

**MINUTES OF
FAUQUIER COUNTY BOARD OF ZONING APPEALS
JANUARY 2, 2020**

Regularly Scheduled Meeting

2:00 p.m.

Warren Green Building, First Floor Meeting Room

10 Hotel Street

Warrenton, Virginia

The Fauquier County Board of Zoning Appeals held its regularly scheduled meeting on Thursday, January 2, 2020, beginning at 2:00 p.m. in the Warren Green Building, First Floor Meeting Room, 10 Hotel Street, Warrenton, Virginia. Members present were Mr. John Meadows, Chairperson; Mr. Maximilian Tufts, Jr., Vice-Chairperson; Mrs. Mary North Cooper; Mr. Benjamin Tissue, Jr.; and Mr. Lawrence G. McDade. Also present were Ms. Holly Meade, Director of Community Development; Mr. Adam Shellenberger, Chief of Planning; Ms. Heather Jenkins, Assistant Chief of Zoning/Development Services; Mr. Jonathan Rodman, Senior Planner; Ms. Kara Krantz, Planner II; Ms. Mary Catherine Anderson, Senior Assistant County Attorney; and Mrs. Fran Williams, Administrative Manager.

Mr. Meadows opened the meeting, which was then turned over to Ms. Anderson to initiate the election of officers.

ELECTION OF OFFICERS:

On motion made by Mr. Tissue and seconded by Mrs. Cooper, it was moved to retain the same officers – Mr. Meadows, Chairperson; Mr. Tufts, Vice-Chairperson; and Mrs. Williams, Secretary.

The motion carried unanimously.

The meeting was then turned over to Mr. Meadows, Chairperson.

LETTERS OF NOTIFICATION AND PUBLIC NOTICE:

Mr. Shellenberger stated that, to the best of his knowledge, the cases before the Board of Zoning Appeals for public meeting and public hearing have been properly advertised, posted and letters of notification sent to adjoining property owners.

CONSIDERATION OF BYLAWS:

In that Board members had no comment, Mr. Meadows stated that the Bylaws would stand as written.

ADOPTION OF THE 2020 MEETING SCHEDULE:

In that Board members had no comment, Mr. Meadows stated that the proposed 2020 Meeting Schedule would be adopted. He noted that the March 2020 meeting will be held on Wednesday, March 4, 2020.

MINUTES:

Mr. Meadows reviewed a proposed amendment to the minutes.

On motion made by Mr. Tufts and seconded by Mr. McDade, it was moved to approve the December 5, 2019 minutes, as amended.

The motion carried unanimously.

REGULAR AGENDA:

SPECIAL PERMIT – #SPPT-19-012187 – KATHY LEE BURNHAM (OWNER/APPLICANT) – KNOLL WOOD FARM, LLC – An application for a Category 13 Special Permit to operate a minor kennel for boarding and training. The property is located at 5648 John Barton Payne Road, Marshall District, Marshall, Virginia. (PIN 6947-15-8240-000) (Kara Krantz, Staff)

Ms. Krantz reviewed the staff report.

Mr. Meadows opened the public hearing.

Ms. Kathy Burnham, applicant, expressed agreement with the staff report.

In that there were no further speakers, Mr. Meadows closed the public hearing.

On motion made by Mr. Tissue and seconded by Mr. Tufts, it was moved to grant the Special Permit, after due notice and hearing, as required by *Code of Virginia* §15.2-2204 and Section 5-009 of the Fauquier County Zoning Ordinance, based upon the following Board findings:

1. The proposed use will not adversely affect the use or development of neighboring properties or will not impair the value of nearby land.
2. The proposed use is in accordance with the applicable zoning district regulations and applicable provisions of the Comprehensive Plan.
3. Pedestrian and vehicular traffic generated by the proposed use will not be hazardous or conflict with existing patterns in the neighborhood.
4. Adequate utility, drainage, parking, loading and other facilities are provided to serve the proposed use.

5. Air quality, surface and groundwater quality and quantity will not be degraded or depleted by the proposed use to an extent that would hinder or discourage appropriate development in nearby areas.
6. The proposed use is consistent with the general standards for Special Permits.

The Special Permit is granted subject to the following conditions, safeguards, and restrictions upon the proposed uses, as are deemed necessary in the public interest to secure compliance with the provisions of this Ordinance:

1. The use shall be in general conformance with the information and drawings submitted with the Special Permit application, except as specifically modified by the conditions below or necessary to meet Zoning Ordinance requirements.
2. The kennel shall be limited to a maximum of ten (10) dogs for boarding and/or training; no commercial breeding shall take place on the property.
3. All customer visits, including client drop-offs and pick-up to the subject property, shall be limited to the hours between 8:00 a.m. and 7:00 p.m. daily and shall be by appointment only. When arriving and departing, all dogs shall be leashed or kept in carriers.
4. All animals shall be confined to a structure or within a fenced area. There shall be direct supervision of the training areas at all times they are in use.
5. Use of the outdoor training and play areas shall be limited to between the hours of 8:00 a.m. and 6:00 p.m. Supervision shall be provided at all times that these areas are in use.
6. Use of the fenced area adjacent to the house shall be limited to between the hours of 7:00 a.m. and 8:00 p.m.
7. Animal waste shall be collected daily and transported, at least weekly, from the site for deposit in an authorized facility.
8. No on-site burial of dogs shall be allowed, except for personal pets.
9. All future signage shall require permits and be in compliance with Article 8 of the Zoning Ordinance.
10. All applicable zoning, building, land disturbance and health permits shall be obtained prior to establishment of the use.
11. An Emergency Plan shall be provided to the Zoning Administrator prior to establishment of the use.
12. A Site Plan shall be approved prior to establishment of the use.

The motion carried unanimously.

Ms. Anderson and staff members left the dais.

APPEAL #AZAD-19-012140, RCH, LLC (OWNER/APPLICANT) – RCH, LLC PROPERTY/PAIGE LEIGH ANNE WAY – An appeal of a Zoning Administrator's determination related to the storage or disposal of nonagricultural fill material in excess of the amount allowed by Zoning Ordinance Section 5-1816.2(1) without the required Special Exception approval and in violation of the standards for this use listed in Section 5-1816.2; the expansion of a non-conforming use without approval of a Special Exception; the commencement of a use prior to the issuance of a Zoning Permit; and the excavation or grading of a parcel before the issuance of a Zoning Permit, PIN 7847-88-1968-000, located on Paige Leigh Anne Way, Cedar Run District, Midland, Virginia. (Heather Jenkins, Staff) ***Note: This is a public meeting, not a public hearing.***

Mr. Meadows stated that the Appellant would be allowed a total of eight minutes since his presentation time was reduced at the last meeting.

APPELLANT PRESENTATION

Mr. Hawkins stated that the County made its determination of how much fill material has been brought to the property based on the neighbors' truck counts even though they did not know what, if anything, was in the trucks or if they were hauling *from* the property. While the County has asserted that he is in violation of expanding a non-conforming use, he questioned how agriculture can be considered a non-conforming use. The property was conveyed from Mr. & Mrs. Thomas Schottler on June 28, 2019 and he has continued their efforts of creating a turf farm; therefore, he has a vested right to continue. Mr. Hawkins expressed concern that the County's action is just a vendetta against him because of the neighbors' relentless phone calls and emails. He stated that he has poured a great deal of time, money, sweat and tears into this project. Mr. Hawkins asserted that the property is his and that he can do as he sees fit with it.

Mr. Hawkins referred to an email from one of his neighbors to the Virginia Department of Agriculture and Consumer Services (VDACS) on the first page of a notebook that he submitted for the Board's review. This email informs VDACS that he has grass planted, but there are roots and rocks in it. Mr. Hawkins stated that he does not understand of what concern that is to his neighbors. Timber harvesting on the property was completed in November 2017 and, as can be seen by the photograph dated October 2018, winter wheat was planted within the allowed 12 month period he had to demonstrate that the project is a bona fide agricultural use. He reiterated that he was clearly within that 12 month parameter.

Mr. Hawkins stated that his neighbors and the County refer to his property as a landfill. But, Merriam-Webster's dictionary defines a "landfill" as "*a system of trash and garbage disposal in which the waste is buried between layers of earth...*" Therefore, he is not a landfill. He noted that he has terraced the property. Merriam-Webster's dictionary defines "terrace" as "*A raised embankment with the top leveled.*" This is exactly what he is doing on the property. He

is raising the grade and leveling it off to an adequate area that has already been established as the original grade on the property to start his bench terracing from there.

Code of Virginia § 10.1-1163 (Exemptions from Article) states: "For the purpose of this article, evidence of intent of bona fide agriculture or improved pasture use shall require, as a minimum and within twelve months from the date of completion of commercial cutting, that the land intended for such use be cleared of all trees, snags, brush, tree tops..." Mr. Hawkins explained that he has been diligently working on this while also trying to perform his regular work and building a farm. This definitely shows his intent is to create a turf farm.

Mr. Hawkins referred to a Zoning Permit/Land Disturbing Permit (ZONE-18-009565), which was issued by the County to the previous property owners to allow a permanent road. He noted that he is not constructing a road. Rather, he is just terracing off the property for a turf farm and does not see why he would need a Zoning Permit for this nor does he believe anyone else is required to have one for farming purposes.

In referring to material just before the yellow tab in the notebook, Mr. Hawkins stated that the County asked the Department of Environmental Quality what he was doing on the property. He stated that he has been in a battle with the County for the past three years since they received an answer they did not like. However, the Department of Environmental Quality has signed off on everything that he has done on the property and, therefore, he could have been in production during this three year period instead of losing money.

Mr. Hawkins referred to a letter from the County to the previous owner dated October 13, 2017 after the blue tab in the notebook, which states: *"...We have reached a consensus with DEQ and VDACS, that a land disturbing permit is required for the access road and the future pad site for the pole barn, since these areas do not fall under an agricultural exemption as listed in the Erosion and Sediment Control Law §62.1-44.15:51 and Fauquier County Stormwater E&S Ordinance §11-5..."* Mr. Hawkins noted that the previous owner obtained a Land Disturbing Permit for the access road but no pad site for a pole barn was ever constructed. Therefore, the previous owner obtained all the necessary permits to get the project to this point. He emphasized that he is not doing anything outside the scope of what has already been approved.

On the third page behind the blue tab, you find a letter from the County to the previous owner dated March 7, 2018, which states: *"...A letter was sent October 13, 2017 requesting a zoning and land disturbing permit for the access road and the future pad site for the pole barn. Guidance provided by the Department of Environmental Quality confirms these items do not fall under the agricultural exemptions as listed in the Erosion and Sediment Control Law and Stormwater Management Act..."*

Two pages further is a Virginia Department of Environmental Quality Site Inspection Report dated August 16, 2018, which indicates DEQ is aware that he was transporting fill material to the property to build a turf farm, which is an agricultural exemption. They indicated that he only needed to continue maintaining his Erosion and Sedimentation Control measures.

Mr. Hawkins referred to an email, dated July 12, 2018, from the County to one of his neighbors, which states: *"As far as on the county end, I have received the remaining*

paperwork in regards to the land disturbance permit application, such as the ag affidavit today...” This shows that the County has received an Agricultural Affidavit, on which I have indicated exactly what I intend to do on the property.

Mr. Hawkins referred to photographs after the orange divider in the notebook, which show that wheat has been planted on the property. He indicated that this is what the neighbor thought was grass. Mr. Hawkins emphasized that he is in the process of building a sod farm. He noted that the photographs also indicate where he had been working prior to the adoption of Ordinance “D” and they have not moved from that location. Therefore, no expansion has taken place.

In conclusion, Mr. Hawkins respectfully requested that the Board overturn the Zoning Administrator's Official Notice of Zoning Violation and Corrective Order based upon the evidence he has outlined.

QUESTIONS FROM THE BOARD

Mr. McDade stated that the Appellant has indicated the property is not a landfill, but rather, is a sod farm. He inquired if the project started as a landfill with the Appellant being paid for the nonagricultural fill material brought to the property.

Mr. Hawkins clarified that there is no landfill located on the property and the intent was always for it to be a sod farm since the first trees were cut down in May 2017. However, he does receive payment for some of the fill material, which helps to offset the costs associated with the sod farm.

Mr. McDade asked if the Appellant had been involved in the project since that time.

Mr. Hawkins responded that he was actually involved with this project prior to May 2017. He was also involved when the previous owners located the property to purchase in order to build the original sod farm.

Mr. McDade stated that the Appellant has indicated he has approval from the Department of Environmental Quality. Mr. McDade asked if the Appellant had been cited for a violation and if this approval was only for the remedial action taken rather than the project itself.

Mr. Hawkins explained that the Department of Forestry inspected the property and said there was a good timber harvest. Subsequently, someone called the Department of Environmental Quality and the U.S. Army Corps of Engineers to complain about sticks and twigs being in a stream. When these agencies inspected the property, they found some fill (i.e., sticks, twigs, and tree branches) in a stream. They requested that this material be removed. When the material was removed, there were four or five stumps that popped up. Therefore, the wetland stream area had to be remediated. However, it was not as if they had intentionally filled in the wetland area.

Mr. McDade stated that it seems that the Appellant initially received approval from the Department of Forestry only to harvest timber, which was done. Then there was the issue as to

whether there was a violation of Department of Environmental Quality regulations. They came out and determined that there was indeed a violation and informed you of what remedial action was needed. The Appellant then took the necessary remedial action. Mr. McDade asked if the Appellant had only received approval from the Department of Environmental Quality for the remedial action that was taken.

Mr. Hawkins replied that there were emails from the County asking the Department of Environmental Quality if he was allowed to do bench terracing for an agricultural use. He noted that both had originally agreed that he was allowed to do this. Mr. Hawkins explained that a silviculture permit is required when you have a wooded parcel and clear cutting must take place prior to the removal of any stumps. Mr. Hawkins stated that once the timber harvesting was completed, he began removing the stumps. This is when the neighbors began complaining that he was burning material to get rid of evidence. Mr. Hawkins stated that there was no problem with the Department of Forestry until the Department of Environmental Quality got involved. At that point, it was as if two state agencies were battling each other. The Department of Forestry said it was a good cut, but the Department of Environmental Quality indicated there was too much material in the stream and it needed to be removed. At that point, they came up with a Letter of Agreement, which included exactly what was taking place on the property as well as the Erosion and Sedimentation Controls that were to be put in place.

Mr. McDade stated that he had carefully reviewed the previous material submitted in December 2019. However, he did not receive the Appellant's additional material until just prior to the meeting and, therefore, did not have adequate time to review it. He asked if there are any documents contained therein or in the initial submission which indicates that the Department of Environmental Quality had given the Appellant reason to believe that he could continue with this project instead of them just approving the remedial action that was taken.

Mr. Hawkins referred to a letter from the Department of Agriculture and Consumer Services dated October 12, 2017, which lays out the findings of the Department of Environmental Quality. He also noted that according to a November 29, 2017 email from the Department of Environmental Quality: *"The site is agriculturally exempt from being required to implement erosion and sediment controls (silt fencing, etc.) for the purposes of satisfying the locality's (Fauquier County) delegated authority, with the exception of the installation of impervious surfaces/structures and roadways serving these structures."*

Mr. Hawkins explained that the County emailed the Department of Environmental Quality to request that they require him to implement erosion and sedimentation controls. He noted that this request is in multiple places throughout the binder of additional material that he submitted. Mr. Hawkins stated that while he does not have an actual permit, there are emails from the Department of Environmental Quality indicating that his project is agriculturally exempt. He also noted that site visits were made to the property by the Department of Environmental Quality and at no time was he ever cited for operating a landfill under the Virginia Waste Management Act.

Mr. McDade stated that according to the Department of Environmental Quality, the Appellant was not in violation of its regulations in October 2017. Therefore, its case has been dismissed.

But, he asked what this has to do with him being in violation of Ordinance “D” which was adopted on September 13, 2018.

Mr. Hawkins referred to additional material in the recently submitted binder.

Mr. McDade reiterated that he had not been able to thoroughly review the new material since he had just recently received it.

Mr. Hawkins apologized for not getting the material to the Board sooner and stated that he would be willing to keep this item open until the next regularly scheduled meeting to allow additional time for review of the new material.

Mr. Hawkins also stated that he wanted to correct one statement from the December 2019 meeting. He emphasized that *he* did not dismiss the Circuit Court case. It was the County that filed for a motion to dismiss the case and won.

Mr. McDade stated that a 2018 Notice of Violation from the Zoning Administrator was appealed to the Board of Zoning Appeals, which ruled against the owner of the property. The property owner at that time filed an Appeal with the Circuit Court. If an Appeal is not filed with the Circuit Court then the Board of Zoning Appeals’ decision is final. He stated that since the Circuit Court case was dismissed, which means there is no Appeal, the Appellant was on notice when the property was purchased that it was subject to the final decision of the Board of Zoning Appeals. Mr. McDade emphasized that the issue had to do with the property and not the individual owner.

Mr. Hawkins stated that, while he is not an attorney, he does not believe that is the case. The County filed a motion to get the suit against them dismissed. It was the County’s position that since Mr. Schottler no longer owned the property, there was no longer an aggrieved party. At that time, Judge Jeffrey Parker told the County there was nothing they could do with this and stated that he could see this all coming back again.

Mr. McDade asked if the Appellant was represented by Counsel when the property was transferred to him.

Mr. Hawkins stated that he did not have an attorney during the purchase of the property; there was only the closing office involved in the transfer.

Mr. McDade stated that it would seem that when the property was sold the Appellant could have substituted himself as the Plaintiff in the Appeal to protect his interests. Mr. McDade asked if there is anything in the new material which indicates the Appellant is not bound by the 2018 final decision of the Board of Zoning Appeals.

Mr. Hawkins stated there is nothing in the new material to indicate he is not bound by this decision. He also stated that he did not receive anything from the County stating that he *is* bound by the previous owner. He noted that the previous owner had obtained a Zoning Permit and a Land Disturbing Permit. Mr. Hawkins further stated that he is not building a road. He is just terracing off the property for agricultural purposes.

Mr. Tissue asked if the Appellant realized that he needed to apply for a Special Exception, as required by the Zoning Ordinance, once the Circuit Court case was dismissed.

Mr. Hawkins replied that he does not feel that he has been over the daily allowed limit of nonagricultural fill brought to the property.

Mr. Tissue asked how the Appellant knows that he has not been over the limit.

Mr. Hawkins asked how the County knows he has been over the limit.

Mr. Tissue stated that the biggest problem is that no grading plan has been submitted to justify him bringing in a certain amount of fill. The normal process is to submit a grading plan which indicates how much material will be brought in, where it will be placed and how deep it will be. He stated that at one point the Appellant estimated that approximately one million cubic yards of material would be necessary for the back side of the property.

Mr. Hawkins emphasized the one million cubic yard figure was given in a deposition in another case and that it was only a “guesstimate.”

Mr. Tissue noted that the Appellant was pretty close – within 11% – in his “guesstimate” since he had stated he was going to fill the 30 acres to 23’ which equates to approximately 1,113,000 square feet or well over 100,000 truckloads. Mr. Tissue stated that is a ridiculous amount for a sod farm and there is no way the Appellant could justify that expense if he were a farmer and had to pay for that amount of fill material.

Mr. Hawkins replied that you would go broke doing it but, as he stated earlier, he does receive payment for some of the material. He noted that even though he does not receive as much as some people think, the amount he receives does keep fuel in the equipment. Mr. Hawkins also stated that nowhere in the Right to Farm Act does it state he is required to have a plan or a permit for his farm.

Mr. Tissue stated that, given the amount of material being brought in, it would have been advantageous to have an overall plan indicating the type of material, where it would be placed and what would be done with it. He asked if the Appellant had ever applied for a U.S. Department of Agriculture farm plan, which can be done locally through John Marshall Soil and Water.

Mr. Hawkins stated that he attempted to do a Stewardship Plan through the Virginia Department of Agriculture and Consumer Services. He also believes his soil engineer tried to go through John Marshall Soil and Water but no one would touch it because the County and neighbors had already gotten to them. Mr. Hawkins noted that, as can be seen in some of his photographs, he has a nice level terrace with sod which he should be able to harvest in April and he is just trying to complete the project.

Mr. Tissue stated that it is his opinion that the term “terrace” is being misused since it is usually done to minimize the amount of fill that would need to be brought in. He noted that it appears to him that the excess material was brought in under the guise of an agricultural use.

Mr. McDade stated that the Appellant was no doubt trying to be accurate in his estimate of one million cubic yards, but there is a very big difference between that and the 4,200 cubic yards allowed by the Zoning Ordinance.

Mr. Hawkins noted that estimates are not always accurate since the County stated it would take him 50 years to grow sod, but as can be seen from the photographs, he already has sod growing. In addition, Mr. Hawkins stated that he does not feel that the Ordinance adopted on September 13, 2018 applies to him since this project was started a year prior to its adoption.

Mr. Tissue stated that other jurisdictions, including Loudoun County, have adopted similar regulations. He noted that Loudoun County has multiple lawsuits against landowners in similar situations as the Appellant.

Mr. Hawkins stated that there is a farm on the right hand side of Route 15 as you drive into Loudoun County that is back to work.

Mr. Tissue stated that the project in that instance was stopped mainly because it was located in an open space easement. The issue was settled after a lawsuit and the posting of a bond. He also noted that this project had an E&S Control Plan, a grading plan, and a Best Management Practices (BMP) plan.

Mr. Hawkins stated that he has paperwork indicating he is not required to have an E&S Control Plan, a grading plan or a Best Management Practices plan since his project is agricultural.

Mr. McDade noted that the Appellant is referring to the document from the Department of Environmental Quality addressing its regulations. However, this does not address requirements of the Zoning Ordinance.

Mr. Hawkins stated that the County received the stormwater management regulations that were put in place from the Department of Environmental Quality and it monitors what the County does. Fauquier County asked the Department of Environmental Quality for its insight. However, the County received an answer it did not like, so here we are.

REBUTTAL – COUNTY

Ms. Jenkins directed the Board's attention to the material that she distributed prior to today's meeting. This material includes an October 11, 2013 opinion from the Office of the Attorney General; an excerpt from Article 10 of the Fauquier County Zoning Ordinance; two site photographs previously provided by the Appellant; an August 15, 2019 opinion provided by Justice S. Bernard Goodwyn regarding Bragg Hill Corporation v. City of Fredericksburg, et al; and an email, dated December 31, 2019, which was received from a neighboring property owner.

Ms. Jenkins stated that the Appellant argues that he is exempt from local regulations, as he is using nonagricultural fill for the agricultural practice of terracing. He has repeatedly claimed that his terrace is an agricultural engineering process. However, Merriam-Webster's

dictionary (2-a) defines “terrace” as “...*a series of horizontal ridges made in a hillside to increase cultivatable land, conserve moisture, or minimize erosion.*” Given that the original topography of the property was a gentle 4% average slope, common sense would not agree that raising a mountain of dirt up to 20 feet above the original grade is equivalent to a series of ridges built into a hillside.

Ms. Jenkins asserted that the Appellant’s appropriation of the term “terrace” is simply an attempt to take advantage of the exemptions provided in the State Code for agriculture that are meant to protect genuine farming operations from unnecessary regulation, and not meant to allow industrial-scale landfill operations to bypass local regulations. In fact, State Code specifies that the disposal of nonagricultural excavation material is not agriculture or silviculture. Ms. Jenkins referred to the October 11, 2013 opinion from the Office of the Attorney General which indicates that the State Code does indeed provide a locality the authority to regulate nonagricultural fill.

The Appellant has provided numerous emails from and between the Department of Environmental Quality and the U.S. Army Corps of Engineers as further reason why he is exempt from local regulation. However, these emails pertain to erosion control and stormwater management regulations that do not apply to this Appeal of a Zoning Ordinance violation. The appeal related to violations of the stormwater and erosion control regulations are the subject of a separate matter to be heard before the Circuit Court, and not related to today’s Appeal.

In addition, the Appellant stated in his Appeal presentation last month that since the acreage of the parcel has not changed, he therefore has not expanded the Use. Zoning Ordinance Article 10 – Non Conforming Uses, clearly states that “*a non-conforming use shall be limited to the land area existing and being utilized for the use as of the date the use became legally non-conforming.*” Article 10 does not say ‘parcel’ or ‘property’ – it clearly says “...*land area being utilized...*”

Ms. Jenkins referred to the two photographs previously submitted by the Appellant. The first is of the eastern-front half of the property, where the depth of the fill material can be compared to the height of an adjacent two-story home. The second is looking east and shows the portion of the property that has been the subject of the active filling operation since RCH, LLC took title to the property. A pick-up truck is on top of the fill material, where the general size of that truck can be compared to the depth of the exposed layers of fill. This photograph clearly shows that since RCH, LLC took title to the property, that the area of the use has been expanded beyond that which was existing prior to June 2019 and prior to September 13, 2018.

Ms. Jenkins stated that the Appellant argued before the Board of Zoning Appeals, in December 2019, that he has a vested right to continue to use the property to dispose of nonagricultural fill material, as he has relied on a significant affirmative governmental act. As previously discussed today, the Department of Environmental Quality and the U.S. Army Corps of Engineers’ approved plan was solely for mitigating wetland and stream channel impacts. In no case did they authorize filling of the property. In fact, there has been no Federal, State or County issued approval that has permitted disposing of vast amounts of fill material on this property. Therefore, RCH, LLC has no vested right to dispose of additional amounts of nonagricultural fill on the property.

The Appellant has provided numerous emails from and between the Department of Environmental Quality and the U.S. Army Corps of Engineers. However, Section 404 of the Clean Water Act and the Zoning Ordinance regulations are separate – two different areas of authority.

The Appellant stated in December that the County’s estimate of the amount of fill that has been placed on the property is a “guesstimate” only with no basis in fact and that he himself has no idea of the amount of fill that has been brought to the property. However, the County has multiple sources documenting truck counts from the County inspectors to numerous neighboring property owners. Ms. Jenkins asked that the Board refer to the email distributed at today’s meeting from an adjoining property owner as just one example of verifiable documentation of dump trucks that have been observed entering the property to dispose of fill material. Just this one account would place the amount of fill that has been brought to the property since August 2019 at over 5,000 cubic yards, and exceeding the 200 cubic yards per day limitation on multiple days.

Ms. Jenkins stated that a Zoning Administrator’s determination is final and cannot be appealed if it is not done so in a timely manner. The previous property owner, Mr. Thomas Schottler, appealed the September 28, 2018 Official Notice of Zoning Violation and Corrective Order to the Board of Zoning Appeals, where the Board upheld the Zoning Administrator’s determination of violation. Mr. Schottler then appealed the Board of Zoning Appeals’ determination to the Fauquier County Circuit Court. However, due to the change in ownership from the Schottlers to RCH, LLC in June 2019 that Appeal to the court was dismissed. It is staff’s position that this dismissal renders that appeal to the court as though it had never occurred and, therefore, the finding of the Board of Zoning Appeals’ upholding the original notice of violation from 2018, still stands. Ms. Jenkins noted that an administrative ruling of a Zoning Administrator is final if it was not appealed by the landowner to the Circuit Court. The Zoning Administrator’s determination of violation from 2018 therefore stands as already being decided, and is unassailable at a later date. For verification, Ms. Jenkins referred to an opinion from the Circuit Court case of Bragg Hill Corporation v. City of Fredericksburg, Virginia, et al.

Ms. Jenkins stated that, for these reasons, as well as the detail and reasoning provided in her written response to the Appeal and in her December 2019 presentation, she respectfully requested that the Board of Zoning Appeals affirm the Zoning Administrator’s determination of violation issued on October 3, 2019.

QUESTIONS FROM THE BOARD

Mr. McDade noted that one corrective action measure is for the Appellant to “*remove all fill that has been imported to the property after September 13, 2018 that is in excess of 4,200 cubic yards, return the property to the original grade and drainage patterns, and establish permanent stabilization on all disturbed areas.*” He expressed concern that if the Appellant were to take this action the situation would be even worse for the neighbors with the potential for excessive run-off.

Ms. Jenkins stated that another option would be for the Appellant to move forward with pursuing Special Exception approval.

Mr. McDade asked if there is any way the Appellant could get Special Exception approval since the County does not know what the fill material contains.

Ms. Jenkins stated that a great deal of testing of the fill material would be required.

After further discussion, on motion made by Mr. Tissue, it was moved to uphold the original decision of the Board of Zoning Appeals since the majority of its rulings has been running with the property instead of the owner.

However, Mr. Meadows stated that should the Appellant feel that staff has raised additional issues, he would have an opportunity for rebuttal. Mr. Meadows asked the Appellant if he wished to proceed with a rebuttal.

Mr. Hawkins stated that he would like to give a rebuttal.

In that there was no second, the motion failed.

REBUTTAL – APPELLANT

Mr. Hawkins stated this is the first he has heard that he was not allowed to come back to appeal this issue.

Mr. McDade stated that he raised this issue at the last meeting but assumed that the Appellant had new material from an attorney indicating he does have the right to appeal.

Mr. Hawkins indicated that, at the December 2019 meeting, Mr. McDade stated the Appellant had requested dismissal of the Circuit Court. However, it was the County's outside attorney that requested the dismissal.

Mr. McDade stated that he did not recall making that statement.

Mr. Hawkins stated that staff has referred to an opinion by the Attorney General. However, there is no case law on the issue.

Mr. Hawkins asked why he was not notified by the County that the property was in violation when it was transferred to him. The County had no problem sending him a tax bill, but he was not notified of any violations on the property until he had some fill material brought to the property to continue working on the sod farm.

Mr. Meadows inquired if the Appellant was aware of the issues with the property when he purchased it.

Mr. Hawkins stated that he was not aware of this since he assumed the issue was with the previous owner since the County was after him to get a Zoning Permit and a Land Disturbing Permit, which he did obtain.

Mrs. Cooper noted that the conditions did not go away.

Mr. Hawkins stated that he purchased the property in June and it seemed to go away until October.

Mr. Meadows asked if we are here today because of a misunderstanding since the Appellant did not realize the conditions stayed the same when he purchased the property.

Mr. Hawkins replied that he did know there were some issues with the property, but there was no final decision by the Circuit Court. He again questioned why the County waited two to three months to cite him for a violation since he had Facebook posts and also sent photographs and emails to the County indicating what was being done at the property. He noted that the Zoning Ordinance Article 10 – Non-Conforming Uses, clearly states that “*a non-conforming use shall be limited to the land area existing and being utilized for the use as of the date the use became legally non-conforming.*” Mr. Hawkins stated that his use of the property has not changed; therefore, it is legally non-conforming. Photographs of the property clearly show that he is still working on the same area of the property. He is building a flat bench, which the County wants to call a “monolithic plateau.” Mr. Hawkins asked if the County wanted to refund his money and have him find another way to proceed with the project.

After further discussion, Mr. Hawkins stated that he has brought in material from Commonwealth of Virginia projects, which he is allowed to do without a permit. He noted that material from a Commonwealth of Virginia project was delivered as recently as last Monday. Mr. Hawkins expressed dismay that the County is now discussing requiring him to haul material from the property.

BOARD ACTION

Mr. Meadows read *Code of Virginia* § 15.2-2312 (Procedure on Appeal), which states: “*The board shall fix a reasonable time for the hearing of an application or appeal, give public notice thereof as well as due notice to the parties in interest and make its decision within ninety days of the filing of the application or appeal. In exercising its powers the board may reverse or affirm, wholly or partly, or may modify, an order, requirement, decision or determination appealed from. The concurring vote of a majority of the membership of the board shall be necessary to reverse any order, requirement, decision or determination of an administrative officer or to decide in favor of the applicant on any matter upon which it is required to pass under the ordinance or to effect any variance from the ordinance...*”

Mr. Meadows stated that, according to the *Code of Virginia*, the Board of Zoning Appeals must make a decision by January 30, 2020, which is prior to our next regularly scheduled meeting on February 6, 2020. Should the Board wish to defer action today, both the Appellant and staff would need to agree and a special meeting would need to be called. Mr. Meadows asked about the preference of the Board.

On motion made by Mr. McDade and seconded by Mr. Tissue, it was moved to act on this item at today's meeting.

The motion carried unanimously.

In that there was no further comment, Mr. Meadows closed the public meeting.

Mr. Meadows read a portion of the Staff Report (Page 5), which states: *"The dismissal of the appeal means that the final determination of the BZA with respect [to] the appeal stands as though the appeal to the circuit court did not occur. The Zoning Administrator's interpretation is therefore a "thing decided" both as it relates to the activity conducted on the property and as it relates to the activities of the prior owners. An administrative ruling of a Zoning Administrator is final if it was not appealed by the landowner to the circuit court. Bragg Hill Corp. v City of Fredericksburg, Va._180647, S.E.2d_(2019)"*

On motion made by Mr. McDade and seconded by Mr. Tissue, it was moved to affirm the decision of the Zoning Administrator, after due notice and hearing as required by the Fauquier County Zoning Ordinance and *Code of Virginia*, in Appeal #AZAD-19-012140, finding that this matter has already been resolved by a prior decision of the Board of Zoning Appeals which is final unless overturned by the Circuit Court. The appeal period to the Circuit Court of that Board of Zoning Appeals' decision has passed. Accordingly, this matter has already been resolved.

The motion carried unanimously.

OTHER BUSINESS:

None.

ADJOURNMENT:

There being no further business, the meeting was adjourned at approximately 3:05 p.m.

John R. Meadows, Chairperson

Fran Williams, Secretary

Copies of all files and materials presented to the BZA are attached to and become part of these minutes. A recording of the meeting is on file for one (1) year.