

MEETING MINUTES
OF THE
FREDERICK COUNTY BOARD OF ZONING APPEALS

Held in the Board Room of the Frederick County Administration Building, 107 N. Kent Street, Winchester, Virginia, on January 19, 2021.

PRESENT: Eric Lowman, Chairman, Red Bud District; Kevin Scott, Vice-Chairman, Shawnee District; Reginald Shirley III, Opequon District; Dudley Rinker, Back Creek District; Dwight Shenk, Gainesboro District; John Cline, Stonewall District and Ronald Madagan, Member at Large.

ABSENT:

STAFF PRESENT: Mark Cheran, Zoning Administrator; Roderick Williams, Frederick County Attorney and Pamala Deeter, BZA Secretary

CALL TO ORDER

The meeting was called to order by Chairman Lowman at 3:30 p.m. and he determined there is a quorum.

Chairman Lowman led the Pledge of Allegiance.

On a motion made by Mr. Cline and seconded by Mr. Rinker, the minutes for the December 15, 2020 meeting were unanimously approved as presented.

ELECTION OF OFFICERS AND ADOPTION OF BYLAWS

Mr. Cheran came forward to open the floor for nominations for Chairman. Mr. Rinker made a motion to nominate Mr. Lowman and Mr. Cline seconded the motion. The floor was closed for nominations. The vote was unanimous for Mr. Lowman as Chairman.

Mr. Cheran opened the floor for nominations for Vice-Chairman. Mr. Rinker made a motion to nominate Mr. Scott and Mr. Cline seconded the motion. The floor was closed for nominations. The vote was unanimous for Mr. Scott as Vice-Chairman.

Mr. Cheran opened the floor for nominations for Secretary. Vice-Chairman Scott made a motion to nominate Mrs. Deeter and Mr. Lowman seconded the motion. The floor was closed for nominations. The vote was unanimous for Mrs. Deeter as Secretary.

Mr. Cheran stated that the Board of Zoning Appeals has met at 3:30 p.m. on the third Tuesday of the month.

Mr. Scott made a motion to keep the Board of Zoning Appeals meeting time at 3:30 p.m., on the third Tuesday of the month. Mr. Rinker seconded the motion and the vote was unanimous.

Chairman Lowman asked if anyone had questions on the Adoption of the Bylaws. On a motion by Mr. Shirley and seconded by Mr. Madagan the Bylaws was approved. The vote was unanimous.

Chairman Lowman inquired if there are any applications for February Mr. Cheran stated no, the cutoff date is Friday, January 22, 2021.

PUBLIC HEARING

Chairman Lowman read the request for **Appeal Request #11-20 of Bryan M. Henry**, submitted by Aristotelis A. Chronis, Esq., with Chronis, LLC., to appeal the notice of violation issued by the Zoning Administrator, dated August 11, 2020. The property is located at 639 Reliance Road, Middletown, Virginia and is identified with Property Identification Number 91-A-77 in the Opequon Magisterial District.

Mr. Cheran came forward to present the Staff report. Mr. Cheran stated this is an appeal due to the determination of the zoning administrator of a violation to the Frederick County Zoning Ordinance. Staff stated the property is zoned RA (Rural Areas) and adjoining properties are the same. Staff presented a map outlining the property. Staff received a complaint and next Staff did an inspection of the property and issued a violation letter for running an excavating business and storing of equipment at this RA location. Under the Frederick County Zoning Ordinance Section 165-401.02 Permitted uses, within the RA Zoning District the excavating business and storing of equipment is not permitted.

Staff mentioned that the Frederick County does allow excavating businesses to operate in the B3 (Industrial Transition), M1 (Light Industrial), and M2 (General Industrial) Zoning Districts. The remedy of this violation would be that the property owner moves the business to a B3, M1, or a M2 District.

Mr. Cheran concluded with requesting the Board affirm the decision of Zoning Administrator that the excavating business use is operating illegally. The excavating company is not a permitted use within the RA District. He concluded that this use shall be discontinued and removed from the property.

Staff stated that representing the County is Roderick Williams, County Attorney, and the property owner, Mr. Henry, is represented by Mr. Chronis.

Mr. Chronis came forward and presented background information. Mr. Henry has operated his business at this location since November 2005. Mr. Henry was a tenant and then purchased the property. Going forward, in December 2017 the Applicant applied for a CUP (Conditional Use Permit) for a landscaping, contracting, and mulching business. Mr. Henry went to the Planning Commission and was recommended approval and the Board of Supervisors denied the CUP. During the process for the CUP, several inspections were done by County agencies and also aerial

photos show exactly the same thing as today. No inspector mentioned anything about a violation. Mr. Chronis states that the property is still in the same condition as it was in 2018 and yet no mention of a violation to Mr. Henry. Mr. Chronis comments that Planning Dept. staff issued a favorable remark in the staff report that was presented to PC and BOS. Mr. Chronis states that an inspection by the Zoning Department was done and no violation was mentioned to the Applicant. Now, in the summer of 2020 a compliant was called in and a violation letter was sent out. The Zoning Department is citing Mr. Henry for the illegal storage facility and illegal excavating business. The Applicant has remained in this location with the same business for 15 years and pays County taxes and is just now getting a violation letter.

Mr. Chronis read the Section 15.2-2311C of the Code of Virginia.

Mr. Chronis mentioned that his client is only parking vehicles. Mr. Chronis compared his client's equipment as to a farmer with equipment on his farm. There is very little traffic only when his employees come to work and park their vehicles and leave in a company vehicle, and then coming back to retrieve their personal vehicles in the evening. Mr. Henry is not disturbing the neighbors. In regard to the photos, you can't tell that a business is being run on 70 plus acres of land. Mr. Chronis states that his client has letters from his neighbors supporting his business.

Mr. Chronis states that the only issue that Zoning Department has is the parking. Mr. Henry is now aware that he needs to operate in a certain district but that is hard to locate.

The Applicant, Mr. Brain Henry came forward. Mr. Henry gave his version of the history of his property. Mr. Henry leased 73 acres of property Nov. 5, 2005 from Mr. Blackwell and Mr. Lowenstein. The property owners let me run my business from this location. In the years of leasing the property, he didn't have any complaints from the neighbors or the County. The property owner approached me in 2016 to purchase the property. The first time I received a formal letter from the County was August 11, 2020 that I was in violation of zoning ordinance. When I investigated further, that Mr. Molden and Jeramiah Cameron had filed a complaint. I have spoken to the neighbors in the area and most neighbors were unaware that I had a business there and they reassured me that I have not been a nuisance to them. Mr. Henry has signed affidavit from the neighbor showing support.

Mr. Henry believed that the problem is excavating. Mr. Henry's company is not the usual excavating company. His company installs fiber optic in Maryland, Northern Virginia, and D.C.

Mr. Henry mentioned if it is a big job, we rent equipment and it is delivered at the project site. When the project is completed, we either return the equipment to the rental place or we move it to another job site. Mr. Henry expressed, his employees come to this location and park their vehicles on property such as F150 because they are not allowed to park the vehicles on the streets. The employees leave in a company vehicle and commute to a job site and return to pick up personal vehicles there. Mr. Henry said there are some materials stored at this address, but they are out of site of the public and are used when needed.

Mr. Henry said he has looked at other properties with the correct zoning, but they are very limited and not affordable. Mr. Henry mentioned he has 15 employees and he pays his taxes. Mr.

Henry asked the Board to allow him to park the vehicles at the Reliance Road address.

Mr. Rod Williams, County Attorney came forward, and said that Mr. Chronis is basing his case on Section 15.2-2311C. Mr. Williams explained that Code section and that particular section requires some written order, requirement, decision, or a determination by the Zoning Administrator or other administrative officer. Mr. Williams noted that there has been nothing in writing. Mr. Williams proceeded with the staff report of the 2018 CUP. In that staff report, there is no mention of excavating in the writing. The Applicant perceived that being silent constitutes something in writing. The County has nothing in writing stating the applicant could operate an excavating company from that address. Mr. Henry should have inquired with the Planning Department to get something in writing, which is his responsibility.

The County Attorney presented the Norfolk 102 case.

Mr. Williams clarified that the Building Official came out to inspect that is correct, but the building official cannot enforce the zoning ordinance. The only people that can enforce the Ordinance are Mr. Cheran, Zoning Administrator and Mr. Burke the Zoning Inspector.

The County Attorney said that we can't go and get tax information because that is confidential by tax statute and is not allowed to be given out so there is nothing in writing. Again, the only thing we can verify is that there is a business at this location.

Next point for Mr. Williams is parking. If they can't park along the street, that doesn't make it ok to park on the 639 Reliance Road property either. Also, the State Corporation Commission has the B & D Excavating listed at the 639 Reliance Rd address. One photo shows that there is more than a F150 Truck at that property.

Mr. Williams states, you should uphold the Zoning Administrator decision.

Discussion

Chairman Lowman asked if there are any questions for Mr. Williams or Mr. Cheran.

Mr. Madagan has a question for Mr. Cheran. The Building Official can't make a decision about Zoning. Mr. Cheran stated no. Mr. Madagan clarified that violations are only on a complaint basis. Mr. Cheran stated that is correct.

Mr. Rinker asked could the Applicant come back in and apply for a CUP again. Mr. Cheran replied yes, but not for excavating.

Mr. Sherk questioned could we extend him time to find a location or he could apply for a CUP? Mr. Cheran stated that we have allowed Mr. Henry time from August 11, 2020 until now.

Vice-Chairman Scott asked what Mr. Henry's options are. Mr. Cheran replied if we allow him to come in compliance, we have a year to act on this matter. The year started at the date of letter. The other option is the Board upholds my decision and the Applicant has 30 days to relocate

the business to one of the Districts we talked about. Now if the Applicant comes in for a CUP, which he can do, but there is no excavating allowed in this zoning district.

Mr. Rinker clarified if we uphold Mr. Cheran's decision, the Applicant can go to the Circuit Court? Mr. Cheran said that is correct.

Mr. Shirley questioned Mr. Henry, when you made the purchase did you contact Planning Department to see you could operate a business on the property. Mr. Henry replied no.

Mr. Madagan commented that his uncle lives across the road on 100 some acre tract and has never complained to him.

Mr. Chronis stated, his client would not go the route of a CUP again for several reasons. Even if he did, he still would not be able to have parking of vehicles. Mr. Chronis expressed that off-street parking is allowed in this district according to the Ordinance. Now if you are talking storage, I can't understand because this is the RA District and this District is for agricultural. Surely, the farmers would need storage. Mr. Chronis noted that storage should be an allowed use for the farmers in the District. Mr. Chronis thinks that the problem is the B & D Excavating signage on the truck. The business isn't creating any traffic problems or any intense land use issue.

Mr. Chronis presented the aerial photo from the CUP staff report in 2018. If you compare the 2018 to the 2020 photos you can see that it is the same buildings on the property as well as other items on the property. The Attorney states this is a non-conforming violation and when my client applied for the CUP the zoning department made a visit to the property and didn't make my client aware of violation.

Mr. Chronis presented to the Board a plat, staff report from CUP, Google map from 2018, and neighbors' statements.

Chairman Lowman needed clarification, that in December 2017 Mr. Henry applied for a CUP. Then Planning Staff visited the property. Next the CUP went to the PC and then to Board of Supervisors. The Board of Supervisors denied the CUP on February 28, 2018. The Applicant has been operating in violation of the ordinance from the time he was denied by the Board of Supervisors in 2018 until the violation letter of August 11, 2020. Mr. Cheran replied, that is the correct timeframe of which Mr. Henry was illegally operating his business. Mr. Henry stated, he stores items on property such as Fiber Optic. Staff continued, by saying the Google maps are a certain period of time. Mr. Cheran mentioned that once an application is submitted the Applicant will need to appear in front of the Board for public hearing. Staff goes and looks at property and the PC member could visit the site as well. Mr. Cheran stated that the County only works on complaint bases. A formal violation was submitted to the County. Upon the investigation of the complaint when staff arrived at the location, staff noticed vehicles were coming to the property to park and as well as storage of equipment. Again, Mr. Henry stated that his employees come there to park.

Chairman Lowman mentioned that Mr. Henry had almost two years after his CUP was

denied He continued operating because at that point the County had no official complaint. Mr. Henry had a choice at that time to relocate the business after BOS decision, but he chose to operate the business and he received two years of revenue.

The County Attorney had an objection as to the aerial photos. Mr. Cheran didn't create the photo, but the photos does show there are some vehicles on the property. Mr. Williams stated we don't have any idea as to what day or who took the photos of the property. We could only use the photos as a reference. For the Applicant to say, the County knew something was going on and that constitutes a determination it is not.

Mr. Chronis came forward to state the photos was taken from Frederick County GIS mapping. Mr. Cheran would have to review the photos before presenting them to PC or BOS. Mr. Chronis suggested that Staff just turned their heads to the violation. Mr. Chronis remarked, a County employee comes to the property, they can't say that today I am a code enforcer, or I am administrator giving CUP favorable report. Mr. Chronis expressed, the County was aware something was going on after all the neighbors attended the BOS meeting on February 28, 2018. The County Planning Department didn't act on this matter until August 2020.

Mr. Williams approached and mentioned he doesn't see a favorable recommendation in the staff report that Mr. Chronic keeps speaking of. The only thing I see in the staff report is under the section Planning and Zoning. Mr. Williams read this proposed use will take place on a 73-acre tract of land which is located in the RA (Rural Areas) Zoning District. A landscaping contacting business is an allowed use within the RA Zoning District with an approved Conditional Use Permit. End of the staff report lists the conditions that the Applicant has agreed to. This favorable recommendation is just an opinion of the Applicant.

Mr. Williams remarked that Mr. Chronis said the conditions that were in staff report were such as the number of vehicles the Applicant. Mr. Williams stated in the conditions, I can't find the word vehicle or automobile or any word referring to vehicles

Mr. Williams states, once the appeal goes to Circuit Court, it doesn't automatically stay further enforcement action. The Circuit Court could elect to stay further enforcement action. The Circuit Court could elect to stay an enforced action pending resolution.

Vice Chairman mentioned, if we uphold Mr. Cheran decision could the Board add a clause giving the Applicant time to come in compliance with violation or move his business to another location.

County Attorney replied, I believe that could be done but he would have to check. Mr. Williams cautioned the Board that if were give an extension, he would like the extension date before the notice of violation expires.

Mr. Madagan asked Mr. Shenk if the Board gave him a continuous extension on his own property and Mr. Shenk said yes. Vice-Chairman Scott mentioned that Mr. Shenk was a variance not an appeal.

Mr. Rinker clarified that variances and appeals, after coming to the Board of Zoning Appeals, have 30 days to file with the Circuit Court. Mr. Cheran replied that is correct. Mr. Rinker questioned we are here about a decision the zoning administrator made and we either uphold the decision or not. I don't think we can put an extension on this appeal.

Mr. Rinker asked what's the time frame for the Circuit Court system to hear a case? Mr. Williams replied in normal conditions six months to a year. Mr. Williams mentioned that no jury trials have been heard since last spring and the courts are waiting for a plan as to the safety of jurors from the Supreme Court of Virginia after the Courts receive the safety plan it will be difficult to schedule a date to appear for non-jury cases.

Chairman Lowman ask is there anyone here to speak for or against the appeal. No one came forward.

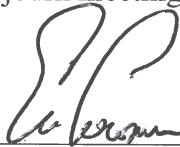
Public Hearing Closed

Mr. Shirley feels empathy for the Applicant, but it also comes back to him that he should have checked the zoning on the property before purchasing. Mr. Shirley doesn't think extending the time frame will make a difference because the court system is backlogged.

Chairman Lowman comment that Board has been supplied with documentation to make a decision on Mr. Cheran's interpretation. Chairman Lowman stated I am inclined to extend the time frame for the Applicant; that way he can decide what his course of action will be. Mr. Williams suggested 90 days, but I think 30 days is not enough so 60 days to come in compliance or may have to relocate business.

Mr. Shirley made a motion to uphold the Zoning Administrator decision with extending for 60 days before taking further enforcement on the violation and was seconded by Mr. Shenk. The vote was unanimous.

On a motion made by Mr. Rinker to adjourn meeting and seconded by Mr. Cline 4:55.



Eric Lowman, Chairman



Pamala Deeter, Secretary