

Minutes
Jefferson County Board of Zoning Appeals
Thursday, October 10, 2013

The Jefferson County Board of Zoning Appeals met on Thursday, October 10, 2013. The meeting was held in the Charles Town Library Conference Room, located at 200 East Washington Street, in the City of Charles Town, West Virginia. Unless otherwise noted, all requests are pursuant to the Jefferson County Zoning and 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; Stephen Groh, Assistant Prosecuting Attorney and Jennilee Hartman, Zoning Clerk.

Mr. Quynn motioned to commence the meeting. Mr. Kelly seconded the motion, which carried unanimously. Mr. Bresee called the meeting to order at 2:01 p.m.

1. Approval of the minutes from the September 19, 2013 meeting.

The minutes were not available therefore they were deferred until the next 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. Action on a proposed amendment to the approved Conditional Use Permit (CUP) for Rippon Brewery, LLC. This project has been approved for a micro-brewery with a tasting room, a future pub/restaurant, a store, a country inn and an office to be situated on 2 acres. The applicant is requesting an amendment to the approved CUP to add a four unit residential dwelling. Location: 2153 Berryville Pike, Charles Town, WV. District: Kabletown (06); Map: 10A; Parcel: 24; Zoned: Village; Size: .69 acres; File: Z11-01.

Mr. Bresee explained that there would not be a public hearing on this item because a Neighborhood Compatibility meeting had been previously held and that the purpose of this meeting was solely for Board action.

Mr. Jesse Morgan presented the request to the Board explaining that the Brewery and associated uses had been approved at a prior meeting and that he was asking to add a four-unit residential dwelling to begin accruing revenue so that he could afford the rest of the renovations necessary for the project. The Board had questions regarding the existing and previous use of the structure, as well as its square footage. Mr. Morgan addresses each of the Board's questions.

Ms. Brockman briefly outlined the project's history and explained that the current use as a two-family dwelling was a permitted use in the Village District.

4. Appeal of an Administrative Decision made by Jennifer Brockman, Acting Zoning Administrator, to deny the use of the St. John's Episcopal Church's facility as an overnight cold-weather shelter in the Rural Zoning District. Appellants: The Rev. Georgia DuBose; The Episcopal Diocese of West Virginia/ The Rt. Rev. W. Michie Klusmeyer and William F. Berry, Vice President of the Jefferson County Homeless Coalition. Location: St. John's Episcopal Church; 2518 Berryville Pike, Rippon, WV. District: Kabletown (06); Map: 10; Parcel: 1; Zoned: Rural; Size 0.5 acres; File: #AP13-03.

Ms. Brockman stated that the request was pertaining to an existing structure located on approximately one acre known as St. John's Episcopal Church. Ms. Brockman began by explaining that the basis for her determination was that the church ceased to function as a church in February 2011. While the structure had been used as a meeting place for various activities and a voting location it had not been actively used as a church since 2011.

The request presented to the office was to use the structure as a cold weather homeless shelter. Ms. Brockman reviewed the Principle Permitted Uses in the Rural zoning district and noted that a Church was a permitted use in that zone and that Accessory Uses are permitted with any Principle Use. Ms. Brockman determined that it was reasonable to assume that a homeless shelter was an acceptable accessory use to a Church. The decision was whether or not the current use of the structure could be designated an active Church. The zoning ordinance defines a Church as, "*A building or site wherein persons regularly assemble for religious worship and which is maintained and controlled by a religious body organized to sustain public worship, together with all accessory buildings and uses customarily associated with such primary purpose. Includes synagogue, temple, mosque, or other such place for worship and religious activities.*" Ms. Brockman stated that her determination was that because the structure was no longer holding regular services that it could not be considered a Church and therefore the homeless shelter could not be permitted as an accessory use.

Ms. Brockman stated she also looked at the Group Residential Facility; however, the facility would have to be owned, leased or operated by a behavioral health service provider and would have to have the following:

"(1) Provides residential services and supervision for individuals who are developmentally disabled or behaviorally disabled; (2) is occupied as a residence by not more than eight individuals who are developmentally disabled and not more than three supervisors or is occupied as a residence by not more than twelve individuals who are behaviorally disabled and not more than three supervisors; (3) is licensed by the Department of Health and Human Resources; and (4) complies with the State Fire Commission for residential facilities."

Ms. Brockman stated since those components did not exist that she could not classify the structure as a Group Residential Facility. Ms. Brockman noted that they would have exceeded the number of residents permitted in the facility; however, they could have come to the Board to seek a variance had this been a viable option.

Rev. Georgia DuBose, Episcopal Church Priest and founding member of the Jefferson County Homeless Coalition (JCHC), stated she would be representing Episcopal Bishop W. Michie Klusmeyer, Appellant, for the appeal. Rev. DuBose introduced Sherry Lynn Barton, President of the JCHC, and Jason Reifer, the immediate past president of the JCHC, as additional representatives of the appeal. Rev. DuBose also introduced members of the audience who were there in support of the project, Rev. Dr. Wyman Hall, former president of the JCHS; Jeff Levesque, volunteer trainer; Rev. Melanie McAlly of the Church Zion, the Episcopal Church that previously hosted the shelter for 3 winters; Carol Baty, Coordinator of the Coalition's Step Up program; Rev. Lee Brumback of St. Thomas Lutheran Church who regularly provides meals for the homeless.

After introductions Rev. DuBose went on to read from a handout provided to the BZA (copy attached). Highlight's included the following:

- The Episcopal Bishop announced in writing on October 4, 2013, "using his canonical and state legal authority to do so" to create a new congregation at St. John's, Rippon.
- The congregation held its first service, and will hold regular worship services in the church the first and third Sunday evenings of each month.

- The first regularly scheduled service was held the previous Sunday, on October 6, 2013, at 5:00 p.m. and officiated by two ordained Episcopal priests.
- The new priests of the Church are Rev. Georgia DuBose and Rev. Melanie McCarley.
- The new trustees of the Church are Bishop Klusmeyer, Mr. David Ramkey and Mr. Tyler Dinsmore.
- While the Appellants argue the use of the Church was never abandoned; they ask the Board to recognize the use of the building in its present use.

Rev. DuBose concluded that since the church was now conducting regular services that any customary activities, such as the homeless shelter, should now be permitted.

Mr. Kelly wanted clarification from the Appellant that the church began holding service after Ms. Brockman had made her decision. Rev. DuBose answered in the affirmative.

Ms. Huddle asked Mr. Groh, given this announcement, is the appeal moot? Mr. Groh asked to defer his answer until deliberative session. Ms. Huddle also questioned if this use could have sought a Seasonal Use permit? Ms. Brockman explained that the applicant would not have met the current definition of a Seasonal Use.

Mr. Bannon expressed concern over the County's position regarding the Church's First Amendment Rights; however, since the appeal may be moot he may not need to have them addressed.

Mr. Quynn had questions for Ms. Brockman regarding the permitted use of a property even if said use is not active for more than 12 months. Mr. Quynn asked if that use would still be permitted. Ms. Brockman stated the difference in this case is that the Ordinance defines a Church using the words, "regular service" and unless the structure can meet that definition she cannot call it a church and therefore cannot allow accessory uses to it. Ms. Huddle also added that there is a distinction between the land and a building that may be located on it and the active land use based on the zoning of the property.

Despite the recent information provided by the Appellant, Mr. Bresee stated he wished to proceed with the public hearing in order to give everyone the ability to speak and therefore asked if there was anyone in support of the request.

Jason Reifer, former president of the JCHC, described a letter was sent to the Department of Planning by the Bishop on September 3, 2013, prior to Ms. Brockman's determination, expressing his surprise that the subject parcel had been listed commercial and clarified that the property was a church and was zoned rural. Mr. Reifer stated that the building was a community landmark where weddings, christenings and funerals had been conducted. Mr. Reifer argued that the structure has not been known as anything except a church for over 140 years and further added that in the short time period that the congregation left the church that the overall use of the church had not been abandoned. Mr. Reifer explained that although the congregation left there have been prayer services and other gatherings held at the church. Mr. Reifer also pointed out that the Bishop clearly declares it a church. Mr. Reifer concluded by saying that the property has always being owned and/or maintained by the church Diocese since 1870 or has had an agent acting on their behalf do so; however, the property has never been outside of their control.

Mr. Quynn asked how the property was taxed. Rev. DuBose stated it was tax exempt because it is a church of the Episcopal Church of West Virginia. Mr. Groh asked how the JCHC and the Episcopal Church were

related. Rev. Dubose stated members of the church and clergy, as well as other a number of other churches in the surrounding area, were also members of the coalition. The JCHC was a nonprofit organization.

Mr. Bresee asked who owned the subject property. Rev. DuBose stated the Episcopal Church Diocese of West Virginia owns the church. A copy of the deed to the subject parcel was provided to the Board. Mr. Reifer stated the Rules of Perpetuity applied to this deed. Mr. Bresee stated they would take that under advisement and would consult with Counsel. Rev. DuBose informed Mr. Bresee that the language in the deed was known as a reversionary clause. Mr. Bresee thanked Rev. DuBose for the information.

Sherry Martin explained the purpose of the shelter would be to provide overnight accommodation during the cold weather season; meals would be served offsite; the guests would be transported back into the Charles Town/Ranson areas approximately 7:00 a.m.

Mr. Bresee called for anyone who may be in favor of the appeal.

Bob Aitcheson, land owner in Rippon, spoke in support of the appeal and in opposition to the request of the homeless shelter and stated that he was the co-owner of the Rippon school house, which is presently being used as an apartment complex. Mr. Aitcheson said he was concerned for the safety of his tenants due to the know substance abuse issues that tend to be associated with the homeless. Mr. Aitcheson stated that the previous members of the church were present and willing to testify to the fact that the church had been abandoned over 18 months ago. Mr. Aitcheson read language from the deed which stated that should the St. John's Episcopal Church cease to exist that the land will to revert back to the Burns family and it was Mr. Aitcheson's position that since the congregation dissolved, the ownership of the property now belonged to the Burns family. Mr. Aitcheson wished to add that he was an inactive attorney. Mr. Aitcheson questioned the legal right to submit the application before the Board when the Appellants were not the legal owners of the property. Mr. Aitcheson reiterated his concerns about safety by adding that it would take the Sheriff's officers approximately 25 minutes to arrive if an incident were to occur and felt that it was up to the applicant to first prove that there were no safety concerns before proposing such a land use.

Mr. Kelly asked Ms. Brockman if she questioned the ownership of the property. Ms. Brockman stated she did not research the ownership of the property. Mr. Groh stated that it is the Department's position to take whoever the owner of record is and in this case the land records indicate Episcopal Church Diocese of West Virginia.

Jeanne Morton, adjacent to the subject property, spoke in favor of the appeal and in opposition to the project. Ms. Morton stated she has assisted several homeless individuals in the past, has had a bad experience in doing so and is therefore fearful of having the shelter next to her property. Ms. Morton stated she sent a copy of a petition with 130 signatures in opposition to the project to Bishop Klusmeyer but had not had an acknowledgement from him. Ms. Morton said several letters were sent to Bishop Klusmeyer by other neighbors, including Mr. William Weston, who provided a copy of the letter, from which Ms. Morton read the following quote, "I wish St. John's could remain a place of worship." Ms. Morton read from another letter dated October 3rd to neighbor Sherry Clifton from Bishop Klusmeyer, "I wish St. John's could remain a place of worship." Ms. Morton surmised that these words meant that Bishop Klusmeyer did not believe St. John's was currently a place of worship. Ms. Morton stated she did not believe that the act of praying made the location a house of worship or a church. Ms. Morton addressed the safety concerns by referencing two Facebook posts saying there was a "desperate need" for help at the overnight shelter.

Ward Zigler had concerns regarding the Appellant's ability to meet the Health Department and Fire Marshal's regulations. Mr. Zigler stated the former trustees were not aware of the formation of the new church and that to his knowledge the staff had recently turned the water and heating system off. Mr. Zigler also questioned if a bond was going to be in place in the event the church sustained damage.

Warren LaRue stated he had been the former junior and senior warden of the church for 63 years and has assisted in the maintenance of the property for the past 5 years. Mr. Warren claimed that none of the past members of the church were invited to the last service. Mr. LaRue explained that Bishop Klusmeyer was the individual who ordered the closing of the congregation. Mr. LaRue was in opposition to opening a homeless shelter outside the city limits. Mr. LaRue stated it has taken up to three days to clear the roads due to a major storm and questioned how the residents of the shelter will be cared for during this type of an emergency situation if their meals are being provided offsite.

Lee Harrison questioned the legality of the property ownership and the church's right to be on property.

Steve Stolipher, former member of St. John's Episcopal Church, stated for the record that he was representing himself and not as a member of the Planning Commission. Mr. S. Stolipher stated that he had been baptized and married in the church; however, he had not received an invitation to the past service. Mr. S. Stolipher also questioned the legal ownership of the property. Mr. S. Stolipher told the Board that he possessed a real estate license and that he did not believe the Rules of Perpetuity applied to the deed as the Appellant indicated.

Ann Dunn Smith, local resident, explained to the Board that she was a social worker and had an extensive background in working with the homeless population. Ms. Dunn Smith stated the shelter where she worked was located in the City of Martinsburg due to its proximity to emergency services; primarily law enforcement. Ms. Dunn Smith was concerned about the rural setting of the proposed shelter and that it currently takes local law enforcement approximately 45 minutes to get to Rippon.

Johnathon Burns, heir of Caleb Burns as noted in the deed that transferred the property to St. John's Episcopal Church, contested that he was the legal property owner and believed that the Appellants were currently trespassing on his property. Mr. Burns also concurred with others in support of the appeal regarding safety of those who live in Rippon and the welfare of the homeless if stranded at the church during a snow storm. Mr. Bannon asked Mr. Burns what steps he had taken to assert ownership of the property. Mr. Burns did not state any steps taken other than explaining that his brother had spoken to an attorney and if necessary they will pursue the matter further.

Doug Stolipher stated he had been the senior warden and is currently a trustee of the St. John's Episcopal Church. Mr. D. Stolipher explained there were approximately seven active members of the church and that due to age constraints they had closed the church; however, they did not abandon the church. The church members continued to maintain the property and paid any expenses associated with the property. Mr. D. Stolipher stated that he suspected the reason for moving the shelter to Rippon was because of the supposed damage to the churches that had previously hosted the shelter. Mr. D. Stolipher stated that he was a licensed septic installer and explained that the current system was installed in the 1960's and that it was his professional opinion that the current system would not accommodate the number of people that would be housed at the proposed shelter.

Pritchard Zigler, local resident, had concerns regarding the safety of the proposed shelter and possible parking issues.

Jesse Morgan, local resident, felt that the church would not be used as a church but that it would be turned over to the JCHC.

Pritchard Zigler had closing remarks regarding the First Amendment.

Mr. D. Stolipher informed the Board of a discussion he had with Bishop Klusmeyer who had informed Mr. D. Stolipher that he did not believe that Rippon was a good location due to the distance of police and ambulance services.

Ms. Brockman stated that the office checked the tax records when the application was submitted and that the Assessor had the Episcopal Dioceses listed as the property owner. Ms. Brockman added that in order for the property to be tax exempt, the property would need to be under the Church's name; however, she was not clear on the details of that provision. Ms. Brockman stated that had another active church proposed this use that she would have issued a zoning certificate for it. Regarding the service conducted the previous Sunday, Ms. Brockman did not have enough information to make a determination on the church's use. Ms. Brockman concluded by stating that at the time of application, the information provided by the Appellant did not prove that a principle use existed and therefore she could not approve the requested homeless shelter as an accessory use. Ms. Huddle asked if the owner of the principle use had to also run the accessory use. Ms. Brockman stated they did not and gave an example of a church as the principle use and a day care being run by a separate entity as the accessory use. Ms. Huddle also asked if Staff considered impact to the community when approving an accessory use. Ms. Brockman responded by stating that an accessory use may be required to process a site plan if an addition or detached structure is being proposed to address adequate parking and stormwater management regulations. Ms. Huddle also asked if Staff considered emergency services when making a determination on a proposed accessory use. Ms. Brockman stated while it is something the office looks at, there is not a provision in the Ordinance that allows Staff to prohibit it because there is not sufficient access to the services.

In rebuttal Mr. Reifer stated that while the local residents and neighbors expressed a lot of concern, anger and fear regarding the proposed use of the property and that while those feelings are important and will be addressed by the church and coalition that they are not relevant to the present case. Mr. Reifer stated that the Assessor's Office listed the Episcopal Church as the legal owner of the property.

In closing, Rev. DuBose explained that it was her duty as a priest to care for the needs of the community.

Mr. Bob DuBose, retired diplomat, was the President of the Nelson Cluster of the Episcopal President of the Eastern Deanery of the Episcopal Church WV Code §36-1A-1 Rule Against Perpetuities states, "An interest that isn't vested or completed is invalid unless: a) it is intended to occur or terminated within 21 years of the death of an individual then alive; or, b) it actually occurs or terminates within 90 years after its creation. Rev. DuBose stated this was considered a reversionary clause; therefore, in his opinion the deed became invalid after 90 years.

Mr. Aitcheson addressed the Board in rebuttal stating that the church does not pay taxes; that simply because the building looks like a church and had been used for a church for approximately 140 years does not make its current use a church; and, Rev. DuBose informed Ms. Morton that the shelter would be for one year although they had signed a two-year lease and Ms. Morton had read in the paper that they had a 3 year lease. Mr. Aitcheson gave his opinion regarding the interpretation of the Rules of Perpetuity.

Jim Burns stated he would file an injunction against the Appellants to protect his ownership rights.

Ms. Huddle motioned to go into deliberative session at 4:00 p.m. Mr. Bannon seconded the motion, which carried unanimously.

Ms. Huddle motioned to come out of deliberative session at 4:25 p.m. Mr. Quynn seconded the motion, which carried unanimously.

Board of Zoning Appeals Rulings

3. Action on a proposed amendment to the approved Conditional Use Permit for Rippon Brewery, LLC. This project has been approved for a micro-brewery with a tasting room, a future pub/restaurant, a store, a country inn and an office to be situated on 2 acres. The applicant is requesting an amendment to the approved CUP to add a four unit residential dwelling.

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

4. Appeal of an Administrative Decision made by Jennifer Brockman, Acting Zoning Administrator, to deny the use of the St. John's Episcopal Church's facility as an overnight cold-weather shelter in the Rural Zoning District. Appellants: The Rev. Georgia DuBose; The Episcopal Diocese of West Virginia / The Rt. Rev. W. Michie Klusmeyer and William F. Berry, Vice President of the Jefferson County Homeless Coalition.

Ms. Huddle motioned that at the time of the decision that no regular services were being held and therefore the decision by Director Brockman was correct and that the request to appeal the Administrative Decision was denied. Ms. Huddle further stated that should regular church services be established that the applicant may reapply for the homeless shelter. Mr. Kelly seconded the motion. Mr. Bannon asked Ms. Brockman if the applicant could apply for the use the following business day. Ms. Brockman stated she was unsure if holding one service constituted 'regular' services and that documentation may need to be provided to the office showing the ongoing use. Mr. Bannon stated he could not support the motion because he believed that the County should not be regulating an applicant's First Amendment Right. Mr. Bresee called for a vote which carried three (3) for and two (2) in opposition (Mr. Bannon and Mr. Quynn).

5. Director's Report.

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

- 1) **Envision Jefferson 2035 Update**

- a) Hold the Date:

- 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 for Approval to move forward with Job Offer for Zoning Administrator Position
- b) Discussion and Possible Action Regarding Potential Amendments to WV Code 8A

3) **Upcoming CC Actions relevant to Planning:**

- a) Request by the Planning Commission that the County Commission Reconsider their Motion of 10/25/12 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 (10/17/13 1:30 pm) to review changes since last Public Hearing and schedule a new Public Hearing to be held 10/17/13 at 7:00 PM*)
- 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 to be held 10/10/13 at 7:00 PM*)

6. Legal Update. None.

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

- a) 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. Appellant's Representative: J. Michael Cassell, Esq., Cassell & Printz, and PLLC. File: #AP13-01. Meeting Date: 09/19/13: *Not available for signature.*
- b) 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. Property Owners: Robert & Donna Edwards. File: #AP13-02. Meeting Date: 09/19/13: *Not available for signature.*

8. Correspondence. None.

Mr. Bresee thanked everyone for making his tenure on the Board enjoyable. Mr. Kelly wished to go on record expressing his gratitude for the 10 years that Mr. Bresee devoted to the Board stating he believed Mr. Bresee was one of the best Chairmen the Board has had. Mr. Kelly told Mr. Bresee that he believed the public appreciated how well he ran the meetings. The other Members also expressed their thanks and agreed with Mr. Kelly's sentiments. Mr. Bresee emphasized how important it was to always let the public have the opportunity to speak.

Ms. Huddle motioned to adjourn the meeting at 4:40 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. These minutes were prepared by Jennilee Hartman, Zoning Clerk.