



# Clarke County Board of Zoning Appeals

## MEETING AGENDA

Monday, February 26, 2024 (10:00AM)  
Berryville/Clarke County Government Center  
101 Chalmers Court, Berryville, VA  
Main Meeting Room (second floor)

### 1) Approval of Agenda

### 2) Organizational Meeting – Election of Officers (Chair & Vice Chair)

*[Attachments: Section 2.2.6 and Electronic Meeting Policy – info only]*

### 3) Organizational Meeting – Approval of 2024 Meeting Schedule

*[Attachment: List of tentative meeting dates up to 02/24/2025]*

### 4) Approval of Minutes – April 24, 2023

*[Attachment: Specified Minutes]*

### 5) Public Hearing

- a. **BZA-24-01.** A variance application submitted by Timothy Olinger requesting a reduction to the minimum distance required between a proposed accessory building and an existing private access easement, as specified under Section 4.1.2B of the Clarke County Zoning Ordinance for properties located within the FOC Zoning District. The subject property is located at 2027 Frogtown Road, identified as Tax Map #32-A-50, and is within the Millwood Election District.

*[Attachments: Staff Report, Application with Supplemental Info, Staff photos]*

### 6) Other Business

- a. **Discussion of Review Procedures for Meeting Minutes**
- b. **Board Member Reports**

### 7) Adjourn

All subsequent appointments shall be for a four year term. When a term expires, a member may be re-appointed or a new member appointed to begin a four year term. When a term expires, or whenever a vacancy occurs, a member shall be appointed or re-appointed within 60 days when necessary to maintain at least five members on the HPC and meet other membership requirements established in [Subsection 1](#). A Secretary shall be chosen to record the activity at the meetings, and may be a nonmember with no voting privileges.

### **2.2.6 Board of Zoning Appeals**

- A. Generally.** The Board of Zoning Appeals (“BZA”) is created and organized pursuant to [Va. Code §15.2-2308](#) and shall have the purposes and duties set forth therein.
- B. Purposes and duties.** The BZA shall review and act on applications for the following:
- Variances [\(Section 6.4.2\)](#)
  - Appeals [\(Section 6.4.3\)](#)
  - Variances and appeals to the Flood Plain Overlay District requirements [\(Section 4.2.1\)](#)
  - Interpretations of Zoning District Map [\(Section 6.4.4\)](#)
- C. Membership.** The BZA shall consist of five residents of Clarke County, appointed by the Circuit Court of Clarke County. Members of the BZA shall hold no other public office in the locality except that one may be a member of the Planning Commission.
- D. Alternate Members.** The Board of Supervisors may request the Circuit Court of Clarke County to appoint not more than three alternates to the BZA, pursuant to the provisions of [Va. Code §15.2-2308\(A\)](#).
- E. Terms of Office.** The terms of office for members of the BZA shall be for five years each except that original appointments shall be made for such terms that the term of one member shall expire each year. The Secretary shall notify the court at least thirty (30) days in advance of the expiration of any term of office, and shall also notify the Court promptly if any vacancy occurs. Appointments to fill vacancies shall be only for the unexpired portion of the term. Members may be reappointed to succeed themselves. A member whose term expires shall continue to serve until his successor is appointed and qualifies.
- F. Officers.** With the exception of its Secretary and the alternates, at its first meeting of each calendar year the BZA shall elect from its own membership its officers who shall serve annual terms as such and may succeed themselves. The BZA may elect as its Secretary either one of its members or a qualified individual who is not a member of the BZA, excluding the alternate members. A Secretary who is not a member of the BZA shall not be entitled to vote on matters before the BZA.

ARTICLE I – ZONING ORDINANCE  
2023 EDITION

- G. Quorum.** For the conduct of any hearing, a quorum shall be not less than a majority of all the members of the BZA.
- H. Procedures.** The BZA may make, alter and rescind rules and forms for its procedures, consistent with County ordinances and general laws of the Commonwealth.
- I. Records.** The BZA shall keep minutes and a full record of its proceedings and other official actions, which shall be filed in the office of the BZA and shall be public records.
- J. Report.** The BZA shall submit a report of its activities to the governing body at least once each year.
- K. Witnesses.** The Chair, or the Vice-Chair or acting Chair in the Chair’s absence, may compel attendance of witnesses and administer oaths of witnesses.
- L. Employees.** Within the limits of funds appropriated by the Board of Supervisors, the BZA may employ or contract for secretaries, clerks, legal counsel, consultants, and other technical and clerical services.
- M. Compensation.** Members of the BZA may receive such compensation as may be authorized by the Board of Supervisors.
- N. Removal.** Any BZA member or alternate may be removed for malfeasance, misfeasance, or nonfeasance in office, or for other just cause, by the Court that appointed the member or alternate, after a hearing held after at least fifteen (15) days notice.
- O. Meetings.** The BZA by resolution may fix a schedule of regular meetings, and may also fix the day or days to which any meeting shall be continued if the Chair, or Vice-Chair if the Chair is unable to act, finds and declares that weather or other conditions are such that it is hazardous for members to attend the meeting. Such finding shall be communicated to the members and the press as promptly as possible. All hearings and other matters previously advertised for such meeting in accordance with [Va. Code §15.2-2312](#) shall be conducted at the continued meeting and no further advertisement shall be required.
- 2.2.7 Zoning Administrator.** This Ordinance shall be administered and enforced by the Zoning Administrator in accordance with [Va. Code §15.2-2286](#). The Zoning Administrator shall have the following purposes and duties under this Ordinance:
- A. Review and Decision.** To review and act on applications and requests for the following:
- [Zoning Permits \(Section 6.2.1\)](#)
  - [Administrative Site Development Plans \(Section 6.2.4\)](#)
  - [Pre-Harvest Plans \(Section 6.2.7\)](#)
  - [Intensive Livestock, Dairy, or Poultry Facility Development Plan \(Section 6.2.8\)](#)

**ATTACHMENT A**  
**BOARD OF ZONING APPEALS ELECTRONIC MEETING POLICY**

1. Pursuant to Code of Virginia §2.2-3708.2, the following policy is established for members of the Clarke County Board of Zoning Appeals (the “Board”) to participate electronically in Board meetings from remote locations for reasons specified as follows:
  - A. Such member is unable to attend the meeting due to a temporary or permanent disability or other medical condition that prevents the member’s physical attendance.
  - B. Such member is unable to attend the meeting due to a personal matter and identifies with specificity the nature of the personal matter. Participation by a member pursuant to this subsection is limited each calendar year to two meetings.
2. Procedures for authorizing electronic participation in a meeting.
  - A. Electronic participation in a meeting shall only be permitted if a quorum of the Board is physically assembled at the designated meeting location.
  - B. Any member requesting to participate electronically in a meeting shall notify the Chair of the reason for electronic participation as specified in Subsection 1 above, on or before the day of the meeting. The Chair shall determine whether the request for electronic participation complies with the provisions of Subsection 1 above and shall either approve or disapprove the request.
  - C. If electronic participation is approved by the Chair, the Clerk of the Board shall record in the meeting minutes the remote location from which the member participated. The meeting minutes shall also indicate the reason for the member’s electronic participation as described in Subsection 1 above.
  - D. If electronic participation is disapproved by the Chair, the reason for such disapproval shall be recorded in the minutes with specificity.
  - E. For any electronic participation, arrangements shall be made to ensure that the voice of the member participating electronically may be heard by all persons in the designated meeting location.

## 2024 APPLICATION CUT-OFF DATES BZA MEETINGS

MEETING DATE	APPLICATION CUT-OFF DATE
<i>January 22<sup>nd</sup></i>	<i>January 2<sup>nd</sup></i>
<i>February 26<sup>th</sup></i>	<i>February 5<sup>th</sup></i>
<i>March 25<sup>th</sup></i>	<i>March 4<sup>th</sup></i>
<i>April 22<sup>nd</sup></i>	<i>April 1<sup>st</sup></i>
<i>May 28<sup>th</sup></i>	<i>May 6<sup>th</sup></i>
<i>June 24<sup>th</sup></i>	<i>June 3<sup>rd</sup></i>
<i>July 22<sup>nd</sup></i>	<i>July 1<sup>st</sup></i>
<i>August 26<sup>th</sup></i>	<i>August 5<sup>th</sup></i>
<i>September 23<sup>rd</sup></i>	<i>September 3<sup>rd</sup></i>
<i>October 28<sup>th</sup></i>	<i>October 7<sup>th</sup></i>
<i>November 25<sup>th</sup></i>	<i>November 4<sup>th</sup></i>
<i>December 23<sup>rd</sup></i>	<i>December 2<sup>nd</sup></i>
<i>January 27<sup>th</sup> 2025</i>	<i>January 6<sup>th</sup> 2025</i>
<i>February 24<sup>th</sup> 2025</i>	<i>February 3<sup>rd</sup> 2025</i>



# Clarke County Board of Zoning Appeals

Meeting Minutes - **DRAFT**

Monday, April 24, 2023 – 10:00 AM

Berryville/Clarke County Government Center – Main Meeting Room

ATTENDANCE:			
Howard Means (Chair)	✓	John Staelin	✓
Clay Brumback (Vice-Chair)	✓	Laurie Volk	✓
Alain Borel	✓		

**STAFF PRESENT:** Jeremy Camp (Senior Planner / Zoning Administrator), Brandon Stidham (Planning Director), Kristina Maddox (Office Manager / Zoning Officer)

**OTHERS:** Tim Johnson, Esq, Robert Mitchel, Esq, Sean D. and Amy C Whyte (appellants)

**CALL TO ORDER:** Chair Means opened the meeting 10:00AM.

## 1. Approval of Agenda

The Board of Zoning Appeals (BZA) unanimously voted to approve the April 24, 2023 Board of Zoning Appeals meeting agenda as presented by Staff.

Motion to approve the agenda for April 24, 2023 as presented by Staff:			
Means	<b>AYE</b>	Staelin	<b>AYE (seconded)</b>
Brumback	<b>AYE</b>	Volk	<b>AYE</b>
Borel	<b>AYE (moved)</b>		

## 2. Approval of Minutes – February 27, 2023 Meeting Minutes

The BZA unanimously voted to approve the February 27, 2023 Board of Zoning Appeals meeting minutes as presented by Staff.

Motion to approve the February 27, 2023 Board of Zoning Appeals meeting minutes as presented by Staff:			
Means	<b>AYE</b>	Staelin	<b>AYE</b>
Brumback	<b>AYE (moved)</b>	Volk	<b>AYE (seconded)</b>
Borel	<b>AYE</b>		

## 3. PUBLIC HEARING: BZA-23-01, Sean D. and Amy C. Whyte

Mr. Camp reviewed the application filed by Sean D. and Amy C. Whyte for the property located at 436 Timber Lane within the Shenandoah Retreat community. He said the violation of corrective order dated February 9, 2023 is being appealed. He continued that the notice issued said they were in violation of Section 5.2B of the Clarke County Zoning Ordinance, which are the regulations for short-term residential rentals. He stated that Section 5.2B prohibits short-term residential rentals in the rural residential (RR) district where the property is located. He added that the application submitted by the applicants includes a statement of justification and that they are being represented

by their attorney. He continued that the county attorney will represent the Zoning Administrator, as this is an appeal case and will not include a typical Staff report for a variance application.

Representing the Clarke County Zoning Administrator on the appeal, Mr. Mitchell said that a notice of violation was filed by Mr. Camp stating that a short-term residential rental business is not permitted in the Rural Residential (RR) District, which is where the appellants' property is located. He said the appellants operated a short-term residential rental business on the property at the beginning of 2019 and that the Zoning Ordinance was silent on the use of short-term residential rentals prior to adoption of the new regulations on February 15, 2022. He continued that the appellants recognize the fact that it is not permitted in this district and do not contest that issue. He said they do, however, assert that the use of the property for a lawful, non-conforming use is therefore grandfathered and that they should be permitted to continue their short-term rental business. He continued that the county is not passing judgement on the business, which has been operated by the owners but rather to follow the law as presented when the Zoning Administrator was called upon to act on a complaint that had been filed. He said the law of what constitutes unlawful non-conforming use has been established by case law in Virginia.

Mr. Mitchell said the Virginia Supreme Court stated the following quote in a 2009 case, "It isn't settled law in Virginia that for a prior use of land that violates a newly enacted zoning restriction to be considered a lawful, non-conforming use, use must have been a lawful use existing on the effective date of the zoning restriction. A civil action which use is challenged as illegal, the challenging party has the initial burden of producing evidence to show that the use is permitted in the zoning district in which the land is located and that the use of the land is not a permitted use. Upon this showing the burden shifts to the landowner to show that his use is a lawful non-conforming use."

Mr. Mitchell continued there is no issue in this case about the fact that the operation of the appellants' business is not a permitted use in the Rural Residential District under the present zoning ordinance and therefore, the burden shifted to the appellants to show the operation of the short-term business is a lawful non-conforming use. He said, however, the appellant is unable to meet that burden as the operation was unlawful as set forth in the report of the Commissioner of Revenue as the appellants had not obtained a business license on the short-term residential rental business in operation. He said as the operator of the business has not made the lawful use existing on the effective date of the revision of the Zoning Ordinance on February 15, 2022 and that the use is not a lawful non-conforming use and is not grandfathered. Lastly, he stated the Zoning Administrator's notice of violation must be upheld.

Mr. Johnson, representing the appellants, said there is no dispute that under the current ordinance that short-term residential rentals are not permitted. He said his clients purchased the property in 2019 with the intention of operating a short-term rental but did not operate it as such until 2021. He said up until February 15, 2022 there is no reference about short-term residential rentals and that the closest reference he could find constitutes a dwelling unit being at least a weekly rental. He continued that his clients did not have any thoughts or expectations to obtain a zoning permit at the time of purchase as there is no reference to it. He said they were also not aware of or knew that the county required a business license to rent out a property, however, they are happy to

resolve this going forward should the violation be overturned. He added that his clients would pay the taxes due in order to obtain a license and correct the issue.

Mr. Johnson said his clients are not obtrusive, uncaring residents trying to make a fortune. He said the statement of justification notes that the owners put a lot of time, money, and effort into renovating the home. He noted the before and after pictures in the packet and said the character of the home was kept during the renovations. Additionally, he said the owners have tried to keep Clarke County at the forefront of their design and have tried to bolster local businesses. He said this is a perfect example of what a good short-term residential rental would be before the code was enacted and restricted as it is beneficial to the community. He continued that these are the types of people that are the exception to the rule, who should get community support, and who can resolve the business license issue rather quickly. Regarding the statement of justification, he said it is listed as a two bedrooms and four-person maximum occupancy instead of the allotted three bedroom and six-person maximum occupancy.

Mr. Johnson stated that this is not a situation where the Board of Zoning Appeals has to worry about setting precedent as this is an exception to the rule by virtue of the fact that his clients are grandfathered or could be grandfathered as they were operating their business up front. He said they have been operating the rental business lawfully besides the issue of the business license. He said he asks that the Zoning Administrators determination be overturned so the appellants can continue to develop Clarke County in a limited fashion.

Mr. Mitchell said he had one point to reiterate in the letter sent by the Commissioner of Revenue. He said it specifically states under Section 165-2 that shall be unlawful for any persons in the county to engage in any business, trade occupation, so forth, for which a county license is required by ordinance. He said in conclusion, the letter from the Commissioner of Revenue states the use of the subject property as a short-term residential rental was unlawful when it was established as the owners did not obtain or record a license.

Mr. Johnson responded that no one brought it to his client's attention that a business license was needed until they received a notice of violation. He said the owners purchased the property at the end of 2019; that COVID occurred during the time of renovations which further complicated matters; and that it was not until 2021 when rental operations began. Lastly, he exclaimed that his clients would like to bring everything into compliance now.

Chair Means asked how long the business was in operation without a business license before the ordinance changed. Mr. Johnson replied the property was listed on VRBO toward the fall of 2021 and that his clients started to get bookings in the last month or two of 2021 into early 2022.

Commissioner Borel asked why the business owners, who were new to the county, did not ask if it was possible to do this type of business in the first place. He expressed how important it is to be familiar with the rules and regulations in a county and commented that it does not cost anything to ask the questions.

Mr. Johnson replied that his clients worked with a realtor who claimed there were no restrictions and they had several discussions with the previous property owner as they wanted to create a sense



of community upfront. He explained that pre-COVID Airbnb's were trending and that no one was paying as much attention to the rules during COVID. He said there was not much guidance provided from the county unless one asked the county directly. Mrs. Whyte said it did not occur to her that Airbnb's were not permitted in the area as there were others nearby. Mr. Johnson said he believes Airbnb.com did a contract around 2021 where they were going to collect taxes for the communities, however, his client used VRBO who did not have anything like that in place at the time to address the transit occupancy taxes. Mrs. Whyte said she read VRBO's website which did not relay any details regarding business license or tax information and reiterated that it did not occur to her to obtain a business license. Mr. Johnson noted that the owners did not set up the rental under an LLC or entity as they were not thinking of terms of it as a business.

Commissioner Borel commented that the one must fully understand the laws and regulation of the county versus being guided by an Airbnb website. Mr. Johnson agreed but stated that during the time of the Airbnb trend, people were approaching it differently as they had no guidance otherwise. He said it was clearly an oversight on his client's part and it would be a non-issue and addressed accordingly had they known.

Commissioner Borel said years ago there was an influx of bed and breakfasts but there were no licenses or regulations. He said eventually the county established the regulations and, as such, they need to be followed and adhered to even if someone is new to a county. Mr. Johnson said at the time there were no established short-term residential rental zoning rules or regulations to follow. He said at the time of purchase, it was not a business; that it was just two people renovating a home so a business license was not at the forefront of the process. He continued that no one actively tried not to follow regulations, they just did not know that a regulation was in effect and that it was applicable to them at the time. He reiterated that the owners would like to obtain a business license and go through the process of paying taxes due.

Commissioner Staelin commented that the documentation provided states that usage started in April 2022 with no tax form, fictitious name, certificate, applications for things for the short-term rental shown in any of these materials prior to February 15<sup>th</sup>. He said the job of Board is to see if the facts presented by the Zoning Administrator are met and he does not see anything that proves that the business was lawful as of February 15<sup>th</sup>. Mr. Johnson said his clients purchased the property in 2019 and set it up under their respective names and not as a business LLC. Commissioner Staelin commented they still need to pay taxes and that his main point is the lawful issue as per the county code which is something that cannot be overruled. Mr. Johnson replied they are not asking the Board to overlook the regulations only because they have a nice, beautiful, wonderful business. He is saying that it's because they were operating something but they missed the business license issue which is the one thing that would have made them otherwise lawful. Commissioner Staelin said the Board is to decide if the Zoning Administrator made a correct determination and followed the ordinance. He noted the owners could rent the property out on a long-term basis if they still wanted it to be profitable.

Chair Means asked Mr. Camp if there is a track record of tax notices being sent out to Airbnb's or if this was a rare occurrence or perhaps commonplace. Mr. Camp replied that he cannot speak on behalf of Commissioner of Revenue or the full details of their process. He said the applicant said they started operating their short-term residential rental business at the end of 2021. He continued

that during that time the county would have been going through the ordinance process which took several months and was adopted by the Board of Supervisors on February 15, 2022. He added there were a lot of notices and public hearing ads in the paper where the majority of the public speakers were in favor of the ordinance. He said one would have to get zoning approval on a business license application prior to the adoption of the ordinance which never happened in this case.

Chair Means opened the public hearing.

Angie Setter, President of the Shenandoah Land Corporation, said she was here to express the board's concern regarding Airbnb's in their community. She said their board strongly disagrees with the operations that Airbnb's or short-term rentals in any location in the Retreat. She said the Airbnbs in their area are advertised as being "close to wineries and breweries," "host your events with plenty of room for entertaining." She said in most cases Airbnb's bring partying and noise disturbances as tourists are on vacation to have a good time and party and may affect the quality of life for permanent residents. She said there have been complaints of litter, illegal parking, and noise disturbances which are a concern. She stated that the Retreat is zoned as Rural Residential where temporary living and Airbnb's are not allowed. She asked that the Board to follow and enforce the county ordinance and that they respectfully request this form of business not be allowed to operate within their community. She said the covenants of the Retreat state "all buildings are for residential use only." She said an Airbnb is a business and not residential use. She continued that the covenants are in the welcome package that are provided to each new homeowner as they come into the community and can also be found in the deed. She said with respect to this case, it is a newer deed which state "the covenants is made subject to conditions, valid restrictions and rights of way of the record" in which case one would have to refer to the original deed for the full details. She said the Zoning and Subdivision Ordinance Code for Clarke County state, "rural residential district for single family residential and office space areas, and is intended to stabilize and protect the essential characteristics of the district to promote and encourage a suitable environment for family life. And to prohibit all activities of commercial and industrial nature." She said the Retreat Board of Directors respectfully request to not provide an exception to allow an Airbnb to operate within the community.

A member of the public commented that it was their understanding that all short-term residential rentals were required to submit an application to zoning by August of 2022. Mr. Camp replied that when the Board of Supervisors adopted the new short-term residential rental regulations they issued a delay in enforcement that expired August 15, 2022. He explained that during that grace period any new short-term residential rentals did not have to pay application fees to obtain a permit and the approvals needed. He also noted that approvals were only in place for the approved zoning areas such as AOC and FOC.

Chair Means closed the public hearing.

Commissioner Volk commented that even though the appellants are very nice people and have tried to do the right thing, that the law is very clear in this case.

Vice-Chair Brumback said he is sympathetic to the applicants, but that ignorance is not a valid defense. He said he is sure the property is wonderful and beneficial to the county but that the issue is clear with the ordinance being well-defined.

Commissioner Borel commented that it is not just the county that has restrictions, that the Retreat itself has rules and regulations. He also commented that long-term rental is still a possibility for the appellants.

The Board had no further questions or comments.

The BZA unanimously voted to uphold the decision of the Zoning Administrator and deny the appeal, **BZA-23-01, Sean D. and Amy C. Whyte**, based on the facts that the short term residential rental use is currently prohibited by the RR District regulations, and the short term residential rental use was not lawfully established in 2021 when it was started.

<b>Motion to deny the appeal of <u>BZA-23-01</u>, Sean D. and Amy C. Whyte, and uphold the Zoning Administrator’s determination:</b>			
Means	<b>AYE</b>	Staelin	<b>AYE</b>
Brumback	<b>AYE (moved)</b>	Volk	<b>AYE</b>
Borel	<b>AYE (seconded)</b>		

**4. Other Business**

- a. Electronic Meeting Policy

The Board reviewed the electronic meeting policy and noted that it was previously voted on and did not require a second vote.

**5. Adjournment**

The motion to adjourn the BZA meeting at 10:38AM was approved by consensus.

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Howard Means, Chair

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Kristina Maddox, Clerk

# VARIANCE REQUEST (BZA-24-01) – Timothy Olinger

February 26, 2024 Board of Zoning Appeals Meeting (10:00 AM)

STAFF REPORT -- Department of Planning

The purpose of this staff report is to provide information to the Board of Zoning Appeals to assist them in reviewing this variance application. It may also be useful to members of the general public interested in this proposed request.

## Case Summary

### Applicant(s):

Timothy W. Olinger

### Property Information:

- Location – 2027 Frogtown Rd (Rt. 649)
- Tax Map # - 32-A-50
- Property Size – 2.1681 acres
- Election District - Millwood
- Magisterial District - Chapel
- Zoning District – FOC



### Summary of Request:

The applicant requests a variance to the setback requirements from the edge of private access easements in the FOC District, as required under Section 4.1.2B of the Clarke County Zoning Ordinance.

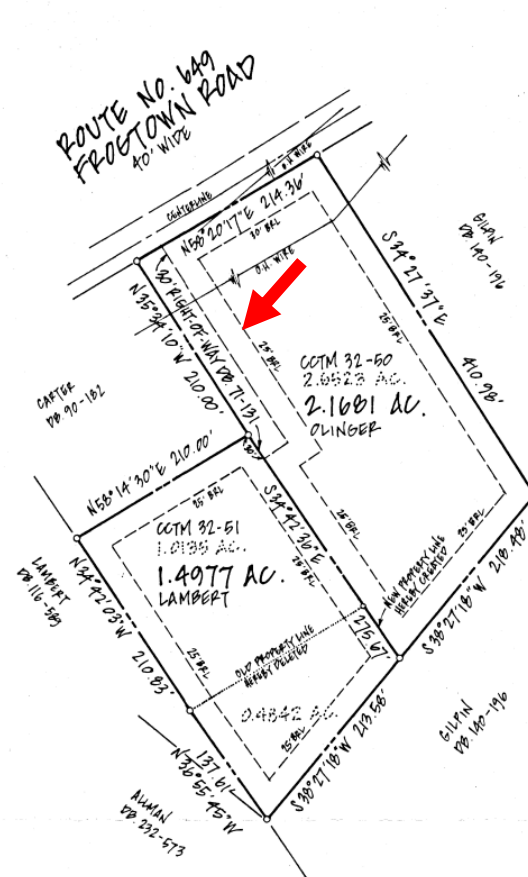
Section 4.1.2B includes the minimum setback distances required for buildings in the FOC District. The requirements vary depending on the size of the lot. The applicant's lot is approximately 2.1 acres which requires a distance of 25 feet between a building and the edge of a private access easement. The table under Section 4.1.2B is shown below.

BUILDING SETBACK REQUIREMENTS				
Building Setback	Lots less than 1 acre	Lots 1 acre but less than 4 acres	Lots 4 acres but less than 20 acres	Lots 20 acres and greater
Edge of private access easement, private road, or private lane	25 feet	25 feet	50 feet	75 feet
Centerline of secondary highway	50 feet	50 feet	75 feet	100 feet
Centerline of scenic byway	50 feet	100 feet	125 feet	150 feet
Edge of primary highway right of way, less than 5000 trips per day	25 feet	75 feet	100 feet	125 feet
Edge of primary highway right of way, 5000 trips per day or greater	50 feet	75 feet	100 feet	125 feet
All other property lines, structures 200 square feet or less	5 feet	10 feet	50 feet	75 feet

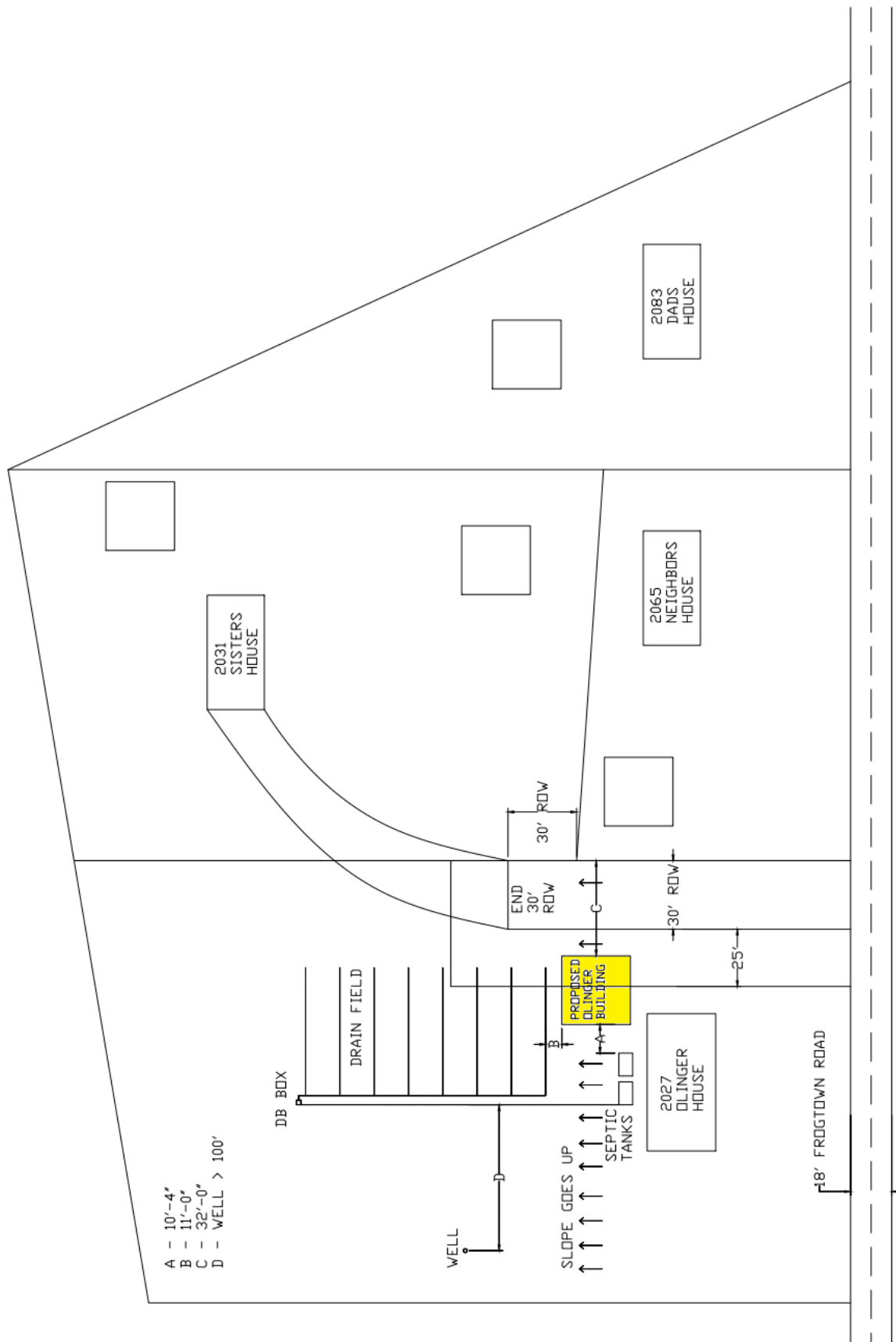
The applicant's lot includes a 30' wide private access easement, as shown on the plat of record (PB2/PG36), illustrated to the right. Since the setback requirement requires a setback of 25' from the edge of the private access easement there is effectively a 55' setback from the right property line adjacent to the private access easement. The 25' setback line is accurately drawn on the plat to reflect this setback requirement.

The applicant submitted a zoning permit application on September 22, 2023 for a 30' x 30' "shop" (accessory building) that would have been only 2 feet from the private access easement. The zoning permit application was denied for that reason.

Staff discussed possibly relocating the building to another part of the property. The location of the existing drainfield and septic tank prevented the applicant from moving it further away from the private access easement in the same general location to the right of the existing house. The applicant could possibly move it to the far rear of the lot or the front yard. However, the applicant believed moving it to the back of the lot was too farm for him to walk to use the building and moving it to the front yard would not be visually appealing.



Below is an illustration provided by the applicant that shows the proposed “shop” building (highlighted in yellow).



The private access easement is shared with only one lot, which is the adjacent 1.4977 acre lot to the southwest. The applicant indicates that this property is owned by his sister. The illustration shows that the proposed building would be slightly over the minimum setback from the septic tank and drainfield and 32 feet from the right property line; or rather, 2 feet from the existing private access easement. Based on an approximate measurement while out at the site, the location the applicant has staked out for the building would be approximately 11 feet from the edge of the driveway at the closest point. While the drawing from the applicant is generally accurate the building is at a slight angle in comparison to the driveway so the other corner is further away by a few feet.

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BOOK 346 PAGE 153

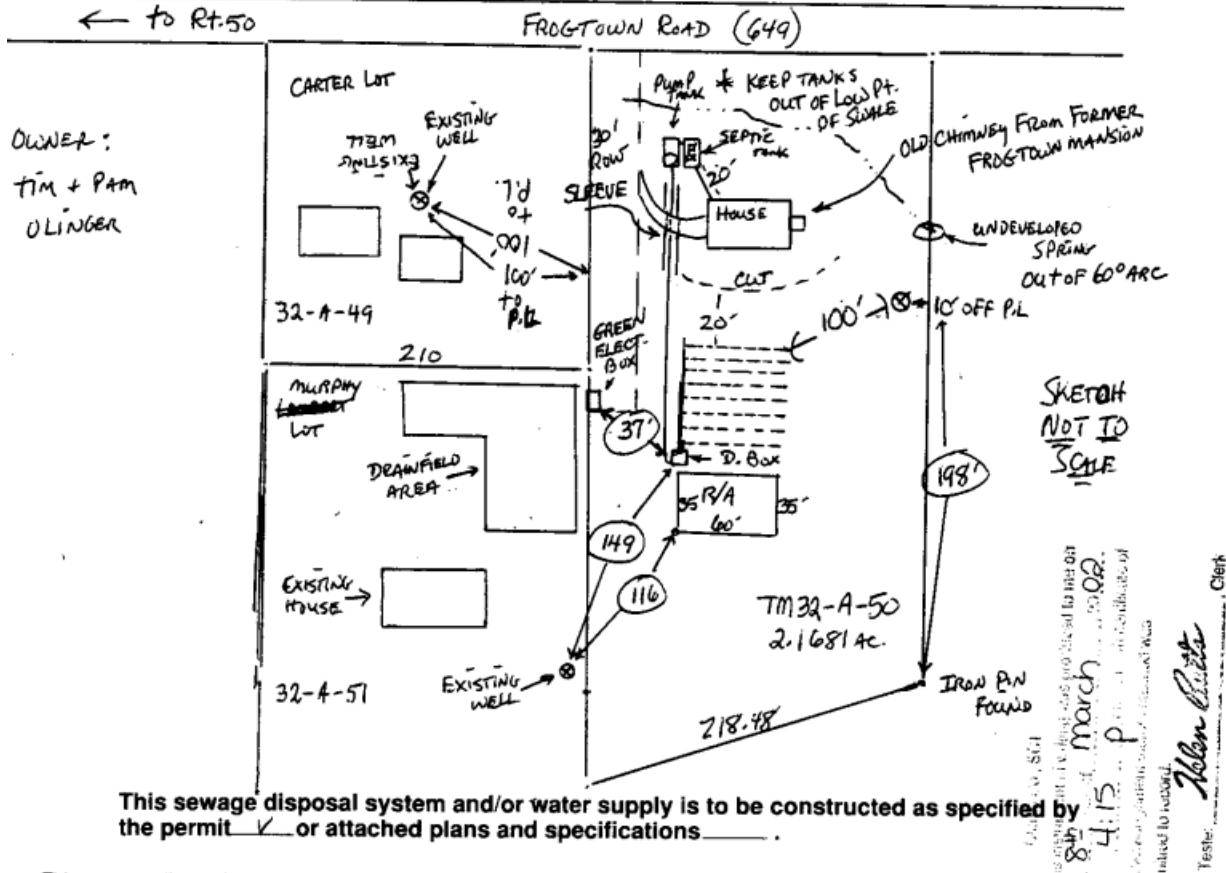
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Health Department  
Identification Number 39778

**Schematic drawing of sewage disposal and/or water supply system and topographic features.**

Show the lot lines of the building site, sketch of property showing any topographic features which may impact on the design of the well or sewage disposal system, including existing and/or proposed structures and sewage disposal systems and wells within 200 feet. The schematic drawing of the well site or area and/or sewage disposal system shall show sewer lines, pretreatment unit, pump station, conveyance system, and subsurface soil absorption system, reserve area, etc. When a nonpublic drinking water supply is to be permitted, show all sources of pollution within 200 feet.

- The information required above has been drawn on the attached copy of the sketch submitted with the application. Attach additional sheets as necessary to illustrate the design.



The Virginia Department of Health indicated that the approved on-site septic disposal system for the property is approved. It only has a 50% reserve area but it may be possible to reconfigure the drainfield to include a 100% reserve area within the same footprint. Above is an illustration from the approved operating permit. The septic tanks were installed behind the house, not to the front-right as shown on the drawing.

## **Legal Analysis:**

A variance is defined as: [A] reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by a conditional zoning.

Variance requests are reviewed against the criteria set forth in the Code of Virginia and in Zoning Ordinance §6.4.2, Subsection C.1., which states the following:

1. *The burden of proof shall be on the applicant for a variance to prove by a preponderance of the evidence that the application meets the standards for a variance as defined in Va. Code §15.2-2201 and the criteria set out in this section.*

§6.4.2, Subsection C.2, includes the review criteria for variance applications. It states the following:

2. *Notwithstanding any other provision of law, general or special, a variance shall be granted if the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property or that the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance, and:*
  - a. *the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance;*
  - b. *the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area;*
  - c. *the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance;*
  - d. *the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and*
  - e. *the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of §15.2-2309 or the process of modification of a zoning ordinance pursuant to subdivision A4 of §15.2-2286 at the time of the filing of the variance application.*

The above review criteria is shown on the following page in a checklist format. The checklist is broken down into two tiers. For approval of a variance an application must meet 1 of the 3 criteria in the first tier and all of the criteria in the second tier. A preliminary evaluation by Staff is provided following the checklist.



# VARIANCES

## *Review Criteria Checklist*

### 1. First Tier Review Criteria (1 of 3 required)

- Check if** ...the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property.
- Check if** ...the granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance.
- Check if** ...a variance would alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.

### 2. Second Tier Review Criteria (5 of 5 required)

- Check if** ...the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance.
- Check if** ...the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.
- Check if** ...the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.
- Check if** ...the granting of the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property.
- Check if** ...the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of 15.2-2309 or the process of modification of a zoning ordinance pursuant to subdivision A4 of 15.2-2286 at the time of the filing of the variance application.

***HARDSHIP CRITERIA (TIER ONE – 1 of 3 required):***

- ***“the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property.”***

✗ The strict application of the requirement for a 25’ setback does not appear to unreasonably restrict the utilization of the property.

- ***“the granting of the variance would alleviate a hardship due to a physical condition related to the property or improvements thereon at the time of the effective date of the ordinance.”***

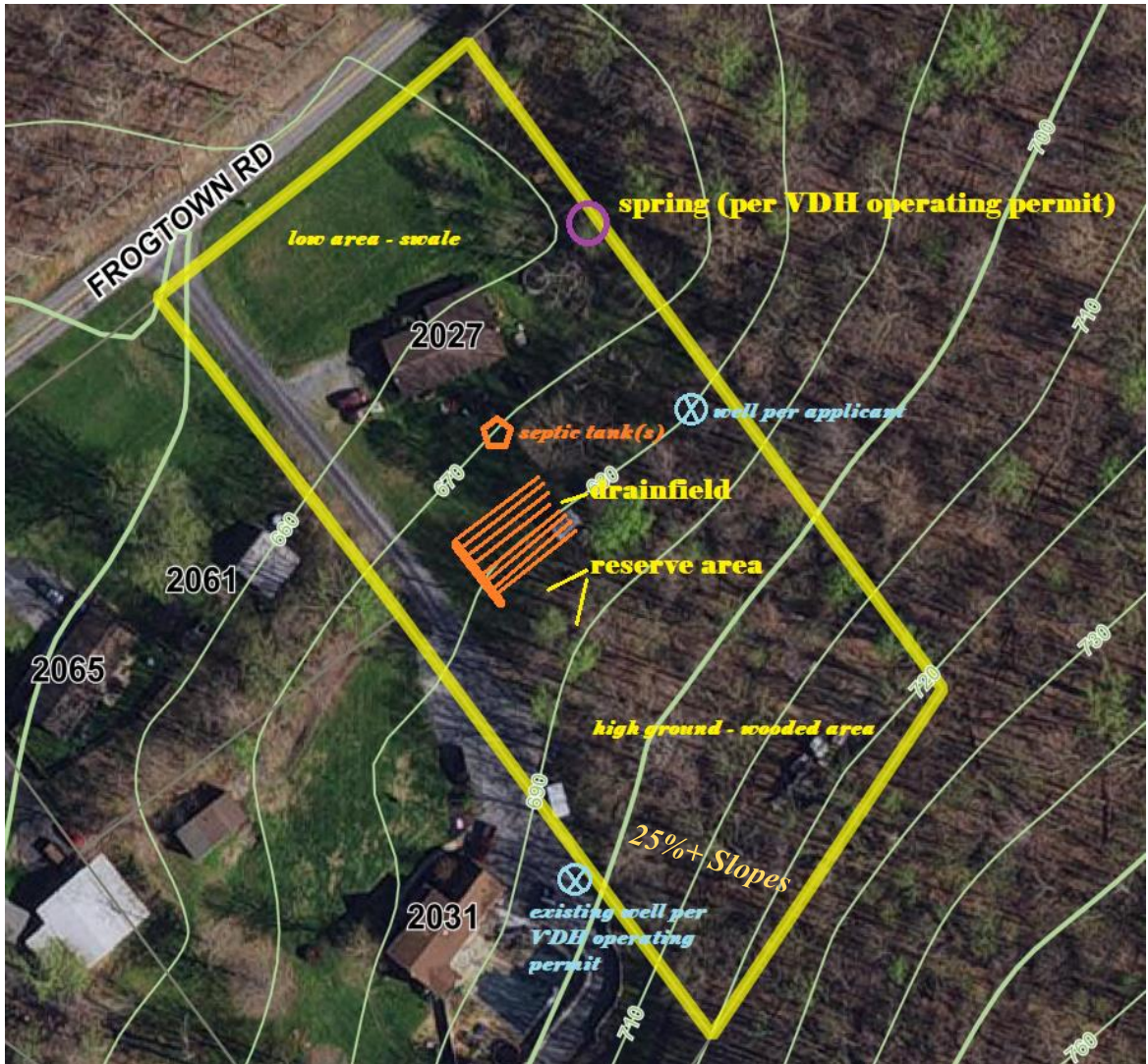
✓ Collectively the existing physical characteristics of the property and the existing site improvements may be a hardship to the property owner that a variance could alleviate. Below is a description of the key physical characteristics of the property and the site improvements within them.

- Stream – As shown on the recorded operating permit for the on-site septic disposal system an “undeveloped stream” is located along the left property line feeding to the low swale area in the front of the lot. A 100’ setback is required from streams by the Zoning Ordinance.
- Small lot size – The lot is approximately 2.1 acres in size which is less than the 3 acre minimum lot size requirement in the FOC District and considerably smaller than the typical lot size in the FOC District.
- Sloped terrain – The entire property is sloped but has three distinctive areas on it. This includes a flat low area in the front influenced by a spring, a middle area in the center where the house is located, and a rear area that is more steeply sloped.

--*Low area:* The operating permit for the on-site septic disposal system recommends no development within swale of the low area. While a stream is not present the operating permit identifies an “undeveloped stream” near left property line that drains into the low area.

--*Middle area:* The middle area of the lot is where the house is located and the septic tanks. These existing improvements utilize most of the flat terrain other than the area where the applicant wants to build his accessory building that is close to the existing private access easement.

--*Rear area:* The rear area of the lot begins where the drainfield and reserve areas are located and gradually gets steeper the further you move to the rear property line. The majority of this area is wooded. A portion of the rear lot is identified by the County GIS as being in an area of 25% or greater slopes. Per County Code land disturbance in such areas of steep slope has restrictions which prevent building construction. It does appear possible to build in the rear left corner area of the property but the slopes here are still relatively steep and such development would require land clearing of the wooded areas and grading for placement and access. There are two wells that impact other locations in the rear area due to the required setbacks from them.



- *“a variance would alleviate a hardship by granting a reasonable modification to a property or improvements thereon requested by, or on behalf of, a person with a disability.”*
- ✗ No evidence has been submitted by the applicant to demonstrate that he is disabled. However, Staff would note that the applicant has stated that he is elderly and needs the building to be within close walking distance.

**5 MANDATORY ELEMENTS (TIER TWO – All required):**

- ***“the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance.”***
  - ✓ The applicant has shown good faith and is applying for the variance after previously applying for the proposed accessory building and being denied.
  
- ***“the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.”***

**TBD.** The applicant has stated that the adjacent property owner most impacted, and who shares the private access easement, has no objections and is his sister. Staff recommends that she speak at the public hearing or provide written comments. No other properties would appear to be significantly impacted but this will be determined at the public hearing. Staff requested the Clarke County Fire Chief to assess the site to determine if the proposed setback is adequate for emergency service access. His input should be available for the upcoming meeting.
  
- ***“the condition or situation of the property concerned is not of so general or reoccurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance.”***
  - ✓ The aspects that are challenging with the property are not rare for lots in the FOC District but are not so common where regulations can be reasonably drafted to prevent the consideration of variances in the future.
  
- ***“the granting of the variance does not result in a use that is not otherwise permitted on the property or a change in the zoning classification of the property.”***
  - ✓ Granting the variance would not result in a use that is not allowed per FOC District regulations.
  
- ***“the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of 15.2-2309 or the process of modification of a zoning ordinance pursuant to subdivision A4 of 15.2-2286 at the time of the filing of the variance application.”***
  - ✓ A special exception is not possible to allow for the proposed accessory building.

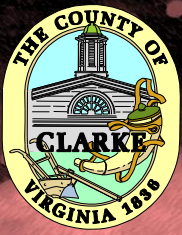
**Staff Conclusions & Recommendation:**

The application appears to meet 1 of 3 criteria of the Hardship Criteria (Tier One). Under this tier of the review checklist only one of the three criteria is required.

The application appears to meet 4 of 5 criteria of the 5 Mandatory Elements (Tier Two). Under this tier of the review checklist all 5 of the criteria are required. The 5<sup>th</sup> of these criteria can not be fully determined until after a public hearing and input from the Fire Chief is received. Staff does not object to granting this variance if after receiving this information it is determined by the BZA that granting the variance would not be of substantial detriment to adjacent properties.

If this variance is approved by the BZA, Staff recommends that the applicant be required to provide an as-built setback certification for the accessory building. Such as-built setback certification should be prepared by a licensed Virginia surveyor and show that the constructed location of the foundation for the accessory building meet the minimum setbacks required from the septic tank and drainfield, and be no closer to the private access easement than shown on the applicant's plan.

The public hearing has been advertised in the local paper. In addition, letters have been mailed to adjoining property owners and a sign was posted on the property advertising the public hearing.



# BOARD OF ZONING APPEALS APPLICATION

VARIANCE, APPEALS, OR MAP INTERPRETATIONS

## General Information

Date:	Tax Map #:
Zoning District:	Lot Size:
Overlay District (if applicable):	
Site Address:	
Property Owner's Name:	
Property Owner's Mailing Address:	
Applicant's Name: <i>(if different than owner)</i>	
Applicant's Mailing Address: <i>(if different than owner)</i>	
Phone:	Email:

## Application Type

Select the type of application that is being submitted. A separate application is required if filing multiple types.

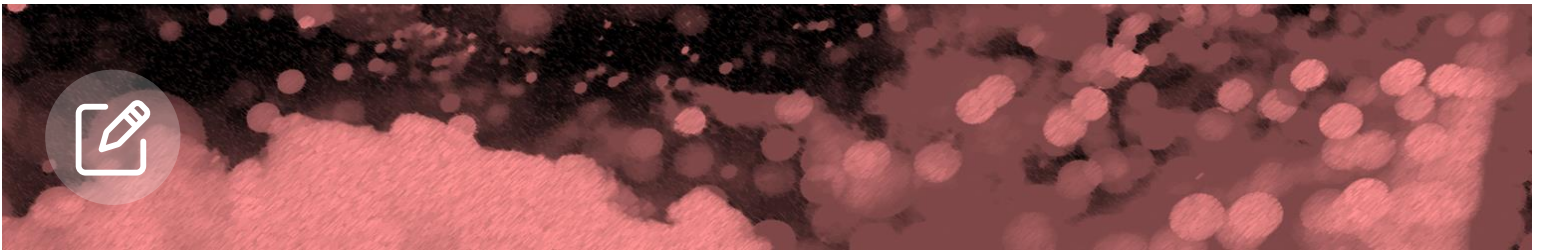
Variance

*If Variance is selected, what code section(s) are included?*

Appeal

*If Appeal is selected, what decision is being appealed?*

Zoning Map Interpretation



## Description of the Application

Provide a detailed description of the application below:

## Exhibits

List the exhibits or other supporting documents included with your application:

\_\_\_\_\_  
Signature of Property Owner

\_\_\_\_\_  
Date

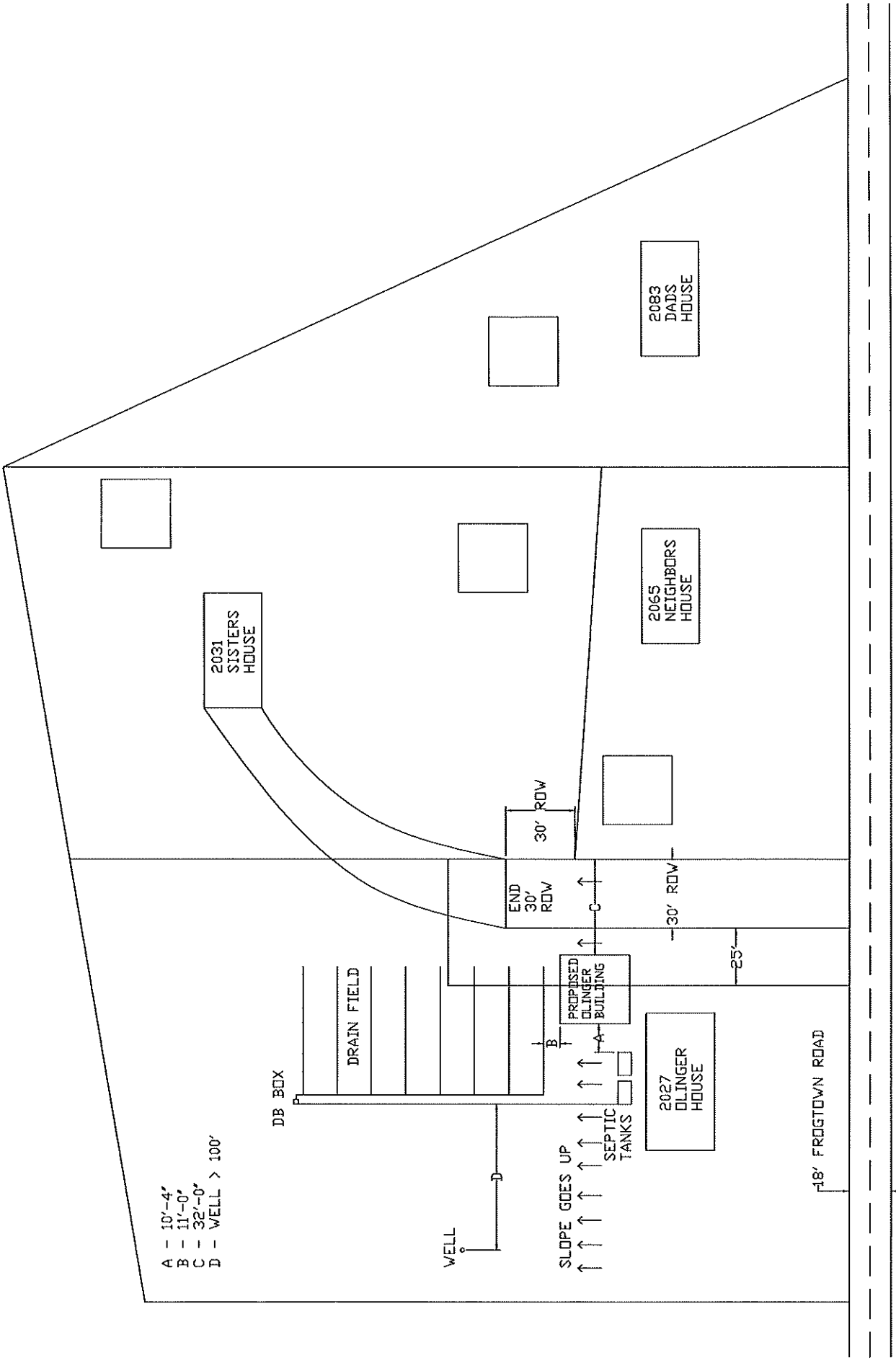
\_\_\_\_\_  
Office Use Only

**DATE RECEIVED:** 2/5/2024

**FEE PAID:** 750.00

**COMMENTS:** BZA Meeting 2/26/2024 @10AM

\_\_\_\_\_  
**GIS ACCOUNT #:** 6374

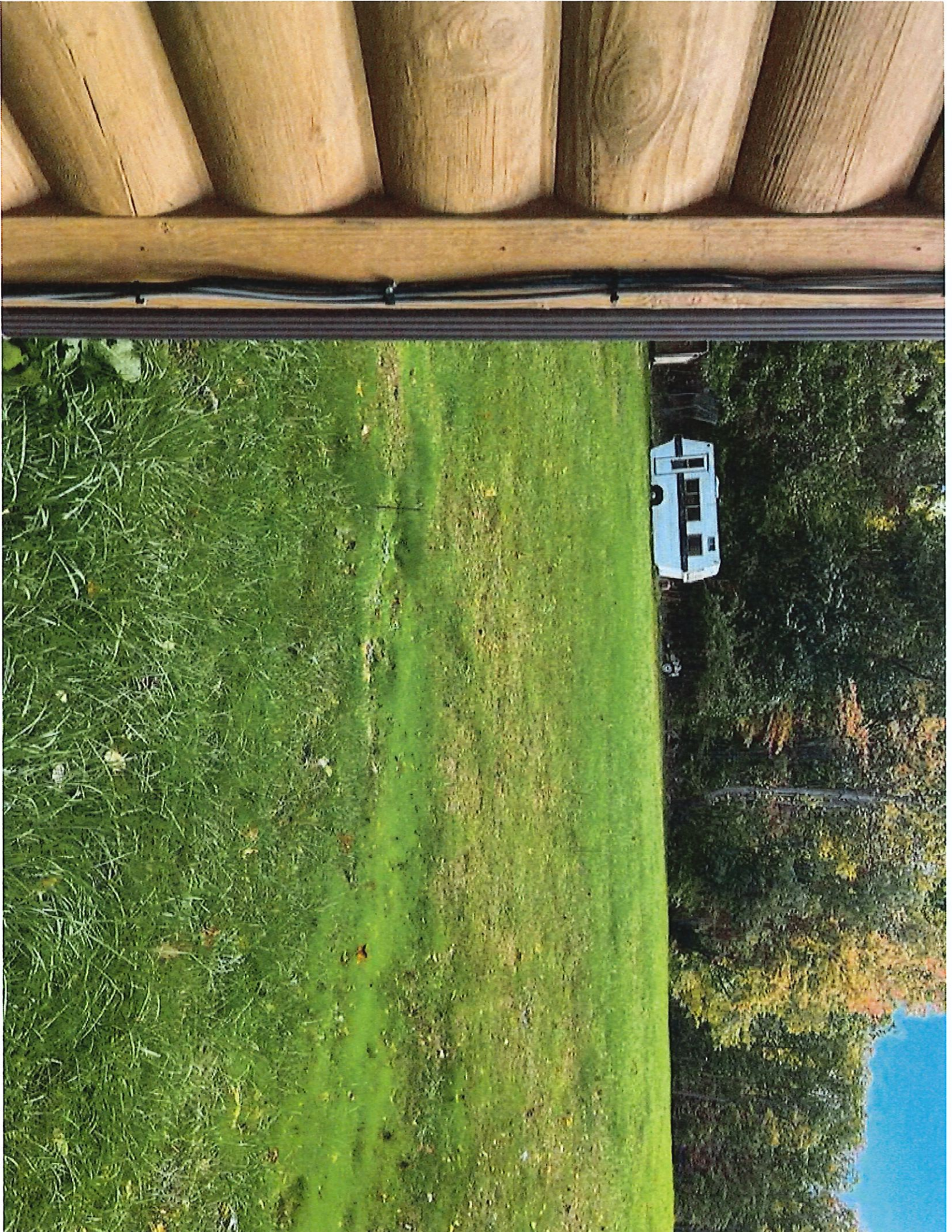






Photos submitted with Application











Staff photos taken 2/14/2024





PUBLIC HEARING;  
LAND USE REQUEST;  
CONTACT COUNTY;  
PLANNING DEPARTMENT;  
(940) 668-0111







