

**AT A MEETING OF THE ROCKBRIDGE COUNTY BOARD OF ZONING APPEALS
HELD IN THE COUNTY ADMINISTRATIVE OFFICE BUILDING, 150 SOUTH MAIN
STREET, LEXINGTON, VIRGINIA, ON JUNE 19, 2019, AT 4:00 P.M.**

**PRESENT: JEFF PUFAHL, SAM VEST, LYNN WELLS,
ABSENT: JOSEPH CLEMMER, GRIGG MULLEN, III
SECRETARY: SAM CRICKENBERGER
STAFF: CHRIS SLAYDON
COUNTY ATTORNEY: VICKIE HUFFMAN
OTHERS: GREGG AMONETTE**

Mr. Pufahl called the meeting to order at 4:05 p.m.

Mr. Slaydon stated that BZA members, Mr. Clemmer and Mr. Mullen, were planning to meet at the site.

Upon a motion by Mr. Wells, seconded by Mr. Pufahl, the Board of Zoning Appeals voted to recess to the site visit at, or after 4:30 pm on the property located on the east side of McElwee Road (Route 726) approximately .56 miles south of its intersection with Bellevue Lane (Route 730). The property is owned by Dairy Air Poultry, LLC. Roll call vote:

Wells – Aye
Clemmer – Absent
Vest – Aye
Pufahl – Aye
Millen – Absent

At approximately 4:40, Mr. Pufahl reconvened the meeting with the addition of Mr. Clemmer and Mr. Mullen attending the site visit. Also attending were Robert Whipple, Stephanie Whipple, Michael Sharp, Greg Amonette, James Gercke and approximately twelve citizens.

Mr. Crickenberger reviewed the location of the proposed poultry houses.

Mr. Pufahl asked about the ownership of the visible dwellings. Mr. Crickenberger reviewed the ownership of the dwellings.

Mr. Clemmer asked about the stream on the property.

Mr. Crickenberger identified the stream to the rear of the proposed houses and then identified the drainage area that has been discussed.

Mr. Pufahl stated that he would like to view the site from the Whipple dwelling (1397 McElwee Road) and the Amonette Dwelling (1195 McElwee Road).

The caravan of cars went to the elevated hill just below the Whipple dwelling and viewed the proposed site. The caravan then went to the barn area just below the Amonette dwelling and viewed the proposed site.

Mr. Pufahl adjourned the site visit meeting at approximately 5:25 p.m.

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HELD IN THE COUNTY ADMINISTRATIVE OFFICE BUILDING, 150 SOUTH MAIN
STREET, LEXINGTON, VIRGINIA, ON JUNE 19, 2019, AT 7:00 P.M.**

PRESENT: JEFF PUFAHL, SAM VEST, LYNN WELLS, JOSEPH CLEMMER, GRIGG MULLEN, III
ABSENT: NONE
SECRETARY: SAM CRICKENBERGER
STAFF: CHRIS SLAYDON AND BRANDY WHITTEN
COUNTY ATTORNEY: VICKIE HUFFMAN
OTHERS: TOM STANLEY, EVAN MAYO, GREGG AMONETTE, JAMES GERCKE, MICHAEL SHARP, ROBERT WHIPPLE, ODIE MOHLER, REED MACKEY, ROBERT BEARD, MACK WILLIAMS, STEPHANIE WHIPPLE, JON MCDONALD, MICHAEL BEZOK, DAVID REYNOLDS, STEVE HART, DANNY MCCLUNG

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Mr. Pufahl called the meeting to order at 7:01 p.m.

Mr. Pufahl asked that members of the public remain considerate of the speakers by not calling out or clapping, to address the Board of Zoning appeals, to limit their comments to three minutes, and to avoid reiterating other speakers' comments.

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The second agenda item was the review of the minutes from the January 16, 2019.

Upon a motion by Mr. Wells, seconded by Mr. Clemmer, the Board of Zoning Appeals voted unanimously to approve the minutes.

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The third agenda item was the appeal for the Rockbridge Area Health Center.

Mr. Slaydon advised that the Rockbridge Area Health Center asked to be removed from the agenda.

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The fourth agenda item was the appeal of the Zoning Administrator's decision to approve a Farm Affidavit for Dairy Air Poultry by Mr. Gregg Amonette and Mr. James Gercke as follows:

Notice is hereby given per Section 15.2-2204 of the Code of Virginia and Section 808 of the County of Rockbridge Land Development Regulations that Public Hearings will be held by the Rockbridge County Board of Zoning Appeals on Wednesday, June 19, 2019, at or after 7:00 p.m. in the Rockbridge County High School Auditorium at the Rockbridge

County High School, 143 Greenhouse Road, Lexington, Virginia, 24450, to consider the following applications:

- 1. Gregg B. Amonette, 1195 McElwee Road, Rockbridge Baths, Virginia 24473 to appeal the decision of the Zoning Administrator pertaining to the approval of livestock confinement system in the Agricultural and General Uses District (A-2) per Section 602.02-1 and 710.00 of the Rockbridge County Land Development Regulations. The proposed livestock confinement system is located on the east side of McElwee Road (Route 726) approximately .56 miles south of its intersection with Bellevue Lane (Route 730) and is located in the Agricultural and General (A-2) Zoning District. The property is owned by Dairy Air Poultry LLC, further identified as Tax Map number 25-A-10B.*
- 2. James W. Gercke, 1125 McElwee Road, Rockbridge Baths, Virginia 24473 to appeal the decision of the Zoning Administrator pertaining to the approval of livestock confinement system in the Agricultural and General Uses District (A-2) per Section 602.02-1 and 710.00 of the Rockbridge County Land Development Regulations. The proposed livestock confinement system is located on the east side of McElwee Road (Route 726) approximately .56 miles south of its intersection with Bellevue Lane (Route 730) and is located in the Agricultural and General (A-2) Zoning District. The property is owned by Dairy Air Poultry LLC, further identified as Tax Map number 25-A-10B.*

Mr. Crickenberger asked that the Board members move from the stage to the auditorium seating to allow view of the screen. He announced that these two appeals were being combined, since both involve the same decision. He suggested that the Board of Zoning Appeals make two motions after receiving presentations by the Zoning Administrator and representatives for both of the appeals. He then began his presentation (Title: Rockbridge County Board of Zoning Appeals June 19, 2019) by reviewing zoning districts in the area, noting that the poultry house and surrounding properties are in the agricultural general district. He then covered the permitted uses and uses by special exception in the agricultural general district. He pointed out that agricultural uses are encouraged in the agricultural districts. Mr. Crickenberger then reviewed Sections 603 and 710 of the Land Development Regulations, engineered site plan, and stormwater management and erosion and sediment control plans for the Whipples' proposed poultry house. and noted that all required setbacks were met or exceeded. Mr. Crickenberger then reviewed the aerial photo and GIS mapping of the area. He recognized that the GIS mapping and the USGS quad mapping shows a stream bisecting the proposed facility. He then stated that he had performed a site visit at the beginning of the process and could not identify a steam at the proposed location. He stated that the Army Corp of Engineers had also been on the proposed site and identified no wetlands impact at the proposed facility. Mr. Crickenberger pointed out that, at the headwaters of this questionable drainage area, there is a dry pond that has been filled in, which is an important indicator of the viability of a stream or not. With the various indicia of no stream existing, it was not used for purposes of setbacks in this case.

Mr. Crickenberger covered the specific setbacks applicable to this project and shown on the site plans, and noted that all required setbacks were met or exceeded. He then

continued his presentation explaining that a poultry house is exempt from the Uniform Statewide Building Code as a farm structure, so is reviewed for zoning compliance under the provisions for Livestock Confinement Systems, an administrative review. The Zoning Administrator determined that the requirements were met and signed off on the Farm Exemption Affidavit. It is this determination that Mr. Amonette and Mr. Gercke have appealed.

At 7:19 p.m., Attorney Evan Mayo of Tremblay and Smith, PLLC, provided a presentation on behalf of his client, Gregg Amonette. The presentation (Title: Whipple Poultry BZA Appeal Wednesday, June 19, 2019, 7:00 pm) included a timeline from the beginning of the poultry house project to the appeal with the Board of Zoning Appeals. Mr. Mayo stated that the Zoning Administrator made a mistake on approving the project and asked that the BZA overturn the decision. Mr. Mayo stated that the proposed facility was proposed to be built on (1) chronically moist soil, (2) on top of the western most stream on the site, and (3) that it is to be built on top of karst topography. The presentation included photos and videos of the purported western most stream on the property. Mr. Mayo then presented information from Dr. Thomas Burbey, a Virginia Tech Geosciences Professor, on characteristics of 61B soils, as documented in his written opinion included in the agenda packet. Mr. Mayo presented pictures of the site during rain events, and a video clip taken by Mr. Amonette, pointing out flooding. Mr. Mayo also showed a depiction of karst topography, noting that this topography exists on the site, constitutes a geological feature and may result in contamination. Mr. Mayo pointed out that if the Zoning Administrator's decision is contrary to the plain meaning of the ordinance, the BZA must substitute its judgment for that of the Zoning Administrator. Mr. Mayo concluded by asking that the Board of Zoning Appeals overturn the Zoning Administrator's decision, as not in compliance with the ordinance; to obey the rule of law and protect Rockbridge County's water resources.

The Board of Zoning Appeals members returned to their stage seating.

At 7:34 p.m., Mr. Gercke provided the Board with handouts (Title: Presentation of James W. Gercke to the Board of Zoning Appeals June 19, 2019). Mr. Gercke started his presentation by noting that the Amonette presentation covers a lot of the ground for his appeal. He pointed out that his objection is not about farming or poultry houses, but to this project in this location because it is contrary to the ordinance. Mr. Gercke started his presentation by reviewing Dr. Burbey's determination and stated that the proposed project violates the plain meaning and intent of section 710.03-4 of the Land Development Regulations. He stated his agreement with Dr. Burbey's opinion. The County's ordinance expresses the County's intent to protect the groundwater. He stated that the project is within 100' of karst. He pointed out that karst geological formations have cracks and fissures that allow groundwater to be contaminated. He noted the stream shown on the USGS mapping. He then reviewed the definition of a stream, as taken from Webster's dictionary. There is no requirement that a stream flow all the time to constitute a stream. He then reviewed details of a rain dependent stream (ephemeral stream). He explained that Ephemeral streams flow only after precipitation. He then reviewed the location of the ephemeral stream on the map and stated that the proposed facility was proposed to be built on top of an ephemeral stream. He then reviewed information on karst topography, two to twenty feet below the surface. He

noted that page 10 of his presentation is a ponding frequency illustration. He stated that this site floods and ponds. The water is removed either by deep percolation, transpiration or evaporation. These maps are the best natural resource tool. He pointed out that all provisions of the ordinance must apply, and presented four points regarding interpretation of the ordinance. Denial of this project is a logical desired and intended outcome of the County's ordinance. He explained, in his interpretation of the zoning ordinance, how the watershed, streams, and geological information proves that the project should be disqualified as it is not in harmony with the Ordinance. Mr. Gercke recommended that the Board overturn the Zoning Administrator's decision.

Following Mr. Gercke's presentation, Michael Sharp of BotkinRose, PLC, asked that the Board uphold the Zoning Administrator's decision and allow his clients, the Whipples, to continue with their poultry houses. Mr. Sharp explained that the site plan was developed and approved because all setbacks were met or exceeded. He stated that the argument that the proposed use is not in harmony with the ordinances is not accurate. He stated the proposed use is a permitted use and all requirements of the livestock confinement ordinance have been met. It is a site plan process. He reviewed the site plan, including erosion & sediment control and stormwater management, and referenced the nutrient management plan. He noted that there is no evidence that these protective measures, as submitted in the site plans, are ineffective or incorrect. He disagreed with Mr. Mayo's statement that there was no basis for the Zoning Administrator to say there was no stream there. He stated that the basis was that Mr. Crickenberger had the opportunity to the site, actually looked, and could see there was no stream there. Further, the members of BZA had an opportunity to see during the site visit; he stated that he was not able to see any stream there. Related to the terms used in the ordinance, he noted that standing water from time to time does not define a stream; it must have flow. Regarding a water source, source means it is the cause or start of something, not water resulting from rain. He stated that they must rely on Mr. Crickenberger's analysis and decision, after reviewing the site and detailed site plan, and presume that his decision is correct. Regarding flooding concerns, the Ordinance states that the Zoning Administrator must look at a particular map. Mr. Crickenberger looked at that map, and determined that this site is not in the flood plain. He asked the board to uphold the Zoning Administrator's decision.

Mr. Robert Whipple advised that, early on, he hired geologist L. Scott Eaton, a Professor at James Madison University, who reviewed the project. He stated that karst topography extends throughout the entire Shenandoah Valley. Mr. Whipple added that when he made contact with the U.S. Army Corps of Engineers, he was advised that Mr. Amonette had already called about the site. He indicated that the U.S. Army Corps of Engineers sent a letter stating that there is not a stream at the proposed location. He noted that he is just trying to make a living and has met all of the requirements. He then asked the Board to uphold the Zoning Administrator's decision.

Mr. Mayo rebutted that by stating that the Zoning Administrator has not addressed the issues raised in his letter. He stated that Mr. Crickenberger has not definitively said that there is no stream, but rather indicated that there is uncertainty of whether or not a stream exists. Since the flood map provided shows the stream exists, then it does in fact exist in his

opinion. Even if the stream is not always there, the poultry waste is always there. If this site is within 100' of a geological feature, it cannot be approved. A stormwater management plan cannot change that. He indicated that the engineer's job is to prepare the plans and get the project approved; it is the Zoning Administrator's job to ensure that it complies with the Ordinance. He stated that Mr. Crickenberger offered no basis for his determination that the soils or karst would not pollute the groundwater. He represented that the Army Corps of Engineer's letter was not an authorization. He stated, although this project is a permitted use, it cannot be run any old way at any old site; it must comply with the requirements because a permitted use can still cause damage. In response to statement that karst topography exists throughout the Shenandoah Valley, he stated not all karst pollutes the groundwater. Simply being on top of the karst doesn't disqualify it; it is because the karst is 2' from the surface. He asked the Board look at the ordinance and apply it as written. He stated that Mr. Sharp noted that Mr. Crickenberger did not see a stream with his own eyes, but the BZA was shown video of the stream. He concluded that the GIS map was the case in point; the facility was proposed over a stream and that is a violation of the ordinance.

Mr. Gercke rebutted by stating his belief that the site plan does not take care of the problems. He noted that he is currently involved in an appeal of the DEQ permit for poultry waste management, believing it has been unlawfully issued, but did not wish to go into detail on that. However, an email from DEQ physical engineer, Andrew Hammond, indicates that now if a BMP is implemented on site, the dual purpose, used to meet both poultry waste management and stormwater management, needs to be designed to the most stringent criteria, such as no discharge except in case of a storm event greater than 25 years. All of Blackwell's calculations are to the standards of the ESC, which are 2 and 10 year analyses. The DEQ requires 25-year stormwater structures. They have not been designed in this site. The DEQ knew this and approved it anyway. Although not here to litigate that issue, he pointed out that he would not take any solace in the idea that the engineering takes care of the issues on the site. He stated that a permitted use is only permitted if it is in accord with all the other regulations. Mr. Gercke stated that flooding is defined in the zoning ordinance as any land subject to inundation by water, and that the conditions on this site are within the meaning of floodplain under the ordinance. He stated that the Army Corp of Engineers letter dated January 8, 2019, from Vincent D. Pero in the Western Virginia Regulatory Section, never mentions the word "stream". According to Mr. Gercke, he did not deny that the site floods and the engineer makes no determination that there is not a stream. The Army Corps jurisdiction is under the Clean Water Act, pertaining to waters of the United States, having to do with whether they will assert jurisdiction. Mr. Gercke asserted that the Army Corps engineer made only a preliminary finding that, on the western stream, there would not be issues with placing fill. Had he made a finding about a stream, it would have been irrelevant. Regarding the karst, he asked Dr. Burbey if there are karst situations that do not have this vulnerability. Dr. Burbey responded "yes", that up on the hill, there is a different karst environment. When the Ordinance was changed recently, the opportunity to engineer around the requirements of the zoning ordinance went away. It does not state that if you have karst, you can have an engineered solution. Mr. Gercke stated that the Right to Farm Act is a non-issue, noting that it relates to immunity from tort actions, primarily a statutory defense against a common law tort action. There is a specific exception for zoning ordinances, as

long as it relates to public health, welfare and safety. He agreed with Mr. Sharp that this is a very simple case and stated that he hopes the BZA will deny this application.

Mr. Crickenberger stated that the stream was never questioned by him, but by the neighbors. The Army Corps of Engineers is the regulatory authority for such determinations and found no wetlands impact, but clearly indicated that the stream to the rear of the property was an intermittent stream that there would be some impacts to that. The Army Corps is clearly the regulatory authority in this case, and they were brought in due to concerns from the neighbors. He then disagreed with comments made that the Board of Supervisors agreed that poultry houses are a polluter. He then stated that the Board did feel that a 100' setback was a reasonable setback and consistent with other land applications of poultry litter and biosolids, which in many cases, can be closer to streams. Mr. Crickenberger stated that he wanted to clarify that, when on the site, waterways, sinkholes, and those types of things were not in evidence on the site. Mr. Crickenberger stated that Blackwell Engineering is a competent engineering firm and does quite a few of these projects. The County uses a system of checks and balances, and has its engineering firm, AMT, review all of the plans to ensure compliance with all of the requirements. AMT approved this plan also. The Right to Farm legislation must be considered, as it specifically provides that the special exception process cannot be used; the language is very clear. Back to "stream", Mr. Crickenberger noted that there is no defined channel, but noted that everyone has experienced heavy rainfall this past year. He pointed out that many properties in the County with dry drainage ways looked very similar to this property during the rain events of this last year.

Mr. Clemmer asked for confirmation that the Army Corps of Engineers determined this was not a stream.

Mr. Crickenberger stated they said there was no wetlands impact, and had there been a stream there, they would have indicated that there was.

At 8:21 p.m., Mr. Pufahl opened the public hearing.

Odie Mohler, President of Rockbridge County Awareness, and a resident of the Walker's Creek District, asked the Board to deny the appeals and uphold the Zoning Administrator's determination. He then shared his support of the Whipple project.

Reed Mackey of the Walkers Creek District noted that this entire project will be lifted above ground level, with compacted soil impervious to water, and in all probability there will be less poultry waste/resource on the site than what is in the backyard chicken operations. Mr. Mackey concurred with the Zoning Administrator's decision, and asked that the Board of Zoning appeals affirm his decision.

Robert Beard of the Walkers Creek District shared his support of the Whipples' project stated that the landowners followed the rules. He stated that he felt that the neighbors were trying to hold up the project and added that the governing body protects its landowners.

Mac Williams of Greenville shared that he and his family have succeeded in running poultry house operations. He asked the Board to uphold the Zoning Administrator's decision.

Stephanie Whipple shared how emotional this process has been for them. She stated that they have followed all the rules only to be harassed, even after taking their neighbors' opinions into consideration, like picking the colors that suited them. Ms. Whipple noted that there was no stream during the site visit earlier today. Ms. Whipple noted that the pictures and video that were presented, of the purported stream, were following weeks of tremendous rainfall events, pointing out that much of Rockbridge County has been under water. She noted that she also has pictures of water coming down Mr. Amonette's driveway that has the appearance of a stream.

Jon McDonald of the Walkers Creek District shared that a study done of poultry houses in Accomack County concluded there was no contamination from the houses.

Michael Bezok of the Walkers Creek District shared his full faith and support of the Zoning Administrator's decision. He stated that he works for the Virginia Department of Transportation (VDOT) and then stated he does not represent VDOT. He stated that replacement pipes in the area are not required to get a live stream permit, because they are not live streams. He discussed drainage along the roads in the area and stated that, due to storm water control measures, the drainage and runoff may be reduced after the development. Mr. Bezok stated that Mr. Crickenberger does a great job looking out for the County and the people of the County. He asked the Board to uphold the Zoning Administrator's decision.

David Reynolds of the South River District shared that there are maps that show a stream on his own property, but there is no stream on his property, just drainage/runoff from the interstate. He shared his opinion that watersheds are more likely to be contaminated from the interstate runoff with oils, gas, and fuels, or parking lots, than from poultry houses.

Tom Stanley, Virginia Tech Extension Agent for Agriculture and Natural Resources stated that he would like to comment on two components of the appeals related to the soils. The prepared comments (Dated: June 5, 2019 to Rockbridge County Board of Zoning Appeal pertained to the soils in the area and the information prepared by Dr. Tom Burbey. He contacted J. David Harbor, state soil scientist and state resource inventory coordinator, when he was unable to generate the same map. Mr. Harbor's response included information to explain the changes made to the mapping to get the results that were generated. He also noted that Dr. Burbey has presumed that there will be significant quantities of poultry waste on the site, which is not the case.

Steve Hart of the Kerrs Creek District stated that he has a PHD in engineering and worked for the U.S. Army Corps of Engineers for 26 years. He stated that he would like to address two points. His first point was to address a statement about what a professional engineer's duties were. He quoted the definition that states that a professional engineer's first duty is to public safety and sustainability. He advised that no engineer that he knows would ever affix their seal to a set of plans that would violate their first duty. His second point was to address wetland delineation by the Army Corp of Engineers. He advised of the intensive

process that is taken to make any determination of wetlands or uplands. He noted that if it is not wet, then it is uplands and it is not a wetland. He noted that it is easy to see once you look at it.

Danny McClung of the South River District asked the Board to uphold the Zoning Administrator's decision. He noted that runoff water is no different than water running in a ditch alongside a road. You might call it a stream at the time, but go back a few hours later and it would be dry.

At 8:45 p.m., Mr. Pufahl closed the public hearing. He then commended Mr. Amonette and Mr. Gercke for providing the Board with so much detail and their time they have put into this. Mr. Pufahl noted that, looking at the plans, it appears that the area where the water was coming through, is now being diverted to another area more than 100' away from the proposed structure.

Mr. Wells stated that he has listened very carefully, and all of the technical information that was put out, did not come close to the presentations that were made, and recommended that the Board support the Zoning Administrator's decision.

Mr. Vest stated that he agreed with Mr. Crickenberger's decision that the project complies with the zoning ordinance. Mr. Clemmer agreed.

After consideration of the Amonette and Gercke's appeals, upon a motion by Mr. Wells, seconded by Mr. Clemmer, the Board of Zoning Appeals voted unanimously to support the Zoning Administrator's decision to approve the zoning portion of the Farm Affidavit for Dairy Air Poultry, LLC, by the following roll call vote:

Wells – Aye
Clemmer – Aye
Vest – Aye
Pufahl – Aye
Millen - Aye

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With no further business to discuss, Mr. Pufahl adjourned the meeting at 8:48 p.m.

Respectfully submitted

Sam Crickenberger
Secretary