

ALBEMARLE COUNTY BOARD OF ZONING APPEALS
COUNTY OFFICE BUILDING
401 MCINTIRE ROAD – LANE AUDITORIUM
TUESDAY, OCTOBER 1, 2019 – 2:00 P.M.

Board Members: Marcia Joseph
Ed Robb
David Bowerman
John Shepherd
Randy Rinehart, absent

Staff Members: Bart Svoboda, Zoning Administrator
Marsha Alley, BZA Clerk and Recorder

County Attorney: Andy Herrick, Deputy County Attorney

BZA Attorney: James Bowling, IV

1. Call to Order

The meeting was called to order at 2:01 p.m. by Chairman John Shepherd.

2. Establish a Quorum

The BZA established a quorum with four members present. Chairman Shepherd reminded everyone that in order to overturn a determination by the Zoning Administrator, it would require a majority vote of the members of the Board, which in this case would mean three.

3. Public Hearings: AP201900004 Bufton & Maus, PLC

MR. SHEPHERD: So, with that, I would like to call the public hearing to order. Just, I feel like I'm talking to a large room with a small crowd here. Sometimes we go through the rules and procedures, but basically what we're going to do is, with a public hearing, we'll start with a staff report that's going to last for 15 minutes. We have a timing system that we do want to adhere to. You'll see the green light on when your time is wide open. The yellow comes on, Marsha, at the one-minute warning? So, when you see the yellow light come on, try to wrap it up and when the red light comes on, bring it to a conclusion. This is more important when you have a large crowd and people are waiting to get through the process, but even so, this is what we want to do.

Of course, after hearing from both the parties, we would hear from the public if there's anyone that wants to speak. Then, have a time for a wrap-up/rebuttal summation. We'll start with the staff and end with the appellants. Then, we'll discuss it, make a decision.

Also, I'll briefly just say, this is our second meeting with Jim Bowling; second time we've had an attorney representing us. So, appreciate your being part of this. It's helpful and good, and I appreciate it. Thank you. Just want to say, so far, so good. But it does create a slightly different dynamic for us that I think is very positive and good.

So, with that, I guess we can just start, if Bart, Kevin, are you guys ready to go?

MR. SVOBODA: I'm Bart Svoboda, Zoning Administrator for Albemarle County. This is Appeal 201900004. I'm going to give you a brief history. I'll speak for a moment, and then Mr. Herrick will finish up. This

property description is Tax Map 50, Parcel 49. It contains 2.4 acres. It's located in Eastern Albemarle County along State Route 631.

MR. ROBB: Mr. Chairman, can you ask him to speak up?

MR. SHEPHERD: Bart, could you speak up a little, or just get closer to the mic?

MR. SVOBODA: Is that better?

MR. SHEPHERD: Yep.

MR. SVOBODA: Okay, sorry about that.

MR. SHEPHERD: Thanks.

MR. SVOBODA: Again, this is Tax Map 50, Parcel 49, 2.4 acres. It's located in Eastern Albemarle County along State Route 631. There's one dwelling and one accessory structure located on the property. The address is 7380 and 7382 Gordonsville Road, respectively. The property fronts on State Route 631, which is an Entrance Corridor, and is zoned Rural Areas. Because this is a residential application, the Entrance Corridor does not come into play here.

The drawing I will show you is a drawing that was submitted with the building permit. If you go back one slide, you can see the existing house on the drawing. The existing house is to the center, and the proposed, or now current, structure is located in the corner of the lot on the northeast corner.

This is a brief history or summary of how we got here. On September 29 of 2017, the applicant had contacted the county and asked questions regarding a home occupation. We responded with an email, which included the 25-foot side property line for this home occupation, for a home occupation permit and a building permit. So, in the email, it was explained the process. So, in that process, we did specify setbacks. We did indicate that there was a home occupation permit required and also a building permit.

On October 18, the appellants applied for that building permit for an accessory structure. On December 7, the building permit for an accessory structure was issued, which authorized the construction. It did note that the rear and side setbacks were 6 feet, which is consistent with an accessory structure. There's a difference between an accessory structure and an accessory structure that's used for a home occupation.

On June 4, 2019, the appellant applied for the home occupation clearance, which was after the permit was issued and the inspections were final. We went out to check to see if the accessory structure met the primary structure, the 25 feet, as mentioned in the 2017 email. It was identified that it does not meet those requirements; so, we could not approve the home occupation permit.

On July 30, that was communicated to the appellant in writing an official determination, which denied the appellant's application for a major home occupation and August 12, the appellant filed the present appeal.

The language you see in this next slide is the zoning ordinance, which is 5.2.a, C1. And if you look at the highlighted section in the middle of the screen, so the red square is just a blowup and it indicates an accessory structure that does not conform to the applicable setback and yard requirements for the primary structure; so not to use for a home occupation. And the chart below that is Section 10.4, which is the Rural Areas portion of the ordinance which indicates that the side setback would need to be 25 feet.

This particular drawing is our GIS map that has identified approximately where the structure is. Again, these maps are used primarily for tax purposes, and this measurement of 14 feet is what was measured out in the field by county staff. I will note that the property line has not been surveyed. The fence that's out there was identified as the approximate line by the property owner, so that's what we're using for our information.

That's all that I have from the zoning perspective and that brief history. And I'll let Mr. Herrick take over from here.

MR. HERRICK: Mr. Chair, members of the Board, it's a pleasure to be here this afternoon. I'm Andy Herrick, on behalf of the County Zoning Administrator. The matter before the Board this afternoon is an appeal of the denial of a home occupation clearance that was sought by the appellant.

Again, as Mr. Svoboda has indicated, the applicants applied for and received a building permit for the accessory structure in 2017, and as the presentation indicated, the rules for accessory structures are that they may be within 6 feet of the property line. Staff advised applicants of the home occupation requirements back in 2017, when the building permit was first applied for. And Ms. Ragsdale's email to the applicant can be found at Attachment G to the staff report; again, in which she outlines what the requirements are, the fact that a home occupation clearance is needed. That was sent to the applicant at the time.

However, the applicants applied for the home occupation clearance only after the construction of the building; after the building was completed in recent months here in 2019. And unlike accessory structures, home occupations must occur within primary setbacks which are 25 feet. So as a result, the home occupation clearance was denied, and what's before you today, again, is the applicant's appeal. That's the only matter that's before the Board today. And again, the options for the Board are to either affirm, modify, or reverse the determination made by the Zoning Administrator, that this property did not qualify for a home occupation clearance.

So as outlined in my memo, which you all should have received as a part of the package, there's a difference between structures and uses, and it's unfortunate that there was a misunderstanding on the applicant's part. I think that there was a misunderstanding that it was one application and that getting the building permit was sufficient in order to basically clear the way for all types of uses on the property. And unfortunately for the applicants, that's just not the case.

There are separate requirements for building permits on the one hand and for uses on the other. The building permit requirements are for the structure's conformance with the Uniform State-wide Building Code, structural soundness, these sorts of things. And again, structures, accessory structures, sheds, small accessory buildings can be located within 6 feet of a property line in the Rural Areas.

And I would suggest that both applications were correctly processed. That the application for a building permit was correctly processed and that the accessory structure was approved because it met all the building code requirements. It met the lesser setback requirements for accessory structures. But then also, the application for a home occupation clearance was also properly processed because that comes with a separate and higher bar that it must be located, or that any use of that accessory structure, must be within the primary setback which is 25 feet. So again, it's a higher bar for the home occupation use; and again, unfortunately for the applicant, that building simply doesn't meet that higher bar for the intended use.

There are a few points that were made in the appellants' submittal that I'd like to address. First of all, there was no promissory estoppel in this case, as I outlined in my memo. A promissory estoppel involves some sort of

misstatement or misleading to where one-party sort of misleads another party. That other party relies on the misleading statement to their detriment. In this case, there was no misleading statement by the County. The County, again, correctly processed the building permit application, informed the applicant of the need to apply for a separate home occupation clearance, correctly processed the home occupation clearance.

So again, aside from the unfortunate misunderstanding on the part of the applicant, the County, again, properly processed and properly communicated the requirements at every step of the process. And for that reason, the Rhoads case that I understand has been cited also doesn't apply in this case. The Rhoads case involves a clear mistake by County staff, which County staff, again, in the Rhoads case, gave more permission or gave greater approval than they could under their Zoning Ordinance, and then tried to walk it back, basically. And the court said no, you can't do that; that once you've made that approval, even a mistaken approval, the County after a certain time can't revoke or pull back.

And again, that's not what the facts are here. The County is not seeking to withdraw or reverse the building permit. The County is still fine with the building permit and isn't seeking to revoke that building permit because, again, the accessory structure in that location is still appropriate. Each permit's been processed correctly.

The other thing, as I indicated at the outset, only the appeal of the Zoning Administrator's determination is before the Board today. There's not a variance application. The Board can't, on its own initiative, award a variance. The BZA is limited to the application that is before it today, and the application that's before it today is an appeal of the determination by the Zoning Administrator for which the three options are, again, to affirm, modify, or reverse. Again, a variance is not an option, based on what's before the Board today.

So again, I would suggest that this was an unfortunate misunderstanding, but it was a misunderstanding on the applicants' part, and that's simply not grounds for a reversal of the correct determination of the Zoning Administrator. I think the applicants deserve some sympathy or empathy for the situation which they find themselves, but they don't deserve a zoning clearance. And again, we'd ask the Board to uphold the finding of the Zoning Administrator. Thank you.

MR. SHEPHERD: Thank you. Mr. Maus?

MR. MAUS: Thank you, Mr. Shepherd, members of the Board. My name is Jack Maus. I am one of the applicants. My law partner, my wife, Lyn Bufton, is seated here in the audience.

Much of the history that we will be going over to start with is similar to what the county has given you. Again, we know Virginians love our history. The history was that on October 18, that Lyn submitted this application for a building permit. It was processed that day, I think it was paid, and then we waited. Waited for the County to do something.

Almost two months later, we received from the County, without any question about whether or not we misunderstood, whether there was some kind of misrepresentation, we received a building permit from the County that said that we could build this law office that we had asked for within 6 feet of the side setback. And of course, this was the wintertime, so we started clearing the property in the spring. Summertime it was ready, and October of 2018, we began construction, and we finished it in May of this year.

A final inspection was done, and although the County Attorney's office says, well, the purpose of a Certificate of Occupancy and the building permit is to ensure that the building is safely done, and this building passed every one of the tests. The County refused to give us a clean Certificate of Occupancy because there may

subject to only our personal use because it was pending zoning matters. They try to tell you, well, they're really different, but they've connected those two as far as what we're able to do with this property.

What you see in front of you is a picture of the building that we constructed, pursuant to the building permit. I'd say right now, it's a 30 by 34 law office. Here is the picture of the back of the property. Mr. Svoboda mentioned 14 feet from the drainpipe there to Mr. Hallow's fence, that is approximately 14 feet no question about it. A view of the same building from the road that you can see, there's an open field behind it. We're not going to be looking into anybody's windows or to any private areas. It's very rural.

Now, when we initially filed the appeal, of course, you have a very limited time in which to do that. And case law, you know, we've cited to the Board what we knew at the time, which as any good trial lawyer will tell you, your legal research continues up to the time you walk into the courtroom. And so, since that time, we've had some more opportunity to research some stuff, and the County Attorney has mentioned to you the Rhoads case, which we're going to get to in a minute.

But in 1994, the Virginia Supreme Court decided a case called Snow vs. Amherst County Board of Zoning Appeals. Now, in that case, what happened was the Snows got approval of a variant to setback variance. I think the current ordinance provides for 150 feet, they've got one for 100. They didn't act on it, and then what happened was the County changed the ordinance. Instead of being 150 feet, it went to 200. They applied and were told no.

So, they appealed to the Board of Zoning Appeals there in Amherst. The Board denied it. The property owners sued to the Supreme Court of Virginia, and the Supreme Court of our state, or the Commonwealth, said that the property owner only has a vested right in a zoning decision under the following circumstances: 1) there must have been a significant government act, 2) the land owner must have diligently pursued the use authorized by the permit, and 3) the land owner must have incurred substantial expense in good faith. Now in that particular case in 1994, the Supreme Court said, well, we don't think a variance is a significant government act and the Snows really didn't pursue their project diligently, so they lost on appeal of the State Supreme Court.

That was September 1994. Well, the next time the General Assembly met, 1995, January 25, several months later, Dick Saslaw introduced the Senate Bill 10.79 intended to fix the problem that was raised in the Snow case. That statute, that bill, would have amended 15.2-2311 by adding a Section C. That bill was sponsored by 17 of Virginia's 40 senators and passed the Virginia Senate by a vote of 39-0. It went over to the House and passed that body by a vote of 96-3, overwhelming support in both houses. The governor signed it in March 20 of 1995.

So, Virginia Code Section 15.2-2311(C) says that in no event shall a written order, requirement, decision, or other determination made by a Zoning Administrator be subject to change, modification reversal, by any Zoning Administrator or official after 60 days have elapsed from the date of the written order. Where the person agreed to materially change his position in good faith reliance on the actions of the Zoning Administrator or the administrating officer unless you can prove malfeasance, not just misfeasance, malfeasance of the Zoning Administrator or administrative officer, or through fraud. There's another sentence in that section, which really doesn't apply here. It says the 6-day limitation does not apply in any case with the concurrence of the attorney for the governing body. You have clerical or non-discretionary errors. Clearly, the granting of a permit saying a side setback line is a discretionary function.

In recent case law, this is what the County Attorney's office is referring you to, Board of Supervisors of Richmond County vs. Rhoads. This is just two years ago, 2017. Latest Supreme Court of Virginia case interprets this, the court said, "The plain language of the statute says it is intended to eliminate the hardship

property owners suffered when they relied, to their detriment, on erroneous or void zoning decisions.” The court said the statute was remedial in nature, and that’s kind of a code word that says it’s meant to be liberally construed so the purpose intended may be accomplished.

So, what did the court in Rhoads say? If you look at page 3 of the Rhoads decision, which I submitted through Marsha yesterday, that it be a written order requiring a decision or determination made by a Zoning Administrator. At least 60 days must have passed from then, and then a material change in good faith reliance on the act of the Zoning Administrator.

So, what do we have here? Building permit definitely constitutes a written decision or determination by the Zoning Administrator. More than 60 days have passed since that building permit was issued in December of 2017, and we indeed changed our positioning, good faith reliance, on where the County told us we could put this building. Now, staff report, they agree that they issued a building permit allowing it to be built where it is. They agree that we relied on that permit in locating it there. But what they disagree with is that the intended use of the structure was fully disclosed to the department, and they disagree that if we can’t have people in there, we can’t have clients in there, we can’t have other professionals in there, that we are, in some way, not going to be harmed.

So, here’s what we think. If you look at the paperwork, when we submitted the application for the building permit, we never used the words, “storage building/accessory structure.” That was something that the County added at some point, and we don’t know when because again, we submitted the application in October 2017. We got the permit in December. We don’t know how many hands, or whose hands, that went through in those two months. Those words were added by someone in Community Development between the time we submitted the application and the time the building permit was issued.

The building permit application, if you look at it, clearly describes it as a new structure for home office, and it says it includes a bathroom and a little kitchen. Now, I understand the difference between a shed and a home office, but you’re not going to be putting a bathroom and a kitchen in an accessory shed, alright? There was no misunderstanding on our part what we were asking the county for.

When we filled out the application, the initial square footage was for a 900-square-foot building, 30 by 30, and we subsequently expanded a little bit to 34 by 30. But somewhere along the way, and again, we don’t know where this happened within the Department of Community Development, but the square footage on the application was changed from 900 to 792. And then the part of the partial building application permit that’s in your package, the one that Jennifer Smith entered on October 18, is blank in the area “setbacks.” It wasn’t until we got that in December that the 6-foot side setback line appeared.

So bottom line is, we never said, we never did, anything that misled the Department of Community Development. Our intended purpose was always to use this building as a law office and a place where we could meet with clients, be with other persons related to our practice, whether it’s court reporters, whether it’s other lawyers, other professionals. That’s what it was always intended for. The floor plan we submitted with the application for the building permit included a conference room, a bathroom, and a kitchenette. Now, tell me why you would have a conference room if the intention was not to have people there. We made our intentions clear the entire time, and if we can’t meet with clients or we can’t meet with their parties for our practice then, yeah, we suffer a detriment. That’ll be pretty obvious.

Now, the package also mentions to you that Albemarle County, but of course, the day the final inspection was done, within an hour, the tax people were out saying, alright, your property is worth more now. And within a couple weeks, 911 came out and said, well you have the structure that people are going to be occupying, and so

because we want rescue personnel to know where to go to, we have to sign your separate 911 address. Clearly, inconsistent with what the department is now saying is that the office was only intended, ever, to be used as a shed, what you see in frame now is a copy of the floor plans were done in October of 2017, when the plans were submitted.

In the lower righthand corner is, where my arrow is, the cursor's going, that says, "Conference/Reception." You've got two offices on the left side, bath, and a kitchen. This is the conference room as it is today. That's what it's always meant to be. It's got a conference table, it's got chairs. It's got a place for people to meet. This is my office. You can see it's got client chairs here. Trial practice involves meeting with clients, meeting with witnesses. It's an integral part of what we do. It's what we always told the County from the get-go we wanted to do.

So, in conclusion, what we're asking the Board to do is to reverse the decision of the Zoning Administrator, grant us a zoning clearance for major home occupation.

Okay, so that concludes my presentation. I still have a couple minutes left, so if you have any questions, I'd be glad to answer them.

MR. SHEPHERD: Thank you.

MR. MAUS: Alright. Thank you, sir.

MR. SHEPHERD: Other questions, at this point?

MR. MAUS: No questions? Good.

MR. SHEPHERD: Not at this point, but there's, there will be discussion, and we may have questions as we get into it.

MR. MAUS: Okay. I'd be glad to answer any questions.

MR. SHEPHERD: But for now, thank you. Is there anyone from the public who wishes to speak? Is there anyone from the public here? Okay. So, that, I guess, we are now, the matter is before us. For starters, does anyone have any questions for staff or the appellant?

MS. JOSEPH: Yes. Mr. Svoboda...when someone is building a shed in the Rural Areas, when does the zoning clearance occur?

MR. SVOBODA: It depends on the use, so there's difference between a shed and an accessory structure. Well, a shed IS an accessory structure. A pool house is an accessory structure.

MS. JOSPEH: Right.

MR. SVOBODA: A garage with a rec room above it is an accessory structure. So, when we talk about accessory structures, we're not just talking about storage buildings. It can be any of those things.

MS. JOSEPH: But when is the clearance done? I guess I always assumed it was done as the footers were put in.

MR. SVOBODA: The zoning inspection is done –

MS. JOSEPH: The zoning inspection, not the clearance.

MR. SVOBODA: Not the clearance.

MS. JOSEPH: Okay.

MR. SVOBODA: The preliminary zoning inspection is done when you locate the building, which is –

MS. JOSEPH: Okay. And that was done.

MR. SVOBODA: Yes.

MS. JOSEPH: Okay. And the other thing that really confuses me, that years ago, an accessory structure couldn't have a kitchen in it because then it would be considered another kind of dwelling, and this is only two acres, and it's in the Rural Areas. So, I'm kind of confused about that.

MR. SVOBODA: So, to be a dwelling unit, a structure has to have a place for cooking, a place for sleeping, and a place for sanitation. This particular structure has two of the three, but not all of the three, not a place for sleeping.

MS. JOSEPH: Okay.

MR. SVOBODA: So, it would not qualify as a dwelling unit.

MS. JOSEPH: Okay.

MR. ROBB: Mr. Chairman, I'd like a question of our counsel. Would you describe and explain, in layman's terms, simply and completely, exactly what this Board is being asked to rule on?

MR. BOWLING: In layman's terms and in professional terms, this is a mess. And what you're being asked to do is to, by the applicant, is to give relief for this mess.

MS. ALLEY: Excuse me, Mr. Bowling? Could you speak into your mic?

MR. BOWLING: Yes. What you're being asked by the applicant to do is to give him relief in this particular case. And what he's hanging his hat on, at least as I heard it, he's not hanging his hat on the memorandum that he prepared for you, which I think was in your packet arguing about equitable relief, and I agree with the Deputy County Attorney's comments concerning equitable relief. I think he's correct on that. He's asking, as I hear it, he's asking you to give him relief under 15.2-2311(C), the statutory language of which is before you. And then he's provided you with reference to a recent Virginia Supreme Court case saying that that statute is to be considered liberally and is designed for this precise situation to provide relief for an applicant under what he says is his particular circumstances.

His point is that, at all times during this effort, he identified what he was to do as a home occupation, and it was clear on his face that he was going to build a home occupation. Staff, on the other hand, as I interpret staff's position, and I hope I'm doing this correctly, they can pipe up and correct me if I'm wrong, is that from the beginning in this, through Ms. Ragsdale's email, the applicant was informed that the applicable setback in this particular case was not 6 feet, it was 25 feet. That's in the record and in the packet that you received.

During the course of this proceeding, a building permit was issued, which muddied the waters considerably and which, if you want to analyze it this way, is the root of the cause of the problem. By that, the application from the building permit, from the applicant's eyes, stated that, clearly, I'm going to be using this for a home occupation. Instead, the building permit was issued with a setback for 6 feet which is for an accessory use only. There is the root of this problem.

Staff says you cannot give relief under the requested statute, or under any sort of equitable theory that's been advanced by the applicant. Staff has also pointed out that this is not a variance situation that's before you. One, the applicant hasn't requested a variance; two, he hasn't applied for a variance. So, you're only left with the application. The official's decision in this case was correct, and you should uphold the Zoning Administrator's decision.

Now, I don't know if I've been clear, because this not one that's so easy to state clearly, but I think I've laid out the two positions for you – or at least, I hope I have.

MR. ROBB: Mr. Chairman, not unusual, but I'm confused. I'm looking here at a building permit, page 1. A copy of the building permit for the particular structure in question, and it says, "Work description: New structure for home office." I can't understand what is hard to follow with that description.

MR. BOWLING: That's clear, but somewhere else on that building permit, on page, further back, I believe, and the other members can correct me, or staff can correct me, there's some notice that says, that refers to the application differently. Am I correct on that?

MR. SHEPHERD: I see that. It says, "Sub-application type: Storage building/accessory building." And then it's blank.

MR. BOWLING: Right, and that's the mess part that I pointed out to you.

MR. ROBB: Right, but down below, in bold letters: "Work description: New structure for home office."

MR. BOWLING: Undeniably, that's what it says.

MR. ROBB: Now, that causes me some heartburn. I understand, and that's why I asked for clarification exactly what we're being asked to deal with. I'm not sure that I still understand. I'm not sure what you could say that would make it more clear for me, so let's just move on with where we are.

MR. SHEPHERD: If I could, I'd like to sort of state, state the question you have in a slightly different way, and the way I'm seeing this. I clearly understand the difference between the approval of a structure, which is done with a building permit, and the approval of a use, which is done with a clearance. That's very straightforward to me, and I understand it. But I used to work in the Zoning Department, so I just sort of take that as clear to me because I know the process.

However, when I look at the building permit, I'm seeing, the words that come off the page to me are, "New structure for a home office," and I see the building plans that were approved, you know, that were part of that, which had conference areas. I'm just repeating, but I think they're salient points. Conference room, reception areas. There're two offices. It shows a handicapped ramp, which just implies that the public is going to be there. So, I inferred from that, and one thing that's difficult about this situation is that you're sort of up here trying to be mind readers, which we are not. But I inferred from that that, at least from the appellant's standpoint, that

they were clear in what they were asking for. I get that, and I think, if you look at the page before you, put your glasses on, you're seeing a home office.

I know that there's a difference between a home office and a major home occupation, per Supplemental Reg 5.2a, or whatever the code section is. Technically, I understand that that is correct. But somewhere along the line, I think there's a, I wonder about the process for flagging that obvious problem with the building permit. There's a, the building permit was reviewed and approved, and that process took quite some time. There's a preliminary zoning approval of that. There's a final zoning approval of that. I don't understand how, I mean, I, from the county side, that it wasn't flagged somewhere to just say, when you see the way the permit was set up, that that shouldn't have been a red flag that would've said, hold everything, we have to get this clarified.

I think there is some, I could argue this, I'm really, in my own mind, hung on the horns of this dilemma. For me, it's clear both ways. But I, I'm concerned about, I wonder about the process that let it get this far, with a permit, with those things that, to me, clearly indicated an office, a commercial-style office, as well as just a description of it in the larger font. And clearly, the applicants' words, it's a home office, where the, I think it's called a "subcategory." I mean, that's really, I guess that's a building code designation that is a class of building and it would establish what building code was controlling it.

MS. JOSEPH: John, can I ask a question too? Because it is, it is connected with what you were just saying because there is a lot of confusion. One of the requirements for the building permit is a plat, right? Or a legal description of the property. Is that something that you received? Because that would, and I guess the other thing that you showed us was this sewage disposal site plan that shows 45 feet from the sideline. Did the Building Department, did Zoning, accept this as a part of the building permit that was required by having a plat submitted?

MR. SVOBODA: That is the sketch that was in the file that located the structure on the parcel.

MS. JOSEPH: Okay.

MR. SVOBODA: It was the Health Department information.

MS. JOSEPH: So, that came from the Health Department. It wasn't part of the requirement that staff received as part of the building permit package.

MR. SVOBODA: It is part of the required paperwork that we use to review the permit.

MS. JOSEPH: Right, but it is called a "sewage disposal site plan." It's not the plat. So, I guess what I'm trying to figure out, was that used when staff looked at this and said, okay, the setback is correct for this?

MR. SVOBODA: The individual who reviewed the permit no longer works for the county. When we go back through these files, we go based on what is located in the file. And so, it would be my understanding that, based on what we have in the file, that those documents were used to review and issue this permit.

MS. JOSEPH: Okay, and that was the person that signed this, Judy?

MR. SVOBODA: No. For Zoning, the young lady's name was Emily.

MS. JOSEPH: Okay. Okay. So that was what was received and accepted?

MR. SVOBODA: Yes.

MS. JOSEPH: Okay, thank you.

MR. ROBB: Mr. Chairman, as I started this discussion with focusing on the piece of evidence here, Building Permit Copy. I'm troubled by what it says related to "Sub-Application Type: Storage Building/Accessory Structure (New Off --" What is that? What does it say? It's not complete. And then we go down till we see, "Work Description." Clearly, bold print: "New structure for home office." We go to the next page. It doesn't -- page -- it doesn't have a number, but it says, "Building application..." so forth, identifying it. And then it goes down in printed, hand-printed by somebody. I'd have to presume it was hand-printed. I'm going to ask who hand-printed that. But it says, "New structure for home office." If this is a piece of evidence that we're supposed to evaluate, then how can we get an, we need an explanation for it, if we're going to be asked to support the, hold the finding of the Zoning Administrator.

MR. MAUS: *[Away from the mic]* Mr. Chairman, I can explain that. I mean, my wife filled out the application. She would tell you -

MR. SHEPHERD: You have to get...step to the mic.

MS. BUFTON: Hello. How are you? My name is Evelyn Bufton. I am the law partner of Mr. Maus and also his wife.

MS. JOSEPH: Can you also please pull that down and speak into it?

MS. BUFTON: Sure, absolutely. Is that better?

MR. ROBB: Yeah.

MS. JOSEPH: Thank you.

MS. BUFTON: I am the one that came into the county to get the permit. And so, on this permit, where you can see that handwriting on that, pardon, on the application, yeah. I filled that out, and I filled it out at the desk at the County Planning Office.

I had never heard a home occupation anything. I didn't even understand that term, and I had never heard that term until the Zoning folks came out and told us that we needed that back corner, one corner of the office that we had built already was at 14 feet. The other corner at the back is over 25 feet.

The reason that the property, I had it situated and I did the, kind of managed all the construction, and the reason that it was set out that way is so that it was parallel with the house so that it looked correct because the property lines kind of go like this and the house kind of goes like this. So, the back side of the office is 14 feet on one corner and over 25 feet on the other corner.

But I'm the one that filled this information in. I put the 900 on there, that writing on there that says 792, that is not my writing. And the writing on the side, over on the righthand side, is not my writing. But the rest of it is.

MR. SHEPHERD: Thank you.

MS. BUFTON: If there are any other questions, I'd be happy to answer them.

MR. SHEPHERD: Mr. Herrick, I know you've been trying to hop in there.

MR. HERRICK: So, Mr. Chair, just to remind the members of the Board, under the Board of Zoning Appeals rules and procedure, each side is entitled to five minutes for rebuttal, and so, I'd like to take advantage of what the rules allow. I'd like to use that time to address many of the questions that have been raised during this time.

First of all, during his remarks, Mr. Maus indicated that the County hadn't given him a clean Certificate of Occupancy, and I have the Certificate of Occupancy that I believe you all received as well. And I think what he refers to as not being a clean Certificate of Occupancy is that the County did issue the certificate, but it specified that it was for a detached personal home office, and there's a statement in there, "Special Conditions or Modifications for Personal Use Only." And I think that there's a critical distinction here, that there can be such a thing as a "Personal Home Office" without being a "Home Occupation." An example of what one might do in a personal home office would be to complete one's taxes, balance one's checkbook, do things not for compensation, perform one's own personal business, like a study, for instance. And in that case, again, there was nothing wrong with conducting, having a personal home office, not for profit, not commercial, a personal home office as an accessory structure. There's nothing wrong with that. So, I would say that the Certificate of Occupancy was correctly issued.

We also heard Mr. Maus invoke the Snow vs. Amherst Board of Zoning Appeals case and the resulting change in the statute that took place to 15.2-2311(C), and I'd like to read that for your benefit. It reads, "In no event shall a written order, requirement, decision, or determination made by the Zoning Administrator or other administrative officer be subject to change, modification, or reversal by any Zoning Administrator or other administrative office after 60 days have elapsed from the date of the written order, requirement, decision, or determination." And then it goes on from there, but I'd like to just focus on that as the relevant portion.

For the first thing, the determination that seems to be discussed here is the building permit which, in fact, is not a determination by the Zoning Administrator. It was issued by the Building Official. It's also been more than 60 days since that was issued. That is not before the Board of Zoning Appeals today. All that's before the Board of Zoning Appeals today is the home occupation clearance.

The County isn't seeking to change, modify, or reverse the building permit. So, 2311C in the Rhoads case might be applicable if the County were seeking, at this point, to somehow revoke the building permit because the building permit has been issued and has been out there for more than 60 days. And if the County had said, "Oops, we didn't mean to issue that building permit. Sorry, we'd like it back now," that would be a similar fact pattern to what existed in the Rhoads case and that would not be allowed under 2311C.

But we're not seeking to change, modify, or reverse the building permit. We think the building permit is still valid and was correctly issued. We think the zoning clearance was correctly denied. So again, I think that the notion that relief can somehow be granted under 2311C is wrong because again, we're not seeking to change, modify, or reverse anything. Thank you.

MR. SHEPHERD: Thanks.

MR. MAUS: Mr. Chairman, one thing, and I meant to say this earlier, during his presentation, Mr. Svoboda said several times –

MR. SHEPHERD: Give me one moment. Is this a rebuttal?

MR. MAUS: We can do that if you want to.

MR. SHEPHERD: And you'll have 5 minutes? Is that acceptable?

MR. MAUS: That'd be fine. Mr. Svoboda several times in his presentation that this property is located on Route 631. That is incorrect. It is located on Route 231, which is the Gordonsville Road, the road that runs from Shadwell to Gordonsville.

Now, those who are familiar with zoning matters, land use matters, may say, okay, we understand the difference between a building permit and the zoning clearance, the structure and the use. We're not those people. I primarily do criminal defense law, and some other general law. My partner does domestic relations work. We don't know.

What we do know, what we do know, is that we applied for a permit to build our office, our law office, in Albemarle County, and we told them, we told the county what we wanted to use it for. And they gave us a permit that said, yes, you can put this 6-feet from the property line. We didn't go that close, we went 14 feet. When we staked that thing out, I was there when my wife and another person staked it out, they called the County and said, "Come out and tell us if we can put this building here." And a County official came out and said, "Go for it." And that is exactly what we did. Exactly what we did.

Now, the County Attorney would have you believe that, well, the building permit was properly issued, but you can still deny them the right to use it. What good does that do if we cannot use this office as a place to meet clients? We might just, you might just as well revoke the building permit. We don't understand the nicety between the use and the structure. We built it; we built it according to code. It was inspected every step of the way, and when the County Building Official said, eh, no, that's not exactly right, you need to fix that, we did it.

It cleared the final inspection, and to say that it is only suitable for habitation for our personal use is shameful. And it would be a shame for this Board to say that the County, that's okay, you can create this confusion, you can have this, this process break down somewhere, but we're not going to hold the County accountable for it, we're going to hold the individuals, the landowners accountable for it. That's what they're asking you to do, and that's wrong. We applied for the structure. We clearly said we want to put our office there. We gave them the plans, showed them what it's going to be like, and they gave us a building permit almost two months after we applied.

Now, I'll tell you, after the building was completed, Kevin came out and he called me up on the phone and said, "Jack, we need to know the size of your house. Square footage of your house." I said, "Kevin, why do you need to know that?" And he said, "Well, because the way I read the regs, your office can't be more than 25% of the size of your house." And I said, "No, that's not right, Kevin. Look at it. It's 25% if the office is in the house. 1,500 square foot otherwise." "You know, you're right." So, it wasn't what Kevin said first that counted, it was what Kevin said second that counted, because he realized that he had started off an incorrect assumption.

So, did Ms. Ragsdale send me an email in September of 2017 to say, "Well we think it's 25 feet"? Yes, she did. But when we applied for the building permit, and the County comes back and says, "You can put that building 6 feet from the property line," it's what they said second that counts. That's what we relied on.

There's been talk about misunderstanding and mistake. Well, maybe there was, but it was done by the people who are professionals in this who knew the difference. We did not. We relied in good faith on what the County told us we can do. We built the building exactly as we proposed it, and we believe that the only way that justice

can be done is for the Board of Zoning Appeals to overturn Mr. Svoboda's decision and say, "Look, you've got to give these people a major home occupation clearance." Thank you.

MR. SHEPHERD: Thank you.

MR. ROBB: As Ms. Joseph points out, the plat, the fact that there is no plat plan noted on this, on, the documents we have don't show a plat plan, period. Now, do you have a plat plan? Is there a plat plan that exists?

MR. MAUS: I don't understand, Mr. Robb. I don't understand what the term "plat plan" means.

MR. ROBB: The accurate measurements, the survey of the property. Do you know for sure that it is more than, or less than, 25 feet from that property? That fence doesn't mean that that's the –

MR. MAUS: It does not mean that, but the only way for us to find out is for us to incur the additional expense of hiring a surveyor to go out and search the land records. The only plat that we have of that property is an old plat that was done back when General Patton's family contributed half of what the Hallows had. The Wilsons contributed half, and there was 2.5 acres on which was placed the old Edgeworth School, which was a public school operated by Albemarle County from the 1910s to the 1940s. There have been no more current plats since then.

MR. ROBB: So, it's entirely possible that that building. Can the County prove that that building is, in fact, less than 25 feet from the property line?

MR. MAUS: As far as I know, they cannot prove it.

MR. ROBB: So, it's all, this is all just, "Maybe." We're asked to make a decision related to what's important to you and is financially important to you, based on a "maybe"?

MR. MAUS: Right. I think everybody is assuming, but we don't know for sure that the fence represents a property line. And so what the County wants us to do, in addition to putting up that building there and paying for the appeal process here, is to hire a surveyor to go back and look at all the land records, figure that out and if it is correct, then they want us to buy property from our adjacent landowner.

MR. ROBB: Can the county, that's my question, can the county identify the exact property line that you're measuring from?

MR. SVOBODA: Is that a question for me?

MR. ROBB: Yes.

MR. SVOBODA: The property line is as indicated by the owner. We do not go out and do surveys.

MR. ROBB: I'm not hearing. Repeat that part.

MR. MAUS: He can't hear you.

MR. SVOBODA: The property line is identified by the property owner under his assumption that that is the correct location for that property line, so we are going by the property owner's say-so.

MR. ROBB: So, we are assuming, then, that that fence is the property line.

MR. SVOBODA: Yes, that is according to the property owner.

MR. ROBB: I think, next question, my next point is I'm still concerned, going back to the building permit where it says, "Storage building/accessory structure (New or -)" What?

MR. MAUS: See, Mr. Robb, we don't know that because when Lyn submitted the application on October 18, there's no such subtype identified in the application.

MR. ROBB: It could say, it could say, excuse me, it could say – is it possible that it could say, "New or Office Space?" Or it could say, "New or Old Shed?" It could say lots of things.

MR. MAUS: You're exactly right, Mr. Robb. There are a lot of possibilities.

MR. ROBB: That's the official document that we're dealing with here, and I'm sorry, I, I think there's too many things that we don't know about, and we're dealing with. And over here, I'm really, I'm troubled by, you know, handwrittens that we know, I guess it was a lady there, "New structure for home office." That's clear.

MR. MAUS: Exactly.

MR. ROBB: So, regardless of what it says, you know, up in that section. Excuse me for my rambling, but I'm seriously very bothered by the determination that was made based on assumptions, things that we don't know that matter to you.

MR. MAUS: Right.

MS. JOSEPH: The complication, as we're looking at building requirements just for the structure itself, and then the use. And that's where it gets really murky because the uses is requiring that the setback be the same as the residence itself so it meets the 75-25-35. So, that's where the complication gets in, and the communication is lacking is that there are groups of people just looking at the structure itself and thinking that it was a "man cave" or a "she-shed" or something. And then, there were other people who, when it came to looking at the home occupation, decided that it was a major and that it needed to meet the required setbacks. So, that's where the communication sort of fell apart, I think.

MR. SHEPHERD: I wonder, from the standpoint of the, I'm thinking of the legal case, and I'm also thinking of the Rhoads case. Is the building, is the building permit considered, I forget the legal term, but a significant determination, is that, it would be understood –

MR. BOWLING: I think you have to, you look at words with their common meaning, and is a building permit a written order? Gives you permission to build something. Is it a requirement or decision? I think it is one of those. And is it made by another administrative officer? I think the Building Official can be seen as another "administrative officer." But the dilemma with interpreting this statute is to do that with any full accuracy, I'd need to be a judge. You'd need to have a nice bunch of decisions, and you don't have the luxury of that. The only luxury that we have available to use is some statutory language that the statute, or actually, decisional language from the Supreme Court that the statute is clearly remedial. What that means is that it's to be liberally construed to carry out its remedial purpose. And you, as the quasi-judicial body, the Board of Zoning Appeals, are to decide how to do that.

MR. SHEPHERD: So, is there an implied sort of delegation of authority from the or between the Zoning Administrator and the Building Official in the course of reviewing and approving permits? So, I mean, I know the preliminary zoning is just going out there and staking the building, but –

MR. BOWLING: I don't know what ultimately a court of law will do. Will they see a link in this? I don't know. It's certainly possible you can argue that both ways. You could say yes, and you could say no. But we don't have the luxury of saying, "Well let's just go up and take this to the Supreme Court of Virginia and find out." We need some guidance, we need some clearance.

You're left with this murky mess, and that's what you're here for, and you need to make a decision. Certainly, if you think that this statute, if it's within what you think, as you interpret the Building Official doing as part of this process, was led to a mistake, then so be it. You can make that ruling. If the county disagrees with you, their remedy is to go forward and appeal the thing. And we're not going to get any better than that. We can sit here and talk about this for a long time.

MS. JOSEPH: Well, is there any other remedy for this applicant?

MR. BOWLING: Well, he's mentioned a couple. He's mentioned that he could have gone to his neighbor and said, "Well, can I get some extra square feet?" Okay. And we talked, I think the Deputy County Attorney talked at the beginning. He said, "Well, this is not a variance set before you." I don't know whether the variance would be applicable here or not. I'm not going to analyze that because it's not before you. I suspect there's arguments that go both ways, so I'm not really sure that kicking the can down the road is going to get you any further in this murky decision that you have to make.

MR. ROBB: Well, again, let me go back to this building permit question where it says, "Sub-application: Storage Building/Accessory Building Structure (New of—)." Could that be, "(new office)?"

MR. MAUS: Mr. Robb, it could be. I have no idea how the county, in its administrative process, how they assign subtypes to this.

MR. BOWLING: And I suspect we could get the Building Official in here and we could grill him, but I'm not sure we'd get –

MR. ROBB: Well, that's why I ask the question.

MR. BOWLING: I don't know if you'd get any more clarity than what you have right now on the paper that's before you, given the amount of time that's passed.

MR. ROBB: That's why I ask. Is this building permit a significant piece of evidence before this –

MR. BOWLING: Yes.

MR. ROBB: Okay.

MR. MAUS: I think Mr. Svoboda is handing the Chairman a piece of paper that has an expanded description of what that is, what the phrase was meant to be. Again, that's something that the county assigned after the application was submitted, and we had no way of knowing that until the building permit was issued.

MR. SHEPHERD: So, what Bart Svoboda has just handed me is the, is showing what the pulldown menu there says, and the full sentence is, "Storage Building/Accessory Structure (new or alteration)." That's what the permit is. That's the subcategory of the permit.

MR. ROBB: So, this is the original.

MR. SVOBODA: Yes, so our permits are done on computer, so we don't have paper copies.

MR. ROBB: Okay, fine, but let's say that that's what it says. Still says, "New structure for home office" in italics below it. Where does it say that on this particular document? No, it doesn't. This isn't the same document.

MR. SVOBODA: It's probably a different page of the document.

MR. ROBB: It isn't the same. It's not the same as the copy of the permit that I have.

MR. SHEPHERD: I'm going to take a chance on speaking for the Building Official here just for a second. But I think you have a building permit, and there would be many pages associated with the building permit that is tracking the review of the permit through various approval processes and inspections. So, you're going to have lots of pages that will have this, the heading will be the same, but below it will be different. Is that a fair –

[Many speakers talking over each other]

MR. ROBB: Mr. Chairman, this is not a copy of the document. This is, if this the original, or the original first copy, then it's different than the one I have in my paperwork here related to titled, "Building Permit, page 1." The rest of the pages I have don't have a number on them. I don't know what they are.

MR. BOWERMAN: Mr. Chairman?

MR. SHEPHERD: Yes, Mr. Bowerman?

MR. BOWERMAN: I think you've all done a real good job up till now. I think what we need is a closure and I would suggest that if Mr. Bowling could come up with the words for a, a rejection of the Zoning Administrator's determination on this, and that we accept this as a significant, under liberal interpretation, that we accept this as a legitimate mess that can be corrected by this board.

MR. BOWLING: So, what I hear you saying is that you want to correct this under Virginia Code 15.2-2311(C)?

MR. BOWERMAN: Yes, based on what we've talked about here tonight, which is a liberal interpretation which I think, that's what this is allowing for, because clearly, you could read these minutes and you're going to see that there has been a lot of discussion about this, and there's no way to get to final answer unless you do the final answer, which is to go out and do the property line. It's just not material anymore.

MR. SVOBODA: Yeah, that burden of proof is on the applicant, not on the County. That's within the code. Correct me if I'm wrong, Mr. Bowling.

MR. BOWLING: I think you're right.

MR. BOWERMAN: Well, that's fine, but still, we could use that as the determination as to why we want to do this, correct? Under a liberal interpretation. I mean, if it's significant expense here on the part of the applicant, based upon a genuine, cloudy method of getting here.

MR. BOWLING: What I hear you saying, sir, is that you think that 15.2-2311(C) is applicable in this situation.

MR. BOWERMAN: Yes.

MR. BOWLING: A mistake was made by the County in issuing this permit, and then making a decision based upon the Zoning Administrator's determination that's before you today after 60 days had passed since the permit had been issued?

MR. BOWERMAN: Yes, because I believe that there was, there was a breakdown on the County's part in communicating to the applicant that there was a substantial difference between, in discussion of this and what had been prior approved, given a –

MR. BOWLING: There was a substantial difference between the home occupation applied for by the applicant on the building permit and how the final permit ended up, which led to all this confusion.

MR. BOWERMAN: I think that, I think the County could have been a lot more helpful.

MR. BOWLING: Now of course, the applicant could have gotten a survey right from the beginning, and maybe we wouldn't be here today at all, but that's "Monday morning quarterback."

MR. BOWERMAN: We are where we are. Anyway, that's what, if you could come up with the phraseology, that's what I would propose as a motion.

MR. BOWLING: Well, I'm kind of making it up as I go along. I'm not trying to put words in your mouth.

MR. BOWERMAN: Well, you're trying to make it sustainable.

MR. BOWLING: Well, I want your decision is to grant the applicant, the decision before you is the applicant is requesting relief from the decision of the Zoning Administrator finding that he could not use his existing structure as a home office because it was an accessory use, and the setbacks were not met. Is that correct?

MR. BOWERMAN: That is my intention, yes.

MR. BOWLING: Alright. And you want to sustain that application of the applicant, correct?

MR. BOWERMAN: I do want to sustain the application.

MR. BOWLING: So, that's what you want to make as your motion?

MR. BOWERMAN: Yes.

MR. BOWLING: And then help me out here, too, before you go further. Even if you sustain the application, as I understand it, the applicant will still have to go back and get the home occupation approval and go through that process.

MR. BOWERMAN: I don't know about that. You could help us with that.

MR. BOWLING: That's what I don't know for certain, either. Maybe staff can help me out. I don't think you ever went through the process of that. Bart, am I making sense as to what I'm trying to say?

MR. SVOBODA: Yeah, the application was applied for and denied.

MR. BOWLING: And denied, but you never got to the determination whether you should put conditions on the home occupation, and so forth and so on.

MR. SVOBODA: It's an administrative approval, so we wouldn't –

MR. BOWLING: So, you wouldn't do that.

MR. SVOBODA: Yeah, we wouldn't condition it when it is black or white. Either it meets the 25 feet, or it doesn't.

MR. BOWLING: So, it either meets it or it doesn't. Okay. So, I just confused the issue. I apologize.

MR. BOWERMAN: This is a place to get rid of the confusion.

MR. BOWLING: So, I think I've laid out the motion for you. Madam Secretary, is that clear enough for you to follow?

MS. ALLEY: I won't be transcribing this.

MR. BOWLING: Who is going to, who can read back what I've said?

MS. ALLEY: We don't have anything written to restate what you've said.

MR. BOWLING: Well then, you need a motion to grant the appeal of the applicant in this case, finding relief appropriate under Virginia Code 15.2-2311(C).

MR. BOWERMAN: And that being the motion, then the exact wording of that can be clarified after it leaves here. I mean, the exact words that were actually used. Or is that what you are suggesting the words should be?

MR. BOWLING: Well, that's what I would suggest the words to be.

MR. BOWERMAN: Okay. That's fine.

MR. BOWLING: Does the applicant see any problem with that?

MR. MAUS: No sir, Mr. Bowling.

MR. SHEPHERD: I want to, does that mean, if we approve that motion, which would be overturning the Zoning Administrator's determination, does that serve as an approval of the, can we approve a clearance, approve the use of the building for a major home occupation without having reviewed all the criteria for the home occupation? I'm a little concerned about that part of this.

MR. BOWLING: That's why I asked the question I did to the Zoning Officer.

MR. ROBB: Mr. Chairman, on that question, Certificate of Occupancy, the detached personal home office. So, we would have to, the County would have to vacate that occupancy, I would think, that certificate.

MR. SHEPHERD: No.

MR. BOWLING: I'm not familiar enough with the County procedures.

MR. ROBB: Obviously, if the County has issued an occupancy, Certificate of Occupancy, they would have to, I mean –

MR. BOWLING: Assuming – well, let's ask the Zoning Administrator for some guidance here.

MR. SVOBODA: So, the Certificate of Occupancies are issued by the Building Official.

MR. BOWLING: No, in the first place –

MR. SVOBODA: That has to deal with building code, so if you change the designation on the Certificate of Occupancy, don't know if this will, or if this won't. Meaning, if it goes from an accessory residential use to a commercial use, it may change the code requirements. I am not sure what that means to the applicant or to the Building Official. So, the Building Official is charged with making sure that all applicable regulations are met, but he's not charged with doing those inspections. He relies on the folks that sign off, like the Health Department. And when the Health Department says it's okay and your septic is working, that's one of the applicable regulations. So, if the designator changes, it could change the permit. I do not know what will happen there.

So again, the Certificate of Occupancy is issued by the Building Official. For the Building Official to revoke a Certificate of Occupancy, then the Zoning Administrator or the Health Department would have to revoke their approval on the permit, and the permit has been issued and approved and CO'ed. So, the permit's not the issue. The issue is whether or not we can grant a home occupation permit. We're not dealing with the building permit. We're dealing with the home occupation permit or, as you guys have referred to it, to the zoning clearance. They are two different things. They are not the same things. One deals with structure, the other deals with use.

MR. MAUS: Mr. Shepherd, I may have about 30 seconds left in my rebuttal, but there have been some references to the email from Ms. Ragsdale back in September 2017. One of the things you want to look at there says, "If the structure for home occupation is not yet built, you would need to apply for a building permit. The home occupation could not be approved until after the structure gets its CO." So, what we did, we built the building, we applied for the clearance.

I appreciate the consideration the Board has given. We think that it's only fair that the Board overturn the Zoning Administrator's decision, grant us the right to use this for something other than just a space that we can occupy for our personal use. And the Certificate of Occupancy, it does say "Detached personal home office," but it's only special conditions for personal use only. Under this CO, we can't have anybody in our office. They can modify it or amend it without having to withdraw it or cancel it. The County can do what it wishes to fix this problem, and we're asking the Board to encourage them to do it. Thank you.

MR. SHEPHERD: Thank you. I think we're all grappling with this.

MR. ROBB: Mr. Chairman, can I make, we don't have a motion.

MR. BOWERMAN: You have a motion before you, but it hasn't been seconded.

MR. SHEPHERD: I think the motion should be boiled down and clarified before –

MR. ROBB: Can I do that?

MR. SHEPHERD: Yes.

MR. ROBB: My motion would be, this is a substitute motion. I would move that this Board not uphold the finding of the Zoning Administrator related to AP-201900004.

MR. BOWERMAN: You want a reference to the case determination that I based this on originally? A liberal interpretation of this? Put that in part of your motion, the reference to the decision. I would second that.

MR. BOWLING: So, you withdraw your motion?

MR. BOWERMAN: Yes, I'll accept what Ed's put up.

MR. BOWLING: If you add the language –

MR. BOWERMAN: Yes, yes. I think that was the key in your discussion. Relating to us, I think that was key information that we should use if we're going to do what I suggested, as the rationale for doing it.

MR. SHEPHERD: Is there further discussion? Further discussion from anyone? Or are we prepared to vote? Do we have a second?

MR. BOWERMAN: I'll second the motion.

MR. SHEPHERD: Okay. I would just like to ask the counsel. Jim, I, simple question. Do you think that overturning the Zoning Administrator's opinion would be within the parameters, within the scope, of 15.2-2311(C), that that could –

MR. BOWLING: I think you could read it that way. It's in the ballpark. I think you have a paucity of legal interpretation about what that language means. It seems to be a remedial statute designed for the kind of situation that you find yourself in here.

I don't think there's any duplicity on the part of the landowner. Nobody's going to go out and set themselves up for this kind of experience, "So hey, I think we know we can't do this, we're just going to build it instead. And then when the setback comes up, and says we didn't meet the setback requirements, we're going to appeal to the Zoning Board." I don't think that's what's going on here. The landowners tried to act in good faith, and I think the County's acted in good faith, too. It was just a, a culmination of errors that occurred throughout the process.

MR. SHEPHERD: I want to say I'm leaning towards this. I had thought earlier that the right path for this was through the variance process. But I'm thinking now that, with all that has happened, that really is kicking the can down the road and would wind up having the same discussion again about how we got to this point, without getting into analyzing variances. So –

MR. BOWLING: I think that's what I concluded, too.

MR. SHEPHERD: There's a lot of criteria that have to be satisfied for the variance where, either with a variance, or this, either way, we're having to make a decision that is not as neat and bound up in a package as I would like it to be, either way. So, I just want to have said that for the record.

MR. BOWLING: And one thing you've got to realize, and I don't know whether this will help or not, is that the Board of Zoning Appeals serves a different function than the Zoning Official and the Building Official and the Board of Supervisors. I think that's important to keep in mind, too, and that doesn't mean that any decision you make visible is right or wrong, or any decision they make if they don't agree with you and decide to go forward to challenge it is right or wrong.

MS. JOSEPH: Mr. Chair, I do want to say something. The Rural Areas are a really important part of Albemarle County, and if you look through the uses that are allowed, by right, it is, major home occupation, is one of them, but it refers you back to meeting the setbacks. The idea of the Rural Areas is to promote agricultural use, and when we're allowing different kinds of commercial activities within the Rural Areas. I just think it's really, really important. All we're asking is that you conform to the setbacks.

So, I've been having a really hard time with this. You're going to be allowed to have a commercial activity, with more traffic than is normal, within a residential area. Maybe not so much less than you would on a working farm, but still, it's keeping that area rural, agricultural, and really kind of focused on those sorts of activities. So, I've been having a really hard time with this.

MR. SHEPHERD: I think this matter, the hearing is closed and what's before us, I'd rather just, I think we should punch ahead here. I'm getting ready to call the roll, and a sorry to do this, but I just want to be very clear on what a "yes" or "no" vote means. The motion, as I understand it, is to overturn the Zoning Administrator's determination. Is that correct? So, a "yes" is overturning the determination and approving the home occupation.

[A woman away from the mic is audible.]

MR. BOWLING: That's what Mr. Shepherd said.

MR. SHEPHERD: Is that correct?

MR. BOWLING: I mean, what you said, that's what you want to do?

MS. JOSEPH: That's what you just said.

MR. SHEPHERD: I mean, if, I thought that's the motion that is before us. The vote, the motion was stated to overturn the Zoning Administrator's determination? Or is the motion to uphold the Zoning Administrator's determination?

MR. ROBB: My motion was to not hold the Zoning Administrator's determination.

MR. SHEPHERD: Okay. So, the motion is to overturn the determination.

MR. ROBB: Right.

MR. SHEPHERD: And a yes vote would overturn the determination.

MR. BOWLING: Right.

MR. ROBB: In a positive way.

MR. SHEPHERD: Ready to vote? Marsha, please call the roll.

MS. ALLEY: Mr. Robb?

MR. ROBB: Yes.

MS. ALLEY: Mr. Bowerman?

MR. BOWERMAN: Yes.

MS. ALLEY: Ms. Joseph?

MS. JOSEPH: No.

MS. ALLEY: Mr. Shepherd?

MR. SHEPHERD: Yes. So, that is our decision. I'm going to think about this one a long time. Thank you for the consideration that folks have given to this. I hope this doesn't happen again, for everyone's sake here in the room.

4. Approval of Minutes

A. June 4, 2019

Mr. Robb said that regarding the minutes, it says, "At this time, the BZA did not adjourn a special meeting, but moved directly into the regular meeting." He asked if this was, in any way, a problem.

Mr. Shepherd replied no, pointing out that there was a statement they voted on that said that they only discussed matters that were proper to be held in a closed meeting.

Mr. Robb asked if the statement could be deleted from the minutes.

Mr. Bowling said he was not following.

Mr. Robb again read the statement and asked if there was a reason why this couldn't be deleted.

Mr. Bowling said it seemed clear that the BZA went from a specially-called meeting into a regular session. He suggested that this was perhaps a better way to describe it.

Ms. Alley asked if the correction could be restated.

Mr. Shepherd asked Mr. Robb how he would like the statement to read.

Mr. Robb answered that he would like the sentence to be eliminated from the minutes.

Ms. Joseph asked if that meeting needed to be adjourned, remarking that she had thought this had been done.

Mr. Bowling said the BZA came out of the executive session and that he also thought they adjourned that meeting.

Mr. Robb said he thought they adjourned as well, but that the minutes did not say so.

Mr. Shepherd asked if the word “not” could be eliminated so that the sentence would read, “At this time, the BZA did adjourn the special meeting and moved directly into the regular meeting.”

Mr. Bowling asked about who transcribes the minutes.

Ms. Alley said they use a transcription service and that the recording is sent to her, and she sends them back in a Word document.

Mr. Shepherd asked, with the elimination of “not,” if there was a motion to approve the minutes.

MOTION: Mr. Bowerman moved to approve the minutes with that correction. Mr. Robb seconded the motion, which passed unanimously (4-0).

5. Old Business

Mr. Shepherd said there had been talk before about BZA training and certification. He said that Mike Chandler was still perhaps holding classes as part of VAZO. He said there was also talk about some word from the County Attorney’s Office about pointing the BZA to good parts of the Land Use Law Handbook. He asked if further consideration had been made on this.

Mr. Svoboda replied that Mr. Chandler was not teaching anymore, to his knowledge. He said that there had been discussion about going away to training, but that this idea was not popular with the BZA. He said some in-house training could be held with the counsel present involving a work session to review the Land Use Law Handbook. He said staff was more than willing to do this in conjunction with himself, the County Attorney, and the Board’s counsel.

Mr. Shepherd expressed that individually, the Board members all brought with them their own experience and talents. He said that the experience of undergoing training together would be a positive thing for the Board and would help them with their analysis, as well as with strengthening their processes. He said he was in favor of the training and liked the idea of reducing the scope of the training to allow it to happen in town. He noted his appreciation for Mr. Bowling, explaining that his presence provides the Board with some training on an ongoing basis.

Mr. Bowling said that the County Attorney had done a good job over the years on monumental work on Zoning law in Virginia, and that this information was all on the County Attorney’s website and that it is updated regularly. He expressed the information was extremely helpful and would be to the BZA as well.

Mr. Shepherd said that Greg Kamptner did a good job on this as well, adding that the information was referred to and used throughout the Commonwealth. He said that he and Mr. Svoboda could discuss this further, as well as anyone else who wanted to be included, so that they could come up with more of a definite plan for the next meeting.

6. New Business

There was no new business.

7. Adjournment

At 3:37 p.m., Mr. Robb moved to adjourn the meeting. Mr. Bowerman seconded the motion, which passed unanimously (4-0).

(Recorded by Marsha Alley and transcribed by Beth Golden)

Respectfully Submitted,



David Bowerman, Secretary Board of Zoning Appeals