

Minutes  
Jefferson County Board of Zoning Appeals  
Thursday, September 19, 2013

The Jefferson County Board of Zoning Appeals met on Thursday, September 19, 2013. The meeting was held in the Maintenance Department Conference Room, located at 128 Industrial Boulevard, in Kearneysville, WV. Unless otherwise noted, all requests are pursuant to the Jefferson County Zoning & Land Development Ordinance.

Board members Jeff Bresee, Chairman; Christy Huddle, Vice Chair; Edwin Kelly, Tyler Quynn and Jeffrey Bannon were present. Staff members present were: Jennie Brockman, Director of Planning and Zoning; Seth Rivard, County Planner; Stephen Groh, Assistant Prosecuting Attorney and Jennilee Hartman, Zoning Clerk.

Ms. Huddle motioned to commence the meeting. Mr. Bannon seconded the motion, which carried unanimously. Mr. Bresee called the meeting to order at 3:00 p.m.

1. Approval of the July 18, 2013 and August 15, 2013 meeting minutes.

Mr. Kelly motioned to approve the July 18, 2013 minutes. Mr. Bannon seconded the motion, which carried four (4) in support and one (1) abstention, as Ms. Huddle was absent for this meeting.

Ms. Huddle motioned to approve the August 15, 2013 minutes. Mr. Bannon seconded the motion. Ms. Huddle suggested the following edits:

- a) Page 2, Item #4, third paragraph, third sentence, place the word *having* after the word *not*.
- b) Page 3, Item #5, second paragraph, first sentence, replace the word *represented* with *presented*.

Mr. Bresee called for a vote which carried three (3) in support and two (2) abstentions, as Mr. Quynn and Mr. Kelly were absent for this meeting.

2. Swearing in of members of the public intending to provide testimony.

Ms. Hartman swore in the individuals who indicated they would be giving testimony.

Mr. Bresee explained to the public how the meeting would be conducted.

3. Continued from the July 18 and August 15, 2013 meetings. The variance request by applicant, John Fridley, was from Section 9.6C & 9.7 for a reduction of the front setback distance from 20' to 5' to construct a 20' x 22' detached garage. At the August 15, 2013 meeting, the applicant indicated that the required setback from the DOH ROW was actually 12"; therefore, the applicant was advised to amend their application or reapply for a new variance. The applicant has not resubmitted and Board action is required on this outstanding request. Owner: William C. Palmer, Sr. Location: Shannondale, Section 1L, 1623 Lakeside Dr, Harpers Ferry, WV. District: Kabletown (06); Map: 6C; Parcel: 292; Zoned: Rural; Size: 25,000 sq. ft.; File: #ZV13-19.

Ms. Brockman stated this item had been continued from the previous two meetings and that the applicant had been advised to amend his variance request which would allow Staff to re-advertise with the correct setback distances along with any additional revised information. Ms. Brockman stated that the applicant had not amended his existing request nor submitted a new application. The Board asked if Staff had contacted the applicant prior to the meeting. Ms. Brockman stated Staff had not. Ms. Brockman noted that action by the Board was required on the outstanding application.

4. Variance request by applicant, ARC-FD JV, LLC., c/o Arcland Property Co., from Sections 4.11A and 4.11D and Table 4.11-1 to reduce the required landscaping buffer from 10' to 0' for the proposed 40,000 sq. ft. U.S. Coast Guard office building within the Burr Business Park. Owner: Jefferson County Development Authority. Representative: Kristen Stolipher, Gordon. Location: Burr Industrial Park, Lot 8, James Burr Blvd, Kearneysville, WV. District: Charles Town (02); Map: 1; Parcel: 108; Zoned: Industrial-Commercial; Size: 5.624 acres; File: #ZV13-25.

Mr. Mark Dyck stated for the record that he was not present as a member of the Jefferson County Development Authority Board and that he would be representing the request as the project's consultant from Gordon. Mr. Dyck stated the site would have no outdoor storage, manufacturing or land use which would impact adjacent properties. Mr. Dyck presented an exhibit to the Board which depicted an aerial view of the Burr Industrial Park. Mr. Dyck referred to various property lines on the exhibit which represented lots that had either been required to provide the landscaping buffer, received a variance from the landscaping provision or had not been required to provide landscaping. Mr. Dyck provided a second exhibit to the Board which indicated the trees they would be planting, including an alternative tree planting to the required buffer shown in a lighter graphic on the Exhibit. Mr. Dyck reviewed each of the four criteria and how the applicant felt they were substantiating the request. Mr. Quynn asked if there was any hardship other than financial. Mr. Dyck argued that safety was a concern of the applicant and that they contended that the ability to see in and see out increased safety and security.

Ms. Brockman informed the Board that there had been projects in the past for which this section of the ordinance was inadvertently overlooked, and others for which the BZA approved or denied a variance from the landscaping buffer section as well as projects which were required to plant the buffer. Ms. Brockman could not explain the inconsistencies but attested to the fact that a text amendment should be considered to address landscaping within existing business parks and that a neighborhood atmosphere would be more suitable. Ms. Brockman approved of the applicant's alternate plan as the proposed trees would provide shade and assist in slowing the stormwater.

Mr. Bresee called for public comment. Ms. Amy Allen was present on behalf of John Reisenweber, Director of Jefferson County Development Authority, who was in a County Commission meeting. Ms. Allen read a letter from the JCDA into the record (copy in the file).

5. Appeal of an Administrative Decision made by Jennifer Brockman, Acting Zoning Administrator, of the interpretation of Section 5.7D(3) regarding *Maximum Number of Lots Allowed* in the Rural zoning district. Appellants: Katherine B. Dunn & Sara V. Lowery, c/o Stanley Dunn. Representative: J. Michael Cassell, Esq., Cassell & Prinz, PLLC. Location: 1371 Myerstown Rd, Charles Town, WV. District: Middleway (07); Map: 17; Parcel: 4; Zoned: Rural; Size: 7.485 acres; File: #AP13-01.

\*Note: All references made to 5.7D and subsections thereof are to be understood to refer to Section 5.7D of the Jefferson County Zoning and Land Development Ordinance

Attorney J. Michael Cassell, outlined his presentation stating the Board would be hearing testimony from the people who drafted the original 5.7D amendment, and from them they would learn the intent of 5.7D, its interpretation and its legislative history. Mr. Cassell introduced Paul Raco and stated he would be directing his testimony. Mr. Cassell also stated that according to the Board's Rules of Procedure, Section 6.5, the applicant should have received Ms. Brockman's Staff Report eight (8) days prior to the

meeting and, because they did not, wished to note his objection for the record. Mr. Bannon asked Mr. Cassell if he wanted to defer the meeting. Mr. Cassell stated he did not want to defer, however, if necessary, he may ask that the document be excluded from the record.

Mr. Cassell began his opening argument by asking Mr. Raco to state for the record where he was formerly employed and the nature of his responsibilities. Mr. Raco explained that he worked for Jefferson County as the Assistant Planner in 1986 and then became the Acting Zoning Administrator and Director of Planning and Zoning after the adoption of zoning in 1988 until 2000. Mr. Raco went on to state that he then became the Executive Director of Planning, Zoning and Engineering until leaving the County in 2007. Mr. Raco stated he served as the County's Zoning Administrator since the adoption of zoning in 1988 until 2007. In response to Mr. Cassell's questioning, Mr. Raco stated that as the Zoning Administrator his duties included enforcement, administration, and interpretation of the zoning ordinance, as well as managing the other ordinances of Jefferson County, including text amendments pertaining to all ordinances under the purview of the Department.

Mr. Cassell asked Mr. Raco to explain where he researched the information for the appeal. Mr. Raco stated he reviewed all the files on amendments and the general correspondence files that were available in the Department of Planning and Zoning; the Clerk's files that pertained to any subdivision that utilized the "two lots every five years" provision and those that subsequently processed again after the 5 year period had lapsed; and, the County Commission files regarding ordinance amendments. Mr. Cassell referenced a list of subdivisions that was previously provided to the Board explaining that Column A were subdivisions that had processed one subdivision under this provision and that Column B indicated if there was a second subdivision from the same parcel after 5 years.

Mr. Cassell asked Mr. Raco to explain the discussion between the Planning Commission (PC) and the [Rural] Committee meetings regarding the purpose of Section 5.7. Mr. Raco explained that in 1988 when the original zoning ordinance was adopted there was only one method by which someone could subdivide their property, other than the parent to child exemption, which was known at that time as Section 5.1.7 *Maximum Number of Lots* which allowed an individual to subdivide two lots every 5 years. Mr. Raco stated that in 1989 the zoning ordinance was amended, which renumbered Article 5, particularly the section in question, though this amendment did not change *Maximum Number of Lots*. Mr. Raco went on to further explain that the "1 for 10" and "1 for 15" [speaking in reference to the current Sections 5.7D(1) and 5.7D(2)] provisions were not added to the zoning ordinance until 1995. The County Commission (CC) and PC were under pressure from the agricultural community to provide an alternative subdivision process other than the two lots every 5 years. After the Comprehensive Plan was approved in 1994, the PC president, Scott Coyle, developed three committees to discuss major amendments to the zoning ordinance. Mr. Raco stated that the amendment committee relevant to this case was the Rural Committee (RC) was created in February 1995. Mr. Raco stated that a charge was given to the RC to expand the permitted uses to provide residential opportunities in the rural district and as a result they held many work sessions, committee meetings & public sessions to draft a proposed recommended amendment to Section 5.7. Mr. Raco produced a copy of a Press Release dated September 26, 1995, which explained the proposed text changes to Section 5.7. Mr. Raco read into the record the following statement, "proposed changes which would allow property owners the ability to subdivide more lots in the rural zone based on acreage; all property owners may opt to continue to subdivide two lots and a residue off their property every five years or may choose one of the two other options...". Mr. Bannon asked Mr. Raco to clarify his involvement with the case. Mr. Quynn asked if all the information being

presented could be found in the courthouse. Mr. Cassell and Mr. Raco confirmed that all the information was public record. Mr. Raco stated a public hearing was held on a proposed text amendment to the zoning ordinance and that a Notice dated January 29, 1996, explained the nature of the amendment. Mr. Raco read the following from the Notice, “the proposed amendments also allow areas in the rural zone more residential lot rights other than the current method than allowing two lots every five years two other methods are proposed to be added; the first is to allow one lot to be created every ten years per ten acres owned by an entity provided that the minimum lot size is three acres...[sic]”

Mr. Cassell questioned Mr. Raco on his interpretation of the use of the word “or” within the sentence, “All parcels of land that were on record as of October 5, 1988, are entitled to subdivide for single family residences based on Subsections 5.7(d)1, 5.7(d)2 or 5.7(d)3 below...”. Mr. Raco stated that he believed an applicant could choose between either of the three subdivision options available. Mr. Cassell drew attention to the last sentence of the same paragraph which read, “A property owner may use a combination of these subsections provided that the number lots are prorated by density.”

Mr. Cassell asked Mr. Raco to confirm that he was the drafter of 5.7D(3). Mr. Raco confirmed that he was. Mr. Cassell asked Mr. Raco to clarify what, “Not in addition to...” meant. Mr. Raco explained the following: should an applicant subdivide their parcel and “max out” or develop all their density rights utilizing 5.7D(1) the “1 for 10” provision, they would not be permitted to further subdivide the ‘Residue’ parcel by utilizing 5.7D(3) the “two every five years” provision. Mr. Cassell then asked, “What did, ‘Not in addition to...’ mean?” Mr. Raco explained that the purpose of the language was to prevent people from further subdividing the residue once their density rights were used. Mr. Cassell asked Mr. Raco if there was a phrase, a word or anything in 5.7D(3) that indicates that the density qualification or condition is applicable to 5.7D(3). Mr. Raco answered there was not. Mr. Raco stated that was not the intention when he drafted the amendment, or the words “during any five year period” would have been removed.

Mr. Cassell asked Mr. Raco if the sentence in 5.7D(4) in any way implied that 5.7D(3) was restricted by density. Mr. Raco stated it did not. Mr. Raco explained that the PC and RC wanted to keep the two lots every five years provision because it was something the public already had from 1988-1996 and they did not want to change that provision. The purpose of the amendment was to meet the need of the farmers who were asking for the larger subdivision rights but did not want to take away the public’s ability to do smaller subdivisions. During the public meetings the farmers wanted the residue of the subdivisions they created under 5.7D(1) & (2) to be “rechargeable”; however, the PC added 5.7D(4) as a way of preventing a major subdivision from further subdividing once they had maxed out their density rights.

Mr. Cassell asked Mr. Raco to address the sentence in 5.7D(3) and read, “All lots qualifying under this section must meet subdivision requirements.” Mr. Raco stated that all the previous information was based on the zoning ordinance; should an applicant wish to subdivide they must meet the subdivision requirements. Mr. Raco gave an example of the changing road requirements should an applicant wish to exceed 3 lots, 5 lot, 10 lots and then 12 lots.

Mr. Cassell and Mr. Raco reviewed the emails that had been submitted as part of the supplemental record which were intended to show a consistent interpretation of the two every five years provision in 5.7D(3) by multiple staff members of the Department of Planning and Zoning through 2009.

Mr. Bannon stated that under 5.7D(3) it appeared clear that an applicant could do multiple subdivisions; however, he did not believe someone would be able to subdivide once an applicant's property was under 10 or 15 acres. Mr. Cassell stated the applicant would still have to abide by the subdivision regulations. Mr. Bannon stated that the first paragraph in 5.7 states that the purpose of this district is to provide for low density single family residence. Mr. Bannon stated that if an individual had a large parcel of land that 5.7D(3) was reasonable; however, if an individual was starting with 8 acres and wanted to subdivide that the section in question appeared to be inconsistent with the purpose of the zoning district. Ms. Huddle contended that it was not the Board's position to discuss the purpose of the zoning district in generality. Mr. Quynn concurred. Mr. Bannon disagreed.

Lyle Campbell Tabb, former PC member from 1990-2000, stated he was Chair of RC and served with former committee members Scott Coyle and Al Hooper. Mr. Tabb explained that the purpose of the committee was to address the local farmer's desire to have additional subdivision options that would allow them to do larger subdivision. Mr. Tabb stated the 1 for 10 and 1 for 15 was approved and the two lots every five years remained in the ordinance. Mr. Tabb noted that to his knowledge the two lots every five years provision was never rescinded, removed or changed.

Chris Stiles, former PC member, concurred with Mr. Tabb in that the interpretation of the two lots every five years has never been changed.

Ernie Benner, former PC member from 1991-2000 and former BZA member, Mr. Benner stated that the two lots every five years has always been interpreted the way it has been described by the previous speakers.

Mr. Cassell referred to West Virginia case law from 1907 *State v Davis* and continued to cite the section. A copy was provided for the file.

Mr. Groh asked Mr. Raco how he would interpret the first paragraph's sentence, "...combination of these subsections provided that the number lots are prorated by density." with regard to 5.7D(3). As an example, Mr. Raco said if an applicant owned a 100 acre farm and first processed under the 5.7D(3) provision and then the following year requested to further subdivide under 5.7D(1), the applicant would be permitted; however, the first two lots that were previously created would then count towards the overall density of the farm. Mr. Raco also explained how an applicant could combine 5.7D(1) and 5.7D(2) as each provision allowed for different lot sizes. Mr. Raco and Mr. Cassell discussed the minimum standards required for establishing a single family lot in the rural district.

Michael Shepp, a local surveyor who's worked in the area since 1976, stated that he has processed many subdivisions under the argued interpretation. Mr. Shepp also stated that he designed Mr. Dunn's (the Appellant) minor subdivision in anticipation of a future subdivision. Mr. Shepp addressed Mr. Bannon's concerns regarding the theoretical infinite ability to subdivide a large parcel by stating that at a certain point the subdivision regulations would apply and the addition of two lots would require an applicant to do stormwater management and to design and pave the roads. Mr. Shepp explained that the addition of the two lots would not pay for the cost of doing the subdivision.

Ms. Brockman thanked all the speakers for their information and history regarding the subject and stated that she found it very interesting and useful to the Staff. Ms. Brockman stated that she would contend that may have been the intent of the text; however, that it is not the way the text reads and is

not how the text has been consistently interpreted since July of 2009. Ms. Brockman drew attention to the highlighted portion of text regarding 5.7 within her Staff Report and stated she believed the phrase, "Not in addition to..." was a process. Ms. Brockman explained by giving the example of an applicant having 100 acres and stated that if they were processing under the 1 for 10 they would get ten lots. The applicant then had the option to utilize 5.7D(3) as a process and be permitted to subdivide two lots every five years until they reached the tenth lot. Ms. Brockman informed the Board of a text amendment which reversed the 1 for 10 provision to 1 for 15 and then reversed it again. Ms. Brockman went on to explain that 5.7D(4) was all inclusive and did not specify 5.7D(1) and (2) nor did it remove 5.7D(3) therefore she had to assume that all lots had a certain density right. Ms. Brockman stated that Staff now has developers add a note to their plat which lists the remaining density rights for the property. Ms. Brockman explained that hearing the history of 5.7D was interesting for Staff as their assumption was the purpose in the provision was to provide a subdivision process for property owners with less than 20 acres as these parcels could not process under the 1 for 10 or the 1 for 15 provisions.

Mr. Stanley Dunn, husband to Katherine B. Dunn, supported Mr. Cassell, Mr. Raco and the additional speakers who were also in support of the appeal.

Robin Butler, neighbor to the Dunn parcel named in the appeal, was opposed to the appeal.

In rebuttal Mr. Cassell reiterated the sentence which reads, "A property owner may use a combination of these subsections provided that the number lots are prorated by density." Mr. Cassell argued that if an applicant utilized two or more of the three subsections, it is a density conditioned subdivision; however, the sentence did not say that they individually must be prorated. Mr. Cassell also argued that in subsection (3) that there is no mention of density; neither in subsection (4).

Ms. Brockman wished to counter by saying that the reference to density in subsection (3) is by way of the phrase, "Not in addition to..." which staff since 2009 has always interpreted to mean that you would use subsections (1) or (2) to set your density and that this subsection is not in addition to that. You can use this method to accomplish parts of one and two.

6. Variance request by applicant, Matt Bernazzoli, from Section 4.3H to allow a current 25'7" x 8'2" shed to remain located on an existing concrete slab where an original shed was formerly situated.  
Owner: Bakerton Bible Church. Location: 662 Carter Ave; Harpers Ferry, WV. District: Harpers Ferry (04); Map: 3; Parcel: 57; Size: 1.44 acres; Zoned: Village; File: #ZV13-26.

Mr. Matt Bernazzoli presented his request to the Board explaining that when he built the shed he was under the assumption that it was on his property. Mr. Bernazzoli stated he was not aware that a building permit would be required to replace an existing shed. Mr. Bernazzoli also stated that since discovering the shed was located on the Church's property an agreement has been made with them to allow him to continue utilizing the shed.

Ms. Brockman briefly explained the history of the property to the Board.

Mr. Bresee called for public comment. There was no public comment.

7. Variance request by applicant, Diane De Laet for Verizon Wireless, from Section 4B.7J.2 to allow an increase of height from 120' to 130' tall stealth silo design for its wireless telecommunications facility, which is required to meet its network objective. Property Owner: George Randolph Welsh, Jr. Location: 231 Trough Road; Shepherdstown, WV. District: Shepherdstown (09); Map: 17; Parcel: 11; Size: 123.6 acres; Zone: Rural; File: #ZV13-27.

Ms. Diane De Laet, Verizon Representative, and Peter Chakmakian, Attorney, were present to address the Board. Mr. Chakmakian stated that cell towers are permitted in all districts. Mr. Chakmakian outlined the necessity for the applicant's request; citing from the Zoning Ordinance that a silo is the preferred design. Mr. Chakmakian stated that the proposed height is requested to achieve optimum service. Mr. Chakmakian acknowledged that there is neighborhood concern regarding the proposed location of the silo. Mr. Chakmakian stated that the objection is based on the belief that the proposed location of the cell tower will impair the view from a historical structure. Mr. Chakmakian argued the objectivity of the belief and likened it to a "they say it will and we say it won't" defense. Mr. Chakmakian referred to a letter he received from the Jefferson County Historic Landmarks Commission (JCHLC) and read, "It is the consensus of this commission that this proposed tower at this site is unsuitable and another location should be chosen." Mr. Chakmakian described how meetings with the Shepherdstown Battlefield Preservation Association (SBPA) led to the relocation of the initially selected site to a site further from Trough Road to its current location. Mr. Chakmakian explained that due to the elevation of the property the relocation dropped the silo's height by 30' and, therefore, in order to accommodate the SBPA, the applicant is requesting a 10' variance to recover the lost height in order to achieve optimum coverage. Mr. Chakmakian provided handouts to the Board which depicted a computer generated image of a structure in the proposed silo/cell tower location. Ms. De Laet assisted in orienting the Board regarding the photos. Mr. Chakmakian also presented a before and after service map. Discussion ensued among the Board and the applicant regarding the maps and pictures of the site (copies were provided for the file). Ms. De Laet also informed the Board that Verizon will still be processing the site plan in conformance with all subdivision requirements. Ms. De Laet informed the Board of various meetings that Verizon representatives held with multiple interested parties and historic preservationists within the past two years. Ms. Huddle questioned Ms. De Laet about the coverage map asking if Verizon had explored other sites. Ms. De Laet answered in the affirmative and elaborated by stating that they even investigated the potential of utilizing the existing silos on Mr. Welsh's farm, as well as reviewed the list of preferred sites provided the JCHLC; however, their options were very limited with regard to their network objectives. Mr. Bannon asked why the additional 10' was required. Ms. De Laet responded by stating that the additional 10' would allow their signal to reach another tower and it would give them the ability to provide the space necessary for colocation within the silo, as required by the zoning ordinance. Ms. De Laet stated that the one proposed silo would accommodate three carriers and explained that the Federal Communications Commission (FCC) requires space between the antennas which the additional 10' will assist in meeting.

Mr. Bresee called for public comment.

Ms. Katy Fiddler was present to speak in favor of the variance. Ms. Fiddler stated that she lived at 48 Trough Road and claimed she was as close as anyone could get to the property and that her home was approximately 75 years old. Ms. Fiddler stated that she did believe the cell tower would not be obtrusive and informed the Board that another cell tower is already visible from the property above the tops of the trees and that it was fairly unobtrusive as well. Ms. Fiddler stated she supported the farmer's

right and need to have an additional income. Additionally, Ms. Fiddler shared that she had Verizon as a provider and worked from home and that having the coverage would be a huge advantage to her because she currently experienced dropped calls consistently.

Mr. Martin Burke, President of the JC Historic Landmarks Commission, spoke in opposition to the request due to the adverse visual impact the request would have on adjacent historic resources. Mr. Burke stated that the HLC also opposes the location of the tower; however, they appreciate that is not the Board's decision. Mr. Burke explained the ways in which the HLC is involved in the review of cell tower locations as a consulting party to cell tower representatives, providing input to the County via Section 4B of the Zoning Ordinance, and to the FCC. Mr. Burke elaborated on this role by stating that cell towers must comply with Section 106 of the National Historic Preservation Act which shares a common goal with the HLC and the text in the Ordinance which is to minimize and mitigate any potential adverse impacts associated with the construction of towers through a variety of reasonable design and landscape construction practices. This is accomplished by identifying historic properties that would be affected by the project and to assess the potential effects on each of the properties and to first seek ways to avoid them or to minimize and mitigate the adverse impacts. Mr. Burke confirmed they have been working with the applicant on this site since December 2011. Mr. Burke stated the HLC has attended all meetings with EBI, a consulting firm with Verizon, and with Verizon representatives and has attended numerous balloon tests. Mr. Burke stated he had propagation maps which depicted coverage if the tower were built at 120', 100' and 80'. Mr. Burke agreed that the higher a tower is built the better the coverage would be; however, colocation was still attainable without the additional 10'. Mr. Burke stated the HLC is opposed to the height and location of the stealth silo and noted it is twice the height of any local agricultural silo.

Mr. Paul Rosa, resident of Jefferson County, spoke in opposition to the request and discussed how the applicant addressed the four criteria listed in the variance request. Mr. Rosa stated he was the principle author of the cell tower ordinance. Mr. Rosa believed that the applicant was not meeting the fourth criteria which require that substantial justice is done when granting a variance because he felt that the file was not complete. Mr. Rosa stated his main objections were procedural in nature. Ms. Huddle questioned whether there would be additional processing should this variance be approved. Ms. Brockman stated there would be a Concept Plan and Site Plan and that Staff believed that the information Mr. Rosa is referring to would be submitted at that time and is not necessary for the variance. Mr. Rosa stated he had a different interpretation than that of Staff. Ms. Huddle discussed her concerns of hearing a variance application for a project when the location has not been approved. Ms. Huddle stated the location seemed to be the more substantive request and that a 10' height extension was secondary. Ms. Brockman explained that it was the PC that approved the location and that the BZA that would hear the height request. Ms. Brockman agreed the order in which the approvals were being heard might appear confusing; however, it would not be appropriate for the applicant to spend a lot of time and money processing a concept and site plan to have the location approved by the PC and subsequently have a height variance denied and have to begin the process over again. It seemed logical to seek a height extension first and then go to the PC to continue the public process.

Edward Dunleavy, President of the Shepherdstown Battlefield Preservation Association, wanted to state for the record that he has not had any communication with Verizon at all; but rather, has been contacted by EBI Consulting who was hired by Verizon to look at how the project could comply with Section 106 of the Historic Preservation Act. Ms. Huddle asked if being contacted by a consultant of Verizon was as if being contacted by Verizon. Mr. Dunleavy stated that he intended to be precise. Mr. Dunleavy

proceeded to provide the Board a handout created by the Civil War Sites Advisory Commission and reviewed various pages with the Board. Mr. Dunleavy commended Verizon for their efforts in protecting the viewshed; however he believed they had not done enough. Mr. Dunleavy informed the Board of efforts made to have the Shepherdstown Battlefield designated as a National Park.

In rebuttal, Ms. De Laet stated she wished to address a few items, the first being the Board's position and conveyed that Verizon would have the burden of proof. Ms. De Laet reiterated that they would meet every standard of the regulations and to continue to work with the local historic authorities to preserve the area in the best way possible. Ms. De Laet went on to address the 'single site solution' concerns that had been raised by Mr. Rosa and stated that Verizon has multiple sites throughout the County and that this site would assist in closing a gap in their existing coverage area. Ms. De Laet applauded the possibility of the Park being designated and noted that the additional coverage would aid in the safety and security of the visitors and tourists. Ms. De Laet stated that during emergencies, cell coverage may be down although texts generally still work and that can be useful. Ms. De Laet explained they needed 3' of separation between antennas, which could be between 2 – 6' in length. Additional benefits to the Battlefield Park could be the new National Park barcode App that has been developed to allow visitors to become more engaged and informed when visiting parks.

Ms. Brockman wanted to state for the record that if the Board approved the request that they would only be approving the height and not the location. Ms. Brockman stated this would be made clear to the PC should the application be moved ahead.

8. Variance request by owners, Gilbert and Catherine Smallwood, from Section 9.7 for a reduction of the side setback distance from 6' to 2' to allow for the construction of a 12' x 21' garage. Location: 932 Jefferson Ave, Charles Town, WV. District: Charles Town (02); Map: 10A; Parcel: 64; Size: .25 acres; Zone: Residential-Growth; File: #ZV13-28.

The applicant was not present to address the Board. Ms. Brockman presented the request on behalf of the applicant and addressed questions raised by the Board.

Mr. Bresee called for public comment. There was no public comment.

9. Variance request by owner, George Armstrong, from Section 5.7B.1 for a reduction of the rear setback distance from 50' to 28' to allow a recently constructed garage to remain located where an original building was formerly situated. Location: 129 Marrs Lane, Kearneysville, WV. District: Middleway (07); Map: 5; Parcel: 12.5; Size: 3.0337; Zone: Rural; File: #ZV13-29.

Mr. George Armstrong presented his request to the Board explaining that he built the garage in question in the same location as a previous building had been situated. Mr. Armstrong stated he was not aware that a permit would be required to replace an existing structure.

Ms. Brockman briefly explained the history of the property to the Board. Ms. Brockman pointed out that while this case was similar to Mr. Bernazzoli, this applicant would be seeking a variance from the setback requirements and not requesting to reestablish a non-conforming use.

Mr. Bresee called for public comment. There was no public comment.

10. Appeal of the Administrative Decision to issue Zoning Certificate #ZC13-23 for a Home Occupation Level 2 that allows a home-based asphalt repair business. The business includes a 16' trailer with seal coating and lawn equipment, to be enclosed in an outbuilding/garage, pending Building Permit approval. Appellants: R.K. & Marianne Hedrick; Wayne & Gloria Chastain; Scott & Alice Dillow; Mike & Pam Hinkle; and Chris & Christy Swisher. Owners: Robert & Donna Edwards. Location: Elk Run Subdivision, Lot 7, 235 Elk Branch Dr, Shenandoah Junction, WV. District: Shepherdstown (09); Map: 22; Parcel: 30; Size: 1.93 acres; Zoned: Rural; File: #AP13-02.

Mr. R.K. Hedrick presented the request to the Board stating that the named Appellants Chastain, Dillow, Hinkle and Swisher had filed the appeal; however, since that time three additional neighbors wished to join in the appeal; Dan and Carolyn Perry, Dan and Marge Neff and Bernie and Darlene Carmody. Mr. Hedrick stated this totaled 8 out of 13 property owners within the subdivision. Mr. Hedrick referenced a letter that was drafted by Bernard and Thelma Carmody. Mr. Hedrick listed various issues that have become a nuisance to the community during the past three years such as trucks moving back and forth, witnessed hour's long struggle of moving seal coating tanks on and off trucks, equipment testing and the storage of vehicles and trailers in the driveway and on the property. Mr. Hedrick stated he spent approximately \$1,500 planting a buffer between him and Mr. Edwards' property in order to block the view of the trucks, trailers and other equipment. Mr. Hedrick stated they had lived with the business operation for a couple of years until he and his wife had noticed what appeared to be an oil/driveway seal spill 20 feet away from his (Mr. Hedrick's) well. Mr. Hedrick stated that while Mr. Edwards was quick to resolve the matter he was now concerned that it would happen again. Mr. Hedrick stated he contacted Mason Carter, the Ordinance Compliance Officer for Jefferson County, who contacted Mr. Edwards and told him to contact the Zoning Department. Mr. Edwards subsequently did, filed for a zoning certificate and was issued a certificate within four days. Mr. Hedrick argues that process was not followed and that Mr. Edwards proposed use is not permitted as a Home Occupation, Level 2. Mr. Hedrick also stated that he was told by a real estate agent that the business would reduce his property value.

Ms. Huddle asked Staff at what point may a homeowner violate an approved zoning certificate before it is revoked? Ms. Brockman stated she was unaware of a procedure for that. Ms. Brockman stated that in this case the homeowner was in violation of the ordinance and applied for a zoning certificate and did so under the Home Occupation, Level 1 (HOL1) and Home Occupation, Level 2 (HOL2). She also explained that HOL1 did not require posting and that HOL2 did require posting. Ms. Brockman stated she did not know why Steve issued the certificate for an HOL2 other than it allowed the applicant the ability to have additional employees; however, then the property should have been posted. Ms. Brockman did not know why the sign had not been posted and had to assume it was inadvertently overlooked. Ms. Brockman argued that she believed it was a valid zoning certificate and that it was issued correctly. Ms. Brockman explained that based on the information provided by the applicant it appeared that the business met all the requirements of the HOL2 standards conditioned upon the fact that they construct the building as described in the zoning certificate. Ms. Brockman explained that it appeared that the Appellant's main contention is that the business must be wholly within the dwelling unit and that one of the requirements of the zoning certificate was to build an accessory structure; however, there was no time limit imposed. Ms. Brockman addressed the concern regarding the signage on the trucks by stating that the County does not prohibit people from driving a truck home that states the name of the business on the side.

Marianne Howard, Appellant, believes Mr. Edwards has the right to operate a business; however, not one that would negatively impact adjacent property owners and the rights of those in the community. Mr. Ronald Perry, neighbor, supported the appeal stating he was concerned about the effects on the property values of the community. Mr. Lawrence Chastain, Appellant, supported the appeal stating he was also concerned about the effects on the property values and that he believed that the equipment being utilized by Mr. Edwards was minimized on the zoning certificate application. Mr. Chastain stated Mr. Edwards used a 16' trailer, 2 pickup trucks with a tank in the rear and a second trailer with a tank which is occasionally loaded and unloaded onto the trucks and trailers. Mr. Chastain also stated that other seal coating equipment was being serviced and tested and that grinding and welding was being done at the site, all in conjunction with the business. Mr. Chastain stated that Mr. Edwards had two employees and that he could see the equipment and vehicles from his property.

Discussion between the Board and Ms. Brockman regarding the chart within the Staff Report ensued.

Mr. Robert Edwards was present to address the Board. Mr. Edwards explained to the Board that he did bookkeeping, scheduled appointments and stored his equipment at his home. Mr. Edwards stated the equipment is loaded onto the trucks/trailer for departure in the morning and then they return in the evening. Mr. Edwards explained that the business of sealing the driveways is conducted at the client's home. Mr. Kelly asked where maintenance of the equipment is done. Mr. Edwards stated that the oil is changed once a year and that it is synthetic and water based which is approved by the EPA. Mr. Edwards further described the oil stating that it does not catch fire, explode, pollute the environment, there is no runoff, it is 96-97% water and there is no smell. Ms. Huddle asked when the structure would be built. Mr. Edwards explained that they just submitted the building permit during that week because he recently suffered a back injury and had been unable to walk without a cane. Ms. Donna Edwards stated the building was ordered approximately one month ago. Ms. Edwards wanted to explain that the second truck and trailer were not used for the business. The second tank was used in the event of a large job. Mr. Edwards stated the second trailer was used typically for hauling wood. Mr. Edwards stated he did not believe his business affected property values. Mr. Edwards defined his business as a part-time job; operating only in the summer and on the weekends. Mr. Edwards stated he has never cleaned a tank. Ms. Edwards answered Ms. Huddle's question regarding noise stating that it is possible that their generator could have been the noise that the neighbors are speaking of; however, many in the community have generators. In addition, Mr. Edwards stated he has a compressor which he used to pump up the tires. Other noise may be attributed to a leaf blower and other lawn maintenance equipment. Ms. Huddle stated she was not concerned about equipment for personal use. Mr. Edwards addressed Mr. Bannon's questions regarding the oil spill which Mr. Edwards contested was approximately 60' from Mr. Hedrick's well and not 20'. Mr. Edwards stated he acted immediately, had EPA come to the site, at which time he was informed that the oil was the safest on the market. Mr. Edwards answered Mr. Bresee's question by stating that the tank was filled in Fredrick, MD. Mr. Groh asked Mr. Edwards to address the employee allegations. Mr. Edwards stated that when he injured his back he had a tenant from a separate residence that had not been paying their rent, work for him as payment and only while his back was injured. Mr. Quynn asked Mr. Edwards to describe the garage. Mr. Edwards stated the garage was made by Carolina Carports and was a metal, 19' x 26' building with pad. Mr. Edwards stated that the structure would not be enclosed. It was explained to Mr. Edwards that the equipment was not permitted to be visible from any property line and that the zoning certificate was conditioned upon the structure being enclosed.

Ms. Huddle motioned to go into deliberative session at 6:39 p.m. Mr. Bannon seconded the motion, which carried unanimously.

A member of the public stated they wished to speak in opposition to the appeal. Ms. Huddle retracted her motion.

Christy and Joseph Michaels spoke in opposition to the appeal. Ms. Michaels stated that among all the noises that can be heard from their home including roosters crowing, generators from neighboring property owners, the school's PA system which is located 2 miles away and dogs barking, that she could not identify any sound that was clearly identifiable as Mr. Edwards' business. Ms. Michaels stated they too owned a compressor and stated she did not believe anything could compare to the noise level of a compressor and that nothing had ever reached or exceeded that level regarding Mr. Edwards' property. Ms. Michaels stated there is nothing visible from the road that would stand out as a business. Ms. Michaels pointed out that Mr. Hedrick's concerns of the seal coating being spilled on the road and that this posed a risk to the children that played there was unfounded as the material was road sealant. Ms. Michaels stated she agrees that the Edwards should build the structure as they were required to do. Ms. Michaels also wanted to address the neighbor's concerns regarding property value by stating that when she purchased her home the value of the home was approximately the same as what the homes in the community had sold for in previous years.

Ms. Huddle motioned to go into deliberative session at 6:46 p.m. Mr. Bannon seconded the motion, which carried unanimously.

Ms. Huddle motioned to come out of deliberative session at 7:06 p.m. Mr. Quynn seconded the motion, which carried unanimously.

### **Board of Zoning Appeals Rulings**

10. Appeal of the Administrative Decision to issue Zoning Certificate #ZC13-23 for a Home Occupation Level 2 that allows a home-based asphalt repair business. The business includes a 16' trailer with seal coating and lawn equipment, to be enclosed in an outbuilding/garage, pending Building Permit approval. Appellants: R.K. & Marianne Hedrick; Wayne & Gloria Chastain; Scott & Alice Dillow; Mike & Pam Hinkle; and Chris & Christy Swisher. Owners: Robert and Donna Edwards.

Mr. Kelly motioned to affirm the Zoning Administrator's decision to issue Zoning Certificate #ZC13-23. Mr. Kelly added that any equipment pertaining to the business must be in a fully enclosed building with four sides, which [the equipment] cannot be seen by anyone. This shall include the trucks and other accessory equipment. The building must be constructed within 90 days. Mr. Kelly stated this was the end of the motion; however, he wanted to add that should the property owner be found in violation of the Zoning Certificate's restrictions, the County may take action and revoke the Zoning Certificate. Ms. Huddle seconded the motion, which carried unanimously.

3. Continued from the July 18 and August 15, 2013 meetings. The variance request by applicant, John Fridley, was from Section 9.6C & 9.7 for a reduction of the front setback distance from 20' to 5' to construct a 20' x 22' detached garage. At the August 15, 2013 meeting, the applicant indicated that the required setback from the DOH ROW was actually 12'; therefore, the applicant was advised to amend

their application or reapply for a new variance. The applicant has not resubmitted and Board action is required on this outstanding request.

Ms. Huddle motioned to disapprove the variance request for a reduction of the front setback distance from 20' to 5' because this request would not meet the actual distance necessary to construct the proposed garage. Mr. Kelly seconded the motion, which carried unanimously.

4. Variance request by applicant, ARC-FD JV, LLC., c/o Arcland Property Co., from Sections 4.11A and 4.11D and Table 4.11-1 to reduce the required landscaping buffer from 10' to 0' for the proposed 40,000 sq. ft. U.S. Coast Guard office building within the Burr Business Park. Owner: Jefferson County Development Authority. Representative: Kristen Stolipher, Gordon.

Mr. Kelly motioned to approve the above referenced request noting the request applies only to the subject lot within the Burr Industrial Park and that the applicant will plant the 13 trees as depicted in dark green on the alternative landscape plan submitted as an exhibit to the Board, prepared by Gordon, marked as Page 20 of 23. Ms. Huddle seconded the motion, which carried unanimously.

The Board requested that Staff begin drafting a text amendment that would address the standards for landscaping and buffering on lots within industrial parks.

5. Appeal of an Administrative Decision made by Jennifer Brockman, Acting Zoning Administrator, of the interpretation of Section 5.7D(3) regarding *Maximum Number of Lots Allowed* in the Rural zoning district. Appellants: Katherine B. Dunn & Sara V. Lowery, c/o Stanley Dunn. Representative: J. Michael Cassell, Esq., Cassell & Prinz, PLLC.

Ms. Huddle motioned to grant the appeal based on hearing the testimony explaining the history of the text amendment. Ms. Huddle stated that while the text of the Ordinance isn't as well worded as it could be, the explanation was clear. Mr. Quynn seconded the motioned and requested the motion be amended to add that the Board also vacates the decision in the Memo and allows the applicant to subdivide. Ms. Huddle accepted the amendment. Mr. Bannon stated he opposed the motion because he believed the Ordinance should be read in its plain meaning and that the rural district is limited by density. Mr. Bresee called for a vote, which carried four (4) in support and one (1) in opposition (Mr. Bannon).

6. Variance request by applicant, Matt Bernazzoli, from Section 4.3.H to allow a current 25'7" x 8'2" shed to remain located on an existing concrete slab where an original shed was formerly situated. Property Owner: Bakerton Bible Church.

Mr. Quynn motioned to approve the above referenced request. Ms. Huddle seconded the motion, which carried unanimously.

7. Variance request by applicant, Diane De Laet for Verizon Wireless, from Section 4B.7J.2 to allow an increase of height from 120' to 130' for a stealth silo design for its wireless telecommunications facility, which is required to meet its network objective. Property Owner: George Randolph Welsh, Jr.

Mr. Quynn motioned to approve the above referenced request contingent upon Planning Commission approval of the site plan. Mr. Quynn added that approval of this variance request does not, in any way,

suggest that the Board advocates for this site. Ms. Huddle seconded the motion, which carried unanimously.

8. Variance request by owners, Gilbert and Catherine Smallwood, from Section 9.7 for a reduction of the side setback distance from 6' to 2' to allow for the construction of a 12' x 21' garage.

Mr. Bannon motioned to approve the above referenced request. Mr. Kelly seconded the motion, which carried unanimously.

9. Variance request by owner, George Armstrong, from Section 5.7B.1 for a reduction of the rear setback distance from 50' to 28' to allow a recently constructed garage to remain located where an original building was formerly situated.

Mr. Quynn motioned to approve the above referenced request. Ms. Huddle seconded the motion, which carried unanimously.

10. Appeal of the Administrative Decision to issue Zoning Certificate #ZC13-23 for a Home Occupation Level 2 that allows a home-based asphalt repair business. The business includes a 16' trailer with seal coating and lawn equipment, to be enclosed in an outbuilding/garage, pending Building Permit approval. Appellants: R.K. & Marianne Hedrick; Wayne & Gloria Chastain; Scott & Alice Dillow; Mike & Pam Hinkle; and Chris & Christy Swisher. Owners: Robert and Donna Edwards.

This agenda item was moved and addressed immediately after reconvening from deliberative session.

#### 11. Director's Report.

Ms. Brockman updated the Board on the following items (see packet for details):

- 1) Envision Jefferson 2035 Update
  - a) County Fair input
  - b) Next steps:
    - Third Series of Public Meetings – Land Use Map – “what and how”:
      - Monday, October 21, 2013: South Jefferson Elementary
      - Wednesday, October 23, 2013: Shepherdstown Middle School
    - Stakeholders Sessions – Friday, October 25, 2013 (four 1½ hour sessions)
    - Future Land Use Map and Recommendations
- 2) Recent CC Actions relevant to Planning:
  - a) Request by the Planning Commission that the County Commission Reconsider their Motion of 10/25/13 Regarding the Proposed Zoning Ordinance Text Amendment Related to New Commercial and Industrial Zoning Categories (09/05/13; CC voted to schedule a CC workshop to review changes since last Public Hearing and schedule a new Public Hearing – date tbd)
  - b) Minor Amendments to the Jefferson County Zoning and Land Development Ordinance Sections 2.2, 4.10, 4A.5, 5.7, 5.8, 8.5, 8.14(new), 8.15 (new), 9.5, 10.5, 11.1, 12.2 and Appendix C (Agricultural Use and Other Amendments) (09/05/13; Voted to schedule Public Hearing – date tbd)
- 3) Upcoming CC Actions relevant to Planning:
  - a) Public Hearings related to items above – dates to be determined.

The Board discussed alternative meeting dates and times due to the reoccurring meeting room availability conflict. The Board agreed that the fourth Thursday of each month at 2:00 p.m. was an amiable solution and requested that Staff revise the Rule or Procedure for the 2014 meeting schedule and, if necessary, have the County Commission amend them with the suggested date and time. Ms. Huddle motioned to hold the Board's October meeting on the fourth Thursday (October 24, 2013) at 2:00 p.m. Mr. Kelly seconded the motion, which carried unanimously.

12. Legal Update. None.

13. Signing of written decisions from prior Board of Zoning Appeals meetings.

- a) Variance request by applicant, Jason Shelton, from Section 5.7(B) for a reduction of the rear setback distance from 50' to 8' for an approximate 16' x 32' existing building, which the applicant renovated and expanded prior to the issuance of a building permit. File: #ZV13-21. *Mr. Bresee signed the Findings for this request.*

14. Correspondence. None.

Ms. Huddle motioned to adjourn the meeting at 7:38 p.m. Mr. Bannon seconded the motion, which carried unanimously.

An audio transcript of this meeting can be found at the Department of Zoning and on the Department's website at [www.jeffersoncountywv.org](http://www.jeffersoncountywv.org). These minutes were prepared by Jennilee Hartman, Zoning Clerk.