

NELSON COUNTY BOARD OF ZONING APPEALS
July 6, 2015
MEETING MINUTES

Present: Gifford Childs, Kim Cash, Ron Moyer, and Mary Kathryn Allen

Absent: Goffrey Miles

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

Call to Order: Mr. Childs called the meeting to order at 7:30 P. M. in the General District Courtroom, County Courthouse, Lovingson. There were four members present to establish a quorum.

Approval of Minutes (May 4, 2015): Mr. Childs asked for any corrections or comments on the minutes. No changes were made.

Ms. Cash made the following motion:

I move to approve the minutes as corrected. Ms. Allen provided the second; the vote 4-0.

Approval of Minutes (June 1, 2015): Mr. Childs asked for any corrections or comments on the minutes.

Ms. Cash noted that on page 5 – 2nd paragraph – 3rd sentence: change show to “*shows*”.

Mr. Childs noted that on page 1 (under item 1) – 1st paragraph – 2nd sentence: change approval to “*approved*”.

Ms. Cash made the following motion:

I move to approve the minutes of the June 1st meeting as corrected. Ms. Allen provided the second; the vote 4-0.

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

1. Variance Request #2015-01 (Melissa Cash Tenorio):

Mr. Padalino stated that on June 12th, County Staff received a complete application for this variance request from Ms. Melissa Cash Tenorio. The subject property is located at 866 Fox Hollow Road, Afton and further identified as Tax Map Parcel #6-A-79; zoned Agricultural (A-1); and is approximately 1-acre in size.

This variance request seeks County approval for a nine (9) foot reduction in the required front yard setback of seventy-five (75) feet from the center of the road (per Z.O. 4-3-1a). Specifically, the applicant is seeking County permission to have her home legally improved through the construction of a porch. The porch has already been constructed, and is located sixty-six (66) feet from the center of the road at its closest point. During some site visits, it was determined that the recently constructed porch is not compliant with the Uniform Statewide Building Code (USBC) requirements, and has not obtained any building permits. If the nine (9) foot variance is granted, the porch would have to be reconstructed or otherwise modified to be up to code.

The subject property is owned by the petitioner. To summarize Ms. Tenorio’s comments, as contained in her application: she feels the porch would be beneficial to her safety and well-being. She specifically mentioned having eight (8) inches of metal in her back; suffering from a spastic gait and shoulder pain; experiencing isolation from her neighbors; and depression. She feels if this variance request was granted, it would allow her to build the porch in a way that accommodates those perceived hardships.

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The State right-of-way (ROW) for Fox Hollow Road is not perfectly parallel to the front of the house. The southeast corner of the house and the porch are compliant, but the southwest corner is not, because of the alignment of the house relative to the road.

It's the opinion of Staff that allowing or disallowing this request will have little to no impact on the neighborhood or adjoining properties. The applicant believes without the porch she would be subject to physical (health) hardship.

With all the above factors in mind, County staff does not recommend the variance of nine (9) feet be granted, unless the BZA determines that the petitioner does in fact have hardship due to the circumstances she has outlined in her application.

Mr. Moyer wanted to clarify that no building permits were obtained as required. Mr. Padalino stated that was correct. This was first brought to the attention of the P&Z staff by a Building Inspector, who asked that we look at the setback requirements. Staff was later informed that it does not meet code and it did not have any permits. Ms. Cash asked what it would take to bring the porch in to compliance; what does the Building Inspection need; and what is deficient. Mr. Padalino indicated that he can't speak to the Building Inspection requirements but the applicant should have those details. The Building Inspector would need a form from the P&Z Director to state that structure is compliant with setbacks and meets the zoning requirements. Ms. Cash asked if this would be a two (2) phase process: to grant a variance or not; and the structure has to be brought in to compliance. Mr. Padalino stated that was correct.

Mr. Childs stated that it was his understanding that one end of the porch is in compliance and wanted to know at what point it reaches it (third or half the way). Mr. Padalino indicated that the measuring of the different points was done by Mr. Grant Massie, and that he had not actually measured the porch. He stated that there was a blanket request for a nine (9) foot variance.

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

Melissa Cash Tenorio: Ms. Cash was sworn in by Mr. Childs before the Board and signed the oath. She stated that, *"what they are trying to say is that the left hand side of the porch meets the requirements and on the right hand side of the porch is down to one (1) foot. I use the porch right now for physical therapy and I can walk pretty much the whole side of this part as well as the length of the porch, and I'm doing really well right now with my physical therapy."* She stated that she is starting to use a walker; she was using the handrail to hold on to; and is getting more confident. She noted that Mr. Grant Massie and David Thompson (Building Official) came out to the property several times. She stated that, *"right now the porch itself is pretty much in compliance but they need a couple of posts or something needs something else to happen right there. I did draw the building plans up, I am not a professional drawer, obviously and I applied for a building permit by mail; or I went to see Stormy and drew the map of it, and I was in court getting custody of Michael when it was supposed to be issued and it got crossed over or something. The guys that were supposed to start working on it, obviously starting working on it on a different day, then when they were supposed to. I was again, in court over custody and things just don't happen the way I have them planned. I can't tell everyone what to do."* She further stated that, *"all I ask for is a peaceful existence on my property; that's what I want."* She noted that she doesn't bother people, people tend to bother her.

She also stated that, *"David is going to work with Shorty. He's been out and they have tried to hook up several times, due to rain and stuff. Once the variance is worked out or whatever is going to happen with that, David has agreed to work with Shorty to get whatever in compliance; and Shorty is the contractor."* Mr. Childs and Ms. Allen asked when the building permit was applied for; before or after the construction of the porch. Ms. Tenorio noted that it was supposed to be before but it wasn't.

Ms. Cash asked Ms. Tenorio if it was her understanding that with the Building Inspector is that the porch can be brought into compliance without having to rebuild it or tear it down, and that footers are the problem. Ms. Tenorio indicated that was correct and that it also needed a 10/2 pitch roof. Mr. Childs asked if the contractor had been

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paid. Ms. Tenorio indicated that she had. Mr. Childs noted that the contractor should have known that he needed a building permit before work was performed. Mr. Childs asked if the porch could be put on a different side of the house where it would be in compliance with the setbacks. Ms. Tenorio stated that she chose that side of the house because it was her mother's last request. She further noted that there was an existing cement porch there previously. Mr. Childs asked if the porch was put on top of that. Ms. Tenorio stated that it was.

Ms. Tenorio stated that she had letters from neighbors that supported the porch. Ms. Cash stated that she could submit those letters. Ms. Cash wanted to clarify that the issue with the construction is not just the footers but the roof as well. Ms. Tenorio indicated that it was both and that it could be fixed with moving the steps inward. She also noted that her insurance inspector asked if a different roofing material could be put on the porch.

Mr. Childs opened the public hearing at 7:55 p.m.

David Cole: Mr. Cole stated that he was a neighbor of Ms. Tenorio. He moved into his house in 1986. He has been neighbors with that household for about thirty (30) years. He further noted that when the house was in the possession of her mother, it became very run down. After her mother's passing, she made a lot of improvements (much cleaner, neater, new siding, and a new porch). After receiving the notice about the hearing, he indicated that he went to visit Ms. Tenorio about the porch. He seems to think that it's a very well built porch and it's a shame that it's not in compliance. He feels that it would be a shame if she were required to remove it. He thinks it improves the property and the building. He noted that he house is pretty small on the inside and it's really the largest clear space that she has to do her exercises. He further noted that in listening, there seems to be some confusion as to what is the left and right. He stated that, "*if you stand on the porch looking out, the left side is in compliance. The road does curve around, as does the bank, and cuts closer on the right side (where the problem is).*" He hopes that the BZA does not require her to remove the porch.

Mr. Childs address Mr. Cole and stated that in looking at other homes in the area, the porch doesn't seem any closer than the front of his house to the road and asked if he ever measured that. Mr. Cole stated that he does not know what the distance is. The house was rebuilt in 2006-2007 with permits.

Mr. Childs asked for other comments; none were provided, the public hearing was closed at 7:58 p.m.

Ms. Cash made the following motion:

I move that the Board of Zoning Appeals grants a nine (9) foot variance to the seventy-five (75) foot setback contingent on the porch meeting the Building Code requirements. A second was offered by Mr. Moyer, vote 3-1 in favor with Ms. Allen voting against the motion.

Zoning Appeal #2015-03 / Mr. Justin Shimp, Mr. Ray & Nellie Koon, and Ms. Vanessa Schroeder:

Mr. Padalino stated that the appeal focuses on an appeal that was provided to Mr. Ray Miles of Zenith Quest, dated on May 15, 2015. The appeal was received within thirty (30) days from the date of the written determination. He noted that his summary (see details below) will be broader due to the fact that it was a part of a larger review and process, and wants to touch on how that determination was made.

Summary of County Review & Approval Process:

- August 13, 2014:
 - They had some preliminary questions before submitting any applications, just seeking some informational guidance.
- August 21, 2014 email from Tim Padalino to Ammy George, Landscape Architect (Roudabush Gale and Associates):
 - The email included a list of question that had been compiled by the Planning Commissioners':

- *“‘Light assembly’ of weaponry: will these modified or assembled guns be tested on site, and if so, how will the testing facility operate? Would it be an interior, soundproof facility?”*
- No response(s) were received from Ms. George or from other members of Zenith Quest that were copied on that email at that time.
- August 28, 2014 conducted a site visit with Planning Commissioners’ (Philippa Proulx, and Michael Harman), as well as Ms. Ammy George, Mr. Ray Miles, and Mr. Peter Kaya:
 - During that site visit the issue of firearms testing was brought up orally in conversation by the ZQ representatives. They mentioned there would be assembly of weapons, and occasional testing.
 - In response, County staff and Planning Commissioners’ briefly asked questions about this “testing” element but provided no detailed information; and provided no determinative information or guidance.
 - After this pre-application courtesy site visit, the “testing” issue was not an item of discussion or correspondence until the formal Planning Commission review at the October 22nd regular meeting.
- October 22, 2014 PC review of Major Site Plan #2014-005:
 - Mr. Ray Miles of Zenith Quest spoke to the issues of “manufacturing” and “testing” of weapons which would be modified or re-assembled at the proposed facility. He indicated that any required testing would occur indoors within specialized spaces.
 - The following information is taken from the approved meeting minutes:
 - *“Mr. Miles then explained that part of ZQI’s existing business involves distribution and sales of firearms, specifically small arms. He explained that ZQI will be involved with light assembly, disassembly, and reassembly of small arms. Mr. Miles noted that, if required, any testing facilities for these modified firearms would be entirely enclosed within the warehouse, and would be constructed according to specifications that are designed to minimize or eliminate all noise.”*
 - Following Mr. Miles’ presentation, the PC did not follow up on the permissibility of the proposed uses and structures as being an issue requiring further review or determination.
- Revisions to Major Site Plan #2014-005 (October 2014 – January 2015):
 - During the three month revision process, the issue of “testing” was not brought up by either the applicants, Planning Commissioners or County Staff.
 - The focus of the revisions were more on aesthetics (landscaping, screening, and lighting) and issues of public safety (fencing, hazardous materials and secondary emergency access).
- January 28, 2015 PC review of the re-submitted revised plans:
 - A lot of discussion about the revisions.
 - There was no discussion of firearms modification, assembly, or testing.
 - The Planning Commission voted 5-1 to provide conditional approval.
- March 25, 2015 PC review:
 - Zenith Quest worked to address the four (4) conditions that were imposed by the PC. The PC voted to approve the Site Plan in full.
- March 26, 2015 Site Plan approval signature:
 - Zoning Administrator signed the final site plans.

In summary the issues of weapons assembly and testing was brought up orally by the applicants on at least two (2) occasions; one of which was at a regular public meeting (October 22nd). Mr. Padalino noted that he never provided a written determination as a Zoning Administrator prior to May 15th. He further noted that he also never objected or determined that the issues and uses were not permissible, during the review and approval process.

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Mr. Childs asked if the May memo wasn't a determination but more of an opinion. Mr. Padalino stated that he would call the May 15th correspondence a zoning determination. He also noted that this was requested after approvals were already granted by the PC and Staff.

Mr. Childs asked Mr. Phillip Payne (County Attorney) to present. He noted that the BZA received Mr. Payne's memo and thanked him for it.

Mr. Phillip Payne: Mr. Payne stated that he is counsel for the County and representing Mr. Padalino. This is appeal number three (3) regarding Zenith Quest from Mr. Shimp. In this instance, there are three (3) other petitioners that have joined in the appeal. Mr. Payne said, *"To elaborate a little bit on what Mr. Padalino is describing; this particular proceeding and this particular appeal have brought into focus something that I've never focused on and I guess Tim hasn't either. That's the interplay with citizen landowners who come to the Zoning Administrator with questions about, can I do this, can I do that, is this going to be permissible. The vast majority of it isn't all give and take. Typically when the Zoning Administrator asks about a use that is not permissible, that alone sometimes is just telling the landowner, you can't do that without a Special Use Permit (SUP). Some of course want it in writing and which case it becomes a formal decision and then become appealable. It's quite clear to me from studying the voluminous records that this use came in to Tim's office (assembly, reassembly, storage of ammunition). This would have never gotten to the PC if there hadn't been standing that it was acceptable with the Zoning Ordinance. It's a bit of a "Catch 22" for both the landowner (Zenith Quest) as well as for the Zoning Administrator; when am I supposed to send out something in writing so I can start the thirty (30) days or I can start the sixty (60) days. In this instance, the question that came in was; do I need to amend the Site Plan to add this testing facility in the basement; and the answer was no. However, in the process of give and take among Staff it was determined that it ought to be outlined in writing, which set up this appeal process. In that connection, Counsel for the applicants has emphasized Mr. Carter's letter or email saying he didn't think that the testing aspect had been disclosed or was a proper use."* Mr. Payne make several comments on that, as follows:

1. *"The context of reaching decisions in the land use is a lot of give and take, a lot of discussion because Zoning Ordinances can never be detailed enough to cover every situation. So there are differences of opinions, and in Mr. Carter's case, he also didn't have all the background. One of the items that you just heard was that this was completely disclosed and discussed at the PC meeting so this wasn't something that was sprung, it was all presented in good faith. And, in the world of emails where people type before they think and punch the send button, is a complete record; which of course is made available to the public. So, in any event, Mr. Carter gave me a letter that I could submit if I thought it appropriate where he explained what I've just explained (the process), but I don't find that determinative of the letter that ultimately that Tim wrote.*

Regarding the Timeliness of the appeal, Mr. Payne stated that, *"the first piece of timeliness that I would like to address is the concept of the assembly/re-assembly of firearms. That, as I said, was plainly in front of the PC; the minutes are public record; it's in the writings; it was upfront the whole way. This is Appeal #3, thirty (30) days went by somewhere between Appeal #1 and Appeal #2. Wherever the clock was supposed to start should have been taken up in Appeal #1 or Appeal #2. Therefore, the assembly item is certainly lost/not timely filed with you.*

Likewise with the Determination, Mr. Payne stated, *"the closer question, certainly admitted upfront; is why the testing issue since it has been presented to you in written format, is a determination, which arguably starts the clock. My response to my own confession though is, this again was disclosed early in the procedure; and the Zoning Administrator writes something later on, eventually connecting to the earlier disclosures and decisions and we start this thirty (30) day clock. In other words, how does he respond to letter about is it an amended site plan needed; and of course, bonds and plus says this is an accessory use so you can't do x, y, and z; does the clock start. As pointed out in his email in response, he explains how the testing could occur to keep it from becoming an open firing range or some other use that would require a SUP or rezoning. That is also very typical of what a Zoning Administrator does. He tells people, yes you can do that, you just can't do x, y, and z. He's not imposing a condition so much as if you go over this limit you may have an enforcement issue.*

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In going to the merits of both claims, Mr. Payne stated that, *"it must be remember that this is not about a rezoning or a SUP. The property was zoned M-2 and has been for we don't know how long. Anyone living in the vicinity of M-2 is going to have the possibility of living near an industrial operation or heavy commercial operation; which may create some nuisance. There is a potential for a large building, industrial building to be there are part of the M-2 existence. I suppose everyone living in the country would rather not live near a heavy commercial operation. The simple fact is, in the wisdom of the BOS, sometime in the past, this became and M-2, perhaps originally zoned M-2, is where this sort of business is supposed to go. The M-2 is going to be somewhere if it exists; there is going to be a use in that M-2 that is going to adjoin or be near someone who is an A-1 or an R-1.*

In regards to Standing, Mr. Payne stated that, *"I do not think Mr. Shimp has shown standing. He's certainly not adjacent to the property. His concern (as I read in Mr. Blaine's letter) is that his children attend a school which is nearby; and that simply doesn't meet the court standards for a legal, equitable or pecuniary interest. Now we have the other two (2) petitioners, the Koon's and Ms. Schroeder. Perhaps they don't want to live next to a facility that is of this size; but I don't think they have alleged grounds that bring them within the limit of standing. They're concerned about the potential for noise; and are concerned about firearm testing impairing their homes. They are alleging certainly concerns and fears but they are not alleging something that is concrete that it won't affect their property. Remember that both Zenith Quest's statement at the PC meeting and then the follow-up letter from Mr. Padalino's said it's either got to be silent or nearly silent. This is in an M-2 district where some nuisance is permissible. As far as the decline in value, its speculative inconclusive; it's not pointing to any particular thing that is going to affect the property other than fear of a big business being nearby.*

Mr. Payne further stated that, *"as to the assembly of firearms fitting into, the counsel for the applicants and I seem to have a difference of opinion on what fabrication means. I looked it up and maybe it was on the computer, which might have been a mistake. The definition give was to construct or manufacture...especially from prepared components. Depending on what Zenith Quest does, they make firearms and change parts to bring them up to whatever standard they want for their market here. But if looking in to the M-2 district, this sort of businesses making stuff (welding, machine shop, automobile assembly) fits this type of use. No matter how many times we amend ordinances and add definitions, there are always these things that keep falling into the grey area, that the guy who has the job of doing the interrupting has to put them within a classification or make the determination that it doesn't fit in the classification. Following up on that, what goes into just the manufacturing process; testing is just an important part as: human resources, safety; it's all a part of process. I know that the Zoning Administrator, after a discussion with me, defined this as an accessory use. The more I thought about this, the more I realized that the line between what it integral to the operation and what is an accessory use is a blurry one. In the memo to you, I pointed out that lunch rooms, facilities used for the repair of equipment used in the process, office space, all of which would probably be a necessity for the types of businesses that are listed here. So, it's certainly a consideration whether this is in fact an integral part of the process or whether an accessory part of the process (talking about the testing, of course). So in sum, I'd ask that you dismiss the applicants on grounds of standing, and if not, then to uphold the Zoning Administrator's decision on testing; and dismiss the applicants on the appeal of assembly of firearms, clearly filed too late."*

Ms. Cash stated she had a question for Mr. Payne. She noted that he stated from the beginning that he was representing Mr. Padalino. She asked if he was also representing the BZA. Mr. Payne stated that he was not.

Mr. Childs asked that the applicant/representative to come forward and present.

Steve Blaine, Attorney at Law for LeClair Ryan: Mr. Blaine was sworn in my Mr. Childs before the Board and signed the oath. He thanked the Chairman and members of the BZA. Mr. Blaine stated that he was representing Mr. and Mrs. Ray Koon, Justin Shimp and Ms. Vanessa Schroeder in this appeal. He stated that, *"this appeal relates to the official determination that was given on May 14th. It's based on a statute that gives members of the public a right to appeal an official determination. The applicants/appellants are not appealing the Site Plan approval, and those were the basis of the prior appeals; so this is a new fresh appeal, given by statute to my clients.*

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As to the Standing issues, Mr. Blaine stated that, *"the Koon's own a residence at 278 Afton Mountain Road, which is immediately adjacent to the M-2 zone area and about a thousand feet from the proposed testing, firearms testing, and shooting range. They've had over fifty (50) years of ties to this community; they are still members of the Rockfish Presbyterian Church; they are retired; and the house is for sale. The sale proceeds are an important funding of their retirement. Now, if you'd ask yourselves, whether you would, when buying a house, would you consider proximity to a firearms manufacturing and testing use in purchasing that home."*

Mr. Blaine noted that, *"Ms. Schroeder lives at 33 Afton Mountain Road, and her home is only two hundred fifty (250) feet from the proposed firearms manufacturing and shooting range. They are both extremely concerned about the nuisance that the firearms testing, in particular will have on their enjoyment; let alone on value of their house, because a reasonable buyer (I think we can conclude) will take that into account and place a lesser value on a house that's in the country, not next to a firearms manufacturing and firing range, and one that is not."*

Mr. Blaine also noted that, *"Mr. Shimp has children who've attended the preschool. He doesn't own property immediately or approximate; but I think it's clear that under the Standing tests that are applied in Virginia, the Koon's' and Ms. Schroeder have standing in this case. Even applying the case that Mr. Payne cited, and that's because: they own property proximate to the use; the harm that would be caused by the noise and nuisance from this manufacturing and firearms shooting range will have particular impact on them and not to the general public. By those measures, we have standing in this case."*

Mr. Blaine stated that the next issue that was presented was if the appeal was timely filed. He stated that, *"Mr. Padalino's statement tonight should end the inquiry. He stated that he entered an official determination. All this evidence about emails between the applicants and the staff that I would have to agree that is how often the projects are planned, but that is not an official determination. You have to consider that the statute gives the right of third parties to make this appeal. What right can exist if the third parties don't have any knowledge of the conversations going on in the emails or a site visit among Planning Commissioners'; and it's often when there's a publication (as in a notice); and in this case all they would have had to do was been honest and truthful in stating the uses on the site plan itself. The Site Plan that was dated February 11, 2015, only lists warehouse and affiliated office use. So you are a member of the public and you want to come down and find out what's happening and you look on the Site Plan and it says that, well we don't necessarily object to that. It doesn't say anything about firearms, manufacture, and firing ranges. That's perhaps why Mr. Carter (who's your County Administrator) did not think there was full disclosure on what the intentions were of the applicant; and that may have changed the zoning decisions on this case. The bottom line, he says is, [my input is there is not an allowable use in M-2 for what Zenith Quest is now proposing]. Now this is an experienced Zoning Administrator, and I don't think that hitting the button on the email is an excuse for dismissing his opinion, and I think it's an important testimony. It seem just ingenious that we would equate email between staff and the applicant as being adequate notice to aggrieved parties who have a right to appeal an official determination. So, I think in terms of timeliness, I think we've demonstrated that we've met that standard."*

Mr. Blaine stated that, *"on the actual merits of it, it's well-settled (for almost 100 years now), that if a use is not specified in a zoning ordinance, either as a permitted use or by Special Use Permit (SUP), it's not permitted. And nowhere in the M-2 (which is Article 9 of the Ordinance) does it list firearms manufacturing or assembly, either as a by-right use or as permitted by a SUP. The mention of fabrication of metal products; the common definition of that is: the bending or cutting and fabricating of metal or steel. That section of the Ordinance also uses manufacturing and assembly. So clearly, the writers' of the Ordinance used terms to mean different things. If they just manufacturing in this case, they could have just used manufacturing; but they distinguish fabrication from assembly and manufacturing. And nowhere, where assembly and manufacturing is used does it mention guns or metal products. We have assembly of appliances, fabrication of much less hazardous and intrusive products than firearms and firearms testing, certainly. Mr. Payne did not mention that the specific clause "accessory uses" as defined, does not appear in M-2 zoning district in the Ordinance. Now that could be oversight, but I think when it's clearly applied and used in all other sections, you have to infer that there is an intent of the drafters' to make the M-2 zoning different than those other zoning districts. And I think that has to do with what Mr. Payne said, that those, as a particularly intense use in an industrial zoning district, and therefore we want to be very specific*

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about the uses that we allow in the industrial use, because of the nature of those uses. So I would submit that there is not the gray area to allow the Zoning Administrator to tack on a nuisance use to warehousing (which is clearly allowed), warehousing and distributing, to which we would not object. I think that perhaps the most compelling, is your own County Administrator, who saw that this really wasn't given the light of day. I guess our questions is, is that really how the County wants to conduct business. There is a lot of give and take between staff and applicants; I represent applicants too, and developers. But when you have something as important as introducing this nuisance to your County, I think you have to be express and it has to be fully disclosed.

Mr. Blaine indicated that he was happy to answer any questions. He asked that the BZA, *"respectfully overturn the Zoning Administrator's official determination; and if it's a policy matter, the County wants to allow firearm manufacturing and testing, then the BOS can adopt a zoning text amendment. We do not have to make that decision here; we are not making a policy decision; we are making a decision whether that was the wrong way to do it."*

Nellie Koon: Mrs. Koon was sworn in my Mr. Childs before the Board and signed the oath. She stated that she and her husband (Ray) have been members of Nelson County for fifty (50) years. They first heard about this issue a week and a half ago. She noted that she and her husband had no idea that something like this was going on, close to property that they own in the area. She stated that, *"we have owned property adjoining Afton Mountain Road, before going up to Sunnyside Presbyterian Home for forty-five (45) years; and we also own the house next door. That's the one that we are trying to get renovated and ready to go on the market. Then to find out that this here was going on, was shocking. Now all that considered, you all know what you have here and what has been presented to you, and you probably already know how you are going to handle it."*

Mrs. Koon noted that she is concerned because she has a great-granddaughter that goes to school up there in the area; and has for three (3) or four (4) years. She is sure that she will lose sleep over it. She also think of the school that's down the road, that's been there for many years. She noted that they couldn't keep the children inside the school all the time. She also stated that, *"on 4th of July in Sunnyside in Harrisonburg, this came to my mind as I was listening to people put off fire crackers. My husband and I went to bed at 8 o'clock, we usually go at 7:30 but we went to bed at 8 o'clock, the firecrackers started and it was pop, pop, pop, pop. Now is this what we want in our lot next to us up here. I ask you to please, and I don't know what the words are to tell you, what to please about, but this is something that we don't need, not in Nelson County."*

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

Amelia McCulley: Ms. McCulley noted that she is a resident and tax payer of Nelson County. She has twenty-six (26) years of experience as a Zoning Administrator in a surrounding locality. She has rendered thousands of official determinations and probably thousands of advisory determinations. She indicated that what Mr. Payne talked about is the day-to-day give and take discussions (by phone, email, walk-ins), those are advisory opinions; they are not the same as an official determination that is appealable; and asked that the BZA disregard those.

Ms. McCulley stated that she, *"supports this appeal; I believe that the Zenith Quest use as proposed is not permitted in the M-2 zoning in Nelson County. I've looked at the Zoning Ordinance. Two reasons: first of all the primary use assembly, modification, and light manufacturing of firearms is not; the M-2 district does not list this use explicitly and it doesn't include language as ours does, which says things like included but not limited to, so it opens the door to interpretation to additional uses, than the uses that are listed. This is very explicit, it lists the uses and it does not give you language, either in the intro to that zoning district section or in the permitted use statement, to go beyond the words on the page. So if you were to have that discretion to go beyond the words on the page, you're still limited by uses that are similar in character in nature to uses that aren't listed; they are guidelines; there's an intent behind the words on the page. If this Nelson BOS had intended a broader interpretation, they would have written the ordinance differently. If they intended firearms to be assembled and tested, they would have written that into their ordinance. None of the M-2 uses include firearms; firearms, let's face it, they're unique; they differ from regular metal. It's not the same as the things that are in that use category, which are kind of artist supplies, like canvas, cork, feathers. You can't tell me that those things are similar to*

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firearms; they're just not. This use determination was not made with a site plan approval; it is not an authority of the PC to make use determinations. They make a decision of whether a site plan is consistent with zoning ordinance with the technical requirements that apply to that site plan. They conduct ministerial review."

*"Now secondly, the accessory use. Accessory use of firearms testing is not permitted in the Nelson County Zoning Ordinance. An accessory use is defined for us and it's a very common definition throughout the Country. Accessory use is customarily incidental to the primary use. Now that calls for two findings. First of all, incidental (from Webster's) means its minor in relation to the permitted primary use; it's a minor use; it's inconsequential. You can't tell me that a firing range is a minor and inconsequential use. It's different in character from both the primary use and the other uses that are listed (like these artists supplies); it's not an incidental use. Secondly, remember accessory use is incidental is customarily. Customary, for a use to be customary it has to be commonly associated with normally and expected to offshoot from the primary use. Mr. Payne notes that you normally test products that are assembled; testing firearms are unique. You can't compare testing a firearm to testing a hairdryer. No one has provided evidence about firearms testing ranges being commonly associated with firearms assembly. Where's that information for us to conclude that it's a customary use. Again, case law says that customary use is commonly, habitually, and by long practice established as reasonable and association with the primary use and there is case law, *Becker v Town of Hampton Falls*. You can think of customary uses: campgrounds that have bathhouses; delis in a grocery store; again, no evidence that this is a customary use.*

In summary the Zoning Ordinance in Nelson County allows the uses that are listed and it doesn't allow the uses that aren't listed: firearms assembly, not listed; it's also not even similar if you are making an interpretation. If you broaden your powers enough to go beyond the words on the page, it's not similar in the character in nature to the uses that are listed. Secondly, firearms testing: accessory use; not allowed (again, not listed). It's not an accessory use, it fails to meet the requirement that it's customary or incidental, and it needs to be both (customary and incidental) to be an accessory.

Ms. McCulley asked that, "you to follow the Nelson County Zoning Ordinance as legislated by the Nelson BOS, and not allow this use because it is not a use that is permitted. It's important to follow the adopted regulations and utilize the public process to change them or legislate; rather than to allow broad interpretation beyond the words on the page.

Walker Richmond: Mr. Richmond stated that he is an Attorney in Charlottesville and there on behalf of the property owners Mount Armour LLC. He noted that Mount Armour LLC adjoins the subject property. He further noted that Mount Armour LLC whole-heartedly supports that appeal that is being presented tonight by Mr. Blaine for the reasons that he and Ms. McCulley articulated. He pointed out that as an adjoining property owner, Mount Armour LLC was never notified of the May 14th official determination. He further noted that allowing the testing of firearms is a major difference from the manufacturing of firearms. He stated that, "to reiterate the statement that Mr. Carter made in his email; it doesn't appear that there was full disclosure of the intent, which may have changed the zoning decisions." He believes the whole process has been skewed by the fact that proper notice was not given to the adjoining property owners.

Ray Miles, Zenith Quest: Mr. Miles stated that he was the Project Manager for the warehouse and light assembly use. He indicated that he agreed with Mr. Padalino in that they (ZQI) presented firearms testing as an integral component of firearms assembly or light manufacturing from the beginning. It was discussed in August, September and in October. Mr. Miles stated that, "it was our understanding as a company that when we got the approval for our Site Plan that when they said we could do light firearms assembly or whatever word you want to use (assembly, manufacturing or putting it together, fabricating), that testing of those items for quality control was included." He noted that this was discussed on site and at meetings with the PC on more than one occasion. He noted that the only objection that came up was that they control the sound; not that it was an unacceptable use. It was presented as one of the uses and thought they had approval for that.

He further noted that he disagrees with Mr. Padalino that they asked for or that his email dated May 15th was an official determination. He stated that, "our attorney has advised us, and myself, never thought I was asking for an

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official determination. In my email, I was asking, [if we put a basement in, do we need we need to come back to the County about our Site Plan and amend it]. And the way I worded it was, [a basement to use for the purposes already approved by the County, namely for occasional firearms testing as part of the light manufacturing process].” It was his understanding that was already approved and he wasn’t asking for a determination on firearms testing, but whether roughly a 4,000 SF basement on the safe footprint in the same Site Plan would require them to come back for more review; and the answer he was given was “no”.

He further noted that Mr. Padalino further clarified points about the firearms testing: employees only; not open to the public; and so forth. Then on May 15th, in the evening when he received Mr. Padalino’s email, he wrote back and thanked him for the clarification. He stated that, *“I was not thinking about determinations and appeals and hearings, I was just expressing at that time, immediately after I got his email, thank you for the clarification. I didn’t say thank you for responding to my request for an official determination, because I had never asked for an official determination about firearms testing, because in our minds it was already included.”*

Mr. Miles noted that their attorney, Valerie Long at Williams-Mullen concurs with the County Attorney that this appeal should be dismissed because there is no standing. Secondly, because their stated use is permitted within the Code. Thirdly, because this wasn’t an official determination and shouldn’t be subject to the appeal process. Finally, in this case, firearms testing is not an accessory use; it’s in integral part of quality control, when putting together firearms to be sent out to the public for them to use. He stated that, *“the only way that you test a firearm is to load a round in it and shoot the round out of it, and that tests the product.”* He noted that rather having the testing facility on ground level, they are going to considerable expense (on their part) to put it below ground by adding an additional 4,300 SF basement. The basement will be surrounded on three (3) sides by earth, plus concrete walls and steel structures; so it will be very safe. Mr. Miles addressed the public and stated that if anyone had concerns with safety, they are more than welcome to contact him or to come by their office located in the Afton professional building (across from Afton Service Center). He indicated that he gets the impression that testing of the firearms in the basement will pose a danger to someone outside of the building; and noted that was not true. He stated that the building and its surrounding would be very secure, to ensure that no one would accidentally get onto the property.

Mr. Miles noted that he has heard several mention the County Administrator’s opinion on the matter. He has never met him regards their plans. He is not sure how he got involved with the process.

Mr. Childs asked if there were any other comments. No further comments were given and the public hearing was closed at 8:54 p.m.

Mr. Moyer stated that he believes the BZA has to go with the previous decisions that they’ve made.

Ms. Allen asked Mr. Padalino when the PC was hearing about the Major Site Plan, was it or was it not advertised accordingly. Mr. Padalino stated that a by-right Site Plan is not subject to the notification requirements. Ms. Allen then stated that Mr. Miles (at the October PC meeting) made it very clear about the assembly and disassembly and reassembly of them, and also talked about the modified firearms would be entirely enclosed within the warehouse for testing purposes; it was clearly talked about. She further stated that she is having a hard time with the fact that now (six months later), to say that it was never spoken of, when it is clearly stated in the minutes, she is having a hard time grasping that.

Ms. Cash stated that, *“I keep going back to the same argument. Whatever I think of how the process was conducted, I wasn’t at the PC meetings. I’ve read every single page. Whatever I think about how the determination was made, how the decisions were made, how the processes were conducted. I go back to the same decision we have made all along.”*

Ms. Cash made the following motion:

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I move that the Board of Zoning Appeals, in the matter of Appeal #2015-03, finds that none of the petitioners - Justin Shimp; Ray and Nellie Koon; nor Vanessa Schroeder - have standing in this matter for the following reasons:

- 1. Mr. Shimp's appeal seeks to redress some anticipated injury that is not based on current fact; and he has no direct interest in this issue; and**
- 2. Mr. and Mrs. Koon and Ms. Schroeder have not demonstrated a clear harm or burden to themselves or their property not shared by the public in general.**

Therefore, none of the four petitioners have standing to appeal the Zoning Administrator's determination.

Mr. Moyer provided a second; the vote 4-0.

Mr. Childs asked that the first of that is that the case is being dismissed for lack of standing. Ms. Cash stated that was correct. Mr. Blaine asked the Board who prepared the motion. Ms. Cash stated that she did.

Other Business:

Mr. Padalino stated there was no other business.

Mr. Childs asked the Board if anyone had questions for Mr. Payne. Ms. Cash stated that she only needed advice when speaking with Mr. Padalino about issues. The issue of ex parte communication came up and she would like understand the process; what questions can and can't be asked; and if there is an issue of ex parte. She stated that the Board is put in the awkward position of trying to understand and they are being asked to make decisions about issues that happen outside of our purview. She further noted that she would like to know who represents the Board. Mr. Payne stated that the BZA needs a lawyer.

Ms. Allen stated that as adamant as the petitioner has been in the last three appeals, she feels that he now has no other choice but to sue the County. Ms. Cash agreed. Mr. Payne suggested that the Board request any information needed in writing to the petitioners. An email could be sent to Mr. Padalino and the petitioners could be copied on it.

Ms. Cash stated that she was trying to understand the process. She further stated that she is unclear as to why a determination was made and what it based on. Mr. Payne stated that those types of questions need to be brought up at the hearings. Mr. Childs stated that he has always thought that the Board shouldn't confer with one another ahead of the meeting and items should be brought up during the meetings.

Ms. Cash asked that Staff or Mr. Payne let the Board know if the process goes any further (to a higher court). Staff agreed to let the Board know if/when that happens.

Mr. Childs stated that there seems to be some process failure since things keep coming before the Board. Mr. Payne stated that the Board would have to make that call. Mr. Padalino stated that it is his understanding that regarding ex parte communications, is that it doesn't prohibit the BZA from inquiring about County Staff's opinion; it just means that if Staff advises the BZA, he has to copy the applicants within seventy-two hours. Ms. Cash stated that she would like to know what the rules are. Mr. Childs stated that he thinks a lot of it is continuing education on the BZA's part. There are a lot of resources out there that are very beneficial.

Adjournment:

Mr. Childs adjourned the meeting at 9:11 P.M.

Respectfully submitted,

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Stormy V. Hopkins
Secretary