

Clarke County Board of Zoning Appeals

Meeting Minutes

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 (Administrative Assistant).

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.

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

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.

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

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 Overlay 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. Johnson 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.

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

5. Other Business

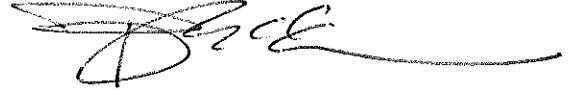
Mr. Stidham stated he had a couple of other business items. He said that he emailed out a draft contact information sheet to everybody. He stated to take a look to see if we have all the contact information correct for everybody. He said if there is any information that you do not want the public to 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.



Anne Caldwell, Chair



Brandon Stidham, Clerk