



Clarke County Board of Zoning Appeals

Meeting Minutes

Monday, April 19, 2021 – 10:00 AM

Berryville/Clarke County Government Center – Main Meeting Room

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

STAFF PRESENT: Brandon Stidham (Director of Planning), Jeremy Camp (Senior Planner/Zoning Administrator), and Tiffany Kemp (Clerk)

OTHERS: Brian Legge (appellant), Timothy Johnson (attorney representing appellant), Robert Mitchell (County Attorney), Allison Teetor, and various other citizens.

CALL TO ORDER: Chair Caldwell called the meeting to order at 10:00 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 | AYE | Borel | ABSENT |
| Means (Moved) | AYE | Brumback | AYE |
| Volk (Seconded) | AYE | | |

2. Approval of Minutes – January 25, 2021, Meeting Minutes

Chair Caldwell noted two minor corrections:

- Page 3, 2nd long paragraph, the eighth line at end currently states, "as it was in a Historic District" for clarification, change to "as it was in a Historic Overlay District."
- Page 5, 2nd paragraph, the seventh line currently states, "Mr. John stated" change to "Mr. Johnson stated."

Chair Caldwell called for a motion to approve the meeting minutes of January 25, 2021, as amended.

The BZA voted 4-0-1 to approve the January 25, 2021 Board of Zoning Appeals meeting minutes as amended.

| Motion to approve the January 25, 2021, Board of Zoning Appeals meeting minutes were approved with edits: | | | |
|---|-----|----------|--------|
| Caldwell | AYE | Borel | ABSENT |
| Means (moved) | AYE | Brumback | AYE |
| Volk (Seconded) | AYE | | |

3. BZA-21-01, Brian Legge

Chair Caldwell stated, in summary, this was a variance application for a setback.

Opened the Public Hearing at 10:03 and asked Mr. Camp to present his analysis.

Mr. Camp presented general information about the application as follows:

- The application is a request for a variance for a detached garage in order to allow the garage to remain where it was constructed, which is in violation of the setback, specifically the setback off Lord Fairfax Highway. The ordinance calls for 50' from the edge of the roadway.
- The property is located at 140 White Post Road and is identified by tax map id 28 A A 66. It is slightly over one acre in size, located within the White Post Election District, The Greenway Magisterial District, Rural Residential Zoning District, and the Historic Overlay District.
- The garage was constructed approximately 35.9 feet from the edge of the right away, which is an encroachment of roughly 14.1 feet into the required setback area.
- The slide presented showed an illustration of the approved plan that was issued with the zoning permit application. The proposed garage and building footprint are shown directly behind the house as well as the 50' setback line. The building was clearly inside the setback, with what was submitted and approved. Also of note, the approved plans showed a garage of 1240 sq. ft.
- Slide shown of the As-Built Survey of the garage after construction, the garage which was built is different from the approved plan as far as the footprint. Because of that, it is within the setback area.
- The 50' setback requirement is based on the Clarke County Code 3A3C of Zoning Ordinance, as noted in the staff report. A setback of 50' is required when the vehicle trips on the primary road exceed 5,000 per day, considerably above that as estimates shown provided by VDOT.
- The Applicant's submittal is very similar to what was submitted with his appeal of the Zoning Officer's decision which was provided in the staff report, the Statement of Justification. It was supplemented with a cost estimate which was provided in the staff report. The Applicant wants to demonstrate as a "Hardship" to remove the structure.
- The Historic Preservation Commission specifically approved what was submitted on the Zoning Permit. After working with the Applicant, this approval was to revise the plan from a much larger structure and in a different location to what was ultimately approved.
- The Board is tasked to measure the criteria for application and whether it meets the requirements to approve the variance.
- This is a Two-Tier decision-making process. If the Applicant meets one of the criteria in Tier One, they must meet all five in Tier Two.
 - Tier One
 - 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.
- Tier Two
 - 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 specific 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.

Summary

- Staff does not feel the criteria are met in the first tier.
- The Applicant appears to be making the argument that there is a financial hardship, which can be something to consider, but there is substantial case law stating financial hardship on its own is not a basis for granting a variance.
- Furthermore, it does not appear the application meets any of the criteria in the second tier. At the very minimum, it does not appear to meet the criteria or is not a self-imposed hardship. It is unfortunate what has happened, but from a legal perspective, the Applicant is responsible for what happens to his property, whether by his contractor or any other professionals he hires.

Questions

Mr. Means questioned the building approved was 1,240 sq. ft. but inquired into the as-built square footage. Mr. Camp responded that it is larger than that but was unsure of the exact square footage. Noted that the dimensions are larger than the approved plan.

Chair Caldwell asked if there are any further questions for Mr. Camp. There being none, she called for Mr. Johnson to speak.

Mr. Johnson

- He noted that some citizens showed up to speak in support of the Applicant.
- The prior appeal, which also addressed the Statement of Justification for the variance, as Mr. Camp directly noted, has remained the same.
- There have been two main supplements; the first being the cost estimate obtained to tear down and rebuild was \$240K. The second being that the Applicant was in a lawsuit at the

last hearing with the framing contractor. A settlement has been reached, but due to a confidential clause, cannot go into a lot of detail, but wanted to note the settlement does not cover the cost to tear down and rebuild.

- As far as the Historic Preservation Committee matters, there is a notice of violation reference regarding many cosmetic issues. That is not the issue today, but it is important to note that notice of violation is what brought the attention to the setback issue. The Applicant was then asked to obtain an As Built Survey based on Clarke County's request.
- With that in mind, it is only 14.1 feet into the Set Back area. This is not a true safety issue as VDOT has its own mandatory Set Back requirement, that being 110 feet diameter spacing. This is strictly Clarke County's own Set Back Regulation. This is not a safety concern as far as Vdot is concerned; this is strictly Clarke County.
- There are numerous neighboring properties, if considered under today's laws, roughly half of the structures would be in violation. Clarke County responded those properties referenced were all under prior zoning ordinances. Noted that this property does not stand out uniquely compared to other properties in the area.
- Wanted to note that his client is not a person considered with a disability at this point, but he has been battling stomach cancer since October 2020.
- Cost is an important factor to consider. Only when the structure was already built did this become an issue. Following the Historic Preservation Committee notice of violation in April 2020 it was discovered that the structure was built significantly bigger and that it was in the Set Back Area.
- The As Built Square Footage is 1,383 square feet, which is less than 10% larger than the approved plan.
- Comparing the As Built Survey to the Proposed Survey, the only major difference seen is front facing the reserve drain field is a difference of one-two feet. The side encroaching toward the Set Back Space expanded by only five-six feet. In total, it only expanded about 100 square feet.
- The Planning and Zoning Administration considers the structure a detached garage; however, it was technically supposed to be considered an attached garage which is why they have a breezeway and thus why the structure is supposed to be the same height as the house.
- Regardless, the structure is outside both the existing and proposed reserved drain field space. This is not an issue of safety or concern in that respect.

Questions:

Chair Caldwell asked if there are any questions for Mr. Johnson. There being none, Chair Caldwell opened the Public Hearing for Citizen Comments at 10:23 am.

- Alvin Poe of 214 White Post Road
 - o Lives two houses down the road from the discussed structure.
 - o Here to support the Applicant and believes this structure is not hurting anything.
 - o The drain field is not affected, neither is the backup drain field.
 - o Noted he is a Class A builder in Clarke County

- The structure is not a shack, very nice building kept clean compared to other properties.
- John Morton of 662 White post Road
 - Believes the structure looks fine.
 - Has lived in Clarke County for 72 years.
 - Previously had a chicken house in area.
- Richard Lawson, lives across the street
 - The property looks fine.
 - Not an eyesore as it used to be.
 - Did a good job on the build.
- Edward Yates of 145 White Post Road
 - The previous house was an eyesore.
 - Cannot see the garage from his house because the garage is shorter than the home
 - Well built garage.
 - Supports him keeping it.
- Betsy Arnett, chair Historic Preservation Commission
 - Worked in local government for 25 years, and then in the land development process in some way the majority of the time.
 - Hardest to do is enact new zoning intended to achieve a vision.
 - Hardship – nonconforming uses
 - When landowners are told "no," they point to others and say they did it even though the structures being referenced often predate the new zoning laws.
 - When the Applicant purchased the property, the current laws were in place, and he was told the plans he had for the property might not be approved as he wanted to do them.
 - The Historic Preservation Committee denied the first Set of plans because the building was too large, it was out of scale with the district, and the roof was too high. He came back with revised plans, submitted a new application with a smaller building and a lower roof, and then proceeded to build what he wanted.
 - Can only assume the Applicant felt the committee would not notice or ignore the building once it was built.
 - Noted, you often hear the phrase, "it's easier to ask for forgiveness than getting permission." He was permitted one, built another, and is now asking for forgiveness.
 - Believes approving this variance will set a precedent and will have dire consequences.
 - Askes for the variance to be denied.

Chair Caldwell asked if there are any more questions or comments. Mr. Robert Mitchell, County Attorney, asked to respond on behalf of the County.

Mr. Mitchell

- The Code of Virginia is very specific about the criteria for the granting of a variance. Those regulations and statutory provisions have been in place for some time and were amended four-five years ago. It is very specific in what has to be shown to grant a variance.
- In terms of standard of proof, the Code of Virginia, which in essence has been adopted and reiterated in our Zoning Ordinance, is that the burden is on the Applicant to prove by ponderance of the evidence that the application meets the standards for a variance.
- The standards for a variance, as pointed out in the staff report, include initial criteria and required one of the three to be met.
 - o Check if... the evidence shows that the strict application of the terms of the ordinance would unreasonably restrict the utilization of the property.
 - Believes this does not constitute meeting that criteria. As demonstrated by the fact that the design and plan initially submitted showed the garage could be built and meet the requirements of the Set Back. The property was not restricted by the fact that there was a Set Back in this case.
 - o 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.
 - This does not apply either, as the garage not there at the effective date of the ordinance.
 - o 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.
- Would submit that neither of the three initial threshold criteria have been met. In addition, if one had been met, then all the others in the second tier *have* to be met. Would like to draw the Board's attention to the first which
 - o 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.
 - This is the case, the Applicant, though he may not have personally constructed the garage, a contractor may have made a mistake, it does not meet the criteria that the hardship not created by Applicant for this variance. In this case, clearly, he got a zoning permit that would meet the criteria and Set Back requirements but then had built a garage that did not meet those criteria.
- Would submit that the Applicant does not meet the criteria as required by law.

Chair Caldwell asked if there are questions for Mr. Mitchell. Being none, Chair Caldwell closed the Public Hearing at 10:34 am.

- Mr. Means stated in the submission; it was basically said there was a dereliction of duty on the part of the County to do due diligence by not doing an onsite examination as alleged, more or less, by Mr. Johnson?
 - o Mr. Stidham stated as a matter of practice: we are not surveyors. We do not go out and inspect for zoning compliance all applications that come in. He is not aware of many counties that do that service. Generally speaking, if there is reason to believe an encroachment is a result of a construction project, we will look to get an As Built by Applicant, which is what took place here.

Chair Caldwell asked if there are any more questions for Mr. Mitchell. There being none, she entertained a motion regarding the variance application.

Ms. Volk, seconded by Mr. Means, moved for the variance to be denied.


- Prior to the vote, Mr. Brumback asked if the variance application is denied, what recourse for the Applicant. Mr. Mitchell responded the Applicant could appeal the decision to the Circuit Court.
- Mr. Brumback then asked if the Applicant went through the Circuit Court and then had to tear down and rebuild, are there any other fees involved? Mr. Stidham stated that a new application depending on what needs to be done, would need to be submitted. Because the property is located in the Historic Overlay District, he would have to go back to that committee should there be any changes to the current approval. The Applicant could attempt to reconstruct if consistent with the approval that is already in place. If that were the case, then he would be looking at getting a new building permit for the modifications or to reconstruct, which includes a zoning fee. Mr. Brumback then asked if the fees would be waived that he has already paid, even though they messed up? Mr. Stidham stated that had not been done in the past. Fee waivers typically go to the Board of Supervisors, which is typically only done for a non-profit entity that is doing a project.

The BZA voted 4-0-1 to deny the variance.

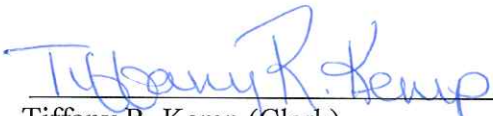
| Motion to deny the variance. | | | |
|-------------------------------------|------------|----------|---------------|
| Caldwell | AYE | Borel | ABSENT |
| Means (Seconded) | AYE | Brumback | AYE |
| Volk (Moved) | AYE | | |

4. Adjourn

Motion to adjourn the meeting at 10:46 am was approved by consensus.



 Anne Caldwell (Chair)



 Tiffany R. Kemp (Clerk)