

**Albemarle County Planning Commission**  
**February 23, 2016**

The Albemarle County Planning Commission held a regular meeting on Tuesday, February 23, 2016, at 6:00 p.m., at the County Office Building, Room 241, Second Floor, 401 McIntire Road, Charlottesville, Virginia.

Members attending were Mac Lafferty, Daphne Spain, Karen Firehock, Pam Riley, Jennie More, Bruce Dotson, and Tim Keller, Chair. Bill Palmer, UVA Representative, was present.

Other officials present were Rachel Falkenstein, Senior Planner; Mandy Burbage, Senior Planner; Megan Yaniglos, Principal Planner; Bill Fritz, Chief of Special Projects; Elaine Echols, Principal Planner; Amelia McCulley, Director of Zoning/Zoning Administrator; David Benish, Acting Director of Planning; Sharon Taylor, Clerk to Planning Commission and Greg Kampfner, Deputy County Attorney.

**Call to Order and Establish Quorum:**

Mr. Keller, Chair, called the meeting to order at 6:00 p.m. and established a quorum.

**ZTA-2016-00001 Eligible Applicants**

The Planning Commission will hold a public hearing to receive comments on its intent to recommend adoption of an ordinance amending Secs. 18-33.4, Uniform procedures for owner-initiated zoning map amendments and special use permits, 18-33.5, Uniform procedures for special exceptions, and 18-34.4, Variances, of Chapter 18, Zoning, of the Albemarle County Code. This ordinance would amend Secs. 18-33.4, 18-33.5, and 18-34.4 to allow holders of an easement to file an applications for a special use permit, special exception, or variance if it pertains to a use allowed by the deed of easement or equivalent instrument, enable the director of planning or the zoning administrator, as applicable, to require an applicant to provide necessary documentation to determine eligibility to apply, require when an easement holder is the applicant that notice be provided to the lot owner within 10 days after the application is deemed complete, and allow easement holders to file an application for a special use permit or variance even though the lot owner owes delinquent taxes, fees, or charges to the county. A copy of the full text of the ordinance is on file in the office of the Clerk of the Board of Supervisors and in the Department of Community Development, County Office Building, 401 McIntire Road, Charlottesville, Virginia. (Mandy Burbage)

Ms. Burbage presented a PowerPoint presentation to summarize ZTA-2016-00001 Eligible Applicants.

This amendment addresses an oversight from the legislative process amendments adopted by the Board in 2013. Legislative process amendments adopted in 2013:

- § 18-3.1 defines "owner" as the fee simple owner of the parcel to which the application pertains
- § 18-33.4 authorizes an "owner" to apply for rezonings and special use permits
- § 18-33.5 authorizes an "owner" to apply for special exceptions
- § 18-34.4 authorizes an "owner" to apply for variances

Circumstances were inadvertently overlooked when an applicant is an easement holder

seeking a permit for a use allowed under the deed of easement. An example would be an electric utility seeking to upgrade its transmission lines and towers within an easement it already holds across another owner's property. Another example would be an access easement holder seeking a setback variation for a road across another owner's property. In either case, under the current wording of the ordinance, the owner retains complete control of the property even though they previously sold that property right to the easement holder.

On January 6, 2016 the Board of Supervisors adopted a Resolution of Intent to amend Section 33.4 of the zoning ordinance pertaining to special use permits and rezonings. As we got into drafting the text of the ordinance, staff realized that changes were also needed in Sections 33.5 and 34.4 to allow for circumstances when a special exception or variance would be needed. The result was the expanded resolution of intent that was on tonight's consent agenda.

### **Ordinance Provisions**

Staff reviewed the provisions of the ordinance proposed to be amended, which are in Attachment A of the staff report.

- Adds easement holder as eligible applicant for a special use permit
- Adds easement holder as eligible applicant for a special exception or variance for a variation to the use permitted by easement
- May require documentation to verify applicant eligibility
- Does not require payment of owner's delinquent taxes when applicant is an easement holder
- Requires notification of the property owner within 10 days

The ordinance provisions enable an easement holder to apply for a special use permit, special exception or a variance for a use that is permitted by the deed of easement. This would not enable an easement holder to apply for an application for uses not specified under the deed of easement. For example, someone with an access easement for a road could not apply for a special use permit to place a gas pipeline within the road easement. An easement holder would also not be able to expand the boundaries of the easement without the owner's consent.

In addition the provisions of this ordinance amendment would not allow parties with the power of eminent domain to apply for a special use permit, special exception or variance for lands they do not yet control.

The provisions also enable the county to require documentation to verify that the easement holder is indeed an eligible applicant for special use permits, special exceptions and variances. For the special use permits and special exceptions this would be analyzed by the planning director and for variances it would be the zoning administrator.

It does not hold the easement holder responsible for any delinquent taxes associated with the property. So if the owner has delinquent taxes and if the easement holder is making the application they would not have to pay that owner's delinquent taxes to get their application through.

Finally, it contains a new notice requirement. This was in response to the Board's concerns about how the owner of the property would be notified if an application is made by an easement holder. This would be in the form of written notice to the property owner within ten (10) days of the application being deemed complete. This notification would be in addition to other notice requirements associated with our legislative process and would ensure that the owner would be notified early on prior to a community meeting or a notice of public hearing.

Those are the highlights of the proposed ordinance and she would be happy to answer any questions. Staff's recommendation is that the Planning Commission recommend adoption of the proposed ordinance amendment for ZMA-2016-1 Eligible Applicants.

There being no questions for staff, Mr. Keller opened the public hearing and invited public comment.

Morgan Butler, with the Southern Environmental Law Center, pointed out a typo on page 12 of the draft ordinance in the section that is using the language in revising the variances. In the new language for Section d5 it refers back to special exceptions twice in the second to last line.

There being no further public comment, Mr. Keller closed the public hearing to bring the matter before the Planning Commission for discussion and action. He invited further discussion.

Mr. Dotson said when reading the proposed language it raises a concern when it says it adds an easement holder as an eligible applicant for a special use permit, special exception or a variance when the use is allowed by the deed of easement. He asked does that put the county in the role of the interpreter of what a private action allows, that is, the easement. He knows on conservation easements the county stays out of those as being private matters. So does that put the county in the role of interpreting a private agreement?

Mr. Kamptner replied yes, we can require the documentation from the applicant to demonstrate they have the ability to obtain the permit and it would be consistent with their easement. However, this is only for the purpose of determining whether they are an eligible applicant and it does not usurp the landowner's right. If there is a dispute as to the scope and extent of the easement we are not intruding on that role since it is solely just to determine whether somebody can file an application.

Mr. Dotson said a related question would be if the fee owner objects to the easement holder filing for that special permit does the county cease processing it or tell them to go work it out and come back later. What is the county's role if there is a disagreement between the fee owner and easement holder?

Mr. Kamptner replied that if we had determined they were an eligible applicant the processing of the application could proceed and we would reevaluate. He noted particularly with subdivision plats we have had issues where people were claiming easement rights and things like that. We continued with the process and cautioned the applicant that they may not be able to get the final approval. However, generally we do not step in and arbitrate property rights when somebody has demonstrated to our satisfaction that they have a right to proceed.

Mr. Dotson commented if there was a dispute it would almost be taking sides to continue processing it. In summary item 4 where it waives the requirement of delinquent taxes when the easement holder is not the one delinquent, it is the owner, he was just wondering why we would want to do that. He asked why the county wouldn't want the easement holder to ask the owner to pay those taxes from the amount they receive each year to have the tower on their property because otherwise they can't get a special permit.

Ms. McCulley said she thinks staff would like them to persuade the owner to pay the taxes. However, they really don't have the ability to force that to happen. So that puts them at the mercy of whether the owner pays those taxes, which is not exactly fair to the applicant who is not the owner.

Mr. Dotson said he assumed this arose out of some specific instance where there was a problem.

Ms. McCulley replied staff realized they defined owner very specifically in doing the legislative amendments in 2013. They defined owner very specifically in laying out the process for applications and said an owner may make these applications and limited people who previously would be considered eligible. She thinks the question was in the case of a utility easement would they be eligible applicants and under this current language they are not; whereas, the courts would consider them to have the legal right to make the application.

Mr. Dotson said just thinking further about it when you have multiple owners, three siblings on a property, and there is an application for a rezoning do all three have to sign the application and approve it.

Mr. Kamptner replied that it would depend on the circumstance.

Mr. Dotson said he asked because in a sense if you have an easement it is like having multiple owners with one that owns a part of it and the other owns the rest of it.

Mr. Kamptner asked what you would do on intake where you have a husband and wife.

Ms. McCulley replied staff has Mr. Kamptner's office assess it, which she thinks is done by Erica.

Mr. Kamptner noted they probably look for just a single signature in those cases.

Ms. McCulley pointed out it depends on the form of the ownership.

Mr. Kamptner noted that it depends on how it is held, and Ms. McCulley agreed.

Mr. Dotson said he just raised these questions because he would not have thought of all of them and he liked his role as troubleshooter. He asked staff to keep them out of trouble.

Ms. Firehock said she had some questions about notice. Since it was said it was written notice for all of the county's policies she wanted to point out some troubles in southern

Albemarle with people not getting notice or people getting notice who had not lived in the residence for four years and originally not getting it. So there have been problems with notice in the county. She was concerned in this case where somebody is making a change to their easement if you send a notice and then you say it has been mailed and that is that. Or, does the owner have to come back to you and acknowledge receipt of that in some way. What is the county's responsibility since you are kind of serving as arbitrator of the change that you know that the owner has actually received and acknowledged that they understand what is going on?

Ms. McCulley pointed out this was actually a really good point that was raised by a Board member at the adoption of the resolution of intent for the Board of Supervisors. Under the normal process the owners would not be given special notice; but, they would be notified as adjacent owners or of the process.

Mr. Kamptner noted it would be prior to the public hearing as opposed to the beginning of the process.

Ms. McCulley agreed that was correct and staff instituted this process. It also stands under State Code if we make a decision or determination and the applicant is not the owner under State law we have to give notice to the owner within ten (10) days of receipt of that application if it is not the owner who has made the application. So we are instituting that notice. In terms of the measures that we properly send the notice to the address as listed on the real estate records we don't send these types of notices certified to make sure that they are received. In zoning enforcement there is a presumption by the courts that if it is sent to the last known address under real estate and it is not returned and it is sent through the regular mail that you can assume that it is received. She hears what Ms. Firehock is saying about people who are absentee owners.

Ms. Firehock added or out of the country. She was very sympathetic to what Commissioner Dotson raised about the fact that somebody has made an arrangement and then the easement holders, the one coming back to us potentially not the landowner, and then we're interpreting whether that is a correct action.

Ms. McCulley asked to mention a couple of different things that happen in addition to this initial letter that goes to the owners. There is a public notice sign, the big red metal kind of tan and red signs that staff puts out on property to give people notice that there is an upcoming public hearing. So that would be put on the property. The other thing is that staff sends out notice of the community meetings. So they would receive notice of the community meeting. Then, finally they receive notice of the public hearing. In addition, it also appears in the newspaper. So there are all these different forms of trying to provide notice to people of these types of things. So if they miss it at one juncture they could hopefully receive it through some other forum.

Ms. Firehock suggested that it would help if staff told us a little bit more about the problem that is driving this. Obviously, they are attempting to fix something that is not working well.

Ms. McCulley replied that staff realized that there is a gap and a problem.

Mr. Kamptner pointed out it was an electric utility that brought it to our attention because they have to upgrade their system. He was not sure of the full length of it. But, unlike the one that came through Albemarle County about a year ago that touched a parcel or two up in the northeast corner, this one covers a much greater distance. However, they do have to upgrade their system and get down to Fluvanna County.

Ms. McCulley said the work is completely within the easement. An example to give to help distinguish what this would do versus what it won't do is if the easement that exists is 100 feet wide, but the work they need to do will take 120 feet, then they don't have sufficient easement. They would still need the owner's signature. If the work can be done within the already secured 100 foot easement, then this would go in place and the easement holder is the applicant and we would notify the owner.

Ms. Firehock thanked staff.

Mr. Palmer said in that case what is being done within that 100 feet would have to comply with the easement deed so staff would have to figure out if that was the case or not and whether to proceed or not to proceed.

Ms. Burbage pointed out that is where the documentation would come into play.

Mr. Kamptner asked to follow up on his first response to Mr. Dotson's question about that. Over the years our practice has been to be very conservative in how we approach this issue to make sure it would be a clear situation unless they could come in with additional evidence to put on a compelling argument or some case as to why they would be eligible. He would expect the easement documentation they provide will be clear one way or the other as to whether they are eligible.

Ms. More asked does the easement documentation generally specify notice to the property owner if there is work to be done on the easement and there is private property that is being crossed or used as access to that easement. Is that stipulated in that original agreement and would this affect or change that in any way if so.

Mr. Kamptner replied that deeds of easements can come in a very wonderful form that anticipate all of these issues and some of them can look and be as detailed as something that might otherwise have just been jotted down on an envelope. The more modern documents we see are going to probably be more encompassing; however, there are some old ones that aren't.

Ms. More said notice to the property owner for this situation would not negate any obligation to notify the property owner if that is part of the easement agreement if they are crossing private property to access the easement to do work.

Mr. Kamptner replied that whatever they are required to do under their deeds that is not going to supersede that.

Ms. McCulley noted that it is not just utility easements. However, that may be what kind of springs to mind as we are thinking of this zoning text amendment; but, there are all kinds of easements such as a sign easement, access easement or drainage easement.

Mr. Lafferty said if the easement goes along the boundary of the property and it abuts the next door neighbor's property are they given notice.

Mr. Kamptner replied they would get notice prior to the public hearing as an abutting property owner.

Ms. Burbage added the adjacent owners would also receive notice of the community meeting.

Mr. Keller asked if the Commission was ready to take action.

Mr. Kamptner noted there is that correction on page 12, which was a cut and pasting error.

Ms. McCulley thanked Mr. Butler for pointing out the error.

Mr. Dotson said he would be happy to make a motion, and to be somewhat innovative in making that this is a yes - if motion.

**Motion:** Mr. Dotson moved and Ms. Firehock seconded to recommend approval of ZTA-2016-1, Eligible Applicants as recommended by staff, as presented by staff in Attachment A of the staff report with one grammatical correction on page 12, if the Board of Supervisors is satisfied that the county is appropriate in the role of interpreting private easement terms, there is a clear understanding of what happens if a property owner objects, and the Board is satisfied that the process for an owner having received notification as provided in the ordinance is acceptable.

Mr. Keller invited discussion. He asked Mr. Kamptner if he had a comment on the motion.

Mr. Kamptner replied no. However, just to give a level of comfort he pointed out every single application whether somebody is an eligible signatory and whether the documentation is there, we go through a fairly rigorous process. Our paralegal is constantly asking to track down resolutions, minutes, by-laws, articles and all of those kinds of things. So this will just become part of that process.

Mr. Keller asked for a roll call.

The motion carried by a vote of 7:0.

Mr. Keller noted a recommendation for approval of ZTA-2016-1, Eligible Applicants will be forwarded to the Board of Supervisors as recommended by staff, as presented by staff in Attachment A of the staff report with one grammatical correction on page 12, if the Board of Supervisors is satisfied that the county is appropriate in the role of interpreting private easement terms, there is a clear understanding of what happens if a property owner objects, and the Board is satisfied that the process for notifying an owner as provided in the ordinance is acceptable.

**The Planning Commission recessed at 7:27 p.m. and the meeting reconvened at 7:33 p.m.**