

**MINUTES OF
FAUQUIER COUNTY BOARD OF ZONING APPEALS
May 1, 2003**

The Fauquier County Board of Zoning Appeals held its regularly scheduled meeting on Thursday, May 1, 2003, beginning at 2:00 P.M. at the Town of Warrenton Police Department, 333 Carriage House Lane, Warrenton, Virginia. Members present were Mrs. Margaret Mailler, Chairperson; Mr. Eugene Lofdahl, Vice Chairman; Mr. John Meadows, Secretary; Mr. James Van Luven; Mr. Maximilian A. Tufts, Jr.; Mrs. Sonja Addison and Mr. Mark Rohrbaugh. Also present were Mrs. Tracy Gallehr, Assistant County Attorney; Ms. Kimberley Johnson, Zoning Administrator; Mr. Fred Hodge, Assistant Zoning Administrator; Ms. Holly Meade, Planner; and Ms. Nancy Albert, Office Associate III.

MINUTES: On the motion made by Mr. Lofdahl and seconded by Mr. Tufts the Board of Zoning Appeals voted to make the following corrections to the April 3, 2003 minutes:

- on page 6 after 5a “the motion carried unanimously” should be added.
- on Page 7 after 10a “the motion carried unanimously” should be added.

The motion carried unanimously.

On the motion made by Mr. Rohrbaugh and seconded by Mr. Lofdahl the Board of Zoning Appeals voted to make the following correction to the April 3, 2003 minutes:

- on Page 3 Mr. Denny Nissley represents “Christ in Action” not “Family Fest”.

The motion carried unanimously.

On the motion made by Mr. Lofdahl and seconded by Mr. Tufts the Board of Zoning Appeals voted to approve the corrected minutes of the April 3, 2003 meeting.

The motion carried unanimously.

LETTERS OF NOTIFICATIONS & PUBLIC NOTICE: Mr. Hodge stated that to the best of his knowledge, the cases before the Board of Zoning Appeals for a public hearing had been properly advertised, posted, and letters of notification sent to adjoining property owners. Ms. Albert read the Public Hearing Protocol.

SPECIAL PERMIT #50887 JOHN P. SIFRIT & HEATHER P. SIFRIT (OWNERS)

Applicants are requesting a special permit to locate a small contracting business on the property, identified as PIN #6945-36-1395, located at 7017 Catbird Lane, Marshall District, Marshall, Virginia.

Mr. Hodge stated the a public hearing was held on this item January 3, 2003, the case was continued, and staff had received an email request to withdraw the application.

On a motion by Mr. VanLuven, seconded by Mr. Meadows, the BZA voted to accept the withdrawal of the applications. The motion carried unanimously.

SPECIAL PERMIT #51090 ROY & LOU ANNE BOATWRIGHT (OWNERS)

Applicants are requesting a special permit for sales, service, repair and rental of heavy trucks, vans, equipment and trailers, to include inventory awaiting restoration. The subject property is identified as PIN #7906-00-9413, located at 5391 Telephone Road, Scott District, Warrenton, Virginia.

Mr. Hodge reviewed a letter from Ms. Angela Barlow, attorney representing Mr. and Mrs. Boatwright, dated April 24, 2003 requesting to table the special permit until July 3, 2003.

On a motion by Mr. Meadows, seconded by Mr. Rohrbaugh, the BZA voted to table the special permit until July 3, 2003. The motion carried unanimously.

SPECIAL PERMIT #51121 OUR SAVIOUR LUTHERAN CHURCH TEES (OWNER) & FAUQUIER COMMUNITY CHILD CARE, INC. (APPLICANT)

Applicants are requesting to renew a special permit granted August 3, 2000 for a teen camp for eight weeks during the months of June – August each year. The subject property is identified as PIN #6995-32-1396, located at 6194 Dumfries Road, Scott District, Warrenton, Virginia.

Mr. Hodge reviewed the staff report, a copy of which is attached to and made part of the minutes.

Ms. Susan Sharp appeared at the meeting representing the application and noted agreement with the staff report. She stated the summer camp has programs for teens such as: finances, how to buy a car, and how to work with a realtor to locate housing.

Mr. Meadows noted that the original application was for three years and asked if it was necessary to maintain a time limit. Mr. Hodge stated there was no legal requirement to impose a time limit.

Mr. Lofdahl asked staff if they had received any complaints against the camp. Mr. Hodge stated no.

On a motion by Mr. VanLuven, seconded by Mr. Meadows, the BZA noted that due notice and hearing as required by the Code of Virginia Section 15.2-2204 and Fauquier County Code Section 5-009 had been provided, and voted to approve the special permit, with the following findings and conditions:

Findings

1. The proposed use will not adversely affect the use or development of neighboring properties.
2. It is in accordance with the applicable zoning district regulations and to applicable provisions of the adopted Comprehensive Plan, and does conform to the general standards set forth in Section 5-006(1) through (9) of the Zoning Ordinance of

Fauquier County, which sections are incorporated in this Motion as if fully set forth.

3. The use will be compatible with the neighborhood in which it is to be located.
4. The application does comply with the specific standards in Section 5-804 which apply to the use in question.

Conditions

5. The special permit is granted subject to the conditions of prior approval, except that the two year time limitation for the use is eliminated.

The motion carried unanimously.

SPECIAL PERMIT #51307 LINDA L. STEPHENSON (OWNER) & JAMES W. & EDEL M. KUNKEL (CONTRACT OWNERS)

Applicants are requesting special permit approval to locate a preschool. The subject property is identified as PIN #6947-10-8248, located at 6089 John Barton Payne Road, Marshall District, Marshall, Virginia.

Mr. Hodge stated that a BZA site visit was made this morning, and he reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Mrs. Edel Kunkel appeared at the meeting representing the application and noted agreement with the staff report. She stated she is the property owner.

Mrs. Mailler asked if someone would be outside to meet the children. Mrs. Kunkel stated the parents would take children in themselves and parking would be available. She could consider a rotation system for parents to walk the children into the school.

Mr. Meadows concerns about the safety of the basement door. Mrs. Kunkel stated that all doors will meet Fire Code regulations, and the exterior basement doors will be left open every day for emergency egress.

Mrs. Mailler asked if the school will follow the public school schedule. Mrs. Kunkel said yes.

Mr. Lofdahl asked if the school would be open for a 3 hour period. Mrs. Kunkel said yes.

Mr. VanLoven asked if the maximum number of children would be 20 as limited by Social Services. Mrs. Kunkel said yes.

There was additional discussion among the BZA about the safety of the basement door. Mrs. Kunkel stated the architect could address the issue of the basement door. Mr. Rohrbaugh asked staff if the site plan approval process would include ingress and egress requirements. Mr. Hodge said yes.

Mrs. Addison stated she was concerned with the cattle guard crossing located closest to the house, and that it should be covered.

Mr. Leonard Toll, an adjoining property owner, stated his concerns with the dangerous road that has hidden driveways. He also stated he believed there are protective covenants on the property. Mrs. Mailler stated covenants are a civil matter.

On a motion made by Mr. Lofdahl, seconded by Mr. Meadows, the BZA noted that due notice and hearing as required by the Code of Virginia Section 15.2-2204 and Fauquier County Code Section 5-009 had been provided, and voted to approve the special permit, with the following findings and conditions:

Findings

1. The proposed use will not adversely affect the use or development of neighboring properties.
2. It is in accordance with the applicable zoning district regulations and to applicable provisions of the adopted Comprehensive Plan, and does conform to the general standards set forth in Section 5-006(1) through (9) of the Zoning Ordinance of Fauquier County, which sections are incorporated in this Motion as if fully set forth.
3. The use will be compatible with the neighborhood in which it is to be located.
4. The application does comply with the specific standards which apply to the use in question, Section 5-503.

Conditions

5. 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:
 - (a) remove cattle guard closest to the house.
 - (b) door must meet safety requirements.
 - (c) limited to 20 students.

The motion carried unanimously.

SPECIAL PERMIT #51317 FREEZELAND ORCHARD CO., INC. (OWNER) & THE DOMINICAN NUNS (CONTRACT OWNERS)

Applicants are requesting special permit approval to locate a monastery, identified as PIN #6001-79-5633, located off of Route 638, Marshall District, Linden, Virginia.

Mr. Hodge stated that a BZA site visit was made this morning, and he reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Mr. Joseph Silek appeared at the meeting representing the application and noted agreement with the staff report. He stated the nuns are a cloistered society, that there will be up to 24 nuns in residence, that only 2 nuns will have permission to leave the monastery, and that one or two times a year there may be a function that could include up to 50 people.

Mrs. Mailler asked if the entrance in Warren County has been approved. Mr. Silek said yes.

Jim O'Brien, architect for the applicants, showed the site plan drawing. The monastery is an enclosure with a perimeter that nuns do not leave and the public does not enter. The bedrooms are 10' x 10'. There are offices, classrooms, a choir room and a prayer room. The public will have a separate entrance.

Mr. Lofdahl stated there are 16 cells on the first page on the plan and 4 cells on the second page of the plan, and asked how the total of 24 cells is achieved. Mr. O'Brien said there are 4 cells in the infirmary.

Mr. Lofdahl asked how would they exit in case of fire and Mr. O'Brien stated there are stairs and an elevator.

Mr. Mark McShirley, resident of Freezeland Road, stated he is in support of the application and that he felt the monastery would be a nice addition to the area.

Mr. Lofdahl asked how the extra acreage would be used and Mr. Silek said the total purchase is 80 acres; 58 would be used for the monastery and the remainder would go back to nature.

On a motion by Mr. Meadows, seconded by Mr. Tufts, the BZA noted that due notice and hearing as required by the Code of Virginia Section 15.2-2204 and Fauquier County Code Section 5-009 had been provided, and voted to approve the special permit, with the following findings:

Findings

1. The proposed use will not adversely affect the use or development of neighboring properties.
2. It is in accordance with the applicable zoning district regulations and to applicable provisions of the adopted Comprehensive Plan, and does conform to the general standards set forth in Section 5-006(1) through (9) of the Zoning Ordinance of Fauquier County, which sections are incorporated in this Motion as if fully set forth.
3. The use will be compatible with the neighborhood in which it is to be located.

4. The application does comply with the specific standards for the use set forth in Section 5-603 of the Zoning Ordinance.

The motion carried unanimously.

VARIANCE #51368 JOHN D. METZ (OWNER)

Applicant is requesting a variance from the side yard setback to construct a detached garage on a parcel identified as PIN #6959-82-5137, located at 4661 Morgan's Bluff Drive, Marshall District, Marshall, Virginia.

Mr. Hodge stated that a BZA site visit was made this morning, and he reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Mr. Metz appeared, representing his application, and noted agreement with the staff report.

Mr. Meadows noted that the drainfield is 50' from the house and that there appears to be sufficient room at the rear of the house to construct a garage without a variance. Mr. Metz stated if the driveway is placed at the back of the house there would be an accessibility issue.

Mr. Meadows asked if the garage could be placed on the left side of the house. Mr. Metz said it would cross over the well.

Mr. Rohrbaugh noted he would abstain from the vote due to a conflict of interest.

On a motion by Mr. VanLuven, seconded by Mr. Lofdahl, the BZA noted that due notice and hearing as required by the Code of Virginia Section 15.2-2204 and Fauquier County Code Section 5-009 had been provided, and voted to deny the variance, with the following findings:

Findings

1. Strict application of the Ordinance would not effectively prohibit or unreasonably restrict use of the property;
2. The granting of the variance will not alleviate a clearly demonstrable hardship approaching confiscation, and is not distinguished from a special privilege convenience sought by the applicant.
3. Any hardship or restriction on the use of the property is not by reason of:
 - (a) exceptional narrowness, shallowness, size or shape of the property at the time of the effective date of the ordinance;
 - (b) exceptional topographic conditions or other extraordinary situation or condition of the property;

- (c) exceptional topographic conditions or other extraordinary situation or condition of property immediately adjacent thereto.
- 4. The variance will not be in harmony with the intended spirit and purpose of the Ordinance, and would not result in substantial justice being done.
- 5. The strict application of the Ordinance will not produce undue hardship.
- 6. Such hardship is generally shared by other properties in the same zoning district and the same vicinity, and is of so general and reoccurring a nature as to make reasonably practical the formation of a general regulation to be adopted as an amendment to the Ordinance.
- 8. The authorization of the variance will be of substantial detriment to adjacent property and that the character of the district will be changed by the granting of the variance.

The motion carried on a vote of 6 Ayes, with 1 abstention.

VARIANCE #51377 JOHN D. PIVK (OWNER)

Applicant is requesting a variance from the side yard setback to construct an attached garage, identified as PIN #7915-33-9490, located at 7204 Sunrise Court, Scott District, Warrenton, Virginia.

Mr. Hodge stated that a BZA site visit was made this morning, and he reviewed the staff report, a copy of which is attached to and made a part of the minutes.

Mr. Pivk appeared at the meeting representing his application and noted agreement with the staff report.

Mr. Rohrbaugh asked how long Mr. Pivk had lived at the property. Mr. Pivk stated two years.

Mr. Rohrbaugh asked if there was inside access and any ADA requirements. Mr. Hodge said there are no requirements in the Zoning Ordinance. Mrs. Gallehr stated ADA does not apply to personal residences.

Mr. Rohrbaugh said there is a hardship due to Mr. Pivk needs access to his vehicle. He also noted that if he were to leave, the existing neighbor does not have a problem with the variance.

Mr. Meadows stated there is ample room in the back yard for the garage.

Mrs. Addison asked if the garage in the back would create more of a hardship for Mr. Pivk. Mr. Pivk said yes.

On a motion made by Mr. Meadows and seconded by Mr. VanLuven, the BZA voted to close the public hearing and defer the case until the next meeting. The motion carried unanimously.

APPEAL – MR. AND MRS. WALTER ARRINGTON (OWNERS) & HOME DEPOT USA, INC. (CONTRACT OWNER)

Mr. James Downey, attorney, has filed an appeal to an interpretation made by the Zoning Administrator regarding whether a use is properly classified as “building material sales (more than one acre)” or “retail sales establishment of more than 75,000 square feet.”

Mr. Hodge stated the case was an appeal of the Zoning Administrator’s interpretation.

Ms. Kimberley Johnson, Zoning Administrator, stated that the issue of appeal was whether a proposed use is “retail sales” or “building material sales”. She noted that the specific use for a Home Depot store had not been identified in the initial request for interpretation, but that information had subsequently been provided by the appellant and that it was helpful to know the specific business in evaluating the appropriate classification for the use. Ms. Johnson proceeded to describe the rationale for her interpretation on this issue. She stated that both the “retail sales” and “building material sales” uses are located in Category 12 of the Zoning Ordinance, indicating that both uses involve a retail component. “Retail sales” is defined in the zoning ordinance. In reviewing the definition relative to information provided by the applicant and information found on the Home Depot Corporate home page it became clear that a Home Depot store meets the specific elements of the definition for retail, they sell primarily small or broken lots, rather than bulk items, and they sell primarily to the end user. Ms. Johnson noted that “building materials” are not defined by the zoning ordinance, so she approached the question of whether Home Depot is a “building materials” sales establishment utilizing the common understanding of the meaning of the term “building materials.” While a Home Depot certainly sells building materials, it also sells many items which are clearly not building materials, such as appliances, plants, lawn items, and home décor items such as rugs, lamps, wallpaper, mirrors, etc. The range of materials sold at a typical home depot cannot reasonably be considered to only be building materials. Finally, a review of the evolution of the ordinance reaffirms the intent of the category “building materials” was for a fairly narrow range of raw products typically considered building materials.

Mr. James Downey, attorney for Home Depot, provided his reasoning in support of Home Depot’s position of being a building materials supply rather than a retail sales establishment. Mr. Downey stated that the Zoning Administrator’s rationale being presented today had not been fully described in the initial interpretation letter. Mr. Downey stated that the fact that the ordinance separates general retail from building materials is significant. Mr. Downey referred the BZA to the zoning ordinance use grid, pointing out that building materials are permitted in the zone whereas retail requires a special exception, and that this separation means that there are going to be building material sales outlets that are not classified as retail sales establishments. The fact that the ordinance provides a separate use category for wholesale building material sales means that the building materials sales under Section 3-312 are somehow different from wholesale. The key question is whether Home Depot is building material sales. It is fair to say that Home Depot sells other things besides building materials, but Home Depot is primarily a seller of building materials. But only 10% of the store is utilized for non-building materials; everything else is supplies utilized to build or improve or add to a building. The ordinance gives us a means to resolve this question. Section 2-302 require that you classify Home Depot as building materials because building materials is more specific than retail. Walmart is a good

example of general retail. It is a general merchandiser; whereas Home Depot is not a general merchandiser. Mr. Downy noted that the garden center element of this is irrelevant, as under section 3-318, plant, nursery, greenhouse sales are permitted by right in the district.

Mr. Lofdahl asked for clarification as to whether Mr. Downy was saying the use should be classified under 3-315.7? Mr. Downy responded no, 3-312.9.

Mr. Meadows asked for clarification as to whether Mr. Downy had stated that the use should be classified under 3-315.6? Mr. Downy stated no, but that you have to look at 3-315.6 in order to understand the meaning of 3-312; Home Depot is not wholesale.

Mr. Meadows discussed the nature of the Home Depot sales, noting that Home Depot is a retailer with some building material sales.

Mrs. Addison stated that the Board needs to consider the percentage of building material sales.

Mr. Tom Gallagher, Home Depot representative, said that the information about the types of sales is not based on the actual sales but on the square footage attributable to different areas within the store. The non-building materials portion of sales is approximately 12,000 square feet, with some of these items being seasonal in nature. Mr. Gallagher referred the BZA members to a table in the materials, showing that 10,000 square feet of space is attributable to lumber, 20,000 square feet is attributable to garden and 70,000 square feet is attributable to building materials and supplies.

Mr. Lofdahl asked whether the dollar value of sales isn't more important than the square feet of space? Mr. Gallagher responded that area is a good indicator of sales in retail. Mr. Lofdahl noted that more money was probably made from the square footage of appliances than from 2x4s. Mr. Gallagher stated that there was a difference between making a profit and volume of sales.

Mr. Rohrbaugh stated it is the turn of the items, that lumber turns over faster than appliances, for instance.

Mrs. Addison stated the average was under \$50.00 per sale and Mr. Gallagher stated that is not a reflection of what we sell. Ms. Johnson noted that the \$50 sale number was a good reflection that most purchases at Home Depot are not bulk. Mrs. Addison asked Mr. Gallagher if the average sale is, in fact, \$50? Mr. Gallagher noted that the average sales transaction is \$50 but that statistic shouldn't be a reflection of what we sell and how we sell it but how much we sell it.

Ms. Johnson provided some follow up comments. First, she noted that the specific vs. general did not apply in this instance because the use did not actually fit within the specific entirely. If you have a use that fits in two categories, you pick the more specific. But if a use doesn't quite fit into one of the categories that rule does not apply. She noted that the real issue here is what one considers to be a "building material." Is it everything Home Depot sells? Or even half? All of these other items that Home Depot sells, are we willing to categorize them as building materials? If not, then general retail is the category that covers building materials plus other

items. It was my conclusion that Home Depot sells many things that cannot be considered building materials. Ms. Johnson referred the BZA to attachment 7C from the Home Depot annual report, where they listed sales by category of goods. If you apply building materials in the narrow sense it is commonly understood, the percentage of sales at Home Depot attributable to building materials is fairly small.

Mr. Rohrbaugh asked whether a Wal-Mart or K-Mart would be considered retail. Ms. Johnson responded yes. Mr. Rohrbaugh noted that Wal-Mart and K-Mart might change his battery, or sell him lunch, does that make them something else? Ms. Johnson responded that the determining factor is the extent to which these other things are sold; every business will have accessory items, but at some point the items are not accessory.

Mr. VanLoven stated that he has always looked at a Home Depot as selling building materials..

Mr. Rohrbaugh said that he asked himself, what do you need to build a house? Home Depot provides the various items necessary to build a house. Even landscaping items go into creating a house. The ordinance is lacking in this area, we have had a paradigm shift with big boxes and the ordinance is lacking.

Ms. Johnson noted agreement, stating that the building materials category was devised before the paradigm shift, and was intended to apply to more of a retail lumber yard, such as that across the street from Walmart.

Ms. Addison asked about the proportion of goods in each category, noting the affidavit by the applicant states that 90% of the floor space is categorized as building materials, but that the more recent information stated that 10,000 square feet was lumber, 20,000 square feet was garden materials and 70,000 square feet was materials and supplies. So does garden supplies come under building supplies?

Mr. Downey said, no, but that it could, given the way the industry works.

Ms. Johnson agreed that the affidavit said 90% was building materials and supplies, but noted that it was not clear how those terms were being utilized. A lot of things were being lumped into that category that are not clearly building materials, such as a lamp or a rug or an appliance or tool.

Mr. Meadows stated that attachment 7C provides a break-down into product groups by Home Depot as of February 23, 2003. In that building material sales is 23.1%, by Home-Depot's own admission.

Mr. Rohrbaugh stated that the if you look at what goes into building a house, the definition is much broader.

Mr. Meadows noted that it was important to consider not just what the product is but who was making the purchase of the product, contractor or homeowner. Contractors are 30% of the sales and homeowners are 70%.

Mr. Rohrbaugh discussed how a lumberyard works, based on his experience in the lumber industry.

Mr. VanLuven stated that the point was to determine whether it was building material sales or retail sales.

Mr. Downey stated the observations call for a response and disagreed with Ms. Johnson's statement that 25% is categorized as building materials. Mr. Lofdahl pointed out that it is not Ms. Johnson's conclusion but rather on the piece of paper from the Home Depot web page. Mr. Downey stated that Home Depot uses departments to categorize the store, for how the store is run. It doesn't mean that some things aren't building materials. It is not our own admission that we don't sell primarily building materials; it is our own admission that we departmentalize items we sell. Home Depot sells building materials. It is different from a Walmart, that sells everything. All of the evidence is that building materials are 80 to 90% of sales.

Mr. Rohrbaugh asked if building material sales would require a site plan in C-2. Mr. Hodge stated yes and explained that site plan approval would tie down parking, storm water management, best management practices, landscaping, footprints of the building, screening. Mr. Rohrbaugh asked about traffic impacts. Mr. Hodge stated traffic flow would be considered. Ms. Johnson noted, the design of entrances is a site plan issue.

Mr. Meadows asked counsel if indeed the Ordinance is lacking is it necessary to act now. Ms. Gallehr stated that the BZA needed to determine which was the appropriate category with the current Ordinance.

A motion made by Mr. Rohrbaugh, seconded by Mr. VanLuven, to OVERTURN the decision of the Fauquier County Zoning Administrator failed on a vote of 3 ayes and 4 nays, with Mr. Lofdahl, Mrs. Mailler, Mr. Meadows, and Mr. Tufts voting against.

On a motion by Mr. Meadows, seconded by Mr. Lofdahl, the BZA voted to affirm the decision of the Fauquier County Zoning Administrator by the following resolution:

A RESOLUTION AFFIRMING THE DECISION OF THE FAUQUIER COUNTY ZONING ADMINISTRATOR IN APPEAL #51417 FILED BY THE HOME DEPOT USA, INC.

Whereas, Appellant, The Home Depot USA, Inc., has appealed the decision of the Zoning Administrator made in her March 20, 2003 letter that the proposed use is retail under the Fauquier County Zoning Ordinance, and pursuant to section 3-312.5 will require a special exception; and

Whereas, the Board of Zoning Appeals has concluded appropriate proceedings on the said appeal, and has determined that the decision of the Zoning Administrator should be affirmed; now, therefore, be it

Resolved this 1st day of May, 2003 by the Fauquier County Board of Zoning Appeals that after due notice and hearing as required by law and based upon both the written and verbal record before it in this appeal, the Board of Zoning Appeals does hereby AFFIRM the decisions appealed from.

The motion carried on a vote of 4 ayes and 3 nays, with Mr. VanLuven, Mr. Rohrbaugh, and Mrs. Addison voting against.

ADJOURNMENT: There being no further business before the Board, the meeting adjourned at 4:30 P.M.

Margaret Mailler, Chairman

John Meadows, Secretary

Copies of all files and materials presented to the Board are attached to and become a part of these minutes. A tape recording of the meeting is on file for one year.

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