

**Albemarle County Planning Commission
FINAL August 4, 2020**

The Albemarle County Planning Commission held a public hearing on Tuesday, August 4, 2020 at 6:00 p.m.

Members attending were Julian Bivins, Chair; Tim Keller; Rick Randolph; Corey Clayborne; Daniel Bailey; Jennie More; and Luis Carrazana, UVA representative.

Members absent: Karen Firehock, Vice-Chair

Other officials present were Bill Fritz; Lisa Green; Bart Svoboda; Jodi Filardo; John Anderson; Amelia McCulley; Charles Rapp, Planning Director; Andy Herrick, County Attorney's Office; and Carolyn Shaffer, Clerk to the Planning Commission.

Call to Order and Establish Quorum

Mr. Bivins called the regular electronic meeting to order at 6:00 p.m. and established a quorum. He said this meeting was held pursuant to and in compliance with Ordinance No. 20-A(6), "An Ordinance to Ensure the Continuity of Government During the COVID-19 Disaster."

Mr. Bivins said there were no Commissioners attending from the County Office Building, and that the Commissioners electronically present that evening were: Mr. Bivins, Mr. Carrazana, Mr. Randolph, Mr. Keller, Mr. Bailey, Ms. Firehock, Ms. More, and Mr. Clayborne.

Mr. Bivins said the public could access and participate in this electronic meeting by following the links available at www.albemarle.org/calendar, or by calling 877-853-5257.

Consent Agenda

Mr. Randolph moved to approve the consent agenda.

Ms. More seconded the motion, which carried unanimously (7:0).

Presentation

Mr. Rapp noted that the planned presentation for JAUNT would be postponed to a future meeting.

Public Hearing

ZTA201900007 Fill Areas and Waste Areas

Mr. Bill Fritz said the Board of Supervisors had directed staff to work on a fill and waste ordinance and bring forward a proposal on a very aggressive time schedule. He said in January, the Board held a work session to discuss the concepts of a proposed ordinance. He said what was before the Commission that day was the product of that work session.

Mr. Fritz said there has been some public outreach, and that staff has borrowed heavily from other Virginia localities to develop the proposed ordinance. He said fill and waste (which he would only refer to as “fill”) involves obtaining material on one property and disposing of it on another. He said moving material around on the same property is not fill.

Mr. Fritz said currently, and in the proposed ordinance, fill material may only be inert material. He said this includes things like soil, rocks, concrete, bricks, and asphalt. He said metals, drywall, and other construction debris are not considered inert materials. He said rebar is permitted as inert fill, but only if embedded in concrete. He said this allows for reinforced concrete to be disposed of as inert material.

Mr. Fritz said currently, fill is permitted in all Zoning Districts by right and that if the area disturbed exceeds 10,000 square feet or if the fill is coming from a site in Albemarle County that is disturbing more than 10,000 square feet, then the regulations of the Water Protection Ordinance and some of the supplemental regulations come into play. He said he would talk more about this later.

Mr. Fritz said if the area disturbed is less than 10,000 square feet or comes from outside the County, the Water Protection Ordinance regulations do not come into play.

Mr. Fritz said regardless of the area of disturbance, if it is for agriculture, it is exempt from regulation.

Mr. Fritz said he would start by giving an outline of what is proposed, and then he would go into the details later in the presentation. He offered to answer questions whenever the Commission has them.

Mr. Fritz said the proposed ordinance creates two types of fill. He said clean earth fill consists of soil and rock, with limitations on the amount and size of rocks. He said inert fill is what is currently permitted as fill. He said clean earth could go everywhere, just as inert fill can today. He said inert fill would be permitted by right in all Zoning Districts except for the Rural Areas, Village Residential, and Monticello Historic Districts. He said in these districts, inert fill would be permitted only by Special Exceptions. He said these three districts are the dominant districts in the Rural Areas of the Comprehensive Plan. He said from now on, he would say, “Rural Area,” which means all three of these districts.

Mr. Fritz said the proposed ordinance amends the definitions of agriculture so that fill is never considered an agricultural activity. He reminded the Commission that in the Rural Area, clean earth fill would still be permitted by right, meaning it could be used to support agriculture, but it would be subject to the performance regulations.

Mr. Fritz clarified that the placement of fertilizers or biosolids is not impacted by the proposed ordinance. He said they would continue to be regulated as they currently are -- by the state. He said even if they are not called "agriculture," they are still permitted.

Mr. Fritz also noted that the moving of soil from one part of a property to another has never been considered a fill activity and is not considered a fill activity under the proposed ordinance.

Mr. Fritz said currently, in districts other than the Rural Area, trees may not be cut unless it is associated with a site plan, building permit, or road plan. He said this effectively prohibits the placement of fill in the Development Areas or on undeveloped property in the Development Areas.

Mr. Fritz said the proposed ordinance would permit tree cutting to allow for fill activities. He said performance standards are created, addressing setbacks, hours, amount of fill, access, and other items, which he would discuss later in the presentation.

Mr. Fritz said that by limiting the Rural Area to clean earth, it limits the total level of activity in the Rural Areas district. He said this reduces the total amount of traffic, and that this reduction in traffic may help to improve safety and the quality of life of rural residents. He said that by having material disposed of in the Development Areas, where most of the material is generated, it reduces truck miles, which may help to reduce the County's environmental impact. He said by not using the Rural Area for the disposal of inert material, they may also be preserving land for future agricultural and forestal operations.

Mr. Fritz said currently, the Rural Areas are used for the disposal of materials because of the ease of getting approvals for fill operations. He said in the Rural Areas, the most that will be needed for approval is an erosion and sediment control plan in order to comply with the Water Protection Ordinance. He said there are some performance regulations, but that they are largely technical.

Mr. Fritz said that in the Development Areas, getting approval for a fill operation is complicated by the need to obtain approval of a site plan, subdivision, or building permit. He said this is because tree removal is not permitted on nonagricultural-zoned property unless one has one of those approvals. He said this means that a vacant property zoned Commercial or Industrial cannot accept fill material unless the necessary approvals have been received. He said development often does not have time to wait for someone to get an approval and needs to dispose of the material immediately. He said the Rural Areas can receive it, and so this is where it goes.

Mr. Fritz said the proposed ordinance will allow tree cutting on non-RA parcels to allow them to accept this fill material without having to go through an extensive review. He said the Development Area is the primary source of fill material. He said keeping material within the Development Area has advantages.

Mr. Fritz said in order to minimize impacts caused by fill operations, staff is recommending a number of new performance standards. He said these include things such as setbacks and limits on amounts of fill. He said preserved slopes in the Development Areas are already protected, but critical slopes in the Rural Areas are not. He said the proposed performance standards would protect critical slopes and hydric soils, which are also not currently protected anywhere in the County. He said he would go over the performance standards in detail momentarily.

Mr. Fritz said there are some potential negative impacts. He said if the Rural Areas can only accept clean earth fill, there will be increased pressure to place inert fill in the Development Areas.

He said as stated previously, the proposed regulations would allow for some tree cutting to make filling easier in the Development Areas. He said this may result, however, in the partial development of property that then sits idle until full development occurs. He said additional regulations may also result in additional costs to place fill. He said there would be costs associated with the processing of applications for Special Exceptions as well.

Mr. Fritz said he would go more into the details and compare current and proposed regulations. He said currently, it is permitted in all districts, and that clean earth is proposed to be permitted in all Zoning Districts. He said inert waste is proposed to be permitted by right in the districts outside of the Rural Area of the County. He said inert waste would be permitted by Special Exception in those districts.

Mr. Fritz said the ordinance contains criteria for the Board to consider during the review of a Special Exception. He said these criteria are, by their nature, general. He said staff attempted to develop detailed criteria that would have eliminated the need for Special Exceptions to be reviewed. He said it was not possible to develop objective criteria that would have allowed staff to administratively determine if inert waste should be permitted in the Rural Area. He said most Special Exceptions do not have any guidance on how to review them. He said staff and the Board have found this to be problematic in some cases. He said therefore, staff is offering language to help guide the review. He said the criteria is subjective and only offers a guide.

Mr. Fritz said it was important to note that the Board is not required to make specific findings in support of its actions. He said this is language actually taken directly from the existing ordinance.

Mr. Fritz said the proposed ordinance does have an incorrect reference in it. He said it references to the Special Exception and variation process for site plans (Section 32) and should be referencing the Special Exception process in Section 33. He said staff will make this correct before presenting it to the Board. He said the ordinance was simply pointing to the wrong section.

Mr. Fritz said currently, inert materials such as rubble, bricks, and asphalt are permitted. He said the proposal is to break it into two types: clean earth and inert waste. He said inert waste is what the County currently allows as inert material. He said clean earth consists of soil and rock, and that there are some limitations on the rock.

Mr. Fritz said the proposed ordinance removes the exemption for placement of fill as an agricultural activity by redefining agricultural activity. He said it also triggers performance regulations when the activity exceeds 2,500 square feet. He said he has used the word "exempt" in the report and in the presentation, and that this may not quite be the best term. He said currently, activity under 10,000 square feet is exempt from some of the regulations that are in Section 5.1.28. He said the proposed ordinance lowers this limit to 2,500 square feet in activity, which is where the trigger of those enhanced performance regulations would start, rather than at 10,000 square feet. He said activity under 2,500 square feet would be subject to the same regulations that currently exist for activities that are under 10,000 square feet.

Mr. Fritz said for the ease of reading the regulations on the screen, he had broken this information into multiple slides. He said Attachment A contains more information that compares and contrasts the current and proposed regulations. He said currently, the regulations prevent water ponding and anything in the stream buffers and floodplains. He said there are reclamation requirements and very limited fencing and screening requirements, as well as very limited setback

requirements. He said there is a one-year limit on activity, and that the limits in hours of operation only apply to industrial-type power equipment, which is not a defined term.

Mr. Fritz said the operational regulations set limits for the area of activity. He said this would include not just the fill activity, but vehicle and equipment storage or maintenance areas, and limits where tree cutting may occur. He said all of these regulations would be supplemental regulations and are in addition to the regulations that were in the previous slide.

Mr. Fritz said the Board has the ability to modify any of the regulations if requested by an owner, and granting any modification, the Board would be able to include appropriate conditions. He said there are setbacks from Entrance Corridors, property lines, and dwellings. He said there is a minimum lot size and maximum activity area. He said in the report, staff talks about the ability to combine lots that are owned by the same person in order to meet the minimum size.

Mr. Fritz said setbacks don't apply if adjacent properties are under common ownership with the property receiving the fill.

Mr. Fritz said the concept with the minimum lot size is that multiple properties can be counted towards establishing the minimum, but they must have the same zoning.

Mr. Fritz said tree cutting regulations proposed would allow trees to be removed, but only within the areas to be disturbed for the fill activity. He said this means that any trees within the setbacks would remain. He said the proposed setbacks for the fill activity are greater than the setbacks that apply when the property is developed. He said this means there will be more trees preserved on a property with fill activity than when the property is ultimately developed, some or all of those trees could actually be removed.

Mr. Fritz said the ordinance currently does not have any access requirements. He said the proposed ordinance includes access requirements, including adequacy of design, hours of operation, maximum fill heights, and prohibitions on critical slopes and hydric soils.

Mr. Fritz said in summary, this ordinance adds protections to the Rural Areas and allows fill in the Development Areas. He said it includes protection for adjacent properties and protection of natural resources. He said it may discourage the generation of fill materials.

Mr. Fritz said staff acknowledges that this proposed ordinance may make fill activities more difficult due to the performance regulations. He said this may discourage the generation of fill material, encourage the reuse of existing infrastructure, and reduce terraforming activities. He said the reuse of existing infrastructure reduces the environmental impacts caused by disposal of demolished infrastructure materials and the manufacturing of new infrastructure materials. He said in other words, if one can reuse a parking lot, this is better than tearing it up, hauling it away, and then bringing in new parking lot or building material.

Mr. Fritz offered to answer questions from the Commission.

Mr. Randolph said given the deliberations that the Board had last year regarding this issue, he thinks Mr. Fritz has come up with a sensible way of differentiating between clean and inert fill. He said he hoped that Mr. Fritz has had some discussion with staff about a moral hazard that they are creating. He said he feels there is potentially room for mischief in permitting some tree cutting

in the Development Area for fill activities. He urged the Commission to talk that evening about a more precise way of describing “some.”

Mr. Randolph said his concern is a situation where a party decides that they want to do development in the Development Area, but they want to fell a beautiful stand of trees, which a neighborhood has grown to look upon rather fondly and which has been a part of the history of that area for an extended period of time. He said currently, they might have a hard time making that case before the Planning Commission and the Board. He said in allowing them to say that they will put in some fill and will need to cut down the trees, he wondered if they were creating a potential loophole that could be exploited.

Mr. Randolph said another point he wanted to raise is that he thinks Mr. Fritz clarified clearly that material may not be placed in the floodplain or stream buffers. He said they have previously had discussion of the fact that intermittent streams are not included as part of the WPO. He asked if there should be a fill exclusion for where there is evidence of an intermittent stream, as his concern was about the potential for abuse with fill being put into an intermittent stream.

Mr. Fritz said he would clarify the tree clearing issue. He said the setbacks would define the maximum area that could be cleared, as this is what fill activity is about. He said the ordinance specifies what the setbacks are. He said trees could be removed, and that all of the trees could be removed during by right development of the property. He reminded the Commission that these would all be properties that already have some zoning on them.

Mr. Fritz said that there could be a property zoned C1 Commercial, for instance, and someone could say they would like to put fill on the property and that they realize they need to meet the setbacks so many feet from the property line. He said they will take out beautiful trees that people like. He said if they had come in for a site plan, they could have gone to the property line or, if there were a buffer there, it would have only been a 20-foot buffer that they had to maintain. He said the setbacks are actually greater than what would occur under by right development, so he didn't see that there is a loophole here, or that someone could claim fill and do more activity than they could otherwise due to by right under the ordinance as it stands today.

Mr. Fritz said that currently in the Development Areas, intermittent streams are not considered part of the stream buffer, but that they are considered part of the stream buffer in the Rural Areas. He said this was a conscious decision by the Board to do that, so they are simply parroting protection that has already been done. He said if the WPO or Zoning Ordinance were changed elsewhere to prevent other types of activity, they would add this. He said they were not putting any greater restrictions on what can happen with fill activity than what can happen by right.

Mr. John Anderson said this was correct -- that there are limits that the stream buffer requirements do apply to intermittent streams in the Rural Area, but not in the Development Area.

Ms. More asked if Mr. Fritz could clarify the 2-acre maximum. She asked if this is for a 20-acre or 30-acre property.

Mr. Fritz replied that for a fill activity, it is 2 acres and that if someone wants to do more than 2 acres, one needs a Special Exception to do so.

Ms. More asked if they could then do 2 acres, and that if they wanted to do any more than that, what Mr. Fritz was talking about that evening were the performance standards.

Mr. Fritz explained that the performance standards would kick in if they are doing more than 2,500 square feet, which is less than one-tenth of an acre. He said if they are doing over 2,500 square feet, the performance standards kick in. He said the maximum area they could do would be 2 acres on any given parcel, or any given fill activity (as they can combine parcels to do it). He said it would be a 2-acre maximum fill activity and if they want to go over that 2 acres, they will need to apply for a Special Exception.

Ms. More said she was wondering about an example where someone wants to do more than 2 acres of fill. She asked about how staff would track people who have already done fill prior to this and how this will be enforced.

Mr. Fritz replied that if they are over 10,000 square feet, they will have to get a WPO. He said a plan will be required, and that staff then has a record of this plan, which shows the size and area that is going to be disturbed. He said just like staff keeps track of development rights or anything else, they will be able to keep track of the past history of development activity on a particular parcel, using County View or any other tracking mechanism they have.

Ms. More asked if they then have tracking on what has already happened.

Mr. Fritz replied yes.

Ms. More said to assume there is inert material someone wants to get rid of, and that it is coming from the City and going to the County.

Mr. Fritz said he could offer some scenarios.

Ms. More said what she wanted to hear was who is responsible to see the process through and where the County's role is in that.

Mr. Fritz said he could offer a couple different scenarios, as there are many ways that this could happen, and staff had to take all these things into consideration when developing the ordinance. He said to assume there is a project in Albemarle County and that it is a fairly small project. He said someone is building a swimming pool on their property and they need to get rid of a small amount of dirt. He said this swimming pool installation is under 10,000 square feet, so that project doesn't require a WPO. He said currently, there is no way of finding out where that dirt is going to go. He said if one wanted to take this dirt out into the County and dump it, staff does not have a tracking mechanism.

Mr. Fritz said there is less than 10,000 square feet of area being disturbed in this example, and that the receiving property would be able to receive it, with very minimal regulations applied. He said there would be no setbacks in the existing scenario. He said in the proposed scenario, the receiving property (because they would be disturbing more than 2,500 square feet) would need to get something from the County, and they would need to meet the setbacks. He said it is less than a WPO.

Mr. Fritz said the next scenario would be a project generating more than 10,000 square feet, so it has a WPO plan. He said as part of that WPO plan, they need to identify where they will be getting rid of the material. He said under the current and proposed ordinances, they would have to identify where they are going to get rid of that material and how they are going to dispose of it.

He said now, as part of the WPO, they would be reviewing the disposal plan to make sure it met all the performance standards.

Mr. Fritz said a third scenario is a project that occurs outside of Albemarle County. He said regardless of the size, the County does not know the source of the material. He said it is basically the same as if it were something under 10,000 square feet. He said right now, they wouldn't know that certain material is being produced. He said to place it in the County, they would need to comply with the new regulations with the setbacks and performance standards. He said if they are disposing more than 10,000 square feet, they need a WPO plan also.

Mr. Fritz said these are the main scenarios that staff sees.

Ms. More said in the third scenario, if they don't know the source of the material, she wanted to know who "they" is. She asked if it is the property that is going to receive the material.

Mr. Fritz replied that it is the property owner receiving the material.

Ms. More asked if it is a complaint-driven process if someone is not doing that.

Mr. Fritz replied yes.

Ms. More said it would take a neighbor to call and ask why all the trucks are on the road. She said in her mind, with some of what she read in the attachment that was about public comment, there was a comment about people dumping fill somewhere else if the County makes it too difficult to dump it in the correct place. She said there could be a scenario where everyone thinks it is going one place, but doesn't. She said this scenario is horrific and takes her back to a situation that has happened many times where there is an ordinance that is trying to accomplish the correct thing, but if someone is noncompliant, in her mind it goes to some sort of fine that is so terribly awful that makes someone reconsider their choice, as the cost of getting caught would be enormous.

Mr. Fritz said this is one thing that staff has acknowledged about all the Zoning Text Amendments. He said Albemarle County is a complaint-driven enforcement community, and that they do not have any proactive enforcement. He said the County Engineer has acknowledged that there is a potential need to revisit fees in the future if it becomes an issue. He said people can dump right now, and they do. He said people call in to complain, County staff go out, and there are fines, corrective measures, and other penalties they can use. He said nothing has changed, and this new ordinance does not change any of that.

Ms. More asked if there is a fine on the first time, where Zoning would have to go out and material has been accepted.

Mr. Fritz replied that they would have to figure out what the actual violation is and whether or not it is a zoning violation. He said in the case they are dumping material other than inert fill, there is a zoning violation, and that the Zoning Administrator would then have to step in and pursue that. He said there are fines associated with that, and that there is some escalation in the fine, which is set by State Code, so there is only so much the County can do there.

Mr. Fritz said he was not an expert in WPO enforcement and that he would lean on Mr. Anderson to answer any questions about how WPO violations are administered.

Mr. Anderson said the erosion and sediment control inspectors routinely visit all the sites that there are permits on that staff are aware of. He said it does take the recognition of knowing where the sites are and having permitted sites during the typical run of things. He said the inspectors schedule visits to permitted sites where there are approved plans. He said if they find things amiss there, even though the ordinance lays out different pathways for warning, Notices to Comply, and stop work orders, it is not an automatic one-size-fits-all.

Mr. Anderson said the inspectors do work with contractors that are receptive, responsive, and responsible, and that perhaps it was an overnight high rainfall event that got away from them, for instance. He said they don't automatically pursue the most rigorous enforcement in those areas that they know they are supposed to visit.

Mr. Anderson said that to Ms. More's point, he does appreciate that Albemarle County relies on people to see things, pick up the phone and call. He said he thinks it could be a similar situation where Engineering or Zoning personnel visit a site, have a conversation with a property owner about a new requirement they may not have been aware of, and take it from there. He said whether it is through the Zoning Ordinance or through the WPO, there are certain measures that are available to the County, such as discussions, warnings, Notice to Comply, and stop work orders.

Mr. Keller said he would reiterate what Mr. Randolph said -- that he thinks this is an excellent approach staff developed dealing with clean and inert and having those two categories. He said staff has done a good job in their attempt to simplify a complex situation.

Mr. Keller said he had two questions. He said the first one is about whether the performance standards will come to the Planning Commission and Board of Supervisors for review before implementation of the ordinance.

Mr. Fritz replied no. He said the performance standards were currently in the ordinance, in Attachment C. He said the new performance regulations start in a meaningful way on page 4 of Attachment C. He said prior to that, there are a couple of small matters noted, such as a 3:1 slope, a fill height of 8 feet, and not being on critical slopes or hydric soils. He said in Attachment C, this is where it starts to talk about access, setbacks, minimum lot size, and the like.

Mr. Keller asked if it was really a small set of performance standards.

Mr. Fritz said it includes the things he read aloud.

Mr. Keller said he needed to think about this more as they get into the discussion. He said his second question was about the three points that were made in the letter from Southern Environmental Law Center and specifically, the question since they have had this discussion about the complaint-driven aspect of this and whether they wouldn't be better in terms of neighbors knowing about things to enforce by remaining with Special Use Permits as opposed to Special Exceptions.

Mr. Fritz replied that they have done something that is not unique, but is unusual. He said the vast majority of Special Exceptions have no notice provision. He said staff is proposing a notice provision for Special Exceptions. He said included in the ordinance is a notice provision for any Special Exception.

Mr. Keller said this was great.

Mr. Bivins said he had a couple questions. He said that with a number of the Special Use Permits that come before the Commission, there is some sort of water issue. He said in terms of stormwater mitigation, they sometimes allow the stormwater mitigation action to be done offsite or elsewhere. He said it doesn't necessarily have to be done in the Development Area or Rural Area, but could be done elsewhere. He said he wondered what the philosophy was in saying that all the fill that comes from a particular part of the County (whether Development or Rural) has to be made in that part of the County. He said it seems somewhat out of sync with what they allow to do with stormwater.

Mr. Bivins said he was not trying to challenge it, but was trying to understand why one thing could be done with credits elsewhere, but with this ordinance, they are saying that this has to be done in the area that the fill has been generated from.

Mr. Bivins asked if he is an owner and owns Property A in the Development Area, for example, and also owns Property B in the Rural Area, if he could transfer the fill between his two properties since it is about ownership then, or if it was only about contiguous properties.

Mr. Fritz replied that it was only about contiguous properties and about the Zoning Districts, which is an important distinction.

Mr. Fritz said to answer the broader question, which was the crux of the break between clean earth fill and inert waste fill, staff recognized there is a need to dispose of material, but that they also recognized (and approached this solely as a land use issue) that in the Development Area, roads tend to be more substantial. He said this is where development is expected to occur, and is where development does occur.

Mr. Fritz said there was some concept of if one is producing material in the Development Area, it would be nice to retain that material in the Development Area rather than impacting the Rural Area. He said the Rural Area is supposed to be used for agriculture and forestal uses, and is not intended as a place to receive the [inaudible] of material from the Development Area into the Rural Area. He said there are also other impacts, such as losing property that is suited for agriculture. He said there could also be transportation infrastructure that is inadequate to receive a certain volume of trucks going up and down it. He said there are neighbors that are expecting a rural level of activity, then a construction level of activity going on.

Mr. Fritz said staff determined that clean earth fill can be used for agricultural purposes and that there is a need to dispose of that. He said it tends to be smaller in scale, and therefore could go into the Rural Areas. He said this is also more likely where the clean earth fill will be generated - much like the swimming pool example he cited earlier (versus getting rid of a swimming pool and needing a place to put it, which is more of a Development Area activity). He said the ordinance is trying to keep these activities in the Development Area.

Mr. Fritz said there is the side effect of all the work that has been done on the Climate Action Plan. He said if they can allow the Development Areas (the source of the material) to receive that material, they are reducing total truck miles and the emissions that are caused by the transportation of debris.

Mr. Fritz said this was a brief explanation of why staff saw this as a land use issue, and why they are trying to regulate it from a land use impact point of view.

Mr. Bivins said he understood this. He said he also knows that the Board of Supervisors has, at times, pushed things to the Commission which they would consider as a Special Exception for review. He said he assumed that nothing would foreclose the Board from doing this, likewise, on this ordinance in terms of the Board asking the Commission to look at this.

Mr. Fritz confirmed this was true.

Mr. Bivins said in a different context, retaining walls had been mentioned before and that with this, the County was actually, in a way, defining what they could be built on. He said they were reshaping and that, in some sense, they were limiting the amount of development of land. He said this is where he wanted to Mr. Fritz speak to this -- if this ordinance would have the impact of limiting the amount of land which can be developed in the urban part of the County.

Mr. Bivins said if this is one of the downstream impacts of this, he would like to have an intentional conversation about that and perhaps, at some point, have a conversation about the hard boundaries that have been put up between the Development and Rural parts of the County. He expressed they could be limiting opportunities and that this is not particularly what he was hearing people wanting to do, as more space is needed for development.

Mr. Fritz replied that staff sees this as potentially having some impacts that would decrease the development of fill activity. He said if it is more difficult to get rid of fill, then one will not make it. He said one is reusing what they have, which does not necessarily limit the area of development because they are reusing what they have rather than decreasing the area of development.

Mr. Fritz said staff also sees this as potentially facilitating development in the Development Areas. He said currently, for example, if one is building a shopping center and needs to get rid of the material today, the only place they can send it that day is into the Rural Areas because otherwise, they have to go through the site plan process to get the site plan approved to cut down a stand of trees on the Development Area property. He said one can now do that -- they can cut down the stand of trees, and they know that in order to develop the property, they need to bring material onto the property.

Mr. Fritz said they can actually start to prepare land for its ultimate development because it can now receive material that it was always going to have to receive. He said in order to develop the property, one needs to bring the material in, which actually slows the development in the property because they now have to time their development of the property with the development of a piece of the property that has the fill to donate. He said the ordinance may actually allow more flexibility to allow that pre-development of a site.

Mr. Bivins opened the public hearing.

Mr. Rex Linville (Piedmont Environmental Council) said he was filling in that evening for his colleague Mr. Sean Tubbs, who has been tracking the issue of fill in Albemarle County. He said unfortunately for PEC, Mr. Tubbs will be leaving PEC at the end of that week and has decided to dedicate his time to the pursuit of his passion for journalism. He said it has been a pleasure to work beside him at PEC for the past two years, and PEC looks forward to a continued relationship with him as he serves the community in his new capacity.

Mr. Linville said that at a regional level, PEC staff has been following the issue of fill for some time, and hopes that Albemarle's work helps set a standard for the state. He said legislation that passed in the General Assembly that year directs the Department of Environmental Quality to set up a process that will require haulers to notify localities where fill dirt came from, what is in it, and where it will be placed and buried. He said PEC worked on this legislation in Richmond, where it unanimously passed in both the House and the Senate. He said PEC is encouraged to see Albemarle County quickly taking steps to protect its Rural Area, and recommends that the Commission approves the ZTA before them that night.

Mr. Linville said that in recent years, PEC staff has also been hearing from many rural property owners who report a high volume of dump trucks on rural roads that are threatening their safety, and fill areas with unknown materials that could be impacting and threatening the environment.

Mr. Linville said that, simply put, many of these Rural Area fill sites are commercial activities that have nothing to do with agriculture and should be regulated accordingly.

Mr. Linville said the County has issued several stop work orders in the past when sites were clearly violating the WPO. He said PEC believes that the proposed changes before the Commission that night will improve the protection of the rural resources and will lessen the impact of these unrelated commercial activities in the Rural Area.

Mr. Linville said another bill that was passed by the General Assembly this past session directs DEQ to set up a workgroup to research the disposal of construction fill and debris on rural lands, and to develop recommendations going forward. He said while this legislation doesn't impact the Commission's decisions that night, the outcome of this important workgroup may inform the direction that Albemarle County takes on this issue in the future.

Mr. Neil Williamson, President of the Free Enterprise Forum, thanked staff (specifically, Mr. Fritz) for his outreach to the Free Enterprise Forum and other members of the Ag community regarding this issue.

Mr. Williamson said he had a fundamental question. He asked if he owns 150 acres in the Rural Area, if he can only use 2 acres for outside fill forever, and what the purpose of this regulation is.

Mr. Williamson said his second question was an open question for the County Attorney, for the record. He asked how, considering they have redefined agriculture, this regulation is in conflict with the Right to Farm act.

Mr. Williamson asked if the Rural Area had really been fully mapped for steep slopes (managed and manmade). He said prior to the mapping in the Development Area, he remembered vividly two hunting mounds that were located in the woods back behind the Hollymead Town Center that almost held up the development of a property there. He said it seems as though there should be an inventory of those things the County wishes to maintain prior to deciding that they need to be maintained. He said he hopes they will look to such an inventory.

Mr. Williamson said the nature of the Rural Area is an active agricultural area, and that he becomes concerned when he hears people who are upset about trucks on the road that are maintaining that agricultural integrity. He said it seems like some of the residents believe the Rural Area is a public amenity that they should be able to control. He said this measure seeks to reduce

the economic viability of Rural Area land, and it could be a backdoor to making that land less viable, economically. He said he was concerned because he used to drive past farms with his kids, rolled down the windows after chicken litter was spread, and told them, "That's the smell of the country." He said this is what they are talking about -- that these are Rural Area lands that need to be economically viable to keep people moving forward.

Mr. Williamson said finally, to be a devil's advocate, they talked about the Zoning designation, and he wondered if such fill, with the setbacks, be placed on commercially zoned land that is located in the Rural Area.

Mr. Williamson said once again, he has more questions than answers. He said he is encouraged that the General Assembly is looking at this, but that he was not certain that Albemarle County shouldn't wait for the General Assembly study group to finish their work prior to moving forward.

Mr. Bivins closed the public hearing and asked Mr. Fritz and Mr. Andersen if they wanted to respond to public comment.

Mr. Fritz said to answer Mr. Williamson's first questions about the 2 acres, the way it is written is how it would be interpreted. He said staff can look into this if the Commission and Board so desire. He said they could change this and have it based on timeframe (e.g. 2 acres every year, every two years, or every five years).

Mr. Fritz clarified that the steep slopes ordinance does not apply outside of the Development Areas, and only applies within the Development Areas. He said this was a zoning overlay that was specifically adopted. He said the Rural Areas, it is critical slopes that would also apply to commercial properties that are in Rural Areas of the County. He said this is critical slopes and is based on either the topographic information available in the County's GIS, or superior based on Field Run or other documents.

Mr. Fritz said he knew exactly of the mounds that Mr. Williamson was talking about behind Hollymead.

Mr. Fritz said commercial land in the Rural Area of the County would be eligible to receive both clean earth fill and inert waste fill, by right. He said these regulations are done by Zoning District and not by Comprehensive Plan designation. He said the vast majority of land in the Rural Area Comprehensive Plan designation is Rural Area, Village Residential, or MHD. He said a commercial or industrial piece of property in the rural portion of the County would be eligible to receive both inert and clean earth fill.

Mr. Bivins asked if there was anything on the work plan to look at taking an inventory of the rural district.

Mr. Fritz said the work that was brought up by Mr. Linville is the work that the General Assembly did in creating a committee to study this. He said the Board discussed this specifically during their work session and directed staff to move forward with this Zoning Text Amendment, but also seek to be a participant in any work committee. He said this does not represent the end of their work, and that they will continue to be engaged at a statewide level on the regulations.

Ms. Firehock said in the first paragraph, in the definitions in Attachment C, it talks about disposal of nonagricultural excavation material waste and debris if the excavation material waste is not

generated on the farm. She asked if this was getting at the point that the materials should be from the same farm.

Mr. Fritz replied that if they are generated from the same farm, they are not considered fill. He said one can move things around on their own property. He said what this is doing is getting rid of the agricultural exemption where people were bringing fill material in and saying that this is for agriculture, terracing, etc. He said this removes that exemption, and the only material one would be allowed to bring in from offsite that would not be covered by these fill regulations is if that material was generated because of bona fide agriculture. He said if one presses apples to make cider, for example, they need to get rid of the pulp that is the apples. He said that material is bona fide agriculture, and they can bring it in and dispose of it. He said it is considered fill and agriculture.

Mr. Fritz said in terms of biosolids and sludge, it is not agriculture, but it is regulated by the state, so the County is not touching it. He said in these terms, the ordinance changes nothing. He said the state regulations supersede anything the County will do.

Ms. Firehock asked if it was necessary to say in the ordinance that the fill is on the same farm as where the material originated, or if it was clear enough to simply say "the farm."

Mr. Fritz replied that he believed it was clear enough there. He noted that much of the language was generated from other localities. He said the clean earth fill and inert waste fill separation were borrowed from Hanover and Montgomery Counties, and that the agricultural definition comes from James City County. He said the language has been tested in those localities and he was therefore recommending it.

Ms. Firehock asked if the Commission wanted to add a clause that no fill activities are permitted to impact areas where state or federal endangered species are known to be located. She said it wouldn't generate a new survey, but it would specifically call out that one cannot fill in something that might cause detriment to a protected species.

Mr. Fritz replied that this may be problematic because the County does not have those areas mapped, so they wouldn't be able to determine a boundary of the area. He said critical slopes are defined, for example, and that USDA maps define hydric soils.

Ms. Firehock said there is a state database that developers go to to look up whether there are any species impacted by their site.

Mr. Fritz said this is for when the site has something on it.

Ms. Firehock acknowledged that it doesn't help one make a plan for a certain spot.

Ms. Firehock said she would like to add a clause that she believed was reasonable. She said she was looking at page 4 and proposed adding something between 10 and 11 that says, "No fill material shall be deposited within the dripline of live trees, other than a forested area." She said she has seen fill material piled up 20 feet high against trees and put in the woods, which kills the forest.

Mr. Fritz asked Ms. Firehock where she was talking about it. He said there is no discussion of tree removal, for example, in the RA/VR/MHD District and the reason for this is that in those three districts, one can cut trees.

Ms. Firehock explained that she was trying to get at the developers not actually piling the fill up onto the trees. She said in other words, she wants to prevent them piling fill under a live tree that effectively kills the tree.

Mr. Fritz asked if the tree should be cut instead.

Ms. Firehock said yes.

Mr. Fritz said if this were something the Commission was interested in, staff could add something along those lines.

Ms. Firehock said it would be better to cut the trees down and clear the area for the fill than it would be to make a big mess with dead trees that they pile the fill up against. She said she sees a lot of trees killed this way.

Mr. Bivins asked where Ms. Firehock was suggesting this.

Ms. Firehock replied that she wanted it to be its own number between 10 and 11.

Mr. Fritz said staff would likely add it as a unique number, and that they needed to develop the language.

Ms. Firehock said she sent the language to Mr. Rapp that day and that he has a copy of it.

Ms. Firehock said Southern Environmental Law Center made a comment on page 6, where they said they had trouble understanding the proposed fill activity being of a limited duration of less than 90 days. She said SELC asked if this means that 89 days of fill activity in aggregate can occur within a 12-month period; or if an applicant could do 30 days near the start of the year, then another 59 days towards the end of the year and still meet the standard. She said she was questioning whether or not the Commission wanted to address that and whether they want to add the term "less than 90 consecutive days."

Mr. Fritz replied no. He said this isn't a matter of being permitted if it is less than 90 days. He said the Board may or may not grant a Special Exception for a limited duration. He said if someone says they will only be doing this for 60 days, the Board can grant a Special Exception for 60 days to do inert fill, but that they cannot do any inert fill or clean earth fill ever again. He said they can do whatever they thought was appropriate.

Mr. Fritz said this is the very general nature of Special Exceptions -- to simply give some guidance when the County receives a request for a Special Exception of what they will review it against. He said this gives the County some intent. He said it is intended to be of short duration and of small scale. He said they cannot write a provision that says, "short duration" or "small scale," and they have to have some definition. He said because this is for Special Exceptions, there is great latitude for the Board to do this.

Mr. Bivins asked the Commissioners to bring up any specific items in Attachment C they would like to add or pull.

Ms. More said she did not have any specific things in Attachment C that she wanted to pull. She said her only question for Mr. Fritz was if this becomes something that the Board endorses, what staff's plans are to do education with property owners that they know have engaged in this activity. She said this went back to one of Mr. Anderson's answers to her questions where they are dealing with owners that didn't know about changes in the rules. She asked if the County has planned for an education piece to help those that they know participate in fill effectively understand that there has been a change. She said she knew staff had probably engaged some of those property owners.

Mr. Fritz replied that there was currently no specific plan.

Ms. More said she thinks a plan for that would be helpful in terms of tracking properties that have participated in this activity in the past. She said it seems like a plan for creating education would be good so that those property owners will know there has been a change.

Ms. More noted as this ordinance has had to move quickly, staff has done good work on this.

Mr. Bivins asked the Commissioners to make comments on Attachment C, page 1, about the definitions. He said when they use the activity as opposed to the definition, the ordering of this was a bit confusing. He said they talk about the activity before they talk about the definition.

Mr. Fritz said this could be fixed and that it made sense to define the term before they start using it.

Mr. Bivins asked the Commissioners if they had any comments about page 1, Section 18-3, "Definitions." Hearing none, he moved on to page 2, Section 18-4 2.3, which talks about the regulations and the location of structures. He asked Mr. Fritz if he could define who the "Program Authority" is, adding that this term is used a number of times throughout the document.

Mr. Fritz replied that it is a term already defined in the Zoning Ordinance.

Mr. Bivins asked if this was in another section.

Mr. Fritz said it is defined in Section 3 as anyone in the Community Development Office that has been assigned by the County Engineer the authority to act as the Program Authority. He said this is a defined term that is used in the WPO.

Mr. Bivins moved on to page 3.

Mr. Randolph said he had a question about number 4 on page 3. He said it reads, "Inert waste fill shall be topped with clean earth fill to a minimum depth of 2 feet in order to allow for permanent stabilization." He asked who monitors this for compliance.

Mr. Fritz replied that the County Engineer monitors this. He said this is taking existing language that they have and making it clear that it only applies to inert waste. He said one obviously does not need to top clean earth fill with more clean earth fill. He said it is part of the reclamation, and that this is an existing regulation that staff is tweaking to reflect the new types of fill materials.

Mr. Keller said going back to the sentence, "The height of fill shall not exceed 8 feet above natural grade," he assumes that if one has a field of hay and there is an intermittent stream, or a gully that is not even an intermittent stream, and one wanted to fill that in in the agricultural Rural Area, that from the low point in that gully to the regular point at the top of the gully that begins to go down into this swale, there could be 8 feet filled in there. He said it is also implying that there could be 8 feet filled above that high point of the gully as well, and asked if this was correct.

Mr. Fritz said this was correct. He said this assumes that the swale is not an intermittent stream because that would be a stream buffer or hydric soils.

Mr. Keller said one thing they did not get an answer on from the County Attorney or from Mr. Fritz was the Right to Farm act and what impact would happen there. He said he assumed that if a farmer wanted to fill that gully truly for agricultural uses (and not to make money by providing a place for things to be brought from offsite to fill), the reason is that they want to be able to get their mowers there, so it is in their benefit to fill that gully. He asked if this was correct.

Mr. Andy Herrick (Deputy County Attorney) said to answer the question that was raised earlier and the implication that this is somehow affecting Right to Farm, there are actually a couple of places in the draft ordinance that deal with the definition of "agricultural activity." He said at the beginning of page 1, there are two different definitions of agricultural activity that are very similar. He noted that they preserve the existing definitions in the ordinance. He said there is also a reference in each of those definitions to the bona fide production or harvesting of agricultural products, as defined in the Virginia Code.

Mr. Herrick said the addition at the end of the definition clarifies what agricultural activity is not. He said in the proposed ordinance, agricultural activity is not the above-ground application or storage of sewage sludge, or the disposal or storage of nonagricultural excavation material, waste, and debris, as those things are not generated on the farm. He said this is something that Mr. Fritz had discussed earlier in response to the question.

Mr. Herrick said all of this was to say that the proposed ordinance is not in conflict with the Right to Farm Act, and does not affect bona fide agricultural activity. He noted that the proposed addition at the end of the definition is actually also derived from state law, and is taken directly from Virginia Code Section 15.2-2288, which deals with the ability of localities to regulate farming. He said even the State Code says that the bona fide production of agricultural products does not include this list that staff is proposing to add to the end of the County's definition.

Mr. Keller thanked Mr. Herrick and Mr. Fritz. He said he understood, but was trying to get a clarification. He said it was somewhat helpful from one of the letters that was sent in to begin to understand that. He said that from a lifetime of looking at agricultural practices, he was just trying to understand why if one weren't filling a floodplain or intermittent stream, they would want to elevate 8 feet above the dominant contour. He said he could understand why there would be a desire to fill in a gully because of what that would mean in terms of farm equipment where large areas are either mowed or cultivated. He said it is a continuing question, and that if the County goes forward with this, it will be interesting to see what they have learned after this has been in place for some time.

Mr. Bivins asked if staff had a definition for "state highways," adding that he didn't know what this was, and he couldn't find that in VDOT documentation.

Mr. Fritz replied that he did not have a chance to look, but believed this term was used elsewhere in the Zoning and Subdivision Ordinances. He said he would clarify that.

Mr. Bivins asked Mr. Fritz if he could take a moment to look at that, as he could not find anything about what a state highway is in the VDOT documentation.

Mr. Fritz said he would make sure they are referencing those roads controlled by VDOT that one needs a [inaudible] for. He said they would figure out what the right term is there.

Mr. Bivins asked if any Commissioners had a comment or question on page 5.

Ms. Firehock asked if the Commission had captured her comment about page 4, as she was having technical difficulties.

Mr. Bivins replied yes.

Mr. Bailey said regarding page 5, number 10, there was discussion raised in one of the public comments about the maximum area of 2 acres. He said the question was about a theoretical property of 150 acres and if the 2 acres for fill was for perpetuity. He said although he didn't know where he stood on it, he thought it was a good point that was raised that was worth having additional discussion about.

Mr. Bivins said staff noted there would be the ability for a person to come back when they hit the 2-acre limit and ask for a Special Exception.

Mr. Fritz said that for any of the provisions, one can ask for a Special Exception to say they want to do more than 2 acres, for example, less than 5 acres, more than 8 feet for setbacks, etc. He said staff can clarify that it is 2 acres as a one-shot deal or, if the Commission has something else in mind (e.g. 2 acres over a given time period; or 2 acres until the area is reclaimed, at which time they can disturb an additional acreage on the property so that there is not more than 2 acres open at any given time). He said this language was borrowed from another locality.

Mr. Bivins asked the Commission for their thoughts. Hearing none, he said a landowner has the ability to come forward and ask for an exception.

Mr. Bailey said he appreciated this clarification.

Mr. Bivins asked if there were further comment about page 5.

Mr. Bart Svoboda (Zoning Administrator) said he wanted to be cautious of any rolling requirements, as they are difficult to track. He said they want to be careful there, although he understood Mr. Williamson's concerns about restricting the fill to the one-time maximum of 2 acres in the Rural Areas.

Mr. Bivins said they still have a mechanism for someone wanting to come forward.

Mr. Svoboda said as this develops, there may be other supplemental regulations that come into play. He said as staff reviews more of these, they may have the opportunity to develop supplemental regulations that clarify what is happening.

Mr. Bivins moved on to page 6. He said his concern is that they are using this to say that the mailing of the notice for a Special Exception eliminates one's ability to come back afterwards to challenge the Special Exception.

Mr. Fritz said it does not limit one's ability to challenge the Special Exception, but limits one's ability to challenge the Special Exception based on the fact that they did not get notice. He said one can still challenge the Special Exception. He said the language is simply saying that if one did not get notice and participates in the Special Exception discussion, one cannot then come back and say that it was not valid because they didn't know it was going to be discussed because they did. He said they can still challenge the Special Exception.

Mr. Bivins said this was basically putting into the ordinance the "mailbox rule," or the presumption that anything gets mailed gets delivered. He said this was fine and that he appreciated it. He said his question for counsel, however, was if this is the only time that the County does this. He said this was the first time he has seen this language in any ordinance. He said if so, he would ask that they would do more wordsmithing on that to make it more obvious.

Mr. Herrick replied that he and Mr. Fritz discussed this provision earlier that day, and Mr. Fritz pointed out (which he has since verified) that this language is lifted from the State Notice Law of Virginia Code Section 13.2-2204, which has a provision very similar to this when it comes to notifying abutting property owners about Zoning Map Amendments. He said it has the same provisions, and it also has a provision at the end that says if one participates in the hearing, they cannot appeal based on a lack of notice. He said it is not that they cannot appeal, but it is saying that the person must have found out about it somehow because they showed up. He said this is not unique, and is drawn directly from state law.

Mr. Bivins said there is a caveat in this. He said he did not see, in the four lines about this, any mention of the person participating in the hearing.

Mr. Herrick said at the very end, it says, "Due to the failure of the party to receive..." He said this removes the alleged failure to receive the notice as grounds for appeal. He said it does not deprive a person the right of appeal. He said they can still appeal, but cannot appeal based on a lack of notice, as they must have found out about it somehow because they showed up.

Mr. Bivins said he is always concerned about things that get buried in big paragraphs. He asked if this could be broken out some way, as this is a dense paragraph with a number of things happening in it about notice.

Mr. Bivins asked if there were any other comments about page 5. Hearing none, he asked if the Commissioners had comments that would move them towards a motion. He asked if Mr. Carrazana had any comment.

Mr. Carrazana said it is a sensible approach, and what has been put in place helps to mitigate some of the circumstances or situations the County has had in the past. He said to Mr. Williamson's point about the 2 acres, he believes this is vague because if someone does have 150 acres, there is the question about where this 2 acres comes from. He said he thinks having a defined timeframe might help. He said he believes the ordinance can mitigate some of the issues seen in the past and more recently.

Mr. Carrazana said that, as in the example of UVA, large developers are the ones that would potentially create large projects. He said others could be doing large projects as well, and that they need a place for some of this, which he thinks the ordinance provides for.

Ms. Firehock said she had suggested something about protecting tree root zones. She said Mr. Rapp made a note that he might word it slightly differently. She said they did not have to wordsmith the ordinance language that evening, but wanted to say that they would like something added to that effect before it goes to the Board.

Mr. Bivins said this was in addition to the comment about piling fill up against the trees.

Ms. Firehock said yes.

Mr. Randolph moved to recommend approval of ZTA201900007 Fill Areas and Waste Areas as discussed by the Planning Commission and with the technical corrections identified by Mr. Fritz.

Ms. Firehock seconded the motion, and said she would like to add a friendly amendment to develop language for the protection of tree roots. She said she already provided an example during the hearing.

Mr. Bivins said this was in addition to a number of other comments and suggestions. He asked if Mr. Randolph was fine with this.

Mr. Randolph indicated he was.

The motion carried unanimously (7:0).

Mr. Bivins noted that there was some editing for staff to make, and asked for counsel to help with the legal piece (about notice and appeals) that was making him nervous.

Adjournment

At 7:35 p.m., the Commission adjourned to August 11, 2020, Albemarle County Planning Commission meeting, 6:00 p.m. via electronic meeting.



Charles Rapp, Director of Planning

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

Approved by Planning Commission
Date: 09/01/2020
Initials: CSS

