



Nelson County Board of Zoning Appeals
Meeting Minutes
September 6th, 2023



Present: Chair Mary Kathryn Allen and Board Members: Jerry Samford, Carole Saunders, and Shelby Bruguire

Staff Present: Dylan Bishop, Director. Emily Hjulstrom, Planner/Secretary. Phil Payne, County Attorney

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

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.

Review of meeting minutes:

October 5th, 2021

Mr. Samford made a motion to approve the October 5th, 2021 minutes. Ms. Saunders seconded the motion.

Yes:

Jerry Samford

Carole Saunders

Shelby Bruguiera

Mary Kathryn Allen

March 7th, 2023

Mr. Samford made a motion to approve the March 7th, 2023 minutes. Ms. Saunders seconded the motion.

Yes:

Jerry Samford

Carole Saunders

Shelby Bruguiera

Mary Kathryn Allen

Appeal #999

Ms. Bishop presented the following information:

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

Ms. Juliette Wagner of 772 Chin Quapin Dr in Lyndhurst, Virginia took the oath. Mr. Spencer Cross of 12 North New St in Staunton, Virginia was the attorney representing the applicant. Mr. Cross asked if he could ask the applicant questions to help move the meeting along. He asked Ms. Wagner how long she had owned the two parcels in question. She noted that she has owned them since 2001. He asked if there are any homes on the parcels. She explained that there are not. He asked if hay had been raised on the parcels. She confirmed that hay had been raised on the property. He asked if the parcels were in land use. She explained that they had been in land use since at least 1986. He asked how many cuttings of hay they had received that year. She explained that they had someone else cut it and it was usually two cuttings a year. He asked who raised the hay and cut it. She explained that her niece did it. He asked if her family hunts on the land. She explained that her son has hunted on the land since he was 13 and was now 56. He asked if she let her grandson target shoot on the property. She explained that he had and had been doing it for about two years. Mr. Cross asked if her grandson had his friends target shoot with him. She explained that he took one friend target shooting. She added that her grandson had been using the land for shooting with his father since he was about 5 and was 21 now. He asked if she had received any complaints about the shooting prior to contact from the county. She noted that she had not. He asked if she wanted her grandson and his friend to be able to continue target shooting on the property. She noted that she did. He asked if she let anyone pay to target shoot on the land or if she plans to allow that in the future. She noted that she did not and had no intentions of allowing it in the future.

Ms. Saunders explained that the reports indicated that there had been heavy gunfire both day and night, on weekends, and holidays. She asked if Ms. Wagner was aware that the shooting was occurring at all hours and on consecutive days. Ms. Wagner noted that she did not think this had occurred and that she did not think they ever shot seven days in a row. She explained that it was once or twice a week for a couple of hours at a time. Mr. Samford asked if that was every week. She noted that they might not come for 2-3 weeks at a time. Chair Allen asked if anyone aside from her grandson and her one son had permission to shoot on the property. Ms. Wagner noted that no one else had permission. Chair Allen asked if she had been aware of a time when anyone utilized the land for target shooting without her knowledge. Ms. Wagner stated no. Ms. Saunders asked where Ms. Wagner's grandson lived. Ms. Wagner noted that he lived in Waynesboro. Ms. Saunders asked what they were using as targets. Ms. Wagner explained that they shot into a large rock pile. Mr. Cross noted that there are photos in the application of the property. Mr. Cross explained that Mr. Wagner was also there to answer any questions that they had.

Chair Allen opened public hearing at 7:19 PM

Mr. Charlie Wineberg of 294 Ennis Mountain Rd explained that his home was directly across the road from the subject property. He explained that he was there to support Nelson County's opinion that the property was being utilized as a shooting range. He noted that he was a real estate agent that valued property rights. He explained that property rights are codified by zoning ordinances and that the Nelson County Zoning Ordinance provides the community with protections and permissions to enhance and preserve everyone's property rights. He stated that everyone in the county should be protected from

the disruption of having a shooting range developed willy-nilly by their neighbors. He added that there are many primary uses in the A-1 zones and that there are many A-1 properties that have multiple by right uses where none are considered above the other. He noted that a shooting range was not a by right use. He explained that the landowners' initial attorney stated that the complainant was a disgruntled family member and that no targets were being used. He noted that this was not true. He added that the current attorney suggested that the Zoning Administrator created a definition specifically for this matter. He explained that in 30 years as a licensed realtor and 40 years in Nelson County he had never heard of an instance where an absentee landowner travels into the county leading a group to develop, groom, and shoot their weaponry day after day and at night on small acreage in the heart of a community. He explained that the interpretation was triggered by a unique instance of behavior that was outside the norm. He explained that the landowners' attorney cited the Second Amendment. He noted that they did not care about the landowners' right to have guns but that this matter was about the discharge of firearms. He explained that the discharge of firearms was regulated by statute and ordinance throughout Virginia. He added that the commonwealth allows a locality to forbid the use of firearms. He noted that the commonwealth states that a shooting range was defined as an area or structure designed for the use of rifles, shotguns, pistols, silhouettes, skeet trap, black powder, or any other similar sports shooting. He noted that it made no distinction whether it was public or private. He noted that Amherst County defines it as the use of land for archery or the discharging of firearms for the purposes of target practice, skeet and trap shooting, mock war games, or temporary competitions such as turkey shoots. This definition does not encompass general hunting and unstructured and non-recurring discharging of firearms on private property with the property owner's permission. He explained that in this case the shooting was structured and recurring. He added that there are counties like Nelson County that don't define shooting range which allowed for staff interpretation. He noted that the appellants came to their 13 acres primarily to discharge firearms on a recurring basis of consecutive days and weeks, in multiple locations developed for shooting with target and shelter, from day into darkness, and in all weather. He added that they had disrupted the community and returned to the quiet enjoyment of their homes elsewhere. He noted that the county had correctly interpreted the landowners as having an outdoor firing range.

The grandson of Ms. Wagner, Alexander Elliot, lives at 587 Cattle Scales Rd in Waynesboro, Virginia. Mr. Cross asked Mr. Elliot how long he had been utilizing the property. Mr. Elliot explained that he and his father had gone to the property to shoot since he was a young child. He added that he and his friend had been going to the property to shoot for the last two years. Mr. Cross asked about the frequency of the shooting. Mr. Elliot explained that there was no set schedule for the shooting but that they had not shot for seven consecutive days. He stated that the max would be three consecutive days. He stated that he only invited close friends or people that his grandma approved of to come shoot. He added that he had never accepted money for people to shoot on the land or opened it to the public. Mr. Cross asked if any of the neighbors had approached him about the shooting. Mr. Elliot explained that he had received no complaints about the shooting but that he had a neighbor ask him to stop shooting for one specific day which was not a problem. Mr. Cross asked about the night shooting. Mr. Elliot explained that they had night vision devices that allowed them to shoot at night. He explained that they stopped shooting around 10 PM. He added that they have always shot in a safe direction and it was the biggest berm he had ever seen that they shot into. He explained that it was a natural backstop that they shot

into and that they had not made alterations to the land. Mr. Cross asked if he had used targets. Mr. Elliot explained that they had used a steel target on a hanger and cardboard targets on occasion.

The son of Ms. Wagner, Richard Elliot, lives at 587 Cattle Scales Rd in Waynesboro, Virginia. He explained that he had raised his son the right way and that Alexander was an Eagle Scout. He explained that he was cordial and abides by the law. He explained that since his son was a child they have been utilizing that land. He noted that there had been false allegations against them. He explained that they try to do the right thing. He noted that he has been a business owner for 13 years in Waynesboro and that his community would be in support of him.

Mr. Freedman Mowrer of 324 Ennis Mountain Rd. He explained that this was not casual target shooting but the operation of a firing range. Mr. Mowrer stated the following:

“An outdoor firing range does not have to be commercial or open to the public to be an outdoor firing range. And in Nelson County, the precedent of neighborly decency has allowed us to exist in peace without a definition of one. Having said that, it’s unrealistic to think that one cannot, with a little awareness of surrounding counties definitions and common sense, understand the essence of what an outdoor firing range is. Let’s be real, you know it when you see it, and in our community, we’ve been seeing an awful lot of it first hand. In this case, the excessiveness in demonstration of what an outdoor firing range is, has actually lended itself to the county doing their duty and establishing it as such. If there was any reality that reflects the definition of an outdoor firing range, it was what is happening in that field, illegally in A-1 zoning. Unfortunately, it’s a firing range of the worst kind. It’s a firing range without safety regulation, without noise regulation, without input from the surrounding community. But it’s still there, it’s still real. And it’s all in plain sight.

I’ve seen many permanent targets set up, trenches cut by bullets in front of the targets. Wooden target posts cut in half due to the amount of gunfire received. Shelters intermittently set up. Mowers on sight to maintain the area. Barrels on-site to handle the amount of refuse. Countless cardboard cutouts of the human figure riddled with holes. The establishment of multiple shooting stations, some of which required the effort to cut down trees and do landscaping in order to create longer and more challenging targets.

Most consistent hours of operation during peak usage (Winter and Spring): 10am to 10pm. 12 hours. 5-7 days a week. Sometimes 7 days a week. A nice break was 3 days a week. The firing range operates at night as well, multiple lights illuminate the woods as several shooters begin blasting at the target aglow. Other times blasting into complete darkness. A wide variety of weapons are fired, relentlessly, and without regard to the sound and safety impact of neighbors in all directions. Shooters oftentimes stand in a line, or in a triangular formation and fire simultaneously in the direction of a target or multiple targets. At other times, drills seem to be performed, with shooters running, ducking under shots, and physically acting out strategic maneuvers. And what I’ve just described was completely ringed by many residences in close proximity.

Anyone who stands up here and says this was not an outdoor firing range was either severely lacking in information, or was equally misinformed.

Imagine having Sunday dinner to the sound of automatic rifles blasting in the background. Imagine the sound of reading a book and putting your young children to bed (well after dark) to the same sound.

Imagine them waking up the next day and it's happening again. Imagine how it feels to lament the idea of going home because they'll probably be there again. Imagine never being approached or asked how you feel as a Nelson County resident, living in this beautiful, peaceful place, how it feels to be insulted with this level of disturbance and disrespect, created by others who don't even live here, driving from their homes elsewhere to the firing range, to so negatively impact ours. Complete and utter disrespect and disregard was an understatement.

Please support the precedent set by the county, that what these people are doing was not legal or ethical."

Ms. Mary Mowrer of 324 Ennis Mountain Rd. Ms. Mowrer stated the following:

"Good evening. My name is Mary Mowrer and I am here in support of Planning and Zoning's determination that the property in question was being used as an outdoor firing range, which requires a special use permit in A-1 zoning.

I can attest firsthand to the main use of the land as a firing range. Prior to the Notice of Correction that was sent to the landowners, aside from the haying twice a year, the only activity that occurred on the property was the continuous, relentless firing of weapons. Individuals who do not own the land or live in the area would come to the field to shoot day after day, from mid-morning and into the night. It was not uncommon for my family to have to endure the sounds of gunshots for the entirety of the day; the sound of rifles as I tried to put my children down for naps in the afternoon, the sounds of pistols as we tried to enjoy a family dinner, the sound of machine guns as we read bedtime stories. It became so common that it was a pleasant surprise when we didn't hear the shooting. These individuals came to the property to fire multiple types of weapons at different targets. If they were not firing, they were setting up different scenarios, targets, etc. However anyone wants to pick apart the definition of a firing range, there was no question that was how the property was being used.

I've lived at my home on Ennis Mountain Road for almost ten years. Prior to 2022, there was occasional and recreational shooting on that property. For whatever reason something changed, and a firing range was established and became the main use of the property. What was once a peaceful, rural mountain road, turned into what sounded like a war zone. How planning and zoning's determination was being challenged again today was beyond comprehension.

For additional neighbors who were not able to or chose not to speak here today, we have signed documents attesting to their observation of the use of the property as a firing range. If this was occasional, recreational, or an accessory use of the land, one has to wonder why all of us have spent the effort to come here and speak or sign these documents. The land was being used as a firing range, which was not permitted in A-1 zoning. "

Ms. Mowrer apologized to the landowner for having to go through this.

Mr. Tom Harvey of 1600 Ennis Mountain Rd. Mr. Harvey thanked the board for having the hearing and that he appreciated hearing both sides. He noted that he had been on Ennis Mountain for about 35

years and was about 3.5 miles from the property. He explained that he was a retired Army Colonel who spent 20 years in the army where part of his job was establishing firing ranges and training soldiers. He noted that this property was being utilized as a firing range. He explained that he could hear the indiscriminate and constant shooting from 3.5 miles away. He noted that he strongly supports the Second Amendment and that he went to appropriate firing ranges when he fired his weapons. He noted that he understood that this could be a contentious issue but that this was a firing range that had not been safely managed. He noted that he could hear indiscriminate firing and automatic weapons that were not appropriate for the residential area. He added that he supported Planning and Zoning's recommendation.

Chair Allen closed the public hearing at 7:37 PM

Mr. Phillip Payne, Nelson County Attorney noted that he was representing the Zoning Administrator. He explained that the U.S. Supreme Court case that Mr. Cross had put in his memorandum was not a land use case, that it was whether the state of New York could require a special need for self-defense in order to issue a carry license to a citizen. He added that the Supreme Court ruled it as unconstitutional in light of the right to keep and bear arms. He explained that the Zoning Ordinance does not touch upon the right to bear arms. He noted that from the land use context they had to think of the considerations that go into land use planning. He explained that he had the right to build and live in a home but that he did not have that right to do so in an industrial zone.

He added that the question did not depend solely on what was a main use. He explained that there can be several main uses with the most common in Nelson County being residential and agricultural.

He added that there was no question of the good character or integrity of the extended Wagner family.

He explained that the issue was whether the use was a main use or an accessory use. If it was a main use it would require a Special Use Permit. He noted that the Zoning Administrator must interpret terms daily and the simplest phrase can require consideration and interpretation. He gave the example of a yard sale, a term that was not defined in the Zoning Ordinance. He questioned what would happen if a yard sale were to occur every Saturday or with greater frequency. He explained that at some point the Zoning Administrator would have to make a determination and decide on a sensible limit of what a yard sale was. He added that this requires a case-by-case analysis with every zoning question being unique.

He explained that in determining whether a use was recognized as an accessory use or a main use, accessory uses are innumerable. For example, he explained that a residential landowner could have a large swimming pool. If the landowner were to open it to the public would it become a commercial use which was not permitted in a residential district or would it become a main use that requires a Special Use Permit? He explained that in the current instance, even if an outdoor firing range were not a stated use in the Zoning Ordinance, it would still need to be evaluated on whether or not it was an accessory use. He noted that accessory uses must be customarily associated with the main use as well as being subordinate in area, extent, and purpose to the primary use of the parcel. He explained that Ms. Mowrer testified that prior to 2022 there was occasional and incidental gunfire. He explained that naturally there would be some gunfire, hunting, and occasional target shooting. He noted that in this

instance the neighbors have explained that the shooting goes far beyond the hunting, incidental target practice, or trap shooting. He added that Mr. Harvey noted that he was a retired Army Colonel who had done it for a living and knew what it was. He explained that based on the time devoted or the extent of the use, a shooting range is not accessory to a haymaking operation. He added that if the evidence presented supported the Zoning Administrator's determination then her determination should be upheld.

Mr. Cross explained that the position of the landowner was largely contained in the written appeal that was filed. He noted that one of the big questions before the board was, "What are the roles of government here?" He noted that the code makes it pretty clear that the Board of Supervisors creates the ordinances, Zoning enforces it, and the Board of Zoning Appeals overlooks those decisions. He added that the BZA can draft the ordinances. He explained that the term 'Outdoor Firing Range' was not defined in Nelson County whereas it was in other counties. He asked whose job it was to make this definition. He explained that elected officials have to answer to everyone in the room as far as time, place, frequency, etc. if they find it important enough to create a definition. He explained that the Zoning Authority has been put in a position by these complaints to take this action. He noted that the definition of an Outdoor Firing Range first appears in a memo dated September 6th from Dylan Bishop, "An outdoor firing range was 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 was determined that this outdoor firing range was a main use." He explained that the definition implies one main use which was haymaking. He argued that there was more time dedicated to growing hay than there was to shooting. He explained that the shooting range would need to be the only main use to meet this definition. He questioned what a Special Use Permit would entitle you to without a definition made by the proper county officials. He explained that if the owners were granted a Special Use Permit they would not know what they would be allowed to do. He questioned whether this definition was formulated to create a violation from the complaints of the neighbors. He noted that Mr. Payne cited a case out of Norfolk that involved the local authority dealing with a zoning issue where you were permitted to have a certain use if it was adjacent to the property. He explained that for decades the housing authority there had used the definition for adjoining and the applicant knew that. He noted that the applicant attempted to use a definition from another source to be able to do what they wanted. Mr. Cross explained that the court said no because he was forewarned, everyone was informed, and this was not the administrator inventing code on the spot. He noted that this case was different from the one at hand. He added that this should be a decision made by the Board of Supervisors. He noted that the decision of the Planning and Zoning Authority was improper because it was arbitrary and not what the law contemplates as far as rule making.

Mr. Samford asked Mr. Payne about the difference between "the main use" and "a main use". Mr. Payne explained that there can be multiple main uses of a property as well as instances where there was only one main use. He explained that there might be a campground where it was the only main use on the property. He added that in other cases, agricultural and residential zoning go hand in hand with the example of a dwelling and a farm on the same property.

Ms. Bruguere noted that there was not a definition in the ordinance and as Mr. Payne stated the Zoning Administrator needs to make determinations on a case-by-case basis. She explained that while they did not have a definition, they have a resolution from the Board of Supervisors in support of Second

Amendment rights. She explained that the Board of Supervisors wanted to make it clear that their intent was that the public funds of Nelson County would not be used to restrict Second Amendment rights. She noted that while they did not have a definition, they did have a guide.

Mr. Samford asked Mr. Wineberg if he could provide more information regarding the continuous nature of the shooting. Mr. Wineberg explained that he did not begin to record the frequency until it began to be bothersome and at that point he still did not write it down. He noted that other people had better records of the shooting. He added that there are also photos of the circumstances on the property. He added that on the 5 out of the 13 acres that were growing grass he couldn't say exactly how many days it was happening. He added that the Sheriff's Department also has a record of their calls.

Mr. Mowrer noted that he did have recordings both day and night of the firing range and operation. He added that another neighbor had printed photographs and journal entries. He stated confidently under oath that from October through to when the violation notice was sent out, the shooting was, at times, 7 days a week, continuous throughout the day, and a surprise when you came home and it was not happening. He explained that the records are only a shadow of what the reality was. He added that there are 5 acres where grass was growing part of the year. He explained that the physical shooting range has existed every second of every day. He stated that he had never personally witnessed the owners cutting or moving hay.

Ms. Saunders noted that it sounded like there was a big change prior to 2022 with an increase in the shooting beyond what was reasonable. She explained that she did not know if this was due to the grandson getting older or some other reason. Chair Allen noted that she specifically asked the land owner if she knew of anyone aside from her grandson and his one friend that were shooting but she said no, but then they had asked the grandson and he stated it was himself and some other friends. She noted that it was obvious that it was more than just the grandson and his friend.

Mr. Samford asked Mr. Harvey if, based on his experience, he had any opinion on how many people were shooting at a time. Mr. Harvey noted that it was certainly more than two due to it being indiscriminate and uncontrolled rapid fire. He explained that he has a hunting group on his property of 350 acres and that they hunt all the time during hunting season. He explained that they are accustomed to what's normal. He noted that you would hear occasional firing from the subject property before 2022 and it was not bothersome. He explained that it was now more than two people, rapid-fire, and often.

Ms. Allen referenced the 2005 case of Orion's Sporting Group v. Nelson County Board of Supervisors from Mr. Payne's memo and asked Mr. Payne about a shooting range once being a Conditional Use Permit. Mr. Payne explained that at some point in the past, Nelson County eliminated Conditional Use Permits because they were just Special Use Permits as opposed to a quasi-rezoning that a traditional Conditional Use Permit would be.

Mr. Samford made a motion to uphold the determination made by the Zoning Administrator. Ms. Saunders seconded the motion.

Yes:

Mary Kathryn Allen

Carole Saunders

Jerry Samford

No:

Shelby Bruguere

Ms. Saunders made a motion to adjourn. Mr. Samford seconded the motion. Chair Allen adjourned the meeting at 8:03 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 extending to the right.

Emily Hjulstrom

Planner/Secretary, Planning & Zoning