

**Albemarle County Planning Commission  
DRAFT Minutes November 19, 2019**

The Albemarle County Planning Commission held a public hearing on Tuesday, November 19, 2019, at 6:00 p.m., at the County Office Building, Lane Auditorium, Second Floor, 401 McIntire Road, Charlottesville, Virginia.

Members attending were Tim Keller, Chair; Daphne Spain; Jennie More; Bruce Dotson; Julian Bivins, Vice-Chair; Pam Riley; and Luis Carrazana, UVA representative.

Members absent: Karen Firehock.

Other officials present were David Benish, Planning Director; Carolyn Shaffer, Clerk to Planning Commission; Tori Kanellopoulos; Bill Fritz; Andrew Knuppel; Lori Allshouse; and Andy Herrick.

**Call to Order and Establish Quorum**

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

**From the Public: Matters Not Listed for Public Hearing on the Agenda**

Mr. Keller invited comment from the public on other matters not listed on the agenda. Hearing none, he moved on to the Consent Agenda.

**Consent Agenda**

Mr. Keller said there were no consent agenda items.

**Action Items**

**VAT201900001 Special Exception for Disturbance of Critical Slopes  
per 18-4.2 on TMP 63-19E**

Ms. Tori Kanellopoulos, Planner and lead reviewer for the project, presented the staff report. She said they would discuss a critical slopes waiver and building site modification request for Tax Map Parcel 63-19E. She said she would start her presentation with the location and context of the parcel, move to the history of the parcel and application, then discuss the waiver being requested, staff's analysis, and the recommendation. She said she was joined by Bill Fritz, Chief of Special Projects, to help answer questions.

Ms. Kanellopoulos said the parcel is located at the end of Wolf Trap Road off of Route 20 in the rural area, in the Rivanna Magisterial District and is zoned R-A Rural Area. She said the parcel consists of mostly critical slopes and Water Protection Ordinance (WPO) stream buffers. She said the parcel was created with a subdivision plat in 1984, and no changes in the boundary of the parcel have occurred since then. She said when the parcel was created, there was no WPO buffer, but the critical slopes ordinance was in place and therefore, there was a building site when the parcel was created.

Ms. Kanellopoulos said that since then, the adoption of the WPO buffer in 1998 has significantly reduced the buildable area, and no building site, as defined as the current ordinance, exists.

Ms. Kanellopoulos added that on an August 15, 2019 site visit, staff found that even the area adjacent to, and outside of, the WPO buffers appeared saturated. She said the applicant's soil consultant has also noted that this area is prone to saturation and is not suitable for a drain field.

Ms. Kanellopoulos said that currently, no house exists on the parcel. She said only one single-family house is permitted on the parcel by right. She said there is an access road through the parcel which was constructed for recent logging activities.

Ms. Kanellopoulos said the application was considered on the Board of Supervisors' consent agenda on October 16. She said the Board took the action to remove the item from the consent agenda for discussion, and after discussion on the item, the Board took the action to send the item to the Planning Commission for their review and recommendation.

Ms. Kanellopoulos said that based on the Board's action, staff provided additional information in the staff report on the logging activities, drain field feasibility, and consistency with the Comprehensive Plan. She said some of that analysis is also included in the presentation.

Ms. Kanellopoulos said staff had initially placed this item on the Board's consent agenda, since staff was recommending approval. She said per the County's ordinance, Special Exceptions must go to the Board within 90 days unless the applicant requests deferral. She said the Board may then choose to approve, deny, or send the request back to the Planning Commission. She noted that although these types of Special Exception applications used to go to the Planning Commission prior to the Board, this is no longer a requirement, and if staff is recommending approval, the request will go straight to the Board.

Ms. Kanellopoulos said the property was recently timbered for logging between October 2015 and February 2018. She said an access road was constructed for this forestry operation and was a permitted disturbance of critical slopes. She said the applicant is proposing to use the existing access road to build a house and a cleared space on the top of the hill, indicating to a red circle on a map.

Ms. Kanellopoulos said that, per Virginia Department of Forestry and County regulations related to logging activities, forestry activity is not subject to critical slopes regulations. She said the only things that are subject to critical slopes regulations are activities associated with site plans and building permits. She said that since the applicant submitted a building permit for the proposed house, the critical slopes regulations apply.

Ms. Kanellopoulos said that in the Rural Area zoning district, agricultural, forest, and fishery uses are allowed by right, and the Virginia Department of Forestry (VDF) requires loggers to notify VDF about timber harvests. She said VDF also provides best management practices, which are voluntary erosion and sediment control measures for logging. She noted that while the measures are voluntary, VDF may also find people engaged in logging activities who have not provided sufficient erosion and sediment control and have allowed pollution and degradation of water quality, per State Code regulations.

Ms. Kanellopoulos said there have been some concerns that approving this request would create a precedent by allowing applicants to timber and create driveways up to hilltop locations for their houses.

Ms. Kanellopoulos stated that staff, however, finds this to be a very unique site. She said if there were another building site outside of critical slopes and WPO buffers that had drain field feasibility, staff would likely recommend denial of a critical slopes waiver. She said that neither proposed location in this case is ideal. She explained that building in the proposed location shown in the presentation, however, was the least impactful option, pointing out that the critical slopes have already been disturbed. She added that the soil consultant for the applicant has been very clear that the area adjacent to, or within, the stream buffers is undesirable or impossible for drain fields.

Ms. Kanellopoulos presented images from staff's site visit that showed the proposed house location, first looking up the hill with the proposed house location shown in a red circle, and then standing at the cleared space where the house is proposed.

Ms. Kanellopoulos presented the alternative house location outside of the WPO buffers where the applicant could build without a Special Exception request. She said this area originally did not have the WPO buffers and was, therefore, a much larger area when the parcel was created in 1984. She explained that building in this location could negatively impact the streams there. She added that the applicant states that this location is not suitable for drain fields, with the soil consultant stating, in part, "The area where I proposed the septic to be installed is the only place on the entire property, in my opinion, that meets both Virginia Department of Health regulations for the installation of sewage disposal systems and Albemarle County's ordinances pertaining to these systems installations."

Ms. Kanellopoulos presented images showing the alternative house location outside of the adjacent stream buffers, which are also at the entrance to the property.

Ms. Kanellopoulos said the request was reviewed by both Planning and Engineering staff and that both did not object to the request. She said County Code 18-4.2.3b prohibits the disturbance of critical slopes with some exceptions, and this project qualifies for exception under 18-4.2.5a.

Ms. Kanellopoulos said the disturbance of slopes has already occurred for the permitted logging activities, and the applicant voluntarily installed erosion control measures for the forest activities, including sediment traps, which were not required. She said the applicant has also, since then, put down seeding and matting on the slopes. She presented a picture of the seeding and matting, adding that they were also voluntary measures.

Ms. Kanellopoulos said the applicant submitted a Virginia Erosion and Sediment Control application (VESCP), which was approved by Engineering staff on November 6. She said staff has found that the waiver request would not be detrimental to health, safety, or welfare.

Ms. Kanellopoulos said that this parcel does not have alternative locations that would allow for construction of a house without disturbing critical slopes, except adjacent to the buffers or on potential wetlands. She said that additionally, the areas do not appear suitable for drain fields. She said given that the disturbance has already occurred, the applicant has provided voluntary erosion and sediment control measures, and that the Health Department has approved drain fields adjacent to the proposed building site, staff supports the request.

Ms. Kanellopoulos said staff also wants to note that approval of critical slopes disturbance in prior applications, or in this instance, does not set a precedent. She said staff is of the opinion that the unique features and the prior activity on the property are such that approval of the request would serve public purpose by allowing reasonable use of the property and protection of water resources.

Ms. Kanellopoulos said the many unique features of the parcel include its unique topography, its 1984 approval prior to the WPO buffers, the availability of a location at the top of a hill that is outside critical slopes, and issues with drain field suitability. She said it would not be possible to build further down the hill, as even the slopes further down are steeper and are classified as critical slopes. She said this type of application itself is very uncommon, and especially so with these unique circumstances.

Ms. Kanellopoulos said the Board of Supervisors also requested an analysis for consistency with the Comprehensive Plan. She said the parcel is within the Mountain Protection Area, which is defined by the Comprehensive Plan. She said this is not a zoning ordinance overlay. She said the intent of the ordinance is to protect natural resources and to protect against erosion and water quality issues. She said the natural resources chapter of the Comprehensive Plan highlights the importance of protecting and retaining both mountain and water resources in Strategy 5B, which is part of Objective 5, to retain mountain resources reads that, "Critical slopes disturbance for construction should be prohibited, except to allow construction of, or access to, the first house on a property."

Ms. Kanellopoulos said the Comprehensive Plan indicates the balance of protecting these natural resources while also allowing reasonable use of property, and given the drain field feasibility constraints and buffers on the parcel, staff finds the disturbance of critical slopes would not be inconsistent with the Comprehensive Plan.

Ms. Kanellopoulos summarized by saying that the two possible building sites both have environmental constraints and challenges. She said staff finds the least impactful option for the first and only dwelling unit on the property is the proposed building site on the hill.

Ms. Kanellopoulos said staff wants to reiterate that this application and parcel have many unique features and therefore, this does not set a precedent. She said, for example, if there were other areas on a parcel outside of critical slopes and stream buffers that had drain field suitability, staff would not recommend approval of a critical slopes waiver for a proposed building site higher up on a hill just because permitted forestry activities had occurred.

Ms. Kanellopoulos said this particular parcel does not appear to have another feasible location for a building site other than the one proposed by the applicant. She said staff's analysis intends to balance both protection of natural resources and reasonable use of the property.

Ms. Kanellopoulos presented the Commission with the motions for their consideration. She offered to answer questions and return to previous slides. She noted that the item was scheduled to go to the Board on December 18.

Ms. Spain asked Ms. Kanellopoulos to speak to the Board's desire to send it back to the Planning Commission, other than whether it is consistent with the Comprehensive Plan. She asked for the main issue they were concerned about.

Ms. Kanellopoulos replied that there were two or three main issues, and that one was the consistency with the Comprehensive Plan and more information about the Mountain Protection overlay.

She said they had also wanted more information about the logging activities, when they occurred, and what the regulations are around that. She said the Board wanted time for more background and analysis to hear what the Planning Commission thought and if there were concerns about setting a precedent, or if this was found to be a very unique site with unique features.

Ms. Spain asked if the logging was carried out by the applicant.

Ms. Kanellopoulos said she believed so and that it was Augusta Lumber.

Ms. More asked about the 1984 approval that came before the WPO and if the approval was for the site that Ms. Kanellopoulos had outlined in red that is lower on the property.

Mr. Fritz replied that the plat that was approved in 1984 was the parcel that was there. He indicated to the blue areas on a sheet, explaining that those blue areas (which are now WPO) were not on the map back then because there was no WPO. He said when staff evaluated the lot to determine if it had a building site (30,000 square feet that fit in a rectangle), it did because those areas weren't prohibited from construction, but now are. He said in 1984, the requirements from the Health Department were very different from what they are currently.

Ms. More said that for the sake of argument, with the absence of the 1998 establishment of the WPO buffer, what she felt like what she was reading is that the soil consultants are noting that the areas prone to saturation and not suitable for a drain field were existing conditions, regardless of the blue highlighted areas that can now be referenced.

Mr. Fritz said that from the field visit, he could say that the areas that are in the blue area now did not appear to be saturated. He indicated to the area on the map circled in red, explaining that it did appear to be saturated and pointed out that there were some V-lines or topographic lines there. He said at first, when staff was out in the field, they thought that this was likely an intermittent stream, and that it looked like there was an intermittent stream there not shown on the plan. He said staff went to investigate this but couldn't get to it because the ground was too soggy.

Mr. Fritz said that subsequently, at some point in October, after it had not rained for three weeks, the County Engineer did go to the site, the ground was dry, and he did not find an intermittent stream in that area. He said it was obvious that that area is saturated at sometimes and not saturated at others, which is an indication of poor soil.

Mr. Fritz said staff noted that the other areas that are in the stream buffer did not appear to be saturated at the time that the other ground was. He said it may be appropriate for drain field there, but the soil scientist wouldn't have even investigated there, and cannot investigate there, because it can't go there, so there is no reason to do an investigation in that area.

Mr. Dotson asked if the entire site was timbered and clear-cut.

Ms. Kanellopoulos replied that this was not done to the entire site, but to a portion of the hillside.

Mr. Dotson asked if the timbering was all in the vicinity of the road and whether this was 30%, 50%, or 70% of the site.

Mr. Fritz responded that having been there and not knowing where the exact boundaries are, the applicant may be able to speak more clearly to this. He said he would guess the area was probably 60-70% of the site but that this was just speculation. He noted it was a significant portion of the site.

Mr. Dotson said he would hold his question for when the applicant comes forward.

Ms. Riley said that a couple times in the report, it said that staff was unable to field verify the slope. She asked staff to explain why that was.

Mr. Fritz explained that there was no independent survey that was done. He said staff visited the site and that there are clearly areas, particularly around where the proposed building site is, that don't appear to be 25% slope based on staff's experience. He said the topographic maps demonstrate this as well, but that staff did not have a field run topography and was using the best topography they have, which is their GIS system. He said there was no independent field run topography that they have, noting that this was not uncommon and was the norm. He said staff was simply making that observation.

Mr. Keller invited the applicant to come forward.

Mr. Lawrence Clay Marshall III (or Luke) said he was attending to field questions from the Commission. He said the staff report was a summation of (inaudible - away from the microphone).

Ms. Riley asked the applicant to speak more closely to the microphone.

Mr. Marshall explained that on the far left-hand corner of the map, there was a live water spring that comes out a hill, which is the water that pitches through the entire area, which is the reason for the saturation. He explained that when it rains, that area becomes more of a marsh of flood plain and that one cannot walk through that area. He said there is an area to walk around it, but there was not an area to get through as far as being a building site.

Mr. Tommy Dobson introduced himself as the builder for the site. He said when he got on the site, the logging road was already there, and so he hired Kirk \_ Associates to come up with an erosion plan to immediately stabilize the erosion he saw. He said this is what they came up with to put in the silt tracks and then do the straw matting to control the site to make sure there wasn't any erosion from the logging. He said he then met with the County to make sure this was acceptable. He said they then went back and implemented all the erosion control.

Mr. Dobson said he then met with the engineer on site several times trying to find a suitable drain field location other than the one that was location. He said he had Kirk \_ come out and do some surveying and contouring to determine if there were other slopes less than critical slopes and to determine if he could find another septic location. He said the only site that they found was the one proposed. He said they could not find the soils that would work for the septic, and could not find anything that wasn't in critical slopes.

Mr. Keller opened the hearing for members of the public to speak.

Mr. Morgan Butler (Southern Environmental Law Center) said that when this item appeared on the Board's consent agenda a few weeks before, SELC asked the Board to take a closer look and send this to the Commission for review. He said primarily, SELC was confused about how much more land disturbance would be necessary to build a house and driveway, whether this

disturbance would be on critical slopes or not, and about what was being proposed to limit the impacts of any disturbance that would still be necessary.

Mr. Butler said SELC appreciates the additional information staff provided, but still was not entirely clear on those questions. He said they do understand, from the staff report, that the choice here may boil down to either allowing development on critical slopes, or allowing it to impact the stream buffer, and that choosing the slopes might well be the less damaging option, since those disturbances have already largely, or perhaps even entirely, occurred.

Mr. Butler said that even assuming this was the case, what remained unclear was the protections the applicant will put in place to minimize the impacts of any land disturbance still necessary. He said the staff report indicates that an erosion and sediment control plan was approved for the project earlier that month, but it also noted in several places that the erosion measures the application includes have already been installed, having been put in place by the owners voluntarily when the road on the property was constructed as part of recent forestry activity. He said, as such, it was unclear if any new erosion measures would actually be put in place during the residential construction activity that remains.

Mr. Butler said that with this in mind, SELC urges the Commission to explore some extra water quality protections that the waiver can be conditioned on. He said, for example, that as part of the stream health proposals that staff is currently working on, the County is considering requiring a two-layer perimeter E&S controls where land disturbances could impact water resources. He suggested that perhaps a second layer of erosion and sediment control protection would be appropriate for disturbances required for this project, since the rationale for the waiver is to limit damage to water resources.

Mr. Butler said that stepping back, there was a bigger picture concern that the application highlights. He clarified that SELC was not saying that this happened on this project because they didn't have that amount of information, but in piecing together different parts of the staff report, it sounded as if a hypothetical applicant could grade a driveway and create a flat building site on critical slopes and call that activity "forestry," then submit a residential building permit application shortly thereafter, and the critical slopes ordinance would not apply if there would be no further impacts to critical slopes. He said if that is the case, it is a very troubling loophole, and one that the County needs to address.

Mr. Butler said that wherever the Commission ended up on the waiver that evening (adding that SELC was not necessarily opposing it, but was bringing up the point about the additional E&S measures and the broader point), SELC urges the Commission to include, as part of their recommendation to the Board, a clear request that the County address this loophole in the critical slopes protections as soon as possible.

Mr. Neil Williamson (Free Enterprise Forum) said that one of the challenges of being in this job for so long was that he and Mr. Fritz were in a meeting in 2007, and none of the current Commissioners were there. He said in that meeting, they discussed property rights as it applied with critical slopes and divisions. He said in that meeting, it was made very clear by staff member Joan McDowell at the time that no one was talking about moving somebody's house or eliminating their house from being built.

Mr. Williamson said FEF doesn't take positions on projects and could not take a position on that project, but that he would refer the Commission to those minutes to suggest the idea of a parcel that exists, and then the government coming in and changing the requirements for a parcel to exist. He said there are still property rights resident on said parcel.

Mr. Williamson said the FEF believes that precedent is the concern that the Board was speaking of in their meeting. He said the Board also didn't particularly like what Mr. Butler mentioned with regard to State law and right to farm and forest, allowing a logging road to go in to do that activity, and then the road being converted. He suggested that perhaps the General Assembly was the place for that discussion rather than the Board of Supervisors. He said that at this juncture, he would argue that when unique properties come forward, it was made clear to him and Mr. Fritz in 2007 that there would not be this level of intense review. He said that, in fact, it was discussed that it would be a staff recommendation and would be on the consent agenda for the Board of Supervisors.

Mr. Williamson acknowledged that things change, but noted that property rights remain and that he hoped the Commission would consider that in its conversation.

Mr. Keller asked the applicant and his advisor to come forward again for questions from the Commission.

Mr. Dotson said he'd asked before about the extent of the timbering and what percentage it was (30%, 50%, or 70% of the site). He asked to what degree the timbering was concentrated around the winding roadway.

Mr. Marshall replied that it would be difficult to put a percentage amount on it. He said that the timbering occurred in other areas, and that he had provided Ms. Kanellopoulos with some roads where they had gone in and out. He said they were not only in that area, explaining that the property lies between three mountain ranges, and the timbering occurred on the other mountain ranges as well. He said the area in question just happened to be the area that was cleared the most because when they initially spoke on the matter, this was where the secondary proposed drain field was. He said this was why the timbering took place in a more drastic matter on this particular part of the parcel.

Mr. Dotson asked if this was a conventional drain field, or an alternative on-site system.

The applicant indicated that it was conventional.

Mr. Dotson asked if the statement by the soil scientist where it was said that there were no other areas on the site suitable for a drain field was geared to, given the house would be on the proposed site, there were none near it or on the entire site.

Mr. Dobson replied that they started from the existing drain field sites that were on the original plat, then worked their way around trying to find other drain field septic sites. He said that in their opinion, there was no way that they could put a septic system there not only because of the moisture, but also because the stormwater runoff would put the stormwater to run directly over top the proposed septic tank over the septic field. He said the risk of those solids and debris to get into the stream system was not a consideration they thought could be recommended.

Mr. Dotson asked if the discussion never went to a mound system on the lower site to deal with the sponginess of the ground.



Mr. Dobson said they explored doing alternative systems, but that it was not just matter of the wetness of the soil, but the stormwater runoff as well. He said the wetness of the soil, from a perc test, definitely came into play, but that they also considered the fact that having the stormwater runoff to go over top the septic tank and distribution box was something that would cause problems and make the system fail.

Mr. Dotson said he couldn't tell from the presented photographs, in terms of visibility from Route 20, if the building site was visible from Route 20.

Mr. Dobson replied that it was not, and that it was not visible until arriving at the property.

Ms. More recalled that the applicant had explained where the timbering took place and that she thought she had heard him say that the timbering took place more on the area in question because it was identified as a drain field, in addition to other areas.

Mr. Dobson explained that Mr. Marshall had said this because the original plat had a proposed drain field location that would have been in the WPO buffer zones. He said more clearing was done in the area because it was already a designated site, and that this was done because when the applicant was looking to purchase the land, he came to the County looking for information to make sure he could build a home before he purchased it, and that this information was given to him at that time.

Ms. More asked if this was on the original site.

Mr. Dobson replied yes.

Ms. More said she perhaps misunderstood what Mr. Marshall was saying.

Mr. Dobson said it was not the new proposed drain field location.

Ms. More asked if the applicant could speak to the question that Mr. Butler had about how much more land disturbance would be expected, as well as the protections that are already in place or what could go in place in addition to those.

Mr. Dobson said he had the erosion controls already designed and engineered to meet all the requirements and, in most cases, exceed what would be minimal. He said as far as more disturbance, there would be some minimum disturbance that is already disturbed around the home site when they do final grading and backfilling around a possible foundation. He said they were not doing any more excavation, clearing, or the like around the area where the homesite would have been.

Ms. Riley said she understood that Mr. Marshall was not the original owner on the parcel.

Mr. Marshall affirmed he was not.

Ms. Riley asked when he purchased the parcel.

Mr. Marshall replied he purchased the parcel in June of 2015.

Ms. Riley said it sounded as if Mr. Marshall's intent, when he purchased the parcel, was always to build a home on it.

Mr. Marshall replied yes.

Ms. Riley said it also sounded as if Mr. Marshall went to the County to make sure that there was at least a by-right ability.

Mr. Marshall replied yes. He said that when he and his father were in talks, Greg Baldwin and Susan Davis were the executors of the property to sell. He said he came to the County and spoke to a gentleman in zoning with the intent to get two division rights. He said because of the topography and the way the land is laid out, the zoning official would not allow it, but he did say that there would be one building site on the property.

Mr. Marshall said that following the purchase of the property, he had Steve Gooch come out as an independent geologist and do a soil test. He indicated on a map to what was the secondary drainage site, and explained that an area on the bottom of the map was the primary drainage site.

Ms. Riley asked if when Mr. Marshall purchased the parcel, it was also his intent at that point to harvest timber.

Mr. Marshall said it was not originally his intent.

Ms. Riley asked Mr. Marshall what led him to decide to do that.

Mr. Marshall replied that he spoke to a timber consultant and had the property surveyed for this in order to receive a monetary figure. He said after this came back, they moved forward with select timbering. He said it was never their intent to clear cut the land. He said Augusta Lumber came in to remove the biggest trees from the property and that this was closed in early 2018.

Ms. Riley asked Mr. Marshall if when he determined he wanted to harvest the lumber, the location where he decided to harvest related to his determination of where he wanted to site the home.

Mr. Marshall replied no. He said after they signed the contract with August Lumber, they had no control over what timber they took out and what they did not. He said they provided them with a contract, and they were hands-off after that point in time. He said August Lumber performed their work as far as the parameters that they set forth in the contract.

Ms. Riley asked Mr. Marshall if he could respond to Mr. Butler's suggestion asking if there were additional measures or erosion controls, he would intend to put in place in conjunction with, or after, building the home to protect the quality of the water.

Mr. Marshall replied that he was a landscape contractor by trade, and that putting in the erosion matting stabilized the hills. He said there was good grass growth coming in on all the hillsides that were disturbed along the road. He said he didn't see any additional erosion control measures needing to happen until evidence provides otherwise. He pointed out that the disturbance to the septic field and the house site is no longer in critical slope.

Mr. Bivins asked if any of the work in the erosion and sediment control plan that was submitted had been done.

Mr. Dobson replied yes. He said it was all complete and that they were now doing their soil monitoring and performing checks on it.

Mr. Bivins referred to Attachment D, on the third page, that talked about sediment traps. He asked if they were temporary or if there were plans to leave them.

Mr. Dobson replied that they plan on leaving them in place and then planting trees and other vegetation around them to shield them from view and to provide more erosion control to provide stabilization.

Mr. Bivins said he was looking for confirmation that everything in the erosion and sediment control plan had been cleared with the County and that it was also in place. He asked if those things that were marked "temporary" were not going to be removed.

Mr. Dobson replied that this was correct, noting that there was no desire to remove them.

Mr. Bivins said there was also a driveway conceptual plan, adding that he drove there recently. He said he was trying to understand what is going to change from the gravel pathway currently there that the concept plan will impact.

Mr. Dobson replied that nothing would change. He said when they did the silt traps and sediment control, they took all that to minimize and not do the work twice. He said the driveway is as the plan shows.

Mr. Bivins referred to Attachment C, which said "Digital copy of survey provided by Kirk Hughes and Associates. One-inch equals 300 feet." He asked if the applicants could describe the notations on the bottom of the page and what they meant, as he could not find it in the notes.

Mr. Dobson indicated to the proposed primary and reserved septic. He also indicated to where the residence was proposed.

Mr. Bivins referred to a smaller block that said "proposed 3C dwell area" and asked if this was the residence.

Mr. Dobson replied no and explained that it was the well, which is a type 3C well.

Mr. Bivins indicated to an area on the map and asked if it was the residence, and if another block was the septic system.

Mr. Dobson replied he was correct.

Mr. Keller asked if the road alignment was more or less the road alignment that was put in by the timbering company.

Mr. Dobson replied no, explaining that it was modified to match the erosion and sediment plan to prevent any more potential erosion. He said the road was not cut in exactly like in the plan and that it had to be modified to make sure they properly put in sediment traps and diversion ditches to ensure all the water runoff went into sediment traps.

Mr. Keller asked if Mr. Dobson worked with staff on what the alignment of the road would be.

Mr. Dobson replied yes. He said before doing this, he received preliminary approval from the County to stabilize the site.

Mr. Keller brought the meeting back to discussion and action.

Ms. Spain said she appreciated Mr. Williamson's institutional memory and that this was worth a lot, because many of the current Commissioners were not at those meetings. She said she also agreed that part of the difficulty was because the regulations have changed since the parcel was first established. She cautioned about having the assumption that this would set a precedent because it seemed as if it was a highly unusual situation. She said those factors combined seemed that they worked in favor of the applicant.

Mr. Keller said he had several questions for staff. He said he wasn't sure that he agreed that there were not many properties like this. He said that in the southwest mountains and towards the western side of the County, there were many parcels that are on very complicated sites such as this. He said his questions were building on Ms. Riley's questions about the history of what was agreed to and the fact that staff had already given the go-ahead on certain portions of the project.

Mr. Keller asked whether or not there were Rural Area lots that have development rights on paper but, in reality, have so many physical constraints that it would be difficult, at best, to build on.

Mr. Fritz said that to say that it's difficult to build would be an accurate statement, but that the County's ordinance is specifically designed not to make lots unbuildable. He said it was an important distinction to note between lots that may exist in the southwest mountains that have existed for a number of years.

Mr. Fritz said the critical slopes provisions, as noted by Ms. Kanellopoulos, only apply in two cases: when applying for a building permit, or when there is an approved site plan. He noted that even when applying for a building permit, there are times when the applicant is exempt from the critical slopes provisions. He said if there is a lot that existed prior to the adoption of the critical slopes provisions and does not have a building site, it is exempt from the critical slopes provisions for the construction of the first dwelling. He explained this was a safety clause in the ordinance to prevent a regulatory taking.

Mr. Fritz acknowledged it would be difficult to build on a site like this as there still has to be design for an appropriate drain field, and information still has to be provided that there is no alternative. He said, however, that it is buildable.

Mr. Keller said that building on this, in Rural Areas, once the residence has been built, there are many options if this is considered an agricultural land. He asked in terms of secondary buildings, barns, machine sheds, a second residence (even if this second residence doesn't have a kitchen), if these were possibilities.

Mr. Fritz replied that if those structures are accessory to the residential activity, then they get building permits and are subject to the critical slopes provisions. He said if those structures are agricultural, they were not and will never be subject to the critical slopes provisions because they are agricultural and, therefore, exempt from the critical slopes provisions.

Mr. Fritz said it depends on what the application is. He said if the applicant was building a detached garage, for example, it would be subject to the building permit. He said if they were building a barn, it would not be subject to the critical slopes provisions. He said this was the way the ordinance works and has worked since its adoption.

Mr. Keller expressed that he understood.

Mr. Fritz said in terms of Mr. Butler's point about grading a site and not being subject to critical slopes provisions as there was no building permit, it was true that those slopes may be less than 25% but that it was highly unlikely they would be buildable because there would have to be 30,000 square feet less than 25% and because getting a drain field in that area would be unlikely because drain fields cannot be put in disturbed areas. He said doing the grading would essentially make the site not buildable. He said this was not necessarily true in all cases, and this may be a provision the County wants to look at in the future, but it was highly unlikely, and staff had not actually seen that occur.

Mr. Fritz said a number of critical slopes waivers that staff has had that are similar are very limited, and that he could only think of two that were even close to this project, adding that they were not the same.

Ms. Riley asked Mr. Fritz to go over this again. She said what she heard Mr. Fritz saying was that although the comment was made that perhaps the Planning Commission should make a recommendation to the Board of Supervisors to close the loophole on the critical slopes regulation, she would like Mr. Fritz to answer her question as to whether he believes there is a loophole. She added that she had just heard him say that there were already many challenges to building in those areas.

Mr. Fritz said that technically, there may be a loophole, but the likelihood that it can actually be utilized was extremely rare, in his opinion. He said that in order to be a building site, 30,000 square feet would have to be created, which is less than 25%. He said if there is terraforming and the soil is being moved around to do this, they will be cutting in some places and filling in others. He said those areas can no longer be used for a drain field and, therefore, there is no building site.

Mr. Bivins asked if they could look at Attachment B.

Mr. Fritz pointed out that in this particular case, when asked about where the house and critical soils are located, the house and drain field scenarios that are less than 25% naturally are being placed based on the topographic information that they have. He said that topographic information predates any of the timbering operations. He said when staff went to the site, it looked like it was less than 25% and was timbered, not terraformed.

Mr. Bivins asked if when this was divided, the WPO buffers did not exist.

Mr. Fritz confirmed that the blue areas on the map did not exist.

Mr. Bivins said that at that particular point in time, someone could come in if, in fact, the soil was appropriate, and they could have placed a house somewhere within the "V."

Mr. Fritz replied yes.

Mr. Bivins said that what happened was the WPO has come up and the County has designated the blue zone to be off limits.

Mr. Fritz replied yes and added that it does not have the same exemptions that the critical slopes provisions have. He said the critical slopes provisions say that if there is a parcel that existed prior to the adopted of the regulations and the slopes have to be disturbed to build, it is exempt. He said the WPO does not have the same exemption about a prior-existing parcel. Mr. Fritz said that certain intrusions could be done there, but that it didn't have exactly the same language. He said this was why there was a relief valve in what they are doing now.

Mr. Dotson asked if along the same lines about whether there is a precedent or a loophole, it would be feasible to do a GIS-level assessment of whether there are those types of parcels. He said in looking at the critical slopes layer, they could overlay the WPO layer and then look for areas that remain (noting that in the graphic presented, they would be white areas) to see how often this occurs. He asked if this would be useful before going to the Board of Supervisors.

Mr. Fritz replied that staff could not do it because they do not have a way of also adding a layer that determines if the parcel existed prior to the adoption of the ordinance. He said that those parcels could not be kicked out.

Ms. Spain said she realized she missed a basic question. She asked if the logging was by right.

Mr. Fritz replied yes.

Ms. Spain said that once the road was constructed, there was no consideration given to whether the road is on critical slopes. She asked if this was not by right.

Mr. Fritz replied that the road was constructed and is there. He said if the road were being constructed as part of supporting the building permit, then it would be subject to the critical slopes provision. He said that because it already exists and no additional earth work is occurring to create the road, it is not subject. He said the fact that it is there on critical slopes is permitted by the ordinance.

Ms. Spain asked why it was okay for the logging operation to disturb critical slopes.

Mr. Fritz said this was because it was not subject to a building permit or a site plan. He said the critical slopes provisions only come into play when there is building permit or a site plan.

Mr. Keller said that to build on that, the Commission heard from the applicant that the road was modified from the original logging road based on staff saying that they could go ahead. He asked how this happened.

Mr. Fritz said he did not know the particulars of this and noted that there was no prohibition on doing this because it is not subject to a building permit or site plan.

Ms. More asked if the road was built for logging purposes as it was, and the County was not going down this path, what stabilization or erosion and sediment control measures, if any, would have been required.

Mr. Fritz asked if Ms. More was referring to forestry.

Ms. More said yes.

Mr. Fritz replied there would be few, if any. He said there were some that were around the streams and that there were very few erosion control measures that are part of a forestry operation. He said what the applicant has put in far exceeds what is required for a forestry operation, pointing out that an additional erosion and sediment control plan or agreement, depending on the details, will be required when the building permit is issued to address any of the activities directly associated with the building permit, the installation of the drain field well, and the like. He said there would be an erosion sediment control plan or agreement associated with that.

Mr. Keller said that, in summary, to understand this issue of development and harkening back to what the County's two NGOs shared with the Commission before, he wanted to know if he was correct in understanding that if there is a parcel that has significant WPO buffers and/or significant critical slopes, and an individual wants to put an agricultural or forestry use on that parcel, in conjunction with a residence that's associated with it, there are very little controls offered to preclude the agricultural/forestry changes (e.g. roads and buildings going in, planting grapevines or orchards) on steep slopes.

Mr. Keller continued by asking for verification that following those activities, once the disturbance has occurred, if there is a place that would meet the after-the-fact requirements the County has for a residence (e.g. a drain field on undisturbed land), the County could look to many of the parcels they think of not having some degree of development on them now as having development in the future. He said that to be fair, historically they might have because from aerial photographs, they can tell there are many more orchards that existed historically than there are today that have gone into pine forests.

Mr. Fritz replied that he wasn't sure he fully understood Mr. Keller's question, as he talked about both agricultural operations and residential.

Mr. Keller said he mentioned this to lead into the residential.

Mr. Fritz explained that if an individual is doing agricultural or forestry and installs roads or clearings involving earth-disturbing activities, those are exempt from the critical slopes regulations. He said if an individual has a lot that post-dates the ordinance (e.g. a subdivision was created with a building site and still does) and exempt activity goes in and gives them access to a new area that is, for example, 20,000 square feet and the individual wanted to build in that area, staff's default position, in all likelihood, would be to recommend denial and say, "No, we understand you did the disturbance. Build in the approved building site area, unless you can demonstrate that it is so much better to build in the new area."

Mr. Fritz acknowledged that at times, it breaks down to the question of what is the "least bad" area. He said staff was supportive of the project because the County needs to provide reasonable use of land, and it appeared to be the least impactful area. He said if the applicant was getting to an area that was less than a building site and that they could otherwise get to, however, staff would not support the application.

Mr. Keller asked staff if they had received the information that the Board of Supervisors had hoped to gain from the Commission's discussion and if not, if they could suggest what the Commission might add either as comment or with Counsel's recommendation of how they might word this.

Ms. Kanellopoulos said she believed everything had been covered.

Mr. Andy Herrick (County Attorney) said he believed the Commission's action on the vote, along with the minutes, will duly inform the Board of what they need to know.

Mr. Bivins said it was compelling to him that the slopes at the top of the property did not exceed 25%, and that this therefore exempts them from the steep slope provisions, and that the applicant has been working with the County to mitigate any issues that may have arisen from the logging operation. He said that therefore, hopefully in continuing deep connection with the County staff (unlike a different property south of town where there was a house), on this particular property there isn't a house and there has been an intimate dialogue with the County.

Mr. Dotson, before voting yes, said he was still concerned about the loophole.

Mr. Keller echoed Mr. Dotson's comment, as well as Ms. Riley.

Ms. Spain moved to recommend approval of the Special Exception request for disturbance of critical slopes and modification of building site for V201901427-SF with conditions as stated in the staff report.

Mr. Bivins seconded the motion, which carried unanimously 6:0. (Ms. Firehock was absent from the vote.)

### **Adjournment**

At 9:31 p.m., the Commission adjourned to December 3, 2019 Albemarle County Planning Commission meeting, 6:00 p.m., Lane Auditorium, Second Floor, County Office Building, 401 McIntire Road, Charlottesville, Virginia.

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David Benish, Interim Director of Planning

(Recorded and transcribed by Carolyn S. Shaffer, Clerk to Planning Commission & Planning Boards)

Approved by Planning Commission
Date:
Initials: CSS