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Bath County Board of Zoning Appeals

Bath County Courthouse – Room 115
August 15, 2016

MEMBERS PRESENT: Chairman Janice O’Farrell, Vice-Chair Scott Miller, Rick Armstrong, Jason Miller, Richard Hise

MEMBERS ABSENT:

PUBLIC IN ATTENDANCE: Geoff Hamill (Press), Steven K. Von Storch, Mr. & Mrs. Tom Gates, Len Foutz, Mike Collins (County Attorney), John Lindsay IV, Peter Judah (Attorney)

STAFF PRESENT: Sherry Ryder

Chairman O’Farrell called the meeting to order at 7:00 p.m.

PUBLIC COMMENT—MATTERS UNRELATED TO THE AGENDA: None

ADDITIONS AND CORRECTIONS TO AGENDA: None

PUBLIC HEARING

- a) **Steven K. Von Storch** (TM#51-2E) – Variance application to allow further subdivision of a parcel of land currently comprising approximately 69.83 acres. The property was divided March, 2015 and does not meet the three year time period for division. The property is situated in the Warm Springs Magisterial District and is zoned A-2 Agricultural General. The property is located near the address of 1663 McGuffin Road, Warm Springs, VA.

Sherry Ryder: An application was received to subdivide the property creating a 29.25 acre parcel and 40.58 acre parcel. The property had a parcel comprising 2.11 acre divided off and recorded on March 25, 2015.

According to Section 902.04 of the Bath County Land Use Regulations, “a parcel of land that has been previously subdivided cannot be further subdivided until a period of not less than 3 years have lapsed.” The 2.11 acre parcel, which was conveyed in 2015, was not to a family member.

Section 904.09 of the Bath County Land Use Regulations states “The agent may, however, permit the separation of one (1) parcel from a tract of land without complying with all the requirements of these Land Use Regulations if it is not in conflict with the general meaning and purpose of these regulations.”

Please refer to the following as you make your decision: The Virginia Supreme Court provided some useful guidance on how a BZA is to approach a variance application: The threshold question for the BZA in considering an application for a variance...is whether the effect of the zoning ordinance upon the property under consideration, as it stands, interferes with “all reasonable beneficial uses of the property, taken as a whole.” If the answer is in the negative, the BZA has no authority to go further.

A Variance is defined as: “reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property, and such need for a variance would not be shared generally by other properties, and provided such variance is not contrary to the purpose of the ordinance. It shall not include a change in use, which change shall be accomplished by a rezoning or by conditional zoning.”

The burden of proof is on the applicant to prove by a preponderance of the evidence that the application meets the standard for a variance.

Then we go back to the Code of Virginia Section 15.2-2309(2): The BZA must grant a variance if the evidence shows that the strict application of the terms of the zoning ordinance would “unreasonably restrict the utilization of the property or that granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance” and “(i) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (ii) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of the geographical area; (iii) the condition or situation of the property concerned is not of so general or recurring nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (iv) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (v) the relieve or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance pursuant to subdivision 6 of 15.2-2309 or the process for modification of a zoning ordinance pursuant to subdivision A4 of 15.2-2286 at the time of the filing of the variance application.”

Just a reminder, decisions on variances must be made within 90 days of hearing. Vote must be at least three members voting in favor of granting variance.

The BZA is required to make findings that reasonably articulate the basis for its decision. This assures that parties can properly litigate, the Circuit Court can properly adjudicate, and Supreme Court can properly review the issues on appeal. A hardship cannot be created by the applicant for the variance – evidence must show “any hardship was not created by the applicant for the variance.” Virginia Code Section 15.2-2309(2) paragraph 2(i).

Relevant Section(s): 902.04 and 904.09 – Bath County Land Use Regulations.

Mr. Foutz sold them the property, he did call and he is here tonight to add to what I may not have addressed. When he sold the property, he granted a one-time division to Mr. Von Storch and when Mr. Puffenbarger, on March 2015 was granted the two (2) acre parcel, Mr. & Mrs. Foutz did deed amendment to allow that one. Mr. Von Storch thought he had one more division and based on what I hear he didn't know the Land Use Ordinance regulations would prohibit him from further subdividing now. So we have a variance request in front of us.

Chairman O'Farrell asked if anyone had any questions for Sherry. None. Then opened the Public Hearing for comment. She asked they state their name and address.

Steven Von Storch: Stated his name and address, 250 Chestnut Oak Lane, Charlottesville, VA. The process that Sherry outlined is accurate. We bought the property from Len and Trish about fifteen (15) years ago. The seventy two (72) acre parcel was allowed by deed to be divided one (1) time further. Over the fourteen (14) years, we got to know Jody Puffenbarger and his family well because they worked with us to work, clear and develop the land to what it is now. During that time Jody and his family were moving back and forth from one rental cottage to the next. So, over time I thought this would be a good opportunity to set his family on to home ownership. To accomplish that we asked Len and Trish, who also know Jody, to amend the deed to allow this lot to be partitioned off. We worked together to make this happen. I know this isn't legal language but we felt that Jody was like family to us. A plat was created, recorded, reviewed and no one in that process waived a flag and said, we were using up our last development and you can't do this again for three (3) years. Part of the timing was, we just need to sale off half of the land for personal reasons. We were surprised and it got clear to the local attorney, who was surprised. I am an architect and work in Albemarle County all the time and I go through their Board of Zoning Appeals and Planning Commission. I understand why this exists and makes sense, from what I understand, it's to keep sudden transitions from happening without being reviewed. If I had known about that, it's something I could have easily done. So I had no reason to hide from that if I had known.

After talking to lawyers and looking for my own way forward on this. The intent, as I read, the main obstacle is, you can't grant relief from a situation that I created. I understand that. This is to address, if I had created a legal landfill on my property and then came to you and say, I have a landfill, why won't you allow me to have it. In this case we created a lot as a gift for a local family, no red flags came up and now we are trapped. We can't go back to the Planning Commission or forward to a sale, without you. If we could turn back the clock, I would. When we came in and Ryan was working with us, at first Ryan thought we would be going to the Planning Commission. Then we discovered that we were all trapped. We ended up her on good faith and for a good reason. We hope you can find a way to grant us some relief. Do you have any question?

Rick Armstrong: If we did grant your relief, would you further subdivide?

Steven Von Storch: We can't, the deed restricts us to one. I had asked the Foutz over the years, if they would be willing to amend that deed to allow further subdivisions if we partnered and developed a few more lots and they said absolutely no. They sold us the land because they like us, needed the money to put into business. They were firm in the way the deed was setup but they also saw the advantage when I asked about Jody having a lot. I presume everyone around here knows everyone and knows how hard he works, seven days a week. I had to do something to help this family. So now we have walked into a door and the door has closed behind us. As it stands now, the land can only be divided into three (3) lots. The two (2) acres of Jody Puffenbarger, the forty (40) we will have and the thirty (30) we are selling. That's all the divisions that can happen for the future, according to the way the deed is setup right now. We aren't trying to harvest something from your beautiful land and then go back to Charlottesville. If I had known about this requirement, we would not have put the Puffenbarger lot first before being able to sale a lot. We like everyone else went through a recession and I am an architect, and things aren't so great. I have two kids in college and we have some bills to pay. Thank you. I will answer any question.

Tom Gates: I live at 5506 Toddsbury Road in Richmond, VA. I think in the third week of May, we entered into a purchase contract with Steve, with Ryan Hodges supervising with the idea that we would be closing on this land on July 1st. My wife and I searching in Bath County for three (3) years, for land in the right spot for us for our retirement years. We thought this was the right one, so we signed a contract. During that time from May to July, we had contracted with Craig Robertson to build a house. Trimble to do the site work. Had a perk test done and gotten a septic and well permit. We are ready to go. During our work with Singleton, on the closing, we found all of this out. We are on tender hooks on this and have lost two (2) other places. It is our intention to use local people and will be spending close to a half million dollars. We want this to be a family home and to transfer it down to generations to come. We hope you will consider this favorable because my wife and I are eager to become tax payers of Bath County.

Len Foutz: We live at 1671 McGuffin Road and we are the original owners of the property Steve Von Storch has. They have been good neighbors and he has done everything he said he would do. I had no idea about the three (3) year waiting restriction either. Knowing Jody and his family, we wanted to help them out by creating this amendment to the original covenant we conveyed to Steve. We have no rejections to this taking place. We share the same driveway for approximately two hundred (200) feet or so. Then our driveway splits off. If anyone should object, it should be me because my driveway is going to see more traffic, but we do not because it was our original intentions to still allow Steve to retain the right to one subdivide.

Chairman O'Farrell asked if anyone had anything else to say and then closed the public hearing comment period. She asked for a motion to discuss.

Vice-Chair Scott Miller made a motion to discuss the Variance application.

Rick Armstrong second the motion.

DISCUSSION ON VARIANCE:

Vice-Chair Scott Miller: Even with the support of his neighbors, I can't see how a variance can be granted with the way the Code of Virginia reads. I do think we need some counseling on this. I believe we have ninety (90) days to go over this. Right Sherry?

Sherry Ryder said yes, she then asked Mike Collins if he had anything to say on the variance.

Mike Collins: Addressing your point Scott, the subdivision ordinance that we know of is a creature of State law. The state gives us only the powers to do thing they allow us to do. The State authorities the creation of ordinances. It doesn't specifically talk about this very issue of three years between subdivisions. What it does say is the County may create provisions for variances or exceptions to the general application of the subdivision ordinance where unusual situations or strict adherence to the general regulations would result in substantial hardship. The State has created that opportunity. We don't have a specific statute on that in the County Code. But the variance that does exist is with you all, is a path appointed not by the Board, but by the Circuit Court and if your decisions are viewed by someone and isn't liked can end up in the Circuit Court. But we are, I think, missing a small provision in the County ordinance that would say, we authorize those considerations by the Board of Zoning Appeals. I struggle with the specific authority of this Board. I guess your decision is the final decision of Bath County unless they are appealed by somebody through the Circuit Court. One last thing, if Von Storch had divided off a plat when he first bought the land, when doing his survey plat, and the lot he intended

to give to Mr. Puffenbarger at the same time, and gotten it approved, before deciding to sale off a lot, he would not have had any restrictions. It would have been an automatic subdivision approval. Even if he had done the divisions at the same time, there would have been no difference. The only difference is, he did them at different times. I will be carrying this back to the Board of Supervisors or Planning Commission. I believe that this needs to be corrected. I bet if anybody should challenge this, and it's not what we want them to do, they would maybe say that it violates the State Code that give us the authority to regulate this. It's not in the State Code that we can do this. Also, it may be unconstitutional.

Vice-Chair Scott Miller: Would we be forming a precedent in future request?

Mike Collin: There is no precedent in these bodies. Someone can say, you did this before and you can say you are not doing it now. So, no there is no precedent.

Vice-Chair Scott Miller: Sherry, Michael, during that ninety (90) daytime frame, is there a chance the Board of Supervisors could act to amend?

Sherry Ryder: It goes to the Planning Commission and Board of Supervisors. I can have an amendment by next month's, September, Planning Commission meeting. It would be November before the Board of Supervisors would hear it. Due to the advertising and due process. They would set the date in October and hear it in November. If you were to go that route, that's the time frame you would be looking at on a Land Use Amendment.

Rick Armstrong: If that was the possibility, I would much rather have a clear, legal path, than trying to go down a path that might not be appropriate. If that's reasonable. That imposes some time penalty again. But if it means we do get a clear path and an approval with no objection.

Steven Von Storch: If ninety (90) days is problematic, can I withdraw or put on hold if time is available?

Mike Collins: You could put into writing and waive that, but the ninety day restriction is to keep the BZA from holding someone up for indefinite. If ninety days go by and they haven't acted upon it, than it is automatically approved. So if you don't want to do that or feel good about having it granted by default. But if the applicant could put a waiver on it then it could be extended. You could move to table it and if it looks like it may go over then you could ask the applicant for a waiver.

Vice-Chair Scott Miller: I make motion we table this motion.

Jason Miller: I second the motion.

I would add in there, with written consent by Steven Von Storch stating the time frame may move beyond the ninety days deadline for applicant.

We don't want to penalize him.

Steven Von Storch: I will keep my eye on it. So it won't go from ninety days to eighteen months.

Jason Miller: We can review this further with the Board of Supervisors. Put down that we need to do something within ninety (90) days.

VOTE: 5-0

PUBLIC HEARING:

- b) **John A. Lindsay, III Estate** – (M#21-6) – Variance application to allow nonconforming lot size of 0.64 of an acre, with minimum lot size being 1.84 acres. The property is situated at 877 Poor Farm Road, Warm Springs, VA. The property was conveyed by Will. The property is zoned FH-1 Flood Hazard and A-2 Agricultural General. The property is situated in the Williamsville Magisterial District.

Sherry Ryder:As you stated the application was received by the Estate of John Lindsay III. Patricia Wollslager, daughter of John A. Lindsay III, was gifted a tract of land. When surveyed, it comprised 0.64 of an acre. I understand the line was actually extended for practical purposes so it would have been a little bit smaller.

Table 1 of the Bath County Land Use Regulations states the minimum lot size for A-2 Zoning, without public water or sewer, is 80,000 square feet or 1.84 acres.

The parcel has a small cabin on it and is near the river. Her father willed this piece to her with certain markers as boundary for her inherited piece. The parcel after being surveyed, and presented to me, the parcel didn't meet the minimum lot size as set forth in Bath County's Land Use Regulations.

Chairman O'Farrellasked if anyone had question for Sherry then opened the floor for Public Comments.

Peter Judah: I speak for John Lindsay for the time being, but he is here to answer any question. Here is the situation, Mr. Lindsay's father made a Will and left this small area of land to his daughter, among other things, he gave the balance to his son. If the variance is not granted than the considerations you have to have are as Mrs. Ryder stated previously. Was this self-inflicted by the applicant?The applicant here in no way created this problem. Her father in this case, made his Will and left the property to his daughter, obviously thinking it was going to be a good bequest. The problem I see, the law says that if it creates a hardship to deny the variance, then you should look into that and perhaps grant a variance for that reason. If you do not grant the variance, the hardship is, if the Will can't be given effect, the hardship is, the daughter gets nothing. It's a deed and the executor who got the rest of the property, would then capture that property and he has no wish to do that. So it wasn't self inflicted, it would create a hardship, there is really no change in the use, that Mrs. Ryder pointed out you would have to have, the property as you can see from the photos, is at one end of the tract. Bordered by the Forest Service. It's a neat division if I may say so. It does not affect any other adjoining property border, no change in use and is not likely to be a reoccurring problem. It is up to you to decide whether to grant a variance or not and allow the executive's father's wishes be executed. I have nothing else to say. I respectfully ask you to grant the variance. Mr. Lindsay will answer question, you may have.

Chairman O'Farrell:Does anyone have any questions for Mr. Judah or Mr. Lindsay? Mr. Lindsay do you have anything to say?

Mike Collins: I think this is more of a subdivision problem really. The issue came up because Mr. Ryder can't approve the plat. It sounds like we are in the same situation as before but we are not. The subdivision ordinance says, one of the things she has to consider is, does this plat meet the minimum size requirement of the zoning requirement for that particular subdivision? When she checked, 80, 000 square feet/0.64 of an acre doesn't. I don't totally agree with Mr. Judah that the Will would be void, maybe the sister owns this little bit of land because the Will said so but it can't be properly recorded. In

the zoning ordinance it does say you can grant a variance for the size of the lot. I totally agree with Mr. Judah that this was not a self in-flicked hardship. I don't know why this hasn't happened a lot more. People will whatever they want to relatives and how they want to, but you would think it might come up more often. But I do see a link to lot size and zoning ordinance and a variance on lot size would give the greenlight to a subdivision agent to approve it.

Chairman O'Farrell asked if anyone had any more to comments. Then closed the floor for Public Comment and opened the floor for discussion by the Board. Hearing none she asked for a motion.

Vice-Chair Scott Miller: I make a motion to approve variance.

Richard Hise seconded the motion.

VOTE: 5-0

CHAIRMAN'S REPORT: NONE

STAFF REPORT:

The staff report is in the packet.

Chairman O'Farrell: Does anyone have questions for Sherry? None

OLD BUSINESS:

NEW BUSINESS:

MINUTES: July 21, 2016

Rick Armstrong: I make a motion to approve the minutes of July 21, 2016

Jason Miller seconded the motion.

VOTE: 5-0

Chairman O'Farrell asked for a motion to adjourn.

Jason Miller motioned to adjourn.

Vice-Chair Scott Miller seconded the motion.

Chairman O'Farrell adjourned the meeting at 8:05 p.m.

Janice O'Farrell, Chairman

Date