

## Motion to re-open the Record for additional testimony

### Introduction

The Charles County Code makes it clear that public hearings must be conducted in a manner that achieves basic due process and fundamental fairness. Code §297-412 provides in pertinent part as follows:

- B. [A]ll people aggrieved by the outcome of the appeal or application shall be given an opportunity to present testimony and evidence and to cross-examine persons who testify.
  
- C. The Board may place reasonable and equitable limitations on the presentation of testimony and evidence, arguments and the cross-examination of witnesses . . . so that all relevant issues may be heard and decided without undue delay.

Assuring due process and fairness is fundamental to the rights of both an applicant and those persons aggrieved by the proposed application. However, for the reasons described more fully below, the record established to date in this proceeding demonstrates that due process and fairness are not being achieved.

It is now obvious that this application raises very complex issues touching on, inter alia, community values, the environment and public safety. Yet, from a process standpoint, the public was given only the bare minimum fourteen days notice of the application. Notwithstanding that short notice, concerned citizens acquired from the public domain information about the proposed use that was not presented as part of the application itself. Based on that evidence, the community rose in widespread opposition to the application. At the hearing, however, concerned members of the community were required to conduct cross examination of witnesses, present testimony and offer argument within three minutes! Additionally, written submissions from concerned citizens were stricken from the record, while submissions favoring the applicant were accepted. This process cannot reasonably be characterized as imposing “equitable limitations” that assure “that all relevant issues may be heard and decided. . . .”

### Specification of Errors

1. Failure to Publish Rules. Evvy Carlson Merit has reported that she called the County Commissioners office about the proposed application and was informed by the secretary that she should communicate her concerns by e-mail to the Board of Appeals. Ms Merit’s enquiry of the County Commissioners’ Office regarding procedure no doubt was necessitated by the fact that there are no published rules of procedure. Undersigned counsel made an attempt to locate the Rules of the Board of Appeals in the Circuit Court Library, but found nothing. Neither were

the rules available on the internet. On March 17<sup>th</sup>, undersigned counsel obtained a copy of the Board of Appeals rules from John Buchanan, counselor to the Board.

2. Failure to Follow Rules.
  - a. Public input was limited to 3 minutes by the Board of Appeals. The rules of the Board of Appeals require that if opposition input at the hearing is so restricted, then the record must be left open for an adequate period of time to allow input in writing. This was not done, as the record was closed on March 10<sup>th</sup>.
  - b. The Board of Appeals procedural rules also call for an order of presentation, including opening statements. The applicant was allowed an opening statement, but no others were afforded this opportunity in contravention of the rules.
  - c. The order of procedure specified in the rules is Opening Statements, then Applicant direct examination of witnesses, then cross examination by opponents, then re-direct by applicant, then re-cross by opponents. While the applicant was allowed direct examination, opponents were not afforded an opportunity to cross examine, nor was there re-direct, nor re-cross.
3. Non-Public Sessions: On February 24<sup>th</sup>, 2009, a public hearing was convened in the above captioned matter. The public hearing was continued to March 10, 2009, and then again until April 14, 2009. On March 17, 2009 a non-public session was convened at the subject site where evidence, including testimony, was submitted by the Applicant to the Board. The provision of testimony in a non-public setting is not consistent with the Charles County Code.
4. Discriminatory Exclusion of Evidence: On February 24, 2009, an unspecified number of written opposition documents were stricken from the record. The stated justification was that the applicant objected to inclusion of the documents in the record due to inability to cross-examine the authors. It is unclear as to whether these documents were comprised of letters, faxes, e-mails, or any combination thereof. However, at the March 10, 2009 Hearing the Board did allow the contents of letters supporting the applicant to be read into the record, notwithstanding the fact that the authors could not be cross-examined by opponents to the application. This differing treatment of written submissions is discriminatory.
5. Unreasonable exclusion of e-mail comments. At the March 10, 2008 hearing the board disclosed that all comments submitted by e-mail had been stricken. The stated justification was that e-mails are less verifiable as to the authorship than letters. Several citizens in attendance questioned this exclusion of these documents. There does not appear to be any rational basis to suggest that a

postmark is a superior form of author identification than an e-mail address. Nothing in the rules obtained from Board Counsel appears to bar citizen input by e-mail.

6. On March 17<sup>th</sup>, the Board of Appeals conducted a site review. While it is commendable of the chair and the Board to attempt to gather onsite information, the meeting was not in keeping with statute or rule, or proper procedure.
  - a. Article 66B, section 4.07 requires all meetings of Board of Appeals to be open to the public. The logistical problems associated with opening a site visit to the public are understandable, but the manner in which the meeting was conducted required it. The site visit was not conducted in a fashion to simply allow the Board to view the site. It was a forum in which the Applicant was allowed to volunteer information, make legal arguments and submit evidence. The applicant was allowed to respond to questions of the Board that were outside of simple site orientation questions.
  - b. The Board, once again, with the best of intentions, attempting to accommodate a site visit while allowing something for public input, allowed undersigned counsel and one person chosen from the protestants to attend the site visit. However, this does not a public proceeding make. During the course of the site visit, protestants who own the neighboring property attempted to attend, and were very politely and diplomatically not allowed to attend the proceeding.
  - c. The Board of Appeals rules also call for all meetings of the Board of Appeals to be open meetings, and they specifically prohibit the presence of the applicant at a meeting that is closed to the public. They further prohibit the taking of testimony or legal argument at a meeting that is not open to the public.
  - d. While this protestant commends the Board of Appeals and specifically the Chair in its and his attempt to gather additional information through a site visit, the visit resulted in a meeting that was improper under the rules, and was exploited by the applicant to introduce testimony and legal argument in contravention of the Board's rules.
  - e. At the beginning of the site visit, Mr. Buchanan, counselor to the Board, asserted that the Board would not allow the production of testimony or new evidence, but would allow the applicant and his counsel to answer questions of the Board. He further stated that the role of undersigned counsel and the citizen allowed to attend, Dr. Chad Stoltz, was to listen and observe. (The Chair graciously allowed undersigned counsel and Dr. Stoltz to ask some questions.)
  - f. Mr. Buchanan stressed the requirement for all Board members to stay together in one group during the visit. This was so, he said, because that

this was a meeting, and that all Board members needed to see and hear the same things

- g. Staying together was not to be. It is understandable that the Chair, who is confined to a wheelchair, could not visit the entire site. This protestant once again commends him and his efforts, and takes no exception to his inability to attend the entire site visit. However, the remainder of the members did not stay in a coherent group as the site visit progressed. Some were attending as the applicant described the location of the driving area and then the firing range, and some viewed the property boundary and Beaverdam Creek, which runs somewhat along the boundary line. Others were not attending. The property was extremely wet and muddy, and Mr. Buchanan and one of the Board Members stayed back on high ground, while the group toured the property. This resulted in the Board members not all being part of the same view, or hearing the same presentation.<sup>1</sup> . In addition, it did not appear that anyone from the Board who was taking notes attended all aspects of the tour, for the purpose of making a record of the proceeding in order to comply with the dictates of Article 66B, Section 4.07.
  - h. No matter how well intentioned a site visit was, it was not conducted in a fashion that afforded due process to all participants. The public was both generally excluded, as originally announced at the March 10<sup>th</sup> meeting, and protestants being specifically excluded, that is, the neighboring property owner, a Mr. Parmley, and his two sons who attempted to attend the meeting but were excluded.<sup>2</sup> The violations, inadvertent as they may have been on the part of the Board, resulted in a significant boon to the applicant in its ability to introduce evidence, testimony, and argument outside the scrutiny or cross-examination of the majority of the protestants, and also outside of the closing of the record, which was closed on March 10<sup>th</sup>. The testimony and evidence presented at the March 17<sup>th</sup> site visit was subject to no cross examination, no re-direct examination, and no re-cross examination as required by the Board's rules.
7. These errors raise serious questions as to whether action by the Board to grant the requested variance would withstand judicial review. However, this protestant would prefer that the respective rights of the applicant and protesting property owners be resolved on the basis of a complete and fairly developed record, and not turn on procedural defects. Toward that end, the Board is respectfully requested to reopen the record and establish the following procedures:

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<sup>1</sup> The introduction of additional evidence and argument was in the form of oral comments by the applicant and his counsel elaborating on the application during the tour.

<sup>2</sup> The Parmelys were treated very kindly by the chair, who handled the matter very diplomatically. Mr. Parmley and the chair even exchanged some jokes. The fact remains, however, that the Parmleys were excluded from the site visit.

- a. The Board of Appeals should attempt to create a document summarizing what transpired during the March 17<sup>th</sup> site visit, including any factual representations or legal arguments made the applicant of its counsel. This document should be entered into the public record of the proceeding.
  - b. The Board should re-open the record and allow for reasonable cross-examination of the applicant's witnesses and following any re-direct by the applicant's counsel allow protestants to submit written evidence and be subjected to cross-examination by applicant's counsel on that evidence. This is a uniquely complex matter and due process demands that protestants have more than more than three minutes for cross examination. If the Board is concerned about unreasonably lengthy cross-examination, it can require that a protestant desiring to conduct cross-emanation file a request with the Board for a specified amount of time.
  - c. All e-mails or any other written communications that have been stricken from the evidentiary record should be included in the public record and identified as evidence that will not be considered in its current form. The Board should also identify what steps must be taken by the authors of the communications to cure the noted deficiencies such that their concerns will be considered. The Board should allow a reasonable time for protestants to cure the defects.
  - d. All of these remedies should be afforded after adequate notice to the public.
  - e. The applicant has closed its evidence, except for rebuttal. Indeed, the Applicant has supplemented its evidence in the site visit. It should not be able to submit further evidence, except in rebuttal. It should be afforded cross examination and re-cross of any new testimony as the rules provide.
8. As the Board is aware, this is a quasi-judicial proceeding. All parties have important rights to be honored and protected. The procedure to date, however well intentioned, has resulted in clear violations of the Board's own rules, as well as state law, and the due process rights of many protestants to this application. This protestant urges the Board to take the actions identified above so that when a decision on the merits is announced by the Board, all interested persons will have confidence that the process was conducted openly and fairly.