

NELSON COUNTY BOARD OF ZONING APPEALS
June 1, 2015
MEETING MINUTES

Present: Gifford Childs, Kim Cash, Goffrey Miles, and Ron Moyer

Absent: Mary Kathryn Allen and John Bradshaw

Staff: Tim Padalino, Director, Planning & Zoning, and Stormy Hopkins, Secretary

Call to Order: Mr. Childs called the meeting to order at 7:40 P. M. in the General District Courtroom, County Courthouse, Lovingson. There were five members present to establish a quorum.

Approval of Minutes: Mr. Childs asked for any corrections or comments on the minutes. It was discussed and determined that corrections would be emailed to Staff, and a revised copy would be sent to the Board. The approval of minutes were postponed until the next meeting.

Mr. Childs provided an overview of the meeting procedures for the public.

1. Zoning Appeal #2015-02 (Shimp / Major Site Plan #2014-004 “Zenith Quest – Afton Mountain”

Mr. Padalino stated that the appeal is made by Mr. Justin Shimp, a resident of Tanbark Drive in Afton. The appeal is in connection with Major Site Plan #2014-005 (“Zenith Quest – Afton Mountain”), which was **approval approved** by the Planning Commission in March. He noted that the subject property is located on Critzer Shop Road in Afton (North District). It is a 10-acre parcel, zoned Industrial (M-2) and is further identified as Tax Map Parcel #4-A-44A.

Mr. Padalino provided a slide showing a portion of the Site Plan depicting the proposed new commercial entrance that would lead to a loading area, and an 80,000 SF warehouse, which would also be used for the assembly of light manufacturing of weapons, and storage of tiles and non-toxic cleaners. Importantly (for this appeal), he drew attention to the Family Lane, which leads to a secondary emergency access that is a twenty (20) foot gravel road, which provides adequate fire and other emergency response access to the back portions of the warehouse.

Mr. Padalino provided a narrative summary of the overall County’s Site Plan Review process, with specific focus on the issue of providing secondary emergency access and the use of Family Lane for that access, as follows:

- Initial Site Plan Review Committee (met on 10/10/2014):
 - No pertinent comments regarding secondary emergency access and/or Family Lane were provided from any of the following Committee members:
 - Nelson County Zoning Administrator
 - Nelson County Building Official
 - VDOT
- Initial Planning Commission review (10/22/2014):
 - In discussion of site plan details, applicant consultant Ms. Ammy George of Roudabush Gale & Associates stated (from Meeting Minutes): “...a small ‘break’ in the forested buffer would result from the gravel fire access road and locked gate which would be installed between Family Lane and the warehouse.”
 - In response to that comment: the Planning Commission did not respond with any questions or follow up comments.

- After the October Planning Commission meeting, the applicant revised the Site Plan before returning to the Planning Commission. During that time of revision, Mr. Padalino provided updated comments in regards to the revised plans:
 - “the following issues or questions also remain, and should be addressed at the January 28th Planning Commission meeting:”
 - “*Compliance with fire access and emergency access requirements:*”
 - “request to provide documentation that ZQI has legal right to access / use Family Lane (private road) for satisfying secondary emergency access requirements”
 - “request to provide documentation of compliance with Fire Code requirements and Building Code requirements regarding the design and layout of the 20’ gravel fire access road”
- At the 1/28/2015, the Planning Commission reviewed those revised plans (from Meeting Minutes):
 - Zoning Administrator provided the following updated review comments from members of the Site Plan Review Committee:
 - “Mr. David Thompson, Building Code Official, confirmed that the layout of the proposed fire access road is sufficient and it does meet code requirements. It would be a twenty (20) foot wide (gated) gravel road, accessing the rear of the property. Mr. Thompson also confirmed that the secondary emergency access provides acceptable access to all areas of the warehouse, with respect to maximum distances allowed between the end of the emergency access road and the farthest extent of the building footprint.”
 - “Mr. Kenneth L. Kent, Assistant Fire Marshall in the Western Region of the State Fire Marshall’s Office, clarified that they do not get involved in plan review; they only do walk-throughs after a building is permitted and constructed; and only engage in any necessary enforcement activities after buildings are planned, permitted, constructed and operated.”
 - The Planning Commission’s response and inquiry regarding the secondary emergency access road and/or Family Lane was as follows (from Meeting Minutes):
 - “Commissioner Russell asked about the private road issue and if there was more information. Ms. George stated that they have been talking with some of the Fire Chiefs in the area to discuss whether they needed legal access to enter the rear of the building property. Mr. Miles noted that back in September, the Building Official, David Thompson, deferred to the Fire Chief. He also noted that he met with Tommy Harvey and Don Fitzgerald, former Fire Chief at Wintergreen; and they came up with the option to have a back gate with a driveway. He stated that during conversation, it was asked several times if an easement was needed for Family Lane due to it being a private property. He noted that Mr. Harvey and Mr. Fitzgerald stated that from their experience, fire or emergency services do not need an easement to go anywhere during an emergency. At that point, he did not pursue an easement.”
 - “[Commissioner Russell] stated that she is still concerned with the fire issue and unseen hazards, and is personally uncomfortable with approving this without some assurance that the County is not going to be held liable for lack of preparation, should there be some sort of issue.”
 - “Commissioner Russell made a motion in relation to the Major Site Plan application #2014-005 ... [that] this project is approved with the following conditions:
 - [#3 of 4]: “A written clarification should be provided of the availability of Family Lane as a legal access for Nelson County fire department.”

Mr. Padalino noted that two (2) of those conditions were delegated to him (Zoning Administrator). The fourth (4th) condition was appropriately left up to State agencies that have review over this project (DEQ, VDOT, etc.). The Planning Commission chose to retain the responsibility to review and approve the third (3rd) issue: Family Lane.

- Applicant response to Planning Commission conditional approval (February 2015):
 - Applicants caused the requested information to be obtained/submitted to the County, including the following:
 - E-mail communication from Mr. Tommy Harvey, Chief, Rockfish Valley Fire Department (dated March 20th)
 - E-mail communication from Mr. David Graves, Assistant Chief, Rockfish Valley Volunteer Fire Department (dated March 23rd)
- In response to this evidence (3/25/2015):
 - Planning Commission evaluated these emails and voted 5-1 to determine that condition #3 had been satisfied. With that being the remaining condition to be satisfied (3 out of 4), the Planning Commission provided approval of the Site Plan. Mr. Padalino noted that he signed the Site Plans the next morning.

Mr. Padalino provided the following summary: he has highlighted the issues; performed due diligence with the appropriate local and state review agencies; and acted as a conduit between applicants to report their information to the Planning Commission. The Planning Commission evaluated all the information and took action based on their own determination.

Mr. Childs asked Mr. Padalino if condition #3 was up to the Building Code Official and not his decision. Mr. Padalino noted that the review and approval of condition #3 was an act of the Planning Commission. He noted that he consulted with the Building Official prior to conditional approval (January) and was assured that it was fine. He also did due diligence with the Fire Marshall out of Roanoke, and Jaime Miller (Emergency Services Coordinator) because it seemed during the initial review, the access road was a main issue. He reported all of his information to the Planning Commission.

Phillip Payne, County Attorney: Mr. Payne stated the he represents the County, and accordingly is representing the Planning Commissions' decision. Mr. Payne stated that, *"he should start acknowledging that for any person not very familiar with the processes of land use and the legal system that it's not intuitive; it's very complicated. As a matter of fact, I have to re-read these things on a regular basis. Having said that, there are certain legal hurdles before an appellant can come before you. Or as you pointed out in your introduction a quasi-judicial body and you effectively act as judges in this initial step of the appeal. You had earlier, in an appeal by Mr. Justin Shimp, as I understand, did not have standing. The jurisdiction issue is similar to standing; except that with jurisdiction the court simply cannot act unless it has jurisdiction. In this instance, there are two things that work. First of all, the Planning Commission decisions can only be appealed to Circuit Court. Rather strangely, the procedure that's in the State Code provides that appeals be treated for Site Plans the same way that they are treated for subdivisions. So the section that talks about appeals for subdivider's going to the Circuit Court is also to be read as dealing with Planning Commission approval or disapproval of site plans. So the first hurdle is the State Code only allows for the subdivider or the applicant with the site plan to appeal to Circuit Court. That means, someone who is complaining about the site plan or the subdivision (that is not the subdivider or the applicant) doesn't have a statutory right to appeal. In this instance, Mr. Shimp has argued that the Planning Commission erred because it relied on improper/incorrect information from the Planning Director. As the report from the Planning Director indicates (in this instance) he was a conduit/a pass through, he gathered information and made a report. An appeal to the BZA from the decision of the Planning Director or any other Zoning Administrator requires an order, requirement, decision or determination. Now quite typically, for example, a Planning Director writes a letter to a landowner, telling the landowner he is in violation of the Zoning Ordinance because he has fifty junk cars and that's not permitted in R-1 and that landowner disagrees. He has made a determination, and he might have issued an order that says you have thirty days to remove this. That's the sort of thing that comes to the BZA. Where there is no such clear cut ordered determination/decision then there is no appeal right to the BZA."*

Mr. Payne referenced the case James vs. City of Falls Church. He stated that, *"it is fairly interesting in that several things were going on in that case. The Church that was appealing was relying on an interpretation that*

the Zoning Director had made. There is a great deal of informal back and forth with the Zoning Director and people who want to use their land, subdivide their land, change the use of their land (a constant back and forth). Those things aren't appealed. That's what happened in this case; the Planning Director said it's my interpretation of the ordinance that you can consolidate these seven lots. So, when they went before the Planning Commission which has the jurisdiction, their argument was, the Zoning Director said we could do this. In the County, no one appealed the Zoning Director, because after sixty (60) days, his decision becomes final for a vested right of the land owner. Therefore, the argument went that the Planning Commission has to listen to him because sixty (60) days has gone by. The Supreme Court said two things. Number one, his letter of interpretation was not a decision, was not a determination, it wasn't an order; consequently it did not have to be appealed to the BZA because it could not be appealed to the BZA. The second thing the Court said was, the Planning Commission applies the law all the time. They've got their own power; they have to figure out what ordinances mean and make their own decisions. So in short, the Planning Commission is not the Zoning Officer, the Planning Commission is not a Zoning Administrator, or Planning Director. Therefore, the appeal of the Planning Commission applies to the Circuit Court. In this instance, where there was no decision or determination made by the Planning Director, their appeal to the BZA is simply without jurisdiction. As to standing, I don't belabor that; perhaps the news coverage gives the impression because the way the federal system works that just about anybody can go to court and sue for environmental type claims. Federal standing issues are different because of state or federal laws or because of federal decisions. The Virginia Supreme Court has kept and made a very narrow window for standing. It is relying on the word aggrieved, which is in the Zoning statute; the appeal right to the BZA statute. One of the critical terms or phrases that the court uses is the word aggrieved. A statute contemplates a substantial grievance means, a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner, different from that suffered by the public generally."

Mr. Payne referenced the case, Friends of the Rappahannock. He stated that, *"there, a group of citizens gathered together and formed a committee (essentially) to oppose this gravel pit in the Rappahannock. They obviously had a genuine, heartfelt, and perhaps reasonable concern about that gravel pit in the Rappahannock River and their county; but they didn't have an injury to their specific property. That's the courts (sort of) measuring point is what's this going to do to your piece of land. So from the standing point, I don't think anything could have changed from the last hearing. The last point, I know that you received a letter from some additional landowners, who are in agreement with Mr. Shimp's concerns. The problem is, they did not join the fight within the thirty (30) day timeframe so they're not parties to this proceeding; they certainly can make their feelings known. In order to be properly before the BZA, the petition has to be filed within thirty (30) days of the decision. So, on top of the fact that they didn't come within the thirty (30) days, they are also facing the jurisdiction issue."*

Mr. Payne stated that he was happy to answer any questions the BZA may have. Mr. Childs thanked Mr. Payne for his assistance with this matter.

Mr. Childs asked that the applicant come forward and present.

Mr. Justin Shimp: Mr. Shimp was sworn in by Mr. Childs before the Board and signed the oath. Mr. Shimp stated that he is a resident of Tanbark Drive, in the neighborhood of this proposed development. He noted that he has a difference of opinion than what was given by Mr. Payne. He stated that, *"in relating to the folks who are joining the appeal; until public notice is sent out and things like this, how do folks have an opportunity to know what's going on."* He indicated that there needs to be some consideration given to those joining the appeal.

Mr. Shimp stated that in relation to his standing, this particular site (proposed use) is within 400 feet of a school that his kids are at, with his wife, every week. He stated that the purpose of zoning is orderly development, and protection of citizens and property. He would hope that there would be some consideration that the safety of his family and of those that live next door, could be considered as a grievance.

Mr. Shimp noted that he has a different view in regards to the jurisdiction of this matter. He indicated that the Zoning Administrator made a decision to present some correspondences from the volunteer fire department as evidence as legal fire access. He noted that they are not entitled to make that call; that it is up to the Building

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Official (deals with the building code for fire access). He stated that, *"that written correspondence, saying that for the purpose of a Site Plan approval, we can account this private road, belonging to somebody else, as our land to use for the benefit of this property."* Mr. Shimp noted that should have been information that the Zoning Administrator took into consideration and not presented as evidence that was requested. He also noted that this information was presented the night of the meeting. He further noted from his standpoint, *"that action as one that I appealed, put a stay (if you will) until tonight, until you all hear this, and that would invalidate the Site Plan."* He noted that if the BZA agrees that the information was incorrect, the Planning Commission could rehear this with the information provided by the Building Official, stating that this meets a legal fire access from a code standpoint. He also noted that decision could be subject to a different set of appeals. He further noted that, *"from the Zoning Administrator's standpoint, I feel very strongly that it was a decision to present the information, it was relied upon, and that appeal that I filed puts a halt on that action from the minute he presented it to the Planning Commission."* Mr. Shimp believes there is room to view this as an appeal to the Zoning Administrator.

Mr. Shimp noted that he has been taken aback (in this case) by how the benefit of doubt in some of these decision has gone toward the developers. He feels the benefit of doubt needs to go to the neighbors. Mr. Shimp indicated that he has documentation that shows that the three (3) petitioning neighbors have deeded access to Family Lane; the Zenith Quest property does not.

Mr. Shimp asked Staff to show a slide he provided showing a proposed alternate fire access (see attached). Mr. Shimp stated that, *"the practical implication is that by taking the right of Family Lane, the developer has created an additional 20,000-30,000 SF buildable area with this layout; without asking for permission; without asking for an easement; none of these things."* He noted that he finds that what's being done is unreasonable, and feels that he, along with those with deeded access on that road, have legal standing.

Mr. Childs opened the public hearing at 8:15 p.m.

Sharon Harris: Ms. Harris stated that she lives on Family Lane. She noted that, *"she did not know anything about this project until I think it was January or February, until Mr. Shimp came to her and asked if she knew a gun factory and they were going to use Family Lane as an access for emergency. I didn't know anything about that, until, I think it was in April, when I first got the letter about this meeting. I don't think it's fair, I think they should ask for our permission for the access."* She noted that she agrees with Mr. Shimp in regards to them building an access off of Route 151, rather than using Family Lane.

Mr. Harris: Mr. Harris stated that Sharon Harris is his sister. He noted that he doesn't understand what all is happening; it happened so quickly. He doesn't feel that it's necessary to destroy the land going to Family Lane. He stated that, *"he don't know who's doing it, but the construction (is like) in her driveway already without permission."* He noted that he is surprised that there aren't more adjoining neighbors here. He further noted that the area (Route 151) is congested enough. He feels that the access needs to be kept on Route 151. He stated that, *"as far as them modifying and upgrading the road, making it better than what it is; it's very inaccessible now."* He further stated that, *"they have uprooted the land all the way into the road that goes to Family Lane."*

Ernest Durette: Mr. Durette stated that he owns land on Family Lane. He stated that, *"I don't like to get in the way of progress but when progress is dangerous, I'd like to know about it."* Mr. Harris asked the Board, *"if any one of you was living on that road, would you approve this property to build a gun factory, that you don't know what's going to happen to that, it could blow up."* He noted that he did some research on the internet and found out more about the company. He noted that he knows jobs are needed in Nelson County but people's safety should be considered first. He further noted that this could be built somewhere else.

Ray Miles: Mr. Miles noted that he is a resident of Nelson County and the Project Coordinator for Zenith Quest for the warehouse and light manufacturing project. He noted that he agrees with the history provided by Mr. Padalino. He stated that, *"back in September, myself and our engineer from Roudabush, Gail & Associates, Ammy George, met with fire official, Tommy Harvey, and also former fire official at Wintergreen, Don Fitzgerald, and talked through all of these issues. We talked about the go around driveway behind the building; we talked about*

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Family Lane; we talked about everything. They drew up an idea for us to put our plans together for firefighting emergency access. Those plans were reviewed by the Commission and approved.” Mr. Miles noted that as a company, they plan to go forward based on the approval.

Mr. Miles also noted that their attorney, Valerie Long with Williams-Mullen in Charlottesville concurred with the County Attorney in this matter that there is no jurisdiction or standing and that the fire company or emergency access vehicles can go anywhere they need to, and no easement is required. He further noted that, *“as a company, they have always been willing to work on an easement, if required to. He continued to ask the question through the process – both of the Planning Commission and the fire officials – do I need to have an emergency access easement in place according to the code or requirements? The answer never came back yes, even to this afternoon when he asked the fire official, Tommy Harvey, do I need that.”* Mr. Miles did note that they have hired a real estate attorney to look into who owns that right-of-way, which is commonly called Family Lane. If the owners can be located, they will work on getting an easement, at their own expense. In regards to current activity on the property (clearing of trees), affecting Family Lane, he wanted to clarify that to his knowledge, they have not gone beyond the boundaries of their property line.

Regarding the Building Official, Mr. Miles stated that, *“back in September, the reason they went to the fire official, is our engineer, Ammy at Roudabush went to the Building Official, David Thompson and asked, what fire access and firefighting setup do we need. He explained the code and then said (in emails) that he deferred to the fire official to meet with us about the specifics. And so my understanding is, the fire official has met with us, and has spoken, and I have not heard that David Thompson did not concur, in fact my understanding is that he has concurred that these plans are fine.”*

No further comments were given and the public hearing was closed at 8:26 p.m.

Ms. Cash noted that in listening to everyone; she is sure they all have concerns, issues or worries about this business. She’s not sure if she would share those same concerns, she does not live there. She noted that this is not the Board that hears those concerns. She thanked everyone for coming and sharing their concerns but noted that the proper authority for making this decision is the Planning Commission and the Board of Supervisors. She further noted that the Board of Zoning Appeals is there to decide whether the appeal of the approval that the Planning Commission and the Zoning Administrator made were within our purview.

Mr. Miles noted that the decision has been made and feels it’s not up to the Board of Zoning Appeals. Mr. Moyer noted that he doesn’t think the Board of Zoning Appeals has jurisdiction to relieve their problems. Mr. Childs noted that he agrees that the Board of Zoning Appeals does not have jurisdiction, but he does sympathize with and understand the concerns.

Ms. Cash made the following motion:

I move that the Board of Zoning Appeals, relative to Appeal #2015-02, finds that Mr. Justin Shimp has no standing to file an appeal of the Planning Commission and Zoning Administrator’s approvals of Major Site Plan 2015-005 for Zenith Quest-Afton Mountain as:

- 1. the petitioner, Mr. Shimp’s, appeal seeks to redress some anticipated injury that is not based on current fact;**
- 2. the petitioner has no direct interest in the matter, hence is not “aggrieved”, as defined by the Virginia Supreme Court, by the Planning Commission, Zoning Administrator or, in this case Building Official’s approvals relative to the fire access road.**

Therefore, Mr. Shimp does not have standing to appeal. The Board of Zoning Appeals does not have jurisdiction to approve or disapprove this access road. In addition, Ms. Awkard, Ms. Banks, Ms. Harris are not included in this appeal or motion as they did not file an appeal within the thirty days required by County Zoning Ordinance Section 14-4.

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Mr. Miles provided the second; the vote 4-0.

Other Business:

John Bradshaw: Mrs. Hopkins stated that she received a phone call from Mr. Bradshaw stating that he would like to resign from the Board as of June 1st. She further noted that she spoke with Candy McGarry, and she would advertise for the position. It was discussed in doing something special to honor Mr. Bradshaw for honoring his years of service. The Board asked Staff to check out some options of what could be done.

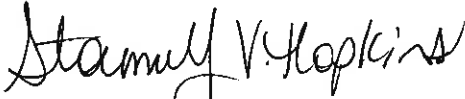
Curro case: Ms. Cash asked if there was an update on the Curro's. Mr. Payne stated that it was noted in the Court of Appeals that it was filed with the wrong Court. He has filed an injunctive relief to have the structure removed. He further noted that the Curro's Attorney is stating that they have no money, he's sick, and the contractor is being taken to court. Mr. Payne stated that they would have to wait until July until there is a new Judge.

Mr. Moyer stated that he would like to check the possibility of taking Mr. Bradshaw's position and the new person could be the alternate. It was noted that it would be up to the Board of Supervisors and the Judge to make that decision. Staff stated they would check on that option, and if there are any requirements to do so, and let the Board know their findings.

Adjournment:

Mr. Childs adjourned the meeting at 8:40 P.M.

Respectfully submitted,



Stormy V. Hopkins
Secretary

