



Nelson County Board of Zoning Appeals

**MEETING AGENDA:
September 6th, 2023
7:00 P.M.**

**General District Courtroom
84 Courthouse Square, Lovingson, Virginia**

- I. Call to Order
- II. Approval of Minutes –
 - a. October 5, 2021
 - b. March 7, 2023
- III. Public Hearings
 - a. Appeal 999 - Wagner
- IV. Next meeting to be determined



Nelson County Board of Zoning Appeals Meeting Minutes October 5th, 2021

Present: Chair Mary Kathryn Allen and Board Members: Gifford Childs, Carole Saunders, and Angela Jones. **Absent:** Shelby Bruguiera

Staff Present: Dylan Bishop, Director. **Absent:** Emily Hjulstrom, Planner/Secretary.

Call to Order: Chair Allen called the meeting to order at 7:00 P. M. in the General District Courtroom, County Courthouse, Lovingson.

Review of meeting minutes:

Ms. Saunders made a motion to approve the minutes from the April 6th, 2021 meeting. Ms. Jones seconded the motion.

Yes:

- Mary Kathryn Allen
- Gifford Childs
- Carole Saunders
- Angela Jones

Chair Allen presented the following:

Nelson County Board of Zoning Appeals Meeting procedure

Call to Order:

Welcome to the Board of Zoning Appeals meeting for (date): There are extra meeting agendas in the back row that detail what we will be discussing and in what order at tonight’s meeting.

Because the BZA is appointed by the Circuit Court Judges of the 24th Judicial Circuit Court the BZA is considered an extension of that court and we will be following courtroom procedures. This meeting is also being recorded so it is important that only one person speak at a time and from the podium.

- Our purpose is to hear appeals by citizens of decisions made by the Zoning Administrator.
- Everyone who has something to say will have a chance to present evidence in a manner that it can be clearly recorded and heard by everyone.
 - First we will hear the staff report, followed by questions from the BZA members.
 - Next the applicant will speak from the podium. Before they present the applicant must state their full name and take an oath. After presenting there are usually follow up questions by the board. The applicant may have representatives also present if they choose.
 - Next the public hearing portion of the meeting will be announced by the Chairman. Anyone who would like to present evidence is invited to approach the podium one at a time, state their full name, take the oath and speak. If you wish to speak we ask that you not interrupt the speaker but wait until it is your turn to speak formally.
 - After everyone that wishes to speak is through the public hearing is closed.
- The BZA then will discuss the case and request a motion to approve or deny the appeal. Followed by a vote or decision to extend or postpone a decision.

Oath:

Do you swear or affirm that the information you give before the Nelson County Board of Zoning Appeals shall be the truth, the whole truth, and nothing but the truth, So help you God?

If the appeal is denied the applicant is informed that they do have the right to formally appeal to the court and that the Zoning Administrator can provide them with information on how that is done.



Appeal by Crabtree Falls LLC of Zoning Violation dated June 11, 2021

Ms. Bishop explained that this property is located on Crabtree Falls Highway and was put in violation in February of 2020, with another letter issued in June of 2021. She added that staff has granted requests for extensions by the applicant to hear the appeal and as of this date nothing has been done. She explained that the three zoning issues in question are the following:

- The structure is located approximately 30' from the road and 10' from the water's edge. The required setback is 75' from the center of the road.
- An accessory structure being placed before a primary structure or use is not permitted.
 - *"Accessory use or structure: A subordinate use or building customarily incidental to and located upon the same lot occupied by the main use or building."*
- Construction in a flood zone without permits.

She explained that the decision to be made was whether or not the Building Official's determination that this property is in violation is valid.

Chair Allen asked Chuck Miller (the Building Official) what he had been told that the property is being used for. Mr. Miller explained that he was initially told it was to be used as a vacation/weekend spot. He noted that he is now being told that it is used as storage only. He added that it is a modified structure with a stove in it and that there is evidence of them staying there. Mr. Childs asked if there was electricity running to the structure. Mr. Miller noted that any electricity they have would be coming from a generator. Ms. Saunders asked what size the structure is. Mr. Miller noted that he didn't remember but that the deck itself is over the 256 sq. ft. building permit requirement. He added that it is the biggest part of the structure and the storage container sits on top of it. He added that a structure being used as a dwelling or existing in the floodplain requires a permit even if under 256 sq ft.

Maynard Sipe is an attorney representing the owner/applicant, Ivan Fanton. Mr. Sipe explained that Mr. Fanton had come to him that summer for help working through these issues with the County. He explained that the three violations stated by staff are what's alleged but that the other information in the letter pertaining to building code is not relevant.

He noted that the rule that no accessory structure can exist without a primary structure is a staff interpretation and doesn't exist in the Zoning Ordinance. He explained that they believe that there is a basic failing here and that they believe that the structure is nonconforming. He noted that the cabin has been there for over 4 decades and was in place before the Zoning Ordinance was adopted. He added that the cabin itself is a primary use and has been used by previous owners recreationally. He noted that because it predated the ordinance, there were no setbacks or floodplain restrictions applied to it. He added that they have some evidence that it is not in a floodplain.

He noted that in his letter he explained some procedural issues with the violation notice and that he doesn't agree with the interpretation that any official can issue the violation. He added that the notice should come from the Zoning Administrator.

He explained that Mr. Fanton purchased the property in 2015, used the cabin for several years and then updated it in 2018. He explained that they have offered to move the storage container part because it may not be nonconforming. He added that it will take time and effort and Mr. Fanton has been hesitating on doing that while Mr. Sipe helps him work through the issues. He explained that Mr. Fanton would like to retain the existing concrete piers and platform to use for recreational purposes.

Mr. Sipe asked Mr. Fanton to confirm that he bought the property in 2015. Mr. Fanton confirmed that he had bought the property in 2015 from an auction house called Blue Ridge Property Buyers. Mr. Sipe

asked Mr. Fanton if the cabin was there when he purchased the property. Mr. Fanton confirmed that it was. Mr. Sipe asked why Mr. Fanton purchased the property. Mr. Fanton explained that he had been looking for a piece of land in that area since he was 18 and found this parcel with the cabin to be ideal for spending the weekend with his kids. Mr. Sipe asked Mr. Fanton to briefly describe the property. Mr. Fanton confirmed that the property was bisected by Route 56 and with the lower portion being about an acre and the upper portion being a little over 10 acres. Mr. Sipe asked if it abutted the Tye River. Mr. Fanton confirmed that it did. Mr. Sipe asked Mr. Fanton to describe the upper portion of land. Mr. Fanton described the upper portion as a steep rocky outcrop. He explained that in many places the slope is over 50 degrees. Mr. Sipe asked what the most attractive part of the property was when he purchased it. Mr. Fanton noted that it was the camp by the river. Mr. Sipe asked if Mr. Fanton used the cabin that was present for the first couple of years. Mr. Fanton confirmed that he had. Mr. Sipe then showed a photo of the former cabin from Google Street View.

Ms. Allen asked what the other structure shown on Exhibit 9 was. Mr. Sipe noted that it was the same cabin but with the upper portion removed by Mr. Fanton and replaced by a metal container. He explained that they believe the platform should be allowed to remain as nonconforming and be used for recreation. Ms. Bishop noted that the Board of Zoning Appeals is not making a nonconforming determination. Ms. Allen explained that the BZA is there to decide whether or not to uphold staff's determination. Mr. Sipe added that they will be making a nonconforming determination request with staff. Mr. Sipe explained that it's difficult to find people that were around 40 years ago but that they do have some evidence. Mr. Sipe noted that if it is nonconforming they could find that the violations are not violations. Ms. Allen explained that it was confusing for Mr. Sipe to keep repeating the nonconforming issue because it cannot weigh into the BZA's decision. Mr. Sipe explained that if the use is legally nonconforming and it was present before the Zoning Ordinance was adopted then it is a legal permissible use on the property. Ms. Allen noted that their decision would not be based off of whether or not it is nonconforming but off of what it currently is. Mr. Sipe noted that he disagreed and explained that they would still work with staff and get a proper determination of its nonconforming status. Ms. Allen noted that the violations did not involve whether or not it was nonconforming. Mr. Sipe noted that he believes staff is looking at the issue improperly and is assessing it as new construction. He added that the three violations look at the structure as if it were new construction. He noted that the storage container is a change to the structure but that the existing structure is legal and nonconforming and that there would be no violation for that portion of the structure.

Mr. Fanton explained that keeping the platform and piers would allow them to stay off the ground in a safe zone. He noted that they could use it for camping, recreation, and fishing. Mr. Sipe asked Mr. Fanton to describe the terrain around the cabin. Mr. Fanton noted that it is steep in all directions and that you need ladders to move around. Mr. Sipe added that it is also rocky and Mr. Fanton confirmed. Mr. Sipe explained that having the platform would make the property more usable for recreation.

Mr. Sipe asked Mr. Fanton if he had asked for a request for a determination from the Army Corps of Engineers. Mr. Fanton confirmed that he had and they told him that they would not need a permit from the Army Corps of Engineers. Mr. Sipe noted that he had also spoke to the Army Corps of Engineers and that Mr. Steven Vanderploeg confirmed that as long as there are no new placements of footings, pilings, or fill that no permit is required. He noted that Mr. Vanderploeg also confirmed that the piers were previously existing. Mr. Fanton noted that it has not been easy to figure out how long the cabin has

been there. Mr. Fanton explained that he spoke to Michael and Scott Carr and that Scott Carr was able to give an affidavit stating that he worked on the cabin for the previous owner.

Mr. Sipe asked if Mr. Fanton had seen the water level reach the piers since purchasing the property in 2015. Mr. Fanton stated that he had not. Mr. Sipe asked if Mr. Fanton had seen the river rise at any point. Mr. Fanton noted that he had seen the water level rise twice, once during a hurricane a few years ago when they had 30 inches of rain in six days, as well as a week and a half ago where there was a lot of flooding in the lower valley. He noted that the water did not reach the piers during either of these events. Mr. Sipe explained that the cabin is pretty far up the road and above Crabtree Falls where the river is not carrying as much area of watershed.

Mr. Sipe noted that the County treated this as all new construction. He then showed the Board Mr. Scott Carr's affidavit.

Mr. Sipe then showed them Mr. Fanton's deed as well as the previous owner, Mr. Gilligan's, deed. He then showed them a deed from 1970 that does not include "with the buildings and improvements there on" that the newer deed includes.

Mr. Sipe stated that he and Mr. Fanton would have liked to have avoided this Board of Zoning Appeals meeting and instead pursue a determination. He explained that Mr. Fanton applied for a new building permit application that day and that he ultimately plans to build another cabin across the road. Mr. Sipe asked that the Board find that there are no violations on the untouched portion of the structure.

Chair Allen opened public hearing at 7:30 PM

Chair Allen closed the public hearing at 7:30 PM

Ms. Saunders asked when the floodplain ordinance took effect for that area. Ms. Bishop explained that the new floodplain maps were adopted in 2010. She added that the ordinance does require that substantial improvements to structures to be floodplain compliant. She noted that the same is true for nonconforming structures.

Chair Allen asked what the piers were currently made out of. Mr. Chuck Miller noted that he was told that Mr. Fanton had redone the piers. He noted that they appear to be cinder block but may be poured concrete. He explained that if they were cinder block they have parge on them, a cement mixture that coats the blocks to make them look uniform. Chair Allen asked what the piers were made of originally. Mr. Miller noted that he never saw the original piers but that they would have been done in the 1970's. Ms. Bishop added that the Zoning Ordinance does not regulate piers or footers as structures. Chair Allen asked if leaving just the piers would require a variance. Mr. Miller explained that the building code definition of a structure is anything that is built and would need to comply with the floodplain requirements. Mr. Miller added that he was told the footings were new and that the deck was all new wood. He explained that there was a cabin there but that this is not the same cabin and is all new construction. Mr. Childs added that they would have also needed to have a building permit and Mr. Miller confirmed. Mr. Childs added that they couldn't approve variances for accessory uses anyways.

Mr. Childs made a motion to uphold the decision of the Planning and Zoning Department and the Notice of Violation sent by the Building Official for Crabtree Falls LLC - Zoning Violation dated June 11, 2021. Ms. Jones seconded the motion.

Yes:

Mary Kathryn Allen

Gifford Childs

Carole Saunders

Angela Jones

Chair Allen adjourned the meeting at 7:41 PM.

Respectfully submitted,



Emily Hjulsstrom

Planner/Secretary, Planning & Zoning



Nelson County Board of Zoning Appeals Meeting Minutes March 7th, 2023



Present: Chair Mary Kathryn Allen and Board Members: Mary Cunningham and Carole Saunders.

Staff Present: Dylan Bishop, Director. Emily Hjulstrom, Planner/Secretary.

Call to Order: Chair Allen called the meeting to order at 7:02 P. M. in the General District Courtroom, County Courthouse, Lovington.

Review of meeting minutes:

Chair Allen noted that the meeting minutes review of the October 5th, 2021 meeting would need to be reviewed at the next BZA hearing.

Officer Elections:

Ms. Saunders made a motion to reelect Mary Kathryn Allen as Chair. Ms. Cunningham seconded the motion.

Yes:

Carole Saunders

Mary Cunningham

Mary Kathryn Allen

Chair Allen made a motion to elect Carole Saunders as Vice Chair. Ms. Cunningham seconded the motion.

Yes:

Carole Saunders

Mary Cunningham

Mary Kathryn Allen

Ms. Cunningham made a motion to elect Emily Hjulstrom as the Secretary. Ms. Saunders seconded the motion.

Yes:

Carole Saunders

Mary Cunningham

Mary Kathryn Allen

Chair Allen presented the following:

DRAFT

Nelson County Board of Zoning Appeals Meeting procedure

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Variance #845

Ms. Bishop presented the following information:

**Nelson County
Board of Zoning Appeals**

To: Board of Zoning Appeals
From: Dylan M. Bishop, Director of Planning & Zoning *DMB*
Date: March 7, 2023
Re: Variance Application #845 – Request for Reduction of Front Setback

OWNER(S): Katherine West & Timothy Taylor, 732 Craigtown Road, Shipman, VA 22971, 559-556-8466, katiectheog@gmail.com

APPLICANT(S): Elaine Woodson, 434-906-8663, ewd83@aol.com

SUBJECT PROPERTY: Tax Map # 68-A-39 / 44 Hilltop Lane / South District

ACREAGE: 0.68 acres

ZONING: A-1 Agricultural

VARIANCE REQUESTED: Reduction in minimum required front setback of 75 feet from the center of the road, to 25 feet from the center of the road.

PURPOSE OF REQUEST: Construction or placement of a single-family dwelling or a manufactured home.

BACKGROUND: Ms. Elaine Woodson initially contacted the Building Inspections Department in December 2022 to inquire about the requirements to build or place a new dwelling in the same location as the previous dwelling, which burned down in 2015. Article 11 (Nonconforming Ordinance) Section 11-1-3(G) states that unless the owner of a nonconforming structure rebuilds within two (2) years of the natural disaster or act of God, such building shall only be rebuilt in accordance with current provisions of the County's Zoning Ordinance. Section 11-1-3(J) states that the property owner shall have the right to seek a variance in order to bring a nonconforming structure into compliance.

After staff determined the date that the structure burned down (more than 2 years ago), and established that there is a 30' wide joint right of way through the subject property, staff notified Ms. Woodson that the granting of a variance would be required to construct or place the proposed dwelling in the same footprint as the previous one. Ms. Woodson submitted this request for variance on January 26, 2023.

LEGISLATION: Article 14, Board of Zoning Appeals, Nelson County Zoning Ordinance

"No such variance shall be authorized by the board unless it finds:

(a) That the strict application of the ordinance would produce undue hardship;

(b) That such hardship is not shared generally by other properties in the same zoning district and the same vicinity;

(c) That the authorization of such variance will not be of substantial detriment to adjacent property and that the character of the district will not be changed by the granting of the variance;

(d) That no rise will be created in the water level during flood conditions in a floodway, as defined in Article 10, as a result of issuing a variance."

Attachments:

Application

Plat

Draft Deed

Pictures

Virginia Code 15.2-2309 – BZA

APO Letter / Listing

Ms. Bishop noted that staff measured 25' from the center of the road to the existing house footprint. She added that the applicants are unsure what size house they will build but that the only setback they will need the variance for is the front setback.

Chair Allen asked when the property was subdivided. Ms. Bishop noted that it was subdivided in 1972.

Ms. Saunders asked if the property was part of an HOA. Ms. Bishop noted that she was not aware of an HOA. Ms. Saunders noted that many houses in the area are built close to the road and added that she has no issue with approving the variance.

Ms. Bishop noted that zoning was not enacted until the late 1970's and that many of the other dwellings in the neighborhood are less than 75' from the center of the road.

Ms. Saunders noted that she visited the site and was unable to find the rear property line. Ms. Bishop noted that it is not marked.

Katherine West and Tim Taylor of 735 Craigtown Rd are the petitioners. Ms. West explained that she used to live in the dwelling years ago and that it burned down when others were living there after her. Ms. Elaine Woodson of 735 Craigtown Rd noted that the septic tank already exists on the other side of the road as well as the well that is on the property line. She noted that her brother-in-law owned the property when the house burned down and he deeded it to Ms. West and Mr. Taylor as a gift. Ms.

Woodson noted that they had contacted the county previously, thinking that they could build it back, but were not aware of the 2-year time limit.

Ms. Saunders asked who divided the property. Ms. Bishop noted that it was Roy Loving who subdivided the property but is no longer the owner of either piece. Ms. Saunders asked if the property owner beyond them was contacted. Ms. Hjulstrom noted that all adjoining property owners were notified.

Terry Warren of 484 Lonesome Pine Rd explained that his son was living in the house when it burned down. He noted that he went to Building Inspections and they told them that they could rebuild and did not say anything about a deadline by which to do so. He noted that the previous house was a two-bedroom home and approximately 24' by 30-34'. Chair Allen asked how big of a dwelling they wished to replace it with. Ms. West noted that they would replace it with a single wide or whatever they are able to fit there. Ms. Hjulstrom clarified that the variance would specifically be for the front-line setback and that all other setbacks would still apply.

Chair Allen opened the public hearing at 7:25 PM

Chair Allen closed the public hearing at 7:25 PM

Ms. Saunders noted that most subdivisions at the time would include a setback. She noted that many of the homes in that neighborhood are very close to the road. She added that the 30' wide driveway is a rather large easement. Ms. Cunningham noted that she doesn't have an issue with approving the variance. Ms. Allen noted that this variance would stay with the land and that if they have another fire they would be able to keep the variance. Ms. Bishop noted that she was not sure if the variance would remain if the new house burned down.

Ms. Saunders made a motion to approve Variance #845 to reduce the front line setbacks from 75' from the center of the road to 25' from the center of the road. Ms. Cunningham seconded the motion. Yes:

Mary Kathryn Allen

Carole Saunders

Mary Cunningham

Ms. Cunningham made a motion to adjourn. Ms. Saunders seconded the motion.

Yes:

Mary Kathryn Allen

Carole Saunders

Mary Cunningham

Chair Allen adjourned the meeting at 7:31 PM.

Respectfully submitted,

A handwritten signature in black ink that reads "Emily Hjulstrom". The signature is written in a cursive style with a long horizontal flourish at the end.

Emily Hjulstrom

Planner/Secretary, Planning & Zoning

DRAFT

Memo

To: Board of Zoning Appeals
From: Dylan M. Bishop, Director of Planning & Zoning *DMB*
Date: September 6, 2023
Re: Appeal #999 – Notice of Violation for Shooting Range at TM# 13-12-4, 5

This property is currently zoned A-1 Agriculture. On May 2, 2023 the property owners were sent a Notice of Correction for complaints received regarding an alleged unpermitted outdoor firing range use. Upon inspection, staff observed items at the site that are commonly used for target shooting. As the owners confirmed the use and then continued as reported by Sheriff David Hill on June 16, 2023, they were subsequently issued a Notice of Violation on June 27, 2023. This Notice requested that the owners comply by discontinuing the outdoor firing range use, applying for a Special Use Permit if so desired, or file an appeal within 30 days. The owners' agent filed an appeal within the required 30-day timeframe.

Per Section 4-1-30a, an outdoor firing range in conjunction with the County noise control ordinance is a Special Use Permit in the A-1 District. Section 4-1-12 permits accessory uses as defined.

In the absence of a codified definition, I have applied the following administrative interpretation based on case law, precedent, and resources from the American Planning Association (APA):

An outdoor firing range is any area for the sport shooting of firearms which is either commercial, or is open to the public, or is the main use. Here it is determined that this outdoor firing range was a main use.

The Zoning Ordinance definitions provide that an “accessory use or structure” is “a subordinate use or building customarily incidental to and located upon the same lot occupied by the main use or building.” Whether an activity is an accessory use is a question of fact.

On this property, the shooting and target practice is occurring on an unimproved tract of land. According to reports from complainants and the Sheriff's Department, the shooting is frequent and not occasional, it is repetitive, and it sometimes occurs at night. Those shooting are not the landowners.

Therefore, it is my determination that the use of the land for these activities comprise a private outdoor firing range which is not an accessory use, but the main use, which would require approval of a Special Use Permit.

Attachments:

1. Memo from County Attorney Phillip D. Payne IV
2. GIS Aerial with Zoning
3. Notice of Correction dated May 2, 2023
4. Response Letter to Ms. Hjulstrom dated June 2, 2023
5. Notice of Violation dated June 27, 2023
6. Letter to Ms. Hjulstrom dated July 3, 2023
7. Response Letter to Owners' Agent dated July 13, 2023
8. Adjoining Property Owner List and Notice
9. Applicant Letter
10. Legal Notice
11. Appeal #999 Cover Letter
12. Appeal #999 Application
13. Appeal #999 Additional Materials
14. Response to Memo from County Attorney August 29, 2023



OFFICE OF
THE COUNTY ATTORNEY
NELSON COUNTY
402 COURT STREET
POST OFFICE BOX 200
LOVINGSTON, VIRGINIA 22949

PHILLIP D. PAYNE IV
COUNTY ATTORNEY

TELEPHONE (434) 263-5555

August 23, 2023

By Hand

Nelson County Board of Zoning Appeals
Lovingston, Virginia

In re: Wagner Appeal of Zoning Violation

This memorandum is submitted on behalf of the Nelson County Zoning Administrator (the "Zoning Administrator").

A.

As the result of complaints received and observation of the site, the Zoning Administrator's office found a zoning violation to exist on an unimproved parcel of land zoned A-1 upon which sport shooting and target practice was repetitive, involved various types of firearms, was frequent and not occasional—sometimes on multiple consecutive days—and occurring at night.

Section 4-1-30a of the Zoning Ordinance provides that an "outdoor firing range in conjunction with the County noise control ordinance" in the A-1 district requires a special use permit. There is no definition for an "outdoor firing range" but the phrase has been interpreted by the Zoning Administrator to encompass an area for the sport shooting of firearms which is either commercial, or is open to the public, or is the main use. Here, the Zoning Administrator determined that this outdoor firing range was a main use and hence, a violation.

The Wagners point to the Noise Control ordinance found in Article II of Chapter 8 of the Nelson County Code contending that they are not operating a "commercial sport shooting range" as defined in that Article. However, Chapter 8 addresses "offenses and miscellaneous provisions" and is not part of the zoning ordinance. Moreover, the remedy for a violation of Article II is a criminal proceeding. No charge has been brought against the Wagners in connection with the Noise Control ordinance. The Noise Control Ordinance has no relevance to the notice of violation in this appeal.

As discussed below, the Zoning Administrator's interpretation of an "outdoor firing range" flows from judicial opinions, particularly a decision of the Nelson County Circuit Court.

B.

The provisions of a zoning ordinance cannot address every specific situation; thus, as recognized by Virginia courts, administrative interpretations are part and parcel of the Zoning Administrator's duties.

In the case of *Trustees v. Board of Zoning Appeals*, 273 Va. 375, 381-382 (2007), the Virginia Supreme Court wrote: "We give such deference to the administrative interpretation of zoning ordinances, in part, because '[z]oning administrators and boards of zoning appeals...are able to ensure consistent application consonant with a local government's intent for specific ordinances. Such agencies develop expertise in the relationship between particular textual language and a local government's overall zoning plan.'"

The *Trustees* decision addressed a zoning administrator's interpretation of the word "adjacent" in connection with two lots under the same ownership but separated by a public street. "The circuit court recognized...that deciding when two objects are not widely separated, but are close enough to be adjacent requires a 'judgment call.'" The Supreme Court held "[t]hat decision, or 'judgment call,' is 'best accomplished by those charged with enforcing'" the zoning ordinance.

Here, the Zoning Administrator's interpretation is grounded on judicial authority.

C.

Because an outdoor firing range is not a by right use, it is permissible only with a special use permit or if it is an accessory use. By zoning ordinance definition, an accessory use is "[a] subordinate use or building customarily incidental to and located upon the same lot occupied by the main use or building."

In *Coleman v Board of Zoning Appeals*, a Fairfax County circuit court case, the judge observed that, "in the context of zoning, accessory uses are those 'customarily incidental' to the main use." He explained: "Generally, to determine if a use is accessory, the court must consider whether it is a use that is customarily associated with the primary use. In the absence of a direct prohibition in the ordinance against a particular use, what is a permitted accessory use depends on the specific details of each case. The majority of Virginia cases that address whether a particular nonconforming use is accessory rely on the relevant ordinance."

In *Orion Sporting Group v. Nelson County Supervisors*, 24 Cir. CH040019, 68 Va. Cir. 195 (2005), the Nelson County Circuit Court reviewed whether a commercial "shotgun sports center or sporting clays facility" was permitted by right in an A-1 zoning district, or, in the alternative, was an accessory use. Judge Gamble ruled that the Nelson zoning ordinance was an inclusive ordinance and thus only the enumerated permitted uses are allowed. "The uses permitted by right do not include a sporting clays facility. This is allowable only under a conditional use permit approved by the Board [of Supervisors]." (It should be noted that an 'outdoor firing range' was originally a conditional use but is now listed as a special use.)

Regarding the accessory use issue, Judge Gamble quoted an Indiana court decision for the proposition that "an accessory use must be subordinate in area, extent, and purpose to the primary use of the lot."

The Indiana case held that a skeet range was an accessory use to a weekend home. As it related to the sporting clays facility at issue in Nelson, Gamble relied on the foregoing case in writing that “recreational uses are commonly associated with country houses, and the [non-public] skeet range is incidental to the recreational use of the weekend home.” It follows that, as a general rule, a homeowner in A-1 would have the same accessory use right.

Gamble ruled that Orion’s proposed “sporting clays facility is a main use, if not the main use, of the property,” and accordingly, not an accessory use.

In connection with “warm-up” shooting, Gamble wrote: “While I have found that it has not been proven that the sporting clays facility, per se, is an accessory use, I do find that the use of sporting clays for warm-ups and safety tests in conjunction with hunts of live animals on the [commercial] hunting preserve is an accessory use. The facts establish that this limited use of sporting clays is customary to allow a hunter to warm-up prior to engaging in a hunt of wild game and for the staff and guides to evaluate the proficiency of the hunter for safety purposes. Thus, and for this limited purpose, the shooting of sporting clays is allowed as an accessory use.”

D.

“In the zoning context, whether a use is subordinate may turn on such factors as the time devoted to or the size of the use.” *Wiseman v. Board of Supervisors*, 19 Cir. CL201014604, 84 Va. Cir. 10 (2011) (Fairfax Co. Circuit Court).

Here there is no “weekend home.” There is no rural residential use. The shooting is not for “warm up” in connection with hunting. The shooting is frequent and not occasional, it is repetitive, and it sometimes occurs at night. To the extent that hay making is considered the primary permitted use, such extensive target shooting on a small tract of unimproved land is not “a subordinate use...customarily incidental to and located upon the same lot occupied by the main use.” Borrowing Judge Gamble’s words, the outdoor shooting range at issue here “is a main use, if not the main use, of the property.”

Relevant here as well is the rule that a use accessory or incidental to a permitted use “cannot be made the basis for a nonconforming principal use.” *Knowlton v. Browning-Ferris*, 220 Va. 571, 575-576 (1979). Thus, even though non-public firing ranges are accessory uses to some principle uses, even a permitted accessory or incidental use cannot be made the basis for a nonconforming principal use. In other words, a main use cannot be leveraged out of an accessory use.

Hence, under these facts, the firing being conducted here is not a by-right accessory use. In this instance it is a main use which requires a special use permit.

Respectfully submitted,

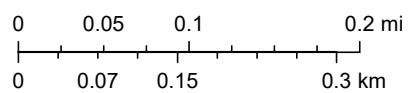

Phillip Payne
County Attorney

cc: B. Spencer Cross, Esquire



August 28, 2023

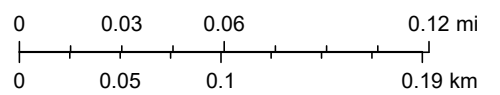
1:9,028





August 28, 2023

1:4,514



DEPARTMENT OF
PLANNING & ZONING



PLANNING COMMISSION
BOARD OF ZONING APPEALS

CERTIFIED MAIL

May 2nd, 2023

Thomas R. & Juliett W. Wagner
772 Chin Quapin Dr.
Lyndhurst, VA 22952

RE: **Notice of Correction:** TM# 13-12-5 – Ennis Mountain Rd. – Zoned A-1 Agricultural

To Whom It May Concern,

Please be advised that the Planning and Zoning Department received notice on April 27th, 2023 that there is an outdoor firing range operating on your property located on Ennis Mountain Rd. On May 1st, 2023, I observed what appeared to be an outdoor firing range.

You may not be aware that an outdoor firing range is only permitted with a Special Use Permit in A-1 (Agricultural) zoning.

Therefore, I am requesting that you take the following actions to avoid additional zoning enforcement action:

- 1. Cease utilizing the property as an outdoor firing range.**
- 2. Apply for and secure a Special Use Permit for an outdoor firing range.**

The property will be reinspected for compliance on **June 2nd, 2023**.

Please contact our office immediately at 434-263-7090 or ehjulstrom@nelsoncounty.org. If you have questions, please let me know. Thank you in advance for your cooperation.

Thank you,

A handwritten signature in black ink that reads "Emily Hjulstrom".

Emily Hjulstrom
Planner
DMB /ewh

LAW OFFICES
EDMUNDS & WILLETTS P.C.
PHYSICAL ADDRESS
110 COMMONWEALTH DRIVE
LYNDHURST, VIRGINIA 22952
MAILING ADDRESS
PO BOX 1617
WAYNESBORO, VIRGINIA 22980

FELIX E. EDMUNDS (1899-1990)
ROGER B. WILLETTS

TELEPHONE (540) 942-5126

June 2, 2023

Emily Hjulstrom
Nelson County Planner
Via Email: ehjulstrom@nelsoncounty.org
PO Box 558
Lovingson, VA 22949

Re: Notice of Correction
TM#13-12-5, Wagner

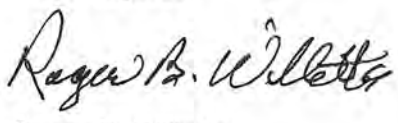
Dear Ms. Hjulstrom:

Thank you for the time to discuss the shooting range issue involving my clients, Mr. and Mrs. Wagner.

It's our belief this issue is the result of a family member complaint due to the fact they are not welcome to use the property.

The grandson has permission to use the property and does in fact shoot his personal guns on the property. It is not open to the public for any purpose and has no target accessories. In sum, It has not been used as a firing range at any time.

Best Regards,



Roger B. Willetts

Cc: Mr.and Mrs. Thomas Wagner

DEPARTMENT OF
PLANNING & ZONING



PLANNING COMMISSION
BOARD OF ZONING APPEALS

CERTIFIED MAIL

June 27th, 2023

Thomas R. & Juliett W. Wagner
772 Chin Quapin Dr.
Lyndhurst, VA 22952

RE: **Notice of Violation:** TM# 13-12-4 & 5 – Ennis Mountain Rd. – Zoned A-1 Agricultural

To Whom It May Concern,

Please be advised that the Planning and Zoning Department received notice on April 27th, 2023 that there is an outdoor firing range operating on your property located on Ennis Mountain Rd. On May 1st, 2023, I observed what appeared to be an outdoor firing range. I received notice from the Nelson County Sheriff on June 16, 2023 that the property continues to be utilized as an outdoor firing range.

An outdoor firing range is only permitted with a Special Use Permit in A-1 (Agricultural) zoning.

Therefore, I am requesting that you take the following actions by July 28th, 2023 to avoid additional zoning enforcement action:

1. **Cease utilizing the property as an outdoor firing range.**
2. **Contact our office to apply for and secure a Special Use Permit from the Board of Supervisors for an outdoor firing range.**

Should you disagree with this violation notice, you may appeal my decision to the Nelson County Board of Zoning Appeals within thirty (30) days from the date of this letter. If an appeal is not made within this time period, then my decision becomes final and unappealable. An application for an appeal may be obtained at the Planning & Zoning Office and the cost of an appeal is \$150.

Please contact our office immediately at 434-263-7090 or ehjulstrom@nelsoncounty.org. If you have questions, please let me know. Thank you in advance for your cooperation.

Thank you,

Emily Hjulstrom
Planner
DMB /ewh

LAW OFFICES
EDMUNDS & WILLETTS P.C.
PHYSICAL ADDRESS
110 COMMONWEALTH DRIVE
LYNDHURST, VIRGINIA 22952
MAILING ADDRESS
PO BOX 1617
WAYNESBORO, VIRGINIA 22980

FELIX E. EDMUNDS (1899-1990)
ROGER B. WILLETTS

TELEPHONE (540) 942-5126

July 3, 2023

Emily Hjulstrom
Nelson County Planner
Via Email: ehjulstrom@nelsoncounty.org
PO Box 558
Lovingston, VA 22949

Re: Notice of Violation
TM#13-12-5, Wagner

Dear Ms. Hjulstrom:

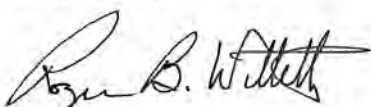
Can you provide me a copy of the Nelson County Planning and Zoning Department definition of "Outdoor Firing Range" so we can better understand the need for a special use permit to discharge firearms on our own property?

Further, can you describe the facts supporting your decision you personally observed what appeared to be a "Outdoor Firing Range".

Also, it would be helpful if you provide me the name of the Sheriff Deputy so I could interview him regarding your determination.

At this point in time my clients have not and do not intend to operate an outdoor firing range. They do, however, plan to exercise their right as tax paying property owners in Nelson County to use their property within the law. I think this situation requires an objective definition of the prohibited conduct before my clients are forced to appeal a subjective decision by your office.

Best Regards,



Roger B. Willetts

DEPARTMENT OF
PLANNING & ZONING



PLANNING COMMISSION
BOARD OF ZONING APPEALS

Sent via E-Mail

July 13, 2023

Roger B. Willetts
Edmunds & Willetts P.C.
PO Box 1617
Waynesboro, VA 22980

Mr. Willetts,

This letter is in response to your correspondence to Ms. Hjulstrom dated July 3, 2023, regarding Notice of Violation (Wagner, TM# 13-12-4, 5) dated June 27, 2023.

For purposes of the Zoning Ordinance, an outdoor firing range is an area for the sport shooting of firearms which is commercial, or is open to the public, or is otherwise the main use of the property.

Our office is acting on the following information which was brought to our attention:

- Heavy gunfire both day and night on weekends, holidays, and at other times;
- On one occasion, firing occurred on at least seven (7) consecutive days;
- Various types of firearms are discharged;
- Volume of shooting;
- Inspection revealed objects that appeared to be utilized as targets.

On June 16, 2023, I received a phone call from Sheriff David Hill notifying my office that firing was occurring on the property. He can be reached at 434-263-7051 or by email at dhill@nelsoncounty.org.

Thank you,

A handwritten signature in black ink that reads "Dylan M Bishop".

Dylan M. Bishop, CZA, CFM
Director of Planning & Zoning
DMB /ewh

SUP #999: Appeal

Owner(s):	Tax Map Parcel(s):
Thomas & Julie Wagner 772 Chin Quapin Dr Lyndhurst, VA 22952	13-12-4/5
B. Spencer Cross PO Box 1287 Staunton, VA 24402	

Adjoining/Adjacent Property Owners:

Jennifer McGarry 199 Ennis Mt Rd Afton, VA 22920	13-A-35M
Johanna & Richard Chupp 171 Ennis Mountain Rd Afton, VA 22920	13-A-35A
David Carter 1911 Greenfield Rd Afton, VA 22920	13-2-1
Peyton & Richard White 1905 Greenfield Rd Afton, VA 22920	13-2-1N
Barbara & Charles Baldwin and Eliza Forbes 2 Bull Pine Rd Afton, VA 22920	13-2-1J
William & Nellie Ln 6624 Rockfish Valley Hwy Afton, VA 22920	13-12-6
Rita Brown 1295 Greenfield Rd Afton, VA 22920	13-A-27
Georgia Ahalt 476 Walnut Ave Waynesboro, VA 22980	13-12-2
Nancy & William Jackson 3149 Spring Valley Rd Afton, VA 22920	13-12-1/3
Dale & Sara Bateman 330 Ennis Mtn Rd Afton, VA 22920	13-A-35N

Roxanne Rodes
2249 Greenfield Rd
Afton, VA 22920

13-A-35

Charles Wineberg, Jr.
PO Box 533
Nellysford, VA 22958

13-A-35J

DEPARTMENT OF
PLANNING & ZONING



PLANNING COMMISSION
BOARD OF ZONING APPEALS

August 17th, 2023

Dear Property Owner:

The following appeal has been made to the Board of Zoning Appeals (BZA), regarding a tract of land adjacent to or near property you own in Nelson County:

Appeal by Thomas and Juliet Wagner of Zoning Violation dated June 27, 2023 - Appealing Notice of Violation by Planning and Zoning for Tax Map Parcels 13-12-4 and 13-12-5 that appellant operated an Outdoor Firing Range without obtaining a Special Use Permit as required in A-1 (Agricultural) zoning.

The application(s) will be considered at a public hearing conducted by the BZA on **Wednesday, September 6th beginning at 7:00 P.M.** in the General District Courtroom on the third floor of the County Courthouse, Lovingson.

As required by law, this notice is being sent to inform adjoining property owners of this request. If you wish to learn more about this request and/or to comment on it, you may contact and/or visit the Department of Planning & Zoning, and/or attend the public meeting.

If you have any questions and/or requests for assistance, please contact County staff as we remain available to assist you.

Sincerely,

A handwritten signature in black ink that reads "Dylan M Bishop".

Dylan M. Bishop
Nelson County Planning & Zoning Director

DMB/ewh



DEPARTMENT OF
PLANNING & ZONING

PLANNING COMMISSION
BOARD OF ZONING APPEALS

DATE: August 9th, 2023
TO: Applicants of the Nelson County Planning & Zoning Department
FROM: Dylan Bishop, Planning and Zoning Director
RE: Appeal of Zoning Violation Determination

Please be advised that your application has been received in our office requesting approval of the following:

1. Appeal 999 - Wagner

Listed below are the dates and times of the meeting when your application will be reviewed. You and/or your representative(s) are encouraged to attend.

Board of Zoning Appeals
7:00 P.M. on September 6th, 2023
General District Courtroom, Nelson County Courthouse,
84 Courthouse Square, Lovingston, VA

If you have questions regarding these items prior to the meeting, or if you need any assistance, please don't hesitate to contact the Department of Planning & Zoning.

Thank you,

Dylan M. Bishop

DMB/ewh

Please publish Thursdays August 24th and August 31st in the Nelson County Times:

**LEGAL NOTICE
NOTICE OF PUBLIC HEARING**

In accordance with Volume 3A, Title 15.2, Counties, Cities and Towns, of the Code of Virginia, 1950, as amended, and pursuant to §15.2-2204, §15.2-2309, §15.2-2311 and §15.2-2312 the **Nelson County Board of Zoning Appeals hereby gives notice that a Public Hearing is scheduled for Wednesday, September 6th, 2023 at 7:00 p.m. at the General District Courtroom** on the third floor of the Nelson County Courthouse located at 84 Courthouse Square, Lovingston, for the following:

Public Hearing

Appeal by Thomas and Juliet Wagner of Zoning Violation dated June 27, 2023 - Appealing Notice of Violation by Planning and Zoning for Tax Map Parcels 13-12-4 and 13-12-5 that appellant operated an Outdoor Firing Range without obtaining a Special Use Permit as required in A-1 (Agricultural) zoning.

Copies of the above files are available for review in the Dept. of Planning & Zoning office, 80 Front Street, Lovingston, Virginia, Monday through Friday, 8:00 a.m. to 4:00 p.m. Telephone inquiries may also be directed to the Dept. of Planning & Zoning, (434) 263-7090, or toll free at 888-662-9400, selections 4 and 1. Nelson County does not discriminate on the basis of handicapped status in admission or access to its programs and activities. Accommodation will be made for handicapped persons upon advance request.

NELSON, McPHERSON, SUMMERS & SANTOS, L.C.

ATTORNEYS AT LAW

P.O. BOX 1287

STAUNTON, VIRGINIA 24402-1287

12 NORTH NEW STREET

THOMAS R. NELSON (1899-1980)
RICHARD F. MCPHERSON (1925-2002)
FRANK L. SUMMERS (1930-2018)
VICTOR M. SANTOS
THOMAS P. MCPHERSON
JOHN C. WIRTH
B. SPENCER CROSS (NM inactive)
DANIEL E. MOWRY

JESSICA L. ROBINSON
COURTNEY A. DYMOND
LETHIA C. HAMMOND

TELEPHONE (540) 885-0346

FACSIMILE (540) 885-2039

WEB SITE:
www.nelsonmcperson.com

July 18, 2023

Dylan M. Bishop, Director of Nelson Co. Planning & Zoning
PO Box 558
80 Front Street
Lovingsston, VA 22949
Via USPS & Facsimile

Re: Notice of Violation (Wagner TM 13-12-4, 5)

Dear Mr. Bishop:

Please let this letter stand as the appeal of the decision of Emily Hjulstrom, dated June 27, 2023, wherein the Department of Planning and Zoning found a violation of the Nelson County Planning and Zoning Ordinance. A copy of Ms. Hjulstrom's letter is attached hereto for reference, as well as the appeal paperwork executed by Mr. & Mrs. Wagner. Additionally, please find a check in the amount of \$150 is enclosed for the appeal. I would ask that you contact my office and let me know the date and time of the appeal hearing.

Warm regards,


B. Spencer Cross

BSC/rlm
Enclosures

cc

BOARD of ZONING APPEALS: APPLICATION

Instructions: Please answer the following questions clearly. If additional space is needed to answer the questions, you may list "see attached" and attach the answers on a separate sheet of paper.

1. Please explain, in detail, why the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements.

Appellants request strict application of the terms of the ordinance. Appellants are accused of utilizing their property as an outdoor firing range. Outdoor firing range is not defined under the Nelson Co. Zoning Ordinance. "Commercial sport shooting range" is defined under said ordinance under Section 8-34. Appellants land is not being used in a manner prohibited under the zoning ordinance.

2. Please explain, in detail, why the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance:

No variance requested, not applicable.

3. Please explain, in detail, why the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.

No variance requested, not applicable.

4. Please explain, in detail, why the condition or situation of the property for which you are seeking a variance would not be more reasonably addressed by an amendment to the Zoning Ordinance or Subdivision Ordinance (due to the condition or situation either being so general in nature, or of such a recurring frequency).

No variance requested, not applicable.

5. Please explain, in detail, why the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property.

No variance requested, not applicable.

At the public hearing, County staff will present each agenda item to the BZA; the applicant or petitioner shall address the BZA; the BZA will conduct the hearing to receive public comments; and the BZA will then discuss the request and take action to approve, deny, approve with conditions, or postpone the agenda item.

Any decision of the BZA is final; however, any person or persons jointly or separately aggrieved by any decision of the BZA may file an appeal with the Clerk of the Circuit Court within thirty (30) days after the final decision of the BZA.

Attachments:

1. Application Checklist (below)
2. Application
3. Code of Virginia Excerpt

BOARD *of* ZONING APPEALS: APPLICATION CHECKLIST

Forms and Fees

Completed Application

Application Fee

Appeal Request

For an appeal of an action by an administrative officer, include a complete justification statement describing the property or site (if applicable), background information, and the rationale for the appeal.

For an appeal of a notice of violation, include a description of the alleged violation, appropriate drawings showing applicable setbacks and other dimensions associated with the structure or use that is the subject of the violation, and the rationale for the appeal.

Variance Request

Drawing showing all existing and proposed improvements on the property, with dimensions and distances to property lines, all abutting streets, and any special conditions of the property that may justify the request.

Justification statement describing how the request satisfies the criteria set forth in Code of Virginia - Section 15.2-2309 (provided in the Instruction Packet).

6. Please explain, in detail, why the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of Section 15.2-2309 (Code of Virginia) or the process for modification of a zoning ordinance pursuant to subdivision A4 of Section 15.2-2286 (Code of Virginia) at the time of the filing of the variance application.

Not seeking a variance. Outdoor firing range is not defined under ordinance. "Commercial sport shooting range" is defined under ordinance, however, no allegation of subject property being used as commercial sport shooting range exists.

7. Affidavit: The undersigned applicant(s) and/or property owner(s) certifies that this application and the foregoing answers, statements, and other information herewith submitted are, in all respects, true and correct to the best of their knowledge and belief. Also, the applicant(s) and/or property owner(s) gives permission for members of the Board of Zoning Appeals and County Staff to visit and view the subject property(s).

Signature: Thomas R. Wagner Printed Name: THOMAS R. WAGNER

Signature: Julie H. Wagner Printed Name: Julie H. Wagner

(Please attach additional sheet if more space is needed for applicant(s) / property owner(s) signatures.)

8. Additional information: (Please attach separate sheet for additional details, explanations, etc.)

Please see attached letter of Emily Hjulstrom dated 6/27/2023 accusing Appellants of operating an "outdoor firing range". This term is not defined and is impermissibly vague in light of the specific definition for the term "Commercial sport shooting range". Please see attached printouts of parcels in questions printed from Nelson Co. GIS website. Without a definition, the term "outdoor firing range" as cited under Section 4-1-30a, makes no sense. Appellants are not put on notice as to what an outdoor firing range is for purposes of the ordinance, nor what a special use permit allowing an outdoor firing range would allow them to do. Planning and zoning officials cannot legislate or create the zoning ordinance, this is the sole function of the Board of Supervisors. Hay has been grown and cut on the property for decades. Recreational shooting has taken place on the property, which is not prohibited under the zoning ordinance. Attached photos of property and GIS outlines of parcels.

9. Please note: In the event of cancellation or postponement at your request after the initial newspaper advertisement for this application, an additional fee will apply for re-advertisement (determined by the actual cost of the ad). This fee will not apply in cases of Board of Zoning Appeals deferment.

----- TO BE COMPLETED BY PLANNING & ZONING STAFF -----

0 Completed application and fee (\$ 150) received on: 7/18/2023

0 Legal Notice of Public Hearing published on: 8/24/2023 & 8/31/2023

0 Date of BZA Hearing: 9/6/2023

BZA Action: _____

Nelson County Planning & Zoning Department

80 Front Street, Lovingston, Virginia | *(Mailing Address)* P.O. Box 558, Lovingston, Virginia 22949
(Telephone Number) 434 263-7090 or Toll Free 888 662-9400, selections 4 & 1 | *(Fax Number)* 434 263-7086
<http://www.nelsoncounty-va.gov/departments/planning-zoning/board-of-zoning-appeals/>



Map My Results Clear All Results Download CSV

Parcels

N/A

Map #: 13 12 4

Owner: WAGNER THOMAS R & JULIETT W TR

Show Adjainers

More Details

Zoom to

Details

Map It

Details

Map It

N/A

Owner: WAGNER THOMAS R & JULIETT W TR

Sale Price: N/A

Parcel ID: 13 12 4

Sale Date: 12/13/2004

N/A

Owner: WAGNER THOMAS R & JULIETT W TR

Sale Price: N/A

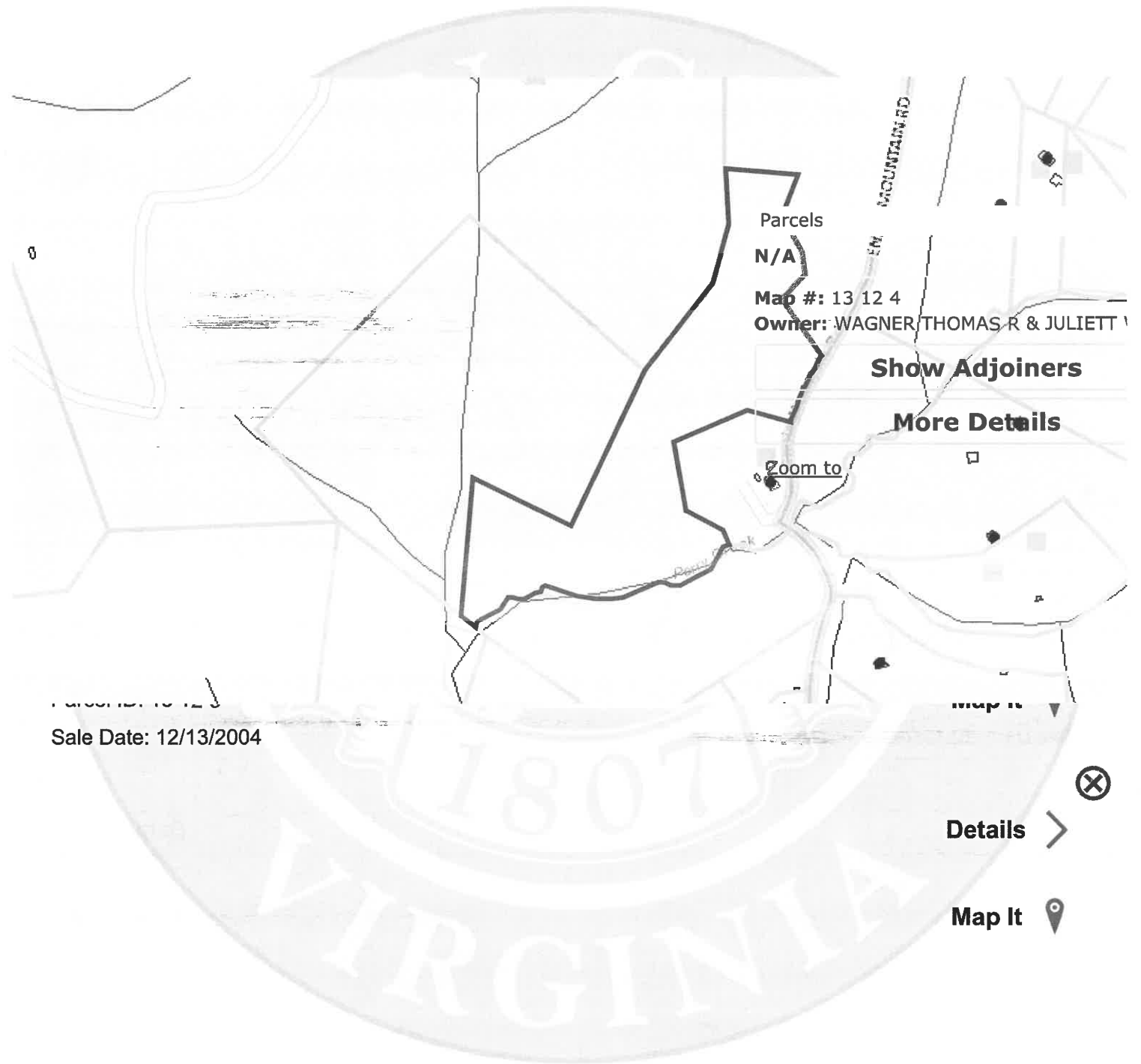
Parcel ID: 13 12 5

Sale Date: 12/13/2004

Nelson County



(www.nelsoncounty-va.gov/)



Sale Date: 12/13/2004

Nelson County

Lot 4 adjoining Properties

Parcel Add Owner	Parcel ID	Sale Date	Sale Price	Map Num	Insert Num	Double Cir	Block	Lot	Sublot
1295 GREE BROWN RI	13 A	27 1/1/1900	N/A	13		A			27
1295 GREE BROWN RI	13 A	27 1/1/1900	N/A	13		A			27
N/A BALDWIN	13 2	1 #####	N/A	13			2		1 J
N/A WAGNER	13 12	5 #####	N/A	13			12		5
383 ENNIS JACKSON	13 12	1 #####	N/A	13			12		1
N/A LANE NELL	13 12	6 #####	N/A	13			12		6
N/A AHALT GE	13 12	2 #####	N/A	13			12		2



Map My Results Clear All Results Download CSV

Parcels
N/A

Map #: 13 12 5
Owner: WAGNER THOMAS R & JULIE

Show Adjainers

More Details

Zoom to

199

171

195

25

Details >

Map It

Details >

Map It

N/A

Owner: WAGNER THOMAS R & JULIETT W TR

Sale Price: N/A

Parcel ID: 13 12 4

Sale Date: 12/13/2004

N/A

Owner: WAGNER THOMAS R & JULIETT W TR

Sale Price: N/A

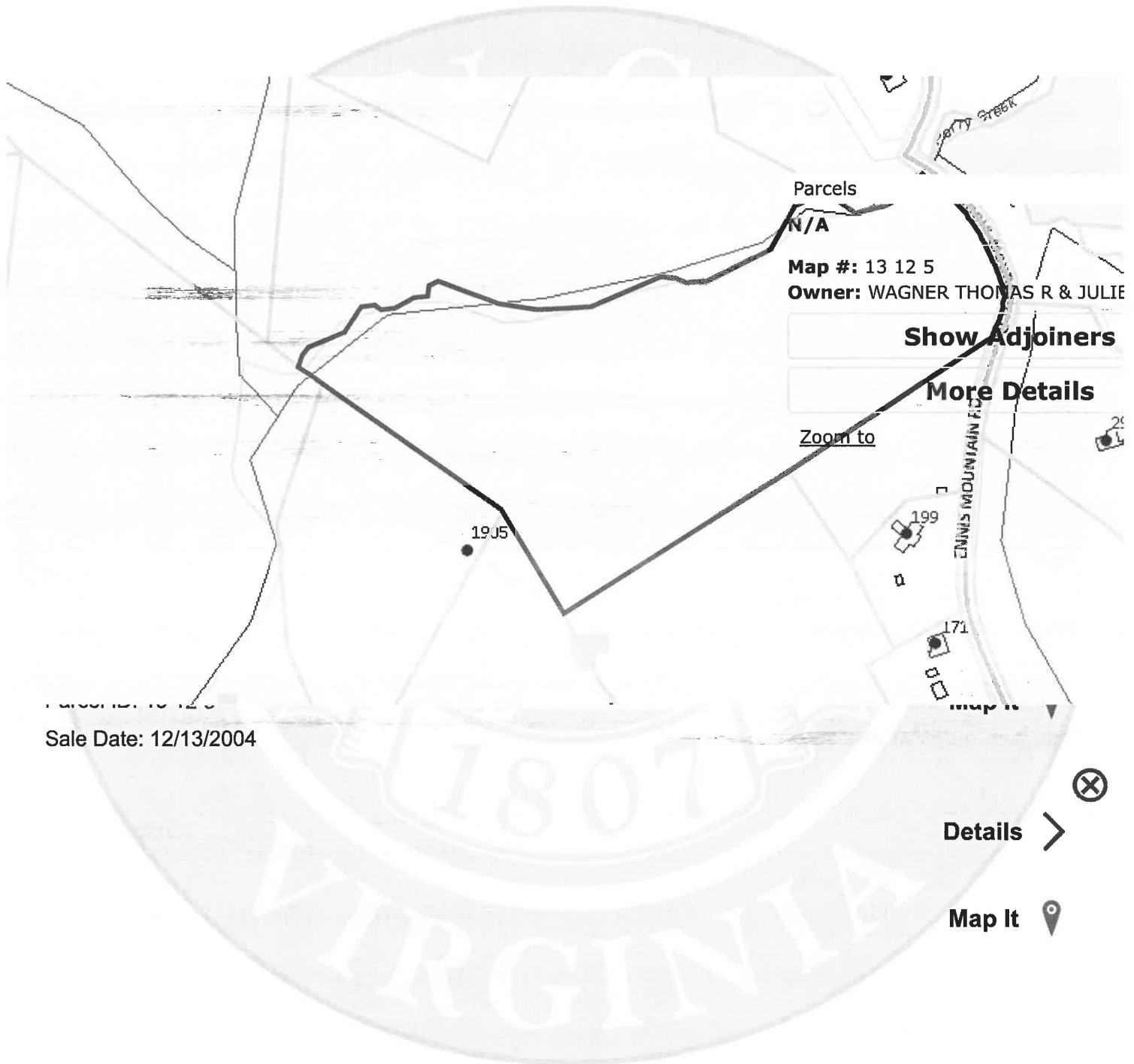
Parcel ID: 13 12 5

Sale Date: 12/13/2004

Nelson County



(www.nelsoncounty-va.gov/)



Sale Date: 12/13/2004

Nelson County

1370 PIGE ROBERT BI

Parcel Add Owner	Parcel ID	Sale Date	Sale Price	Map Numl	Insert Num	Double Cir	Block	Lot	Sublot
N/A	GAINES EF 42 A	31 N/A	N/A	42	N/A	A	N/A	31	N/A
N/A	FITZGERAL 42 A	28 #####	\$185,000	42	N/A	A	N/A	28	N/A
1370 PIGE ROBERT BI	42 A	29 #####	N/A	42	N/A	A	N/A	29	N/A





NELSON, McPHERSON, SUMMERS & SANTOS, L.C.

ATTORNEYS AT LAW

P.O. BOX 1287

STAUNTON, VIRGINIA 24402-1287

12 NORTH NEW STREET

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 RICHARD F. MCPHERSON (1925-2002)
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 VICTOR M. SANTOS
 THOMAS P. MCPHERSON
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 B. SPENCER CROSS (NM inactive)
 DANIEL E. MOWRY

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WEB SITE:
www.nelsonmcperson.com

JESSICA L. ROBINSON
 COURTNEY A. DYMOND
 LETHIA C. HAMMOND

August 29, 2023

Nelson Co. Planning & Zoning
 Lovingston, VA

Re: Wagner Appeal of Zoning Violation

This responsive memorandum is submitted on behalf of Thomas & Juliet Wagner.

The Zoning Administrator's definition of an "outdoor firing range" is not well grounded. The case of *Trustees v. Board of Zoning Appeals*, 273 Va 375, 381-382 (2007), cited by Mr. Payne in his August 23, 2023 letter is not instructive to our current case. In *Trustees v. Board of Zoning Appeals*, the issue dealt with a zoning board's historic use of the term "adjacent". For years, the zoning authority had traditionally used "adjacent" to mean adjoining, and advised the aggrieved part of that fact prior to the zoning issue arising. In that case, the court found a clear history of the Board of Zoning using this term in a peculiar way not only with respect to the aggrieved party's application but with other persons and entities served by the zoning authority. The recent invention of a definition of "outdoor firing range" in the present case is not analogous to the question presented in *Trustees*.

Here, the Nelson County Zoning Administrator formulated a definition, whole cloth, following the receipt of a complaint or complaints. It would appear that the definition was created specifically to find a violation of the part of the Wagners, which is improper. There are no subjective criteria for defining the term outdoor firing range provided by the Zoning Administrator. Does the Zoning Administrator take the position that any discharge of firearms outside of hunting or preparation for hunting constitutes the operation of an outdoor firing range? Does using the same area as a backstop for purposes of safety for more than one shot transform any location zoned Agriculture into an "outdoor firing range?" How many times is a person allowed to shoot on his or her land outside of hunting season before being considered an "outdoor firing range?"

Mr. Payne takes the position that the commercial sport shooting range, as defined in Article II of Chapter 8 of the Nelson County Code does not apply to the issue of the Wagners appeal. However, Paragraph C of Mr. Payne's letter attempts to substantiate his position by using the *Orion Sporting Group* case. That case dealt with a commercial entity that charged

August 29, 2023

Page 2

customers for its shotgun range. There is no such commercial entity at play with the Wagner appeal. The *Orion Sporting Group* case does not assist the Board in its decision, rather it confuses the issues merely because Orion involved the discharge of firearms. *Orion* was clearly a commercial enterprise, whereas the casual recreational discharge of firearms on the Wagner property is not.

As to Paragraph D of Mr. Payne's letter, it is true there is no weekend home on the Wagner property. There is, however, a long history of raising and cutting hay, which goes back many decades. Clearly, hay is grown and/or cut many more hours out of the year than anyone has been shooting on the Wagner property. In terms of space and time, this agricultural activity substantially outweighs shooting as the primary usage of the Wagner land.

Additionally, on June 23, 2022 the United States Supreme Court issued its decision in *New York State Rifle and Pistol Association, Inc. V. Bruen*, 142 S. Ct. 2111, unreasonable restrictions on the right to keep and bear arms were prohibited. The definition of an outdoor firing range by the Zoning Authority and the implementation of it as applied to the Wagners constitutes a violation of the Second Amendment of the Constitution of the United States of America post-*Bruen*. The Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. The target shooting at the Wagner property is conduct plainly covered by the Second Amendment, therefore the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with the Nation's history and tradition of firearm regulation. Only if a firearm regulation is consistent with the Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

Therefore, the discharge of firearms on the Wagner property is lawful. The Zoning Administrator may not legislate, as that is the task of the Board of Supervisors. The Zoning Authority is setting the stage for the prohibition of target shooting on vacant private land in Nelson County through its arbitrary and capricious definition of an "outdoor firing range." Furthermore, the conduct complained of by the Zoning Administrator on the Wagner property is protected by the Second and Fourteenth Amendments to the Constitution of the United States of America following the *Bruen* decision.

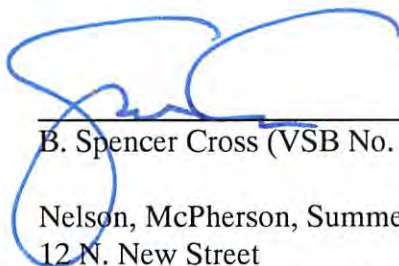
Respectfully submitted,

THOMAS & JULIET WAGNER

By counsel,

August 29, 2023

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