MINUTES OF
FAUQUIER COUNTY BOARD OF ZONING APPEALS
NOVEMBER 1, 2018

Work Session
1:40 p.m.
Warren Green Building, First Floor Meeting Room
10 Hotel Street
Warrenton, Virginia

The Fauquier County Board of Zoning Appeals held a work session on Thursday, November 1, 2018, beginning at approximately 1:40 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; Mr. Bill Chipman; Mrs. Mary North Cooper; and Mr. Benjamin Tissue, Jr. Also present were Mr. Adam Shellenberger, Chief of Planning; Mr. Rob Walton, Chief of Zoning/Development Services; Ms. Heather Jenkins, Assistant Chief of Zoning/Development Services; Ms. Marianne Primeau, Senior Assistant County Attorney; Ms. Kara Krantz, Planner; and Mrs. Fran Williams, Administrative Manager/Secretary.

MINUTES:

Board members reviewed the October 4, 2018 minutes.

AGENDA ITEMS:

SPECIAL PERMIT #SPPT-18-009900 – JAMES J. (SR.) & JACQUELINE SELLERS (OWNERS)/JAMES J. SELLERS, SR. (APPLICANT) – SELLERS CONSTRUCTION – An application for a Category 2 Special Permit to operate a small contracting business as a major home occupation, PIN 6986-86-07-4702-000, located at 6535 Blantyre Road, Center District, Warrenton, Virginia. (Ben Holt, Staff)

Withdrawn

Mr. Shellenberger stated that this application has been withdrawn.

SPECIAL PERMIT #SPPT-18-010029 – ALEXANDRA LAMETT & DAVID C. VARGAS AYAYLA (OWNERS)/ALEXANDRA LAMETT (APPLICANT) – SUNSHINE HOMECARE – An application for a Category 2 Special Permit to operate a family day home as a major home occupation, PIN 6889-61-7939-000, located at 6890 Maplewood Drive, Lee District, Bealeton, Virginia. (Kara Krantz, Staff)

Ms. Krantz reviewed the application.

SPECIAL PERMIT #SPPT-18-010050 – SEMPER K9 ASSISTANCE DOGS (OWNER/APPLICANT) – SEMPER K9 ASSISTANCE DOGS – An application for a Category 13 Special Permit to operate a kennel, PIN 7848-94-2431-000, located off Brent Town Road, Cedar Run District, Catlett, Virginia. (Kara Krantz, Staff)

Ms. Krantz reviewed the application.

OTHER BUSINESS:

Mr. Shellenberger provided an update on The Bridge Community Assembly of God Church and stated that an application for a Special Permit Amendment will be on the next agenda.

The meeting was adjourned at approximately 1:50 p.m.

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, November 1, 2018, 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; Mr. Bill Chipman; Mrs. Mary North Cooper; and Mr. Benjamin Tissue, Jr. Also present were Mr. Adam Shellenberger, Chief of Planning; Mr. Rob Walton, Chief of Zoning/Development Services; Ms. Heather Jenkins, Assistant Chief of Zoning/Development Services; Ms. Marianne Primeau, Senior Assistant County Attorney; Mr. Ben Holt, Planner II; Ms. Kara Krantz, Planner; and Mrs. Fran Williams, Administrative Manager/Secretary.

LETTERS OF NOTIFICATION AND PUBLIC NOTICE:

Mrs. Williams read the public hearing protocol.

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

MINUTES:

On motion made by Mr. Tufts and seconded by Mrs. Cooper, it was moved to approve the October 4, 2018 minutes.

The motion carried unanimously.

REGULAR AGENDA:

SPECIAL PERMIT #SPPT-18-009900 – JAMES J. (SR.) & JACQUELINE SELLERS (OWNERS)/JAMES J. SELLERS, SR. (APPLICANT) – SELLERS CONSTRUCTION – An application for a Category 2 Special Permit to operate a small contracting business as a major home occupation, PIN 6986-67-4702-000, located at 6535 Blantyre Road, Center District, Warrenton, Virginia. (Ben Holt, Staff)

Withdrawn

Mr. Shellenberger stated that this application has been withdrawn.

SPECIAL PERMIT #SPPT-18-010029 – ALEXANDRA LAMETT & DAVID C. VARGAS AYAYLA (OWNERS)/ALEXANDRA LAMETT (APPLICANT) – SUNSHINE HOMECARE – An application for a Category 2 Special Permit to operate a family day home as a major home occupation, PIN 6889-61-7939-000, located at 6890 Maplewood Drive, Lee District, Bealeton, Virginia. (Kara Krantz, Staff)

Ms. Krantz reviewed the staff report.

Mr. Meadows opened the public hearing.

Ms. Alexandra Lamett, applicant, expressed agreement with the staff report.

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

A discussion ensued regarding the proposed ages of the children being cared for and if additional fencing should be required.

Mr. Tissue noted that correspondence had been received from the Edgewood East Homeowners' Association related to their rules and regulations, which limit uses within the subdivision to residential only.

Mr. Tissue asked the applicant if she is aware of these rules and regulations.

Ms. Lamett responded that she is aware and will work with the homeowners' association.

Mr. Meadows clarified that the Board cannot consider the covenants of a homeowners' association in making its decision.

On motion made by Mr. Chipman 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. Operation of the home day care business shall be limited to the hours between 6:30 a.m. and 6:00 p.m., Monday through Friday, except in emergency situations.

3. A maximum of twelve (12) children, not older than five (5) years of age, shall be served by the business at any given time.

4. All children shall be accompanied to and from the house by an adult during drop-offs and pick-ups.

5. There shall be no signage associated with the use.

6. The Applicant shall obtain and maintain all necessary state licensure and/or permits associated with the use.

7. No vehicle parking on Maplewood Drive shall be permitted.

8. Prior to commencement of the use, the applicant shall refurbish the private entrance with aggregate base material or similar.

9. The Special Permit is issued for a period of two (2) years.

After discussion, on motion made by Mr. Tufts and seconded by Mr. Tissue, it was moved to amend the above motion, as follows:

10. *A privacy fence shall be installed on the rear and left side yard property lines to match the height of the existing right-hand side yard privacy fence.*

The amended motion carried unanimously.

Thereafter, the original motion carried unanimously, as amended.

SPECIAL PERMIT #SPPT-18-010050 – SEMPER K9 ASSISTANCE DOGS (OWNER/APPLICANT) – SEMPER K9 ASSISTANCE DOGS – An application for a Category 13 Special Permit to operate a kennel, PIN 7848-94-2431-000, located off Brent Town Road, Cedar Run District, Catlett, Virginia. (Kara Krantz, Staff)

Ms. Krantz reviewed the staff report.

Mr. Meadows opened the public hearing.

Mr. Christopher Baity, representative, expressed agreement with the staff report.

Mr. Larry Warhurst, a neighbor, spoke in support of approval.

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

On motion made by Mr. Tufts and seconded by Mr. Tissue, 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 training uses only with a maximum of twelve (12) dogs on-site.

3. The regular hours of operation for the Semper K9 training facility shall be limited to between 10:00 a.m. and 4:00 p.m., Monday through Friday. Training may occur between these hours on Saturdays by appointment only.

4. There shall be direct supervision of the training areas at all times. Additionally, a staff member, volunteer, or dog owner shall be present with the service dogs at all times.

5. Animal waste shall be collected daily and transported, at least weekly, from the site for deposit in an authorized facility.

6. No on-site burial of dogs shall be allowed, except for personal pets.

7. All facilities, both indoor and outdoor, associated with the use shall be at least one hundred (100) feet from all property lines and at least one hundred ten (110) feet from the perennial stream.

8. All training shall occur within structures and/or outdoor fenced areas located at least one hundred (100) feet from the property lines. The outdoor training areas shall only be located north of the perennial stream and within the proposed limits of grading and clearing, as shown on the Special Permit plat.

9. The existing one hundred (100) foot buffer of woods around the kennel use area shall be preserved.

10. The Applicant shall obtain applicable building and zoning permits for all structures on the property.

11. A land disturbance permit is required for the prior work that has occurred and no further clearing can occur without an approved Site Plan.

12. All vehicle entrances (temporary and permanent) shall be shown on the Site Plan and satisfy all applicable Virginia Department of Transportation requirements. All required permits associated with the entrance shall be obtained prior to commencement of the use.

13. The construction entrance shall be removed entirely after construction completion and all disturbed areas shall be restored.

14. Signage shall be in compliance with Article 8 of the Zoning Ordinance, and all applicable permits shall be obtained.

15. A Site Plan is required to be approved and released prior to commencement of the use.

The motion carried unanimously.

APPEAL #AZAD-18-010081, THOMAS & JODY A. SCHOTTLER (OWNERS)/R.C. HAWKINS CONSTRUCTION CO., INC. (APPLICANT) – SCHOTTLER 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 limited by Zoning Ordinance Section 5-1816.2 without approval of a Special Exception and the expansion of a non-conforming use without approval of a Special Exception, PIN 7847-88-1968-000, located on Paige Leigh Anne Way, Cedar Run District, Midland, Virginia. (Rob Walton, Staff) ***Note: This is a public meeting, not a public hearing.***

Mr. Meadows reviewed the Rules of Procedure Regarding Appeals and opened the public meeting.

Mr. Meadows asked the Appellant's representative, John H. Foote, Esq., if he had received a copy of the Rules of Procedure Regarding Appeals.

Mr. Foote responded that he did receive a copy.

Mr. Meadows inquired if Mr. Foote had additional materials and information to present to the Board since the Statement of Justification indicated that he reserved the right to do so.

Mr. Foote confirmed that he did have additional materials to submit.

Mr. Meadows also asked if County staff had any additional materials to submit.

Mr. Walton stated that he did not have any additional materials to submit.

In addition, Mr. Meadows clarified that the Board does not have legal counsel present for this case.

COUNTY PRESENTATION

Mr. Walton provided background information on the property, stating that it consists of approximately 56 acres, is zoned Rural Agriculture (RA) and is located on the western side of Brent Town Road just north of its intersection with Paige Leigh Anne Way. Beginning in late 2017, the Appellant obtained a Forestry Permit to clear trees on the property. Once the trees were cleared, the Appellant began importing nonagricultural fill material to establish a sod

farm on the subject property. The fill operation began in approximately October of 2017. Previously, on October 11, 2013, the Attorney General had issued an opinion regarding §15.2-2288 of the State Code which allows jurisdictions to require a legislative approval for *"the storage or disposal of nonagricultural excavation material, waste and debris if the excavation material, waste and debris are not generated on the farm."* On September 13, 2018, the Fauquier County Board of Supervisors adopted an Ordinance which limits the amount of fill that can be brought to a parcel greater than 10 acres. Those limits are not to exceed 200 cubic yards per day or 4,200 cubic yards within a year without the approval of a Special Exception. The importation of nonagricultural fill did not cease once the Ordinance was adopted and the Zoning Office continued to receive complaints. The Appellant submitted a trip log indicating that 28 dump truck loads had been delivered to the site on September 19, 2018. On September 21, 2018, staff sent a Zoning letter to the property owners with a copy to the Appellant, stating that the fill operation must cease immediately until all required approvals were obtained. The importation of nonagricultural fill material continued and, on September 28, 2018, an Official Notice of Zoning Violation and Corrective Order was sent to the property owners and the Appellant. An Appeal of the Official Notice of Zoning Violation and Corrective Order was filed on October 3, 2018.

The Official Notice of Zoning Violation and Corrective Order refers to a violation of Section 3-318.25, Storage or Disposal of Nonagricultural Fill Material in excess of the amount limited by Section 5-1816.2 without Special Exception approval and Section 10-101.2(B), Expansion of a non-conforming use without approval of a Special Exception. Mr. Walton stated that, in that same notice, he certified that due to the erosion, sediment, run-off, noise and dust caused on neighboring properties, that, in his opinion, these violations cause imminent peril to property.

The Appellant argues that the citation for violation of Section 3-318.25 is invalid because §15.2-2288 of the State Code provides an exemption to agencies of the Commonwealth and its contractors from having to obtain a Special Exception for the storage or disposal of nonagricultural fill excavation material. Staff does not argue that this exemption exists; however, the Appeal acknowledges that neither the property owners nor the Appellant are contractors of the Commonwealth. The Appellant's interpretation of the State Code would allow contractors of the Commonwealth to dispose of nonagricultural fill on *any* parcel within an Agricultural district or classification without any approvals. Mr. Walton stated that the Virginia Department of Transportation (VDOT) is requiring its contractors to obtain the required approvals from jurisdictions showing that they have the ability to place material on these properties.

The Appellant has submitted Offsite Material Tracking Forms which indicate that, while some material may have been from road projects associated with the Commonwealth, most is from private developments that are not exempt from obtaining Special Exception approval.

Mr. Walton also reviewed the Appellant's argument regarding the citation for violation of Section 10-101.2(B) related to the expansion of a non-conforming use without approval of a Special Exception. Mr. Walton stated that the Appellant contends that, according to previous case law, this is not an expansion of a non-conforming use. Section 10-101.2(A) of the Zoning Ordinance states: "…*A mere increase in the volume, intensity or frequency of activities that is trivial, insubstantial or reasonably customary or incidental, and that is not accompanied by*

an alteration or variation in the use, shall not be deemed to be an enlargement or extension of the use." Mr. Walton emphasized that bringing in 22 feet of fill as indicated on the Offsite Material Tracking Forms – when a typical sod farm may require only four inches of topsoil being placed over the existing ground – is not trivial, insubstantial nor reasonably customary or incidental according to Mr. Vernon W. Cooper, who considers himself an expert on sod farming.

Zoning Ordinance Section 10-101.2(B) states: *"A non-conforming use which is non-conforming solely because the use now requires an Administrative Permit, Special Permit or Special Exception in the district in which it is located may only be expanded subject to an Administrative Permit, Special Permit or Special Exception obtained in accordance with the current provisions of this Ordinance…"*

Mr. Walton stated that it is important to note that the activity which has taken place to date has occurred on the front portion of the property. An additional portion has been cleared of trees and is being prepared to accept new fill material. To gauge the impact of this fill operation, using an average of the County's assumed capacity of dump trucks (12 cubic yards), 932,000 cubic yards of nonagricultural fill would equate to almost 78,000 dump truck trips to the property. The Appellant maintains that his trucks carry only eight cubic yards per load, which would equate to approximately 116,500 dump truck trips.

Mr. Walton stated that the Appellant contends that the alleged violations do not reach the level of causing imminent peril to property. However, in addition to the traffic noted above, photos included with the September 27, 2018 Inspection Report show how the toe of slope is graded in close proximity to adjoining properties. In addition, Mr. Walton noted that the swale was to be graded toward the wetland area on the property. All of this activity is located on the front portion of the parcel. The Appellant plans to continue importing nonagricultural fill on the back half of the property as well.

He showed additional photos which indicate the negative effect this project is having on neighboring properties. In addition, he showed a video which indicates that rather than the swale being graded toward the wetland area, it continues to flow toward the access road, resulting in sediment being deposited on adjoining properties. While he acknowledged that the video was taken during the rainy summer, it indicates that the silt fence and safety fence are not effective, allowing the run-off to flow down the hill.

In conclusion, Mr. Walton stated that the Notice of Zoning Violation and Corrective Order, dated September 28, 2018, in this matter is correct and respectfully requested that it be upheld by the Board.

QUESTIONS FROM THE BOARD

Mr. Tissue inquired if there were any plans with calculations showing what Erosion and Sedimentation (E & S) controls were being proposed.

Mr. Walton responded that a permit was issued for the permanent portion of the access road; however, the back portion for the sod farm fell under an agricultural exemption.

APPELLANT PRESENTATION

John H. Foote, Esq., representative, distributed copies of a binder containing a number of exhibits and a flash drive as additional materials.

Mr. Foote introduced several members of the audience, including Mr. Thomas Schottler, the property owner; Mr. Mike Hawkins, Appellant; several members of his staff; and expert witnesses.

Mr. Foote stated that this Appeal is probably one of the most complex and significant cases the Board has ever considered because what has been heard from staff reflects how little they know about this property and what has been done there since their information was obtained. The Official Notice of Zoning Violation and Corrective Order only alleges two things: one, that there has been the storage and disposal of nonagricultural fill without a Special Exception; and secondly, that there has been an unlawful expansion of a non-conforming use. It has been ordered that a Special Exception must be obtained for the fill and one for the expansion of a non-conforming use. Part of this is based on the statute that you have been directed to and an opinion from the Attorney General issued some years ago, which has no legal binding since the Supreme Court of Virginia has determined that he is just another lawyer.

Mr. Foote asked that the Board be careful about what they have seen and heard. He stated that absolutely *nothing* that occurred on this site prior to September 13, 2018 was unlawful. Mr. Foote emphasized that this agricultural use of the property as a turf farm was indisputably lawful and by-right, including all of the materials hauled to the site prior to that date. It was only after Ordinance "D" was adopted on September 13, 2018 that any question arose whether what was occurring on the property was lawful. In fact, there is no doubt that this Ordinance was enacted for the purpose of trying to stop this project. So, whatever happened on September 12, 2018 is completely irrelevant and the construction that occurred prior to that date was entirely lawful. This was an agricultural use which does not require an E & S permit nor the submission of E & S plans. In fact, you will find from what we are going to present to you today, there *is* an E & S plan and the E & S controls are in place. It is of no consequence what materials there were or how much there was since the County recognized this as a permitted agricultural use and the staff report even says this. As recently as July 23, 2018, a Zoning Permit (Exhibit A), indicating the proposed use as a "612 Sod Farm," was signed by Mr. Rob Walton, Zoning Administrator, for this property. The County knew that the entire property was going to be used for the construction of a sod farm.

Also, on July 23, 2018, a Land Disturbing Permit (Exhibit B) was approved, not simply for the construction of a temporary road into the property, but for the *permanent* road into the "612 Sod Farm." So, in July 2018, the County was issuing permits to Mr. Schottler and Mr. Hawkins for the construction of a road to a sod farm.

Mr. Foote presented a video of the property which shows the area timbered as well as the placement of diversion dikes and check dams above the silt fencing, which were installed to mitigate the impacts and protect the wetlands. This video was taken on October 5, 2018 by Mr. Lee Tilton, a drone pilot.

Once timbering of the property was completed, the Virginia Department of Forestry signed off on the work as being a good harvest and consistent with its Best Management Practices. However, after receiving complaints, the Virginia Department of Environmental Quality (DEQ) visited the site and noted that there had been unauthorized impacts to approximately 0.09 acre of palustrine forested wetlands. A Letter of Agreement (Exhibit E) dated May 18, 2018 was executed between Mr. Schottler and DEQ regarding remediation measures that were to be taken. Mr. Foote noted that the materials were placed in this area, in part, due to a bureaucratic battle between the Virginia Department of Forestry and the DEQ.

A second video taken by the drone pilot on October 25, 2018 shows that grass has been planted on the property and the sides have been stabilized. An Affidavit (Exhibit M) from Mr. George Stephenson, a civil engineer, is included which affirms that the silt and supersilt fences are stable and there is, nor has there ever been, an imminent danger to anyone. Mr. Foote stated that this is not even a relevant consideration since the Certificate of Imminent Peril was solely issued to end the automatic stay that would last between the violation notice and the Appeal being heard by the Board of Zoning Appeals (BZA). The County was so anxious to stop any additional fill material from coming to the property that they issued a Certificate of Imminent Peril when there was no imminent danger. However, his client did not go to court to seek a restraining order since they were able to get an early BZA date. Mr. Foote assured the Board that E & S controls, in the form of both silt and supersilt fencing, are in place and the civil engineer's Affidavit (Exhibit M) verifies that these are secure.

Mr. Foote referred to a plan, prepared by Mr. H. Aubrey Hawkins, a licensed Land Surveyor, which indicates that the site currently drains the same as it always has. He also drew attention to additional photos (Exhibits C-1 through C-9). Picture C-8 was taken in 2015, prior to any work being done, from Brent Town Road at the pond to which everything in the area currently, and has always, drained. Picture C-9 is a still photo of the same pond which was taken by the drone pilot on October 5, 2018 after all of this "disaster" was supposed to have occurred. In comparing the two photos (C-8 and C9), Mr. Foote stated that they look the same, with no evidence of any disastrous erosion and sedimentation that was supposed to have occurred. He stated that, as evidenced by the Affidavits, this is a stabilized facility and is functioning as it should.

Mr. Foote reviewed National Weather Service rain reports (Exhibit N) for the Dulles region, which includes Fauquier County. These reports indicate that June was a normal month with approximately 105% normal rain, but when you get to July, the rain was 305% normal. In August, rain totals were 205% normal and 188% normal in September. The Affidavit of Mr. Stephenson, a civil engineer, highlights the fact that silt and supersilt fences are not designed to take that amount of water. With this enormous amount of rain, it is not possible to say how many silt fences failed in this County or other parts of northern Virginia during this time. Mr. Foote emphasized that to somehow suggest that a single picture taken before the property was stabilized is an example of how this was a danger to others is a mistake.

However, Mr. Foote reminded the Board that this is not the question before them. The issue centers around the question: "Is this the expansion of a non-conforming use?" He asserted that it is *not* the expansion of a non-conforming use. First, the fundamental question with respect to a non-conforming use is whether there has been a change in the character of the use. The use of this property has never changed. The use – a turf farm – continues to this day as a valid

conforming use. It will always be an agricultural use and if there were not soil on the property that the County does not like, this would never be a question. What has been changed is not if this is a permitted use, but it is a question of how you can build it. Can you use this material to build it? Mr. Foote stated that the County actually knows better and used the analogy of a person being granted permission to construct a 10 story building. You have constructed five stories and then an Ordinance is passed stating that you cannot build a 10 story building. This is what has happened in this case. This property is always going to be a turf farm. It was always designed as a turf farm, has been permitted by the State, to the extent they have been involved with it, and the County has always known it was going to be a turf farm. It has been timbered for that purpose, but now the County is saying you cannot build that 10 story building. An even better example is: "We are going to let you build that 10 story building, but remember how you were going to use steel? Well, you cannot use steel above the fifth floor anymore." This would be absurd, but that is what is being said here with a restriction on a use – a turf farm – that is lawful. This is a continuation of a permitted use, not an expansion.

Mr. Foote stated that the County's citation of a Supreme Court case (Board of Supervisors v. Trollingwood Partnership) does not apply since it had to do with someone with three parcels of property, with a site plan for two of them, but who tried to extend its concept to a third parcel and the Court said no. Mr. Foote stated that no plan is involved and this is not a phased project. Mr. Schottler's Affidavit (Exhibit D) indicates it was his intention to start and complete a turf farm on the property subject to weather conditions permitting and the availability of material.

Mr. Foote then drew attention to the contracts (Exhibits H and I) between Mr. Schottler and R.C. Hawkins Construction Company, Inc. for the initial clearing of the road, the removal of stumps and logging debris and the work to construct a sod farm. Exhibit J, dated September 14, 2018, the day after the adoption of Ordinance "D," is a contract between Lane Contracting, SP Trucking, and R.C. Hawkins Construction Company, Inc. to bring in fill. Mr. Foote noted that the contract indicates the job location as being "Route 395 and Seminary Road." Lane Contracting is the Virginia Department of Transportation (VDOT) contractor to make the improvements to Route 395 and Seminary Road. The County states that his client is not a contractor with the Commonwealth of Virginia. He stated that VDOT does not own a depository for excavation materials. VDOT uses Lane Contracting to build the improvements and they have contracted with SP Trucking to take it to another location. In this instance, it was taken to this facility, the subject property. Consequently, that contract down to R.C. Hawkins Construction Company, Inc. and the Schottler Turf Farm means that this is a contract between VDOT and this property to dispose of nonagricultural fill. Exhibit K, dated September 17, 2018, is a contract with FAM-66 (FAM Construction, LLC), which is building I-95. Mr. Foote contended that the dates of each of these contracts is *after* the adoption of Ordinance "D." Therefore, the only material brought to the subject property since the new Ordinance was approved, is that which has come from a VDOT construction project. He stated that County staff has acknowledged that there is an exemption from the requirement of obtaining a Special Exception for materials from a Commonwealth of Virginia project. The County just does not believe the Appellant is a contractor for the Commonwealth. He, once again, stressed that VDOT does not place this material in its own depository. It hires people to take it to another location. The County has argued that this would mean it could be taken to any location and that is exactly right. The General Assembly intended for VDOT and the Commonwealth not to be burdened by local restrictions on their ability to place this material

where it is economically feasible to do so. They do not want localities to impose regulations on them and require that the material been taken to other states. Just as Fauquier County, Prince William County and other localities would like to have control over this, the General Assembly has already said that would be too expensive since they are already paying billions of dollars for this and it does not want every jurisdiction to be able to put obstacles in place. That is why this exemption exists. He stated that if the Board looks closely at these contracts, it cannot escape the fact that the Appellant is a permitted contractor. Mr. Foote emphatically stated that this project is not the unlawful expansion of a non-conforming use since it is a permitted agricultural use, but the County is trying to stop it from being completed. He contended that, in his judgment, the purpose of issuing the Certificate of Imminent Peril was to focus on the complaints made about the project and to poison this Board against this project because there are a number of trucks involved. However, this is a legally irrelevant issue and, as mentioned previously, only had to do with the automatic stay that exists between the issuance of an Official Notice of Zoning Violation and Corrective Order and the hearing of an Appeal by this Board. He noted that during this automatic stay period, the Appellant could have continued to bring in material completely legally. But, because a Certificate of Imminent Peril was issued, the Appellant had to stop hauling, which was done. The property had already been stabilized, so during that time, the Appellant planted the cover on the field to make sure it does not erode during the winter.

In that the Appellant's allotted time was almost up, Mr. Meadows asked the Board if they wished to continue hearing from Mr. Foote.

Board members indicated that they would like to give Mr. Foote five additional minutes for his presentation.

Mr. Foote displayed a map showing the current grade of the property. In addition, he once again referred to the Affidavit of Mr. H. Aubrey Hawkins (Exhibit L), which states that, at most, some portions of the property were regraded to an elevation of approximately 14 feet rather than the 15 to 20 feet alleged by the County. Mr. Foote stated that Mr. Schottler, who has been a sod farmer for approximately 40 years and a past president of the Virginia Sod Farm Association, can tell you that the whole purpose is to make this property suitable for sod farming. He further explained that the County's alleged expert witness, Mr. Vernon W. Cooper, has never run or built a turf farm nor has he been to the subject property. Therefore, the question of how he might have done it has nothing to do with the issue at hand.

Mr. Foote reiterated that there is no illegal expansion of a non-conforming use. Referring to the analogy used earlier, he stated that it is the same as not allowing steel to be used in the remaining five floors of the hypothetical 10 story building. It is an effort to change the means of construction and to stop a lawful use because this is, in fact, work being done on behalf of the Commonwealth of Virginia. They are exempt since the Board's authority extends to interpretation, not only of the Ordinances, but of the laws of the Commonwealth. Mr. Foote stated that he is not asking the Board to declare the Ordinance invalid, but to properly interpret the laws as they apply.

Mr. Foote also presented the Board with a packet containing Virginia Department of Transportation (VDOT) contract information.

In conclusion, Mr. Foote 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. Chipman stated that he understands Mr. Foote's argument that VDOT does not have a waste disposal site, but he inquired if there is a written contract between Lane Contracting or SP Trucking and R.C. Hawkins Construction Company, Inc. Mr. Chipman stated that he does not see the correlation that R.C. Hawkins Construction Company, Inc. has a direct contract with VDOT.

Mr. Foote stated that SP Trucking, one of the largest contractors in the area with the necessary trucks to haul the excavated material, has a verbal contract with FAM-66. He noted that Lane Trucking also has a verbal contract with SP Trucking as well. Once they are called, SP Trucking picks up the material from the I-66 and I-395 construction sites. He stated that, for the record, these trucks carry approximately eight cubic yards per load. The Appellant does have a written contract with both Lane Contracting (Exhibit J) and SP Trucking (Exhibit K).

Mr. Tissue asked about the date Mr. H. Aubrey Hawkins, Land Surveyor, prepared the plans.

Mr. Foote responded that he asked the surveyor to run field topo on the existing site to determine where the drainage and drainage divides are located, and the plans were prepared just this month.

Mr. Tissue inquired if there had previously been a grading plan prepared to show the entire parcel or a corresponding E & S plan generated as required for the amount of fill that was brought in.

Mr. Foote stated that, as a matter of law, there is no requirement for these since an agricultural use is exempt.

Mr. Tissue noted that even if it had been for a qualified farm management plan, you are required to provide Best Management Practices.

Mr. Foote stated that the plan does not need to be very extensive and is included in the notebook previously distributed. He noted that the plan was prepared in connection with the remediation of the wetlands issue. He explained that because this is an agricultural use, no jurisdiction can require an E & S plan. He referred to the Letter of Agreement (Exhibit E) between Mr. Schottler and the DEQ. Mr. Foote also stated that Mr. Schottler and the Appellant have done a large amount of land movement work and they designed the project, which is all they are required to do.

Ms. Cooper asked why the property owner decided to operate a sod farm in a wooded area with wetlands.

Mr. Foote responded that the property was inexpensive and a sod farm is very valuable. He also stated that Mr. Schottler currently owns a sod farm in Prince William County. Mr. Foote stated that there are very little wetlands on the property and those that are there are secure. He acknowledged that the property owner is being compensated for accepting the fill, thereby making a profit while the sod farm is being developed.

REBUTTAL – COUNTY

Mr. Walton stated that some of the discing has been completed and the seed to grow the sod has been planted. In referring to Exhibit C-5 in the Appellant's binder, he stated that if you look closely at the photo, there appears to be a lot of root material as well as some garbage in the soil. Mr. Walton stated that, in his opinion, this is a soil dump and a sod farm is suspect to say the least.

Mr. Walton acknowledged that Exhibits H, I, J and K, provided by the Appellant, do refer to contracts with VDOT. However, the Offsite Material Tracking Forms (County's Attachment 5) include private developments, which are not exempt, that are proposing to bring dirt to the site.

REBUTTAL – APPELLANT

Mr. Foote stated that rye grass – not sod – has been planted on the property for stabilization during the winter. He also clarified that *none* of the material delivered to the site since the adoption of Ordinance "D" has been from a private developer. Rather, it has all been from VDOT contractors.

ACTION

Board members noted that a tremendous amount of material has been received during this meeting.

Mr. Walton noted that the Appellant's representative has stated that a transcriptionist is present and a copy of the meeting transcript will be provided to the Board.

Board members also requested copies of information displayed on the board by the Appellant's representative as well as the plans.

Mr. Shellenberger inquired if the Board would like to have an independent counsel present at its next meeting.

Mr. Meadows responded that the Board will get back to him on this matter.

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

On motion made by Mrs. Cooper and seconded by Mr. Chipman, it was moved to postpone consideration of this item until our next regularly scheduled meeting.

The motion carried unanimously.

OTHER BUSINESS:

None.

ADJOURNMENT:

There being no further business, the meeting was adjourned at approximately 3:25 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.