

**FLATHEAD COUNTY BOARD OF ADJUSTMENT
MINUTES OF THE MEETING
OCTOBER 6, 2009**

**CALL TO
ORDER**

A meeting of the Flathead County Board of Adjustment was called to order at approximately 6:00 p.m. Board members present were Gina Klempel, Scott Hollinger, Mark Hash and Gary Krueger. Craig Wagner had an excused absence. Dianna Broadie, Allison Mouch, and Jeff Harris represented the Flathead County Planning & Zoning Office.

There were approximately 25 people in the audience.

**APPROVAL OF
MINUTES**

Klempel motioned, seconded by Krueger, to approve the 9/1/09 minutes. The motion passed unanimously by quorum.

**PUBLIC
COMMENT
*(not related to
agenda items)***

None.

**MOUNTAIN
HIGH CONST.
NORMAN WOLK
(FZV 09-05)**

A request by Peter Hoveland of Mountain High Construction, Inc., on behalf of Norman Wolk for a Zoning Variance to property within the Bigfork, R-4 (Two-Family Residential) Zoning District. The applicants are requesting a variance to Section 3.12.040 (4) of the Flathead County Zoning Regulations. The property is located at 154 South Crestview Terrace in Bigfork.

STAFF REPORT

Dianna Broadie reviewed Staff Report FZV 09-05 for the Board.

**BOARD
QUESTIONS**

None.

**APPLICANT
PRESENTATION**

Peter Hoveland, of Mountain High Construction, didn't have anything additional to add but said he was available for questions.

**BOARD
QUESTIONS**

Klempel asked if he had an architect on this project.

Hoveland said he had a draftsman.

Klempel asked when he realized the pitch wasn't going to meet the code.

Hoveland said when they were doing the foundation. He immediately went to the county. He wanted to do it right and keep the project going to keep his six men employed. He didn't want his owner to be in a bad position down the road either.

Kruger asked what the roof pitches are.

Hoveland said 6 and 12.

**PUBLIC
COMMENT**

None.

**STAFF
REBUTTAL**

Broadie said she got in touch with Nat O'Farrell, the Bigfork Fire Chief, and they did not have a problem with this application.

**BOARD
DISCUSSION**

Klempel asked for clarification of the staff report.

Broadie responded.

MAIN MOTION

Klempel made a motion seconded by Krueger to adopt staff report FZV 09-05 as findings-of-fact and grant the variance requested.

ROLL CALL

On a roll call vote the motion passed unanimously.

**NODDING
ONION, LLC
(FCU 09-08)**

A request by Nodding Onion, LLC/Cork Andrews for a Conditional Use to allow multiple primary uses on one tract of land located within the Lower Side, I-1H (Light Industrial-Highway) Zoning District. The property consists of a mix of existing and new buildings and the applicant is requesting to utilize the buildings for a variety of different uses, all permitted in I-1H zoning. The property is located at 996 Demersville Road.

STAFF REPORT

Allison Mouch reviewed FCU 09-08 for the board.

**BOARD
QUESTIONS**

None.

**APPLICANT
PRESENTATION**

Zach Andrews, 2150 Riverside Rd in Bigfork, represented Nodding Onion LLC. He told the board they first took the project to the city but were told they couldn't have offices so they approached the county. He read some letters from Environmental Health and the Department of Environmental Quality (DEQ) pertaining to the project and talked about the complaint filed by Montana Ventures LLC. He went over the

costs associated with connecting to city water & sewer. He said they were issued a septic permit by Glen Gray and said it's already installed and working. He reviewed the reasons for the conditional use permit request and their intentions for the property. Lastly he discussed the condition requiring paving and why he felt that it would be onerous. He said they would prefer to use shale and would mitigate dust.

**BOARD
QUESTIONS**

Hollinger asked if the applicant was asking that condition#4 be completely struck.

Andrews said the roads around the exterior also get traffic from other businesses that would tear up the roads. He said it would cost them about \$70,000 to pave. He most of the buildings would be for heavy equipment storage and reiterated that it wouldn't make sense to pave so yes he was suggesting condition #4 be struck.

Klempel asked if they knew for sure they would be housing heavy equipment.

Andrews said they don't know for sure because they don't know who their tenants will be. He talked about permitted uses in the zoning regulations.

**PUBLIC
COMMENT**

Andy Miller, 175 E. Many Lakes Drive, is a partner of Montana Ventures LLC who own property next to the subject property. He said the desire for their project was to attract modern businesses to the flathead and to help with jobs. He said they are hoping to close with Fed-Ex next week. They feel that south of town is the best place to bring in commercial business. He said septic systems aren't the way to go when trying to plan for a greener future. He feels regulations are important for growth. He said the applicants put in the septic systems prior to being approved for any conditional use permits. He said one of the first questions businesses ask is if there's public water & sewer available in addition to other infrastructure.

**STAFF
REBUTTAL**

Mouch strongly recommended the board keep condition #4 as-is in regard to paving. It is a requirement of the zoning regulations specific to that property.

**APPLICANT
REBUTTAL**

Andrews said the well existed on the property when they bought it and the septic system took several months to obtain during which time no buildings were occupied. He doesn't disagree with

bringing good business to the valley but said they're a small company so paying \$161,000 for water & sewer when they already have a well is a lot of money—their business plan would no longer work.

Cork Andrews, 629 Lower Valley Road, said when they bought the property it was an eyesore and explained the previous condition of the property. He feels they've done a lot of work already. He didn't know they would be getting opposition from their neighbors. It was his opinion that the only "green" Mr. Miller talked about would be the green going in his pocket from them having to hook up to the city sewer and pay the latecomer fees. He continued to talk about the extensive work they've done to the property.

**BOARD
DISCUSSION**

Hash asked staff if the board has the authority to waive the non-paving.

Mouch said they applicants could pursue it through a variance.

Hash asked if that was something they could do tonight.

Staff said no, it would be a separate application and process.

The board and staff continued to discuss roads, paving, and parking.

Andy Miller wanted to rebut Mr. Andrews' comments. He said they owned their property long before the Andrews' bought theirs. He said they did a nice job of cleaning up the property but said they knew city sewer and water was available—it's been there for 4 years. He said the objection is not to put money in his pocket it's to build a business/technology park that will attract businesses. He reiterated that it's not about putting money in his pocket, he pointed out that it cost a lot of money to get in the first place. He doesn't want the rules to be bent just because it's a cheaper situation.

The board and staff continued to discuss roads and paving.

Hollinger said it appears to be a phased project and thinks the road could be a part of that plan.

Mouch seemed to think that in talking with the applicant that future activities would require a similar review.

MAIN MOTION

Krueger made a motion seconded by Hollinger to adopt Staff Report FCU 09-08 as Findings-of-Fact and grant the Conditional Use Permit with the removal of Condition #9.

BOARD DISCUSSION

Krueger said there is a due process for revoking conditional use permits within the zoning regulations and state law. He feels that condition #9 could be taking away the due process. He talked about the violation process.

Hash thought this was the first time he’s seen condition #9. He asked if it’s something new or if it was something that always exists.

Harris said not always but on occasion staff places this condition.

Hash asked if Krueger was right in that it would give the county an additional right they wouldn’t normally have. He asked about the ramifications if someone violates their permit.

Harris said if they violate the terms of the permit they violate the permit itself. He said this issue was recently brought up in a lawsuit where it was argued that the Board of Adjustment didn’t have the authority to deal with violations.

The board and staff discussion violations and the wording in condition #9.

Krueger said state code says violations should go to the commissioners and also states there is a 30-day period to correct a violation. He didn’t see anything addressing that in the staff report; only that staff has the right to revoke it.

The board and staff continued their discussions.

MAIN MOTION ROLL CALL

On a roll call vote the motion passed unanimously.

APPEAL-EYRIE SHOOTING RANGE (APPEAL 09-02)

An appeal by Kaplan & Breck, PC on behalf of Tally Bissell Neighbors, Inc. regarding the interpretation and decision made by the Flathead County Zoning Administrator on August 4, 2009 about the Eyrie Shotgun Ranch, LLC zoning violation complaints. The subject property is located off Farm to Market Road directly across from the Tally Lake Road turn off.

STAFF REPORT Jeff Harris reviewed Staff Report Appeal 09-02 for the Board.

BOARD QUESTIONS Hash said he’s always had a problem with the non-conforming use provisions in the regulations—he feels they’re extremely vague. He doesn’t think the Board of Adjustment (*BOA*) has the authority to restrict the days like staff suggested.

The board and staff continued to discuss the process of the appeal, the BOA’s authority, the regulations and state law, and non-conforming uses.

APPLICANT PRESENTATION Eric Kaplan, attorney for the applicants, said the BOA needs to decide what the manner and extent of the use was at the time the zoning went into effect. He said zoning went into effect in that area on October 2, 2007 and stated that Mr. Hayes cannot do any more than he was doing on that date. He talked about the amount of shooting and how it’s increased. He represents about 40 landowners in the area and many of them submitted written comments. The Tally-Bissell area consists of 980 acres and is one of the most beautiful, tranquil areas in the valley. He said that all changed when Mr. Hayes “plunked” his shooting range right in the middle of the area. He discussed how disturbing the consistent shotgun “booms” are and how it’s impacting area residents. He said people are having a hard time selling their property. He said that Mr. Frampton was probably going to get up and say that shooting ranges are above the law. He said they are not exempt from the regulations. He said they just want them to obey the law. He said the shooting is totally arbitrary and said people can’t live like that—the neighbors would like to know when the shooting will take place. He said they would like to prohibit shooting on Sundays. He said he would like them to consider using silencers and low-impact ammunition and would also like some sort of “sunset” provision so that people know the shooting will stop at some point. The neighbors need some hope that the shooting will not continue forever. He said staff may not have observed the actual shooting going on but some neighbors will be speaking and can attest to the activity. He thanked the board for their time.

Shawn Frampton, represented Bob Hayes and the Eyrie Shotgun Ranch, LLC. He said Mr. Kaplan made an emotional plea but unfortunately emotions don’t come into play when talking about the law and in particular the reason the board was there—to determine whether or not Mr. Harris made the right decision. Mr. Hayes purchased the property in 2006 with the intention of

having this operation. It's a private operation for him and his guests; not a public operation. He said zoning was put in place by the neighbors in response to Mr. Hayes' activities. He talked about a lawsuit that was dismissed regarding this operation. Five days after it was dismissed from District Court, Mr. Kaplan filed a zoning violation with the Planning & Zoning office. He said they had a settlement conference but were unable to get things resolved. He pointed out that the five people who turned in violation forms are all plaintiffs in the lawsuit. He read the definition for the word 'use' in the zoning regulations. He continued to give background information as to the intended use of the project and handed out a letter to the board, staff, and Mr. Kaplan—he reviewed the letter. He said there is a log in which everyone must sign in and out when shooting on the property. He continued reviewing his letter. He talked about property rights and due process and asked the board to affirm the zoning administrator's decision.

**BOARD
QUESTIONS**

Klempel asked about item #4 in his letter in regard to daily hours of operation.

Frampton said those were rules that Mr. Hayes' came up with.

**PUBLIC
COMMENT**

John Klassen, 100 Talley Lake Road in Whitefish, lives about ¼-mile from the gun club. He said the shots coming from there are intolerable. He talked about issues it has caused for him, his animals, and business. He said the Triple D Game Farm has leased land from them for the purpose of filming trained animals for both still photography and films. He said they've been doing so for the last 19 years but business is now limited because of the shooting. He talked about how much shooting is going on and how it negatively affects the people who live there. He feels there is a complete lack of respect and consideration for the neighborhood, the school, and the families who live there.

Laurie Nelson Hustwaite, 230 Tally Lake Road in Whitefish, thinks Jeff's ruling was completely incorrect; he wasn't there 24/7 and couldn't possibly determine whether or not there was a violation.

Jay Deist, 190 Drake Drive in Kalispell, owner of Triple D Game Farm. He's leased the Klassen's land for around 18 years. They have done movies and photography there with their trained animals. He said they picked the Klassen's property because it was very solitude and has natural features very conducive to

photography. He said this came to an end in 2007 when the shooting started. He said it was tolerable in 2007, less so in 2008, and not at all in 2009. He said the atmosphere for their clients is gone and he has lost a lot of business. He said if there was some sort of plan they could probably work around it but there doesn't seem to be a predictable pattern.

Greg Lee said he bought his place 20 years ago with the plans of staying there but isn't sure now. He passed some handouts on to the board about devices the shooters could use to help quiet the noise.

Bob Brown said he lived in the Tally-Bissell area when he was a teenager when his dad bought a cattle ranch. He said it's an area known for its quiet beauty. He said he inherited part of that property and intended to retire there. He talked about the shooting ranch and said it's startlingly loud. They mentioned to Mr. Hayes that silencers could be used which would help enormously with the problem but they apparently don't work well with their expensive shotguns. It doesn't seem right that one property owner should be able to use his property to the exclusive detriment of the rest of the property owners; there should be some reasonable limitation set forth.

Jacqueline Frahm, 5920 Farm to Market Road in Whitefish, has lived across Bissell school for 41 years. She read a statement from the county's rural living guide. She also read from the Code of the West which talked about when people first started settling the west. It talked about the unwritten code of behavior based on the simple rules of honesty, fair-play, and respect towards one another, not unlike the Golden Rule.

Robert Rice, 5838 Farm to Market Road in Whitefish, has a recording business and said the shooting range has made it challenging for him to live and support his family. Before zoning went into effect, shooting was minimal but has since increased. He handed photos out to the board and further explained. He said this past summer the shooting was extensive. He said the planning office wasn't able to confirm the shooting because they weren't out there when the shooting was going on. He isn't anti-gun; the problem is the constant everyday shooting. He said it's very hard to concentrate on anything. No one wants to live next to a shooting range and that Mr. Hayes doesn't even have a house there. The neighbors and the peace and quiet existed first and Mr. Hayes hasn't done anything to appease the neighbors;

he comes down to from the mountain to shoot and then retreats to his mansion. He is not being a good neighbor.

Craig Drew, 5755 Farm to Market Road. He and his wife have lived on the subject property as full-time caretakers since November 2007. He said the property is for Mr. Hayes and his guests only. Contrary to what's been said, Mr. Hayes has tried to strategically place trees to help with noise and has maintained the grounds to the highest standards. He commented on the wildlife on their property, including whitetail deer and wild turkeys, which are present when the shooting is in process. He said when the zoning was put in place the facility was still under construction and couldn't be used for its intended capacity. He said there is a log that documents the shootings.

Robin Allen, 2450 KM Ranch road, lives about $\frac{3}{4}$ of a mile east of the subject property. He doesn't believe the owner would set up an LLC if the property is just for personal use.

Narda Wilson, 184 Midway Drive, was initially involved in the establishment of the Tally-Bissell zoning district. Around March of 2007, she heard the rumor of a possible shooting range. She looked into it and there were some covenants but no zoning. She was retained by some of the area property owners to initiate zoning. She referred to page 2 of the staff report and said it wasn't the noise that prompted the zoning district process; it was the potential of incompatible uses that could come into the neighborhood. She does believe the Zoning Administrator has made an error in his interpretation and further explained. She hoped the board could come up with something equitable to everyone involved.

Tom Courtney, 407 Beaver Creek Ranch Road, which is just SW of the subject property. He is a real estate broker and spoke to the effect on real estate in proximity to the shooting range. He spoke about a client selling their property in 2008, who had to disclose the shooting range, which in turn negatively affected the sale of their property. He feels the shooting has increased significantly.

Craig Drew reiterated that the property was still under construction in 2007 so of course the shooting increased in 2008.

**APPLICANT
REBUTTAL**

Kaplan responded to Frampton's letter. He feels things have gotten off-track. He talked about the existing use at the time of zoning. He doesn't see what he's missing—it seems clear the use cannot increase and it has. The public testimony made it pretty clear that the shooting has increased. If there was a shooting log, it should have been brought tonight. He said there is an appeal step after this in which case it would go to District Court.

Sean Frampton said they heard a lot of emotional pleas from the neighbors. He responded to comments that were made. He reiterated a few points from his letter and read a portion of state law in regard to shooting ranges. He asked the board to affirm Harris' decision.

**STAFF
REBUTTAL**

Harris gave the board some background as to where the recommendation for 3 hours per day came from. He read a portion of his letter that was drafted after complaints were filed.

Krueger asked Harris for clarification about his letter.

Harris said the letter asked if there was expansion of the non-conforming use after the zoning district was established. He continued to discuss said letter and the information that was provided to him regarding the shooting ranch. He talked about staff visits to the site to observe shooting.

Hollinger called for a 6 minute recess.

**BOARD
DISCUSSION**

Klempel spoke *(no audio/visual, camera was not recording)*.

Krueger talked about some things in the staff report he felt could be deleted.

Hollinger talked about expanding a non-conforming use and gave some examples in regard to extent of use.

Hash knows people have spent a lot of time and money and hopes there will be a resolve. It seems extremely personal now there and he sees that there is a detriment to the neighbors. He wondered what the board could really do in this forum and referred Harris to a few sections of the zoning regulations. From what he understands, the board isn't looking to do any fact-finding on their own. Whether or not he agrees with the use he doesn't see that Harris interpreted the regulations incorrectly. He doesn't feel the board or staff can put limitations on this project

at this point. He feels the board's role is pretty simple to either agree with the decision or not.

Krueger asked Hash if he felt they needed to take out the parts in the staff report that states the board can do other things. He asked about a section of the zoning regulations and thought that should be put in the report.

The board members concurred this is basically a yes or no decision as to whether or not the board agrees with the decision.

Harris offered some suggestions to the board.

Krueger agreed that it was grandfathered in as a shotgun range but didn't feel comfortable legislating new terminology as Harris was suggesting; they aren't a legislative board.

Hollinger asked Harris about a statement in the report that says Eyrie Shotgun Ranch is a non-conforming structure. He asked if he was referring to the structures at the facility.

Harris said he is talking about the physical shotgun ranch.

Hollinger asked if he was referring to the structure or the activity.

Harris said the structure itself is grandfathered and he also tried to address the use.

The board and staff further discussed this issue.

Hash thought the board was digging a hole and going too far. He asked Harris his thoughts.

Harris said he's reading as clearly as he can what the Board's decision has to be founded on.

Hash asked Harris to tell the Board his facts are so the board could determine whether or not he made the right decision.

Krueger wanted to make sure the board made a decision on the facts that were presented. Facts are listed in the staff report and he also mentioned the board should consider public testimony. Between the two, the board should have enough information to make their decision.

Harris went over the facts.

MAIN MOTION Hollinger made a motion seconded by Krueger to adopt staff report Appeal-09-02 therefore affirming the zoning administrator's decision and **denying** the appeal.

ROLL CALL On a roll call vote the motion passed unanimously.

OLD BUSINESS None.

NEW BUSINESS Harris briefed the board on upcoming agenda items.

ADJOURNMENT The meeting was adjourned at approximately 9:45 pm. on a motion by Klempel seconded by Hash. The next meeting will be held at 6:00 p.m. on November 3, 2009.

Scott Hollinger, President

Jill Goodnough, Recording Secretary

APPROVED AS SUBMITTED/CORRECTED: 4/6/10