

**CLARKE COUNTY BOARD OF ZONING APPEALS**  
**TABLE OF CONTENTS**  
**April 19, 2021, 10:00 AM, Meeting Packet**

<u>Item #</u>	<u>Description</u>	<u>Pages</u>
<b>1</b>	<b>Meeting Agenda</b>	<b>1</b>
<b>2</b>	<b>January 25, 2021 BZA Meeting Minutes</b>	<b>2-8</b>
<b>3</b>	<b><u>BZA-21-01, Brian Legge</u></b>	<b>9-63</b>
	-- Staff Report	9-17
	-- GIS map of subject property	18
	-- §3-A-3-c (Minimum Yard Requirements)	19
	-- Photo of structure from edge of pavement (U.S. 340)	20
	-- As-built survey (8/3/2020)	21
	-- Notice of Violation letter (8/31/2020)	22
	-- Appeal request and application	23-24
	-- Appellant's Statement of Justification	25-60
	--Applicant's Cost Estimate	61-63



# Clarke County Board of Zoning Appeals

## MEETING AGENDA

Monday, April 19, 2021 (10:00AM)

Berryville/Clarke County Government Center

101 Chalmers Court, Main Meeting Room (second floor)

1. **Approval of Agenda**
2. **Approval of Minutes – January 25, 2021 Meeting**
3. **BZA-21-01**. Brian Legge (owner/appellant) is requesting a variance to allow “*his completed garage that is located approximately fourteen (14) feet within the setback area adjacent to Route 340 to continue to exist in its current location.*” A permit was issued that required that the garage to be no less than 50 feet from the edge of the right-of-way to Rt. 340. However, the garage was constructed only 35.9 feet from the edge of this right-of-way. The subject property consists of approximately 1 acre within the RR (Rural Residential) Zoning District and H (Historic) Overlay District. The property is identified by Tax Map #28A-A-66, and the existing house on the property is addressed as 140 White Post Road. §3-A-3-c of the Clarke County Zoning Ordinance includes the minimum setback requirements for properties within the RR District.
4. **Other Business**
5. **Adjourn**



# Clarke County Board of Zoning Appeals

Meeting Minutes -- **DRAFT**

Monday, January 25, 2021 – 10:00 AM

Berryville/Clarke County Government Center – Main Meeting Room

ATTENDANCE:			
Anne Caldwell (Chair)	✓	Alain Borel	✓
Howard Means (Vice Chair)	✓	Clay Brumback	X
Laurie Volk	✓		

E – Denotes electronic participation

L – Denotes arrived late

**STAFF PRESENT:** Brandon Stidham (Director of Planning), Jeremy Camp (Senior Planner/Zoning Administrator), and Debbie Bean (Clerk).

**OTHERS:** Brian Legge (appellant), Timothy Johnson (attorney representing appellant), Robert Mitchell (County Attorney).

**CALL TO ORDER:** Mr. Stidham stated that this being the first meeting of the year he opened the meeting at 10:04 AM

## 1. Approval of Agenda

The BZA voted 4-0-1 to approve the agenda as presented.

Motion to approve the January 25, 2021 meeting agenda as presented:			
Caldwell (moved)	AYE	Borel	AYE
Means (seconded)	AYE	Brumback	ABSENT
Volk	AYE		

## 2. Organizational Meeting - Election of 2021 Officers – Chair and Vice-Chair

Mr. Stidham stated that this is the first meeting of the calendar year and officers for 2021 will need to be elected. Mr. Stidham asked for nominations for Chair for 2021. Mr. Means nominated Anne Caldwell. With no further nominations, Mr. Stidham closed the floor to nominations. The BZA voted 4-0-1 to elect Ms. Caldwell as Chair for 2021.

Motion to Approve the election of Anne Caldwell as the Chair of the Board of Zoning Appeals for 2021:			
Caldwell	AYE	Borel (seconded)	AYE
Means (moved)	AYE	Brumback	ABSENT
Volk	AYE		

Chair Caldwell asked for nominations for Vice Chair for 2021. Ms. Volk nominated Howard Means. With no further nominations, the BZA voted 4-0-1 to elect Mr. Means as Vice-Chair for 2021.

<b>Motion to Approve the election of Howard Means as the Vice Chair of the Board of Zoning Appeals for 2021:</b>			
Caldwell	<b>AYE</b>	Borel (seconded)	<b>AYE</b>
Means	<b>AYE</b>	Brumback	<b>ABSENT</b>
Volk (moved)	<b>AYE</b>		

**3. Approval of Minutes – November 23, 2020 meeting**

Chair Caldwell called for a motion to approve the meeting minutes of November 23, 2020. Ms. Volk noted several minor edits and stated that the first one is on page 4 of 56 in the first sentence – at the top of the page, the word “virtually” should be “virtual.” In the same sentence, the word “entirely” should be taken out. She said on page 5 of 56 in the second sentence under “Approval of Minutes,” the word “Commissioner” should be removed and “Ms.” should be entered in front of Volk.

Chair Caldwell said that on page 5 of 56 in the first sentence under “Approval of Minutes,” the date should be December 20 not December 19.

The BZA voted 4-0-1 to approve the November 23, 2020 Board of Zoning Appeals meeting minutes with edits.

<b>Motion to approve the November 23, 2020 Board of Zoning Appeals meeting minutes were approved with edits:</b>			
Caldwell	<b>AYE</b>	Borel (seconded)	<b>AYE</b>
Means (moved)	<b>AYE</b>	Brumback	<b>ABSENT</b>
Volk	<b>AYE</b>		

**4. BZA-20-01, Brian Legge**

Brian Legge (owner/appellant) is appealing the Zoning Administrator’s August 31, 2020 Notice of Violation that the appellant’s newly constructed garage is in violation of the required 50 foot setback from the edge of a primary highway right of way with 5,000 or more trips per day per Section 3-A-3-c (Minimum Yard Requirements) of the Clarke County Zoning Ordinance. The subject property is located at 140 White Post Road, Tax Map #28A-A-66, White Post Election District, zoned Rural Residential (RR) and Historic Overlay (H).

Mr. Stidham introduced the appeal to the Board of Zoning Appeals (BZA) and stated that Mr. Mitchell is representing the Zoning Administrator.

Chair Caldwell opened the public hearing.

Mr. Mitchell stated to the BZA members that he is representing the County Zoning Administrator with respect to this BZA appeal. He said that the matter before the BZA today is an appeal of an administrative determination by the Zoning Administrator and the Notice of Violation dated August 31, 2020 which is on page 12 of 56 in the packet. He said that the Zoning Administrator determined that there was a violation of minimum yard setback in the

location of a garage constructed on the property. He said that he wants to clarify the fact the request for Administrative Appeal and Variance has been accepted as an Administrative Appeal only which is on page 16 of 56 of the packet. He stated that a future accepted variance request pending the outcome of the appeal will require a separate application variance and fee. He stated that what is before the BZA is solely the matter of the administrative determination. He said that he would like to point out that the standard of review that the BZA is to apply and act upon is an appeal of the administrative determination that is set forth in Code of Virginia Section 15.2-2309. He said that this code section sets forth that the decision of the BZA is to be based upon the BZA's judgment of whether the Zoning Administrator's determination was correct. He also said the code section states that the determination of the Zoning Administrator shall be presumed to be correct and goes on to explain the process that the BZA follows and acts on when considering an appeal. He stated that the appellant has the burden of proof to rebut the presumption of correctness of the Zoning Administrator's determination by the preponderance of the evidence.

He said that the issue before the BZA is the minimum yard setback requirement and the applicable Zoning Ordinance provision Section 3-A-3-c is set forth on page 9 of 56 in the packet. He said that this is a property that is composed of more than 15,000 square feet and it has frontage on a primary highway mainly on Route 340 which has 5,000 or more trips per day. He said that the chart will indicate that the minimum setback requirement from the highway is 50 feet. He said that the basis for the Zoning Administrator's determination is that the property owner in this case desired to build a garage and such a garage required a Certificate of Appropriateness from the Historic Preservation Commission (HPC) as it was in a Historic District. He said that the application for the Certificate of Appropriateness was approved and the owner applied for a zoning permit with a plat attached. He stated that the zoning permit with the attached plat was approved on November 4, 2019 and is shown on pages 31 and 32 of 56 in the packet. He said on page 32 the plat was submitted with the proposed location of the garage and shows that the proposed garage is in compliance and meets the setback requirements. He said that a 50 foot boundary line shown in red on the plat and shows that the proposed garage meets the setback requirements. He said that the zoning permit was approved on November 4, 2019 and that subsequently in April of 2020 the HPC made a visit to the site to see if the construction was meeting the requirements of the approved Certificate of Appropriateness. He stated that in making that observation there were certain violations noted and by the Notice of Violation dated April 9, 2020 the owner was advised that there were violations of the Certificate of Appropriateness. He said that the Notice of Violation which dealt with the Certificate of Appropriateness is not a matter before the BZA today. He said that it also contained a reference that the HPC thought the garage may be in violation of the setback requirements. He stated that it was mentioned in that Notice of Violation concerning the Certificate of Appropriateness an as-built survey may need to be done. He said that this was followed up in May of 2020 by the Zoning Administrator who emailed the owner advising that an as-built survey plat be done showing the location and the size of the garage would be required. He stated that the email is on page 34 of 56 in the packet. He said that the owner in response to that email had an as-built survey plat done that shows that the garage violates the 50 foot setback requirement. He said that the plat is on page 11 of 56 in the packet and shows the corners of the garage as constructed are 35 and 37 feet from the highway and therefore in violation of the 50 foot setback requirement. He stated that the as-built survey was submitted to the County by the applicant and

proves that the garage structure violates the 50 foot setback requirement and proves that the Zoning Administrator's determination was correct. He stated that the statement of justification prepared by council for Mr. Legge acknowledges that the location of the garage violates the ordinance setback requirement and suggests that the violation results from contractor error in construction of the garage. He said that the garage was also constructed a size larger than what was shown on the application for the Certificate of Appropriateness. He stated that there is no dispute in this case that the Zoning Administrator's decision was correct and there is really no issue they have acknowledged that it does not comply with the setback requirements. He said therefore in accordance with the application of the statute and the standard of review required by the Code of Virginia, we ask that you affirm the Zoning Administrator's determination. Mr. Mitchell asked if there are any questions. There being none, Chair Caldwell asked the appellant's attorney to speak.

Mr. Johnson said that he is the attorney representing Mr. Legge in this matter. He stated that Mr. Mitchell cited this matter correctly. He stated that the prior Zoning Administrator, Ryan Fincham, decided to make this request strictly an administrative appeal. He said that as he presents this matter and moves forward it is not the variance that that we are discussing today. He stated that he is hopeful that the BZA will take some of these arguments and matters into consideration regarding their decision. He said that he thinks it is a critical fact to consider in this situation that at no point did the Zoning Administrator or any designee of the Planning Department actually go out and measure or by any other means to determine whether Mr. Legge's property was in violation of the zoning setback. He stated that there is no evidence presented that the Planning Department even took a ruler to say here is the central line of Route 340 and how far in or out does it go from the actual setback requirement. He stated that Mr. Fincham required Mr. Legge to get his own as-built survey to which he complied but he does not think that there is a requirement for any resident to do so from the request of a government official. He said that his client has been cooperative and compliant with the County all along. He said that there are some discrepancies in the survey and it is the most recent survey which has been relied upon by the Zoning Administrator. He said if the BZA would turn to page 31, 32, and 33 of 56 in the packet and look at the Marsh and Legge Survey and look at some of the courses and distances on various sides of the property you can see that it is different in the surveys. He said it is not as if the Zoning Administrator asked for an independent investigation or assessment for their opinion on whether it violates the setback requirement. He stated that it was not presented by the Zoning Administrator that Route 340 has more than 5,000 trips per day. He said he is not going to fight about this because that is about the time that COVID kicked in and that number could have reduced for a period of time and could have had an effect on traffic counts. He said we are not seeing any other items presented by the Zoning Administrator regarding that or anywhere in the packet. He stated that he also thinks that in this matter one of the interesting points is that it is not brought up anywhere that these issues were brought to the Zoning Administrator's attention regarding the setback requirements. He asked why the County did not conduct its own survey of this area. He said that it is an interesting issue that the County is requiring a private citizen to do his own survey based on the County not doing its own measurements. He said another point is that there are numerous properties along the Route 340 corridor in the Historic District that violate the setback requirements. He said that there are 17 properties along Route 340 that have road frontage and 9 of them violate the setback requirements. He said that we do not see any complaints or any prior histories addressing those

matters. He said there are other items he could discuss but they apply more to a variance request. He stated that we are asking for the BZA to consider the nature of this situation and how it arose and find that the Zoning Administrator did not properly do his job at that time. He said not by any means he is not criticizing Mr. Stidham or Mr. Camp at this point they would not be the persons handling this matter. He stated that looking at this stage it has been presented that the Zoning Administrator did not do his job by not going out to the site and measuring. He said that there were building permits opened and the Planning Department would have had access to those inspection notes and at any point they could have come out and checked it. He stated that it would have been discovered and it could have been addressed at that time before Mr. Legge had his garage fully completed. He thanked the BZA for looking at this case as it was presented and asked that the Zoning Administrator's determination be overturned.

Mr. Mitchell replied to Mr. Johnson's comments. He said that Mr. Johnson has acknowledged that this is not really a dispute as to whether or not that this garage is a violation of the setback requirements. He stated that in response to a couple of points that he made as to the suggestion that there was some responsibility on the part of the County to go out and have their own survey prepared and there is no suggestion that the survey would have resulted in a different result. He said that is not uncommon for an as-built survey to be called upon from the owner with respect to an issue related to setbacks. He said that Mr. John stated that no evidence has been presented or no evidence in the file that there are at least 5,000 trips a day on Route 340. He stated that on page 12 of 56 in the packet the Zoning Administrator made a comment that it stated he has confirmed with the Virginia Department of Transportation (VDOT) officials that Route 340 traffic exceeds 5,000 trips a day. He said that finally with respect to the fact that they are allegedly numerous properties that have structures that are closer than 50 feet in that area it should be noted that this code section was amended in 2009 and it very well could be that many of those houses were built before the code section was amended to require a 50 foot setback. He said that given the standard set forth by the Code of Virginia the BZA's responsibility is to determine whether or not the Zoning Administrator's administrative determination is a violation of the setback requirements is correct. He stated that there is really no dispute in the facts that the Zoning Administrator's determination was correct. He said the fact is that there may be other remedies available to them but it does not affect this matter as to whether or not the Zoning Administrator's determination should be affirmed and we ask that it be affirmed.

Mr. Johnson replied to Mr. Mitchell's comments. He said that the BZA will note that the last exhibit in the packet reflects that there are numerous neighbors that do not have objections or concerns regarding this structure. He said that this is not a situation that has presented itself as a safety concern or something as a particular problem area for the neighbors.

Chair Caldwell asked the Commission for any questions or concerns they would like to address. Ms. Volk told Mr. Johnson that she was not quite clear with the discrepancies between the different survey plats and more importantly are they material or relevant. She said that the big issue is the distance from the center line to Route 340. Mr. Johnson said that the distances are correct and were consistent throughout all of the surveys and the distances that go back toward Route 340 are correct. He stated that if it is a course and distance issue like where is the line going it could actually pull the actual property line down further from the right of way area. He said that in the grand scheme of things it will probably still be that some amount of the garage is

in the setback space and we are not talking about 30 feet it would probably be more of a difference like 5 feet to 10 feet. He said that it does impact how far the garage would be in the setback space.

Vice Chair Means asked if it is safe to say that these variances were an after-the-fact consideration because Mr. Legge originally had a garage design that agreed with the survey. Mr. Johnson stated he thinks it is pretty clear from his statement of justification that we are looking at this from the prospective of a variance and obviously there is a very high possibility it is in the setback space and these are after construction discovered issues. He said if it was done exactly like what we were expecting it would have been resolved.

Chair Caldwell asked if anyone from the public would like to speak. There being no comments Chair Caldwell closed the public hearing.

Chair Caldwell asked the Board if they have any more questions about this application.

Vice Chair Means said he suspects the Board will be back here again in a few months but he thinks the decision is a violation whether there is a variance to be granted or not.

Mr. Borel said he thinks that we should look at the plans. He stated that we do not have any building plans from the builder and what did he or she use to build the garage. He said it seems like if you are going to be building something you would have the accurate locations. He stated that he would like to see what the plans were and where did the plans come from that were completely different from what it says on the plat. He stated that he would like to look at the plans from the starting point.

Chair Caldwell stated that Mr. Mitchell described that we are looking at just the Zoning Administrator's determination today and we will see where that goes in terms of a variance.

Chair Caldwell asked if there are any more questions from the Board. There being none she called for a motion.

The BZA voted 4-0-1 to approve the Zoning Administrator's determination.

<b>Motion to approve the Zoning Administrator's determination:</b>			
Caldwell	<b>AYE</b>	Borel (seconded)	<b>AYE</b>
Means (moved)	<b>AYE</b>	Brumback	<b>ABSENT</b>
Volk	<b>AYE</b>		

## **5. Other Business**

Mr. Stidham stated he had a couple of other business items. He said that he emailed out a draft contact information sheet to everybody. He stated to take a look to see if we have all the contact information correct for everybody. He said if there is any information that you do not want the public to see please let us know. He told the Board to please turn in their Conflict of Interest to the County Administrator's office because the deadline is coming up.



**Adjourn**

Motion to adjourn the meeting at 10:35 AM was approved by consensus.

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Anne Caldwell (Chair)

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Debbie Bean (Clerk)

## VARIANCE REQUEST (BZA-21-01) -- Brian Legge

April 19, 2021 Board of Zoning Appeals Meeting

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 proposed variance request. It may also be useful to members of the general public interested in this proposed request.

### Case Summary

#### Applicant(s):

Brian Legge (Owner)

#### Property Information:

- Location - 140 White Post Road (Rt. 604)
- Tax Map # - 28A-A-66
- Property Size - 1.0878 acres
- Election District - White Post
- Magisterial District - Greenway
- Zoning District - Rural Residential (RR) & Historic Overlay

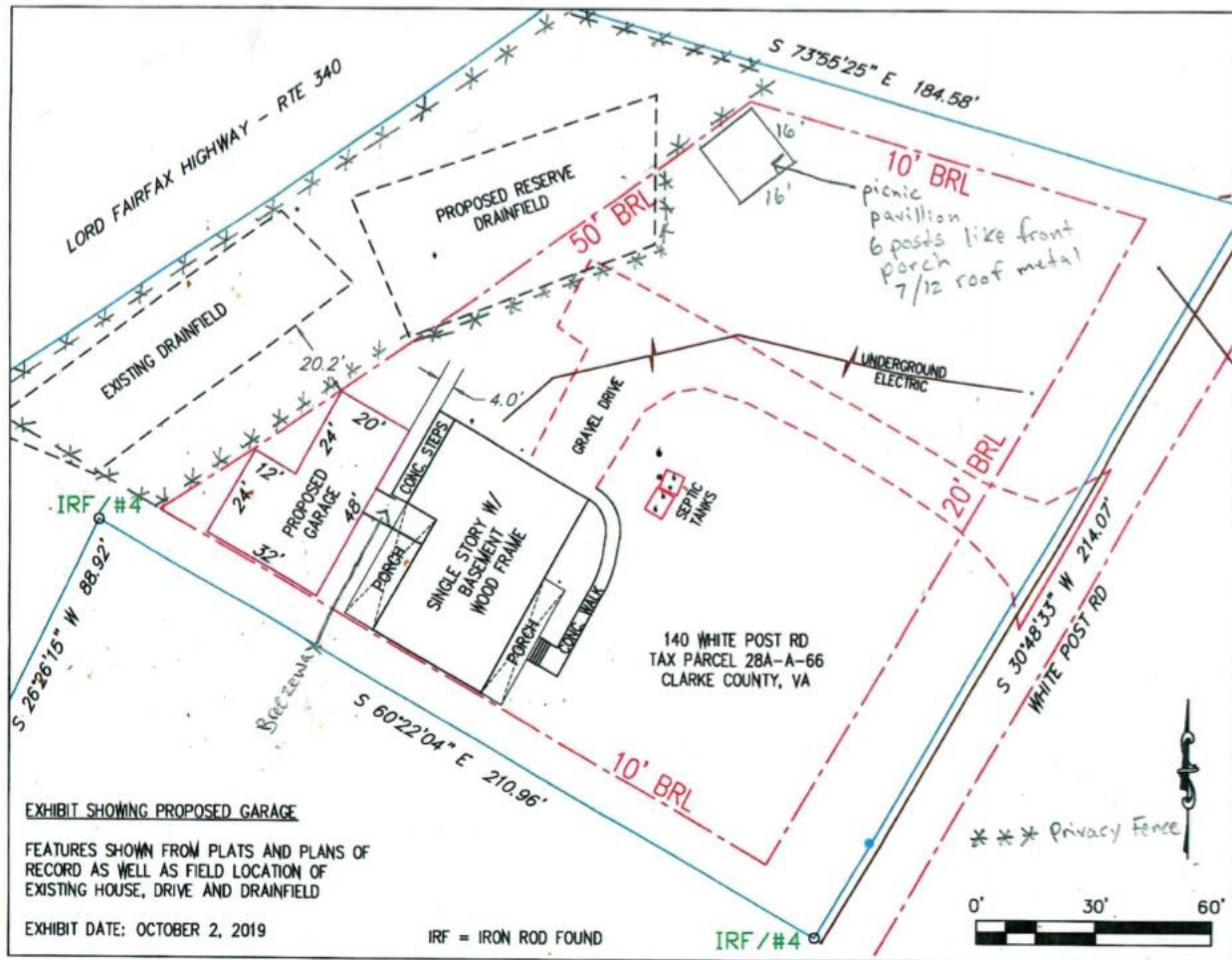


#### Summary of Request:

The applicant requests a variance for a recently constructed detached garage to allow the garage to remain as it currently is. Despite a zoning permit and certificate of appropriateness that required a 50-foot setback, the garage was constructed only 35.9 feet from the edge of the right-of-way for Lord Fairfax Highway (Rt. 340). This encroaches within the 50-foot setback area by 14.1 feet.

**Facts:**

A zoning permit was submitted by the Applicant, and approved by Clarke County, on November 4, 2019. This zoning permit was for a detached garage at the applicant's property. It also included a picnic pavilion that is not relevant to this application. The application and associated plan, clearly showed that the garage would be constructed outside of the 50-foot setback area from Lord Fairfax Highway (Rt. 340). The application showed a garage with dimensions that calculated to a total ground floor area of approximately 1,240 square feet. Below is an illustration of the plan approved with the zoning permit application.



§3-A-3-c of the Clarke County Zoning Ordinances requires a minimum setback of 50 feet between structures and the edge of the right-of-way for primary highways with 5000 or more vehicle trips per day. VDOT's most recent traffic count publication (2019) shows that US Rt. 340 (Lord Fairfax Highway), from Double Toll Gate to White Post Road, has 8300 vehicle trips per day.

From	To	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT	ADT
340 Lord Fairfax Hwy	US 522 Double Toll Gate	2.09	8300	G	92%	1%	1%	1%	6%	0%	C	0.092	F	0.656	8200	G		
	21-658 White Post Rd																	

Virginia Department of Transportation Traffic Engineering Division 2019 Annual Average Daily Traffic Volume Estimates By Section of Route – Clarke Maintenance Area.

Below is an illustration of §3-A-3-c of the Clarke County Zoning Ordinance that shows the required 50-foot setback.

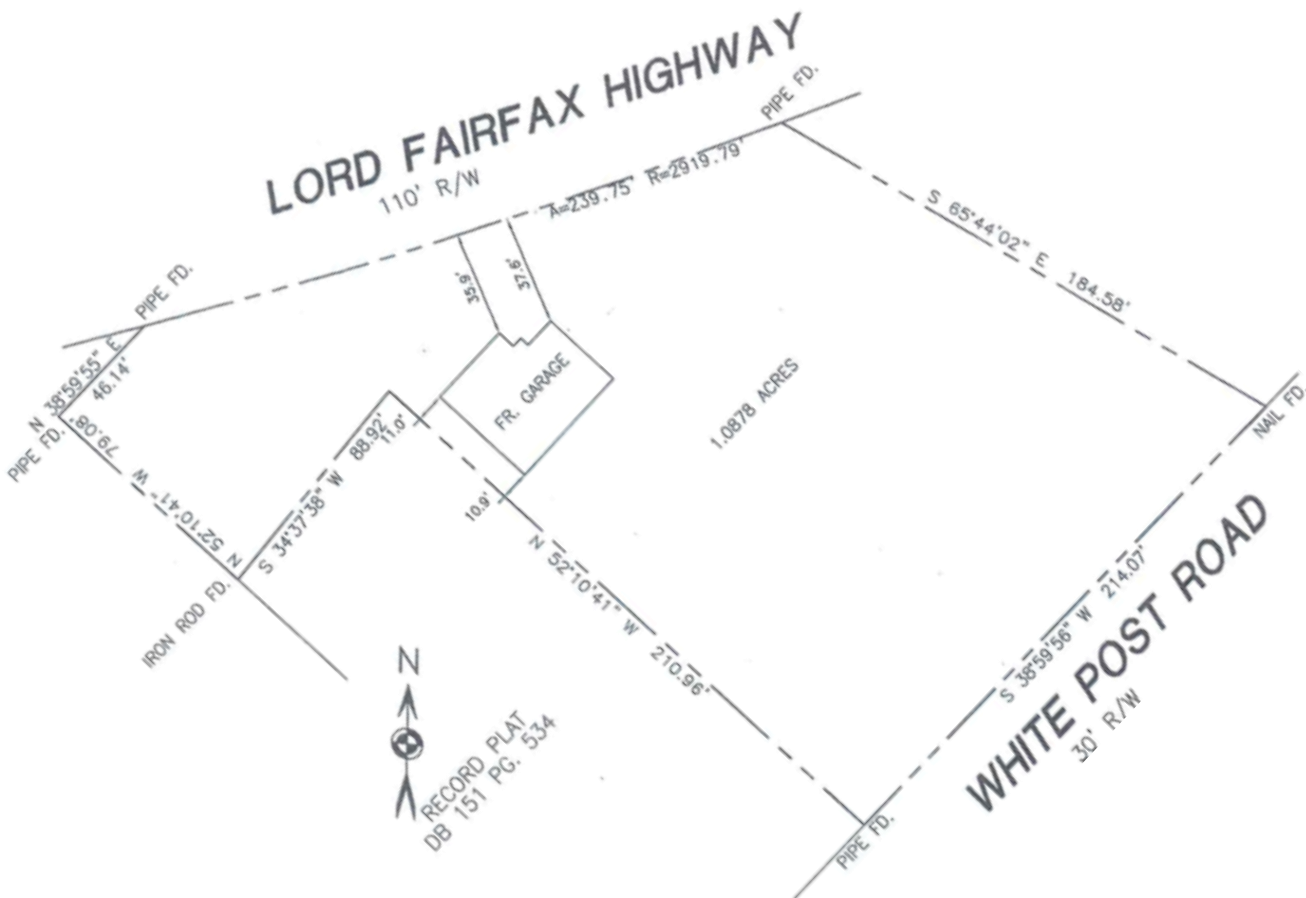
**3-A-3-c Minimum Yard Requirements**

	Parcels with less than 15,000 sq. ft.	Parcels with 15,000 sq. ft. or more
(1/16/01)		
(12/17/02)		
(11/16/04)	From the edge of a private access easement	15 feet*
(10/18/11)	From the centerline of a secondary highway	40 feet*
(2/16/16)	From the edge of a primary highway right of way	
	With less than 5000 trips per day	15 feet*
	With 5000 or more trips per day	40 feet*
	From side property lines	5 feet
	From rear property lines	25 feet
	(structures 200 sq. ft. or less)	5 feet
	From intermittent streams	0 feet
	From perennial streams, springs, & sinkholes	100 feet



\*add 10 feet for entrance side of garages, carports, or other structures used to house vehicles

An as-built survey of the structure was conducted to verify the distance that the garage was built to the right-of-way. The as-built shows a setback of 35.9 feet at the structure's closest point. Below is an illustration of the drawing provided on the as-built survey.



The applicant appealed the Zoning Administrator's determination that the garage is a violation of the Clarke County Zoning Ordinance, §3-A-3-c. This appeal application (#20-01) was reviewed by the BZA during a public hearing held on January 25, 2021. After testimony, the BZA voted to uphold the Zoning Administrator's determination. Following this denial of the appeal application, the applicant submitted the subject variance application (#21-01).



## **Historic Preservation Commission (HPC):**

The subject property is located within the Historic Overlay (H) District. New construction within the H district requires approval by the Historic Preservation Commission (HPC) by issuance of a Certificate of Appropriateness. On October 30, 2019, after initially denying a larger garage plan submitted by the Mr. Legge, the HPC approved the garage with a revised plan (page 2 of Staff Report). The HPC's approval was conditional on the following:

- 1) That the garage be smaller and shorter (2') than the main house (1,240 square feet).
- 2) That the side of the building facing the house have an overhead garage door and two swinging man doors (one is beneath the breezeway). The north side facing the driveway have two overhead garage doors. The west side facing the rear have a single overhead garage door. The south side facing the church have two double-hung windows. The fiberglass "Stamped Carriage Style" garage doors, which have 8-light frieze windows, was provided by the applicant and included in the staff report as the proposed style of garage door.
- 3) That the garage siding would be "LP Smart Siding," a fiber-cement product with a wood pattern that simulates vertical wood boards. These materials could be appropriate for a modern utilitarian outbuilding within the district .
- 4) That the garage would be painted the same color as the main house.

During the 3/18/20 HPC Meeting, HPC members identified that the structure was not built as they approved. The following issues were discussed, as noted in the meeting minutes:

- size of the structure - the approved footprint was attached to the approval letter - and is attached here - no larger than 1,240 sq ft., and they are concerned that the building extends into the setback
- the height of the structure - approved to be 2 feet lower than the roofline of the house - it appears to be taller
- the roof material - approved black standing seam metal roof - the owner installed a black corrugated metal roof
- there is an extra door on the back of the building which was not approved
- there is a skylight which was not approved
- the garage doors are not as approved - see picture of Carriage style garage door
- on the side of the building facing the church there is a garage door and no windows
- there is a heat vent or something on the 340 side that was not approved
- garage doors should be pull up not sliding
- the height of the garage doors appear different than the approved elevations provided by the owner
- the pavilion should be 16 x 16 it appears larger and may extend into setback area

A notice of violation was then sent to Mr. Legge on April 9, 2020 for the observed violations of the Certificate of Appropriateness granted by the Historic Preservation Commission. Another notice of violation was later sent on August 31, 2020 for violation of the required zoning setbacks. This was done after the applicant submitted an as-built survey that was required by the previous Zoning Administrator to verify the setbacks of the constructed garage.

## 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 §7-A-3-e. Subsection 1 of §7-A-3-e 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.*

§7-A-3-e, Subsection 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 Clarke County Code reflects the review criteria explained under Virginia Code §15.2-2309; except that, a recent amendment includes expanded criteria intended to assist persons with disabilities. The following page includes a summarization of the review criteria required by the Clarke County Code and Virginia Code. It is formatted as a checklist to assist with the review of variances by the BZA. First an applicant must meet 1 of the first tier criteria related to establishing a hardship. If this is achieved, all of the second tier criteria must also be met.

# 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.



The applicant has provided a 36 page document titled “Statement of Justification” that was previously included with the applicant’s former appeal application. The applicant desired to use this same document as supportive information for his variance application. In addition, the applicant supplemented the application with a “Cost Estimate” for demolishing and rebuilding the garage. Below are staff comments on the subject application as it applies to the review criteria.

***HARDSHIP CRITERIA – UNREASONABLE RESTRICTION (TIER ONE):***

- ***“the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property.”***
  - Based on the applicant’s “Statement of Justification” and “Cost Estimate”, it appears that the applicant is making the primary argument that *“Mr. Legge Will Suffer Financial and Lifestyle Hardship if a Variance Is Not Granted”*. Financial loss can be a factor for consideration, but it is not sufficient on its own to justify granting a variance. Case law on this matter includes *Riles v. Board of Zoning Appeals of City of Roanoke*, 246 Va. 48, 431 S.E.2d 282 (1993); and *Natrella v. Board of Zoning Appeals of Arlington County*, 231 Va. 451, 345 S.E.2d 295 (1986). Preference by a property owner is also not grounds for a variance.
  - It is not unreasonable to require new structures to comply with what is approved on a zoning permit, and more specifically in this case, minimum setback requirements from primary highways. These standards currently apply to all new buildings and are routinely complied with today. The applicant argues that more than half of the properties in White Post violate the setbacks. This is not correct. Some of the structures in White Post may not meet today’s setback requirements. However, these structures were built in the past when prior ordinances existed. They are therefore considered nonconforming and are not considered violations.
- ***“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.”***
  - This does not appear to be relevant because there are not pre-existing physical conditions that create a hardship.
- ***“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.”***
  - This was not included in the applicant’s submission and is not relevant in the current application.

A summary of the first tier review for a variance shows that the criteria for a variance is NOT met.

## 5 MANDATORY ELEMENTS (TIER TWO):

- ***“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.”***
  - While the property owner most likely acquired the property in good faith, the hardship was indeed created by the applicant. The applicant is the owner of the subject property, and is responsible for what happens on the property in regards to zoning law. This includes actions by hired contractors and design professionals.
- ***“the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area.”***
  - The applicant includes a few letters from neighboring properties that are supportive of his request. No substantial negative impacts to adjacent properties is noted by Staff.
- ***“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.”***
  - It is not reasonably practicable to create an ordinance for this situation where the applicant did not follow the ordinance requirements.
- ***“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.”***
  - This is not applicable, as the use of the garage for personal use by the property owner living in the house is permitted and referred to as an accessory use.
- ***“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 Clarke County Zoning Ordinance does not have a special exception process.

The second tier review criteria for a variance shows that at least one criteria is not met.

### **Recommendation:**

Upon review of this application for a variance, and after consultation with legal counsel, it does NOT appear that the legal criteria for granting a variance is met with this application, as stipulated under Virginia Code §15.2-2309 and the Clarke County Zoning Ordinance §7-A-3-e. Therefore, Staff recommends denial of Variance Application #21-01.

A public hearing is required prior to taking action on this application. 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.



- Public
- Points of Interest
- Parcels
- Parcels With Orthos
- Towns
- Clarke County Boundary
- Major Roads
- Interstate
- US Highway
- State Highway
- Surrounding Counties Opa
- Surrounding Counties Non



The data shown on this site are provided for informational and planning purposes only. Clarke County and its consultants are not responsible for any errors or misrepresentation of the data.



Printed on 01/15/2021 at 10:30 AM

3-A-3-c Minimum Yard Requirements

	Parcels with less than 15,000 sq. ft.	Parcels with 15,000 sq. ft. or more
(1/16/01)		
(12/17/02)		
(11/16/04)	From the edge of a private access easement	15 feet*
(10/18/11)	From the centerline of a secondary highway	40 feet*
(2/16/16)	From the edge of a primary highway right of way	
	With less than 5000 trips per day	15 feet*
	With 5000 or more trips per day	40 feet*
	From side property lines	5 feet
	From rear property lines	25 feet
	(structures 200 sq. ft. or less)	5 feet
	From intermittent streams	0 feet
	From perennial streams, springs, & sinkholes	100 feet

\*add 10 feet for entrance side of garages, carports, or other structures used to house vehicles

3-A-3-d Maximum Residential Structure Size for property in a County Sewer Service Area  
(7/19/05) The maximum heated floor area of a dwelling shall not exceed: 2,000 sq ft or 10% of the lot area, whichever is greater.

3-A-3-e Maximum Lot Coverage by All Impervious Surfaces: 30 percent

3-A-3-f Maximum Height of All Structures: 35 feet, except on parcels  
(11/16/04) with a width of less than 75 feet, structures shall not exceed a height of 25 feet, and as otherwise provided.

3-A-3-g Critical Environmental Areas (CEAs)  
(7/19/05)

1. CEAs are 100-year flood plains, slopes in excess of 25 percent, and the area within 100 feet of perennial streams, perennial springs, and the discernable edge of sinkholes.
2. Structures requiring building permits shall not be located in CEAs.
3. CEAs shall not be included in maximum or minimum lot area or any density calculations, or be used to meet open space requirements.

3-A-3-h Additional Regulations  
(8/15/06) The height of an accessory building shall not exceed 12 feet.

3-A-3-i Access Easement Areas  
(2/19/08) Areas covered by access easements shall not be included in maximum or minimum lot area or any density calculations, or be used to meet open space requirements.

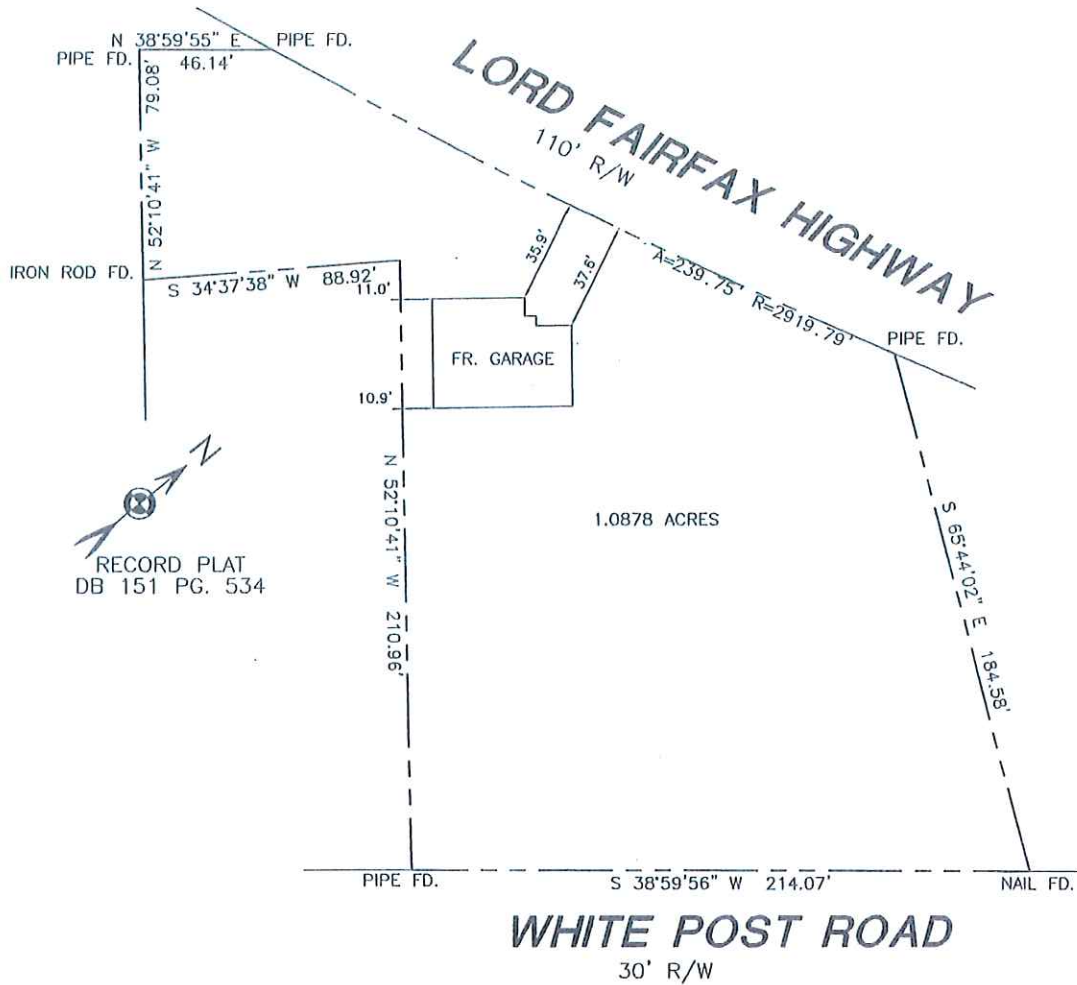
3-A-4 Open Space Residential District – OSR  
Intent: The Open Space Residential (OSR) District is created to preserve and protect two sensitive areas in the Town of Berryville and within the precincts of the Berryville Area Plan: 1. existing residential properties and estates which have cultural and/or historical value, and 2. property with critical environmental features including 100 year flood plains, sink holes, slopes in excess of 15% and, rock outcrops. The maximum density of one residence per ten net developable acres establishes this district as one with a low-density



NOTES:

- 1) TAX MAP PARCEL: 28A-A-66
- 2) NO TITLE REPORT FURNISHED, EASEMENTS OTHER THAN THOSE SHOWN HEREON MAY EXIST.
- 3) IMPROVEMENTS OTHER THAN NEWLY CONSTRUCTED GARAGE NOT SHOWN.

GARAGE AS-BUILT  
 LAND OF  
**BRIAN K. LEGGE AND  
 TARA M. CROSEN**  
 DEED BOOK 643 PAGE 215  
 GREENWAY MAGISTRERIAL DISTRICT  
 CLARKE COUNTY, VIRGINIA



DATE: AUGUST 3, 2020      SCALE: 1" = 40'

**1520 COMMERCE STREET, #309  
 WINCHESTER, VIRGINIA 22601  
 540 974-4268  
 christopher@cdfsurveying.com**





**Clarke County Planning Department**  
 101 Chalmers Court, Suite B  
 Berryville, Virginia 22611  
 (540) 955-5132  
 www.clarkecounty.gov

**CERTIFIED MAIL:** 7019 1640 0001 8812 7220

**NOTICE OF VIOLATION**

Notice Date -- August 31, 2020  
 Owner of Record - Brian K. Legge & Tara Crosen  
 140 White Post Road  
 White Post, VA 22663  
 Property Address – 140 White Post Road  
 Tax Map # -- 28A-A-66

A Notice of Violation dated April 9, 2020 was sent to you regarding violations of a Certificate of Appropriateness granted by the Clarke County Historic Preservation Commission. In that letter, I also indicated that it had been alleged that the newly constructed garage was located within the required 50 foot setback area from the edge of a primary highway right of way with 5,000 or more trips per day. Please note that I have confirmed with VDOT officials that Rt. 340 traffic exceeds 5,000 trips per day.

You have provided the attached as-built survey dated August 3, 2020 by Christopher D. Furstenau (Lic. No. 2727) which shows the location of the constructed garage structure. The as-built survey shows that the garage is located 35.9 feet from the edge of the Rt. 340 Primary Highway easement. Thus, the garage location is 14.1 feet within the required setback area. The zoning permit application which you submitted on November 4, 2019 clearly shows the required 50 foot setback and the proposed garage location outside the setback area and within the required building envelope.

Therefore, the garage location is in violation of County Zoning Ordinance Section §3-A-3-c Rural Residential (RR) Zoning District minimum yard requirements (setbacks).

*You are hereby notified that you have the right to appeal this administrative determination to the Clarke County Board of Zoning Appeals (BZA) within thirty (30) days of the date of this determination letter by filing with the Zoning Administrator and the BZA a notice of appeal specifying the grounds thereof and by paying the appeal fee of \$750.00. This administrative determination shall be final and unable to be appealed if not done so within 30 days. Any additional information regarding the filing of an appeal may be obtained in the Zoning office.*

Respectfully,

Ryan Fincham,  
 Clarke County Zoning Administrator

Copy: Commonwealth Attorney

BZA-21-01  
BZAP-5882



**CLARKE COUNTY**  
**LAND DEVELOPMENT APPLICATION**

Applicant Brian Legge  
Applicant's Address 140 White Post Road  
White Post VA 22663  
City State Zip Code  
Applicant's E-Mail Address \_\_\_\_\_  
Agent (Contact Person) Timothy R. Johnson, Esq. Phone 540-352-4672  
Agent's Company The Law Offices of Timothy R. Johnson, PLC  
Agent's Address 20-B E. Main Street, Berryville, Virginia 22611  
Current Property Owner Brian Legge  
Owner's Address 140 White Post Road, White Post, VA 22663 Phone 704-450-5805  
Correspondence to be sent to:  Applicant  Owner  Agent  Other  
Tax Map Parcel Number 28A-A-66 Magisterial District White Post  
General Project Location 140 White Post Rd Site size (gross/net acreage) ~1.0 acre

Check Appropriate Request:

- |   |   |
|---|---|
| <b>PLANNING COMMISSION</b>  | <b>PLANNING COMMISSION &amp; BOARD of SUPERVISORS</b>         |
| <input type="checkbox"/> Major Subdivision                                | <input type="checkbox"/> Rezoning                             |
| <input type="checkbox"/> Minor Subdivision (1 or 2 lots)                  | <input type="checkbox"/> Special Use Permit                   |
| <input type="checkbox"/> Administrative Subdivision (parcels > 100 acres) | <input type="checkbox"/> Comprehensive Plan Amendment         |
| <input type="checkbox"/> Boundary Line Adjustment                         | <input type="checkbox"/> Zoning Ordinance Text Amendment      |
| <input type="checkbox"/> Site Plan  | <input type="checkbox"/> Subdivision Ordinance Text Amendment |
| <input type="checkbox"/> Site Plan Amendment                              | <input type="checkbox"/> Other                                |
| <input type="checkbox"/> Erosion & Sediment Plan                          |   |
| <input type="checkbox"/> Storm Water Plan                                 |   |
| <input type="checkbox"/> Maximum Lot Size Exception                       |   |

**BOARD OF ZONING APPEALS**

- Administrative Appeal
- Variance
- Special Exception

**BOARD OF SEPTIC & WELL APPEALS**

- Administrative Appeal
- Variance

**BERRYVILLE AREA DEVELOPMENT AUTHORITY**

- Site Plan
- Site Plan Amendment

**HISTORIC PRESERVATION COMMISSION**

- Certificate of Appropriateness

Complete as applicable:

Name of Subdivision, Development, or Proposal \_\_\_\_\_  
Proposal/Request See attached sheet.  
Existing Zoning \_\_\_\_\_ Proposed Zoning \_\_\_\_\_ # of Proposed Lots \_\_\_\_\_

Applicant: The information provided is accurate to the best of my knowledge. I acknowledge that any percolation tests, topographic studies, or other requirements of the Health Official or Zoning Administrator will be carried out at my expense. I understand that the County may deny, approve, or conditionally approve that for which I am applying. I certify that all property corners have been clearly staked and flagged.  
Applicant's Signature [Signature] Timothy R. Johnson Date 2/26/2021

Owner: I have read this completed application, understand its intent, and freely consent to its filing. If this application is for the purpose of subdivision, I understand that further subdivision of this property will not be permitted within twelve (12) months of approval of this action, unless an Exploratory Sketch Plan is submitted with this application. Furthermore, I grant permission to the Planning Department and other authorized government agents to enter the property and make such investigations and test as they deem necessary.  
Owner's Signature [Signature] Timothy R. Johnson Date 2/26/2021

101 Chalmers Court  
Berryville, VA 22611

[www.clarkecounty.gov](http://www.clarkecounty.gov)

(540) 955-5132  
Fax (540) 955-5180



### **Request for Variance**

Brian Legge appeals from the August 31, 2020 Notice of Violation found against his property located at 140 White Post Road, White Post, Virginia 22663 (Tax Map ID 28A-A-66).

**Request for Variance:** Mr. Legge requests a variance to permit his completed garage that is located fourteen (14) feet within the setback area adjacent to Route 340 to continue to exist in its current location. A prior Statement of Justification will primarily be relied upon in support, and an additional Supplement will be provided at least three (3) weeks prior to the BZA hearing.

**Request for Hearing Date:** Mr. Legge further requests that a hearing be scheduled on April 19, 2021 per prior discussions with the Planning and Zoning Department.

A handwritten signature in blue ink, appearing to be the name 'B. Legge', is located below the text of the 'Request for Hearing Date' section.

# STATEMENT OF JUSTIFICATION



January 25, 2021

For Brian K. Legge's Clarke County  
Board of Zoning Appeal Application

Address: 140 White Post Road, White Post, Virginia 22663  
(Unincorporated Clarke County); Tax Map ID #: 28A-A-66

Zoning Classification: Rural Residential, White Post Magisterial District

Property Description: 1.09 acres located within the White Post Historic District; Single-family residence with the detached garage that is the subject of this appeal; Mr. Legge and his wife reside at the property as their principal residence; located adjacent to White Post Methodist Church along south property boundary line, adjacent to Lord Fairfax Highway (Route 340) along western property boundary line; road access to White Post Road along eastern property boundary line; ~\$190,000 cost to build garage

# STATEMENT OF JUSTIFICATION

## FOR BRIAN K. LEGGE'S CLARKE COUNTY BOARD OF ZONING APPEAL APPLICATION

Dear Board of Zoning Appeals:

### SUMMARY OF APPEAL

Brian K. Legge appeals the former Zoning Administrator's (Ryan Fincham) August 31, 2020 Notice of Violation ("NOV" herein attached as Exhibit 1). The alleged violation stems from a detached garage situated on the property encroaching approximately fourteen (14) feet into a setback area of fifty (50) feet along the Route 340 corridor. Mr. Legge asserts as a defense to this purported violation that:

- (1) the Clarke County Planning Department was notified via the Building Department of when the concrete footings were poured and provided an opportunity to measure and inspect prior to further construction but refused to inspect;
- (2) numerous structures in the same neighborhood do not comply with the setback requirement from Route 340 and have not been subject to the same level of scrutiny;
- (3) the only substantive change to the design and construction was an expansion of six (6) feet of the width of the building which has contributed toward the encroachment; and
- (4) the underlying measurements approved on November 4, 2019 were not addressed by any of Mr. Legge's retained contractors (i.e. experts in construction) prior to pouring footings, framing, and subsequent construction.

If the Board of Zoning Appeals ("BZA") does not overturn the former Zoning Administrator's decision, it is respectfully requested that the BZA grant a variance on the grounds of hardship based on those same reasons cited above and now that the structure has been substantively complete for more than nine months and that it would be cost-prohibitive to rebuild and impractical to move the building. Mr. Legge pursues such a variance in good faith and such hardship was not caused by his own doing, granting such a variance will not be of substantial detriment to any adjacent property, and that such a variance would not require a change in the use (proposed or actual) of the property. Any aesthetic or safety concerns can be addressed by the installation of foliage near on the property between the garage structure and Route 340.

## FACTUAL STATEMENTS

### **Prior Interactions with the Clarke County Planning Department and Clarke County Historic Preservation Commission**

Prior to filing for a zoning permit to build the subject garage, Mr. Legge communicated with Alison Teetor (then Zoning Administrator) regarding what would be needed to obtain approval both for the Clarke County Zoning Ordinance generally and to obtain a Certificate of Appropriateness from the Clarke County Historic Preservation Commission (White Post Historic District). Discussions primarily concerned matters of aesthetic design to have the building approved for a Certificate of Appropriateness rather than concerns regarding the setback.

The Clarke County Historic Preservation Commission considered Mr. Legge's application for a Certificate of Appropriateness on two separate occasions for which the garage was presented in different locations around the property on each occasion. Ultimately, his second application where the garage is generally currently located was approved. Mr. Legge and the Planning Department extensively communicated throughout this time to ensure that what would be built would be compliant.

### **Approved Plan and Required Setback Area**

On November 4, 2019, Mr. Legge submitted his application for a zoning permit with his survey from Marsh and Legge Land Surveyors P.L.C. attached (Exhibit 2). Per the permit, the garage was to be built as an 'L'-shape with a longest-length side of forty-eight (48) feet and a maximum width of thirty-two (32) feet. The structure was not to be squared off in the northwest corner to avoid encroaching on the required setback area from Route 340. The same day that Mr. Legge submitted the Zoning Permit application, it was approved by Alison Teetor.

Per prior surveys, Route 340 (Lord Fairfax Highway) maintains a one hundred ten (110) foot diametrical right-of-way easement. It is unclear whether the centerline of the as-built highway presents the radial fifty-five (55) foot right-of-way area or whether such prior surveys accurately depict the location of the right-of-way regardless of where the road was actually built. (See Exhibit 3 for the original and still controlling July 11, 1983 recorded boundary survey.) Regardless, Route 340's right-of-way is treated as spanning at least fifty-five (55) feet onto Mr. Legge's property from the centerline. Clarke County's Zoning Ordinance 3-A-3-c tacks on an additional fifty (50) feet from the edge of a primary highway right-of-way where five thousand (5,000) or more trips are made per day. Accordingly, Mr. Legge's garage would be required to be at least one hundred and five (105) feet from the centerline of Route 340 if the centerline were treated as the center of the right-of-way. Per the approved plan and permit, the proposed garage would fit within the required setback area.

### **Notice of Violation**

Between November 4, 2019 and April 9, 2020, Mr. Legge retained several contractors to build the garage including E.R. Neff Excavating, Inc. (concrete footings) and D.K. Construction Custom Carpentry LLC (framing). Prior to every major construction event, the Clarke County Building

Department was contacted by the respective contractors to inspect the work being performed, including the concrete footings being poured, framing, electricity, and insulation. Presumably, the Clarke County Planning Department has access to the inspection log of the Building Department and would have constructive notice of these events.

On April 9, 2020, a Notice of Violation was issued regarding violations of the Certificate of Appropriateness granted by the Clarke County Historic Preservation Commission (not being addressed by this appeal). In that letter, it was referenced that there was a concern that the structure was built within the setback area.

In May 2020, the former Zoning Administrator, Ryan Fincham, and Mr. Legge discussed the concerns that the garage was built larger than what was proposed per a neighbor's complaint. By that time, the structural framework was complete. Mr. Legge reviewed the building's dimensions and realized that the structure's width extended from thirty-two (32) feet to thirty-eight (38) feet, and that the same directional width of the cut-in area changed from twelve (12) feet as planned to sixteen (16) feet. As a result, the structure was built presumably six (6) feet larger spanning toward the setback area.

On May 15, 2020, Alison Teetor inspected the property with Mr. Legge's consent. That same day, Mr. Fincham emailed Mr. Legge advising that an as-built survey would be required to verify that the structure is not located within the setback area. (See Exhibit 4.) Mr. Legge obtained a survey performed by Christopher D. Furstenuau dated August 3, 2020 (the "CDF Survey"),<sup>1</sup> and such survey was provided to the Planning Department on or before August 9, 2020. (See Exhibit 5.)

On August 31, 2020, Mr. Fincham issued the NOV. The NOV relies upon the CDF Survey to establish that the garage is located 35.9 feet from the edge of the Route 340 right-of-way, and accordingly, is in violation of the setback requirement.

## JUSTIFICATION FOR A FINDING OF COMPLIANCE, AND IN THE ALTERNATIVE, A REQUEST FOR A VARIANCE

### **Mr. Legge Substantially Complied with the Plan Presented in the Permit**

#### **Discrepancies in Surveys**

First and foremost, it should be noted that the Clarke County Planning Department has not yet conducted its own independent investigation to establish whether there is a zoning violation other than by Mr. Legge providing information to the Planning Department at their request. All surveys used were provided by Mr. Legge, and no on-the-ground measurements have been taken by the Planning Department staff related to the setback issue. (It is acknowledged that there have been on-the-ground measurements taken of structure dimensions, but not of purported boundary lines in relation to the garage.)

---

<sup>1</sup> Marsh and Legge refused to perform an as-built survey.

## **STATEMENT OF JUSTIFICATION**

There also appears to be a discrepancy between the several surveys concerning the property (Exhibits 2, 3, and 5). Exhibit 2 (Marsh & Legge) is the survey that was submitted with the zoning permit application. The submitted plan fails to depict courses and distances along the boundary line running along Route 340. Further, there appear to be several discrepancies regarding the courses that are depicted in Exhibit 2 compared to Exhibits 3 (Original plat) and 5 (CDF Survey). In Exhibits 3 and 5, the courses and distances along the White Post Road, and northern and southern (neighbors') boundaries match. However, either the courses or distances are different on the Marsh & Legge survey for each of the boundaries. Further, on the survey used by Mr. Fincham to cite a setback violation of 14.1 feet, there are specific concerns of that survey's accuracy given that the survey fails to depict critical monumentation, namely, the as-built residential home that preexisted the garage, which would give further context to how the garage was built so far into the setback area (if it is as far as depicted). Accordingly, there are concerns that despite Mr. Legge obtaining two surveys of the property, there may be discrepancies as to their accuracies.

### **Contractor Error in Construction and No Early Detection of Error by Government Officials**

Mr. Legge can offer no specific explanation for why the building was not built according to the approved permit. Neither of his two primary contractors whose work would have been most likely to identify and address any substantial derivations from the proposed permit have offered a clear explanation for why the plan's dimensions were not honored. The derivations appear to be a six-foot (6') increase in width of the building. Although it has not been measured, it also seems that the breezeway was not built with the four (4) foot gap that was depicted in the Marsh and Legge survey, but rather, an approximate ten (10) foot gap. Combined, such derivations may explain how the structure encroached approximately fourteen (14) feet into the setback area (if the CDF Survey is accurate).

Mr. Legge has been consulting with his contractors to identify where an error may have been made. There is current litigation involving D.K. Construction related to this matter.

Further, despite the Clarke County Building Department receiving notice of major events such as pouring of concrete footings, framing, and insulation and electrical, at no time did any Clarke County official measure the footings or the framework of the building in context of the approved plan. Presumably, the Clarke County Planning Department had notice of such events and could have requested access to measure the location of the building but did not do so at any time prior to May 2020. Since no official detected any deviations of the building's construction from the permitted plan prior to April 2020 despite several opportunities to do so, the building was substantially completed by that time. If the error had been caught earlier in the construction phase, it is highly likely that such error could have been corrected at minimal cost at the time. (See Exhibit 6 for current pictures of the structure's exterior and interior to demonstrate completion status.)

### **Numerous Structures in the White Post District Do Not Meet the Setback Requirement**

Mr. Legge's property is not unique in that it purportedly fails to meet the setback requirement within the White Post Historic District. By visual observation and simple review of a distance measuring

using geographic information systems and satellite mapping, numerous properties along Route 340 near Mr. Legge's property do not meet the setback.

Assuming Route 340 has a fifty-five (55) foot radial right-of-way, and that all properties along Route 340 within the Rural Residential zoning classification must keep all structures outside of a fifty (50) foot setback from the edge of Route 340's right-of-way, then no structures should exist within one hundred and five (105) feet of the centerline of Route 340, radially. The following properties appear to maintain structures that would generally not meet the requirement (and are depicted in Exhibit 7):<sup>2</sup>

1. 14280 Lord Fairfax Highway: building corner within 70 feet from centerline
2. 14401 Lord Fairfax Highway: church building corner within 75 feet from centerline
3. 14402 Lord Fairfax Highway: residence corner within 95 feet of centerline
4. 14420 Lord Fairfax Highway: residence corner within 70 feet of centerline
5. 14478 Lord Fairfax Highway: residence located within 70 feet of centerline
6. 14725 Lord Fairfax Highway: post office located within 80 feet from centerline
7. 14767 Lord Fairfax Highway: commercial building within 80 feet of centerline
8. 98 White Post Road (adjacent neighbor): Shed located within 70 feet of centerline
9. 17 White Post Road: residence within 90 feet of centerline

Considering that the White Post Historic District only has seventeen lots that front Route 340 with structures on them, it appears that more than half of those properties enjoy structures situated within the required setback area of Route 340. And comparable to many of those structures, the as-built garage is located *further* outside the setback area than many of those structures (90.1 feet from centerline for comparison). Accordingly, the BZA should find that despite the most technical of violations, substantively, the structure conforms to the setback norms of the White Post Historic District.

### **Conclusion**

For the foregoing reasons, Mr. Legge requests that the BZA find that his property substantially conforms to the zoning ordinance, and accordingly, that the Zoning Administrator's determination of a violation be overturned.

### **Standards for Granting a Variance**

Per Clarke County Zoning Ordinance § 7-A-3e: "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;

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<sup>2</sup> Mr. Legge raises this issue to the BZA's attention not as a complaint to bring zoning enforcement against these properties, but rather, to highlight that the Rural Residential setback requirement is problematic for many properties in this area and that only his property is being singled out.

## STATEMENT OF JUSTIFICATION

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- 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.”

### **If the BZA Will Not Overturn the Violation, a Variance is Appropriate**

In the alternative to overturning the Zoning Administrator’s determination of a violation, Mr. Legge requests that the Board of Zoning Appeals grant him a variance for the setback requirement. As the arguments for overturning have been laid out in the prior section (pp. 3-5), those arguments are restated here insofar as they may be applied in the context of the standards considered for granting a variance.

### **Mr. Legge Will Suffer Financial and Lifestyle Hardship if a Variance Is Not Granted**

Mr. Legge incurred approximately one hundred and ninety thousand dollars (\$190,000.00) constructing the garage.<sup>3</sup> If Mr. Legge were required to accommodate the Zoning Ordinance by strict adherence to the code, his garage would either need to be demolished or moved as there is no practical means to “rebuild” a section of it strictly to conform to the zoning ordinance without likely needing to demolish the majority of the structure. Further, there would be a large section of concrete slab beneath where the structure would have existed that would be inordinately expensive to remove. Moving the structure is also not possible since there is only approximately ten (10) feet of space between the garage and the residence, which would still not put the structure back far enough to clear the setback area.

Considering that more than half of the properties with buildings fronting Route 340 within the White Post Historic District (rural residential zoning) violate the setback requirement much more substantially than Mr. Legge’s structure, the garage’s location should not trigger any unique requirement to demolish or move it. Rather, an appropriate remedy could be to require Mr. Legge to place foliage between the garage and Route 340. (He intended to build a privacy fence for additional aesthetic and sound-reduction benefits, but has waited on the result of this matter before proceeding. He would consider the addition of foliage if it would appease any of the BZA’s concerns.)

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<sup>3</sup> Mr. Legge would agree to the property’s tax assessment value being increased immediately by that amount upon approval of his as-built garage.



Since the garage has been substantially completed, Mr. Legge spends approximately twenty (20) to twenty-five (25) hours per week in his garage performing welding and automotive repair work (non-commercial) for himself, family, and friends. It would be a substantial hinderance to his ability to live and perform such work at home (especially given the workplace restrictions that have been imposed during COVID-19) if he was no longer able to use the garage that was built.

For these reasons, Mr. Legge requests that the BZA recognize that without a variance, Mr. Legge and his wife (Tara Crosen) would experience significant hardship.

**Mr. Legge Acted in Good Faith With the Planning Department and Did Not Create the Problem**

Mr. Legge has cooperated with the Planning Department throughout this matter. Whenever he was requested to provide information, he not only provided such information, but also retained experts at personal cost to prepare the underlying materials to support his requests. He has allowed the Planning Department and Building Department staff to enter onto his property whenever requested to conduct inspections. And he has diligently engaged those same staff members to try to resolve issues as they were presented.

The discrepancies between the three surveys affecting the property are inexplicable, and it is not certain whose (if anyone's) is the most accurate depiction of the property. Regardless of the accuracy of the surveys presented, those were items prepared and presented by some of Mr. Legge's experts whom he relied on to ensure that the structure would be compliant with the Zoning Ordinance.

Likewise, Mr. Legge cannot explain why the structure was not built according to the submitted plan, but at least one lawsuit is pending related to construction of the garage. Despite the failure to build the garage's dimensions according to the plan, and despite several opportunities for either the Clarke County Building Department or Planning Department to note inconsistencies with the proposed design during construction, no staff member brought such an issue to Mr. Legge's attention.

For these reasons, Mr. Legge requests that the BZA recognize that Mr. Legge has acted in good faith with the Planning Department and was not responsible for the problem that was created.

**Adjacent and Nearby Properties Will Not Be Detrimentially Harmed by Granting the Variance**

As the garage has been substantially completed since April 2020, none of the adjacent or nearby properties have been able to assert verified instances of how the garage has detrimentally affected their respective properties. If anything, the addition of the garage (if finally approved) will increase Mr. Legge's property value, and accordingly, the surrounding neighbors' properties.

As previously stated, more than half of the properties fronting Route 340 with buildings on them within the White Post Historic District are already in violation of the setback requirement. If Mr. Legge's garage were to be included in that list, it would not be a unique "standalone" structure for the area, and accordingly, could not detriment the aesthetic or community character.

## STATEMENT OF JUSTIFICATION

Mr. Legge has obtained several letters of support from some of his neighbors, attached as Exhibit 8. Mr. Legge intends to supplement with additional letters of support prior to the hearing or otherwise asking neighbors to appear and voice their support for his garage.<sup>4</sup>

Accordingly, granting a variance for Mr. Legge's structure would not detrimentally harm any other adjacent neighbor or nearby neighbor's property interests.

### **The Setback Affects Numerous Properties, But Does Not Require Amendment to the Ordinance**

The setback issue can affect up to thirty-three (33) parcels of land that front Route 340. However, of those properties, only sixteen (16) appear to have structures on them. And of those sixteen (16) with structures, at a quick glance, only nine (9) of them (excluding Mr. Legge's property) appear to violate the setback requirement. Some, if not most of the properties, may be 'grandfathered' in, now. Accordingly, it would not be necessary to amend the Rural Residential section of the Clarke County Zoning Ordinance as such ordinance addresses not only the White Post Historic District, but other similar sections of Clarke County (i.e. Millwood, Shenandoah Retreat, etc.), and that the very few properties that may be subject to the same problem that Mr. Legge's property has can be accommodated by a variance, if needed.

### **Granting the Variance Does Not Result in a Changed Use of the Property that Is Not Permitted**

The granting of the requested variance does not change Mr. Legge's or any successor's use of the property. The same restrictions applicable to primary residences within the Rural Residential zoning section of the Zoning Ordinance would remain in effect.

### **A Special Exception Permit Does Not Apply**

A special exception permit is not applicable to this situation.

### **Conclusion**

For the foregoing reasons, Mr. Legge requests that if the BZA does not find that his property substantially conforms to the zoning ordinance, that he be granted a variance from the setback requirement and that the garage be deemed approved as-is.

## CONCLUSION

Mr. Legge greatly appreciates this Board of Zoning Appeal's consideration toward reading this Statement of Justification and attention to this matter. Mr. Legge consents to a BZA site inspection with due notice provided.

---

<sup>4</sup> The White Post Methodist Church has orally indicated that they intend to support him and that a letter would be forthcoming. The White Post Methodist Church is the adjacent neighbor who would have most likely been adversely affected by the location and size of the garage.

Accordingly, Mr. Legge respectfully requests that this Board of Zoning Appeals:

- (1) overturn the Zoning Administrator's decision to find his garage structure in violation of the Clarke County Zoning Ordinance; or
- (2) in the alternative, grant Mr. Legge a variance to allow his completed garage to remain where it is located upon reasonable conditions issued by this Board.

On behalf of Mr. Legge, thank you for your consideration of this appeal and Mr. Legge's requests. Mr. Legge is open to the BZA conducting a site inspection with due notice. Mr. Legge may further supplement this Statement of Justification as more information may become available. Please do not hesitate to contact me if you have any questions or concerns.

Truly yours,



Timothy R. Johnson

The Law Offices of Timothy R. Johnson, PLC  
20-B E. Main Street  
Berryville, Virginia 22611  
P: (540) 352-4672  
F: (540) 595-3500  
E: [trjohnson@trjlegal.com](mailto:trjohnson@trjlegal.com)  
*Counsel for Brian K. Legge*



## Clarke County Planning Department

101 Chalmers Court, Suite B

Berryville, Virginia 22611

(540) 955-5132

www.clarkecounty.gov

CERTIFIED MAIL: 7019 1640 0001 8842 7220

### NOTICE OF VIOLATION

Notice Date -- August 31, 2020  
Owner of Record - Brian K. Legge & Tara Crosen  
140 White Post Road  
White Post, VA 22663  
Property Address - 140 White Post Road  
Tax Map # -- 28A-A-66

A Notice of Violation dated April 9, 2020 was sent to you regarding violations of a Certificate of Appropriateness granted by the Clarke County Historic Preservation Commission. In that letter, I also indicated that it had been alleged that the newly constructed garage was located within the required 50 foot setback area from the edge of a primary highway right of way with 5,000 or more trips per day. Please note that I have confirmed with VDOT officials that Rt. 340 traffic exceeds 5,000 trips per day.

You have provided the attached as-built survey dated August 3, 2020 by Christopher D. Furstenau (Lic. No. 2727) which shows the location of the constructed garage structure. The as-built survey shows that the garage is located 35.9 feet from the edge of the Rt. 340 Primary Highway easement. Thus, the garage location is 14.1 feet within the required setback area. The zoning permit application which you submitted on November 4, 2019 clearly shows the required 50 foot setback and the proposed garage location outside the setback area and within the required building envelope.

Therefore, the garage location is in violation of County Zoning Ordinance Section §3-A-3-c Rural Residential (RR) Zoning District minimum yard requirements (setbacks).

*You are hereby notified that you have the right to appeal this administrative determination to the Clarke County Board of Zoning Appeals (BZA) within thirty (30) days of the date of this determination letter by filing with the Zoning Administrator and the BZA a notice of appeal specifying the grounds thereof and by paying the appeal fee of \$750.00. This administrative determination shall be final and unable to be appealed if not done so within 30 days. Any additional information regarding the filing of an appeal may be obtained in the Zoning office.*

Respectfully,

  
Ryan Fincham,  
Clarke County Zoning Administrator

Copy: Commonwealth Attorney

# Clarke County

## ZONING PERMIT



Tax Map # 28A-A-66 Date: 11/4/19 Telephone: 704-450-5805

Applicant: BRIAN K. LEECE

Address: 140 WHITE POST

Owner's Name: BRIAN K. LEECE

The purpose of this permit: (  ) Build ( ) Enlarge ( ) Remodel ( ) Other

GARAGE

Size of structure: 20 x 48 x 32 Contractor: BRIAN K. LEECE

Proposed use of structure: Storage, Work Shed

Signature of applicant: Brian K. Leece Date: 11/4/19

### OFFICE USE ONLY

Description of structure and/or use: garage

Street address: Same as above Zoning: RR, H

Historic District: Yes -

Minimum required setbacks Front: 50 Side: 10 Rear: 50 (RT 34)

Setbacks provided F 100+ LS 10' RS 100+ R 50

Site Plan? attached Water/Sewer Taps? \_\_\_\_\_

Flood Plain? NA Easements? \_\_\_\_\_

Conditions: \_\_\_\_\_ Well Setback: public water

Zoning permit is hereby: (  ) Granted ( ) Denied  
For the structure and/or use described herein.

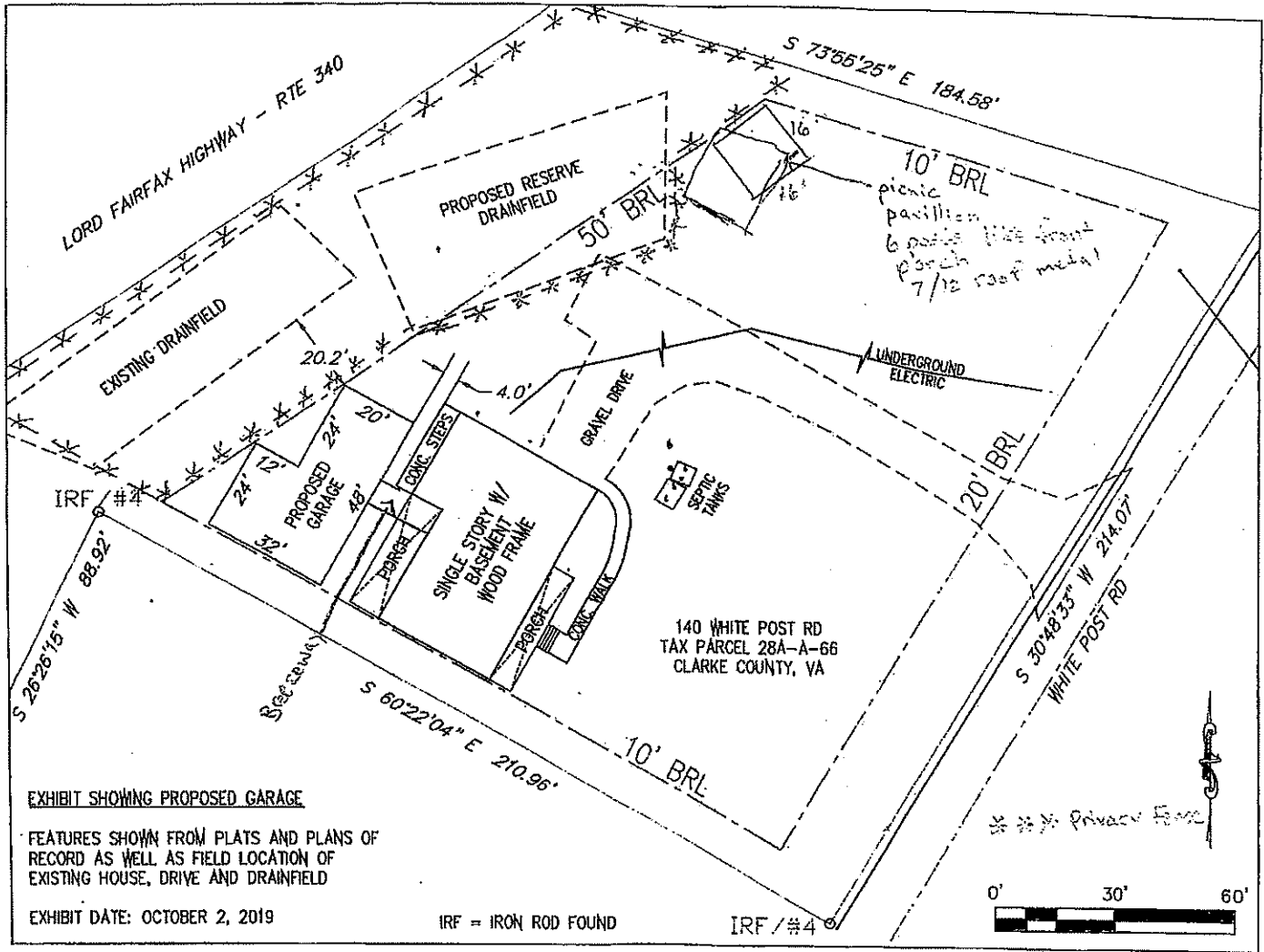
Zoning Administrator: Alison Teebore

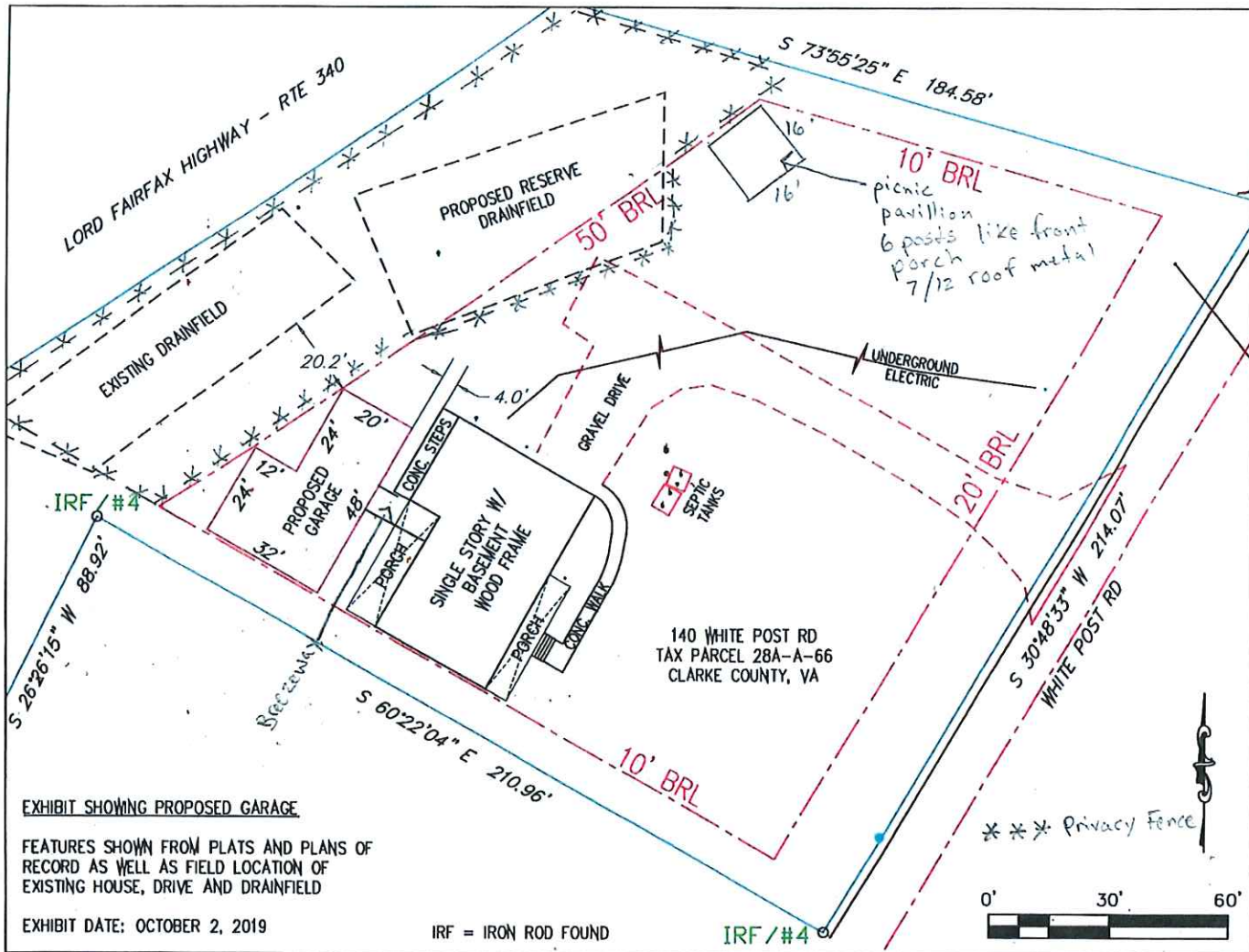
Date: 11/4/19

Fee: \$200.00 Check #: \_\_\_\_\_

Town/County Government Center  
101 Chalmers Court  
Berryville, VA 22611

[www.clarkecounty.gov](http://www.clarkecounty.gov)  
voice 540-955-5132  
fax 540-955-5180





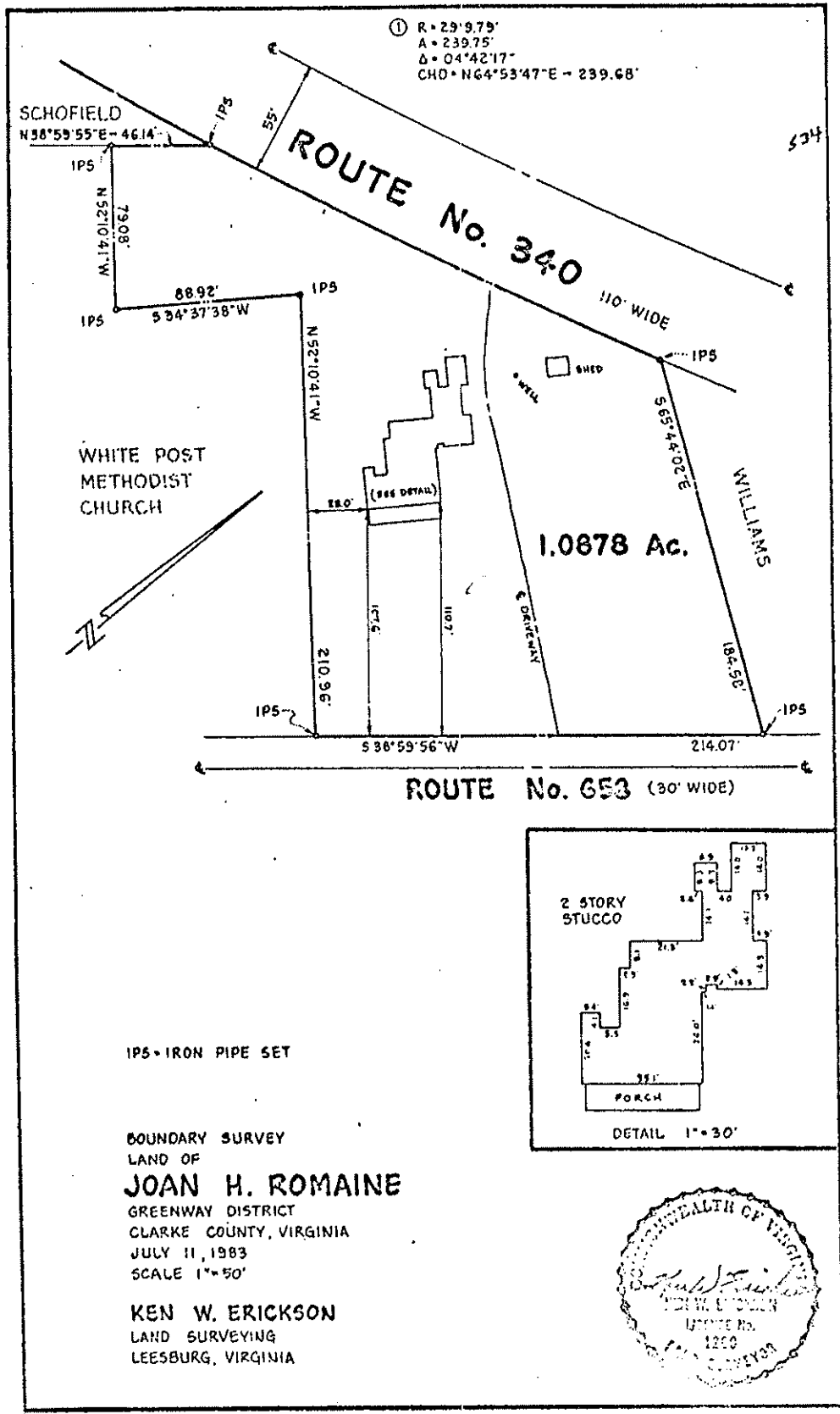
**EXHIBIT SHOWING PROPOSED GARAGE**

FEATURES SHOWN FROM PLATS AND PLANS OF RECORD AS WELL AS FIELD LOCATION OF EXISTING HOUSE, DRIVE AND DRAINFIELD

EXHIBIT DATE: OCTOBER 2, 2019

IRF = IRON ROD FOUND

IRF/#4





From: Ryan Fincham <[rfincham@clarkecounty.gov](mailto:rfincham@clarkecounty.gov)>  
Date: May 15, 2020 at 1:49:55 PM EDT  
To: [brianklegge@mail.com](mailto:brianklegge@mail.com)  
Cc: Alison Teetor <[ateetor@clarkecounty.gov](mailto:ateetor@clarkecounty.gov)>  
Subject: Setbacks

Good afternoon-

Based upon observations made at the site visit today by Alison Teetor and your acknowledgement of the constructed garage footprint being larger than the approved 1,248 square foot shown on the zoning permit approval, an as-built survey plat showing the location and size of the garage structure from a licensed surveyor will be required to assure compliance of the garage to all required zoning setbacks.

According to observations made at the site visit, the constructed 16' by 16' pavilion was located in a slightly different location than shown on the zoning permit approval, but the size of the pavilion appears correct and the constructed location appears to meet zoning setbacks. The constructed location for the pavilion can be shown on the as-built plat, or a new zoning permit sketch can be provided by you showing the constructed location of the pavilion and the required setbacks.

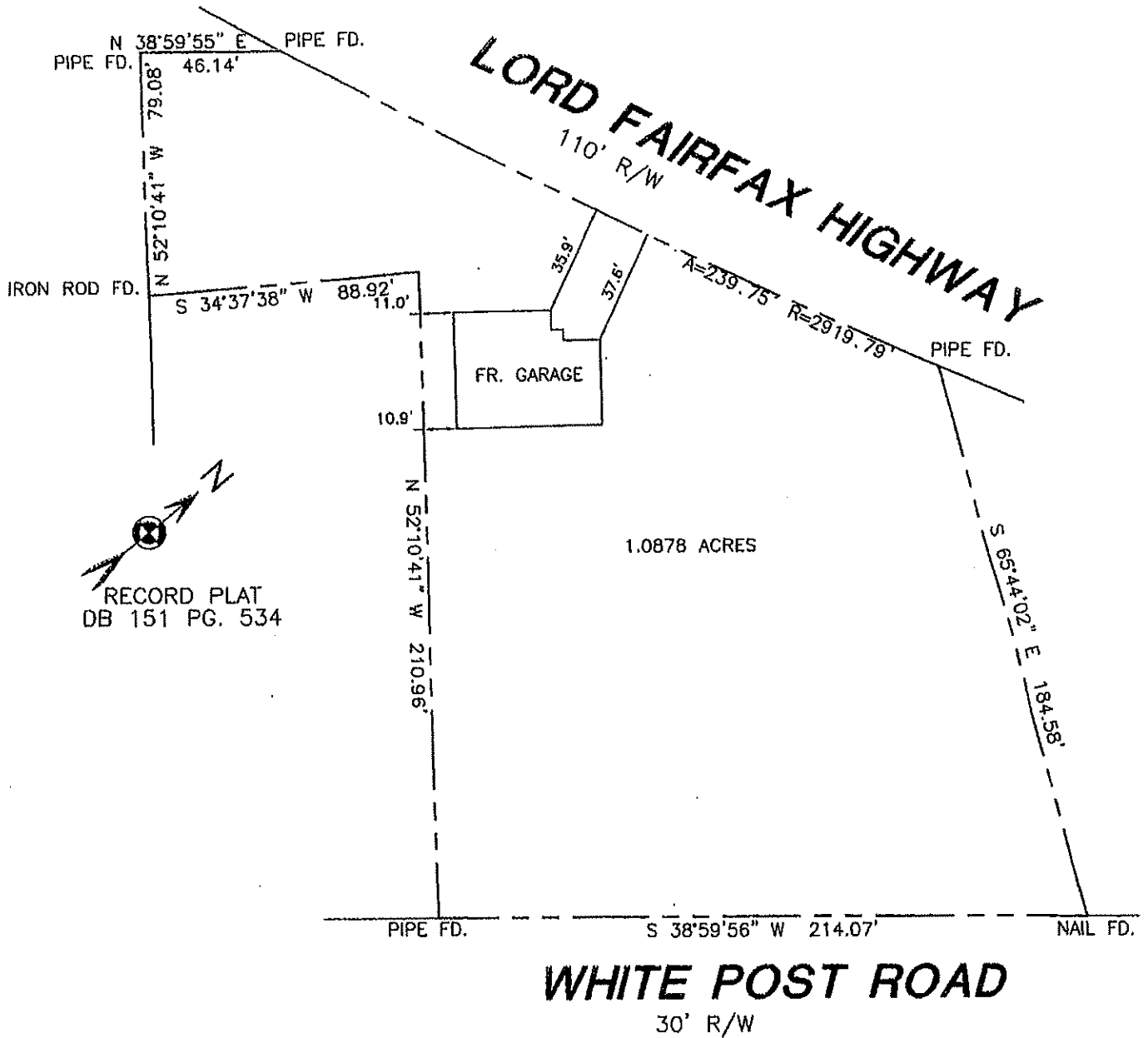
Thank you-

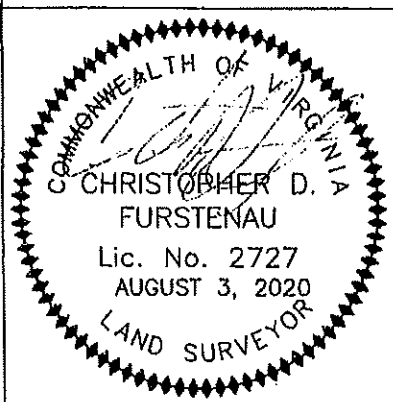
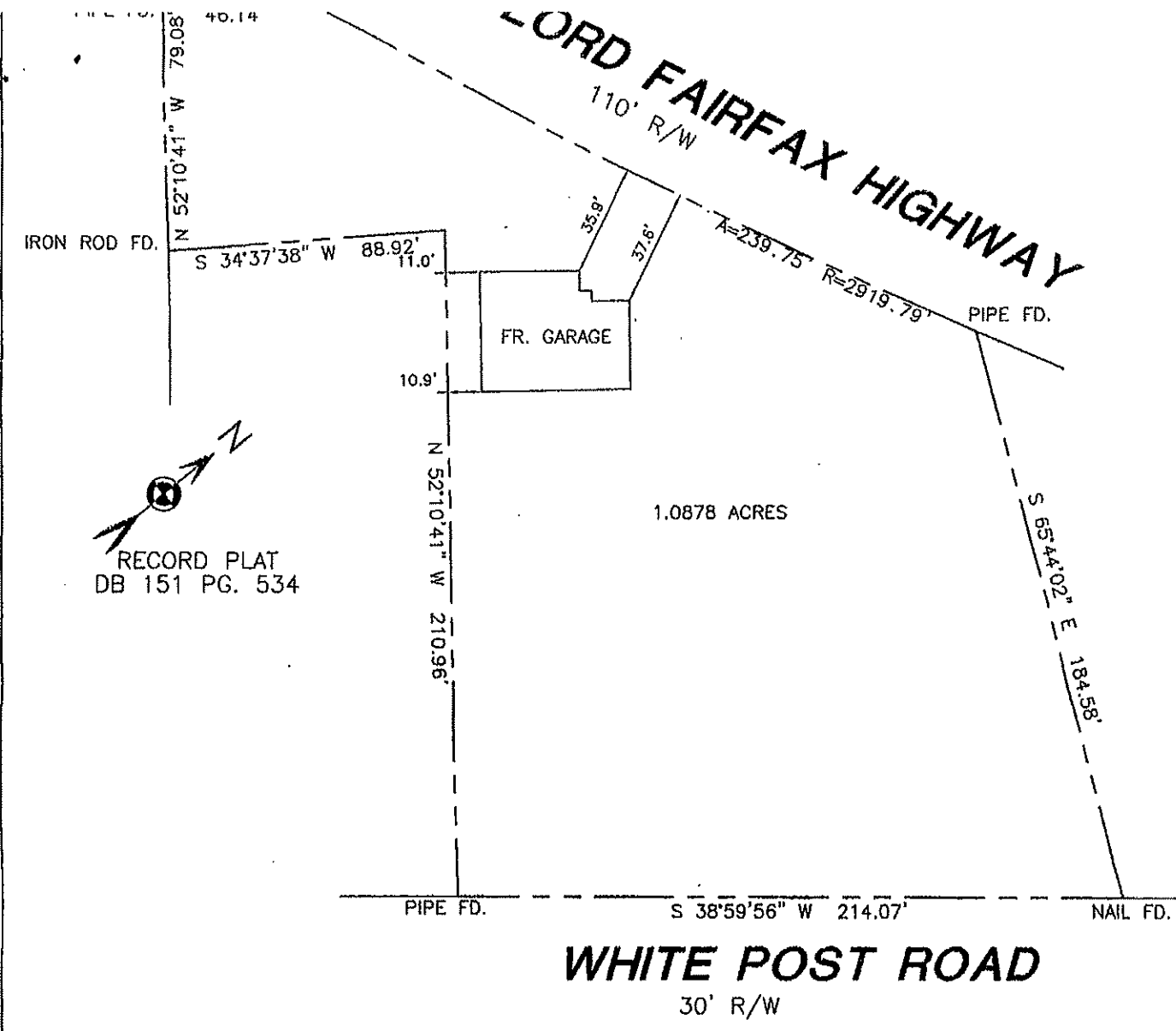
Ryan Fincham,  
Senior Planner & Zoning Administrator  
Clarke County, Virginia  
(540) 955 - 5131

NOTES:

- 1) TAX MAP PARCEL: 28A-A-66
- 2) NO TITLE REPORT FURNISHED, EASEMENTS OTHER THAN THOSE SHOWN HEREON MAY EXIST.
- 3) IMPROVEMENTS OTHER THAN NEWLY CONSTRUCTED GARAGE NOT SHOWN.

GARAGE AS-BUILT  
 LAND OF  
**BRIAN K. LEGGE AND  
 TARA M. CROSEN**  
 DEED BOOK 643 PAGE 215  
 GREENWAY MAGISTRERIAL DISTRICT  
 CLARKE COUNTY, VIRGINIA

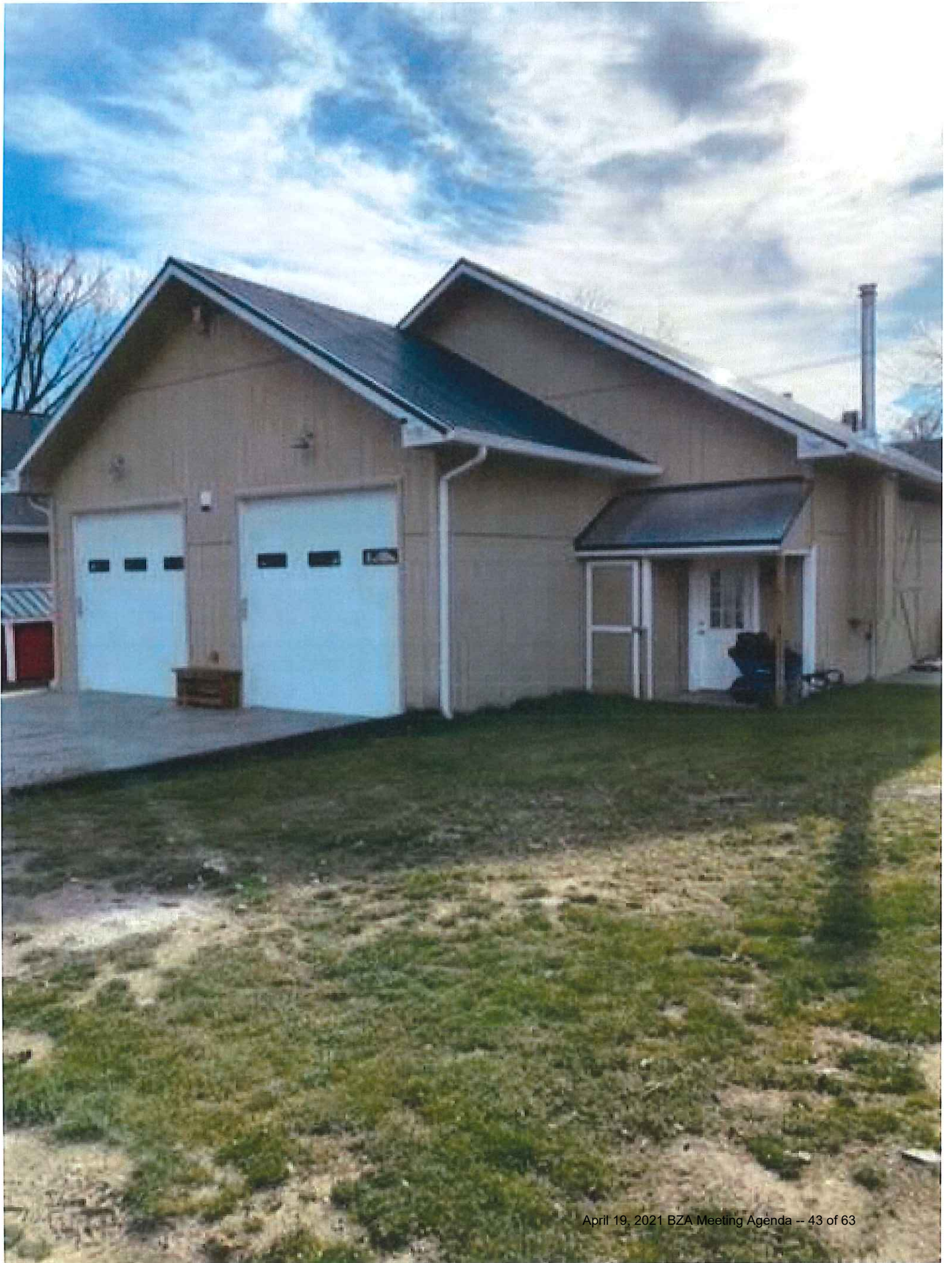


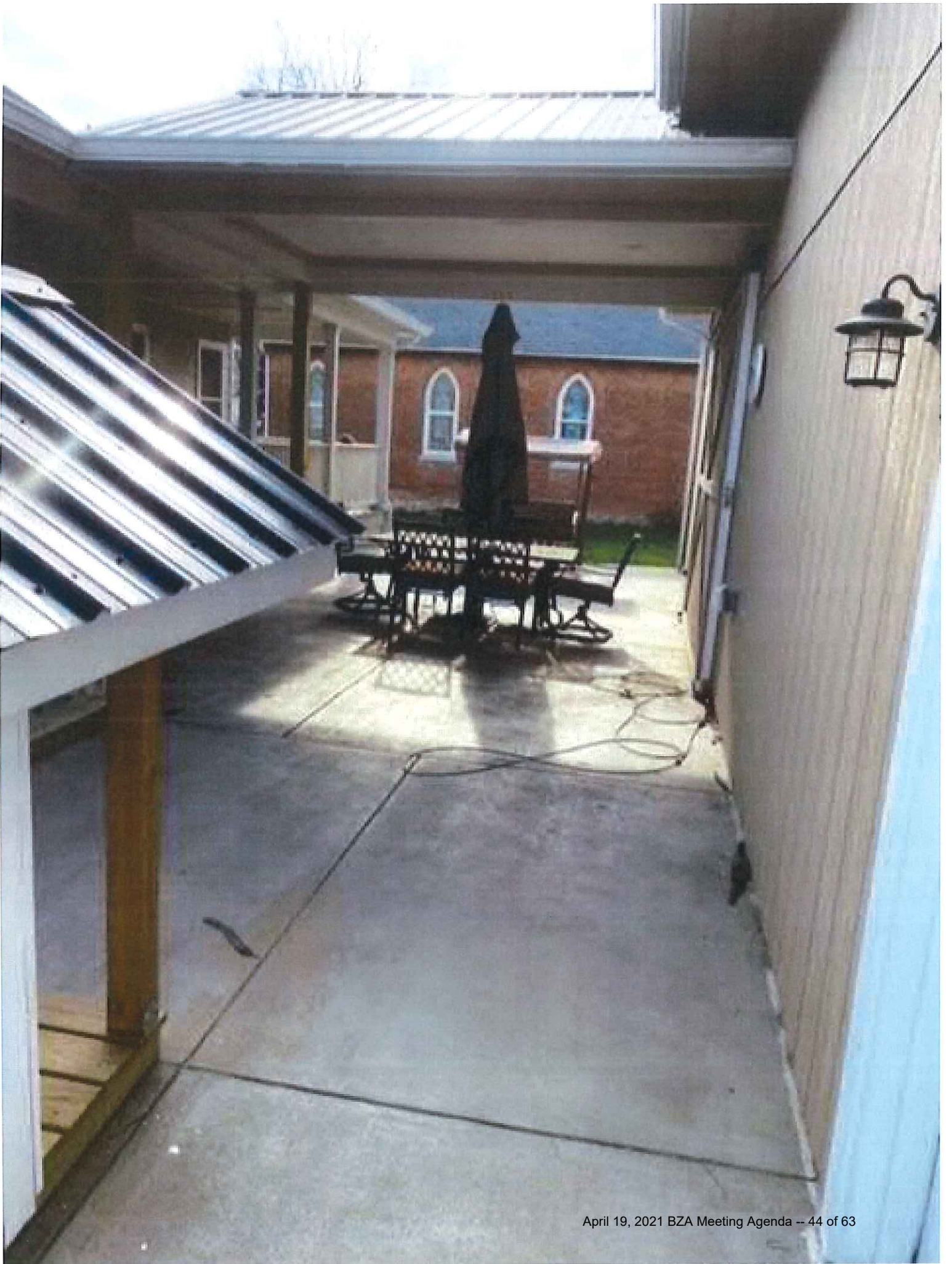


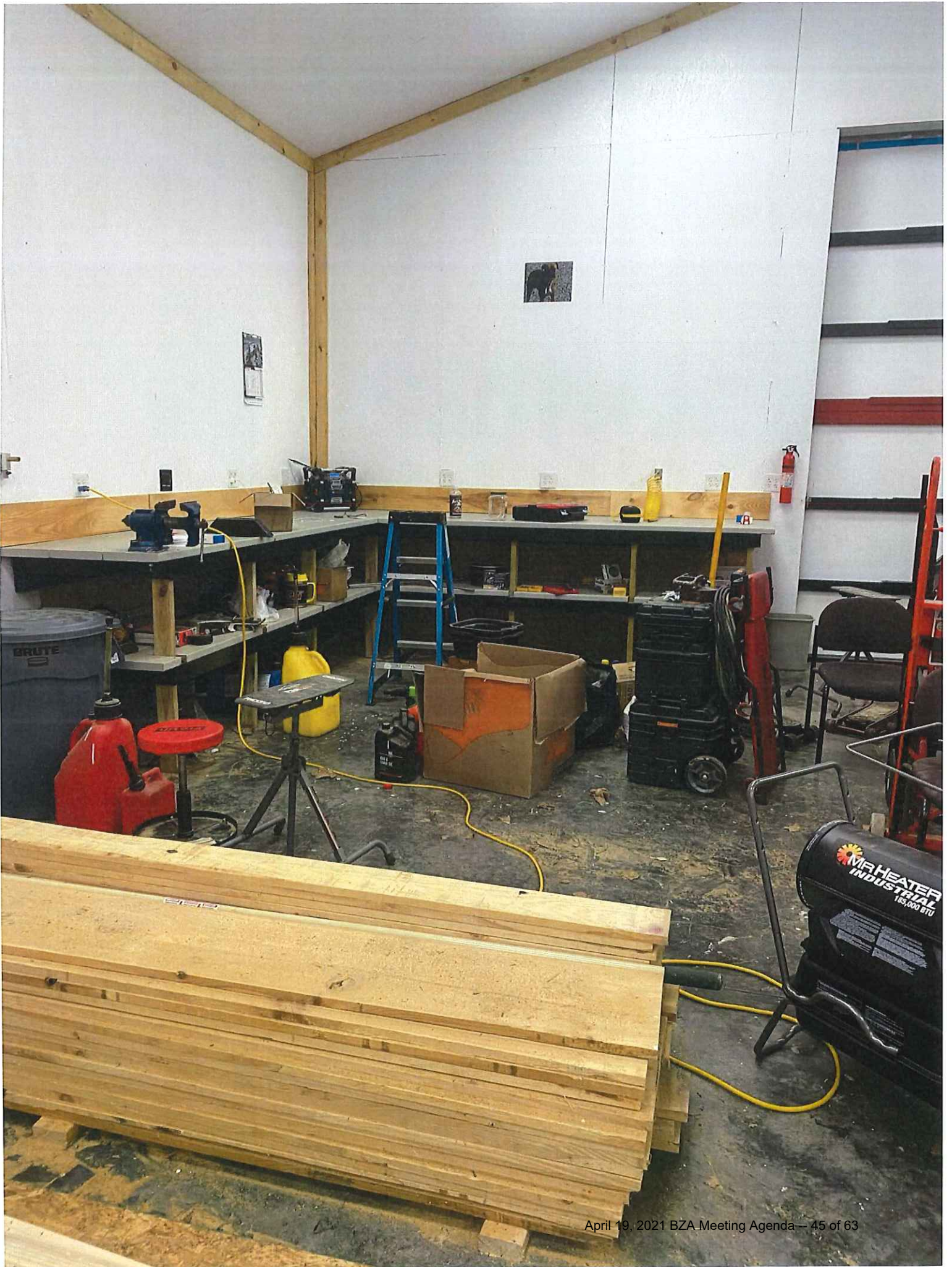
DATE: AUGUST 3, 2020      SCALE: 1" = 40'

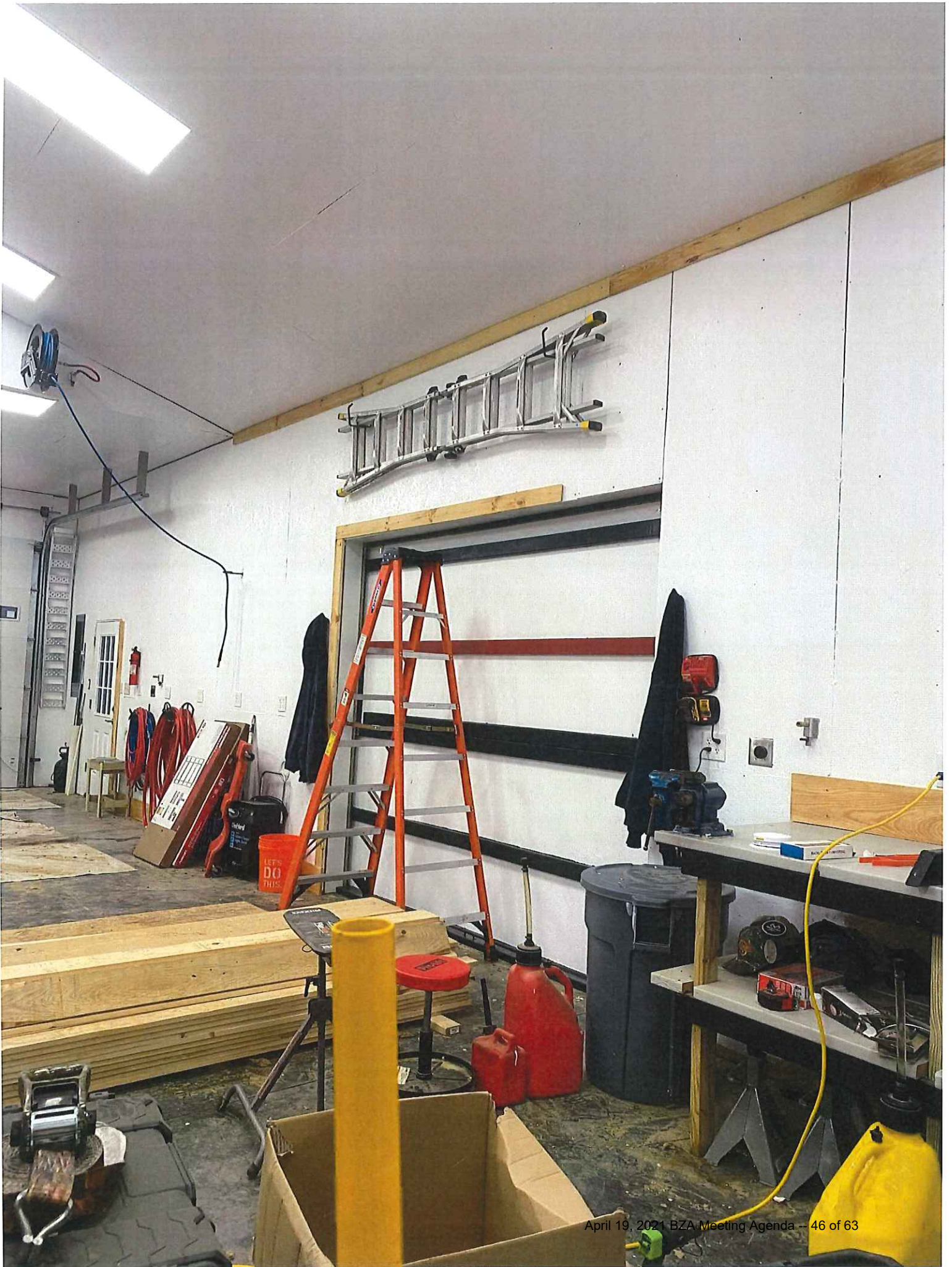
1520 COMMERCE STREET, #309  
 WINCHESTER, VIRGINIA 22601  
 540 974-4268  
 christopher@cdfsurveying.com





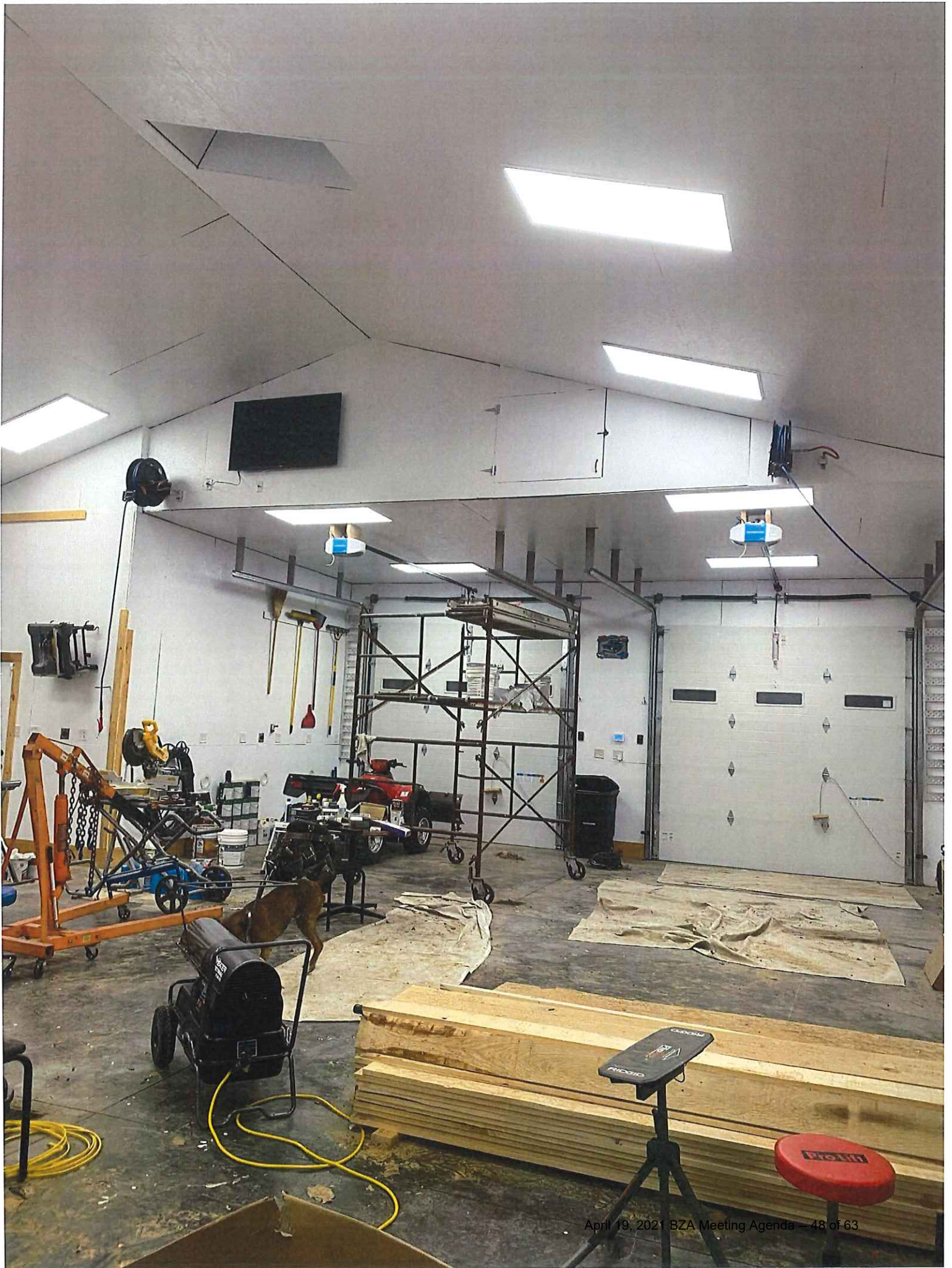












# 14402 Lord Fairfax Highway

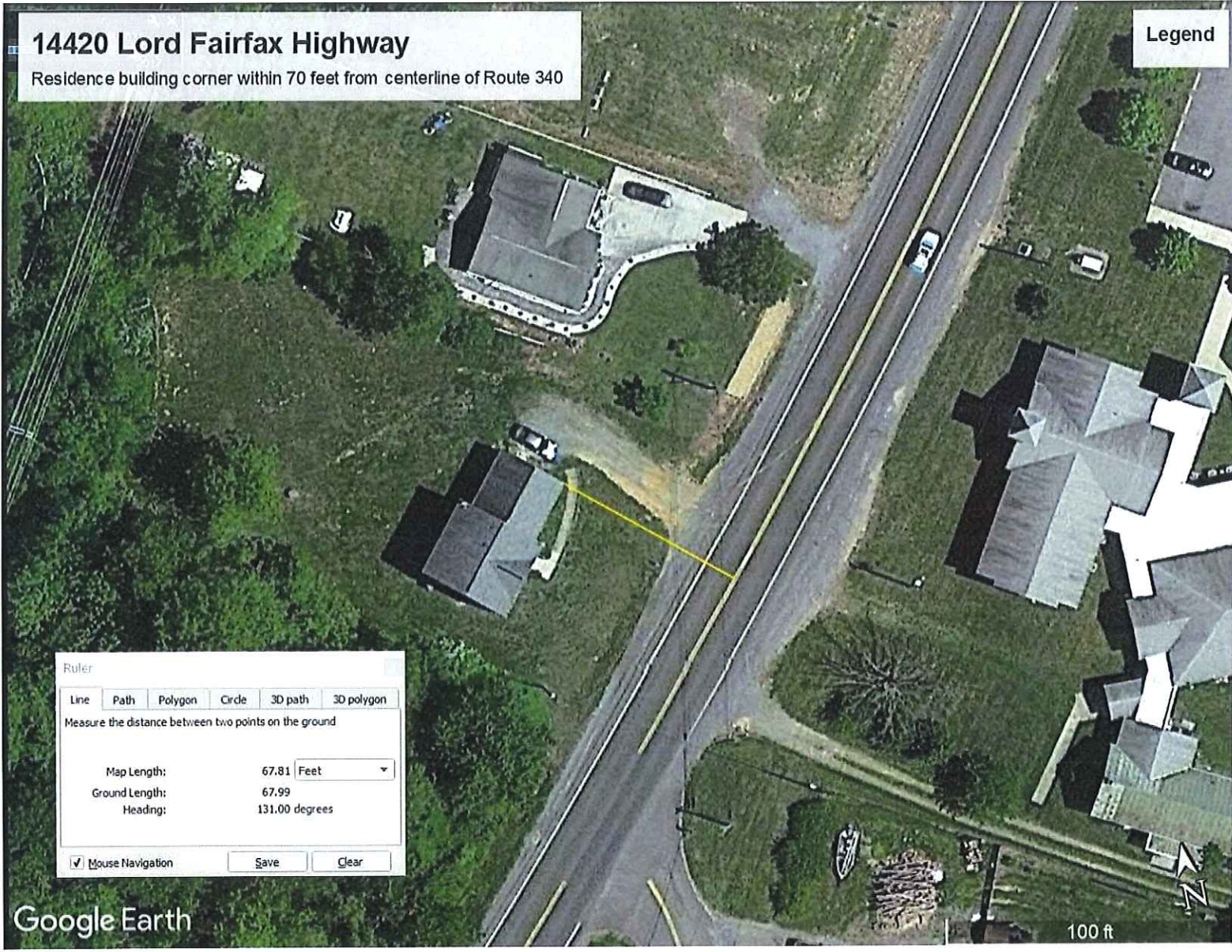
Residence building corner within 95 feet from centerline of Route 340

Legend



**14420 Lord Fairfax Highway**  
Residence building corner within 70 feet from centerline of Route 340

Legend



Ruler

Line Path Polygon Circle 3D path 3D polygon

Measure the distance between two points on the ground

Map Length: 67.81 Feet

Ground Length: 67.99

Heading: 131.00 degrees

Mouse Navigation Save Clear

Google Earth

100 ft

# 14725 Lord Fairfax Highway

Post office building within 80 feet from centerline of Route 340

Legend



Ruler

Line Path Polygon Circle 3D path 3D polygon

Measure the distance between two points on the ground

Map Length: 77.82 Feet

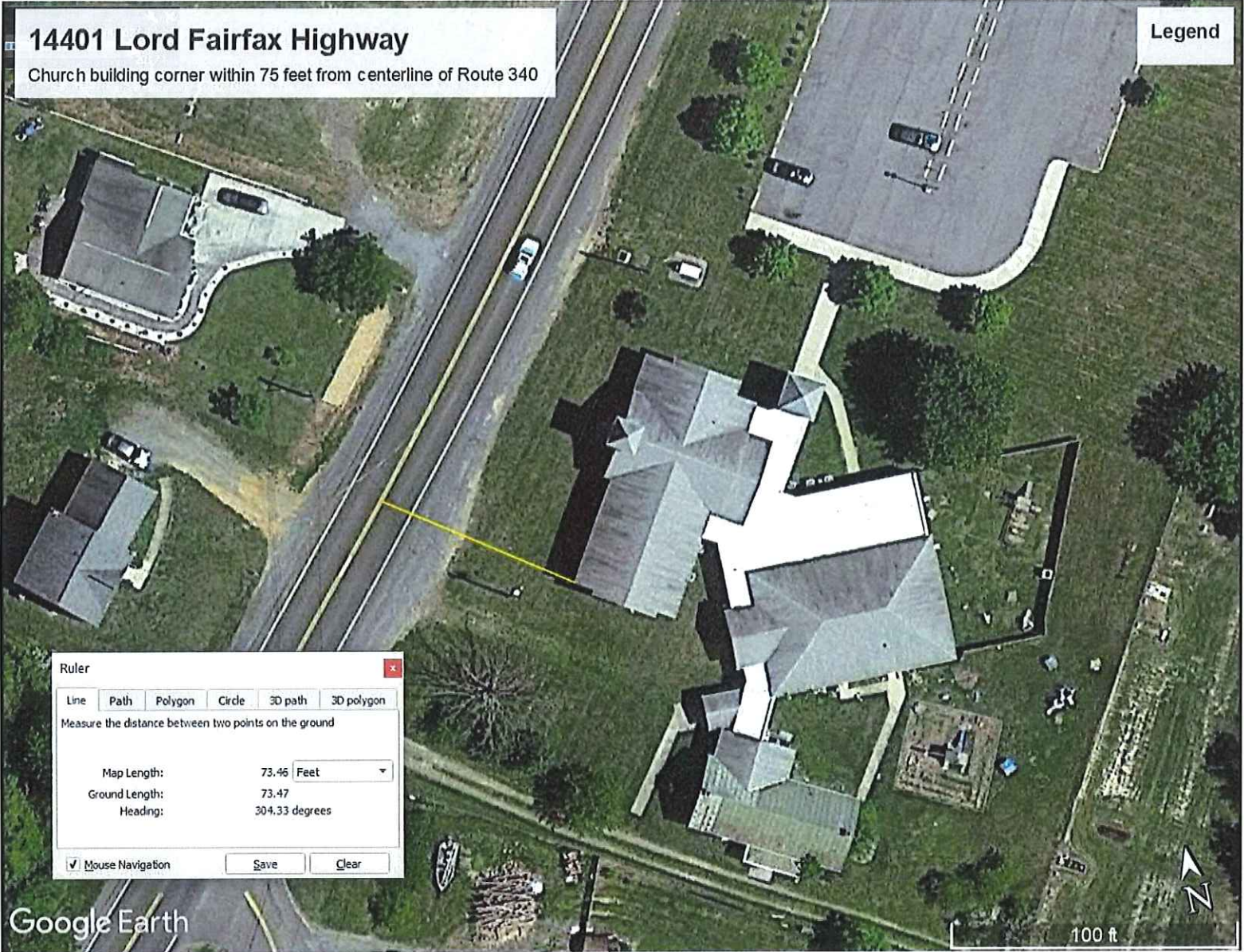
Ground Length: 77.83

Heading: 338.89 degrees

Mouse Navigation Save Clear

Google Earth

100 ft



# 14478 Lord Fairfax Highway

Residence's corner 70 feet from centerline of Route 340

Legend

Ruler

Line Path Polygon Circle 3D path 3D polygon

Measure the distance between two points on the ground

Map Length:	66.64	Feet
Ground Length:	66.73	
Heading:	135.47	degrees

Mouse Navigation Save Clear

Google Earth

100 ft

# 14767 Lord Fairfax Highway

Building within 80 feet from centerline of Route 340

Legend

Ruler

Line	Path	Polygon	Circle	3D path	3D polygon
------	------	---------	--------	---------	------------

Measure the distance between two points on the ground

Map Length: 77.09 Feet

Ground Length: 77.12

Heading: 341.72 degrees

Mouse Navigation       

Google Earth

100 ft

# 17 White Post Road

Residence's corner 90 feet from centerline of Route 340

Legend

Ruler

Line Path Polygon Circle 3D path 3D polygon

Measure the distance between two points on the ground

Map Length: 87.45 Feet  
Ground Length: 87.48  
Heading: 307.97 degrees

Mouse Navigation Save Clear

Google Earth

100 ft



# 98 White Post Road

Shed's corner 70 feet from centerline of Route 340

Legend

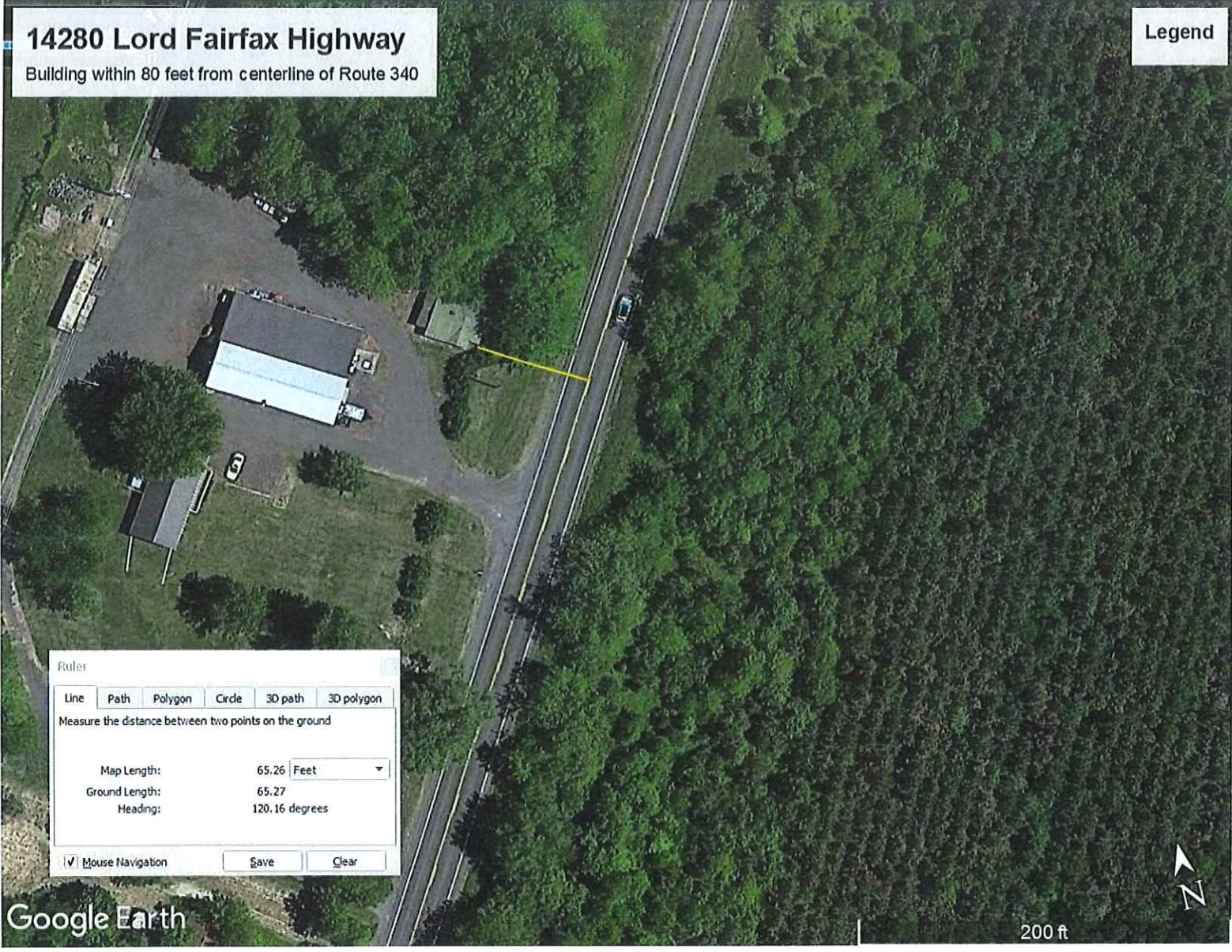


Google Earth

100 ft

**14280 Lord Fairfax Highway**  
Building within 80 feet from centerline of Route 340

Legend



Ruler

Line Path Polygon Circle 3D path 3D polygon

Measure the distance between two points on the ground

Map Length: 65.26 Feet

Ground Length: 65.27

Heading: 120.16 degrees

Mouse Navigation Save Clear

Google Earth

200 ft



Richard Lawson

169 White Post Road

White Post, VA 22663

January 3, 2021

To Whom it May Concern:

Re: Barn owned by Brian Legge located at 140 White Post Road White Post, VA 22663

I am writing regarding the structure next to my property. The barn is maintained with regular upkeep and I do not consider it an eyesore in the neighborhood.

Thank you for your cooperation on this matter.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Richard Lawson". The signature is written in a cursive style with a long horizontal flourish at the end.

Dec 20, 2020

To whom it may concern:

My name is Jose Guzman and I live at 91 White Post Rd. I am neighbors with Brian Legge at 140 White Post Rd. He recently built a garage on his property, as his neighbor the building does not bother nor interfere with us at all. If you have any questions you can give me a call at 540-539-8404.

Thanks

Jose Guzman  
Jose Guzman

Kathy Jones

111 White Post Road

White Post, VA 22663

January 3, 2021

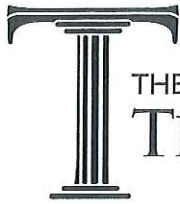
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Thank you for your cooperation on this matter.

Yours sincerely,



THE LAW OFFICES OF  
**TIMOTHY R. JOHNSON**

20-B E. Main Street  
Berryville, Virginia 22611  
P: 540.352.4672  
F: 540.595.3500  
[trjohnson@trjlegal.com](mailto:trjohnson@trjlegal.com)  
[www.trjlegal.com](http://www.trjlegal.com)

VIA E-MAIL

March 29, 2021

Clarke County Board of Zoning Appeals  
C/O Brandon Stidham  
[bstidham@clarkecounty.gov](mailto:bstidham@clarkecounty.gov)

Re: Supplement to Brian Legge's Application for Variance

Dear Clarke County Board of Zoning Appeals:

In addition to Mr. Legge's previously filed Statement of Justification used in support of his appeal of the Zoning Administrator's notice of violation and request for a variance, Mr. Legge provides the following supplemental information:

1. The contractor responsible for framing the garage structure, D.K. Construction Custom Carpentry, LLC was involved in a lawsuit with Mr. Legge in Clarke County General District Court that terminated as of March 25, 2021. The case was settled between the parties. The terms of the settlement are subject to a confidentiality agreement.
2. Mr. Legge retained Bollinger Construction, Inc, d/b/a Bollinger Homes to assess the cost of removal/reinstallation of the garage. Per Bollinger's estimate, it would cost approximately two hundred forty thousand dollars (\$240,000.00). Their estimate letter is attached.

If you require any further information, please do not hesitate to contact my office.

Truly yours,

Timothy R. Johnson

CC: Client  
Robert Mitchell, Esq. *via e-mail*

To: Timothy Johnson

Ref. -- Brian Legge (Garage Structure)

Bollinger Homes Representative conducted a site visit to 140 White Post Rd. White Post, VA on January 29<sup>th</sup> 2021 and determined that the newly constructed garage was not built per drawings provided to us by Brian Legge. Garage size and location differ from plans provided. I found the following issues with removal and relocating of structure.

#### **Scope of Work**

- New footing and foundation walls would need to be installed as the primary structure is designed to bear on exterior frame walls existing slab would need to be saw cut removed and excavated for this to occur.
- Existing exterior metal siding and roofing would be required to be removed.
- Existing roof trusses and roof purlins would need to be removed.
- Existing exterior framed walls would need to be removed.

# BOLLINGER HOMES

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- All existing electrical work would need to be removed from walls and ceiling before walls and roof trusses could be removed.
- Once new footing and foundation walls are installed. Work could commence on reinstalling all existing framed walls, roof trusses and metal siding.
- Once all framing is complete, work could begin on reinstalling all electric wiring, lighting, etc.
- Existing damaged floor slab would require new concrete/stones infill at all areas where existing footings and foundation were removed.

## **Estimated cost to remove and reinstall structure:**

**\$240,000.00**

Sincerely,



Blaine Andrew

Project Estimator

Bollinger Construction