

Hardy County Planning Commission

Meeting Minutes

8-4-2020

18

A special Hardy County Planning Commission meeting was held on August 18, 2020 at 6:00 pm at Brighton Park, Pavilion 3, Moorefield, WV. Planning Commission members present were Greg Greenwalt, Lee Lehman, Charlotte Bowman, George Leatherman, Roger Saville, Tim Wilkins, Robert Williams, Tyler Bradfield and County Commission Representative Dave (Jay) Fansler. Also present was Planning Office Manager Nicole Rohrbaugh and AmeriCorps Volunteer Ben Martin. Members of the public present were Lon Anderson with the Moorefield Examiner, Daryl See with WV Poultry Association, Jeff Courtney, Allen Collins, and Tim Cullers with Pilgrim's Pride, Kirk Wilson with L&W Enterprises, Dave Mathias, Mike Weaver, Steve Pendleton, Steven Schetrom, Ronald Miller, David Workman, and Lloyd Fultz, Jr.

Lee Lehman called the special meeting of the Hardy County Planning Commission to order at 6:00 pm

The minutes were read and approved from the August regularly scheduled meeting with the following corrections: George Leatherman and Charlotte Bowman need to be added to those in attendance.

- Greg Greenwalt made a motion to approve minutes
- David "Jay" Fansler seconded the motion
- Motion carried, all in favor.

Unfinished Business:

The Planning Commission received letters from Steve Pendleton, Kirk Wilson, and Mark Sadd, Attorney for Pilgrim's Pride. Lehman allowed Kirk Wilson and Steve Pendleton to read their letters and asked the Pilgrim's Pride representatives if they would like to discuss Mr. Sadd's letter in which they declined.

Next the discussion turned to the Berkley Group Proposed Text Amendment. Several members of the public addressed their concerns with the amendment and asked questions about the complex that was being built. Pilgrim's representatives clarified that the large complexes are not an ideal situation for them and that all their farms are contract farms. They would rather have smaller family owned farms but needed to do this to fill the processing plant back to capacity because of the decrease in farms in the recent years.

The possibility of scheduling work sessions to work on updates to the text amendment was discussed and will be looked at further at the September meeting.

The next meeting date was set for September 1, 2020 at 6pm at Brighton Park, Shelter 3.


At 7:08 pm Lee Lehman called for a motion to adjourn

- George Leatherman moved to adjourn
- Tim Wilkins seconded the motion
- All in favor

Meeting adjourned.



President, Hardy County Planning Commission



Hardy County Planning Office Manager

August 17, 2020

Lee Lehman, President
Hardy County Planning Commission
204 Washington Street
Moorefield, West Virginia

Dear Mr. Lehman:

The residents of the Becky Webb subdivision are pleased with the decision of the Planning Commission to hire the Berkley Group for the purpose of obtaining professional guidance for future regulation of industrial poultry operations. It is my understanding that the Berkley Group has submitted a comprehensive report and that the Planning Commission is prepared to move forward to study the recommendations. This is an essential step forward and a seminal moment for County's future and protection of its citizens', health, their property values and wellbeing of the environment. With so much at stake, it is critical that the analysis and use of the Berkley Group findings is handled with objectivity and input from a diverse selection of community members. Therefore, I am asking that the Planning Commission establish a formal Commission comprising not only of industrial friendly entities but also representatives of the public health field, environmental profession, and lay members of the community to make recommendations ensuring responsible construction and operation of industrial farms.

Sincerely,

Steve Pendleton
Old Fields, West Virginia

L & W ENTERPRISES, INC.

P.O. Box 826
Petersburg, WV 26847

Phone 304-257-4818 • Fax 304-257-2224

Mr. Lee Lehman, President
Hardy County Planning Commission
204 Washington Street, Basement Level
Moorefield, WV 26836

August 18, 2020

Subj: Proposed Text Amendment to Hardy County Zoning Ordinance

I have reviewed the subject proposed Amendment to the Hardy County Zoning Ordinance and can say without doubt that its adoption, without significant roll back of the requirements, will kill poultry production in Hardy County. The Berkeley Group provided recommendations largely focused on Rockingham and Page Counties in Virginia and to some extent Best Management Practice Manuals from DELMARVA Poultry Industry and NRCS. While these may be appropriate for their respective areas, their lands and infrastructure are vastly different than the South Branch Valley. They have a significant amount of flat open farm land with improved roads serving most of it. Delaware, eastern Maryland and Virginia are flat land with developed infrastructure. These areas also have diverse economies and much larger populations and are notorious for over regulation. We should not be modeling Hardy County Ordinances based on non-similar out-of-State practices.

Hardy County has ~210 poultry houses most of which will not meet the proposed Ordinance because they are too close to occupied dwellings, or roads or boundary lines. Hence, an existing farmer who wants to add two houses to the farm for additional cashflow or for the children will be prohibited from doing so. Most of the farms have two to four houses but, six and 8 house groups are not uncommon. A significant portion are 500-foot-long older houses that will require updates or demo and replacement. The proposed Ordinance allows for reconstruction after a fire or collapse but, does not include replacement. It is clear that the Amendment drives all farms to two house operations as additional requirements focus on larger operations. Future generations of Farmers will be prohibited from upgrading, modernizing or investing in their farms.

The proposed Ordinance does not have clear requirements that a Farmer or Investor can quantify and price into a cashflow model. Too many places say the Board of Zoning Appeals may add requirements at their will and pleasure. Likewise, the requirements for an application drive the costs of design to a point where a Farmer or Investor can't afford to design and create the application. The items listed in Paragraph B, 1. will likely cost \$80,000-\$100,000 to create an application package that can't be finally approved until WV DEP, DOH and other permits are obtained. The other application requirements listed in Paragraph B, 5. only add to the costs. An Environmental Impact Statement is a term used by the National Environmental Policy Act and is required for all large Federally funded projects (interstates, pipelines, military bases, flood control dams, etc.) and cost typically, \$300-500K for small and medium size projects. Decommission plans are another way to drive costs for the Farmer by requiring annual Bond premiums. The proposed Amendment represents the County Government taking of the Landowner's rights to farm his/her property to its highest and best use.

The Offsets listed in Paragraph G eliminate most of the available land for agriculture. Hardy County has an area of 584 Square Miles. Of that there is ~ 76 Square Miles that are currently under agriculture or has poultry operations. Subtract from this floodplains, wetlands, streams, springs, wells cisterns, small tracts of land and land with slopes greater than 25% and there is approximately 15 Square Miles of land

(estimate) for poultry operations. Of this very little can be accessed without an extensive road system which further drives up costs. No Ordinance should be recommended without a clear understanding of the impact to the Citizens of Hardy County. The Berkeley Group should have provided an impact assessment for each of their recommendations.

Likewise, a revised Planning Commission Ordinance Amendment should be provided to the Berkeley Group and/or recognized State Agriculture groups to do an impact assessment. The Planning Commission should also have the revised Ordinance published as a Class II-0 legal notice in local papers and send letters to all landowners to be impacted by the Amendment so, that the Citizens of Hardy County have visibility and the opportunity to provide written comment (Refer to WVC 8A-7-8). This will allow the Planning Commission to assess the impacts and evaluate the comments of more than just a vocal few and allow for sound policy decisions based on facts and not unfounded circumstances.

From my experience in planning and design, the more complex an Ordinance becomes, the more likely it will discriminate against certain groups or industries and usually for the detriment of all involved. The proposed Ordinance is complex. I would encourage the Planning Commission to simplify the ordinance with a goal to preserve Poultry and other Agriculture operations. This can be simply done by enacting the following changes:

1. Poultry Operations shall be limited to no more than 10 houses per 50-acre parcel. An additional house can be added with every 10 acres of additional property.
2. Offsets to any property boundary shall not be less than 150 feet
3. Off sets to existing occupied dwellings shall be a minimum of 500 feet.

These three items along with existing Federal and State Environmental and Agriculture Regulations will promote small farms while allowing Landowners and Investors to pursue prosperity.

At this point in time, I have heard of statements used by elected officials stating that "we will never let this happen again" assuming that the outcome is negative. I would recommend that the Planning Commission forego enacting any changes to the Ordinance until the current operation is up and functioning and an assessment of real impacts can be done. My belief is the impacts will be minimal and all the emotion and energy will have been for nothing more than politics and perceived issues. This will also give the Planning Commission an understanding of the increased tax base and income to the County which cannot be ignored.

The Planning Commission has the opportunity to ensure the future of Poultry and Agriculture in Hardy County or they can yield to the vocal few and those that have no long-term future in Hardy County and kill poultry and farming for future generations. Contrary to the victim culture in our world today, the needs of the many still outweigh the needs of the few. The first line of the FFA Creed is "I believe in the FUTURE of Farming..." The Planning Commission should embrace this for the Farmers of the Future.

If you have questions, please contact me.

Sincerely,



Kirk Wilson, PE

President

L&W Enterprises, Inc.



LEWIS GLASSER

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August 18, 2020

BY EMAIL

Mr. Lee Lehman, President
Hardy County Planning Commission
204 Washington Street, Basement Level
Moorefield, West Virginia 26836
c/o Nicole Rohrbaugh at hardyvwplan@gmail.com

Re: Proposed Text Amendment to the Hardy County Zoning Ordinance

Dear President Lehman:

Pilgrim's Pride Corporation asked me to help the company understand the constitutional and other legal aspects of the "Proposed Text Amendment to the Hardy County Zoning Ordinance Designed to Address Agriculture Feeding Operations", dated July 29, 2020. You invited me to prepare this letter in anticipation of what I understand will be a meeting (with no formal action scheduled) of the Hardy County Planning Commission, or perhaps an *ad hoc* committee appointed by the Planning Commission, this evening to discuss the proposed Text Amendment.

Pilgrim's Pride asked me, and I am pleased, to serve as a resource for the company and others, including Hardy Countians, as the proposed Text Amendment is studied and considered over the next few months.

I have practiced law in West Virginia for 28 years and regularly handle land use matters on behalf of landowners, developers and local governments. For instance, I have served as special counsel on land use and zoning matters for Braxton, Greenbrier and Kanawha Counties, the cities of Dunbar and Fairmont and the towns of Harpers Ferry and Fayetteville. In 2003 and 2004, I advised the drafters of the Land Use Planning Act, codified in Chapter 8A of the Code of West Virginia of 1931, as amended. I regularly appear before planning commissions and boards of zoning appeals and have taken action against them in our state courts.

To form my initial comments, I read the proposed Text Amendment, the Hardy County Comprehensive Plan (2011), the Comprehensive Plan (Proposed 2016), the Hardy County Zoning Ordinance, the Hardy County Subdivision Ordinance and the Hardy County Improvement Location Permit Ordinance, revised as 2012. I also examined the Zoning Map. All but the proposed Text Amendment are found on the Hardy County website.

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The task of a lawyer is to spot legal issues, including in proposed legislation, so that the legislation may be enacted for its intended policy purposes. Land use regulation is subclass of legislation that, if not properly structured, can cause confusion and conflict. Good land use regulation should promote good policy, clarity and a stability of expectations. With these principles in mind, my review of the proposed Text Amendment raises several concerns, including ones that lead me to believe that some of its provisions are legally infirm, conflict with West Virginia law or raise constitutional questions that could result in a possible challenge in court.

My concerns fall into the following areas:

1. Conflicts between the stated purposes of the proposed Text Amendment and the stated goals of the Comprehensive Plan or plans pertaining to agriculture and farming operations.
2. Conflicts between the stated purposes of the proposed Text Amendment and the states purposes of the Agriculture “A” District set forth in the Zoning Ordinance.
3. The proposed revisions of or additions to Article IV, *Development Standards*, and the purpose of the minimum requirements of the proposed Application Process and so-called “Additional Compliance” set forth in the proposed Text Amendment.
4. Proposed restrictions on replacements and “proposed expansions” of existing Animal Feeding Operations within the proposed Text Amendment and, more broadly, in Article VII of the Zoning Ordinance.
5. The rationality of the proposed Administrative Approvals for applicants who plan for a poultry CAFO that “involves no more than two poultry houses” and “the number of animal units does not exceed the AFO maximum by more than 10,000”.
6. The absence of standards for consideration and approval (or rejection) of applicants who plan for a poultry CACO that “involves more than two poultry houses”.

In addition, I recommend that Pilgrim’s Pride Corporation ask that the Planning Commission state with clarity its plans (and thus, the procedures) for (1) gathering information on the scientific, economic, technical practical aspects of the proposed Text Amendment; (2) studying such information; and (3) formulating a fair and balanced land use regulation for its submission to the Hardy County Commission for its review.

I briefly address some of these concerns.

First, the proposed Text Amendment does not harmonize with the Comprehensive Plan generally or the Zoning Ordinance specifically as the latter address agriculture uses in the zone and text pertaining to “Agricultural “A” District.” Omitted from the proposed Text Amendment are any policy or legal considerations for the proposed regulation that conflicts with those documents. According to the Comprehensive Plan and the Zoning ordinance, Agricultural “A”

Districts exist to “encourage” “agricultural uses” while “permitting more restricted non-agricultural uses”:

SECTION 2. AGRICULTURAL “A” DISTRICT

This district comprises the residual unincorporated lands in the county after “P”, “R”, “C”, “I” and the floodplain areas have been designated. It is recognized that some land in the county must be available for innovative ideas and less restrictive uses. The “A” District provides this land. Agricultural uses are encouraged in “A” district, but the following uses are also permitted there . . .

The drafters of the proposed Text Amendment do not address the Comprehensive Plan at all. From a legal perspective, this is troubling. For example, I refer to the requirements of the Land Use Act including, W. Va. Code § 8A-3-6(a), W. Va. Code § 8A-3-6(d) and W. Va. Code § 8A-3-11(b).

A similar legal concern arises in relation to the Zoning Ordinance and the stated purpose of Agriculture “A” District, which primarily imposes on residential development buffering and other obligations to maintain “separateness” to protect residential encroachment on agricultural uses (rather than the other way around). Currently, the Zoning Ordinance imposes on the sponsors of “housing subdivisions” the principal regulatory obligation to “contain buffers and restrictive covenants to allow existing agricultural practices to continue on neighboring properties without hampering the agriculture enterprise and threatening ground water quality.”

Second, the proposed Text Amendment disfavors nonconforming poultry farming uses. It would severely curtail the repair and replacement of nonconforming houses and, together with the existing Zoning Ordinance, would improperly restrict enlargement of non-conforming and even conforming uses. Taken individually or together, these directly would violate W. Va. Code § 8A-7-10(c):

Land, buildings or structures in use when a zoning ordinance is enacted can continue the same use and such use cannot be prohibited by the zoning ordinance so long as the use of the land, buildings or structures is maintained, and no zoning ordinance may prohibit alterations or additions to or replacement of buildings or structures owned by any farm, industry or manufacturer, or the use of land presently owned by any farm, industry or manufacturer but not used for agricultural, industrial or manufacturing purposes, or the use or acquisition of additional land which may be required for the protection, continuing development or expansion of any agricultural, industrial or manufacturing operation of any present or future satellite agricultural, industrial or manufacturing use. A zoning ordinance may provide for the enlargement or extension of a

nonconforming use, or the change from one nonconforming use to another.

Third, I recommend that the Planning Commission seek a full understanding of the reasons for certain application requirements, such as the prerequisite compliance with U.S. and West Virginia laws and the submissions of soils studies and so-called Environmental Impact Statements, before recommending their enactment in law. These requirements, I suggest, could have a significant economic effect on especially small poultry farmers. Respectfully, I ask whether Hardy County has the local expertise for meaningful consideration of these studies

Fourth, I am especially concerned about the rationality of the proposed Administrative Approvals for applicants who plan for a poultry CAFO that “involves no more than two poultry houses” and “the number of animal units does not exceed the AFO maximum by more than 10,000”. In addition, I am as well concerned about the absence of standards for consideration and approval (or rejection) of applicants who plan for a poultry CACO that “involves more than two poultry houses”. An effective and lawful Zoning Ordinance must include standards for compliance with it to eliminate arbitrariness from the process of enforcement either by a code enforcement official of the Board of Zoning Appeals. For example, leaving such wide discretion in the Board of Zoning Appeals for issuing a conditional use permit without specific standards is a recipe for future costly and embarrassing litigation.

Fifth, I respectfully suggest that the Planning Commission invite input from specialists and technicians who can share best practices for regulating poultry farming operations of the type, size and variety that Hardy County has and might well have in the future. This information would guide the Planning Commission in recommending to the County Commission the most efficacious and constitutional amendments to both the Comprehensive Plan and the Zoning Ordinance.

I would be happy to discuss my reflections further with Pilgrim’s Pride Corporation or others to aid in the development of the best legislation for all constituents.

Very truly yours,



Mark A. Sadd

cc: Dr. Jeffery J. Courtney, D.V.M., M.A.M., A.C.P.V
Pilgrim’s Pride Corporation

MAS:cal