Present:

Steven Laffoon – Chairman
Stephen Walters
Gamaliel Rose
Ned Stephenson
Edward Haile

Also Present:

Kelly McKnight – Planning and Zoning Office Manager
Rob Hodges - Planning and Zoning Administrator
Max Hlavin – County Attorney

Absent

Call to Order

Chairman Laffoon called the June 29, 2023, meeting of the Essex County Board of Zoning Appeals to order.

Roll Call

Ms. McKnight called the roll. A quorum was met.

Approval of Minutes

Chairman Laffoon stated they needed to revisit and approve the minutes from April 27, 2023. Mr. Stephenson made the motion to approve the minutes as presented. Mr. Rose seconded the motion. AYES: 5 NAYES: 0 ABSENT: 0

Chairman Laffoon asked about the May 25, 2023, minutes. Mr. Rose made a motion to approve the minutes as presented. Mr. Stephenson seconded the motion. AYES: 5 NAYES: 0 ABSENT: 0

Public Comments

None.

Public Hearings

None
New Business


Mr. Hlavin stated that if there is an appeal for a zoning decision the zoning administrator supplies the basis of their decision. Then the Appellant has the burden of proof to rebut that by preponderance. He is happy to defer to Mr. Howeth if he would like to put in his case first but the normal procedure is to have the zoning administrator give their basis and then allow the appellant.

Mr. Hlavin is here on behalf of the County, A.K.A. the Zoning Administrator. He is going to have Mr. Hodges come up and introduce some brief evidence to have it before you. They are not going to be putting very much in front of you just the request and the letter in response from Mr. Hodges.

Mr. Hlavin asked Mr. Hodges if this was an accurate and true copy of the letter received from Mr. Howeth.
Mr. Hodges stated yes it is an accurate and true copy of the letter received dated May 5.

J. L. Howeth P.C.
Consulting Engineering and Land Surveying
By Appointment Only At All Offices

1019 Elm Street
Tappahannock, Virginia 22560
804-443-6367

9408 King’s Highway
King George, Virginia 22485
540-775-5585

2833 Cople Highway
Montross, Virginia 22520
804-491-9066 / 804-491-1333

May 5, 2023

Mr. Robert Hodges, Zoning Administrator
Essex County
202 South Church Lane
Tappahannock, Virginia 22560

Dear Mr. Hodges:

I am in receipt of your letter dated April 21, 2023 confirming that my interpretation of your effective date as becoming the Zoning Administrator, Subdivision Agent and Plats Officer is incorrect. Therefore, please accept the enclosed appeal to the Essex County Board of Zoning Appeals and associated fee as my appeal of a Zoning Administrator’s interpretation as you are currently the Zoning Administrator of Essex County. Furthermore, as a FOIA requirement of this appeal, please provide me with a copy of the Board of Supervisor’s resolution which approved you as the Zoning Administrator, et al and a copy of the employment agreement and duty discussions as the resolution’s “nunc pro tunc” clause cannot be enforced unless the action taken was certified in writing at the time you were hired. If no documents can be produced to validate your position and granting of powers commensurate with the position duties at your time of hire, then I request that you re-evaluate your decision on this matter. Also, please do not claim that these actions are personnel related and protected from FOIA as I hardly believe that the appointment of a Zoning Administrator, Subdivision Agent and Plats Officer would be afforded this protection from the citizens that you would serve, which is why a Board of Supervisor’s resolution is required for this action.

Thank you in advance for your consideration in this matter and please let me know when you have scheduled the meeting in accordance with the Code of Virginia timelines. We do not want a repeat of Essex County’s failure to observe my due process rights as was done with my last appeal to the Essex County Board of Zoning Appeals.

Sincerely,

Jeffrey L. Howeth, President, J. L. Howeth, P.C.
Virginia Licensed Professional Engineer
Virginia Licensed Land Surveyor
Nationally Certified Floodplain Manager
Virginia Dual Combined Administrator ES&C and SWM

Mr. Hlavin asked Mr. Hodges if that was an accurate and true copy of his response.

Mr. Hodges stated yes it is an accurate and true copy of his response dated 21 April.
Mr. Hlavin stated that ordinarily in an appeal or a zoning administrator decision any sort of issue within the purview of the zoning ordinance you would be presented with considerably more factual based evidence to justify the decision. This letter issued by Mr. Hodges as zoning administrator is not an appealable decision. Things that can be appealed to the Board of Zoning Appeals are only those decisions that are related to the administration and enforcement of the zoning ordinance or zoning laws. Mr. Howeth requested that Mr. Hodges essentially confirm his interpretation of the State Code provision that would in his position deem a site plan having been approved. That is really only in the proper scope of the Circuit Court. Additionally, any issues with a Board of Supervisors resolution making an appointment is not within the purview of the Board of Zoning Appeals to consider. That is all of the evidence that we are going to present. We have additional argument, and we will reserve time to
present evidence should the Board of Zoning Appeals feel that there is an issue of appeal that they want to take additional evidence and argument on. Essentially this letter limits itself to not confirming Mr. Howeth’s requested interpretation of State Code. That does not rise to the level of something that is in the appellant jurisdiction of the BZA. So we would simply ask that you would find that this Board doesn’t have jurisdiction to hear the appeal that has been requested by Mr. Howeth.

Mr. Howeth stated that we have an interesting situation Chairman Laffoon. He just heard the Attorney say that this is not something that you can deal with.

Chairman Laffoon stated that is what he understood.

Mr. Howeth stated that is what he understood too. That is an interesting position to take, and this is part of the reason why he showed up before you tonight. We run into these situations, we have these big ordinances, Mr. Hodges does a fine job. This is not an attack on Mr. Hodges, he likes Rob Hodges. He thinks he is doing a decent job. We do have procedures and citizens do have rights, so he stands here tonight. The question that he brought tonight, and he is going to give the facts, he paid $400 to be here so he is going to use up some time. He turned in a site plan and you all have a copy of it, and he gets some site plan comments back. He got 2 ½ pages of comments back. They just had one come before the board that is two lots over, which is Mike Parker and David Stokes main lot, where there was a site plan turned in. He asked if they had a copy of that site plan.

Mr. Hlavin stated that for the record he objects any this to be relevant to the appeal.

Mr. Howeth stated he was going to keep going, he will appeal that objection later. He showed the site plan that is for Lot 12. He explained that Lots 8 and 9 are all the way at the end of the cul-de-sac, Mike Parker owned lot 10, David Stokes has 11 which is Essex Recycling and then there is Lot 12. This is the site plan that was turned in. There were no comments on that site plan.
Mr. Howeth stated that he had 2 ½ pages of comments.
May 25, 2022

J. L. Howeth
1019 El Street
Tappahannock, VA 22560

Re: Review of Site Development Plan, Lots 8 and 9 LaGrange Industrial Park

Attn: Mr. Howeth:

Staff has performed a review of the site plan entitled “Final Site Plan Lots 8 and 9 LaGrange Industrial Park” prepared by J. L. Howeth, P.C., and last revised on 6 May 2022 to locate and construct a ‘disassembly/repair building’ and multiple ‘automobile wrecking yard/open or enclosed storage junk yard(s)’ on a 16.72 +/- acre property identified as Tax Parcel IDs TM 36 ((71)) Lot 8 and TM 36 ((71)) Lot 9 located at the end of LaGrange Industrial Drive, Tappahannock, Virginia.

Based upon the results of this review, the site plan is found to be incomplete with respect to the requirements of the Essex County Zoning Ordinance. Enclosure 1 outlines the missing requirements in the plan. Once a complete plan is submitted the county and appropriate state agencies will initiate reviews.

Please advise if you have any questions.

Sincerely,

Robert Hodges
Planning and Zoning Administrator
Enclosure 1

<table>
<thead>
<tr>
<th>Reference</th>
<th>Requirement Detail</th>
<th>Component(s)</th>
<th>Payed</th>
<th>Status</th>
<th>Note/Comments</th>
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<tr>
<td>Address:</td>
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<td>Tax ID(s):</td>
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<td>Land Disturbance less than 2500 SF</td>
<td>N</td>
<td>Y</td>
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<td>LD Permit required</td>
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<td>Plan Review</td>
<td>TBU</td>
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<tr>
<td>Multiple Parcels</td>
<td>N</td>
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<td>Y</td>
<td>North edge lot 8, zone A; sheet 1 of 4. FEMA Information in sheet 4a of 4. General Notes 3 Indicates different FEMA Information than sheet 4a of 4. North edge lot 8.</td>
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<td>CBPA/RPA Buffer</td>
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<td>Wetlands</td>
<td>Y</td>
<td>Y</td>
<td>Y</td>
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17.30.2. A. Two (2) copies of the site plan submitted.  Meets Requirement

17.30.2. B. Drawn to scale.  Meets Requirement

17.30.2.1. Name and address of the applicant, owner of the property, and the preparer of the plan.  Meets Requirement

17.30.2.2. Location of the property including name of the subdivision, tax map number, and name or route number where property is located.  Meets Requirement

17.30.2.3. A boundary survey of the tract, if available, or site plan showing north arrow and property line measurements.  Meets Requirement

17.30.2.4. Location of all building restriction lines, setbacks, easements, covenant restrictions, and right-of-ways.  Does Not Meet Requirement

17.30.2.5. Existing zoning classification.  Meets Requirement

17.30.2.6. Date, scale, and number of sheets.  Marginal Meets Requirement

17.30.2.7. The location of all existing and proposed structures, including marine and temporary structures. The date when the structure will be removed must be indicated.  Does Not Meet Requirement

17.30.2.8. The location and extent of all wooded areas before development; the proposed area of clearing, with indication of post-development cover.  Does Not Meet Requirement

17.30.2.9. Computations shall include the approximate amount and percentage of the site to be covered by open space, and the amount and percentage to be covered by impervious surface after development.  Does Not Meet Requirement

3x Automobile Storage/Wrecking Yard areas are depicted for lot 8 on sheet 1 of 4. No Automobile Storage/Wrecking Yard areas are depicted for lot 8 on sheet 4a of 4. Neither sheet depicts the limits of clearing necessary for the proposed use.
<table>
<thead>
<tr>
<th>Reference</th>
<th>Requirement Detail</th>
<th>Component(s)</th>
<th>Paid</th>
<th>Status</th>
<th>Note/Comments</th>
</tr>
</thead>
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<tr>
<td>17.30-2.10</td>
<td>The locations of all existing and proposed septic tanks and drain field sites including reserve sites; the location of all existing and proposed wells.</td>
<td>Does Not Meet Requirement</td>
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<td></td>
<td>1- does NOT depict primary and reserve septic areas 2- does NOT depict location of well</td>
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<tr>
<td>17.30-2.11</td>
<td>The location of all existing and proposed easements for roads, overhead and underground utilities, drainage, or other easements which may exist or are proposed on the property.</td>
<td>Does Not Meet Requirement</td>
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<td></td>
<td>no drainage depicted for lot 8</td>
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<td>17.30-2.13</td>
<td>Transportation demonstrating efforts made to control access and minimize impacts to through traffic on adjacent routes.</td>
<td>Meets Requirement</td>
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<td>17.30-2.13</td>
<td>The location and layout of any driveways or parking areas, or any other paved or gravelled areas.</td>
<td>Does Not Meet Requirement</td>
<td></td>
<td></td>
<td>existing parking areas and/or proposed parking areas not depicted on other lot</td>
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<td>17.30-2.14</td>
<td>The shortest distances from all property lines to all existing and proposed structures.</td>
<td>Does Not Meet Requirement</td>
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<td>17.30-2.15</td>
<td>The approximate limit of all Resource Protection Area features and any additional required buffer areas if an environmental assessment is not submitted</td>
<td>Meets Requirement</td>
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<td>17.30-2.16</td>
<td>The approximate limit of the 100-year floodplain included with the site plan shall be documentation of all existing permits and applications relevant to the parcel, including, but not limited to: Health Department permits for all wells and septic drain fields; all existing zoning permits and zoning applications; applications for rezoning, special use and conditional use permits, and zoning variances and evidence of all wetlands permits required by Federal, State, and local laws and regulations applicable to the site, lot or parcel.</td>
<td>Meets Requirement</td>
<td></td>
<td></td>
<td>1- missing VDH septic and well permits 2- missing VDOT commercial entrance permit</td>
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</tbody>
</table>
Mr. Howeth struggles with is that he feels he had a better site plan than Mr. Stokes. He felt he met a little more of the law, a little more of what needed to be done by code.

Mr. Hlavin stated again he objects to any of these documents being relevant to the appeal.

Mr. Howeth stated he has a site plan and he gets a little bit different treatment then with the other site plan does. So we go along and here is where the course of the night goes. Mr. Hodges was hired on January 18, 2022 it states halfway down the page on the resolution nunc pro tunc an interesting Latin phrase that we will get to later. So he is hired in January, but our County Code actually says in the new adopted code 36.16.a ‘Zoning Administrator shall be appointed by the Board of Supervisors.’ So he is hired by Mr. Lombardo, who at the time was the person that was hired everybody. So he is hired in January but they don’t actually do the resolution until the 13th of December. Almost a whole year went by. The real interesting question is if the Board of Supervisors by our own code has to appoint him was he actually the zoning administrator through that entire year. The reason why this becomes important is because the Code of Virginia 15.2-2259 actually states that if he turns in a site plan the County has 60 days to properly respond to him but using the proper person. Which would be the zoning administrator in this case. If he was not the zoning administrator at the time, then he didn’t get a proper response and the 60 days timed out, therefore that site plan theoretically approved itself. When he asked Mr. Hodges, and that is your first letter, the letter that he sent that the attorney gave you. He asked him if he would confirm that he was not and the 60 days went by and we had the resolution, we knew the dates. He would not confirm that he stated he was so he disagreed with his decision. Our County code says that he come here to the Board of Zoning Appeals and plead his case because that is the decision of the zoning administrator. The most important part of that is that, Sans Anderson, Mr. Hlavin’s parent firm has clearly stated on record many times that you need to exhaust all of your administrative appeal processes before you are allowed to go into that circuit court. So he is here tonight, he paid his money, filed his application, you guys were nice enough to come out to hear him, but he is filing his appeal process. You can validate that Mr. Hodges was the Zoning Administrator at the time, you can validate
that he was not. He has met his requirement because he showed up here before you. Max is objecting like crazy to everything he is doing and that is fine and he will make a couple of comments. If you read that resolution, we are now going to talk about *nunc pro tunc*, in that resolution, Max’s firm, wrote ‘Be it further resolved that such appointment shall be *nunc pro tunc* January 18, 2022, the date of his hire as the Director of Planning & Zoning for Essex County, Virginia and the Board of Supervisors hereby ratifies the actions taken by Rob Hodges as the Zoning Administrator and Subdivision Agent (Plats Officer) of Essex County, Virginia since January 18, 2022.’ It was adopted in December 2022. *Nunc pro tunc* is a Latin phrase that attorneys use that means ‘then for now’. So the real question of the matter is can they use that phrase? If you do some research on it, here from the North Carolina School of Law, it says no more *nunc pro tunc* in civil cases. Let’s explain so everyone knows what this means.

*Nunc pro tunc* is an item that is court ordered, it is designed to set the record straight. The classic example is a man gets a divorce from his loving wife and he goes through the court system and the divorce is actually ordered and decreed. It is properly done but somebody forgets to write it down. Then that man goes and marries another woman, without that divorce being written down and properly documented that he was divorced from that woman before he married the other woman he has a little problem on his hands in most states. So *nunc pro tunc* is usually an item that straightens up chronology with clerks and judges. Can *nunc pro tunc* actually be used to make a zoning administrator retroactive and of course if it can, can it be used to make a tax retroactive, can it be used to make anything retroactive? If the pure definition of *nunc pro tunc* says you can do it as long as the action was taken when it was contemplated and you can prove that, he has FOIA Mr. Hodges asking for every piece of information saying they made you the zoning administrator the day he was hired, he has gotten nothing. Hopefully Max has something. He has been given nothing under a FOIA, so he has to assume since the time frame is out that it doesn’t exist. So we don’t have those functions. The interesting part of all of this, of course this is the part he loves it when they get up and object. You are asking, he shouldn’t do this but he is going to, you are asking the man whose firm wrote the resolution if he did anything wrong? What do you think his answer is going to be? He, right now in this room, represents you guys. He represents that man right there.

Mr. Hlavin stated as a point of clarification he does not represent the BZA. The BZA is totally separate from the County. He represents the County and the Zoning Administrator.

Mr. Howeth asked Mr. Laffoon who represents them in these legal matters? This is a tough one. He is the Chairman of the Wetlands board and had a case that implicated the prior building official. He asked this County and it’s Supervisors for independent council because it was Sans Anderson who was representing the old building official. He was told he would get what he gets. He is assuming you will be told the same thing so that might be the man that represents you. This is where we are, this is not an easy case to what’s there. The only other comment that he has here tonight is, he thinks those documents and those comments stand for themselves, he thinks most of them know how long he has been here and what projects he has worked on. The only other comment he has, and then he will stop and let Max take off with it, he printed a section 15.2.2308.1 Board of Zoning Appeals *ex parte* communications and he would trust because he was delivered no documents ever of anything that the County said, any position that they took, he would assume that none exist. Only you gentleman would know if anything was said that he wasn’t made privy to.

Chairman Laffoon stated the only thing that he has been given, and he is sure it is what has been given to everybody, is the correspondence between you and Mr. Hodges.
Mr. Howeth stated fair enough. He has given you and will leave a full set of copies what he has given you so they can be put into the record. He does want them to understand that this is the type of situation, he is probably not considered the average citizen here because of the functions that he does, but this makes it really hard for an average citizen to deal with it’s government. We write the books down but all of sudden things we write in the books don’t come true. It makes it very difficult, and you would imagine a guy that doesn’t have his background trying to hold this off or defend himself that would be an absolute joke.

Chairman Laffoon asked if before he was given all of this was he acting as the Zoning Administrator? If so as an acting zoning administrator wouldn’t he have all the authority and everything that goes with that as acting, temporary or otherwise, because that would be the position that he is in?

Mr. Howeth stated that the County Code that we just adopted that mimics the old one says the Board has to appoint the Zoning Administrator.

Chairman Laffoon stated that is for the permanent one but for a temporary fill-in as acting then wouldn’t he have the same authority?

Mr. Howeth stated that he asked for any documentation that would prove to him as such. It is a very good question, very fair question. He has asked for any documentation that makes him such. Let’s be careful what you are asking because he paid his money and has the right to appeal the Zoning Administrators decision. It doesn’t say he has the right to appeal an acting Zoning Administrator’s decision. We need to follow what the rules are. We don’t do this with the Building Official. When the Building Official comes we make him the Building Official and he is the guy because he has lots of power. Mr. Hodges has a substantial amount of power as well as a Zoning Administrator don’t the citizens have the right to know who that Zoning Administrator is if they want to do an appeal. We are 25 minutes in to an appeal and you all probably have not seen an appeal in years of a zoning administrators decision. This is a difficult process. So does an Acting Zoning Administrator have the same power as a Zoning Administrator? Where did we declare him acting?

Mr. Walters stated in the Minutes of the January meeting when you brought this up. In the January 13th 2022 meeting when you first came to us with the plan for 8 and 9. You were asking for a change to the setback. When that came up, at that point in time Mr. Nuckols was the Acting Administrator and he stated in that meeting and it is in the minutes that Mr. Hodges is taking over as Acting Administrator going forward. So at that point in time it is public record that he is the acting administrator.

Mr. Rose stated so the absence of evidence in a FOIA is not evidence of absence because you have the record that show it.

Mr. Walters stated that this came from the public minutes on the 13th.

Mr. Howeth raised an interesting question to Mr. Walters Who made Bart Nuckols the Acting Zoning Administrator? Do you have that record?

Mr. Walters stated no but that’s not our problem.

Mr. Howeth stated he asked for a copy of the records.
Mr. Walters stated that they serve at the pleasure of the Board of Supervisors.

Mr. Hlavin stated he appreciates the boards curiosity. It is really not relevant to the jurisdiction of the BZA. He appreciates the curiosity, he will let them discuss *ad nauseum*, but it is not relevant to what the appellant jurisdiction of the BZA on a decision of the Zoning Administrator is really on something that is in the administration and enforcement of the Zoning ordinance or the zoning laws of which a Board of Supervisors action appointing and a claim to Circuit Court are not those two things.

Mr. Rose asked if they could provide the citation for the vacation of *nunc pro tunc* that you mentioned? Can you give us the date on that, where that was vacated? Mr. Howeth had mentioned that the *nunc pro tunc provision*.

Mr. Howeth stated that is probably a better question for Max but *nunc pro tunc*, this is an opinion from UNC law. He has a copy of what is in Blacks Law dictionary which is usually one of the standards.

Mr. Rose stated he understands the concept but Mr. Howeth mentioned in his presentation on *nunc pro tunc* a document which vacated the concept in Virginia.

Mr. Howeth stated that document is called ‘On the Civil Side A UNC School of Government Blog No More *Nunc pro Tunc* in Civil Cases. He does not think that Virginia has actually struck it because utilizing the divorce example you do not want to take it out of the bag to what is there but is it appropriate. The whole fundamental basis is that the act happened when you said it did back in January there is no proof that the act happened to what is there. So, we can’t go 12 months in advance and say ‘I’m going to use this Latin phrase to say that the act happened when there is no evidence that the act happened.
No More Nunc Pro Tunc in Civil Cases?

*Nunc pro tunc* is a phrase used in an order or judgment when the court wants the order or judgment to be effective as of a date in the past rather than on the date the judgment or order is entered into the court record. Black's Law Dictionary defines the term "nunc pro tunc" to mean "now for then; [a term signifying] a thing is now done which should have been done on the specified date." Recent cases from the North Carolina Court of Appeals have made it clear that nunc pro tunc is a tool available only in extremely limited circumstances.

**Judgment/Order Must Have Been Decreed or Signed in the Past**

In *Whitworth v. Whitworth*, 222 NC App 771 (2012), the court of appeals reminded us that nunc pro tunc only can be used if an order actually was "decree or signed" on the date in the past. Because nunc pro tunc is a tool to correct the court record to reflect an event that actually occurred in the past, it cannot be used to give an order retroactive effect when the order was not in fact entered in the past.

The trial court in *Whitworth* entered an equitable distribution judgment in a case involving a marital corporation. At some point during the equitable distribution proceeding, the marital corporation filed a motion to intervene. The trial court indicated on the record that it would sign an order allowing intervention but a written order was not signed. Several years after the final equitable distribution judgment was entered, the court signed a written consent order granting the corporation's motion to intervene nunc pro tunc to the date the court indicated on the record that it would allow the motion.

The court of appeals vacated the consent order, holding that nunc pro tunc can be used only if the trial court determines:

1. An order/judgment actually was decreed or signed on the date in the past;
2. The order/judgment was not entered on the record due to accident, mistake, or neglect of the clerk; and
3. No prejudice will result if the order is entered nunc pro tunc.

The order allowing intervention in *Whitworth* clearly had not been signed in the past. So what does "actually decreed" mean? The court does not explain but held that the intervention order had not been actually decreed in this case because:

*...any rendition in open court did not precisely set out the trial court's order on the motion to intervene... the court merely stated [that it would sign an order if one was presented by the attorney,]... Thus, the trial court made no oral findings of fact, although the written order contained specific findings. ...*

Mr. Rose stated that this is where Mr. Walters testimony is positive because he is saying that we have minutes/records showing that he was appointed as Acting.
Mr. Walters stated that it is recorded that from this point on, and in a public record. First, we don’t have jurisdiction over any appointment of employees, we are not part of the County Government, we do not appoint the Zoning Administrator. Whether or not his appointment is valid there is not anything we can handle or adjudicate.

Mr. Haile agreed with Mr. Haile. He asked if we had anything that appointed Mr. Hodges as acting supervisor.

Mr. Rose stated the minutes.

Mr. Haile asked other than the acceptance of the position defacto on January 18th. Is there a document that states Mr. Hodges will be henceforth Acting in this capacity.

Mr. Howeth stated that no and we don’t have one for Mr. Nuckols either who supposedly passed the torch of acting onto Mr. Hodges.

Mr. Haile stated that this board has no authority over appointing Mr. Hodges. So it seems that we need to turn this over to the Board of Supervisors or the Circuit Court. He has no authority to grant or deny Mr. Hodges authority.

Mr. Rose stated he would move to go with Max’s argument that this is for Circuit Court.

Mr. Haile stated this is a technical point and is probably well taken. He doesn’t think that this board can handle that.

Mr. Howeth stated that is a probably a fair assumption so with that being said if you choose to just simply validate Mr. Hodges opinion then I have jumped the hurdle of going through the BZA. It doesn’t matter which answer, he has jumped the hurdle which allows me to move on forward to Circuit Court because as most of you are aware he actually has a suit pending. This will get appended to that suit.

Chairman Laffoon asked if there is a motion.

Mr. Rose made the motion.

Mr. Haile asked if they were going to hear tonight that *nunc pro tunc* is valid in Virginia?

Mr. Howeth stated that he is going to simply say their firm wrote that and guided this County, right, wrong or indifferent, that is what somebody is going to decide. He does not think it is the BZA.

Mr. Hlavin stated on the point of Mr. Howeth saying this is a complex matter. For the purposes of the Board of Zoning Appeals it really is not. It couldn’t be any simpler, just because you ask a question of the Zoning Administrator doesn’t mean it is an appealable decision in the jurisdiction of the BZA to hear an appeal. This letter issued by Mr. Hodges pretty well represents that. Him stating he can’t, he doesn’t have the authority to confirm your interpretation of state code or his appointment is not a decision appealable to this body. If it feels like an odd procedure before you. That’s why it feels like an odd procedure before you because it is not within your jurisdiction. Mr. Howeth can petition the Circuit Court under the statue that he sites. There are limitations to any deemed approved, he can battle those
out in Circuit Court should he wish to. But they will not deem a deficient site plan to be approved and there are lots of issues there. To address the actual issue before the Board of Zoning Appeals, the Zoning Administrator and the County would ask that you make a ruling that the Board does not have jurisdiction to hear the appeal filed by Mr. Howeth. That is the ruling the Zoning Administrator is requesting. As far as *nunc pro tunc* goes, this is not at all relevant to the appeal, but since you all have expressed the curiosity the ‘now for then’ does operate to ratify decisions of an appointee or designated person. A Zoning Administrator is only a designated person to act on behalf of the Board of Supervisors. The Board of Supervisors is the ultimate authority for the County when it comes to Zoning. Planning Commission is also a designated authority for Zoning decisions. The Board of Supervisors has the ability to ratify any decision of its designees or appointees within their delegated responsibility. The *nunc pro tunc* issue is just a red herring really as to whether or not a zoning decision has been valid due to Mr. Hodges appointment.

Mr. Walters asked about going back to the motion that was made.

Mr. Rose stated that we didn’t give the Chairman the opportunity to articulate the motion.

Mr. Howeth asked about the public portion of this?

Mr. Hlavin stated that usually on an appeal of a determination there is no public hearing. There is a publicly noticed hearing before the BZA but there is not a public hearing component. If it was advertised as a public hearing there is nothing wrong with opening it for comment but it is not really relevant to the decision that you will make.

Mr. Walters asked to clarify the site plan is not under consideration in this meeting? All we are considering is Mr. Howeth’s questioning of the authority of Mr. Hodges to act as Zoning Administrator.

Mr. Rose stated that is very important clarification because it wasn’t clear initially that we weren’t just to whether we could ever hear a zoning appeal or an appeal of a decision which we don’t want to concede.

Mr. Walters stated of course not and we don’t want to have peoples expectations that in having this hearing and especially if we are going to have public comment that we are considering this plan at this point because it hasn’t been presented to us as something that needs their action to make it fit into the zoning or needs variances for them to execute.

Mr. Hlavin stated that is correct and the basis of his objections on the relevance to the appeal. Not that he has any objection to the plans themselves in any other context just that they are not relevant to your consideration of the appeal.

Chairman Laffoon stated this is a little different territory than we normally have. We do or do not need a public comment period?

Mr. Hlavin stated that there is a requirement that there be a notice for the hearing but there is not customarily a public hearing on an appeal. There is a hearing that has taken place that allows for the appellant to make their case and the Zoning Administrator to justify their decision but there is not a traditional public hearing.
Chairman Laffoon asked for a motion that we dismiss this as it is out of our purview. In other words we don’t have any authority to actually rule in this.

Mr. Rose stated that it is rather funny as Mr. Howeth correctly asserts. They are being asked to apine on our incompetence to apine on a letter in defense of a man who is responsible for the matter in question. So it is awfully convoluted in sort of responsibility, nevertheless it does seem to resolve to a very simple question. If there is a question about the authority of Rob Hodges prior to his actual official appointment it would certainly not be our question. He would assume it would go to the court that appointed us which would be the Circuit Court.

Mr. Haile stated we should acknowledge that we have heard Mr. Howeth’s appeal on behalf of his people and we have to say we don’t have the authority to act on his appeal but acknowledge that he made one. It is apparently important for tonight for his purposes, this is step one.

Mr. Howeth stated this would be in interesting question, and since Mr. Hlavin is going to represent the County and it looked like he became your attorney for split second. So he asked Mr. Hlavin if he met the criteria of going through the hoops or are you going to stand up at some later date and say Mr. Howeth didn’t get a decision from the Board? Because he would say to go ahead and support Mr. Hodges decision, then he gets a decision and can move on to Circuit Court. He would like Mr. Hlavin to answer, if he would, but is he going to stand up and at a later date and argue, well you didn’t go through, because he has already done that in other cases with this County, it didn’t go through the entire appeal process so you don’t have the right to be in Circuit Court. The dismissal of this case certainly leaves that, in his mind, wide open. As you have noticed, he did not bring an attorney tonight. Mr. Hlavin started with you. He was under the impression Mr. Hlavin was just going to sit back and watch, we see that didn’t pan out. He would prefer, if you don’t mind, since he did spend his $400 here and they won’t be giving it back, that you would make a motion to support Mr. Hodges or confirm his decision that he was Zoning Administrator. That doesn’t hurt his feelings at all.

Mr. Walters stated that is not their jurisdiction.

Mr. Haile stated they don’t have the authority.

Mr. Howeth stated that his $400 is gone, its all wiped away. He has to go now, he and all other citizens who get pinched, has to go and spend a pile of money battling in Circuit Court. That is probably where we are in the capitalistic society that we are in. Obviously we end up where we are going to end up. He put on what he thought was a reasonable set of facts to get us to where we were and if we were not going to do this how come he wasn’t told this when he filed the appeal? Why are you gentleman here if this couldn’t be done? He does not know the answer.

Mr. Rose stated that he thinks he knows and it is very easy, although he sympathizes very much with your position. It is simply that they are appointed by the Circuit Court and so is Mr. Hodges and we are spokes on the same hub but we are not the hub.

Mr. Howeth stated that you are appointed by the Circuit Court but the reason that there is an appeal process is, this is where the whole thing gets skewed a little bit on the County side. You have team County, the BZA is appointed by the Circuit Court but Mr. Hodges is who the appeal is on. If we always agree with the zoning man then why would anybody want to come here? What is the purpose of being here? If we are always going to support the County decision, the sole reason why a citizen appeals a
zoning administrators decision is he disagrees with it. He has the right to stand in front of you gentleman with as much realism as possible and plead his case. Now you may not be able to help them, he thinks they are going to find out in just a few minutes you won’t be able to help me. It doesn’t change any of their positions.

Chairman Laffoon stated that the past times that Mr. Howeth has been there they have found in his favor.

Mr. Howeth stated that he is 110% correct. You all do a wonderful job. Most of the time he is in there representing citizens. Now there are citizens in this county that we both care for. These are the people that pay our taxes, that we meet in the grocery store, that we like. Mr. Laffoon we do them a good job, we help them get through some of these stickey wickets of what we are going through. So thank you. He expects to be before them again he just ran into this. His sole point is we are not following what our rules are. You have two site plans for putting vehicles on one acre and they are so different you can’t even fathom why one has 2 ½ pages of comments and the other doesn’t. This is where these things start. He is going to end with, he just had a right and again he likes $400 more than anyone else does, but he had a right to come here and say what he had to say tonight and appreciates the gentlemen for allowing him to come and say it.

Mr. Rose asked just one more time to clarify you are not appealing the prior zoning, BZA decision, you are appealing the legitimacy of Rob Hodges prior to December 2022?

Mr. Howeth stated he is not appealing any prior. He knows Mr. Walters was looking at the prior act but that’s all done and gone. Everybody is happy we did exactly what we did. The sole appeal here is Rob Hodges sent me some comments on a site plan. He did not send them to a very similar site plan two lots over. That’s what got it started. So he came in and appealed the decision that he is the legitimate, Board of Supervisors appointed Zoning Administrator without using some retroactive Latin phrase to try to make him so. Because if he was not the legitimate Zoning Administrator, and he had the right when it was presented to say no you are right your plan is approved go on about your business but he didn’t. He was just questioning his plan but his path is to stand here tonight and try to enunciate to you all where he is. Since he didn’t get his answer yet he asked Max if he had met the criteria to go into the Circuit Court without you arguing that he didn’t go through the administrative process?

Mr. Hlavin stated that Mr. Howeth is too clever by half that any request to the Zoning Administrator is not appealable so you can’t write a letter to Mr. Hodges saying you think the NN Burger is better than the other burgers and Mr. Hodges disagrees and then say you are going to appeal it to the BZA. That’s not how it works. On the issue of ‘deemed approved’ Mr. Hodges as Zoning Administrator does not have the authority to deem a site plan approved per a provision of state code that allows for a Circuit Court to deem a plan approved if there has been a delinquency in review. That is only affectual to the extent that the site plan is not deficient anyway. As far as the right to petition the Circuit Court to have a site plan reviewed or deemed approved, that right exists outside of the scope of an appeal to the BZA.

Mr. Rose asked to clarify the zoning decision of the BZA is not actually what is under appeal. What Mr. Howeth is appealing is the legitimacy of the then putative Zoning Administrator, Mr. Hodges. There is no analogy between a Zoning appeal, which we would want to hear and an appeal standing before the court that appoints these positions. There is no analogy because you are asking about two different kinds of authority. On one of which we possess and the other we are completely without. With due respect to Mr. Hodges there is some blurring of categories here, probably not intentionally. The simple
fact that we would have issued a finding as a board that may or may not be appealable is not the matter before the board despite all the printouts. It is simply whether Mr. Hodges, at the time, was in good standing as the man to represent those decisions. That is not a question for this board in his opinion.

Mr. Hlavin stated he wanted address Mr. Howeth’s point about why are we here tonight if the BZA does not have jurisdiction to appeal. That is not a decision for staff to make. If a citizen wants to submit an appeal to the BZA they are entitled, just as he said, to come and present their case to the BZA. That does not mean that appeal, the county has said, has jurisdiction to hear it and decide it. But it is not up to staff to take that right away from someone who wants to appeal something to the BZA.

Mr. Howeth asked if he met the legal requirements.

Mr. Hlavin stated that the legal requirements are separate from a deemed approved appeal than they are for a BZA appeal.

Mr. Howeth did he presenting here tonight, you are pushing them to not make a decision and he wants them to support Rob’s decision.

Mr. Hlavin is asking the BZA to rule that it does not have jurisdiction to decide on this appeal. This is not a decision appealable to the BZA.

Mr. Rose stated to clarify you are not pushing us to approve Rob’s decision you are pushing us to assert Rob’s authority in the making of that decision. That is a totally different species of question.

Mr. Howeth stated to be clear the appeal is that ‘I said he wasn’t the Zoning Administrator so therefore the site grant approved because he did not address it within 60 days’ That was the appeal. Mr. Hodges countered with ‘I disagree with you.’ So he answered his question.

Mr. Hlavin stated that the letter from Mr. Hodges has been introduced as evidence to you says ‘I cannot confirm your interpretation’ ‘Your interpretation is not confirmed’ Mr. Hodges cannot deem a site plan approved and Mr. Hodges cannot rule on the validity as a Zoning Administrator to the satisfaction of Mr. Howeth.

Mr. Rose asked Mr. Hlavin to tell Mr. Howeth what he wants to hear because he thinks the request is accurate.

Mr. Howeth asked if he is going to go to Circuit Court are you going to block me from going into the Circuit Court by saying he didn’t follow through with the administrative process? Yes or no?

Mr. Hlavin stated he cannot anticipate what Mr. Howeth is going to put into a Circuit Court petition. The appeal right from the BZA to the Circuit Court exists on a decision if you decide you all do not have jurisdiction to hear this appeal. Which is the decision that the Zoning Administrator and the County are asking for. That can be appealed to the Circuit Court should Mr. Howeth disagree that this is a matter that is properly before the BZA for decision. Separate from that, Mr. Howeth, should he feel it is necessary rather than turning in a site plan for a property that he owns that complies with the Zoning Ordinance, he can petition to the Circuit Court to have a site plan deemed approved. That is a separate process.
Mr. Howeth stated just to clarify this is not an issue as to whether or not that site plan is approvable or not. He has not produced a site plan that is not approvable. He can get this one approved just as easy. This is a question of was that man legal and if he was how much retroactivity can we do? Can we retroactive taxes, can we retroactive other people in, can we put people here that are gone and put them back, is it even possible to do?

Mr. Hlavin stated he is glad Mr. Howeth has clarified that. Again it is not an issue within the appellant jurisdiction of the Board of Zoning.

Mr. Rose asked is it not possible for Mr. Howeth, having established and gone through this process, to go to the Circuit Court and argue that the decision made during the intermittency or illegitimacy of the early Hodges administration is vacated because it doesn’t have standing because of his lack of official appointment?

Mr. Hlavin stated those are completely separate issues. He is not going to give Mr. Howeth legal advice.

Mr. Howeth stated we are probably not going to get that answer even though we have asked it several times in several ways. So what happens tonight if you just dismiss it is he is left in limbo. To attempt to battle in Circuit Court where they may say no you didn’t get through your administrative appeals you are done or go back. So the better outcome, don’t give him the site plan approval, he is not even going to ask for that, just validate Mr. Hodges and that means that we made a decision here to what’s there. Or just let it drop and his decision will stand but don’t dismiss it. That’s what Max wants you to do.

Mr. Rose stated unfortunately it’s the facts.

Chairman Laffoon stated we don’t have the authority.

Mr. Howeth stated wouldn’t it be nice to have had an independent attorney.

Mr. Stephenson stated it seems to him that we have an appellant before us and we have neither the authority to deny the appellant nor grant the appellant. It is not ours to choose. He is reluctant for this board to make any motion ruling on a matter that is not theirs to rule on.

Mr. Rose seconded the non motion.

Mr. Stephenson stated to Mr. Howeth that the record is clear tonight, abundantly clear, many times, that they are being asked to do something that is not theirs to do and therein you are referred to whatever authority is available to you to cure that. He thinks of it as no different if a man came in with a traffic ticket and asking us to rule on it. That would be silly we would tell them they were in the wrong forum. That is what we have today. For that reason he would abstain from any motion. He is not making a motion and recommending the board not make any motion.

Mr. Rose made a motion to abstain from a motion.

Mr. Hlavin stated that to secure Mr. Howeth’s appeal rights from a decision of this board the proper motion were you to decide that there is not jurisdiction would be rule that the BZA does not have jurisdiction to decide Mr. Howeth’s appeal. That would be an appealable decision.
Mr. Rose made the motion that we do not have the authority in the question of this appeal. Mr. Walters seconded the motion. AYES: 4 NAYES: 0 ABSTAIN: 1

Mr. Howeth thanked the Board for being there.

Mr. Stephenson stated that he thought it was good that Mr. Howeth was heard.

Mr. Howeth he thinks it is good that the citizens can be heard.
Land DEVELOPMENT & ZONING APPLICATION

DEPARTMENT OF BUILDING & ZONING
202 S Church Lane
P O Box 1079
Tappahannock, VA 22560
(804) 443-4951
(804) 445-8023 fax

CASE NUMBER: __________________ PERMIT NUMBER: __________________

1. TYPE OF REQUEST – Check all/any that apply.
   □ Rezoning: From __________________________ To __________________________
   □ Site Construction Plan □ Major - Name of Development: __________________________
   □ Minor - Name of Development: __________________________
   □ Conditional Use Permit (ordinance section):
   □ Subdivision
     □ Minor □ Family □ Major
     □ Boundary line adjustment/Lot Consolidation
     □ Preliminary Name & Phase/Section:
     □ Final/Record Name & Phase/Section:
     □ Final/Record Name:
   □ Land Disturbance □ Chesapeake Bay Exception
   □ Right-of-way Vacation □ Major WQIA □ Minor WQIA
   □ Administrative Appeal (zoning/building):
   □ Zoning Variance/Special Exception: Specify ordinance section:
   □ Subdivision Variance: Specify ordinance section:

2. ZONING PERMIT - GENERAL INFORMATION FOR ALL ZONING PERMITS:
   Tax Map Number: __________________________ Site Address:
   Water/Sewer Supply: □ Well/Septic □ Central □ Public
   Existing Land Use: __________________________ Proposed Land Use:
   □ New Building □ Addition □ Change-In-Use/Modification
   □ Accessory Structure
   Residential – Zoning District: __________________________ Magisterial District: __________________________
   Subdivision Name:
   □ Single-Family Dwelling Size (Length by Width) _____ Height _____ No. of Stories: _____
   □ Mobile Home Size (Length by Width) _____ Height _____
   Setbacks for Principal Building - Required: Front ______ Rear ______ Side ______
   Proposed: Front ______ Rear ______ Side ______
   □ Accessory Building Size (Length by Width) _____ Height _____ No. of Stories: _____
   Setbacks for Accessory Building - Required: Rear ______ Left Side ______ Right Side ______
   Proposed: Rear ______ Left Side ______ Right Side ______
   Existing Impervious Percentage: _____________ Post Impervious Percentage:

Commercial – Zoning District: __________________________
Type of Structure:
Size Length ______ Width ______ Height ______
Accessory Building Size (Length by Width) _____ Height ______ No. of Stories:
Setbacks - Required: Front ______ Rear ______ Left Side ______ Right Side ______
Proposed: Front ______ Rear ______ Left side ______ Right Side ______

*NOTE: All measurements in Feet (round to nearest whole foot). Impervious % is the sum of the square feet of all areas that is covered by roof, sidewalks, driveways, decks, or accessory structures divided by the total square footage of the lot. Example: a 1 acre lot = 43560 sq.

Effective July 1, 2018
2. APPLICANT INFORMATION

OWNER(IAL OF RECORD (use additional sheets if more than one party)

Jeffrey L. & Dawn M. Howeth 904-241-4160
Owner DAYTIME PHONE NUMBER

559 Riverdale Road Tappahannock, Virginia 22560
MAILING ADDRESS, CITY, STATE, ZIP CODE

Fax Number E-mail Address

Applicant (if different from owner)

Applicant DAYTIME PHONE NUMBER

MAILING ADDRESS, CITY, STATE, ZIP CODE

Fax Number E-mail Address

Agent/Contractor (if different from owner/applicant)

Applicant DAYTIME PHONE NUMBER

MAILING ADDRESS, CITY, STATE, ZIP CODE

Fax Number E-mail Address

3. PROPERTY INFORMATION (FOR REZONINGS, SITE PLANS, SUBDIVISIONS, CONDITIONAL USE, SPECIAL EXCEPTIONS & VARIANCES)

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<th>TaxMap Number</th>
<th>Subdivision Name</th>
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Effective July 1, 2018
4. NARRATIVE - REQUIRED FOR ALL REZONINGS, CONDITIONAL USE, VARIANCES, SPECIAL EXEMPTIONS AND APPEALS. THE NARRATIVE SHALL DESCRIBE THE NEED AND/OR REASONS FOR THE APPLICATION AND HOW THE REQUEST IS CONSISTENT WITH THE GOALS AND OBJECTIVES OF THE COMPREHENSIVE PLAN.

5. SIGNATURE(S)

I/WE HAVE READ THIS COMPLETED APPLICATION, UNDERSTAND ITS INTENT AND FREELY CONSENT TO ITS FILING. THE INFORMATION PROVIDED IS ACCURATE TO THE BEST OF MY/OUR KNOWLEDGE. I UNDERSTAND THAT THE COUNTY MAY APPROVE, CONDITIONALLY APPROVE, APPROVE WITH MODIFICATIONS OR DENY THE REQUEST FOR WHICH I AM APPLYING. FURTHERMORE, I GRANT PERMISSION TO THE DEPARTMENT OF BUILDING AND ZONING AND ANY OTHER AUTHORIZED GOVERNMENT AGENTS TO ENTER THE PROPERTY AND MAKE SUCH INVESTIGATIONS AS THEY DEEM NECESSARY TO EVALUATE THE REQUEST AND ENSURE THAT CONDITIONS PLACED ON THE REQUEST HAVE BEEN IMPLEMENTED AND/OR MAINTAINED AS PROSCRIBED BY THE APPROVING AUTHORITY. ADDITIONALLY, IF OUTSIDE REVIEW IS NEEDED BY THE COUNTY TO EVALUATE THIS REQUEST I ACKNOWLEDGE AND AGREE TO REIMBURSE THE COUNTY OF ESSEX FOR THESE OUTSIDE REVIEW AGENCY COSTS.

Owner/Applicant/Agent Signature  
[Signature]  
Date  May 1, 2023

Owner/Applicant/Agent Signature  
[Signature]  
Date

Owner/Applicant/Agent Signature  
[Signature]  
Date

Owner/Applicant/Agent Signature  
[Signature]  
Date

6. APPROVAL/DISAPPROVAL

☐ APPROVED AUTHORIZED SIGNATURE: __________________________ DATE: __________________________

☐ DISAPPROVED AUTHORIZED SIGNATURE: __________________________ Date: __________________________

☐ REASONS FOR DISAPPROVAL:

IF DISAPPROVED/DENIED: Any person aggrieved by the disapproval of this application may appeal to the Board of Zoning Appeals in accordance with provisions of the Essex County Zoning Ordinance. Such an Appeal must be filed with the Zoning Administrator or approved application forms within thirty (30) days from the date of this denial. Application shall be accompanied by a filing fee of $250.00, made payable to the County of Essex for the Administrative Appeal. This decision in written order shall be final and unappeasable if not appealed within thirty (30) calendar days from the date of this letter.

*NOTE: DENIAL OF BOARD OF ZONING APPEALS, BOARD OF SUPERVISORS, AND PLANNING COMMISSION DECISION(S) MUST BE FILED WITH THE ESSEX COUNTY CIRCUIT COURT WITHIN 30-DAYS OF THE DENIAL AS PROVIDED BY THE CODE OF VIRGINIA, 1950, AS AMENDED.
RESOLUTION OF APPOINTMENT ESSEX COUNTY
ZONING ADMINISTRATOR AND SUBDIVISION AGENT (PLATS OFFICER)

WHEREAS, the Board of Supervisors of Essex County, Virginia desires to
appoint a Zoning Administrator and Subdivision Agent (Plats Officer); and

WHEREAS, section 15.2-2286 of the Code of Virginia and Essex County Code Appx.
B, Sec. 21.1 provides for the appointment of a Zoning Administrator; and

WHEREAS, section 15.2-2258 of the Code of Virginia and Essex County Code Appx.
A, Sec. 2.1 provides for the appointment of a Subdivision Agent (Plats Officer);

NOW, THEREFORE, BE IT RESOLVED, that the Board of Supervisors of Essex
County, Virginia hereby appoints Rob Hodges, as the Zoning Administrator for Essex County,
Virginia and as the Subdivision Agent (Plats Officer) for Essex County, Virginia.

BE IT FURTHER RESOLVED that such appointment shall be nunc pro tunc: January
18, 2022, the date of his hire as the Director of Planning & Zoning for Essex County, Virginia,
and the Board of Supervisors hereby ratifies the actions taken by Rob Hodges as the Zoning
Administrator and Subdivision Agent (Plats Officer) of Essex County, Virginia since January
18, 2022.

Adopted this 13th day of December 2022.

CERTIFICATION OF ADOPTION RESOLUTION

The undersigned Clerk of the Board of Supervisors of the County of Essex, Virginia certifies
that the Resolution set forth above was duly adopted during an open and electronic meeting
on the 13th day of December 2022 by as majority of the members of the members of the
Board of Supervisors with the following votes:

AYE: Akers, Gill, Johnson, Magruder, Smith
NAY:
ABSTENTION:

Signed this 13th day of December 2022.

ATTEST:

Michael A. Lombardo, Clerk
Board of Supervisors of the County of Essex, Virginia
Old Business

None

Miscellaneous

None.

Adjourn

Mr. Stephenson made a motion to adjourn. Mr. Walters seconded the motion. AYES: 5 NAYES: 0 ABSENT: 0

Steven Laffoon - Chairman