# MINUTES OF THE MEETING OF THE ISLE OF WIGHT COUNTY PLANNING COMMISSION HELD ON THE TWENTY-THIRD DAY OF JULY IN THE YEAR TWO THOUSAND AND TWENTY-FOUR

## CALL TO ORDER

Bobby Bowser, Chairman, called the Isle of Wight County Planning Commission meeting to order at 6:00 PM on July 23, 2024, in the Board of Supervisors Room at the Isle of Wight County Courthouse, Isle of Wight, Virginia.

## INVOCATION

Don Robertson delivered the invocation.

## PLEDGE OF ALLEGIANCE

Chairman Bowser invited everyone present to join in the Pledge of Allegiance.

## ROLL CALL/DETERMINATION OF A QUORUM

**PRESENT**
Bobby Bowser, Chairman
Thomas Distefano, Vice-Chairman
Brian Carrol
Cynthia Taylor
Jennifer Boykin
George Rawls
Rick Sienkiewicz
Raynard Gibbs
Matthew Smith

**ABSENT**

James Ford

A quorum was determined.

**ALSO IN ATTENDANCE**
Bobby Jones, County Attorney
Don Robertson, Assistant County Administrator
Trenton Blowe, Planner II
Sandy Robinson, Planner II
Caleb Kitchen, Planner I
Amanda Landrus, Secretary

## ACTION ON REQUESTS TO WITHDRAW OR TABLE PENDING AGENDA ITEMS

Chairman Bowser asked if there were any requests to table or withdrawal agenda items. Amanda Landrus, Planning Commission Secretary, stated there were no requests.

## APPROVAL OF AGENDA

Chairman Bowser called for a vote to approve the agenda. Commissioner Smith made the motion to move CUP-3-24 Carrsville Modular Classroom to the first public hearing item. Commissioner Gibbs seconded the motion. Chairman Bowser asked for all in favor to signify by saying aye. The motion passed unanimously.

## APPROVAL OF CONSENT AGENDA

Chairman Bowser called for a vote to approve the consent agenda. Commissioner Carroll made the motion to approve the consent agenda. Commissioner Taylor seconded the motion. Chairman Bowser asked for all in favor to signify by saying aye. The motion passed unanimously.

## CITIZENS' COMMENTS

Chairman Bowser invited any citizen to speak on an item that is not on the agenda tonight.

Glen Willis, 24291 Lovers Lane, stated he has been doing research on the setbacks and has sent an email with suggestions how to improve setbacks with citizens opinions in mind and asked for the commissioner's feedback.

There being no further citizen comments, Chairman Bowser closed citizen comments

## PUBLIC HEARINGS

Chairman Bowser called for the first public hearing on the following item:

> Application (CUP-3-24) of Todd Christiansen, applicant, and Isle of Wight County School Board, property owner, for a conditional use permit for a modular classroom on approximately 0.5 acres on tax parcels 66-01-010 and 66-01-010A located at 5355 Carrsville Highway (Rte. 58) in the Village Center zoning district. The current use of the property is as a primary educational facility and is the site of Carrsville Elementary School.

Trenton Blowe, Planner II, gave the following presentation.

Planning Commission Meeting

July 23, 2024

# CUP-03-24 Carrsville Elementary Conditional Use Permit Modular Classroom

## Details

Location – 5355 Carrsville Hwy

Tax Map Parcel Number - 66-01-010/010A

Zoning – Village Center (VC)

Election District – District 5

Purpose – Conditional Use Permit (CUP) for a modular classroom on a parcel currently zoned VC

# Background

- Project site is the location of Carrsville Elementary School.
- School in its current form was approved for renovation in 1996.
- In 2022, the school approached the County to place a modular classroom to the rear of the existing school on an existing concrete pad.
- Supplementary use regulations state modular classrooms requiring placement longer than twelve months or including construction of additional parking require a conditional use permit.
- Modular classroom was permitted to be installed with the condition that if it were on the property longer than a year, a conditional use permit would be required

# Project Description

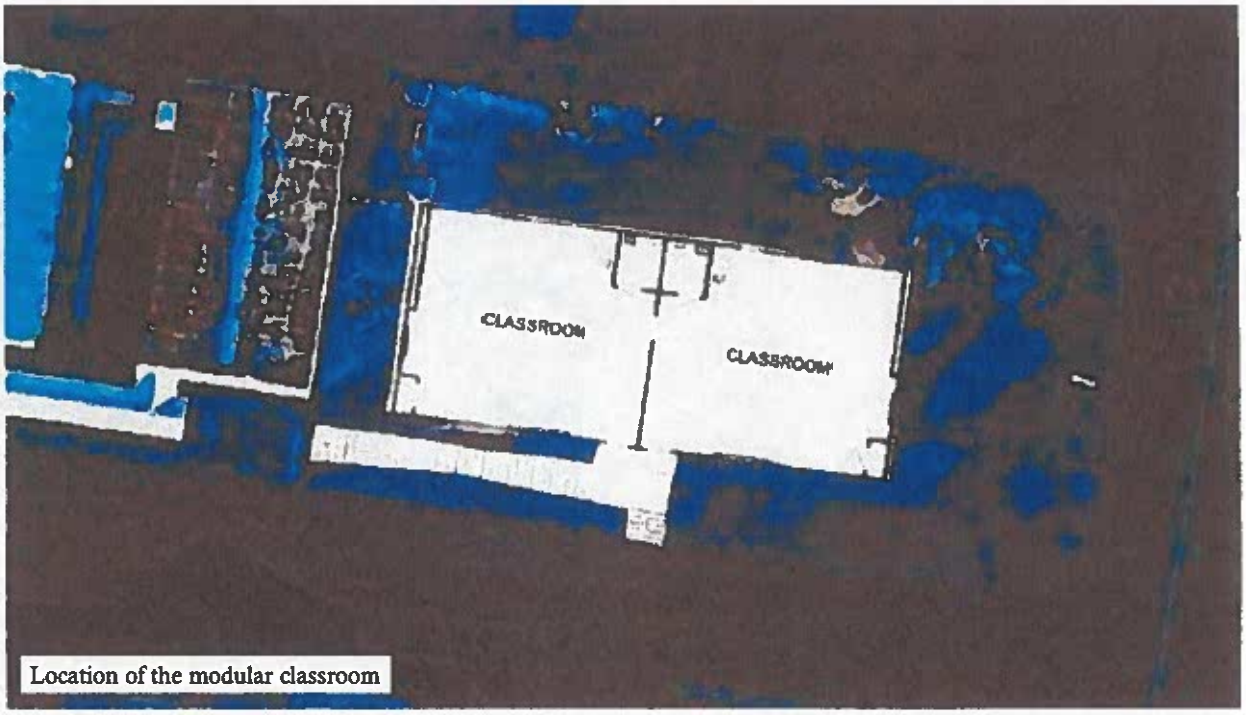
- 1700-square-foot modular classroom proposed at existing school site on an existing concrete pad.
- Modular classroom is one building that has two separate classrooms.
- Each classroom can hold 20 students.
- Applicant states one classroom is the current location for the Pre-K program and the other classroom is being used for individual learning.

## CUP-3 -24 - Conditional Use Permit- Location Map

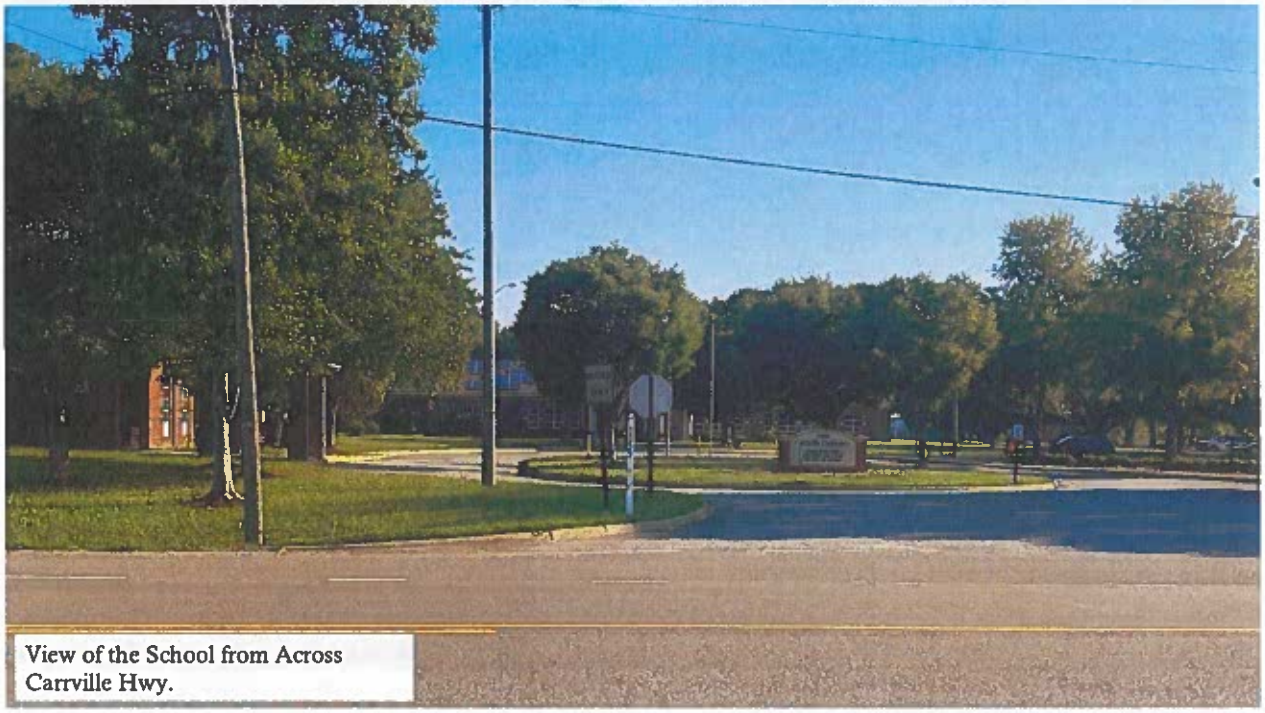
## CUP-3 -24 - Conditional Use Permit- Location Closeup Map

## CUP-3-24 - Conditional Use Permit- Zoning Map

## CUP-3-24 - Conditional Use Permit- Land Use Map




Location of the modular classroom



View of the School from Across Carrville Hwy.

Modular classroom

The Planning Commission and Board of Supervisors shall consider the following criteria before granting a conditional use permit:

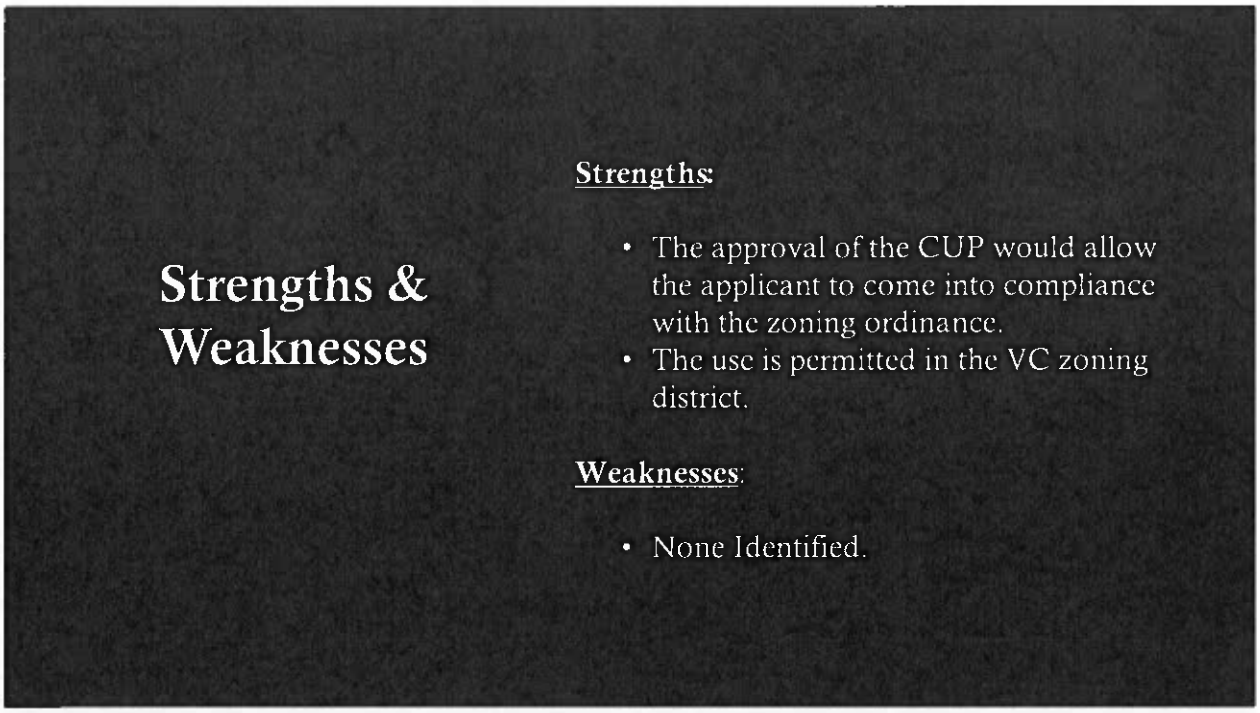
1. Will not be detrimental to or endanger the public health, safety, and general welfare;
2. Will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially impair the use of other property within the immediate proximity;
3. Adequate utilities, water, sewer or septic system, access roads, storm drainage and/or other necessary public facilities and improvements will be provided;
4. Ingress and egress so designed as to minimize traffic congestion on the public streets;
5. Not contrary to the goals and objectives of the Isle of Wight County Comprehensive Plan;
6. Shall conform to all other applicable regulations of the zoning district classification in which it is located and to the special requirements established for the specific use; and
7. Will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use.

Board may impose additional conditions or limitations on CUPs.
Such conditions may include, but are not limited to:

1. Number of persons living or working in the immediate area and the proposed hours of operation;
2. Traffic conditions, sidewalks, parking facilities, vehicle access, peak periods of traffic and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future;
3. Orderly growth of the neighborhood and community and the fiscal impact on the County;
4. Effect of odors, dust, gas, smoke, fumes, vibration, glare, and noise upon the use of surrounding properties;
5. Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal, and the ability of the County or persons to supply such services
6. The degree to which the development is consistent with generally accepted engineering and planning principles and practices;
7. The structures in the vicinity such as schools, houses of worship, theaters, hospitals, and similar places of public use;
8. The purposes set forth in this ordinance, the County's Comprehensive Plan, and related studies for land use, roads, parks, schools, sewers, water, population, recreation, and the like;
9. The environmental impact, the effect on sensitive natural features, and opportunities for recreation and open space; and
10. The preservation of cultural and historic resource landmarks.

## Agency Review

The location and installation were approved by the General Services, Inspections, and Planning and Zoning during the initial submittal.



**Chairman Bowser opened the public hearing and invited the applicant to speak.**

Dr. Coleman, Deputy Superintendent of Operations for Isle of Wight County Schools, thanked the Planning Commission and asked to move the item forward with making the learning cottage permanent at Carrsville Elementary.

There being no public comment, Chairman Bowser closed the public hearing and called for discussion from the commissioners.

Commissioner Boykin asked how many pre-k students Carrsville currently has, and what is the long-term goal for this cottage.

Dr. Coleman stated there are approximately fifteen to twenty students in the pre-k program, and the initial goal of the cottage was to expand based on covid guidelines. Dr. Coleman stated at this time, it is hard to tell what the long-term goal is.

Commissioner Boykin asked how many other schools in the County have learning cottages.

Dr. Coleman stated only Carrsville has them at this time.

Commissioner Gibbs made the motion to send this application to the Board of Supervisors with the recommendation of approval. Commissioner Taylor seconded the motion. The motion was adopted with Commissioners Boykin, Distefano, Rawls, Taylor, Sienkiewicz, Gibbs, Smith, Carroll and Bowser voting in favor and no Commissioners voting against.

The motion passed unanimously, and the item will go to the Board of Supervisor's August 15, 2024, meeting.

Chairman Bowser called for the next public hearing item:

> Application (CUP-7-24) of Jeremy Kooiman and Lucy Kooiman, property owners, for a conditional use permit to operate a short-term rental on approximately two acres located at 214 Shivers Mill Lane on tax parcel number 43A-06-025 in the Suburban Residential zoning district.

Caleb Kitchen, Planner I, gave the following presentation.

# PEACE BY THE RIVER SHORT-TERM RENTAL CONDITIONAL USE PERMIT REQUEST CUP-7-24

BOARD OF SUPERVISORS REGULAR MEETING
AUGUST 15, 2024

## SITE DESCRIPTION

- Tax Map ID#: 43A-06-025
- Location: 214 Shivers Mill Lane
- Current Zoning: Suburban Residential (SR)
- Election District: D4
- Purpose: To allow a short-term rental business to continue operation within a single-family dwelling.

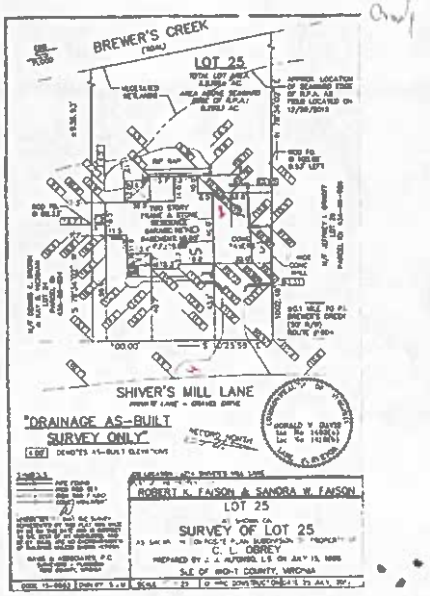
# BACKGROUND

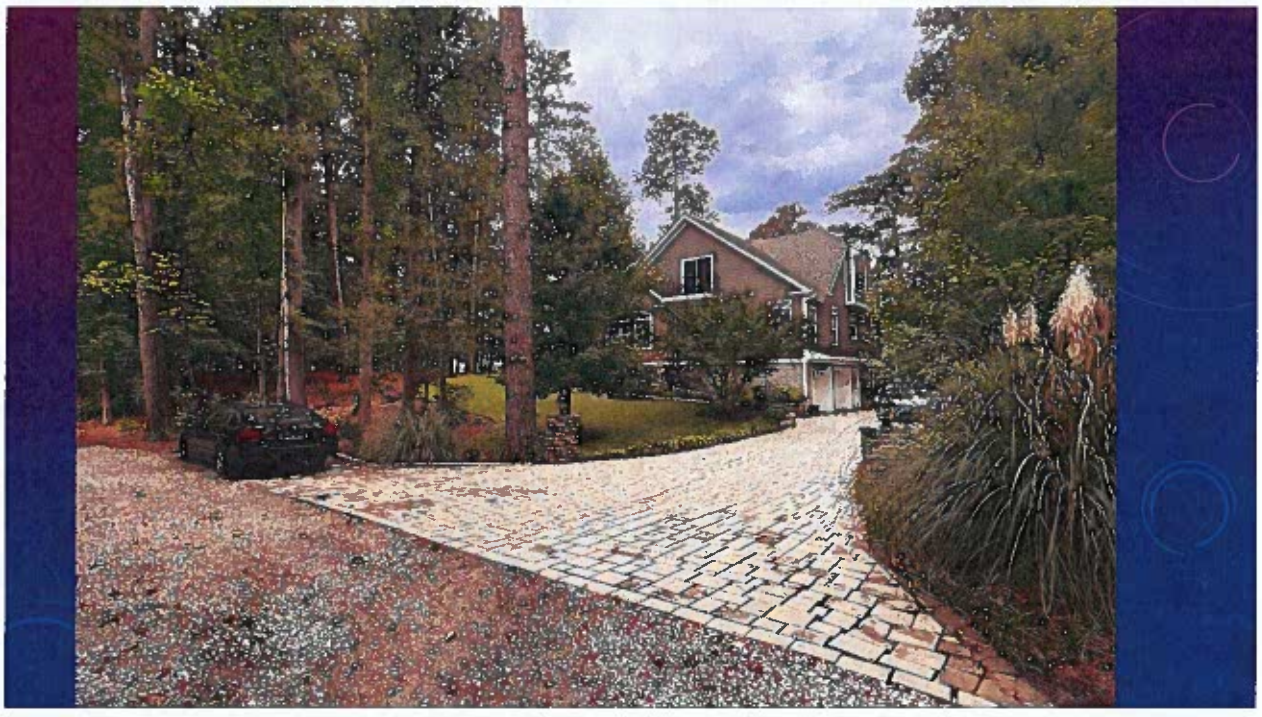
- Existing single-family dwelling constructed in 2017
  - CBPA Exception approved in 2016
  - Second CBPA exception approved in 2019 for garden shed
- Accessory Apartment CUP denied in 2020 for basement
  - Interior door was removed to no longer constitute a separate dwelling
- Kooimans applied for a by-right short term rental use on March 19th, 2024 and Community Development received an objection in writing within the 30-day review period.
- If an objection in writing is received, administrative approval ceases and the applicant is required to obtain a conditional use permit per Section 5-5005.DD.1 of the Zoning Ordinance.

**CUP-7-24 Peace by the River STR CUP Request - Location Map**

## CUP-7-24 Peace by the River STR CUP Request - Zoning Map

## CUP-7-24 Peace by the River STR CUP Request - Land Use Map


BREWER'S CREEK
LOT 25
SHIVER'S MILL LANE
"DRAINAGE AS-BUILT SURVEY ONLY"
ROBERT K. FAISON & SANDRA W. FAISON
LOT 25
SURVEY OF LOT 25
C. L. OBREY



**The Planning Commission and Board of Supervisors shall consider the following criteria before granting a conditional use permit:**

1) Will not be detrimental to or endanger public health, safety, and general welfare;
2) Will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially impair the use of other property within the immediate proximity;
3) Adequate utilities, water, sewer or septic system, access roads, storm drainage and/or other necessary public facilities and improvements will be provided;
4) Ingress and egress so designed as to minimize traffic congestion on the public streets;
5) Not contrary to the goals and objectives of the Isle of Wight County Comprehensive Plan;
6) Shall conform to all other applicable regulations of the zoning district classification in which it is located and to the special requirements established for the specific use; and
7) Will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use.

**Board may impose additional conditions or limitations on CUPS. Such conditions may include, but are not limited to:**

1) Number of persons living or working in the immediate area and the proposed hours of operation;
2) Traffic conditions, sidewalks, parking facilities, vehicle access, peak period of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future;
3) Orderly growth of the neighborhood and community and the fiscal impact on the County;
4) Effect of odors, dust, gas, smoke, fumes, vibration, glare, and noise upon the use of surrounding properties;
5) Facilities for police, fire protection, sewage, water, trash and garbage collection and disposal, and the ability of the County or persons to supply such services;
6) The degree to which the development is consistent with generally accepted engineering and planning principles and practices;
7) The structures in the vicinity such as schools, houses or worship, theaters, hospitals, and similar places of public use;
8) The purposes set forth in this ordinance, the County's Comprehensive Plan, and related studies for land use, roads, parks, schools, sewers, water, population, recreation, and the like;
9) The environment impact, the effect on sensitive natural features, and opportunities for recreation and open space; and
10) The preservation of cultural and historic resource landmarks.

## COMPREHENSIVE PLAN REVIEW

- Future Recommended Land Use Designation for this property is Environmental Conservation.
- Appropriate uses for the EC land use designation include wetlands, farms, forest uses, open space, and limited park facilities.
- Existing facilities approved and constructed in compliance with Chesapeake Bay Preservation Area Ordinance requirements.

## AGENCY REVIEW

Staff distributed the application to the following departments for review and comment:

- Fire Rescue: Facility would have little to no impacts on calls for service, no objections.
- Sheriff's Department: No incidents at this location within past 6 years, no objections.
- Health Department: No increase on residential septic system.
- County Attorney: No objections

## STAFF ANALYSIS

Strengths:

1. The application is generally consistent with the Comprehensive Plan and can meet all ordinance requirements, including recent amendments related to short-term rental uses.
2. The proposed use will have minimal impact on facilities and resources.
3. Granting the CUP will allow a short-term rental that existed prior to the ordinance changes, to continue to operate

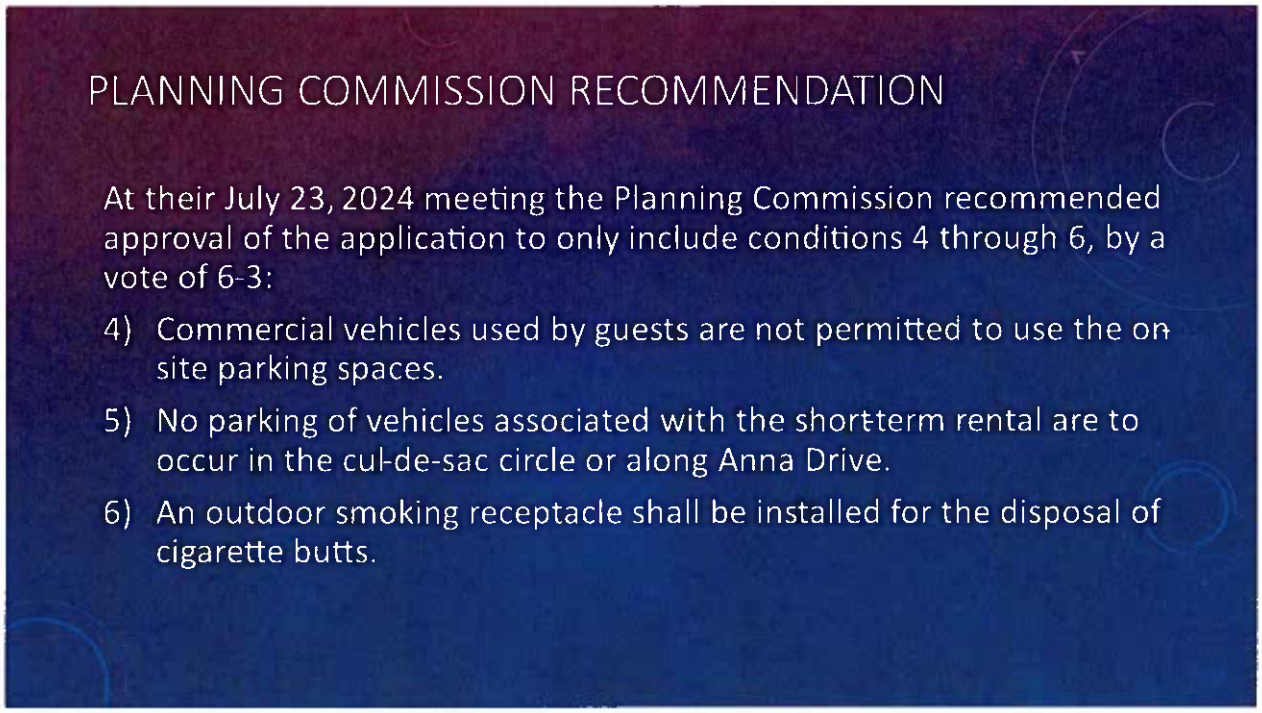
Weaknesses:

1. The use is located along a narrow private lane in close proximity to other residences and may cause impacts such as noise and odors.
2. There many be an increase in vehicular traffic along a private lane that already serves multiple residences.
3. Increasing the intensity of activities on the parcel may have negative impacts on sensitive environmental and natural features that surround the parcel.

## STAFF RECOMMENDATION

Staff recommends approval of the CUP with the following conditions:

1) Check-in/Check-out times for guests may not occur earlier than 8:00 A.M. or later than 8:00 P.M.
2) No outdoor recreational activities are to occur after 7:00 P.M.
3) No use of outdoor fires or flame-grills are permitted.
4) Commercial vehicles used by guests are not permitted to use the on-site parking spaces.
5) No parking of vehicles associated with the short-term rental are to occur in the cul-de-sac circle or along Anna Drive.
6) An outdoor smoking receptacle shall be installed for the disposal of cigarette butts.




Chairman Bowser opened the public hearing and invited the applicant to speak.

Lucy Kooiman, property owner, stated because of one neighbor's objection, they are applying for this Conditional Use Permit. Ms. Kooiman stated that this business is family-oriented and additional screening is done for the safety of her family. She added that no parties or pets are allowed. Ms. Kooiman stated they charge a higher rate to limit the number of reservations. Ms. Kooiman stated she has been running this business for six years with a business license and paying lodging tax. She added that many of their guests are travel professionals. Ms. Kooiman stated that with the exception of Mr. Ornoff, their small cohesive neighborhood manages and maintains the private drive and has a social platform that they communicate through. She asked for the Planning Commission's favor in approving their application.

Brian Peoples, legal representative for Mr. Ornoff, 222 Central Park Avenue, stated that he respectfully disagrees with Ms. Kooiman's statement saying there have been zero incidents. Mr. Peoples stated he believes these short-term businesses have impacts on nearby communities, and the neighbors did not purchase their current home to live next to short term rentals or hotels. Mr. Peoples stated this is harmful to Mr. Ornoff and reinstated the house is built so close to his while other neighbors are further away. He added that their driveway is thirty-three percent larger than what was approved and has had to get after-the-fact permits. The driveway abuts Mr. Ornoff's property line. Mr. Peoples added that the house is rented out two to four weekends a month. Mr. Peoples passed out the following documents to the commissioners.

# ISLE OF WIGHT
## COUNTY, VIRGINIA

**TO:** Amy Ring, Director

**FROM:** Rachel Bass, Codes Enforcement Officer

**SUBJECT:** Findings at 214 Shivers Mill Ln.

**DATE:** June 6, 2019

Mrs. Ring,

On June 6, 2018 I visited 214 Shivers Mill Ln. to investigate several complaints. I spoke with the property owner, took several pictures, and my findings are listed below.

In reference the shed. The shed on site is exactly 5' from the side property line. The shed is 12'X16' with a covered porch. The paver walk-way is 3' wide that extends from the driveway area to the shed. The property owner, Mr. Jerry Kooiman, advised that per his conversations with Ms. Kim Hummel the shed was always planned and approved to be 5' from property line. I have attached the zoning permit and site plans that were attached to project #202457 in Munis for reference.

In reference to the short-term rental listings. I advised Mr. Kooiman that per the Zoning Ordinance he was only allowed a maximum of two occupants/renters and needed to change his listing to reflect that. Mr. Kooiman also stated that he has made no changes to the interior of his home but would not let me inside the home to see the area listed as rental. He advised it is not a separate apartment just has a separate entrance. After discussing this information with you I will be sending a formal letter to Mr. Kooiman to discuss any changes that need to be made (i.e. Changing the rental listing).

Respectfully,

R. Bass, *Codes Enforcement Officer*

P.O. Box 80
17140 Monument Circle
Isle of Wight, VA 23397
(757) 357-9200

Local Roots, Global Reach

# ISLE OF WIGHT COUNTY, VIRGINIA

DEPARTMENT OF PLANNING AND ZONING

June 7, 2019

Kooiman Jeremy H & Lucy M
214 Shivers Mill Ln
Carrollton, VA 23314

VIOLATION NOTICE

RE: Violations at 214 Shivers Mill Ln (Tax Map/Parcel ID# 43A-06-025)

Dear Mr. Kooiman:

On June 6, 2019 an inspection was conducted at the above-mentioned property to investigate complaints of a apartment/short-term rental complaint. Please see the below code in reference to regulations of short-term rentals within the County:

Sec. 5-1805. - Accessory uses to residential principal uses.

*The following activities, so long as they satisfy the general criteria set forth above, are specifically regarded as accessory uses to residential principal uses:*

A. *Hobbies or recreational activities of a noncommercial nature.*

B. *The renting out of one (1) or two (2) rooms within a single-family residence (which one (1) or two (2) rooms do not themselves constitute a separate dwelling unit) to no more than two (2) persons who are not part of the family that resides in the single-family dwelling.*

As we discussed the 2 rooms you are currently advertising/renting shall not constitute a separate dwelling unit and cannot be rented out to more than 2 people. In order to abate the above violation please ensure all short-term rental advertisements meet these criteria.

Isle of Wight County requires you rectify this violation by **June 21, 2019**. Other inspections of the site will be conducted to verify compliance. Failure to comply with these regulations could result in legal action by Isle of Wight County. Isle of Wight County could take legal action against you and or hire a contractor, at your expense, to abate this violation. The County Zoning Ordinance may be viewed online at www.municode.com. If you anticipate any difficulty complying with the listed regulations, you may contact me at (757) 365-6305 or at rbass@iwus.net.

Sincerely,

R. Bass, Codes Enforcement Officer

P.O. Box 80
17140 Monumental Circle
Isle of Wight, VA 23397
(757) 357-9206
www.isleofwightus.net

Local Roots. Global Reach

# ISLE OF WIGHT COUNTY, VIRGINIA

DEPARTMENT OF PLANNING AND ZONING

July 1, 2019

Jeremy H. & Lucy M. Kooiman
214 Shivers Mill Ln.
Carrollton, VA 23314

**SECOND NOTICE**

RE: Violation at 214 Shivers Mill Ln (Tax Map/Parcel # 43A-06-025)

Dear Sir or Madam,

On June 6, 2019 your AirBNB listing was brought to the attention of our zoning office. This is a follow up notice to advise that you are still in violation of the Isle of Wight County Zoning Ordinance:

**Sec. 5-1005 Accessory uses to residential principal uses.**

*The following activities, so long as they satisfy the general criteria set forth above, are specifically regarded as accessory uses to residential principal uses:*

*a. Hobbies or recreational activities of a noncommercial nature.*

*b. The renting out of one (1) or (2) rooms within a single-family residence (which one (1) or two (2) rooms do not themselves constitute a separate dwelling unit) to not more than two (2) persons who are not part of the family that resides in the single-family dwelling.*

Please be advised that based on your AirBNB rental listing date July 1, 2019, you remain in violation of the ordinance which prohibits the renting of more than 2 rooms to a maximum of 2 unrelated persons. Isle of Wight County requires you to rectify the violation by **July 10, 2019**. A final inspection of your listing will be conducted to verify compliance. Failure to comply with these regulations could result in legal action by Isle of Wight County. The County Zoning Ordinance may be viewed online at www.municode.com. If you have any questions you may contact me at (757)365-6306 or rbass@iwus.net.

Respectfully,

Rachel Bass

R. Bass, Codes Enforcement Officer
Attachments: 1st Notice 6-7-19
AirBNB listing

P.O. Box 80
17140 Monument Circle
Isle of Wight, VA 23397
(757) 357-9206
www.co.isle-of-wight.va.us

Local Roots, Global Reach

# ISLE OF WIGHT COUNTY, VIRGINIA

DEPARTMENT OF PLANNING AND ZONING

Jul 23, 2019

Jeremy H. & Lucy M. Kooiman
214 Shivers Mill Ln.
Carrollton, VA 23314

**NOTICE OF VIOLATION**
*3rd letter*

**RE: Violations at 214 Shivers Mill LN (Map Parcel Number 43A-06-025)**

Dear Sir or Madam:

An inspection of you Air BNB listing has been conducted and is now in compliance. I appreciate you working to abate the violation. However, you have multiple listings on other rental sites that still need to be corrected as well. **As a result you are still considered in violation of the zoning ordinance.**

Isle of Wight County requests that you start to rectify this violation by August 13, 2019. Failure to comply with these regulations could result in legal action by Isle of Wight County. The County Zoning Ordinance may be viewed online at www.municode.com. Information on the permitting process can be found at www.iwus.net. If you anticipate any difficulty complying with the listed regulations, you may contact me at (757) 365-6306 or at rbass@iwus.net.

Respectfully,

Rachel Bass

R. Bass, *Codes Enforcement Officer*

P.O. Box 80
17140 Monument Circle
Isle of Wight, VA 23397
(757) 357-9206
www.co.isle-of-wight.va.us

Local Roots, Global Reach

# ISLE OF WIGHT COUNTY, VIRGINIA

DEPARTMENT OF PLANNING AND ZONING

**VIA ELECTRONIC AND US MAIL**

December 2, 2019

Mr. Jeremy Kooiman
214 Shivers Mill Lane
Smithfield, VA 23430

**SUBJECT: Initial Notice of Violation for Accessory Apartment at 214 Shivers Mill Lane with tax parcel number 43A-06-025**

Dear Mr. Kooiman,

Based upon a recent site visit by the County Building Official, Art Berkley, on October 11, 2019, and your rental pictures found online at AirBnB.com, it appears that you have constructed an accessory apartment without the necessary approvals at your residence. According to Section 3-3000 of the County Zoning Ordinance, an accessory apartment is defined as the following:

> Accessory apartment. An accessory dwelling unit on the same lot as a single-family detached dwelling or a commercial use that is clearly incidental and subordinate to the main use or a separate, complete dwelling unit that is substantially contained within the structure of, and clearly secondary to, a single-family dwelling.

Section 2-1002 of the Zoning Ordinance further defines dwelling unit as the following:

> Dwelling unit. One (1) or more rooms physically arranged so as to create an independent housekeeping establishment for occupancy by one (1) family with toilets and facilities for cooking and sleeping separate from any other dwelling unit.

Because your basement area contains separate sleeping, cooking, and bathroom spaces which establishes an independent housekeeping establishment with its own private entrance, you have created an accessory apartment. Your accessory apartment requires a conditional use permit in your zoning district which is the Suburban Residential (SR) district. More information on the SR zoning district requirements can be found using the following link: https://library.municode.com/va/isle_of_wight_county/codes/code_of_ordinances?nodeId=APXBZO_ARTIVZODIBO_PT7SURESRDI_S4-7003COUS.

I have also attached a copy of the email dated November 19, 2019, from Mr. Berkley with his findings for your information.

Please note you have fifteen (15) days from the date of this letter to file for a conditional use permit for the accessary apartment or take steps to remove the separate bathroom, kitchen or bedrooms from the basement area. You may find a conditional use permit application on the County's website using the following link: **http://www.co.isle-of-wight.va.us/central-permitting/community-development/**.

If your basement does not have separate bedrooms, kitchen and bathroom, please call me at 365-6210 or by email at **aring@iwus.net** to schedule an inspection to resolve this issue.

Sincerely,

Amy M. Ring, AICP
Planning and Zoning Director

Attachment: Email from Art Berkley, Building Official, dated November 19, 2019

cc: Bobby Jones, County Attorney
Rachel Bass, Code Enforcement Officer

**VIRGINIA: IN THE CIRCUIT COURT FOR ISLE OF WIGHT COUNTY**

| | | |
|---|---|---|
| JEFFREY ORNOFF | | |
| Plaintiff, | | |
| v. | : | Case No: CL21000420-00 |
| JEREMY KOOIMAN | | |
| and | | |
| Lucy Kooiman | | |
| Defendants. | | |

**ORDER FOR INJUNCTION**

On May 31, 2022 came the Plaintiff, by counsel, and Defendants, *pro se*, for trial upon Plaintiff's Complaint for Injunctive Relief.

Upon consideration of the evidence and argument, and for good cause shown, the Court finds as follows:

1. Defendants purchased that certain real property known as 214 Shivers Mill Lane Carrolton, VA 23314 ("the property") on or around April 20, 2016 via Deed recorded on April 26, 2016 in the Isle of Wight Court Clerk's Office as Instrument #161639; and
2. Certain covenants and restrictions set forth in a Deed dated March 9, 1966 and recorded in Deed Book 182, page 516-519 in the Isle of Wight Court Clerk's Office, run with the land and are binding upon owners of the property including the Defendants; and
3. Defendants were on actual and/or constructive notice of aforesaid covenants and restrictions at the time that they purchased the property; and

4. The Defendants use of the property is in violation of certain of those covenants and restrictions; to wit:

    a. **Restriction #1** which states, "Said real estate shall be used solely and exclusively for residential purposes, and no structure shall be erected, altered, placed or permitted to remain on said real estate, other than a single family dwelling, not to exceed two stories in height, a private garage for not more than two cars and appurtenant out-buildings incidental to residential use."

    b. **Restriction #4,** which states, "No trailer, basement, tent, shack, garage, barn, boat house or other outbuilding erected or placed on said real property shall at any tine be used as a residence, temporarily or permanently.

**THEREFORE,** it is hereby **ADJUDGED, ORDERED, AND DECREED** that:

1) The Defendants are forever barred, restrained, and enjoined from renting out, leasing, or letting out the lower level (basement) of the property for any period of time; and

2) Defendants are forever barred, restrained, and enjoined from allowing any person other than the Defendants to reside in the lower level of the property for any length of time.

3) Defendants are forever barred, restrained and enjoined from themselves using the basement as a separate residential space or permitting the basement to be used as a separate residential space while the remainder of the of the home is rented or occupied by others for any period of time.

It is further **ADJUDGED, ORDERED, AND DECREED** that this Order for Injunction runs with the land and is binding upon future owners of the property and shall be recorded in the land records of Isle of Wight County; and

It is further **ADJUDGED, ORDERED, AND DECREED** that anyone who violates this injunction shall be liable for reasonable attorney fees and costs expended in the enforcement of this Order, in addition to other monetary, equitable, or punitive relief that the Court may deem appropriate.

For the reasons stated below* and pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the Court dispenses with the endorsement of this decree by the parties.

The Clerk is directed to send certified copies of this Order to all counsel of record.

Date: 11/2/22

**Hon. Lawson Wayne Farmer**
**Judge**

*The Court notes that counsel for the plaintiff prepared an order for the Court's consideration that purported to encompass the Court's ruling. That order was endorsed by plaintiff's counsel. The order was further endorsed "Seen and Objected To" by the defendants for reasons written on the proposed order. Thereafter, both parties forwarded requests for changes to the proposed order. By an undated letter that was received by the Court on October 7, 2022, the defendants requested changes to the proposed order. By a letter dated October 11, 2022 and received by the Court on October 19, 2022, the plaintiff also requested changes to the proposed order. The Court has prepared this order in accordance with the Court's findings. To the extent that this order does not contain the changes requested by plaintiff or defendant, the motions for such changes have been denied and the parties' exception to that ruling is noted. Further, the court notes the objections raised in writing by the defendants on the order drafted by counsel for plaintiff.

**A COPY:**
**ISLE OF WIGHT CIRCUIT COURT**
**TESTE: KATHLEEN S. TORRENCE, CLERK**
**BY:** _____ **DC**

Cited
As of: July 20, 2024 2:18 PM Z

# *Kooiman v. Ornoff*

Court of Appeals of Virginia

January 30, 2024, Decided

Record No. 1758-22-1, Record No. 1760-22-1

**Reporter**
2024 Va. App. LEXIS 42 *; 2024 WL 330506

JEREMY KOOIMAN, ET AL. v. JEFFREY ORNOFF

**Notice:** PURSUANT TO THE APPLICABLE VIRGINIA CODE SECTION THIS OPINION IS NOT DESIGNATED FOR PUBLICATION.

**Prior History:** [*1] FROM THE CIRCUIT COURT OF ISLE OF WIGHT COUNTY. Lawson Wayne Farmer, Judge.

**Disposition:** Affirmed

## Core Terms

basement, circuit court, rental, short-term, cinder block, restrictive covenant, restrictions, renting, residential purposes, exterior, deed restriction, attorney's fees, injunction, post-trial, ambiguous, guests, residential, primary residence, proposed order, real estate, constructed, transient, dwelling, garage, basement apartment, permanently, alteration, structures, prohibits, occupied

## Case Summary

**Overview**
HOLDINGS: [1]-Deed restrictions prohibited property owners from using the basement apartment in their home for short-term rentals because reading the restrictions together led to the conclusion that the purpose of the restrictions was less about preventing short-term rentals of property and more about preventing the creation of more than one residence or living area on the owners' property. Thus, even though the deed restrictions did not expressly prohibit short-term rentals, by definite and necessary implication, the restrictions prohibited the use of the basement for short-term rentals; [2]-The property owners were not entitled to an injunction against a neighbor because a restrictive covenant did not intend to prohibit the exposed rows of the neighbor's cinder block foundation in its prohibition on the use of cinder blocks on the exterior side of buildings.

**Outcome**
Judgment affirmed.

## LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Encumbrances > Restrictive Covenants > Enforcement of Restrictive Covenants

*HN1*[↓] **Standards of Review, De Novo Review**

The interpretation of a deed restriction is a question of law that an appellate court reviews de novo. Covenants, express or implied, which restrict the free use of land, are not favored and must be strictly construed. The burden is on the party attempting to enforce the covenants to establish that the activity objected to is within their terms. Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property. Nevertheless, Virginia courts will enforce restrictive covenants when the intention of the parties is clear and the restrictions are reasonable and if it is apparent from a reading of the whole instrument that the restrictions carry a certain meaning by definite and necessary implication.

Real Property Law > Deeds > Construction &

Interpretation

HN2[] **Deeds, Construction & Interpretation**

The whole of a deed and all its parts should be considered together to determine the controlling intent.

Governments > Legislation > Interpretation

Real Property Law > Deeds > Construction & Interpretation

HN3[] **Legislation, Interpretation**

When several nouns or verbs or adjectives or adverbs — any words — are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.

Civil Procedure > Trials > Bench Trials

Civil Procedure > Appeals > Record on Appeal

HN4[] **Trials, Bench Trials**

Although a trial court speaks through its written orders, an appellate court can look to a circuit court's oral explanations to help the appellate court interpret that order.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

HN5[] **Judges, Discretionary Powers**

In the exercise of its equity jurisdiction, a court is afforded broad discretion in fashioning complete and just relief.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN6[] **Reviewability of Lower Court Decisions, Preservation for Review**

The purpose of Va. Sup. Ct. R. 5A:18 is to allow a trial court a fair opportunity to resolve an issue at trial, thereby preventing unnecessary appeals and retrials. Rule 5A:18 requires a party to specifically raise a legal challenge to preserve that issue for appeal.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN7[] **Reviewability of Lower Court Decisions, Preservation for Review**

A general resistance to any relief is not the same as preserving a specific objection for appeal.

**Counsel:** Norman A. Thomas (Norman A. Thomas, PLLC, on briefs), for appellants.

Bryan S. Peeples (Pender & Coward, P.C., on brief), for appellee.

**Judges:** Present: Judges O'Brien, AtLee and Malveaux. MEMORANDUM OPINION BY JUDGE RICHARD Y. ATLEE, JR.

**Opinion by:** RICHARD Y. ATLEE, JR.

## Opinion

MEMORANDUM OPINION* BY JUDGE RICHARD Y. ATLEE, JR.

Appellants Jeremy and Lucy Kooiman appeal the circuit court's rulings granting injunctive relief against them and denying injunctive relief against their neighbor, Jeffrey Ornoff. The circuit court interpreted certain restrictive covenants to prohibit the Kooimans from renting out their basement apartment for short-term rentals. The circuit court also found that Ornoff did not violate a separate restrictive covenant that prohibited the use of cinder blocks on the "exterior side" of buildings. On appeal, the Kooimans argue that the circuit court erred in its interpretation of the restrictive covenants, by granting Ornoff relief that he did not seek in his complaint, and by denying them due process by granting Ornoff relief requested post-trial without giving the Kooimans the opportunity to be heard. For the **[*2]** following reasons, we disagree and affirm the decision of the circuit court.

---

*This opinion is not designated for publication. See Code § 17.1-413(A).

I. BACKGROUND[1]

The Kooimans and Ornoff are neighbors in an Isle of Wight County subdivision that was platted and developed in 1966. Ornoff's property is designated lot 26, while the Kooimans own lot 25. Each of the properties in the subdivision are encumbered by eight deed restrictions that run with the land. At issue in this appeal are restrictions one, three, and four, which provide:

> 1. Said real estate shall be used solely and exclusively for residential purposes and no structures shall be erected, altered, placed or permitted to remain on said real estate, other than a single family dwelling, not to exceed two stories in height . . . .
>
> . . . .
>
> 3. All buildings on said lot shall be constructed of frame or masonry material or a combination of the two except that no exterior side shall be of cinder block, asbestos shingles, or combination asphalt siding material.
>
> 4. No trailer, basement, tent, shack, garage, barn, boat house or other outbuilding erected or placed on said real estate shall at any time be used as a residence, temporarily or permanently.

Both parties filed suit against the other seeking to enforce **[*3]** the restrictive covenants.[2]

A. *Ornoff's suit against the Kooimans*

At the time Ornoff purchased his lot in 2012, the neighboring lots were empty. In 2016, the Kooimans purchased one of the empty lots next to Ornoff's property and built a house. The house included a finished basement with a separate apartment,[3] which, beginning in 2018, the Kooimans listed for rent on both Airbnb and VRBO. Mr. Kooiman testified that they hosted Airbnb or VRBO guests "on average maybe two weekends a month, some months we have nothing and some months we have four." On occasion, the Kooimans also allow family members to stay in the apartment.

Ornoff filed a complaint seeking injunctive relief to enforce the restrictive covenants. Relevant here, his complaint asked the circuit court to "issue a permanent and perpetual injunction ordering [the Kooimans] to restore their basement apartment to an unfinished basement[ and] cease using any part of their home as a short-term rental business." It also asked for "such further and general relief as the nature of this case may require or this Honorable Court sees fit."

At trial, the Kooimans represented themselves. Mrs. Kooiman denied that their basement constituted a separate **[*4]** residence or apartment, though she admitted they host paying guests. Mr. Kooiman testified that they use the basement as part of their home. He testified that the paying guests lack the rights and privileges typically associated with a "residence," noting, among other things, that they do not have a lease, do not receive mail, cannot set house rules, and cannot control the HVAC or hot water temperature.

During closing arguments, the Kooimans relied on *Scott v. Walker*, 274 Va. 209, 645 S.E.2d 278 (2007), which held that a short-term rental of a house did not violate a "residential purpose" requirement in a restrictive covenant. They argued that the short-term rental of their basement was likewise a "residential purpose." They also argued that restriction four did not prohibit the short-term rentals because the paying guests never establish a "residence" in the basement.

Ornoff argued that payment for use of the basement was a commercial, rather than residential, purpose. He pointed out that the basement was used as a living area separate from the rest of the house, and he argued that restrictions one and four, when read together, prohibited using the basement as a short-term rental. He also distinguished *Scott v. Walker*, arguing that that case involved **[*5]** a single, ambiguous restriction, while this case involved two restrictions that, when read together, were clear and unambiguous.

The circuit court took the issue under advisement and allowed the parties to submit letters with additional case law and argument. On September 9, 2022, the circuit court issued its ruling orally. It acknowledged that restrictive covenants are not favored but noted that they

---

[1] The parties have a long and tortured history, including a separate lawsuit and complaints with zoning authorities. Because those details are not relevant to the issues before us on appeal, we do not include them.

[2] Both suits were consolidated and tried together, though we list the facts relevant to each case separately for clarity. The circuit court ruled against the Kooimans in both cases, and they appealed the rulings in both cases. We resolve both appeals in this memorandum opinion.

[3] At trial, the Kooimans disagreed that it was an apartment. The basement includes two bedrooms, a full bath, a living room, a dining room, and a kitchen. It has a separate entrance, but it can also be accessed from the upstairs. The circuit court found it was an apartment.

are enforceable if they are clear in their meaning. It found that the language in restrictions one and four, when read together, is clear. The circuit court pointed out the inherent contradiction in arguing that the short-term rental is not a "residence" but that it is a "residential purpose." It made three specific rulings:

> One, the [Kooimans] may not permit any person to occupy the basement as a separate residence or for living purpose that are separate from the primary residence. It cannot be a separate residence or separate living area separate from the primary residence for anyone.
>
> Two, the [Kooimans] may not rent, lease, or any way convey the basement to be used as a separate residence for living purposes, no matter how brief.
>
> And, three, the [Kooimans] shall be responsible for any **[*6]** attorney's fees and costs associated with the enforcement of this injunction.

The circuit court refused to order the Kooimans to remove any structures within the basement that rendered it a separate residence. It noted that the restriction did not require the basement only be used for storage, and it acknowledged that there were ways that the Kooimans could use the basement as part of the primary residence. It asked Ornoff's counsel to prepare the order.

After the circuit court's oral ruling, but before a proposed order had been submitted to the court, the Kooimans filed two letters. First, the Kooimans objected to the proposed order. Next, they argued that Ornoff requested modifications to the final decree that are beyond what was requested in the pleadings, beyond the scope of the matters litigated during trial, and beyond the court's final ruling.

Ornoff then submitted a letter to the court along with multiple proposed orders. He informed the court that the Kooimans were now renting out the main house with the basement excluded. He argued that the Kooimans "intend to circumvent this Court's Order by using the basement as a residence for themselves while they rent out the main house **[*7]** to their customers." He asked the court to issue a modified order clarifying that no part of the Kooimans' property may be used as a rental.

The circuit court declined to issue the proposed orders and prepared its own order "in accordance with the Court's findings." The order stated:

> 1) The [Kooimans] are forever barred, restrained, and enjoined from renting out, leasing, or letting out the lower level (basement) of the property for any period of time; and
>
> 2) [The Kooimans] are forever barred, restrained, and enjoined from allowing any person other than the [Kooimans] to reside in the lower level of the property for any length of time.
>
> 3) [The Kooimans] are forever barred, restrained and enjoined from themselves using the basement as a separate residential space or permitting the basement to be used as a separate residential space while the remainder of the home is rented or occupied by others for any period of time.

As it did orally, the circuit court also ordered that anyone who violates the injunction will be responsible for attorney fees and costs expended in the enforcement of the order. The circuit court incorporated the objections that the Kooimans made to the proposed orders into **[*8]** the final order. The Kooimans now appeal this ruling.

B. *The Kooimans' suit against Ornoff*

In response to Ornoff's suit, the Kooimans filed a complaint against Ornoff seeking to enforce restriction three, which prohibits the use of cinder block on the "exterior side" of any building. The Kooimans' complaint asked the circuit court to order Ornoff to "remove any and all cinderblocks on both house and garage and replace with brick."

There was already a house on Ornoff's lot when he bought it. The walls of the house "are made out of wood and then covered with vinyl siding." The house, however, has a cinder block foundation, and the foundation extends above the ground. Sometime later, Ornoff built a detached garage. Like the house, the garage has a cinder block foundation that extends above the ground. Mr. Kooiman testified that as many of six rows of cinder blocks are visible above the ground. Ornoff offered photos of his home into evidence. The photos show between two and four rows of cinder blocks extend above ground. Ornoff also offered photos of other homes in the neighborhood that had similar cinder block foundations that extend aboveground.

Ornoff argued that restriction number three **[*9]** prohibited an entire side of a house to be constructed out of cinder block, but it did not prohibit a foundation from being constructed out of cinder block. The Kooimans argued that the provision was clear and prohibited cinder blocks on the side of a building. Since Ornoff has cinder blocks showing on the side of his home and garage, they argue that he was in violation of third restriction.

The circuit court ruled in favor of Ornoff and found he did not violate restriction three. It noted that the restriction did not mention a material requirement for the foundation; instead, it had a restriction for the "siding." The circuit court also noted that you could "hardly see" the cinder blocks, and it concluded that preventing the use of cinder blocks in the foundation is "not what the deed restriction intended." The Kooimans appeal that ruling.

II. ANALYSIS

A. *The circuit court properly interpreted the deed restrictions.*

HN1[↑] The interpretation of a deed restriction is "a question of law that we review de novo." Sainani v. Belmont Glen Homeowners Ass'n, 297 Va. 714, 722, 831 S.E.2d 662 (2019). "Covenants, express or implied, which restrict the free use of land, are not favored and must be strictly construed." Taylor v. Northam, 300 Va. 230, 251, 862 S.E.2d 458 (2021) (quoting Sloan v. Johnson, 254 Va. 271, 274, 491 S.E.2d 725 (1997)). The burden is on the party attempting to enforce the **[*10]** "covenants to establish that the activity objected to is within their terms." Sainani, 297 Va. at 722 (quoting Scott, 274 Va. at 213). "Substantial doubt or ambiguity is to be resolved against the restrictions and in favor of the free use of property." Barris v. Keswick Homes, L.L.C., 268 Va. 67, 71, 597 S.E.2d 54 (2004) (quoting Anderson v. Lake Arrowhead Civic Ass'n, 253 Va. 264, 269-70, 483 S.E.2d 209 (1997)). Nevertheless, Virginia courts will "'enforce restrictive covenants where the intention of the parties is clear and the restrictions are reasonable' and 'if it is apparent from a reading of the *whole instrument* that the restrictions carry a certain meaning by definite and necessary implication.'" Sainani, 297 Va. at 723 (quoting Shepherd v. Conde, 293 Va. 274, 288, 797 S.E.2d 750 (2017)).

1. Deed Restrictions One and Four

The question before us is whether deed restrictions one and four prohibit the Kooimans from using their basement apartment for short-term rentals. Restriction one provides, "Said real estate shall be used solely and exclusively for residential purposes, and no structures shall be erected, altered, placed or permitted to remain on said real estate, other than a single family dwelling, not to exceed two stories in height . . . ." Restriction four provides, "No trailer, basement, tent, shack, garage, barn, boat house or other outbuilding erected or placed on said real estate shall at any time be used as a residence, temporarily or **[*11]** permanently."

Relying on Scott v. Walker, the Kooimans argue that the short-term rental of property is a "residential purpose," and they contend we are bound by the holding in Scott. They also argue that the short-term rental of their basement does not violate restriction number four because the transient guests do not establish a "residence" in their basement.

In Scott, the restrictive covenant stated that "[n]o lot shall be used except for residential purposes" and the property owners sought to rent out the entire house on a nightly or weekly basis. Scott, 274 Va. at 212 (alteration in original). Noting first that the language did not expressly prohibit the short-term rental of the property, the Supreme Court next found that the covenant also did not "by definite and necessary implication" prohibit such use. Id. at 217. It found that the term "residential purposes" was ambiguous in multiple respects. *Id.* Among the ambiguities was whether "residential purposes requires an intention to be physically present in a home for more than a transient stay." *Id.* And it noted that if there was a "duration of use" component, it was unclear "when a rental of the property moves from short-term to long-term." Id. at 218. Because of the ambiguities, the Supreme Court **[*12]** held that the restrictive covenant must be interpreted "in favor of the free use of property and against restrictions." *Id.* (quoting Schwarzschild v. Welborne, 186 Va. 1052, 1058, 45 S.E.2d 152 (1947)). Thus, it found that the restriction did not prohibit the short-term rental of the home. *Id.*

Scott, however, does not control the outcome here. The Court in Scott did not hold that short-term rentals are always a permitted residential purpose. Rather, the term "residential purposes"—in the context of the restrictive covenant at issue—was ambiguous and therefore did not prohibit such use.[4] *Cf.* Schwarzschild, 186 Va. at 1065 (noting "[a] house is not being used for 'residential purposes' by tourists who spend the night"). Where, as here, the facts and the restrictive covenants lead us to a

---

[4] In Scott, the Court pointed out that "the Walkers do not rely on the Scotts' receipt of rental income as a basis for challenging the Scotts' use of their lot." Scott, 274 Va. at 213. Thus, the Supreme Court did not resolve whether the receipt of rental income would mean that a property is not used for "residential purposes." Although that issue was raised here, we do not decide that issue as it is not necessary to resolve this case. See Butcher v. Commonwealth, 298 Va. 392, 396, 838 S.E.2d 538 (2020) ("[W]e decide cases 'on the best and narrowest grounds available.'" (quoting Commonwealth v. White, 293 Va. 411, 419, 799 S.E.2d 494 (2017))).

different interpretation, *Scott* does not control the outcome of this case. Although restriction one here is similar to the restrictive covenant in *Scott*, this case involves an additional restrictive covenant that leads us to a different outcome. *See Mount Aldie, LLC v. Land Trust of Va., Inc.*, 293 Va. 190, 197, 796 S.E.2d 549 (2017) (*HN2*[↑] "'[T]he whole of a deed and all its parts should be considered together' in order to determine the controlling intent." (quoting *Wetlands Am. Trust, Inc. v. White Cloud Nine Ventures*, 291 Va. 153, 161, 782 S.E.2d 131 (2016))).

First, *Scott*, like the out-of-state cases cited by the Kooimans, involved the short-term rental of the entire property, whereas the short-term **[*13]** rental here only involves the basement.[5] The Kooimans contend that this is a distinction without a difference. But unlike *Scott*, the deed here contains restriction four, which specifically addresses the use of the basement as a residence. *See Scott*, 274 Va. at 217 (distinguishing between the lease of the entire single-family dwelling at issue and the rental of individual rooms at issue in both *Deitrick v. Leadbetter*, 175 Va. 170, 173, 8 S.E.2d 276 (1940), and *Schwarzschild*, 186 Va. at 1054-55). Thus, the distinction is of great significance.

Second, the Kooimans rely on the argument that the short-term renters do not establish a residence because their use of the basement is transient.[6] But the duration of use has never been the determinative factor in interpreting similar restrictive covenants. *Scott*, 274 Va. at 217; *see generally Deitrick*, 175 Va. 170; *Schwarzschild*, 186 Va. 1052. And contrary to the Kooimans' argument, the Court in *Scott* noted that the short-term renters "engage in activities normally associated with a dwelling place" and that "[i]t can be argued that a nightly or weekly rental is more than mere physical presence." *Scott*, 274 Va. at 217-18. Which is one of the reasons why the Court found "residential purpose" to be ambiguous. Here, restriction four removes any ambiguity regarding the duration of use required to establish a residence: it prohibits the use of the **[*14]** basement as a "residence, *temporarily or permanently*," (emphasis added), which suggests an intent to prohibit even transient use of the basement.

In fact, reading restrictions one and four together lead us to conclude that the restrictions were intended to create a blanket prohibition on all possible types of residences in the basement. Restriction four prohibits the use of the basement, or other structures, as a residence separate from the rest of the house. The temporary or permanent language in restriction four removes any time requirement to establish a residence. Further, restriction four lists other places, apart from the basement, that cannot be used as a residence, including a trailer and a tent.[7] *HN3*[↑] Given that a tent and certain types of trailers are typically for more transient uses, the inclusion of them in the list further indicates that the duration of use is not a factor to be considered, or at the very least transient uses of the listed structures are not to be excluded. *See Sainani*, 297 Va. at 725-26 ("When several nouns or verbs or adjectives or adverbs — any words — are associated in a context suggesting that the words have something in common, they **[*15]** should be assigned a permissible meaning that makes them similar," (quoting Antonin

---

[5] *See, e.g., Yogman v. Parrott*, 325 Ore. 358, 937 P.2d 1019, 1020 (Or. 1997) (*en banc*) (renting out entire beach house). The Kooimans argue that *Lowden v. Bosley*, 395 Md. 58, 909 A.2d 261, 262 (Md. 2006), is similar to this case because it had a restrictive covenant that prohibited use of a basement "at any time as a permanent or temporary residence." But *Lowden*, like *Scott*, involved the rental of the entire property and did not require the court to consider whether renting the basement separate from the remainder of the house would violate that portion of the restrictive covenant.

[6] The Kooimans also argue that the definition of residence in past cases requires more than a transient stay. In *Jernigan v. Capps*, 187 Va. 73, 45 S.E.2d 886 (1947), the Supreme Court relied on the dictionary definition, which defined residence as "[t]he place where one actually lives or has his home, a person's dwelling place or place of habitation; an abode." *Id.* at 80 (quoting *Webster's New International Dictionary* (2d ed.). But as noted in *Scott*, even the "people who rent the . . . property use it as a *temporary* place of abode and engage in activities normally associated with a dwelling place." *Scott*, 274 Va. at 217 (emphasis added). And the restriction at issue here prohibits the use of the basement as a temporary residence.

[7] The Kooimans argue that the basement is not a residence because it does not have features such as the ability to receive U.S. mail or service of process, does not have its own WiFi, does not have control over the HVAC or hot water, etc. But many of these features cannot be obtained in the other structures listed in restriction four ("trailer, basement, tent, shack, garage, barn, boathouse"). Thus, the Kooimans ask us to impose a definition of residence that is impossible to meet in the other structures. If we adopted such an interpretation, it would be unclear what exactly restriction four prohibited. *See CNX Gas Co. v. Rasnake*, 287 Va. 163, 168, 752 S.E.2d 865 (2014) ("Effect should be given to every part of the instrument, if possible, and no part thereof should be discarded as superfluous or meaningless." (citation omitted)).

Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012)). Finally, only a "single family dwelling" is permitted. *See* Schwarzschild, 186 Va. at 1063 (stating that renting of rooms was not an issue because the covenants did not limit the property to single-family dwellings).

The deed restrictions here do not mention rentals, whether short-term or long-term. But reading restrictions one and four together lead us to the conclusion that the purpose of the restrictions was less about preventing short-term rentals of property and more about preventing the creation of more than one residence or living area on the property. Regardless of how long each individual guest stayed, the combination of guests using the basement separate from the rest of the home created two separate residences on the property. Thus, even though the deed restrictions do not expressly prohibit short-term rentals, by definite and necessary implication, the restrictions prohibit the use of the basement for short-term rentals.[8] *See* Bauer v. Harn, 223 Va. 31, 39, 286 S.E.2d 192 (1982) ("[I]f it is apparent from a reading of the whole instrument that the restrictions carry a certain meaning by **[*16]** definite and necessary implication, then the thing denied may be said to be clearly forbidden, as if the language had been in positive terms of express inhibition.").

The Kooimans argue that the circuit court's interpretation of the deed restrictions is so broad that they are prevented from using the basement when family members visit them, for example during holidays like Christmas or Thanksgiving. HN4[↑] Although a trial court speaks through its written orders, Kosko v. Ramser, 299 Va. 684, 689, 857 S.E.2d 914 (2021), we can look to the circuit court's oral explanations to help us interpret that order. Orally, the circuit court stated that the basement "cannot be a *separate* residence or separate living area *separate* from the primary residence for anyone." (Emphasis added.) The circuit court also noted certain uses of the basement would not violate the restrictive covenants because "it's being used as part of the primary residence." The written order also prohibits the Kooimans from using the basement "as a *separate* residential space while the remainder of the home is rented or occupied by others." (Emphasis added.) Thus, looking at both the oral and written rulings, the circuit court's focus appeared to be on the use of the basement separate **[*17]** from the rest of the house. Accordingly, we do not interpret the order so broadly as to prohibit the Kooimans from hosting their family, for example during Christmas, so long as that use is connected to their own use of the residence.

2. Deed Restriction Three

Restriction three provides, "All buildings on said lot shall be constructed of frame or masonry material or a combination of the two except that no exterior side shall be of cinder block . . . ." They point out that the restriction prohibits cinder blocks on the "exterior side" and does not have an exception for the foundation. Thus, they argue, the exposed rows of cinder block violate this restrictive covenant.

But the rule relating to the "exterior side" is itself the exception. The restriction permits all buildings to be constructed of "frame or masonry material or a combination of the two," which includes cinder blocks. It carves out an exception for the "exterior sides." Thus, the restriction itself permits a cinder block foundation. The question is whether the restriction intended to include the exposed foundation within the meaning of "exterior side."

When determining whether the exposed rows of cinder block foundation is **[*18]** included within the "exterior side," we look to the ordinary meaning of the words in the context in which they are used. *See* Berry v. Bd. of Supervisors of Fairfax Cnty., 302 Va. 114, ___, 884 S.E.2d 515 (Mar. 2023) ("[W]ords in a statute [or ordinance] are to be construed according to their ordinary meaning, given the context in which they are used." (alterations in original) (quoting City of Va. Beach v. Bd. of Supervisors, 246 Va. 233, 236, 435 S.E.2d 382, 10 Va. Law Rep. 256 (1993))). Because these words are used in the context of constructing a building, we find the Virginia Construction Code ("VCC") instructive.[9] The VCC also incorporates the International Building Code, 13 VAC 5-63-10(B), which separately defines "exterior walls"[10] and "foundations." Further, the

---

[8] The same rationale applies regardless of whether the Kooimans themselves stay in the basement and rent out the rest of the house or whether they stay upstairs and rent out the basement.

[9] The VCC is part I of the Uniform Statewide Building Code. 13 VAC 5-63-10(A).

[10] We recognize that restriction three uses the term "side" rather than "wall." But in this case, we find the terms synonymous. *See Webster's Third New International Dictionary* 2572 (2002) (defining "wall" as "one of the *sides* of a room or building that connects the floor and ceiling or *foundation and roof*" (emphasis added)).

VCC treats "exterior walls" and "foundations" as separate and distinct parts of a building, with separate chapters and regulations pertaining to each. Accordingly, we find that the restrictive covenant did not intend to prohibit exposed rows of a cinder block foundation in its prohibition on the use of cinder blocks on the "exterior side" of buildings. Therefore, the circuit court did not err in denying the injunction and dismissing the Kooimans' complaint.

B. *The circuit court [*19] did not err in barring the Kooimans from using the basement themselves while renting out the rest of the home.*

The circuit court prohibited the Kooimans from "themselves using the basement as a separate residential space or permitting the basement to be used as a separate residential space while the remainder of the home is rented or occupied by others for any period of time." The Kooimans argue that they were denied due process because Ornoff did not request this relief in his complaint and because they did not have a meaningful opportunity to litigate the issue because this relief was requested post-trial. We disagree.

Ornoff's complaint asked the circuit court to order the Kooimans to "cease using *any part* of their home as a short-term rental business." (Emphasis added.) This request alone is broad enough to incorporate the relief granted by the circuit court. But the complaint also sought the complete removal of the basement apartment and its return to an unfinished state. Instead, the circuit court fashioned a remedy short of going to that extreme, which it is permitted to do. *Hooper v. Musolino, 234 Va. 558, 572, 364 S.E.2d 207, 4 Va. Law Rep. 1516 (1988)* (*HN5*[↑] "In the exercise of its equity jurisdiction, a court is afforded broad discretion in fashioning complete [*20] and just relief.").

Although the factual allegations in Ornoff's complaint focused on the Kooimans' renting out their basement (as opposed to them staying in the basement and renting out the upstairs of their home), the legal issue before the circuit court, both in the complaint and at trial, was the interpretation of the restrictive covenants. To interpret the restrictions, the circuit court had to consider whether the restrictions prohibited the use of the basement as a residence separate from the rest of the house. That legal issue does not change when it is the Kooimans, rather than the guests, staying in the basement. Additionally, considering Ornoff's request to completely remove the basement apartment, the circuit court certainly had to consider the ways in which the Kooimans were permitted to use the basement.

We also find that the Kooimans were not deprived of a meaningful opportunity to be heard on the issue. Their argument is premised on their belief that the circuit court granted additional relief based on Ornoff's post-trial request and without allowing additional argument. But the circuit court did not grant additional relief. Though the written ruling specifies that the [*21] Kooimans cannot use the basement while renting out the remainder of the home, consistent with Ornoff's post-trial request, the circuit court's oral ruling included the same prohibition, albeit phrased more broadly. The oral ruling prohibited "any person" from occupying the basement separately from the primary residence.[11] Though the written ruling may have used different language, consistent with that in the post-trial request, the ruling is nevertheless consistent with the oral ruling, which was made prior to the post-trial request. Thus, the circuit court did not grant additional relief post-trial.

C. *The attorney fees issue is not properly preserved.*

The Kooimans argue that the circuit court erred by anticipatorily ruling that anyone who violated the injunction would be liable for attorney fees and costs expended in the enforcement of the order. That issue, however, is not preserved.

*Rule 5A:18* provides, "No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." *HN6*[↑] The purpose of this rule "is [*22] to allow the trial court a fair opportunity to resolve the issue at trial, thereby preventing unnecessary appeals and retrials." *Hogle v. Commonwealth, 75 Va. App. 743, 755, 879 S.E.2d 622 (2022)* (quoting *Creamer v. Commonwealth, 64 Va. App. 185, 195, 767 S.E.2d 226 (2015)*). "*Rule 5A:18* requires the accused to *specifically* raise a legal challenge . . . to preserve that issue for appeal." *Hargrove v. Commonwealth, 77 Va. App. 482, 504, 886 S.E.2d 322 (2023)* (alteration in original) (quoting *Dickerson v. Commonwealth, 58 Va. App. 351, 357, 709 S.E.2d 717 (2011)*).

The Kooimans did not object to the attorney fee issue.

---

[11] Orally, the circuit court ordered: "[T]he defendants may not permit *any person* to occupy the basement as a separate residence or for living purpose that are separate from the primary residence. It cannot be a separate residence or separate living area separate from the primary residence *for anyone*." (Emphasis added.)

The Kooimans' objection[12] focused on the alleged infringements of their property rights and the interpretation of the deed restrictions. Though the objection mentioned "all reasons preserved in the record," they did not raise the attorney fee issue anywhere else in the record. *HN7*[↑] Contrary to the Kooimans' argument, a general resistance to *any* relief is not the same as preserving a specific objection for appeal.

Alternatively, the Kooimans contend that the circuit court awarded the fees post-trial, they had no opportunity to object, and, relying on *Code § 8.01-384(A)*,[13] they argue that the lack of opportunity to object should not prejudice them on appeal. But the circuit court announced its ruling, including on the issue of attorney fees, orally on September 9, 2022. Between then and entry of the final order, the Kooimans filed multiple letters with the court objecting to the **[*23]** contents of the proposed final order, which included the circuit court's ruling on attorney fees. The Kooimans also signed the proposed order and listed their objections. None of these letters or objections included an objection to "anticipatory attorney's fees." Thus, the Kooimans did, in fact, have the opportunity to object on that issue and did not do so.

III. Conclusion

For the foregoing reasons, we affirm the decision of the circuit court.

*Affirmed*.

End of Document

[12] The circuit court dispensed with endorsement of the final order pursuant to *Rule 1:13*. It noted, however, that the Kooimans had written their objections on the order proposed by Ornoff, and it incorporated those objections into the final order.

[13] *Code § 8.01-384(A)* provides, in relevant part, "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal."

***VIRGINIA:***

*In the Court of Appeals of Virginia on* **Friday** *the* **16th** *day of* **February, 2024.**

Jeremy Kooiman, et al., Appellants.

against Record No. 1758-22-1
Circuit Court No. CL21000420-00

Jeffrey Ornoff. Appellee.

Upon a Petition for Rehearing En Banc

Before Chief Judge Decker, Judges Huff, O'Brien, AtLee, Malveaux, Athey, Fulton, Ortiz, Causey, Friedman, Chaney, Raphael, Lorish, Callins and White

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 30th day of January, 2024 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

A. John Vollino, Clerk

By:

Deputy Clerk

Lucy Kooiman stated the driveway has been used for the last seven years for their large family of eleven children. Ms. Kooiman stated there has not been any incidents involving the driveway, and there would be no way for Mr. Ornoff to tell the difference between house guest vehicles and family vehicles. Lucy Kooiman added that this is a seasonal business, in the summer months there may be more guests.

Chairman Bowser closed the public hearing and called for discussion from the commissioners.

Commissioner Carroll asked if the Kooimans were agreeable with conditions one through three.

Mr. Kitchen said the conditions were proposed by staff based off the concerns shared in the rejection letter received.

Commissioner Carroll stated he did not agree with implying those conditions.

Commissioner Sienkiewicz asked if there was a road maintenance agreement.

Ms. Kooiman stated her husband and neighbors manage the road repairs. Ms. Kooiman stated she would like to not have these conditions.

Commissioner Sienkiewicz asked if the house was rented, while they were away and who was the emergency contact.

Ms. Kooiman stated her son is fifteen minutes away and manages the property.

Commissioner Boykin asked if the house or the bedrooms were for rent.

Ms. Kooiman stated they rent the whole house.

Commissioner Taylor asked why this was going on for six years, and how was the County notified that there was a violation.

Mr. Kitchen stated he believes Mr. Ornoff asked for a zoning determination to verify if a short-term rental operation was permitted, which Amy Ring confirmed was allowed. Mr. Kitchen added that the Board of Zoning Appeals upheld Amy Ring's determination that this was allowed to operate under the old section.

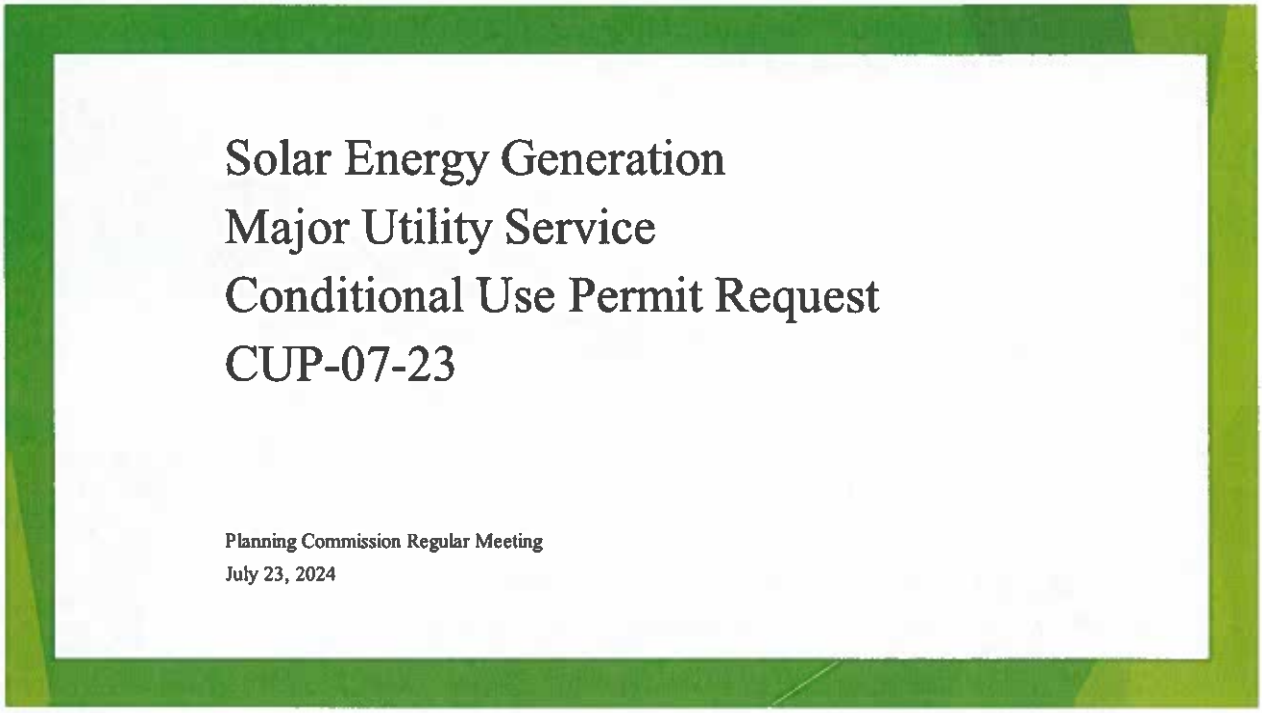
Commissioner Gibbs made the motion to recommend approval of this application to the Board of Supervisors with the removal of staff recommendations one through three. Commissioner Carroll seconded the motion. The motion was adopted with Commissioners Distefano, Taylor, Gibbs, Smith, Carroll and Bowser voting in favor and Commissioners Boykin, Rawls, and Sienkiewicz voting against the motion (6-3).

The motion passed, and the item will go to the Board of Supervisor's August 15, 2024, meeting.

Chairman Bowser called for the next public hearing:

> Application (CUP-7-23) of Elk Development, LLC, applicant, and William Sawyer, property owner, for a conditional use permit for a major utility service, specifically a three-megawatt utility-scale solar energy generation facility on approximately 28.84 acres located on Orbit Road on tax parcel number 39-01-026 in the Rural Agricultural Conservation zoning district. The application includes a request to withdraw 22.02 acres from the Courthouse Agricultural and Forestal District.

Trenton Blowe gave the following presentation.



## Site Description

- Tax Map ID#: 39-01-026
- Location: 18213 Orbit Road
- Current Zoning: Rural Agricultural Conservation (RAC)
- Election District: D4
- Request: Establish a 3.0 MW solar facility on solar energy generation facility on approximately 28.44 acres on a 228.308 -acre tract located on Orbit Road with a tax map number 39-01-026 in the Rural Agricultural Conservation (RAC) zoning district.

## Project Description

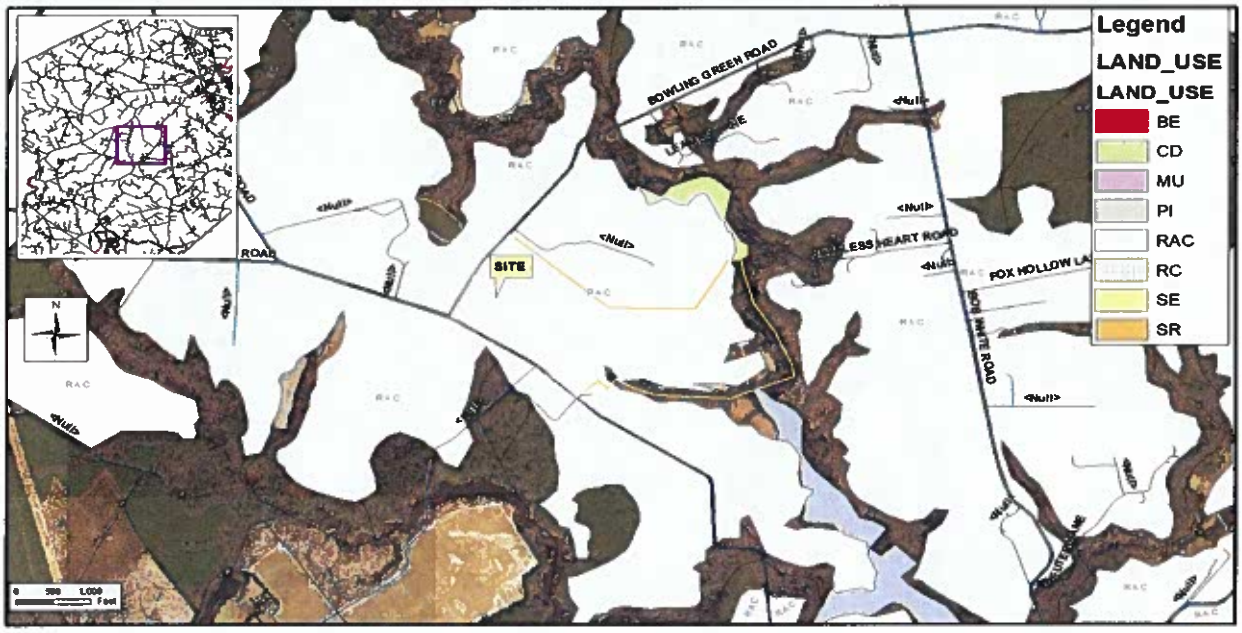
- Applicant has proposed a three-megawatt (MW) solar energy generation facility in the western portion of the property.
- An electrical line that bisects the project area along Orbit will serve as the interconnection point.
- Project will consist of solar panels along with their racking systems and metal posts, inverters, and fencing.
- Based on the project area, 27 acres of corn will be removed from production. Approximately 19 acres will be in the fenced area of the solar facility project area.
- Property has historically been used for agriculture.

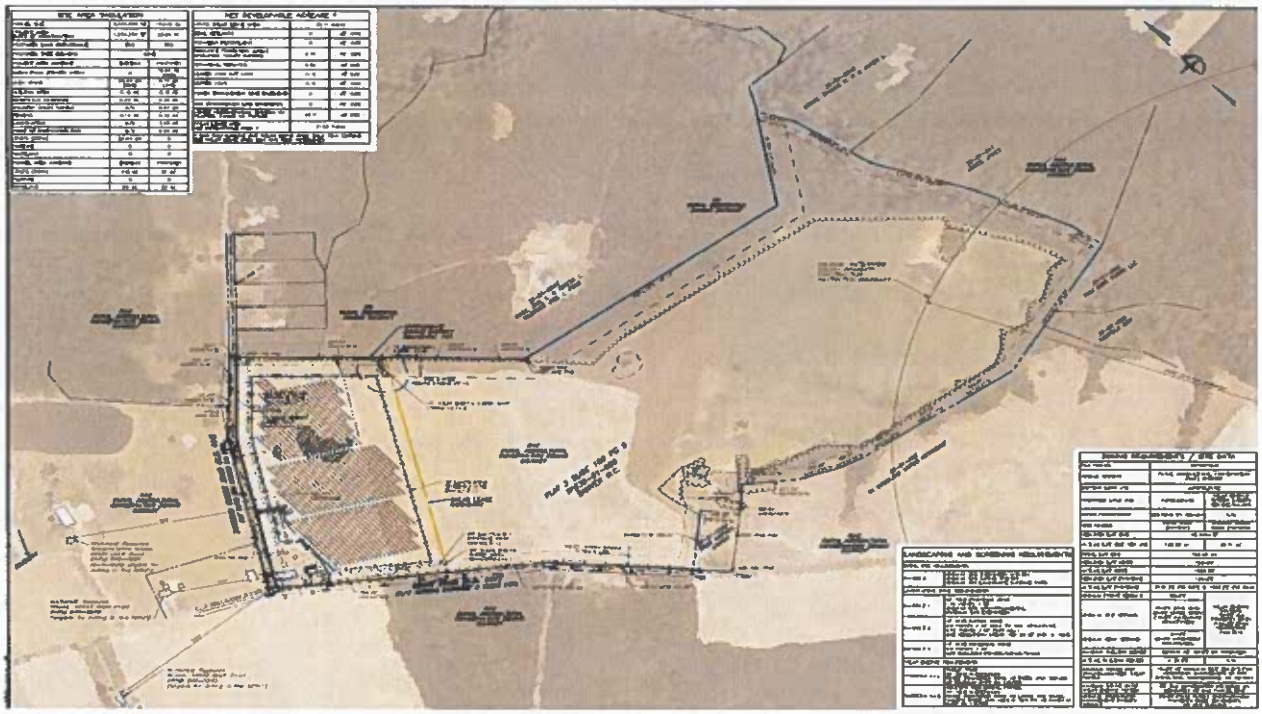
## CUP-7-23 - Conditional Use Permit- Location Map

## CUP-7-23 - Conditional Use Permit- Closeup Map

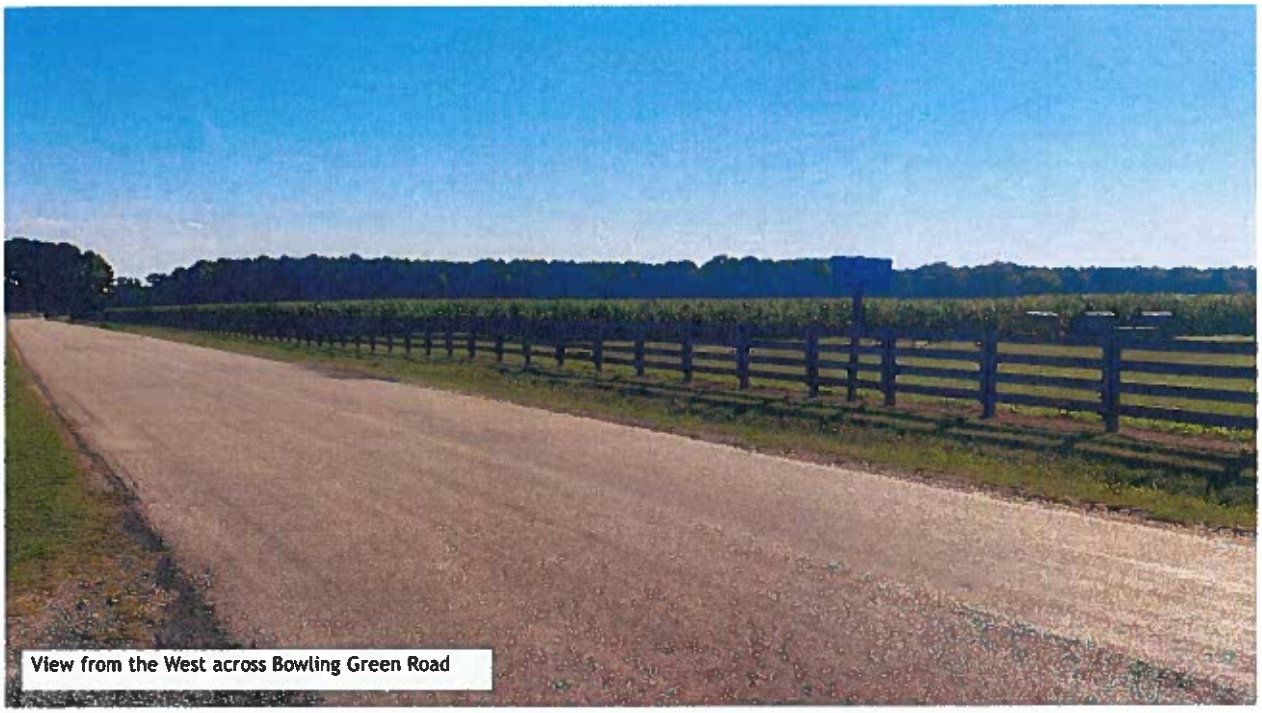
## CUP-7-23 - Conditional Use Permit- Zoning Map

## CUP-7-23 - Conditional Use Permit- Land Use Map

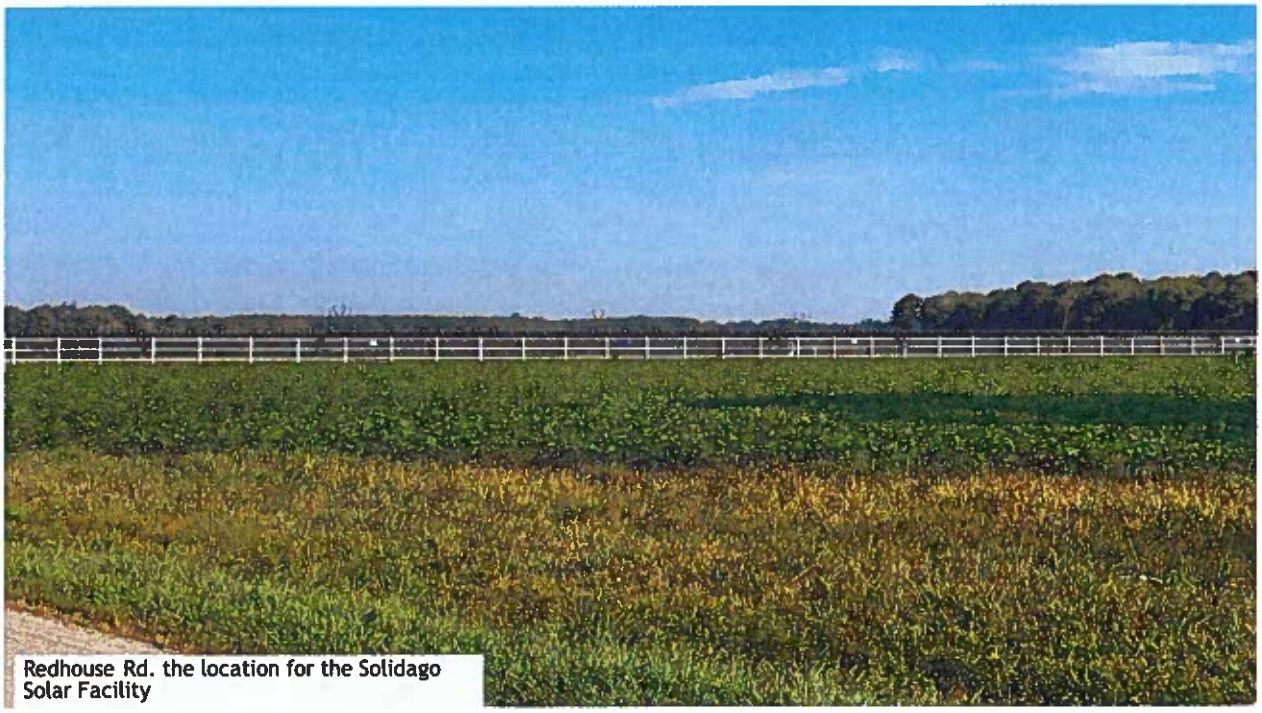




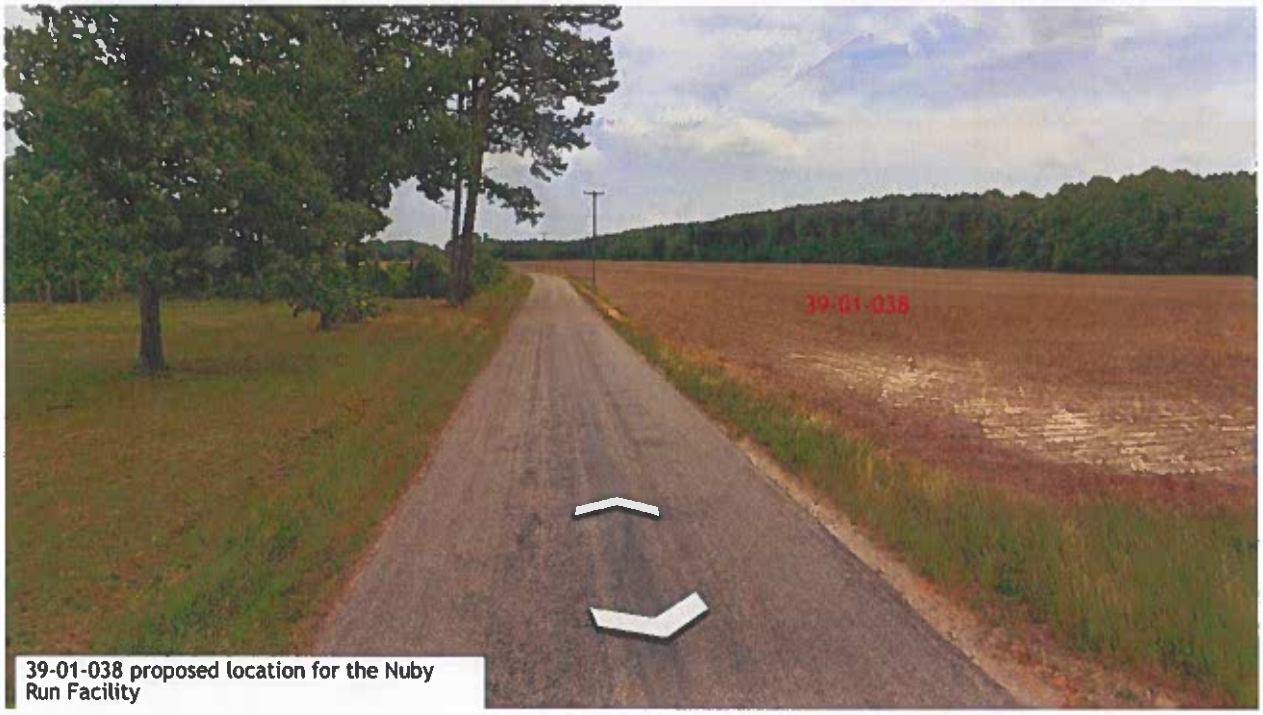
View from the South across Orbit Road



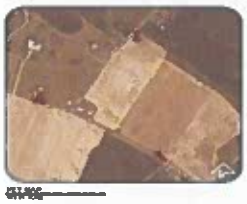
View from the West across Bowling Green Road

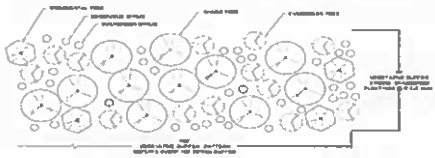


Redhouse Rd. the location for the Solidago Solar Facility




39-01-038 proposed location for the Nuby Run Facility





PROPOSED LANDSCAPE BUFFER | VIEW 1

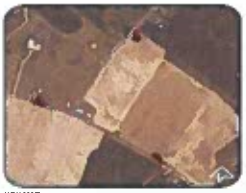
EXISTING CONDITIONS | VIEW 1

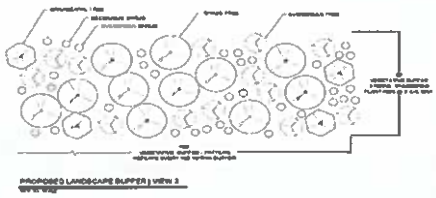
## Viewshed from Orbit Road

PROPOSED LANDSCAPE BUFFER | ESTIMATED TIME OF PLANTING | VIEW 1

PROPOSED LANDSCAPE BUFFER | ESTIMATED 5 YEAR GROWTH | VIEW 1

PROPOSED LANDSCAPE BUFFER | ESTIMATED 10 YEAR GROWTH | VIEW 1





Viewshed from Bowling Green Road

## The Planning Commission and Board of Supervisors shall consider the following criteria before the granting of a conditional use permit:

1. Will not be detrimental to or endanger the public health, safety, and general welfare;
2. Will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially impair the use of other property within the immediate proximity;
3. Adequate utilities, water, sewer or septic system, access roads, storm drainage, and/or other necessary public facilities and improvements will be provided
4. Ingress and egress so designed as to minimize traffic congestion on the public streets;
5. Not contrary to the goals and objectives of the Isle of Wight County Comprehensive Plan;
6. Shall conform to all other applicable regulations of the zoning district classification in which it is located and to the special requirements established for the specific use; and
7. Will not result in a multiplicity or saturation of similar uses in the same general neighborhood of the proposed use.

## The Board may impose additional conditions or limitations on CUPS. Such conditions may include, but are not limited to:

1. Number of persons living or working in the immediate area and the proposed hours of operation.
2. Traffic conditions, sidewalks, parking facilities, vehicle access, peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future;
3. Orderly growth of the neighborhood and community and the fiscal impact on the County;
4. Effect of odors, dust, gas, smoke, fumes, vibration, glare, and noise upon the use of surrounding properties;
5. Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal, and the ability of the County or persons to supply such services.
6. The degree to which the development is consistent with generally accepted engineering and planning principles and practices;
7. The structures in the vicinity such as schools, houses of worship, theaters, hospitals, and similar places of public use;
8. The purposes set forth in this ordinance, the County's Comprehensive Plan, and related studies for land use, roads, parks, schools, sewers, water, population, recreation, and the like;
9. The environmental impact, the effect on sensitive natural features, and opportunities for recreation and open space; and
10. The preservation of cultural and historic resource landmarks.

## Staff Analysis – Public Facilities

- Applicant proposes to access the site from an entrance on Bowling Green Road via Orbit Road (Rt. 637) for construction. The applicant will use Route 258 to access Orbit Road.
- In establishing the use, the enjoyment of neighboring properties may also be temporarily impacted by construction traffic and noise generation.
- Applicant is required to submit an emergency response plan with the submission of the preliminary site development plan. The plan shall include a training program to be provided to County emergency responders concerning safety for on-site emergency response.

## Staff Analysis – Environmental Assessment

- Project lies within the Chesapeake Bay Preservation Area (CBPA) Overlay District. There will be impacts to two palustrine emergent (PEM) wetlands.
- Both wetland areas are currently located within an actively managed agricultural field.
- Per the water quality impact assessment (WQIA), proposed impacts will be minimized to the extent practicable, and erosion and sediment controls will be utilized during the construction period to further mitigate for potential impacts.
- Eastern portion of the parent parcel is within the 500' boundary for colonial waterbirds. Correspondence with the Department of Wildlife Resources (DWR) stated that the project area will not impact this boundary.

## Staff Analysis – Historical Resources

- A Phase 1 Cultural Resources Survey of the project area was conducted by Stantec.
- During the architectural survey, no shovel tests were positive for cultural material and no new isolated archaeological finds or new archaeological sites were identified during the investigation.
- A total of six individual resources were located within the architectural study area, defined as the project area, and a 0.5-mile radius around the project area. There are five previously recorded resources and one newly recorded resource.
- Four of the five previously recorded resources have been determined as potentially eligible for listing in the National Register of Historic Places (NRHP).

## Staff Analysis – Historical Resources CTD

- All of the resources considered eligible or potentially eligible are historic homes.
- The Seeds-Pierce house is approximately 946' from the project area, historic resource #046 -5546 is approximately 537' from the project area, historic resource 046-5545 is approximately 1058' from the project area, the Cedar Acres home is located approximately 3000' from the project area.

## Staff Analysis – Economic Impact

- According to the applicant's economic impact study, the proposed facility would generate approximately $ 227,900 in cumulative county revenue over a 25-year operational life and approximately $ 328,300 in cumulative county revenue over a 35-year operational life based on both projected real estate and machinery and tax revenues.
- The projected real estate tax revenue on the current agricultural land use over 25 years is $6,730, and a total of $9,420 over 35 years.
- The acreage subject to the Conditional Use Permit would be reassessed for real estate taxes at $15,000 per acre.

## Staff Analysis – Viewshed Analysis

- An effects evaluation was conducted for NRHP - listed, eligible, and potentially eligible properties that may be affected by the proposed project.
- Four properties were assessed for effects and included the potentially eligible Cedar Acres (DHR #046-0004) and Seeds-Pierce House (DHR #046-0021) and two dwellings that are considered eligible for environmental review purposes (DHR #046-5545 and #046-5546).
- Based on the results of the phase I study, the project would have adverse effects on all four of the previously listed resources.
- Mitigation in the form of a donation to the Isle of Wight County Museum has been accepted by VDHR.

## Comprehensive Plan Review

- The future recommended land use designation for these properties is Rural Agricultural Conservation (RAC) under the adopted Comprehensive Plan.
- Appropriate uses for the RAC land use designation include agriculture, horticulture, forest lands, and scattered low-density residential uses. Other uses such as resource extraction and utility-scale solar facilities are also permitted when appropriately sited.
- Solar energy facilities are considered compatible with RAC land use when properly sited and with the application of appropriate development criteria.

## Department and Agency Review

Staff distributed the application to the following departments for review and comment:

- Economic Development: The department stated it had no concerns.
- Environmental Planner: All concerns addressed with the conditional use permit. Further information will be required at site plan review.
- Commissioner of Revenue: Rollback estimates should be based on the entire acreage of the entire lease area not just the acreage of the solar facility. The acreage subject to the Conditional Use Permit would be reassessed at $15,000 per acre.
- Emergency Services: Staff will work with the applicant during site plan review on the required Emergency Response Plan to include annual training.

## Department and Agency Review CTD

- Utility Services: Staff will review the site plan for compliance with State Stormwater regulations.
- Isle of Wight County Museum: A memo was attached to the staff report.
- Virginia Department of Transportation (VDOT): No concerns at this time.

Please note that, should the conditional use permit be approved, the project will be subject to site plan review and approval from all necessary agencies.

## Staff Analysis

Strengths:

1. The proposed use would generate additional non -residential tax revenue for future public service and facility needs for the County

Weaknesses:

1. The proposed use would remove agricultural land from production.
2. Temporary impacts to residential development in the area from construction traffic and noise is expected during the construction phase.
3. There are adverse impacts to several historical resources. The mitigation proposed does not directly affect the neighboring properties.
4. The proposed construction traffic route utilizes narrow rural roadways with limited pull-off and passing areas.
5. The facility would result in a saturation of uses in the same general neighborhood.

## Staff Recommendation

- Based on the weaknesses listed above, staff recommends denial of the CUP request.
- However, should the CUP be approved, staff recommends the following conditions:

1. Topsoil shall be stockpiled on the site and shall be stored out of view from adjacent properties and public road
2. The applicant shall submit a seed mix for site groundcover that includes native pollinators blooming in spring/summer as recommended by DCR.
3. The applicant will work directly with the Isle of Wight County Chamber of Commerce, Paul D. Camp Community College, and the Economic Development Department to ensure the inclusion of local contractors in the bidding process.
4. A laminated Emergency Response Poster will be mounted near the front gate. The poster will include a general site plan, evacuation routes, and muster points, emergency response chain of command, directions to the closest hospital, coordinates to the closest life flight landing area, and other pertinent information associated with the facility during an emergency response.

# Staff Recommendation

5. The facility perimeter fencing will be equipped with push -bar pedestrian gates to permit emergency exits from the facility.
6. Adherence to the proposed transportation plan shall be required for all facility traffic. Truck traffic shall be limited to only the preferred route as described in the transportation plan. No other local routes in Isle of Wight County may be used. The applicant shall coordinate deliveries outside of school bus pickup and drop -off times.
7. Excluding the buffer yards, the ground between the panels and in areas not otherwise covered by gravel or infrastructure shall be planted and maintained with a vegetative cover. This vegetative cover will be managed with mowing and/or grazing.
8. Hours of operation for construction and post -construction operation shall be limited to Monday through Friday, 7:00 a.m. to 6:00 p.m. Saturdays from 7:00 a.m. to 5:00 p.m. No construction is to occur on Sundays by any party involved with the project.

# Staff Recommendation

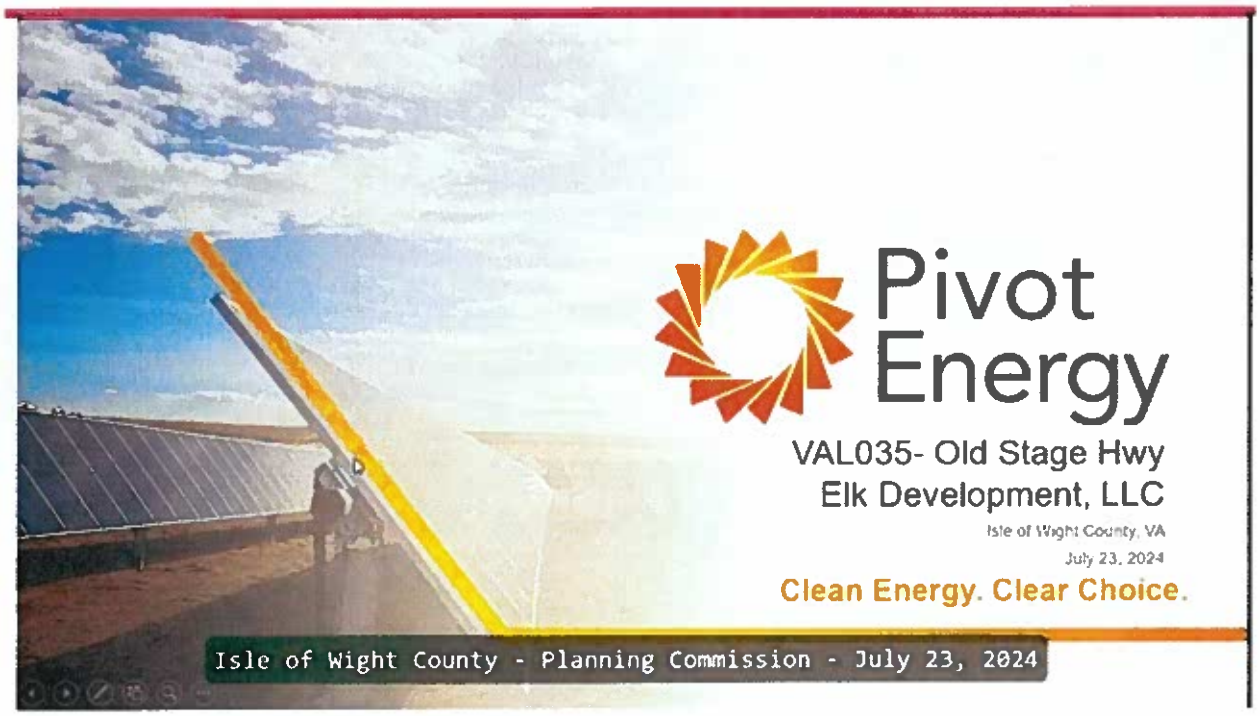
9. As part of the site plan review, the applicant shall provide documentation that the selected panels and all power-generating equipment on -site are "Tier 1" modules, as established by the most recent "PV Module Tier 1 List" issued by Bloomberg NEF or a similar third party analysis widely accepted in the solar industry. Additionally, the make and model of the selected panels and all power -generating equipment initially installed and replaced on the site must qualify, for disposal purposes only, as non -hazardous waste under applicable U.S. Environmental Protection Agency tests ( e.g. TCLP).
10. The applicant shall implement a program for the collection of baseline data establishing pre -construction soil conditions for the production of row crops for the agricultural areas within the project area. The program shall establish the relevant characteristics of the topsoil. The baseline data shall be derived from field and laboratory testing of soil conditions, including depth, density, and quality from representative locations. Laboratory testing shall be conducted by an accredited laboratory. Parameters for assessing soil quality may include the following: infiltration rate, bulk density, water holding capacity, pH, percent organic matter, cation exchange capacity, Phosphorous/Phosphate (P), Nitrogen (N), and Potassium/Potash (K). After 30 years of operation and again after 35 years of operation, soil conditions shall be determined for the same sampling locations using the same parameters and the results used to plan soil restoration activities. After equipment is removed as part of decommissioning, soil conditions shall be determined for the same sampling locations using the same parameters. Soil restoration activities shall be performed as necessary during operations or decommissioning to return soil conditions to at least baseline conditions. The County will be provided with data of soil conditions within 30 days after the receipt of results.

## Staff Recommendation

11. Any recommendations provided by VDHR during site plan review will be adhered to, in addition to requirements in the zoning ordinance.

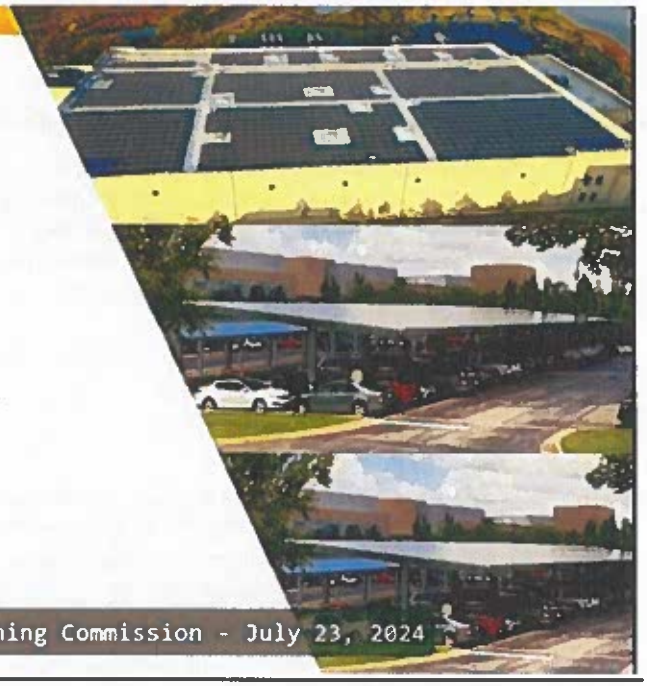
Chairman Bowser opened the public hearing and invited the applicant to speak.

Robert Hickox, Pivot Energy, applicant, 1601 Wewatta Street, Denver, Colorado, gave the following presentation.



## About Pivot Energy

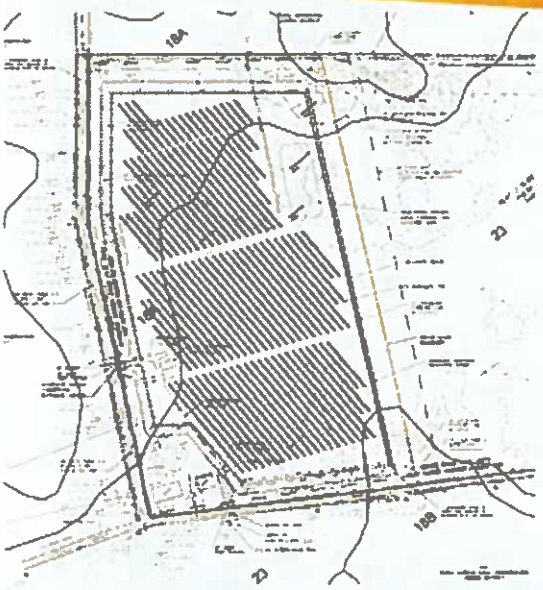
- Founded in 2009, Owner-Operator
- Headquarters in Denver, CO
  - Offices in St. Louis and Chicago
- Areas of Focus
  - Small Utility / Community Scale Solar
  - Commercial Solar
  - Creating a diversified energy grid
- Over 250 solar projects completed in 9 states.
- 20 active project in Virginia
  - 5 permitted
  - 15 in active development
  - Oldest site 2009 rooftop (15yrs)
  - Oldest greenfield 2016 (8yrs)



## VAL035- Orbit Rd.

- **Zoning: Tax parcel number 39-01-026 in the Rural Agricultural Conservation (RAC) zoning district**
- **Project Boundary – 28.71 Acres Total/ 19.64 Acres Fenced Array**
  - Setbacks – over 1 mile from Hwy, 150ft from closest residence
  - Fencing includes required 8' chain link or game fence
  - Frontage along Bowling Green/ Orbit Rd. using varying height of trees & shrubs
  - Minimum 16' wide gravel access road
- **Project Size – 4.35 MWdc / 3.0 MWac**
  - Estimated production of 7.0 GWh/yr
  - Equivalent of 500+ homes (estimated)
  - 7200 panel modules
- **Community Engagement**
  - Community Meeting held 6/15/23 at Windsor Library (Zero abutters attended, mailing list available)
  - Siting agreement of $135K to the County, $15K to the Virginia Cooperative Ext./ 4H
- Interconnection to existing distribution lines along Orbit Rd..

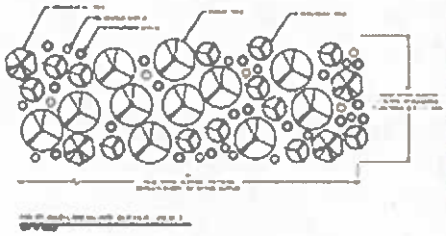




## Why site here?

- Open site, not requiring tree removal, few residences, and way from sensitive resources
- Proximity to 3-phase utility service and substation
- The opportunity for dual use grazing/ pollinators.

## Viewshed Studies



## Community Concerns

- Erosion
  - Following last DEQ guideline to for erosion control planning
  - Use of pollinator/ grazing seed mixture with deeper root systems that crops
- Ecological
  - No pesticides or mechanical mowing used to maintain vegetation height, minimizing runoff.
  - Natural fertilization from sheep grazing regenerates soil composition
  - Panels are non-toxic **borosilicate glass**, also used in labs/kitchen glassware

## Community Concerns (conti.)

- EMF/ Radiation
  - Non-ionizing aka non-cell altering
  - Radio/TV/Cell Phone/microwaves generate more EMF than a solar facility and power lines and at vastly closer distances.
  - 4,200 Volts/meter is the permissible safe limit.
  - Solar inverters produce, at most, 10 V/m
  - Homes produce:

| Electric Appliance/Equipment | Electric Field (V/m) | Magnetic Field (mG) |
|---|---|---|
| Electric Mains (Home) | 100 | 2 |
| Hair Dryer | 50 | 0.1 - 70 |
| Vacuum Cleaner | 50 | 20 - 200 |
| Fluorescent Light | 5 | 5 - 20 |
| Microwave Oven | 1.5 | 40 - 80 |
| Portable Radio | 150 | 10 - 10 |
| Electric Oven | 8 | 1.5 - 5 |
| Iron | 120 | 1.2 - 3 |
| Computer | 40 | 0 - 0.1 |

- The study is available to review



## Community Concerns (conti.)

- Soil Health
  - Panels are coated (like windshields) to prevent glass from breaking off
  - Potential point exposures below USEPA screening values in soil/air/water
  - Toxicity Characteristic Leaching Procedure (TCLP) tests worst case scenarios and International Energy Agency concluded that:

"risk assessment method that estimated exposures that may occur when broken PV modules are exposed to rainwater, estimated the associated chemical concentrations in soil, groundwater and air, and compared these exposure-point concentrations to health-protective screening levels based on 1×10-6 cancer risk (i.e. one in a million)"

  - Pivot recycles all PV modules

## Property Values

- Conducted a 40 site, 17 state study show no negligible impact to property values
- No deterrent to sales of residential or agriculturalist lands.

- All studies presented are available for the Boards review



## Native Vegetation & Pollinator-friendly Habitat

Pivot Solar 26 (CO)

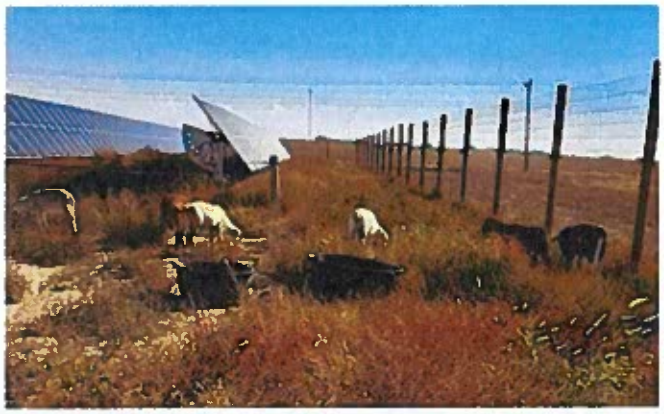
Minnesota Solar 10 (MN)

Kankakee Solar 4B (IL)

## Dual Use – Sheep Grazing

## Commercial Operation

- String Inverters operate at <60 Decibels
- SCADA and security system installed to remotely monitor site 24 hours/day. Fiber-optically monitored system.
- Annual maintenance visits; 2-4 times a year
- Training for local Fire and EMTs on proper system access and shutdown
- Knox Box attached to fence for site access



## Property Taxes

- The proposed Project is subject to property/machinery taxes and revenue sharing (estimated) over 35 years of operation
  - approximately $226,500 in cumulative county revenue over a 25-year operational life
  - approximately $325,900 in cumulative county revenue over a 35-year operational life

- Tax revenue provided will be a net economic benefit to Isle of Wight County, where as other types of development project may not; as Solar facilities do not:
  - Impact local schools with additional students as residential development would
  - Increase daily traffic and wear on County infrastructure
  - Do not required additional Police, Fire, or EMS services.

## Technology, Equipment, & Design

- Solar PV Modules (crystalline)
  - Have become a global commodity; in use for over 30 years
  - Materials used do not endanger public health
  - Glass, polymer, aluminum, copper, & semiconductor materials that can be recycled
  - Crystalline silicon modules are silicon wafers > cells > panels
    - PV cell itself is nearly 100% silicon, which is the 2nd most common element found in the Earth's crust

- Manufactured for decades of use; cells are protected from outside elements with tempered glass and polymer
  - Similar to car windshields & hurricane windows
  - If cracked, the module stays intact; not broken into pieces
  - Withstand 110 mph wind; ~1" diameter hail at 50 mph

- Amount of lead in a solar PV panel is roughly 1/750$^{th}$ of the amount of lead in a car battery; Panels encapsulate material from air or water for the life of the panel

Mellissa Sawyer Vick, 10153 Rainbow Road, representing the property owner, stated this application will provide a secure revenue stream for their family. Ms. Vick added that the two homes mentioned belong to her family, and her son farms the land. She added that this would allow the land and farm to be kept in their family.

Joel Ross, 13376 Bowling Green, shared concerns with the runoff and stated that the drainage goes right through his property.

John Pisula, Dawood Engineering, stated there would be a detention basin, and the project would not change the natural drainage.

There being no additional citizen comment Chairman Bowser closed the public hearing and called for conversation from the commissioners.

Commissioner Boykin asked how the panels will be recycled and how the sheep will be cared for.

Mr. Hickox stated they have a certified recycling center that takes them that is in the United States. He stated that there are three to five sheep per acre, and the sheep farmers provide food and water weekly.

Commissioner Distefano asked if the three-megawatts facility was transmission or distribution, and if there is any plan now or in the future for onsite storage of energy.

Mr. Hickox stated they were distribution, and he stated there will never be plans for onsite storage.

Commissioner Gibbs asked where the panels are manufactured.

Mr. Hickox stated they are trying to obtain more domestic suppliers, but currently they are purchased both in the US and in other countries.

Commissioner Distefano read the following letter from Ben Stagg and Chairman Bowser asked for the letter to be entered into the minutes.

May 10, 2024

To:
Isle of Wight Planning and Zoning
17140 Monument Circle, Suite 101
Isle of Wight VA 23397

From:
Ben Staff
PIN 39-01-038
PO Box 497
Carrollton, VA 23314

Hello,

I own one of the closest properties to the proposed solar farm at Clay Sawyer's land. I am writing you to give my opinion on the proposed solar farm.

This type of development is perfectly fine by me. As someone who is a firm believer in property rights, it is important that owners can pursue opportunities with their land. In my opinion, Orbit Road is a great location for solar—it is less trafficked and would fit in the surrounding area with other solar projects that have been approved.

Pivot Energy sent me information about the project and invited my feedback at a community meeting, something I don't believe was required. I appreciate their thoughtfulness and what I perceive to be a sincere desire to incorporate input into the project.

I hope Isle of Wight County approves this project. Increased investment in our infrastructure and tax revenue are good things.

Thank you,

Ben Stagg

Commissioner Boykin made the motion to recommend denial to the board of supervisors based on staff's recommendation. Commissioner Rawls seconded the motion. The motion was adopted

with Commissioners Boykin, Distefano, Rawls, Sienkiewicz, Gibbs, Carroll and Bowser voting in favor and Commissioner Taylor and Smith voting against (7-2).

The motion passed, and the item will go to the Board of Supervisor's August 15, 2024, meeting.

**OLD BUISNESS**

Amanda Landrus confirmed there are no old business items.

**NEW BUSINESS**

Amanda Landrus confirmed there are no new business items.

**COUNTY ATTORNEY'S REPORT**

Bobby Jones confirmed there are no items.

**PLANNING DIRECTORS REPORT**

Amanda Landrus confirmed there are no items.

**CLOSED MEETING**

Chairman Bowser confirmed there were no items to discuss in closed meeting.

**ADJOURNMENT**

There being no further information to discuss, Chairman Bowser adjourned the meeting at 7:30PM.

Adopted this 27th day of August, 2024

Bobby A. Bowser

Bobby Bowser, Chairman, Isle of Wight County Planning Commission

Attest: A. Landrus

Amanda Landrus, Secretary