

STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES
June 22, 2010

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, June 22, 2010, was called to order with the determination of a quorum at 7:00 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 stated the Bylaws of this Board state 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 minutes for rebuttal.

Members Present: Robert Gibbons, Ray Davis, Marty Hudson, Larry Ingalls, Karl D. Larson, Paul Ortiz and Steven Apicella

Members Absent: Ernest Ackermann

Staff Present: Rachel Hudson, Zoning Administrator
Melody Musante, Senior Zoning Technician
Aisha Hamock, Recording Secretary
Andrew McRoberts, Legal Staff to the BZA

DECLARATIONS OF DISQUALIFICATIONS

Mr. Gibbons: Is there any declarations or disqualifications? Mr. Ingalls?

Mr. Ingalls: Basically, what I am going to do is the same statement I gave before. In case A10-1/1000030 and case A10-2/1000064, Chesapeake Stafford Associates, over the years from time to time, the firm that I work for, Sullivan, Donahoe and Ingalls, has shared the same clients with Mr. Clark Leming and his firm. Sullivan, Donahoe and Ingalls has not worked on this project with Mr. Leming and I do not personally represent Mr. Leming's firm or the applicant Chesapeake-Stafford & Associates, LLC., and I have not had any contact with Mr. Leming or his firm concerning any matters before this Board, except an email containing additional information that I believe was sent to all members of the Board. In addition, a copy of the plat showing the sixty foot wide ingress egress easement for Venture Drive was included with the information submitted by the applicant. This plat was prepared in 1993 by the firm that I work for, for a client different than the applicant, who had not taken title of the subject property until 1997. Therefore, I am able to participate fairly, objectively and in the public interest of the cases before the board. Also Mr. Chairman, in case A10-3/1000106, the Myra Neville case and case A10-4/1000116, Christy Farms sign, Mr. Leming is also representing the applicants in those cases and again Sullivan, Donahoe and Ingalls has not worked with Mr. Leming on either one of these cases, I have not had any contact with Mr. Leming or his firm concerning the cases with the exception of email information that I believe was sent to all members of the Board. In the Neville case, the house location plat submitted with the case was prepared for the firm I work for, Sullivan, Donahoe and Ingalls, and the plat was prepared in 2001, I don't know who we did it for or who was the client at that time. I also visited the site on June 21st and spoke with Mr. Darley on the site. Again, I am able to participate fairly, objectively and in the public interest of the cases before the board.

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Mr. Gibbons: Any other members?

Mrs. Stefl: Mr. Chairman, I do want to state that on case number V10-2/1000130, Mr. and Mrs. Darley, I am involved in a community concern group/ organization with them but I do not feel that my participation with them nor have I discussed this case or their property at any time while in that organization and I do not feel that it will affect my judgment or any type of concerns that may exist. Thank you Mr. Chairman.

Mr. Gibbons: Anybody else? I visited the case of Mr. Darley and met with Mr. Darley on Saturday along with the former Chairman of the Board of Supervisors, Ms. Musselman. I just wanted to disclose that I did visit the site and did a site visit.

PUBLIC HEARINGS

3. **A10-1/1000030 - H. CLARK LEMING** - Appeal of the Zoning Administrator's vesting determination dated January 14, 2010, regarding vesting of land use under the M-1, Light Industrial zoning district, Chesapeake-Stafford & Associates, LLC, Assessor's Parcel 38-83H, on Venture Drive in the Wyche Industrial Park. This parcel was zoned to B-3, Office, on March 18, 2008.
4. **A10-2/1000064 - H. CLARK LEMING** - Appeal of the Zoning Administrator's electronic mail dated March 18, 2010, regarding reconsideration of the January 14, 2010, vesting determination for Chesapeake-Stafford & Associates, LLC, Assessor's Parcel 38-83H, on Venture Drive in the Wyche Industrial Park.

Mr. Gibbons: With that in mind, we do have two deferment type actions, one as I understand, Rachel, the County Administrator called you.

Ms. Hudson: Yes.

Mr. Gibbons: Okay, do you want to tell us the action of the Board on that case?

Ms. Hudson: Mr. Chairman, members of the BZA, the County Administrator did call me late this afternoon and advised me that there could possibly be a deferment on the Chesapeake Stafford Appeal. The two appeals. That is all I know.

Mr. Gibbons: The information that I got out of the County Attorney's office, that he advised them and the Chairman and the County Administrator are keeping the case there for further review and possible action. Does the applicant have any problem with the Board doing that?

Mr. Leming: I was also contacted this afternoon and asked if I had any objection to the Board of Supervisors holding onto the matter and we don't, that is fine. If the Board needs some additional time to look at the facts of this particular case that had been referred to the Board by the BZA two months ago. We are fine with that but that did materialize this afternoon.

Mr. Gibbons: So I would like to because I don't want the young lady bringing all the equipment out when it is not necessary, so on case number A10-1/1000030 and case A10-2/1000064, I would like a motion from the Board to defer it until the Board of Supervisors notifies us of their action.

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MOTION:

Mr. Ingalls: So moved.

Mr. Leming: I think we would like a specific point in time rather than it being open ended. I don't mind it being two or three months but I would not want to have this group unable to act on the appeal.

Mr. Gibbons: Why don't we put a ninety day limit?

Mr. Leming: That will work.

Mr. Gibbons: Then we will go back to the Board and ask as they get closer.

Mr. Leming: That's fine.

Mr. Ingalls: What meeting would that be? July, August, September meeting?

Mr. Leming: September meeting.

Mr. Gibbons: Yes, September. I need a second?

Mr. Apicella: Second.

Mr. Gibbons: All in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

Mrs. Musante: I'm sorry Mr. Gibbons, who was the second?

Mr. Gibbons: Mr. Apicella seconded.

VOTE:

The motion to postpone this case until the September meeting passed 7-0.

Mr. Apicella - Yes

Mr. Davis - Yes

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Mr. Gibbons – Yes
Mr. Hudson – Yes
Mr. Ingalls - Yes
Dr. Larson - Yes
Mr. Ortiz – Yes

Ms. Hudson: Who seconded the motion?

Mr. Gibbons: Mr. Apicella did?

Mr. Ingalls: Who is a member tonight?

Mr. McRoberts: Was Mr. Apicella acting in that case as a member of the BZA?

Mr. Gibbons: He was a member and each one. I will go through each case of who is sitting in because I was absent so I should not be ruling on the case.

Mr. Apicella: Mr. Chairman, at the start of the meeting you stated that I was acting on behalf of Mr. Ackermann.

Mr. Gibbons: Yes, I did and Heather will sit on the two cases that she did last month in my absence. Okay, so the first one we have a request for deferment of the first case Ms. Neville.

Mrs. Stefl: I sat in.

Mrs. Musante: Mrs. Stefl sat in on 1000030 and 1000064, which are the cases we are deferring now. Mr. Apicella voted on the case 1000106 from last month so he cannot second the motion.

Mr. Apicella: Can you help me understand why?

Mr. Gibbons: He is the alternate member sitting in for Mr. Ackermann tonight. He is the sitting member and that is what the two alternates are, they rotate. Now, there were two absentees last month and so both Mrs. Stefl and Mr. Apicella were on the Board to make up the quorum last month and I was not here. So when a case comes up, or the two that Mrs. Stefl sat in on last month, I will abstain from participating in the discussion and Mrs. Stefl will take over.

Mrs. Musante: Okay, then that clarifies it.

Mr. Gibbons: But we have not gotten to that point.

- 1. A10-3/1000106 - MYRA M. NEVILLE** - Appeal of a Notice of Violation dated March 4, 2010, received March 26, 2010, of Section 28-35, Table 3.1 "District Uses & Standards" regarding the use of a recreational vehicle for the purpose of a temporary dwelling on Assessor's Parcel 42-14-23. The property is zoned A-1, Agricultural, located at 6 Ridgeview Circle, River Ridge Estates Subdivision.

Mr. Gibbons: Now, you requested a delay of the first case before we get into that.

Mr. Leming: Let me advise the Board that Ms. Neville met me in my office yesterday and requested

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that I represent her. I did send a letter to Mr. Gibbons asking that it be deferred for the simple reason that there is not enough time for me to be ready for a case before the BZA. I realize that this case has been postponed one time previously at the applicant's request. We will go forward tonight if we have to but I think that justice would be better served if you give her lawyer a chance to become acquainted with the facts of the case and go out and see the property and be ready at the next meeting.

Mr. Gibbons: I did send that to all the members Mr. Leming and there was some concern about going to September. Would a day shorter than that be acceptable to you?

Mr. Leming: What is the date of the July meeting?

Mr. Gibbons: There are no scheduled cases.

Mr. Leming: The fourth Tuesday in July, do we know what date that is? About the last nine days in July, I am not here.

Mr. Gibbons: What about August?

Mr. McRoberts: Tuesday, the 27th of July and August would be the 24th of August.

Mr. Leming: Okay, I will be here in August, I will not be here on that date in July.

Mr. Gibbons: Any objections to postponing it until the 24th of August?

Mrs. Steffl: Mr. Chairman, I do have at least a point of clarification I would like to at least state here. We did make it clear to the applicant last month that legal could be sought and she was going to seek legal counsel. I am a little bit weary on why she waited until the day before this hearing to finally seek. I too also visited the site to properly prepare myself for this case and there is some disregard for some issues there, so I am very hesitant to vote on that but I will vote for Mr. Leming's sake on that case but I do want to state my objection for the record.

Mr. Gibbons: So we need a motion please.

MOTION:

Mr. Apicella: I move that we postpone this item until the August meeting.

Mr. Gibbons: Okay I have a motion, do I have a second?

Mr. Ortiz: Second.

Mr. Gibbons: Second by Mr. Ortiz.

Mr. Ingalls: I guess I am confused again. Who makes up the quorum for this case? And the last one, you can't have eight people voting.

Mr. Gibbons: I understood Mr. Ingalls so I will say it again, on this case here, I was not here last month and Heather and Steven were here so I will not vote on this case.

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Mr. Ingalls: Are you going to step aside as the Chair and not be a member of this Board?

Mr. Gibbons: For just this one action. I will not vote on this action, I will record the vote but the action will be by the seven members that heard that case.

Mrs. Stefl: So do we need to yield that Vice-Chair maybe?

Mr. Gibbons: Would you take over for this thing?

Mrs. Stefl: No, no, I am not Vice-Chair.

Mr. Gibbons: I meant Dr. Larson. Will you take over and do the vote on this?

Dr. Larson: Certainly.

Mr. Hudson: Just a point of order Mr. Chairman, I am a little confused. I was obviously absent also, I don't see it anywhere in the bylaws or anywhere that says I have to step aside. If I feel that I am familiar with the case, I don't know how that came about that you feel you have to step aside. I don't see any policy, I don't see any declaration, I don't see anything in the bylaws that would require that.

Mr. Gibbons: Okay, we will go with the seven members that I have right now. Mrs. Stefl will not participate in this although you were here so the seven members voting is Mr. Apicella, Ray, Mr. Ortiz, Mr. Ingalls, myself, Marty and Dr. Larson. We need a motion on the floor to delay this to the 24th of August.

Mr. Apicella: That motion was already made.

Mr. Gibbons: Okay, I need a second?

Mr. Ortiz: Second.

Mr. Gibbons: Seconded by Mr. Ortiz. All in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

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VOTE:

The motion to postpone this case until the August meeting passed 7-0.

Mr. Apicella - Yes
Mr. Davis - Yes
Mr. Gibbons – Yes
Mr. Hudson – Yes
Mr. Ingalls - Yes
Dr. Larson - Yes
Mr. Ortiz – Yes

Mr. Leming: Thank you.

Mr. Gibbons: So the administrative issues have been taken care of. Are there any changes to the advertised agenda? We have already gone through that.

Mrs. Musante: Right.

Mr. Gibbons: I will ask the Secretary to read the first case please

- 2. V10-2/1000130 - L. PERRY AND LISA M. DARLEY** - Requests a Variance from Stafford County Code, Section 28-35, Table 3.1, "District Uses & Standards", front yard requirement, to allow the construction of a building on Assessor's Parcel 43-6. The property is zoned A-1, Agricultural, located at 71 Coakley Lane.

Mrs. Musante: Case V10-2/1000130 - L. Perry and Lisa M. Darley, requests a Variance from Stafford County Code, Section 28-35, Table 3.1, "District Uses & Standards", front yard requirement, to allow the construction of a building on Assessor's Parcel 43-6. The property is zoned A-1, Agricultural, located at 71 Coakley Lane. You have the application, the application affidavit, plat of the property, construction plans, photo's of the property, recorded plat showing location of the current easement, preliminary plan showing proposed ingress egress easement, tax map and vicinity map. Applicant is requesting a thirty-four (34) foot Variance of the front yard setback to construct an eighteen (18) by twenty-one (21) building for the purpose of storing hay. This property is zoned A-1, Agricultural, which requires a front yard setback of fifty (50) feet. Owners of the property currently operate an Alpaca farm and Coakley Lane dead ends at the gated access road to the Vulcan property. State maintenance of Coakley Lane ends approximately sixty (60) feet from the building location. The applicant has indicated due to the topography of the lot, easements, well and septic fields, there are no other suitable alternative building sites. Photographs submitted by applicant to support this statement are enclosed. Single-family dwelling constructed in 1996. Detached garage permit issued in 1999. Deck permit issued in 2006. Shed permit issued in 2010. Permit for new building placed on hold pending BZA action. Private access easement approve February 2005 to serve three (3) lots. The original easement was shown fifty (50) feet from the side property line. Due to the location of the drain field, the ingress egress easement had to be relocated which limits the use of the property on the other side of the easement.

Mr. Gibbons: Any question of staff? So will the applicant please come forward and you have to state your name and your address sir.

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L. Perry Darley: My name is L. Perry Darley and I live at 71 Coakley Lane, Fredericksburg, VA, Stafford County.

Mr. Gibbons: And you want to present your case why?

Mr. Darley: We are asking for a Variance from the setback requirements because the position of where we are proposing to put the shed seems to be the most viable location to place it. The topography of our property is very hilly, there are quite a lot of ravines and we can't put the shed further back beyond the fifty (50) foot line. We are also constrained by a septic field, which is the flattest part of our property across the easement to the other two lots which are below us. The setback requirements for power line, the easement road plus the front setback requirements prevent me from putting it on the left hand side of the property and if we go to the right hand side of the property from where my house is we have extreme gullies and ravines back there.

Mr. Gibbons: Is there any questions of the applicant? Mr. Ingalls?

Mr. Ingalls: You already have a permit for another shed, is that correct?

Mr. Darley: Yes sir we do.

Mr. Ingalls: What size is that?

Mr. Darley: That is an eighteen (18) by twenty (20).

Mr. Ingalls: And you are building that generally in front of your existing home?

Mr. Darley: Yes sir, it is on the side of the house, which if you were to look at the house from where the front door is but it's on the side based on where the property line is.

Mr. Ingalls: I guess from my visit and in speaking with you and looking at the property, it certainly appears to me that there are other possible locations.

Mr. Darley: Yes sir.

Mr. Ingalls: Of course, the private access easement that kind of runs and curves through your lot, the setback as I understand it for that is twenty-five (25) feet or fifty (50) feet from the center of that easement and not fifty (50) feet. You don't have as much setback on the side going along that existing private access, which is a paved driveway actually.

Mr. Darley: Yes sir.

Mr. Ingalls: So it looks to me like there is certainly room on the left hand side in that one little piece where your drainfield only went back maybe 100 or 120 feet, you pointed out some type of solar cell, you said there was some limits, behind that you had a fenced in area for Alpaca that was there and it seem like you could put the garage right there where that little fence was if you wanted to, where that one little Alpaca was and all that or back even further and still be outside of the power line outside of the limits of the setback for that private access road. Your fence on the right going down that road, there was another gate down there that looked like you could go in that gate and put it back there in the

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corner back there. I don't know how far in the corner your property goes but that was open field back there. You are trying to put it in the worst spot in terms of topography. If you look at the topography of your lot, that gully on that side of your house is probably the steepest. The one that kind of cuts right down through the middle isn't quite as bad. I just feel like, in my looking at it, that you have maybe not examined all the other spots that maybe you should look at a couple other spots for it. That is certainly possible. I forget the size eighteen (18) by twenty (20) or whatever the size that you are purposing is not very big.

Mr. Darley: No sir.

Mr. Ingalls: To find a spot for an eighteen (18) by twenty (20) shed that would meet the setback. We already have a house that is in violation, we already have a garage that is well into the front setback and to continue that idea would seem to me that maybe you ought to about maybe looking for an additional location for this thing. Rather than keep trying to push this thing to the front where it would get in that front setback.

Mr. Darley: I did look at the piece where you are talking about, which is on my drainfield and based on my conversation with the zoning board and my understanding of the setback requirements were from the easement line, it did not quite meet that sir.

Mr. Ingalls: Where the Alpaca fenced in area was outside of your drainfield.

Mr. Darley: The drainfield is the front piece of it, which is actually one of the flatter pieces of the property and it slopes off as well.

Mr. Ingalls: Where that little fenced in area was, was relatively flat and that was behind your drainfield.

Mr. Darley: It is behind the drainfield but it does slope.

Mr. Ingalls: Yes, there is some slope, certainly. It has some slope but not severe enough that could not build on there, I don't think.

Mr. Darley: The slope of that piece of property is something like this, so to me it is more severe than the flat piece that you are purposing to put it sir.

Mr. Ingalls: Okay.

Mr. Gibbons: Any questions down here?

Mr. Apicella: Can you please help us understand now about hay storage?

Mr. Darley: I provided some additional photographs and we are using one of those portable carports and they aren't the most sturdiest of things. Right now it is sitting right behind our garage.

Mr. Apicella: What size is it?

Mr. Darley: I would like to say maybe a twelve (12) by thirty (30).

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Mr. Apicella: So, would that not be a spot that you could put a new shed?

Mr. Darley: Well, that is actually a lot closer to the road and the Variance on the setback requirement would be greater than what I am asking for. It would actually be putting it closer to the driveway of my neighbor, which is across the street. The location where I am proposing puts it farther back so when he comes in and out of his driveway, he really does not look at my shed as much as he does the current existing structure.

Mr. Apicella: So that structure is already in violation into the setback requirements?

Mr. Darley: I am not sure if I need a setback on a tent. This is a portable shed and I am not sure if I need one or not. It matches the setback of my existing garage.

Mr. Apicella: I understand. This is sort of in line with my previous question, are you sure there aren't other, all be it more expensive options for storage that you have not fully explored or pursued?

Mr. Darley: Such as?

Mr. Apicella: I understand that you are saying that the shed would be like this but you could somehow grade the area or put cinderblocks or something to level out the storage shed.

Mr. Darley: Based on my understanding of what my setback requirements were and just the ease of getting the hay to and from plus the location of the power lines which are right there, I thought this location was the preferred location.

Mr. Apicella: I understand that it is the preferred location, I guess the question is, are there other possible locations that again might be less convenient, might be more expensive but where you could put a shed or more than one shed to meet your requirements?

Mr. Darley: I imagine there may be, yes.

Mr. Apicella: Okay, thank you.

Mr. Gibbons: Any other questions?

Mr. Ortiz: Mr. Chairman, just one question. Concerning your adjacent property being owned by Vulcan Materials, have you consulted with them in terms of what their opinion is in terms of where you would place this building and whether it would have any impact on them?

Mr. Darley: No sir, I have not. It meets the setback requirements from the side lot so I was not aware that I had to consult with them.

Mr. Ortiz: Well, you did not have to, I just wanted to know whether you did or not.

Mr. Darley: No sir, I have not.

Mr. Ortiz: Thank you.

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Dr. Larson: Mr. Darley, how big is your lot?

Mr. Darley: It is four point seven three (4.73) acres sir.

Dr. Larson: And the shed you are purposing to put up is ten (10) by sixteen (16), is that correct?

Mr. Darley: I have to look real quick.

Mr. Davis: According to the application, it is twelve (12) by eighteen (18).

Mr. Darley: It is twelve (12) by eighteen (18).

Dr. Larson: Twelve (12) by eighteen (18).

Mr. Ingalls: Is it eighteen (18) by twenty-one (21).

Mr. Darley: The eighteen (18) by twenty-one (21) is my wife's fiber studio, which is adjacent to our house already and we already have a permit for that.

Mr. Ingalls: I was reading the background. Okay.

Mrs. Stefl: It says eighteen (18) by twenty-one (21) in the enclosure one.

Dr. Larson: I guess I don't care within a few feet, I guess my point is you have a large lot and a fairly small proposed building. If we grant a Variance for you for this building, that Variance continue with the property forever.

Mr. Darley: Yes sir.

Dr. Larson: We are always very reluctant to grant Variances unless it is really an undue hardship and the hardship is due to features of the property. So I think what I have heard so far is the slope is the issue but as my colleague at the end pointed out, you level a piece of land and put your shed on the level piece of land. It would be a little bit more work but you could do that.

Mr. Darley: Yes sir.

Dr. Larson: Okay.

Mr. Darley: We did level the spot where we are proposing to put it already if that makes any difference.

Dr. Larson: Okay.

Mr. Darley: To try and maximize the setback to the road that we're proposing.

Dr. Larson: Okay, thank you Mr. Chairman.

Mr. Gibbons: Any other questions? When I was out there Saturday, the one spot that I looked at, you

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put over 100 truck loads of dirt in that one area?

Mr. Darley: Yes sir. Behind the house we had a ravine filled with 110 loads of fill dirt to bring it up to the grade that it is, which is still quite steep.

Mr. Gibbons: And the proposed area that you are putting it in is the cul-de-sac. I never did get anything from VDOT, did any of you get anything back from VDOT on what they considered where the road ends?

Mrs. Musante: The only thing we have is the email that was sent to Mr. Darley stating that “probably correctly placed though we have not yet verified it position”, that was from VDOT back in April.

Mr. Gibbons: Yes but that was sent to someone in the County asking...

Mrs. Musante: I have not seen anything.

Mr. Gibbons: I wonder who that went to. Okay, I will follow up on that, but anyways the building that he proposes goes into part of the cul-de-sac. That is a cul-de-sac now and the gate down there is the emergency exit for Vulcan in case of disaster or fire. The area in which the building is on is a private access easement and is setback. Any further questions to the applicant?

Mr. Ortiz: One final question, I know that they address this concerning the proportion of the acreage to the plot. Is there anything else that you would like to add in terms of comments, suggestions, perspective on the location of that twelve (12) by eighteen (18) facility versus any other particular location throughout the four point seven three (4.73) acres that you would like for us to hear?

Mr. Darley: I just want to clarify the size of the proposed building is an eighteen (18) by twenty-one (21), so it is smaller. I had misspoken before. I just believe that the site I proposed is the best available site.

Mr. Gibbons: And the building will be used to store hay for the animals?

Mr. Darley: Yes sir.

Mr. Gibbons: And that is all it is used for?

Mr. Darley: Yes sir.

Mr. Ortiz: Can you address the perspective on any additional hardship if it had to go to a different location?

Mr. Darley: I would probably have to have heavy equipment traverse my septic field and I am not sure what the damage would be, the paved easement is not my road, it belongs to my neighbor so any damage to the road due to heavy equipment would be mine to bear. As well as getting trucks on my road, it is pretty much a single lane gravel road. We had the fill dirt brought in, it was quite the show if you were out there watching these big dump trucks dump dirt. The inconvenience to my neighbors is something I am a little worried about as well.

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Dr. Larson: So Mr. Darley, the heavy equipment that you are talking about, does that have to do with constructing the shed or hauling the hay?

Mr. Darley: Hauling the dirt or whatever it is to modify the topography of the land in order to get these other sites built.

Dr. Larson: Okay, thank you.

Mr. Hudson: If you were to move the shed somewhere else, is there any hardship in how you get the material to the shed to feed the animals? Would you build a road, would you have to do something that would create a harder conditions for you than where it is proposed right now?

Mr. Darley: We would probably have to build an access road to where it is built, move some gates and work out an arrangement with my neighbor to use his driveway.

Mr. Hudson: Is it a tractor that you haul with?

Mr. Darley: Right now I used my neighbors flat bed trailer to move the hay.

Mr. Hudson: Thank you.

Mr. Darley: Yes sir.

Mr. Gibbons: Okay, thank you. We will get back to you in a minute.

Mrs. Musante: Mr. Gibbons, can I share something please? On the Vulcan property that is adjacent to Mr. Darley, I have done extensive research on their plat, their site plans, their deeds as well as the Darley's and adjacent property owners and from the end of State maintenance to the back entrance to Vulcan does not state on the site plan that that is an emergency access entrance, it does not label it, it is just a gate. We don't know from the end of state maintenance to the Vulcan gate what type of easement it is.

Mr. Gibbons: Okay, I was just told that everybody thought it was an emergency exit.

Mrs. Musante: It does not state that on the site plan.

Mr. Gibbons: Okay, thank you. We will open the public hearing, would anybody like to for or against the application, please come forward?

Linda Musselman: Good evening, my name is Linda Musselman and I live at 728 Truslow Road and I also have known the Darley's for probably ten years and they are a hard working couple. Regardless of that, I did visit the site on Saturday and it just looks to me and I have never been on a BZA, it looks to me that the end of state maintenance, the road that goes to the end of state maintenance is a gravel road. The garage that they got a permit, that somebody got a permit, to build is right on that road, right at the edge, I don't know how many feet back, maybe five, less then five feet back. What they are asking for is a temporary shed that could be moved, it is not a permanent structure, it has like a gravel base and past the state maintenance sign. It is a private road I would assume. The topography is bad and there probably is another place they could, with a lot of work and effort, put this shed but it just

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seems a logical thing, to put that shed there. Maybe you could specify that if the property sold the shed goes or something like that, just for convenience. They are a small business and I think we should encourage that kind of thing. If it is convenient for them, I don't know if they have people here speaking against this tonight or not but regardless of that, it looks like it would harm nothing. I know that we don't want to encourage sites that are not in conformance but an eighteen (18) by twenty (20) shed that is just past a garage that is already not in conformance would seem to do no harm. Thank you for your attention.

Mr. Gibbons: Thank you ma'am. Anybody else who wants to speak? Anybody want to speak against it? I will bring it back to the Board. Mr. Darley, any closing comments? I will close the public hearing and bring it back to the Board, what is the wishes of the Board?

MOTION:

Mr. Ingalls: Mr. Chairman, I move that we deny the request for a Variance.

Dr. Larson: I second the motion.

Mr. Gibbons: Okay, any comments?

Mr. Ingalls: Mr. Chairman, I honestly believe there are some better places that it could be put and I think Mr. Darley and his business, I agree with Mr. Darley, they have a nice family business with these Alpacas but I have never been that close to one before. I think there are some other opportunities there and if you read what we are supposed to be looking at and part of one of the statements is in the law, it says "the strict application of the terms of the ordinance would effectively prohibit or unnecessarily restrict the utilization of the property". Not every piece of property can have five (5) sheds on it. He has a house, he has a garage, he has one framed shed there in the back, he is building another shed that is permitted and this is another shed. He has reasonable use of his property, you can't just keep saying I am going to build more and more sheds. He has a house, a garage and basically two other sheds already. We are not restricting, the ordinance does not restrict him the unnecessary utilization of his property. That is kind of what I am hanging my hat on, I feel like the Variance would violate that portion of what we are supposed to be looking at. I do feel like there are some other opportunities, it may be a little more costly but I think trying to protect roads and so forth. None of us know what Coakley Lane is going to look like or whether it is or isn't going to be extended, I don't know what Vulcan is going to do, I don't think any of us know. I think we need to be careful in approving things that maybe have a possibility of not being so close to the road.

Mr. Gibbons: Any other comments.

Dr. Larson: Mr. Chairman, I seconded the motion because I did not feel there was a demonstrated hardship in this case. I think that although it would be more convenient for the applicant to put his shed where he wants to put it and that could very well be the case but lack of convenience does not equal hardship.

Mr. Ortiz: Mr. Chairman, unfortunately I agree. I do feel for the family, I believe the small businesses try very hard to succeed and any additional cost incurred to perform that business is sometimes difficult to bear. Unfortunately, I agree with the granting of a Variance and the qualifications that you need to be eligible to grant that Variance. In this case again it is the undue hardship element.

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Mr. Gibbons: I only have one request, if you really think there are other sites out there, I walked it and I did not see any, I don't mind going back out there again. I know he could not use the other road because of access easement. I would go back out there again to work with him to find it. I know when I walked it and I could not find it Larry.

Mr. Ortiz: Mr. Chairman, as my comment before concerning undue hardship, I would support your effort to extend it to see if there is any possible options.

Mr. Gibbons: Do you have any problems with that Mr. Ingalls?

Mr. Ingalls: It is not up to us to demonstrate that he has a hardship or where to put it, I think there is opportunity there. I don't think that he has demonstrated a hardship. Again, I think he has effective use. The ordinance does not say he has to have another shed, it just doesn't say you can keep on having sheds. I think he has reasonable use of his property, the ordinance does not restrict him from that and if he can find another site then he should look for it. I don't think it is up to us to go out there and try to figure out, well I think you could put it there, he has obviously put X number loads of dirt where he wants to put it.

Mr. Gibbons: You made the statement, I am only quoting you.

Mr. Ingalls: I know.

Mr. Gibbons: You are very eloquent the way you put it in the King James English version of the language but you said that he had other uses. I did not find, when I went out there with the topography and everything, any other use. He was putting it in the cul-de-sac area, in fact Larry, if you go out in a rural area, they are called the upper reaches of Hartwood and Rockhill, you will probably find out that every farmer has put up a building and never went to get a permit anyways in the beginning. He was trying to do something right.

Mr. Ingalls: Maybe his biggest problem was he asked for the permit, I guess.

Mr. Gibbons: He is just trying to do something and be a good citizen. Rather than deny it with his application fee, you don't feel that if we look at something and see how expensive it may be and bring that back as part of his justification for the hardship? I am just one member of the Board.

Mr. Davis: I have a question.

Mr. Gibbons: Yes sir.

Mr. Davis: If this property is past the end of state maintenance, is there a requirement for setback.

Mr. Gibbons: Yes. The code says whether it is private or state, it is the same requirement. I had the same question. Melody will tell you, we had a history of it when we were on the Board and Planning Commission of this same problem. I don't think it should be but it is there and the reason why, sometimes you take it into the state system and you want to make sure that it is adequate.

Mr. Ingalls: When you look at the plat, there is another issue that he ought to be looking at, is the paved access is not in the access easement, if he looks at the plat provided, which he has done and my

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company did in 2001. It clearly shows that the access back there is not within the easement. He may not want to do anything about that and that is fine with him, which also gives him more room to build out there when he walks out and figures out where is that access easement. When I was out there, we were discussing the setbacks and I wasn't sure whether it was twenty-five (25) from the edge of the easement or fifty (50) feet from the edge of the easement. I think it is twenty-five (25) and I think the county has agreed that it is twenty-five (25) because it is a corner lot situation. I think he has an extra twenty-five (25) feet that he maybe he did not think he had we he first started this process. Sounded to me like he thought he had to be fifty (50) feet from the edge of the fifty (50) foot easement. That gives him an additional twenty-five (25) feet if he has not figured out where that is.

Mr. Hudson: I certainly understand the motion but I find myself, Mr. Chairman, having a hard time supporting it. The applicant may have not articulated the hardship enough but if he keeps a tent up where it is, obviously, it would be easier than building a road and putting money into leveling the ground. I don't know that we want to encourage people to keep having a tent up instead of a permanent structure that would be safer. I think that one could come to the conclusion that if you have to feed from another place or get your hay from another place, you may have to have a vehicle or a tractor and could certainly create a different hardship, a financial one. For those reasons in my mind, I am not going to support the motion.

Mr. Gibbons: I still would like to take another look, I am not doubting your words I am just quoting you. In fact, I don't know why you didn't just put the thing up and nobody would have ever known the difference. When you get a private access easement you could have moved it and the neighbors had no problem with it. The problem we have now is out in that area with the snow storm, most of our folks who had hay for horses buildings collapsed with the weight of the snow and got damage on the canvas area too. I would like to make a motion to delay it to the August meeting to take another look at it and see if there is a better site and show it. I walked it Larry and I did not see it. I went out there and purposely did it so I would like to just delay it until August to take another look at it.

Mr. Davis: I will second that motion.

Dr. Larson: What happened to the last motion?

Mr. Gibbons: This is a substitute motion. So we will vote on the substitute. All in favor say aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

Mr. Apicella: Nay.

Mr. Ingalls: Nay.

Dr. Larson: Nay.

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VOTE:

The motion to postpone this case until the August meeting passed 4-3.

Mr. Apicella - No
Mr. Davis - Yes
Mr. Gibbons – Yes
Mr. Hudson – Yes
Mr. Ingalls - No
Dr. Larson - No
Mr. Ortiz – Yes

Mr. Gibbons: Mr. Darley, we will delay this to the August meeting and we will come back out to make another visit. Thank you for coming. Thank you for coming tonight Mrs. Musselman.

5. **A10-4/1000116 - H. CLARK LEMING** - Appeal of Deputy County Administrator's electronic mail dated April 7, 2010, regarding an existing nonconforming subdivision sign on Assessor's Parcel 27F-2-B1. The property is zoned A-1, Agricultural, located at the entrance to Christy Farms Subdivision.

Mr. Gibbons: The next item is item # 5 and I would like to ask Andrew, I called you today Andrew because I questioned this from the beginning and you had a better understanding.

Mr. McRoberts: This is the appeal of the Deputy County Administrator's email?

Mr. Gibbons: Yes.

Mr. McRoberts: Yes, I took a look at the email and I took a look at the ordinance of Stafford and I was unable to find anywhere where the Deputy County Administrator was given authority to interpret and enforce the Zoning Ordinance. This body, the BZA, has authority to consider appeals from the Zoning Administrator, which is plainly authorized to interpret and enforce the Zoning Ordinance or any other administrative officer who is interpreting and enforcing the Zoning Ordinance. In this case, I don't see anything in the law that authorizes the Deputy County Administrator to interpret and enforce, therefore, I question the jurisdiction of the Board of Zoning Appeals to consider this appeal. I simply don't see how it is appealable. Now, obviously the applicant can come forward and if he can produce an ordinance or something else that shows the Deputy County Administrator is authorized to interpret and enforce the Zoning Ordinance, I am willing to stand corrected, that is how I see it.

Mr. Gibbons: Okay, so the other fact is that we did hear this case and it was a zoning...

Mr. McRoberts: That is correct, the matter is final as far as the Board of Zoning Appeals is concerned.

Mr. Gibbons: It is final as far as the court because there was no appeal.

Mr. McRoberts: That is correct. It is a final determination and this Board of Zoning Appeals has acted. At this point if the prevailing party in that case, which is to enforce it, then an action in Circuit Court would be required.

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Mr. Ingalls: If we were to take the opinion that we don't have any, we shouldn't even hear this case or we shouldn't even open it up I assume or do you open it up and say our determination is we shouldn't hear this.

Mr. McRoberts: I think that the case, as a procedural matter, probably should not be opened because I don't think you have jurisdiction but I do believe that that is a question that you all need to decide. I have given you my opinion, obviously, the applicant may have a different opinion.

Mr. Ingalls: If you open it up, have we given our opinion is we want to hear it.

Mr. McRoberts: Well, like I said, before you announce the case and open the public hearing, etc. I think the issue of whether you have jurisdiction to even hear the case is something that ought to be decided by this body. It can't be decided by staff, it can't be decided by me. I think it need to be decided by you all and so I would not open the case, but I would present the issue of whether it ought to be opened.

Mr. Ingalls: Could we hear from the applicant?

Mr. McRoberts: I would think that would be appropriate. Absolutely.

Mr. Ortiz: So hearing from the applicant does not open the case, I just want to make sure it is clear?

Mr. Gibbons: No, we are not opening the public hearing.

Mr. McRoberts: I just think the applicant probably deserves to be heard on the legal point of whether or not this BZA has jurisdiction to hear this appeal or whether it is an appeal at all.

Mr. Gibbons: Mr. Leming, Mr. Ingalls would like to ask you a few questions.

Mr. McRoberts: I think that Mr. Leming would agree with me on this one.

Mr. Leming: On whether the BZA has the right to hear the case?

Mr. McRoberts: No, on whether you would like to be heard.

Mr. Apicella: Before he starts, all I have on this matter is what was provided to us. I have no historical context whatsoever; other than there was a Deputy County Administrator's letter informing the person of certain decisions or facts. I don't have any of the history before that letter.

Mr. Gibbons: I apologize.

Mr. Apicella: It would help me to know some of the context of why we are here and what the matter truly is.

Mr. Gibbons: I will do that in a minute.

Mr. Leming: If I might, this is the posture as I see it. In the fall, the Seven Lakes Estates or Christy Farms Homeowners Association obtained a building permit from the County and erected a sign that

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said Seven Lakes Estates at the entrance to their subdivision. The subdivision was approved as Christy Farms and Seven Lakes Homeowners Association went to the Zoning Administrator and questioned the authority of the county to issue a permit for a sign containing the name Seven Lakes Estates. The Zoning Administrator came back and indicated the county did not have the authority to regulate the content of signs issued under the Zoning Ordinance, that is what regulates signs in this county and the Board of Zoning Appeals heard the case in October and overruled her. I think on Dr. Larson's motion, ruled that the existing Zoning Ordinance there was the ability to regulate the content of the signs and that the subdivision sign had to reflect the name of the subdivision that it was in front of, all of which seemed like good common sense. There were two appeals filed, the Board of Supervisors filed an appeal and Seven Lakes Estates Homeowners Association filed an appeal to the Circuit Court. Both appeals were withdrawn, the cases were dismissed and the BZA decision was reinstated and affirmed by the court on the face of those orders. I agree that we could go to Circuit Court to enforce this, however, what we have in the interim is another writing from an administrative officer with the County and I will explain why I think you may have jurisdiction in a moment, an email saying why the county substantively, why it is that the County is not going to enforce the BZA decisions. That is what this appeal is about, the grounds under which the Deputy County Administrator indicated to the president of the Homeowners Association as to why the decision was made, not the BZA's decision affirmed by the Circuit Court was not going to be enforced by the county. You start with a very broad statute under state law and this Section 15.2-2311(a) and as often in the case I disagree with Mr. McRoberts analysis of this completely. The state statute says "an appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of this article". Now the email from Deputy County Administrator Neuhard states on its face "I am responding on behalf of Anthony to your question concerning enforcement actions", enforcement of the Zoning Ordinance because you all said what it is, "enforcement actions regarding the Christy Lake", which is incorrect, it is either Christy Farm or Seven Lakes Estates, "subdivision sign". Then he gets in to legal reasoning, "as you are aware the sign is now a non-conforming sign", which its not, to be non-conforming it had to be legal in the first place and you all said it wasn't. "Since it had a valid permit", which it wasn't "and the new regulations were not applicable to the existing sign". New regulations adopted by the Board in March have nothing to do with this one way or another. Your interpretation, your decision turned on the existing Zoning Ordinance in place at the time the permit was issued. Not any amendment to the ordinance. The sign cannot be altered because he says it non-conforming, the county has no legal authority to enforce the removal of the sign. You all said this sign was a violation, in making his motion Dr. Larson said the sign was in violation of the Zoning Ordinance. There is a provision, I have this to share with you, we have to decide where the line is with the case and the jurisdictional issue, but there is a provision of the Zoning Ordinance that says when there is a violation of this ordinance the County, through the Zoning Administrator, will enforce the Zoning Ordinance and correct the violation. So, I will provide that to you in partial response as Mr. McRoberts has suggested there being nothing that you could go on here. The Deputy County Administrator has told you legally, told him legally why the county can't do this. It is a non-conforming sign, then he goes on to say that the argument in the BZA was based on the Subdivision Ordinance, which it wasn't. The motion of Dr. Larson was very clearly based on the definition of subdivision sign in the Zoning Ordinance. The Zoning Ordinance is the basis under which the county issues permits for signs, not the Subdivision Ordinance. The BZA has no authority to rule on it, if there was an issue about that that should've been handled at the Circuit Court. The County appealed the case, they dropped the appeal, so did the other homeowners association, they drop the appeal, the BZA decision was affirmed. The appropriate venue for resolution of the dispute lies in the courts; it may ultimately lie in the court but we have an interim

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animal here that needs to be dealt with. As you are aware the board has decided not to pursue the appeal and the opportunity to do this is passed, that was the opportunity to challenge any of this, the sign remains a private dispute. Now what the county has done is to unilaterally decide that your decision was no good even though it's been affirmed by the court and is provided a legal basis as to why the county is not going to enforce it. I also point out that he is authorized hereby the County Administrator to share this information, maybe Mr. Neuhard himself did not make the determination that somebody sure did and this e-mail is how it's communicated with all the legally reasoning that goes along with it and the basis for it. That is communicated to the applicant, number one, we have an absolute duty to appeal this; if we don't appeal this in the stands the county is surely gonna come to court and say what we took this position and they could've appealed it, they did not exhaust their administrative remedies. That is one reason why we're here at the more problematic issue here is that the County has unilaterally, all by itself, decided that it's not going to enforce the decision of the BZA; the BZA found the sign in violation of the Zoning Ordinance and ignored a court order which affirmed the BZA decision and blew it off because they say that your opinion was simply advisory, it was decided under the Subdivision Ordinance rather than the Zoning Ordinance and it's a non-conforming use, which is a brand-new legal theory. That is why it is here, it's here because the County Administrator, incidentally this Deputy County Administrator is over Planning and Zoning, the Director of Planning and Zoning, Mr. Harvey, reports directly to him, Ms. Hudson, the Zoning Administrator reports to Mr. Harvey. So he is right smack in the middle of it, it is enforcing and interpreting the zoning ordinance on the face of e-mail here, he is clearly within the definition of state law "any administrative officer", this is a decision that the County has made that is being communicated to the applicant here. It is certainly done in the context of the administration at least for lack of enforcement of the Zoning Ordinance. So, clear state law, the county ordinance that says they're required to correct violations of the Zoning Ordinance and the County basically saying we're not going to do it. We are not going to enforce the BZA's decision. So, that is why I think the BZA has jurisdiction, Mr. Neuhard is clearly an administrative officer, if he's not enforcing the Zoning Ordinance or administering the Zoning Ordinance, what is he doing? Non-conforming uses are covered squarely in the Zoning Ordinance. The non-conforming uses are exactly the province of the Zoning Ordinance and he's saying that's what this says. So is enforcement, enforcement prerogative of the County comes directly out of the Zoning Ordinance. That is why I think you do have jurisdiction, that is why we came this route and we thought carefully about which way to go before we decided. As I said, it all may end up in Circuit Court, but this administrative officer has raised zoning issues and they come to you guys first before we can go to Circuit Court.

Mr. Ingalls: I guess, not getting into the facts of the case but just can we hear it, that is my question? If I'm hearing you correctly, it almost sounds like you got this e-mail and set a better appeal because if I don't somebody might use it against me. Why didn't you just say, ask Rachel for determination or register a complaint to tear down.

Mr. Leming: We did that. We sent a letter asking when it was going to happen and this was the response to that letter.

Mr. Ingalls: And when she said I'm not going to do that, then that's Zoning Administrators... Then you have something from the Zoning Department saying that I'm not doing that or the County's not going to do that based on the ordinance. Why didn't you just do it that way? It just afraid that the 30 days between the time of the e-mail and you doing all that other would expire and you would be, maybe somebody would say here look at this you didn't even answer this.

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Mr. Leming: It is a little more complicated Mr. Ingalls. Certainly the fact that there is an appeal period that runs with any kind of determination is a factor but the breath of state law, the state code that governs this is extremely right “any order, requirement, decision, or determination made by any other administrative officer”.

Mr. Ingalls: I want to stop there, “and enforce ordinance”, because I'm a little bit further.

Mr. Leming: In administration. Let me ask you this, if he is communicating something about the county's position on the BZA's appeal and communicating something about the county's interpretation of the zoning ordinance, why isn't he administering the Zoning Ordinance?

Mr. Ingalls: You, like me, probably have asked County officials lots of questions and we've got certain answers, sometimes we agree or disagree with the County. I never appealed them because, maybe I should have.

Mr. Leming: You know we did send a letter be to Ms. Hudson and to the County Administrator asking when the decision of the BZA was going to enforced and we never advanced to the letter. You know why, because obviously we would've appealed it. Mr. Scharpenberg can testify that he then went to the County Administrator to find out what was going on and this was the communication that came back. There is nothing in the law that has to be a letter to the Zoning Administrator to get an interpretation of the Zoning Ordinance; that is not what the statute says. The statute says “any other administrative officer”. It doesn't even say that they have to belong to the zoning office.

Mr. McRoberts: I would just respond to what Mr. Leming said, it almost sounds like Mr. Leming and his clients want to have the BZA enforce its own determination here. I know that's not how it's couched but that is really why he's here. The fact is the BZA has jurisdiction to hear appeals from the Zoning Administrator or other administrators who is in the administration or enforcement of this article. There is a basic statement and I think Mr. Leming cited in some of his materials, if an action is taken without an authority, in this case he was talking about the issuance of sign permits inappropriately but the same legal premise stands on this, if the Deputy County Administrator thought he was administering and enforcing the zoning ordinance, he has no authority. If you look at the section 28-291 of the zoning ordinance, it's in your packet, section 28-291 say “It is the purpose of this article to set forth the entities charged with the administration of the provisions of this chapter”, i.e. the zoning chapter. Section 28-292, the Board of Supervisors, “The Board of Supervisors shall have the following duties for the administration of this chapter: (1) To appoint such officers and bodies as required by this chapter and the Code of Virginia.(2)To authorize, upon the proper findings”, etc. etc. Section 28-292, the Planning Commission, the Planning Director in 28-294 and in 28-295 is the Zoning Administrator. I don't see the Deputy County Administrator listed anywhere in there, I don't see the County Administrator listed anywhere in there. The Zoning Administrator once appointed holds the statutory duties of the Zoning Administrator as listed in the statute and that is to administer and enforce the ordinance. Again, I have asked Mr. Leming, one of the reasons I wanted to invite him to appear was because I wanted him to be able to have the opportunity to cited an ordinance that authorized the Deputy County Administrator or the Administrator to interpret and enforce the Zoning Ordinance and he did not give me one. I hear his argument, the Deputy County administrator is plainly an administrative official and plainly he has communicated a position of policy that the administration has taken, rightfully or wrongfully. But what I'm telling you is, I don't think the proper venue for this argument is here because I don't believe that this body has jurisdiction to hear an appeal from the Deputy County Administrator.

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Mr. Hudson: I find that troubling if we don't have the right, counsel, to hear it. I don't see the other side of this coin that the Deputy County Administrator has the right to send out an interpretation as to what he thought we were doing. I could've been home that evening. He takes the opinion, if I read this e-mail on its face, he takes the opinion that I was sitting here getting an advisory opinion in that he subjects someone in his mind that I was making it based on a subdivision ordinance. If he can say that then how can this board not hear a case on a county official? If you're a representative of the County, coming to some conclusion that is absolutely 180 degrees different from what this board said.

Mr. McRoberts: I understand absolutely what you're saying. I guess what I'm saying is if what the Deputy County Administrator here has said is wrong, and I'm expressing absolutely no opinion whatsoever one way or the other, but if in fact it is wrong then the venue to challenge that is in the Circuit Court. To bring an enforcement action on an earlier decision when it was made final when it failed here by appeal.

Mr. Apicella: I have a more basic question Mr. Chairman is to try to work our way through this. What separates this particular matter, we make a ruling on a particular matter, who has a responsibility; which is a last person who came in and decided to not grant their variance or lipstick a situation where somebody had built something and put into the setback area and they wanted us to grant a variance after the fact and we said no. Who has the responsibility to enforce our decision?

Mr. McRoberts: That would be the Zoning Administrator and if in fact the Zoning Administrator refused or you receive an e-mail, dear citizen, it is the policy of the County that we're not going to enforce that determination then the proper venue is an action in Circuit Court for either declaratory judgment or writ of mandamus as something like that that would force the official to take action.

Mr. Apicella: Okay, so I'm taking it to the next logical step. We've made a decision that the sign was a non-conformance and some action was presumably supposed to be taken to put the sign in conformance or to limit the sign, is that about right?

Mr. McRoberts: Well, it is the duty of the Zoning Administrator to enforce Zoning Ordinance. This body, the BZA, has made a final determination about what the zoning ordinance means.

Mr. Apicella: Right.

Mr. McRoberts: The County has made a policy determination.

Mr. Apicella: No, no, no, let's stop with the policy.

Mr. McRoberts: Okay.

Mr. Apicella: So isn't the responsible party Zoning Administrator here to enforce the BZA's decision?

Mr. McRoberts: Only the Zoning Administrator and people acting in her direction have the authority to enforce and interpret the Zoning Ordinance, that is what the ordinance says.

Mr. Apicella: Why isn't that the action that needs to be taken tonight? To have the Zoning Administrator enforce the decision of the BZA?

Mr. McRoberts: The BZA has no jurisdiction to order the Zoning Administrator to do anything.

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Mr. Apicella: So we can spin our wheels and make decisions and we're vetoed by the Zoning Administrator?

Mr. McRoberts: Legally, the authority to enforce one of your orders comes from the Circuit Court. If you grant an appeal or deny a variance or whatever the scenario is, the enforcement authority for that, once it's final, comes from the Circuit Court. The Circuit Court has authority to enforce the law. You do not have authority to enforce the law, you have authority to hear appeals of what that means and that was done successfully by Mr. Leming and his client.

Mr. Apicella: So one more time, you make a decision, but unanimously that certain action should be taken, then the Zoning Administrator has the authority to ignore our decision?

Mr. McRoberts: That is something that would be determined ultimately by the Circuit Court. Evidently the County has determined that...

Mr. Apicella: I thought Mr. Leming said that the Circuit Court upheld the BZA's decision?

Mr. McRoberts: Well what happened is the BZA made a determination and that became final when it failed to be appealed or was appealed and withdrawn.

Mr. Leming: It was withdrawn and dismissed and the BZA decision was affirmed.

Mr. McRoberts: So the BZA's determination in favor of Mr. Leming's client is final, that is the law. Now it appears that Stafford County has an argument that says that was in fact invalid or beyond the BZA's authority because it was a different ordinance, I'm not getting into all of that. Whatever the merits of that argument are that is what the County Administration has determined to say. Rightfully or wrongfully, that is what they've said. I'm not saying that that position is right or wrong, what I'm saying is the authority to make the Administration do what the BZA said the law is, is not from this BZA. You issue an order and then your jurisdiction is complete on that matter. You do not have jurisdiction beyond that.

Mr. Ortiz: So I guess the bottom line is to carry on the final question, even if we made the same decision again, no result is going to occur?

Mr. McRoberts: I guess that's sort of a practical issue, if you heard it here tonight and said we really meant it the first time.

Mr. Ortiz: That's right.

Mr. McRoberts: You would be in the same dilemma until a court actually orders the County to do what the BZA said they needed to do.

Mr. Ingalls: He has asked the County to change the sign or do something to the sign, one of the owners did.

Mr. Leming: They asked him to take it down.

Mr. Ingalls: They basically ignored his request, they complained and the County has ignored it. What you're saying is their next action should be going to the Circuit Court, demand that the County do what

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we said.

Mr. McRoberts: Essentially, for what Mr. Leming's client is looking to do is enforce the final determination that was made and the proper place to do that is in the Circuit Court not the BZA.

Mr. Ingalls: Otherwise we would be enforcing our own...

Mr. McRoberts: Lets say you heard it and you said Zoning Administrator go out there and enforce it, we really meant it, you don't have the authority to tell her to do that.

Mr. Gibbons: Did you get correspondence addressed to you about enforcing? They said they gave you a copy.

Ms. Hudson: Yes I did get a letter from Leming and Healy requesting that in February, I believe. I did not respond to the letter, Leming and Healy could...

Mr. Gibbons: Why would you not respond to a letter like that? I have never seen you do that before.

Ms. Hudson: What he could have done...

Mr. Gibbons: No, I mean when they asked you...

Ms. Hudson: Let me answer your question.

Mr. Gibbons: Well I asked you if you got correspondence from the homeowners association?

Ms. Hudson: No, it was from the legal representative.

Mr. Leming: It was from us.

Mr. Gibbons: It was from the legal representing the homeowners association?

Ms. Hudson: Right.

Mr. Gibbons: The status of which we're gonna do and you never got back to them, you never replied to them?

Ms. Hudson: I did not. I know that you know my thoughts, there is no secret about that. What Leming and Healy or the HOA could have done was file an application for determination regarding the enforcement of the sign and I would have replied to that. I don't know if my reply would've been any different.

Dr. Larson: You mean another application, I'm sorry I'm not following you, when we make a decision then somebody has to file an application to you to enforce the decision?

Ms. Hudson: No, if someone wants a formal determination from the Zoning Administrator the Board of Supervisors put into the ordinance that an application must be filed, I must notify all adjacent property owners, I must wait 30 days before I even send notices out to the adjacent property owners, and then within 90 days issue the response. That is for vesting right, a determination or a decision.

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Mr. Leming: That was not done on the first letter that we appealed to you all.

Mr. Davis: You indicated your response would have been the same as to the letter or the application. What would that response have been?

Mr. Leming: She would take the County Administrator's position.

Mr. Davis: I asked her.

Mr. Leming: I understand that that's what happened.

Mr. Gibbons: No Clark he's asking her.

Ms. Hudson: What was your question?

Mr. Davis: You indicated that you received a letter and you had to have an application but your response would have been the same if you had responded to the letter. What would that response have been?

Ms. Hudson: My response would have been that it's a nonconforming sign. The code, the Board of Supervisors changed the code and you have it in your file, a year and a half after the sign was permitted. My feeling is that the sign was permitted by right, I understand what you, as the BZA have ruled.

Mr. Davis: Well it was the wording on the sign that was the problem, not the sign itself.

Mr. Hudson: I have a hard time understanding your feeling and thought and how you feel about it. You made the decision and he came to the Board, the Board took action and your feelings then, I don't know how your feelings become different from the policy of the Board to say that you still felt like you did before your decision was appealed and overturned. That is what's troubling here and how you get the judicial right to take the vote or policy that a branch of the established government made and just say I felt like I did before it came to me, you made the decision but I don't agree with it so be it. The County had the right to appeal our decision. Our decision was what it was.

Dr. Larson: Mr. Chairman, if I could say something here, I might be able to clarify something. What we were determining back in October was the appeal of the Zoning Administrator's letter that stated it had no authority to regulate the subdivision sign. What we determined was she had the authority to regulate the subdivision sign, we had a lot of discussion where I think everybody knows how we felt. What we were determining was that she had the authority to regulate the subdivision sign. So we overturned her letter saying she did not have the authority. We determined that she did, so it was back to her to regulate it.

Mr. Leming: If I might Mr. Chairman, Dr. Larson is the one that made the motion that indicated there was a violation so that was the motion that was made by the BZA. That is the language that is carried forward in the transcript. That specific language was used. The problem here, from our standpoint, is that we are not getting responses from the County. We have a statement from the Deputy County Administrator that if it's not a decision or determination itself, which I think it is, it is at least an implicit of a determination that was made and is being communicated, that is the only communication we have gotten in response to our correspondence from the President of the Homeowners Association.

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Now Ms. Hudson has indicated that she would've said the same thing, so the issue of whether this is a non-conforming sign seems to me it's clearly before the BZA. That is a zoning question, that is what the Deputy County Administrator stated was the basis for not enforcing it in and Ms. Hudson just said that that's what she would tell us if we asked her. That it is a non-conforming sign and it had the right to stay and we contest that.

Mr. Gibbons: I think we discovered something here that we have to get clarified right away. What was the motion? You said the transcript shows...

Mr. Leming: The motion of Dr. Larson was, this is directly from the transcript, "so the Zoning Ordinance definition talks about identifying the subdivision sign, it has already been discussed that Seven Lakes Estates is not a subdivision so there is a violation there". Then later it says "at the entrance to such subdivision that indicates that a reasonable person would have to say the sign has to be the subdivision that it's at the entrance to, which again is not true violation so that's why move the way I did". It seems to me than that on its face goes considerably beyond the general issue of whether or not the Zoning Administrator has the ability to interpret or regulate the content of signs. That goes to this particular sign and the language used in the motion that went forward to the court. It says the violation, that this particular sign is a violation and that was the motion and seconded and voted on by the Board of Zoning Appeals. My position is that, and I think it's clear where this is going, should we have to go back and file another formal application for proffer determination to have Rachel tell us what she has just told you. That this is a non-conforming sign, which it is not. That is what Mr. Neuhard communicated to us. Is it not obvious that this was a decision made within the County probably involving Ms. Hudson or least County Attorney and was then communicated to the President of the Homeowners Association saying that it was a non-conforming use and we can't make them take it down. We appealed that, that is a substantive ruling regarding the Zoning Ordinance, that is the reason they are not willing to require the sign be taken down and enforce what we understood this Board's decision to be. That is the basis for the appeal, it is a substantive decision that was made if not by Mr. Neuhard by somebody else in the county and communicated on behalf of the County Administrator incidentally. That's what Mr. Neuhard says he is doing "I am responding on behalf of Anthony", the County Administrator. How can you get more official than that? They are interpreting the Zoning Ordinance, non-conformity is controlled by the Zoning Ordinance, they say they can't make a fine come down because of the non-conforming sign and therefore it's entitled to stay. It is not a non-conforming sign, you all clarified that and with respect to Dr. Larson I think his motion said exactly what you intended to do and that was the motion and that's what you voted on. This sign was in violation.

Mr. Ingalls: Sometimes the County, the Zoning Administrator will make a decision that the County does not like and they can't overrule that decision because that is the person who has the final authority.

Mr. Leming: I don't know what that has to do with this. Ms. Hudson...

Mr. Ingalls: You think the County Administrator is administering the ordinance.

Mr. Leming: In this case.

Mr. Ingalls: I think he's rendering an opinion. If you asked them what was going on he would state this is how I feel.

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Mr. Leming: So what should we do? Should we have to apply and have her tell us what she just told you.

Mr. Ingalls: Maybe that's the correct legal way, it is a roundabout way I agree.

Mr. Leming: I think the decision was made, even if not by Mr. Neuhard. He was a conduit that communicated the substantive decision regarding the enforcement and administration of the Zoning Ordinance and that has to do with the nonconforming status of the sign. That is what they say, that is what she said it is, that is the issue that, I think, that is before the BZA. Is this or is this not a nonconforming sign? Does it have to come down? That is the substantive decision that was communicated to us.

Mr. Apicella: Mr. Chairman, based on the back and forth, what I'm still not clear on is if we can't require the Zoning Administrator to enforce a decision of the BZA, what relief can we grant you?

Mr. Leming: Well there is another legal issue. There is another legal issue that the County has placed as an obstacle before moving ahead with the decision that we thought the BZA made last time. They did not raise it when they were here last time, they didn't say well this is a nonconforming sign and there's no issue here. There's a new issue, a new substantive issue that the BZA needs to rule on. If the BZA agrees that the nonconforming sign, and we will certainly argue why it's not, if the BZA agrees the sign would stay unless we appeal that to the Circuit Court and ask the Circuit Court to overturn that. On the other hand, if the BZA agrees that it's not a non-conforming sign then that is no longer a legal basis that the County can use for not enforcing the first decision of this Board. Now it's true that the Court ultimately would have to enforce it. We now have another substantive issue regarding the enforcement of the Zoning Ordinance that has been raised by the County. They have now come and said regardless of what the BZA said we are not going to make them take it down because it's a non-conforming sign, its not. That is the issue that we are prepared to argue.

Mr. Gibbons: It only took us 20 minutes to get to that one point so I'm glad we're brief. Mr. Ingalls, did that answer your question?

Mr. Ingalls: I still don't know the answer truly to whether I ought to hear it or not. I want to hear it if it's the right channel to hear it. I am just not convinced that the Deputy County Administrator's e-mail is something that we ought to be... They render opinions alot of times to which none of us may agree to that that is his opinion and it's not her opinion. Even though she said it probably will be you haven't filed... She should have said you have to give me all the information so I can look at your case.

Mr. Leming: We did. She has the letter that has all the information about the enforcement that she wouldn't respond to, she just told you that.

Mr. Ingalls: Then you should force her to respond.

Mr. Leming: Well, it seems to me that the response for whatever reason was upstairs, the Deputy County Administrator is the one that took the ball and decided that he was going to communicate why it is that we didn't get a response to our letter and he did. There is nothing in state code that says I have to formally apply to get a determination as to what the Zoning Ordinance says. The language is extremely broad. It says any administrative officer, in this particular case I think is patently clear that the Deputy County Administrator took it upon himself to communicate this interpretation of the Zoning Ordinance, that is what it is. He says the nonconforming sign, that his interpretation of the

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Zoning Ordinance.

Mr. Ingalls: Just because he took it upon himself to say that doesn't mean he's right.

Mr. Leming: He said he was acting on behalf of the County Administrator and the statute is broad enough to encompass that. It says "any administrative officer", the County Administrator is an administrative officer and the Deputy County Administrator is too and in this case he was interpreting the Zoning Ordinance. Now whether he had a right to do it or not, I don't know, but he did it, so I've got to appeal it.

Mr. Ortiz: Mr. Chairman, just one question for Mr. McRoberts. After the 20 minutes of discussion here, can you give me a concise opinion as to the event such as took place?

Mr. McRoberts: Well, as I said at the beginning, in my view the real question is the enforcement of the law as it's been interpreted and as the final decisions been made. This body does not have the authority to enforce. Second of all, as to what you have the jurisdiction to hear, you have jurisdiction to hear appeals from the Zoning Administrator or some other authorized administrator in enforcement or administration of the Zoning Ordinance. I have taken a look at the Zoning Ordinance, the Deputy County Administrator is not authorized to administer and enforce the Zoning Ordinance, neither is the County Administrator. Mr. Leming, I mean I understand his point but he has yet to point me to an ordinance whereby the Board of Supervisors appoints the County Administrator or the Deputy County Administrator to administer or enforce the Zoning Ordinance. That is the limits of your jurisdiction. As awkward as it may seem, Mr. Leming's client really has a couple choices; one, go to Court to enforce the law as it stands, that is one option; the other is, if you really want to have this e-mail appealed, one way to do it would be to appeal the Zoning Administrator's determination that is not appealable than this whole square issue could be decided. But at this point I guess this concise determination from your counsel is I don't think, in my opinion, there is jurisdiction for this body to hear this.

Mr. Apicella: I think the question in my mind is whether the Deputy County Administrator was acting as a de facto Zoning Administrator in this particular matter in responding to your letter. My question to Ms. Hudson was, you got the letter, did the letter also go to the County Administrator or Deputy County Administrator or was there some handshake for discussion about who would respond to that letter?

Mr. Leming: The letter went to the County Administrator also.

Mr. Apicella: Okay, so again why haven't you responded to the letter, Ms. Hudson?

Ms. Hudson: Excuse me.

Mr. Apicella: Why has the zoning office not responded to the letter?

Ms. Hudson: It was a decision that I made that I wasn't going to respond to that letter.

Mr. Apicella: So you can choose to respond or not respond to letters?

Ms. Hudson: Yes.

Mr. Apicella: Do you have some response from a legal basis?

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Mr. McRoberts: Well, I can advise you on that, I mean if there is a request made for determination, the Zoning Administrator has a certain period of time within the statute. If the Zoning Administrator chooses not to act within that period of time, which Ms. Hudson is advised that she has, or I guess once the period expires she will have decided not to do that, then it goes to Circuit Court to force her to give an opinion.

Mr. Leming: The period has expired.

Mr. McRoberts: Again, through declaratory judgment action for writ of mandamus.

Mr. Hudson: Hasn't that already happened though?

Mr. Leming: Yes. The time has already expired and the response we got was from Mr. Neuhard. That is the response to the question raised, I don't think there could be much question about that.

Mr. McRoberts: Mr. Leming's client wishes...

Mr. Leming: Hang on Mr. McRoberts. There is nothing under state law and the state statute that indicates as Mr. McRoberts indicated a minute ago that the administrative officer has to be specifically authorized under County Code or anything else. All it says is "an administrative officer in the enforcement or administration of this article". The question is, is that what Mr. Neuhard was doing in communicating this decision to the President of the Homeowners Association here. It came immediately or in general proximity to the request on our part to enforce the decision of the BZA that have been affirmed by the Circuit Court and this was the response that came.

Mr. Apicella: I would have to say that I agree that the Deputy County Administrator was acting on behalf of the Zoning Administrator who as you pointed out is her boss. So there was a response from the County and since there was no response from Ms. Hudson it seems to me that the response from the Deputy County Administrator makes him, in this case, the de facto Zoning Administrator responding for the Zoning Administrator in his capacity as her superior.

Ms. Hudson: May I say something?

Mr. Apicella: Sure.

Ms. Hudson: I thought I had it with me but I don't. The letter that I received from Leming and Healy, I believe it was dated February something and it was not a formal request asking me a question. It was a normal letter that we used to frequently get. The letter that was sent by Leming and Healy to the County Administrator, I do believe was dated April 12, and that was after Mr. Scharpenberg sent an e-mail to the County Administrator. I understand from County Administration that the Deputy County Administrator weekly replies back to requests that are sent in by constituents to the County Administrator. The County Administrator evidently said to his Deputy County Administrator, I want you to update every week with answer back to constituents and that is what I understood the e-mail is all about.

Mr. Apicella: Would it be incumbent upon you to either agree or disagree with his response in your official capacity?

Ms. Hudson: I did not know he had sent the e-mail out.

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Mr. Apicella: But you know now. At some point you knew that the e-mail was sent out.

Ms. Hudson: Right.

Mr. Apicella: So what may be incumbent upon you as an official in your capacity to either affirm or disagree with his interpretation?

Ms. Hudson: I didn't believe that it was an interpretation. He was responding to Mr. Scharpenberg, I did not consider it an interpretation. Not at all. That's all.

Mr. Ortiz: So let me see if I can better understand this and maybe we can close this effort. What then is the next step for either side? I know you talk about some options that Mr. Leming can take.

Mr. McRoberts: I guess the question for the BZA's lies, I think, you need to vote whether you have the jurisdiction or you don't. If you do we go ahead and open the public hearing and have it and if you don't then that is the end of this matter. Mr. Leming can do a number of things at that point and I'm sure as a smart lawyer he knows what those things are, a number of which I mentioned earlier.

Mr. Ortiz: Okay.

Dr. Larson: I would question if we open the public hearing what influence would we have and what good would it do? Are we just wasting our time to hear this? Even if we had jurisdiction are we just wasting our time?

Mr. Gibbons: Okay, we have some good dialogue going on and we're down to the wire. Mr. Leming I think the lady was trying to explain something to you tonight, I do take little mental notes, I'm not as good as Mr. Ingalls on the interpretations but she just stated and it's on tape she didn't get an official request from you. He sent the letter and she didn't interpret that to be an official request. You gave her a letter in February that said what?

Mr. Leming: We asked her to proceed with the enforcement of the removal of the sign. I don't know how much more official it was. This is not a contest where, from our standpoint, we needed to ask for any kind of determination or interpretation of the ordinance. We had a Court order and we were inquiring as to when the enforcement would occur. We did not get a letter in response to that, then came the letter to the County Administrator. The reason Mr. Scharpenberg got involved is because I suggested it, I said they're not responding, go through channels on your own and see what you can find out about what the County's position is because they won't do anything and will respond to the letters.

Mr. Gibbons: I gathered that the County gave you your position.

Mr. Leming: That is why we are here. I do disagree that this Board can't do anything, you have to decide the jurisdictional issue and you have to decide whether or not this rises to the level of an interpretation of the Zoning Ordinance and I think clearly it does. The man is telling Mr. Scharpenberg that it's a nonconforming use and that's why he can't, and that is interpreting the Zoning Ordinance. So I think the answer to the question that was raised by Mr. Ortiz is not what can we do. If you have jurisdiction, if you accept jurisdiction to the issues that have been raised by the Deputy County Administrator, is a specific issue to whether this is a nonconforming sign. That is a substantive issue regarding the interpretation of the Zoning Ordinance that seems to me he squarely put into the mix here. It's never been raised before and has not been decided by this Board and that is the primary basis

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for this appeal. If it's a nonconforming sign it stays and if it's not it goes, that is ultimately the legal issue that has to be decided. That I think is substantively, if you believe that Mr. Neuhard was interpreting or administering the zoning ordinance, that the substantive issue that would be decided. It's not a matter of trying to force the prior decision, it's now trying to clarify why the County says they can't.

Mr. Gibbons: Okay, so what are the wishes of the Board?

Mr. Hudson: I would like to make one more statement.

Mr. Gibbons: Yes sir.

Mr. Hudson: Even if the County was issuing its opinion, it also took the liberty to issue what the Board's thinking was, so it has no authority to rule on it. They can write what they want and say they're not going to enforce what we do but the County doesn't have the right to take on and pronounce the Board's position and pronounce that the Board doesn't have the right to do it after it's already done. I would welcome that had he come in here in October and said he didn't have a right to hear this but that's not what happened. That's just troublesome to me that something like this could go out there who want to sit and play games. Anybody that's a representative of an administrative body is going to be held responsible for putting a piece of paper that says what the position of the administrative body is. Whether it's where you work or I work, I just find this troubling, I'm not saying hey I think that appealing it may be had a better argument if it wasn't opened in our decision remained in effect. The County could've taken our decision to the Board, they have that right and they didn't. This is troublesome.

Mr. Apicella: Mr. Chairman, I'm looking at the actual e-mail from Mr. Neuhard dated Wednesday, April 7, it lists a number of cc's and on cc's list are Mrs. Hudson and the County Attorney. Again I would offer up the notion that the Zoning Administrator, in my view, to the extent that she agreed to, the extent that she disagreed, would have a responsibility to respond either by saying I agree or disagree or this is the jurisdictional matter, which is in my purview not yours to make this sort of determination. I don't see anything in the record where there was a response to that effect one way or the other.

Mr. Gibbons: Okay, so what are the wishes of the Board? Mr. Ingalls you started this. What does the Board wish to do? Hear this case already want to postpone it to another date or we can open up the public hearing and probably go on for another 35 to 40 minutes, I don't mind doing that. Do we want to hear the case? The problem is I think something very serious here, the Zoning Administrator is appointed by the Board of Supervisors and they pass it down to the Administrator and it's clear here that the County disagrees with what the BZA did. I think it's pretty sad that we get down here, you gonna make a Circuit Court judge arbitrate and make a County employee do what he said they should do. I think it's a sad day when that happens. Do we open it and hear it? If they're saying it's nonconforming, that did not come up at the October meeting, it never was mentioned. If Rachel made a mistake, than the County has to come out and say that we goofed on this, but that did not come forward. They are not enforcing it on the County attorney has said from day one that they did not have the right to enforce the language within the ordinance. Do we want to hear it or don't we want to hear it?

MOTION:

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Mr. Davis: I don't believe that the County Administrator or the Assistant County Administrator has the authority to determine what is the authority of the Zoning Administrator, for that reason I would make a motion that we not hear this request.

Mr. Gibbons: Do we have a second?

Mr. Ingalls: I'll second that.

Mr. Gibbons: Any discussion?

Dr. Larson: Mr. Chairman, the only reason I was considering hearing it was to clarify the Board's position, there seemed to be some ambiguity of what the Board actually did only overrode that Zoning Administrator's determination in the first place. Although, I agree with Mr. Leming that the text is pretty clear on how I've always felt at that time.

Mr. Gibbons: Any other discussion of the Board on the motion? Does anybody have a substitute motion?

Mr. Apicella: Yes, Mr. Chairman, I like to make a substitute motion that we actually do hear the appeal.

Mr. Gibbons: We have a motion.

Dr. Larson: I second that.

Mr. Gibbons: So we have to take the substitute motion first. The substitute is to hear the case so all in favor say aye.

Mr. Apicella: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

Mr. Davis: Nay.

Mr. Hudson: Nay.

Mr. Ingalls: Nay.

VOTE:

The motion to hear this case passed 4-3.

Mr. Apicella - Yes

Mr. Davis - No

Mr. Gibbons - Yes

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Mr. Hudson – No
Mr. Ingalls - No
Dr. Larson - Yes
Mr. Ortiz – Yes

Mr. Gibbons: So we are going to open the public hearing.

Mr. Davis: Can we take a break first?

Mr. Gibbons: Yes sir. We will take a five-minute break.

Meeting reconvened at 9:00 P.M.

MOTION:

Mr. Gibbons: During the break I was requested by the Zoning Administrator that she would like to have this postponed until the next meeting because she does not have legal representation here tonight. I think that she should be afforded that. The applicant has legal, we have legal and she does not have legal and she would like to have legal before she goes forward with the public hearing. I think that's an appropriate request.

Mr. Apicella: So moved.

Mr. Ortiz: Second.

Mr. Gibbons: Okay, we have a motion from Mr. Apicella.

Mr. Leming: Can I remind you that I won't be here for your July meeting?

Mr. Gibbons: No, this will be going in August.

Mr. Leming: Okay.

Mr. Gibbons: Okay, so we will postpone it until 24 August meeting. We have a motion and duly seconded by Mr. Ortiz. All in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

VOTE:

The motion to defer this case until the August meeting passed 7-0.

Mr. Apicella - Yes
Mr. Davis - Yes
Mr. Gibbons – Yes
Mr. Hudson – Yes
Mr. Ingalls - Yes
Dr. Larson - Yes
Mr. Ortiz – Yes

OTHER BUSINESS

6. Discussion of Bylaws

Mr. Gibbons: Other business, discussion of the bylaws, we had a draft of the bylaws. I didn't get any comments back from Mr. Ackermann and he's usually pretty good with that. The draft bylaw that we have in front of us, does anybody have any changes or additions.

Mrs. Stefl: I have a couple of questions.

Mr. Gibbons: Go ahead.

Mrs. Stefl: One, I guess I kind of go through because I made notes for each. So two dash one (2-1), is there anything, I guess this may be on the Board of Supervisors, if a regular member or an alternate should leave the board is a reappointment done or in the case of a regular member, would an alternate move up to regular membership?

Mr. Gibbons: When a regular member...

Mrs. Stefl: If a regular member should leave or be removed?

Mr. Gibbons: Then the Board appoints a new member in the alternate fills in until that appointment is made.

Mrs. Stefl: Okay, and then on the case of the permits, when an alternate serves in that position for that meeting, like what happened today, if we had a case that last month I served on, this month now that member is present, does the regular member vote or the alternate?

Mr. Gibbons: No, the regular member votes.

Mrs. Stefl: Okay.

Mr. Ingalls: I would have a little different opinion of that. I had that same question, how are we going

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to be, because it's getting a little complicated. There may be a chance that I may not be here and may be it's something fairly simple and I come the next meeting and I have read the case, I read the minutes, I've looked at it and I think I can vote. Maybe I would, I think I could make that decision as the board member. I will go and I can vote because I can understand the case. Now, I may not vote and if I'm not going to vote on that case I would think that I would have to notify the County and say that I don't feel comfortable having not heard the first part of the case. I think that would be an individual...

Mr. Gibbons: It would be the same as a conflict of interest. You do that at the beginning of the meeting.

Mr. Ingalls: Right, if I had made the decision before the meeting but I wasn't in a vote on that case I would let somebody know so that we could have an alternate here. But otherwise I'm not sure that I would, I don't know whether I would vote or not vote it would depend on a case-by-case basis. There have been times when that exact thing has happened. When somebody misses the meeting and that person shows up at the next meeting and we continue the hearing and a vote.

Mr. Gibbons: That is part of the declaration area. Would you like to rewrite the declaration area and see? You can always declare in the beginning of the meeting what you are saying Larry and at that point in time and for that particular case an alternate can sit in.

Mr. Ingalls: It says "such alternate may vote on any application in which a regular member abstains".

Mr. Gibbons: Right.

Mr. Ingalls: I can abstain for any reason. I could have a conflict or just not heard enough of the case or part of it.

Mrs. Stefl: I'm just trying to get back to the point because of all the confusion. I did start with Mrs. Neville's case and I don't understand I guess, so next time when it's heard in September, am I there if one of you guys miss the chance? And also the next question is, how does one determine when the alternate, which alternate serves next?

Mr. Gibbons: We rotate it. Next time is yours then we go back to Steven.

Mr. Apicella: I think there is a difference between voting and participating. I am absolutely good with serving as an alternate whenever a regular member is not here and that that person has lead or the primary and that the alternate member should not have a vote on a particular matter. I do think that we should be able to participate and ask questions, in part because the matter might be deferred to another meeting and so we have an interest in that same issue not knowing how it's going to be adjudicated. Or during the course of discussion on that matter someone might drop out or abstain and we would've lost our opportunity to participate. I think within reason but I don't think we should be able to vote if a majority a regular members present.

Mr. Gibbons: You're saying you should be able to participate in the dialogue.

Mr. Apicella: I believe it would be helpful to the process, not knowing how things would turn out.

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Mr. Hudson: I don't think that that was the intent.

Mr. Apicella: That is not what I meant, I mean to be able to have part of the debate to ask questions of the participants.

Mr. Hudson: Well my point is I think the law...

Mr. Apicella: What law are you talking about?

Mr. Hudson: The Code pointing to be the members.

Mr. Apicella: So you are saying that the code says we can't actively participate?

Mr. Hudson: The Code is silent. The code doesn't say that we could have alternates, the bylaws do. The code does say that there is seven members one from each jurisdiction appointed by the supervisors.

Mr. Apicella: By the same token alternates are appointed by the supervisors. I am with you on voting, I agree with in terms of making decisions that the regular members arguably are able to vote on any matters that they so choose but to be an alternate you should be able to participate.

Mr. Ingalls: The appointment of alternates was to serve when someone was not here. I don't think it was intended that they would be part of the meeting and discussion. We have seven of us now discussing, you have nine or ten of us discussing a case every time? We have a hard enough time with time running out now. I think if you want to attend the meeting and sit here and listen and if one of us were to drop out and I have dropped out after something has come up, you have at least be here and have listened to the discussion.

Mr. Apicella: But I would not have had a chance to ask my questions.

Mr. Ingalls: Then you could get into a discussion.

Mr. Apicella: But we might be passed that point. I can't know until he abstains when he's going to drop out. He could drop out right at the point where there is no more discussion for whatever reason that person could recuse himself and I will not have had a chance to engage in again, in my mind, fully participate and have my questions answered. You will have abstained and I'm uncomfortable with voting because I haven't got what I needed to make a decision.

Mrs. Stefl: Ultimately, has it really been us that have been the biggest drawer of the time as you stated or is it really the applicant because the applicants always were to have ten minutes and we have been very lax on allowing the applicant to speak longer than ten minutes.

Mr. Ingalls: You have not been so I don't have any problem with that part of it. Again, if you're sitting here, if you want to be here and listen I think it's great because I think you'd be able to better understand the case because it may get postponed and it made come up again next month and you may be here next month as an alternate so at least you've heard it. Andrew, do you have any suggestions?

Mr. McRoberts: I think that the ordinance basically quotes the statute and I think that the bylaws quote both of them. What it says is "alternate members shall serve on the board when there is an absence"

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and it also says "when a regular member abstains the designated alternate member shall assume the privileges". I think what the statute says, if around the wording, I don't have it in front of me, is that this service begins when the person abstained or is absent and notifies the chair and the chair appoints an alternate. The alternate then assumes all the rights and responsibilities the debate, the discussion, the right to ask questions and the right to vote of the regular member. For that case are for that night that person for all intensive purposes, is a member of the BZA along with the other six or the other five if there were two alternates. I understand that Mr. Apicella said and I do believe that there is a value in having alternates there even when they're not participating in the case. I mean there may be a deferral etc. I don't think it's a matter of law that the alternate member gets to participate as a member of the BZA even to ask questions if they are not acting as a member of the BZA. Now, that's obviously up to you guys whether you all want to take that on or do something else. I would suggest that there be some way to clearly delineate who was acting as a member of the BZA in that case or that night and who's not. One thought I had was that if you were actually acting you are up on the dais and if not you're down in the front row. That might not be something that you guys are interested in doing but that would be a clear delineation to the public of who's on and who's not. That's just a thought. You asked what I thought, I think you're either acting or you're not. You're either on the BZA that night for that matter or you're not.

Mr. Gibbons: Can we agree on that then? All right, we'll move onto the next one.

Mrs. Stefl: My next one is seven dash three (7-3) "the Board shall receive all relevant and material evidence and shall weigh each item of evidence, as it deems appropriate", I guess it's seven dash four (7-4) to because I did a lot of repeat from legal counsel. So is this to force the hand of legal counsel to give everything to the County so that when we get our package that we have all prevalent information and to stop that. Okay. And will that also include legal counsel has to present his or her information. There have been a couple of nights he has brought some case law to us and sometimes I am a little overwhelmed trying to read the case law that particular night.

Mr. McRoberts: I don't know if case law or legal opinions is really evidence. Evidence to me is factual stuff.

Mrs. Stefl: But it is material that has to go into consideration for the night, is that correct?

Mr. McRoberts: Oh, absolutely but I don't know that you want your counsels opinions going into the board packages where everyone can read it. There is some confidentiality there.

Mrs. Stefl: And that's where we need to, I guess, bounces ball around.

Mr. Gibbons: Good point.

Mr. Davis: If our legal counsel is required to submit that information that would be public information.

Mr. Gibbons: No I don't think so. I think you're protected with the proper disclaimer.

Dr. Larson: I would rather not have the legal counsels opinions as a matter of public record.

Mrs. Stefl: I totally agree with that. I was just trying to get all prevalent information prior to the meeting. I tried my best to study up for that week.

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Mr. Ortiz: I think about a month or two ago we were basically supposed to get all the information in the package and that any miscellaneous information given out by Mr. Leming or something of that nature does not have to be read. I think something was sent out, in fact, we were encouraging them not to send it out because what we were supposed to read was the packet that we got. I don't believe that there is anything that says that he cannot send us something.

Mrs. Stefl: We have it in the bylaws.

Mrs. Musante: That is the draft.

Mr. Gibbons: Ernest is the one who wrote that.

Mr. Ortiz: I am talking about the actual lawyer for the individual, representing the individual. What stops him from sending us anything?

Mr. Gibbons: We said that the only thing we would consider information presented the night of the hearing or it had to be in the packet when it went out. I think that's what we agreed upon.

Mr. Ortiz: Yes.

Mrs. Stefl: Do we have an exception for our legal counsel? That's fine if we want to I was just trying to clarify.

Mr. Apicella: I think your point is, you're sitting there listening at the same time reading the opinion that you were given and it's good stuff so you got caught between a rock and a hard place because you wanted to do your due diligence on both ends of the equation and you really can't do it effectively when you try to do two things at one time. It would be helpful to get any other documentation from legal counsel that would help us in advance of the actual meeting to fully digest it.

Mrs. Stefl: Even Monday, the day before, even if it's in e-mail form I don't mind. Usually the stuff that we receive is only a couple of pages.

Mr. McRoberts: Yes, everything that I have given out to the BZA has been far enough in advance for you all to digest believe.

Mr. Apicella: I remember at the last meeting you walked in with some case law and I was sitting there trying to read it at the same time while listening. I was trying to do my best with both things.

Mr. McRoberts: That is certainly well taken. If you want me to give you case law or whatever in advance I can certainly appreciate that that's good practice.

Mr. Gibbons: Why don't we leave it like that and if it becomes burdensome, come back and tell us.

Mr. McRoberts: Yes. I will say that one of the reasons why I sort of wait to the last minute sometimes to do this is because there is a limitation on the funding available for this and I am trying to live within the means of been provided by the County. For me, what I try to do is set aside little bit of time in the afternoon on the day of the hearing itself to pull everything that I need to get together to advise you that evening and that usually is less time. I have written a couple of memos recently in this because

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there have been specific requests for me to do so. I hear you and I'll try to be sensitive and I'll try to provide things more in advance.

Mr. Gibbons: Why don't we leave it like that for now.

Dr. Larson: I don't think we need to modify the bylaws because it says "any decision by the Board shall be based only on evidence received at the hearing or material in the packet that is distributed". Andrew normally gives his opinions at the hearing or one of us picks out things that we think is important from what he has given us from case law. I think we are still good.

Mr. Gibbons: The next one Heather.

Mrs. Stefl: And my final one, I think is seven dash six (7-6) and seven dash seven (7-7), "the Board will consider a request to defer any agenda item". How many deferrals are we going to... it gets to the point where we defer, defer, defer.

Mr. Davis: According to the opening statement made by the Chairman, we defer one time.

Mr. Gibbons: They can defer it one time.

Mrs. Stefl: Okay, but we deferred twice now a case.

Mr. Gibbons: Which one was that?

Mrs. Stefl: Ms. Neville.

Mr. Gibbons: One was because... I don't know, you have personnel action and personal action and we have to be careful that we don't cross into the County Administrator's ability to do personnel actions. She just like tonight with Rachel, she did not know that this was going to be heard tonight. We deferred it to give her legal representation. Same thing with the client.

Mr. Davis: That was not by the applicant though.

Mrs. Stefl: Yeah.

Mr. Ingalls: We have the authority to approve and disapprove.

Mr. Hudson: You can only defer it once but why do you want to restrain yourself to say if something comes up, counsel has a car wreck, oh your case is denied. You only have two chances, right now you have the authority but why not leave the authority there.

Mr. Ingalls: We have the authority to either agree to defer or not. We don't have to.

Mr. Apicella: I think the only issue that we should be conscience of and I don't think it has to be in the bylaws but someone could use repeated deferrals just to by themselves more time so they can continue to do whatever they do.

Mr. Ingalls: If we agree.

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Mr. Apicella: If we agree, right. I am just saying that we have to be conscience of it.

Mr. Ingalls: Yes and we should be.

Mr. Gibbons: All right, the next item?

Mrs. Stefl: Those were my comments.

Mr. Gibbons: Okay, Doctor, did you have any?

Dr. Larson: I wanted to talk a little bit more about the permits while we are here. I know in the past, historically, we have been very lenient in granting deferments and maybe that is the right thing to do. I think there have been times in the past where we have people responding to an ad, the public responding to an ad and several members of the public show up expecting to speak and we defer because they suggested. I am suggesting that we should look at the reasons for deferment as we did tonight. Not automatically defer, which I think we have had a tendency to do in the past.

Mr. Gibbons: It used to be terrible, I thought we got it cleaned up pretty good. It used to go on for years. Eight or nine months or a year.

Mr. Ingalls: I think one of those statements is newer in the bylaws that gives us the ability to say no we are not going to defer it any longer. We have gotten better with it.

Dr. Larson: When you first advertise something, especially when it is controversial, I think the trash dump comes to mind. We had a lot of people the first time and what a great tactic by the legal advisor to defer.

Mr. Ingalls: We can say no and open the public hearing and let them all speak that night and don't close the public hearing and continue it to the next meeting.

Dr. Larson: I would just like to consider that.

Mr. Gibbons: Anything else? Marty, you have anything?

Mr. Hudson: No, I don't have anything other than I don't know if you recognize me notifying the county that I am not going to be here. It says notify the Chair, I am in West Virginia and unless I get your home phone, I don't have a cell phone or email.

Mr. Gibbons: Okay.

ADOPTION OF MINUTES

7. April 27, 2010

Mr. Gibbons: Moving right along, we've adoption of the minutes for April 27, 2010. Any corrections for Aisha? I need a motion for approval.

Mr. Hudson: I will abstain from voting on the minutes.

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Mr. Gibbons: I need a motion and the second.

MOTION:

Mr. Davis: So moved.

Mr. Ortiz: Second.

Mr. Gibbons: Okay, we have a motion and a second to adopt the minutes with one abstention. All in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Hudson: Abstain.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye. Opposed?

VOTE:

The motion to approve the April 27, 2010 minutes passed 6-0.

Mr. Apicella - Yes

Mr. Davis - Yes

Mr. Gibbons – Yes

Mr. Hudson – Abstain

Mr. Ingalls - Yes

Dr. Larson - Yes

Mr. Ortiz – Yes

8. May 25, 2010

Mr. Gibbons: Okay, the minutes from May 25, 2010. Any corrections, deletions or changes?

Mrs. Musante: You don't have those.

Mr. Gibbons: Okay, so we will go in and take those off. Unfinished business?

UNFINISHED BUSINESS

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Mr. Gibbons: We don't have any applications for July.

Mrs. Musante: No applications for July.

Mr. Gibbons: I would like to cancel the July meeting if it's appropriate. Okay, so I need a motion for that.

MOTION:

Mr. Davis: So moved.

Mr. Hudson: Second.

Mr. Gibbons: Okay, removed and Mr. Hudson second. All in favor say aye.

Mr. Apicella: Aye.

Mr. Davis: Aye.

Mr. Hudson: Aye.

Mr. Ingalls: Aye.

Dr. Larson: Aye.

Mr. Ortiz: Aye.

Mr. Gibbons: Aye.

VOTE:

The motion to cancel the July meeting passed 7-0.

Mr. Apicella - Yes

Mr. Davis - Yes

Mr. Gibbons – Yes

Mr. Hudson – Yes

Mr. Ingalls - Yes

Dr. Larson - Yes

Mr. Ortiz – Yes

ZONING ADMINISTRATOR REPORT

Mr. Gibbons: The zoning administrator's report?

Mrs. Musante: She did not have anything other than to let you all know that you've got the new nonconforming section of the ordinance. It was handed as a handout so make sure you keep it in your binders.

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Mr. Gibbons: Okay, the next thing is that we do have the conference down in Charlottesville. Regarding a headcount to see how much money we need to spend. Would anybody like to go down there? I think it's on 23 July. How many are interested? Possible of three.

Mrs. Musante: Can you send me an email.

Mr. Gibbons: Yes. The other things is that I need to get with the Chairman to get the funding settled down so we don't run into an issue of only getting so much money. I will get that done before the next meeting. And the other thing I want to commend the Board on is this Chesapeake thing on this Wyche Road thing after we sat down today and wrote what we said. We asked them to consider it. They then realized that was a good request from the BZA. The BZA and the Board were trying to work together. They really thought that we took the right action because if we don't watch ourselves, we could open pandora's box. Everybody and his brother would be coming for a determination so we needed to stop it now and fix it. I want to commend you all for doing that. Anything else for the Board, I want to thank you all very much and I will see you on the 24th of August. Counsel, somehow I will get something somehow.

Mr. McRoberts: I will say that if the Board of Supervisors does not appropriate any money, I would like to say that I have truly enjoyed working with all of you all. I was saying this during the break, there are very few places where you could go and see such interesting legal issues on a regular basis. I mean that, there are many localities that have many more appeals but the issues tend to be more mundane. I guess my hat is off to Clark Leming, he is a marvelous lawyer and he comes up with things that I have never heard before in my entire life. He really puts me to my test to figure out what the law really says on that point and he puts you all to the test too. I have enjoyed it and you all have been very kind to me and I appreciate it.

ADJOURNMENT

With no further business, the meeting was adjourned at 9:37 PM.

Robert C. Gibbons, Chairman
Board of Zoning Appeals