

Special Meeting, Friday, July 15, 2011, 5:00 p.m. Government Center, Verona, VA.

PRESENT: Jeremy L. Shifflett, Chairman
Wendell L. Coleman, Vice-Chairman
David R. Beyeler
Larry C. Howdyshell
Tracy C. Pyles, Jr.
Patrick J. Morgan, County Attorney
Todd Flippen, P.E., County Engineer
Patrick J. Coffield, County Administrator
Jessica Staples, Administrative Secretary

ABSENT: Gerald W. Garber
Nancy Taylor Sorrells

VIRGINIA: At a special meeting of the Augusta County Board of Supervisors held on Friday, July 15, 2011, at 5:00 p.m., at the Government Center, Verona, Virginia, and in the 236th year of the Commonwealth....

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Chairman Shifflett welcomed the citizens present.

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FLOODPLAIN OVERLAY ZONING DISTRICT – ZONING ORDINANCE AMENDMENT

The Board considered an ordinance amending the Zoning Ordinance of Augusta County Related to the Floodplain Overlay Zoning District and adopting new floodplain maps for the Sherando Area. The Planning Commission recommends approval. This request was heard on July 13, 2011 at which time the Board voted for Mr. Morgan to seek an injunction to keep FEMA from suspending the Flood Insurance Program and the issue to be reviewed on this date. **This item was tabled at the July 13, 2011 Regular Board meeting until July 15, 2011.**

Mr. Beyeler moved, seconded by Mr. Pyles, that the Board remove this item from the table.

Vote was as follows:	Yeas:	Howdyshell, Beyeler, Shifflett, Pyles and Coleman
	Nays:	None
	Absent:	Sorrells and Garber

Motion carried.

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Patrick Morgan, County Attorney, stated on Wednesday the Chairman authorized him to file suit on the Board's behalf in the event there could be a challenge to the flood plain maps for the Sherando Back Creek Area. Mr. Morgan stated he has researched similar cases including the pleadings of challenges in Mississippi and Louisiana. Mr. Morgan stated those were the only two cases where local government challenged the federal government and both cases involved flood control levies that the federal government declared were not up to standard. He explained the threat was if the local governments did not improve the levies, flood plain maps would be adjusted. In the case with Mississippi, Mr. Morgan stated the localities were successful in getting an injunction and plans were to implement the new maps; however, in speaking with one of the attorneys that handled the case, politicians encouraged the localities to file suits, it then had to be withdrawn after a conflict of interest was filed concerning the State of Mississippi. In Louisiana, the case was dismissed under the Tenth Amendment. Mr. Morgan stated the

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above cases were the only ones in his research that he could find where local governments challenged FEMA. He stated he has also discussed the issue with several private attorneys but was unsuccessful in finding one that would consider filing suit for the county to challenge FEMA based on the facts in this case. Mr. Morgan stated the preliminary maps were received dated August 20, 2010. He quoted the letter received from FEMA to the county at that time which stated, "We are sending preliminary copies at this time to give your community a thirty (30) day review period". He further stated the letter did encourage local government to distribute the maps not only to agencies within the government, but other interested people. Mr. Morgan explained the letter also encouraged non-technical changes such as corporate limits, road names, bridges, and stream names. He explained there were some changes and recommendations made by the County Engineer regarding street names. Mr. Morgan stated there was to be a meeting involving the citizens between August 20, 2010 to November 18, 2010 that the state was to arrange, at which time the citizens were to voice their concern, but he could not find the exact date. When the Federal Government notified the county the maps were to be adopted, it was noted that no comments were received; therefore, no changes were to be made.

Mr. Pyles questioned whether or not the citizens were notified of this meeting that was arranged by the state and stated part of their argument was they were not made aware of the 90 day appeal period.

Mr. Morgan explained the file includes a packet of information that "looks like it should have been sent out to people" that mentions the 90 day appeal period, so it was not just one letter that the county received that mentioned the 90 day appeal period. He went on to state there was a letter dated January 18, 2011 from FEMA that the maps have become final and the county had until July 18, 2011 to adopt those maps and amend the ordinance. He stated it seemed if there was an appeal period, that time would have started then. Mr. Morgan stated a certified letter from FEMA was received on April 4, 2011 reminding the Board Chair of the July 18, 2011 deadline and again on June 8, 2011 a second certified letter was received reminding the Board Chair of the July 18, 2011 deadline. Mr. Morgan explained the Planning Department then sent out letters to property owners and adjacent property owners affected by the new flood plain maps. He stated 80 properties were newly added to the Flood Plain, 44 properties had land both added to and removed from the floodplain, 17 properties were completely removed from the floodplain, and 529 property owners were contacted as adjacent property owners. Of the 141 property owners directly affected by the new maps, Mr. Morgan stated only 11 people spoke at the Planning Commission Public Hearing and 2 citizens spoke at the Board of Supervisors Public Hearing that was held on June 22, 2011. Mr. Morgan explained case weaknesses to the appeal. One weakness he stated was changes in maps were based on topographic maps sent to the consultant by the county (2007 maps developed by the Commonwealth of Virginia). Mr. Morgan explained the community outreach meeting on the preliminary maps was held sometime between August 20, 2010 and November 18, 2010. After discussing the meeting notification with the FEMA representative, Mr. Morgan was told notices such as that were left up entirely to the state and the locality. Another weakness with the appeal, Mr. Morgan stated was found in the case law which indicates that the appeal process established in U.S. Code must be followed, 42 U.S.C. §4104 of the U.S. Code which provides for an appeal to the director based on scientific and technical data submitted by the community, and the Department of Community Development does not have scientific or technical data to contest the maps. With regard to that, Mr. Morgan stated the citizens' comments made at the public hearing may or may not be accurate; but even so, they do not rise to a level of scientific or technical data necessary to contest the maps at this late date. Mr. Morgan provided the Board with two options: 1) Approve the ordinance with the revised maps for Back Creek; or 2) Do not approve the maps and the FEMA flood insurance program for the entire county will be suspended at 12:01 July 19, 2011. Plans of action Mr. Morgan proposed to the Board included to litigate and risk the loss of flood insurance coverage and possible sanctions, approve the ordinance and proceed with

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flood study for Back Creek and petition FEMA for map revision (\$105,000), approve ordinance and set aside \$10,000 to assist individual property owners to obtain a Letters of Map Amendments (LOMA), which the Board would need to determine percentage of participation (e.g. 50/50 or 75/25), or contact a local surveyor to establish a discounted base rate for surveys for land owners to obtain LOMA. Mr. Morgan concluded his recommendation is for the Board to adopt the ordinance amending the Zoning Ordinance of Augusta County Related to the Floodplain Overlay Zoning District and adopt new floodplain maps for the Sherando Area.

Mr. Coffield stated Todd Flippen, Acting County Engineer, was available to explain the LOMA process and had provided a copy of an LOMA as an example as well as a fee amount for this service from two local surveying companies.

Mr. Flippen explained the Back Creek Area is an AE Flood Zone. He explained the AE Zone is a zone that does have floodplain elevations. He noted there are areas in the county that are in a Zone A that do not have floodplain elevations. The processes for obtaining an LOMA, Mr. Flippen explained, would be to have the property surveyed by a licensed engineer or surveyor. The survey would include the structures using the corners of houses, etc. The elevations of the structure would then be compared to the floodplain elevations to determine whether or not the structure is floodplain elevation. If the structure is determined to be at least one foot above floodplain elevation by the certified survey, the property owner may not be required to carry flood insurance. Mr. Flippen explained the FEMA maps only depict floodplain boundaries, not holes, hills, etc. within the floodplain. He stated it is up to the property owner to provide those elevations. Mr. Flippen stated the Community Development Department has received three LOMA requests since May and records are kept in the department. With regard to the insurance requirement, Mr. Flippen explained the county has spoken with three FEMA representatives who explained there is a program available to property owners who had originally built out of the floodplain, but whose homes are now located within the floodplain based on the revised maps. He explained these homeowners are eligible for a preferred risk policy that is offered at a lower rate for two years after the revised map date.

Mr. Howdysshell asked for those that request an LOMA, is the process done interoffice.

Mr. Flippen explained it is the property owners' responsibility to submit the information to FEMA however the request is required to have the county's certification.

Mr. Beyeler stated there are approximately 40 homes that will immediately be involved with these revisions. He explained the insurance program requirement will only apply to those homes that hold a federally insured loan; however, if the value of the house is below the value of the loan, the loan could default. Mr. Beyeler stated this process is done automatically.

Mr. Howdysshell stated the study will provide those parcels the option to provide proof they are not located within the floodplain as these revised maps have shown.

Mr. Beyeler stated he knows of several parcels that have been placed in the floodplain according to the revised maps; however, the parcels are not located in floodplain and the study will be able to prove that.

Mr. Flippen reiterated if the property was placed in the floodplain according to the revised maps and an LOMA then determined the parcel to be located outside the floodplain, flood insurance will not be required.

Mr. Beyeler commented yes, but the money that the property owner was forced to pay

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for flood insurance prior to the removal of their parcel from the floodplain will not be refunded. He stated according to Jo Payne, she has spoken with a representative from FEMA who stated the agency has agreed to fund \$50,000 towards a flood study for the Sherando Back Creek Area which would be almost half of what the Board had approved on Wednesday night.

Mr. Howdyshell stated this issue only pertains to the Sherando Back Creek Area. He questioned how many other areas in the county will be impacted by changes in the floodplain in the future that the Board will have to review.

Mr. Beyeler responded 100 year storm events seem to happen in the Sherando Back Creek Area approximately every 10 years. He stated the study will also assist with drainage areas in the area.

Mr. Pyles stated the exercise is not futile. He stated the issue is not "unique to us". He referred to an article by NBC News titled "Fleecing of America". Mr. Pyles explained the article discussed FEMA and the need for insurance money. He explained senators from Mississippi and Arkansas were trying to pass legislation that would allow for an appeal process to these proposed changes from FEMA as there was concern people did not have an opportunity to suggest changes. Mr. Pyles further stated the county has learned if an issue such as this arises in the future, to grant it great attention and get involved with the citizens that are impacted by these changes. He commented in this case, with regard to the LOMAs, if assistance will be provided from FEMA and the county can then provide assistance for the remaining amount to the approximately 40 properties that have structures now located in the floodplain, that then maybe "we will have done our part without setting ourselves up for just anybody coming in" as they will be responsible for paying half of the costs for the study.

Mr. Beyeler stated staff did not see the urgency of acting on this issue because as late as two months ago, in working on the ordinance revisions, he was told by staff this ordinance needed to be adopted and he was even asked if he wanted to "wait until after the election". He stated he was then told "it needed to be done right now" because it had to be adopted by July 18, 2011. Mr. Beyeler stated the date of adoption was something that "fell through the cracks" but "these things happen". Mr. Beyeler moved, seconded by Mr. Pyles, to approve the adoption of new floodplain maps for the Sherando Back Creek Area with a revision date of July 18, 2011 and an ordinance amending the Zoning Ordinance of Augusta County Related to the Floodplain Overlay Zoning District with the following changes: He recommended removing the "9,000 square feet" of buildable area.

Mr. Howdyshell commented with regard to the 9,000 square feet requirement. He stated it is a matter of whether or not to permit a well and septic to be placed under water by allowing them to be placed in a floodplain.

Mr. Beyeler responded in 50% of the cases, the property will have public water and there will be some cases where the lot will have an alternative system. Mr. Beyeler stated the county has approved septic systems on adjacent lots. He stated each situation will be unique, but the applicant will have to show on the site plan that the area is "workable". He stated staff will determine the "buildable" area on a case by case basis.

Mr. Flippen responded to Mr. Beyeler's motion regarding removing the minimum requirement of "9,000 square feet" with regard to buildable area. He explained the existing ordinance does include the "9,000 square feet", which states if one has 9,000 square feet of buildable area outside the floodplain the property owner is not required to meet §25-475. He stated if the 9,000 square feet requirement is removed, the ordinance will require all properties with portions in the floodplain to comply with those requirements.

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Mr. Beyeler stated the language states “no new lots shall be created”.

Mr. Flippen asked for clarification if the requirement of 9,000 square feet were to be removed from the proposed and existing ordinance.

Mr. Beyeler stated yes.

Mr. Flippen explained if the minimum requirement of 9,000 square feet is removed from the existing ordinance, any lot in the floodplain regardless of the size of the lot will have to proceed with the requirements according to the Floodplain Ordinance. He explained the existing ordinance states if a property has 9,000 square feet outside the floodplain the property owner will not have to proceed further with the requirements such as one foot contours, etc. Mr. Flippen also noted a diagram depicting the 9,000 square foot requirement in the ordinance will also need to be amended.

Mr. Beyeler withdrew his original motion. He moved, seconded by Mr. Pyles, that the Board approve the following ordinance to be effectively immediately:

**AN ORDINANCE TO ADOPT AMENDMENTS TO
SELECTED SECTIONS OF THE
FLOODPLAIN ORDINANCE**

WHEREAS, the Federal Emergency Management Agency (FEMA) has amended its floodplain maps in and for the County of Augusta; and

WHEREAS, the Floodplain Insurance Program is only available if the County adopts certain requirements for the floodplain districts, as established by the FEMA floodplain maps; and

WHEREAS, it is the desire of the Augusta County Board of Supervisors that floodplain insurance be available to residents of the County;

NOW THEREFORE be it resolved by the Board of Supervisors for Augusta County that a new Section 25-474.1 be adopted and that amendments to Section 25-471, Section 25-473, and 25-475 be adopted and enacted to read as follows:

§ 25-471. Purposes, applicability, liability and penalties (Floodplain Ordinance).

B. Applicability. This article shall apply to all lands within the County of Augusta which are identified as being in, or within one hundred feet (100') of, the Floodplain Overlay Districts as established in § 25-473 of this article.

§ 25-473. Floodplain Overlay Districts.

A. Basis of Floodplain Overlay Districts. Floodplain Overlay Districts shall include areas subject to inundation by waters of a one hundred (100) year flood. The basis for the delineation of these districts shall be the Augusta County Floodpool Maps and the Flood Insurance Study and associated FIRM for the County of Augusta prepared by the Federal Emergency Management Agency, Federal Insurance Administration, dated September 28, 2007 and with the following revision dates for specific map panels: Panel 51015C0339E dated January 6, 2010, Panel 51015C0539E dated July 18, 2011, Panel 51015C0541E dated July 18, 2011, Panel 51015C0543E dated July 18, 2011, Panel 51015C0652E dated July 18, 2011, and Panel 51015C0654E dated July 18, 2011. Floodplain Overlay Districts include areas identified as Floodway Districts, Flood-Fringe and Approximated Floodplain Districts. (Augusta County Code 1969, § 25-115O, Ord. 9/26/07, eff. 9/28/07)

§ 25-474. Development prohibited in Floodplain Overlay Districts.

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Development, as defined in § 25-472 of this article, is prohibited in Floodplain Overlay Districts in Augusta County unless one (1) or more of the following exceptions applies:

A. Exception A. The lot or parcel on which the development is to occur meets all of the following criteria:

1. The lot or parcel was created prior to January 1, 2010 or was lawfully created after January 1, 2010 and found to be in the floodplain by subsequent amendment to floodplain maps listed in § 25-473. For the purposes of this section, when a lot is subdivided, all of the lots, including any residue, are deemed to have been created as of the date of recordation of the plat creating such lots.

§25-474.1. New lots prohibited in Floodplain Overlay Districts.

No new lots shall be created in Floodplain Overlay Districts in Augusta County unless the lot contains at least nine thousand square feet (9000 sq. ft.) of contiguous acreage lying outside of the district and a buildable area is clearly identified on the subdivision plat. Except that, a lot which has less than nine thousand square feet (9,000 sq. ft.) of contiguous acreage lying outside of the district may be created if the lot is otherwise appropriate for the proposed development which is permitted by the regulations of the underlying zoning classification and this article and there is a statement on the plat and in the deed such as "Lot _____, as depicted on this plat, does not contain sufficient land area outside of the floodplain for development."

§ 25-475. Development in or near Floodplain Overlay Districts.

B. Step Two, determination of applicability of district regulations.

1. If the property is confirmed to be in, or within one hundred feet (100') of the Floodplain Overlay District through "Step One" (§25-475 A) above, the applicant shall file a floodplain development plan prepared and sealed by a professional engineer or land surveyor showing:

- a. The proposed development including any access roadways,
- b. Existing and proposed contours at one foot (1') intervals,
- c. The elevation of the one hundred (100) year flood, both before and after the proposed development, and
- d. The boundaries of the lot or parcel within one hundred feet (100') of the one hundred (100) year flood elevation.
- e. Applicable setbacks

Vote was as follows:	Yeas:	Howdyshell, Beyeler, Shifflett, Pyles and Coleman
	Nays:	None
	Absent:	Garber and Sorrells

With regard to the LOMA, Mr. Morgan suggested if a short timeframe was put on the study, it may be determined the LOMAs will not be needed or after the study is complete, it may be determined the number of houses impacted by these changes is less.

Mr. Beyeler stated he spoke with Jo Payne today who stated, after discussing the issue with a representative from FEMA, who stated a flyover of the area will not be done until

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fall when the foliage is off the trees. He suggested Mr. Coffield to contact the representative from FEMA and take action if it is determined to be necessary.

Mr. Pyles stated a deadline should be given, He suggested January 1, 2012.

Mr. Beyeler asked Mr. Flippen to contact FEMA as surveyors can begin some of the work prior to the fly over in the fall.

Mr. Flippen stated the surveying can be done prior to the flyover.

Mr. Coleman questioned the accuracy of flood studies and information from FEMA in the other districts. He asked if the Board were prepared to handle requests from constituents from other areas in the county.

Mr. Beyeler asked if the county has flood studies from other areas in the county.

Mr. Flippen answered yes.

Mr. Beyeler asked if a study was done in the Craigsville area.

Mr. Pyles stated yes. He recommended funding come from infrastructure accounts on a case by case basis as these issues only arise when there is a change in the mapping.

Mr. Beyeler commented the Sherando Area, for whatever reason, is more prone to flooding than other areas in the county.

Mr. Pyles stated he feels it is less to do with elevation and more to do with forest issues such as clear cutting, road construction, etc.

ADJOURNMENT

There being no other business to come before the Board Mr. Beyeler moved, seconded by Mr. Coleman, the Board adjourned subject to call of the Chairman.

Vote was as follows: Yeas: Howdyshell, Beyeler, Shifflett, Pyles and Coleman

Nays: None

Absent: Garber and Sorrells

Motion carried.

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Chairman

County Administrator