

**STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES**  
**June 26, 2012**

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, June 26, 2012, was called to order with the determination of a quorum at 7:02 p.m. by Chairman Robert C. Gibbons in the Board of Supervisors Chambers. Mr. Gibbons introduced the Board members and staff and explained to the public present, the purpose, function and process of the Board of Zoning Appeals. He asked the members of the public who planned to speak at this meeting to please stand and raise their right hand, swearing or affirming to tell the truth.

Mr. Gibbons explained the Bylaws of the Board and stated the applicant would be allowed up to ten minutes to state their case, the other speakers would be allowed three minutes to testify, and the applicant would be allowed three additional minutes for rebuttal.

**Members Present:** Robert Gibbons, Robert Grimes, Ernest Ackermann, Ray Davis, Larry Ingalls, and Heather Stefl

**Members Absent:** Steven Apicella, Danny Kim, and Dean Larson

**Staff Present:** Susan Blackburn, Zoning Administrator  
Melody Musante, Zoning Manager  
Andrekia Magwood, Recording Secretary

**DECLARATIONS AND DISQUALIFICATIONS**

Mr. Gibbons asked if there were any declarations of disqualification. There were none. Mr. Gibbons proceeded to briefly inform everyone on the purpose of the meeting and the Board of Zoning Appeal's role. He asked before the first case was heard if any Board member wished to make any declarations or statement concerning any cases that were being held and if anybody had any disclosures. With no disclosures, Mr. Gibbons asked Mrs. Musante to read the first case.

**PUBLIC HEARINGS**

1. **A12-02/1200153 - FIVE CEDARS LLC C/O MARK G. JENKINS, ATTORNEY** – Per Stafford County Code, Section 28-349, "Appeals to board generally", the applicant is appealing a failed zoning review for building permit application number 1200993. The review failed due to a plat restriction on Assessor's Parcel 49D-C-117, Crows Nest Harbour Subdivision.

Mrs. Musante presented the first case stating the applicant was appealing a failed zoning review of building permit application number 1200993. The review failed due to a subdivision plat restriction requiring the parcel to be connected to public water and sewer infrastructure. She gave a brief description of the zoning history for Crow's Nest Harbour, indicating staff provided the applicant and the applicant's agent with possible solutions to resolve the plat notation issue, after which a building permit application successfully passed a zoning review, but at the time, the applicant had not pursued either of the options and chose to file an appeal with the Board of Zoning Appeals. Mr. Gibbons opened the public hearing and asked the applicant to come forward.

Mr. Mark Jenkins, the attorney and agent for the applicant Five Cedars LLC, stated he would begin by submitting a letter with today's date and several attachments. He stated one thing that was missing from the staff report, was the copy of what he described as a court order. He explained that it was a contract entered into by the Board of Supervisors concerning the Crow's Nest Harbour subdivision

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improvements. He stated it was part of the original building permit application that was attached to a memorandum that he submitted, but the court order was not included in the staff report. Mrs. Stefl stated that from her understanding the board could not accept any new evidence from attorneys at the public hearing, unless it was presented in the member's packets. Mr. Jenkins stated the By-laws specifically provide that one may submit evidence at a public hearing. Mrs. Stefl stated the BZA members had a previous discussion about the issue. Mr. Gibbons stated he would not consider the letter evidence because it was a public record that was already on file. Mrs. Stefl stated the Board previously dealt with a similar situation with prior attorneys. Mr. Jenkins stated he received the staff report last Monday, which was less than 10 days, and the Bylaws stated he could perhaps submit something within 10 days. Mr. Gibbons asked Mrs. Musante to read the By-laws.

Mrs. Musante stated that any decision of the Board shall be based only on evidence received at the hearing or material in the staff report that is distributed by the Department of Planning and Zoning to all the members of the Board before the meeting, interested parties may submit relevant material to the Department of Planning and Zoning 10 days prior to the meeting to be included in the staff report, interested parties and/or staff may submit relevant material during the hearing, any Board member who has visited a site that is subject of an application may consider any of the sites characteristics in rendering his/her vote. Dr. Ackerman stated the members were previously concerned about getting information in the mail the day before/of the meeting, when the packages were sent over the weekend.

Mr. Jenkins proceeded with his discussion and stated this was a building permit application for a lot that already had frontage on State Road 609, in the State Road System. A permit was issued for well and septic by the Virginia Department of Health, but the problem they have with the staff report and the conditions that were suggested by the Zoning Administrator, was that they were inconsistent with the history of Crow's Nest Harbour. The history of Crow's Nest Harbour made the action of the court order going to the Board of Supervisors unnecessary and unavailable because the Board of Supervisors had already addressed the issue, similarly there was no requirement in the court order stating that every lot in Crow's Nest Harbour must first wait for all the infrastructure to be constructed before it could be used. The property was down zoned in 1978, it was originally zoned in the early 70s, the developer failed and there was extensive litigation between the County and the absurdity for the subdivision bonds in the matter. In the meantime, the Board of Supervisors down zoned the property to A-2. Eventually, the Board entered into a settlement agreement of extended litigation and received a sum of money in excess of \$1,000,000, which was specifically by the terms of the agreement, to be applied to Crow's Nest Harbour subdivision improvements, and it was part of the submission. At that time, the Board of Supervisors entered into a contract that was endorsed by the local Circuit Court, and in the agreement the County agreed that the funds, upon several different options, would be used for lots that did have public water and sewer and therefore would need well and septic. At some point, the funds had to be spent on the subdivision because it was non-discretionary. Given how the Court's interpret such contracts, you cannot impose what amounts to a silent condition, which is what the Zoning Administrator was doing by having the Board of Supervisors exercise this discretion, on whether or not they should eliminate the plat notes. He stated when reading the plat notes with the court order and other background information of Crow's Nest Harbour, the inevitable conclusion that the plat notes simply no longer apply, it was solely an administrative matter. There was County and its Administrators duty to make appropriate notations, and not every change to a subdivision plat required vacation, which was recognized by the Ordinance. He stated if you allow the Zoning Administrator's condition, this would mean there is a silent right of the Board to simply revoke the contract. This was a serious aspect, and the applicant previously spoke with staff about their recommendation to go with the vacation procedure, but as they analyzed the information the applicant did not think it was justified. This was a ministerial or administrative matter, either through the Ordinance or through the inherent obligation of the County to administer its own Subdivision Ordinance consistent with the law, that at

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the time the contract was signed the zoning had already been changed. He stated this could be accomplished by putting a note on the building permit application and record it or if the other administrative procedure was thought to be advisable for clarification or convenience reasons, that could be a possibility as well. In their view, there was no authority to say that the Board of Supervisors could exercise discretion of whether to do it or not. There was nothing in the court order that indicated a lot that already had road frontage, as this one did, and that received an actual permit for well and septic, as this lot had, must wait for other subdivisions or improvements for other lots. He stated that it was true that there are other lots in the subdivision that currently do not have roads, but this one does. He stated he was aware there was no legal principle and none had been cited, that stated your entitlement to use and enjoy your property under an existing subdivision plat, necessarily had to wait for the County to decide to spend other money at a later date. There was neither authority nor language in the court order that would so indicate. He stated there was a lot of detail in the application and a lot of the information mentioned in the letter provided was missing from the staff report. It was impossible to take the position that you could impose the conditions without addressing the issues that form the background of the Crow's Nest Harbour subdivision and critically the nature of an actual contract recorded in Land Records, therefore becoming part of the subdivision approval. The agent requested the Board members reverse the determination of the Zoning Administrator and find that the two conditions stated in the staff report were improper and were not required, and any revision that would be advisable concerning the plat notes in order to ratify that the lot may be developed with well and septic and its existing road frontage, would be accomplished administratively, either by an appropriate note on the approval or by other appropriate administrative means and respectfully requested that occur within 15 days of the date of the Board's decision.

Mr. Gibbons stated the Director of Planning and Zoning was the individual Mr. Jenkins was referring to, not the Zoning Administrator. Mr. Jenkins addressed Mr. Gibbons statement by stating that the way the Ordinance reads for building permits, was that it was the affirmative and clear duty of the Zoning Administrator to issue a building permit, and a specific obligation to seek certifications from other administrators for issues within their bailiwick, but it was clearly a duty of the Zoning Administrator to make that decision. He noted there were no certifications in the record and both, the Zoning Administrator and Mr. Harvey, had characterized this as a zoning failure. He explained the review was failed by the Zoning Administrator. From their own interpretation this was precisely a zoning matter, which is consistent with the decisions of the Virginia Supreme Court.

Mr. Ingalls asked Mr. Jenkins if he was asking the members of the Board to take the contract that was approved on in 1978, and bring forth today. Mr. Jenkins stated the actually court order was dated 1995. Mr. Ingalls stated he felt in listening to Mr. Jenkins statement, staff could have informed him that they were going to eliminate the note. Mr. Jenkins stated that subdivision generally was an administrative process, and once taken into account the court order as described, the answer would be yes. That would make it consistent with current zoning, the down zoning that occurred long ago was still in effect, so that would make it consistent with an agreement already entered into by the Board of Supervisors, because there was prior action by the Board of Supervisors. Mr. Ingalls stated the subdivision plat was prior to the Taylum case and everyone anticipated water and sewer being provided. Mr. Jenkins stated correct, until the Board of Supervisors down-zoned the property to prohibit it. Mr. Ingalls stated possibly there were other parts of the property that were not subdivided, that were vacant. Mr. Jenkins stated there were four sections, A, B, C, and D that were platted and recorded. Mr. Jenkins stated the Virginia Supreme Court stated that the entire subdivision was down-zoned. He was questioned who had authority, and if staff disagreed then the situation should be resolved. Mr. Jenkins stated he would like to resolve the issue, but he did not think it was for the right reasons Mr. Jenkins previously stated. Dr. Ackerman asked had staff confirmed that down zoning took

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place for this particular property. Mr. Jenkins stated that the staff report noted the property was now zoned A-2.

Mr. Gibbons opened the public hearing and asked Mr. Harvey to come forward.

Mr. Gibbons asked Mr. Harvey if he made two recommendations to vacate the note and contact the engineer. He stated it was to his knowledge that Mr. Harvey indicated the applicant could go to the Planning Commission and ask that the Urban Service District be expanded. Mr. Harvey stated this was one step in the process, if the Urban Service Area was expanded to where water and sewer utilities in the master plan, would be ran to that area, it still would require detailed engineering and construction of those water and sewer utilities that are contemplated in the plat notation and also stipulated in the court order. Dr. Ackerman asked if the County had plans to provide public water and sewer. Mr. Harvey stated the County did not have specific plans to provide public water and sewer at this time, but there was wording in the settlement with regard to securities that the County had so that water and sewer would either be built buy the developer or land owners within a certain timeframe, and if that deadline was not met then the County would step in and build those facilities for the on-site improvements. Dr. Ackerman asked what the timeframe was. Mr. Harvey stated he believed it was 2015. Mr. Ingalls asked if the property outside the service area now would hinder providing water and sewer. Mr. Harvey stated yes the property was outside the designated Urban Service Area and the Urban Service Area defined in the County's master plan where they would provide public water and sewer. Mr. Ingalls stated the current master plan did not see the area as having public water and sewer brought to it today. Mr. Harvey stated that was correct. Mr. Ingalls asked Mr. Harvey when he saw the note on the plat, did he seek advice. Mr. Harvey stated he consulted with the Zoning Administrator, as well as representatives from the County Attorney's office on that plat notation and also the review process for the permit. In the review process for the permit, the software was set up with certain review types, one for the Zoning Administrator and building reviews, but there was not a subdivision review, so staff had no software vehicle to convey the message that the review did not pass that specific issue. Therefore, he instructed the Zoning Administrator to do that as part of the zoning review for the permit.

Dr. Ackerman stated he would be interested in knowing Mr. Harvey's opinion on Mr. Jenkins's statement to add required public water and sewer at this point was adding a hidden condition to the contract, and asked how he felt about it. Mr. Harvey stated he could not speak specifically on the settlement agreement, but in his discussion with the County Attorney's office they felt the settlement agreement had certain stipulations in it that there would be public water and sewer utilities for that particular subdivision. Dr. Ackerman asked if all the plats in that subdivision require that stipulation. Mr. Harvey stated yes for those four sections, and to his knowledge no exceptions had been made. Mr. Davis stated he did not see where it stated that the stipulation on the plat had been removed or told that it was removed by the court, but they were told that it was later changed by the Board of Supervisors. Mr. Harvey stated that was part of the nature of their comments that were in the staff report. The avenue for removing those restrictions was to go through the plat vacation process. The local Ordinance and State Code speak about vacating subdivision plats and in most cases, you see it in the context of removing lot lines, but they have done other vacations where they removed certain restrictions on the plat as a partial vacation. The Board of Supervisors did that in a plat in one neighborhood where there was a restriction that the land would be used for a park, but there was no Homeowners Association. The land was never dedicated to anybody, and they went through the process to remove that restriction, so that was the vehicle in which staff viewed that would be eligible for removing a potential restriction. Mr. Davis asked what type of road was in that area that served this lot and if was it under State maintenance. Mr. Harvey stated that this particular lot had frontage on Raven Road and that section of Raven Road was a public state maintained road. Mr. Davis asked if

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there were any lots developed in the subdivision that currently have well and septic. Mr. Harvey stated not to his knowledge.

Mr. Jenkins stated it was true there was no language stating they specifically changed the notes but the history and the meaning of the court order were affected by the reasons he mentioned earlier, and he disagreed with the County Attorney's report which stated, the court order only allowed public water and sewer, because it was wrong. With various alternative scenarios, one of which was in paragraph 17 stated the funds could be used for road improvements, not in reference to public water and sewer, precisely because at the time it was zoned to prohibit public water and sewer. He stated this was why the applicant could agree with Mr. Harvey that vacation was the mechanism, because the court cases state it was discretionary, and they believe it was utterly inconsistent with accepting money, pursuing it for years in litigation, signing a contract on how it would be used, stating clearly that it could only be used for those purposes, and then to change their mind and decide not to do it after 16 years during the phase of the building permit application. That was the reasoning for it being an administrative matter.

Mr. Gibbons closed the public hearing and referred back to the Board members. He stated this was a very complex application, and suggested they go back to the Administrator and the Board of Supervisors and ask that they be provided proper legal assistance to review it and make sure everything was accurate, recommended that be accomplished tomorrow at the discretion of the Board, and suggested taking an additional 60 days. Mrs. Musante stated that the BZA members had to make a decision by July. Mr. Davis stated if the applicant had to re-file, then the time should start at the date of refiling. Mr. Harvey stated the County Attorney advised staff, as the plain reading of the Code and Mrs. Musante's interpretation, the 90 days begin from the date that the application was filed with the Planning and Zoning department, and the code did not allow for extension voluntarily or otherwise, so it was a fixed 90 day period. Mrs. Musante stated the resubmittal date was April 26, 2012.

Mr. Gibbons asked for the wish of the Board. Mr. Ingalls made a motion to uphold the Zoning Administrators decision. Mr. Davis seconded the motion. Mr. Ingalls stated this was a very complicated case and Mr. Harvey previously stated there was a mechanism and he told the applicant what the mechanism was, along with his opinion. Mr. Harvey made a decision for removal or clarification of the note in order to issue a building permit and in his opinion he made the correct decision and did his duty. Mr. Davis agreed with Mr. Ingalls statement. Mr. Gibbons called for the vote. The motion passed 6 to 0.

**UNFINISHED BUSINESS**

**1. Draft Variance Application**

Mrs. Musante stated had taken all suggestions back, made changes and took out the necessary items. Mr. Ingalls stated there was nothing wrong with the way the application was, but he was still unsatisfied with a couple of the questions on the application. He stated he was dissatisfied with questions 4B and 4C because they did not mean anything. The questions would not gain information that could be useful, but he did not have a problem leaving them in the application. Mr. Davis and Dr. Ackerman agreed to keep the questions in the application. Mr. Ingalls stated it was a very good application, and made a motion to approve the new variance application as presented tonight. Mr. Davis seconded the motion. Mr. Gibbons gave thanks to staff for an outstanding work. The motion passed 6 to 0.

**ADOPTION OF MINUTES**

**2. February 28, 2012**

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Mr. Gibbons approved the minutes, but suggested staff begins stating the members that arrive late were present. The motion passed 6 to 0.

ZONING ADMINISTRATOR REPORT

Mrs. Blackburn stated the phone calls concerning additions, houses, and developing property had increased and many people were asking good questions. Building permits increased, particularly with residential. Staff would be working on expanding some of the sign regulations into various districts that allow for uses, but did not allow signs for those uses. In several districts, they allow certain uses under conditional use or special use, and when you go to look for signage for those uses in that district it was not been included, so they are going to make sure those uses have signage that are usable. Mr. Ingalls stated for some of the special use permits, the language in the Ordinance allows them a 2x2 sign. Mrs. Blackburn stated staff would be working on that and it could end up staying that way in some instances. Mrs. Blackburn concluded her report. Mr. Gibbons stated one of the largest undertakings was Embrey Mill, which consisted of about 1,400 homes.

ADJOURNMENT

Mr. Gibbons suggested the members of the Board discuss a date for the next meeting. He suggested skipping July because they had no applications to consider, so the Board would convene in August. Mr. Davis so moved the motion. Dr. Ackerman seconded the motion. The motion passed 6 to 0.

With no further business to discuss, the meeting was adjourned at 8:02 p.m.

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Robert C. Gibbons, Chairman  
Board of Zoning Appeals