

ALBEMARLE COUNTY BOARD OF ZONING APPEALS
REGULAR MEETING
TUESDAY, JULY 11, 2023—2:00 P.M.

Board Members Present: John Shepherd
Marcia Joseph
Edward (Bo) Carrington
Kurt Burkhart

Board Members Absent: Ronald Rosenberg

Staff Members Present: Bart Svoboda, Zoning Administrator
Lisa Green, Manager of Code Compliance
Benjamin Cooper, Code Compliance Officer I
Marsha Alley, BZA Recording Clerk

County Attorney: Andy Herrick, Deputy County Attorney

BZA Attorney: James Bowling, IV

1. Call to Order

The meeting was called to order at 2:00 p.m. by Marcia Joseph

2. Establish a Quorum

Ms. Joseph established a quorum and recognized that the BZA members present at the dais were Kurt Burkhart, Edward Carrington, John Shepherd, and herself.

The following members were absent: Ronald Rosenberg.

She stated that also present were Andy Herrick, James Bowling, IV, Marsha Alley, Bart Svoboda, Lisa Green, and Benjamin Cooper.

3. Public Hearing

A. AP2023-00003 Appeal of VIO2023-109 {Sign #18}

Mr. Bart Svoboda, Zoning Administrator, provided a presentation of the appeal to the Board. He reviewed the zoning designation history of the parcel from Agriculture to Planned Residential Neighborhood/A-1 in 1978 and noted the perpetual open space easement that was placed on the parcel in 2014 by the Virginia Land Company. He added that in 2015, the County approved the boundary line adjustment submitted by the Virginia Land Trust, noting that the plat specifically noted the applicable zoning district as PRD and that the parcel was not located in the Agricultural Forestal District. He stated that in 2022, the Albemarle Conservation Easement Authority approved a harvest plan for the site. He explained that though the conservation easement complied with the comprehensive plan for rural areas, the zoning designation was PRD, and timbering was not a permitted use in the PRD zoning district. He clarified that an easement could be more restrictive than the underlying zoning but not less restrictive.

Mr. Svoboda stated that the appellant's first argument was an attempt to invoke a vested right on a use that was no longer permitted in the PRD zoning district. He explained that the use was not established, so there was no vested right on the property, and the property owner only recently took possession of the property. He stated that the appellant's second argument claimed a vested right associated with the open

1 space easement encumbering the property. He explained that there was an open space easement limiting
2 uses on the property, but it did not overrule the underlying zoning district. He stated that the appellant's
3 third argument was that, "mobile tools, such as tractors, hay wagons, two trucks, and harvesting
4 equipment" were the same as a manufactured building or structure.

5
6 Mr. Svoboda explained that the violation notice, VIO2023-109, cited the appellant for tree cuttings that
7 were not dead or dying and were greater than six inches, unpermitted storage of structures on the parcel,
8 the accumulation of tires and car parts on the parcel constituting an unpermitted junkyard, and
9 manufactured homes stored on the parcel not on a foundation which were not used as a primary residence.

10
11 Mr. Burkhart asked what initiated the complaint.

12
13 Mr. Svoboda responded that a nearby resident called in a complaint regarding noise and bulldozer sounds.

14
15 Mr. Svoboda stated the appellant's final argument was that the Zoning Administrator erred in classifying
16 tires and car parts as junk and claimed that the items were required parts for the mobile agricultural
17 devices. He said that the PRD did not permit agriculture, so even if the parts were for agriculture, there
18 was no accessory use. He said that by the appellant's own admission and with photographic evidence, tree
19 cuttings had occurred, and there were structures, tires, and parts located on the property. He noted that the
20 appellant could seek a remedy through a rezoning request. He recommended the Board affirm the Zoning
21 Administrator's official determination.

22
23 Mr. Burkhart asked what the timeline would be if the appellant sought to rezone the property.

24
25 Mr. Svoboda responded that an estimated timeline would be between six and eight months. He added that
26 he had discussed the opportunity with the appellant.

27
28 Mr. Carrington asked whether the storage of structures was a use defined in County Code.

29
30 Mr. Svoboda responded that it was a use in the commercial district.

31
32 Mr. Carrington asked whether staff would reject a site plan if it conflicted with a conservation easement.

33
34 Mr. Svoboda responded that as part of the site plan review, staff would ask the easement holder whether
35 the use complied with the terms of the easement. He said that if the use did not comply, the easement
36 holder would have to grant permission of the use on the property and would become party to the
37 application.

38
39 Mr. Carrington asked whether an ownership change would have an impact on an existing non-conforming
40 use.

41
42 Mr. Svoboda explained that non-conforming uses did not expire with an ownership change.

43
44 Mr. Dominique Kostelac, appellant, stated that he had a right to continue agriculture as a non-conforming
45 use and as a vested right on the property. He said that the property had one owner since the 1970s, Dr.
46 Hurt, who had continuously maintained a silviculture crop. He read a letter submitted by Dr. Hurt. He said
47 that he continued to maintain the non-conforming silviculture use and vested agricultural status on the
48 property.

1 Mr. Kostelac noted that the comprehensive plan designated the area as rural/agricultural. He explained
2 that when the property was rezoned in 1977, there was no dispute that the category included agriculture,
3 and the conservation easement limited the maximum number of subdivisions. He claimed that the
4 agricultural use was preserved by the continuing non-conforming use and a vested right. He stated that the
5 structures defined in the ordinance did not include structures with wheels, and he claimed that structures
6 did not include cars, trucks, vans, or RVs because they were not affixed to the earth.

7
8 Mr. Kostelac stated that the junkyard violation was made in error. He claimed that spare tires and axles
9 were required companions for the vehicles and devices on the property because they routinely required
10 replacement. He said that specialized parts were hard to find and must be immediately available when
11 needed. He stated that junk only referred to discarded, dismantled, or inoperable vehicles, furniture,
12 construction materials, and others. He claimed that the items in question on the property were highway
13 certified and traveled with the required brakes, lights, and licenses. He said that they experienced
14 problems while transporting the items and temporarily set aside the damaged materials on the property.

15
16 Mr. Kostelac claimed that there was no manufactured home on the property, and the Zoning Department
17 had not observed, identified, or photographed a manufactured home on the property. He reiterated that the
18 property had retained an agricultural use, and tree cuttings were permitted. He said that the citation related
19 to the storage of structures was erroneous, and undefined wheeled devices were permitted though the
20 agricultural use and separately as wheeled vehicles.

21
22 Mr. Kostelac stated there was no junkyard on the property, and the items on the property did not fall
23 within the definition of junk and were not accumulated in a junkyard. He claimed that there was no
24 evidence from the County of a manufactured home on the property. He claimed that the items in question
25 were stored within a 40-acre parcel with posted no trespassing signs and a security gate, so all pictures
26 were taken in violation of the 4th Amendment.

27
28 Mr. Carrington asked Mr. Kostelac if there was evidence of the active management of the timber.

29
30 Mr. Kostelac stated that he provided a letter from the previous property owner.

31
32 Mr. Burkhart asked how expectations that prior uses on the property would transfer with the sale were
33 communicated to the appellant.

34
35 Mr. Kostelac said that the conversations were vast, but he was not able to recall all of them. He said that
36 they did not touch on the transfer of uses because they understood the law.

37
38 Ms. Joseph opened the public hearing noting that there were no members of the public wishing to
39 comment on the matter.

40
41 Mr. Andy Herrick, Deputy County Attorney, provided a rebuttal to the appellant's argument. He
42 explained that to establish a legal non-conforming use, there must be a continuous usage of the property
43 that was not discontinued for more than two years. He explained that the burden of proof was on the
44 applicant to establish a legal non-conforming use. He explained that the law placed the burden of proof on
45 the owner because they were presumed to have better records and documentation as to what the uses on
46 the property had been.

47
48 Mr. Herrick said that Mr. Carrington's question regarding specific evidence of active timbering on the
49 property was salient, and the provided answer was minimal. He stated that Dr. Hurt's correspondence did
50 not suggest when, if ever, the property had been timbered. He said that until there was evidence of active

1 timbering on the property, such as a forest management plan, the appellant had failed to meet the burden
2 of proof to establish forestry as a legal non-conforming use on the property. He noted that Dr. Hurt sought
3 to rezone the property from A1 to PRD in 1978, indicating the intention to convert the property from its
4 existing use to PRD.

5
6 Mr. Herrick explained that the conservation easement was held by the Conservation Easement Authority,
7 not the County. So, when the Authority approved the timbering plan from the appellant, it did not
8 constitute County approval. He said that the approval of the timbering plan was not sufficient to address
9 the zoning ordinance. He stated that there were pictures in the staff report showing dismantled parts
10 existing on the property per the definition of junk.

11
12 Mr. Herrick said that Mr. Svoboda would be able to clarify how the Code Enforcement Officers entered
13 the property. He explained that the property was not posted at the time the Code Enforcement Officers
14 entered. He said that the pictures were pursuant to a valid search. He stated that the County's argument
15 was that the appellant had not established a legal non-conforming use, and the Conservation Authority did
16 not and was unable to give permission to contravene the zoning ordinance. He recommended that the
17 Board affirm the notice of violation.

18
19 Mr. Kostelac offered a rebuttal. He stated that Paul Haney, drafter of the timbering plan, said that nothing
20 was done to manage the type of timber crop on the property, and the trees did not need yearly cuttings. He
21 said that the silviculture crop was 80 to 100 years old, and it had received the highest value from
22 silviculture experts. He said that in terms of the junkyard violation, he used the parts for emergency
23 repairs and to innovate new solutions for the materials, such as chicken coops or mobile devices with
24 undefined uses. He indicated that there was a range of waterfront activities that occurred on the site. He
25 claimed that the silviculture use was preserved on the site. He stated that the property was gated and
26 posted.

27
28 Ms. Joseph closed the public hearing and brought the matter before the Board.

29
30 Mr. Shepherd clarified that the existence of an easement would not control the County's determination on
31 how to proceed. He noted that the County would be required to consult with the easement holder and
32 receive an agreement before enforcing County code.

33
34 Mr. Svoboda responded that an easement could not overrule, override, or rezone a property. He said that
35 if there was an easement on a property and a structure or use encroached on the easement, the County
36 would deny zoning approval until the easement holder gave permission.

37
38 Mr. Carrington asked whether the structure pictured in the staff report was served by any utility.

39
40 Mr. Svoboda responded that it was not.

41
42 Mr. Carrington clarified that the structure then did not meet the definition of a manufactured home.

43
44 Mr. Svoboda responded that in Article 3.1 of the Zoning Ordinance, a manufactured home was defined as
45 a structure subject to federal regulations which was transportable in one or more sections, was eight body
46 feet or more in width and 40 body feet or more in length, and was 320 square feet or more when erected
47 on a site. He said that the difference between a modular home and a manufactured home was that modular
48 homes were built to state standards, and manufactured homes were built to federal HUD standards. He
49 said that the labeling of a structure was important, and any of the structures would require a permit.

1 Mr. Carrington noted that the definition stated manufactured homes included plumbing, heating, air-
2 conditioning, and electrical systems contained in the structure. He asked whether there was a separation in
3 the definition of the structure from the utilities.

4
5 Mr. Svoboda clarified that the definition applied to those components installed at the factory, not the
6 onsite hookups. He said that in the photographs of the structure, wiring was visible. He said that a
7 manufactured home was considered a manufactured home before it was connected to utilities.

8
9 Mr. Carrington asked whether a modular office structure would be considered a manufactured home.

10
11 Mr. Svoboda responded that it could not be defined as a manufactured home.

12
13 Mr. Shepherd asked for clarification regarding the structures located on the site.

14
15 Mr. Svoboda responded that the photographs in the staff report depicted the items and structures on the
16 site.

17
18 Mr. Shepherd noted there were about 13 tires and three axles. He asked whether there were other items on
19 the property not pictured that may be related to a logging operation.

20
21 Mr. Benjamin Cooper, Code Compliance Officer, addressed the Board at the request of the Chair. He
22 responded that the items pictured in the report were all the items which were visible on the property.

23
24 Mr. Bowling clarified that the structure referred to in the staff response to the appeal was the same
25 building as the manufactured home stored on the parcel and not on a foundation.

26
27 Mr. Cooper responded yes.

28
29 Mr. Burkhart asked whether the structure was measured.

30
31 Mr. Cooper responded that he did not measure the structures. He said that there were a few separated
32 structures on the property.

33
34 Mr. Burkhart asked whether a no trespassing sign and gate were visible when Mr. Cooper visited the
35 property.

36
37 Mr. Cooper responded that he entered the property from the Glenmore side and walked across the creek
38 and up the hill.

39
40 Mr. Burkhart asked if Mr. Cooper took the route to circumvent the gate.

41
42 Mr. Cooper responded that he did not see the gate. He said that he was discussing the matter with the
43 complaining party and with their permission used their property to access the appellant's property. He
44 stated that he did not see any no trespassing signs.

45
46 Mr. Carrington asked whether Mr. Cooper was searching for no trespassing signs.

47
48 Mr. Cooper responded that he tried to keep a lookout for signs, and if he saw no trespassing signs, he
49 typically included them in his pictures.

1 Mr. Burkhart asked whether the structure was on the property when it was purchased.

2
3 Mr. Kostelac responded that he brought the structures to the property, and he experienced six tire
4 blowouts while transporting the structures to the site.

5
6 Mr. Shepherd said that in terms of the forestry use, the 1980 rezoning was key to understanding the case.
7 He stated that after 1980, the site would be subject to the tree cutting ordinance, and allowing the trees to
8 passively grow did not show a vested right, and no right had been asserted.

9
10 Mr. Burkhart suggested addressing each of the violations separately rather than all at once.

11
12 Mr. Carrington asked whether the Board should be concerned about the right of entry and potential
13 violations in the gathering of evidence.

14
15 Mr. Bowling responded that the right of entry was not an issue before the Board. He said that it would be
16 a separate issue entirely under the 4th Amendment.

17
18 Mr. Carrington said he did not believe the structure on the property constituted a manufactured home
19 based on the definition of a manufactured home. He suggested modifying the violation. He said the
20 photographs did not illustrate a junkyard and noted that the materials were stacked neatly and appeared to
21 be stored for future use. He said that the natural, passive growth of trees did not constitute agricultural
22 activity, and the parcel was subject to the tree cutting provisions in the ordinance.

23
24 Ms. Joseph said she agreed with the County Attorney regarding the silviculture onsite. She noted the lack
25 of documentation from the appellant regarding silviculture on the property. She said that in terms of the
26 junkyard violation, she could consider the items junk because the only activity on the site was tree cutting
27 and storage. She said she supported the staff recommendations.

28
29 There was discussion regarding the option to address each violation separately.

30
31 Mr. Shepherd said the tree cutting was not a vested right, so he supported the Zoning Administrator's
32 decision. He said that the manufactured homes appeared to be storage facilities without building permits,
33 so they were not permitted on the property. He said that if the items related to the junkyard violation were
34 kept in storage buildings, then they would not be considered junk.

35
36 **MOTION:** Mr. Carrington moved to affirm the Zoning Administrator's determination, VIO2023-109,
37 that trees which are not dead and greater than six inches in diameter were being cut on the parcel in
38 violation of § 18-4.3. Mr. Shepherd seconded the motion, which passed unanimously (4-0). (Mr.
39 Rosenberg was absent.)

40
41 Mr. Carrington said that in terms of the violation related to the storage of structures on site, the structures
42 in question did not meet the definition of structure in the ordinance.

43
44 **MOTION:** Mr. Carrington moved to reverse the Zoning Administrator's determination, VIO2023-109,
45 on violations 2 and 4 because the of the definitions included in the ordinance related to "structure" and
46 "manufactured home". Mr. Burkhart seconded the motion, which passed (3-1). (AYE: Ms. Joseph, Mr.
47 Burkhart, and Mr. Carrington; NAY: Mr. Shepherd; Mr. Rosenberg was absent.)

48
49 **MOTION:** Mr. Shepherd moved to affirm the Zoning Administrator's determination, VIO2023-109, that
50 the accumulation of tires and car parts on the parcel constituted a junkyard and was not a permitted use.

1 Ms. Joseph seconded the motion, which passed (3-1). (AYE: Ms. Joseph, Mr. Burkhardt, and Mr.
2 Shepherd; NAY: Mr. Carrington; Mr. Rosenberg was absent.)

3
4 Ms. Joseph stated that the appellant would receive a letter explaining the results of the proceedings. She
5 explained that if the appellant disagreed with the ruling and wanted to appeal the decision, they had the
6 right to appeal the matter to the Circuit Court.

7 8 **4. Approval of Minutes**

9 **A. June 6, 2023**

10
11 Mr. Shepherd requested that a sentence be added to the minutes mentioning the Board's discussion
12 regarding ministerial review.

13
14 Ms. Alley asked where the insertion should be made.

15
16 Mr. Shepherd said he did not recall where the discussion took place because it was not mentioned in the
17 minutes.

18
19 Mr. Svoboda suggested deferring approval of the minutes until the next meeting to give staff the
20 opportunity to identify in the recording where the discussion took place and to draft a summary for
21 approval by the Board.

22
23 Ms. Joseph noted that on page 2, line 4, it stated, "...and caused the following harms:" but no list of
24 harms was provided. She suggested correcting "elementary" on page 2, line 19, to, "elementary schools".

25
26 **MOTION:** Mr. Burkhardt moved to defer the June 6, 2023 minutes until the next scheduled meeting in
27 August. Mr. Carrington seconded the motion, which carried unanimously (4-0). (Mr. Rosenberg was
28 absent.)

29 30 **5. Old Business**

31 Ms. Joseph said they had discussed drafting motions with Mr. Bowling when reversing decisions of the
32 Zoning Administrator, and she and Mr. Carrington had met with staff on how to draft motions. She noted
33 that the motions needed to be able to explain the reasoning of the Board in case the decisions were
34 appealed.

35 36 **6. New Business**

37 Ms. Joseph suggested that the Board pursue requesting the Circuit Court to appoint alternates for Board
38 members. She said they could request staff to research possible routes forward. She said she wanted to
39 avoid tie votes.

40
41 There was discussion regarding if the alternates would serve for individual meetings, defined time
42 periods, or by rotation. It was suggested that there should be a short list of one to three people to serve as
43 alternates.

44
45 Mr. Bowling suggested that staff and the Board of Supervisors provide feedback. He noted that the Court
46 was able to appoint up to three alternate members.

47
48 **MOTION:** Mr. Shepherd moved that the Board request staff to investigate the possibility of requesting
49 the Court to appoint alternate Board of Zoning Appeals members. Mr. Carrington seconded the motion,
50 which carried unanimously (4-0). (Mr. Rosenberg was absent.)

1
2 Mr. Carrington stated that he would be traveling for personal reasons during the next meeting, but he
3 would be able to participate virtually if needed.
4

5 **7. Adjournment**

6 **MOTION:** Mr. Burkhardt moved to adjourn the meeting. Mr. Shepherd seconded the motion, which
7 carried unanimously (4-0). (Mr. Rosenberg was absent.)
8

9 The meeting adjourned at approximately 3:59 p.m.
10

11 (Recorded by Marsha Alley and transcribed by Golden Transcription Services)
12

13 Respectfully Submitted,
14

15
16
17 
18 _____
19 John Shepherd, Secretary Board of Zoning Appeals