PLANNING COMMISSION MINUTES

June 2, 2009 Revised

Attendees:

Dan Talbot/Chair	Cole McGregor
Vic Corbo	Charlotte Shifflett/Secretary
Lauri Sigler/Attorney	Margretta Isom/Council Representative
Madelyn Dixon	Cathy Morrison (excused first half)

Guests:
Bertha Williams

Dan Talbot/ Chairman called the meeting to order at 7:00 pm.

- **Minutes:**
  - Vic Corbo made a motion to accept the May minutes, seconded by Cole McGregor.

  Voice Vote: 5-0
  Motion Carried

Old Business:

- **110-610 Land Development**
  Downtown Business District B-1
  Ref. B- Permitted Uses
  - (4) Living and/or sleeping quarters shall be a permitted use when constructed above the ground and basement floors. No living and/or sleeping quarters shall be permitted in any detached accessory building or structure on the same lot of any building.

Mrs. Bertha Williams was in attendance and inquired where she stands on the issue involving her property located at 120 Spotswood Ave.?

- The rental of business usage (B 1) as residential rental property is an issue for the Zoning Administrator rather than the Planning Commission.
- Mrs. Williams submitted letters, signed by witnesses, that the efficiency apartment in the back was occupied from November 2006 thru Feb 2009 by Jackie Dovel. It was noted she ran her business in the front section.
- The small efficiency apartment is grandfathered and she may continue to to rent as living quarters, however, the front shall be occupied by business only. The Zoning Administrator will give written documentation and resolve this topic.

Proposed Amendments to the Town of Elkton Code
Adding Section 713 to Chapter 110- Land Development,
Article VII, Use Regulations
June 2, 2009

§ 110-713 Foundation Surveys

A. A foundation survey shall be obtained for the following structures:

(1) New structures, renovations, or additions that require a foundation or footer inspection;

(2) Manufactured homes, decks or other additions over three (3) feet by three (3) feet within a manufactured home park or manufactured home subdivision established after 1995.

B. The foundation survey shall be prepared by a certified land surveyor licensed to practice in the commonwealth after the footer or foundation (whether existing or new construction) has been inspected and approved by the building inspector. Construction above the foundation, slab, or pier shall not commence until the survey has been approved.

C. The foundation survey shall document the location of the foundation, slab, or piers relative to property lines to confirm that the construction complies with setback regulations.

D. Exceptions. The following are exemptions from those requirements:

(1) The placement of manufactured homes on a manufactured home park lot that existed prior to 1995 does not require foundation, slab, or pier survey. County staff shall determine if sufficient space for the requested unit complies with the current building code.

(2) A new structure or the addition to an existing structure, on a tract of land that has a valid survey, does not require a foundation, slab, or pier survey if a certified land surveyor licensed to practice in the commonwealth confirms by letter that the construction is more than 40 feet from all property lines. This determination must be made by the surveyor after the approval of the footer inspection.

(3) Survey may be waived on parcels of 3 acres or larger if the owner of the land states in writing that the structure in question is more than 40 feet from all property lines.

(4) Survey may be waived for structures of record, at the time of adoption of this regulation, with non-conforming setbacks as long as the remodeling of an existing porch or deck does not further decrease setbacks. This situation applies to the creation on non-conforming structures resulting from widening or relocation of roads of the construction.

(5) If application is made for an addition to a structure, and the applicant presents a previous survey of the property that shows the existing structure meets setbacks, and it can be determined that the addition shall meet all setbacks, that survey may be used and a new foundation survey may not be required.

E. Exemptions: The following are exempted from these requirements:

(1) Storage building that is less than two hundred fifty six (256) square feet and not on a permanent foundation.

(2) Deck, stoop, or porch, without a roof and not located in a manufactured home park or manufactured home subdivision established after 1995.

Cole McGregor made a motion to accept 110-713 as presented with changes as noted; seconded by Vic Corbo.

a. Remove last two (2) sentences from Section C.

b. E (2) change 60 feet to 40 feet.

c. E (3) change 6 acres to three (3) acres and 60 feet to 40 feet.

A Public Hearing is recommended.
Voice Vote: 5-0
Motion Carried

§ 110-910 Lot Line Revisions and Vacations

A. A lot line on an existing parcel may be revised or vacated if the revision or vacation will not be in conflict with any provisions of this chapter.

B. **Vacation:** The property owner or proprietor of a tract of land in Elkton shall file a plat meeting the requirements of § 910-908. The Zoning Administrator shall review requests for lot line vacations for compliance with this chapter and shall approve the plat if he/she finds all to be in compliance with provisions of this chapter. ~~*The Planning Commission shall review the proposed revision and make recommendations to Town Council. Council consideration will follow the process outlined in § 110-909.*~~

C. **Revision:** The property owner or proprietor of a tract of land in Elkton shall file a plat meeting the requirements of § 910-908. The Planning Commission shall review the proposed revision and make recommendations to Town Council. Council consideration will follow the process outlined in § 110-909.

Vic Corbo made a motion to revise 110-910 and recommended holding a Public Hearing.. The motion was seconded by Cole McGregor.
Voice Vote: 5-0
Motion Carried

2009-012
Clyde Hisey

- Mr. Hisey's request was revisited by the commissioners. He may reactivate the original plat he presented, which requested subdivision of a lot and a lot line vacation. With implementation of this plat, he would be required to dedicate an additional 20 feet to increase the existing 30 ft Right of Way to a 50 ft. Right of Way to comply with code and VDOT standards.

Pathforward:
Charlotte will contact Mr. Hisey with the latest results.

□ **Current Zoning vs. Rezoning and Comprehensive Plan**

This discussion began with a memo researched, authored and distributed by Town Attorney, Lauri Sigler, relative to the subject of Downzoning.

- In a downzoning case it should be noted that the threshold question is whether the action was **"comprehensive"** or "**piecemeal".** We want our rezoning to fit into the "comprehensive" category. In a "piecemeal zoning" we would have to show a change in circumstances. What will make it "comprehensive" is a period of investigation and planning by the Commission.
- The mentality of property owner's is to assume when going from B to an R; they may have been down zoned.
- A downzoning is the reduction in formally permitted land use intensity, as when a commercially zoned property is down zoned to permit only low intensity residential use. It is not downzoning if the property is rezoned from a more economically desirable classification to a less desirable one.
- Some residents living in business districts may have a hardship under current zoning.
- Generally, land use decisions by local governing bodies are legislative actions enjoying a presumption of validity, and which the courts will not lightly overturn. As the Planning Commission moves forward and considers the rezoning of certain areas of the Town, the Commission needs to consider whether these actions will result in a downzoning of property.
- Downey Knolls has presented a boundary line adjustment request to Rockingham County officials. If this development is annexed into Town we have the possibility of creating more business on the West end of Town.
- Each member should review the paper in it's entirety before next month's meeting. The examples may be beneficial in determining your outlook as we move forward.

Pathforward:

Dan will write a summary to define issues and provide information as to why rezoning should occur.

With no further business, the meeting adjourned. The next regular meeting is scheduled for the first Tuesday, July 7, 2009 @ 7pm in the Elkton Area Community Center at 20593 Blue & Gold Dr. A possible Public Hearing may be held on July 14, 2009.

Submitted By:
Charlotte Shifflett

Dan Talbot/Chair

Madelyn Dixon/Secretary

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M. CHRISTOPHER SIGLER
LAURI A. NOWAKOWSKI SIGLER

LEGAL MEMORANDUM

To: **Charlotte Shifflett, acting zoning administrator**

Members of the Elkton Planning Commission

From: **Lauri A. Nowakowki Sigler, Esquire**

Date: **June 2, 2009**

Re: **Downzoning**

A downzoning is a reduction in formerly permitted land use intensity, as when a commercially zoned property is downzoned to permit only low intensity residential use. It is not downzoning if the property is rezoned from a more economically desirable classification to a less desirable one. The Virginia Supreme Court has held that it is the use of the land, rather than the profit expectation, that is determinative of whether a rezoning is a downzoning. This is in contrast to an upzoning which is an upward change from one use classification to another, or the grant of a special use permit. "Upzonings" are legislative decisions that increase the intensity of development permitted on a given parcel of land.

Generally, land use decisions by local governing bodies are legislative actions enjoying a presumption of validity, and which the courts will not lightly overturn. When an upzoning application has been denied by a locality and the landowner files suit, if the landowner produces evidence that the denial of a rezoning request was indeed arbitrary, capricious, or unreasonable, the locality must respond with countervailing evidence that its decision was in fact reasonable, and if upon weighing the parties' evidence the court indeed finds the governmental decision to have been **"fairly debatable,"** that is, one upon which the evidence would lead objective and reasonable persons to reach different conclusions, the legislative action must prevail regardless of the intrinsic merit of the landowner's proposal. The Virginia Supreme Court has said that an issue may be said to be fairly debatable "when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *County Board v. Bratic*, 237 Va. 221, 227, 377 S.E.2d 368, 371 (1989), quoting from *Loudoun County v. Lerner*, 221 Va. 30, 34, 267 S.E.2d 100, 102 (1980).

In a downzoning case the threshold question is whether the action was "comprehensive" or "piecemeal." If the court finds the action to have been comprehensive, the traditional "fairly

debatable" zoning rules set out above apply to its consideration of the matter, and the locality will usually prevail if the issue is indeed fairly debatable. In the case of a "piecemeal" downzoning, however, the "normal" standard is substantially modified to the material detriment of the locality. Where the landowner can make a prima facie case by showing that "since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward shifts to the locality to demonstrate fraud, mistake, or changed circumstances justifying its course." *Turner v. Board of Supervisors of Prince William Cnty.*, 263 Va. 283, 559 S.E.2d 683 (2002); *see also Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974); *City of Virginia Beach v. Virginia Land Inv. Ass'n No. 1 ("VLIA")*, 239 Va. 412, 389 S.E.2d 312 (1990).

In the *Snell* case, the Virginia Supreme Court said that a comprehensive downzoning enjoys a presumption of validity because it is adopted only "after a period of investigation and community planning." Piecemeal downzonings, however, do not satisfy this predictability test because they may be adopted "suddenly, arbitrarily, or capriciously." 214 Va. at 658, 202 S.E.2d at 892. In *Snell*, the Court found the downzoning to have been piecemeal where the ordinance was (1) initiated by the zoning authority on its own motion, (2) addressed to a single parcel and an adjacent parcel, and (3) reduced the permissible residential density below that recommended in the master plan.

In the *VLIA* case, the Virginia Supreme Court held that a downzoning of some 3,500 acres of Virginia Beach was piecemeal and not comprehensive, where the parcels downzoned by that action represented 25 percent of the city's land zoned for development. A large portion of the rezoned land, consisted of a single parcel, 80 percent of which was undevelopable marshlands, and the entire area rezoned constituted no more than 2 percent of the city's land area. The pattern of properties selected by a newly elected city council for downzoning was, according to both the trial court and the Supreme Court, indecipherable and smacked of discriminatory purpose or effect.

In piecemeal downzoning litigation, the locality has the burden of demonstrating a compelling justification for its action by (1) evidence of fraud, (2) change in circumstances, or (3) mistake in its decision to downzone. Fortunately, fraud is rare and where it exists would be a relatively straightforward, although no Virginia case has turned on the existence of such fraud. Mistake requires proof that material facts or assumptions relied upon by the legislative body at the time of the previous rezoning were erroneous.

Therefore, "changed circumstances" must generally be shown if the locality is to prevail in a piecemeal downzoning case. This means a changed condition, as shown by objectively verifiable evidence, which substantially affects the character of the neighborhood insofar as the public health, safety, or welfare is concerned. *Id.*; *see Seabrooke Partners v. City of Chesapeake*, 240 Va. 102, 393 S.E.2d 191 (1990).

The locality prevailed in *Aldre Properties, Inc. v. Board of Supervisors*, Chancery No. 78463-A (Fairfax Cnty. Cir. Ct., March 22, 1984) where the Fairfax County Circuit Court ruled that the downzoning of one-third of that county, consistent with an amended comprehensive plan, was a *piecemeal* legislative decision, however, the court found that Fairfax County had met its burden of proving changed circumstances, by demonstrating advances in the understanding of the impact of development on water quality in the Occoquan Reservoir and the court upheld the downzoning. Since this decision was by a circuit court its effects were one limited to Fairfax County.

Then, in 1990, the Virginia Supreme Court itself upheld a piecemeal downzoning for the first time in *Seabrooke Partners*. In *Seabrooke*, the Chesapeake City Council almost twenty years earlier had rezoned a thirty-four-acre tract to multi-family uses. The tract was never so developed, and the property owner later submitted a subdivision plat for approximately half of the tract to be developed as single-family housing, which was approved. A plat was subsequently submitted and approved for the remainder to be developed as a single-family residential housing. A number of individuals subsequently built and occupied single-family homes on the single-family lots. The owner then conveyed a portion of the property to another corporation. This approximately ten-acre tract was conveyed as a single parcel, and no subdivision plat was ever recorded for it. The land was then conveyed to the plaintiffs, who contracted to sell to yet another corporation, conditioned upon continued multi-family zoning on the tract. The new corporation submitted an application for site plan approval for the development of an apartment complex. Before the planning commission had decided upon the site plan application, however, the city council downzoned the ten acres to single-family use consistent with the actual development of the remainder of the parcel.

On appeal, the Virginia Supreme Court found that the landowner's evidence was sufficient to make a prima facie showing that there had been no change in circumstances since the zoning classification of the tract as multi-family twenty years ago sufficient to sustain the evident piecemeal downzoning of the land. The Court found, however, that the city had produced sufficient evidence of changed circumstances to overcome the presumptions against it in a piecemeal downzoning case. The neighborhood, as defined by the city, had manifestly changed since the original zoning, since the original thirty-four-acre tract had been developed as single-family housing, not the multi-family dwellings that had concededly been approved, and therefore it was fairly debatable that the circumstances justified the compatible zoning of the residue, despite the landowner's anticipated use of the land for more valuable purposes. The case is important both because of the Court's deference to the city's definition of the appropriate "neighborhood" boundaries for purposes of downzoning analysis and for the fact that the Court actually agreed that circumstances had changed.

Conclusion:

As the Planning Commission moves forward and considers the rezoning of certain areas of the Town, the Commission needs to consider whether these actions will result in a downzoning of the property. If the rezoning will result in a downzoning, the Town needs to substantiate the action as being a "comprehensive" downzoning so that the "fairly debatable" standard will apply and the rezoning will enjoy a presumption of validity. The Town will have to show that it adopted the rezoning after a period of investigation and community planning. In order for the Town to defend itself against a finding that the downzoning was "piecemeal," the Town must show a change in circumstances which means a changed condition, as shown by objectively verifiable evidence, which substantially affects the character of the neighborhood insofar as the public health, safety, or welfare is concerned. There have been recent discussions with the owner of the Downey Knolls project regarding a boundary line adjustment with Rockingham County. This development will create more business development on the west side of Town. This additional business property could perhaps give rise to or at least contribute to a change in circumstances to validate the rezoning of other property from business to residential. The Commission should consult with the Central Shenandoah Planning District Commission as they provide planning and technical support services to its members. The Rockingham County Community Development office may also be of assistance in guiding the Town forward.