ALBEMARLE COUNTY BOARD OF ZONING APPEALS

COUNTY OFFICE BUILDING
401 MCINTIRE ROAD – LANE AUDITORIUM
TUESDAY, AUGUST 3, 2010 – 2:00 P.M.

Board Members:	David Bass, Chairman Lloyd (L.F.) Wood, Vice-Chairman Randy Rinehart, Secretary David Bowerman M. Clifton McClure
Staff Members:	Amelia McCulley Ron Higgins J.T. Newberry
County Attorney:	Andy Herrick, Assistant County Attorney

1. Call to Order
The meeting was called to order at 2:00 p.m. by Board Chairman David Bass.

2. Establish a Quorum
A quorum was established, and the meeting proceeded.

3. Matters not on the Agenda
None were presented, and the meeting proceeded.

4. Matters Deferred from Previous Hearings
None were presented, and the meeting proceeded.

5. Appeal Hearing

AP-2009-00007 Redfields Land Trust and Redfields Development

Mr. Rinehart: Mr. Chairman, due to a conflict that I have with living in Redfields and [the fact that] Mr. Beights and Mr. Montague have had and currently have a partnership, I obviously have a conflict of interest so I am going to recuse myself from this appeal hearing.

Mr. Bass: OK, we have an appeal today and just for the information of everybody that may be new to this, the Board of Zoning Appeals is empowered by Virginia Code to hear appeals. In this case, it's an appeal of a decision by the Zoning Administrator, and the…action that we can take is to affirm the Administrator's decision, reverse it, or modify it. So we can do three things today. In any case, if anyone is aggrieved by our decision, you have 30 days to appeal to the Circuit Court – so there is a further right to appeal a decision by this body. What we'll do is we'll ask for the staff to make us a report. We have it in writing and the Board has read it, then we'll ask the appellant to state their position, and then anyone opposed to the appellant's position. And then it will be open to the public, and anyone here that would like to address the Board is welcome to and the only thing we do ask is that you try to be brief and not say exactly the same thing that someone said just before. But we're interested in all public comment. So, Amelia?

Ms. McCulley: Thank you, Mr. Chairman. Before I get started, I wanted to mention, I'm going to hand out to the Board some copies of my PowerPoint. There are also copies available over here on the credenza of my PowerPoint, the staff report, and also a set of minutes from the Board meeting when the rezoning for Redfields was originally approved – and to which I will refer in my presentation. I also wanted to mention that the Zobrist Law Group will be representing the developer and owner of the property and I just want to start by acknowledging that this is an issue that the residents rightfully feel very strongly about – and I recognize that and want to respect that before I get started with the zoning argument.

This is all about a determination that I made that the subject property is open space, not common open space. Open space is a land use designation; common open space includes an additional restriction as to the ownership or control of the property. You're going to hear that again and again – open space versus common open space, use versus ownership or control. Because the subject property is not required common open space, it may be sold to a private party without granting control to Redfields residents. Now this outlines the areas of agreement and disagreement. The first bullet shows that both the county and the appellants agree that the subject property is limited to open space use and it may not be developed without rezoning the property. Now the appellants contend that the property is subject to ownership control by the Redfields Community Association, and that is the crux of our discussion and that is our area of disagreement.

Just to kind of give you a background on why we even have requirements for open space, well first of all, open space is undeveloped land and it's required to be set aside – particularly for development of higher densities, such as with a smaller lot when you can't make the entire recreational use of your land, you have common area for both community purposes and recreational purposes. And that allows neighborhood parks to offset the demands of the county park system. People can enjoy recreation within their own community.

Now in some cases, property is designated as open space because it's expected to remain undeveloped unless and until further rezoning action would allow other use of the property. Now that is the case with the subject property. The subject property consists of two parcels...and they total about 58 acres. Both parcels are designated as open space land use in the Redfields planned residential development application plan. This shows in red the two parcels that comprise the subject property today. Now the next one shows you still the subject property and the two parcels, but you'll see outlined in gray are areas that have been designated as common open space. Now there are 14 different parcels that have been dedicated to, and are in the ownership of the Redfields Community Association. And they total all together the 14 parcels over 83 acres. That is the required dedicated common open space within the control and ownership of the Redfields Community Association.

So again, back to this key issue: it's open space versus common open space. These are zoning terms; unfortunately they're very technical. Most people wouldn't be expected to understand the differences of them. Open space is basically, by definition, land that's undeveloped and undisturbed. The subject property meets that use requirement. Now the second definition is for common open space, and what you'll see is the difference is common open space adds the requirement for ownership or control by the residents of the development. Now let me explain that further with this next slide.

The dedication of land, the common open space that the Albemarle County Zoning Ordinance requires for a planned residential development - which is what Redfields is zoned - is 25% of the area devoted to residential use. Now in the case of Redfields, the developer offered to go beyond that 25% and instead increase the amount of open space up to 30% - and you can see listed on the screen, Proffer #6 is that offer to go beyond the minimum ordinance requirements and go from 25% to 30% as the standard of common open space in Redfields. So that means in Redfields, instead of 25% being the requirement of land that has to be dedicated and somehow in the control of the homeowner's association community association, that percentage is 30%. And again from that exhibit that I showed you with the areas in gray, there are over 83 acres that comprise the 30% required

common open space in Redfields. So the next couple slides kind of walk you through the basis for my determination.

First of all, the common open space requirement of 30% has been met without the dedication of the subject property. Common open space parcels have been previously dedicated to the Redfields Community Association by subdivision plats and deeds and so forth to make that conveyance. Now the second reason is that if you would follow the legislative history of Redfields, through the record of all the rezoning actions, how has this property been treated? Well, it's been called something about as close to a residue as you can get. And this is where I'm going to refer to the minutes, but I'm going to show you the plan for just a second.

So in this case, the subject property is more like a residue with a limit of open space use. It may be the subject of future rezoning action, it may not. And who knows whether it would be approved or not? But that's the status it was left in the original rezoning discussion with ZMA 89-18; at that point, this area was called Phase 6 – later it was called Phase 5 – but anyway, Phase 6 in that discussion, it states that the subject property is not required to be dedicated but could be subject to future rezoning action.

Now if you take the Board minutes...that are dated...January 17, 1990, and if you turn over to page 107 on the top, I'm going to read to you – and this is out of the staff report addendum, and this is the Board of Supervisors meeting..."a total of 561 units may be approved with the dedication of all open space except for that shown in Phase 6. Phase 6 is not approved for development and is open space. The applicant has stated that they may seek to amend the PRD at some time in the future to allow development of Phase 6; however the current proposal does not allow for development in Phase 6, and no development in Phase 6 can be supported at this time.

Well the reason for that is that this land lies outside of our designated development area, so it would be inappropriate in terms of the Comprehensive Plan for this property to zone it for development at that time and at this time. So that's from 1990; there's another mention and answer to a question from a Board member on Page 110, because some neighbors got up at a public hearing and expressed some concerns about the open space, and at the top of Page 110, it's the third paragraph, in response to a question from Mr. Bowie, Mr. Keeler – who was the Chief of Planning – said the developer could build 561 units before declaring any portion of Phase 6 as open space. Once he goes over that, and I'm paraphrasing if you'll bear with me, he will have to dedicate the open space shown in Phase 6. And, basically, that just restates what the staff report said.

Now let me show you...on the plan... this is the approved plan with that rezoning with the 1990 action by the Board of Supervisors. This is the entire application plan, as we call it, which is the plan for development for a planned development – it's called an application plan – now the subject property is here and here, if you can just follow my cursor. Now the next view I'm going to show you is zoomed in, so you can read what that plan said about this land. It said, "Use – open space." Now at that time, there was some hope that this would be future development but the note says, "Development subject to future PRD amendment; use – open space."

OK, so that's the original rezoning for Redfields and it goes with the minutes in 1990 when the Board of Supervisors...the one that I was just reading from. So then later, in 1998, there's another rezoning, and in response to a question at a Board meeting about this property – which at this point, for some reason with renumbering is called "Phase 5" instead of "Phase 6," staff says that Phase 5 is presently open space – that was left to the future and not necessary for density reasons. Let me explain density reasons. If you cluster your development and do smaller lots, then you have to designate open space – common open space – and what the staff is saying is that it wasn't necessary to dedicate this land because there was enough other land that was dedicated to meet the 30% requirement in Redfields. So this was land that was open space use but didn't have to be dedicated.

So in conclusion, for those two reasons, the first is that this subject property is not required to be common open space because the 30% dedication requirement for the proffer has been met without this property; and secondly, the public record shows very clearly that this land is not intended to be common open space but must remain undeveloped until rezoned. So I ask the Board to uphold the determination of the Zoning Administrator.

Mr. Bass: Thank you. Does the Board want to ask questions of Amelia, or would you like to hear from the appellant? Would the appellant come forward please?

Mr. Kroner: Good afternoon. My name is Robert Kroner. I'm an attorney here in Charlottesville and I'm here in capacity as attorney representing the Redfields Community Association, Inc. and Mr. Barry Condron, who are the petitioners in the matter before you. And I have nine pages of remarks, most of which I can dispense with now because Amelia and I are on the same page on a lot of this. Where we disagree...is the characterization that our conflict with the county is whether or not this is "common" open space or open space. And it is the petitioners' position, we agree, it is not common open space. It was never held or determined by the Board of Supervisors that it should be dedicated to the [homeowners] association during the initial rezoning application and in subsequent actions by the Board of Supervisors. The Board directed that the property be shown on the plan that Amelia put on the overhead, the revised land use notes to include Phase 6 as "open space" – initial caps – O.S. And it is the petitioners' position that in so designating the land as open space that it does fall within the purview of Section 4.7.D of the Zoning Ordinance, which does not mandate that open space will be conveyed to the [homeowners] association. We have not suggested that. We have only suggested that it be subject to an encumbrance. Section 4.7.D specifically states "Open space may be privately owned, or dedicated to public use. Open space in private ownership shall be subject to a legal instrument ensuring the maintenance and preservation of the open space that is approved by the agent and the county attorney in conjunction with the approval of the subdivision plat or site plan." Clearly, it's open space in private ownership.

The portion of the Zoning Administrator's determination to which the petitioners took issue was the statement that it could be freely transferred to a third party, which is true, but what she neglected to include was the 4.7.D encumbrance dealing with the preservation of the open space. And rather than walk us through the several years of action by the Planning Commission and the Board of Supervisors, Amelia and I are on the same page in that respect, that it is open space. Where we take issue with Amelia is her characterization that the open space designation was a term of convenience and not a term that falls within the meaning of Section 4.7 of the Zoning Ordinance. If in fact the Board or the Planning Commission or the applicant/owner had intended for the property to be listed as "residue" or future development, the original plan that was adopted and approved in 1990 could have shown it as available for future development.

It was characterized as open space; the Board of Supervisors specifically directed that the notes to the plan show that it be open space. And it is our position that since that designation has never been changed, amended, modified by the Board of Supervisors, it is open space – albeit privately owned – that it is subject to the requirements of Section 4.7 of the Zoning Ordinance. We are not asserting that it must be conveyed to the [homeowners] association. The community association has been waiting for quite a few years, simply that the developer comply with those requirements of Section 4.7D, and it is in that respect that we are petitioning that the zoning determination letter be modified to specify that the property is open space and subject to the requirements of 4.7.D of the Zoning Ordinance.

I'd be happy to answer any questions you might have.

Mr. Bass: Mr. Kroner, read me 4.7.D again. I didn't bring my code book, wish I had.

Mr. Kroner: Sure. "Open space may be privately owned or dedicated to public use. Open space in private ownership shall be subject to a legal instrument ensuring the maintenance and preservation of the open space that is approved by the agent and the County Attorney in conjunction with the approval of the subdivision plat or site plan." That second sentence, quite honestly, is typical of an ordinance written by lawyers. It's confusing as heck, but I think the way I interpret this – "Open space in private ownership shall be subject to a legal instrument approved by the agent and the County Attorney. The instrument ensures maintenance and preservation of the open space." And Amelia, I will ask if you agree with that interpretation since I shifted the clauses around just to make the sentence more meaningful.

Mr. McClure: Mr. Kroner, is there such an instrument in existence?

Mr. Kroner: No sir, there is not.

Mr. Bass: Why not?

Mr. Kroner: Well, that's really the owners association as well, that the county has not required that that be proposed or presented by the landowner/developer.

Mr. Bass: There's no history though that would indicate that one was drafted and not executed, or that there was a dispute as to its language.

Mr. Kroner: We have found no evidence of that...there was nothing in the files to suggest that it had ever been prepared.

Mr. Bass: Alright, so your suggestion is that a modification might be appropriate. If we were to make a modification here, I guess we'd have to start with a legal instrument wouldn't we?

Mr. Kroner: It seems to me that at this stage of the proceedings your authority is limited to modifying the zoning determination letter...and the portion of that letter...in particular on Page 3, first paragraph towards the end it says "there is no specific proffer language that requires Parcels 1 or E-4 to be maintained as open space," and the third paragraph on that page, "in conclusion, the several zoning approvals related to Parcels 1 and E-4, including the current application plan with relevant proffers, do not prevent Parcels 1 and E-4 from being sold to third parties." Interjection here, we agree with that. "However, there are no expressly permitted uses other than the trail shown on Parcel 1 without approval of a rezoning to establish uses on those lands." We agree with that. What we don't agree with is the suggestion that the property can be conveyed without complying with 4.7.D with the instrument that encumbers the property.

Mr. Bass: OK, let us think about that. Any other Board questions for Mr. Kroner? If not, is there a rebuttal?

Mr. Aldous: Good afternoon, my name is T.J. Aldous, Zobrist Law Group. I represent the developer in this case, and Mr. Percy Montague, who is with the developer, is present here with us today. We don't have much more to add than what Amelia has already stated on behalf of the county. We would note, however, that the definition of open space referred to by Mr. Kroner is simply that, it's just a definition of what open space is – it doesn't require in any way, nowhere in the code does it require that it be dedicated. The documents themselves that govern the association don't require anything to be dedicated; this is only a zoning matter, and clearly the county has previously decided this is a zoning matter. In 2005, subsequent to the issues that were raised by Mr. Kroner, the county said "since you want to develop this open space parcel," talking to the developer, "you will need to submit the fee and a ZMA application that meets all the submittal requirements of the Zoning Ordinance Section 8.5. This will require an amended application plan for the whole PRD, including a summary of the lots, etc. It should also show what you want in the Phase 5 to demonstrate and that you will meet the PRD

requirements of a minimum of 25% open space overall, and not exceed the amount of dwelling units already approved." So even in 2005 the county understood, and everybody understood, that this was supposed to be, it was open space intended for future development or potentially future development because the 30% requirement had already been met.

I would also note that the Board has no authority to create an easement in this case, which is what the appellants are requesting – that has to be done by the developer in this case, and they have not done that simply by... in any zoning matter you can't just create an easement on the property. And finally, just to note as well that the intent is what's most important here. The Board has required, this is a legislative matter, the intent is always what's required by the code – I'm talking about the Virginia State Code – requires this Board to consider the intent of any legislative matter, and clearly Amelia has gone back and shown that the intent from the 1980s all the way through the present has always been by the developer not to create any kind of encumbrance on this particular property. It was always intended to potentially be developed some time in the future, and there's no requirement in its mind ever to have dedicated this property simply as open space forever, or place any kind of easement on it. Now the proffer was for 30% common open space, it's met that requirement, and there's nothing further that they are required to do under their proffers.

The 2005 matter that I referred to is a final determination letter from the Zoning Administrator, and it was dated October 25, 2005. Thank you for your time.

Mr. Bass: Now if there are no Board questions, would the public like to address the Board please. And when you come forward, just state your name and speak closely into the microphone so we can pick it up for the minutes.

Mr. Condron: Hi, my name is Barry Condron. I am one of the appellants on this appeal. I am not an attorney, I'll make that clear. First of all this is a highly complex situation. I am a resident there, I've been there for 13 years, and I have tried to dig through all the paperwork here and it is extremely complex and there are some ambiguities here.

However, I'd like to address some aspect of intent here, as was just pointed out. That's the intent of the developer when I moved there. When I moved there 14 years ago, I secured a real estate agent from Montague Miller, and I asked specifically for a place with a nature trail. They took me there, brought me there to that place, some of the nature trail signs are still there from that time. There was a trail marked in, they gave me a wonderful brochure with a map on it, with the trail marked. I was still uncertain, so I went back to the Montague Miller office and got one of the seller agents that were selling the property there. They took me out and did the same, so I felt pretty confident that this property – Redfields – was being sold with this property, Phase 5, with the intention of marketing a nature trail. You know, there's kind of a frustration on the part of many of the residents, which is that you've got this huge bucket of documents that we can't really interpret very well. And if you get enough attorneys in there, they'll find a way out of it, and that this is what's going on. The intention originally was to sell us our property with that nature trail. They want out of that now, and I think that's just wrong. Questions?

Mr. Bass: Thank you. Anyone else, please? No other public comment? Please come forward, ma'am.

Ms. Corgan: Hi, my name is Marie Corgan and I'm a new resident to Redfields. We purchased a home that backs up to this property. The reason we bought the home is because we had this open space behind us; it was beautiful. The property itself is actually a very, very steep hill, and between our house and this area behind us there is another development – and I believe that's Mosby Mountain, with 22-25 acre lots. So there is this portion of land that is sandwiched between these two huge developments. I know personally that I would have never bought this home if I knew that this land was going to be developed.

If it is developed, I'll absolutely sell my home, but I can't imagine somebody going into that steep hill and trying to put roads in, sewer systems. It will be a nightmare for all of the people that live in that area that back up to this property. It will ruin the area and the ambiance of the neighborhood – not only for our neighborhood, but for the development that's behind it. Everyone that lives there enjoys the space; if anyone is interested in preserving the ambiance of their neighborhoods, of future developments, if someone goes in there and develops that property the whole entire place is ruined and it will be ruined forever because you won't be able to go backwards.

And I know there are other people that feel the same way I do, that if they knew that this land was ever going to be developed, and especially putting in high-density units or anything of that sort, they never ever would have bought the property. And so I'm hoping that the developers can consider what damage they would do if they went in there and did that. I know money speaks all the time, but there are some things that matter more. And that's my opinion. Thank you.

Mr. Bass: Anybody else, please? Just come forward, folks. You don't have to raise your hand.

Ms. Davis: Hi, my name is Christine Davis, and my husband and I recently purchased in late 2009, 120 Overlook Drive – which abuts Parcel E-4. And we bought this property not knowing the history of all this stuff. We did see the trail back there and the implications that that would be green space. We're zoned rural, and we're in the neighborhood of Sherwood Farms…and we're of course concerned about the issues that many Albemarle County residents are. We're concerned about the rural nature of the county, and I happen to be zoned rural, and development in that parcel I feel would affect my property values quite adversely and of course not be in accordance with the rural nature of Albemarle County.

Mr. Bass: Thank you. Anybody else? If not, the matter is before the Board. We may come back and ask some of the parties that spoke to clarify, but at the moment we'll discuss it.

Mr. Bowerman: Can I ask Amelia a question? Amelia, did the rezoning in 1991 result in the extinguishment of any of the residential lots, because the PRD was reduced in size, correct? You took 7 ½ acres from PRD to rural, and moved a little bit more than ½ acre from R-1 to PRD.

Ms. McCulley: I have to check my notes on that, Mr. Bowerman. I do have that file and I can look into that a little bit further if you give me just a minute.

Mr. Bass: Just to share some thoughts with the Board while Amelia is looking that up. It's clear that this Board cannot rezone the property – that's not our purview. We're just here to make a decision on the Zoning Administrator's determination, but it seems to me that we certainly can't put deed restrictions on the property either, although in my opinion it might have avoided a lot of unhappiness and conflict if the Planning Commission at the outset had anticipated that perhaps something like a legal instrument would have kept this clearer for future reasons. It doesn't seem to be an issue as to the potential transfer of ownership. All parties seem to agree that there could be a transfer of ownership, although it would still be subject to rezoning in order to change its use. So I think we're down to whether the argument about open space not needing to be common open space carries with it some sort of restriction. Mr. Kroner says, according to 4.7.D there should have been a restriction with it. I'm still struggling with 4.7.D.

Mr. Bowerman: I don't…that part of the ordinance was in existence in 1990? It hasn't been modified since then?

Ms. McCulley: That part of the ordinance was in existence in 1990, let me confirm that there haven't been any later amendments.

Mr. Bowerman: Because it was 20 years ago, my memory's not perfect, and I don't remember any discussion of the residue open space of being of any note to the Board or the Commission. The minutes don't show that.

Ms. McCulley: There's been an amendment in 2009, but I don't think it was substantial and I don't have that information with me.

Mr. Bowerman: So you're saying that you think the ordinance as it exists now in this matter was the same in 1990?

Ms. McCulley: It's substantially the same.

Mr. Bass: Andrew, do you have comments on this that we should have at this point?

Mr. Herrick: Well my only comments to the Board would be to direct the Board's attention to Ms. McCulley's original determination letter, in which she makes four determinations. And those are really the issues before the Board today. Her four determinations were, "It's my determination that nothing in any of the zoning actions discussed below prevents the property from being sold to third parties." So that's her first determination. "It's my further determination that these two parcels are not required open space at this time." That's her second determination. "And therefore are not required to be conveyed to the Redfields Homeowners Association." That's the third determination. And then the fourth determination, "It's my further determination that prior to any future use of these parcels, an amendment to the Redfields Planned Residential District zoning must be obtained." So those are the four issues, the four determinations that are before the Board today. Basically, it's up to your discretion to decide how to rule on each of those. But I would ask that the Board sort of limit itself to those findings, because those are the determinations made by the Zoning Administrator.

Mr. Bowerman: Mr. Chairman, one of the things I noticed that I realized in reading over this, that if this is proposed for redevelopment and application is made to amend the PRD, it would go before the Board, which is a legislative matter. And if it needed to be interpreted, I think they would do it. And if it needed to be rectified, I think it would be there. And it seems to me that the four points that were in Amelia's letter are the things we should deal with. And I'm in agreement with Amelia on those issues, and Andy, that we're confined to those four issues. But if a further determination needs to be made about intent, it's not our purview to do that.

Mr. Wood: Just to expand upon what Mr. Bowerman is saying, it's clear to me that in the minutes when this was finally approved by the Board of Supervisors, that it makes clear that any further development of this property would have to go through the zoning process – which means a site plan would have to be submitted, approved by the staff, go to Planning Commission, public hearing, and then before the Board of Supervisors. And going through that process any determinations that Mr. Bowerman was speaking of and what's being requested today would seem to be made at that time. It's clear that it was not made in the minutes of January of 1990. So the four points that we have to consider today are very clear, and the minutes when this was approved by the Board of Supervisors – which has the final determination – is very clear.

And I understand the association's concern and having enjoyed that property for so long, but I think that if it is ever developed your concerns would be solved at that time – and you would certainly have more than ample opportunity to come before the Planning Commission and the Board of Supervisors, and those determinations would be made at that time. As far as we're concerned now, Mr. Chairman and fellow Board members, I think that the Zoning Administrator's position and determination is very clear. So I think we are here to either affirm it or amend it or deny it. And I feel comfortable that everyone is being heard, and I feel comfortable that what's

been presented is very clear. And Mr. Chairman, I'd be prepared to make a motion if there is no further discussion.

Mr. Bass: Well we could, and this is just for the matter of debate, if we thought 4.7 – Amelia didn't address 4.7.D – this was new to me today. And if we thought that was relevant we could modify by saying that we uphold the determination but that it needs [to be] subject to the conditions of 4.7.D that deals with open space, and it's consistent with her determinations. I'm just not sure whether that would be useful. I'm anxious to have other people's opinion. I remain troubled by the fact that there was vagueness at the time, and obviously it was confusing enough that homeowners and purchasers since then have made assumptions that open space was going to be in compliance with something that would ensure maintenance and preservation – which is 4.7.D.

Mr. Bowerman: Looking at it the opposite way, you could say that the absence of that indicates that we believe it was residential or residue and could be developed in the future by not having that.

Mr. Bass: The subsequent rezoning. Well you were there, Mr. Bowerman.

Mr. Wood: Mr. Chairman, to further support Mr. Bowerman's position, if there was a concern at the time it would have been addressed. And as we are speaking here today and the question has been asked by Mr. McClure, there is no legal document that says that. So it would be difficult to impose 4.7.D after the fact and here at today's meeting. So I think we're here to make a determination of whether the Zoning Administrator is correct and made right thing or not. I'd think we'd be stepping over our bounds if we had to come back and modify it and impose the position of 4.7.D after the fact.

Mr. McClure: Mr. Chairman, I agree with Mr. Wood.

Mr. Bass: Amelia, did you look at 4.7.D?

Ms. McCulley: Yes sir.

Mr. Bass: Would you comment on that for my sake at least.

Ms. McCulley: I'd be happy to, thank you for asking. There are two reasons that 4.7.D do not apply to this property. One is that it only applies to common open space. If you look at these two definitions, the difference between regular old open space and common open space is the statement here about "owned or controlled by the residents of such development." Now 4.7.D in the reference that Mr. Kroner is making to the legal instrument about the maintenance and preservation of the open space, that has to do with control by the residents of the development. And it's my argument, and it's our practice, that that does not apply unless that land is required to be common open space dedicated or in some way eased and under the control of the residents. So, reason number one is 4.7.D only applies to common open space – which this is not. Because that's the difference, the absence of any reference to control with regular open space as compared to common open space.

The second reason is that the legislative history is very clear – if there was any intention to have some kind of perpetual easement or control that would bind up the future use of the property, then it wouldn't have been discussed the way it was – that it was entitled to some potential future rezoning action, so it would be inconsistent with all the legislative history to have some kind of legal instrument, as Mr. Bowerman said, that would bind the future use and control of this property.

Mr. Bass: Mr. Kroner, do you have a comment on that, just before we finish here.

Mr. Kroner: Well the only comment I would make that in terms of construing the ordinance and following the Virginia rule of strict construction, the language in the ordinance does not make that distinction between common open space and open space – it applies to open space and then it distinguishes between privately owned open space and open space that is required to be dedicated to the public, which would be my way of looking at the common open space that is conveyed to the owners association. Subsection D makes that distinction between the private and the property that's required to be dedicated, and says "privately owned open space shall be subject to…legal instrument ensuring the maintenance and preservation of the open space." And that's the only area where Ms. McCulley and I are really disagreeing on this – especially in light of the Board's clear instructions when the property was initially zoned that this property be open space.

Mr. McClure: Amelia, how many units are there?

Ms. McCulley: I'm afraid I don't know that answer, and I can answer…Mr. Bowerman's question. With the 91 rezoning, there was land that was rezoned to PRD but there was more land that was downzoned to rural areas and the unit number changed from I think 656 to a smaller number of 520.

Mr. Bass: Is there any other Board discussion, or would someone make a motion?

Mr. Wood: Mr. Chairman, I'd like to move that, after hearing all sides of this, that we affirm the Zoning Administrator's decision. And my motion is made on the basis of the four reasons that are stated in the minutes.

Mr. McClure: I'll second it.

Mr. Bass: Seconded by Mr. McClure, moved by Mr. Wood.

Mr. Newberry: Mr. McClure?

Mr. McClure: Aye.

Mr. Newberry: Mr. Wood?

Mr. Wood: Aye.

Mr. Newberry: Mr. Bass?

Mr. Bass: Aye.

Mr. Newberry: Mr. Bowerman?

Mr. Bowerman: Aye.

Mr. Wood: Thank you all for coming, those of you who expressed your opinions. And the matter obviously is not finished yet, it needs to be considered if there is a rezoning request, by the Planning Commission and the Board of Supervisors. There have been some excellent points made today on both sides, so stay with it. We appreciate everybody coming.

6. New Business
None was presented, and the meeting proceeded.

7. Old Business

Mr. Bass asked Mr. Herrick if he needed a motion for representation on the Re'store-N-Station. Mr. Herrick indicated that he did not, noting that there is a petition for a writ of certiorari that's currently pending, and once the writ is entered by the court the county would be providing the documents in the case.

Mr. Bowerman asked if a court date had been set for the property on Route 29 North with an issue of displaying imported rugs. Mr. Herrick responded that the court date is October 15. Mr. Wood asked if they were still operating in violation. Ms. McCulley confirmed that they are.

Ms. McCulley indicated that there would be an appeal heard by the Board of Supervisors next month, because it is an appeal of enforcement of a zoning proffer, and Mr. Kamptner has indicated that there is a special state code provision that sends that type of appeal to the Supervisors instead of the BZA.

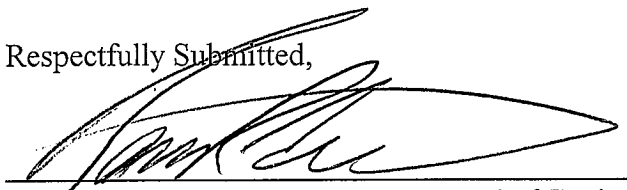
8. Adjournment

Mr. Rinehart moved to adjourn the meeting; Mr. McClure seconded the motion, which passed unanimously (5-0).

There being no further business, the meeting adjourned at 2:50 p.m.

(Recorded by J.T. Newberry and transcribed by Beth Golden)

Respectfully Submitted,



Randolph R. Rinehart, Secretary Board of Zoning Appeals