BOARD OF ZONING APPEALS
April 7, 2005

A. ROLL CALL

PRESENT:	ABSENT:
Mr. Fraley	None
Mr. Rhodes	
Mr. Fischer	
Mr. Wenger	
Mr. Nice	

OTHERS PRESENT:

John Rogerson, Senior Zoning Officer
Melissa Brown, Senior Zoning Officer
Christy Parrish, Senior Zoning Officer
Michael Drewry, Assistant to County Attorney

B. MINUTES

On a motion by Mr. Fraley, seconded by Mr. Rhodes, the minutes of the March 10, 2005 meeting were unanimously approved with no grammatical corrections.

C. OLD BUSINESS

1. ZA-01-05 190 Clark Drive; Clarence F. Curry Subdivision

Mr. Fraley asked for a summary of the case since it appeared on the last agenda but was not opened for public hearing.

Mr. Rogerson stated that Mr. Spearman applied for two variances on the same property in order to subdivide 1.21 acres of General Residential zoned property into four lots. The variance for proposed lot one was to reduce required minimum lot width for a corner lot from 100 feet to 60 feet. The applicant also asked for a reduced rear-yard setback from 35-feet to 25-feet for proposed lots 2, 3, and 4.

Mr. Rhodes asked if the minor subdivision could be created administratively and what was involved. Mr. Rogerson stated it could be created administratively, however he could not subdivide and leave a residual parcel that did not have a sufficient building envelope in which to place a house. Therefore, the applicant was requesting a variance for these four lots to obtain a sufficient buildable depth. The variance for lot 1 is to satisfy the requirement in the ordinance for 100-feet minimum lot width at the setback

line. Mr. Rhodes wanted clarification that the subdivision did not require any public hearing. Mr. Rogerson confirmed. Mr. Fraley read a summary of the roles, powers and duties of the Board of Zoning Appeals and then opened the public hearing at 7:07 pm.

Mr. Roger Spearman identified himself as the applicant and thanked the Board and Planning Staff. He gave a brief history of the property including the county/state acquisition of different pieces of the Curry parcel for various easements and rights-of-way by eminent domain. In the end, the county and state reimbursed Mr. Curry $14,000 dollars for the takings. Mr. Spearman noted that adjacent property owners were not as extremely affected as his client. He stated that Mr. Curry bore the full brunt of these takings. He added that Mr. Curry always intended to subdivide the property.

Mr. Spearman stated that the lot was a legally non-conforming corner lot in his opinion. He continued by noting that the request for the rear setback variance was simply to accommodate an affordable home of around 25 feet in depth, and to have some space for a rear deck or patio. No subversion of the Zoning Ordinance was intended. Mr. Spearman pointed out that five other variances were approved in the same area after 1994 in which the hardship was a direct result of land acquisition for right-of-way and easements. He concluded that adding four affordable lots would be an asset to the community and to the county as a whole. Mr. Nice asked if the proposed lots would be consistent in size with other lots in the area. Mr. Spearman confirmed. Mr. Fischer inquired about the projected value of the land had it not been taken. Mr. Rogerson stated that the total acreage taken amounted to four acres in an R-2 General Residential District inside the Primary Service Area. He elaborated, saying that the minimum lot size with these specifications was 10,000 square feet, technically allowing four units per acre. In summation, Mr. Rogerson stated that if the property was situated to allow maximum development, 16 residential lots could be created, but value couldn't be determined. Mr. Spearman estimated the value of one residential lot in this area at $25,000 to 40,000.

Mr. Nice pointed out that the property was bought in good faith, and that Mr. Curry's holdings were decreased substantially by takings. He emphasized that the proposed lots were consistent in size with other lots in the area. He saw no reason not to grant the variance since the proposal was consistent with the neighborhood and other similar cases that were approved due to the non-conformity of the area. Mr. Nice stated that he saw the proposed use as being a beneficial use of the property considering the losses.

Mr. Rhodes asked the applicant to define the hardship. Mr. Spearman noted that the property was purchased in 1975 as an investment with the ultimate goal of financial gain. The hardship was created by the taking and the method of taking. He continued, saying that the burden resulting from the acquisition for public right-of-way was placed entirely on Mr. Curry, while neighbors will be able to fully develop their properties within their rights. Mr. Spearman pointed out that Mr. Curry could build a house with a side patio by right, but that he could build a more "normal" house with a back patio for privacy if granted the variance. The hardship was created by the take in terms of developable property, and the method of the take given the lack of sharing of the

burden by neighbors. Mr. Rhodes explained that one aspect of a taking is that the property owner must be fairly compensated for the taking and the impact of the taking on the residual part of the property should be taken into consideration. Mr. Curry should have noted this as part of compensation for taking. Mr. Spearman reiterated that the easements reduced the use of the land substantially. Mr. Rhodes stated that he didn't feel it was fair to make judgement on whether or not Mr. Curry was fairly compensated. Mr. Spearman concurred and noted that the unusualness of the situation was that one property bore the full burden when other contiguous properties were fully usable without consideration for the zoning. He remarked that the designers of Curry Drive should have noticed that they were leaving Mr. Curry a strip of land that to the highest and best use was not usable without a variance. He felt that it would have been simpler to realign the right-of-way but that this was not done because more people would have had to have been dealt with and land under several ownerships condemned. Mr. Rhodes asked if the property was in fact condemned. Mr. Spearman confirmed, and noted that Mr. Curry negotiated for a higher compensation.

Mr. Fraley pointed out that the comprehensive plan emphasizes pushing for more affordable housing and asked what the range of housing was proposed on the lots. Mr. Spearman noted that the houses would be offered in the $110,000 to 135,000 range and that given the number of quality of houses in the area money could not be made building a $200,000 house on these lots. Mr. Fraley thanked Mr. Spearman and asked for questions from the public.

Mr. Drewry clarified that the common law of Virginia states that a hardship that is self-inflicted is not considered a hardship, and that you enter the realm of self-inflicted when you subdivide four lots on a non-conforming property. He noted that somebody could potentially challenge the county on this. Mr. Fraley asked Mr. Rogerson if there was any input from adjacent property owners. Mr. Rogerson responded no. Mr. Fraley asked how past variances were granted, if on a one-structure basis. Mr. Rogerson stated that he had a variance request for a rear yard allowance to preserve the uniform alignment of the front yard setbacks. He noted that it was his impression that there were numerous non-conforming properties in the vicinity, many due to the application of the 25 foot front and 35 foot rear setback. The issue was buildable depths.

Mr. Fraley asked if the subdivision of these lots would result in lots consistent in size with other lots in the area. Mr. Rogerson pointed out that the newly proposed lots would meet current minimum area requirements but due to the predominance of non-conforming lots in the area would actually be larger overall, than other neighboring properties. Mr. Rogerson noted a few other properties in the vicinity that were virtually undevelopable by current zoning standards. Mr. Fraley asked for confirmation that if a variance was granted, the new lots created would not be atypical for the area. Mr. Rogerson confirmed. Mr. Fraley then asked Mr. Rogerson what he thought about Mr. Spearman's justification of a hardship. Mr. Rogerson noted that Mr. Spearman's argument was that Mr. Curry once had 4 acres of developable land and now has 1.2 acres of land. Mr. Rogerson stated that strict application of the zoning ordinance provides him and the Board with staff's recommendation. One house on 190 Clark

Lane is feasible, and the property is currently usable. Mr. Fraley asked how productive the use was. Mr. Rogerson responded that it was very uncharacteristic for lots in that area and that it exceeds minimum area requirements in R-2 by six or seven-fold.

Mr. Rhodes suggested that the statement of intent for R-2 asked for low-density residential and that this proposal seemed inconsistent with that specification. Mr. Rogerson referenced section 24-55 of the zoning ordinance to clarify minimum area requirements for the district. Mr. Fraley clarified that low-density as defined in the ordinance encompassed this density. Mr. Rogerson also noted an example of variations from the statement of intent for R-2, referencing Raintree Villas, a residential district with a cluster overlay. The cluster overlay district permits higher density development in the R-2 designation. Mr. Rhodes approached the purpose of cluster, and asked for confirmation that this requires additional open space. Mr. Rogerson concurred. Mr. Fraley reopened the public hearing at 7:35 pm.

Mr. Spearman noted that Mr. Curry realizes the corner is too narrow to build on and that setbacks would require the same building envelope throughout the length of the property. He also realized that the same variance would be requested for all four. Mr. Fraley responded that he did not have a problem granting a variance for a single structure, but just wanted to pose the question whether entertaining the current subdivision variance proposal would increase the complexity of the matter. Mr. Spearman stated that he wanted to present the proposal as one package. Mr. Fraley asked Mr. Drewry if the applicant could have proceeded after variance approval to subdivide without having to obtain separate variances for each property. Mr. Drewry responded that the applicant would have to get a variance for each separate lot proposed before administrative approval of the subdivision could be granted.

Mr. Fraley restated the case then asked Mr. Drewry his legal opinion regarding the fairness of the proposal given the circumstances. Mr. Drewry said he felt the present issues should have surfaced at the time of the condemnation, and reiterated that this variance could be challenged and that the challenger would have backing with Virginia Common Law. Mr. Fischer inferred that after he realized the extent of the losses, he viewed the situation as an atrocity and would support the variance. Mr. Wenger stated that he felt in favor of the variance because minimum area requirements were met and lots proposed would be approximate to the size of adjacent properties. Mr. Nice restated the case that Mr. Curry could have developed 16 lots and now can only get four, therefore a hardship is justified. Mr. Rhodes stated he felt that the issues applicable to the variance should have surfaced during the condemnation and that it was not Board's determination if he was fairly compensated. He then noted that Mr. Curry should have been aware that he was being left with a residual parcel that had little development capacity. Mr. Fischer stated that Mr. Curry was not a lawyer or judge, and was defrauded by the government. Mr. Rhodes stated that it was the property owner's responsibility to get the legal aid needed to ensure a fair transaction.

Mr. Fraley mentioned that the proposal was indirectly attractive due to the inclusion of affordable housing, but reiterated the decision was based on technical reasons. Mr.

Fraley stated that while he shares some of Mr. Rhodes concerns, he didn't feel it was possible for Mr. Curry to be properly compensated at the time and felt the hardship was justified. Mr. Rogerson restated the sections of the ordinance pertinent to the proposed variance. Mr. Fraley made a motion for approval, seconded by Mr. Nice. The variance was granted 4-1 with Mr. Rhodes opposing.

2. ZA-2-05 1826 Jamestown Road and 259 Sandy Bay Road- Cooke's Garden Expansion

Mrs. Parrish stated she received a petition packet and distributed them to the Board. She asked if there were any questions. Mr. Fraley noted that he received letters of support in favor of the variance and opened the public hearing at 7:50 p.m.

Mr. Greg Davis of Kaufman and Canoles, LLC introduced himself as the applicant representing Mr. Schell and Charles Martino. He presented a vicinity map and explained Mr. Schell's desire to do some beautification projects in preparation of the Jamestown 2007 events as encouraged by several entities including the Corridor Enhancement Committee. Mr. Davis gave a short history of the property, pointing out that the buildings were built in the 1950's, shortly before VDOT acquired additional rights-of-way to improve Jamestown Road to a four-lane highway. Since that time, the proposal for widening has been abandoned. The application would permit the creation of a trellis running the length of the front of the building and the construction of a new building between two existing buildings. He noted that VDOT consented to the encroachment into the right-of-way for the purpose of building improvements. Mr. Davis summarized that the enhancements would not be revenue generating improvements but rather an enhancement to the Jamestown corridor for the 2007 events. Mr. Anderson concluded that the current ordinance imposes a restriction and the hardship was the inability to upgrade the property to meet community requests.

Mr. Wenger asked if VDOT gave approval for the trellis to encroach into VDOT right-of-way. Mr. Anderson responded that VDOT gave approval for the trellis to overhang the right-of-way and for the reconfiguration of landscape islands, but that no construction would take place in the right-of-way. Mr. Rhodes asked how non-conforming the building setbacks were. Mr. Anderson stated that the setbacks varied, but that the encroachment was as small as one foot. Mr. Rhodes noted that the proposal was not changing much. Mr. Fraley asked for public comment.

Ms. Karen Shoemaker introduced herself and explained her support for the project including its fulfillment of the mission of the Historic Triangle Corridor Enhancement Program. She listed supporting entities, reiterated her support and thanked the Board. Mr. Fraley closed the public hearing at 8:00 pm.

Mr. Rhodes stated he felt it was not inconsistent with what was already there, but wished for a requirement to extinguish the property line between the two parcels as a condition of variance approval. Mrs. Parrish suggested a motion to grant a variance to section 24-372 and 24-393 to reduce the front setback from 50 feet to 0 feet to construct

a trellis and new building addition at 1826 Jamestown Road and 259 Sandy Bay Road with the condition that they extinguish the property line between the two parcels. Mr. Fraley wanted verification that the statement was consistent with what the applicant proposed. Mr. Anderson confirmed. Mr. Fraley made a motion for approval with Mr. Fischer seconding. The variance was approved 5-0 without objection.

D. NEW BUSINESS

1. ZA-4-05 4000 S. Riverside Drive- Ricardo Steiner

Mrs. Brown stated that staff had no additional information to share and asked for questions. Mr. Rhodes noted that the staff report indicated that the ordinance was amended in 1989 to change setbacks and asked for elaboration. Mrs. Brown stated she knew one concern was the proximity of dwellings to the right-of-way. She stated that the property in question was located in an A-1 Zoning District that was subject to an increase in setbacks when the ordinance was amended. Mr. Fraley asked how to respond to a situation where well and septic permits are erroneously approved. Mr. Drewry stated that there are situations where you have legal backing on vested property rights, but said he could see where a hardship could be justified based on the fact that the property owner could not readjust the location of well and septic because it would encroach into wetlands. Mr. Rhodes questioned whether the county failed in its enforcement responsibility or if the applicant was at fault given this situation where the applicant provided inaccurate information to the county. Mrs. Brown noted that when you make application for a well and septic permit, the drawings have to be to scale. She stated that the original application was made in 2000 and the applicant resubmitted in 2001. Mr. Drewry stated he was unfamiliar with the particular situation and did not know why the applicant would not provide correct information. Mr. Fraley opened the public hearing at 8:09 pm.

Mr. Dwayne Hirsch introduced himself and stated that the original plat and paperwork showed a 35 foot setback, and the Health Department plats showed a 35 foot setback. After the septic system was installed, the paperwork was changed and redlined to 75 feet after the well was placed. Approval was issued. The problem is that the well cannot be moved or relocated because there is only one reserve area for the drainfield. He concluded that there was not much you could do.

Mr. Joe Swanenburg introduced himself as an adjacent property owner at 3026 The Pointe Drive and a licensed general building contractor. He identified the RPA, reserve area, and house and pointed out that the option of putting another drainfield in was slim to none even with treatment. Mr. Swanenburg pointed out that when the subdivision was preliminarily approved the setback was 35 feet and by the time it was finally approved the ordinance had been amended and the setback was 75 feet, instantaneously leaving the property basically undevelopable. Mr. Swanenburg voiced his support of the variance noting that given RPA buffer and setback requirements, many of the surrounding properties would be looking at the same issues. Mr. Hirsch added that VDOT had no issue with the proposed variances effect on the cul-de-sac. Mrs. Brown explained that the

cul-de-sacs in the neighborhood were not built to standards shown on the subdivision plat and that VDOT did not wish to ever expand the right-of-way to the specifications shown on the plat. Mrs. Brown noted that the applicant could apply for an administrative variance for RPA setbacks from the Environmental Division. Mr. Fraley asked if approval from Environmental had been granted. The applicant stated they had received approval. Mr. Fraley closed the public hearing at 8:18 pm.

Mr. Rhodes asked Mr. Drewry if a recorded setback on a plat takes precedence over a subsequent change in the ordinance. Mr. Drewry stated that if you build later you must comply with the current standards in the ordinance, which gives purpose to the variance process. Mrs. Brown noted that there was a vesting resolution for lots recorded with setbacks prior to 1969, but that there was no vesting resolution recorded when they added the setbacks. Mr. Drewry stated that under Virginia Law there is no vesting of setbacks but you can change that in local ordinances. However, no vesting resolution was recorded when they recorded the ordinance change. Mr. Rhodes asked how many lots in the subdivision were developed. A member of the audience offered that four of sixteen lots were still undeveloped in the particular section of the neighborhood with three building permits under review including the proposal at hand. Mrs. Brown stated that only four of those were over three acres with the majority of farmettes being one acre lots.

Mr. Rhodes asked if most of the fourteen developed were built to conform with the 50 foot setback required in A-1. Mrs. Brown asked if Mr. Rhodes was referencing houses built prior to the change. Mr. Rhodes confirmed. Mrs. Brown elaborated that several are built to the 35 foot requirement, but that the newer lots on The Point Drive were built to meet the current 50 foot setback. The lots to the right of Mr. Steiner's property are zoned R-2, so all houses were built with a 25 feet or less setback. Mr. Rhodes asked if granting the variance would be of detriment to the character of the neighborhood. Mrs. Brown stated no, and she confirmed that the proposed location would be consistent with the other houses on the street since the Steiner parcel was the only one zoned A-1 on the street.

Mr. Nice stated that it was unfortunate that the location of the well was in question but felt it was consistent with adjacent properties. Mr. Nice stated that it was in the Board's purview to recognize the encroachment into the RPA as an additional non-conformity. He voiced his approval. Mr. Fischer asked what plat was recorded with a 35 foot setback since the ordinance change was in 1989 and the documentation provided was from 2000. Mrs. Brown replied that the subdivision was being processed at the same time the ordinance was being amended. The subdivision received preliminary approval a month before the amendment was approved and final approval a month after. She continued, stating that Mr. Steiner had the legal right at the time to make application for a building permit before the ordinance change was approved since the subdivision as a whole had received preliminary approval. Additionally, since there was no vesting resolution, any additions would now have to meet current requirements.

Mr. Fischer clarified his question. Mrs. Brown stated that the original plat was not to scale and did not show the setback line. Mr. Fischer asked how application could be made for a well and septic permit using an original not-to-scale plat when the ordinance had been changed x amount of times. Mrs. Brown replied that the Planning Division would require a perc test and a scaled drawing and that this was not done at the time Mr. Steiner made application.

Mrs. Brown suggested a motion to grant variance to section 24-215A setback requirements to reduce the front setback from 75 feet to 35 feet for the construction of a single family dwelling with no further structural encroachments. Mr. Fraley made a motion for approval, seconded by Mr. Wenger. The motion was approved 5-0.

2. ZA-7-05 106 Winter East- Steve Devan

Mrs. Brown provided additional information, noting that since the ordinance change in 1992, there were four variance requests in the same vicinity as the current case, all approved. Mr. Fraley asked Mr. Drewry what concern he should have in considering granting a variance as far as setting a precedent for similar cases. Mr. Drewry stated that there is no legal requirement stating a proposal should be approved based upon precedent. Mrs. Brown asked for additional questions. Mr. Fraley opened the public hearing at 8:32 pm.

Mr. Roland Braux introduced himself as a resident of 109 Weatherburn Lane. He presented a short history of the property, noting that in 1992 the setback lines were reversed so that the rear setback became 35 feet from 25 feet. He noted that the proposal does not encroach into the original setback of 25 feet. The hardship is personal right to have a deck in one's back yard. Mr. Braux explained that no further land clearing permits would be needed to the side of the property. He explained that adjacent properties have buildings encroaching already. Mr. Fraley closed the public hearing at 8:37 p.m.

Mr. Fraley asked Mrs. Brown about her feeling beyond the fact there were technical issues. Mrs. Brown stated that beyond strict application of the ordinance and given past similar cases, she saw no additional issue with the application. Mr. Fischer asked why the applicant could not build on the old plat since they got permission to put a well on the original plat. Mrs. Brown clarified that since there was no vesting resolution associated with the plat, any modifications would have to be built to meet the requirements of the current ordinance. Mr. Rhodes asked about the setbacks of neighboring properties. Mrs. Brown noted that most homes were built when the property was zoned R-3 but that most homes were built close to the setback so they are close to the current requirement. Mr. Rhodes inquired as to whether a property owner in the area could build a screened in porch and still meet setbacks. Mrs. Brown stated that probably 70% of homes in the area could meet current setback requirements. Mr. Wenger noted that the zoning change was in 1992, the house was built in 1983, but that the house was added onto in 1996. Therefore, is there any point at which the property owner has to stop with the additions.

Mr. Rhodes asked what the hardship was since the property owner has full use of the property and proposes a change simply for convenience. Mr. Fraley stated that when the County changes the zoning ordinance they must be mindful that these changes may be made after the purchase and that the changes are of no fault of the property owner. Therefore, it affects the ability of land owners to enjoy their property. Mr. Fischer stated that when amending the ordinance, a grandfather clause should be set in place to prevent situations like this.

Mrs. Brown suggested a motion to grant variance to Section 24-258B Yard Regulations, to reduce the required rear yard setback from 35 to 25 feet for the construction of a screened in porch with no further encroachment. Mr. Fischer made a motion for approval with Mr. Nice seconding. Motion approved 5-0.

E. Matters of Special Privilege

Mr. Drewry made a report regarding by-laws review to be performed by a William and Mary law intern.

F. Adjournment

Meeting is adjourned at 8:48 pm.

Jack Fraley
Chairman

Allen J. Murphy
Secretary