MINUTES OF
FAUQUIER COUNTY BOARD OF ZONING APPEALS
APRIL 1, 2021

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, April 1, 2021, 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 Mr. Adam Shellenberger, Chief of Planning; Martin Crim, Esq.; Ms. Mary Catherine Anderson, Deputy County Attorney, who joined the meeting after the Appeal; and Mrs. Meredith Meixner, Planning Associate.

Staff participating remotely included Ms. Heather Jenkins, Assistant Chief of Zoning/Development Services and Ms. Lauren Runyan, Planner.

LETTERS OF NOTIFICATION AND PUBLIC NOTICE:

Mr. Shellenberger 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 Mr. McDade, it was moved to approve the March 4, 2021 minutes.

The motion carried unanimously.

REGULAR AGENDA:

APPEAL – AZAD-21-014645, 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 reviewed the Rules of Procedure Regarding Appeals and opened the public meeting.

COUNTY PRESENTATION

Ms. Jenkins provided background information on the property, stating that it consists of approximately 56 acres, is zoned Rural Agricultural (RA) and is located on the south side of Brent Town Road, approximately 3.5 miles south of the Village of Sowego. The primary access is a roadway that has been constructed within a private access easement – Paige Leigh Anne Way. RCH, LLC purchased the property on June 28, 2019.

As of September 13, 2018, the Zoning Ordinance regulates the placement, storage or disposal of nonagricultural fill. Nonagricultural fill material is defined as *"uncontaminated excavated material, to consist solely of soil or rock that is brought to a property where the material is not generated from."* Other materials such as gravel and asphalt millings, are acceptable solely for maintenance (i.e., repairing a permitted driveway). The use requires the approval of an Administrative Permit or a Special Exception. Zoning Ordinance Section 10-101.1 states that *"...non-conforming uses are* ***limited to the land area*** [emphasis added] *and buildings* ***existing and being utilized for the use*** [emphasis added] *as of the date the use became legally non-conforming."*

The Ordinance requires Special Exception approval, for properties larger than 10 acres in size, to import nonagricultural fill at a rate greater than 200 cubic yards per day, or a volume greater than 4,200 cubic yards per year. It also requires that the placement of nonagricultural fill on a property must meet certain standards for location, soil quality, use and permitting.

Prior to May of 2017, the property was wooded. The previous owners, Thomas and Jody Schottler, received a permit from the Virginia Department of Transportation (VDOT) on June 13, 2017 for a logging entrance. Shortly thereafter, the property was logged and then the previous owners, along with R.C. Hawkins Construction, commenced importing large volumes of fill.

On May 31, 2018, Michael S. Hawkins applied for Zoning and Land Disturbing Permits to construct a 595-foot long, 16-foot wide gravel accessway. The Zoning Permit was issued on July 23, 2018, specifically for the 595-foot length of roadway that is within the easement area of Paige Leigh Anne Way. No other permits have been issued by the County for this property.

A slide provided on the screen showed the area where nonagricultural fill was placed on the property prior to September 2018. The image showed the fill area and fill embankments,

consisting of approximately 10 acres of the 56-acre property. As of September 2018, the remainder of the property was cleared of trees and vegetation, with no other activity.

Another slide outlined the permitted 595-foot long roadway and showed an extension of approximately 2,200 feet that has been constructed without the required permit. Ms. Jenkins stated that the fill area is located in approximately the center of the photo, with the rear and side slopes of the fill embankment indicated with blue arrows.

In December 2020, the front portion of the property had fill placed to depths of up to 20 feet, while the back portion of the property was cleared and denuded of vegetation except for the wetland swale area.

In early January 2021, Zoning staff began receiving numerous complaints about filling activities on the property, to include increased dump truck traffic entering and exiting the property along Paige Leigh Anne Way, noise from dump trucks emptying loads of fill on the property, and noise from heavy earth moving equipment spreading the fill over the rear portion of the property. Complaints were also received related to dump truck traffic, dirt, mud and debris on Brent Town Road. Consequently, Zoning inspection staff drove along Brent Town Road and determined that the increased traffic was being caused by numerous dump trucks with fill material coming to the property, emptying the fill onto the rear portion of the property, and then exiting the property from Paige Leigh Anne Way onto Brent Town Road, and returning to various construction sites in Prince William County, Stafford County, Fauquier County, and other locations.

The Fauquier County Zoning Inspector, Mr. Keith Broyles, inspected the property on January 4, 2021 and January 14, 2021 and, on both occasions, observed dump trucks emptying loads of fill material in the two areas outlined in yellow on one of the slides. In the outlined area closest to Route 612, Inspector Broyles observed fill material placed in a natural drainage swale feature, raising the ground surface to be level with the higher elevations to either side. On the left side of the outlined area on the slide, Inspector Broyles observed loads of fill material containing concrete rubble, asphalt millings, aggregate, rock and subsoil deposited on the property.

On January 4, 2021, trucks were recorded entering full and exiting empty from 8:45 a.m. to 3:50 p.m. by date and time stamped photos taken from a trail camera mounted along Paige Leigh Anne Way on the adjacent Rainwater property. A total of 34 trucks entered the property on this date (photo log was provided with the staff report as Attachment 3). Based on an average load of 10 to 12 cubic yards per tri-axle truck, this totals between 340 and 408 cubic yards of fill material imported to the property in one day, exceeding the 200 cubic yard limitation allowed in the Zoning Ordinance. As shown on the aerial image provided, the size, scope and area of fill has expanded beyond the area that existed on September 13, 2018.

The photographs provided were taken by Inspector Broyles on January 14, 2021 from the neighboring Hupp property, and look north onto the RCH, LLC property. In response to continuous complaints about dump truck traffic, an inspection by Mr. Broyles, on January 14, 2021, revealed full dump trucks actively depositing fill material on the property. Fill material was placed in the area of a gentle swale that slopes down toward the northern property boundary. The swale area is shown in the location map provided as the dashed blue line. An

examination of the County's GIS topography data reveals the head of this swale was previously located at the edge of the roadway at an approximate elevation of 425 feet, and sloped down to the northern property line to an approximate elevation of 410 feet. This swale area has been filled in so that it is at the same level as the high point close to the road. The large stockpile of fill on another slide was estimated by Inspector Broyles during his site visit to be approximately 7 to 9 feet in height, 10 to 15 feet wide, and parallel to the roadway for a length of 60 to 90 feet.

Another photo marked with a red star was taken along the unpermitted roadway expansion, looking west toward a large stockpile of fill material. In this area the roadway surface has been elevated over the natural ground surface by 2 to 4 feet, as indicated by the blue and green arrows shown marking the toe and top of the roadway embankment.

An orange star indicated the property boundary, looking toward the north. The piles consist of asphalt rubble mixed with subsoil, gravel and concrete mixed with subsoil, as well as large chunks of concrete. For scale purposes, the large piece of concrete that is the high point of the pile, is approximately 6 feet by 6 feet in size. The overall size of this stockpile was estimated by Inspector Broyles to be 120 feet long by 180 feet wide, and 8 to 10 feet in height. The stockpiled fill materials and the roadway fill area are actively eroding, as neither temporary nor permanent stabilization measures have been installed on the property.

An additional slide showed the filling operation, with a dump truck entering and leaving the property, on the afternoon of January 14, 2021. The slide included a series of four photos, which were time and date stamped, taken from a trail camera mounted on the neighboring Rainwater property and pointed toward Paige Leigh Anne Way. Also shown were two photos taken by Inspector Broyles on this same day showing a dump truck being filled with waste excavation material from the Royal Farms construction site at the Opal interchange. The dump truck, which has a green colored cab with white "C & C Trucking" lettering on the side, was followed by Inspector Broyles from the subject property to the Royal Farms construction site, and was observed returning to the property to dump the fill material. The six photos show:

1. Truck entering property full at 2:02 p.m.
2. Truck leaving property empty at 2:19 p.m.
3. Truck being loaded with waste excavation material from Royal Farms in Opal.
4. Full truck leaving the Royal Farms construction site onto Route 29.
5. Full truck entering property at 3:32 p.m.
6. Truck leaving property empty at 3:42 p.m.

Ms. Kerry Wharton, the County E&S and Stormwater Program Manager, was notified that waste excavation material was leaving the Royal Farms construction site and being taken to the RCH, LLC property. Ms. Wharton contacted the Royal Farms construction project manager and Responsible Land Disturber to notify them that their fill was being delivered to a non-permitted site. An email exchange, on January 14, 2021, between Ms. Wharton and the construction project manager was included with the staff report as Attachment 4.

Ms. Jenkins highlighted another slide which showed a white dump truck that was immediately behind the green dump truck, with a time separation between the two trucks of 1 to 5 minutes. The slide shows the following:

1. Truck entering property full at 2:07 p.m.
2. Truck leaving property empty at 2:20 p.m.
3. White truck immediately behind the green truck at the Royal Farms construction site, waiting while the green truck is being loaded with fill material.
4. White truck being loaded with fill material.
5. Truck entering property full at 3:35 p.m.
6. Truck leaving property empty at 3:48 p.m.

These slides show the intensity of the filling operation that occurred on January 14, 2021 where full dump trucks entered the property separated only by a few minutes, and then left empty, returning to the property multiple times with loads of fill material, where the fill was then dumped on the rear portion of the property.

Inspector Broyles directly observed 21 trucks full of fill material entering the property between 12:30 p.m. and 2:30 p.m. Based on the 21 trucks observed by Inspector Broyles during only two hours of the all-day filling operation, and an average of 10 to 12 cubic yards of fill per truck, the fill imported to the property between 12:30 p.m. and 2:30 p.m. would exceed the 200 cubic yard per day limitation allowed by the Zoning Ordinance.

The total number of full dump trucks entering the property on January 14, 2021 was documented by trail camera photographs as 40. Ms. Jenkins stated that she and Inspector Broyles found that the volume of fill material brought to the property between January 1, 2021 and January 25, 2021 exceeded the limits allowed by Zoning Ordinance Section 5-1816.2(1).

Ms. Jenkins stated that, based upon the inspections, photos, research of the property's approvals, and information received, a Notice of Zoning Violation and Corrective Order was issued to the property owner on January 25, 2021. It was determined that the owner was in violation of the Zoning Ordinance by:

1. Construction waste fill material was imported to the property at a rate exceeding the allowable maximum of 200 cubic yards in any one-day period. The fill has been placed closer than 100 feet from the property line; the Appellant has not demonstrated that the fill material is equal to or better than the existing soil on the property; a grading plan and an erosion control plan for the fill has not been submitted; a Land Disturbing Permit for the fill has not been submitted or issued; and a Special Exception for the fill has not been submitted or approved.

2. Expansion of the fill area beyond that which existed as of September 13, 2018. This is an unpermitted expansion of a non-conforming use that requires the approval of a Special Exception.

3. The use of the property to place, store or dispose of fill material requires a Zoning Permit before the use can begin, and the roadway has been extended beyond the permitted 595-foot length.

4. The property was graded, raising the elevation and changing the slope of the property, to include raising the elevation below the unpermitted roadway extension, without the required Zoning Permit.

Ms. Jenkins offered to answer any questions the Board may have. She also stated that Mr. Keith Broyles, Zoning Inspector, is available for testimony regarding inspections of the property. Ms. Kerry Wharton, County E&S and Stormwater Program Coordinator is also available to confirm her communication with the Royal Farms construction manager. In addition, Mr. Steve Rainwater, the adjacent property owner, is available for any questions regarding the source and accuracy of the trail camera photos.

In conclusion, Ms. Jenkins stated that sufficient evidence has been presented to uphold the Zoning Administrator's January 25, 2021 Notice of Zoning Violation and Corrective Order, and respectfully requested that the Board do so.

APPELLANT PRESENTATION

Mr. Meadows inquired if the Appellant had received and read a copy of the Rules of Procedure Regarding Appeals.

Ms. Mernin, speaking via livestream, responded that her client did receive the Rules of Procedure Regarding Appeals and he has submitted a signed copy acknowledging such.

Ms. Mernin stated that this matter involves the Appeal of a Notice of Zoning Violation and Corrective Order dated January 25, 2021 issued to her clients, RCH, LLC and Michael Shawn Hawkins, concerning nonagricultural fill material. The Notice of Zoning Violation specifically stated *"Staff has determined the property has been used to store or dispose of nonagricultural fill material in excess of the limitation of 4,200 cubic yards per calendar year and in excess of the limitation of 200 cubic yards per day allowed on properties of 10 acres or greater in size for the 2021 calendar year, without the required Special Exception and Zoning Permit."*

The property subject to this Appeal is an approximately 56-acre parcel that abuts Brent Town Road in the southeastern portion of Fauquier County and is owned by RCH, LLC, of which Mr. Michael Hawkins is the sole member. Mr. Hawkins is currently engaged in establishing a turf farm, which is a permitted use in the Rural Agricultural zoning district, on the property. The owner has, in fact, already sold a turf crop.

The property was conveyed to the current owner, RCH, LLC, on June 28, 2019. It is important to note that this property has been the focus of Fauquier County scrutiny since it was purchased in 2017 by the previous owners, Thomas and Jody Schottler. Mr. Schottler is a turf farmer by trade and when they purchased the property in 2017, it was their intent to establish a turf farm, which is a by-right agricultural use. Mr. Hawkins began helping the Schottlers build a turf farm shortly after they purchased the property.

It should be noted that a successful turf farm requires maintaining a very specific grade to grow and hydrate the turf crop. This is commonly done by creating an almost flat surface on

which to grow the turf grass. Almost immediately after the property owners began constructing the turf farm, the County and neighbors conspired in any way they could to stop it from being built, erroneously claiming that the property was being used for something other than a turf farm. After receiving overt threats and enduring much distress, Mr. & Mrs. Schottler decided to sell the property to RCH, LLC, which had been hired to assist in building the turf farm. The property was specifically acquired by RCH, LLC so that Mr. Hawkins could continue to build a turf farm on the entire property. In fact, Mr. Hawkins did successfully build a turf farm and, to date, has sold several thousand yards of premium turf grass.

Well after Mr. & Mrs. Schottler purchased the property and RCH, LLC began working to build the turf farm on it, the County adopted, what was then known as Ordinance "D," on or about September 13, 2018. Ordinance "D" constitutes a series of amendments that regulate the storage or disposal of nonagricultural fill material. However, Ordinance "D" was enacted after a turf farm was planned and had already started to be established on the subject property. This is the first issue related to the Notice of Zoning Violation and Corrective Order since the Supreme Court of Virginia defines non-conforming uses as those that were lawful at the time of adoption of a zoning ordinance or amendment thereto, but that would be unlawful if subjected to the existing provisions of law. Virginia Code § 15.2-2307(C) empowers localities to restrict the expansion of a non-conforming use. The Supreme Court of Virginia has stated that the principal inquiry in determining the expansion of the use is whether the character of the use has continued or impermissibly changed. The Court has held that whether a non-conforming use has been increased in size or scope is merely one circumstance relevant to the key determination of whether the character of the use has been changed and that the relevance of any such increase depends upon the quantum of the increase and its effect upon the purposes and policies the zoning ordinance was designed to promote. Section 10-101.2(A) of the County's own Zoning Ordinance states that the *"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."* Also, as previously noted, the Appellant has been working the entire property to turn it into a turf farm. They started from the front and worked toward the back, always working and preparing the entire property to become a turf farm. This has been true since 2017. They have never expanded the area they were working on and they have never tried to include areas of the property that were not originally intended to be used as a turf farm. This satisfies the Zoning Ordinance requirements.

The Appellant has been lawfully engaged in the beneficial use of a permissible quantity of nonagricultural fill material with the explicit purpose of filling and grading an entire property to establish a lawful turf or sod farm since the Schottlers purchased the property in 2017. As noted, this was prior to the enactment of Ordinance "D" in 2018. Establishing a turf farm is a permitted use in the RA (Rural Agricultural) zoning district and there have never been restrictions on how much fill is required to level a parcel for this lawful purpose. In addition, prior to Ordinance "D," there were no restrictions of any kind on the importation of nonagricultural fill material.

The Zoning Administrator's argument is to the plain effect that the continued placement of clean fill material on the property, no matter the amount, without the County's legislative approval is an expansion of a non-conforming use, is an expansion of the area as a turf farm

and is an increase in the area that was originally used to establish the turf farm before Ordinance "D" was enacted. However, this is not Virginia law.

The Appellant contends that this activity is not an alteration or variation in the use or an impermissible expansion of the use. Rather, this is a continuation of precisely the same use the prior owners and the Appellant were making of the property the day before the enactment of Ordinance "D," which is to turn the entire property into a turf farm, and they have continued doing so without stopping, since that time. It is the type of activity contemplated by the County when it enacted those non-conforming use provisions of its Zoning Ordinance in Section 10-101.2(A), which says: *"…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."* The use of fill, whether nonagricultural excavation material or otherwise, is reasonably customary and incidental to the ultimate agricultural use of a turf farm and is not in any way an alteration or variation of the use.

Previous litigation over the use of the property has focused on whether it is being put to agricultural use, and thus whether it is obliged to comply with the County's Erosion and Sediment Control and Stormwater Management Ordinance. The Fauquier County Court has held that the use of the property is agricultural, and while that decision is on appeal, the ruling is still in effect. This Appeal is based on an entirely different ground – that the entire property has been used as an agricultural site and indeed has been in preparation as a turf farm since a time before the County enacted Ordinance "D," which, therefore, cannot affect the operations of the turf farm since its conversion from a lawful by-right use, to what is now a lawful non-conforming use.

Moreover, the Appellant has already affirmatively extended their efforts to construct the turf farm to the full extent of the property and have even grown and sold turf. The Appellant has also done so consistently with permits issued by the Virginia Department of Environmental Quality (DEQ), U.S. Army Corps of Engineers, the Virginia Department of Forestry and Fauquier County. Fauquier County issued a permit for the entrance to the turf farm. The entire property has been timbered pursuant to a permit issued by the Commonwealth; silt fencing has been placed throughout the property; and diversion berms have been constructed to protect wetlands throughout the site – all in direct preparation for the continued development of the property as a turf or sod farm. As a result, the Zoning Administrator improperly asserted that the Appellant violated the Zoning Ordinance concerning the issue of an expansion of a non-conforming use without proper approval and that a Special Exception or other approval would be necessary. As such, the alleged violation should be dismissed.

If this Board decides that the property is subject to the restrictions of the codified Ordinance "D," the other issue with the Notice of Zoning Violation relates to the allegations in the Zoning Administrator's reply to this Appeal as well as what she has alleged today. The Zoning Administrator alleged, in her Notice of Zoning Violation, that from January 1, 2021 to January 20, 2021, that the Appellant either brought over 200 cubic yards of nonagricultural fill to the property within any 24-hour period or, alternatively, that the total amount of fill brought to the property exceeds 4,200 cubic yards within a one year period. The Zoning Administrator alleges that she can prove that the dump trucks came onto the property on two specific days in January 2021 bringing in more fill than is allowed by statute. However, the

pictures that were provided just show trucks coming in and out. They do not show any of the specific material being deposited on the property, exactly where all of the fill was being placed or specifically what it was used for. Furthermore, there is no way the County employees could have observed exactly where all the material was going or what it was used for from the vantage point of where they were allegedly standing. In addition, the Zoning Administrator provided no concrete evidence of what materials were included in the trucks or just how full the trucks, in fact, were to determine that the amount of fill material being brought in was more than the Zoning Ordinance allows. In fact, there is no way for her to definitely know that without her being on the property, looking at the material and testing it herself. Notably, the Zoning Administrator has also not provided any concrete evidence of the negative impacts that are alleged to have been caused from the dump trucks on the property related to noise and dust. It is just that other property owners have been negatively impacted. The Zoning Administrator also says there is a general increased risk of flooding and water damage, but provides no evidence of flooding or water damage occurring during the time of the alleged Zoning violation. In addition, the Zoning Administrator alleges the safety of local roadways has been negatively impacted; however, yet again, she does not provide any concrete proof of just how the roads have been negatively impacted. The Appellant argues that the Zoning Administrator did not provide proof because evidence of these perils does not exist. Generalized statements cannot be made and then passed off as facts.

Finally, the Appellant contends that the loads of fill material brought in were aggregates for building and maintaining a farm road, which is allowed under the Zoning Ordinance. The County issued a Zoning Permit and a Land Disturbing Permit specifically related to building a road on the property. The property is large and farm roads are necessary to be able to get on and off the property. For these reasons, the Zoning Administrator's allegations against the Appellant related to the amount of nonagricultural fill being brought onto the property in 2021 are in error. This Board cannot base its decision on broad, generalized, inconclusive and unsupported facts.

In conclusion, Ms. Mernin respectfully requested that the Zoning Administrator's January 25, 2021 Notice of Zoning Violation and Corrective Order be dismissed as it is improper and runs contrary to the established principles of Virginia law concerning non-conforming uses.

REBUTTAL – COUNTY

Ms. Jenkins noted that the Appellant's representative has asserted that a change in character is required before a use becomes non-conforming. However, this is not the case. The County Zoning Ordinance, in Section 10-101.1, clearly states that *"...non-conforming uses are limited to the land area and buildings existing and being utilized for the use as of the date the use became legally non-conforming."* As shown earlier in our presentation, the map clearly indicates that, as of September 2018, the land area being used for the filling operation was on the front portion of the property near Brent Town Road and did not include the portion behind that. The aerial imagery clearly shows that the fill operation was limited to the front area and not the rest of the property.

The Appellant's representative bases part of her argument on Zoning Ordinance Section 10-101.2(A), which 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." However, expanding the fill area by more than half – twice as large as it was – is not trivial, insubstantial or incidental. Furthermore, Section 10-101.2(B) clearly states: *"A non-conforming use which is non-conforming solely because the use now requires an Administrative Permit, Special Permit or Special Exception…may only be expanded subject to an Administrative Permit, Special Permit or Special Exception…"*

Also, the Appellant's representative refers to State law as well as findings of the Virginia Supreme Court. I would direct the Board members to my response to the Appeal in which I included an excerpt from the *Chesterfield County v. Trollingwood Partnership* case, which clearly shows that just because a project had a future phase or future area does not mean that the future phase or future area enjoys the non-conforming status and can be enlarged or further developed.

The Appellant's representative also contends that there is no way to tell if fill material was in the trucks and there is no proof of what material was in the trucks. However, Mr. Broyles, the Zoning Inspector, was at the property on both January 4, 2021 and January 14, 2021, as stated in my response, and he observed fill material in the trucks. I do agree it is hard to see the material that is in the trucks from the photographs. However, the fill is there and you can see the growing area and volume of the fill material just by observing the change in the site as shown in my earlier presentation. As can be seen on the photographs, the fill areas that were marked in yellow during my presentation are the areas that have been active and have been receiving fill. As shown, there is grass on the front portion indicating that it has not been disturbed.

The Appellant's representative has also stated that the County has no proof of what material was in the trucks. But, on several occasions, trucks were followed directly from the construction sites where they were filled to the property. One construction site was the Royal Farms project at the Opal interchange where the fill material was loaded into the trucks and taken to the property. They were followed from the property to Royal Farms and then from Royal Farms to the property. Also included in my earlier presentation was a photograph of some of the materials that were being brought to the property. This material included not only soil, but a large pile of aggregates, concrete and asphalt rubble which were mixed with sub-soil and huge chunks of concrete.

Ms. Jenkins concluded by saying there is plenty of proof through observation of the material that was brought to the property and the increasing volumes. She stated that both Mr. Keith Broyles, the Zoning Inspector and Mr. Steve Rainwater, the adjacent property owner, are available should the Board have questions.

REBUTTAL – APPELLANT

Ms. Mernin emphasized that, since 2017, it was the intent of the owners for the entire property to be a turf farm. Since that time, the property has been prepared to become a turf farm, which included timbering the entire property. She stated that you have to start somewhere, so the owners started in the front and were working toward the back.

The Zoning Administrator has cited a case in the Virginia Supreme Court related to the issue of phasing; however, this was not an exact phasing case because, in this situation, the entire property had been timbered and was being prepared as a turf farm. Just because the Appellant started in the front and was working toward the back does not mean that the entire property was not intended to be a turf farm at the time Ordinance "D" was enacted as the Zoning Administrator alleges. It is all one property which was being timbered to become a turf farm prior to the enactment of Ordinance "D."

While fill material was brought to the property, it is still not clear exactly how much was brought in. However, it was certainly not as much as the Zoning Administrator has alleged was delivered during the time period stated in the Notice of Zoning Violation and Corrective Order. Therefore, it would be speculative for the Board to determine the amount exceeded the daily or yearly limits.

For these reasons, Ms. Mernin requested that the Zoning Administrator's determination be struck down and not upheld by the Board.

QUESTIONS FROM THE BOARD – MR. McDADE
RESPONSES – MS. MERNIN (ITALICS)

The following questions (bold) were asked by Mr. McDade, with responses from Ms. Mernin, the Appellant's representative, in italics:

The property transferred to the current owner in June 2019 and that was when Mr. Hawkins took ownership of it – correct?

Yes. That is when RCH, LLC took ownership of the property and Mr. Hawkins is the sole member of RCH, LLC. Both Mr. Hawkins and RCH, LLC had been doing work on the property for Mr. Schottler prior to that date.

Is the part of the property which has already produced a turf crop the same portion that was used as a turf farm prior to June 2019?

The entire property has been worked on to become a turf farm. The owners started in the front, so that portion was done first and had been working their way through the property. The front portion has already been completed so they were able to yield a turf crop.

And the portion of the turf farm that has been harvested, was that from the portion of the property that was turned into a turf farm prior to June 2019?

Yes.

How much of the remaining property is there – approximately 30 – 35 acres?

There is a fair amount, but I am not sure off the top of my head. I have not been out to the property recently, but the front field area is completely done and a crop has been able to be

harvested. I know that in the back there is work being done, but I am not sure how much of that has been completed to date.

We have seen photographs of the property. What has the elevation increase been in that back 35 acres since June 2019?

The back acreage is the portion that was being worked on. There has been some discrepancy with the front elevation and the County is alleging that there was a 12' berm area, but we have brought in an expert who has indicated that it was only 7' to 8' to get that ground leveled.

Assuming it is 7' to 8', how many cubic yards of fill material would be necessary to level 30 acres? It would be well in excess of 10,000 cubic yards, would it not?

Right now, we are talking about the violations in January 2021 and the back acreage is not done yet – it has not been leveled.

In your presentation, sometimes you used the term "calendar year" and at other times you used the term "year." Is it your position that we are limited in our decision only to calendar year 2021 or to a 12-month calendar period regardless of when it began?

We are talking right now about a specific violation that was alleged for 2021. The County is alleging there was a violation of the Zoning Ordinance because on specific days in January 2021, the amount of fill material brought to the property far exceeded the amount that could be brought in over a 24-hour period or in one year.

But, there are two issues. One is related to how much was delivered to the property in a day. The County has presented evidence that specifically on January 4, 2021 and January 14, 2021, in excess of 240 cubic yards came in. There is also an allegation that over a one year period of time, more than 4,200 cubic yards came in. Is it your position that we are limited to considering an annual amount in 2021 or can we look at a 12-month period?

We would argue that it was limited to 2021 when it is alleged that the violations occurred.

The County has indicated that they observed material coming from the Royal Farms Opal interchange construction site directly to the property. Is it your position that construction debris would constitute nonagricultural fill?

It is our position – if the Board does not agree that we are not subject to the Zoning Ordinance regulations – that what has been presented and what has been represented by the County does not prove that the amount of fill material brought to the property in a 24-hour period exceeded the amount that was allowed.

Construction debris would be nonagricultural fill, would it not?

It depends on what is included in that. I do not know exactly what was in those trucks.

While you may not, photographs presented by the County showed that the fill material included asphalt and concrete, among other things. Do you contest that this was an accurate observation?

So, that is what is being observed. I would argue that you cannot determine exactly what material was in each truck or the exact amount of fill material the trucks contained based on the pictures and the representations made today.

Was Mr. Hawkins or his company paid to dispose of the construction debris, which he deposited on that property? Also, do you know how much he was paid over the past year to deposit construction debris on that property?

I know there was payment for the hauling, but I am not sure exactly how much that payment was off the top of my head. I do not want to misrepresent.

You also indicated the question is how much material was in each truck. Is it your position, for example, that on January 4, 2021 they had 34 empty trucks come to the property and leave empty? Do you contest that they came to the property and deposited construction debris from the Royal Farms construction site?

It is our position that there is no way to quantify exactly how much was deposited based on the County's observations or the photos that were provided.

Based on the pictures provided, there has been a significant increase in the elevation of the property that would require more than 4,200 cubic yards of material.

But, I would again argue that there is no hard proof that all of this came from outside material. Some of the material could have come from the site itself.

Looking at the photographs, there certainly was no great excavation on the property. If the purpose was to level the property, it would make no sense to dig a hole in one place on the property and then place the material in another area, only then to grade it so that it would be level. That seems like a totally illogical argument. How is it not?

You could also be moving dirt from different areas. Obviously, the ground itself was hilly and not level, so in order to create a flat grade, which would be necessary to build a turf farm, you would have to be able to level it, which would include making sure all the ground is the same or uniform. This would involve using parts of the property that may be significantly higher than others to help achieve that.

From the photographs, it appears that there was debris deposited within 100 feet of the property line. Do you contest that?

I would say that is what was said. There is no specific proof of that. Again, going back to one of our main arguments, we are not subject to these regulations as this is something that has been in the process of being worked on prior to the enactment of Ordinance "D."

But, there are two separate things. One is a legal issue – whether or not you are subject to it and then there is a factual issue – whether or not there was a violation of the Zoning Ordinance. From the photographs that we saw, isn't there evidence that fill material was put within 100' of the property line?

That is what we were told today.

But, don't the photographs show that?

That is what I have been told the photographs show. But, I have not gone out there and measured or seen anything myself. That is what has been presented by the Zoning Administrator today.

There was an approval for a 195' road. How is the remainder of the road you were speaking about different from that and why would that not have required a permit as required by the Zoning Ordinance?

The Appellant was still working within the confines of the area for which the Land Disturbing Permit and Zoning Permit were issued, so that would be covered under the farm road. It is my understanding, from the Appellant, that some of the material being brought to the property was for the farm road, which was covered by the permits.

Assuming, for the sake of argument, that the debris which was deposited on the property did not degrade the soil productivity of the area, wouldn't you still need a grading permit in order to grade the property and level it and was that permit sought or obtained?

The grading permit would not be necessary because this is something that we argue is a turf farm that was started to be built in 2017, which is before Ordinance "D" was enacted.

Is it possible for a property to have multiple purposes? In other words, from June 2019 to the present, to be used as a depository for construction debris and at some point in the future, once it no longer serves that purpose, to be used for something else, such as a turf farm?

No. I would argue that the entire purpose of purchasing the property by Mr. Schottler, who is a turf farmer by trade, was to construct a turf farm and he hired Mr. Hawkins to help him do so. A turf farm requires a very specific grade to ensure it is not overly hydrated. To do that, many times, higher raised flat surfaces are created, which is what is happening in this case. We would argue that the purpose was to create a turf farm the entire time.

If the intended purpose was to be a turf farm, wouldn't you bring in a certain amount of sand and gravel to provide for drainage and use that to level the property?

In a previous case involving the Appellant, we had an expert in turf farming who said the way it was built is not dissimilar to ways that other turf farms are built. The area itself is obviously able to produce turf grass. If the property was a dump site, as alleged by the County, I would argue that the Appellant would not have been able to produce and sell turf grass.

But, won't it only be used as a turf farm after its use as a depository for construction debris is over and then a significant amount of topsoil would be brought in after that to serve as a basis for a turf farm, which would then change the use from construction debris depository to turf farm? That would be a necessary intermediate step, would it not?

It is our argument that this is all part of building a turf farm – doing whatever is necessary to level the property and then properly grow the turf grass. This is what has been done all along since the property was always intended to be a turf farm. We would not say that it was used for one thing for a while and then became a turf farm. We would argue that the entire property was always intended to be a turf farm and everything that has been done was for this purpose.

QUESTIONS FROM THE BOARD – MR. TISSUE
RESPONSES – MS. MERNIN (ITALICS)

The following questions (bold) were asked by Mr. Tissue, with responses from Ms. Mernin, the Appellant's representative, in italics:

Has the Appellant applied for a farm plan for this property with the U.S. Department of Agriculture (USDA)?

I do not know the answer to that.

You indicated that there were higher elevations on the property from which material was moved to other locations on-site for leveling purposes. Has a grading plan been prepared to indicate exactly what elevations needed to be changed? If so, have those plans been followed?

So, there have been plans showing the areas that were ultimately going to be covered in turf grass.

No, I am asking about some type of contour elevations – a grading plan that shows the difference between the fill and the cut. It would take into account the whole site and what the finished grade will ultimately be.

There have been topographical maps that have been done as well. I cannot answer exactly what types of other plans have been prepared.

Normally, it is a critical step to have plans prepared to help you determine how many yards of material have to be imported or hauled out. Have there been any plans prepared related to the farm road? If so, what were the elevations for that and how much fill needed to be brought in or be removed for that particular road?

Descriptions of the road were included in the permits that were issued by the County. Again, I know that there were plans, but I do not have any at my disposal related to the exact questions that you are asking.

Do you know how much of an area 200 cubic yards of fill encompasses?

No, not off the top of my head.

I can give you almost an exact area – 50' x 55' x 2' of depth is 203 cubic yards. Do you know how much 4,200 cubic yards of material allowed on an annual basis is and how large an area that would encompass?

No, not off the top of my head.

That would be 300' x 150' x 2.5'. Does that provide an idea of just how much material the Appellant has brought in?

So, again, I would argue that there is no way to know exactly how much fill material was being brought in on each of the trucks. We do not have pictures of exactly where each load went or what it was being used for. We have the observations and statements that were made by the Zoning Administrator and the Zoning Inspector as to what they allege they saw. But, I would argue that those would only be estimates and not something definitive to say that there was an actual violation of the Zoning Ordinance.

Yes, that goes both ways.

CLOSED SESSION

On motion made by Mr. Tufts and seconded by Mr. Tissue, it was moved to go into a closed meeting, pursuant to *Code of Virginia* Section 2.2-3711.A. (7 and/or 8), for the purpose of consultation with legal counsel pertaining to specific legal matters requiring the provision of legal advice by counsel relating to Zoning Appeal #AZAD-21-014645.

The motion carried 5 – 0, as follows:

AYES: Mr. Meadows, Mr. Tufts, Mrs. Cooper, Mr. McDade, Mr. Tissue

NAYS: None

ABSTENTION: None

ABSENT: None

Upon reconvening from the closed meeting, Mr. Tufts read the following Certification of Closed Meeting:

The Fauquier County Board of Zoning Appeals, having adjourned into a closed meeting this day for the purposes stated in the resolution authorizing such meeting, does hereby certify that to the best of each member's knowledge:

1. Only public business matters lawfully exempted from open meeting requirements under the Virginia Freedom of Information Act; and

2. Only such public business matters as were identified in the motion by which the closed meeting was convened, were heard, discussed or considered in the closed meeting.

This certification shall be recorded in the minutes of the Board of Zoning Appeals on motion of Max Tufts and seconded by Mr. Tissue.

The motion carried 5 – 0, as follows:

AYES: Mr. Meadows, Mr. Tufts, Mrs. Cooper, Mr. McDade, Mr. Tissue

NAYS: None

ABSTENTION: None

ABSENT: None

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

BOARD ACTION

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-21-014645, stating that the BZA considered the applicable Ordinances, laws and regulations cited by the parties and the argument of Counsel, exhibits and witnesses in this case and the BZA specifically finds:

1) The property owner has not obtained a Special Exception for nonagricultural fill.

2) The BZA finds that the Notice of Zoning Violation and Corrective Order was based on facts that have been adequately shown by the County, and not rebutted by the property owner, each of which is an individual violation of the County Zoning Ordinance:

    a. The property owner has violated the daily and annual maximums for nonagricultural fill set out in the County Zoning Ordinance Section 5-1816.2(1).

    b. The property owner has violated the standards for nonagricultural fill set out in the County Zoning Ordinance Section 5-1816.2(2).

    c. The property owner has expanded the non-conforming use of the property without a Special Exception.

    d. The property owner has graded the property without a Permit.

3) The BZA also finds that there is no vested right in the use of the property for the disposal of nonagricultural fill in connection with the turf farm based on the decision for AZAD-18-010081. For that reason, the Board finds that it is incorrect to say that the existence of a turf farm authorizes the bringing of additional fill material onto the property in excess of the annual and daily amounts provided in Zoning Ordinance Section 5-1816.2(1).

4) The BZA also finds, based on the evidence presented, that the expansion of the area used for nonagricultural fill is an impermissible expansion of the non-conforming use of Zoning Ordinance Section 10-101.2(b) based on the Virginia Supreme Court's decision in *Chesterfield County vs. Trollingwood Partnership*.

5) The BZA also finds, based on the evidence presented, that the nonagricultural fill material was not used solely to build and maintain a farm road and degraded the soil productivity on the property.

The BZA, therefore, upholds the Zoning Administrator's determination.

On motion made by Mr. Meadows and seconded by Mr. McDade, it was moved to amend Condition #2 of the above motion, as follows:

2) The BZA finds that the Notice of Violation and Corrective Order was based on facts that have been adequately shown by the County, and not rebutted by the property owner, each of which is an *independent* ~~individual~~ violation of the County Zoning Ordinance:

    a. The property owner has violated the daily and annual maximums for nonagricultural fill set out in the County Zoning Ordinance Section 5-1816.2(1).

    b. The property owner has violated the standards for nonagricultural fill set out in the County Zoning Ordinance Section 5-1816.2(2).

    c. The property owner has expanded the non-conforming use of the property without a Special Exception.

    d. The property owner has graded the property without a *Zoning* Permit.

The motion carried unanimously.

Thereafter, the original motion carried unanimously, as amended.

Mr. Crim left the meeting.

Ms. Anderson returned to the meeting.

SPECIAL PERMIT – SPPT-21-014673 – RICHARD & KAREN VARONA (OWNERS/APPLICANTS) – WARRENTON EQUIPMENT, LLC – An application for a Category 14 Special Permit to allow farm equipment sales, rental and service, PIN 6982-58-2756-000, located at 6901 Beach Road, Cedar Run District, Warrenton, Virginia. (Lauren Runyan, Staff)

Ms. Runyan reviewed the staff report.

After discussion, Mr. Meadows opened the public hearing.

Mr. & Mrs. Richard Varona, applicants, expressed agreement with the staff report and reviewed the proposal.

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

On motion made by Mr. Tufts and seconded by Mr. McDade, 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.

7. The use of gravel or other similar surface for parking, storage, loading, display and driveways will not cause an undue impact on neighboring properties.

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. Hours of operation shall be limited to between 8:00 a.m. and 5:00 p.m. Monday through Friday and between 8:00 a.m. and 1:00 p.m. on Saturdays.

3. The outdoor storage and/or display areas shall be:
   a. Limited to the areas shown on the Special Permit Plat;
   b. Clearly indicated on the Site Plan Amendment;
   c. Set back a minimum of 10 feet from any property line; and
   d. Limited to tractors, farm implements, and related equipment.

4. All servicing of farm equipment and tractors shall occur in the existing garage. Mechanical service or body work of automobiles, trucks or heavy equipment shall be prohibited.

5. All equipment that is to be stored and/or displayed in outdoor areas shall be in a "ready-for-sale" state. The stocking or display of such items in shipping and/or packing materials is prohibited in the outdoor display areas.

6. Access to the property shall be from Beach Road (Route 616). All outdoor display areas shall be accessed internally. The loading or unloading of equipment from within the public right-of-way is prohibited.

7. The Applicant shall place a sign on the property, adjacent to Beach Road (Route 616), that directs all combination vehicles leaving the site to turn North on Route 29.

8. The facilities shall not be lit at any time other than during the same hours that the facility is open for business, except for necessary security lighting.

9. All applicable Zoning, Building and VDOT permits shall be obtained prior to establishment of the use.

10. A Site Plan Amendment shall be required prior to establishment of the use.

11. For clarification, the uses approved with the previously approved Special Exception (SPEX-16-006012) shall continue on the property. All conditions of the Special Exception shall apply to the property unless amended by the Board of Supervisors.

The motion carried unanimously.

OTHER BUSINESS:

- Ms. Anderson suggested that the Rules of Procedure Regarding Appeals be reviewed to consider any necessary updates. Ms. Anderson stated that she will prepare a revised copy to be discussed at the next meeting.

  Board members were in agreement with the proposal.

- Ms. Anderson provided the Board with a review of legal requirements regarding Appeals and also discussed various aspects of the approval and denial process for other applications.

ADJOURNMENT:

There being no further business, the meeting was adjourned at approximately 4:05 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.