

LOUDOUN COUNTY BOARD OF ZONING APPEALS  
JANUARY 23, 2003

The Loudoun County Board of Zoning Appeals held a public hearing in the Board of Supervisors Meeting Room, Government Center, 1 Harrison Street, Leesburg, Virginia, on January 23, 2003 at 7:30 p.m. The following is a summary of that meeting; the tape recording constitutes the official minutes.

**Call to Order:**

Chairman Myers called the meeting to order at approximately 7:30 p.m. Members present were E. Frank Myers, III, Chairman; William S. Leach, Vice Chairman; Nan M. Joseph Forbes; E. Page Moffett. James M. Purks was absent. Staff was represented by Ronald Brown, Assistant County Attorney; Melinda Artman, Zoning Administrator; Marilee Seigfried, Assistant Zoning Administrator; Amy Lohr, Planner; Janice Weber, Recording Secretary.

**SPEX 2002-0017, STUP/COX PROPERTY:**

[Michael Stup and Paige Cox, husband and wife, of Waterford, Virginia, have submitted an application for a special exception pursuant to Section 6-1612 of the 1993 Loudoun County Zoning Ordinance to permit the existing 5'8" high fence on their lot in the Village of Waterford to encroach approximately 8 feet into the 25 foot required front yard. Fences in required residential front yards are limited by Section 5-200(A)(1) to 3½ feet in height. The subject property is approximately 0.28 acres in size, and is zoned CR-2 (Countryside Residential-2), and Waterford Historic and Cultural Conservation (HCC) District. The proposed amendment of the Zoning Ordinance, ZMAP 2002-0014 / ZOAM 2002-0003, under consideration as of 11/27/02, would rezone the parcel to Village Conservation Overlay District. The property is located at 40152 Main Street in the Catocin Election District and is more particularly identified as Tax Map /28/A/1/B//11/ (MCPI#303-26-5872).]

Melinda Artman stated that with the adoption of the Revised 1993 Loudoun County Zoning Ordinance, SPEX 2002-0017, STUP/COX PROPERTY, no longer required a special exception. She requested that they dismiss this item. Ms. Forbes moved that SPEX 2002-0017, STUP/COX PROPERTY be dismissed. Mr. Moffett seconded the motion. All in favor, 4-0-1 (Purks absent).

**APPL 2002-0023, NEW COUNTRY CORNERS, L.P./BLACK ORCHID GRILLE & BREW, INC:**

[New Country Corners, L.P., of El Segundo, California, and Black Orchid Grille and Brew, Inc., of Sterling, Virginia, have submitted an application under the 1993 Loudoun County Zoning Ordinance for an appeal of the October 17, 2002 Notice of Violation of 1993 Zoning Ordinance Sections 5-1202(A)(2) and 5-1203(A), which indicated the following probable violation: the "Black Orchid Grill" and "Restaurant" signs violate the conditions of sign permit Z20197990001. The property is approximately 7.41 acres in size and is zoned Planned Development-Commercial Center (Small Regional Center) [PD-CC(SC)]. The property is located on the north side of Harry Byrd Highway (Route 7) at 20921 Davenport Drive, Suite 134/135, in the Potomac (formerly Broad Run) Election District and is more particularly identified as Tax Map 81 ((10)), Parcel A, (MCPI# 029-30-3064).]

Melinda Artman stated that the posting of the property of this appeal was subject to vandalism and, consequently, was not posted properly. She stated that a deferral was requested to February 27, 2003. Mr. Moffett moved that APPL 2002-0023, NEW COUNTRY CORNERS, L.P./BLACK ORCHID GRILLE & BREW, INC. be deferred to the February 27, 2003 Public Hearing. Mr. Leach seconded the motion. All in favor, 4-0-1 (Purks absent).

**APPL 2002-0027, ISLAMIC SAUDI ACADEMY, INC.:**

[Islamic Saudi Academy, Inc., of Washington, D.C., has submitted an application under the 1993 Loudoun County Zoning Ordinance for an appeal of the November 14, 2002 Zoning Administrator determination which found that the issuance of Zoning Permit ZP11167 for ball fields did not constitute such an action as set forth in Section 6-1313 which specifies the actions which must occur within five years of special exception approval in order to prevent the special exception from expiring after five years. The determination relates to Special Exception SPEX 1997-0023, which was approved on March 4, 1998 to allow a private school on the subject parcel. The property is approximately 101.30 acres in size and is zoned Planned Development-Industrial Park (PD-IP). The property is located on the south side of Farmwell Road (Route 640) and the east side of Ashburn Village Boulevard (Route 2020) in the Dulles Election District and is more particularly identified as Tax Map 79 ((25)), Parcel 35B, (MCPI# 088-40-3678).]

Melinda Artman presented the staff report to the Board members.

[Douglas L. Fleming, Jr. was sworn in by the Chairman]

Mr. Fleming came forward and stated that he and John McGranahan, Jr. were representing the Islamic Saudi Academy (ISA). He stated that they were asking the BZA to uphold the words of the Zoning Ordinance, Section 6-1313(A)(3), as they are written. He noted that the issue is not, as Ms. Artman suggested, whether a private school commenced; rather what they asked for ruling on was did they receive a Zoning Permit under Section 6-1313(A)(3), and that Section provides a guaranteed right to protect a special exception from expiration upon, among other things, issuance of a Zoning Permit. He stated that the sole issue tonight is, did they obtain a Zoning Permit within 5 years of their special exception approval. He explained that their permit was approved on March 4, 1998 for 101 acres, which included the site for the ballfields; on June 23, 2000, they obtained a Zoning Permit, Z11167, for certain ballfields that they had constructed on their property, and that Zoning Permit says specifically "reference Special Exception 1997-0023", and the tax map reference makes it clear that it is for the entire 101 acre parcel. He said that the issuance of that Zoning Permit was a Zoning Permit and it satisfied the plain language of Section 6-1313(A)(3), thereby protecting ISA's Special Exception from expiration. He said that Note 10 of the Site Plan for the ballfields stated that "development of the property is subject to the conditions of a approval for Special Exception 1997-0023, and it included every single Special Exception condition on the plat itself, listed verbatim, on sheet 2 and it further stated specifically that this parcel of ground that they obtained the site plan for was part of the 101.82 acre parcel. He explained that the Department of Building and Development approved the site plan on August 31, 1999; fields were completed in April 2000 at a cost of over \$400,000. He noted that in doing so, they complied with Special Exception Condition 14, which specifically referenced these fields and said that they could not be lighted, they complied with Special Exception Condition 19, and put that condition in their contract with Mr. Hazel, who did the work, that construction traffic could not access certain parts of Ashburn; they complied with Special Exception Condition 17 with regard to no perimeter fencing; and they complied with Special Exception Condition 23, which required shared use of the fields (he noted that they complied with that when the County of Loudoun, the very agency present tonight stating that they did not meet Section 6-1313, was a signatory with them on a memorandum of understanding and has been since 2000). He said, in addition, ISA complied with Condition Number 22 when they purchased the property by purchasing the property in the name of a specific corporation, giving the fire department access to the facilities and had, in fact, placed a special lock on the ballfields so that they fire department could access it. He said they complied with Condition 12, enlarging Farmwell Road; complied with Condition 9, with regard to contributing for the traffic signalization at Smith Switch; complied with Condition 10, by constructing a major 4-lane divided highway for part of Route 625; and dedicated all of this under Conditions 9, 10 and 12 to the County, and they have complied with Condition 11, when they transport students to the ballfields by bus. He explained that the office of Zoning Administration indicates, in their report, that this is a permitted park; however, there is no evidence in County reports to support that. He noted that there was no definition of park in the Zoning Ordinance at the time they obtained the permit. He said if you look at Webster's Unabridged Dictionary, the definition of park is "a tract

**APPL 2002-0027, ISLAMIC SAUDI ACADEMY, INC (Continued):**

of land maintained by a city or town, a place of beauty or public recreation, or large tract of land maintained in its natural state for public use". He said then there are 2 issues, maintained and public use; this land has never been maintained by the County and it is not public use, because public use is defined in the Zoning Ordinance as "held, used or controlled exclusively for public purposes". He noted that the memorandum that the County signed indicates, as does the County land records, that this property is held, controlled and used by ISA and, according to a Special Exception Condition, yes, the County has shared usage, but there is no doubt who owns it. He said that these ballfields have remained at all times in ISA's ownership and are specifically conditioned under the Special Exception. He noted that a memorandum dated November 25, 1997, initiated by Ms. Artman, says specifically that "the acreage associated with the Special Exception consists of 101.82 acres and the applicant is proposing to establish a private school campus which will include....., including associated recreational facilities", and that is exactly what these ballfields are. He said that they are referenced in Condition 14 as outdoor recreational facilities, and are specifically identified and conditioned as part of the Special Exception. He stated that this is not and never has been a park, and if the Zoning Permit was for a park, it would have been issued to Loudoun County, not to ISA. He requested that they go back to the plain language of the Zoning Ordinance - did ISA obtain a Zoning Permit for a use that was unequivocally subject to the special exception, and the answer to that is yes. He stated that the duty of the BZA is to act in strict compliance with the wording of the Zoning Ordinance, and the Zoning Administrator's duty under Section 6-104(F) is to enforce the conditions of approval of the special exception, not to negate them; and under Ms. Artman's interpretation, they would be negated. He requested that the BZA grant the appeal and rule that they have obtained a Zoning Permit and, based upon the language of Section 6-1313, that their special exception is protected from expiration.

[Tom Berezaski was sworn in by the Chairman]

Mr. Berezaski, a resident of Ashburn, came forward and stated that he helped build the ballfield. He said when the Zoning Permit was granted, the ballfield was part of the big picture, and the County and Parks and Recreation wanted the ballfield built as quickly as possible. He said ISA went ahead and built the ballfield as part of the overall operation, and had the roads put in while waiting to get the funding to continue building the school, and suddenly there was no money to move forward any further. He said they have swallowed hard and tried to move forward, and they did apply for the Zoning Permit during this period of time, which was required by the County, and they deserve to be able to keep going.

[Dr. Miles Davis was sworn in by the Chairman]

Dr. Davis, a resident of Ashburn, came forward and stated that he lives in Farmwell Hunt Subdivision, directly across from the proposed ISA building. He asked the BZA to uphold the provisions of Section 6-1313 as written. He said the question is, did ISA obtain a Zoning Permit within 5 years, and he felt that they would all agree, based upon the issuance of the permit on June 23<sup>rd</sup>, that the Zoning Permit was issued within the 5 year period. He said a Zoning Permit is a Zoning Permit. He urged the BZA to uphold the principles of construction set forth by the Virginia Supreme Court by taking a Zoning Permit, as written, and not subject to extraneous interpretations, because these interpretations seem to be specifically designed to exclude ISA's special exception from expiration, and act in accordance with the Zoning Permit that was issued as provided by the plain language of Section 6-1313.

[Nabil Mufti was sworn in by the Chairman]

Mr. Mufti, a resident of Reston, came forward and asked the BZA to uphold the words of the provisions of Section 6-1313. He stated, as a resident of the state and the father of 2 children he hopes to send to ISA, he would ask them to uphold the provisions so that they can proceed with building the school. He noted that it is pretty clear that a permit is a permit, and the residents are very excited that their children will attend this excellent school in the near future. He said ISA is

**APPL 2002-0027, ISLAMIC SAUDI ACADEMY, INC (Continued):**

very important to the community, is a first class school and functions based on the curriculum of the County, plus teaches religious education.

[Karl Hellman was sworn in by the Chairman]

Mr. Hellman, a resident of Sterling, came forward and stated that in 1998 he was the Chairman of the Planning Commission that approved, or offered, the preliminary approval of this special exception. He said what they reviewed, in 1998, was a special exception for one piece of property for a school campus. He noted that the ISA has started construction on that, and have obtained a Zoning Permit, and when they (the Planning Commission) reviewed it, they put no conditions in that said this needs to be built first, this needs to be built second, etc. He said that they gave them conditions for the construction of the school campus and told them to adhere to them. He noted that the issuance of the Zoning Permit seems to satisfy their claim.

[Dale Polen Myers was sworn in by the Chairman]

Ms. Myers, previous Chairman of the Board of Supervisors, came forward and explained she was the Chairman during this application process. She said to say that this application went through a lot of variations is an understatement. She explained that this school did not just encompass a school, it encompassed recreational activities, and at one point also it encompassed dormitories that included around-the-year stay. She noted that through the negotiations of working with the communities, it changed; but it always included the entirety of the property and it always included recreational facilities and opportunities with the property. She said one of the concerns of the citizens was what they would get if the special exception were approved; and there was a crying need for baseball fields in that area. She noted that the Board of Supervisors and the Planning Commission (on which she served) realized that recreational opportunities need to be with a private school. She corrected a statement in the staff report (the site was offered voluntarily and not in response to request by the County): she said as the Chairman of the BOS, she personally, as an elected official of Loudoun County, requested those ballfields because of what she had heard about the need for the ballfields, the sharing of the ballfields and also the concerns of the community wanting to make sure that none of the outdoor activities were lit. She noted that there were conditions put on the entire property that it would not be lit, how the construction would be done and how the facilities would be shared. She said, as the Chairman of the BOS, it was her opinion and when she voted on this, these ballfields were absolutely part of the special exception. She said they did not look into the phasing, and was it the chicken or the egg that came first; they looked at it more from the perspective that it had to be on that property. She stated that as the Chairman who participated in this and voted on this, it was their intention that this be part of the special exception.

[Robert Young was sworn in by the Chairman]

Mr. Young, Treasurer of Dulles Little League, came forward and explained that he has been getting calls from many parents, concerned that they are going to lose the use of the ISA fields for Little League. He said that ISA has been very gracious to his league and to his kids, and they do not have a whole lot of funds for fields or anything for the league. He said that this area cannot afford to lose any recreational facilities, especially ones as nice as these. He noted that this is a voluntary act and not something that was compelled by the County, and for that reason, he applauded ISA. He said he has approximately 600 kids, ages 7 - 12, who will be counting on using those fields on April 21st.

[Howard Jorns was sworn in by the Chairman]

Mr. Jorns, a resident of Ashburn and a member of the Board of Directors of the Little League, came forward and stated that they are in debt to ISA for providing the fields. He said he represented over 1,000 kids in the community, ages 7 - 12, and there is an outcry amongst the community, not only in the Ashburn area but all other areas, with respect to youth sports and

**APPL 2002-0027, ISLAMIC SAUDI ACADEMY, INC (Continued):**

recreational outdoor facilities, and not just baseball, but also football, la crosse, etc. He said they are proud that ISA has partnered not only with the local area, but also with the County in general, to make their facility available for all of the kids in the area so that everybody benefits from it. He encouraged the BZA to keep that in mind when making their decision.

[Shah Abbas was sworn in by the Chairman]

Mr. Abbas came forward and stated that he owns property across the street from the ISA. He said he supports the academy and is eagerly awaiting the school to be built.

Ms. Artman returned for rebuttal. She noted that Section 5-102(H) provides that no accessory use shall be established until the principle use is established; therefore, if the ballfields were to be part of the school use, that Zoning Permit is null and void. She noted that Mr. Fleming made a great number of arguments regarding the conditions; but there are only 3 criteria by which to establish if the time frame has been met, and the conditions have nothing to do with it. She said how much money they have spent is a vesting argument; the Zoning Ordinance now allows a way for the Zoning Administrator with the concurrence of the County Attorney to make a vesting determination, but none of those things have anything to do with the time frame.

Mr. Brown stated that the County's opinion is that ISA applied for a permitted use, the ballfields, and the Zoning Permit was issued for this permitted use. He noted that it was not a permit that implemented the special exception use, it was a Zoning Permit for some non-connected permitted use that they had a right to get a Zoning Permit for. He said what Ms. Artman is saying is if you buy the argument that this field that they built was not built as a permitted use but was built as an accessory to the school, then they would have to go back and say if that is what you did, you did something in violation of the Zoning Ordinance.

Ms. Artman pointed out that Section 6-1002 concludes the issuance of such Zoning Permit shall not afford protection to any owner who is found to be violating this or any other applicable law, ordinance or regulation.

**Mr. Fleming returned for rebuttal.** He said it is not an accessory use because, under Section 5-102, accessory use is only used in the Zoning Ordinance in the context of permitted use. He said it is not a permitted use, rather it is associated recreational activity. He said it is not accessory because it was never permitted. He said the Zoning Ordinance, as it reads now, says a building permit is obtained and the erection or alteration of a structure is started and diligently pursued and (*emphasis on and*) an occupancy permit is obtained and a use is commenced. He explained that the way it read when they obtained their Zoning Permit was "OR a Zoning Permit". He said what they (the County) really wanted was something different than what it said, and they are entitled to rely on what it said, not what they really wanted, because you can not go to what's inside somebody's mind to extraneous facts, rather you have to look at the words as written. He noted that Ms. Artman argued about a void permit; after 60 days that permit cannot be changed and it is not void, it was a Zoning Permit issued pursuant to a use that was unequivocally part of the special exception. He noted that the Zoning Administrator couldn't knowingly issue a void permit, not under Section 6-1002. He said that they did not apply for a permitted use, they applied for a special exception and that was their contention all along. He noted that the best thing that the County did, to lend credence to his argument, was to change the Zoning Ordinance.

The Public Hearing was closed and the Board began deliberations.

Mr. Moffett stated that he felt the ballfields, from the beginning, were a very integral part of the SPEX, and the ballfields were not an after-thought. He said that based on the testimony of Ms. Myers and Mr. Hellman, he felt the clear reading of this is that the Zoning Permit has to relate back to the primary use of the special exception and, based on the evidence of the intent, it seems to indicate that the ballfields were an integral part of this special exception and not just a small