

ALBEMARLE COUNTY BOARD OF ZONING APPEALS
COUNTY OFFICE BUILDING
401 MCINTIRE ROAD – LANE AUDITORIUM
TUESDAY, JANUARY 7, 2020 – 2:00 P.M.

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

BZA Attorney: James Bowling, IV - absent

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

County Attorney: Andy Herrick, Deputy County Attorney

1. Call to Order

The meeting was called to order at 2:30 p.m. by Chairman John Shepherd. (The meeting started late due to snow and road conditions.)

2. Establish a Quorum

The BZA established a quorum, with four members present. (Mr. Bowerman arrived later.)

3. Annual Organizational Meeting/Election of Officers

A. Election of Officers

Mr. Shepherd stated that this was the annual organizational meeting in which they elected officers for the coming year, and he asked for a motion for a slate of officers.

Mr. Rinehart nominated Ms. Joseph for Secretary, Mr. Robb as Vice-Chair, and Mr. Shepherd for Chair of the Board of Zoning Appeals.

MOTION: Mr. Rinehart moved to approve the slate as presented. Ms. Joseph seconded the motion, which passed unanimously (4-0).

B. Review and Re-Adopt Rules of Procedure

Mr. Svoboda said there was not a formal presentation but that this was something to be reviewed annually. He said if the Board feels that there is something that needed to be changed, they could do so. He recommended that if there are questions or suggested revisions, a discussion could be scheduled for a future agenda and the Rules of Procedure could be re-adopted at a later date.

Mr. Shepherd asked if they would not be adopting the Rules of Procedure that day.

Mr. Svoboda replied that if the Board did not want changes, it could adopt the Rules of Procedure. He suggested that if changes were desired, they should discuss them but possibly move those discussions to a future meeting. He said the Rules of Procedure had been reviewed the prior year, and that there were not many changes. He said Mr. Robb facilitated part of that discussion last year, and that the changes they made had worked well that year. He said staff did not have any recommendations for changes, and that he would leave it up to the Board.

Mr. Rinehart suggested tabling the item because of the discussion they would be having in New Business, and then come back to it.

Mr. Shepherd asked if he meant coming back to the Rules of Procedure as New Business.

Mr. Rinehart replied that this would be the case, if the fellow Board members agreed on tabling it until the end of the meeting.

Mr. Shepherd said he thought this would be a good discussion. He said that while he did not have any recommended changes; he had a couple items he wanted to talk about that could be closely related to the Rules of Procedure and were agreed-upon practices. He said as far as the Rules of Procedure, he had no changes in mind.

NOTE: This item was voted on at the end of Agenda Item 7, as recorded below.

Mr. Bowerman arrived at the meeting at 2:31 p.m.

C. Review and Adopt 2020 Meeting Schedule

Mr. Shepherd pointed out that a revised 2020 Meeting Schedule had been provided at their seats, noting that the March meeting had originally been scheduled on March 3, which is known as “Super Tuesday,” with an election that day. He suggested that the meeting date be changed to March 10 which is reflected on the revised schedule. He added that he understood that the room was reserved for March 10.

After questions about the date, Mr. Shepherd clarified that the March 10 meeting was on a Tuesday.

MOTION: Mr. Rinehart moved to approve the 2020 meeting schedule as presented with the March revision. Mr. Robb seconded the motion, which passed unanimously (5-0).

D. Review BZA Annual Report for 2019

Mr. Svoboda presented the Annual Report which summarizes what the BZA has considered in the past year, noting that upon approval it would be forwarded to the Board of Supervisors as required by the Code of Virginia. He said there have been some interesting cases noting that the report itself was straightforward. He offered to answer questions about any of the specific items. He added that if the Board wanted to train on any items that they had reviewed in the past that are closed, they could talk about this when they discuss future training.

There was discussion regarding there only being two items in 2019 and a question as to when the Roslyn case was heard. It was noted that the Roslyn case was heard in 2018 and included on that annual report.

Mr. Shepherd asked if the report was something the Board would have to accept with a vote.

Mr. Svoboda replied that he would prefer this, at least by a consensus vote, to note that the Board was in agreement with the report so that they could pass it on to the Board of Supervisors.

MOTION: Mr. Rinehart moved to accept the 2019 Annual Report as prepared. Mr. Robb seconded the motion, which passed unanimously (5-0).

4. Public Hearings:

There were no public hearings scheduled.

5. Approval of Minutes

A. October 1, 2019

MOTION: Mr. Bowerman moved to approve the October 1, 2019 minutes as presented. Mr. Robb seconded the motion, which passed unanimously (4-0). (Mr. Rinehart abstained from the vote, as he was not present at the October 1, 2019 meeting.)

B. October 29, 2019

MOTION: Mr. Rinehart moved to approve the October 29, 2019 minutes as presented. Ms. Joseph seconded the motion, which passed unanimously (4-0). (Mr. Bowerman abstained from the vote, as he was not present at the October 29, 2019 meeting.)

6. Old Business

There was no old business.

7. New Business

A. Discuss BZA Training Options

Mr. Shepherd asked Mr. Svoboda to walk the Board through the options for training.

Mr. Svoboda presented the BZA with several training options which included:

- The 39th Annual Certified Board of Zoning Appeals program which the Board members could attend the sessions in Richmond that the County would pay for. He added that they would spend the night there.
- A staff training approach that could be used which would include either himself, Mr. Herrick, or possibly Mr. Greg Kamptner (County Attorney) providing some individual training that staff would be present for.
- A possible legal training that Mr. Herrick will be teaching for the program that is held in Richmond. He noted that periodically that legal training is available to the Board at the Omni Hotel. He said the difference was that if they were to hold the training in-house, it would not cost the County as opposed to sending the Board members to the Omni.
- A likely more expensive option would be to bring in an outside trainer for a personalized training class especially for the BZA rather than having staff conduct the training.

Mr. Svoboda stated that staff was willing to go with whichever training option the Board wanted. He said the travel portion was up to the Board members, noting that the cost portion was built into the budget for the BZA to take any of those training classes.

Mr. Svoboda asked what the Board preferred, suggesting that they could possibly start with the basics or about meeting procedure. He said if they attended the BZA class in Richmond, for instance, a number of staff have been through the class and could provide a summary of the powers and duties of the BZA, as well as the legal perspective, the cases they deal with, the current applicable laws, and what has changed over the past year. He said staff was open to any suggestions on what the Board would like to train on.

Mr. Svoboda suggested some topics the Board might want to cover in their training, such as variance procedures and appeal procedures, basic zoning boundaries, etc. He noted that the BZA acts as a quasi-judicial Board as opposed to a mediation type of Board. He said that because they actually act like a group of judges, training could cover what it means to stay within those parameters. He said between staff and Board members, a refresher on those points may be beneficial.

Ms. Joseph suggested the Board consider the orientation staff provided her the year prior. She said it covered everything the BZA looks at, as well as the documents available to them. She said this was very helpful to her

because what she hears from staff in going into more specifics of zoning, an orientation would perhaps bring out some of those questions, rather than looking at specific questions before being refreshed on the background and the BZA's duties. She said this would be her suggestion, but that she hadn't heard the other Board members' remarks.

There was discussion regarding the need for training versus reviewing on a case by case basis, the type of training that may be beneficial, the reminder of the obligation to the voters and citizens of Albemarle County to represent them fairly and honestly, and whether or not BZA Counsel should be present for the training as well.

Mr. Svoboda pointed out that the training that Ms. Joseph referred to would be the beginning and would lay the foundation for the basics. He said in starting out with the basics together, they can learn together about what they know and do not know and share perspectives on it. He added that it would be a good thing for the Board members to all hear the training at the same time in order to maintain consistency. He said it was beneficial that when the Board goes through the refresher training, they are all on the same page. He said if they ask a question, they all get to hear the answer and can better collaborate on what they understand or do not understand. He added that one member might have a different perspective than another and that this type of training gives them the ability to understand each other's point of view.

Mr. Svoboda said staff would try to format this training in a less formal manner. He said everyone would be in the same room, but the interaction would be like a workshop, such as the Planning Commission holds, where there is more of a discussion format with staff as opposed to a presentation. He said there would be a presentation component, but there would also be a Q&A back and forth to understand what is happening. He said it was not a formal public hearing, though it is a public meeting, but that they would want to hold it as a training session.

There was also discussion regarding how often training would occur and how long each session may last.

Mr. Svoboda stated that he would have to collaborate with Mr. Herrick on this. He said the first session would likely be limited to an hour to determine how comfortable everyone was. He said this was about how long the orientation Ms. Joseph referred to would take. He said staff would try to schedule the training for a meeting where there are no other items, and that they would devote the meeting time to a work session. He said they would open the meeting like a normal meeting, then have more of a back-and-forth Q & A training and close the meeting and go from there. He said as Ms. Joseph suggested, from there, they may find out what they know and don't know, then be able to move forward on any specifics. He said those may involve shorter or longer sessions or may lead into hiring an outside trainer. He said he wanted to have a plan but stay flexible.

There was discussion regarding the training sessions being recorded.

It was noted that if it is a public meeting, they would be recording the sessions. He said there are only certain criteria where they would go into Executive Session (or closed session), and training does not qualify under the Code of Virginia for this. He added that summary minutes could be done for the training sessions. He said the law requires keeping minutes of a public meeting, and if there are specific questions, they would like to note the answers. He said there would also be training materials to reference, and that there may not be many specifics included in the minutes. He said the purpose of the meeting minutes is to convey the general conversation of the meeting, and they would have to play this by ear. He said the Board would have to approve the minutes as well.

Mr. Shepherd said he wouldn't want to stifle conversation in this situation but wanted to have an open conversation that minutes could stifle.

Mr. Svoboda said this was one reason why they would try to schedule the training for a meeting that does not include any other items. He said there would then be no confusion about whether they are discussing the application before or after that meeting because it would all be about the training work session. He said they want to be able to have those free discussions, and that it was part of good practice to communicate in the public meeting setting.

Mr. Shepherd noted that when this was discussed in the past, there was not much interest in doing the training in Richmond.

Mr. Svoboda agreed.

Mr. Shepherd said the idea of taking advantage of expertise in-house was appreciated and seemed like a positive thing.

Mr. Svoboda said if he was understanding correctly, staff would look for a training date. He said they would have Ms. Alley try to find a date where all the Board members would be present so that it is not only scheduled for a date where there is not another agenda item, but that everyone is present.

Mr. Robb voiced additional concern regarding the recording of the training sessions and asked if the Richmond sessions are recorded.

Ms. Joseph explained that the recording had to do with the meeting of more than two members being present for the training.

Mr. Svoboda explained that if they were to send three of the Board members to the training in Richmond, they would have to figure out how to adjourn a meeting and continue it at the training. He said if they wanted to go to the training in Richmond, it would be unlikely that they would send all five members at the same time, and that they would send only two at a time. He said these were the rules of the General Assembly: that if three or more Board members get together and discuss BZA business, it is deemed a public meeting under the law, and so they have to keep their regular minutes and Rules of Procedure.

Mr. Robb asked if Mr. Herrick could answer his question about why they would need to record the comments, questions, and discussion that would become discoverable.

Mr. Herrick clarified that the meetings of the BZA do not necessarily need to be recorded, but that they need to be open to the public.

Mr. Robb agreed with this.

Mr. Herrick said he did not think that there was a requirement that there be an audio recording of the public meeting, but that the public be allowed to attend. He said if this was an important distinction to the BZA, perhaps they could accommodate turning off the recorders when it came time to offer the training. He reiterated that it would still be open to the public, as it would be an open public meeting.

Mr. Robb said he completely agreed with the public meeting aspect but objected to having the Board's open discussions become discoverable.

Mr. Herrick reminded that the minutes of the meeting would need to be kept, but that there was not a requirement that specific, verbatim word-for-word minutes be kept. He said summary minutes could be approved because, under open public meeting requirements, minutes must be kept as well.

Mr. Shepherd said it sounded as if there was a way that was accommodating all the concerns. He said they would keep minutes to generally cover the topics discussed, with significant decisions being noted.

Mr. Herrick explained the typical procedure and how it compared to requirements of FOIA. He said what FOIA requires is that the meeting be open to the public, and that there be action minutes that reflect the actions of the Board, and not necessarily a word-for-word description.

Mr. Robb asked if, then, the transcript of the recording would not be word-for-word.

Mr. Herrick replied that it need not be, under FOIA.

Mr. Robb said he agreed with having the general points of the meeting be included in the minutes, but that he again objected to having open, frank discussions be recorded.

Ms. Joseph said for the record, she did not object.

Mr. Shepherd asked staff to look at the schedule to determine when the training could happen. He said he gathered from the conversation that there was a way they could accommodate all the concerns and that they could proceed with that.

Mr. Svoboda agreed. He said that, to put Mr. Robb at ease, the minutes of a training workshop are less detailed than a regular public hearing.

Ms. Joseph asked if doing the in-house training would preclude anyone from attending the BZA certification program in October.

Mr. Svoboda replied no. He said if anyone was still interested in any of the other training to let staff know in order to make arrangements.

Mr. Robb noted there was a cost and asked who pays it.

Mr. Svoboda replied that the County pays for the training.

Mr. Rinehart asked if it was a pass-fail test.

Mr. Svoboda replied that there is homework that comes with the class and if one completes the assignments, they receive a certificate stating they are certified under the training as a BZA. He said they could still attend the training, not do the homework, and still get the benefit of the training but not the certificate. He said there was no penalty from the County if they do not receive the certification.

B. Additional New Business

Mr. Rinehart said he was speaking to his fellow BZA members and asking them to respect the fact that he would like to hold comments to what he was saying. He emphasized that he was trying to come from a point of respect to the office that they are serving in the County. He said he has spoken with Mr. Shepherd and that he was generally aware of what he wanted to talk about.

Mr. Rinehart presented feedback from having read the minutes of the October 1, 2019 meeting noting that he was disturbed and concerned from the hearing in reading the minutes of that appeal and how it was conducted. He said he was not hearing it, but that he was reading it word-for-word, knowing everyone who was speaking

(except for the appellant). He said he was concerned by the way that went about, expressing that it seemed disjointed and did not seem like many of the other hearings. He added that he was also disturbed when the Board of Supervisors asked the BZA to re-hear the case because it didn't work out the way it appeared that they wanted it to work and that he was offended by this and that it set a tone for him. He said that staff is a joy to work with, but that he felt there was a disconnect from the Board because of being asked by the Board of Supervisors.

Mr. Rinehart said that in his 25 years of being on the Board, there was apparently one other time when the Supervisors asked the BZA to re-hear a case. He said he hoped they were not setting a precedent of the Supervisors coming back and questioning the decision of the BZA in that particular case.

Mr. Rinehart said reading the minutes from that hearing also caused him to take an inventory of the new relationship that the BZA has with its own attorney, which is to provide the Board advice. He said he understood why they have their own attorney (in addition to the County Attorneys), but that it seemed like Mr. Bowling was piping in without being called on. He reiterated that he was reading and not hearing the individuals, but that this caused him to ask a question of his fellow Board members. He suggested that there perhaps be a protocol about the BZA having counsel. He asked if Mr. Bowling needed to be at every meeting. He said the Board needs to give some confidence to its Chair to potentially invite him if there is a case that the BZA needs him to be there for.

Mr. Rinehart asked how Mr. Bowling should conduct himself during a hearing, and if the Board should recognize him at certain portions. He said there is a discipline that when Mr. Herrick is asked a question or for his opinion, he comes before the microphone in a somewhat formal, structured situation. He asked if this is what the Board should be asking of Mr. Bowling. He asked if Mr. Bowling should sit at the table. He said the minutes implied that he was sitting there at the table.

Ms. Joseph indicated to where Mr. Bowling sits.

Mr. Rinehart asked if sitting at the table was appropriate and if it was appropriate for Mr. Bowling to attend every meeting. He said the BZA has a certain budget, expressing the concern that they will run through their budget very quickly if Mr. Bowling attends every meeting.

Mr. Rinehart expressed his appreciation to Ms. Joseph coming to the Board as the fifth member and keeping the Board on track. He said the way the hearing took place was all behind the Board, but that it could be a learning opportunity for the Board to structure Mr. Bowling's role going forward and to create some protocol through a team effort in a professional way.

Mr. Shepherd said he appreciated the thoughts that went into Mr. Rinehart's remarks and for bringing them forward.

Ms. Joseph said she did not sit on the Board when it did not have an attorney, and so she did not know whether or not it was appropriate. She said one thing that occurred to her was that it was also the first meeting for Mr. Bowling and, in essence, they were all trying to figure out how he fits into the process. She said if Mr. Rinehart felt, reading the minutes, that there were times it was inappropriate, that perhaps the Board needed to figure out amongst themselves when it is during the process that the Board brings Mr. Bowling in. She reiterated that it was Mr. Bowling's first meeting, adding that it was very confusing.

Mr. Rinehart clarified that he was not trying to be critical of Mr. Bowling. He said he was using this as an opportunity to do exactly what they are currently doing and that his recollection was that Mr. Bowling went back and forth with the appellant, which he felt was inappropriate.

Ms. Joseph noted the appellant was also another attorney.

Mr. Rinehart said he wanted to use this as an example to suggest that the Board, as a body, have some understanding for its Chair and how it will play out. He said, for example, Mr. Bowling or Mr. Shepherd have to check with one another to determine if Mr. Bowling is needed at the next meeting.

Mr. Rinehart said that the BZA having its own attorney was new to him, and in the past, it had worked out with Mr. Kamptner or Mr. Herrick.

Ms. Joseph explained that they are not the BZA's attorneys.

Mr. Rinehart said he understood this but that they had worked it out in the past.

Mr. Robb said that he supposed he had been spoiled by the fact that since 1969, he has dealt with prosecuting and defense attorneys and that this included some of the best in the country, based on the experiences he had in criminal cases. He said he has formed an opinion of what to expect and what not to expect.

Mr. Robb said he thought that both Mr. Herrick and Mr. Bowling are professionals, adding that he admires what they do and how they do it. He said he believed that together, they could follow the protocol Mr. Rinehart was referring to. He said perhaps Mr. Herrick would take a different position, but that he thought it was important that Mr. Bowling has the opportunity and responsibility to provide the Board with the kind of advice he gave the day of the hearing.

Mr. Robb said he did not recall where Mr. Bowling was particularly unkind or unprofessional at any point. He asked Mr. Rinehart if he thought that Mr. Bowling was.

Mr. Rinehart replied that it was more about Mr. Bowling having a dialogue back and forth with the applicant when he was representing the Board. He said that Mr. Bowling should have the dialogue with the Board and not with the applicant.

Mr. Robb said he would then say that the County Attorney would have the same responsibility.

Mr. Rinehart said there was no question that he does.

Mr. Robb said this would be arguable.

Mr. Shepherd acknowledged that the Board was finding its way with the process. He said a key takeaway he had from the last meeting was that Mr. Bowling was part of the discussion where it was more appropriate for the Board's discussion to remain amongst themselves. He said Mr. Bowling's role is different, in that, he is to offer legal advice to keep the discussion within the bounds of the legality of what they are considering, and for the discussion itself to remain with the Board.

Mr. Shepherd said that part of the process would be for the Board to direct its questions and comments in a discussion to each other and not invite Mr. Bowling into the commentary portion of it. He said they will achieve a better balance this way and that the protocols that come from that will help.

Mr. Shepherd noted that the roles are different.

Mr. Rinehart asked if Mr. Shepherd meant the roles are different between Mr. Herrick and Mr. Bowling.

Mr. Shepherd replied that everyone has different roles and that it can be confusing when either Mr. Herrick or Mr. Bowling become part of the discussion, noting that this was a difficult distinction to make. He said in terms of the structure of the meeting and how the conversation is going, and how the ideas develop and solidify, they want to be clear that people are speaking from a correct point of view.

Mr. Bowerman said that with the back-and-forth between Mr. Bowling and the applicant, and between he and Mr. Bowling, he tried to come up with the words for a motion and did not pick up on the fact that a third party was involved with that at the time.

Mr. Rinehart said he did not want to go backward but wanted to go forward. He said his point was to see if his fellow members wanted to have some sort of protocol and understanding with the Board's counsel to, through the Chair and counsel, determine whether he attends the meetings or not. He again expressed his concerns with budget.

Mr. Bowerman and Mr. Robb agreed.

Mr. Robb said Mr. Bowling is a very practiced zoning attorney who is representing BZAs and town councils. He said Mr. Bowling does a lot of this type of work and that he had a great deal of admiration and trust for his professional standards and how he presents himself. He said he hated to put Mr. Herrick on the spot but that he would ask him his thoughts on the matter. He asked Mr. Shepherd if this was an appropriate question.

Mr. Shepherd replied yes.

Mr. Herrick said it was up to the Board to decide when it wants its counsel present. He said he and the chair were speaking about the importance of following the Rules of Procedure. He said he analogizes to when an application goes before the Board of Supervisors or Planning Commission, where there is a very clearly set-out order of business in which staff speaks first, then the applicant, then members of the public with rebuttal for the applicant afterwards. He said it is a very predictable process for all involved and is something that can be reflected in the Rules of Procedure that the Board would re-adopt and adhere to.

Mr. Herrick said in terms of what role the Board's counsel had to play, he would leave this up to the Board. He said there is an important place for having the Rules of Procedure that the Board wants and then following them consistently.

Mr. Robb said that looking back, they should look back at what brought about appointing the Board's counsel. He said he did not recall that the Board asked for this particularly.

Mr. Rinehart said this was correct.

Mr. Shepherd said it was a Board of Supervisors initiative.

Mr. Robb said if he recalled correctly, he was not overly enthusiastic about it.

Mr. Rinehart agreed.

Mr. Robb said he didn't know what the enthusiasm was among the other members.

Ms. Joseph said she was not there.

Mr. Shepherd said he was there and thought it was a good idea.

Mr. Robb said whatever the case is, the Board has its own counsel, and they need to deal with what they have fairly and professionally. He said he believed the answer was with the Chair, as the Chair establishes the protocols and insists that this is the way it would be done.

Mr. Shepherd said he accepts this responsibility. He said Mr. Herrick made a good clarifying point about sticking to the Rules of Procedure. He said there is also some fine-tuning with the order of events of the meetings that would make the meetings better and that, in fact, he wanted to discuss this before leaving that day. He said he would be open to ideas from the Board members as far as the relationship with Mr. Bowling goes, and that he would do his best to be attentive to that and to make it as productive as possible.

Mr. Rinehart asked if there was independent legal representation with the Board of Supervisors and Planning Commission.

Mr. Herrick replied that the County Attorney is the Board of Supervisors' counsel. He said he sits in at Planning Commission meetings and that they are ultimately answerable to the Board of Supervisors. He said the Board of Supervisors asks that the County Attorney be present at the Planning Commission meetings.

Mr. Rinehart asked if the Planning Commission needs an attorney.

Mr. Herrick replied yes. He said the difference, however, was that under Conflict of Interest laws, there is a legal ethics opinion that says that local government attorneys cannot represent both the Zoning Administrator and the BZA at the same time. He said there are actual specific legal ethics opinions that would preclude an in-house local government attorney from also being the attorney for the BZA.

Mr. Rinehart asked if there were any other Boards in the County that have legal counsel for that Board.

Mr. Herrick replied that these included the School Board and that sometimes an attorney will sit in with the Architectural Review Board. He said he has sat in occasionally with the Board of Equalization.

Mr. Rinehart said he was curious about how those Boards are conducted and if he was raising a legitimate question as to having some structure or protocol. He said he agreed with Mr. Robb that the protocol should go through the Chair. He asked if it was appropriate for the BZA attorney to be at the table. He acknowledged this may be a petty question. He expressed that asking the counsel to come to every meeting seemed extraneous.

Mr. Herrick said the questions Mr. Rinehart raised were more procedural questions than legal questions. He said the BZA is different than other County Boards and commissions, in that, there are legal ethics opinions that preclude local government attorneys from representing BZAs. He said the Board's relationship with the attorney and what role they want the attorney to play in the meetings is up to them.

Mr. Herrick said when it came to Board of Supervisors and Planning Commission meetings, there is a clearly defined order of business in which the meetings truly are the Boards' meetings that the public is allowed to attend because they are open public meetings. He said there are very defined windows for the public participation, but once those windows are closed, it's an internal discussion among the Board members. He said this format seems to work well for local governing bodies, School Board, Planning Commission, etc. He said whether the BZA wants to follow those same procedures is a procedural question for the Board to decide.

Ms. Joseph asked if the Board wanted to look at the procedures that the Board of Supervisors and Planning Commission follow to get an idea of how they work with the attorney, or if they even mention how the attorney

works with them. She said they typically sit at the table and answer questions from the Board as they come up. She said her experience was that they did not necessarily have a conversation with the appellant, unless the Board or Planning Commission invites them to.

Mr. Bowerman said the attorney will sometimes chime in if the Boards get off track.

Mr. Rinehart said he had no problem with that.

Mr. Rinehart said it sounded as if they did not need to look into those procedures from the Board, as Ms. Joseph and the other members seemed to recall them, unless they wanted to put them in writing.

Ms. Joseph said it may be something that the BZA would want to put into writing as far as the procedure, with perhaps a sentence about the relationship with the attorney, as it could clarify things. She reminded that they were just starting with an attorney and that it might be a good idea for everyone to know what the expectations are.

Mr. Robb said at the moment, the process related to using the counsel was too new. He encouraged the Board not to overreact and try to get into providing guidelines. He said the Board should pledge its total support to the Chair and ask the Chair to establish his own protocol and rules and go by these without trying to tell the attorney what the Board thinks he ought to do.

Ms. Joseph said she understood what Mr. Robb was saying but that she was also listening to Mr. Rinehart and how uncomfortable he was feeling with this.

Mr. Robb said he and Mr. Rinehart seemed to be on the same page and that he heard Mr. Rinehart say that the Chair should have more authority.

Mr. Rinehart said the Chair should have more authority over having the counsel present at meetings or not.

Mr. Shepherd said he knew he had that authority, as he exerted that day.

Mr. Robb said he didn't think there was a problem.

Mr. Bowerman told Mr. Rinehart he appreciated him bringing up the issue. He said he was more concerned about what Mr. Rinehart said about reading the minutes and having difficulty, as that is the way a general member of the public might look at this. He said the conversation he had back and forth with Mr. Bowling was confusing.

Mr. Bowerman said that the problem was that if they came up with an approval or denial, Mr. Herrick was going to have to go to the Circuit Court with his appeal and represent the County of Albemarle but that he was on the BZA, which would have been a conflict. He said the attempt of having the Board's own attorney was to try to eliminate that conflict. He said Mr. Herrick would represent the County and if the BZA needed to, they would have someone to represent the BZA's interests, in following the rules of the Attorney General. He said the Board asked him to make motions that he was clearly uncomfortable with, at times.

Mr. Rinehart said he tended to agree with Mr. Robb, suggesting that it is either on the agenda for the April or May meeting, should they hold one, to revisit and see how the next few meetings go to determine if a written protocol was needed. He said they should allow the Chair to have a conversation with Mr. Bowling, with the knowledge of the fellow members, to determine if there was an issue. He said he also appreciated Ms. Joseph's thoughts. He thanked his fellow Board members for listening to his concerns.

Mr. Rinehart said they would need to go back and vote on the Rules of Procedure, if they would not be adding to them.

Mr. Shepherd thanked the Board for the conversation, noting that he would try to provide good guidance on it and looked forward to a future discussion to see how the process goes.

MOTION: Mr. Rinehart moved to adopt the Rules of Procedure as written. Mr. Bowerman seconded the motion.

Before voting, Mr. Shepherd said he was not clear on the moment when rebuttal is made by the staff or applicant. He said he was unsure if this needed to be in the Rules of Procedure, as it already covers that it is done after the hearing. He asked if this meant that they would expect the rebuttal after the public has spoken (but before the BZA takes up the discussion), or later.

There was discussion regarding the timing of rebuttal statements.

Mr. Herrick said he believed that the existing Rule 3C was clear in allowing for rebuttal at the close of the hearing, meaning the final comment from a non-Board member.

Mr. Shepherd said this made sense to him and that he was happy to do that. He said he also gathered that this works for staff in its presentations.

Ms. Joseph asked if after the public has spoken, the public hearing is closed.

Mr. Herrick replied yes.

Ms. Joseph asked if this was something that would also happen at the BZA - that the Chair would say that there are no more comments, the public hearing is closed, and the matter is back for discussion with the Board.

Mr. Herrick replied that this would be a good procedure to follow.

Mr. Shepherd said he does this, and means to, as it is important to make it clear that the comments from the public were complete and that once the Board starts its discussion, there is no time for the public to interrupt that.

Mr. Herrick said it makes for a nice demarcation between when the public participation is invited versus the Board's conversation. He said the public is open to watch and observe the meeting but that it is truly that of the Board.

Mr. Rinehart asked if the times allotted for speaking adequate for all parties, and if there was any reason to adjust them.

Mr. Shepherd replied that it seemed adequate.

Ms. Joseph said that having sat on both sides, 15 minutes is a lot of time and that 3 minutes can also seem long. She said she thought the times were adequate as well as generous.

The motion carried unanimously (5-0).

Mr. Shepherd said he wanted to bring up preliminary and final packets. He said what brought this up for him was that for the hearing about the home occupation, the final packet had a significant piece of information that the preliminary packet did not have, which resulted in spinning his approach to it. He said this prompts the question if the Board was happy with the way the packets were going, or if they would rather get them all at once at the end, when it is complete.

Mr. Bowerman said he always enjoys the opportunity to look at it first to get an idea of what is coming up, and then any significant changes are apparent when they receive the packet. He said getting it earlier was a benefit.

Mr. Rinehart said he tries to discipline himself to read the packet the night before, unless he has a feeling that he needs to visit the site. He said he did not need the preliminary packet.

Ms. Joseph said she did not need it, either. She said perhaps a paragraph saying what was coming up, even via email, to describe the parcel and whether it is a determination or a variance would be helpful to her. She said she gets herself very confused if new information comes in at the end. She said she did not necessarily need it.

Mr. Svoboda said the process he has been following was the one that was in place since he started. He said if they no longer want preliminary packets or want to modify what the information is, he was fine with this, but that staff would need to know what the BZA would like to see, in what amounts, and when.

Mr. Rinehart asked if Board members call to ask questions ahead of a meeting.

Mr. Svoboda said there is newer legislation that was not in place 20 years ago when the Zoning Administrator or the applicant could talk to the BZA separately. He said as part of the training, they would cover what is called "ex parte communication," meaning if there is something going on before the BZA (which is a group of judges), in a normal case, he is not allowed as the defendant or plaintiff to lobby the judge prior to the hearing. He said those kinds of questions are not acceptable, though they used to be.

Mr. Rinehart asked if this included technical questions.

Mr. Svoboda said that questions such as what time the meeting is, what it is about, and what the applicant is asking for are fine. He said anything not in the ad would be his rule of thumb; that if it is not in the ad, it is not an acceptable question, unless both parties are present, as they do not want to shift the judge's opinion one way or the other, and they want to keep the process pure.

Mr. Svoboda said that in other localities, there were discussion about how to interpret what this was, from the staff perspective or from the appellant's perspective, but that this was not taking place with all the parties in the room, and so the law came into effect about 10 years ago.

Mr. Bowerman said if they did this, they were obliged to make sure the other side knew about the interaction. He asked if this was correct.

Mr. Svoboda confirmed this was correct. He said when they did the last appeal, they included that copy of the code section to let everyone know, as it is different from what has been done in the past. He said if it is a special permit, there are some other things there that have to do with appeals.

Mr. Svoboda said that for training, between the roles that were discussed that day, as well as some of the other questions, that these would start to come out as staff conducts the training. He said they will actually be covering those Virginia Code sections. He said this would bring clarity for both staff and the BZA as they go through the training and start to figure out communication.

Mr. Robb asked Mr. Shepherd, "If it ain't broke, why fix it?" He said he liked the system they already had with receiving the preliminary package. He said he didn't know what brought up the idea of making that change.

Mr. Svoboda said primarily, the preliminary packet is the information that the applicant submitted and that this is prior to staff's report and review. He said it may be helpful to some to see what the applicant is asking versus getting staff's opinion, and more helpful to others to get it all at once. He said the final report includes all the analysis. He said perhaps they could simplify the ad to say it is a variance or a certain number of feet.

Mr. Svoboda said there was currently an application in the coming months, and that they may end up following the same procedure in the next couple meetings until they figure out how they want this information sent. He said if the members are okay with looking at or not looking at the preliminary packet, it was up to them, and that it didn't sound as if they had consensus on which way to go.

Ms. Alley added that the preliminary packet information is not reproduced and included in the final packet. She said that if they are not looking at it when it comes, they will want to hang on to it, and when the final packet arrives, they should look at them both together.

Mr. Svoboda noted that some of the information is similar, but that it may not all be the same, and so this may be part of the discussion. He said what he would not want to do for staff time is send it out twice. He encouraged the Board to decide on how to receive the information.

Mr. Shepherd said the fact that some members appreciate the preliminary packet makes him think there is no reason to change anything at the moment, but that it was worth thinking about and perhaps modifying it somewhat. He clarified that he was not asking for any changes immediately.

Mr. Robb said this was a good opportunity to commend Ms. Alley, Mr. Svoboda, Mr. Herrick, and Mr. MacCall for their wonderful work.

Mr. Shepherd said he looked forward to working more with everyone.


Mr. Bowerman remarked how he has had the preliminary packet for a long time.

8. Adjournment

At 3:47 p.m., Mr. Rinehart moved to adjourn the meeting. Mr. Bowerman seconded the motion, which passed unanimously (5-0).

(Recorded by Marsha Alley and transcribed by Beth Golden)

Respectfully Submitted,



Marcia Joseph, Secretary Board of Zoning Appeals