing temporary homelessness due to domestic abuse, sudden job loss, a family breakdown, or health crisis.

17. Some clients of the Barber Shelter also struggle with substance abuse.

18. Only a small fraction of the Barber Shelter's clients—approximately five percent—are homeless on a long-term basis.

19. The Barber Shelter opens at 6:30 p.m. and closes at 6:30 a.m. every day, meaning that clients must leave the premises by 6:30 a.m.

20. The Barber Shelter contracts with the Wilkes Transportation Authority to pick up the Shelter's clients at 6:30 a.m., and then drop them off again at the end of the day.

21. The Barber Shelter limits clients to 14 cumulative nights per year, unless exceptional circumstances require modest additional time. No one may stay long term.

22. The Barber Shelter has many rules to ensure the safety and welfare of its clients, as well as the safety and welfare of its neighbors.

23. The Barber Shelter's rules include, but are not limited to:

- a. No loitering in the vicinity of the Shelter;
- b. Zero tolerance for violence, theft, or threatening behavior;
- c. People with criminal records involving violence or sex crimes cannot use the Shelter;

- d. No consumption of alcohol or drugs on the premises;
  - e. No possession of illegal substances on the premises;
  - f. No possession of weapons;
  - g. No foul language or uncivil behavior;
  - h. Personal effects are subject to search;
  - i. No admittance after 10:30 p.m. except with a police escort; and
  - j. A guest's bed and sleeping area must be kept tidy.
24. All clients who use the Barber Shelter must sign an agreement consenting to the Shelter's rules.
25. Since spring 2020, the Barber Shelter has had a COVID-19 policy to reduce the risk of coronavirus transmission. The policy limits availability at the Shelter to only Wilkes County residents; requires masks, temperature checks, and hand sanitizing; and clients must fill out a questionnaire concerning their potential exposure to the disease.
26. If the Barber Shelter denies entry to someone seeking a bed, the Shelter will notify the police to ensure that the person does not loiter in the area.
27. If the Barber Shelter needs to evict a client based on a rule violation, the Shelter will notify the police to ensure that the person does not loiter in the area.
28. It is rare for the Shelter to need to ask someone to leave due to a rule violation.
29. In addition to providing a safe place to sleep, the Barber Shelter provides bathing and laundry facilities, food at night, a hot meal for breakfast, and gift cards to McDonald's.
30. The Barber Shelter works closely with its clients and local social-services providers to help the clients regain housing as soon as possible, address physical and mental health issues, and find gainful employment.

31. The Barber Shelter's rental home at 86 Sparta Road was configured for up to 10 clients per night, but the average was five to seven clients per night.

32. Although the Barber Shelter typically operated under 86 Sparta Road's 10-bed capacity, there were occasions when more than 10 clients sought shelter for the night.

33. In early 2019, the Barber Shelter decided to move from 86 Sparta Road to 108 Sparta Road, where the Shelter planned to build its own housing that could accommodate more clients.

34. Because relocating would require a variance, the Barber Shelter made the appropriate applications to the Town of North Wilkesboro Planning Department in July 2019.

35. The Town of North Wilkesboro Board of Adjustment denied the variance, and the Barber Shelter did not appeal.

36. In September 2019, the Barber Shelter's landlord at 86 Sparta Road informed the Shelter that the lease would be terminated after 31 years because the landlord purportedly wanted a tenant able to pay market rates and had concerns about the Shelter reaching capacity.

37. Faced with the imminent loss of its longtime rental home, the Barber Shelter had an urgent need to relocate.

38. In the fall of 2019, the Crossfire United Methodist Church, which has a North Wilkesboro address but is located beyond town limits, invited the Barber Shelter to temporarily relocate to the Church's property at 3200 Statesville Road.

39. From October 2019 through the present, the Barber Shelter has hosted its clients on the second floor of the Crossfire Church building.

40. Between 1987 and the present, regardless of where the Barber Shelter operated, neither the Shelter nor its clients caused crime, disorder, or nuisances on the premises or in the surrounding area.

41. Between October 2019 and the August 26, 2020 hearing, the Barber Shelter provided 1,041 bed nights to 178 people at the Crossfire Church with zero complaints from neighbors.

42. The arrangement with the Crossfire Church is temporary for two reasons: (1) the Church is located outside town, off standard bus routes, and lacks sidewalks, which makes it difficult for Barber Shelter clients to come and go; and (2) the Church eventually needs its space back.

43. Since losing its lease at 86 Sparta Road, the Barber Shelter has sought another permanent location.

44. The Barber Shelter faces serious financial obstacles in relocating because its limited annual budget of \$50,000 leaves few options for purchasing, renting, and renovating property.

45. In early 2020, Dr. Christopher Roberts, a dentist, and his wife Timberli learned of the Barber Shelter's plight and offered to donate a property that they own at 106 Elkin Highway in North Wilkesboro.

46. Dr. Roberts used 106 Elkin Highway as his dental office until moving office buildings roughly six years ago.

47. Since Dr. Roberts moved offices, 106 Elkin Highway has not been used as a business.

48. The Roberts' property at 106 Elkin Highway (pictured below) is in the Highway Business district, spans approximately one-third of an acre (approximately 13,500 square feet), contains one building (Dr. Roberts' former dental office of approximately 3,000 square feet), and has paved parking and landscaping.



49. The front door of 106 Elkin Highway is 40 feet from the curb.

50. 106 Elkin Highway is an ideal location for the Barber Shelter because: (1) the building is a perfect size for the Shelter's expansion from a 10-bed capacity to 20 beds; (2) the building has utilities and other infrastructure that will minimize renovation costs; (3) the Shelter is centrally located, near a major intersection, along bus routes, across from a streetlight, and reachable on foot via sidewalks; and (4) is within a five-minute walking distance of inexpensive providers of food and goods and services, such as a McDonald's and dollar store.

51. On October 5, 2020, the Barber Shelter and the Roberts entered into a 36-month option contract according to which the Shelter has the right to obtain 106 Elkin Highway from the Roberts upon securing the legal right to operate the Shelter at the property.



**B. 106 Elkin Road Is an Ideal Location Because It Satisfies the Zoning Ordinance’s New Requirements for a Homeless Shelter.**

52. When the Barber Shelter opened in 1987, no zoning ordinance existed that imposed additional requirements on homeless shelters or that required homeless shelters to obtain a conditional-use permit.

53. In 2018, the Town of North Wilkesboro amended its Zoning Ordinance to add specific requirements for the use of property as a “homeless shelter.”

54. The Town of North Wilkesboro amended the Zoning Ordinance to add restrictions for homeless shelters after the Town learned that a shelter in neighboring Watauga County was considering expanding into North Wilkesboro.

55. After North Wilkesboro enacted its new restrictions on homeless shelters, the shelter in Watauga County abandoned its plan to come to North Wilkesboro.

56. The Zoning Ordinance defines “homeless shelter” as “[a] short or long term shelter for persons who lack a fixed, regular and adequate nighttime residence.” § 5.3.

57. Section 11.4-11 imposes five requirements that a homeless shelter must satisfy:

- a. SPACING--A homeless shelter shall not be located within two thousand five hundred (2,500) linear feet of any other homeless shelter and within 250 linear feet from any residential use or residentially zoned property, public park, and school, as measured by a straight line from the closest structure to the proposed homeless shelter structure. . . .
- b. ACCESS--A homeless shelter shall have access to a public sidewalk[.]
- c. SUPERVISION--A homeless shelter shall provide adequate supervision and security for the number and needs of the residents. Staff shall be trained in emergency procedures (including CPR and first aid), safety plans and procedures used by the facility.
- d. HEATED SQUARE FOOTAGE--A minimum of fifty (50) square feet of heated floor area must be provided for each individual sheltered occupant.
- e. The homeless shelter must be in harmony with the area in which it is located and be in general conformity with the comprehensive plan.

58. The property at 106 Elkin Highway enables the Shelter to satisfy the five homeless-shelter criteria in section 11.4-11 of the Zoning Ordinance. Specifically:

- a. SPACING—106 Elkin Highway is more than 2,500 linear feet from any other homeless shelter (because there are no other shelters in town) and more than 250 linear feet “from any residential use or residentially zoned property, public park, and school.”
- b. ACCESS—106 Elkin Highway has new public sidewalks that the State of North Carolina built in 2020—the Shelter waited to apply for the conditional-use permit until sidewalk construction was complete.
- c. SUPERVISION—the Barber Shelter’s night staff are adequately and properly trained to supervise the approximately 20 beds that the Shelter plans to use at 106 Elkin Highway.
- d. HEATED SQUARE FOOTAGE—the 3,000-square-foot building at 106 Elkin Highway provides 150 square feet of heated floor space for the Shelter’s proposed 20 beds, which is triple the 50-square-foot minimum.
- e. HARMONY—a homeless shelter at 106 Elkin Highway is consistent with Town of Wilkesboro planning documents and in harmony with neighboring property uses, which are all non-residential uses within the Highway Business district.

**C. The Zoning Ordinance Now Also Requires Shelters to Be in the Highway Business District and Obtain a Conditional-Use Permit.**

59. Beyond the five criteria in Section 11.4-11, homeless shelters face two other requirements: They may only be located in the Highway Business district, and they must obtain a conditional-use permit from the Board of Adjustment. Zoning Ordinance §§ 3.4, 6.7.

60. The Highway Business district is “designed primarily to serve the town as compact and efficient retail shopping, consumer services and wholesaling areas along designated highways and thoroughfares . . . .” Zoning Ordinance § 6.4(H).

61. The Town deliberately chose the Highway Business district, adopting the zoning staff’s recommendation that it was the most appropriate fit for a homeless shelter due to the proximity of sidewalks and public transit stops.

62. Obtaining a conditional-use permit requires the submission of an application containing a fee, a completed form, an explanation of the proposed use of the property, a site plan, documentation of the facts supporting the application, and a list of neighboring property owners. Zoning Ordinance § 3.4(C).

63. The Town’s zoning staff reviews all conditional-use permit applications and can furnish additional evidence addressing the compliance (or lack thereof) of an application with the varying sections in the Ordinance. *See* Zoning Ordinance § 3.4(D).

64. Once the application passes the zoning staff’s review, the Board of Adjustment holds a conditional-use-permit hearing, which is a quasi-judicial hearing, to determine whether it will issue a permit. At the hearing, the applicant bears the burden of producing sufficient evidence demonstrating that the proposed use complies with the Ordinance’s requirements. Zoning Ordinance § 3.4(G).

65. The Board of Adjustment must make six specific findings of fact in order to grant a conditional-use permit, pursuant to Zoning Ordinance § 3.4(E)(2):

- a. The use will not materially endanger the public health or safety if located, designed, and proposed to be operated according to the plan submitted.
- b. The use complies with all regulations and standards of this article.
- c. The use will not substantially injure the value of adjoining property, or the use is a public necessity.

- d. The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located.
- e. Public water and sewer service are available in adequate capacity, if needed.
- f. [T]he proposed use will not be in conflict with the objectives of the most detailed plan adopted for the area in which it is located.

66. Once an applicant establishes that the proposed use meets the Zoning Ordinance's requirements, she has made a prima facie case of her entitlement to a conditional-use permit.

**D. The Zoning Ordinance Imposes Requirements on Homeless Shelters That Are Not Required for Materially Similar Uses.**

67. Although the Town demands homeless shelters obtain conditional-use permits, it does not require such permits for materially similar uses, which need only obtain a permit from the planning department as a matter of right.

68. Obtaining a permit from the planning department is less burdensome than obtaining a conditional-use permit from the Board of Adjustment in that planning-department permits do not require attending a quasi-judicial hearing, involving neighbors, or demonstrating that the proposed use meets the six elements required for conditional-use permits. *See Zoning Ordinance § 3.3.*

69. A "homeless shelter" is materially similar to an "emergency shelter" in that both provide overnight shelter to people in acute need in the Highway Business district, but only a "homeless shelter" is subject to additional conditions in Article 11 of the Zoning Ordinance and only a "homeless shelter" is required to obtain a conditional-use permit.

- a. "Emergency shelter" is defined as a "facility providing temporary housing for one or more individuals who are temporarily or permanently homeless due to disaster, evacuation or other similar civil emergency." Zoning Ordinance § 5.3.

70. A “homeless shelter” is materially similar to a “child care institution” in that both provide overnight shelter to people in acute need in the Highway Business district, but only a “homeless shelter” is subject to additional conditions in Article 11 of the Zoning Ordinance and only a “homeless shelter” is required to obtain a conditional-use permit.

- a. “Child care institution” is defined as a “facility providing residential and non-residential care for thirteen or more children under the age of twenty-one, who are handicapped or who are without the benefit of parents who can provide for those children’s basic physical, emotional, educational, spiritual, and/or other special needs.” Zoning Ordinance § 5.3.

71. A “homeless shelter” is materially similar to a “congregate care facility” in that both provide overnight shelter to people in acute need in the Highway Business district, but only a “homeless shelter” is subject to additional conditions in Article 11 of the Zoning Ordinance and only a “homeless shelter” is required to obtain a conditional-use permit.

- a. “Congregate care facility” is defined in relevant part as a “multi-unit facility which provides housing, part-time medical care, shared food preparation and dining areas, and recreational facilities, as well as significant social facilities to meet the needs of the elderly.” Zoning Ordinance § 5.3.

72. A “homeless shelter” is materially similar to a “hospital” in that both provide overnight shelter to people in acute need in the Highway Business district, but only a “homeless shelter” is subject to additional conditions in Article 11 of the Zoning Ordinance and only a “homeless shelter” is required to obtain a conditional-use permit.

- a. “Hospital” is defined as a “facility providing medical, psychiatric, or surgical services for sick or injured persons, including emergency treatment,

diagnostic services, training, research, and administration.” Zoning Ordinance § 5.3.

73. A “homeless shelter” is materially similar to a “group care facility” in that both provide overnight shelter to people in acute need in the Highway Business district, but only a “homeless shelter” is required to demonstrate “harmony” under Article 11 of the Zoning Ordinance and only a “homeless shelter” is required to obtain a conditional-use permit.

a. “Group care facility” is defined as:

A transitional housing facility for more than twenty residents . . . which provides room and board, personal care and rehabilitation services while persons receive therapy and/or counseling for one or more of the following purposes:

- i. To assist them to recuperate from the effects of or refrain from the use of drugs or alcohol;
- ii. To provide emergency and temporary shelter for persons in distress such as runaway children and battered individuals; and
- iii. To provide shelter and support for older adults and persons who are handicapped.

Zoning Ordinance § 5.3 (formatting altered).

74. A “homeless shelter” is materially similar to a “nursing care institution” in that both provide overnight shelter to people in acute need in the Highway Business district, but only a “homeless shelter” is required to demonstrate “harmony” under Article 11 of the Zoning Ordinance and only a “homeless shelter” is required to obtain a conditional-use permit.

a. “Nursing care institution” is defined in relevant part as a “licensed healthcare facility, however named, governmental or non-governmental, which provides in-patient care to six or more non-related persons for whom planned and continued medical or nursing attention, or both, are indicated.” Zoning Ordinance § 5.3.

75. Of the 183 authorized uses across all districts in the Zoning Ordinance, “homeless shelter” is the only one that specifically requires “access to a public sidewalk,” § 11.4-11, even though dozens of other authorized uses serve pedestrians—such as, but not limited to, convenience stores, apartment buildings, shopping malls, restaurants and bars, entertainment establishments, churches, schools, post offices, medical clinics and dance studios.

76. Of the 183 authorized uses across all districts of the Zoning Ordinance, “homeless shelter” is the only one subject to an additional condition in Article 11 of establishing “harmony” with neighboring uses.

77. Only two other uses mention harmony, but those only demand that a portion of the use be harmonious—not that the entire use be harmonious with its neighboring uses. Zoning Ordinance § 11.2-3(A), (N) (requiring a “bed and breakfast” show that its design and lighting are harmonious with surrounding properties); Zoning Ordinance § 11.7-6(C) (requiring a “manufactured home, temporary” show that the unit be placed “in harmony with existing site-built structures” on the lot).

**E. The Barber Shelter Applies for a Conditional-Use Permit and the North Wilkesboro Board of Adjustment Denies It Following a Quasi-Judicial Hearing.**

78. On July 9, 2020, the Barber Shelter submitted an application to the Town of North Wilkesboro Planning Department for a conditional-use permit to operate a “homeless shelter,” as that use is defined and regulated under the Zoning Ordinance, at 106 Elkin Highway.

79. Pursuant to Zoning Ordinance § 3.4(B), the Barber Shelter was a proper applicant because it was acting as the “authorized agent of the property owner,” namely, Christopher and Timberli Roberts, as embodied in the notarized document included with the application.

80. The Barber Shelter’s application contained all of the necessary facts and materials to enable the Board of Adjustment to consider it. *See* Zoning Ordinance § 3.4(C).

81. After the Barber Shelter submitted its application, the “Zoning Administrator and technical review committee” reviewed the application and concluded that it was complete and ready for a hearing, pursuant to Zoning Ordinance § 3.4(D).

82. On August 26, 2020, the Town of North Wilkesboro Board of Adjustment held a quasi-judicial hearing on the Barber Shelter’s application for a conditional-use permit.

83. The Board of Adjustment convened the August 26, 2020 quasi-judicial hearing pursuant to N.C.G.S. § 160D-406(a).

84. The August 26, 2020 quasi-judicial hearing was recorded on audio.

85. The August 26, 2020 quasi-judicial hearing satisfied the notice requirements of N.C.G.S. § 160D-406(b).

86. Prior to the quasi-judicial hearing, the Planning Department transmitted to the Board of Adjustment all relevant administrative materials, including the Barber Shelter’s application and exhibits, and the Board of Adjustment admitted all documents during the hearing without objection. *See* N.C.G.S. § 160D-406(c)–(d); Zoning Ordinance § 3.1(A)(1).

87. At the beginning of the quasi-judicial hearing, the Board of Adjustment administered an oath to all witnesses, as required under N.C.G.S. § 160D-406(f).

88. Barber Shelter board member Carmen Daecher represented the Shelter at the quasi-judicial hearing.

89. Prior to his own testimony and legal argument, Mr. Daecher reserved the right to cross-examine witnesses, but the Board of Adjustment Chair repeatedly denied him the right to cross-examine.

90. Mr. Daecher presented factual testimony and legal argument in support of the application.



91. The Board of Adjustment Chair acknowledged that Mr. Daecher, who is a traffic engineer and who has participated in roughly 1,000 quasi-judicial hearings, is an expert in traffic issues.

92. Mr. Daecher walked the Board of Adjustment through the Barber Shelter's application, demonstrating that the application satisfied the requirement that a homeless shelter be in the Highway Business district, as well as demonstrating that the application satisfied the five criteria for homeless shelters set out in Article 11. Zoning Ordinance §§ 6.7, 11.4-11.

93. Mr. Daecher also demonstrated that the Barber Shelter application satisfied the six criteria for a conditional-use permit in § 3.4(E)(2).

94. Mr. Daecher's testimony included, but was not limited to:

- a. Data about the Barber Shelter's services—between relocating temporarily to the Crossfire Church and the hearing, the Barber Shelter sheltered 178 people for 1,041 bed nights with zero complaints from neighbors;
- b. That the Shelter has used hotel rooms, as needed, during the coronavirus pandemic;
- c. That the Shelter has cooperated with law enforcement to help those in need;
- d. That 106 Elkin Highway's location is ideal for the Shelter's mission;
- e. Facts establishing the absence of public safety, and especially traffic safety, concerns;
- f. Facts demonstrating that the Barber Shelter will increase neighboring property values by making exterior improvements to 106 Elkin Highway, such as extensive flower landscaping; and

- g. Facts establishing that the Barber Shelter will be in harmony with neighboring uses.

95. During his testimony and legal argument, the Board of Adjustment asked if the Barber Shelter is required, contrary to the Shelter's policy, to admit sex offenders because it receives state money, to which Mr. Daecher responded that the Shelter does not receive funds from the state.

96. During his testimony and legal argument, the Board of Adjustment asked if the Shelter's acceptance of a one-time federal COVID-19 grant required the Shelter, contrary to its policy, to admit sex offenders, to which Mr. Daecher responded it did not.

97. During Mr. Daecher's testimony and legal argument, a Board of Adjustment member, despite asserting that "I'm not trying to be ugly here at all," stated, "I need an answer to this. I understand that you [Mr. Daecher] live in Clemmons. [Shelter board member] Dan Huffman, I understand lives in Jefferson Landings. My question is, why are you [Mr. Daecher] who live in Clemmons involved in a shelter in North Wilkesboro?"

98. Three other witnesses were permitted to testify in favor of the Barber Shelter:

- a. Dr. Alan Rice, the pastor of the Crossfire United Methodist Church where the Barber Shelter is presently located, testified that the Shelter guests had generated zero complaints from neighbors and that the Shelter guests did not loiter on church property or in the vicinity during the day when the Shelter is closed.
- b. Dr. Christopher Roberts, the owner of 106 Elkin Drive, explained why he is giving his property to the Barber Shelter to support its mission.

- c. Derek Wyatt, one of the night managers for the Barber Shelter, testified about the Shelter's operating policies and the practical steps the Shelter takes to minimize impacts on neighbors and to help clients regain their footing.
99. Four witnesses testified in opposition to the Barber Shelter:
- a. John Battle, landlord of a neighboring strip mall, testified that the Shelter would:
    - i. Damage property values and reduce area harmony;
    - ii. Be unsafe for the homeless who would be walking around in that area because there are busy roads and it is dark in the winter;
    - iii. Prevent mothers from bringing their children to the area for haircuts;
    - iv. Subject parishioners of a nearby church to ill effects, and force "women and children" to "deal with the presence of homeless people intruding on their [church] services, begging for money or food"; and
    - v. Coddle homeless people who "are not looking to help themselves. They are only looking for a handout or free stuff . . . [It] never ends."
  - b. Yvette Bushard, the owner of a nearby gym, urged the Board of Adjustment not to be "naïve," testifying that the Shelter would bring people to the area who are dangerous to young people and the elderly and who would lurk in the corridors of the warehouse complex where her gym is located.

- c. James Brown, who since 1972 has owned a nearby undeveloped property (except for two billboards), testified that:
- i. The Barber Shelter's guests would create hazardous conditions because they walk or ride bikes;
  - ii. He does not know if the Town of North Wilkesboro would provide security or protect citizens from the Shelter's clients and asked "if the town is going to pay for any lawsuit resulting in the homeless person trespassing on our property and adjoining properties and then injured"; and
  - iii. He reserved the right to sue and "seek punitive actions for any injuries related to property or the person in the future."
- d. Scott Nafe, a self-described property developer who was repeatedly admonished by the Board of Adjustment Chair for making false or irrelevant assertions during his testimony, testified that the Shelter would lower property values and increase crime.

100. An eighth witness, Thomas Page, a former client of the Shelter who got back on his feet with the Shelter's assistance, attempted to testify in favor of the Barber Shelter, but the Board of Adjustment Chair ruled him ineligible to testify because, the Board of Adjustment determined, he did not have an interest in 106 Elkin Highway or the contiguous properties and does not own property in the Town.

101. After John Battle, the first opposition witness, testified, Mr. Daecher requested to cross examine Mr. Battle, a request that the Board of Adjustment Chair denied.

102. The only witness the Board acknowledged as a subject-matter expert was Mr. Daecher with respect to traffic.

103. No other witness was qualified as a subject-matter expert in traffic or property values.

104. In addition to the absence of testimony about property valuations by a qualified expert, none of the lay-witness testimony about property values in opposition to the Barber Shelter even purported to use objective real estate data or the formal methods of a professional appraiser to analyze the effect the Shelter would have on neighboring property values.

105. After the presentation of evidence, the Board of Adjustment formally ruled at the quasi-judicial hearing that the Barber Shelter satisfied the requirement that a homeless shelter be in a Highway Business district per Zoning Ordinance § 6.7, and that the Barber Shelter satisfied the five criteria for homeless shelters per Zoning Ordinance § 11.4-11.

106. The Board of Adjustment stated at the quasi-judicial hearing that the only relevant question was whether the Barber Shelter's application satisfied the six criteria for a conditional-use permit set forth in Zoning Ordinance § 3.4(E)(2).

107. The Board of Adjustment ruled at the quasi-judicial hearing that only three of the six criteria were at issue: § 3.4(E)(2)(a) "The use will not materially endanger the public health or safety if located, designed, and proposed to be operated according to the plan submitted"; § 3.4(E)(2)(c) "The use will not substantially injure the value of adjoining property, or the use is a public necessity"; and § 3.4(E)(2)(d) "The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located."

108. The Board of Adjustment ruled at the quasi-judicial hearing that the other three criteria in § 3.4(E)(2) were fully satisfied: § 3.4(E)(2)(b) “The use complies with all regulations and standards of this article”; § 3.4(E)(2)(e) “Public water and sewer service are available in adequate capacity, if needed”; and § 3.4(E)(2)(f) “The proposed use will not be in conflict with the objectives of the most detailed plan adopted for the area in which it is located.”

109. During deliberations, the Board of Adjustment Chair read each of the six criteria for a conditional-use permit in § 3.4(E)(2) and solicited comments from Board of Adjustment members.

110. During deliberations:

- a. One Board of Adjustment member commented that the Shelter would be dangerous because its guests would come outside at 6:30 a.m. and walk into the flow of busy traffic;
- b. One Board of Adjustment member said, “I think that it would devalue property” nearby; and
- c. One Board of Adjustment member commented that the Shelter would not be harmonious with the nearby church.

111. The nearby church that Mr. Battle referenced in his testimony and that a Board of Adjustment member referenced in his comment during deliberations was personally notified in writing, as required by law, of the conditional-use application and the August 26, 2020 quasi-judicial hearing, but the church did not oppose the Shelter’s application in any way.

112. The Board of Adjustment’s deliberations lasted for approximately eight minutes.

113. Following a motion, the Board of Adjustment voted unanimously to deny the Barber Shelter’s application.

114. On September 9, 2020, the Board of Adjustment rendered a written decision, as required under N.C.G.S. § 160D-406(j).

115. With respect to each of the six criteria in § 3.4(E)(2), the Board of Adjustment made the following written findings:

- a. **The use will not materially endanger the public health or safety if located, designed, and proposed to be operated according to the plan submitted.** *The Board found that the evidence does not support this finding as the use would endanger the public's safety as the residents of the shelter would be exiting the shelter close to the highway and the highway's right of way significantly impacts the front of property where the residents would be entering and exiting the property, often at times early in the morning and late in the evening when visibility would be an issue due to low light.*
- b. **The use complies with all regulations and standards of this article.** *The Board found the evidence supported this finding as the proposed use did meet all regulations and standards of the Zoning Ordinance.*
- c. **The use will not substantially injure the value of adjoining property, or the use is a public necessity.** *The Board found that the evidence did not support this finding, since this use would substantially impact and decrease existing neighboring property values.*
- d. **The location and character of the use, if developed according to the plan as submitted and approved, will be in harmony with the area in which it is to be located.** *The Board found that the evidence did not support this finding, as this use will not be in harmony with the area in which it is proposed to be located as there is a church, gym and other retail businesses in the area and the proposed shelter was a use not in keeping with the current uses in the area.*
- e. **Public water and sewer service are available in adequate capacity, if needed.** *The Board found that the evidence supported this finding, as the proposed use is within close proximity to Town Sewer and Water.*
- f. **That the proposed use will not be in conflict with the objectives of the most detailed plan adopted for the area in which it is located.** *The Board found the evidence supported this finding, as the proposed use was in harmony with the Town of North Wilkesboro's 2018 Comprehensive Plan and the Town of North Wilkesboro's Thoroughfare Plan.*

**F. In Denying the Conditional-Use Permit, the Board of Adjustment Applied the Zoning Ordinance Against the Barber Shelter in a Way That Singled Out the Shelter for Adverse Treatment.**

116. In the last year, the Board of Adjustment has considered three conditional-use-permit applications. It: (i) granted a conditional-use permit for non-franchised motor vehicle sales; (ii) declined to rule on the Barber Shelter's first conditional-use-permit application for its proposed building at 108 Sparta Road, having denied the Shelter variances necessary for the permit; and (iii) denied the Barber Shelter's second conditional-use-permit application for the proposed shelter at 106 Elkin Highway.

117. The Board of Adjustment has never granted a conditional-use permit for a homeless shelter.

118. The Board of Adjustment's denial of the Barber Shelter's conditional-use permit application to operate at 106 Elkin Highway was irrational and its justifications nonsensical.

*Proximity to Roads and Sidewalks*

119. The Board of Adjustment's concern about sidewalks next to the Shelter does not make any sense when the Town requires homeless shelters have access to public sidewalks. Zoning Ordinance § 11.4-11.

120. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit on the ground that pedestrians associated with the use are incapable of using public sidewalks responsibly.

121. There is no evidence in the administrative record of the August 26, 2020 hearing or basis in reality to support a factual finding that those experiencing homelessness, as a discrete class of adult persons, are incapable of using public sidewalks responsibly.



122. There is no evidence in the administrative record of the August 26, 2020 hearing to support a factual finding that the proximity of the sidewalks to a homeless shelter would materially endanger the public health or safety.

123. The Board of Adjustment's concern about the proximity of a busy road near the Shelter does not make any sense when the Town requires homeless shelters be only in the Highway Business district, an area "along designated highways and thoroughfares." Zoning Ordinance §§ 6.4(H), 6.7.

124. The Board of Adjustment's concern about Barber Shelter clients coming and going when it is still dark makes no sense when there is a streetlight in front of 106 Elkin Highway.

125. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit for the Highway Business district on the ground that the use was next to a major road.

126. There is no evidence in the administrative record of the August 26, 2020 hearing or any basis in reality to support a factual finding that the proximity of the road to a homeless shelter would materially endanger the public health or safety.

127. There is no evidence in the administrative record of the August 26, 2020 hearing or any basis in reality to support a factual finding that those experiencing homelessness, as a discrete class of adult persons, are incapable of safely being near a road.

#### Property Values

128. The Board of Adjustment's determination that the Shelter would "substantially impact and decrease existing neighboring property values" was based on pure speculation unsupported by data and an expert interpretation of that data.

129. No expert in property valuation testified during the August 26, 2020 hearing, and there is no evidence in the administrative record or any basis in in reality that allowing the Barber Shelter to operate at 106 Elkin Highway would “substantially injure” neighboring property values.

130. The Board of Adjustment’s determination that the Shelter would “substantially impact and decrease existing neighboring property values” ignored the reality of the area.

131. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit based on substantial injury to property values without evidence concerning the value of the applicant property, the values of surrounding properties, and an objective, evidence-based analysis of the impact of the proposed use on those valuations.

Harmony

132. The Board of Adjustment’s determination that the Shelter would not be in harmony with the area was not based on any specific facts about the Barber Shelter or specific facts about the “church, gym, and other retail businesses” identified in the written decision. To the contrary, the Board of Adjustment irrationally concluded that a “homeless shelter,” a use the Town of North Wilkesboro has expressly approved in the Highway Business district, is inherently non-harmonious with other approved uses in the Highway Business zone.

133. The Board of Adjustment’s determination that the Shelter would not be in harmony with the area ignored the reality of the area.

134. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit for an authorized use within the Highway Business district, such as a homeless shelter, on the ground that the proposed authorized use lacked harmony with surrounding commercial entities in the Highway Business district.

135. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit for an authorized use within the Highway Business district, such as a homeless shelter, on the ground that the proposed authorized use lacked harmony with a religious entity inside the Highway Business district.

136. Upon information and belief, the Board of Adjustment has never before denied a conditional-use permit for an authorized use within the Highway Business district, such as a homeless shelter, on the ground that the proposed authorized use lacked harmony with a neighbor (such as the church, here) that, despite personal notice of the permit proceedings, did not object.

#### **INJURY TO PLAINTIFF**

137. The Barber Shelter requires a conditional-use permit from the Board of Adjustment to operate a homeless shelter at 106 Elkin Highway, and the Board's denial of the conditional-use permit has made it impossible to proceed with that plan.

138. Plaintiff has the resources to immediately commence its plan to exercise its option to obtain the property at 106 Elkin Highway and then to renovate the property into a homeless shelter, and the only reason Plaintiff has not begun that process is the Board's denial of the conditional-use permit.

139. But for the Town of North Wilkesboro's zoning classifications that require a conditional-use permit for a "homeless shelter," but not for materially similar overnight uses in the Highway Business district such as an "emergency shelter," *see* ¶¶ 59, 67–77, the Barber Shelter would not need a conditional-use permit and would have been entitled to open its homeless shelter at 106 Elkin Highway as a matter of right.

140. But for the Town's irrational zoning classifications—which require a "homeless shelter" alone, out of all 183 authorized uses in the Zoning Ordinance, to have access to a

“public sidewalk”—the Barber Shelter would have had more options in identifying a new location.

141. The Barber Shelter was injured insofar as the Board of Adjustment treated the Barber Shelter differently and worse than other conditional-use-permit applicants, *see* ¶¶ 116–136, and this differential treatment resulted in a permit denial.

142. The Barber Shelter was injured insofar as the Board of Adjustment’s stated reasons for denying the conditional-use permit were irrational and in violation of equal protection.

143. The Barber Shelter was injured insofar as the Board of Adjustment’s errors in violation of North Carolina law and its arbitrary and capricious application of North Carolina law and the Zoning Ordinance to the facts resulted in the Board denying the conditional-use permit.

144. But for the constitutional violations and legal errors described above, the Barber Shelter’s expenditure of time, labor, and financial resources in planning a homeless shelter at 106 Elkin Highway would not have been in vain.

## CLAIMS

### **Count I: Fourteenth Amendment Equal Protection Clause**

145. Plaintiff incorporates paragraphs 1 through 144 as though fully set forth herein.

146. The Town of North Wilkesboro and its Board of Adjustment cannot treat similarly situated land uses differently unless that different treatment is rationally related to a legitimate government interest.

147. The Town of North Wilkesboro lacks a rational basis for treating the land use of “homeless shelter” differently from similarly situated overnight uses in the Highway Business district by requiring a conditional-use permit for homeless shelters, but not for, for example, an “emergency shelter.”

148. The Board of Adjustment irrationally singled out the Barber Shelter for unequal treatment by denying the conditional-use permit on grounds that the Town would not invoke against any other applicant. These reasons include, but are not limited to:

- a. Denying the conditional-use permit because the Barber Shelter would be along busy roads and its clients would use the sidewalks there, even though the Zoning Ordinance requires homeless shelters to be in the Highway Business district and requires sidewalks;
- b. Denying the conditional-use permit based on a presumption that the Barber Shelter's clients will not stay on the sidewalks and will instead walk into traffic;
- c. Denying the conditional-use permit based on a finding of "substantial injury" to neighboring property values despite the absence of the expert testimony required under North Carolina law to establish a severe diminution in property values; and
- d. Denying the conditional-use permit based on a lack of harmony with neighbors despite the fact that the neighbors are typical uses within a Highway Business zone.

149. The reasons cited in the Board of Adjustment's decision are irrational.

150. The Board of Adjustment has no legitimate interest in denying the county's only homeless shelter a conditional-use permit to operate at 106 Elkin Highway.

151. The Barber Shelter is entitled to a declaration that the Town of North Wilkesboro violated its right to equal protection.

152. The Barber Shelter is entitled to compensatory and nominal damages for the violation of its right to equal protection.

153. The Barber Shelter is entitled to a permanent injunction prohibiting the Town of North Wilkesboro and its Board of Adjustment from subjecting the land use of “homeless shelter” to adverse differential treatment and from subjecting the Barber Shelter specifically to adverse differential treatment.

154. Unless the Court enters a declaratory judgment, awards actual and nominal damages, and enjoins the future unconstitutional application of the Zoning Ordinance—and related policies, practices, and customs—the Barber Shelter will continue to suffer violations of its right to equal protection.

#### **Count II: State Law Petition for Writ of Certiorari**

155. Plaintiff incorporates paragraphs 1 through 144 as though fully set forth herein.

156. Pursuant to this Court’s supplemental jurisdiction, Plaintiff challenges the denial of its conditional-use-permit application under N.C.G.S. § 160D-1403.1(d). These sections allow an aggrieved conditional-use-permit applicant to file an original civil action in federal court challenging the constitutionality of the decision and bring with it a petition for a writ of certiorari—i.e., an administrative appeal under North Carolina state law—in the same proceedings.

157. Count II is Plaintiff’s petition for writ of certiorari.

158. This petition for a writ of certiorari contains all of the information required by N.C.G.S. § 160D-1402.1(b).

159. The proposed writ of certiorari is attached as Exhibit 1 to this Complaint.

160. The proposed writ of certiorari contains all of the information required by, and conforms to the format set forth in, N.C.G.S. § 160D-1402(e). *See* Ex. 1.

161. The Barber Shelter has standing to bring a petition for a writ of certiorari under N.C.G.S. § 160D-1402(c)(1)(b)–(c) because the Shelter has an option contract with Dr. Roberts to purchase the property at 106 Elkin Highway and because the Shelter is an aggrieved applicant to the Board of Adjustment.

162. The administrative record for this petition for a writ of certiorari is described in N.C.G.S. § 160D-1402(h).

163. Plaintiff challenges the decision on all grounds listed in N.C.G.S. § 160D-1402(j)(1): unconstitutionality, ultra vires, inconsistent with applicable procedures, affected by other errors of law, unsupported by competent evidence, and arbitrary and capricious.

164. Without waiving other available remedies, Plaintiff asks the Court to “remand with instructions that the permit be issued.” N.C.G.S. § 160D-1402(k)(3)(a).

165. This petition for a writ of certiorari was timely filed as part of this Complaint within 30 days of the Town of North Wilkesboro Board of Zoning Adjustment’s decision on September 9, 2020.

166. Unless this Court hears and rules on the Barber Shelter’s state-law cause of action pursuant to this Court’s supplemental jurisdiction, the Shelter will continue to suffer harms from the violation of its statutory rights, including its inability to proceed with operating a homeless shelter at 106 Elkin Highway.

### **REQUEST FOR RELIEF**

The Barber Shelter respectfully requests the following relief:

- A. A declaration that the Town of North Wilkesboro violated the Barber Shelter’s right to equal protection by enacting a Zoning Ordinance that makes irrational distinctions between materially similar overnight uses in the Highway Business district;

- B. A declaration that the Board of Adjustment violated the Barber Shelter's right to equal protection by denying a conditional-use permit to operate a homeless shelter at 106 Elkin Highway;
- C. A permanent injunction enjoining the Town of North Wilkesboro and its Board of Adjustment from, respectively, enacting and enforcing classifications in the Zoning Ordinance that irrationally discriminate against homeless shelters as a land use in violation of its equal-protection rights;
- D. A permanent injunction enjoining the Board of Adjustment from enforcing the Zoning Ordinance in a manner that irrationally singles out the Barber Shelter for adverse treatment in violation of its equal-protection rights;
- E. A permanent injunction ordering the Town of North Wilkesboro and Board of Adjustment to allow the Barber Shelter to operate at 106 Elkin Highway;
- F. A declaration that the Board of Adjustment violated North Carolina law by denying the conditional-use permit for reasons that are unconstitutional, legally erroneous, arbitrary and capricious, or without support in competent, material, and substantial evidence;
- G. An Order directing the Board of Adjustment to issue the Barber Shelter a conditional-use permit to operate a homeless shelter at 106 Elkin Highway;
- H. An award of compensatory damages in an amount no greater than \$1,000;
- I. An award of \$1 in nominal damages;
- J. An award of Plaintiffs' costs and expenses of this action, together with reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988 and N.C.G.S. § 6-21.7; and
- K. Such other and further relief as this Court deems just and proper.



Dated: October 7, 2020

Respectfully submitted,

By: /s/ David G. Guidry  
David G. Guidry (N.C. Bar No. 38675)  
**MAINSAIL LAWYERS**  
338 South Sharon Amity Road, #337  
Charlotte, NC 28211  
T: 917.376.6098  
F: 888.501.9309  
E: dguidry@mainsaillawyers.com

**INSTITUTE FOR JUSTICE**  
Diana K. Simpson\*  
Alexa Gervasi\*  
901 North Glebe Road, Suite 900  
Arlington, VA 22203  
T: 703.682.9320  
F: 703.682.9321  
E: diana.simpson@ij.org  
agervasi@ij.org

Jeffrey Rowes\*  
816 Congress Avenue, Suite 960  
Austin, TX 78701  
T: 512.480.5936  
F: 512.480.5937  
E: jrowes@ij.org

*Attorneys for Plaintiff*

\*Motions for Admission *Pro Hac Vice*  
forthcoming

**COMPLAINT AND PETITION FOR A  
NORTH CAROLINA WRIT OF  
CERTIORARI**

**EXHIBIT 1**

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
STATESVILLE DIVISION**

CATHERINE H. BARBER MEMORIAL  
SHELTER, Inc.

*Plaintiff,*

v.

BOARD OF ADJUSTMENT OF THE  
TOWN OF NORTH WILKESBORO and  
the TOWN OF NORTH WILKESBORO,  
a municipality,

*Defendants.*

Civil Action No.: 5:20-cv-163

**[PROPOSED ORDER] Writ of Certiorari**

**TO THE TOWN OF NORTH WILKESBORO:**

A petition for a writ of certiorari has been filed with this Court by Petitioner/Plaintiff Catherine H. Barber Memorial Shelter, Inc. on October 7, 2020. On that date, Petitioner/Plaintiff brought “an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in . . . federal court to challenge” the constitutionality of the Town of North Wilkesboro Board of Adjustment’s September 9, 2020 denial of Petitioner/Plaintiff’s application for a conditional-use permit to operate a homeless shelter at 106 Elkin Highway, North Wilkesboro, NC 28659. N.C.G.S. § 160D-1403.1(a). As expressly authorized by statute, Petitioner/Plaintiff has “for convenience and economy . . . joined” that “original civil action . . . with a petition for a writ of certiorari [to be] decided in the same proceedings.” N.C.G.S. § 160D-1403.1(d).

The respondent for the petition for writ of certiorari is the Town of North Wilkesboro. Finding that the petition has been properly filed and that the submitted writ is in proper form, it is hereby **ORDERED** as follows:

1. The Town of North Wilkesboro shall prepare the record of proceedings before the Town of North Wilkesboro Board of Adjustment concerning the conditional-use permit application for parcel ID #1402700, 106 Elkin Highway, North Wilkesboro, NC 28659. The Town of North Wilkesboro shall file the record of proceedings with this Court within thirty days of the entry of this Order.
2. Petitioner/Plaintiff shall serve its petition and this writ upon each named defendant in the manner provided for service of a complaint under Rule 4(j)(2) of the Federal Rules of Civil Procedure. To the extent that a defendant is a local decision-making board, the complaint and the writ shall be served upon the chair of that decision-making board.

So ordered, this \_\_\_\_\_ day of \_\_\_\_\_, 2020.

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