Clarke County Planning Commission

AGENDA – Policy & Transportation Committee Meeting
Friday, March 4, 2022 – 9:30AM or immediately following Planning Commission Business Meeting
Berryville/Clarke County Government Center – Main Meeting Room

1. **Approval of Agenda**
2. **Approval of Minutes – November 4, 2020 Meeting**
3. **Discussion, Mergers and Dwelling Unit Right (DUR) Accounting**
4. **Discussion, Boundary Line Adjustments**
5. **Other Business**
6. **Adjourn**

Clarke County Planning Commission

DRAFT MINUTES – Policy & Transportation Committee Meeting
Wednesday, November 4, 2020 – 3:30PM or immediately following Planning Commission Work Session
Berryville/Clarke County Government Center – Main Meeting Room

ATTENDANCE:			
Bob Glover (Millwood)	✓	Scott Kreider (Buckmarsh)	✓
Douglas Kruhm (Buckmarsh)	X	Gwendolyn Malone (Berryville)	✓
George L. Ohrstrom, II (Ex Officio)	X		

STAFF PRESENT: Brandon Stidham (Director of Planning), Jeremy Camp (Temporary Planner/Zoning Official)

OTHERS PRESENT: Frank Lee, Doug Lawrence

CALL TO ORDER: By Mr. Stidham at 3:48PM.

1. Approval of Agenda

The meeting agenda as presented by Staff was approved by consensus.

2. Approval of Minutes – March 6, 2020 Meeting

A motion to approve the March 6, 2020 meeting minutes was adopted 2-0-2.

Motion to approve March 6, 2020 Meeting Minutes:			
Glover	**abstained**	Kreider	**AYE (seconded)**
Kruhm	**absent**	Malone	**AYE (moved)**

3. Discussion, Short-Term Residential Rentals Draft Text Amendment

Mr. Stidham reviewed the Staff Report for this discussion item which outlines an alternative approach to a short-term residential rentals text amendment, prioritizing verifying compliance with onsite sewage disposal system regulations and de-emphasizing whether or not the operation is owner-occupied.

Commissioner Lee asked what Staff means by requiring an onsite sewage disposal system to be brought up to Virginia Department of Health (VDH) requirements. He added that VDH requires a drainfield with a 100% reserve area and noted that many older homes have no approved reserve area. Mr. Stidham replied that they will have to get VDH to approve the 100% reserve area and noted that ensuring the septic system can handle the proposed occupancy is the primary issue identified with short-term residential rental regulation. Commissioner Lee said that without a reserve area an existing septic system may still be able to handle the proposed occupancy, adding that older systems may have been compliant with earlier regulations. Mr. Stidham asked Commissioner Lee whether it would be less of an issue for two bedroom occupancies with a maximum of four guests in an older home with a nonconforming septic system. Commissioner

Lee replied that it will be an issue on every rental if you require a 100% reserve area, reiterating that most older homes have either a 50% reserve area or no reserve area. He added that requiring a 100% reserve area to be installed would be a significant cost and some smaller lots may have functioning permitted systems but lack the area for a 100% reserve. Mr. Stidham noted that the text amendment does not specify that you have to provide a 100% reserve area, it says that there must be written confirmation from VDH that the existing system will support the stated maximum occupancy of the rental. He added that if VDH confirms in writing that an existing permitted system which does not meet current regulations will handle the proposed rental occupancy, this will comply with the requirements of the text amendment. He noted that based on discussions with VDH staff, it is likely that they will require applicants to come into full compliance with current regulations. Commissioner Lee said not necessarily and that they will likely honor valid permits even if they do not identify a 100% reserve area. Mr. Stidham asked for confirmation that this means VDH would say that an existing permitted system will support a maximum rental occupancy without a 100% reserve area and Commissioner Lee replied yes. Mr. Stidham added that the current draft text amendment does not dictate the system requirements, it states that the applicant has to satisfy VDH. Commissioner Lee reiterated based on his experience working with VDH that they will honor a valid existing permit. Mr. Stidham asked the Committee if they are comfortable with this result. Commissioner Glover asked about a testing requirement for older systems. Mr. Stidham replied that this is where we originally started and that VDH does not want to issue approval letters for short-term residential rentals because they consider them to be commercial uses. He then explained how VDH will agree to compare the records for the property against the proposed rental occupancy and confirm whether the existing system can support the occupancy.

Commissioner Kreider said that the use of the residence is changing to a rental and we have no way of knowing how much water is being used by the renters or what they are flushing into the system. Mr. Stidham said that this goes to the owner vs. non-owner occupied policy issue and how much that issue should impact the draft regulations. Commissioner Glover said that the one to two bedroom rentals with a maximum of four guests does place a limit on the septic system impact. He added that the age of the septic system is what bothers him. Commissioner Lee explained how regulations have changed and that septic systems that were once compliant with VDH regulations do not comply with current requirements. Mr. Stidham said that he could argue that the bedroom and maximum occupancy regulations would place more limits on the rental use than would be in place if it were a typical single-family residential use. Commissioner Lee noted that modern VDH permits list the maximum number of occupants but older permits do not. He added that requiring a 100% reserve area will knock out a lot of operators and Commissioner Glover said that many may go underground and not get permits. Mr. Stidham said he noted from the previous discussions that there is not a great concern with one to two bedroom rentals with a maximum of four occupants but Commissioner Kruhm noted that we do not want to give these smaller rentals a “free pass” from compliance with septic system regulations. Commissioner Glover noted that Commissioner Kruhm was particularly concerned about small lots located along the river.

Regarding the “business license” approach to enforcing the proposed regulations, Commissioner Kreider asked whether an operator considered to be “grandfatherered” from the proposed regulations would be required to comply with the septic system regulations and Mr. Stidham said

no. Commissioner Kreider said that this would not solve the problem and we would not know whether existing operators have a septic system that can support their maximum occupancy. Mr. Stidham said the trade-off is getting the existing operators to document their business so they can be taxed as opposed to encouraging them to go underground and not get any permits. He added that VDH can also be notified of these operations but they will not take any enforcement action unless there is sewage on the ground. Mr. Stidham noted that we do not have to grandfather any existing businesses unless they were actually granted zoning approval. Commissioner Glover suggested allowing a six-month grace period to get into compliance with the new regulations as opposed to grandfathering. Commissioner Malone asked how the grandfathering would work and whether an existing rental operator would have to do anything besides get a zoning permit. Mr. Stidham replied that the rental operator would come in to get a business license during the six-month period after adoption of the proposed regulations and then would be treated as nonconforming. He added that they would not have to comply with the regulations so long as they maintain their nonconforming status which would include maintaining the business license in good standing and not letting it lapse or discontinue rentals for two or more years. Commissioner Lee asked if operators in that scenario would have to comply with VDH requirements and Mr. Stidham replied no because they would be grandfathered. Mr. Stidham added that the Committee needs to decide whether they have a problem with this outcome. Commissioner Kreider said that he thinks that even grandfathered operators should have to meet the occupancy limitations for their septic systems. Mr. Stidham asked Commissioners about eliminating the grace period. Commissioner Glover said we still need to find a way to be fair to these businesses. He added that he is confused about what regulations we would be grandfathering existing operators from. Mr. Stidham replied that operators would be grandfathered from having to comply with all of the proposed regulations. Commissioner Glover replied that he agrees with Commissioner Kreider that this does not solve the septic system concerns. Supervisor Lawrence asked if there should be contingencies that would cause grandfathering to be revoked such as not having a building permit. Mr. Stidham replied that he thought you could choose which regulations could be grandfathered but he would have to discuss it with the County Attorney. Commissioner Kreider said that there should be no grandfathering but we would still use complaint-basis enforcement. He added that if you allowed grandfathering then you would lose your enforcement authority over those rentals when you receive a complaint.

Mr. Stidham suggested that instead of a grace period you could do a delayed implementation of the regulations. He said in this scenario the Board of Supervisors would adopt the regulations with an effective date of six months in the future for the regulations to go into effect. He added that you would publicize that all existing rentals will have to come into full compliance by the effective date. Mr. Stidham noted that there is still the possibility that operators will go underground and Commissioner Glover said that you will still have the option of enforcement since you would not be grandfathering any existing businesses. Commissioner Kreider said that he would not have a problem with this approach. Mr. Stidham noted that any operators who received a business license with "zoning approved" or similar language instead of "no zoning approval required" would be grandfathered from the regulations. Commissioner Kreider said that we cannot cover everyone but we need to cover as much as we can.

Mr. Stidham asked the members if they would be comfortable with the new draft regulations being presented to the full Commission at the December workshop without grandfathering but with the delayed implementation approach. Members agreed with this approach and reiterated that they did not like grandfathering. Mr. Stidham added that the delayed implementation would allow Planning Staff to work with Economic Development Staff to get the word out. He also said that operators who are in the process of getting approval for their septic systems when the rules go into effect would not be penalized.

4. Other Business

None.

ADJOURN: Meeting was adjourned by consensus at 4:19PM.

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Brandon Stidham, Clerk

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TO: **Policy & Transportation Committee members**

FROM: **Brandon Stidham, Planning Director**

RE: **Mergers of Lots and Dwelling Unit Right (DUR) Accounting**

DATE: **February 23, 2022**

The following item is presented as a policy issue discussion for the Committee. The ultimate goal is for the Committee to determine whether the policy issue warrants the development of a text amendment and, if so, what the parameters of the text amendment should be.

Section 3.8 of the Zoning Ordinance states that when lots are merged or vacated, the dwelling unit accounting for the merged lot shall be based on the dwelling unit right allocation table in Section 3.2 – not necessarily the total number of existing dwelling unit rights on the lots that are merged:

> When dwelling unit rights have been allocated to any lot of record as of October 17, 1980, and such lot is subsequently vacated pursuant to **Title 15.2, Chapter 22, Article 6, Sections 2271 and 2272 of the Code of Virginia** or merged, the number of dwelling unit rights shall be reallocated, pursuant to **Section 3.2**, to the lot(s) resulting from such vacation or merger as though the resulting lot(s) had been the tract(s) of record that existed on the **Clarke County Real Property Identification Maps** on October 17, 1980.

For example, a property owner wants to merge the following two lots:

- Lot A – 100 acres, 4 DURs
- Lot B – 100 acres, 4 DURs

The resultant merged lot would be 200 acres in size and would appear to have a total of 8 DURs. However, per Section 3.8, the DURs for the merged lot must be reallocated according to the DUR allocation table in Section 3.2 which states that a 200 acre lot is allocated 6 DURs. In this scenario, the property owner would **lose** 2 DURs if these two lots are merged. In order to inform property owners of the potential loss of DURs through merger, the Subdivision Ordinance was amended in 2012 to require plat approval for all mergers. With the exception of the merger of lots under 15 acres in size, the merger of two lots containing all of their originally-allocated DURs (consistent with the allocation chart) would result in the **loss** of one or more DURs in all cases.

It should be noted that the preceding version of Section 3.8 applied only to vacation of plats. Vacation is a seldom-used tool outlined in the Code of Virginia that allows a recorded plat to be

rescinded, resulting in the affected lot(s) returning to their previous configuration. From a policy perspective, DURs on lots that are vacated and returned to a past layout should be reallocated according to the DUR allocation chart. Mergers were added to this section in 2003 but a merger is very different from a vacation in that it is the combination of two or more lots of record to produce a new lot. Therefore the policy justification for requiring DUR reallocation for plat vacations – that the affected lot(s) are being returned to a previous configuration – cannot apply to mergers as well.

There is one possible argument for requiring DURs on lots resulting from a merger to be based on the allocation chart and justifying the loss of DURs. Allowing a merged lot to retain more DURs than allowed by the allocation chart results in a lot with a density that is greater than a lot of the same size that complies with the chart. Using the previous example, a 200 acre lot containing 6 DURs after merger would have a density of 1 dwelling per 33.33 acres. A 200 acre lot containing 4 DURs – consistent with the allocation chart – would have a density of 1 dwelling per 50 acres.

A counter-argument to requiring compliance with the allocation chart is that no **new** DURs are being created by allowing all existing DURs to be retained on a merged lot. There have been past concerns that consolidating DURs from multiple lots onto a merged lot could facilitate a subdivision of more residential lots than would have been permitted according to the allocation chart. While this may be true, it is important to remember that such a subdivision would only utilize existing DURs and could potentially result in a subdivision with a layout that preserves more open space for farming than if the DURs were dispersed across the same area.

While DURs may be lost through merger, there are situations in which following Section 3.8 can result in the net **gain** of DURs. Here is an example:

- Lot A – 100 acres, 4 DURs
- Lot B – 100 acres, 1 DUR (3 originally allocated DURs were previously used to subdivide new lots)

The resultant merged lot would be 200 acres in size and would appear to have a total of 5 DURs. However, when DUR allocation is applied per the table in Section 3.2, the reallocation results in 6 DURs with a **gain** of 1 DUR.

As a matter of practice, Planning Staff has only recognized the loss of DURs through merger and not a gain of DURs. The original 1980 allocation of DURs theoretically created a fixed amount of DURs for all AOC and FOC tracts in existence and there is no mechanism to create new DURs. In the aforementioned example, 3 of the 4 DURs originally allocated to Lot B were used to subdivide new lots. If an additional DUR were recognized in this situation, that DUR would be considered newly created and in excess of the original 1980 allocation.

The interpretation of Section 3.8 creates what could be viewed as an inconsistency in that the loss of DURs would be recognized but not the gain of DURs. The Zoning Ordinance is silent in regards to this interpretation, therefore it appears that a text amendment should be developed to address this issue. Staff recommends that the Committee first discuss whether allowing DURs to

be lost through merger is an equitable policy or whether it should be changed. If the Committee decides that the policy should not be changed, the Committee should then discuss how to address the issue of not recognizing the gain of DURs through compliance with Section 3.8. The Committee should also discuss whether the rules for vacation and merger should be written separately to recognize the different policy issues described earlier in this memo.

One potential solution that could be used to address the issue of gain of DURs could be to include language in Section 3.8 that no lot resulting from a merger shall have more DURs than the total DURs existing on the merged lots. This would make it clear that no new DURs can result from the mathematical outcome of complying with the allocation chart. If the Committee wants to eliminate the policy of allowing DURs to be lost through compliance with the allocation chart, Section 3.8 can be replaced with this language. As a reminder, the policy justification for continuing to require compliance with the allocation chart for **vacations** is stronger than for mergers so the Committee may want to consider separate rules for vacations and mergers.

Please let me know if you have questions or concerns in advance of the meeting.

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TO: **Policy & Transportation Committee members**

FROM: **Jeremy Camp, Senior Planner/Zoning Administrator**

RE: **Boundary Line Adjustments**

DATE: **February 23, 2022**

The following topic is presented as a policy issue discussion for the Committee. The ultimate goal is for the Committee to determine whether the policy issue warrants the development of a text amendment and, if so, what the parameters of the text amendment should be. Below staff provides a summary with examples of the perceived issues with the potential problems and questions identified at the end of this report.

At the request of Staff, a certain boundary line adjustment application was reviewed by the Plans Review Committee in November of last year that brought attention to boundary line adjustments. In particular, it was brought to light that the regulations governing boundary line exceptions are not always consistent with the regulations for subdivisions, particularly in regards to the maximum lot size requirements in the AOC District. That certain application met the code regulations for boundary line adjustments, but resulted in a lot layout of 20+ acre lots, despite the AOC subdivision regulations that require new residential lots to be limited in size to 3 acres on average (2 minimum, 4 maximum). The application that was reviewed by the Plans review committee in November is summarized below for the purpose of being an example for discussion purposes on the larger policy issue.

The history of the application started with a minor subdivision application from a couple years ago (MS 20-03). In this minor subdivision application the applicant created two new lots from a 145 acre parent parcel in the AOC District. An exception was granted by the Planning Commission to allow Lot 1 to exceed the maximum size requirements for new lots created in subdivisions. It was approved for 19 acres. The other lot, Lot 2, was created with 3 acres per the regulations. Following the minor subdivision application, the applicant submitted a boundary line adjustment application for Lot 1 and Lot 2 (BLA 21-06). This boundary line adjustment transferred a portion of the extra acreage allowed for Lot 1 into Lot 2. Approximately 7 months later the applicant submitted another boundary line adjustment that incorporated an adjacent lot (Lot 3) and the residue parcel (remainder of parent parcel). This resulted in 3 lots over 20 acres and the residue lot from the original subdivision being reduced to 82 acres. Below are the acreage changes shown in a sequential chart to help visualize the series of applications:

1	**Original Parcels** Parent Parcel: 145.37 acres (1 Ex.Dwl., 6 DURs) Lot 3: 6.78 acres (1 DUR)	**3**	**Boundary Line Adjustment 21-06 (June 2021)** Lot 1: 12.30 acres (1 Ex.Dwl., 0 DUR) Lot 2: 9.69 acres (1 DUR) *Lot 3: 6.78 acres (1 DUR) - not included in BLA Residue Lot: 123.37 (5 DUR) – not included in BLA*
2	**Minor Subdivision 20-03 (Sept 2020)** Lot 1: 19.00 acres (1 Ex.Dwl., 0 DUR) Lot 2: 3.00 acres (1 DUR) *Lot 3: 6.78 acres (1 DUR) - not included in MS* Residue Lot: 123.37 acres (5 DURs)	**4**	**Boundary Line Adjustment 21-14 (Jan 2022)** Lot 1: 25.39 acres (1 Ex.Dwl., 0 DUR) Lot 2: 22.64 acres (1 DUR) Lot 3: 22.06 acres (2 DUR) Residue Lot: 82.05 acres (4 DUR)

During the review by the Plans Committee another boundary line adjustment from a few years ago was brought up in discussion. It had resulted in a similar result as the example given above. However, in that circumstance the configuration was achieved more by transfer between several existing agricultural lots than changing residential lots to agricultural lots.

The Plans Review Committee believed that this is a topic that should be evaluated by the Policy & Transportation Committee to determine if a code amendment would be appropriate. There was concern that the boundary adjustment regulations allow for the intent of the Comprehensive Plan and/or zoning regulations to be disrupted.

Below are the special regulations for boundary line adjustments from 4.4.1 of the Clarke County Zoning Ordinance:

A. Lots Located in the Agricultural-Open Space-Conservation (AOC) District. In the Agricultural-Open Space-Conservation Zoning District, the relocation or altering of property lines is permitted in the following cases:

1. Adjustments where a residential lot is increased in size and an agricultural lot is decreased.

   a. Boundary Line Adjustments are permitted where a residential lot is increased in size to a maximum of three acres, or so that it becomes an agricultural lot, if the residential lot qualifies for the Land Preservation Special Assessment (land use taxation) and the agricultural lot involved in the adjustment remains an agricultural lot.

   Potential Problem 1

   b. Upon application, the Planning Commission may permit boundary line adjustments exceeding the maximum area of three acres. Such boundary line adjustments shall be approved when it is determined by the Commission that the lot is of sufficiently low quality to justify a boundary line adjustment exceeding the area limitations.

   c. Low quality land characteristics. The following are considered characteristics of low quality land that would permit boundary line adjustments exceeding the maximum area of three acres:

(1) Physical features or small size or irregular shape of potential residual lot such that efficient use of farm machinery would not be possible or that said land would be left to no useful purpose; or

(2) Combination of physical features and setting such that the maximum lot size allowed in this section for a lot proposed in a minor or major subdivision is too small to accommodate a dwelling, drainfield, and well so as to meet the minimal applicable health standards and provided that no lot may be created or increased in area so as to exceed a maximum area of four acres. An application for a maximum lot size exception, submitted under this section, shall be accompanied by a written statement prepared by a Virginia Health Department environmental specialist or a professional soil scientist (as defined in County Code Chapter 143, Septic Systems) stating why the proposed lot could not accommodate a dwelling, drainfield, and well meeting Virginia and Clarke County health standards within the maximum lot size allowed in this section. Lots proposed in a major subdivision are not eligible for a Maximum Lot Size Exception under this section; or

(3) Land that is part of a lot where such land has been determined by the Zoning Administrator to be not important farmland.

c. In no case shall an agricultural lot be reduced in size below twenty acres.

2. Adjustments of boundary lines where a residential lot is decreased in size and an adjoining agricultural lot is increased.

3. Adjustments of boundary lines between agricultural lots, provided that no resulting lot is less than 20 acres.

Potential Problem 1

4. Adjustments of boundary lines between adjoining residential lots where the total acreage in the subject lots is not increased.

Potential Problem 2

5. For the purposes of this subsection, a residential lot is a tract of under 20 acres with at least one dwelling unit right or existing dwelling; and an agricultural lot is a tract of 20 or more acres.

The special regulations for boundary line adjustments include some limitations on boundary line adjustments based whether the lot is classified as residential or agricultural. The code defines an agricultural lot as consisting of 20 or more acres, and a residential lot as being less than 20 acres. This is somewhat of an arbitrary distinction. 20 acres is not so much a magic number that makes agriculture viable, as it is where the line was drawn between respecting property rights and advancing the public interest of maintaining as much land as possible for agriculture.

Potential Problem #1: *Do we need to change the rules for boundary line adjustments to be less flexible and more restrictive on boundary line adjustments that significantly alter the layout of lots? If so, what issues should be targeted in the process of creating new regulations?*

Maintaining agricultural lots so they are not reduced below 20 acres is clearly achieved in the boundary line adjustment regulations, but the regulations do not guarantee an optimal configuration of lots for agriculture. The following boundary line adjustment regulations would need to be changed to prevent the examples discussed by the Plans Review Committee.

1) Adjustments that change residential lots to agricultural lots. The special regulations for boundary line adjustments allow residential lots to be turned into agricultural lots provided that existing agricultural lots are not reduced below twenty acres. This allows for land to be transferred from agricultural lots to residential lots, turning them into agricultural lots. In this process the reconfiguration is not classified as a subdivision and is therefore not subject to the subdivision regulations, such as maximum lot sizes.

2) Adjustments between agricultural lots. Adjustments between agricultural lots is not restricted provided that the lots remain 20 acres or more. This also can allow for large lot subdivisions where a property owner owns multiple lots that are adjacent to each other. The lots can be reconfigured to create smaller agricultural lots for the purpose of having a large lot subdivision.

Potential Problem #2: *Do we need stricter rules to prevent the transfer of land between residential lots where it would result in residential lots above the maximum lot size or maximum average lot size?*

Another issue that can be separated from the first has to do with the unrestricted transfer of property between residential lots. As seen in the application reviewed in November, a property owner can adjust the acreage between residential lots without restriction to lot size. This does indeed give the perception of a circumvention of the regulations when such transfer occurs after the lot are created through the subdivision process. However, adjusting property with a neighbor to correct encroachments, improve access, or for other utilitarian purposes certainly appears to be something that should not be restricted.