



Clarke County Planning Commission

MEETING MINUTES – Work Session

Tuesday, September 28, 2021 – 3:00PM

Berryville/Clarke County Government Center – Main Meeting Room

ATTENDANCE:			
George L. Ohrstrom, II (Chair/Russell)	✓E	Pearce Hunt (Russell)	✓
Randy Buckley (Vice-Chair/White Post)	✓	Scott Kreider (Buckmarsh)	X
Matthew Bass (Board of Supervisors)	✓E	Douglas Kruhm (Buckmarsh)	✓
Anne Caldwell (Millwood)	✓	Frank Lee (Berryville)	✓
Buster Dunning (White Post)	✓	Gwendolyn Malone (Berryville)	✓
Robert Glover (Millwood)	✓	Doug Lawrence (BOS alternate)	X

E – Denotes electronic participation

NOTE: George L. Ohrstrom, II participated electronically due to health issues related to the current pandemic. Matthew Bass participated electronically due to personal reasons.

STAFF PRESENT: Brandon Stidham (Director of Planning), Jeremy Camp (Senior Planner/Zoning Administrator), Kristina Maddox (Office Manager/Zoning Officer)

CALL TO ORDER: By Chair Ohrstrom at 2:59PM.

1. SUP-21-01/SP-21-01, Crown Castle International LLC (Tower Owner) and Network Building and Constructing, Inc. (Project Consultant), on behalf of AT&T (Service Provider)

Mr. Camp said he would address the tower questions from the previous Planning Commission meeting. One specific question, he said, related to the existing users of the tower. He said that Shentel, Verizon, and T-Mobile are existing users and the proposal would add AT&T as a new carrier. He said the other question was how the existing tower, which was originally approved at 95 feet, got to be 110 feet. He said while we do not have the records for the permit on file, per the regulations the height could be increased by 10% of the originally approved height or by the height needed to provide a 20-foot separation from the closest antennae located on the wireless communication facility, whichever is greater. He said the tower would still be in compliance and that it is a Federal requirement that we need to abide by. Commissioners had no additional questions.

2. TA-21-03, Short-Term Residential Rental, Home Occupation Bed and Breakfast, and Country Inn

Mr. Stidham said the discussion for today surrounds whether or not the Commissioners are ready to set public hearing on short-term residential rentals text amendment. He said the packet includes the changes in red font starting on page 101 and said the biggest change is the addition of a new use regulation to set maximum occupancy at ten persons. He said Commissioners also discussed previously how to apply this rule to an operator that has a main dwelling and one or more tenant houses they want to use as a rental. He said he understood from the Commissioners that they want the maximum occupancy of ten persons capped per lot regardless of the number of dwellings an operator proposed to rent. He said this would be regardless of whether their septic system could support more than ten persons or whether they comply with building code requirements to allow more than ten persons. He said if an operator wished

to have more than ten occupants on the property at one time, their only option would be to apply for a special use permit and site plan to become a country inn. He said the wording changed from permanent residents to resident to make enforcement easier.

Regarding other changes, Mr. Stidham said language was added to clarify that rental uses are not allowed to be conducted in structures other than a single-family dwelling, minor dwelling, or tenant houses. Structures that would not be allowed for rental use would include RV, yurt, tents, or treehouses. When asked by Chair Ohrstrom what a “minor dwelling” is, Mr. Stidham answered a dwelling that is less than 600 square feet of living space.

Mr. Stidham said language was added to emphasize that even though the maximum occupancy limit is set to ten, it can be further limited by the septic system and any building code requirements that may arise. He continued that there are definition language changes to the bed and breakfast regulations. As the changes only apply to home occupation context, he said they are in this particular section rather than in the definitions chapter. He explained that it is a home occupation where lodging and meals are offered for fewer than thirty consecutive days in exchange for a charge. He said that the primary reason for adding the language is to make sure that across the board, short-term residential rentals, bed and breakfasts, and country inns can do short-term occupancies of fewer than thirty consecutive days and so the language is standardized across the three uses. He said language was added that bed and breakfast lodging would not be permitted in any structure that is not a dwelling. He said it is emphasized that the holder of the home occupation permit has to occupy the lot at all times during rental periods as they would for any home occupation. He said maximum occupancy language was added to mirror what is proposed for short-term rentals. He said this includes the current occupancy of three bedrooms and five persons increased to five bedrooms and ten persons subject to any further reductions due to septic systems or building code requirements. He said that language was also added for operators to comply with septic system requirements and have a business license in good standing throughout the lifetime of the use. He added there is a minor change in the country inn regulations where he combined the two sections on occupancy and septic system requirements that now mirror the other two uses.

Mr. Stidham noted a draft zoning permit application for short-term rental residential uses on page 115 and pointed out that applicants would have to initial disclaimers that they have read and understand the short-term residential rental regulations and they can only advertise rentals for the maximum occupancy that is consistent with the permit. He said if they advertise the occupancies for a higher amount, it is considered a violation of their zoning permit. He said it may not hold up in court if advertising at a higher amount on a website is our only evidence during an investigation. He said it gives us more weight in court by adding this disclaimer.

Chair Ohrstrom asked if a grandfathered operator is non-conforming if they continued to advertise and allow more than ten occupants on their lot even after this text amendment is adopted and approved by the Board of Supervisors, and also following the six-month grace period. Mr. Stidham answered that it depends if they received County zoning approval or not. He said this interpretation is based on a prior discussion regarding our ability to apply these rules retroactively. He said the operator might have come in to get a business license from the Commissioner’s office but if our zoning review line did not say “approved,” “zoning does not apply,” or “no zoning required,” then they have not received zoning approval to which they would be grandfathered. Chair Ohrstrom asked if they did get zoning approval, would they be grandfathered. Mr. Stidham said in order to be grandfathered, an operator had to have been legal at one point in time and in most cases, that means the operator would have had approval from

the County. Commissioner Caldwell asked if we know how many people have already come in to get zoning approval from the County for their Airbnb. Mr. Stidham replied he does not know how many there are, but the ones he is concerned about are the ones that may have gotten business licenses before this started. He said Staff at the time may have written "approved" instead of "no zoning required" in which case the operator would have zoning approval. He said once we started working on this and started talking about the implications, Staff started to write "no zoning required" or "zoning does not apply." Commissioner Caldwell asked if we researched to see how many operators currently have zoning approval. Mr. Stidham replied that we would not get involved in that unless we got a complaint on a specific property once this is adopted. Chair Ohrstrom asked if it was possible to get a list of the people who do have zoning approval for an Airbnb. Mr. Stidham said he is hesitant to put that work in specifically because we are doing complaint-basis enforcement. He said Staff would pull paperwork to see if an operator was given approval or not only if someone complains that an operator is not in compliance. He said he is also hesitant to start making judgments on those generally, as it could be interpreted as a zoning determination. He said he would rather leave that alone unless we want to look at proactive enforcement as another form of zoning enforcement. He said the only reason we would want to access a list of who is legal or illegal is if we wanted to do proactive enforcement, however, it is irrelevant if we are doing complaint-based enforcement. Chair Ohstrom said it would be nice to know anyway. Mr. Stidham said it would take effort to do so such as going through individual business license forms in which case we would have to go far back. He said there may have been rentals even before Airbnb was introduced.

Commissioner Bass asked Mr. Stidham to walk him through the remedial procedure of someone without a permit through a court proceeding in the event of a violation. Mr. Stidham replied that in a complaint-based situation if someone complains that their neighbor is running an Airbnb without a permit, first we confirm they have no permit on file. He said if the neighbor has the rental advertisement along with pictures or videos of multiple vehicles with an out of state license plate on the property or gatherings in the backyard of people who do not reside there as evidence, Mr. Camp would issue a notice of violation to the property owner. He said the property owner would then have 30 days to contact us to discuss the matter and bring their property into compliance. He continued that if they do not want to work with or contact us at the end of that 30-day period, their ability to appeal our determination is gone and we can proceed to the next step of going through the court system. He said if the property owner wants to work with us, but they are committed to two more bookings within the next 30 days, we would consider that reasonable but would require they provide something in writing that stated they would cease those rental activities. He said they might even have the ability file an application to appeal the zoning determination that they are in violation. He said that appeal would first go to the Board of Zoning Appeals (BZA) and if they do not get the answer they want, they can take it to court. Commissioner Bass said it would be the same process if someone has a permit, that they would receive a notice of violation. Mr. Stidham said it would be a stronger case on our end since we would have the property owner's initials on the application next to the disclaimers. Commissioner Lee asked about those who are grandfathered. Mr. Stidham said those are grandfathered from having to complete a zoning permit application but not necessarily would be grandfathered from having to follow the regulations. He said we would need a complaint and proof of violating one or more of the regulations themselves other than having to obtain a permit. He said the most obvious one would be the maximum occupancy and since we do not have them signing a permit application, just an advertisement would not be enough. Commissioner Glover asked for clarification that just an internet advertisement is not enough for anything. Mr. Stidham agreed that it is not as it is not evidence they have done the use. He said usually when you reach out to a property owner about a complaint and mention that we have a copy of your advertisement, it is

something that will jolt them into compliance. He said other times they lay low for a while and start back up again. Mr. Camp commented about a campground with a website that had sixty public comments on it from people that had camped there which added a little more depth to the evidence than just a website listing.

Chair Ohrstrom asked if Mr. Stidham heard from any of the audience members from the previous meeting. Mr. Stidham said when Mr. Waite stopped by his office, he provided an overview of the staff report, explained the process, and noted that a public hearing will be held in November. He further explained to Mr. Waite that if it moved forward, the process would be repeated at the Board of Supervisors level. Mr. Stidham said Mr. Waite would let him know if he had any questions regarding the staff report but did not have any specific concerns.

Regarding two other disclaimers on the form, Mr. Stidham said one notes the zoning approval does not authorize events such as special events, weddings, conferences, or other gatherings of people. He said the second disclaimer reads that zoning approval is contingent upon the property owner maintaining their septic system and being in good standing with the Health Department. He said if there are additional constructed uses or something that requires an upgrade of the drainfield, the property owner is responsible for that as well. He said it will be very clear on the permit that failure to do so is a violation of the zoning permit. Commissioner Lee asked if a property owner with a three-bedroom approved who advertises for six people wanted to upgrade their system, would they have to comply with 100% reserve according to the regulations. Commissioner Lee then asked if someone is in compliance without the 100% reserve area, would they not be required to upgrade their system. Mr. Stidham asked him to clarify if he means someone who has a confirmed three-bedroom drainfield with four occupants and they wish to increase to six occupants. Commissioner Lee said they can go up to the sewage level at six because the three-bedrooms is designed for six full-time occupants but we are not requiring them to do anything as far as reserve area, only if they want system modifications. Mr. Stidham said or if they want to do an occupancy that is greater than what is permitted. He said it depends on the situation and what is actually in the Health Department's file on the drainfield. He continued there may need to be a reasonable agreement between the applicant, the soil scientist, and the Health Department to fill in the blanks of what is on file. He said it may be that a soil scientist needs to investigate what is there to confirm the file details. He said he is unsure how complete their files are consistently across different time periods. He said it is up to the applicant to go to the Health Department to sort it out.

Commissioner Bass asked Mr. Stidham if he foresees any glaring holes in the regulations. Mr. Stidham said getting existing operators to come in for compliance. He reiterated that we are not going to do proactive enforcement. He said the plan is to get the word out once the new amendment is adopted and encourage people to come in voluntarily during the grace period. He added proving someone is operating a rental illegally is an additional challenge and that the grace period might encourage people to come in but noted it will be challenging after the grace period. Additionally, he said a potential problem lies with the conforming operators who follow the process and pay a lot of money to upgrade their systems while seeing non-conforming operators continuing to run. He said the irritant to a potential applicant is that we are attempting to apply retroactive rules to users who are already operating, may already have business licenses, and think they are in the clear. He said the biggest challenge potentially is retroactive enforcement. He said that some applicants may disagree with Mr. Mitchell's interpretation and think they are grandfathered with a business license in which they could appeal and challenge those grounds. Furthermore, he said we could get push back when applicants realize how much it is going to cost and what needs to be done to bring their septic into compliance. Mr. Stidham said the zoning permit fee is

the same as other permits at \$100.00 and that one idea is to waive the fee during the six-month grace period. Lastly, he said education and getting the word out to let people know that the rules have changed will be another challenge. He said in addition to posting on our website and social media pages, Mr. Camp suggested we put together a realtor distribution list. Commissioner Bass said he hopes Mr. Stidham will keep the Commissioners informed as he encounters any significant hurdles. He said as overdue as some might think, he is glad that we took the time to get to this point as there is no comprehensive set of regulations that we could craft to cure every detail.

Mr. Stidham said to be prepared at the public hearing to hear arguments from operators that there is not a huge outcry against short-term residential rentals that would necessitate us having regulations. He said some may say it arose from a complaint of one person that started all of this. Chair Ohrstrom pointed to the fact there are a few legal operators who have been concerned about this so it puts everyone on a level playing field. Mr. Stidham agreed and said that compared to different localities, we view this from a completely different perspective. He said most other localities put these regulations in effect because they have high-density neighborhoods where people do not want transient visitors staying in single-family homes as there would be noise and parking complaints. He said we come from the perspective ensuring ground water quality. Commissioner Lee said we are not the only county doing it this way at the present time and that a lot of counties within the state are taking a strong look at this. He said a number of our local communities are looking at and dealing with this same thing. Chair Ohrstrom said that almost every single one they spoke to from the Regional Planning Commission mentioned that septic capacity is a major concern. Mr. Stidham said some localities around the state that have had these rules in place and either their first attempt failed or they need to modernize them. Chair Ohrstrom said our approach would be much stronger legally than a “not-in-my-backyard” (NIMBY) approach in a high-density neighborhood. Mr. Stidham said our approach is legally defensible given the groundwater quality and building code compliance. He said even the maximum of ten is not arbitrary since you can tie that back to the building code number. Mr. Stidham added that he will not say much on Friday and will look for the Commissioners to pass the motion to set public hearing at the November Business Meeting.

3. Other Business

Commissioner Caldwell asked about the court case against Mr. Legge. Mr. Camp said we are waiting for Mr. Mitchell to file a rebuttal against Mr. Legge’s suit. He said this is after the appeal period so it is pretty much dead in the water but they are still making an effort. He said he heard that Mr. Legge has a new attorney and that Staff will let the Commissioners know as soon as there is an update from Mr. Mitchell. When asked by Commissioner Caldwell, Mr. Camp confirmed that the trial would go before a judge rather than a jury. Mr. Stidham said they are still at the procedural deliberations. When asked by Commissioner Caldwell, Commissioner Bass responded that it would probably be Judge Iden. He said the scheduling of the injunction hearing is scheduled for October 13, 2021 so perhaps 30-60 days after that.

Mr. Stidham said the finalized Guidance Manual can be found in the meeting packet which is the very first public draft. He said he is working with Cathy Kuehner to add it to the website and that he plans to have a series of webpages and/or one page where it is downloadable as a pdf. He highly suggested the Commissioners read through the manual and he welcomed their ideas or suggestions for content. He said this is a living fluid document and will continue to improve over time. He added that he imagines it will need to be updated in January or February depending on what happens with the rentals text

amendment. He noted a section in the document for transient lodging rules, noting that they are on notice the rules are being examined and to be aware of possible changes.

Commissioner Kruhm asked about the broadband grant and said he does not recognize any of the companies listed online. Mr. Stidham said he sent out an email that noted part of the broadband grant program allows providers to challenge areas that we claim are unserved. He said we received data that Comcast, Winchester Wireless, and Shentel have challenged certain areas and the state agency gave us a map showing the specific address points that are being challenged. He said we currently do not have a breakdown as far as to who made the challenges at those different addresses, but you can see where there are clusters, such as Shenandoah Farms as an example, which is most likely challenged by Comcast. Others, he said, are sort of scattered throughout the County and may be challenged by Winchester Wireless at the points they are serving. He said he was under the impression that we could automatically rebut wireless service provider challenges as wireless technology cannot provide the same level broadband can, but he does not think that is a default rebuttal. He said that anyone that happens to have Winchester Wireless and is not getting the broadband speed should go on the website and indicate they are not being served with broadband as proposed in the grant application. He said localities in our region are experiencing similar challenges from the same providers. He said he thinks Clarke County is at an advantage by being a smaller county and it is easier for us to spread the word. He said it is a tight turnaround timeframe to get everyone to at least get on the website to log in their address within the next couple of days. Chair Ohrstrom said that is only if you are not a customer of broadband and he asked if he should log his address anyway. Mr. Stidham said he should as it is a good rebuttal if he is close to a challenged address. Commissioner Glover said that it also cannot be underestimated that Winchester Wireless or Shentel does not compare to fiber. He said the website reads 25 megabytes per second or less and he is technically at 15 at the maximum as you have to pay more to get more and we are limited to 200 gigabytes per month. He said he is underserved and noted that is why virtual learning did not work. He said he understands Winchester Wireless was challenging it and he is curious to see what they are going to do. He said he is a new customer that only became eligible one year ago. He said he did answer the question online and noted Clarke is underserved for the reasons mentioned including they do not get fiber connectivity or the data needed. Mr. Stidham said even the best wireless services may be able to produce speeds greater than what is listed but the fact remains that it is an up and down, weather-dependent technology and it cannot compete with consistent unlimited wired broadband. Commissioner Glover said Winchester Wireless was out for three-and-a-half weeks at one point. He said he has the most needs and that it is difficult to reach his location so he pays more than other customers. He also said they were out for a period of three-and-a-half months because they are a small company and do not have the fiber support.

Mr. Stidham said unless you are in the town of Berryville, Boyce, or an active Comcast fiber area, you should go to the site and log your address. Commissioner Glover noted the Retreat and Pine Grove have Comcast. Mr. Stidham said he is not sure why Shentel is challenging because they told us repeatedly they do not provide residential service in Clarke County. He noted they may be challenging some business addresses they are serving but again, we will not know who made the challenge until we get data from the state. He said to tell as many people as you can to log their address on the site. When asked about the drive for the turnaround time by Commissioner Glover, Mr. Stidham replied it was due to the grant timeline. He said challenges came in at the end of the last week.

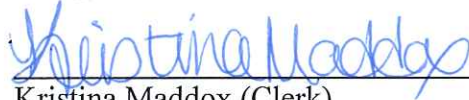
Commissioner Caldwell said she attempted to fill it out but it kicked her off after she entered her zip code. Commissioner Glover said he added his address and zip code and when asked if he had internet,

he said no because he wanted to get further into the questionnaire. Commissioner Caldwell commented that she was not even able to get that far into it. Commissioner Malone asked if she tried it again afterwards. Commissioner Caldwell said she tried several times. Commissioner Malone said it booted her off when she added 22611 but it allowed her to proceed when she tried a second time. Mr. Stidham said he hopes to get an answer soon but he still feels confident about this project. He said he unless we do not get the grant funds that we think we are going to get, All Points is going to survey everyone and eventually want to get the customer base to get the additional density.

ADJOURN: The September 28 Planning Commission Work Session adjourned by consensus at 3:44PM.



George L. Ohrstrom, II (Chair)



Kristina Maddox (Clerk)