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**NELSON COUNTY PLANNING COMMISSION
MEETING MINUTES
February 27th, 2019**

Present: Chair Mary Kathryn Allen and Commissioners Mark Stapleton, Chuck Amante, Phil Proulx, Mike Harman, and Tommy Harvey

Staff Present: Sandy Shackelford, Director of Planning & Zoning and Emily Hjulstrom, Secretary

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

Approval of minutes: January 23, 2019

Mr. Harman motioned that the minutes from January 23rd, 2019 be approved. Mr. Stapleton seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Chuck Amante

Phil Proulx

Mike Harman

Tommy Harvey

The minutes were approved with a vote of 6-0.

Public Hearing Items:

- Class C Tower Permit #2019-01 - Diggs Mountain Rd. / Apex Towers, LLC

Ms. Allen presented the following:

Nelson County Planning Commission

Public Hearing Guidelines

Adopted 4-25-2018

1. The Presentation by the Petitioner's representative(s) will be limited to fifteen (15) minutes. If it is difficult to fully explain a complex proposal orally within the time limit, it is recommended that the petitioner submit in advance to the Planning and Zoning Office written information that can be mailed to the Planning Commission prior to their respective meetings.
2. Speakers representing a group will be allowed five (5) minutes to speak if their presentation will reduce the number of persons to make a public comment.
3. Subsequent speakers will be allowed a maximum of three (3) minutes each and cannot allocate their time to another individual.
4. Speakers must come to the podium, give their name and address before making their remarks.
5. Speakers will be timed by a staff assistant and given notice when they have one (1) minute left and when their time has expired. Upon notification the speaker shall relinquish the podium and return to their seat.
6. Speakers are asked to not be repetitive and to insure their remarks are relevant to the request at hand.
7. When the public hearing is closed the Planning Commission will deliberate on the agenda item, during which the public may remain present but will not be allowed to speak. Members of the Planning Commission may ask questions of anyone in the audience in order to seek clarification of issues that were brought out at the hearing.
8. Abusive and inappropriate language will not be tolerated.
9. The Chair will fairly enforce the above rules.

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Ms. Shackelford presented the following:

Nelson County Planning Commission

To: Planning Commission
From: Sandra M. Shackelford, Director of Planning & Zoning
Date: February 15, 2019
Re: Tower Class C #2019-01 – Diggs Mountain Road

BACKGROUND: This is a request for a Class C Communications Tower on property zoned A-1, Agricultural in accordance with §4-1-22 and §20-13 of the zoning ordinance.

Public Hearings Scheduled: P/C – February 27, 2019; Board – March 12, 2019 (tentative)

Location / Election District: East of, and across the street from 875 Diggs Mountain Road / South Election District

Tax Map Number(s) / Total acreage: 77-A-2A / 85.0 acres +/- total.

Applicant Contact Information: Dale Hill, Apex Towers, LLC, 2838 Riverside Drive, Suite C, North Tazewell, VA 24630; 276-964-7416.

Comments: The requested use is for a new 130' monopole telecommunications tower. The tower does not include a lightning rod. The applicants have agreements with AT&T and T-Mobile to utilize the tower for service provision, and have offered to allow Nelson County to place its communication equipment on the tower free of charge. One of the service providers has requested waivers from §20-12.D.4, which limits the equipment that can be attached to the tower.

T-Mobile is requesting to be permitted to utilize a four-sector configuration, with two antennae per sector, to utilize four different spectrum bands. The configuration requested from AT&T appears to comply with §20-12.D.4.

The applicants have also requested a waiver from the landscaping requirements since the tower location is in a heavily wooded area.

This property is located south of and adjacent to the LockN Farm property, so this will also allow additional coverage for large events.

DISCUSSION:

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Land Use / Floodplain: This area is rural in nature. The property does not fall within any 100-year flood plains.

Access and Traffic: Property is accessed from Diggs Mountain Road (62-668, AADT 160). The proposed tower will not take impact the daily traffic once construction is completed.

Utilities: The proposed tower will not utilize water or septic/sewer services. A 40' access/utility easement is proposed to access the property.

Conditions: The final approving authority for this request is the Board of Supervisors. The ordinance states that the final approving authority shall approve the color of the tower and may impose other conditions upon approval. The Planning Commission may make recommendations to the Board of Supervisors regarding proposed conditions. The applicants have proposed leaving the tower galvanized silver, which traditionally seems to be the most unobtrusive option for towers to blend in with the sky in spaces where it may be visible above the tree line.

Comprehensive Plan: The current Comprehensive Plan has this area identified as Rural and Farming. The current Comprehensive Plan does not address communications towers/infrastructure. The application meets the guidelines established in §20-2 of the Zoning Ordinance outlining the purpose of the Communications Tower Ordinance including the importance of protecting the scenic nature of the County.

RECOMMENDATION: The applicant has satisfied all of the application requirements. Staff recommends granting the waivers as requested.

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Mr. Harman asked why the applicant did not include a lightning rod. Ms. Shackelford noted that the grounding mechanism was able to be internalized in the tower.

Mr. Dale Hill of 238 Fincastle Turnpike, Tazewell, VA is the applicant for the request. He noted that the tower was reengineered to not include the lightning rod and to have it be internal to the tower. He noted that the highest antenna will be lower than 130' and that it is a 130' galvanized tower. He noted that they did photo simulations and that it was only visible at four of seven sites and that most were from Oak Ridge Rd. with one being from Nelson Methodist Church. He noted that T-Mobile and AT&T will be the first two carriers on the tower and that there will also be one space available for county use. He noted that this will be part of the first NET initiative, an emergency communications system going nationwide. He noted that the landscaping requirement that they are asking to be waived is due to the existing heavy tree growth being redundant to whatever is required. He noted that he believes they have met all requirements in the ordinance. He also noted that the tower will not be illuminated and that it will be surrounded by a 6' fence with 2' of barbed wire on top.

Ms. Allen opened the public hearing at 7:11 PM.

Ms. Allen closed the public hearing at 7:11 PM.

Mr. Harman made a motion to recommend approval of the 130' Class C tower #2019-01 with no lightning rod at 875 Diggs Mountain Rd, Arrington, VA in accordance with the attached application dated February 1st, 2019 and drawings dated January 31st, 2019. Also to recommend approval of waiver of 20-12.D.4, the landscape requirements, and for the finish to remain galvanized silver. Ms. Proulx seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Chuck Amante

Phil Proulx

Mike Harman

Tommy Harvey

The motion was approved 6-0.

Other Business:

- **Special Use Permit #2018-11 - Restaurant**

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Ms. Shackelford noted that this is a continuation of a previous public hearing and that she had received the following from the county attorney:

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MEMORANDUM

To: S. Shackelford
From: Phillip Payne
Date: February 25, 2019
Re: Non-conforming Structure

Issue: To what use, if any, may a non-conforming structure be put assuming its prior use was discontinued more than two years ago. In this instance, the structure's non-conformity is the result of a failure to meet current setback requirements.

Zoning non-conformities are addressed in Article 11 of the zoning ordinance. Section provides:

If at the time of the enactment of this ordinance, any legal activity which is being pursued, or any lot or structure legally utilized in a manner or for a purpose which does not conform to the provisions of this ordinance, *such manner of use or purpose* may be continued as herein provided. (emphasis added.)

Section 11-1-2 resonates with the 11-1-1 in that the nonconforming "use existing may be continued" when a change of title or possession occurs but makes no mention of the status of a non-conforming structure.

Similarly, Section 11-1-4 addresses a "non-conforming structure, lot or activity" only in connection with a "nonconforming use".

Section 11-1-3 addresses the "discontinuance" of "structures or activities" but then provides limited circumstances when the "nonconforming activity may continue."

It is my conclusion that the foregoing provisions clearly address and limit non-conforming uses but are indefinite and sometimes contradictory with regard to non-conforming structures. Pointedly, there is no directive that a non-conforming structure may not be used for a conforming use. Notably, on the other hand, expansion, replacement, or repair of a non-conforming structure is specifically addressed in Sections 11-4 and 11-6.

Under the common law, and prior to the enactment of zoning and other land use laws, a present-day non-conforming structure could exist and be used for any purpose "The rule which prevails in most jurisdictions, at least in the absence of any statute to the contrary, is that since zoning ordinances are in derogation of the common law and operate to deprive an owner of a use thereof which otherwise would be lawful, they should be strictly construed in favor of the property owner." *Ramsey v. Zoning Appeals Board*, 26 Cir. C04346, 68 Va. Cir. 135 (2005). "When an enactment does not encompass the entire subject covered by the common law, it abrogates the common-law rule only to the extent that its terms are directly and irreconcilably opposed to the rule." *Cherry v. Lawson Realty Corporation*, 295 Va. 369, 377 (2018).

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Ms. Shackelford

Hence, any ambiguity, or the lack of clarity, in Article 11 requires a construction of the ordinances “in favor of the property owner.”

Lastly, the consistent interpretation of the Zoning Administrator has been that a nonconforming structure may continue to exist when its prior use has ceased but its new use must be in conformity with its zoning district. “A consistent administrative construction of an ordinance by the officials charged with its enforcement is entitled to great weight. 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.” *Trustees v. Board of Zoning Appeals*, 273 Va. 375, 381-382 (2007) (internal citations omitted).

Under the circumstances related to me, it is my conclusion that the Zoning Administrator is correct in determining that this structure as described may be used for a new conforming use.

Ms. Shackelford added that this does not mean that the Planning Commission cannot consider the nonconforming aspect of the building as a factor in their decision.

Ms. Shackelford also showed VDOT’s most recent response to the project stated that including the use of 6 cabins, the retail unit, and the restaurant use that they would only require a 100’ taper but that any additional use would trigger the need for a turn lane. Ms. Shackelford recommended that the Planning Commission consider adding the condition that no additional outdoor seating be added to the restaurant to avoid the need for a turn lane. Ms. Shackelford noted that the building can grow up to 50% of its original structure, and the additional seating associated was part of VDOT’s calculations. But any seating in addition to the 50% expansion such as picnic tables placed in the lawn would trigger the requirement of a turn lane from VDOT.

Ms. Allen noted that things could happen under the radar (like people having picnics without picnic tables) that would add to the traffic without triggering the need for a site plan to be made. Mr. Harvey noted that adding another building would trigger the need for a turn lane. Mr. Amante noted that additional traffic growth on Route 151 would also trigger the need for a turn line. Ms. Shackelford noted that VDOT would not hold the applicant responsible for the turn lane if it were due to Route 151 traffic. Ms. Proulx asked if VDOT had included the expansion with the deck added on, Ms. Shackelford confirmed that they had. Mr. Harvey noted that there is still

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difference in the opinion on non-conforming uses. He noted that Mr. Payne said that anything that is unclear should side with the property owner. Mr. Rath of 161 Wood House Ln. noted that there will be no upstairs to the restaurant. He noted that there will be storage in an upstairs loft. Mr. Amante asked if there was asbestos in the building. Mr. Rath noted that there is only asbestos in the siding of the old houses.

Ms. Proulx asked what was happening with the 6 cabins. Ms. Shackelford noted that she issued a formal determination letter earlier this week that the 6 cabins will not meet the definition of a bed and breakfast. Mr. Harvey asked if there was still something happening with the proposed barn structure. Mr. Rath noted that the barn structure is now not being considered. Mr. Harvey asked what was happening with the three retail units. Mr. Rath noted that they are all rented but that he is unable to do anything with them until the site plan is approved. Mr. Rath noted that VDOT used the highest traffic counts that they could possibly put on the property.

Mr. Harvey asked if Mr. Rath had considered building new buildings that meet the setbacks. Mr. Rath noted that they had considered that. Mr. Rath noted that initially he tried to compromise with everyone but that no one would compromise with him. Mr. Harvey noted that he would not support the project without it meeting current setbacks. Mr. Rath asked what the major concern about the setback was. Mr. Harvey noted that it could be dangerous for small children in the restaurant being so close to the highway. Mr. Rath noted that there would be fencing and bushes and that the garage would just be storage.

Ms. Allen agreed with Mr. Payne and Ms. Shackelford's interpretations of non-conforming uses versus structures. She also noted that there is a reason we now have these setback requirements. Ms. Proulx asked how adding a turn lane would affect these setbacks. Ms. Shackelford noted that it would come a little close to the building but not really affect their setbacks.

Mr. Harvey noted that once things become nonconforming the goal is for them to be eliminated over time by going only to same or lesser uses. Mr. Harvey noted that Mr. Payne changed his mind on the topic three times.

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Ms. Allen asked Mr. Rath if there was any other option concerning the setback. Mr. Rath noted that he is considering asking the engineers what would happen if they put the same square footage for the restaurant where they were considering putting the grocery store.

Mr. Amante asked what would happen if the Planning Commission voted but then Mr. Rath changed his mind. Ms. Proulx noted that this application is just for the restaurant in the existing building. Ms. Shackelford noted that she would be uncomfortable taking something to the board that is different from what the Planning Commission voted on. Mr. Harvey noted that if he gets turned down on the restaurant then he cannot reapply for a year. Ms. Shackelford noted that the Planning Commission could table the vote while Ms. Shackelford looks into whether or not moving the restaurant would trigger the need for a new application or they could vote that night and resolve some of these questions and then Mr. Rath could decide whether he wanted to move forward or withdraw his request. Mr. Rath noted that he will not withdraw any more applications.

Mr. Rath noted that if the location was changed, they would build a mimic of the existing building on a different spot of the exact same size so that they did not mess with VDOT or VDH calculations.

Ms. Proulx made a motion to recommend denial to the Board of Supervisors of application SUP #2018-11 for the primary reason of it being in a non-conforming structure that has too little setback for Route 151. Mr. Stapleton seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Phil Proulx

Mike Harman

Tommy Harvey

No:

Chuck Amante

The motion passed.

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Ms. Shackelford noted that she made a request for some of the amendments to the site plan including taking out all of the extraneous information and making it clear that approval of the site plan would not approve zoning. She noted that the 3-unit building is the only one subject to zoning approval at this time. She also noted that VDOT has responded with comments about the 100' taper and that those changes have been made to the site plan. Ms. Shackelford recommend that the Planning Commission approve the Major Site Plan.

Ms. Shackelford clarified for Mr. Amante that only the 3-unit building is subject to review right now. Mr. Harvey asked if this would allow him to begin work on the 3-unit building, Ms. Shackelford confirmed that it would. Ms. Proulx noted that site plan approval is ministerial and their approval is based on whether or not it meets the requirements of a site plan.

Mr. Harman made a motion to approve Major Site Plan #2018-02 dated June 25th, 2018 with the revision date of February 27th, 2019. Ms. Proulx seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Chuck Amante

Phil Proulx

Mike Harman

Tommy Harvey

The motion passed.

- **Amendment to approve meeting schedule for November**

Ms. Shackelford noted that they will need to amend the meeting schedule in November to avoid meeting on Thanksgiving week.

Ms. Proulx motioned to change the November meeting from the 27th to the 20th. Mr. Amante seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Chuck Amante

Phil Proulx

Mike Harman

Tommy Harvey

The motion passed.

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Board of Supervisors Report:

Mr. Harvey noted that he had nothing to report.

Adjournment:

Mr. Amante made a motion to adjourn the meeting at 7:51 pm. Ms. Proulx seconded the motion.

Yes:

Mary Kathryn Allen

Mark Stapleton

Chuck Amante

Phil Proulx

Mike Harman

Tommy Harvey

The motion passed.

Respectfully submitted,



Emily Hjulstrom
Secretary, Planning & Zoning