

Clarke County

PLANNING COMMISSION WORK SESSION MINUTES TUESDAY, DECEMBER 3, 2019



A work session of the Planning Commission of Clarke County, Virginia, was held at the Berryville/Clarke County Government Center, Berryville, Virginia, on Tuesday, December 3, 2019.

ATTENDANCE

Present: Robina Bouffault; Anne Caldwell; Mary Daniel; Bob Glover; Scott Kreider; Frank Lee; Gwendolyn Malone; Pete Maynard; and George L. Ohrstrom, II.

Absent: Randy Buckley; Doug Kruhm;

Staff Present: Brandon Stidham, Planning Director; Ryan Fincham, Senior Planner/Zoning Administrator

Others Present: Robert Mitchell (County Attorney)

CALLED TO ORDER

Mr. Stidham called the meeting to order at 3:02PM.

APPROVAL OF WORK SESSION AGENDA

Members approved the work session agenda as presented by consensus.

REVIEW OF AGENDA ITEMS FOR DECEMBER 6, 2019 BUSINESS MEETING

Mr. Stidham stated that the only action items on the Business Meeting agenda are the approval of four sets of minutes. Commissioner Bouffault stated that the minutes reflect Mary Daniel as "Commissioner" instead of "Supervisor." Mr. Stidham replied that Staff debated about which title to use. Commissioner Bouffault said that Commissioner Daniel is the Board of Supervisors' liaison to the Commission and is not a commissioner. Mr. Stidham asked Commissioner Daniel which title she prefers and she replied that she is appointed to the Commission by the Board just as the other commissioners are appointed. Commissioner Bouffault asked her if she is called a liaison and Commissioner Daniel replied that she is both of those things. Commissioner Bouffault said that there is a difference because supervisors are the governing body and commissioners are the advisory body, adding that if it were up to her she would rather have the supervisor title. Commissioner Bouffault also noted that Commissioner Daniel's attendance at joint workshops can constitute a quorum for the Board as well. Commissioner Bouffault said that it would be more proper for her to be listed as a supervisor. Commissioner Daniel replied that she is also part of a quorum for the Commission. Mr. Stidham said that his logic was the joint workshops were organized under the Planning Commission and that if the workshops had been organized under the Board, then it would have been appropriate to

reference Commissioner Daniel as "Supervisor." He added that he can go either way on the issue. Commissioner Bouffault said that Commissioner Daniel is not a full-fledged commissioner, she is a liaison and a supervisor with a vote. Commissioner Kreider said that she is a full-fledged commissioner. Chair Ohrstrom said that if she has a vote and is appointed by the Board then she is. Commissioner Daniel noted that she gets paid \$50 per meeting just like the other Commissioners.

OLD BUSINESS ITEMS

Discussion, Rezoning and Special Use Review Factors (Ordinance Update Project)

Mr. Stidham stated that this discussion was deferred from the previous joint workshop. He noted that an additional copy of the spreadsheet that was distributed at the joint workshop is included in the meeting packet with no new changes. He added that he asked Mr. Mitchell to attend as he performed a significant amount of work on this particular section with Staff.

Commissioner Bouffault said that her concern is that the 19 special use permit criteria have been used effectively for the past 30 years and it keeps the determination of whether something will cause an undue adverse effect under the Board's control. She said that the word "mitigation" is subjective depending upon who defines what it means in a particular instance, and that it opens us up to legal challenges from developers who think they have mitigated sufficiently when the Board thinks otherwise. Chair Ohrstrom asked Mr. Mitchell's opinion on Commissioner Bouffault's concerns. Mr. Mitchell replied that he reviewed Staff's proposed draft and he felt that the revised language is satisfactory. He added that he did not think there was any intent to change the options or discretion of the Board. Commissioner Bouffault asked what was wrong with the current language, "will not cause an undue adverse effect." Mr. Mitchell replied that he was not the one who initiated that change. Commissioner Bouffault said that the current language has never had a legal challenge and has been used several times to turn down applications. She also noted one of the project policies is that proposed changes should be based on an actual problem and not a perceived issue or a problem that is unlikely to occur. She said she believes the Board will be giving up a certain amount of their legislative discretion if the language is changed. She asked why the language was changed.

Mr. Stidham said that in his opinion, the proposed language provides more flexibility and is more legally defensible than the current language. He said that Mr. Mitchell can weigh in on whether he has concerns with this opinion. Commissioner Bouffault asked Mr. Stidham why he thinks the language provides more flexibility. Mr. Stidham replied that "will not cause" is more of an absolute and if the Board is making a judgment call on an application, they may want to rule in terms of a mitigating fashion but would be held to the stronger standard in the current language. He said that it is ultimately a policy decision and we can resolve this pretty quickly by asking Mr. Mitchell's opinion on the question. Mr. Stidham added that if Mr. Mitchell thinks the language distills the Board's authority, that was not Staff's intent and we can go with different language. Commissioner Bouffault said that she is concerned an attorney will challenge a Board decision by saying the Board has defined "mitigation" one way but we define it a different way and can prove it. Commissioner Caldwell said there is a general principle that when you are very specific in the wording of regulations, you are held to that specific wording and it gives you no flexibility. She added that we do not need to be held to specific things because it limits what we can ask the applicant to provide and limits our decisions. Commissioner Maynard said that he agrees with the goal and said that the

operative word in the current language is “undue.” He said that it is the Board’s discretion to determine what is “undue,” but in the proposed language they would only have discretion to determine whether an impact has been mitigated. He added that the current language gives the Board discretion to determine whether an impact is reasonable or not. Commissioner Caldwell said that a simple fix might be to change the language to “mitigation such that no undue impacts occur.” She added that this would let us determine whether an impact is undue. Commissioner Maynard said that you would allow mitigation up to the point at which it allows an undue impact to occur.

Mr. Stidham asked the commissioners to look at proposed subsection (c) and asked if the wording “Effective mitigation of any impacts” would resolve concerns. Commissioner Bouffault replied that subsection (c) is an important factor that deals with open space conservation and she believes that the current language should be retained to keep discretion in the hands of the Board. She added that the proposed language waters the current language down, she does not understand why it is being proposed, and we have had 4-5 instances where we have used it to address improper development on the wrong properties and have never had a legal challenge. Commissioner Caldwell replied that we had a legal challenge regarding the Georgetown University special use permit application. Commissioner Bouffault said that it was within the Board’s authority to mitigate that as a backup, adding that you have to keep it in the hands of the Board because there are too many attorneys who can figure out creative ways to get around the regulations.

Chair Ohrstrom asked Mr. Mitchell if he had any comments. Mr. Mitchell replied that Commissioner Caldwell’s suggestion that both the current and proposed language can be used. He gave the example language “mitigation of impacts such that the development would not cause an undue adverse impact.” Commissioner Maynard said that this would get us back to the current wording and Commissioner Bouffault said that it is saying the same thing. Chair Ohrstrom said that the Committee thinks that it provides more flexibility but it is up to what the Commission thinks. He added that you could combine the language or leave it the way it is. Commissioner Daniel asked whether we allow mitigation regularly so that we can determine whether it is reasonable. She added that with a developer-friendly State legislature we are seeing regulations being struck down that are not flexible. Commissioner Maynard said that he thinks our current regulations would be overly restrictive if they did not contain the word “undue” in each criteria. Chair Ohrstrom said that “undue” is a difficult term to define and Commissioner Bouffault agreed and said that it is in the Board’s hands.

Mr. Stidham said that he believes we are talking about review factors (b), (c), and (f). He added that there are other similar review factors that were changed but for different reasons, citing (d) as an example where the focus is now on whether an application complies with the Virginia Department of Transportation’s (VDOT) regulations and recommendations. He also noted that (e) is proposed to be strengthened as an absolute regarding destruction of or encroachment upon historic or archaeological sites. Chair Ohrstrom asked the commissioners if they want to hybridize the language or just keep the current language, and Commissioner Bouffault replied that she would like to go back to the original language on the factors that reference mitigation. Mr. Mitchell said that legal challenges come up when the Board denies an application based on one of the review factors. He added that using the current language, the challenge would be that an impact was not undue. He also said if you use the proposed language, the argument would be that there was effective mitigation proposed. He

said that either way, the court will have to determine whether the ruling was within the Board's legitimate discretion. He also said that there will be an issue to deal with either way so it comes down to which language the Commission is most comfortable with. Chair Ohrstrom said that Commissioner Bouffault may be right because an applicant can say that they mitigated an impact. He added that disproving an undue adverse impact would be harder to do in court than it would be to demonstrate that the impact was mitigated. Commissioner Daniel pointed out that subsection (g) also contains the language at issue. Commissioner Kreider said that he would like to see (b), (c), (f), and (g) stay the same and he has no problems with changes to the other subsections. Mr. Mitchell added that he did not have any legal concerns with the other subsections. Commissioner Daniel said that per Mr. Mitchell's comments, we are going to have the same problems to address with either version of the wording. Commissioner Maynard said that if there is a legal challenge, there is value in being able to say that the language has been the same for 30 years.

Mr. Stidham said that if there really is no loss in legal defensibility, he will merge the current language with the new format and replace "mitigate" in the applicable subsections. Commissioner Daniel asked Mr. Stidham if he will be changing the proposed factors that have been changed to an absolute "no" and Mr. Stidham said that he will not change the wording of those factors. He added that the Committee wanted to make a stronger statement by using the stronger language. Mr. Stidham asked if subsection (j) regarding visual impact should be changed since the proposed language focuses on effectiveness of screening and buffering. Chair Ohrstrom noted that detrimental visual impact is open to subjective interpretation. Mr. Stidham noted that he will try to combine the current and proposed wording. He also noted that in proposed 6.3.3D-2, he will change "Planning Commission" to "advisory body" per previous comments by commissioners.

Commissioner Bouffault asked if we could discuss the role of the Berryville Area Development Authority (BADA) with Mr. Mitchell. She said that the BADA is a separate entity from the County Planning Commission created through an agreement between the County and the Town of Berryville and that it has nothing to do with the Commission. She said that there is no reason for the BADA to be included in the Commission's Zoning Ordinance. She also said that the Commission is the advisory body to the County governing body and the BADA is the advisory body to the Town only. She added that by changing the language in the revised Zoning Ordinance, you are muddying the waters and may make people think that the BADA has to weigh in on something in the County which they do not. Chair Ohrstrom replied that technically the BADA advises on applications in the County annexation area. Commissioner Bouffault said that Annexation Area B is under the authority of the BADA and their recommendations go back to the Town Council and Board of Supervisors. She added that is it not appropriate for the BADA to be mentioned in the same Ordinance sections as the Commission.

Mr. Stidham said that Annexation Area B covers land that is in the Town and in the County. He said that the land within the Town has already been annexed and is entirely under control of the Town with the BADA serving as the advisory body. He also said that we are talking about the land in the County that is in Annexation Area B but has not been annexed. He noted that the Town of Berryville has extraterritorial jurisdiction over subdivision of land in the County that is also in Annexation Area B. He said that review of subdivisions of land in the County and Annexation Area B applies the Town's Subdivision Ordinance and the applications would be processed as Town applications

reviewed and acted upon by the BADA as the approval authority. He said that Commissioner Bouffault is correct in regards to subdivision applications that the County Planning Commission does not have a role in the review process, and language is added in the draft Subdivision Ordinance to note this procedure. He stated that the process for review of applications under the Zoning Ordinance is not the same as Subdivision Ordinance applications. He said that we apply the County Zoning Ordinance to matters involving County land in Annexation Area B. He added that State Code grants localities the ability to delegate their subdivision authority to another jurisdiction but does not allow zoning authority to be delegated. He also said that the Commission would not serve as the advisory body on zoning applications because it falls under the BADA's authority. He said that the Annexation Area Agreement states that the County will carry over the Town's zoning regulations which is why we have their regulations in our Zoning Ordinance. Commissioner Bouffault said that she thinks it is redundant. She noted an example of Bel Voi which is located in Annexation Area B, stating that any changes requiring zoning review would fall under the BADA as the advisory body. Mr. Stidham replied that she is correct. Commissioner Bouffault said that it is important to separate from our Ordinance because it will be difficult to explain the process to the public. Mr. Stidham replied that we are attempting to explain the process with the format of the new Ordinance. Commissioner Bouffault said that the BADA and Commission are in the same paragraph as though they are equal bodies and they are not. Mr. Stidham replied that you have to explain under which situations the BADA and Commission are the advisory bodies. Commissioner Bouffault said that you do not need to explain it because there is not very much land to develop in Annexation Area B. Chair Ohrstrom said that we have to be in the list because it is part of our Zoning Ordinance. Commissioner Daniel said that whoever is the advisory body applying our regulations needs to be in the same rules. Mr. Stidham said that we have written the draft Ordinance to better explain the BADA process and the Annexation Area regulations are designed to be easily removed if the process changes in the future.

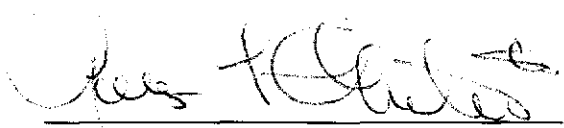
Chair Ohrstrom asked the commissioners what they want to do with this issue. Commissioner Caldwell said that she is in favor of keeping the proposed language as it is written because our Zoning Ordinance applies to any matters that have to come before the Board of Supervisors. She said that it is very important to have that spelled out in the Zoning Ordinance. Mr. Stidham said that Mr. Mitchell assembled a chart several years ago that outlines how applications are reviewed in the Annexation Area and that this chart was added to the Berryville Area Plan when it was updated. Commissioner Caldwell asked if the chart could be included in the Ordinances and Mr. Stidham replied that we could add it as an appendix. Mr. Lee said that it could solve the problem if we include it in the Ordinances. Mr. Stidham said that there is no mention in the current Subdivision Ordinance that the Town has extraterritorial jurisdiction over subdivisions in Annexation Area B. Commissioner Bouffault said that unless we want to tell the Board and Town Council to re-do the Annexation Area Agreement, we need to leave the Ordinance language alone as much as we can. Chair Ohrstrom said that because we cannot delegate Zoning Ordinance authority under the State Code, then we need to have language in the Ordinance to differentiate the processes. He added that including Mr. Mitchell's chart as an appendix would be very helpful. Mr. Stidham noted that there will be a section in the Guidance Manual that explains the processes. He added that review processes have not been mapped out before in a clear fashion and that this may be the first time that we have looked at the processes in depth. He added that we are not proposing any changes to the processes as noted on Mr. Mitchell's chart, we are spelling out the processes in the revised Ordinances for clarity.

purposes. Commissioner Bouffault asked if the wording could be changed where the Commission and BADA are referenced in the same section. Mr. Stidham replied that they can look at it, adding that if language is hitting people the wrong way then this is the time to fix it. He added that in previous years there was a public perception that review of certain applications had to go through both the BADA and Commission.

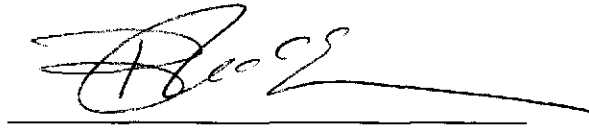
NEW BUSINESS ITEMS

Mr. Stidham noted that he has included copies of materials for commissioners to prepare for the Organizational Meeting in January.

The meeting was adjourned by consensus at 3:45PM.



George L. Ohrstrom, II (Chair)



Brandon Stidham, Planning Director