

ALBEMARLE COUNTY BOARD OF ZONING APPEALS
VIRTUAL MEETING
TUESDAY, AUGUST 2, 2022—2:00 P.M.

Board Members Present: John Shepherd
Marcia Joseph
Ed Robb
Edward (Bo) Carrington
Kurt Burkhart

Staff Members Present: Bart Svoboda, Zoning Administrator
Francis MacCall, Deputy Zoning Administrator
Lisa Green, Manager of Code Compliance
Marsha Alley, BZA Clerk and Recorder

County Attorney Present: Andy Herrick, Deputy County Attorney

BZA Attorney Present: James Bowling, IV

1. Call to Order

The meeting was called to order at 2:04 p.m. by Chair Marcia Joseph. She said this meeting was being held pursuant to and in compliance with Ordinance No. 20-A(16), “An Ordinance to Ensure the Continuity of Government During the COVID-19 Disaster.” She added that opportunities for the public to access and participate in the public hearing are posted at <https://www.albemarle.org/community/county-calendar> and that participation includes the opportunity to comment on those matters for which comments from the public will be received.

2. Establish a Quorum

Ms. Joseph established a quorum and recognized that the BZA members electronically present were John Shepherd, Ed Robb, Kurt Burkhart, and Edward Carrington; also present were Andy Herrick, James Bowling, IV, Bart Svoboda, Francis MacCall, Lisa Green, and Marsha Alley.

3. Public Hearings

SP2022-00016 Charlottesville Catholic School Electric Message Sign (Signs #68 & 69) Property Owner: Catholic Diocese of Richmond, Walter F. Sullivan, Bishop et al

Mr. MacCall stated that the application was in accordance with Section 4.15.7(d) of the Albemarle County Zoning Ordinance. He stated that the property owners at 1191 Pen Park Road had raised concerns, and the parcel in question was TMP 61A-29 located at 1205 Pen Park Road. He noted that one of the conditions would require a lower brightness in the evening, and the property owners were aware the County was trying to mitigate the impacts of the light.

Mr. MacCall suggested changes to the fifth and sixth conditions, which were sourced from the design criteria from the ARB for the Entrance Corridor, by adding definite articles to references to electric signs. He noted that daytime (7 a.m. to 7 p.m.) and nighttime (10 p.m. to 7 a.m.) hours were defined in the ordinance. He explained that a “nit” was a unit of measurement that described how bright a display was, and the technical term was “candela per square meter.” Mr. MacCall said the applicant said the sign will darken to a black screen after 7 p.m. to eliminate light pollution, and it will illuminate after 6 a.m.

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3 Mr. Herrick suggested specifying a range of times for the last two conditions rather than leaving them
4 open-ended time frames, and said that it would be clearer to state “between 7 p.m. and 6 a.m.”

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6 Mr. Brion Draper, the applicant, said the sign had an integrated auto-dimming light function. He said it
7 was recommended that the message on the sign only change every 15 minutes, but he requested the sign
8 change every 30 seconds. He said the sign had FEMA response built in, with AMBER alerts, Silver alerts,
9 and automatic inclement weather warnings.

10
11 Mr. Francis Murphy stated that he was the business manager for the Catholic school.

12
13 Ms. Joseph opened the hearing to the public. Ms. Alley noted that no one has signed up for public
14 comment. Ms. Joseph closed the public hearing.

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16 Mr. Burkhart noted he supported the quicker message rotation on the sign.

17
18 Mr. Shepherd said the hours of illumination should be extended, and it was often light out after 7 p.m. He
19 supported reducing the brightness and suggested extending the illumination hours to 9 p.m., as well as the
20 applicant’s request to cycle through the messages every 30 seconds.

21
22 Mr. Carrington said cycling the messages every 30 seconds made the sign more useful.

23
24 Ms. Joseph noted that the sign was 410 feet from Pen Park Road and was only about 3 feet tall, and the
25 elevation change from Pen Park to the sign was about 30 feet. She said she supported changing the
26 message display time to be faster than 15 minutes per message.

27
28 Mr. Carrington said 5 or 10 seconds seemed to be long enough for passing travelers to see the messages.

29
30 Mr. Draper said if there were multiple messages, a more rapid cycle rate should be used.

31
32 Ms. Shepherd noted that the second condition in the staff report was amended from 15 minutes to 15
33 seconds for the message display time.

34
35 Mr. MacCall said anything less than a 15-second limit would potentially look like it was flashing, so he
36 would want to avoid a shorter time.

37
38 Mr. Herrick clarified that he did not suggest changing the illumination timeframes, and suggested that the
39 sixth condition state: “The electric message sign may not be illuminated between 8 p.m. and 6 a.m.”

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41 Mr. Bowling suggested that the conditions use “must” instead of “may.”

42
43 Mr. Shepherd said if an event ended after 8 p.m., it would make sense to have the sign illuminated until
44 the event was over. He suggested extending the timeframe to 8:30 p.m. or 9 p.m.

45
46 Mr. Carrington said they should include the 5,000-nit requirement from 6 a.m. to 9 p.m., and there was no
47 maximum illumination during the daytime.

48
49 Mr. Bowling said it was good to leave the 5,000-nit requirement in the condition for technical reasons.

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3 Ms. Lisa Green said they would review the conditions in the case there was a complaint for enforcement,
4 the less ambiguous the condition, the better. She said she wanted to ensure the sign was not displaying at
5 5,000 nits when it was dark.

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7 Mr. Svoboda said they could use sunrise and sunset tables as they were used for hunting and other things.
8

9 Mr. Draper said dusk-to-dawn was the same as a photocell—a photosensitive circuit that turned on in the
10 light—and the sign had an automatic light dimmer that could lower the brightness as it got darker.

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12 Mr. Herrick suggested that the fifth condition be effective between sunset and 9 p.m., that the sixth
13 condition be effective between 6 a.m. and sunset, and that there be an additional condition stating: “The
14 electric message sign must be dark between 9 p.m. and 6 a.m.”

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16 Mr. Svoboda noted the second condition still stated the sign must not change messages more than four
17 times per hour. He suggested that line be struck from the condition.

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19 **MOTION:** Mr. Carrington moved to support approval of SP2022-00016 Charlottesville Catholic School
20 Electric Message Sign subject to the conditions as follows:

- 21 1. The property is limited to one (1) freestanding electric message sign no more than 24 square feet
22 in the location, as shown in Attachment B.
- 23 2. Each message must display for a minimum of 15 seconds.
- 24 3. Content may not blink, flash, scroll vertically or horizontally, or display animation or movement
25 of any kind.
- 26 4. Content may change only through an immediate transition that does not have the appearance of
27 moving text or images.
- 28 5. The electric message sign must not exceed a maximum luminance level of 300 Nits between
29 sunset and 9 p.m.
- 30 6. The electric message sign must not exceed a maximum luminance level of 5,000 Nits between 6
31 a.m. and sunset.
- 32 7. The electric message sign must be dark between 9 p.m. and 6 a.m.

33
34 Mr. Shepherd seconded the motion, which passed unanimously (5-0).

35
36 **AP2022-00002 801 Franklin Street Appeal of a Zoning Determination (Sign #70) Property Owner:**
37 **John Harvey Falls**

38
39 Mr. Bart Svoboda said the applicant had requested an appeal of a determination, ZVIO2022-076, dated
40 May 5, 2022, that storage of portable toilets in the flood hazard overlay district was not a permitted use.
41 He said the appeal was limited to determining whether the zoning administrator’s decision was correct
42 and whether the zoning ordinance was applied correctly.

43
44 Mr. Svoboda said they were unable to verify zoning clearance issuance and that a use had begun. He said
45 on May 5, 2022, ZVIO2022-076 was issued that determined the storage of multiple portable toilets in a
46 storage yard in the floodplain was not a permitted use based on the parcel history.

47
48 Mr. Herrick said that a storage yard was a permitted use by right in the light industrial district, but not in
49 the flood hazard overlay district. He said that the applicant did not receive the appropriate zoning
50 clearances. Mr. Herrick agreed that the Zoning Administrator’s decision should be upheld.

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2 Mr. Shepherd asked if the use would be by-right if not for the floodplain.

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4 Mr. Herrick explained that a storage yard was permitted by a special use permit in the light industrial
5 district, but the flood hazard overlay district superseded all other district regulations and did not permit
6 the use by-right or by special use unless the applicant demonstrated a legal non-conforming use. He said
7 that a legal non-conforming use could not be discontinued for more than two year under state law and
8 County Code.

9
10 Mr. Svoboda explained the latest update to the overlay district occurred April 2, 2014. He said the
11 authority came from the enabling legislation for the zoning ordinance in the state code.

12
13 Ms. Joseph asked the appellant to provide their presentation.

14
15 Mr. Steve Blaine said he represented the appellant. He said his clients were Tee Valentine and John
16 Epley, who owned Allied Portable.

17
18 Mr. Epley said they had leased the property since May 2019, and it had been used as an industrial storage
19 yard prior; the site was near Moore's Creek WTP where they disposed of the portable toilet waste.

20
21 Mr. Blaine said the determination related only to the flood overlay district. He said the use was legally
22 nonconforming and had operated as an equipment storage yard prior to 2014. He argued that the code
23 section was not appropriately applied to the determination of the legal nonconforming use.

24
25 Mr. Shepherd asked if clearances were required when the owners changed.

26
27 Mr. Svoboda said if the parcel changed ownership, then new clearances were not required, but if the
28 business changed, then a zoning clearance was required.

29
30 Mr. Blaine said he was not aware if they had received a zoning clearance, but it did not determine if a use
31 was lawful. He said a use was lawful as determined by the ordinance.

32
33 Ms. Joseph opened the public hearing.

34
35 Ms. Alley read the guidelines for public comment.

36
37 Mr. Andrew Dean said he was a resident near the parcel and could smell the portable toilets from his
38 house, in addition to noise, adding that they were degrading his quality of life.

39
40 There being no others signed up for public comment, Ms. Joseph closed the public hearing.

41
42 Mr. Herrick said that the regulations for the Light Industrial district in County Code Section 18-26.2 only
43 allowed one use by-right—temporary construction storage yard—and that every other variety of storage
44 yard required a special use permit. He said that three violations were mentioned in the 2014 violation
45 notice, and that the burden to prove a legal nonconforming use was on the appellant.

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47 Ms. Joseph allowed the appellant a rebuttal.

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49 Mr. Blaine said he disagreed with the light industrial district ordinance interpretation. He noted the
50 owner's testimony and leases showed the use had been continuous.

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Mr. Epley said they were aware of the complaints mentioned during public comment.

Mr. Shepherd noted the confusion regarding what was and what was not permitted in the light industrial district by-right and said he wanted more information about what was permitted.

Mr. Herrick said that temporary construction storage was the only type of storage allowed by right in the Light Industrial district; and that all other storage yards required a special use permit. He said that what was allowed in the floodplain overlay district was at issue, and that storage yards were not.

Mr. Carrington said the use did not matter; they had to determine if the use had been established as a legal nonconforming use. He noted there was no reference to the floodplain in the 2014 determination.

Mr. Robb said the issue was whether the applicant was in violation of the floodplain overlay district ordinance or not.

Ms. Joseph asked for clarification whether the floodplain ordinance stipulated if there was a use in operation prior to 2014, then the use would not be subject to the floodplain ordinance.

Mr. Herrick said that according to County Code Section 18-30.3(d): “Any use or development lawfully existing on April 2, 2014 shall be nonconforming to the extent that it is not in compliance with Section 30.3,” which is the Flood Hazard Overlay District.

After continued discussion, Mr. Burkhart said that his preference would be to defer the decision to the next meeting to allow the appellant and their counsel to secure additional documentation as referenced by the Chair.

Mr. Robb asked if the issue was about whether there was a legal nonconforming use or a violation of the flood hazard overlay district.

Mr. Herrick said that the issue was whether the use had been established prior to 2014 and whether it had been continuously used since that time. He said that because state law required the BZA to render a decision within 90 days, if the BZA wanted to make a deferral, the request should come from the appellant.

Mr. Blaine said he could recommend that they defer if the BZA needed more evidence but noted that he believed that the facts are there to make a decision.

Mr. Epley said he believed the evidence was robust enough to support their claim.

Mr. Herrick said that it would be within 90 days of when the appellant filed the appeal.

Mr. Valentine said they could not commit to getting notarized statements from the previous tenants before August 27.

Ms. Joseph said if they deferred the item, then they would be able to submit documents after August 27. She said the appellant was permitted to continue to use the site.

Mr. Svoboda explained that a pending appeal stayed all enforcement action. He said if the appellant wished to defer, it would continue to stay the enforcement action until the matter was resolved.

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2 Mr. Blaine requested the Board address the determination at the meeting. He said the appellant would
3 work with staff to address concerns from neighboring residents.

4
5 Mr. Bowling said that wasn't enforceable and the Board would have to make a decision; if they did not
6 get a deferral, the decision would automatically be rendered when the 90-day period expired.

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8 **MOTION:** Ms. Joseph moved that the Board affirm the Zoning Administrator's determination in
9 AP2022-002. Mr. Shepherd seconded the motion, which failed (2-3). Ms. Joseph and Mr. Robb voted yes;
10 Mr. Carrington, Mr. Burkhart, and Mr. Shepherd voted no.

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12 **MOTION:** Mr. Carrington moved that Board overturn the Zoning Administrator's determination in
13 AP2022-002. Mr. Shepherd seconded the motion, which carried (3-2). Mr. Burkhart, Mr. Carrington, and
14 Mr. Shepherd voted yes; Ms. Joseph and Mr. Robb voted no.

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16 **4. Approval of Minutes**
17 **A. March 1, 2022**

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19 **MOTION:** Mr. Shepherd moved to approve the minutes for March 1, 2022. Mr. Robb seconded the
20 motion, which passed unanimously (5-0).

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22 **5. Old Business**
23 There was none.

24
25 **6. New Business**
26 **A. Review Rules and Procedure**

27 Mr. Herrick said that modifications were made to the Freedom of Information Act (FOIA), which did not
28 yet allow all-virtual meetings for certain boards, including the BZA, but did allow for more permissive
29 use of remote participation. He said that the proposed amendments to the Board's Rules of Procedure
30 were limited to Section 7, and that the Rules adapted to the changes in the law that would take effect
31 September 1, 2022.

32
33 Mr. Bowling said Board members had two personal days to attend a meeting virtually, and they had
34 unlimited sick days to participate remotely.

35
36 **MOTION:** Mr. Shepherd moved to address amending the Board of Zoning Appeals Rules of Procedure
37 at the next available meeting. Mr. Burkhart seconded the motion, which carried unanimously (5-0).

38
39 **B. Annual Report Update**

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41 Mr. Svoboda said they would provide a full report that would be addressed in more detail at the next
42 meeting. He said it would include a list of what was before the Board and what the result was.

43
44 Ms. Alley said the annual report was due to the Board of Supervisors on September 2, and they were
45 currently drafting it.

46
47 **C. Contract Renewal for Legal Counsel**

48 Ms. Joseph said the Board took action in February related to this item.
49

1 Mr. Svoboda explained when the Board took action, it was a vote on the rate. He said because the new
2 fiscal year had started, the contract was active and the Board had approved the funds to cover it.
3

4 **7. Adjournment**

5 **MOTION:** Mr. Burkhart moved to adjourn the BZA meeting. Mr. Robb seconded the motion, which
6 passed unanimously (5-0).
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8 The meeting adjourned at 5:36 p.m.
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10 (Recorded by Marsha Alley and transcribed by Golden Transcription Services)
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12 Respectfully Submitted,
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16 _____
17 John Shepherd, Secretary Board of Zoning Appeals
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