

CLARKE COUNTY BOARD OF SUPERVISORS
January 16, 2009 Public Hearing 1:00 p.m.
Main Meeting Room

At a public hearing of the Board of Supervisors of Clarke County, Virginia, held in the Main Meeting Room, 2nd Floor, Berryville Clarke County Joint Government Center, 101 Chalmers Court, Berryville, Virginia on Friday, January 16, 2009.

Board Members Present

Barbara J. Byrd; A.R. "Pete" Dunning, Jr.; John R. Staelin; David S. Weiss

Board Members Absent

J. Michael Hobert

Staff Present

David Ash, Chuck Johnston, Lora Walburn

Also Present

Grace Ritzenberg, Dexter Odin, Mary Louise Costello Daniel, Keith Dalton, Dave Tyrell, Laura Oleniacz, Dennis Cox

Call To Order

Chairman Staelin called the meeting to order at 1:04 p.m.

PH 09-01 Public Hearing SUP-08-02: Special Use / Site Plan – Determination Of Proposed Utility Being In Accord With Comprehensive Plan:

The Town of Berryville requests approval of a Special Use and Site Plan for a Public Utility Facility (outfall line for treated effluent).

Chairman Staelin announced that the only item on the agenda was a public hearing on the Town of Berryville's request for an outfall line for treated effluent. He noted that this was an appeal of the 2232 opinion of the Planning Commission.

Chairman Staelin invited Keith Dalton, Town Manager, to provide comment on behalf of the Town of Berryville. Mr. Dalton stated that he did not have a great deal to add to the November 15, 2008 appeal letter but he did want to highlight the Town's reasons for appeal.

- The County Planning Commission had determined that this request was in accord with the Comprehensive Plan. He stated that it was the Town's position that the Planning Commission should make that determination and not leave that to someone else, VOF and the landowners.
- On September 16, the Planning Commission reviewed this project and recommended it to the Board of Supervisors for passage. Mr. Dalton stated that part of the Special Use Permit and Site Plan application process includes review of the 17 criteria established in the Zoning Ordinance to ensure a submission is in accordance with the 2007 Comprehensive Plan. He opined that the Planning Commission would not have recommended approval to the Supervisors if the application did not comply with the Comprehensive Plan putting forth the following criteria in particular:
 - o A. Is consistent with the Comprehensive Plan.
 - o B. Consistent with the purpose and intent of the Zoning Ordinance.
 - o D. Will not cause undue adverse effect on neighboring property values.
 - o E. Will not cause undue adverse effect on preserving agricultural or forestal land.
- The County staff report of November 7 for the Planning Commission 2232 review did recommend approval; further proof that the submission was in substantial accord with the Comprehensive Plan.
- Mr. Dalton asserted that there was already a great deal of action on the County's part that shows its support of the plan.
- Mr. Dalton stated that this project is incredibly important to the community, for Berryville and the County for the Town must have the outfall line to: upgrade the treatment plant to meet state-imposed nutrient reduction; serve the Berryville Area Plan; and provide orderly development of the community.
- Mr. Dalton reminded the Supervisors that some years ago a different route was planned but the County had said it was unacceptable for it crossed streams too many times through agricultural land and would affect the ability to farm the land. As instructed by the Supervisors, the Town moved the outfall line running it along Route 7 to comply with the County's wishes and to meet state standards.
- Mr. Dalton expressed a desire to move forward with the project in a manner that was respectful of the property owners.

Supervisor Dunning recapped Mr. Dalton's comments pertaining to passage by the Planning Commission opining that he did not think the Planning Commission would have passed the

matter if the codicil had not been added stating that as long as it was approved by the property owners.

Chuck Johnston stated that he could not remember this being a specific request of the original action of the Planning Commission on the special use. He did note that it was part of the Planning Commission discussion that they did not want to put themselves in the role of determining the specific impact of this facility on these specific properties under easement believing this determination should be made by the grantor holding the easement.

At 1:11 p.m., Chairman Staelin opened the public comment portion of the public hearing.

Dexter S. Odin, Legal counsel for Grace Ritzenberg, an affected property owner, whose land is encumbered with a conservation easement: stated that if the decision of the Planning Commission is not appealed to the Supervisors it is final. He submit that when the Supervisors hear an appeal they are not making the decision but rather reviewing the validity of the decision made by the Planning Commission. He put forth that it was his opinion that the standard here is whether the decision is fairly debatable; and if it is, it should stand and should not be overturned for it is presumed to be correct. Mr. Odin asserted that someone attacking that opinion must come forward and prove that the decision is wrong. He said that the decision before the Supervisors was that the Planning Commission believed that the submission was in accord with the master plan only "if" VOF and the landowner consent. He put forth that if consent is not required than the Planning Commission has not found that it is in accord with the master plan. Mr. Odin submitted that he believed the Planning Commission met the law in that there decision was fairly debatable.

Mr. Odin stated that a conservation easement could not be accepted unless it is in accord with the Comprehensive Plan of the jurisdiction in which the property is located. He opined that the Supervisors would not dispute the finding that the conservation easement was in accord with the Comprehensive Plan. He observed that Clarke County's Comprehensive Plan mentions conservation easements numerous times and states that they will be supported financially and philosophically.

Mr. Odin stated that the VOF must determine that the proposal is essential to be in that location. He opined that the strongest argument that the Town has is that DEQ has already approved that location, and only that location, so that legally that is the only way they can go. He drew the Supervisors attention to 15.2-2232, the section that provides for hearings such as this, it says that before there will be any building, construction or even approval of an infrastructure proposal such as this there must first be a determination by the Planning Commission that that proposal is in accord with the Comprehensive Plan. He submit that the Town knew, or should have known, that a 2232 hearing was required prior to submission of the special permit application; therefore, since the Town did not ask for the hearing, the application could not have been approved. He enumerated the following points:

- 1) The DEQ approval is invalid

- 2) The easement is not essential on that property at that location for there are seven to ten alternative ways to go. Only the VOF can make a determination that it is essential and the Planning Commission was quite insightful in deciding that until the VOF makes that determination that they did not know whether it was in accord with the Comprehensive Plan. VOF consent is required; and by the conditions set forth by the Planning Commission, without the consent of VOF and the property owner, the Planning Commission has not found it to be in accord with the Comprehensive Plan.

Mr. Odin concurred with the Town's position that the outfall line going along Route 7 was more cost effective. However, he asserted that landowners considering placing their property in easement must feel that they will be protected. He opined that conservation easements reduce property value making them more attractive to entities with the power to condemn. He pointed out that the easement contract states that no disturbance of the land and no utility easements will be granted except those essential to the serving of the property in question and the neighboring property. Mr. Odin opined that the Town of Berryville could not be considered neighboring property; and while the outfall line served the Town, it did not provide any of the serves to the property.

Mr. Odin concluded by requesting that the Board of Supervisors respect the Planning Commission decision.

Mary Daniel, Berryville Town Counsel Ward 3: put forward that the issue before the Supervisors was whether what the Town of Berryville proposed was consistent with the Comprehensive Plan. She argued that this determination could not be delegated to a private party. She opined that the Planning Commission had given veto power to the private landowner and the VOF, which she deemed inappropriate. She assured that the review process did not stop with this action for the Town must still work out the details with VOF and the property owners. She concluded by asking the Supervisors for approval.

Supervisor Dunning commented that it is the State that gives veto power. Mrs. Daniel countered that she did not agree.

Keith Dalton, Town Manager: asked to provide follow up comment and assured that there was no deception by the Town of Berryville in this matter, just a difference of opinion. He opined that Mr. Odin's comments should be made to the VOF and not at this hearing with the Supervisors. He supported Mrs. Daniel's assertions that the Town still had many issues to resolve with VOF and the property owners. Mr. Dalton said that there were competing issues with regard to the importance of conservation easements and the proposed improvement. He asserted that the Berryville Area Plan was the keystone of Clarke County zoning; and it was imperative that it function as a growth area, which was essential to maintaining the rural character of the rest of the County.

Dexter S. Odin, spoke again stating that he believed that the Town had dealt with his client in good faith. He concurred with Mr. Dalton that the Berryville Area Plan was essential to the Comprehensive Plan. He put forward that the issue was the essentiality of locating the

outfall at that location as opposed to any other. He asked that these competing priorities be weighted equally.

At 1:40 p.m., there being no others desiring to be heard in this matter, Chairman Staelin closed the public comment portion of the public hearing.

Chairman Staelin requested clarification of the Town of Berryville's December 14 letter wherein it states that the contract with Mrs. Casey states that the school might go on the Casey property east of Town. He advised that the Casey property considered for the school was to the west of Town not the east. Keith Dalton responded that Dave Tyrell drafted the letter in question and the error noted by Mr. Staelin was to be corrected.

Mr. Staelin addressed his comments to the specific role of VOF stating that VOF deals with the specifics of the easement and ensuring that all actions conform with the law. He said that the Supervisors role was to deal with the appeal of the Planning Commission's decision as to whether this project conformed to the Comprehensive Plan. He noted that state law required the locality to make the decision before VOF. Chairman Staelin stated that he trusted VOF to protect easements.

Supervisor Byrd remarked that Clarke County encourages open space, agriculture, agricultural districts and conservation easements, all of which are voluntary. She opined that the Ritzenberg property could have been used for housing development; but instead, the landowner had placed their property in easement. She added that to encourage the voluntary giving up of property rights the County must act to protect the landowners in easements. She put forward that lack of communication appeared to be a contributing factor to the problem before the Supervisors. She stated that she had taken an oath to protect the Comprehensive Plan; therefore, as it stands now, she could not support the proposed placement of the outfall line.

Supervisor Weiss stated that the outfall line would run through his district. He said that it was up to VOF to make the decision whether it was essential. He stated that he had faith in VOF's ability to make the right decision. He said that he believed the special use was in compliance with the Comprehensive Plan. He opined that the proposed route appeared to be the least disruptive to agriculture.

Supervisor Dunning stated that he knew that the outfall line was necessary. He did express concern for the protection of the scenic river and the purity of the water entering the river. He read from an email from Keith Fowler, DEQ, where it said that DEQ would be making revisions to their notifications. He opined that the Town of Berryville rushed to get approval for the outfall line under the current DEQ standard that would require checking the oxygen of the water only once per year while the new standard would require daily testing. Supervisor Dunning expressed his preference for more frequent water testing.

Supervisor Dunning told the Supervisors that Mr. Fowler had indicated that the location of the outfall line could be changed and such a change could be done in a month to six weeks.

He further stated that he was a strong supporter of easements and trusted certain persons within VOF to make the right determination.

Chairman Staelin called for a motion to uphold or overturn.

Keith Dalton interjected asking the Supervisors if the issue was the Ritzenberg property.

Supervisor Byrd responded that she believed that with proper communication and a few changes, such as moving the line, the Town and the property owner could come to agreement.

Chairman Staelin said that he was not aware of any issue other than the location of the outfall line on the Ritzenberg property.

David Ash called for legal opinion from Henry Day, attorney representing the County of Clarke in this matter, as to whether the Board should include in its resolution comments specific to a particular piece of property or individual as justification for their decision.

Henry Day advised that under Section 15.2-2232 an appeal of a Planning Commission decision is a limited process. He stated that the purpose was either to overrule or uphold the decision. He told the Supervisors that he had assisted in drafting the two resolutions before them and he provided a brief synopsis of each. He further stated that uniformity was necessary if the Supervisors opted to amend the resolution to add additional issues as a basis of their decision. He advised that Section 15.2-2232 is statewide and applies to all governing bodies and all planning commissions. Mr. Day said that the order of occurrence was not a concern for him explaining that the Town of Berryville had filed an appeal under the statute and the Supervisors had to hear this appeal and make a decision, which is a narrow, limited proceeding.

Mr. Day stated that the resolution set up a dichotomy, the conflicting goals of the Comprehensive Plan; and it was the Supervisors responsibility to determine which of those goals was paramount. He explained that the Planning Commission had decided in a different way that it was in fact in compliance but on the basis of the conditions that there be VOF and landowner approval.

Supervisor Byrd contributed that the landowner did not concur with the modification of the Planning Commission's decision.

Chairman Staelin and Supervisor Weiss put forward that the Supervisors were relying upon VOF, another state entity that controls the easement, to review and make the final determination. Supervisor Weiss stated that the Supervisors could only rule on the Planning Commission decision; therefore, they were not abrogating their responsibility for they were placing the matter with the proper entity with the proper authority.

Supervisor Dunning asked Mr. Day about the acceptability of reprioritizing the order of the proposed upholding resolution moving those paragraphs referencing easements to the beginning of the document. Mr. Day responded that as a point of order the first three paragraphs outlined the facts upon which the decision was before the Board and the remaining paragraphs could be arranged as the Board deemed acceptable. For clarification, Chairman Staelin restated the proposed change in paragraph order.

Henry Day advised that the 60-day time limit was up today leaving two options either the Supervisors made a decision today; or, if the Board did not make a decision, and if the Town of Berryville did not ask for an extension of time, the decision of the Planning Commission would stand.

Chairman Staelin concluded that the resolution modifies the Planning Commission decision by removing the landowner as one of the parties that must agree. He noted that the law does not specifically state that the landowner has to be satisfied in order to meet the Comprehensive Plan. David Weiss added that the Supervisors were not totally clear on whether the Planning Commission could add those contingencies.

Supervisor Weiss moved to adopt the following resolution, as revised, upholding the Planning Commission decision.

The motion was approved by the follow vote:

John R. Staelin, Chair	- Aye
J. Michael Hobert, Vice Chair	- Absent
Barbara J. Byrd	- Nay
A.R. Dunning, Jr.	- Aye
David S. Weiss	- Aye

**RESOLUTION OF THE BOARD OF SUPERVISORS OF CLARKE COUNTY UPHOLDING
DETERMINATION OF ITS PLANNING COMMISSION ON APPEAL
09-01R**

WHEREAS, the Planning Commission of Clarke County at its meeting on November 7, 2008, determined pursuant to Section 15.2-2232 of the Virginia Code that a proposed sewage line from the Town of Berryville to the Shenandoah River was in substantial accord with the 2007 Clarke County Comprehensive Plan provided that the owners of the properties under Virginia Outdoors Foundation ("VOF") open space easement, identified as Tax Map Parcels 15-A-8 and 16-A-39, the Town of Berryville, and the Virginia Outdoors Foundation agree to the location of the proposed outfall line; and,

WHEREAS, the Town of Berryville filed an appeal of such decision by a letter dated November 15, 2008 and received by the Town November 17, 2008; and,

WHEREAS, the Board of Supervisors, upon proper notice and proper advertising, held a public hearing on the appeal on January 16, 2009; and,

WHEREAS, the 2007 Clarke County Comprehensive Plan calls for the preservation of farmland, riparian buffers and open space and the Board of Supervisors believes that one of the best ways of preserving these three items is through the use of permanent conservation easements; and,

WHEREAS, permanent conservation and open space easements have become an extremely important component of the County's Comprehensive Plan as 18% of the County is covered by an easement; and,

WHEREAS, the Clarke County Board of Supervisors believes that the landowners who have donated easements or who own land in easement expect their easements to be enforced; and,

WHEREAS, the Board of Supervisors believes that a violation of or lax enforcement of any single easement by any easement holder would run counter to the 2007 Clarke County Comprehensive Plan because any such lax enforcement would weaken all remaining easements in the County and thus lessen the County's ability to protect its scenic and environmental resources (open space, riparian buffers, forest land, etc) as called for in the Plan; and,

WHEREAS, the Clarke County Board of Supervisors believes that landowner confidence in the Commonwealth's and the County's easement programs would be severely diminished if there is any indication that easements will not be strictly enforced and that any action leading to such loss in confidence would reduce the number of people willing to put their land in easement and thus run counter to the 2007 Clarke County Comprehensive Plan; and,

WHEREAS, the 2007 Clarke County Comprehensive Plan designates the Town of Berryville as the growth area for the County; and,

WHEREAS, Berryville cannot serve its role as a growth area unless it expands its sewer capacity; and,

WHEREAS, the 2007 Clarke County Comprehensive Plan calls for improving the water quality of the streams and rivers flowing through the County; and,

WHEREAS, the proposed new Berryville Wastewater Treatment Plant will improve the quality of effluent entering the Shenandoah River; and,

WHEREAS, the 2007 Clarke County Comprehensive Plan calls for preserving agriculture; and,

WHEREAS, the treated effluent from the Berryville Wastewater Plant will be piped through farmland and farmers might* be able to tap into the pipe to access "free" water suitable for irrigation; and,

WHEREAS, the Town of Berryville, in a letter dated March 14, 2008 to VOF stated that there are alternatives to the route for the proposed utility facility; and,

WHEREAS, the VOF is responsible for determining whether there are feasible alternatives to the route that would eliminate or reduce the negative impacts of the proposed utility facility on open space easements, pursuant to Section 10.1-1704 of the Virginia Code; and,

WHEREAS, on December 16, 2008 staff members of VOF and the Attorney General's Office told the Clarke County Board of Supervisors that their organizations have a long and consistent history of strictly enforcing Section 10.1-1704 and the easements VOF holds; and,

WHEREAS, the Clarke County Board of Supervisors has been asked to determine whether the proposed utility facility is in substantial compliance with the 2007 Clarke County Comprehensive Plan.

NOW, THEREFORE, BE IT RESOLVED, that the Clarke County Board of Supervisors expects VOF and the Attorney General's Office to continue to strictly enforce Section 10.1-1704 of the Virginia Code and the open space easements VOF holds in Clarke County.

FURTHER, BE IT RESOLVED, that because the Clarke County Board of Supervisors has been assured that VOF has, and will continue to enforce both the easements it holds and the laws of the Commonwealth, the Clarke County Board of Supervisors hereby determines that the proposed utility facility is in substantial conformance with the 2007 Clarke County Comprehensive Plan.

MOTION MADE: Supervisor David S. Weiss

VOTING

In favor: A.R. Dunning, Jr.; John Staelin; David S. Weiss

Opposed: Barbara Byrd

Absent: J. Michael Hobert

Adopted 16th day of January 2009,

Attest:

David L. Ash, Clerk
Clarke County Board of Supervisors

*This word changed from "will" to "might" by direction of the Clarke County Board of Supervisors authorized on January 20, 2009.

Adjournment

There being no further business to be brought before the Board at 2:38 pm Chairman Staelin adjourned the public hearing.

Next Meeting Date

The next regular meeting of the Board of Supervisors is Tuesday, January 20, 2009 at 2:00 p.m. in the Main Meeting Room, Berryville Clarke County Joint Government Center

ATTEST: January 16, 2009

John Staelin, Chairman

David L. Ash, County Administrator

Minutes Recorded and Transcribed By:
Lora B. Walburn
Deputy Clerk, Board of Supervisors