

Clarke County Board of Zoning Appeals

Meeting Minutes

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	AYE	Staelin	AYE (seconded)
Brumback	AYE	Volk	AYE
Borel	AYE (moved)		

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	AYE	Staelin	AYE
Brumback	AYE (moved)	Volk	AYE (seconded)
Borel	AYE		

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 appellant's 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, that has been operated by the owners but rather following 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 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-bedroom 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 Administrator's 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 it 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 explained 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; 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 15th. 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 15th. 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 operation of 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 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, 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.

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

4. Other Business

a. Electronic Meeting Policy

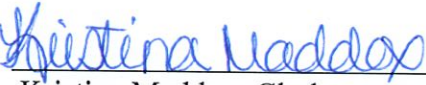
The Board reviewed the electronic meeting policy and noted that it was previously voted on and did not require a second vote.

5. Adjournment

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



Howard Means, Chair



Kristina Maddox, Clerk